**First-tier tribunal for Scotland (Housing and Property Chamber)
("the tribunal")**

Decision: Property Factors (Scotland) Act 2011 ("the 2011 Act"), Section 19(1)

Chamber Ref: FTS/HPC/PF/19/1362

**Property at 19/4 Fettes Rise, Edinburgh, EH4 1QH
("The Property")**

The Parties:-

**Mr Steve Collins, 19/4 Fettes Rise, Edinburgh, EH4 1QH
("the Applicant")**

**James Gibb Property Management Limited, 4 Atholl Place, Edinburgh, EH3 8HT
("the Respondent")**

**Tribunal Members:
Ms Susanne L M Tanner QC (Legal Member)
Ms Elaine Munroe (Ordinary Member)**

DECISION

1. **The Respondent has failed to comply with the Code of Conduct, Sections 2.1, 2.5 and 3.1.**

2. **The Respondent has not failed to comply with the Code of Conduct, Sections 4.1, 4.6 and 4.7.**

3. **The Respondent has failed to carry out its property factor's duties.**

4. **The decision of the tribunal is unanimous.**

STATEMENT OF REASONS

1. In this decision the tribunal refers to the Property Factors (Scotland) Act 2011 as "the 2011 Act", the Code of Conduct for Property Factors as "the Code of Conduct" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the 2017 Rules".

Findings in fact

2. The tribunal makes the following findings-in-fact:

   2.1. The Applicant is the registered proprietor of the Property.

   2.2. The Applicant's Property is a flat in a development known as Fettes Rise ("the Development").

   2.3. There is a Deed of Conditions for the Development.

   2.4. The Respondent registered as a property factor on 23 November 2012 and renewed its registration on 17 May 2016.

   2.5. On or about 11 December 2013, a meeting of proprietors was held in which a quorum agreed to appoint the Respondent as Property Factor for the development in place of the existing factor whom it was agreed would be given notice of termination.

   2.6. Intimation to the Respondent of the decision to appoint the Respondent was by letter dated 14 December 2013 from the Chairman of the proprietors' association to Mr Mayall of the Respondent.

   2.7. The letter included six charter points which the Chairman asked if the Respondent would agree to.

   2.8. On 16 December 2013, Mr Mayall of the Respondent agreed to have regard to the charter requirements set out by the Chairman of the proprietors' association in the letter of 14 December 2013. There was no agreement that these would be included in the WSS or Development schedule for the Development.

   2.9. While acting as property factor for the Development, the Respondent issued a Written Statement of Services ("WSS") for the Development which included standard terms and conditions of business and a Development schedule.

2.10. The WSS first release was issued to all proprietors on the Development, including the Applicant in or about April 2014.

2.11. Further issues of the WSS were made: 06, amended to introduce name change from Homeowner Housing Panel to First-tier Tribunal for Scotland; and Issue 07 to change Sections 5.1, 5.3.3, 5,7 and 11.5.

2.12. For non-emergency repairs on the Development, the delegated authority level in the WSS from the start of the Respondent's appointment was £30 plus VAT per household.

2.13. From the outset of the factoring arrangement with the Respondent, the Applicant raised issues with the Respondent challenging the validity and terms of the Respondent's appointment, the content of the WSS, the level of delegated authority and costs for major works.

2.14. An AGM was held in November 2014.

2.15. The Applicant did not attend the AGM.

2.16. Mr McAllister attended the AGM on behalf of the Respondent and chaired the meeting.

2.17. Prior to the AGM, the Applicant and another owner had raised an issue with the Respondent about the validity of the appointment of the Respondent.

2.18. During the AGM, under AOCB, Mr McAllister informed the 18 owners present at the meeting that the Respondent's authority to act had been questioned by two owners prior to the meeting and he informed those present that there was delegated authority up to a limit of £30 per property and explained why that was necessary to enable the Respondents to effectively factor the Development.

2.19. No vote was taken at the meeting on the issue of the Respondent's authority to act or the level of the Respondent's delegated authority to instruct works.

2.20. Mr McAllister asked those present in the room whether anyone else had an issue with the level of delegated authority.

2.21. The Minutes of the AGM record that those present agreed that the Respondent had delegated authority of £30 per property.

2.22. At the time that the Respondent commenced factoring services at the Development, the property manager was Georgina Ramsay.

2.23. During its management of the Development, the Respondent issued invoices to proprietors, including the Applicant.

2.24. The Applicant chose to pay only for items on invoices which he accepted and not to pay for items on invoices which he disputed on the basis that he disputed the Applicant's level of delegated authority.

2.25. As a result of the Applicant's approach to part payment of invoices, significant arrears accrued on his account during the period in which the Respondent factored the Development.

2.26. The Respondent commenced its debt recovery procedures in respect of the Applicant's arrears.

2.27. As part of its debt recovery process, the Respondent appointed a debt collection company to pursue the Applicant's arrears.

2.28. In or about March 2017, a Notice of Potential Liability ("NOPL") was registered against the title to the Applicant's Property.

2.29. The registration dues for the NOPL were added to the Applicant's quarterly invoice.

2.30. In or about August 2018, the Applicant made a complaint to the Respondent about a payment dispute.

2.31. The Respondent acknowledged the complaint but took an unreasonable period of time to substantively respond to the Applicant's complaint.

2.32. The Applicant made a number of enquiries and complaints which the Respondent did not respond to within reasonable timescales or in accordance with the timescales in the Respondent's WSS.

2.33. On a number of occasions the Respondent made duplicate charges on homeowners' invoices in respect of works and services which had been carried out. These errors were rectified by crediting homeowners accounts.

2.34. In or about October 2018, a quorate of proprietors at a meeting agreed to terminate the contract with the Respondent.

2.35. The Respondent ceased factoring the Development on or about 23 January 2019.

2.36. The Respondent finalised the accounts for the Development and re-distributed Development debts amongst all the proprietors when final invoices were issued, in line with the arrangements in the event of termination.

2.37. The Applicant's arrears balance was £2299.07 when the Respondent ceased to factor the Development (taking into account his £300.00 float).

2.38. The re-distribution of debts amongst the proprietors included the re-distribution of the arrears of the Applicant.

2.39. At the time that the Respondent ceased to factor the Development there were two insurance claims in respect of common repairs which had not been pursued expeditiously by the Respondent. These were not progressed until in or after April 2021, as a result of directions in the tribunal hearing process.

2.40. On or about 21 February 2019, the Applicant made a formal complaint to the Respondent about the Respondent's failure to respond to his complaint about the payment dispute (referencing Section 2.5 of the Code of Conduct) and expressing concern that his debt may be redistributed amongst the other proprietors at the Development.

2.41. The Applicant's complaint to the Respondent was not resolved to his satisfaction.

2.42. The Applicant made an application to the tribunal on 30 April 2019.

2.43. The Applicant formally notified the Respondent of alleged failures to comply with the Code of Conduct and alleged failures to comply with property factors' duties on 31 May 2019.

The Application

3. The Applicant lodged an application ("the Application") with the tribunal on 30 April 2019.

4. In Section 7A of the Application the Applicant alleged that the Respondent has failed to comply with the Code Sections: 2.1, 2.5, 3.1, 4.1, 4.6 and 4.7.

5. In Section 7B of the Application the Applicant alleged that the Property Factor has failed to comply with its Property Factor's duties. The Applicant's paper apart to Section 7B provided further details the **alleged breaches of property factors' duties:**

5.1. Failure to incorporate the owners' charger, 6 conditions, within their WSS as voted on by owners at the December 13 AGM, as part of the agreement / contract to appoint them as factors.

5.2. Operating a delegated authority policy to carry our work on the development below a certain limit per property, when this was contrary to our charter and never voted on and agreed by owners on a quorate basis, as per the development deed of conditions.

5.3. Following on from their removal as factors in January this year [2019], they are communicating to owners that any outstanding amounts due that remain unpaid will be distributed amongst other owners, even when some amounts due continue to be disputed / unresolved and that as a factor they haven't followed their own debt recovery procedures as outlined in their WSS to allow them to take such action.

5.4. Failure to respond to owners and committee's requests for answers and additional information, in a timely manner and in line with their published response times included in their WSS.

5.5. Failure to consistently secure a minimum of three competing quotations from contractors for major work projects to be carried out, so owners could digest the information received and vote on the preferred option at the AGM.

5.6. Failure to provide accurate invoicing for work carried out and slow to have any errors corrected on future invoices.

5.7. Failure to expedite buildings insurance claims and have payments agreed, credited back on owners' invoices.

6. The Applicant's paper apart to Section 7C in the Application provided as follows:

*6.1. **What is your complaint?** Since rejecting their WSS received in April 14, I have been trying to have matters resolved with the factors and traded many communications back and forth over the period with various members of their management team, without concluding all with them successfully. They continue to reject my claims regards the terms of their appointment, the content of the WSS issued to owners, delegated authority they believe owners approved and to clearly explain additional costs incurred for major*

work carried out, that is over and above the amounts agreed by owners at AGMs. To be clear, I have continued to make payment for all amounts invoiced to me for work or services that I have not disputed. They have also failed to provide responses within agreed timescales and failed to provide the same to the owner's committee.

6.2. ***What are the reasons for considering that the property factor has failed to resolve the complaints?*** *All remains unresolved as above with the factor continuing to counter any claims that I have made since 2014.*

6.3. ***How has this affected you?*** *As this matter has gone on for such a log time. I have become very concerned regards the increasing amount of money outstanding (disputed0, due to the factor's hard line approach, and the impact on my health worrying about it all, and the possible potential falling out with neighbours, should they decide to distribute my disputed amounts across them for payment. I just want all resolved to my satisfaction so I can move on.*

6.4. ***What would help to resolve the problem?*** *I would like all amounts invoices to me in connection with work carried out under delegated authority returned to me, also any additional amounts for major works carried out, that were not voted on and agreed at AGMs returned to me as well. The NOPL registration attached to my property in March 17 by Alex M Adamson via the factor removed. I would also like the factors to apologise for their behaviour and in my opinion threatening approach at times.*

7. In response to a request from the tribunal, the Applicant lodged a copy of the notification letter to the Respondent dated 31 May 2019, in which he outlined the **alleged breaches of the Code of Conduct**, as follows:

2.1 Making owners believe that delegated authority had been approved at the owners' AGM, when it hadn't been, as the vote for not quorate. Inaccurate and duplicate invoicing for work carried out on the development. Confirmation by your property manager at the November 18 AGM that the garage ventilation system was fully operational when asked, but it clearly wasn't as one of the motors had been switched off for many months, due to a fault that had still not been addressed. Writing to owners to request payment of outstanding amounts due where the amounts involved were being disputed and confirming that if not paid these amounts would be distributed amongst other owners as a charge on their final invoice.
2.5 You have failed to deal with requests for information, queries regarding works carried out, complaints lodged, and amounts invoiced within the time frames as set out in the written statement of services (WSS). I am also aware [of] that the

owners' committee are in a similar position, regards requests etc. that they have made to you.

3.1 Prior to and post notification of your termination as factors you have failed to provide me with information as requested on various occasions and have failed to provide me with a final invoice and the return for the £300 float within three months of your contract being terminated.

4.1 You have outlined in your WSS for our development the procedures for any debt recovery, however you have not followed these as set out in sections 5.9 to 5.9.6.

4.6 Limited information has been provided to owners regards any outstanding amounts due, however, no updates were ever provided on where you were in the process to recover any amounts due.

4.7 You have not taken all the necessary steps as outlined in the Development 'WSS' to recovery any amounts due, therefore any amount due cannot be shared across remaining homeowners.

8. In response to a request from the tribunal the Applicant lodged the letter to the Respondent dated 31 May 2019, in which he notified the Respondent of the alleged failures to comply with property factors' duties, which are in the same terms as those summarised in the Application (other than an additional point 8 in the notification letter which is not included in the Application and therefore not before the tribunal for consideration).

9. In response to a request from the tribunal, the Applicant lodged with Written Statement of Services for the Development (Issue 07).

10. On 2 July 2019, the Application, comprising all documentation received in the period 3 May and 4 June 2019, was referred to the tribunal in terms of Sections 18 and 18A of the 2011 Act.

11. On 31 July 2019, the tribunal's administration wrote to the parties to advise that the Application had been referred to the tribunal.

12. A hearing was fixed for 17 September 2019 at the tribunal centre at George House, Edinburgh.

13. The hearing date was intimated to parties and parties were invited to lodge any written representations by 21 August 2019 and to lodge any documents in accordance with Practice Direction number 3.

14. The hearing was postponed to 28 October 2019 at Riverside House, Edinburgh.

Written Representations and documents lodged by parties

15. Both parties produced written submissions which were considered by the tribunal and crossed over to the other party.

16. Both parties produced bundles of documents for the purposes of the hearing. These bundles included some documents which were produced by the Respondent in response to Directions issued by the tribunal. All documents were crossed over to the other party.

17. Supplementary documents were added by both parties during the hearing process and were numbered to follow on consecutively from those already lodged.

18. The Respondent also produced information in relation to insurance claims towards the end of the hearing process and after the hearing had concluded and that information was sent to the Applicant.

19. Hearing – 28 October 2019, 4 December 2019, 27 October 2020, 11 January 2021, 11 March 2021 and 23 April 2021

20. The oral hearing continued over six days on 28 October 2019 at Riverside House, Edinburgh; 4 December 2019 at George House, Edinburgh and then over the remaining days by teleconference as a result of the Covid-19 pandemic.

21. The Applicant appeared on all six dates and represented himself. He led evidence from one additional witness, Mr John Bratton, another homeowner in the Development, in relation to the events at the November 2014 AGM.

22. Ms Bole, Ms Kirkwood and Mr McAllister variously appeared on behalf of the Respondent.

23. Both parties led evidence and made oral submissions to supplement their written submissions.

Concessions and withdrawals

24. During the hearing process the following concessions and withdrawals were made:

    24.1. The Applicant withdrew his fourth complaint under Code of Conduct Section 2.1: *"writing to owners to request payment of outstanding amount*

due where the amounts involved were being disputed and confirming that if not paid these amounts would be distributed amongst other owners as a charge on their final invoice".

24.2. The Applicant partly withdrew his complaint under Code of Conduct Section 3.1, as regards the issuing of the final invoice and returning the float within the specified period after termination, both of which he accepted had occurred. He insisted on the part of his Section 3.1 complaint which related to *"prior to and post notification of your termination as factors you have failed to provide me with information as requested on various occasions",* in relation to information about two insurance claims.

24.3. The Applicant withdrew the 8th complaint under property factors' duties, which in any event was not included in the Application form: *"failure to provide owners with a final invoice and the return of the £300 float payment, within three months of your contract termination date"*.

24.4. The Respondent admitted that there was a breach of the Code of Conduct, Section 2.1 in relation to inaccurate and duplicate invoicing when they were acting as factors for the Development (allegation 3).

24.5. The Respondent conceded that there was a breach of Code of Conduct, Section 2.5 in respect of its communication timescales for responses to requests for information.

24.6. The Respondent conceded that there was a breach of Code of Conduct, Section 3.1 in respect of the insurance claim for the garage door (but not in relation to whether there had been an insurance claim for repairs to a window).

24.7. The Respondent conceded that there was a breach of property factors' duties, number 7: *"failure to expedite buildings insurance claims and have payments authorised by the insurer credited back to the owners on future invoices"*, in respect of the insurance claim for the garage door (but not in relation to whether there had been an insurance claim for repairs to the window.

Alleged failures (3) to comply with Code of Conduct, Section 2.1

25. Section 2 "Communication and Consultation" provides: ***"Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:***

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

Applicant's evidence and submissions (Code of Conduct, Section 2.1)

26. The Applicant originally alleged four separate failures to comply with Section 2.1, the fourth of which was withdrawn during the hearing (see above). The parties made written and oral representations about the three remaining allegations.

27. **(1)** ***"Making owners believe that delegated authority had been approved at an owner's AGM [on 17 November 2014], when it had not been as the vote for not quorate".***

Applicant's evidence and submissions

28. The Applicant complained about misleading information being provided to homeowners (other than himself) by David McAllister during an owner's AGM which took place on 17 November 2014, which the Applicant did not attend. The Applicant stated that his complaint was based on the Minutes which had been issued to homeowners, including him, after the meeting and what he had been advised had occurred by other homeowners who had attended the meeting. The statement complained of by Mr McAllister who was alleged to have said that he was 'looking to have it re-clarified that the Respondent had delegated authority'. The Applicant alleged that the said statement was misleading.

29. The Applicant referred to a number of documents, including the letter to the Respondent informing them of the appointment which included the homeowners' charter, the response from the Respondent, the Written Statement of Services, the Respondent's letter of 24 October 2014 with an agenda for the AGM and a voting form sent out to those who wished to provide proxy votes. The issue of the Respondent's authority to act was not included on the agenda or as any of the items to be voted upon.

30. The Applicant stated that when he initially received the WSS, he rejected it because he did not think that the Respondent had been properly appointed. He stated that the meeting which voted to appoint the Respondent did not include a decision to approve delegated authority and that the initial WSS was never approved. He stated that the delegated authority gave the Respondent carte blanche to instruct any work up to £30 per flat and that the owners were left exposed as the Respondent had the ability to spend nearly £3000. He stated that he was not clear as to who within the Development agreed to that level of delegated authority as there are no minutes and no decisions taken so it appears on the face of it that it was a decision taken by the Respondent.

31. The Applicant stated that the Minutes of the AGM showed that Mr McAllister raised the question of authority to act as a matter under AOCB and that he was not entitled to do so as he was not a homeowner.

Respondent's evidence and submissions

32. Ms Bole submitted that the Applicant has not presented any evidence that there was any misleading information stated by Mr McAllister at the meeting. She stated that the Applicant was not present at the meeting. She was not aware of any productions or communications in support of the Applicant's allegation, other than the Minutes which have been produced. She stated that the Applicant had objected about the Respondent's appointment from the point of appointment onwards.

33. Ms Kirkwood referred to the Minutes of AGM on 17 November 2014 under AOCB which state "the meeting went on to agree that the factor has a delegated authority". She stated that the wording could have been better. It should have said "confirm" rather than "agree". It was in the WSS and had not been voted on that evening. She stated that the Minutes were also approved by the owners' association prior to distribution to the other owners. She submitted that she does not think that it is misleading. She stated that it is open to interpretation but it is not misleading.

34. Ms Bole stated that the WSS was part of the tendering process for the Development and formed part of the Respondent's proposal pack. She stated that the Respondent would not be able to factor a development without some level of delegated authority to attend to routine matters without having to seek approval on every item of expenditure before work or services are instructed.

35. Mr Mayall stated that the factor would have regard to the title deeds and unless there was any other agreement they would follow what is in the deeds. He stated that it varies by development but the Respondent tends to do it on a per property basis because it gives more scope than a development wide figure. It could be £20 to £50 per property, depending on the number of properties. The tender document which was provided included a level of delegated authority with a draft development schedule.

36. Ms Kirkwood referred to the 2013 Minutes which included consideration of another factor taking over factoring from factor who was in place at that time. She stated that as the incumbent factor they had not at that point been appointed. She stated that the figure for delegated authority had been consulted on with the Steering Group. Ms Kirkwood submitted that the Respondent got delegated authority when the first version of the Development schedule (PF Pro 3) was

issued. She stated that the Respondent has to set a figure for authority to act. In this instance, £30 per property was the figure which was selected. The document went to all homeowners with the WSS. At no point was it disputed by anyone other than the Applicant and one other former owner. It came up at the 2014 AGM because of those two owners. Everyone at that meeting appeared to be satisfied with it. It was not queried at that time by the Applicant, who was not there. Neither was it queried by any homeowner who was present.

37. Ms Bole stated that the Respondent had agreed to have regard to the Development 'charter' but stated that the Respondent did not amend its standard terms and conditions to incorporate charter terms as that is not something that the Respondent would do. She stated that the Respondent is obliged to produce a WSS by the Property Factor (Scotland) Act 2011, both in the core document and in the affiliated development schedule. The content of the main core document is their terms of business and service level agreement with our clients. The content would not be discussed or debated on an individual development basis. The schedule is personalised for the Development.

38. Ms Bole stated that on 12 March 2014, the Respondent sent information about its appointment and the WSS to all homeowners on the Development, including the Applicant. The standard WSS was supplemented by the Development Schedule.

39. Ms Bole referred to the WSS Development schedule, Section 2, which outlines the Respondent's authority to act. For non-emergency repairs the delegated authority level is £30 plus VAT per household.

40. Ms Bole stated that the only reason that the matter was raised by Mr McAllister at the AGM in November 2014, under AOCB, was because there had been a challenge raised prior to the meeting by two homeowners to the appointment in its totality (as opposed to the question of delegated authority).

41. Mr McAllister stated that he chaired the meeting in November 2014, as well as attending in his role as factor. He was asked to chair the meeting by the owners' association. He generally does not chair the meeting. He gave evidence that two people had raised concerns before the meeting about the Respondent's appointment. One of them was at the meeting and spoke to Mr McAllister. Mr McAllister did not recall why the issue was not put onto the agenda as an item for discussion at the AGM. He stated that he had not mentioned to the Applicant that he might raise it at the AGM. He stated that the reason that he raised the matter was that he wished to find out from those at the meeting whether there was general discontent about the Respondent's appointment. He stated that nobody at the meeting asked for a formal vote and that no vote was taken about the Respondent's appointment, the terms of the WSS or delegated authority. No vote was taken under AOCB. All 18 owners present confirmed that they were satisfied

that the Respondent had the delegated authority that had been questioned. He stated that if it was a formal vote the Respondent would have sent out proxy votes in advance as they would do for approval of a major project. He stated that he raised it as an issue, told those present about the situation, asked whether anyone had a problem with this and that nobody disagreed. He does not recall asking for a show of hands. He also kept the minutes. He stated that he does not think that a factor would take on a site without any delegated authority.

42. Mr McAllister stated that he wrote the Minutes of the meeting but that they were approved by the Owners' Association before distribution to homeowners, including the Applicant. Nobody in the Owners' association raised an issue with the minutes. It is recorded that the homeowners present went on to "agree" that there was delegated authority.

43. **(2) "Inaccurate and duplicate invoicing for work carried out on the development".**

44. The Respondent admitted that there was inaccurate and duplicate invoicing when they were acting as factors for the Development, in particular an invoice from Lothian Electric for £1944.00, the shares of which were charged to proprietors on the Development twice. The Respondent submitted that this information was misleading rather than false.

45. The tribunal was advised that the overcharge on the Applicant's account had been refunded to him by the Respondent by a credit on a later invoice.

46. **(3) Confirmation by your property manager [Angela Kirkwood] at the November 18 AGM that the garage ventilation system was fully operational when asked, but clearly it was not as one of the motors had been switched off for many months due to a fault that still had not been addressed"**

Applicant's evidence and submissions

47. The Applicant stated that false information was given to homeowners by Angela Kirkwood at an EGM in November 2018, at which the Respondent was given the opportunity to present, as were the other factors.

48. The Applicant's position changed as between hearing days. He initially stated that Angela Kirkwood said that the garage ventilation system was "fully operational" and it was not fully operational at that time, so the statement was false. He stated that at the time the sixth motor was not working as five had been

replaced but not the sixth. The Applicant stated that he did not record the meeting nor did he make a note of what was said. He stated that a question was asked to Angela Kirkwood and that "basically the answer was that the garage ventilation system was fully operational." He stated that Minutes were taken by the owners' committee but that he had not obtained or lodged a copy.

49. That position changed on a later hearing day when he apologised for inaccuracy in his letter in which he alleged that Ms Kirkwood had said that the system was "fully operational" but that she had actually said "fully serviceable". He stated that that was referred to in the Minutes in EGM on 17 October 2018. He submitted that it is misleading or false to say if it is "fully serviceable". Mr Easton asked after her presentation if it was serviceable and safe (HO Doc 53) and Ms Kirkwood said that it was. Ms Kirkwood wrote to owners in August 2018 (HO Doc 24) about a fault with one of the extractor fans in the garage in July 2018. Between July 2018 and the EGM that fan was still effectively switched off. The fact that she confirmed that it was serviceable is incorrect. Mr Easton is an airline pilot. If he says is it fully serviceable he would not fly the plane. He stated that he took the word "serviceable" to mean "in full working order". It is a word that he has used in the past. He has read about the airline industry.

Respondent's submissions

50. Ms Kirkwood disputed the suggestion that she said that the garage system was "fully" operational or "fully serviceable". She stated that there was no false or misleading information provided at that meeting. She stated that the position was confirmed in a document sent out by her to all owners confirming the position with the garage extraction system (PF Doc 7.2), which stated that the system remains functioning as it was when installed and in line with requirements of building control at that time. That went out in the August newsletter.

51. She stated that at the meeting she had a powerpoint but she was not able to show it on a screen so I read from the laptop. The powerpoint (PF Doc 25), slide 12 refers to the car park ventilation system. There was no discussion that it was fully operational. The subject of that meeting was the Respondent's retention. The reference was purely around the Respondent's knowledge of the system.

52. She stated that she did not say that they were fully serviceable. That is not terminology she uses in the factoring industry. The position as to what was working and what was not, was in the newsletter which went out. At no point did she say that they were in full working order. She did not recall that question from Mr Easton. She does not see it in the AGM Minutes. The Committee prepare the Minutes (PF Doc 24.1, 24.2, 24.3. Page 3) which say "She confirmed that the ventilation system was safe and that a certificate was available." She submitted

that that is factually correct. They had certification available and it was uploaded to the portal.

53. Mr McAllister stated that the ventilation system did not require all six motors to be on for the system to be operational. The fans work on a trickle system. If there is CO2, the control panel ramps the fans up to a higher speed. The sixth fan was working at the time that the project was quoted for. It became faulty after the installation of the other five. Mr McAllister stated that he had not been involved in the Development when the fan became faulty. The documentation says that the system was "functioning".

54. Ms Bole stated that 5 of the 6 fans had been condemned and required to be replaced. The 6th fan had passed the inspection so it was not included in the replacement. After the five fans were installed, at the next test all 6 were working. They are tested every 6 months. There was a report from owners that the sixth fan was making a noise. As a result of the concerns, it was turned off at that time. It had no effect on the system, it just isolated one fan. Georgina Ramsay made the decision. She was the property manager.

55. Mr Mayall stated that no report had been obtained from the contractor. The decision was taken through their own judgement and experience. They believe that the system was adequately operational at that time. At the time it was switched off (12.10.18) a report was to be instructed from Witt and Son. No reports or costs were obtained before the November 2018 EGM.

56. Ms Bole stated that she could not comment on what is reported to have been said by Ms Kirkwood at the meeting as the issue had only been raised at the hearing and no-one else attending from the Respondent was at that meeting. She stated that they did not know in what context the question had been asked and answered. She wished to reserve the Respondent's position until they had seen the minutes.

57. Mr Mayall stated that Angela Kirkwood issued Pf doc 7.2 to homeowners in which she went into detail about the issues. He submitted that she had been transparent.

Alleged failure to comply with Section 2.5 of the Code of Conduct

57.1. Section 2.5 provides: "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)."

57.2. The Respondent conceded that it had not responded to one or more of the Applicant's enquiries within prompt timescales. Reference was made to the timescales in the WSS, which had not been met.

57.3. Ms Kirkwood expanded on the detail of this at the hearing. She referred to Ms Bole's response on 11 April 2019 and in relation to that complaint the Respondent upheld the failure to respond to an enquiry of 21 February 2019 (HO23). The Respondent agrees that it was at fault for not responding. She stated that the letter of 11/4/2019 made reference to the emails which were not responded to within 5 working days, which was the response time in the service level agreement at that time.

Alleged failure to comply with Section 3.1 of the Code of Conduct

58. **Section 3.1** provides: **"If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services)."**

Applicant's evidence and submissions

59. The Applicant's complaint was restricted at the hearing to the issue of two insurance claims, one in respect of a common garage door and the other in respect of a common window.

60. He stated that after the agreement was terminated he still had outstanding issues about non-payment of insurance claims. He referred to two insurance claims, a garage door and gate repairs claim and the other was glazing for a window. He stated that the overpayment was not rectified at any time and has not appeared on any invoices he received.

Respondent's evidence and submissions

61. The Respondent conceded that they had breached the Code of Conduct Section 3.1 in respect of a failure to follow up on an insurance claim which was made for a garage door.

62. The matter was discussed over several hearing days and further information was provided by the Respondent during the hearing process and sent by the Respondent to the tribunal after the hearing had concluded. The information is summarised, below, in relation to the alleged breach of property factors' duties, number 7.

63. The Respondent accepted that with respect to the garage door claim, the processing of the claim was done the day after it was reported. It should have been pursued more vigorously and there evidently had been confusion as to whether the payment had been made. The Respondent conceded that that was not done in a timely manner.

64. From April 2021 onwards, the Respondent progressed the garage door claim on behalf of the homeowners and undertook to remit funds received from the insurer to the new factor so that they could be credited to homeowners at the Development.

65. In relation to damage to a common window, and any resulting insurance claim, the Respondent investigated the matter during the hearing process although this took some time.

66. In relation to both matters, Ms Bole reported that there had been issues accessing the email account of the former property manager, Georgina Ramsay, and that the information was not held anywhere else in the office. She also stated that the Respondent had changed insurers which made follow up more difficult.

67. With regard to the window, when the original incident occurred there had not been an apparent insured peril which had been invoked. It was instructed as a repair only. It was only further to a request from a homeowner that that had occurred. It was submitted that there was no failure to comply with Section 3.1 of the Code of Conduct in this regard.

Alleged failure to comply with Section 4.1 of the Code of Conduct

68. **Section 4.1** provides: **"You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and**

reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.

Applicant's evidence and submissions

69. The Applicant's complaint was that the debt procedure was not clearly, consistently and reasonably applied.

70. He stated that he had not looked at the terms of the income recovery procedure, despite that being lodged by the Respondent. However, he stated that he had considered the terms of the WSS.

71. He stated that he received letters from the Respondent regarding his debt and he responded saying that he continued to dispute amounts. He then received letters from an external debt management company. He told them he was disputing amounts. It was referred back to the Respondent. He stated that he was pursued for disputed debts. On each occasion when it was raised there was no communication sent to him by the Respondent. He stated that on one of his invoices he had a charge for registration of an NOPL. He had no idea what this was. He asked the Respondent and they did not tell him. That was in March 2017. He had not heard of a Notice of Potential Liability. There was no communication from James Gibb to explain that it has been applied and for what amount. He stated that he does not have his title and does not know if it is still on his title.

Respondent's evidence and submissions

72. Ms Bole stated that there was a NOPL and it was withdrawn as a matter of course when they ceased to factor. She stated that at this Development, the Applicant was the only one. The charge on the Applicant's invoice was for Registration dues.

73. Ms Bole stated that the normal procedure was followed when dealing with the Applicant's debt. The Applicant asserted that he was withholding payment because he did not think that the Respondent's appointment was valid. His debt rose every quarter because of his dispute of some of the communal charges. If the Respondent accepts that there is a dispute, they put a pause on the debt recovery procedure. Reference was made to PF Doc 12, 5.5 in which the Respondent advises any client whose dispute they did not consider to be valid. The Respondent did not consider this to be a valid dispute because the Applicant was maintaining at that time that the Respondent had not been properly appointed.

74. Ms Bole stated that no one else on the Development took the approach which had been adopted by the Applicant.

75. Mr Mayall stated that the Respondent effectively carried that part of the debt. Any contractors' payments were met from existing floats. If more than one person was taking that approach the Respondent might have been prevented from instructing works and services. During their factoring period they did not have to pursue other owners for Mr Collins' arrears.

76. Ms Bole stated that there were no court proceedings commenced against the Applicant.

Applicant's further response

77. The Applicant stated that although he had initially challenged the totality of the Respondent's appointments, he had accepted, through time, that the Respondent's appointment was valid. He stated that the majority of the money he retained was due to the delegated authority which he believes was not approved through a quorate meeting. He stated that he asked the Respondent on several occasions to provide evidence that they had delegated authority. He still believes he is in dispute with the Respondent about this matter. He still maintains that delegated authority was never approved by the homeowners. He did not pay for any items on invoices that he thought had been instructed under delegated authority. As a result, he had a constant arrears balance that grew throughout the Respondent being factor. He paid a float at the start. The float was eaten up by arrears and the balance was distributed to owners after the Respondent ceased to factor. His arrears balance was £2299.07 when the Respondent ceased to factor the Development. He was not expecting his fellow homeowners to pick up that share but he did understand and accept that they could legally be pursued for the debt.

Alleged failure to comply with Section 4.6 of the Code of Conduct

78. **Section 4.6** provides: **"You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation)."**

79. The Applicant stated that at the Development AGMs, part of the procedure was to inform owners of the number of debts and debtors outstanding along with amount of debt and where the Respondents were in the process regarding their debt recovery. He referred to HO Doc 21 'Financial Report' which was part of the Factor's report provided at each AGM and to a minute which followed the AGM in

November 2014. He stated that at that time there were eight proprietors with debts and he was one of them.

80. He also referred to HO Doc 21.1, dated November 2016, at which point there was only one person owing a debt and that was the Applicant. The only comment to owners was about the outstanding balance and the fact that Mr McAlister had spoken to the owner.

81. The Applicant stated that he was dispute with the Respondents and had received at least one letter from external debt company in relation to the debt. He stated that he would expect that to be noted on the Respondent's report to inform owners.

82. He also referred to HO Doc 21.2 dated November 2017 and stated that it does not specify the stage of the debt collection procedure.

83. The Applicant stated that in 2016 and 2017 there should have been more information provided to other homeowners about the stage of debt recovery for his debt. He referred to HO Doc 13.2 and stated that the minutes show that the Respondent was asked by another homeowner for an update and to actively pursue the outstanding debts and provide him with an update. He stated that a couple of people on the Development knew at that time that he was the defaulter to whom the Respondent was referring.

84. The Applicant stated that it was factually incorrect to say that the Respondent was in discussion with him at that time because they were not.

85. He stated that he did not believe that there were any updated at the next meeting at the AGM in November 2017. He stated that he would be expecting the Respondent to be upfront and tell homeowners that his account had gone to debt collection or a solicitor. He stated that the NOPL was never mentioned to anyone. He does not think that the owners were updated and informed as they should have been, including the stage of the debt.

86. The Applicant referred to the WSS 5.9.5 and submitted that there is an undertaking to provide the information about the debt to the homeowners, including the stage of the debt.

87. He stated that the other owners have not made attempts to recover funds from him.

Respondent's evidence and submissions

88. Mr Mayall stated that the Respondent was in compliance with Section 4.6 of the Code of Conduct, to make sure that homeowners are kept informed of any debt recovery problems on the Development. He stated that the Respondent did highlight the fact that there were issues. He submitted that Section 4.6 does not say the factor has to stipulate steps or processes. Information was provided that there is a debt. The homeowners were being told of any debt that may be of concern.

89. Mr Mayall stated that it is a written document which is submitted on the night of the AGM and the manager would go through the report verbally. Owners could ask questions if they wanted to know more.

90. Mr McAllister stated that he was at the meetings and that no-one asked any questions about the aged debt.

91. Mr Mayall stated the WSS 5.9.5 says that information about the stage of the debt "can" be provided rather than saying that it must be provided. He stated that that clause provides parameters to discuss it in detail.

92. Ms Bole referred to the minutes from the AGM at November 2017 and stated that page 2 was missing. She stated that if there was a factor's report this would be sent out with any minutes generated by the residents. She stated that if the Respondent attended the meeting it would have provided a factor's report with the statement.

93. Developing that point, Mr McAllister stated that the Chair of the residents' association prepared the minutes and that he got a copy before they became final minutes, and then distributed to owners by email, post (or portal, from 2016). He stated that the minutes and the factor's report should be read in conjunction.

94. Ms Bole stated that it was not the Respondent's practice to name individual owners as a matter of course, unless proceedings had been raised which were public. She considered that that would amount to a breach of data protection if there were no formal proceedings.

95. Mr Mayall stated that the information the Respondent would give on debt would vary at each AGM between 2014 and 2019, depending on the debt. Mr Mayall advised that since 2019 the Respondent has produced a live debt stream so that everyone can see what the debt is. It will say how many are in debt recovery, how many are in stage 1 etc. but it stops short of giving names.

96. Mr McAllister stated that in the information which the Applicant was complaining about, he had written the summary of the Applicant's debt. He stated that one of the explanations he gave was "discussion", because he had had conversations and letters with the Applicant. He stated that he did not report that it was at debt collection and thought that that was probably because the Respondent was in discussion with Applicant. He stated that the income recovery team deal with NOPLs. He stated that had he looked up the accounts, it would show up amounts. It would not show up the stage. It would stage 1 or stage 2.

97. Ms Bole referred to PF Docs 18 and 18.1, which relate to the November 2017 AGM. She stated that by November 2017 the debt collection company had come back to say that the Applicant was in dispute so they would not take it further.

98. Ms Bole stated that the Respondent notified all owners that debt would be reallocated if balances were not paid. It was reiterated in the cease to factor letter. Final letters were sent out by the income recovery. There was more than one homeowner whose balance was reallocated. On the final bills the owner and amount is notified. Her memory is that there were three homeowners with debt at the time of the case to factor. She stated that the Applicant was not named at any time until the debt was redistributed in May 2019.

Alleged failure to comply the Section 4.7 of the Code of Conduct

99. Section 4.7 provides: **"You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs."**

Applicant's evidence and submissions

100. The Applicant stated that his understanding of the WSS was that unless it was at the legal stage it would not be distributed amongst owners. But he stated that he understood what was said earlier in the hearing about the procedure to be followed as a result of the cease to factor. At the time when matters were being disputed and had not proceeded to legal action, he did not believe they could distribute. He stated that the other homeowners were charged for a share of his debt after termination. He now accepts that the Respondent was entitled to do that under the termination agreement.

101. He stated that he had people approaching him who were unhappy with him about the personal level of debt and did not understand why he was challenging it. The owners who spoke to him believed that the debt should not be apportioned against them and they became really upset when they found out about debt.

102. He stated that if the PF had given him the information regarding the source of the delegated authority, he would have settled the amounts due. He stated that it has always been a continuous dispute. He said that they had four years to resolve by responding to the various requests for information and on each occasion they have failed to provide that. He stated that the Respondent has never provided any evidence that owners approved the delegated authority. He stated that if they had given the evidence he would have paid and that would have avoided the debt issue. He stated that if the Respondent had wanted to find out what homeowners' understanding was of the delegated authority surely the Respondent should have written to everybody, rather than raising it under AOCB. He also repeated his position that they should have put the matter to a vote on delegated authority.

Respondent's evidence and submissions

103. Mr Mayall submitted that reasonable debt recovery steps were taken but that the direction had been accelerated because there was a cease to factor. The Respondent moved on to Clause 11 of WSS as there was a termination.

104. Mr McAllister stated that the Respondent had written to the Applicant on numerous occasions and that he never accepted anything that was said.

105. Ms Bole stated that the WSS is a document produced by the Respondent. It is not something that is specifically negotiated on an individual basis. It is the Respondent's terms of business. It includes a sum for a delegated authority. She stated that the Applicant's repeated requests have been responded to in a similar vein and that the Applicant does not accept the explanation.

106. Ms Bole referred to the Respondent's original submission documents, which included letters issued repeatedly to Mr Collins. He continued to lodge objections and refused to pay. They carried out recovery work that they thought was appropriate. Because of the ongoing disputes, they decided not to take legal action. The dispute arose due to his challenge to their original appointment. There was an ongoing dispute. There were never formal legal proceedings. The NOPL was put in place to protect other owners in the event he chose to sell.

Alleged failures to comply with Property Factor's duties (7 allegations)

107. As noted above, the Property Factor conceded one failure to comply with property factors' duties (point 7) in relation to an insurance claim for a common garage door, but not in respect of a common window.

108. Initially, the Applicant had failed to specify the basis of the duties to which he was referring. During the hearing process he provided further specification on this matter.

109. Parties made written and oral representations on the remaining 7 allegations of breach of duty. Evidence on many of the same issues had already been advanced in relation to the alleged breaches of the Code of Conduct and parties adopted that evidence, some of which was expanded upon:

110. ***(1) Failure to incorporate the owners' charger, 6 conditions, within their WSS as voted on by owners at the December 13 AGM, as part of the agreement / contract to appoint them as factors.***

111. The Applicant relied on the Deed of Conditions ("DOC") 21.1, which says "at a meeting the proprietors may decide a) to appoint a … company as factor on such terms as they may specify".

112. He referred to the owners' AGM in December 2013. He stated that as owners they voted at that meeting and approved a charter of six conditions as regards the appointment of the Respondent. The charter was drawn up by owners and discussed at the AGM, for the purpose of appointing a new factor. It was due to the poor relations and difficulties they had at that time with the previous factor. It was part of the appointment that was voted on, as was noted in the minutes. *HO Doc 2. Page 4. "it was agreed to appoint JG and we noted the 6 charter points that we wanted included and we agreed would be"*. He stated that he would have expected to see those in the development schedule but the charter was not included within the WSS at all.

Respondent's evidence and submissions

113. Ms Bole stated that HO pro 1 and 2 showed that the requirements of the charter were accepted but there was no undertaking that these would be incorporated to the WSS. She stated that any form of charter or constitution will run in concert but will not be incorporated within their core documents. The development schedules are all template documents and they would not slot in charters. The six points in the charter are within the standard conditions that they have in their WSS. There is nothing which conflicts with the WSS.

114. ***(2) Operating a delegated authority policy to carry our work on the development below a certain limit per property, when this was contrary to our charter and never voted on and agreed by owners on a quorate basis, as per the development deed of conditions.***

115. The Applicant relied on the DOC, Section 18.3, section (b) which states that when the property factor is calling an AGM the notice that they provide owners with must state the business to be transacted at the meeting.

116. He referred to HO Doc 10, the notice that went to owners, which made no reference to the points regarding their appointment as factors and the matter of delegated authority in respect of the 2014 AGM; and HO Doc 10.1 which is the agenda of meeting, in which there was no mention of the appointment or the delegated authority. The mandatory proxy voting form did not mention it so did not give the owners the ability to vote.

117. The Applicant stated that he did not attend the meeting. He sent in his proxy vote.

118. The Applicant submitted that the DOC does not make any specific provision for delegated authority. He submitted that any decision to allow delegated authority needed 29 people either attending or providing proxy votes in favour of whether a delegated authority existed. He stated that this was the first time that it was raised with owners and only those who were at the meeting. The December 2013 the Minutes do not show that delegated authority was discussed.

119. He submitted that in in essence there has never been a quorate vote on delegated authority. In relation to the Steering Group it would not have that authority. Under the DOC it requires 29 out of 78 owners, so the Steering Group would not have had that authority to agree that. He stated that the Respondent was in possession of the DOC. He thought that it seemed strange that at the December 2013 that 32 people all voted in favour of the appointment. He stated that as owners they wanted control and that he would not have seen an issue with delegated authority if it had gone through the correct procedures and been voted on by owners.

120. Later in the hearing process, the tribunal heard evidence from Mr Bratton, aged 73, a semi-retired academic, who was another homeowner on the development, who had attended the AGM in November 2014. His evidence related to the alleged breach of property factors' duties as well as one of the complaints under Section 2.1 of the Code of Conduct.

121. It was the first AGM that he attended. He recalled being in attendance with his wife. He stated that what was discussed was the payment of £30.00 per unit that they could do repairs without going to the committee. They voted on that. He and his wife assumed that the other residents knew best. They agreed to it. It has come up several times since then. When they switched factor they raised this at the owners' AGM. They did not realise that there was no control over how many

times the factor could initiate repairs. The £30 per unit could be three times every quarter or more. They had learned their lesson from issuing a blank cheque. With the new factors they inserted a clause saying that it could only be one time every quarter before they have to come to the owners' committee.

122. He stated that the matter was dealt with as any other business. He stated that they did vote. We voted with the other residents. The motion was that there should be the ability to undertake repairs up to £30 per unit. He stated that David McAllister proposed the motion. He was not holding a proxy or a mandate from anyone else.

123. He believed that he had received a welcome pack and development schedule when he first moved into his property on the Development. He recalled seeing the factor's report during the November 2014 AGM. He thinks he has the original document at home. He thought he had received the minutes of that meeting and the factor's report after the meeting. He said that he was clear about what happened at that meeting because he and his wife remember the meeting because it has come up several times on subsequent occasions in relation to how much money owners should deduct. That meeting is clear in their minds. He recalls the discussion being in the context of issues in the development and the need to expedite work without going to the committee. He was not a member of the committee at that stage. Mr McAllister explained that some work needed to be done quite urgently. The people at the meeting agreed with the idea. He and his wife went along with the general consensus of those present. He did not know how many owners were required for quorate decisions. He did not read the deeds until much later, maybe two years later when he voted to go on to the committee. He does not recall any discussion about proxies or mandates. His recollection is that it was under AOB and there was an explanation from Mr McAllister why they should pay this £30 per quarter unit. So that was the first time he and his wife were aware of the issue. He does not know whether it had already been agreed on a prior date. He does not recall whether the word ratification was used by Mr McAllister. It seemed a plausible explanation why they needed to deduct £30 per month. He did not recall Mr McAllister stating on the night "if anyone is unhappy with our WSS, can you please write to us after the meeting detailing any concerns."

124. After Mr Bratton's evidence, the Applicant made some additional submissions. He submitted that a meeting is only quorate if 40% of the owners are in attendance and vote in favour of any items at AGMs, which for this Development means 29 owners are needed to attend or give advance cooperation. At the AGM meeting in 2014, only 18 owners were in attendance. A vote took place. The vote was not quorate. Under Rule 22 of the Deed of Conditions under liability for costs, proprietors are only liable to meet the costs where a binding decision has been enacted. In effect, our Deed of Conditions says that unless the decision is

quorate it is not binding on other owners for work to be carried out. Effectively the Respondent did not have delegated authority. The costs should not have been spread amongst other owners. The costs can only be spread amongst owners. The Respondent stated that they could carry out work up to the value of £30 + VAT per property.

125. He submitted that from November 2014 up to January 2019 that the items under the purported delegated authority are not chargeable to the owners. Ultimately the costs have to be paid for but owners do not have a legal liability to pay them. He paid all the items that he believed were non-delegated. He went through every invoice. His last invoice [new HO doc 59] showed that £2299.07 was outstanding at the end. It remained unpaid by him and it was redistributed amongst the other owners. That was the amount after the £300.00 float was taken into account.

126. The Applicant accepted that the meeting, from a generic point of view, was quorate. However, he submitted that the mandate from those who could not attend did not give anyone the ability to provide their yes or no on that AOCB item. He stated that there was no information before the AGM and he would have thought that that would be on the agenda and give owners the opportunity to read about it or attend. It is HO Doc 10.2. It only relates to specific items or gave authority to the person holding the mandate to make any decisions on the day. On the mandatory form, the items replicate the three items for decision which were on the agenda. The mandate and the covering letter sent out by the Respondent sent out information regarding these three points. Owners had the opportunity to digest or the ability to put a yes or no on the proxy. It is not a generic mandate. It is specific to the areas highlighted.

127. He stated that if the factors are saying that this was an important area for discussion, it calls into question why it was not put on the AGM letter in advance to give everyone the opportunity to be made aware.

Respondent's evidence and submissions

128. Ms Bole referred to PF Doc 3 the WSS which was issued in a Welcome pack at the commencement of their management. It was provided in hard copy at the start (version 1). The WSS is updated if there are any changes from commencement. From the start of management, owners were advised that there was delegated authority of £30 + VAT per property. It was agreed following discussions with the Steering Group after the appointment. If the Steering group had proposed a figure the Respondent would have authority to include it in the WSS. If there was a proposal to raise the amount it would be put on the agenda

for an AGM. She stated that the Respondent would not have taken over management of the Development without some form of delegated authority.

129. Mr McAllister stated that the Respondent sent out a sample management proposal to the committee or steering group. That included the fact that they needed a delegated authority. At the AGM in 2014 when it became evident that two people were exorcised by this, he decided to raise this to see if it was a shared view. His recall was that this had become a situation that he decided to raise to find out the mood of the meeting.

130. Ms Bole submitted that that meeting in November 2014 was quorate. The matter was raised under AOCB that the sum of £30 per property was already in place. She stated that Mr McAllister was seeking the view of those who were present whether there was a commonly held view that the delegated authority was inappropriate, in which case there would be another AGM. She submitted that in any event it was quorate by those in attendance 18 together with mandates and proxies received of 23. However, she stated that it was not a vote, but it was a ratification. She referred to the agenda (HO doc 10.2), with a proxy voting form including three other issues.

131. Mr McAllister did not recall whether the Applicant and another homeowner were in contact about the delegated authority issue before or after proxy voting forms were sent out.

132. Ms Bole referred to HO Doc 7 and 8, letters in which the Applicant challenged Mr Mayall in September 2014 about the appointment and adoption of the charter. Mr Mayall's was perplexed. He responded and he attached the December 2013 Minutes and the letter of appointment.

133. Mr McAllister stated that he decided to raise it at the last minute to see if it was a shared view. The minute of that November 2014 meeting starts off by talking about the appointment of the factor.

134. Ms Bole repeated her assertion that there was a request for ratification. It was seeking feedback following concerns raised by the Applicant and another owner. It was raised under AOCB to understand whether those in the room had similar views. The purpose was looking for feedback. When the Minutes went out there were no concerns raised by any other homeowners. It was purely to seek information from those in attendance. She stated that the three issues for decision making were in the agenda and proxy.

135. Mr McAllister stated that if there had been dissension in the room, they would have called another meeting. The Minutes of the meeting were circulated to everyone. They included the "unfortunate wording" about "agreement".

136. Ms Kirkwood reiterated the point that it was in the WSS right at the start. It was never raised as a formal complaint or issue. David McAllister had heard that two people had raised a concern. It was not anything other than a topic of discussion. It was mentioned under AOCB to get general feedback. It did not appear to be an issue so nothing further came of it. The Minutes factually recorded the fact that the delegated authority was £30 and there appeared to be no issue. She agrees that the minutes could have been better worded.

137. Ms Bole made some additional submissions after the evidence of Mr Bratton. She stated that the Minutes of 17 November 2014 were circulated on 27 November 2014 which also included a copy of the factor's report (HO doc 12). There was a fairly lengthy narrative over two pages under AOCB about the validity of the original appointment and also the authority to act figure at £30 plus VAT. The factoring report was not distributed in advance. It was distributed at the AGM. The Minutes were distributed. There was a question as to whether there had been any consultation on this point as it had been raised under AOB (PF Pro 6), minutes record Welcome and apologies, the list of attendees and also confirms the number of apologies and mandates.

138. It is also noted that the Minutes themselves state that with the minuted attendees, apologies and mandates, the meeting was indeed quorate. It is permissible to rely on mandatories. There were 18 physically present and 23 apologies and mandates and the meeting was therefore quorate.

139. Ms Bole stated that Rule 16 of the Deed of Conditions does have an obligation to maintain. It is not clear why there were no questions by the homeowner to pay gardening etc. but he is challenging items under the delegated authority. All of the items are routine maintenance. She does not see whether there should be any difference whether there was an obligation to maintain.

140. The residual amount owed by the Applicant was reallocated amongst all other proprietors. The Applicant was the only homeowner who retained a balance of this amount. There were two other owners who had funds to be re-allocated when the Respondent ceased to factor.

141. There were specific things highlighted on the mandate for larger cost items. There are two separate issues here. This was raised under AOCB as questions had been raised as to the validity of the appointment. The Factor's Report that was circulated includes snipped sections from the Deed of Conditions, 21.2 and 21.5. There is a specific request in the Factor's Report asking for feedback from the development homeowners. "We would request you write to us after the meeting…". There is an obligation on all homeowners to maintain the common areas. There is a difference between larger items which require advance funding

or routine maintenance which are ongoing. HO pro 25.1 There is the obligation for all homeowners for the maintenance of the development. These are all ongoing maintenance items such as lighting repairs. Some are under £1. It is still yet to be made clear why Mr Collins should not be paying sums of 50p, 80p, £2.04.

142. Ms Bole accepted that the proxy is not a general mandate. There were questions on three specific items. There was a quorate meeting with respect to the people in the room and the items on the mandate itself. The matter which was raised under AOB under any other business was about authority to act. It was included on the factoring report as a matter which had been raised at the meeting. The factoring report was presented at the meeting and was circulated with the minutes following the meeting on 27 November 2014 with the quarter. It invited anyone with any questions or concerns to notify us in writing.

143. Mr McAllister stated that to his best recall there were no questions following the meeting to amend the WSS other than Mr Collins who had an ongoing dispute. The Factoring Report (Ho Pro 12), second page of any other business. "Secondly on a related matter…" It talks about the deed of Conditions 21.2 and 21.5, stating that the factor is entitled to carry out repairs without a meeting having to be called. I wanted to reiterate that because they can instruct and have executed any works considered necessary, for example for health and safety.

144. Ms Bole stated that if there was a health and safety matter they would require to have those carried out without calling a meeting, whereas they would be relying on the £30 + VAT authority to carry out routine services and maintenance works, which they require to do without going back to every owner. The obligation for maintenance rests with the homeowners.

145. She referred to the Code of Conduct 1.1a: *For situations where the land is owned by the group of homeowners*
The written statement should set out:
A. Authority to Act
a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;
b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

146. With a small development of eight or nine properties, a roof repair would be proportionately very expensive. The delegated authority is for the protection of owners that we would not instruct works without reverting on costs. They will apply the principle across all properties.

147. ***(3) Following on from their removal as factors in January this year [2019], they are communicating to owners that any outstanding amounts due that remain unpaid will be distributed amongst other owners, even when some amounts due continue to be disputed / unresolved and that as a factor they haven't followed their own debt recovery procedures as outlined in their WSS to allow them to take such action.***

148. Mr Collins relied on the WSS 5.9.3.

149. He submitted that the Respondent should have used all available means to recover the debt. He invited the tribunal to refer back to the Deed of Conditions, Section 22.3 which states that where a costs cannot be recovered from a proprietor the that share must be paid by the other proprietors as if it were a cost under Rule 21.1. Rule 21.1 says that the costs are incurred under binding decision.

150. He stated that he paid all the invoiced amounts apart from those he disputed because I believe that the Respondent did not have delegated authority. He submitted that on that basis the costs should not have been distributed.

151. He referred to the Respondent's debt recovery procedure (5.10), regarding distribution of debt. His contention is that he made it clear to the Respondent on a number of occasions that if they could give authority for the delegated authority he would pay. He did not understand why the Respondent did not proceed to recover the money rather than registering an NOPL. Ultimately, the NOPL would only have expunged the debt if he sold the property. They could have taken legal action against him to recover the money.

152. He accepted that 5.9.2 of the debt recovery procedure states that the solicitor is entitled to impose an NOPL. But he submitted that they should have moved to recover the debt by other means. They should have raised a court action against him.

Respondent's evidence and submissions

153. Ms Bole stated that they would adopt our argument and submissions made under the Code of Conduct.

154. She reiterated that where someone is in a dispute there will be elements which will not be passed further. Every time a bill was issued there were sums disputed. Internal credit control passed it to debt collectors. Ultimately a decision has to be made whether court proceedings are viable or something else is appropriate. The NOPL was felt appropriate due to the dispute and legal costs in

a potentially defended action, to protect all of the other owners' interests if there was a sale. The recovery of money under a court decree can be difficult or ineffective. They provided as much information as they could to the Applicant and he refused to pay the ongoing costs.

155. When it comes to distribution, there is the facility to redistribute the debt. It is also in the WSS termination provisions, section 11.4. Where there is a termination of agreement after the cease to factor date they can no longer issue instructions to solicitors because they are no longer the factors. Any actions ongoing would have been cancelled as they no longer had authority. For winding up any outstanding balances need to be re-distributed amongst other owners. It was in the cease to factor letter (PF Doc 10).

156. Under the DOC, Mr Collins as with all owners have an obligation to maintain their property and contribute to the costs of that, which he has failed to do. The Applicant has an obligation to maintain and pay for the Development.

157. ***(4) Failure to respond to owners and committee's requests for answers and additional information, in a timely manner and in line with their published response times included in their WSS.***

Applicant's evidence and submissions

158. The Applicant relied on WSS Section 6.1.1, which states that for requests the Respondent will acknowledge receipt within two working dates of receipt and provide a timescale for response and it will be agreed with the homeowner.

159. The Applicant referred to evidence already led in relation to his requests.

160. In relation to committee requests, he referred to HO Doc 45, a letter of 12 June 2018 from another homeowner to Nik Mayall with specific regard to Mr McAllister. It contained complaints about failure to deal with specific requests. Ms Bole responded apologising for the situation and confirming that Mr McAllister would be removed and would be replaced by Georgina Ramsay. The letter went back to the member of the Committee.

Respondent's evidence and submissions

161. Ms Bole referred to the concession already made about the failure to respond in a timely manner and in accordance with the timescales in the WSS on a number of occasions.

162. Ms Bole stated that the letter HO Doc 45 was received from another homeowner, not the Applicant and that she would have to verify the response.

163. ***(5) Failure to consistently secure a minimum of three competing quotations from contractors for major work projects to be carried out, so owners could digest the information received and vote on the preferred option at the AGM.***

Applicant's evidence and submissions

164. The Applicant relied in WSS Section 2.7, which states that multiple quotations will be obtained where considered appropriate by James Gibb.

165. He submitted that in relation to major works, it had been agreed that three competing quotations would be obtained.

166. He referred to HO Doc 16, the Respondent's operating model, which states "Where possible we will normally obtain three quotations."

167. He stated that there was only one major works carried out having received three quotations, which was the communal area re-painting in 2014.

168. For the garage ventilation and garage lighting, which were major works, the owners were not provided in advance with three quotations. For the garage ventilation system only one quote was secured. For the garage lighting system, two quotes were secured. For the replacement boundary fence two quotes were secured. For the removal of trees only one quote was secured. For the garage ventilation system only one quote was secured.

169. He referred to the agreement which he said was in place between the committee and the property manager that they would seek to get up to three quotations for major works, that was contained in the Respondent's presentation at the AGM. He conceded that it says "up to 3 quotes".

170. In relation to the garage ventilation he stated that they were made aware that only one company in Halifax had the expertise to quote for the ventilation system. However, the system failed not long after the contractors left. It was interesting that the new property manager Georgina Ramsay managed to access a company based in Glasgow to analyse the issue with the system and provide a costing to repair the system. It seems strange that they were led to believe only one company was available. He referred to HO Doc 56 which he submitted confirms that very quickly Ms Ramsay was able to secure another company that has the

appropriate qualifications and maintenance on the system itself. He does not know the reasons why that did not happen.

Respondent's evidence and submissions

171. Ms Bole stated that the Respondent endeavoured to obtain three quotes where there are larger cost works but that they were not required to do so in terms of the WSS 2.7.

172. Ms Kirkwood submitted that the Respondent had a duty to comply with WSS 2.7, which provides that multiple quotations will be arranged where considered appropriate by James Gibb. She stated that the Respondent will endeavour to obtain the best possible price. They do not pledge that they will always be able to obtain three quotes. Where it is a specialist contract it is not always possible. She submitted that multiple means more than one so two quotes would satisfy the requirement. She submitted that it is a qualified obligation.

173. Ms Bole stated that the trees and boundary fence were not matters which had previously been raised by the Applicant. She stated that they would have to verify so she could not comment. Ms Bole stated after a short adjournment that she had obtained further information on the tree felling and boundary fence. They were both within the delegated authority. There was not a further quote obtained for the tree felling. For the boundary fence, there were two quotes from the same contractor and a further one from another contractor.

174. Ms Bole stated that the garage ventilation was a very specialised contract. They made significant efforts to find another contractor to quote for the works required there. They were unable to find someone else at that time. That was something which was discussed with the committee. Mr McAlister did put in significant effort to find another contractor. With respect to the lighting, there were two comparative quotes obtained. The contractor who was successful was the cheaper of the two and the comparisons were notified to the Committee.

175. Mr McAllister stated that he went to considerable lengths to try to find another contractor apart from the Halifax contractor and was unable to come up with anyone. He reported this to the Committee. One of the people on site had contacts in the field. They put him in touch with someone. He met them on site. They were unable to access the system. He does not know who Georgina instructed.

176. ***(6) Failure to provide accurate invoicing for work carried out and slow to have any errors corrected on future invoices.***

Applicant's evidence and submissions

177. The Applicant submitted that the duties arise under WSS, Section 5.5, invoicing and sections 5.2 and 5.3.

178. His understanding under 5.5 is that the Respondent would submit to owners on a quarterly basis invoices for the period for all costs incurred within that quarter and they would also provide a fully itemised invoice at that stage for that quarter's charges. He submitted that there are various examples where they had incorrect invoicing, duplicate invoicing and invoicing for work carried out some time substantially previously.

179. He referred to HO Doc 32, for the period from February 17 to May 17. However, the 6th entry down is an example of work carried out in Sept 2016 and was only invoiced to owners between chargeable period of February to May 2017.

180. He referred to HO Doc 32.1, for the period May 2018 to August 2018. It contained works carried out in September – December 2017.

181. He referred to HO Doc 32.2, where homeowners were invoiced for work carried out previously, in October 2014.

182. His expectation was that all costs incurred would appear on the quarterly invoice. His issue was the Respondent's approach to the quarterly invoicing. He confirmed that he was not saying that the amounts are inaccurate.

183. He referred to some situations where amounts had been inaccurate or duplicated and they had been picked up the Respondent and rectified. He submitted that document 32.3, the final invoice, is one example. Issues had been raised with the Respondent regarding gardening and repairs and maintenance from May and March 2018. They were conceded by the Respondent and credits were put onto the final bills.

184. The Applicant stated that he is not querying the accuracy of the amounts as he never saw the invoices. His main criticisms were the historic amounts and the invoicing of duplicate amounts.

185. He thought it would be surprising for Lothian Electric to send an invoice one a half years later. They were the preferred contractor for electrical works. They regularly did work and the homeowners regularly got the amounts on invoices.

186. He stated that as far as he was aware, the errors of duplication on bills were only ever picked up by owners and that he could not think of an occasion where the Respondent had identified such an error.

Respondent's evidence and submissions

187. Ms Bole stated that respect to billed amounts which pre-date the billing quarter, the Respondent only processes an invoice from a contractor once they are in receipt of an invoice. In most invoices those arise timeously and will be on the correct quarter. On occasion an invoice goes missing and will appear in a later quarter. The entries which appear with respect to the lift charges were received as a backlog of a number of charges which appeared prior to the bill on which they appears. The invoices had not been received and processed. That was the case with Doc 32, 32.1 and 32.2.

188. Ms Bole accepted that there were occasions where invoices were duplicated and credits had to be put through, which was done. It was an infrequent occurrence. On some occasions it had been drawn to their attention by the homeowners. On one or two occasions it had been picked up by the relevant manager. She stated that it was not conceded that it was a breach of WSS 5.5. She submitted that it was an input error that was highlighted and corrected. We concede that it did occur but they dispute that there was a breach.

189. ***(7) Failure to expedite buildings insurance claims and have payments agreed, credited back on owners' invoices*.** [part conceded, see above].

Applicant's evidence and submissions

190. The Applicant relied on WSS, Section 8, lift insurance and inspection, subsection 8.4. It states that in order to maintain insurance premiums at the lowest level, it ensures the broker's standard commission. It is able to do that by taking some work in house. He stated that part of administrative work the Respondent undertook was to deal with the claim have the claim agreed and have work carried out.

191. He referred to the evidence led in relation to the Code of Conduct about two scenarios where the owners were billed for work carried out in advance of the work being finalised. One of the claims was for the garage gate and one was for a window in block 19. He understood that both claims had been paid out but that those amounts were never credited to owners.

192. He referred to HO Doc 25 dated October 2018, at which time the Respondent was waiting for the credit from the insurance claim of £2095.00 and HO Doc 26 which was an email from Georgina Ramsay. Under point 2, building insurance excess queries, she confirmed that both would be rectified on the next invoice. That never happened. It would be about £2900 divided amongst the owners. The amount was just under £41 per property. He submitted that there was a total failure, not just a delay.

193. Having heard the updated information provided by the Respondent at the later hearing days, the Applicant stated that it was odd that the factors appeared to be saying that they could not find that a claim had been submitted regarding the window. He referred to his HO Doc 24 which is a document produced by Mrs Kirkwood (after August 2018), section 1.3. There is a sub-section about the development being charged £660.00. Mrs Kirkwood stated that at the time that a retrospective claim had been made.

194. He stated that despite the additional information produced, he was still maintaining that there was a breach of Section 3.1 and Property Factor's duties.

195. He stated that he was at the meeting and it was confirmed to them at the meeting that a claim had been made and that the Respondent was waiting for an outcome from the insurers. He believes that that window should have been replaced under an insurance claim. He works in the insurance industry. If a claim had been made a claim reference would have been provided. He accepts that if the insurers did not meet the claim they would say that that is their decision. He stated that it was discussed at the Liaison Group meeting around about July 2018, at which time they had various issues that they were unhappy with. Georgina Ramsay was also at the meeting. The Liaison Committee then produced a document which was circulated to all owners and Ms Kirkwood produced a response (HO Doc 24).

196. If no claim was made, he still has a complaint. The factor takes a commission. They should pursue matters to a final position. He stated that Nik Mayall attended the meeting with Georgina Ramsay. One of the committee, John Bratton received an email from Georgina Ramsay on 7 August 2018 0921. Under 2.2 it refers to Comely Bank glazing. There was a question from the owner's committee and a response from Georgina Ramsay. The committee were questioning an overcharge of £440. Ms Ramsay said that there was an error by accounts that would be rectified on the next invoice.

Respondent's evidence and submissions

197. Ms Bole confirmed that with respect to the insurance claims, it is correct that the factor will notify to the insurer where it is a common repair. With respect to any claims submitted, the credit can only be applied once there has been a payment by the insurers.

198. Initially Ms Bole checked the Respondent's records and could not see any credit coming in from the insurers. She stated that they have moved provider. The invoice from Comely Bank glazing was January 2018. The invoice from Garage door and gate was dated 11 October 2018. Normally she would anticipate that these would be forwarded to the insurers once received. They are both addressed to the property factor. They should have been forwarded to the insurers. She stated that she would require check Georgina Ramsay's emails to see whether these were forwarded on. She stated that there are systems in place with the company to deal with insurance claims. She believes an insurance claim was made for the garage door. Originally with the window there was not a claim being made as there did not seem to be an insured peril. However, that was made retrospectively. She stated that the Respondent would have to attempt to access Ms Ramsay's emails as she is no longer a member of staff and/or to obtain some additional information via the brokers, as they cannot contact that insurer directly any more.

199. At a later date during the hearing process, Ms Bole managed to ascertain that a claim was lodged with regards to the damage to the garage gate. The claim was accepted and it does appear that a claim was made. Notification was made on 8 October 2018; it was confirmed 9 October 2018. Information was sent on 20 October 2018 (photographs and request for information in a police report). That was accepted. There were two elements to that, emergency works and then full reinstatement. Works were carried out. It was accepted by Allianz insurance. Funds are sent to James Gibb rather than direct to the client. They had not managed to track the payment at that time. She stated that it appeared that there was a miscommunication with the settlement date. Different staff were dealing with it. It does appear that the bank details were provided to them to arrange settlement. The amount from the insurer was £2132 for the garage door. She stated that once they have the correct confirmation, they will arrange to have it forwarded to current factors for crediting to current homeowners.

200. Ms Kirkwood submitted that she does not think that there is a failure to comply as such. She submitted that they Respondent has failed to confirm that the payment has been received. She submitted that it is premature to say that there was a failure to expedite the claim. She stated that if the Respondent gets the money and something has failed in the process they are quite happy to say that there has been a failure.

201. Ms Bole stated that she is satisfied with the Respondent's efforts to resolve this. She stated that the only place to find the claim number was in the email account of a former member of staff. The number had not been copied onto a central folder.

202. In relation to the window insurance claim, Ms Bole stated that as at March 2021, she not managed to find a claim reference number and that she was carrying out enquiries through the former staff member's email account to find out when it was notified to Allianz. In order for Allianz to trace it they would need the confirmation of an initial claim reference. The owners have been charged for the full amount of the works. The total amount of the claim was £660, less the excess which would have been £440.

203. Ms Ramsay left the firm on 3 February 2020, at which point the Respondent no longer factored the development. She was the property manager at the time it went to the other factors in 2019. If there were any insurance claims being finalised at that time they should have been notified. Ms Bole suspected that it was not done in this case.

204. On the last day of the hearing in April 2019, Ms Bole provided further information about both claims:

205. (1) Damage to the garage door.

206. She stated that it was the Applicant who contacted the Respondent to report the damage which had occurred. It was notified to Allianz who were the holding insurers on 8 October 2018. That included a crime reference and a brief outline of the damage which was subject to vandalism. Also included were the invoice to the initial call out as well as a quotation for like for like replacement. There was an acknowledgement by Allianz. The claim was confirmed on 9 October 2018. The bank details to which payment was to be made were provided by Ms Ramsay on 9 October 2018. There had been a communication from Mr Bratton with respect to the mechanisms which powered the gate having been damaged and there was some conversation about installing some heavy duty pistons. That was a higher cost of £2095.00 compared to £1110.00. Ms Ramsay indicated that the insurers would pay for like to like so the difference would be payable by the homeowners. This altered the sum that would have been paid out. It should have been £1147.00 including the initial call out invoice for £237.00 and after deduction of the excess.

207. Ms Bole stated that she had made enquiries with the accounts department both on the original amount and the lower amount. No payment of either of those sums had been received as a cheque. The suspense account and the main

account were checked. This information was all relayed back via the brokers as they do not have direct communication with Allianz claims. The brokers made enquiry and they have established that no payment was made in either amount as information had been sought from the development manager which had not been received. They had asked if there had been any photographs taken to the gate or gate arms and whether the property factor was aware whether the police had apprehended anyone for the damage caused. Photographs had apparently been issued. Ms Ramsay had indicated to Allianz that she had gone back to look at the file for the garage door and gate claims to ascertain if any photographs had been taken. There had been photographs taken, but Ms Bole could not see any information of these having been received by Allianz. From 27 March 2019 there was a follow up from Allianz looking for the additional information and final invoice. There was an email from them on 6 June 2019 followed up on 17 July 2019. It makes reference to what appears to be a telephone conversation with respect to the claim. Then the email of Ms Ramsay (D137) stating that she believed that the claim had been settled. The final email that Ms Bole could locate was the one which starts D139 where a different property claims adjuster had been in touch who had been looking at this particular claim and thought that it might be a duplicate and that Allianz wished to close the claim. The brokers have confirmed that the claim was closed down at that point and that payment had not been made. That is the only correspondence that Ms Bole could find.

208. She stated that Allianz have agreed to re-visit this. Ms Bole has sent a photograph from Garage Door & Gate. They said that it appeared that the gates had been held open as opposed to damage by a vehicle. Allianz have re-opened the claim. If the claim did proceed and there was a payout, they would transfer the money to the current factors to credit those payments to the homeowners. From the information that she could find it would appear that there was some confusion as to whether or not the claim had been paid. It is unclear whether there was a misunderstanding as to at what point payment would be made. On the basis of the information she has found the Respondent has to concede that there was an error by the property factor.

209. (2) Window

210. Ms Bole could find no trace of a claim in respect of the window. When the repair was carried out there was no record of any insured peril. Ms Bole could find a request, although she is not sure where from, with respect to contacting the insurers as to whether consideration would be made for a claim. Ms Bole could find no information for any claim reference or any details having been sent on. Ms Bole stated that the accounts department could not find any unallocated payment coming in for the amount that would have been involved in that instance. The brokers could not find any indication of a claim reference or any payment being

made. It would appear that no claim was made in that instance. £660 less £200 excess if a claim had been accepted in that instance.

211. Ms Bole conceded that there was a failure to expedite buildings insurance claims and have payments agreed and credited back to owners' invoices. She accepted that it should have been followed up with the accounts department.

212. Ms Bole stated that she did not doubt that Ms Kirkwood reported to homeowners that a claim had been made for the window on the basis of communication of a member of staff, stated in good faith. Whether or not the claim had been notified, she has not been able to find any written evidence of that. She stated that the other potential scenario with the window is that on the basis of the information provided, there was no insured peril and the claim may have been submitted and turned down. Ms Bole could not find any information in writing confirming a claim was made retrospectively. She stated that the invoice for the repair was dated 24 January 2018. She cannot find a claim reference from Allianz in that regard. As such, it may be correct or it may be incorrect that a claim was notified retrospectively to Allianz. Ms Bole stated that it would certainly be useful to narrow down when the Liaison Group meeting occurred to which the Applicant referred so that she could make any review on that point and whether Mr Cole could confirm whether minutes were taken. She stated that Ms Kirkwood has been off work for some weeks.

Parties' submissions on proposed PFEO

213. Both parties were invited to make submissions about any proposed PFEO.

214. The Applicant stated that all he was seeking was a financial payment. He submitted that this should be around the amount on the final invoice, which was £2598.00. He also stated that he was seeking a payment for the stress that has been caused in trying to deal with the factors and the tribunal process.

215. Ms Kirkwood stated that the Respondent obviously refutes the proposal that there was no delegated authority. She stated that there were a sufficient number of years where that operated effectively. They tried very hard to work with the Applicant over the years. She stated that there is a responsibility for the Applicant under the Deed of Conditions to meet the charges for his property and that it is unfortunate that he disputes that there is a delegated authority. She stated that had there been a £0 figure it would have made it very difficult or impossible for them to deliver the service. They would consider £2598 to be entirely unreasonable by way of compensation. She stated that the Respondent has worked hard to resolve the Applicant's concerns and to make sure that the Applicant did pay for services due. They never intended to cause any distress.

There is a dispute mechanism in place. They did work hard to resolve the dispute with the Applicant. The Applicant can raise the matter with the tribunal for a determination, which he has chosen to do. She stated that the Respondent had only had a desire to do what is correct.

Discussion

216. The tribunal's reasons for its decision are summarised as follows, with reference to each alleged failure to comply with the Code and alleged breach of - property factor's duties and its findings-in-fact:

Code of Conduct, Section 2.1

217. Section 2.1 provides:

> ***"Section 2 "Communication and Consultation" provides: "Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:***
> ***2.1 You must not provide information which is misleading or false. …"***

218. The tribunal considered parties' evidence and submissions in relation to each of the three remaining allegations made by the Applicant under Section 2.1:

219. **(1)** The tribunal had regard to the Respondent's Management proposal and the Written Statement of Services as well as the Development "charter" which was accepted by the Respondent. The tribunal found that the WSS was already in place at the start of the Respondent's appointment and had been issued to homeowners in or about April 2014, some months before the AGM on 17 November 2014. The Respondent was appointed by a quorate meeting of homeowners on 12 March 2014 and the WSS was issued thereafter. The WSS Development Schedule section 02 provides details of the Respondent's authority to act, including delegated authority up to the level of £30 plus VAT per property.

220. The tribunal considers that the Applicant's submissions about a "vote" having been taken place on the question of delegated authority at the 17 November 2014 AGM are not well founded. The Applicant was not at the meeting. There was a conflict between the evidence of Mr McAllister and the evidence of Mr Barton. While the tribunal found that Mr Barton was doing his best to recall matters, it did not accept the evidence of Mr Barton that a vote was taken at the meeting. David McAllister chaired the meeting. He explained his reasoning for

proceeding in the way that he did. Votes were taken on other matters which had been notified in advance (and the meeting was quorate for that purpose.) The documents produced after the meeting recorded what had taken place. While the Respondent's witnesses agreed that the word "agreed" was unfortunate, when considered in context the tribunal did not consider that the matter would have been put to a vote, given that the Respondent already had delegated authority in the WSS and the matter had been raised to gauge the views of the room following concerns raised previously by the Applicant and another.

221. The tribunal accepted Mr McAllister's evidence that at the AGM on 17 November 2014, Mr McAllister pointed out to those present (18 attendees) that two proprietors in the Development had challenged the Respondent's authority to act. Mr McAllister had decided he would raise it at the meeting despite the fact that it was not included on the agenda. The tribunal accepted that thereafter Mr McAllister reiterated the position regarding authority to act and explained why it was important to have delegated authority, before inviting comments.

222. The tribunal considers the way in which Mr McAllister acted, in failing to include the matter on the agenda given his advance knowledge of the subject and dealing with it as an issue of AOCB amounted to poor practice and observes that this catalyst has led to many of the complaints in the Applicant's application as the majority of the allegations flow from disputed debts arising from the dispute about authority to act.

223. On the balance of probabilities the tribunal is not satisfied that the Applicant has established that the Respondent has breached the Code of Conduct, Section 2.1, with the statement made by Mr McAllister at the meeting about the Respondent's authority to act, given its finding that the Respondent did have such authority.

224. **(2)** The Respondent admitted that there was inaccurate and duplicate invoicing on a number of occasions when they were acting as factors for the Development.

225. Evidence of this included Productions 25.1 and 25.4, Lothian Electric invoices, in which the same amount was invoiced to homeowners on the Development on two occasions.

226. The tribunal observed that it was agreed that the matter has been remedied with this homeowner and other proprietors on the Development.

227. **(3)** The Applicant's complaint related to a statement which was said to have been made by Angela Kirkwood at an EG meeting in November 2018 at which the Applicant did not take notes. The EGM was called by proprietors in the Development. The Respondent was given an opportunity to make a presentation, as were the other factors who were in attendance. The Applicant's evidence was that Angela Kirkwood said that the garage ventilation system was "fully operational" at a time that it was not. He then changed his position to state that she said that it was "fully serviceable".

228. The tribunal was satisfied that Angela Kirkwood did attend and make a presentation. However, there was no evidence upon which the tribunal could conclude that she told those at the meeting that the system was "fully operational" or "fully serviceable". The tribunal accepted the evidence from the Respondent about the issues with the system at that time. The tribunal accepted Ms Kirkwood's evidence that she would not use the term "fully serviceable". The tribunal also had regard to the newsletter produced afterwards in which owners were updated on the issue with the ventilation system.

229. The tribunal was not satisfied on the balance of probabilities that there was a failure to comply with Section 2.1 in this regard (allegation 3).

Code of Conduct, Section 2.5

230. Section 2.5 provides: **"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)."**

231. The Respondent conceded that there had been a failure to respond to the Applicant's enquiries within prompt timescales and that there had been a failure to comply with Section 2.5 of the Code of Conduct in relation to a number of pieces of correspondence.

232. As such, there was a failure to comply with Section 2.5 of the Code of Conduct.

Code of Conduct, Section 3.1

233. Section 3.1 provides: **"If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title**

deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).”

234. The tribunal considered both parties’ evidence and submissions.

235. The Respondent conceded the failure to comply in respect of the insurance claim for the garage door, which was still ongoing after the hearing concluded on 23 April 2021.

236. It was not clear whether the Respondent also conceded the failure in relation to the window claim, despite the fact that Ms Bole had still not managed to fully investigate the matter by the time the hearing concluded in April 2021.

237. Having considered the parties’ evidence and submissions, the tribunal was satisfied that there was also a clear failure to comply with Section 3.1 in respect of the common window. The Respondent failed to provide “all financial information that relates to their account”. They did not produce the information within three months and it was not produced by 23 April 2021, when the hearing concluded.

238. The tribunal was satisfied on the balance of probabilities that there had been a clear failure to comply with Section 3.1 in relation to both items which were complained about, namely the common garage door and the common window.

Code of Conduct, Section 4.1

239. Section 4.1 of the Code of Conduct provides**: “You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.**

240. The tribunal considered both parties’ evidence and submissions.

241. The Applicant’s complaint was that the Respondent’s debt recovery procedure was not consistently and reasonably applied, when one had regard to the process in the WSS.

242. The tribunal was satisfied that the Respondent had followed the process in the WSS when attempting to recover debts from the Applicant.

243. The tribunal was not satisfied on the balance of probabilities that the debt recovery procedure had not been consistently and reasonably applied by the Respondent in its dealings with the Applicant.

244. The tribunal observed that the Applicant was not told about the NOPL being registered on the title to his Property and he found out because he was charged the registration dues. Although the Respondent was entitled to register an NOPL to protect other homeowners in the event of sale of his Property, it was not good customer service to fail to inform the Applicant that this had been done.

Code of Conduct, Section 4.6

245. **Section 4.6** of the Code of Conduct provides: **"You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation)."**

246. The tribunal was satisfied that the Respondent had complied with the general obligation to keep homeowners on the Development informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).

247. The tribunal accepted the evidence that the Respondent provided annual updates on this matter at the AGMs. The Respondent also provided information in the period of its notice, prior to ceasing to factor the Development.

248. The tribunal was not satisfied on the balance of probabilities that the Respondent failed to comply with Section 4.6 of the Code of Conduct.

Code of Conduct, Section 4.7

249. Section 4.7 of the Code of Conduct provides: **"You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs."**

250. The tribunal was of the view that the Applicant had not presented a very clear argument about the way in which the Respondent was said to have failed to

comply with this section. During the hearing, he did not expand upon his argument to any extent, despite the opportunity to do so. The Applicant did accept that matters had moved on following the Respondent ceasing to factor the Development in January 2019 and that the NOPL which had been registered on his title had been removed.

251. The Respondent outlined the steps which they had taken during the period in which they were factoring the Development to recover unpaid charges from the Applicant, including the instruction of collection agents. A NOPL was registered against the Applicant's title. The Respondent was not entitled to instruct solicitors after they had ceased to factor. The NOPL on the Applicant's title was withdrawn when they ceased to factor.

252. The tribunal was satisfied that the Respondent had taken reasonable steps to recover unpaid charges from the Applicant who had not paid his share of the costs for the Development. They did this prior to charging the remaining homeowners who were jointly liable for such costs (which was done as a redistribution when the Respondent ceased to factor).

253. The tribunal was not satisfied on the balance of probabilities that the Respondent had failed to comply with Section 4.7 of the Code of Conduct.

Property Factor's Duties

254. *(1) Failure to incorporate the owners' charter, 6 conditions, within their WSS as voted on by owners at the December 13 AGM, as part of the agreement / contract to appoint them as factors.*

255. The tribunal considered both parties' evidence and submissions.

256. The tribunal was not satisfied on the evidence that there was any agreement on behalf of the Respondent that the owners' charter would be incorporated into the WSS. The tribunal was therefore not satisfied on the balance of probabilities that any such duty existed.

257. *(2) Operating a delegated authority policy to carry our work on the development below a certain limit per property, when this was contrary to our charter and never voted on and agreed by owners on a quorate basis, as per the development deed of conditions.*

258. The tribunal considered the parties' evidence and submissions on this matter which largely overlapped with their evidence and respective positions about one of the alleged breaches of Section 2.1 in relation to misleading information.

259. The Respondent's WSS for the Development, issued to all homeowners in or about April 2014, after their appointment by a quorate meeting of owners, contained a limit of delegated authority up to a limit of £30 per property. That formed part of the agreement between the homeowners on the Development and the Respondent. No further vote was required for this to form part of the contract.

260. The tribunal was not therefore satisfied on the balance of probabilities that there was any obligation *not* to apply a delegated authority policy in its management of the Development.

261. *(3) Following on from their removal as factors in January this year [2019], they are communicating to owners that any outstanding amounts due that remain unpaid will be distributed amongst other owners, even when some amounts due continue to be disputed / unresolved and that as a factor they haven't followed their own debt recovery procedures as outlined in their WSS to allow them to take such action.*

262. The parties' evidence and submissions on this matter overlapped to a large extent with those in relation to Section 4 of the Code of Conduct.

263. The tribunal was not satisfied on the balance of probabilities that there was any obligation on the Respondent not to communicate with owners about outstanding debts which might require to be distributed amongst them (including those of the Applicant). On the contrary, there was an obligation on the Respondent to so inform owners, both in terms of the Code, during their period of appointment and as part of the termination procedures.

264. *(4) Failure to respond to owners and committee's requests for answers and additional information, in a timely manner and in line with their published response times included in their WSS.*

265. The Respondent conceded that there were a number of situations in which they had not responded to the Applicant in a timely manner in accordance with the timescales in the WSS. There was an admitted failure to comply with their WSS in this regard.

266. No such concession was made by the Respondent in relation to responses to committee's request for information. There was insufficient evidence on which the tribunal could make any finding about that matter.

267. *(5) Failure to consistently secure a minimum of three competing quotations from contractors for major work projects to be carried out, so owners could digest the information received and vote on the preferred option at the AGM.*

268. The tribunal had regard to both parties' evidence and submissions.

269. There tribunal found that the Respondent had discretion whether to instruct competing quotes before instructing works, in terms of the WSS.

270. The tribunal found that there was no obligation on the Respondent in terms of the WSS to secure a minimum of three competing quotations.

271. *(6) Failure to provide accurate invoicing for work carried out and slow to have any errors corrected on future invoices.*

272. The Respondent conceded that there had been some duplicate invoicing to homeowners on the Development but stated that this had been rectified on further invoices once the matters had been identified or drawn to their attention by homeowners.

273. The tribunal was satisfied on the balance of probabilities that there was a failure to accurately invoice homeowners for work carried out.

274. There was insufficient evidence to make a finding about whether the Respondent was slow to have errors corrected on future invoices.

275. *(7) Failure to expedite buildings insurance claims and have payments agreed, credited back on owners' invoices*. [part conceded, see above].

276. The parties' evidence and submissions overlapped to a large extent with those relating to the alleged breach of the Code of Conduct Section 3.1.

277. There was an admitted failure by the Respondent in respect of expedition of the garage door claim and to have payments agreed by the insurer and credited back to proprietors' invoices. The matter was still being followed up after the conclusion of the hearing in April 2021.

278. The Respondent accepted that there was an obligation on them to expedite such claims and to have payments agreed (if the claims were accepted) and credited back to owners' invoices. It appeared to be very unsatisfactory to the

tribunal that information in relation to these matters was difficult to obtain due to Ms Ramsay, the former property manager, leaving the Respondent's employment and the only record of claims numbers being locked in her email account. The Respondent took an inordinate amount of time to progress these matters, despite them being brought to the Respondent's attention at the start of proceedings. It was the final day of the hearing process and beyond before information was provided by Ms Bole.

279. The tribunal was satisfied on the balance of probabilities that there was a failure by the Respondent to expedite the common window repair claim to its conclusion and that there was a failure in the Respondent's duty to expedite building claims and have payments agreed and credited back to proprietors' invoices.

Property Factor Enforcement Order

280. The tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Notice in terms of Section 19(2) of the 2011 Act.

281. The tribunal considered that the outstanding issue of the two buildings insurance claims should be included in the PFEO to ensure that the Respondent, through its broker, progresses the insurance claims in respect of the garage door and window repair with former insurer Allianz to their conclusion and reports back to the new property factor and to the homeowner and the tribunal as to the outcome. (If any insurance payment is received from the insurer, it will be for the Respondent to remit that to the new factor to disburse funds to homeowners.)

282. The tribunal considered that the Applicant has been put to significant time and inconvenience in pursuing the Respondent for multiple alleged failures to comply with the Code of Conduct and alleged failures to comply with property factors' duties, some of which were conceded by the Respondent during the lengthy tribunal proceedings and others which were disputed and in relation to which the tribunal has found in favour of the Applicant. However, many of the Applicant's issues arose from his adopted position in respect of the Respondent's appointment in early 2014, which position the tribunal found was misconceived. In some sense he prolonged matters by continuing to dispute parts of invoices and refusing to pay them, which lead to debt collection procedures being commenced. The tribunal also took into account the fact that the Applicant never paid his outstanding debt for the Development and it was redistributed amongst the other owners when the Respondent ceased to factor. The tribunal did not therefore consider that it was appropriate to make a financial order in the sum sought by the Applicant.

283. On the other hand, the Respondent's position on certain matters was not entirely straightforward and there were a number of areas of poor practice identified. Some issues were conceded by the Respondent throughout the hearing, up to and including the last day of the hearing. These should have been properly investigated in advance so that a consistent defence could be presented. Other issues, such as the two insurance claims remained unresolved as at the conclusion of the hearing which was entirely unsatisfactory as the Respondents had been made aware of the issue some years previously.

284. In taking into account the length of the tribunal proceedings, the tribunal acknowledged that they have been prolonged as a result of the Covid-19 pandemic in the period from March to October 2020, so no account was taken of that period in considering the Applicant's time and inconvenience, given that that was no fault of the Respondent.

285. In all of the circumstances the tribunal proposes to order the Respondent to make a financial payment to the Applicant (in cleared funds) in the sum of £1000.00. It is a matter for the Applicant whether he considers that any part of that payment should be paid by him to the other homeowners who had his debt imposed upon them when the Respondent ceased to factor the Development.

286. The parties will be allowed to make representations on the proposed PFEO.

Appeals

287. 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.

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Ms. Susanne L M Tanner QC
Legal Member
19 July 2021