Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/PF/21/1698

The Parties:

Mr William McGibbon, Flat 10, 12 Ravelston Terrace, Edinburgh EH4 3TP ("the homeowner")

and

Hacking and Paterson Management Services, a company incorporated in Scotland under the Companies Acts (SCO73599) and having their Registered Office at 1 Newton Street, Glasgow G3 7PL ("the property factors")

The Property: Flat 10, 12 Ravelston Terrace, Edinburgh EH4 3TP

Tribunal Members – George Clark (Legal Member/Chairman) and Andrew Murray (Ordinary Member)

Decision
The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") decided that the property factors have failed to comply with their duties in terms of Sections 2.5 and 3 of the Property Factors Code of Conduct ("the Code of Conduct") made under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act"). The Tribunal proposes to make a Property Factor Enforcement Order as set out in the accompanying Notice under Section 19(2)(a) of the Act.

Background

1. By application, dated 22 January 2021 and received by the Tribunal on 29 January 2021, the homeowner sought a Property Factor Enforcement Order ("PFEO") against the property factors. His complaint was that they had failed to comply with their duties under Sections 2.1, 2.4, 2.5, 3 paragraph 1, 6.3 and 6.6 of the Code of Conduct and that they had failed to carry out the property factor's duties.

2. The application was accompanied by a copy of the property factors' Terms of Service and Delivery Standards ("TOSADS"),

3. The application also included extensive written representations. The homeowner stated that he disagreed with the methodology used by the property factors in the calculation of hot water charges for his property, as it failed to comply with the prescribed process narrated in the title deeds. The title deeds stated that each flat was to be liable for a share of the Hot Water Costs calculated by dividing the total number of Flow Units consumed in any period by that Flat by the total number of Flow Units consumed by the whole Site in that period and then multiplying the product by the Hot Water Cost in that period. The method adopted by the property factors, however, allocated the Standing Charges, Communal Charge and VAT by 2/63rds, rather than according to user, as the title deeds stipulated. This methodology had been used by the property factors throughout the homeowner's period of ownership. The homeowner provided comparative calculations for one quarter in 2020, concluding that his share of the cost should have been £402.39, whereas by the method adopted by the property factors, he had been charged £473.47. The fact that the property factors' calculation is widely accepted by homeowners and is longstanding does not justify non-compliance with the title deeds.

4. The crushed stones around a turning circle in the Development had been replenished. The Homeowner's view was that replacing them with different, more expensive stone was an upgrade rather than a top-up or like-for-like replacement. The last two options would have been regarded as repairs to Scheme Property, subject to the appropriate process of Scheme voting, but the work that was done was an upgrade and, as such, would have required the unanimous agreement of the homeowners. The homeowner's view was that he should be excluded from the cost differential between the cost of maintenance of the red ash and the cost of the replacement stones.

5. The homeowner believed that the title deeds were not being properly applied and that every expense that was new or unusual should be tested against the title deed provisions. His view was that inappropriate application of the title deeds had led to unnecessary financial burdens upon himself and other homeowners.

6. The homeowner stated that open and honest communication for all is key and that, when this is not the case, it leads to ill-informed stakeholders, conflict and misunderstanding. He wanted correct methodology to be used in accordance with the title deeds, reimbursement for overcharges, and clear and relevant communications for all.

7. The case proceeded to a Hearing on 23 November 2021 at which it was established that the homeowner's central concern was that the property factors are not rendering charges for hot water usage and other services in line with the provisions of the title deeds, in particular, Clause 3.7.1 of the Deed of Declaration of Conditions registered on 20 August 2008 by Yor Limited. The property factors acknowledged that the method they were using in rendering bills for such costs to homeowners in the Development of which the Property forms part did not reflect the terms of the title deeds and told the Tribunal that they were in the process of trying to engage in dialogue with homeowners regarding the method of charging. The view of the homeowner was that it was not appropriate for them to be providing homeowners with a choice between the method presently being used and the method provided in the title deeds. The Tribunal expressed its preliminary view that the title deeds are the governing document in respect of the method of charging.

8. The Tribunal decided that the Hearing should be adjourned to a later date, to enable the Parties to seek legal advice if they so wished and advised the Parties that they might wish to consider the relevance or otherwise of the law of prescription insofar as any claim for compensation for overcharging the homeowner is concerned.

9. On 21 January 2022, the property factors submitted written representations to the Tribunal. They acknowledged an error in a statement in an email of 5 June 2020 to the homeowner and stated their intention to write to him to apologise for this error (Section 2.1 of the Code of Conduct). Section 2.0 of their TOSADS identifies the procedures they have in place to consult with homeowners or where written approval is necessary (Section 2.4 of the Code of Conduct). Following a forensic review of the homeowner's records they had identified one occasion where they had failed to respond within their own timescales for doing so and, on identifying this error, they had apologised to the homeowner (Section 2.5 of the Code of Conduct). Section 4.0 of their TOSADS sets out the financial and charging arrangements which are in place (Section 3 of the Code of Conduct). Section 4.10 of their TOSADS confirms the arrangement in place where a homeowner may wish to request further information on a common repair or service (Sections 6.3 and 6.9 of the Code of Conduct).

10. The property factors then referred to the homeowner's complaint that they had failed to carry out the Property factor's duties. He had cited failure to comply with title deeds, but the property factors were unclear on where the homeowner believed this duty or legal responsibility is recorded. Their TOSADS, produced in accordance

with the requirements of the Act and associated Code of Practice sets out the arrangements in place between the property factors and the homeowners. In response to the complaint that they had authorised unnecessary works to be carried out where repairs would suffice, thus failing to protect homeowners' funds, the property factors said that they did not consider that they had carried out any unnecessary works on behalf of their customers. In accordance with their TOSADS, and, where considered necessary, they would consult with the homeowners prior to instructing common works or services. The homeowner had also alleged poor and often weighted communications in favour of a specific contractor to carry out work. The property factors were unclear as to which specific item of correspondence was being referred to.

11. The property factors said that they derived authority to act through custom and practice. Where they considered that consultation with the homeowners is necessary, they will consult with all homeowners in writing, seeking their views and/or instructions. In accordance with the TOSADS arrangement and having considered it necessary to consult with the homeowners. They wrote to them confirming that the current method of apportioning the hot water and usage charges was not in line with what is detailed in the title deeds. In their letters of 15 and 18 November 2021, they invited the homeowners' instructions on which method should be used. 39 homeowners replied, with 26 in favour of retaining the existing method and 13 in favour of the method recorded in the title deeds.

12. On 18 November 2021, the property factors had written to the homeowner confirming that they would refund in full the homeowner's share of the cost of replacement crushed stones. This figure was rounded up to £100, which the homeowner agreed would be donated to a charity of his choice, and was offered as a gesture of goodwill on the understanding that it did not in any way represent any admission of wrongdoing on the part of the property factors.

13. The property factors concluded their written representations by advising that they had decided not to attend the reconvened Hearing on 8 February 2022.

14. On 5 February 2022, the homeowner provided the Tribunal with copies of three letters that he had received from the property factors. On 27 January, they wrote to say that they accepted that a statement in an email they sent him on 5 June 2020 that "the Development needs to be managed as per the Title Deeds" was incorrect and they apologised for that error. On 3 February, they told him that, following their letter to homeowners of 15 November 2021 seeking instructions as to which method they wished the property factors to adopt regarding the future heating and associated hot water costs, they had received replies from 26 homeowners who were in favour of retaining the existing method and 13 in favour of the method recorded in the Title Deeds. As a homeowner had objected to the current method, they had not received the collective instruction to continue with the present method,

so would now apply the method as outlined in the Title Deeds. In their third letter, dated 4 February, the property factors stated that they had calculated that the difference between the current method and that detailed in the Title Deeds from the date that the homeowner had first raised the matter with them was £365.70 and that, as a gesture of goodwill they had credited the homeowner's account with £500.

The Continued Hearing

15. The continued Hearing was held by means of a telephone conference call on the morning of 8 February 2022. The homeowner attended and was supported by his sister, Miss Jane McGibbon. The property factors were not present or represented.

16. The homeowner confirmed to the Tribunal that he had received the payment of £100 and that the issue regarding the stones was resolved at a financial level, but he added that the property factors should design a new process for repairs, maintenance and replacement. He maintained that the new stones were an upgrade, so should have required unanimous approval, not a majority vote. The Tenant Management Scheme was imported into the title deeds and it was clear from the Scheme that "maintenance" des not include improvement unless it is reasonably incidental to the maintenance. The homeowners have a Committee, but its task is to work with the property factors, not to override the title deeds.

17. The homeowner told the Tribunal that he had never agreed to the £500 credit to his account referred to in the property factors' letter of 5 February 2022. He needed the property factors to acknowledge that it is the title deeds which govern the development. He had drafted a letter to all homeowners and had distributed it to those whose email addresses he had, but the property factors would not send it out to all homeowners on his behalf. The wrong method of calculating hot water costs had been used for 10 years and he estimated the overcharge to him at £2,500. In the last 18 months, he had received credits to his account of £1,100, £800 of which were "goodwill gestures". His view was that the property factors thought they could "goodwill" themselves out of this, rather than actually resolve issues. He understood that the property factors had been appointed to take over from the developers, who had initially factored the development themselves. The right thing for the property factors to do would be to recalculate the figures for all homeowners over the last 10 years.

18. The Tribunal had raised with the Parties at the first Hearing the impact of the law of prescription on any claim made by the homeowner. The homeowner contended that Section 11(3) of the Prescription and Limitation (Scotland) Act 1973 provided a gateway that allowed the full period of 10 years to be looked at, rather than any claim being limited to 5 years in terms of Section 6 of the Act. The error which had occurred continued from 2012 until it was drawn to the attention of the property

factors by the homeowner, who had been unaware of any loss until he decided to look into the matter. If the property factors were arguing that the homeowner had acquiesced in the present arrangements by not complaining sooner, it was for them to establish that he was aware of his loss at an earlier date.

19. In his closing remarks, the homeowner stated that a property factor is in a privileged position. He could not unilaterally "fire" them, but he does have a personal contract with them. They had tried to force solutions on him, and it had taken 3 years to get to a solution on this matter. The property factors said in their representations and their TOSADS that they operate on custom and practice, but that did not give them any right to change the way in which the development operated, or to depart from the provisions set out in the title deeds.

20. The Parties then left the Hearing, and the Tribunal Members then considered all the evidence, written and oral, that had been presented to them.

Findings in Fact

(i) The homeowner is the proprietor of the property.

(ii) The property factors, in the course of their business, manage the common parts of the the development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").

(iii) The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.

(iv) The date of Registration of the property factors was 1 November 2012.

(v) The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.

(vi) The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber, received on 29 January 2021, under Section 17(1) of the Act.

(vii) The concerns set out in the application have not been addressed to the homeowner's satisfaction.

(viii) On 28 July 2021, the Housing and Property Chamber intimated to the Parties a decision by the President of the Chamber to refer the application to a Tribunal for determination.

(ix) The methodology adopted by the property factors for apportioning the cost of hot water amongst the homeowners in the Development is different from that prescribed in the Deed of Declaration of Conditions by Yor Limited, registered in the Land Register on 20 August 2008.

Reasons for Decision

21. The Tribunal did not consider further the homeowner's complaint in relation to the replacement of the stones in the parking area. The property factors had refunded to him his share of the cost of that work. Accordingly, it was not necessary for the Tribunal to determine whether the work was repair and maintenance, requiring majority consent or whether it was improvement work, which would have required unanimous consent.

22. The essence of the homeowner's complaint was that the property factors had used an incorrect methodology in apportioning the costs of the hot water supply to the development, in that they had not followed the procedure laid down in the title deeds. The Tribunal was clear that the title deeds are the governing document and that, if the owners in a development wish to apportion certain costs differently from the manner provided in the title deeds, that would require unanimous consent. The homeowner's view was that it was not for the property factors to offer a choice between a correct and an incorrect method. They should always follow the title deeds. Accordingly, when they became aware of their error, they should simply have reverted to the correct procedure and recalculated the bills sent out over the last 10 years.

23. The Tribunal could not speculate on whether the property factors had simply continued with a procedure that their predecessors as factors (the developers) had adopted. but accepted that the method that had been used was incorrect, in that it did not follow the title deed provisions and there was no evidence presented by the property factors to indicate that all the owners had at any time agreed to the costs being calculated differently. It appeared that both the property factors and all the development homeowners had been unaware of the error until the matter was raised by the homeowner in May 2020. The view of the Tribunal was that, whilst property factors are expected to familiarise themselves with the provisions of any Deeds of Conditions affecting the maintenance and repair of common parts of a development, there is equally an onus on property owners to know and understand the rights conferred on them and the burdens imposed on them by their title deeds. Accordingly, whilst an incorrect methodology had been applied to the apportionment of hot water costs, the delay in ascertaining it was not attributable solely to the property factors. Homeowners had accepted their bills over many years, and it would, in any event, be impracticable, taking into account that a number of

properties in the development will have changed hands during the period, to expect the property factors to recalculate all the individual charges, refund to some who had overpaid and issue additional invoices to others who might have underpaid. The view of the Tribunal was that in all the circumstances, it would not be proportionate to require the property factors to carry out such a recalculation exercise for the period prior to the date that the matter was raised with them in 2020.

24. Having made this finding, it was not necessary for the Tribunal to consider the provisions of the Prescription and Limitation (Scotland) Act 1973, as the period under consideration was from 2020 to the present.

25. The Tribunal held that the property factors had been made aware by the homeowner in an email of 30 May 2020, that he did not consider they were apportioning the hot water costs in accordance with the title deeds. This matter was included in a formal complaint to the property factors on 27 July 2020. On 1 June 2020, the property factors explained in an email the method by which they apportioned the charges, and this was confirmed in their response of 26 August 2020 to the homeowner's complaint. In a separate email of 1 June 2020, the property factors told the homeowner that they would have to amend the way they calculated the bills going forward and thanked him for bringing this to their attention. However, in their letter of 26 August 2020, they stated that they did not believe that the method of charging for hot water and maintenance was incorrect, adding "It has always been the case and a method for which the collective homeowners, by settling their common charges account, agree with."

26. When the error was brought to their attention by the homeowner, the property factors, after taking such legal advice as they required on the interpretation of the Deed of Conditions, should have advised all homeowners that they would thenceforth be charging them using the correct methodology and it was not for the property factors to canvass the homeowners as to whether to continue using the incorrect method or revert to the process as set out in the title deeds. They did not, in any event, seek such instructions until November 2021, and it was not until 3 February 2022 that they advised the homeowners that future bills would be based on the proportional liability provided for in the Deed of Conditions.

27. The Tribunal considered first the homeowner's complaint under Section 2.1 of the Code of Conduct, which provides as follows: *"You must not provide information that is misleading or false".* The Tribunal noted that the property factors had identified one occasion on which they had made an incorrect statement and they had apologised for that. The Tribunal could not understand how the statement that "the Development needs to be managed as per the Title Deeds" to which they referred was incorrect. It appeared to the Tribunal that the homeowner's complaint under Section 2.1 of the Code of Conduct was that the incorrect billing of hot water charges amounted to information that was false. The Tribunal's view was that the

property factors had been unaware of the mistaken methodology until it was brought to their attention in May 2020 and that the reference to "information that is misleading or false" is not intended to include an error such as that in the present case, of which the property factors were unaware. The homeowner did not provide specific evidence of any other instances in which the property factors had failed to comply with Section 2.1 of the Code of Conduct, so the Tribunal did not uphold his complaint under that Section.

28. Section 2.4 of the Code of Conduct states *"You must have a procedure in place to consult with the group of homeowners and seek their written approval before providing work or services which incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as emergencies)."* The complaint under this Section appeared to relate to the replacement stones in the parking area and, as this matter had been held by the Tribunal to have been resolved, the complaint was not upheld.

29. Section 2.5 of the Code of Conduct says *"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 top keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement."* The view of the Tribunal was that the property factors had not dealt with the homeowner's enquiry and subsequent complaint as quickly and as fully as possible. This was acknowledged by the property factors in their letter of 26 August 2020. They apologised for failing to respond to some of the homeowner's enquiries within their stated timescales, adding that, while some of the items raised by him were complex and required more time to investigate, they should have advised him of this. They credited his account with a sum equivalent to one quarter's management fee. The Tribunal upheld the complaint under Section 2.5 of the Code of Conduct.

30. The opening paragraph of Section 3 of the Code of Conduct state *"While transparency is important in the full range of services, it is especially important for building trust in financial matters. Homeowners should know what they are paying for, how the charges are calculated and that no improper payment requests are involved."* The Tribunal noted the view of the homeowner that the error in methodology in calculating the hot water charge meant that the property factors had made improper payment requests and decided that, whilst the property factors had not wilfully miscalculated the charges, improper payment requests had been made. Some homeowners in the development had benefited from the error and some had paid more than they would have, had the procedure in the title deeds been followed. Accordingly, the Tribunal upheld the homeowner's complaint under Section 3 of the Code of Practice.

31. Section 6.3 of the Code of Conduct provides *"on request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a tendering exercise or us in-house staff."* The homeowner, in his application, had referred to poor and often weighted communications in favour of a specific contractor to carry out work, but no supporting evidence was presented to the Tribunal, so the Tribunal did not uphold the complaint under Section 6.3 of the Code of Conduct.

32. Section 6.6 of the Code of Conduct states *"If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners, free of charge. If paper or* electronic *copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance."* No supporting evidence was presented to the Tribunal, so the Tribunal did not uphold the complaint under Section 6.3 of the Code of Conduct.

33. Having decided that the property factors had failed to comply with Sections 2.5 and 3 of the Code of Conduct, the Tribunal then considered whether to make a Property Factor Enforcement Order. The Tribunal's view was that the property factors should recalculate the apportionment of hot water charges included in bills covering the period from 30 May 2020 to date and should refund to the homeowner any sums by which he has been overcharged. The Tribunal noted, however, that the property factors appeared to have carried out this exercise already, had calculated the difference between the two methods of calculation as £365.70. They had credited the homeowners account with the sum of £500, which they stated was a gesture of goodwill. The homeowner had told the Tribunal that he had not agreed to this, and the Tribunal accepted that his consent had not been sought prior to the credit being applied. Nevertheless, the Tribunal held that he had received a credit which exceeded the amount to which he would have been entitled by way of refund, and the property factors had advised homeowners on 3 February 2022 that they would now be apportioning the hot water costs in accordance with the title deeds, so the Tribunal did not consider that it was necessary to make an Order requiring them to do just that or to make a payment in respect of actual loss.

34. The Tribunal then considered whether an award of compensation should be made against the property factors. The Tribunal noted that the property factors had refunded one quarter's management fee in respect of their acknowledged failure to comply with Section 2.5 of the Code of Conduct and that the £500 credited to the homeowner's account exceeded the amount overcharged from 30 May 2020, but it was clear to the Tribunal that the homeowner had been put to very significant inconvenience in having to bring his complaint to the Tribunal, the property factors having failed to deal with his complaint quickly and fully and having sought homeowners' instructions on whether to persist with their method of apportioning

costs, when they knew, or ought by then to have known, that it did not comply with the provisions of the title deeds, so required unanimous agreement and that at least one homeowner would not consent to it. Having considered carefully all the evidence presented to it, the Tribunal decided to order the property factors to make payment to the homeowner of the sum of £500 by way of compensation.

35. The Tribunal's Decision was unanimous.

Right of Appeal

In terms of Section 46 of the Tribunal (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.

Legal Member/Chairman: 17 March 2022

George Clark