

# Housing and Property Chamber

## First-tier Tribunal for Scotland



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

Statement of reasons for decision in terms of the First-tier Tribunal for Scotland, Housing and Property Chamber ("the Tribunal") (Rules of Procedure) Amendment Regulations 2017 ("the 2017 Regulations")

**Chamber Ref: FTS/HPC/PF/18/1978**

**Re.: 28 Kelvin Court, Glasgow, G12 0AD (the property)**

#### **The Parties:-**

Charles Duncan, 28 Kelvin Court, Glasgow, G12 0AD (**"the homeowner"**) represented by Iain Bradley, Solicitor Advocate, Unit 530, 103 Byres Road, Glasgow, G11 5HW

Ross and Liddell Limited, 60 St Enoch Square, Glasgow, G1 4AW (**"the property factor"**) represented by Michael Ritchie, solicitor, Anderson Strathearn LLP, George House, 50 George Square, Glasgow, G2 1 EH

**The Tribunal members:** Simone Sweeney (legal chairing member) and Helen Barclay (ordinary housing member)

#### **Decision of the Tribunal Chamber**

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Tribunal cannot determine an application for a failure to comply with section 2.1 of the Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the Act.

The Tribunal determines that the property factor has not failed to comply with the property factor's duties.

#### **Background/Procedure**

1. By application dated 24<sup>th</sup> July 2018, the homeowner applied to the Tribunal for a determination on whether the property factor had breached section 2.4 of the Code

and the Property Factor's duties. This application was heard before a Tribunal.

Reference is made to the decision of the Tribunal of 4<sup>th</sup> March 2019. The decision of the Tribunal was appealed to the Upper Tribunal. The Upper Tribunal sent back to be heard by a differently constituted Tribunal in order to determine certain factual issues. Reference is made to the decision of the Upper Tribunal of 25<sup>th</sup> October 2019, reference UTS/AP/19/0017.

2. As directed by the Upper Tribunal, a differently constituted Tribunal heard parties at a case management conference on 20<sup>th</sup> December 2019. At that hearing, Mr Bradley appeared for the homeowner. Mr Richie appeared for the property factor. No evidence was heard.
3. At the hearing on 20<sup>th</sup> December 2019 Mr Bradley explained the background to the homeowner's complaint. He submitted that there had been two separate breaches of data protection legislation by the property factor. These had occurred on 9<sup>th</sup> October 2017 and in May 2018. On each occasion the property factor was alleged to have revealed personal information of the homeowner and other owners at the Kelvin Court development which breached the Data Protection Act 1998. The incidents had not come to light until some months after they had occurred. The property factor had reported each of the breaches to the Information Commissioner's Office ("ICO"). Investigations had been carried out by the ICO and no action had been taken against the property factor. This background was accepted by Mr Richie on behalf of the property factor.
4. Mr Bradley confirmed that the homeowner's complaint was now more focused than before. The Tribunal was asked to concentrate on the first of the breaches in October 2017 only and, specifically, how the property factor had reported this breach to the ICO. Mr Bradley alleged that the language adopted by the property factor in its report was false and misleading as it did not reflect the impact which the breach had caused homeowners. The homeowner was asking the Tribunal to determine whether this report to the ICO breached the Property Factor's duties and section 2.1 of the Code.

5. The Tribunal identified a new date for a hearing of evidence as 7<sup>th</sup> February 2020. Parties were directed to lodge, no later than 13<sup>th</sup> January 2020 a written note of their respective arguments and for lists of witnesses, productions and any joint minute of agreement to be lodged no later than 24<sup>th</sup> January 2020.

#### **Hearing of 7<sup>th</sup> February 2020**

6. At the hearing of 7<sup>th</sup> February 2020 Mr Bradley appeared for the homeowner. The homeowner was absent. Mr Richie appeared with Mr Cassidy who identified himself as a director of the property factor. Before the Tribunal were written notes of argument submitted by parties' representatives. No joint minute of agreement was produced.
7. The Tribunal chair advised that, in the absence of a joint minute of agreement, the Tribunal wished to establish which facts were agreed between the parties. Reference was made to the written note of argument produced by the property factor of 13<sup>th</sup> January 2020. The chair enquired if the homeowner accepted the factual background which had been narrated in the note. Mr Bradley accepted most of the factual background but had identified an error at page 2 of the note. The note referred to the chairman of the residents' committee in 2017 as Mr John Harrison. In fact the chairman of the residents' committee in 2017 was a Mr David Semple. Mr Harrison was another resident of the Kelvin court development. Mr Richie took no issue with the error being identified. With that one amendment, Mr Bradley then accepted the factual background as set out in the note of argument on behalf of the property factor, as being both accurate and sufficient for the Tribunal to determine the application. Both parties were in agreement that no further evidence was required other than the productions which had already been lodged. It was agreed that the application could proceed by submissions.

#### **Submissions on behalf of the Homeowner**

8. Mr Bradley began by providing further background to the data protection breach of October 2017. At that time the owners at Kelvin court were in discussions with the property factor about installing a new heating system. The owners were represented by a residents' committee called the Kelvin Court Proprietors Association ("KCPA").

Mr Harrison was living in Australia at the time. He had contacted the property factor to enquire how many people were contributing towards the heating system. On 9<sup>th</sup> October 2017 there occurred an email exchange between a director of the property factor (identified as Brian Fulton) and Mr Harrison. Attached to that email was an Excel spreadsheet. The spreadsheet contained, *inter alia*, a list of all the owners at the development, their addresses and information about their respective payment proposals to meet their share of the costs of the new heating system. A copy of the spreadsheet was within the papers before the Tribunal. Copied into the email with the attached spreadsheet were Mr Semple and an employee of the property factor, Mr Bill Frew. Mr Bradley submitted that attaching the spreadsheet, containing the personal information of owners amounted to a data protection breach. Although he accepted that the breach had been reported to the ICO, correctly, it was the homeowner's position that the property factor had failed to accurately convey to the ICO just the impact which the breach had caused owners. In failing to do so the report by the property factor to the ICO was false and misleading in Mr Bradley's submission.

9. Given the references being made to an impact on other owners at the development, the Tribunal chair enquired if Mr Bradley accepted that the application is brought by the homeowner only and that the homeowner has no locus to bring this application on behalf of all owners. Mr Bradley accepted that the Tribunal would consider the impact, if any, on the homeowner only.
10. With regard to the homeowner, Mr Bradley confirmed that the personal information which had been disclosed on the spreadsheet by the property factors was,  
*"29300281, Mr Charlie Duncan, 28 Kelvin Court, 2 instalments"*
11. Mr Bradley confirmed to the Tribunal that; (i) the number "29300281" was the homeowner's individual account number with the property factor; (ii) the name and address on the spreadsheet related to the homeowner; (ii) "2 instalments" accurately reflected how the homeowner intended to pay for his share of the heating costs.
12. The report to the ICO by the property factor was before the Tribunal. The date of the report was 23<sup>rd</sup> May 2018. The report had been completed on behalf of the property

factor by Mr Fulton. Mr Bradley drew to the attention of the Tribunal the information which the property factor had inserted at page 3 of the report under the heading, “*Potential consequences of the breach*”. The relevant section read,

*“...Little or no impact on the data subjects. Information passed on incorrectly is names, addresses, Ross and Liddell client account numbers and details of how clients intended to fund a repair project i.e. by 1 payment or 2 payments etc. No bank account information was included in the data.”*

13. Mr Bradley submitted that within this section of the form, the homeowner took issue with the suggestion that the data breach had caused, “*Little or no impact on the data subjects.*” The homeowner wished the Tribunal to determine that this phrase was false or misleading. Mr Bradley submitted that the homeowner was very angry and very upset to discover that his personal information had been exposed. Not only was the homeowner upset for himself but he was angry on behalf of the others whose details were contained on the spreadsheet. They too were upset at their personal information being exposed. When asked why the other owners had not brought their own complaints if they were aggrieved, Mr Bradley explained that many of the other owners were vulnerable and elderly and would have found the complaints process a complex one.
14. In addition to this phrase, Mr Bradley directed the Tribunal to page 8 of the report to the ICO. At this section of the form, the property factor had been required to identify the, “*Categories of personal data included in the breach.*” A list of 17 categories was provided and the author of the form invited to “*tick all that apply.*” Mr Fulton had placed a “X” at, “*Basic personal identifiers, eg name, contact details.*” Mr Bradley submitted that the property factor had been false and misleading in the way this section of the form had been completed. Mr Bradley was of the opinion that the reference to “*2 instalments*” in the spreadsheet was more accurately described as financial information. In that regard, when completing the form, Mr Fulton ought to have ticked the category, “*Economic and financial data, eg credit card numbers, bank details.*”

15. Mr Bradley submitted that the property factor ought to have contacted all the owners at the time the data breach was identified and made enquiries about how the breach had impacted on them individually. Mr Bradley described this as an "*impact assessment.*" Had they undertaken an impact assessment on the homeowner, Mr Bradley submitted that the property factor would have found, "*one very angry man.*"

#### **Homeowner's response to the property factor's preliminary points**

16. It was put to Mr Bradley that the property factor had raised two preliminary legal points in its written submissions to which the Chair invited Mr Bradley's responses.

17. Firstly, it was submitted by the property factor that the homeowner had failed to give notice that his complaint was a breach of section 2.1 of the Code. In the absence of notice, section 17(3) of the Act prevents an application being made to the Tribunal unless the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out his property factor's duties.

18. Mr Bradley responded stating that he was satisfied that the property factor was aware from the outset of the application to the Tribunal that the homeowner was arguing that the report to the ICO was false or misleading. He insisted that his argument that this amounted to a breach of the Property Factor's duties had been argued at earlier hearings by both parties.

19. Secondly, the property factor argued that the data protection issue, reported to the ICO, did not fall within the duties as defined by section 17(5) of the Act. Section 17 (5) provides,

*"In this Act, property factors duties means in relation to homeowners-(a) Duties in relation to the management of the common parts of land owned by the homeowner."*

The property factor submitted that the duty breached was a data protection duty. It was not a duty in relation to the management of the common parts of land owned by the homeowner. Therefore the Tribunal does not have jurisdiction to deal with a breach of this duty.

20. In response, Mr Bradley described the idea that the data protection breach did not fall within the property factor's duties as, "*nonsense.*" Mr Bradley submitted that the property factor's personnel only recovered the information to enable them to perform their property factor's duties.
21. The Tribunal's housing member enquired of Mr Bradley what the property factor could have done to deal with the upset and anger which the homeowner was submitted to have experienced following the breach. Mr Bradley suggested that the property factor could have contacted the homeowner and made enquiries about how events had impacted upon him personally. The property factor should have submitted individual reports to the ICO on behalf of every individual whose data had been exposed. Mr Bradley submitted that, in doing so, the property factor could have accurately reflected the individual impact on each homeowner arising from the breach. Had this occurred and the property factor had provided the ICO with an accurate picture of the impact on him then the homeowner may not have brought this complaint. Mr Bradley accepted that the homeowner had received a written apology from the property factor. Mr Bradley accepted that the report was investigated by the ICO and that no action taken against the property factor by the ICO.

#### **Submissions for the property factor**

22. In response to the submissions of the homeowner, Mr Richie, confirmed that he was adopting the written submissions lodged on 13<sup>th</sup> January 2020.
23. Mr Ritchie began his submissions by reference to his two preliminary points. In respect that the property factor had not received notice of the homeowner's complaint including a breach of section 2.1 of the Code, Mr Ritchie began by referring to the homeowner's application of 24<sup>th</sup> July 2018. The application specified that it was section 2.4 of the Code which the homeowner alleged to have been breached. There was no reference to section 2.1. The Tribunal Chair referred to previous procedure and highlighted the content of the property factor's written submissions which answered the alleged breach of section 2.1. The Chair suggested that the property factor had received fair notice in the course of this application that

the homeowner alleged that the content of the report to the ICO was false or misleading.

24. Whilst he did not deny that the property factor had knowledge that section 2.1 was part of the homeowner's complaint, Mr Ritchie submitted that he did not have to demonstrate any prejudice to the property factor. Rather the Act, at section 17 (3) (b) provides that an application to the Tribunal for determination on whether the property factor has failed to comply with Code cannot be made unless,

*(b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve the homeowner's concerns.*

Mr Ritchie submitted that the original application failed to include any reference to section 2.1 of the code. Neither had the homeowner expressed this complaint in writing to the property factor. Therefore the Tribunal was prevented from making any determination on this part of the homeowner's complaint.

25. In the event that the Tribunal was to allow the homeowner's complaint to include section 2.1 of the Code then it was denied by the property factor that any of the information on the report to the ICO of 23<sup>rd</sup> May 2018 was false or misleading.

26. In relation to the property factor's argument that the data protection issue, reported to the ICO, did not fall within the duties as defined by section 17(5) of the Act, Mr Ritchie explained that he had adopted that line of argument simply because it was the view of the original Tribunal which had heard the application. Mr Ritchie withdrew the argument and requested that the Tribunal make no determination on this point.

27. Finally, Mr Ritchie argued that the Property Factor's duties in terms of the Act are separate and distinct from the duties set out in Code. Mr Richie referred to section 17 (1) of the Act which provides-

*A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed—*

*(a)to carry out the property factor's duties,*

*(b)to ensure compliance with the property factor code of conduct as required by section 14(5) (the "section 14 duty").*

28. Mr Richie argued that, by distinguishing between the property factor's duties and the Code, the intention of the Act was for the duties to be considered separate and distinct from each other.
29. The property factor disputed any breach of the Code or the Property Factor's duties. The property factor did not deny the breach. As soon as it was identified it was reported to the ICO. Mr Richie emphasized that the personal information released was the homeowner's name, address, account number and his intention to pay for the works in 2 instalments.
30. Referring to the ICO report of 23<sup>rd</sup> May 2018, Mr Richie highlighted that the form requested that the property factor describe "*potential*" consequences of the breach, only. There was no requirement to describe *exact* consequences. Mr Richie submitted that the property factor has a duty to comply with Data Protection legislation and a duty to report any breach to the ICO. Mr Richie explained that the property factor had met these duties and had reported matters diligently and honestly.
31. One of the recipients of the email was Mr Frew, an employee of the property factor and someone who would have had access to the information in any event. Therefore the information had been disclosed with two people, only, who ought not to have received it. Furthermore, disclosure of the information to an employee could not be considered a data protection breach.
32. Mr Richie rejected any suggestion from the homeowner that there was a duty on the property factor to undertake an impact assessment following the breach. Mr Richie claimed that this may be best practice but there is no authority to suggest that there was any responsibility on the property factor to have undertaken such investigations. He argued that the homeowner had failed to identify any duty which had been breached. A duty can arise only from contract or statute and until that duty is established then it cannot be held that there has been any breach of duty. Mr Richie denied that the failure to carry out an impact assessment was a breach of the Property Factor's duties.

33. In conclusion, Mr Ritchie asked the Tribunal to refrain from issuing a Property Factor's Enforcement Order ("PFEO") in the event that the homeowner's complaint is upheld. In Mr Ritchie's submission, the matter is now historical, the property factor no longer manages the property and a written apology has already been issued to the homeowner.

#### **Response by the Homeowner to the submissions on behalf of the Property Factor**

34. Mr Bradley denied having suggested that there was a specific duty on the property factor to carry out an impact assessment. His position is that the duty to satisfy the code of conduct comes within the property factor's duties and they must be read together.

#### **Findings in fact**

35. That the property factor managed the property in October 2017.
36. That, in October 2017, the property factor breached data protection legislation by disclosing the homeowner's personal information
37. That the personal information was disclosed in an email from the property factor's Mr Fulton to Mr Harrison into which Mr Semple and Mr Frew were copied.
38. That the information disclosed was the homeowner's name, address, account number and by how many instalments the homeowner intended to pay for his share of heating costs.
39. That this information was neither false nor misleading.
40. That the homeowner was upset and angry at the information being disclosed.
41. That the property factor reported the breach to the ICO on 23<sup>rd</sup> May 2018.
42. That the report was completed on a standard pro forma document issued by the ICO.
43. That the document required the property factor to report, "*potential consequences of the breach.*"
44. That the property factor reported the potential consequences as having had "*little or no impact on the data subjects.*"

45. That the property factor's description of the potential consequences as having had, "*little or no impact on the data subjects*" was neither false nor misleading.
46. That the homeowner's application of 24<sup>th</sup> July 2018 contained no reference to an alleged failure to comply with section 2.1 of the Code.
47. That the homeowner's complaint of a failure to comply with section 2.1 of the Code was set out in the homeowner's written submission of 12<sup>th</sup> January 2020.
48. That the property factor received intimation of the homeowner's complaint of a failure to comply with section 2.1 of the Code on or around 12<sup>th</sup> January 2020..
49. That the background to the complaint of a failure to comply with section 2.1 of the Code was based on the description to the ICO on 23<sup>rd</sup> May 2018 of the consequences on the homeowner from the data protection breach.
50. That the application of 24<sup>th</sup> July 2018 contained a complaint relating to a failure to carry out the Property Factor's duties.
51. That the application of 24<sup>th</sup> July 2018 specified a breach of Data Protection legislation as an alleged failure to carry out the Property Factor's duties.
52. That the homeowner's complaint that the property factor's description to the ICO was false and misleading was the subject of discussion at the hearing before the original Tribunal on 15<sup>th</sup> February 2019.
53. That, paragraph 22 of the original Tribunal's decision of 4<sup>th</sup> March 2019 states,  
*"Homeowner's Agent explained to the tribunal that the on (sic) each of these occasions the Factor had self-referred to the Information Commissioner's Office ("the ICO") but on both occasions had understated the extent and effect of the breach."*
54. That, paragraph 23 of the original Tribunal's decision of 4<sup>th</sup> March 2019 states,  
*"Mr Fulton of the Factor and the Factor's Agent agreed that the data breaches had occurred and had been self-referred but disputed that there had been under reporting. The Factor's Agent submitted that the matter had been dealt with by the ICO and so was not a matter for the tribunal."*

55. That paragraphs 22 and 23 of the Tribunal's decision of 4<sup>th</sup> March 2019 set out the parties' respective arguments on the description to the ICO of the impact of the breach on the homeowner.
56. That within the written submissions of 13<sup>th</sup> January 2020 the property factor responded to the allegation that the description to the ICO of the potential consequences of the breach was false and misleading.
57. That the property factor had fair notice of the homeowner's allegation that the description to the ICO of the potential consequences of the breach was false and misleading.
58. That the property factor had fair notice that the homeowner's complaint related to a failure to comply with the Property Factor's duties.
59. That section 17 (3) of the Act provides that no application may be made to the Tribunal unless (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and (b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.
60. That, prior to 12<sup>th</sup> January 2020, the property factor had received notification in writing that the homeowner's complaint related to a failure to comply with section 2.1 of the Code.
61. That, prior to 12<sup>th</sup> January 2020, the property factor did not refuse to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern in respect of section 2.1 of the code.

#### **Reasons for decision**

##### **Section 2.1 of the Code**

62. The homeowner invites the Tribunal to make a determination on whether the property factor has failed to comply with section 2.1 of the code. The basis for this allegation is that when completing a report to the ICO on 23<sup>rd</sup> May 2018 the property factor described the potential consequences of a data protection breach as having had "*little or no impact*" on the homeowner. The homeowner claims that the breach

caused him to feel angry and upset. He submits that the description, “*little or no impact*” was false or misleading as it does not accurately reflect how the breach impacted on him.

63. The property factor submits that (i) there has been no fair notice of the section 2.1 complaint (ii) section 17(3) of the Act prevents the Tribunal hearing the complaint and (iii) there has been no breach of section 2.1 in any event.
64. The homeowner’s application to the Tribunal of 24<sup>th</sup> July 2018 specified the homeowner’s complaint as a failure to comply with section 2.4 of the Code and a failure to comply with the property factor’s duties. The application specified that part of the complaint arose from the breach of data protection obligations. The breach has always been admitted by the property factor. The property factor has provided the homeowner with an apology for the breach. The property factor has knowledge that the breach and the subsequent report to the ICO has continued to present an issue for the homeowner resulting in his application of 24<sup>th</sup> July 2018.
65. At a hearing of evidence before the original Tribunal on 15<sup>th</sup> February 2019, both parties addressed the Tribunal the homeowner’s complaint of a failure to comply with the property factor’s duties in respect of two separate breaches of the General Data Protection Regulations and the Data Protection Act 2018. In its decision of 4<sup>th</sup> March 2019, the Tribunal records,

*“Homeowner’s Agent explained to the tribunal that the (sic) on each of these occasions the Factor had self-referred to the Information Commissioner’s Office (“the ICO”) but on both occasions had understated the extent and effect of the breach.”*

At the following paragraph, the Tribunal records,

*“Mr Fulton of the Factor and the Factor’s Agent agreed that the data breaches had occurred and had been self-referred but disputed that there had been under reporting. The Factor’s Agent submitted that the matter had been dealt with by the ICO and so was not a matter for the tribunal.”*

66. Further, in his written note of argument of 12<sup>th</sup> January 2020, the homeowner states,

*“In categorising the impact... the Respondents asserted wrongly (sic) “Little or no impact on data subjects”. That assessment was wholly subjective and self-serving ...No approach had been made to any of the affected parties to assess the impact of the data breach...the sanguine terms of the ICO self-referral were not disclosed to the Respondent ...until after the ICO deliberated upon the report...the circumstances of the report were made known in December 2018.”*

67. In the written note of argument of 13<sup>th</sup> January 2020, the property factor addressed the section 2.1 complaint in the following terms,

*"...in the report to the ICO the Respondents were asked to describe the possible impact on data subjects...and to state if there had been any actual harm to the subjects. The Respondents response to this is as follows:- Little or no impact on the data subjects. Information passed on incorrectly is names, addresses, Ross & Liddell client account numbers and details of how clients intended to fund a repair project i.e. by 1 payment or 2 payments. No bank account information was included in the data."...the ICO determined that no further action on their part was necessary. The reasons given were as follows:-*

- *The incident affected a relatively low number of people.*
- *The data appears to have been limited to basic personal identifiers.*
- *You believe that the individuals affected are unlikely to be at risk as a result of this breach.*
- *You have notified the affected individuals, so that they can mitigate any risk as a result of this breach.*
- *You have notified the affected individuals, so that they can mitigate any risk they feel present.*
- *This breach appears to have been caused in part by human error."*

68. The Tribunal accepts that the section 2.1 complaint was only introduced explicitly in the homeowner's submissions of 12<sup>th</sup> January 2020. Section 17 (3) of the Act prevents a homeowner bringing an application before the Tribunal unless

*(a)the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and  
(b)the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.*

69. There is no evidence before the Tribunal that the property factor had received notification of a specific section 2.1 complaint until the homeowner produced his written submissions on 12<sup>th</sup> January 2020. There is no evidence before the Tribunal that the property factor had refused or unreasonably delayed to resolve a section 2.1 complaint. For these reasons the Tribunal refuses to allow the homeowner to introduce a complaint that the property factor has failed to comply with section 2.1 of the Code at this stage.

70. However, the background to the matter which gives rise to the homeowner complaining that the property factor has failed to comply with section 2.1 of the Code is within the knowledge of the property factor. It has been within the property factor's knowledge since at least 15<sup>th</sup> February 2019 when the first Tribunal heard parties' respective submissions on the matter. The property factor has had knowledge that the homeowner claims that the property factor has failed to comply with the property factor's duties since the application was lodged in July 2018. They concede same in the written submissions of 13<sup>th</sup> January 2020,

*"The Applicant's only complaint in relation to data protection was that the Respondents had breached their Property Factor's duties."*

Moreover, within those written submissions of 13<sup>th</sup> January 2020, the property factor not only confirms knowledge of the homeowner's complaint under the property factor's duties but addresses same denying any failure to comply.

71. The property factor has withdrawn the argument that a data protection breach does not fall within the property factor's duties as defined at section 17 (5) of the Act. The Tribunal is satisfied that the property factor has a duty in terms of the property factor's duties as defined at section 17 (5) of the Act not to provide information which is false or misleading. The Tribunal allows this part of the homeowner's complaint to be considered under the property factor's duties therefore.

### **Breach of the property factor's duties**

72. The homeowner accepts that the information which was disclosed was his name, address, account number and his intention to pay for the heating costs in 2 instalments. The information was disclosed to three people, one of which was an employee of the property factor and would have had access to this information in the exercise of his duties. The property factor was asked of the "*potential*" consequences of the breach. They described the consequences as having had, "*little or no impact*" on the homeowner on the basis that no bank account information was disclosed. Having investigated matters the ICO was satisfied that no further action was necessary. The homeowner submits that the property factor ought to have assessed the impact of the breach on him. Had this been carried out the property factor would have identified that this breach made the homeowner angry and upset. The Tribunal accept that the disclosure of personal information would have made the homeowner angry and upset. However there is no evidence of any financial or physical risk to the homeowner from the breach. The Tribunal is satisfied that even if the property factor had identified that the breach caused the homeowner to feel angry and upset, the description that this caused "*little or no impact*" remains an accurate one. Further, the Tribunal is not satisfied that the description of what was disclosed as being "*basic*

*personal identifiers eg name , contact details” as opposed to “economic and financial data, eg credit card numbers”* was false or misleading. There was no meaningful financial information disclosed such as bank account or credit card numbers. In all the circumstances, in respect of the description to the ICO of the impact of the data breach on the homeowner, the

Tribunal finds no breach of the property factor’s duties.

#### **Property factor’s duties separate and distinct from duties under Code**

73. The property factor submits that the property factor’s duties are separate and distinct from the duties incumbent upon the property factor under the Code. Reference is made to the fact that these are set out separately at section 17(1) of the Act
74. The Tribunal rejects the proposition advanced by the property factor that the code and the property factor’s duties are separate and distinct obligations. It is clear that the definition of the property factor’s duties in the Act is deliberately wide. It is intended to cover all obligations owed by a property factor to a homeowner in the performance of their duties as property factor.
75. The code sets out certain minimum standards of practice in relation to how certain specific duties of the property factor must be carried out. In that respect there is a clear and obvious overlap between the two.

#### **Decision**

76. The Tribunal determines that the homeowner’s application under section 2.1 of the Code cannot be considered. However the matters giving rise to that complaint can be considered under the property factor’s duties. For the reasons set out, the Tribunal determines that the property factor has not failed to comply with the property factor’s duties. There is no requirement for any proposed PFEO in the circumstances.

#### **Appeals**

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

**Simone Sweeney, legal chair, 20<sup>th</sup> February 2020, Glasgow**