Housing and Property Chamber
First-tier Tribunal for Scotland

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal")
Property Factors (Scotland) Act 2011 ("the Act")

Statement of reasons in terms of regulation 38 of the First-tier Tribunal for Scotland (Housing and Property Chamber) (Rules of Procedure) Regulations 2017 ("the regulations")

Chamber Ref: FTS/HPC/PF/21/0458

Re.: 66 Silvertrees Wynd, Bothwell, G71 8FH **("the property")**

The Parties: -
Mrs Eileen Wright, 66 Silvertrees Wynd, Bothwell, G71 8FH **("the homeowner")** represented by Ms Caroline Adams, 18 Silvertrees Wynd, Bothwell, G71 8FH

Miller Property Management Limited, Suite 2.2, Waverley House, Caird Park, Hamilton, ML3 0QA **("the property factor")**

Tribunal Members: - Simone Sweeney (Legal Member) Andrew Taylor (Ordinary Member)

Decision of the Tribunal

The Tribunal unanimously determined that the property factor has failed to comply with sections 2.1, 2.5 and 7.2 of the Code of Conduct for Property Factors ("the Code") as required by section 14 (5) of the Act.

The Tribunal unanimously determined that the property factor has failed to comply with the Property Factor's duties as required by section 17 (1) (a) of the Act.

This decision should be read alongside the decision of the Tribunal dated, 31st August 2021.

Background

1. A hearing was conducted by telephone conference on 14th December 2021. In attendance was the homeowner, her representative, Ms Caroline Adams and Mr Harry Miller, Director, on behalf of the property factor. The hearing commenced at 10am. At the outset, Ms Adams submitted that the homeowner wished to withdraw from her application of 25th February 2021, complaints concerning sections 5.5 and 6.7 of the Code. The Tribunal allowed this amendment.
2. Having already heard from the homeowner at the hearing of 12th August (at which no representative for the property factor was present) the Tribunal invited Mr Miller to respond to the homeowner's allegations. Thereafter, the homeowner was invited to make any further submissions to the Tribunal.
3. Following the hearing a direction was issued by the Tribunal. Both parties satisfied the terms of the direction lodging further documentation and written submissions. This decision incorporates the evidence of the homeowner from the hearing of 12th August 2021, the evidence of both parties from the hearing of 14th December 2021 and the further written submissions produced thereafter and received by the Tribunal during January and February 2022.

Hearing of 14th December 2021

Section 2.1 of the Code:

"You must not provide information which is false or misleading."

4. With regard to section 2.1 of the Code, Mr Miller denied any allegation that, within his email of 20th January 2021, he had provided information which was false or misleading. It was admitted that an invoice had been issued to the homeowner. This provided to the homeowner her share of the cost of carpet cleaning in the common stairwell. The carpet required to be cleaned as a result of a report of dog fouling. This had been intimated to the homeowner in the property factor's email of 20th January 2021. An explanation for the cost read,

"This was for the removal of dog excrement and urine within the lift and stairwell of your area within the block. This was a health and safety issue notified to us by one of the owners and the work was carried out by the 'in-house' cleaners…"

In her earlier evidence, the homeowner had submitted that there was no evidence of such fouling in the common close at the area where her property was positioned. Therefore the explanation was false (see paragraphs 10 to 13 of the decision of 31st August 2021).

5. Mr Miller denied having instructed cleaning of the carpets of all five floors of the building in which the property is situated. Rather he instructed that only those carpets which required cleaning were attended to. The report of dog fouling in the common close had come from residents. Mr Miller submitted that the cleaning company cleaned up the *'mess'* and charged him accordingly. His position was that this would not have occurred if the cleaners had not had anything to clean. Mr Miller undertook to provide to the Tribunal copy invoices of the company instructed to undertake the work.
6. An invoice dated 30th November 2020 was produced by the property factor in response to the Tribunal's direction dated 14th December 2021. The property factor also lodged a letter from the cleaning company *("Reflections")* dated 16th December 2021, copy emails purported to be to the property factor from another owner, dated 19th December 2021, copy letters to residents from 2015 and photographs of the third floor common landing.
7. The invoice from Reflections cleaners, dated 30th November 2020, provided a cost of £445 for work carried out at 54 -80 Silvertrees, Bothwell on 20th November 2020. The invoice provided,

"On inspection, faeces/urine had been spread throughout the stairwell on the carpets, lift floor and tiled area on ground level, all of the areas affected had to be cleaned and sanitized."

8. An email dated 17th December 2021 was produced. In a covering letter dated 20th December 2021 the property factor submitted that the email was from, *"one of the owners in this stairwell."* The email began, *"Mr Miller phoned me this morning regarding the issues with dogs on our landing. As requested I can confirm the following…"* Thereafter the email contained a list of dates and issues dating back to January 2015. The only relevant entry to this matter was that of 12 November 2020 which read,

> *"E-mail to MPM requesting that the stairwell landing carpet and the lift carpet be deep cleaned due to the soiled condition from uncleaned dogs walking on it."*

9. By way of response to this additional information, the homeowner produced a written submission dated, 12th January 2022. Within this email the homeowner encouraged the Tribunal to place no evidential value on the invoice from Reflections. It was described by the homeowner as,

> *"questionable and only prepared retrospectively…Furthermore, I submit that this invoice in reality has no evidentiary or or (sic) probative value in terms of my culpability or complicity re the allegations against me…"*

10. The homeowner invited the Tribunal to prefer the content of the email from the neighbouring resident which indicated that the necessity for carpet cleaning was from dogs walking across the common areas.

Section 2.2 of the Code:

> *"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)."*

11. The basis of this part of the homeowner's complaint was the letter of 23rd July 2015. In particular the homeowner had found the invitation to residents to indicate whether the homeowner's dog should be removed from the building to be a breach of section 2.2 of the Code. Mr Miller denied that his letter of 23rd July 2015 was a

communication which was abusive, intimidating or threatening. (Reference is made to the earlier submissions of the homeowner at paragraphs 14-22 of the Tribunal's decision of 31st August 2021).

12. Mr Miller explained that the letter had been sent to fourteen residents within the block in relation to an on-going issue with dogs within the building. He alleged that residents were concerned that the homeowner was not washing the paws of her dog before bringing the dog into the building from outside. It was admitted that the letter had not been sent to the homeowner. Mr Miller's explanation for his actions was to ascertain whether other residents wanted him take action to have the homeowner's dog removed given that there had been an on-going issue for some time prior to issue of the letter. Reports had been received of malodours from dogs and paw prints on the lift carpet. Letters had been issued requesting that dogs were cleaned before entering the building from outside but the problem persisted.
13. Mr Miller admitted that he had never had sight of the homeowner allowing her dogs to misbehave or causing any problem within the building. Never previously had he ever requested an owner to remove a pet and denied *"singling out"* the homeowner. Mr Miller's position was that he received complaints about the homeowner's dog from other residents, did not bring these allegations to the attention of the homeowner or make enquiries about their accuracy. He believed that two or three residents had complained. He felt obliged to take action but was unable to do so without the authority of the owners, hence the letter.
14. Mr Miller referred the Tribunal to the burdens' section of the title deeds in support of his position that the property factor had authority to have the homeowner's dog removed from the building. Section Seventh (e) provides:-

> *"(f) no dog, cat or other animal or bird (except birds kept in cages inside the said dwelling houses) which is or may be an annoyance to other proprietors (and it is declared that the factor hereinbefore mentioned shall be the sole judge as to whether or not any such animal or bird is or might cause such annoyance) shall be kept by any proprietor or others as aforesaid in the dwelling house belonging to him and no dog shall be permitted on the common subjects (including the garden ground)…"*

15. On the basis that he had authority within the title to have the dog removed, Mr Miller denied that he was attempting to take action which could be described as abusive, intimidating or threatening.
16. The second part of the letter with which the homeowner took issue concerned the allegations against her husband,

> *"Please note that Mr Wright has now commenced acting and gesturing in a threatening manner towards the caretaker for some reason therefore we now require to report his actions to the police."*

17. In response, Mr Miller defended the content of his letter. He submitted that he had contacted Police with allegations of anti-social behaviour towards him by the homeowner's husband. The purpose of contacting the Police was for advice, only. The advice received was to keep records of incidents and obtain photographs where possible. There was no incident or crime number as there was no formal complaint.
18. At the hearing, Mrs Adams emphasised how upset the homeowner and her husband had been on discovery of the letter. Ms Adams submitted that the Tribunal should consider the content of the letter to be defamatory and unprofessional on the part of a property factor.

Property Factor's duties

19. The homeowner had set out in writing by email dated 27th December 2021 how she claimed that the property factor had failed to meet the property factor's duties under section 17 of the Act insofar as the letter of 23rd July 2015 was concerned. The email of 27th December 2021 provided, insofar as is relevant:-

> *"The Title deeds do NOT prohibit owners from keeping dogs, nor do they prohibit owners using their lifts with their dogs to access their apartments, therefore the simple fact of doing so cannot be considered as "nuisance" or "annoyance" in terms of the title deeds. The factor wrongly interpreted an applied the word "annoyance"*

within the tile deeds to deliberately mislead owners that dogs were expressly prohibited in the lifts…showed a lack of due diligence in the process of having a dog removed from its owner. As a factor it was his professional duty to be fully conversant with the title deeds and to then properly and fairly interpret and apply. The factor failed to do so…He breached his fiduciary duties of confidentiality in advising all 13 neighbours by letter of a serious allegation involving my husband…This letter and the way the factor conducted this case was a failure to carry out his duties…The respondent has actively and undeniably sought to cause conflict both between him and me, and more damningly between our neighbours and ourselves."

20. In response, the property factor produced written submissions on 7th January 2022. He denied having breached the property factor's duties from the way in which this matter was handled. The property factor again relied upon the terms of clause seventh, in particular, that the property factor would be *"sole judge"* as to whether or not an animal was causing annoyance to other residents.
21. The letter, insofar as is relevant, provided,

"This was the reason for the Factor requesting that dogs should not be allowed within the only lift-due to the continual complaints being received from residents regarding the mess that they were causing to the walls and lift carpet…the applicant was not sent this letter as they were the subject of the problems raised by the residents of the stairwell and were therefore not entitled to have a vote on the issue."

Section 2.5 of the Code:-

"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)."

22. Mr Miller did not deny that the homeowner had sent him emails and letters on 22nd January, 2nd February, 25th February and 14th March 2021. Neither did he deny having failed to respond to any of the communications. In defence, he reminded the Tribunal that these communications were received during the pandemic. He was working alone in his office and was doing his best to handle many competing interests. Mr Miller admitted that the terms of the statement of services provide that the property factor will endeavour to respond to written enquiries within seven working days of receipt and that he had failed to meet this commitment. He admitted his failure to respond timeously under explanation that these were not usual times.

Section 5.3 of the Code

> *"You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance."*

23. Reference is made to the Tribunal's decision of 31st August 2021 at paragraphs 29 to 33 in which the homeowner alleged that the property factor had failed to comply with section 5.3 of the Code. By email of 6th January 2021, the homeowner had made the following enquiry of the property factor:-

> *"What commission, administration fee, rebate or other financial remuneration do you receive from the property insurance providers and any other contractor/supplier of services you instruct?"*

24. The property factor responded to the query in the email dated 20th January 2021. Insofar as is relevant, the email provided,

> *"There is an annual process undertaken by our brokers in accordance with their FCA guidelines and all owners have been provided with our commission details in every quarterly invoice correspondence."*

25. The homeowner was dissatisfied with this response. She received invoices and quarterly statements, as referred to by the property factor. The homeowner

understood that the property factor received a commission of 6% from all insurance premiums processed.

26. This was denied by the property factor. Mr Miller insisted that he had set out the facts to all owners of the commission received by the property factor through quarterly statements and invoices. Mr Miller submitted that he did not *"buy"* the insurance policy. Rather he goes through a broker. He receives a commission of 6% on the block policy. The block policy is for all developments managed by the property factor. There is no one standalone policy for the homeowner's block of flats. The 6% commission which he receives is approximately £30,000. This covers the administration of the policy. He receives no benefit from submitting claims. Rather, the property factor receives 6% of the premium and then processes a claim.

Property Factor's Duties

27. Whilst the homeowner appeared to accept the property factor's position on section 5.3 at the hearing of 14th December 2021, within her written submissions of 27th December 2021, the homeowner alleged that the position with financial benefit from insurance was misleading within the written statement of service. This, in turn, breached the Property Factor's duties in terms of section 17 of the Act.

28. The homeowner referred to the section of the written statement of services which provided, *"…we receive commission from insurers for administration and claims handling on your behalf… details can be provided on request."*

29. The homeowner submitted that her enquiry of 6th January 2021 was a request for details which was not answered by the property factor, *"which breaches the Service agreement and code of conduct."*

30. The homeowner submitted further that,

> *"It was only when pressed…that he conceded that he received a commission of 6% on the purchase of a block policy. He further conceded that the commission fee was unconnected to the number of claims processed on behalf of owners therefore it was not simply for administration and processing claims as his Service Agreement states."*

31. By way of response, Mr Miller relied on his position stated previously that all relevant information had been shared with all owners within the quarterly statements. Moreover, he relied upon a document which had been issued to owners (including the homeowner) dated 24th December 2021 which bore the heading, *"Your Factoring Charges."* The document provided a section on insurance. Specifically it provided,

> *"The policy and claims handling service is administered by ourselves on behalf of the Insurers and they provide us with a commission for the provision of staff at an equivalent rate of approximately 6.0% for this service."*

32. This document post-dated the hearing of 14th December 2021.

Section 6.3 of the Code:-

> *"On request, you must be able to show how and why you appointed contractors, including cases where you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff."*

33. The homeowner's complaint was that, in response to her email of 6th January 2021 requesting evidence of the tendering process entered into for the instruction of cleaning work the property factor responded that no competitive tendering exercise had been undertaken stating, *"There was no requirement for a "tendering" exercise…"* The homeowner believed that, having not appointed the cleaners by way of a tendering exercise, a failure to comply with section 6.3 of the Code had arisen.

34. Mr Miller denied any failure to comply with section 6.3 of the Code.

35. He relied upon section three (vi) of the deed of conditions which provides that the property factor shall keep a fund,

> *"for the execution of necessary and reasonable repairs, renewals, maintenance and cleaning charges…"*

36. Section three (vi) of the deed of conditions provides that,

> *"the factor shall have full power and authority to instruct and have executed from time to time such works for the repair, maintenance or renewal of the common subjects…as he in his judgement shall consider necessary, provided always that in*

the case of major work (being the cost of which is estimated by the factor to exceed £100 per dwelling…) the factor shall before instructing the same obtain the authority of the proprietors…"

37. At the hearing of 12th August 2021, and having given the matter consideration, Ms Adams advised that she wished to *"write off 6.3"* in terms of the homeowner's complaint. However the homeowner wished to re-visit the complaint at the hearing of 14th December 2021. There being no objection, the Tribunal allowed same.

38. Mr Miller explained that as property manager, he undertakes jobs as he sees fit. Where a job will not exceed £100 per dwelling there is no requirement for a tendering exercise. Mr Miller submitted that section 3 (vi) provided the property factor with the power to proceed in this way to do what is necessary to ensure that the building is maintained in an acceptable condition. An example would be the cleaning of the carpet in the stairwell. The cost of this work did not exceed £1,400 (being £100 per 14 owners). Therefore no tendering process was required to instruct the cleaners to do the work as it was not required in terms of the deed of conditions.

39. Mrs Adams remained insistent that there ought to have been a tendering exercise undertaken but was unable to specify why and the failure to do so amounted to a failure to comply with section 6.3 of the Code.

40. Mrs Adams admitted that section 6.3 of the Code places an obligation on a property factor to show, *"how and why"* a contractor was appointed including situations where you decided not to carry out a tendering exercise. Mrs Adams could not point the Tribunal to the property factor having been requested to specify *"how and why"* the cleaners were appointed to clean the carpet.

Section 7.2 of the Code:-

"When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be in 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."

41. Mr Miller was asked to respond to the allegation that no complaints procedure had taken place. Mr Miller admitted that he had not replied to the homeowner's communications of 25th February and 14th March 2021. He admitted that both communications were formal complaints from the homeowner.

42. He referred to section ninth of the deed of conditions over the property which provides that an owner is entitled to pursue a complaint with the Tribunal should it wish to do so and the relevant address to which the complaint should be directed. The homeowner would have access to the deed of conditions over her own property. Moreover the details of the Tribunal are within the written statement of services, a copy of which the homeowner has already referred to. This negated any requirement on his part to make the homeowner aware of how to direct a complaint to the Tribunal.

43. Finally Mr Miller moved the Tribunal to take cognisance of the fact that these communications occurred when lockdown regulations were in place and he was unable to run his business in the usual way.

Findings in Fact

44. That the property factor instructed Reflections cleaners to undertake carpet cleaning of the common areas on 20th November 2020.
45. That Reflections cleaners identified that the carpets were soiled with urine and excrement.
46. That urine and excrement necessitated the cleaning of the carpets in the common areas.
47. That this explanation for carpet cleaning was included within the property factor's email of 21st January 2021.
48. That the property factor issued a letter dated 23rd July 2015 to fourteen residents within the same block as the homeowner.
49. That the letter was not sent to the homeowner.
50. That the letter alleged that the homeowner's partner had behaved in a threatening manner to a caretaker.

51. That there was no action taken by the Police.

52. That the letter invited neighbours to indicate whether they would like the homeowner's dog "*removed*."

53. That the letter sought the majority consent from other residents prior to notifying the homeowner.

54. That the homeowner became aware of the letter.

55. That the tone and content of the letter was unpleasant and caused offence to the homeowner.

56. That the deed of conditions prohibits animals being kept by owners should the property factor judge that that the animal is causing an annoyance to other owners.

57. That the deed of conditions are silent on whether homeowners can take dogs into the lifts within the development.

58. That the property factor received allegations from neighbours of the homeowner taking her dog into the lift.

59. That the property factor neither investigated these allegations nor made the homeowner aware of the allegations.

60. That the property factor had no evidence of the homeowner's dogs creating annoyance within the block in which the property is located.

61. That, in terms of the statement of services, the property factor will endeavour to respond to written enquiries within seven working days of receipt.

62. That the homeowner sent written enquiries to the property factor on 22nd January, 2nd February, 25th February and 14th March 2021.

63. That the property factor did not respond to the written enquiries of the homeowner of 22nd January, 2nd February, 25th February and 14th March 2021.

64. That, by email dated, 6th January 2021 the homeowner requested whether the property factor received any financial benefit from any insurance arrangements.

65. That invoices issued to owners contained commission details from insurance arrangements.

66. That the homeowner receives invoices and quarterly statements from the property factor.

67. That, by email dated, 22nd January 2021 the homeowner requested whether the property factor received any financial benefit from any contracts instructed.

68. That the statement of services confirms that the property factor does not receive any commission, fee payment or any benefit from any contractor or maintenance service supplier.

69. That the homeowner has a copy of the written statement of services.

70. That, by email dated, 6th January 2021 the homeowner requested whether the property factor received any financial benefit from any insurance arrangements.

71. That invoices issued to owners contained commission details from insurance arrangements.

72. That the homeowner receives invoices from the property factor.

73. That the statement of services confirms that the property factor does not receive any commission, fee payment or any benefit from any contractor or maintenance service supplier.

74. That the homeowner has a copy of the statement of services.

75. That the property factor receives a commission of 6% from a block insurance policy which covers all developments managed by the property factor.

76. That this information is provided within the quarterly invoices provided to owners.

77. That the written statement of services is silent on this matter.

78. That the property factor wrote to owners on 24th December 2021, post hearing, to provide clarity on the issue.

79. That section three (vi) of the deed of conditions provides authority to the property factor to instruct works to the common areas as he judges necessary provided that the works will not exceed a cost of more than £100 per household.

80. That that stair cleaning instructed by the property factor fell below this threshold and that there was no requirement for the property factor to undertake a competitive tendering exercise in advance.

81. That the homeowner's letter of 25th February and email dated 14th March 2021 were formal complaints.

82. That the property factor did not respond to the homeowner's complaint.

Reasons for decision

83. The role of the Tribunal is to determine whether or not the content of the property factor's email of 20th January 2021 is a breach of section 2.1 of the Code, ie. to determine whether there is anything false or misleading in the explanation provided for necessitating carpet cleaning. It is a matter of agreement between the parties that the carpet of the common close was cleaned by Reflections in November 2020 on the instruction of the property factor. By email of 20th January 2021, the property factor specified that the reason for the carpet cleaning was, *"for the removal of dog excrement and urine within the lift and stairwell…"* Before the Tribunal is an invoice from Reflections cleaners. It is dated 30th November 2020. The homeowner alleges that the document is produced retrospectively and should not be relied upon. The Tribunal accepts that Reflections' cleaners undertook cleaning on 20th November 2020. The Tribunal accepts the content of the invoice from Reflections that the carpet in the common close was, *"soiled with urine and excrement."* The author of the invoice is referring to the common areas of a five-floor building in general terms. There is no specific information about the state of the carpet in and around the entrance to the homeowner's property. The Tribunal is satisfied that the content of the property factor's email of 21st January 2021 was based upon this information. To that end the Tribunal do not find the content of the email dated 21st January 2021 to be false or misleading. However, the email is directed to the homeowner only. The property factor makes specific reference to the lift and stairwell of, *"your area"* within the block. The Tribunal understands why the property factor may interpret the email as an allegation that there was dog fouling within the immediate vicinity of her home.

The Tribunal understands why the homeowner may consider this allegation to be false if there was no evidence of dog fouling outside her home at the material time. In this context, the Tribunal finds that the property factor has failed to comply with section 2.1 of the Code.

84. It has been apparent throughout proceedings that the relationship between the parties is not a strong one. The homeowner submits, at length, that she is a responsible dog owner who would never allow her dog to foul or misbehave in any way. The Tribunal do not doubt this to be the case. Neither does the Tribunal have any doubt of the great care and pride in her home and surrounding areas which is held by the homeowner. It is understandable that the homeowner my take exception to the content of the property factor's email, particularly given the history of the relationship between the parties. However, neither the invoice from Reflections nor the property factor's email refer to dog fouling being the direct responsibility of the homeowner.

85. The Tribunal refers to its reasons set out in its decision of 31st August 2021 in respect of section 2.2. It was entirely foreseeable that the tone and content of the letter and the way in which the property factor approached the matter would cause offence to the homeowner. At best, the Tribunal find the conduct of the property factor to have been regrettable and unprofessional.

86. Sharing private information about the homeowner and her partner with third parties may give rise to legal remedies which are out-with the jurisdiction of this Tribunal. It was entirely foreseeable that the homeowner would become aware of the letter despite her not receiving a copy directly. The homeowner's evidence was that she felt, *"distressed, threatened and intimidated"* by the letter. The Tribunal must apply an objective and not subjective test in determining whether this letter was, *"abusive or intimidating"* in all the circumstances. The Oxford English dictionary definition of, *"abusive"* is behaviour which is, *"extremely offensive or insulting."* The definition of "intimidating" is, *"having a frightening, overawing or threatening effect."* While the Tribunal accepts that the content of the property factor's letter was upsetting and caused offence to the homeowner, the Tribunal does not find that, assessed objectively, it meets the test for being abusive, intimidating or distressing.

87. Turning to the definition of *"threatening",* the homeowner's evidence in June 2021 was that the threat which she felt was of a complaint to the Police and the risk of legal action to remove her dog from the building. The Tribunal has insufficient evidence to make any comment about the allegations about the homeowner's partner. The threat of court action by the property factor is not what was intended by section 2.2 of the Code. Applying its proper meaning, the Oxford English dictionary definition of, *"threaten"* is to cause someone to be vulnerable or at risk; endanger. There is no evidence before the Tribunal that the homeowner was endangered or left at risk. Rather, she was gravely concerned of the possibility of court action and the potential consequences which may arise from that. Moreover, reference is made to section 2.2 where it provides, *"threatens them (apart from reasonable indication that you may take legal action)."* The homeowner admits that she took her dog into a lift. She has had sight of the deed of conditions which prohibits an owner keeping an animal if the property factor judges that it creates an annoyance or may do so. Whilst the Tribunal does not seek to downplay how upsetting this experience was for the homeowner, applying an objective test to the circumstances, the Tribunal is not satisfied that the property factor has failed to comply with section 2.2 of the Code.

88. The Tribunal recognises that the homeowner will continue to be disappointed with the Tribunal's decision on section 2.2. The Tribunal understands that the homeowner has taken legal advice which has led her to understand that she may have a legal remedy for damages arising from alleged defamatory comments by the property factor. This may be correct and it is not for the Tribunal to make any comment in that regard save to say that it is an entirely separate test which is being applied by the Tribunal in its determination of this application.

89. Whilst the Tribunal finds no failure by the property factor to comply with section 2.2 of the Code in this regard, the Tribunal is satisfied that the conduct of the property factor fell below what was acceptable for a professional property factor. In evidence, Mr Miller submitted that he received allegations against the homeowner from two or three residents. He made no investigation into these allegations nor did he bring them to the attention of the homeowner or her husband. He wrote to residents stating that the homeowners continue to take their dog into the lift, that this was a

continued nuisance and that the property factor could arrange to have the dog removed from the building. This was despite having no evidence to support same nor having made the homeowner aware of the allegations and allowing her an opportunity to respond. Moreover, the property factor made allegations against the homeowner's husband within the letter. The property factor defends his position to attempt to have the homeowner's dog removed on the basis that, as property factor, the title appoints him to *"judge"* whether there is, *"annoyance"* to other residents. To enable him to reach any decision on this matter required investigation and consideration of the position of both sides. By the property factor's own admission, no consideration of the homeowner's position was ascertained. Against this background the Tribunal finds a failure on the part of the property factor to comply with the Property Factor's duties insofar as the letter of 23rd July 2015 is concerned.

90. Reference is made to the Tribunal's reasoning for finding a failure to comply with section 2.5 of the Code in its decision of 31st August 2021. At that time, there was no evidence before the Tribunal of any response from the property factor to the written enquires of the homeowner of 22nd January, 2nd February, 25th February and 14th March 2021. Moreover, Mr Miller admits that he did not reply to the communications and recognises that this is a failure to comply with the terms of the property factor's own statement of services. Whilst the Tribunal recognise the difficulties for businesses arising from the pandemic, these communications were sent by email in 2021. Mr Miller explains that he was operating his office at the time. It was open to him to send a holding email to the homeowner explaining that he would not be able to meet the seven day reply timescale within the written statement of services. He chose not to do so. The Tribunal is not satisfied that Mr Miller provides sufficient justification for his failure to reply to four communications over a three month period. The Tribunal determines that by failing to respond to the homeowner, the property factor has failed to comply with section 2.5 of the Code.

91. At the hearing of 12th August 2021, the homeowner confirmed that she was aware that the property factor received a commission of 6%. There appeared to be a lack of clarity about what was covered within the commission. At that time the homeowner admitted that she had no evidence to contradict the content of the written statement

of services that the property factor receives no financial benefit from the company providing insurance cover. That remains the position. To that end, the Tribunal continues to find no failure on the part of the property factor to comply with section 5.3 of the Code.

92. It would appear that the property factor has clarified the position for the homeowner as to what is covered within the 6% commission. The written statement of services is silent on the issue. It is regrettable that it took until 14th December 2021 for this confusion to be resolved between the parties. Moreover, the Tribunal note that the property factor thought it appropriate to write to owners and clarify the matter ten days post hearing. The Tribunal is satisfied that the position is unclear within the written statement of services and the additional information provided by the property factor by letter of 24th December 2021 is helpful for owners. To that end, the Tribunal finds the written statement of services unclear for owners and a failure to comply with the Property Factor's duties in terms of section 17 of the Act.

93. Section three (vi) of the deed of conditions provides authority to the property factor to instruct works to the common areas as he judges necessary provided that the works will not exceed a cost of more than £100 per household. The cost of cleaning to the common stairwell in November 2020 fell below this threshold, there was no requirement for the property factor to undertake a competitive tendering exercise in advance. There is no evidence that the homeowner requested that the property factor show how and why the cleaners were appointed. That said, the homeowner was aware of the reasons for the property factor instructing the common stairwell as those reasons are the basis of her complaint and application. Against this background, the Tribunal finds no evidence of any failure to comply with section 6.3 of the Code by the property factor.

94. The Tribunal adopts its reasoning from 31st August 2021 in relation to the alleged failure to comply with section 7.2 of the Code. The communications to the property factor from the homeowner of 25th February and 14th March 2021 were formal complaints. The property factor admits that he was aware of them and confirms that he did not reply. The property factor did not activate any in-house complaints procedure. No final decision was issued to the homeowner, in writing. No details of

how the homeowner could apply to the Tribunal, albeit it is accepted that the homeowner made an application to the Tribunal, successfully. In relation to the property factor's position that this occurred during the pandemic when lockdown regulations were in place does not negate the obligation on the property factor. It was open to him to issue a holding communication to the homeowner if he was unable to respond within the specified timescales. Rather, he did nothing. Against this background, the Tribunal is satisfied that the property factor has failed to comply with section 7.2 of the Code.

Decision

95. In all of the circumstances narrated, the Tribunal finds that the property factor has failed in its duty to comply with sections 2.1, 2.5 and 7.2 of the Code and that the property factor has failed to comply with the Property Factor's duties as required by section 17 (1) (a) of the Act.

96. The Tribunal determined to issue a PFEO.

97. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the property factor and to allow parties to make representations to the Tribunal.

98. The Tribunal proposes to make the order in the following terms:

Within 28 days from the date of issue of this order, for the property factor to:-

a. *provide to the homeowner payment of £750 in recognition of: - the content of the property factor's email of 21st January 2021; the property factor's failure to reply to the homeowner's communications of, 22nd January, 2nd February and 25th February and 14th March 2021; to follow the property factor's complaints procedure and; in recognition of the time, preparation and inconvenience the homeowner has expended in having to bring this application and the property factor's failure to comply with the Property Factor's duties as required by section 17 (1) (a) of the Act.*
b. *To provide evidence of same to the Tribunal's administration.*

Appeals

99. 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 within 30 days of the date the decision was sent to them.

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

…… Legal Chair, at Glasgow on 31st March 2022