Housing and Property Chamber
First-tier Tribunal for Scotland

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

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 Ref: FTS/HPC/LM/22/1998

Property: Woodilee Village Estate, Lenzie, Kirkintilloch G55 3UX ("the Property")

The Parties:-

Mr Ewan Miller, 31 Cramond Drive, Lenzie G66 3UX ("the homeowner")

Residential Management Group Scotland Limited incorporated under the Companies Act (SC591810) and having their registered office at Unit 6, 95 Morrison Street, Glasgow G5 8BE ("the property factors")

Tribunal Members:

George Clark (Legal Member/Chairman) and Elizabeth Dickson (Ordinary Member)

Decision
The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") decided that the property factors have not failed to comply with their duties under the Code of Conduct for Property Factors, effective from 16 August 2021 made under Section 14 of the Property Factors (Scotland) Act 2011 and that they have not failed to comply with the property factor's duties.

Background

1. By application, dated 21 June 2022, the homeowner sought a Property Factor Enforcement Order under Sections 17 and 20 of the Property Factors (Scotland) Act 2011 ("the 2011 Act") in respect of a failure by the property factors to comply with OSPs 2,4, 8 and12 and Sections 1.19 and 1.21 of the

Code of Conduct for Property Factors effective from 16 August 2021 ("the Code of Conduct"), and a failure to carry out the Property Factors' duties.

2. The homeowner stated that his complaint related to failure by the property factors to exercise multiple obligations under the Code of Conduct in relation to the termination of their role by residents. Following termination notice being served by the Woodilee Residents Association ("WRA") on 28 January 2022, clearly stating that their role would finish on 30 April, the property factors have still not accepted the decision and have refused to transition to the appointed incoming factor. The homeowner's complaint related solely to their behaviour in relation to termination of their role.

Homeowner's written representations

3. In October 2021, the WRA ran a vote to seek and obtain a mandate to appoint a new factor. They spent considerable time reviewing the deeds to ensure a correct interpretation was made in relation to termination of an incumbent factor and replacement with a new one. One interpretation was that they did not need to seek a mandate from residents and that a quorum of the WRA (20%) decision at a committee meeting was sufficient. They had, however, decided to engage the wider resident community and obtain support from 20% of all households in the estate. This process had been used to obtain quorate decisions to vote in the new committee and, the following year, in October 2020, committee role holders, and had been a process ratified by the property factors.

4. In January 2022, following a tender process, the WRA sent the property factors confirmation that a new factor had been selected and that their role would end at the end of the current budgetary year on 30 April 2022.

5. On 18 February 2022, WRA were sent a letter from the solicitors acting for the property factors. The solicitors stated that they had been instructed to ensure, if necessary, proper termination of the property factors' position. They pointed out that, in accordance with the Deed of Servitudes and Conditions for the development, a meeting may be called by any member of the Woodilee Village Proprietors' Association at such time and place as is reasonably convenient, provided seven days' notice is provided in writing to every plot owner. The quorum is 20% and if the meeting is quorate, the plot proprietors present may vote to appoint a qualified firm to perform maintenance and management of the subjects owned in common. In order to review the suggested termination, they asked WRA to confirm what steps they took to notify every plot holder of the meeting and how they ensured that every owner had knowledge of the meeting, as a number of properties were rented. They wished to know the date, time and place of the meeting, the notice given, and how the votes were counted and wished confirmation of the number of plot owners present and the number of votes in favour of appointing the new factor. They also sought details of the specific vote taken at the meeting, as it appeared that at the meeting it was agreed to appoint a new factor, but the title deeds required a vote to be undertaken in favour of a specific person or firm. The solicitors stated that the property factors acknowledged the development's right to appoint a new factor if

done in accordance with the title deeds and simply wished to confirm that the process was conform to the title deeds, so that they could assist in any necessary handover exercises. They warned, however, that the property factors reserved their rights during the continuation of their services to recover their expenses and charges incurred for any work done or undertaken or services performed, "which shall include the services provided by us in ensuring the appointment of a new factor is conform to the title deeds."

6. On 21 February 2022, the WRA pointed out to the property factors' solicitors that the wording of the title deeds did not include the word "every" in its provisions regarding the requirement to give notice of a meeting to plot owners. They stated that a pro-forma letter had been physically posted through the door of every property. The WRA accepted that these might not have reached proprietors directly, but the pro forma made it clear that only proprietors would have a vote and count towards meeting the quorum. The meeting had been held online on Zoom, due to the COVID situation. The property factors had agreed that this was a suitable arrangement for the 2020 AGM. WRA detailed the process for recording and verifying votes cast. 254 responses (29.5%) had been received and 252 had ultimately cast votes. Of those, 244 (96.8%) voted to grant the WRA authority to decide who should factor the development with 8 (3.2% against). The Motion was "Members of the association grant the Woodilee Residents Association the authority to decide who factors Woodilee Village estate". The WRA took issue with the property factors' solicitors' assertion that the vote need be undertaken in favour of a specific person or firm.

7. On 25 March 2022, the property factors' solicitors wrote again to WRA. Their clients' position was that the information provided by WRA did not confirm that the procedure followed conformed to the title deeds. They wished evidence that the true owners of all properties in the development were notified of the meeting and proof of the homeowners that attended the meeting, with confirmation of the process undertaken to verify that all those present were homeowners and not tenants. They also wished evidence of the votes that were issued by each of the homeowners. If the WRA were not able to provide this evidence, a fresh meeting would be required and it would have to be notified to all true homeowners to ensure the vote conformed to the title deeds. The property factors' Written Statement of Services provided, in relation to Termination of Appointment, that "Written evidence to illustrate that competent consultation of all owners has occurred must be produced to RMG Scotland, along with a signed document verifying the decision of each owner."

8. On 28 March 2022, the homeowner, as WRA Chair, advised the property factors' solicitors that the property factors had now confirmed that their role as Manager at Woodilee Village had been terminated as of 30 April. He quoted from an email sent by the property factors' designated Property Manager for the Woodilee Village on 22 March regarding a delay in completion of the annual tree survey. The quote was "Due to circumstances regarding Woodilee, as the inspection has not taken place yet, RMG will not

be completing such works and it will be the responsibility of NPM to conduct such inspection."

9. On 6 April 2022, the property factors' agents advised WRA that the purported termination of appointment was rejected, as WRA had failed to evidence compliance with the conditions required for termination as set out in the title deeds. Further, the email of 22 March in no way constituted such acceptance.

10. WRA responded on 7 April, contending that the confirmation contained in the email of 22 March was unqualified and came from the person whose name featured heavily on all correspondence from the property factors. It was an inconsistent situation to state that the property factors did not accept notice of termination but were also refusing to carry out their duties (in relation to arranging the tree survey) in line with the title deeds, their Written statement of Services and the Ground Maintenance Specification. The WRA provided a link to a Zip file which contained all the voting forms. They argued again that contacting "every" owner was not a requirement of the title deeds. At any given date, in a development the size of Woodilee some houses might be "in probate" and the true owner not identified thus rendering the "fictional" requirement for "every owner" realistically unobtainable. With regard to the property factors' solicitors' reference to the Written Statement of Services, the clause referenced came from a generic Written Statement of Services available on the property factors' website, although it was unclear when this version was published there. This Written Statement of Services had never been provided directly to residents of Woodilee Village via email or letter and WRA did not accept that this later version was applicable to Woodilee Village as it had never been circulated to residents, residents had not been consulted on its contents nor on any changes from previous versions, and neither residents nor their representatives had agreed to any changes. The only Written Statement of Services on the property factors' portal dated from May 2017 and was uploaded on 29 December 2017. The "Termination of Appointment" clause quoted in their letter of 25 March did not appear in the May 2017 version of the Written Statement of Services and it was with the 2017 version that WRA had complied.

11. On 28 April 2022, the property factors issued a communication to residents updating them on various matters and commenting that no budget had been approved by WRA for the coming year. In their communication, they advised homeowners that a copy of their most recent Written Statement of Services was available on their website, and they provided a hyperlink to the website. The homeowner stated in his application that no communication had been made by the property factors to ask the WRA to agree a budget. If their position was that they remained in post he would have expected them to come to WRA with an initial proposal, as they had done in previous years.

12. On 3 May 2022, the property factors' solicitors wrote to WRA again, stating that the property factors were adamant that they were unable to accept the termination of their appointment, as the requirements of the title deeds had

"simply not been obtempered." The title deeds provided that at least seven days' notice of a meeting shall be given "to the other Plot Proprietors." Despite the evidence of 250 voting slips, the issue remained that the property factors were yet to receive evidence supporting the assertion of WRA that all owners were given the required notice of the meeting. There was no evidence to satisfy the property factors that delivery of voting slips to all of the properties in fact took place, but even if such evidence were provided, given that 38 of the properties are tenanted, this did not ensure notice was given to the owners who do not reside at the property. The property factors had received correspondence from owners advising they were unaware of the vote and there were also social media comments from owners stating they did not receive voting slips. The property factors were bound to act in accordance with the title deeds, so could not accept termination of their appointment unless they were satisfied that all owners within the development had been provided with the opportunity to participate in the vote. Acceptance of termination without receiving adequate evidence of due process having been followed would breach their duties as factors. The property factors would accept termination if WRA provided evidence that the vote had been completed in accordance with the title deeds. Otherwise, they suggested that the members of WRA driving the termination should accept their failure to conduct the vote in accordance with the title deeds and resign their positions within the committee, or WRA should accept the failure to conduct the termination in accordance with the title deeds and agree to enter into a consultation regarding an appropriate penalty to be paid to the property factors, thereafter allowing the parties to mutually part ways.

13. WRA responded on the following day, listing the dates on which individual parcels were posted through doors in each block and the initials of the persons who had distributed them. All of these had been completed by 10 October 2021. They had also posted notice of the meeting on the WRA website and on the notice board in the development.

14. The homeowner then summarised his complaint under the various Sections of the Code of Conduct.

15. OSP2 states "You must be honest, open, transparent and fair in your dealings with homeowners." The homeowner dealt with this along with OSP4, which states "You must not provide information that is deliberately or negligently misleading or false." The homeowner stated that the property factors' solicitors had said that "every" owner had to be notified of the meeting, thus effectively and deliberately inserting extra words into the true wording of the Deed of Servitudes and Conditions. This was clearly intended to increase the apparent difficulty of achieving a successful EGM and was neither honest nor transparent. The property factors had failed to treat the EGM fairly, as they had attempted to apply a different level of verification to the EGM than has historically been applied to AGMs. They had also issued an unqualified acceptance to the office-bearers of WRA whilst simultaneously insisting via their "subcontractor" (their solicitors) that the termination had not been accepted. They had been dishonest in

providing their solicitors with an invalid Written Statement of Services and should have made it clear that the only valid WSS at the time of legal challenge was the last one issued to residents through their portal, namely the one dated May 2017.

16. The homeowner dealt with OSP8 and OSP12 together. OSP8 states "You must ensure all staff and any sub-contracting agents are aware of relevant provisions in the Code and your legal requirements in connection with your maintenance of land or in your business with homeowners in connection with the management of common property." OSP12 states "You must not communicate with homeowners in any way that is abusive, intimidating or threatening." The homeowner's contention was that the property factors' solicitors were subcontracting agents to the property factors and referred again to the deliberate rewording of the title deeds, reference in letters to re-charging solicitor time to residents and a personal threat to seek financial redress from WRA office-bearers. Threats of legal costs had certainly caused fear and alarm and fell within the definition of "abusive or intimidating."

17. Section 1.19 of the Code of Conduct requires that the Written Statement of Services should provide "clear information on when and how a homeowner should inform the property factor of an impending change in ownership of their property (including details of any reasonable period of notice which is required by the property factor to comply with its duties under this Code). This information should also state any charges for early termination administration costs." The homeowner argued that there was no information on administration costs for termination within the May 2017 Written Statement of Services, as required by the Code of Conduct 2021 edition.

18. Section 1.21 of the Code of Conduct requires the Written Statement to include "a clear statement confirming the property factor's procedure for how it will co-operate with another property factor to assist with a smooth transition process in circumstances where another property factor is due to or has taken over the management of property and land owned by homeowners; including the information that the property factor may share with the new, formally appointed, property factor (subject to data protection legislation) and any other implications for homeowners. This could include any requirement for the provision of a letter of authority, or similar, from the majority of homeowners to confirm their instructions on the information they wish to be shared." The homeowner stated that this information did not exist in his Written Statement of Services. On 29 March 2022, he had written to the property factors asking why it was not present. He had chased this up twice but had received no response. This, he said, highlighted that the property factors had no intention of ever providing a smooth transition to a replacement manager.

19. The homeowner was seeking confirmation that there had been no failing in the EGM process, that the property factors would not charge any management fee or attempt any recharges for work taking place after 30 April 2022, that the property factors' solicitors acted as their subcontractor

during the termination phase and that, having failed, in their Written Statement of Services, to provide details of administration fees associated with termination, they would not charge any such fees. He also stated that, as Chair of WRA, he had spent 5 full days preparing the complaint, and, as his self-employed day-rate is £600, he was seeking compensation, which he suggested should be £3,000. He also wanted the property factors to be struck off the property factors' register for such period as the Tribunal should determine, to act as a deterrent to other factors who might consider behaving in a similar manner.

20. The application was accompanied by copies of all the documents to which the homeowner referred in his application.

21. On 8 August 2022, the property factors' agents sent an email to WRA, in which they said that the property factors remained dissatisfied, for reason detailed in their earlier correspondence, that the process by which the WRA Committee had attempted to terminate their appointment as factor had been fully compliant with the Deed of Conditions contained within the title deeds but, in the interest of drawing the dispute to a close, the property factors offered to provide administrative services to the Committee in order that a fresh vote of the Association might be held. The property factors held contact details for all of the owners within Woodilee Village, so could ensure valid notice of a fresh meeting was provided. The email set out the question to be asked and the process for holding the EGM and proposed an administration fee of £10 per owner for their services in assisting the Committee with the intimation and organisation of the meeting. The property factors considered this to be a reasonable solution for both parties and most importantly for the benefit of all owners, but if the Committee declined the offer, the property factors maintained that they had a stateable case to pursue legal action against the Committee and its office-bearers.

22. On 10 August 2022, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the Parties were invited to make written representations by 31 August 2022.

23. On 18 August 2022, the homeowner advised the Tribunal that WRA had chosen not to respond to the property factors' solicitors' letter of 8 August, as they believed the correct termination process had been followed and wished the matter to be determined by the Tribunal.

Property factors' written representations

24. The property factors' agents submitted written representations on their behalf on 18 August 2022. They stated that a proper interpretation of Clause 2 of the Deed of Servitudes and Conditions was that the Residents' Association can call a meeting by giving at least seven days' written notice to all owners. In the absence of notification to all owners, a meeting is not properly convened in terms of the deeds. The owners present at an improperly convened meeting have no power to make a binding decision on the other owners. A decision made at an improperly convened meeting is

invalid and unenforceable as a matter of law. The property factor has a duty to ensure that a decision terminating or appointing a factor is valid and enforceable for a number of reasons, for example, the property factors must be satisfied there is a legitimate reason for transferring personal data of owners to a third party, and also that any transfer or assignation of debt is properly executed. If the property factors accepted an invalid and unenforceable termination of their appointment, that would be a flagrant breach of the property factor's duties under the Code. The property factors had no intention of holding on to an appointment when the owners want to appoint an alternative factor and make a valid decision to do so.

25. The property factors' view was that there is no interpretation of the Deed of Servitudes and Conditions that would allow a property factor to be terminated without obtaining a quorate meeting of 20% of the overall owners and did not accept that the improperly convened meeting was quorate. The homeowner had referred to the fact that the process followed had been the same as had been used to elect the Committee, but Clause 2 of the Deed of Servitudes and Conditions states that the Committee shall be entitled to call annual general meetings at which time elections of new Committee members may be held. It was clear from the express reference and distinction between the annual meetings and meetings called by a member of the Residents' Association that they are subject to two entirely different procedures and thus any endorsement of the process of appointing the Committee had no bearing on the process for terminating the property factors' appointment. The Tribunal does not have the authority or the jurisdiction to consider and determine whether the property factors' interpretation of the deeds is correct, but simply to decide whether the property factors have complied with the various provisions of the Code of Conduct they are said to have breached.

26. WRA had sent an email on 28 January 2022 to the property factors purporting to terminate their appointment, but no evidence whatsoever was provided of the voting process, or of the votes, or of notice of the meeting having been given to the other owners. The property factors' position on the validity of the purported termination was clear from the response sent on their behalf on 18 February 2022, in which their agents requested documents to assist the property factors in considering the validity of the decision. The Committee accepted in their correspondence of 21 February 2022 that the proxy voting form might not have directly reached proprietors. The property factors knew that not every owner was notified. Only 27 people attended the meeting. 171 would have been required for it to be quorate.

27. On 25 March 2022, the property factors' agents had reiterated that the property factors were not satisfied the purported termination conformed to the title deeds. They requested evidence that all owners had been notified of the meeting on 20 October 2021 and put the WRA Committee on notice that, in the absence of evidence of a properly convened meeting and valid decision, a fresh meeting and new decision would be required.

28. In their agents' letter of 6 April 2022, the property factors made it clear that

the purported termination was not accepted, but they nonetheless engaged with the Committee with a view to effecting a transition in the event that the Committee were able to produce evidence satisfying the property factors as to the validity of the decision.

29. With reference to the homeowner's comments regarding the property factors' communication to residents of 28 April 2022, the property factors responded that, given the conduct of the Committee and their dogmatic determination that the property factors had been terminated, the property factors were unwilling to input the necessary management time into preparing, negotiating and agreeing a budget when the Committee's position was that the property factors had no locus to do so.

30. The property factors set out, in their agents' letter of 3 May 2022. their reasons for being unable to accept the purported termination. They also made it clear that they had no issue accepting the purported termination if satisfied the decision conformed to the title deeds.

31. The property factors' agents stated that it was irrelevant whether "reasonable efforts" were made to notify other owners, the point being that all owners must be notified.

32. **OSP2/OSP4** Dealing with the homeowner's complaints under the various Sections of the Code of Conduct, the property factors' agents stated that they had honestly, openly and transparently set out the basis for the property factors' rejection of the purported termination. The Parties had competing interpretations of Clause 2, but at no point had the property factors' agents imported words into said Clause. The AGM and an EGM called by a member of WRA are convened using different procedures and are thus treated differently by the property factors. The property factors, through their agents, had already explained that the purported termination was never accepted. In any event, the property factors' employee had neither the express or ostensible authority to bind the property factors.

33. The property factors' Written Statement of Services is constantly reviewed and updated. It is available on their website and is automatically updated with any changes. There is no obligation on the property factors to intimate a new Written Statement of Services whenever there are minor or inconsequential changes. The property factors intimated copies of their 2021 version directly to the Committee and its 2022 version was intimated through the website portal to which all homeowners have access, in compliance with the Code of Conduct.

34. **OSP8/OSP12.** The property factors pointed out that OSP8 imposes a duty in relation to subcontractors, but the property factors' agents are not subcontractors. They are appointed agents. The complaint under OSP8 was, therefore, irrelevant.

35. The property factors had not imported words into the Deed of Servitudes and Conditions. They were interpreting the wording of the provision.

36. The property factors also expressly refuted the allegation of "threats". They were entitled to put the homeowner on notice that that they intended to recover their costs in exercise of their legal remedies, particularly in instances where WRA were belligerently continuing with the purported termination despite being advised that the decision was invalid. They referred the Tribunal to the definition of "abusive and intimidating" in the Code of Conduct. It applied where it is reasonable for the homeowner to form a view that the manner of the communication is offensive or insulting. The homeowner had not disclosed any comments that could be reasonably construed as threatening or designed to cause "fear and alarm".

37. **Clause 1.19**. The property factors' agents stated that this Clause clearly relates to termination of the relationship between a homeowner and a property factor because of a sale of the property, not to the termination of a property factor's appointment.

38. **Clause 1.21**. The view of the property factors was that the present application concerns the property factors' rejection of its purported termination, so the complaint under this Section was irrelevant.

39. The property factors' agents contended that the property factors had consistently advised the WRA Committee and the homeowner that they dispute the purported termination of their appointment, because they are not satisfied, having regard to the documentation and explanations provided by the Committee that the meeting was properly convened in terms of the title deeds, or that it was quorate. The question for the Tribunal was whether the property factors have acted in a way consistent with the Code of Conduct in their non-acceptance of the invalid decision and communication with the homeowner (including through the property factors' agents). The Tribunal is not tasked with determining the correct interpretation of the deeds. They also stated their view that there is a misconception by the homeowner as to what remedies the Tribunal can grant. Section 17 of the 2011 Act sets out that a homeowner may apply to the Tribunal for determination of whether a property factor has failed to (i) carry out the property factor's duties, or (ii) to comply with the Code of Conduct. The power of the Tribunal was restricted to deciding whether such failure had taken place and, if so whether to make a Property Factor Enforcement Order ("PFEO"). It was not within the competence of the Tribunal to strike off a property factor from the Property Factors Register. That was a matter for Scottish Ministers. Accordingly, the only one of the various remedies being sought by the homeowner that was within the competence of the Tribunal was a request that the Tribunal make a PFEO. The property factors' agents pointed out that the role of Chairman of the WRA is a voluntary one and, accordingly, even if the Tribunal upheld his complaint (and the property factors denied any breaches of the Code or failure to carry out their duties) the homeowner was not entitled to claim compensation in respect of his time.

40. The property factors invited the Tribunal to reject the application for the reasons set out in their written representations. In particular, the homeowner

had brought an application before the Tribunal seeking remedies outwith the Tribunal's powers and jurisdiction, and more importantly, the homeowner had failed to demonstrate that the property factors have not complied with their duties under the Code of Conduct.

Case Management Discussion

41. A Case Management Discussion was held on the morning of 29 September 2022. The homeowner was present. The property factors were represented by Mr Aaron Kane of BTO LLP, solicitors, Glasgow. The Legal Member of the Tribunal outlined the purpose of the Case Management Discussion, which was to clarify the issues if required, to identify areas of factual dispute and to determine whether to adjourn the case to a full evidential Hearing and what further information/documentation was required by the Tribunal in advance of such Hearing.

42. The homeowner told the Tribunal that the WRA Committee had discussed how to interpret the title deeds and decided that they should aim to contact every owner and had used their best endeavours to do so. They copied the process that had been used to set up the second iteration of the Committee. The property factors' interpretation of the title deeds would make it almost impossible to remove factors.

43. Mr Kane responded that 38 of the properties are tenanted and that various people had intimated on social media that they had not known of the meeting. He referred to the title deeds and said that property factors have a duty to ensure they are complied with. If agreement could not be reached in the present case, a court would have to decide which interpretation was correct. Only 27 people had attended the meeting. A quorate meeting of 20% of the residents would have been 171.4. The property factors had no desire to hold on to the contract simply for monetary purposes. The property factors are a very large and very successful business, and they had no financial need to hold on to the Woodilee Village contract, but they had a legitimate reason to ensure their duties and rights are obtempered. They were not trying to be difficult, but it would be a flagrant breach of their duties to the residents if they did not ensure the vote to remove them had been properly taken in accordance with the title deeds. It was not a matter of considering what was reasonable by way of endeavouring to contact all owners. The question was whether or not all the owners had been notified. If they had not been, the property factors were entitled to reject the vote. The title deeds were clear and what mattered was what the Committee did, not what they thought. The property factors had at all times simply tried to verify the process.

44. In relation to the homeowner's contention that, in an email of 22 March 2022, the property factors had indicated acceptance of termination of their contract, Mr Kane stated that its author did not have express or ostensible authority to bind the property factors. The abundance of correspondence makes it clear that the termination was not accepted. At the point that the email was sent, the property factors had still been hopeful that WRA would

be able to verify the validity of the termination. The Committee of WRA knew that it was not accepted by the property factors.

45. Mr Kane told the Tribunal that the property factors' Written Statement of Services is constantly updated. Only material changes need to be intimated. It is automatically updated on their website. The property factors had intimated copies of their 2021 Written Statement of Services directly to the WRA Committee and the 2022 version was uploaded to their website portal within three months of the date of the changes.

46. The homeowner told the Tribunal that until 28 April 2022, no resident saw the 2022 Written Statement of Services. Until that date it was the 2017 version that appeared on the website.

47. The homeowner had stated his view that the property factors' solicitors had been subcontractors in relation to the response to the vote. Mr Kane told the Tribunal that they are appointed agents. A subcontractor is appointed to carry out the work of a main contractor. His firm had simply been appointed as legal representatives of the property factors.

48. The homeowner said that he had taken umbridge at the terminology of some of the letters from the property factors' solicitors. He felt that there had been an attempt to bully him. Mr Kane strenuously denied that any of the comments were designed to be intimidating or threatening. The only "threat" had been in relation to legal costs. Their professional rules of conduct required them to be very clear about any steps they intended to take on behalf of clients. This was particularly important in relation to unrepresented parties.

49. The homeowner then turned to his complaints under Sections 1.19 and 1.21 of the Code of Conduct. Mr Kane responded that Section 19.1 refers to changes of ownership, not to the termination of factoring agreements.

50. As regards Section 1.21 of the Code of Conduct, Mr Kane referred the Tribunal to the property factors' written submissions.

51. Questioned by the Tribunal, the homeowner confirmed that WRA had not taken formal legal advice in relation to the EGM and termination, but they had taken advice from a number of other property factors. He also told the Tribunal that WRA had told the property factors that they were holding a vote, but had not asked for their help in the process.

52. In his closing remarks, the homeowner stressed that he was not on a vendetta. The Committee had tried its best within reason to ensure everyone on the estate had proper notice of the meeting. The matter had dragged on for months and months and most people in his position would have given up.

53. Mr Kane, in his concluding remarks, told the Tribunal that there was no suggestion on the part of the property factors that the residents were being

disingenuous, but neither were the property factors. The Tribunal had to decide whether, in rejecting the outcome of the vote, the property factors had breached the Code of Conduct.

Findings of Fact

54. The homeowner is the proprietor of the property, part of a large development, collectively known as Woodilee Village, by Persimmon Homes Ltd, Cala Management Ltd, Miller Group Ltd and Redrow Homes Ltd.

55. The property factors, in the course of their business, manage the common parts of 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").

56. 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.

57. The date of current Registration of the property factors is 5 April 2018.

58. 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.

59. The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber, dated 21 June 2022, under Section 17(1) of the Act.

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

61. The Code of Conduct for Property Factors relevant to the application is the version effective from 16 August 2021.

62. The Deed of Conditions relevant to the development for the purposes of the present application is Deed of Servitudes and Conditions by Persimmon Homes Limited, Cala Management Limited, Miller Group Limited and Redrow Homes Limited registered in the Land Register on 12 May 2011.

Reasons for Decision

63. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied from the extensive written documentation before it and the evidence led at the Case Management Discussion that it was able to decide the application without a Hearing.

64. The Tribunal cannot consider applications made by a Residents' Association or by one homeowner on behalf of himself and a number of other residents. It can only consider whether, in relation to the individual homeowner who makes the application, the property factors have failed to comply with the Code of Conduct or have failed to carry out the property factor's duties. Accordingly, the request by the homeowner for compensation for his time was not considered by the Tribunal, as he stated in terms that the time had been spent by him as Chair of WRA, which is a voluntary position.

65. The Tribunal's view was that it was not within its powers to determine whether the EGM had been competently convened or whether the decision to terminate the property factors' appointment was valid. There was a clear dispute between the Parties as to the legal interpretation of the Deed of Servitudes and Conditions affecting the development and this was rightly a matter for a court to determine, if the Parties could not reach agreement.

66. OSP2 states "You must be honest, open, transparent and fair in your dealings with homeowners and OSP4 states "You must not provide information that is deliberately or negligently misleading or false." The Tribunal did not accept that the addition of the word "every" in the property factors' agents' letter of 18 February 2022 was deliberately or negligently misleading or false. It merely emphasised the property factors' interpretation of the provisions of the title deeds. The property factors and their agents were clear and consistent in their stated view that they were not satisfied that the EGM and the vote taken at it were valid and, that, having considered the documentation provided to them by the WRA Committee, they remained dissatisfied with the process. They were rightly concerned that they might be open to complaints from other residents that they had failed in their duties had they not sought to be satisfied as to the validity of the process.

67. The homeowner alleged that the property factors had been dishonest in providing their agents with an "invalid" Written Statement of Services, namely the 2022 version. The homeowner's view was that the only valid version at the time of his legal challenge was the 2017 one. The Tribunal decided that this was a matter between the property factors and their agents and any alleged dishonesty on the part of the property factors was not directed at the homeowner. The Tribunal did not, in any event, accept that the property factors' reliance in correspondence on the 2022 version of the Written Statement of Services had been in any way detrimental to the homeowner's position. The property factors were entitled to make such enquiries as they thought reasonable to enable them to form a view as to the validity of the process undertaken by the WRA in seeking to terminate their appointment.

68. For the reasons set out in the two immediately preceding paragraphs, the Tribunal did not uphold the homeowner's complaints under OSP2 and OSP4 of the Code of Conduct.

69. OSP8 states "You must ensure all staff and any sub-contracting agents are aware of relevant provisions in the Code and your legal requirements in

connection with your maintenance of land or in your business with homeowners in connection with the management of common property."

70. The Tribunal did not uphold the homeowner's complaint under OSP8. Solicitors are not subcontractors of their clients. They are agents for a disclosed principal and are not covered by the provisions of OSP8 of the Code of Conduct.

71. OSP12 states "You must not communicate with homeowners in any way that is abusive, intimidating or threatening." Appendix 1 of the Code of Conduct is a Glossary of terms and is stated to be relevant to the interpretation of the Code of Conduct. Under the heading "Abusive or intimidating" it states "For a property factor (or a third party acting on their behalf) to communicate to a homeowner in a manner where it is reasonable for the homeowner to form a view that this manner is offensive or insulting and/or for a property factor or a third party acting on their behalf to cause the homeowner fear and alarm including threats of physical and/or non-physical violence against the homeowner." The view of the Tribunal was that the property factors and their agents had been measured and temperate in their communications with the homeowner and at no point had they been abusive. They had consistently stated what they were looking for in order to assess the validity of the process by which WRA had sought to terminate the property factors' appointment, and a warning that legal action might follow, and the possible consequences thereof with regard to legal redress and expenses was not intimidating or threatening. The Tribunal accepted that it would have caused a degree of anxiety to the homeowner but did not accept that it could have caused "fear and alarm" under any normal and reasonable interpretation of that phrase. Accordingly, the Tribunal did not uphold the homeowner's complaint under OSP12.

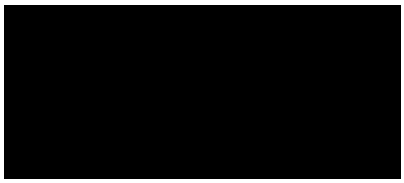
72. Section 1.19 (more correctly Section 1.5(19)) of the Code of Conduct requires that the Written Statement of Services should provide "clear information on when and how a homeowner should inform the property factor of an impending change in ownership of their property (including details of any reasonable period of notice which is required by the property factor to comply with its duties under this Code. This information should also state any charges for early termination administration costs." The Tribunal rejected the homeowner's complaint under this Section, as it relates to the procedure to be followed on the sale of a property, not to the procedure for appointing or terminating the appointment of property factors.

73. Section 1.21 (more correctly Section 1.5(21)) of the Code of Conduct requires the Written Statement to include "a clear statement confirming the property factor's procedure for how it will co-operate with another property factor to assist with a smooth transition process in circumstances where another property factor is due to or has taken over the management of property and land owned by homeowners; including the information that the property factor may share with the new, formally appointed, property factor (subject to data protection legislation) and any other implications for homeowners. This could include any requirement for the provision of a letter of authority, or similar,

from the majority of homeowners to confirm their instructions on the information they wish to be shared." The version of the Written Statement of Services to which the homeowner was referring in his complaint was the 2017 one, the requirements for which were set out in the earlier version of the Code of Conduct, effective from 1 October 2012, which did not contain a provision equivalent to Section 1.21 which was introduced by the Code of Conduct effective from 16 August 2021. Accordingly, the Tribunal could not uphold the homeowner's complaint under Section 1.21 of the Code of Conduct.

74. The homeowner did not lead any evidence specifically in relation to any failure by the property factors to carry out the property factor's duties.

75. Having considered carefully all the evidence, written and oral, presented to it, The Tribunal did not uphold any of the homeowner's complaints.



George Clark
Legal Member/Chair
14 October 2022