

Housing and Property Chamber

First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016

Chamber Ref: FTS-HPC-PF-17-0108

Re: 30 Drumsmittal Road, North Kessock, Inverness, IV1 3JU

The Parties:-

Mr Emrys Jones, residing at 30 Drumsmittal Road, North Kessock, Inverness, IV1 3JU ("the Homeowner")

Allied Souter & Jaffrey, having a place of business at Lyle House, Fairways Business Park, Castle Heather, Inverness, IV2 6AA ("the Factor")

Tribunal Members

Helen Forbes (Legal Member)

Elizabeth Dickson (Ordinary Member)

Decision

The Tribunal determined that the Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Sections 1 and 4.4 of the Property Factor Code of Conduct ("the Code").

The decision is unanimous.

Background

1. By application received on 21st March 2017 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Factor has failed to comply with Sections 1, 3, 4.4, 4.6 and 4.7 of the Code. The homeowner also alleges that the Factor has failed to carry out the Property Factor's duties. Details of the alleged failures were outlined in the Homeowner's application and associated documents comprising letters and emails to and from the Factor, an extract from the Homeowner's title deeds, details of a complaint raised against the Factor, the Factor's complaints procedure and credit

control procedure, a copy of the Approved Service Charge Budget for 2016 to 2017 and the Certificate of Income and Expenditure for 2015 to 2016 for the Drumsmittal Road development. The failures outlined by the Homeowner comprised:

- (a) No Written Statement of Services had been issued at any time during the Homeowner's residence at Drumsmittal Road. The Homeowner had requested this document by letter dated 19th February 2017.
- (b) The Factor had not shown clarity and transparency in all accounting procedures. The Homeowner had requested information by letter and email in this regard from 11th February 2016 onwards. The Homeowner remained unsatisfied by the format of, and information contained in, the annual Certificate of Income and Expenditure provided by the Factor.
- (c) No clear statement had been provided showing how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations. The Homeowner had requested information by letter and email in this regard.
- (d) The Homeowner had not been kept informed of any debt recovery problems of other homeowners which could have implications for him. The Homeowner had requested information by letter and email in this regard.
- (e) The Factor had not demonstrated that they had 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. The Homeowner had requested information by letter and email in this regard.

The Homeowner also applied for a determination that the Factor had failed to comply with its duties under section 14 of the Act in respect of a failure to enforce title conditions contained in a Deed of Conditions pertaining to the development at Drumsmittal Road. The Homeowner had raised this as a concern by letter dated 28th December 2016, and on several occasions thereafter.

2. By Minute of Decision dated 28th March 2017 a Convenor of the Housing and Property Chamber referred the Application to a Tribunal.
3. The Tribunal issued a Direction to parties on 4th May 2017 in the following terms:
 - The factors are required to produce a copy of their Written Statement of Services as provided for by Section 1 of the Code of Conduct for Property Factors.
 - The factors are required to produce a copy of the Service Agreement between themselves and the Drumsmittal Road Owners Association or any such document or contract that shows how the factors are appointed and the extent of the factors' power and authority in relation to the development at Drumsmittal Road.
 - The factors are required to produce a copy of the minute of the Annual General Meeting held on 19th January 2017 as mentioned in their letter to the applicant dated 7th February 2017.

- The factors are required to produce a copy of the constitution of the Drumsmittal Road Owners Association, as mentioned in their email to the applicant dated 10th January 2017.
- The factors are required to produce a copy of the Deed of Conditions referred to in their letter to the applicant dated 7th February 2017.
- The applicant is required to produce a copy of his title deed for the property at 30 Drumsmittal Road, North Kessock, Inverness, IV1 3JU.

The Homeowner complied with the Direction timeously. The Homeowner also lodged a paginated bundle of documents. The Factor provided some of the documents requested, but had to be reminded to provide the Written Statement of Services and the Deed of Conditions pertaining to the development at Drumsmittal Road, after the expiry of the period allowed in the Direction.

Hearing

4. A hearing took place at 10.00 on 30th May 2017 at the Spectrum Centre, Farraline Park, Inverness. The Homeowner was present. The Factor was represented at the hearing by Mr Richard Smith, Managing Director. Mr Smith was supported by Mr Derek Rudkin, Property Factor. Ms June Thomson, Assistant Property Factor, was in attendance as an observer.

Neither party called additional witnesses.

5. The Legal Member raised a preliminary point to ascertain whether all documents that outlined the extent of the Factor's powers and authority to act had been lodged. She referred to four documents, namely:

- (1) Factor's Written Statement of Services
- (2) Factor's Terms and Conditions for Property Factoring
- (3) Constitution of the Drumsmittal Road Residents Association
- (4) Deed of Conditions contained in a Land Register Title Sheet for a property at Drumsmittal Road, which had been redacted to remove the proprietor's details.

The Legal Member asked why the Factor's Terms and Conditions for Property Factoring referred to the Factors being appointed, or their appointment terminated, on the basis specified in the Deed of Conditions, when there was no such procedure contained in the Deed provided. The Homeowner had also stated in his Application that the Factor was not accepting his contractual responsibility. The Legal Member asked for the source of that contractual responsibility.

Mr Smith confirmed that the Deed of Conditions was exactly as set out in the Title Sheet before the Tribunal. He stated that the Factor had been appointed by Taylor Woodrow when the development was built in 2000. There was no further document at that time, other than the Deed of Conditions as provided to the Tribunal. The Drumsmittal Road Owners Association ("the Association") was formed at that time and

their Constitution adopted. The Homeowner stated that he believed the contractual responsibility came from the Title Conditions (Scotland) Act 2003.

Parties were satisfied that there was no further document in existence that outlined the extent of the Factor's powers and authority other than the four documents referred to by the Legal Member.

6. The Homeowner raised a preliminary issue in that he had not received all the documents referred to in the Direction. The Legal Member explained that, although the Direction had ordered five documents to be lodged by the Factor, at that stage it was not known which documents were in existence. Although all the documents had not been lodged timeously by the Factor, all the documents had been made available to the Tribunal and the parties, and the Homeowner was in receipt of all documents prior to the Hearing.
7. The Tribunal then dealt with each of the Homeowner's complaints in turn.

Evidence and Representations

Failure to comply with section 1 of the Code

Section 1 of the Code states: '*You must provide each homeowner with a written statement setting out, in a simple and transparent way the terms and service delivery standards of the arrangement in place between you and the homeowner*' and '*You must provide the written statement ... to existing homeowners within one year of initial registration as a property factor.*'

The Homeowner, Mr Jones, has been a resident of the development since 2001. He has never received a copy of a written statement of services from the Factor. He has spoken to other residents and none of those he spoke to had received a copy of the written statement of services. He requested a copy by letter dated 19th February 2017 and, in response, he received the Factor's Terms and Conditions for Property Factoring, which the Factor described as the written statement of services. He then received a copy of a document purporting to be the written statement of services after said document had been lodged by the Factor with the Tribunal. These were two different documents and the 'written statement of services' was undated and appeared to have been written specifically for the purposes of the Tribunal. It did not comply with the requirements of the legislation. He had brought the legislation to the attention of the Factor on several occasions.

Mr Smith said he was aware the Factor had not responded promptly, including the response to a complaint raised by the Homeowner. Mr Smith had been unwell and suffered a family bereavement. He is the designated person to respond to complaints and it would not be right for staff that had dealt with the issues complained about to deal with a complaint. There are only four people in the Inverness office. He said that they sent out the Terms and Conditions to the Homeowner after his request for the written statement of services. This was an error. He accepted the Tribunal had to chase up the written statement of services. He said the company made the documents available to all homeowners at the time

of their commencement as Factors. They had been given legal advice that they only had to issue these documents to new homeowners thereafter. He accepted that was incorrect, and the documents should have been reissued after the Code became effective in October 2012. He said that the written statement of services lodged only extended as far as the line that read 'AGM Room Hire'. The text thereafter had been added for the purposes of today's hearing, by way of representations.

Failure to comply with section 3 of the Code

8. The Homeowner said that he believes the Factor has failed to show clarity and transparency in accounting procedures, as required by section 3 of the Code. The Certificate of Income and Expenditure produced by the Factor is misleading. There is no reference to debtors and creditors. There is no reference to the account year in the receipts. There is no explanation of the charges for debt recovery. VAT is included and this should not be the case. When Mr Jones multiplies his annual factoring fee by the number of properties in the development, there is always a shortfall, but this is never explained. He has been asking for information concerning the debt owed for some time, but the Factor has refused to give him this information. He noted that the Factor had responded to his criticism of the annual statement previously by saying they were Factors and not accountants, but he believes they have a legal obligation to give the information that he has requested, namely a simple balance sheet comprising assets and liabilities, including debtors and creditors. The Homeowner believes the procedures within the Association are too lax. He wrote to the Factor on 7th August 2016 asking for more notice of the Association's AGM and suggesting topics for the agenda. He also asked for clarity of responsibilities regarding preparing and circulating information for the AGM. The letter had not been answered despite a reminder email in September. Eventually, he was informed of the AGM at short notice and was unable to attend. He believes the timing and location of the AGM prohibits many people from attending. No account is taken by the Factor of disabled homeowners that may wish to attend but cannot due to access issues. Responding to questions from the Tribunal about where the responsibility for arranging the AGM and issues such as the venue lay, and whether it lay with the Association rather than the Factor, he said that the AGM does not follow proper procedures. The committee are automatically re-appointed and there is no room for anyone else to be elected. He has concerns with the minutes and other matters that haven't been dealt with, such as changing the constitution, as the AGM does not take place when it should, in terms of the constitution. He had put himself forward for election but he was told there were no vacancies. He believes that fellow homeowners are unaware of their rights as they are not getting any information. Until he started looking into it, he was unaware of his rights and what was required of the Factor. He said that the VAT situation is a serious issue. Following questions by the Tribunal, he acknowledged that VAT had not formed part of his application nor had he ever asked the Factor for information in relation to VAT. He disputed that the Factor should only take instructions from the Association, saying there is nothing in the legislation to that effect.

Mr Smith said that the format in which the Factor produces the Certificate of Income and Expenditure is what is required of them by the Association. They have been doing this for 16 years and the Association has been satisfied with this. No one else has

complained to them. There is no requirement for audited accounts. They also produce a list of tenant balances but this is only provided to the committee of the Association. They comply with their financial requirements and fulfil their responsibility to the Homeowners by protecting the Homeowner funds in a separate account and providing a bank reconciliation to the Committee. They use a recognised automated system called RENT, and they use the same format of accounting for all the organisations to whom they provide factoring services. At the Annual General Meeting of the Association, questions can be asked by Homeowners. The Association is, effectively, the employer of the Factor. In answer to questions from the Tribunal, he said that the Factor did have a responsibility to individual homeowners, but it would prove very difficult to take instructions from 78 different owners, so instructions were taken from the Association. He pointed out that the Homeowner, Mr Jones, has only attended approximately four AGMs, since becoming a homeowner in the development, but he had a meeting with Mr Rudkin and Ms Thomson on 15th April 2016 when all Mr Jones' questions were answered and he was told the outstanding level of debt at that time. The Factor would ideally like to see more homeowners at the AGM. They have tried to make it more appealing by reducing the length of the meeting. Increased homeowner involvement enhances the running of the estate. Mr Smith said he appreciates the concerns of Mr Jones regarding bad debt. He said their problems are really with late payers rather than persistent bad debtors. Mr Smith said that they had no record in their files of a letter of 7th August 2016 from Mr Jones, however, he accepted that the letter had been referred to in subsequent correspondence and the Factor should have followed this up. However it would be difficult to take the preferences of all 78 homeowners into account in scheduling the AGM. The committee are running the AGM, and each year they stand for re-election. If no one comes forward, the office-bearers are reappointed. He pointed out that the appointment of the Factor can be terminated at the AGM; however, his firm has been reappointed each year. With regard to all the other letters received from Mr Jones, the Factor had responded within a reasonable timescale.

Section 4 – Debt Recovery – 4.4

9. The Code states: '*You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.*'

The Homeowner said that no such clear statement has been provided by the Factor, despite repeated written requests by him. It was stated in his Application that he had not been informed how many debts there are or the total amount of the debt, and he had not received an impact statement. He referred to his production 13 which was minutes of the AGM of the Association from 2003, where it mentions consideration of writing off bad debts. He felt that homeowners should not have to go to the AGM to get information. No one had told them that this information would only be available at the AGM.

Mr Smith responded that their credit control procedures are clear. There are only three late payers. He felt it would not be correct to issue detailed information to Mr Jones in this regard. Two homeowners had been sequestrated and allowed to stay in the property. Their debt had accumulated and it was felt it would be difficult to sue the

homeowners after sequestration. An inhibition was placed on the house by the Factor. The debt is slowly reducing. The third late payer's debt was less than £100. The Factor discussed the cost implications of these late payers with the Association in regard to these debts. There would only be an impact if the debts were written off and that is not their practice. There has not been a negative impact on any homeowner, and the charges to the individual homeowners have never been increased as a result of late payers or bad debts. There would have to be a substantial debt to affect the delivery of service. In answer to questions from the Tribunal as to whether these matters were set out in any documentation to comply with what is required by the Code, Mr Smith said that these matters are discussed at the AGM. There was discussion between the Tribunal members and parties as to whether the following statement in the document Terms and Conditions for Property Factors might comply with the requirement of the Code: '*In the event of the factoring charges payable by any proprietor remaining unpaid after demand for payment thereof has been issued, the Factor shall be entitled to sue for and recover the same in his own name on behalf of the remaining proprietors. Any unpaid factoring charges are a debt to the remaining proprietors. The Factor will take all reasonable steps on behalf of the remaining proprietors to recover all sums due.*' Mr Smith felt this covered the requirements of the Code and he accepted that the homeowners should have this information; however, the Association's committee had said that they wanted detailed information to be made available only to them. All homeowners get pre-AGM documents including the income and expenditure and budget information, and a copy of the minutes following the AGM.

A recurring theme in the Homeowner's complaint and submissions was a lack of clarity around who is responsible for the production of minutes of the AGM. Mr Smith was clear that it was the responsibility of the Association, however, Mr Jones felt that the Factor influenced the minutes by making notes on them for circulation to homeowners.

Section 4 – Debt Recovery – 4.6

10. The Code states: '*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).*'

The Homeowner stated in his application that he had not been informed of any debt recovery problems or for how long each debt had been accumulating. He had requested this information repeatedly from the Factor, with limited response. He said in submissions that he is certain that debts have been accumulating for years.

Mr Smith said the problems with debt were minimal, as he had outlined earlier. The debts were reducing; there had been no impact on other homeowners; and the debts were not written off. If there were, indeed, no implications for homeowners, he did not feel the Factor had to provide any more information than had been provided. He was unaware of debts being written off in 2003. Factoring charges had fallen at that time, so it did not suggest negative implications for the homeowners.

Section 4 – Debt Recovery – 4.7

11. The Code states: '*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.*'

The Homeowner said that he had not been given this information despite repeated requests for it. In the absence of any such information, he didn't know whether he had been charged because of the bad debts of others. He said that there is a list of charges called a debt recovery policy, supplemental to the Factor's credit control policy.

Mr Smith reiterated that reasonable steps had been taken as mentioned previously. He said that it would be difficult to give detailed information to all 78 homeowners and this would increase administration costs. In response to questions from the Tribunal he said that the Factor's credit control policy was available to the Association. It was not available on the Factor's website but can be given out if required.

Failure to carry out the Property Factor's duties

12. The Homeowner said that the Constitution of the Association (production number 10) states that the objects of the Association shall be to protect and maintain the amenity and environment of the development at Drumsmittal Road. A fundamental part of that is to uphold the terms of the Deed of Conditions that pertain to each property. The Deed of Conditions states: '*No power boats, marine craft, caravans, trailers, commercial vehicles or vehicles hereinafter referred to as 'excepted vehicles' other than private motor cars, motor cycles or cycles shall be parked or stored in the open on any plot except with the prior written consent of us or our foresaids which consent will be subject to conditions intended to protect the visual amenity and relate inter alia to the siting and covering of such excepted vehicles and which consent will not in any event permit any part of such excepted vehicles to be in front of the front wall of the dwellinghouse or to remain on the plot for a period of more than one year without interruption.*' Each owner agreed to the burdens contained in the title deed when they bought the property. There are problems in the development with people not complying with the title conditions. The Homeowner has written and emailed the Factor repeatedly, asking the Factor to enforce the conditions in the Deed of Conditions. The Factor has said that he would only take action 'in extreme circumstances'. The Homeowner referred to correspondence to this effect from the Factor dated 27th April 2017. This correspondence had not been lodged as a production. The Homeowner said he doesn't believe it is within the remit of the Factor to arbitrarily refuse a homeowner's request to enforce these conditions. The Title Conditions (Scotland) Act 2003 provides that the Property Factor must carry out its contractual duties in regard to such enforcement. In response to questions from the Tribunal, the Homeowner was unable to provide a reference to the particular section of the Act that sets this out. He does not believe that the committee of the Association should have the right to veto any action taken by the Factor in this regard. He was asked by the Tribunal whether he had the power to enforce the title conditions himself. He said this was possible, but this is the primary purpose of the contract of the Factor. The Factor should not pick and choose which conditions they choose to implement.

Homeowners have been let down by the Factor's refusal to enforce the title conditions. The Association has said it would prove too costly to instruct a solicitor in this regard. In response to questions from the Tribunal, he said that he believed the costs of legal action would be negligible. If the Factor took action against one homeowner in contravention of the title conditions, this would stop others from contravening in future. He said that the problem with parking of excepted vehicles and other breaches of the conditions varies from time to time, including the prohibition against carrying out a business from a property. He said that the Chairman of the Association was the prime offender, so it was difficult to have any confidence in the Association in regard to asking them to assist in enforcing the conditions. In response to questions from the Tribunal as to whether he had considered asking for an Extraordinary General Meeting, in terms of the Constitution, Mr Jones said that he didn't know the Constitution existed until recently. No information had been given out, so he didn't know what he could ask for.

Mr Smith said the Deed of Conditions was put in place to protect the visual amenity of the development. He said that the Factor took legal advice some years ago in regard to breaches of conditions and they were told to monitor the situation and make visits. They were informed that, if an excepted vehicle was moved, any legal action would fail. They were advised to continue to liaise with those breaching the conditions, to approach them and ask them to comply with the Deed of Conditions. The Factor makes regular and unannounced visits to the development. They note persistent breaches, and discuss these with the relevant homeowner. There have been four main breaches over the last five years. They are still liaising with one homeowner in this regard. They have not taken any legal action, based on the advice given, and the knowledge that similar cases have failed. The cost implications of losing such a case would be huge. There are anomalies between the layout of the properties, in terms of access, and the Lands Tribunal may take the view that some owners are discriminated against in terms of the Deed of Condition, and set them aside. Any costs of action would be set against the Association. It would not be worth taking legal action over a simple breach. In response to questions from the Tribunal as to whether they take instructions on breaches from individual owners or from the Association, he said they have to act reasonably in all circumstance. They have to act on behalf of all homeowners, but individual homeowners also have the right to take legal action against another homeowner who is in breach of the conditions. He believes the Factor would need the approval of all 78 homeowners before taking legal action. He does not believe they have the power or responsibility to take legal action on behalf of one homeowner. He said that many homeowners don't notice or care about the breaches. He appreciates that others do. The Factor is not turning a blind eye. There is only one caravan sited in breach of the conditions and it is not always there. The Factor continually takes action, knocking on doors and sending letters. It is also raised and discussed at each AGM. In response to questions from the Tribunal, he said that the Factor carries out the work in the same way in all 66 estates that they manage. The majority of estates are satisfied with the work carried out. The Factor charges £1200 per estate per year. Some homeowners have greater expectations than others as to what they expect from the Factor. He said that some of their procedures would be changing in view of the Application and what had been said at the hearing. The Factor is more than willing to work with Mr Jones and other homeowners.

In response, the Homeowner said that none of this information was supplied to him when he asked for it. It all comes back to communication. If the Factor communicated what was being done and when, the situation may be different. Those who couldn't attend AGMs might be satisfied if they were actually told what was happening. Mr Jones referred to the large number of letters he had written, but he accepted that he had not explicitly raised a breach of the Code in terms of communication. He would have preferred not to have had to raise the Application at all – he had not done so lightly.

Complaint against the content of the Written Statement of Services

13. Mr Jones had raised a complaint during the hearing about the content of the written statement of services and its non-compliance with the Code. The Tribunal adjourned at this stage to consider whether to hear more on this matter, considering that this had not formed part of the Application.

The Tribunal considered that the Homeowner was in a difficult position, as he was not provided with the written statement prior to lodging the Application, so he could not comment on its content. It was agreed that the Tribunal would take submissions in this regard.

The Homeowner pointed out that the written statement was not dated and it did not have details of how to end the arrangement, as required in section 1.F. The debt recovery policy was not clear. The accounting procedures were not satisfactory. There were issues with VAT. The Tribunal explained that the VAT issues had not been raised as part of the Application and would not be discussed further.

Mr Smith accepted that the written statement should have been issued in terms of the Code. He accepted that work was required in order to comply with the Code.

Findings in Fact

14. (i) The Homeowner has been the proprietor of the property at 30 Drumsmittal Road, North Kessock, Inverness since 2001.
- (ii) The Factor was appointed as property manager of the development of 78 houses at Drumsmittal Road, North Kessock, Inverness, by the developer, Taylor Woodrow Homes Limited, in 2000.
- (iii) Each property is subject to the terms of a Deed of Conditions executed by Taylor Woodrow Homes Limited dated Fourth January and recorded in the Division of the General Register of Sasines on Fourteenth April, 1989.
- (iv) The Factor is a registered Property Factor with registration number PF000470
- (v) The date of registration of the Property Factors was 24 September 2013

(v) The Association was set up with the objects of protecting and maintaining the amenity of the development and to uphold and renew and maintain in a neat and tidy condition, amenity ground, open spaces and off-street parking areas.

(vi) The Association holds an Annual General Meeting in January of each year, despite the terms of its constitution providing that such meeting should be held in October.

(vii) The Constitution of the Association gives the Council of the Association power to appoint a Managing Agent or Factor to administer the objects of the Association. The Factor, Allied Souter & Jaffrey, has, accordingly, been appointed by the Association each year since 2000.

(viii) An annual levy is collected from each homeowner by the Factor. An annual Certificate of Income and Expenditure is prepared by the Factor for the AGM of the Association, and circulated to each homeowner prior to the AGM.

(v) The Homeowner has raised various issues with the Factor concerning debt and accounting procedures, scheduling and documents of the AGM, and breaches of title conditions.

Determination and Reasons for Decision

15. The Tribunal took account of all the documentation provided by parties and to their oral submissions.
16. With regard to the alleged breach of Section 1 of the Code, the Tribunal found that the Factor had breached this section. The Factor had not provided a written statement of services to each homeowner after commencement of the Code. The Factor did not provide the written statement of services to the Homeowner following his letter of 19th February 2017. The Factor lodged a document purporting to be the written statement of services with the Tribunal following the Direction and subsequent prompting. The document lodged is wholly insufficient in terms of compliance with section 1.1a of the Code.
17. With regard to the alleged breach of Section 3 of the Code the Tribunal did not find that the Factor had breached the Code in terms of a lack of clarity and transparency in all accounting procedures. The Factor has provided a Statement of Income and Expenditure each year to the satisfaction of the Association. Details relating to debt have been disclosed and discussed at the AGM of the Association. However, the Tribunal members observed that, had the Homeowner alleged a failure in terms of Section 2.5 of the Code, the Tribunal might have been minded to make a finding of non-compliance with the Code by the Factor. Although most of the Homeowner's letters and emails were answered, there was a failure to answer a letter and email in August and September 2016. Furthermore, although the Tribunal accepted that there was information that could not properly be passed to Mr Jones, the Homeowner, had the Factor supplied more information in relation to some of the Homeowner's concerns, the Application before the Tribunal might have been avoided.

18. With regard to the alleged breach of Section 4.4 of the Code, the Tribunal found that the Factor had breached this section. Although some information had been provided in the Terms and Conditions, it did not fulfil the requirements of the Code by providing homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.
19. With regard to the alleged breach of Section 4.6 of the Code, the Tribunal found that the Factor had not breached the Code in this respect. Information in relation to debts had been made available and there had been no specific debt recovery problems with implications for the other homeowners.
20. With regard to the alleged breach of Section 4.7 of the Code, the Tribunal found that the Factor was able to demonstrate that they had taken reasonable steps to recover unpaid charges from homeowners who had not paid their share, and that remaining homeowners had not been charged as a result of any unpaid charges. Accordingly, the Factor had not breached the Code in this respect.
21. With regard to the alleged failure to carry out the Property Factor's duties created by section 17 of the Property Factors (Scotland) Act 2011, the Tribunal did not find that the Factor had failed in carrying out their duties. The Factor was taking reasonable steps to try to enforce the title conditions. The Factor had taken legal advice, and considered the costs and disadvantages of taking legal action. The Factor discussed this issue regularly with the Association, including at each AGM. The Factor could not reasonably be expected to take enforcement action in this regard on the demand of one homeowner, and the Tribunal was not provided with any compelling reason why the Factor might be expected so to do. The Tribunal members observed that this was another area where better communication by the Factor to the Homeowner might have helped to avoid the necessity for an application. There appeared no satisfactory reason for the Factor failing to assure the Homeowner that appropriate action was being taken. There would have been no breach of data protection legislation in letting the Homeowner know that unscheduled inspections and visits were taking place, that letters were being sent out, and that consideration had been given to all aspects of the situation. Again, however, the Homeowner had not included a breach of Section 2 in his Application.
22. The Tribunal observed an apparent lack of clarity in the boundaries between the Association and the Factor. It was not clear who was responsible for the running of the Association and the scheduling and preparation for the AGM. It seemed that the Homeowner had legitimate concerns about the Association and procedures carried out at the AGM, and understandable confusion with regard to the relationship between the Factor and the Association. It is not within the remit of the Tribunal to make any findings or orders in relation to the way in which the Association carries out its role; however, better communication, clarity within the Property Factor's Written Statement of Services, and more openness and transparency in this regard may help to avoid future problems. As previously stated, a recurring theme in the Homeowner's complaint and submissions was a lack of clarity around who is responsible for the production of minutes of the AGM. Mr Smith was clear that it was the responsibility of the Association, however, Mr Jones felt that the Factor influenced the minutes by making notes on them for circulation to homeowners. The Tribunal felt the responsibility for the reliability of the minutes should be made clear to all homeowners.

If they are not the Property Factors minutes, the Factor should not rely on them to distribute information he has a duty to provide.

Proposed Property Factor Enforcement Order (PFEO)

23. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO.
24. The Tribunal proposes to make a PFEO requiring the Factor to draft and provide to each homeowner and the Association within a period of six weeks (a) a written statement of services taking cognisance of the requirements of the Code; and (b) a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations, in terms of Section 4.4 of the Code. The Property Factor is to inform the Tribunal when this has been completed.
25. The Tribunal found that Mr Jones, the Homeowner, had been subjected to strain and anxiety over the lack of compliance with Sections 1 and 4.4 of the Code, and his repeated attempts to gain clarity in this regard. The Tribunal determined that the Factor should pay to Mr Jones, from their own funds, the sum of £100.

Right of Appeal

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

H Forbes

Chairperson

30th May 2017

Date

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Proposal regarding the Making of a Property Factor Enforcement Order:
Property Factors (Scotland) Act 2011 Section 19(2)**

Chamber Ref: FTS-HPC-PF-17-0108

Re: 30 Drumsmittal Road, North Kessock, Inverness, IV1 3JU ("The Property")

The Parties:-

Mr Emrys Jones, residing at 30 Drumsmittal Road, North Kessock, Inverness, IV1 3JU ("the Homeowner")

Allied Souter & Jaffrey, having a place of business at Lyle House, Fairways Business Park, Castle Heather, Inverness, IV2 6AA (represented by their agent Mr Richard Smith, Managing Director) ("the Respondent")

Tribunal Members:

**Helen Forbes (Legal Member)
Elizabeth Dickson (Ordinary Member)**

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFOE"):

"Within six weeks of the date of the communication of this correspondence to the Respondent, the Respondent must:

1. Pay to the Applicant the sum of £100.
2. Draft and provide to each homeowner and the Association a written statement of services taking cognisance of the requirements of the Code.
3. Draft and provide to each homeowner and the Association a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations, in terms of Section 4.4 of the Code.
4. Confirm in writing to the office of the Tribunal that the above steps have been carried out."

Section 19 of the 2011 Act provides as follows:

"(2)In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3)If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), 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, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

H Forbes

Chairperson

30th May 2017

Date