

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision and Statement of Reasons under Section 19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/17/0285/0286-0287

**65 Greenrigg Road, Cumbernauld G67 2QB
169 Greenrigg Road, Cumbernauld G67 2QB
223 Greenrigg Road, Cumbernauld G67 2QB
("the Properties")**

The Parties:-

Derek Nicholson and Gary Nicholson, 3 Clairmont Gardens, Glasgow G3 7LW ("Homeowner")

Apex Property Factor Limited, 46 Eastside, Kirkintilloch, Glasgow G66 1QH ("Factor")

Tribunal Members:

**Joan Devine – Chairing and Legal Member
Sara Hesp – Ordinary Member**

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Factor has failed to comply with the Code of Conduct for Property Factors as required by section 14 of the 2011 Act. The Tribunal unanimously determined that the Factor has failed to comply with its factor duties in terms of section 17(5) of the 2011 Act. In all the circumstances the Tribunal proposes to make a Property Factor Enforcement Order ("PFEO"). The terms of the proposed PFEO are set out in the attached section 19(2) Notice.

The Tribunal make the following findings in fact:

1. 65 Greenrigg Road, Cumbernauld is a flat within a development of 75 dwellinghouses which make up 1-135 Greenrigg Road, Cumbernauld under title number DMB23242. 169 and 223 Greenrigg Road, Cumbernauld are flats within a development of 68 dwellinghouses which make up 137-259 Greenrigg Road, Cumbernauld under title number DMB24479 (collectively referred to as the "Development").
2. The title to 65 Greenrigg Road, Cumbernauld is subject to a deed of conditions recorded in the General Register of Sasines on 2 July 1986. The title to 169 and 223 Greenrigg Road, Cumbernauld is subject to a deed of

- conditions recorded in the General Register of Sasines on 25 June 1987 (collectively referred to as the "Deed of Conditions").
3. There is in existence a Resident's Association as provided for in the Deed of Conditions.
 4. The Factor has performed the role of the property factor of the Development since 2015.
 5. The Factor was not appointed in compliance with the procedures set out in the Deed of Conditions.
 6. The Factor did not issue to the Homeowner a Written Statement of Services.
 7. The Factor did not respond to requests from the Homeowner to provide a breakdown of charges made and supporting documentation.

Introduction

1. In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"
2. Following on from the Homeowner's application to the Tribunal which comprised documents received in the period 23 July to 10 October 2017 ("the Application"), the Convener, with delegated powers under section 96 of the Housing (Scotland) Act 2014, referred the Application to the Tribunal on 17 October 2017. The Tribunal had available to it, and gave consideration to, the Application, Inventory of Productions provided by the Homeowner, productions lodged by the Factor at the Hearing on 14 December 2017, the oral submissions made by both parties at the Hearing, representations from the Factor enclosed with their letter dated 12 December 2017 and comment thereon from the Homeowner dated 16 January 2018.

Hearing

3. A hearing took place at Wellington House, 134-136 Wellington Street, Glasgow G2 2XL on 14 December 2017. The Homeowner attended on their own behalf. The Factor was represented by Neil Cowan, Solicitor and Christine Davidson-Bakhshaee of the Factor. James Collier attended as Supporter to the Homeowner.

Basis of the Application

4. The Homeowner complained of non-compliance with sections 1A, 3, 4 and 6 of the Code. The Homeowner also considered that the Factor had failed to comply with the property factor's duties.

Summary of Submissions

Preliminary Issues

5. The Homeowner asked if James Collier could attend the Hearing as an observer. The Tribunal determined that Mr Collier could attend the Hearing as Supporter in terms of section 11 of the Rules. The Tribunal explained to the parties the role of a Supporter.
6. The Tribunal noted that the Application made in respect of each of the 3 properties were in the same terms. The Tribunal therefore determined to deal with the Applications together in terms of section 12 of the Rules.
7. The Tribunal noted that the deed of conditions applying to 65 Greenrigg Road was in the same terms as the deed of conditions applying to 169 and 223 Greenrigg Road. Both the Homeowner and the Factor agreed that was the case.
8. On 20 December 2017 it was brought to the attention of the Tribunal Members that a written response had been provided by the Factor by email dated 12 December 2017 and timed at 17.24. A copy of this was provided to the Homeowner and they were invited to comment thereon which they did by letter dated 16 January 2018.

The Code

10. **Section 1A: Written Statement of Services, Authority to Act**

"The Written Statement should set out:

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;"*

11. The Homeowner produced a copy of a decision of the Tribunal dated 5 July 2017 which related to an application by Ian McNaught to the Tribunal regarding a property at 1 Millcroft Road, Cumbernauld, Glasgow. The Homeowner said that the decision regarding the application of Mr McNaught confirmed that the Factor had not been properly appointed. The Homeowner explained that Greenrigg Road and Millcroft Road are adjacent to one another. The Homeowner did sign a mandate stating that they were in favour of the Factor being appointed as factor for the Properties. No meetings had been called to appoint a Factor. There was a Residents' Association but the Homeowner was not sure how active it had been. The Chair was a lady called Angie Inch. The Homeowner was not aware that the Residents'

Association had been disbanded. The Homeowner had lodged Minutes of a Meeting of the Greenrigg and Millcroft Residents' Association which was held on 27 September 2017. The Homeowner explained that the meeting was called by emails being sent and a notification in each close. At least a couple of weeks' notice had been given. The Homeowner said that at the meeting there was a vote on the removal of the Factor. The Homeowner explained that there had been around 50 or 60 people present at the meeting. All votes were to be received by 11.59 pm on 11 October. The Homeowner said that they had asked the Factor for evidence of their appointment on a number of occasions.

12. Mr Cowan then gave evidence on behalf of the Factor. He said that the Factor had been approached by several owners in 2015 and they were asked to become Factor. They wrote out to those owners setting out the services which they could provide and the charges that would be made. This letter enclosed a mandate asking the Homeowner if they wanted to appoint the Factor. Mr Cowan said that the Factor had spoken with residents who had told the Factor that the Residents' Association was no longer active. Mr Cowan said that the titles do not allow for a new Residents' Association to be formed if the old one ceased to exist. In light of that, it was his submission that any decision made by a re-constituted Residents' Association now was not valid.
13. Mr Cowan said that there are a lot of absentee landlords at Greenrigg Road. Because of this, Mr Cowan said that the Factor was of the view that they had sufficient mandates to allow them to proceed as Factor. He explained that the Factor have 29 mandates for Block 1-135 Greenrigg Road and 18 mandates for 137-259 Greenrigg Road. He explained that there are 68 flats in the block at 137-259 Greenrigg Road and 20 owners have said that they did not want to have a Factor.
14. The Tribunal asked Mr Cowan why it was impractical to call a meeting of the residents. Mr Cowan said that there were a lot of absentee landlords. That renders it impractical to have a meeting of homeowners. Mr Cowan explained that the Factor had been invited to a meeting of residents in 2015. There had been about 30 people in attendance. The meeting had not been formally called. Mrs Davidson-Bakhshaee said that many residents are not owners. She explained that the Factor's contract is with homeowners. Mrs Davidson-Bakhshaee said that there had been a meeting in September 2016 to discuss the setting up of a Residents' Association but she did not know the outcome of the meeting.
15. The Tribunal asked the Factor about the issuing of a Written Statement of Services ("WSS"). Mr Cowan said that it was issued to everyone on 30 July 2015. He said that it was sent to the home address of all owners. When asked if he had a certificate of posting, Mr Cowan said that he did not but that the Factor kept a mail book which would evidence everything that had been issued by the Factor.
16. The Homeowner was then invited to comment further. The Homeowner noted

that reference had been made to the titles as being binding and yet the Factor had also referred to 20 flats who did not wish a Factor. The Homeowner said that the position set out in the titles could not be varied by the Factor.

17. The Homeowner referred to Mr Cowan's comments that a new Residents' Association would not have authority to act. The Homeowner did not agree with that submission. The Homeowner submitted that the titles were clear that both costs and voting were to be dealt with by block. The Homeowner said that there was a difference between the Residents' Association being inactive and being disbanded. The Homeowner noted that Angie Inch attended the Residents' meeting which took place on 27 September 2017. The Homeowner then produced a letter to the Factor dated 20 October 2017 explaining the outcome of the vote. The Tribunal asked the Factor whether they had any difficulty with the letter being lodged although late. The Factor said that they did not. The Tribunal allowed the letter to be lodged although late.

18. Section 3: Financial Obligations

"While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The overriding objectives of this section are:

- *protection of homeowners' funds;*
- *clarity and transparency in all accounting procedures;*
- *ability to make a clear distinction between homeowners' funds and the property factor's funds.*

3.3 *You must provide to homeowners in writing at least once a year (whether as part of billing arrangements or otherwise) a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. This may impose a reasonable charge for copying subject to notifying the homeowner of this charge in advance".*

19. The Homeowner said that their concern related to paragraph 3.3 of the Code. They had requested information regarding charges made, but no breakdown had been provided. The Homeowner said that they had concerns about the division of costs. They were also concerned that invoices may be fabricated. The Homeowner referred to their letter dated 21 September 2017 to the Factor which was produced with the Application. In this letter they sought a breakdown of charges made. No response was received. The Homeowner said that they also made numerous telephone calls seeking information

regarding charges made. They also attended a meeting at the offices of the Factor in an attempt to obtain clarity as to the charges made.

20. The Homeowner referred to the photographs marked as Production 3 and 3A in their Inventory Productions. These were pictures of the stairwell at 223 Greenrigg Road. Production 4 was an invoice from McCluskey Glazing in respect of supplying two glass panels. The Homeowner explained that their flat at 223 is a top floor property. The glazing therefore had to be repaired. The Homeowner then referred to invoice number 29413 dated 16 January 2017 from the Factor. This was also for 223 Greenrigg Road. This invoice included a charge for boarding up a bannister. The Homeowner said that this work was not done by the Factor. The Homeowner said that they had contacted the Factor to ask them to carry out the works but it was not done.
21. The Homeowner referred to their letter to the Factor dated 19 May 2016 where clarification was sought regarding the division of invoicing. In the letter the Homeowner noted that invoicing is divided "1/122" whereas it should be "1/143". The Homeowner said that no response was received to the letter.
22. The Homeowner referred to their letter to the Factor dated 21 February 2017 in which information was sought regarding division of charges and regarding pursuit of unpaid invoices. In the letter the Homeowner also sought a breakdown of charges. The Homeowner said that the breakdown was not produced.
23. The Homeowner said that they attended a meeting at the offices of the Factor and sought a breakdown of charges. They said that the Factor told them that the information would be provided but it was not. The Homeowner said that they both attended the meeting as did Mr Cowan, Mrs Davidson-Bakhshaei and "Ann" who worked for the Factor.
24. The Tribunal asked the Homeowner what information they were looking for. The Homeowner said that they wanted to see what contractors had been charging as the invoices produced by the Factor seemed to be very high compared to other factor bills which they received. The Homeowner said that they were concerned that they were being charged a management charge in terms of the title but also a further charge over and above that.
25. The Homeowner made reference to invoice number 24750. The Homeowner noted that this included a charge for a temporary roof repair. The Homeowner said that they did not think that this repair had been carried out although they did not have evidence of that.
26. The Homeowner then referred to an invoice received from the Factor being invoice number 26675. This was an invoice for £425.02 in respect of repairing and replacing lights and electrics. The Homeowner explained that all of the lights in the Properties were original and had been there since the Properties were constructed. Reference was made to the pictures numbered 5 and 5A. The Homeowner was of the view that the work referred to in the invoice had not been done.

27. The Homeowner referred to an invoice received from the Factor being number 20379. This invoice included a cost for replacement and installation of lamps. The Homeowner said that they had requested an explanation of the work done but no explanation had been provided. The Homeowner said that they replace light bulbs. They therefore queried why they were being invoiced for it. The Homeowner explained that if light bulbs are missing tenants contact them and they respond within 24 hours.
28. The Homeowner referred to invoice number 26974 received from the Factor which also referred to replacement and installation of lamps. The Homeowner said that their concern was that they received no invoices for the first year or so and then they were bombarded with invoices. The Homeowner made reference to invoice number 27632. This contained a charge for removal of trollies. The Homeowner explained that there is a company called TrolleyWise who retrieve, repair and return trollies. The Homeowner has requested a breakdown of this invoice as they believe that TrolleyWise deal with the trollies at the Development.
29. The Homeowner referred to invoice number 29930. This contained a charge for "*clean, sanitise and seal bin chutes*". The Homeowner said that the work was not carried out. They referred to picture numbered 12 in their Inventory. They said that the picture showed that the bin chutes were sealed up 7-8 years ago. The Homeowner said that at 169 Greenrigg there had been a difficulty with people setting fire to the bins and the fumes coming up the bin chutes. The Homeowner said that it was their view that the Factor was invoicing for work that had been done in the past.
30. The Homeowner referred to invoice number 29839. This was an invoice for sealing bin chutes at 65 Greenrigg Road. The Homeowner said that recently the local authority had started sealing bin chutes. Environmental Services authorised the works. The works were carried out by the council around 4 weeks ago. The Homeowner said that they had spoken with Jamie Brannigan at the local authority who said that they had carried out the work. The Homeowner said that at the time of making the Application to the Tribunal the chutes had not been sealed up.
31. The Homeowner made reference to invoice number 289901 which related to 223 Greenrigg Road. The Homeowner said that the point that they wished to make regarding this invoice was the same point as they made regarding invoice 29839. The Homeowner said that the only bin chutes that had been sealed were the ones at 169 Greenrigg Road.
32. The Homeowner referred to invoice number 29364 which contained a charge for boarding up side windows in the close and board up main door glass panel. Reference was made to picture numbered 13 in the Homeowner's Inventory. The Homeowner said that the picture showed that there was no boarding up other than a small board across one panel in the door. The Homeowner said that the door in the picture has no glazing other than the two bottom panes. The Homeowner said that there has been no glazing in the

door for some time.

33. The Homeowner said that many of the invoices which they received contained a charge for cleaning. However, it was the Homeowner's position that cleaning has not been carried out. The Homeowner referred to picture number 7 which was made up of 2 photographs. One was taken on 9 March and the other on 23 March 2017. The Homeowner noted that the litter evident in the picture on 9 March was also evident in the picture of 23 March.
34. Mrs Davidson-Bakhshaee gave evidence on behalf of the Factor. She explained that when the Factor took over the Development it was in a horrific state. There were few lights working. Many Closes had no bulbs. In the courtyard areas the lights were all broken. The Development had not been re-wired in 20 years and doors had been kicked in.
35. Mrs Davidson-Bakhshaee referred to the cable heads. She said that about four had their cover removed. This was an electrocution risk. Mrs Davidson-Bakhshaee said that the Factor had been approached by the council. An employee had been electrocuted when moving a bin. The electrical cupboard being adjacent to the bin store. As a result of this, council employees would not remove bins. They asked the Factor if they would help. The Factor carried out bin removal for a number of weeks. It was apparent to the Factor that the wiring was horrific. The Factor said that the meters and electrical cupboards had been tampered with. The Factor said that the neglect at the Development had been going on for 10-15 years. The Factor said that at the Development around 50% of owners pay the Factor's fees and the other 50% do not. Mrs Davidson-Bakhshaee said that the Factor had asked for grant funding but there needs to be a contribution from owners. Only two owners said that they would contribute. She said that the purpose of the grant funding was to upgrade the building.
36. Mrs Davidson-Bakhshaee said that the residents at the Development are mainly tenants and owners are not close by. The Factor said that they attend the site every two weeks. Mrs Davidson-Bakhshaee said that the Development is the worst site that they have. She said that the integrity of the building is terrible. Mrs Davidson-Bakhshaee said that the Factor had to replace lamp fittings. She said that some residents are feeding their electricity off the lamps. She said that residents have interfered with the electrics so much that it is hard to tell what is live and what is not. She said that it would cost thousands of pounds to replace all of the electrics. Mrs Davidson-Bakhshaee said that there can be up to 10 shopping trollies on site at the Development. There can be 3 piece suites, fireplaces, washing machines etc. She said that trollies had not been taken away on a regular basis. She said that the Factor does their best to look after the Development but it is soul destroying.
37. Mr Cowan then gave evidence on behalf of the Factor. He said that at the outset the Factor provided figures for routine charges. He referred to invoice number 26675. This was an invoice for £425.02 for repairing/replacing lights and electrics. Mr Cowan said that this invoice has been credited. He said

that an electrician was instructed to isolate the supplies in the bin store. However, the work was not properly done. The Factor told the contractor that they would not be paying his bill. The electrician accepted that.

38. Mr Cowan referred to invoice numbers 29930, 29839 and 29901. He said that each of the invoices deal with sealing bin stores. He said that the local authority wanted the Factor to carry out the work and then cancelled the request. The invoices have therefore all been credited. Mr Cowan explained that the Factor will issue a proforma invoice that makes clear the money is being collected before the work is done. The Tribunal noted that the invoices referred to did not state that they were "proforma". Mr Cowan said that all of the invoices had been credited in March 2017. As none of the Homeowners had paid the invoices there was no need for money to be refunded.
39. As regards cleaning, Mr Cowan said that this was carried out every two weeks but that the Factor has no control over what happens after the cleaning has been carried out. Mrs Davidson-Bakhshaee made reference to the photographs which were number 7 in the Homeowner's Inventory and were dated 9 and 23 March 2017. She said that the items shown in the photographs could have been placed there. Mrs Davidson-Bakhshaee said that she is very happy with the cleaning at the Development.
40. Mr Cowan said that the invoices have not been fabricated. The Factor has timesheets from workmen showing that the work has been done. Mr Cowan referred to invoice number 29364 which included a charge for boarding up. He said that the Factor's records show that employees were at the Development on 14 and 24 November 2016 to board up windows at 65 Greenrigg Road. Mrs Davidson-Bakhshaee said that invoicing is carried out monthly. She said that she had broken her spine and had a hysterectomy which meant that billing became irregular for a period. The Tribunal noted that the invoices are not consistent in showing the proportion being billed to the Homeowner. For example, invoice number 29413 has a proportion noted for the first three entries and nothing for the last two entries. Invoice 27632 had a column for proportion but nothing completed in the column. Mr Cowan said that the software which the Factor used did not allow for recording of proportions. New software had been installed in November/December 2016 which did allow for this.
41. The Factor was asked about the allocation of charges. The Factor said that they allocate 1/122 not 1/43 because some properties do not wish to be factored. Mr Cowan said that those homeowners do not incur the costs and so the Factor does not issue a bill to them.
42. As regards the provision of information requested, Mrs Davidson-Bakhshaee said that all information requested had been provided at the meeting attended by the parties. Mrs Davidson-Bakhshaee said that the written statement of services was provided at the outset of the Factor's appointment.
43. The Homeowner referred to the evidence given by the Factor regarding the electrics. The Homeowner said that there had been a blackout in the Close

for some six weeks. The Homeowner repeatedly contacted the Factor. The Homeowner met Mr Cowan and Mrs Davidson-Bakhshaee on site. The Homeowner rectified the difficulty with the lights. This was the case in respect of 223 and 169 Greenrigg Road. The Homeowner said that they had not received the credit notes referred to.

44. Mr Cowan said that statements are issued to homeowners monthly which show the credits. The Homeowner said that they did not receive the statements. They also said that no information was supplied to them at the meeting attended. The Tribunal sought clarification of the date of the meeting. The Homeowner and the Factor agreed that the meeting was around September 2016.
45. As regards the WSS, Mrs Davidson-Bakhshaee produced the Factor's mail book and drew attention to an entry dated 29 September 2017 to "Millcroft Road & (All) Greenrigg". The mail book narrated that what had been sent out was an "Inv, Stat & SoS". The Tribunal noted that the entry does not narrate individual letters being sent to Homeowners at their correspondence address. The Tribunal allowed a photocopy of the relevant page in the mail book to be taken and to be lodged on behalf of the Factor although late.

46. Section 4: Debt Recovery

"Non-payment by some homeowners can sometimes affect provision of services to the others or can result in the other homeowners being liable to meet the non-paying homeowners' debts (if they are jointly liable for the debts of others in the group). For this reason it is important that homeowners are aware of the implications of late payment and the property factors have clear procedures to deal with this situation and take action as early as possible to prevent non-payment from developing into a problem.

It is a requirement of Section 1 (Written Statement of Services) that you inform homeowners of any late payment charges and that you have a debt recovery procedure which is available on request.

- 4.1 *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.*
- 4.3 *Any charges that you impose relating to late payment must not be unreasonable or excessive.*
- 4.4 *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.*
- 4.5 *You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written*

reminders to inform individual homeowners of any amounts outstanding.

- 4.6 *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).*
- 4.7 *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.*
- 4.8 *You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention".*
47. The Homeowner was asked to clarify which element of Section 4 gave rise to their concerns. The Homeowner said that they had concerns in respect of paragraph 4.1, 4.3, 4.4, 4.5, 4.6, 4.7 and 4.8.
48. As regards paragraphs 4.1 and 4.4 the Homeowner's concern was that they did not have a WSS.
49. As regards paragraph 4.3 the Homeowner noted that they had been charged £15 every time an invoice is issued to them in respect of late payment. The Homeowner said that the late payment charge was excessive. The Homeowner said that the late payment charge appears on every invoice they have received since January 2017. The Homeowner said that they are not sure if this is the same £15 or an additional £15 per invoice.
50. As regards paragraph 4.5, the Homeowner said that they are receiving timely reminders but there was a period of around a year where no invoices were received, that was in the period 2015-2016.
51. As regards paragraphs 4.6 and 4.7, the Homeowner said that certain homeowners were not being chased for payment. The Homeowner said that they were not being given any information about debt recovery. The Homeowner said that the Factor has not demonstrated that steps were being taken to recover unpaid charges.
52. As regards paragraph 4.8, the Homeowner referred to being on the phone to "Ann" at the Factor and Mrs Davidson-Bakhshaee in the background threatening legal action if payment of an outstanding bill was not made by 5 pm that day.
53. On behalf of the Factor Mr Cowan referred to the mail book showing an entry which he said evidenced issuing the WSS. The entry was dated 29.9.17 and said "*Millcroft Road + (All) Greenrigg, Inv, Stat & SoS*". The Homeowner said that they did not receive a letter dated 29 September 2017 enclosing the WSS. Mr Cowan said that what was being issued on 29 September 2017 was

a new WSS making some changes to the old WSS regarding apportionment and monthly charges.

54. As regards the complaints raised by the Homeowner under Section 4 of the Code, Mr Cowan said that the Factor does have a debt recovery procedure that is available on request. He said that the Factor did not re-apportion debt. Each homeowner was still being charged 1/122. As regards late payment charge, Mr Cowan considered it to be reasonable and comparable to other factors. He said that the Factor had started to impose a late payment charge from January 2017 when the debt had started to build up.
55. As regards paragraph 4.4, Mr Cowan said that services are not affected by non-payment by some homeowners.
56. As regards paragraph 4.5 Mr Cowan said that the Factor has an accounting system that monitors all payments. He noted that the Homeowner accepted that they had received timely reminders.
57. As regards paragraph 4.6, Mr Cowan noted that that paragraph refers to a situation where debt recovery problems could have an implication for them. Mr Cowan said that as the charges have not been re-apportioned there is no implication for the Homeowner.
58. As regards paragraph 4.7, Mr Cowan said that as the charges have not been re-apportioned, paragraph 4.7 is not relevant.
59. As regards paragraph 4.8, Mr Cowan said that the Factor tries everything to obtain payment before taking action against a homeowner. The Tribunal noted that the Homeowner had complained about legal action being threatened in a phone call. Mrs Davidson-Bakhshaee said that the Factor had taken all steps before that threat was made.
60. The Factor then produced a copy of a letter dated 21 August 2017 addressed to the Homeowner and sought to lodge the copy letter although late. The Homeowner was shown a copy of the letter. The Homeowner said that the letter had not been received and objected to the letter being lodged. The Tribunal allowed the letter to be received although late. It was noted that the letter makes reference to a letter from the Homeowner dated 17 August 2017. The Factor accepted that the letter was in fact in response to a letter from the Homeowner dated 10 August 2017. Mr Cowan said that the letter of 21 August confirms the processes to be adopted by the Factor and the effect that they will have on homeowners.
61. The Homeowner made reference to a letter dated 25 October 2017 from the Factor which was part of the Homeowner's Inventory of Productions. The Homeowner referred to paragraph number 3. The Homeowner said that he felt that the letter was threatening. Mr Cowan said that the letter of 25 October 2017 was not relevant to the section of the Code dealing with debt recovery.

62. Section 6: Carrying out Repairs and Maintenance

"This section of the Code covers the use of both in-house staff and external contractors.

- 6.2 *If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out of hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs, wherever possible.*
- 6.3 *On request you must be able to show how and why your appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff".*
63. The Homeowner explained that they had paid £100 per property to the Factor on appointment for emergency works. Emergency works were not being carried out on numerous occasions. Examples cited by the Homeowner were the glazing missing from the bannister, the need to repair a roof in order to prevent flooding and the need to fix the lighting in the stairwells which had been blacked out for some time. The Homeowner said that they had offered to carry out the work themselves. The Factor responded by saying they would call the Police. The Homeowner then met the Factor on site. At that meeting the Homeowner reinstated the electricity at 223 and 169 Greenrigg Road. The Homeowner said that the Factor had failed to carry out emergency works in a timely manner.
64. As regards roof works, reference was made to the pictures numbered 1, 1A and 2 in the Homeowner's Inventory of Productions. The Homeowner explained that picture 1 shows the glass missing. Picture 1A shows the glass missing. Picture 2 shows the glass replaced with corrugated plastic. The Homeowner said that this work had been carried out around the end of 2015.
65. As regards emergency works, the Homeowner said that they could not provide a copy of a written request for emergency works to be carried out. Requests were all submitted by telephone. The Homeowner referred to paragraph 6.3 of the Code and to the evidence given earlier regarding failure to provide a breakdown of costs.
66. The Homeowner referred to a failure on the part of the Factor to pursue contractors. Reference was made to the earlier evidence regarding an electrician who carried out defective work. The Factor noted that they had agreed with the electrician that his bill would not be paid. There was therefore no need to pursue him.
67. Mr Cowan then gave evidence on behalf of the Factor. He said that the £100 payment is a float to provide working capital. It is not specifically for emergency work. Mr Cowan explained that the debt position at the Development is such that work cannot be carried out if funds are not being received. Mr Cowan said that the Factor has responded to emergency call

outs.

68. Mrs Davidson-Bakhshaee referred to the electrics being in a terrible state and some homeowners interfering with the electrics. She referred to work being carried out by Jim Grant who is a qualified electrician who fixed all of the lights. She referred to employing a company called "Mr Electric" who she said turned out to be a cowboy. Mrs Davidson-Bakhshaee had asked him to leave the site and she told him she would not be paying his bill. Jim Grant however fixed all of the electrics. Fortnightly checks are now carried out. Mrs Davidson-Bakhshaee said that the Factor does respond to emergencies. As regards the roof repair which had been referred to, this was a major repair. She said that there are numerous roof repairs required at the Development. She said that proformas are issued for roof repairs, the electrics and glass. The response received is very poor. She said that quotes had been received from contractors but only one or two homeowners respond. Mrs Davidson-Bakhshaee said that it is not the job of the Factor to subsidise repairs. Mrs Davidson-Bakhshaee said that the Factor responds immediately. A 24 hour service is provided by a dedicated phone line. She said that she and the maintenance manager visit the Development about twice each week. She said that some homeowners carry out work themselves. She said that they are not insured to do so.
69. The Homeowner said that he has phoned the out of hours number and gets no reply. He noted the evidence given regarding quotations being provided for the roof repair and he said that a copy had not been circulated to them. The Homeowner queried how long it takes the Factor to respond to a call out. Mrs Davidson-Bakhshaee said that she would assess the request on a case by case basis and she would make that assessment based on her experience on whether it was necessary to go out immediately. Mrs Davidson-Bakhshaee said that the Factor cannot subsidise the cost of the works. She said that the Homeowner does not pay for the work. The Homeowner noted that work was not being carried out two years ago and at that point invoices were all paid up to date.

Breach of Factor's Duty

70. The Homeowner said that North Lanarkshire Council have told them that there are no grants available for properties such as Greenrigg Road. The Homeowner said that they find it misleading that the Factor has said that funding might be made available. The Homeowner said that a WSS had not been received for any of the three properties. Further, the Homeowner only receives invoices and no explanation of the charges.
71. Mr Cowan said that he had correspondence from North Lanarkshire Council saying that funding would be made available. The application does however need to be by the Homeowner. The Factor co-ordinates the applications.

Remedy Sought

72. The Homeowner said that they did not believe that the Factor has been correctly appointed. They wish the Factor to be removed and to cease work. The Homeowner said that they have paid for emergency work - £100 per property was paid on appointment. They thought this was for emergency work but the work has not been carried out. The Homeowner said that they were happy to have a factor as it protected their investment but they cannot work with the Factor in this case.
73. The Homeowner said that they have not been receiving information which has been requested. They have invoices for work that has not been carried out. The Tribunal asked the Homeowner if they were provided with a breakdown of invoices whether that would assist with payment. The Homeowner said that it would.
74. Mr Cowan said that he considered that the Factor had been properly appointed and the Factor had done their best with limited resources.

Tribunal Findings and Reasons for Decision

Section 1: Written Statement of Services

75. The Homeowner's evidence was that no WSS had been received by them. Section 1 of the Code provides that a factor must provide each homeowner with a WSS within four weeks of agreeing to provide services to any new homeowner and within one year of initial registration as a property factor in respect of an existing homeowner. Section 1 of the Code further provides that the factor must supply the full WSS before that time if they are requested to do so by a homeowner within four weeks of the request.
76. The Homeowner's evidence was that they had not received a WSS. The Homeowner had provided a copy letter from them to the Factor and dated 1 May 2017 in which they requested a copy of the WSS and noted that they had not received a copy to date.
77. The evidence from the Factor was that the WSS was issued to all homeowners at Greenrigg Road on 30 July 2015. The evidence provided in support of that was a mail book. The Tribunal's attention was drawn to an entry dated 29 September 2017, which suggested that a letter was sent to "Millcroft Road and (all) Greenrigg". The entry further suggested that what had been issued was "Inv, Stat & Sos". No copy WSS was produced to the Tribunal.
78. The Tribunal found that on the balance of probabilities, no WSS had been issued to the Homeowner. The Tribunal therefore found that the Factor had failed to comply with Section 1 of the Code.
79. As regards the authority to act and Section 1A of the Code, the evidence from

the Factor was that the basis of their authority to act was a number of mandates held from homeowners. The Factor gave evidence that they held 29 mandates to act for Block 1-135, and 18 mandates for Block 137-249.

80. The Tribunal noted, however, that the Deed of Conditions relating to the Properties provide for the superior to appoint a factor for the period of three years commencing from and after completion of the first dwellinghouse. The Deed of Conditions then provides that the factor shall be appointed in terms of Clause 6 of the Deed of Conditions. Clause 6 provides that there will be appointed a factor who will be responsible for supervising the common repairs to and maintenance of the property, the curtilage and the common parts, and apportioning the cost thereof among the proprietors in accordance with that clause. Clause 8 provides that the factor shall be appointed in terms of Clause 6 and his appointment may be renewed or terminated by the Residents' Association. Clause 8(2) provides that the remuneration of the factor and the terms and conditions of his appointment shall be determined from time to time by the Residents' Association. Clause 9 provides that on completion and sale of the last flatted dwellinghouse, the appointed factor shall arrange the setting up of a Residents' Association, whereby the proprietor of each dwellinghouse shall become a member of such an Association and the proprietor shall have only one vote in deciding matters of common interest to the entire block of flatted dwellinghouses. The Deed of Conditions further provides that such a Residents' Association shall have no power in deciding the maintenance and upkeep of the property without a majority consent from the proprietors of the 75 dwellinghouses known as numbers 1-135 Greenrigg Road and 68 dwellinghouses known as numbers 137-259 Greenrigg Road. Clause 9(2) of the Deed of Conditions provides that the Residents' Association will convene a general meeting of residents at not less than 7 days' notice and with a quorum no less than 7 proprietors shall have power (i) to appoint a factor, and (ii) to have executed any works of repair or maintenance, decoration, renewal, improvements, etc. of the common parts or any part thereof. The Deed of Conditions further provides that all resolutions of the Residents' Association will be passed by a majority of the votes cast and the resolution so passed shall be binding upon all proprietors, whether assenting or not.
81. The evidence from the Factor was that they had not called a meeting of the Residents' Association. The Factor's evidence was that whilst a Residents' Association may have existed at one time, it had been disbanded. The evidence from the Factor was that it was impractical to call a meeting of the Residents' Association because a lot of the homeowners were absent.
82. The submission from Mr Cowan was that as the original Residents' Association had ceased to exist, any new Residents' Association was not properly constituted in terms of the Deed of Conditions. His submission was that the Deed of Conditions did not allow for a new Residents' Association to be constituted if the original one was disbanded.
83. The Tribunal determined that the Factor had not been appointed in accordance with the Deed of Conditions which govern the Properties.

Evidence had been given to the Tribunal that a Residents' Association had existed in 2015 and in 2017. Evidence had been given which suggested that individuals involved in the Residents' Association which was active in 2015 were also involved in the Residents' Association which was active in 2017. The Tribunal noted that a meeting of the Residents' Association had taken place on 27 September 2017, and the decision had been taken to remove the Factor as property factor for the Development. The Tribunal found that the Factor had failed to comply with Section 1A of the Code in that the Factor had not provided the Homeowner with a WSS which contained a statement of the basis of any authority they have to act on behalf of all homeowners in the group as required by paragraph 1A of the Code..

Breach of Section 3 of the Code

84. The Tribunal heard evidence from the Homeowner regarding invoices where a request had been made for a breakdown of invoices to be provided and no such breakdown being provided by the Factor. The evidence from the Factor was that breakdowns had been provided following a meeting which took place between the parties at some point around September 2016. No such breakdowns were however produced to the Tribunal. The Factor gave evidence that homeowners were sent a statement on a monthly basis showing debits and credits on their accounts. The Homeowner's evidence was that they had received no such statement. The Tribunal found that the Factor had failed to comply with Section 3 of the Code. The Factor failed to provide the Homeowner with a detailed financial breakdown of charges made and a description of the activities and works carried out which were charged for. The Tribunal also found that the Factor had failed to provide supporting documentation and invoices or other appropriate documentation for inspection or copying in response to reasonable requests from the Homeowner for such documentation.

Breach of Section 4 of the Code

85. As regards breach of paragraph 4.1 of the Code, the Tribunal found that there had been a breach of paragraph 4.1. As previously determined in this Decision, the Factor did not issue a WSS to the Homeowner. The Factor did not provide any evidence to the Tribunal which would indicate that they had a clear written procedure for debt recovery which outlined a series of steps which they would follow unless there was a reason not to.
86. As regards breach of paragraph 4.3 of the Code, the Tribunal found that there had been no breach. The late payment charges imposed were reasonable.
87. As regards breach of paragraph 4.4 of the Code, there was no evidence before the Tribunal that the Homeowner had requested a clear statement of how service delivery and charges would be affected if one or more homeowners did not fulfil their obligations. The Tribunal therefore found that there was no breach of paragraph 4.4 of the Code.
88. As regards breach of paragraph 4.5 of the Code, the Tribunal heard evidence

that there had been a period in 2015-2016 when invoicing was irregular. The Tribunal also heard evidence that monthly statements were issued to homeowners, but the Homeowner had not received those monthly statements. The Tribunal found that there had been a breach of paragraph 4.5 of the Code. The Factor did not appear to have systems in place to ensure the regular monitoring of payments due from homeowners.

89. As regards breach of paragraph 4.6 of the Code, there was no evidence before the Tribunal which indicated that the Factor had kept the Homeowner informed of any debt recovery problems of other homeowners which could have implications for them. However, the evidence given by the Factor was that charges had not been reallocated and therefore debt recovery problems of other homeowners would not have implications for the Homeowner. In those circumstances, the Tribunal found that there had been no breach of paragraph 4.6 of the Code.
90. As regards breach of paragraph 4.7 of the Code, there was no evidence before the Tribunal regarding steps taken by the Factor to recover unpaid charges from homeowners who had not paid their share of costs prior to charging those remaining homeowners if they were jointly liable for such costs. The Tribunal heard evidence from the Factor that they did not reallocate charges. In those circumstances, the Tribunal found that there had been no breach of paragraph 4.7 of the Code.
91. As regards breach of paragraph 4.8 of the Code, the Tribunal heard evidence that legal action had been threatened by the Factor against the Homeowner. However, there was no evidence before the Tribunal in respect of the steps taken by the Factor in advance of that. What was produced to the Tribunal was a copy of an email from the Factor dated 17 March 2017 which made reference to a telephone call with the sheriff clerk and to a letter from the Factor to the Homeowner dated 7 September 2017 which made reference to an application to the Court to "restart the case". In the circumstances, the Tribunal found that there had been no breach of paragraph 4.8 of the Code.

Breach of Section 6 of the Code

92. As regards breach of paragraph 6.2 of the Code, the Tribunal heard evidence from the Factor that there were procedures in place for dealing with emergencies. The Factor gave evidence that a 24-hour service was provided by a dedicated phone line. The Homeowner, however, said that when they called the out-of-hours number, they received no reply. The Factor gave evidence that, on receipt of a request to deal with an emergency repair, they would weigh up whether it was appropriate to respond immediately. When deciding whether to respond to an emergency repair the Factor would consider the nature of the work which required to be undertaken and whether or not the Factor would be paid for carrying out the work. The Factor would use their experience to make the decision whether to respond. The Tribunal heard a great deal of evidence regarding lights not functioning and problems with electrical installations. On balance, the Tribunal took the view that the Factor was in breach of paragraph 6.2 of the Code.

93. As regards breach of paragraph 6.3 of the Code, the Homeowner's concern related to the Factor's failure to provide a breakdown of costs. There was, however, no evidence before the Tribunal as regards how and why particular contractors were appointed. In those circumstances, the Tribunal found that there had been no breach of paragraph 6.3 of the Code.

Breach of Factor's Duty

94. As regards breach of the Factor's duty, having considered all of the information placed before it, the Tribunal determined that there had been a breach of the Factor's duty to the Homeowner. The Factor had failed to provide the Homeowner with a Written Statement of Services. The Factor had misunderstood the Deed of Conditions regarding the way in which a factor should be appointed. The Factor had failed to provide the Homeowner with a detailed breakdown of charges made and a description of activities and works carried out which were charged for. The Factor had failed to respond to reasonable requests for documentation which supported invoices. The Factor had failed to carry out emergency repairs.

Proposed Property Factor Enforcement Order

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

Appeals

96. **In terms of section 46 of the Tribunals (Scotland) Act 2014 a homeowner or property factor 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.**

J Devine

Signed
Joan Devine, Legal Member and Chair

18 May 2018
Date

