

Housing and Property Chamber

First-tier Tribunal for Scotland



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

PROPOSED PROPERTY FACTOR ENFORCEMENT ORDER: Property Factors (Scotland) Act 2011, section 19(2)

Case Reference Number: FTS/HPC/PF/16/0175

The Property:

10 Lochranza Court, Carfin, Motherwell ML1 4FJ

The Parties:-

David Bissett, 10 Lochranza Court, Carfin, Motherwell ML1 4FJ

(“the Homeowner”)

and

Hacking and Paterson, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL

(“the Factors”)

Tribunal Members:

Adrian Stalker (Chairman) and Andrew Taylor (Ordinary Member)

This document should be read in conjunction with the tribunal's decision of 8 September 2017

The tribunal proposes to make a Property Factor Enforcement Order in the following terms:

In terms of section 20(1) of the Property Factors (Scotland) Act 2011, the Factors are required:

1. To produce, in terms of section 3.3 of the Code, all supporting invoices for bills rendered by the Factors to the Homeowner, from 1 January 2009 to date, at no charge.
2. To provide to the Homeowner a statement of services in terms of section 1 of the Code of Conduct for Property Factors.
3. To make a payment of £400 to the Homeowner.

Section 19(2) and (3) 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 tribunal's decision and this proposed Property Factor Enforcement Order 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 Tribunal Office by no later than 14 days after the date that the decision and this proposed Property Factor Enforcement Order are intimated to them. If no representations are received within that time, then it is likely that the tribunal will proceed to make a Property Factor Enforcement Order without seeking further representations from the parties.

Failure to comply with a Property Factor Enforcement Order may have serious consequences and may constitute an offence.

A Stalker

Signed

Date 8 September 2017

Chairman

Housing and Property Chamber

First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: Property Factors (Scotland) Act 2011, section 19(1)(a).

Case Reference Number: FTS/HPC/PF/16/0175

The Property:

10 Lochranza Court, Carfin, Motherwell ML1 4FJ

The Parties:-

David Bissett, 10 Lochranza Court, Carfin, Motherwell ML1 4FJ

(“the Homeowner”)

and

Hacking and Paterson, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL

(“the Factors”)

Tribunal Members:

Adrian Stalker (Chairman) and Andrew Taylor (Ordinary Member)

Decision:

The First-tier tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”), having made such enquiries as it saw fit for the purposes of determining whether the Factors had complied with the Code of Conduct for Property Factors (“the Code”), and with their duties as property factors, determined that the Factors had failed to comply with the Code, and their duties. It proposes to make a property factor enforcement order, in the following terms:

In terms of section 20(1) of the Property Factors (Scotland) Act 2011, the Factors are required:

- 1. To produce, in terms of section 3.3 of the Code, all supporting invoices for bills rendered by the Factors to the Homeowner, from 1 January 2009 to date, at no charge.**
- 2. To provide to the Homeowner a statement of services in terms of section 1 of the Code of Conduct for Property Factors.**

3. To make a payment of £400 to the Homeowner.

Background

1. By an application to the Homeowner Housing Panel (“the HoHP”) received on 21 November 2016, the Homeowner sought a determination of whether the Factors had failed: (a) under section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”), to comply with the Code; and (b) to perform the property factor duties, as defined in section 17(5) of the Act, in respect of their factoring of the property. On 1 June 2017, a Convener having delegated powers under section 18A of the Act made a decision, under section 18(1)(a), to refer the application to a First-tier tribunal.
2. The Homeowner’s application comprised a completed application form, together with a covering letter further specifying his complaints, and 56 pages of supporting documents. In this Decision, these are referred to as his productions, and designated HP1, HP2, etc.
3. Following the referral of the application to the Tribunal, the Factors lodged four applications, seeking directions under regulation 20 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 (“the Procedure Regulations”). On 28 June, the Tribunal issued a direction, which included certain observations on the application. It directed the parties as follows:

Directs the Homeowner: as regards the complaints made in the bullet points listed in the covering letter to his application and the letter of the Factors of 15 December 2016:

- (a) to confirm which of the complaints he wishes to pursue;
 - (b) to specify, in respect of each of those complaints, the property factor duties said to have been breached, and how and when they were breached;
 - (c) to specify, in respect of each of those complaints, which parts of the Code of Conduct are said to have been breached, and how and when they were breached;
 - (d) to provide a breakdown of the figure of £2,169.67 given at the end of his letter to the Factors of 15 December 2016;
- and to do so within 14 days of receiving intimation of this direction.

Directs the Factors: to make written representations in relation to the application, within 14 days of receiving intimation of the Homeowner’s response to this direction.

4. In response, the Homeowner provided an email dated 14 July, which further specified the complaints that he wished to pursue at the Tribunal hearing. Notwithstanding the Tribunal’s direction, the Factors did not lodge written representations in relation to the application. Instead, by letter dated 10 August, they lodged an inventory of productions comprising six documents. In this Decision, their productions are designed FP1, FP2, etc.

Hearing

5. A hearing took place in respect of the application on 17 August 2017, at Wellington House, 134-136 Wellington Street, Glasgow. The Homeowner, Mr Bissett, was present. Mr Colin Devon, one of the Factors' directors, represented them. Mr Devon has had an involvement in the factoring of the Property. He has recently met with Mr Bissett, at the property, to discuss his complaints. At the hearing, the Tribunal advised the parties that it would treat Mr Bissett's email of 14 July (being his response to the Tribunal's direction) as setting out the various bases on which he would argue that the Factors had failed to carry out their duties, or failed to comply with the Code.

Preliminary issues

6. Mr Devon sought to raise two preliminary issues. He firstly contended that the Factors had been unable to respond fully to the Homeowner's case, because the complaints were insufficiently specific. The Homeowner had, it was suggested, failed to comply with the Tribunal's Direction. He had failed to provide adequate specification in terms of the matters set out in paragraphs (a) and (b) of the Direction. In developing this point, Mr Devon placed particular emphasis on regulation 14(d) of the Procedure Regulations, which requires a homeowner to attach, to his application to the Tribunal, "any statement of services provided by the property factor to the homeowner as required by the property factor code of conduct". The Homeowner had failed in this requirement: no statement of services was produced by him. Therefore, his application should not have been accepted by the Tribunal. That failure was significant: the Homeowner complained that the Factors had failed in their duties because they were not performing certain services. Without the statement of services being produced by the Homeowner, the Tribunal could not determine whether there was such a failure.
7. Secondly, Mr Devon argued that the Homeowner had failed to use the Factors' Complaints Procedure before making his application. He had subsequently done so, but the procedure had not been exhausted. Therefore, again, the application should not have been accepted by the Tribunal.
8. For his part, Mr Bissett maintained that he had never received any statement of services from the Factor. He had, however, received certain maintenance and cleaning specifications from them, in 2001, 2003 and 2016, which set out the work that they would arrange to have done, as property managers. The specifications from 2001 and 2016 were produced with his application (they are respectively HP 3-5 and HP 21 and 22). He maintained that the works set out in the specifications were not done, and accordingly the Factors had failed in their duty. He also maintained that he had never received any notification from the Factors, prior to making his application to the Tribunal, that they had a formal complaints procedure.
9. Mr Devon was asked whether he had any particular motion or application to make, in light his arguments. He did not. However, he asked that his comments be noted. Therefore, the Tribunal was not asked to make any decision in relation

to the preliminary points, before hearing from Mr Bissett and Mr Devon on the substance of the application. Nevertheless, the Tribunal finds it convenient to make some comment, at this stage in its decision, on what it made of these points.

10. When advancing his first point, Mr Devon maintained that the Factors had sent out a statement of services to homeowners such as Mr Bissett, when the Code of Conduct came into force in November 2012. He knew that this was the case, because Hacking and Paterson had sent out statements of services to all homeowners for properties they factored. Mr Devon was asked by the Tribunal whether he had a copy of the statement of services that was applicable to this property. His response to that question was not easy to follow. He said that he did not have a copy with him. He maintained that such a statement of services existed. However, the Factors had many statements of service applicable to different properties, and it was not a straightforward matter to produce the statement of services that was applicable to this particular property. Mr Devon did not go so far as to say that it was not possible for the Factors to produce the statement of services, and that only the Homeowner could do so. His position came to be that he was not obliged to produce the statement of services to the Tribunal, and had not done so; as the Homeowner had not produced it, he argued that the Tribunal could not determine that the Factors had failed in their duty (see paragraph 6 above).
11. Regulation 14(d) requires the Homeowner to attach to his application any statement of services "provided by the property factor to the homeowner". The Tribunal accepted Mr Bissett's evidence that he had never received a statement of services from the Factors. It did so for the following reasons. Firstly, the Tribunal formed the impression that Mr Bissett was honest and straightforward in his account of his dealings with the Factors. Secondly, it also had the impression that he was meticulous in retaining the correspondence he had received from the Factors. Thirdly, the fact that Mr Devon failed to produce a copy of the statement of services, or any evidence that it been sent to Mr Bissett (apart from an assertion that statements of services had been sent to homeowners in general), tended to undermine his contention that such a statement was provided to Mr Bissett. As the Tribunal found in fact that a statement of services was never provided to the Homeowner, regulation 14(d) does not apply.
12. As the Tribunal observed in its Direction to the parties, a property factor's duties can arise from various sources. Mr Bissett's case (see paragraph 8 above) amounted to assertion that the Factors, having sent maintenance and cleaning specifications to homeowners, were under a duty to arrange for the specified work to be carried out. For his part, Mr Devon insisted that these schedules could not be regarded as setting out any duty on the part of the Factors. The reasons given for that contention were: a) the Factor's duties were in the statement of services; b) the schedules were undated. However, the Tribunal found that no statement of services was provided to Mr Bissett. It also found in fact that the specifications which HP 3-5 were sent to him in 2001. They were attached to notice which is HP1. The notice begins: "Hacking & Paterson are pleased to be the appointed Property Managers for Ogilvie Homes prestigious new Development – Millgait Court, Carfin". It was confirmed by Mr Devon that this

appointment was in 2001. This notice, and its timing, are significant. In the Tribunal's view, these documents were analogous to a statement of services in setting out, at the time of Factors' appointment, work that they were going to have done, in return for their fee. The Tribunal also accepted Mr Bissett's evidence that HP 21 and 22 are specifications which were provided to him in 2016. Mr Devon did not suggest any alternative date. Against that background, the Tribunal also accepted Mr Bissett's argument that the Factors were under a duty to have the specified work done.

13. As regards Mr Devon's second preliminary point, it is necessary to recall that earlier in the case, the Factors applied for a direction that the Homeowner produce, "evidence that [the Factors'] Complaints Handling Process has been exhausted". That was refused, on the basis that such evidence was unnecessary in this case. It was clearly part of the Homeowner's complaint that he had never been advised that Factors had a complaints procedure, before making his application to the HoHP (as indicated in his letter to the Factors of 3 March 2017, to which reference was made, at paragraph 7 of the Direction). Therefore, this issue is part of the merits of the application, rather than a preliminary point. The issue of the Complaints Procedure is considered below, beginning at paragraph 31.

14. As indicated at paragraph 9, Mr Devon did not move the Tribunal to refuse to consider the merits of the application, in light of his preliminary points. Had he made such a motion, it would have been refused, for the reasons stated. The reasons for the tribunal's decision, on the merits of the application, are as follows.

Alleged Failure to comply with the maintenance schedules

15. As already described, the Homeowner's primary complaint was that the Factors had failed to carry out the work that was described in the maintenance and cleaning specifications, sent to him in 2001 and 2016. This is further described in his email of 14 July:

The factor has failed to comply with its duties as property factors because they have not carried out all duties set out in their maintenance schedule (page number 3,4 & 5 of my documents) the duties not carried out are...

There follows a list of items in the maintenance and cleaning specifications which, it is said, have not been carried out. However, there is no indication in the email (or in the application) of any particular date or period during which any failure is said to have occurred, over the 15-year period from 2001 to Mr Bissett's application.

16. With one exception (see the next heading), the Tribunal was unable to make any finding to the effect that the Factors had failed in their duties in relation to the maintenance and cleaning specifications. As Mr Bissett appeared to accept, there was a lack of evidence as to any particular failure, at any particular time.

17. Mr Bissett sought to substantiate his complaint in various ways. Firstly, he maintained that other homeowners in the development were dissatisfied with the Factors' service. However, he could not say whether any of them had expressed that dissatisfaction to Hacking & Paterson. He offered to show the Tribunal photographs he had taken on his smartphone, which would provide evidence of work not carried. However, he accepted that these had not previously been intimated to the Factors, before the hearing, and therefore, the Factors had not had the opportunity to look at them, and decide what to make of them. In the circumstances, the Tribunal decided that it would be unfair to the Factors, and therefore unjust, to place any weight on those photographs. Accordingly, it did not look at them. Mr Bissett also sought to support his case by expanding on the following paragraph in his email of 14 July:

I believe that section 6 of the code of conduct has been broken as they have failed to carry out the repairs and maintenance as mentioned above and since I have complained they are trying to fix all defects at the one time which is incurring a large cost to all home owners as you can see in letter enclosed quote of £10555.00 + vat. If these problems were rectified when asked or they made regular visits to the site they would have noticed these and would not have a bill like this.

However, as Mr Devon pointed out, this letter (which was not produced by Mr Bissett, but was provided by the Factors as FP5) quotes an estimate from contractors in relation to external redecoration work. That could not arise from any failure to perform the tasks set out in the maintenance and cleaning specifications.

18. For these reasons, the Tribunal was unable to make a determination to the effect that the Factors had failed in their duties (subject to the discussion of the "annual carpet shampoo"), below. The Tribunal heard evidence from Mr Bissett that in recent weeks, in advance of the hearing, the performance of the Factors, in attending to the maintenance and cleaning work, has considerably improved. He said that issues that have been outstanding for some time have now been addressed. If that is correct, then his application has been of benefit to him, even if he has not been successful in obtaining the determination he seeks from the Tribunal.
19. Finally, for the sake of completeness, we should mention that the Tribunal regarded certain other parts of the Homeowner's email of 14 July as relating to issues considered under this heading. Those were, in particular, the paragraph beginning "Section 6 carrying out repairs and maintenance", and the following two paragraphs.

Annual carpet shampoo

20. This issue requires separate treatment. In contrast to the other items of the Homeowner's list (see paragraph 18 above), it was accepted by Mr Devon that, although "annual carpet shampoo" appears on the "Common Cleaning Specification" from 2001 (HP 5), that was never done. Instead, the carpets were

shampooed when necessary, and the homeowners were then charged for that cost, separately.

21. It was Mr Devon's position that the reference to an "annual carpet shampoo" in the 2001 specification was an error: it was never intended that this service would be included. Hence, it was not included in the 2016 specification, which led Mr Bissett to assert, in his email of 14 July, that the Factors had changed the maintenance and cleaning specification, after he started to complain.
22. In the view of the Tribunal, the Factors contracted to receive payment for arranging the services set out in the maintenance and cleaning specification. As they did not perform one of those services, they failed in their duties to the homeowners, including Mr Bissett. Accordingly, the complaint under section 17(1)(a) of the Act is established.
23. That said, it is difficult to determine whether Mr Bissett suffered any loss as a result of that failure. Had the carpet been shampooed by contractors annually, as opposed to now and again, any additional cost would have been passed on to the Homeowners. Mr Bissett did not suggest that there had been any particular consequence of the carpet not being shampooed annually. Accordingly, the Tribunal does not propose to make any Property Factor Enforcement Order in respect of this failure.

Code of Practice section 2: Communication and Consultation

24. The Homeowner's email of 14 July contended that the Factors had failed to comply with this section of the Code. The relevant paragraph in his email may be regarded as indicating three complaints, the first of which was as follows:

Section 2.1 providing information which is misleading or false.....
I believe this has been breached because they are hiding an increase in maintenance costs by changing the way they charge it
docs 41,42,43.

The Tribunal considered the relevant invoices sent by the Factors to Mr Bissett (being HP 41-43), together with FP 1, being a record of annual maintenance costs. With the assistance of an explanation from Mr Devon, the Tribunal was able to establish that there had been no increase in the relevant maintenance costs. They were simply charged in a different way. Mr Bissett accepted that this was the case. Accordingly, there was no failure under section 2 of the Code of Practice in relation to this issue.

25. The second complaint under this heading was:

They also have never provided any paperwork that their charges for maintaining the grounds and stairwells are increasing yet we see increases in invoices over the last 15 years, they should notify of any change to costs from contractors.

Again, the Tribunal did not find this complaint to be established. Homeowners can expect that, over a period such as 15 years, contractors may increase their charges. That does not require any special notification or intimation from the Factors, provided the increase is in line with what one might reasonably expect. Unusually large increases may necessitate consultation with homeowners, but Mr Bissett did not point to any such increase in this case.

26. The third complaint under this heading was:

Also in doc15 they state that [a notice of potential liability] had been registered to my account which was not the case, this is false information and intimidating to try and force payment. I have also asked them to start legal proceedings many times but they do not wish to do this as they know they are in the wrong that is why they changed tactics and threatened with notice of potential liability.

It was accepted by Mr Devon that this complaint was correct. The Factors wrote to the Homeowner on 3 March 2016, stating that "a Notice of Potential Liability for Costs has now been registered against the Title of your property, with the associated cost of £100 plus VAT being incurred and levied to your account." That was not true. The Notice of Potential Liability was not registered until later in 2016. The Tribunal understood Mr Devon to attribute this error to a failure in the Factors' administrative system. Be that as it may, the Tribunal considers that the Factors are, in this instance, in breach of paragraph 2.1 of the Code: "You must not provide information which is misleading or false."

Code of Practice section 3: Financial Obligations

27. Paragraph 3.3 of the Code provides:

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. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

28. Mr Bissett's complaint in relation to this matter is set out, in his email of 14 July, as follows:

Section 3.3 I believe this has been breached as I asked for details of supporting invoices doc23 and they said this would cost £25 plus vat which I paid and they sent my invoices from them and not the supporting documents, when asked about this in a meeting with Mr Cosgrove he stated this would cost £120 plus vat but as you can see in my letter I clearly state all supporting invoices and would never have paid £25 plus vat for invoices I already have.

29. HP 23 is a letter to the Factors dated 26 April 2016, in which Mr Bissett asks to be sent "all chargeable bills and all supporting invoices that date back to my entry date of 30th March 2001". This request was clearly based on section 3.3 of the Code, which states:

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.* You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

30. The Factors response of 28 April (HP 24) states:

In relation to your request for copy invoices dating back to 2001, unfortunately, our computer system does not have the facility to store information dating back to the aforementioned year, however, copies of your common charges invoices can be provided from 2009 to the current date.

As this request is outwith our Terms of Service and Delivery Standards, we would require an administration fee of £25.00 plus VAT in order to provide copies of the requested invoices.

31. By letter dated 31 July (HP 27), Mr Bissett asked: "Please send me all invoices you have charged me for as far as you can possibly go back, please also send all supporting invoices from each individual company that you are charging for." Subsequently, Mr Bissett duly arranged for a payment of £30 (£25 plus VAT) to be made to the Factors. [See also HP 32] However, the invoices were not sent to him. During the course of subsequent meeting with the Factors' Mr Cosgrove, he was advised that the administration fee would be £120 plus VAT, rather than £25 plus VAT. This was account of events was not disputed by Mr Devon.

32. The Tribunal found this complaint to be established. It was clear from HP23 that Mr Bissett was asking for the invoices on which the Factors' bills were based. The Factors' response (HP24) is not entirely clear. However, the Tribunal considers that Mr Bissett reasonably understood it to mean that those invoices would be produced, subject to two conditions: they were only available from 2009, and he was to pay a charge of £25 plus VAT. He duly paid that charge, and his request was not met. Therefore, the Factors are in breach of section 3.3 of the Code.

Code of Practice sections 1 and 7: Complaints resolution

33. Although this is the last item in the Homeowner's application, it is logical to deal with it before the "Debt recovery" (next heading), for reasons that will become clear.

34. Section 1 of the Code of Practice requires Factors to provide each homeowner with a written statement of services. That should set out "your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the [First-tier Tribunal] if they remain dissatisfied following completion of your inhouse complaints handling procedure" (paragraph 1.1a(l)). This is re-iterated at section 7 of the Code, which specifically deals with complaints resolution.
35. The Tribunal found in fact that no statement of services was ever provided to Mr Bissett (see paragraph 11). He also maintained that he had never received any separate intimation of the existence of the Factors' Complaints Procedure, until after he made his application to the First-tier Tribunal. Instead, he was simply advised by Hacking & Paterson that he should make his complaints in writing, which he did, on a number of occasions.
36. Mr Devon confirmed that the Factors' Complaints Procedure existed as a separate document, which could be sent to Homeowners, apart from the statement of services. He also pointed out that there was a copy available on Hacking & Paterson's website. He said that where a homeowner made a complaint, the Factors would try to resolve it. Where, however, the homeowner remained dissatisfied, it was then their practice to draw the homeowner's attention to their Complaints Procedure, and suggest that it be followed, if the homeowner wished to pursue the matter.
37. In the Tribunal's view, that practice is appropriate. Unfortunately, there is no evidence that Hacking & Paterson actually followed it in this case. In particular, as Mr Devon was eventually constrained to accept, the Factor's first intimation to Mr Bissett of the existence of the Complaints Procedure came after he had made his application to the HoHP. Accordingly, the Tribunal accepts Mr Bissett's evidence on this matter. In particular, it finds in fact that he was never informed of the Factors' complaints procedure before making his application, and they are accordingly in breach of sections 1 and 7 of the Code.
38. It appeared to the Tribunal that the Factors' position on relation to the Complaints Procedure, in particular the second preliminary point pursued by Mr Devon (see paragraphs 7 and 13 above) proceeded on a misunderstanding of section 17 of the Act, and section 7 of the Code. Neither requires the Factors' Complaints Procedure to be "exhausted" before an application can be made. Rather, section 17(3)(b) of the Act provides that "No...application shall be made unless - the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern." In the Tribunal's view, that was clearly the case in this instance. Mr Bissett had been asked to make complaints in writing, which he did. They were not resolved by the Factor. It was not suggested to him that he should pursue any Complaints Procedure. Matters would have been different, had the Factors followed the policy described by Mr Devon. Had the Complaints Procedure been suggested to Mr Bissett at an earlier stage, then the Tribunal would have expected him to pursue that procedure, before accepting his application, provided that the procedure was not subject to unreasonable delay.

Code of Practice section 4: debt recovery

39. The Homeowner's email of 14 July states:

Section 4 debt recovery.....section 4.8 I believe this has been breached as they have threatened legal action many times without trying to rectify the issues I have and are still threatening legal action and [a notice of potential liability] even although I have been in touch with them consistently through this process, most recent threat from Hardy Macphail solicitors on 5/7/2017.

40. Paragraph 4.8 of the Code states:

You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

41. Mr Bissett has an outstanding balance due to the Factors, in respect of their invoices. He has advised them, on several occasions, that he is withholding payment until his complaints against them are resolved (see HP 23 and 27). The Factors, and their solicitors, (Messrs Hardy Macphail) have written to the Mr and Mrs Bissett on numerous occasions threatening legal action (see HP 7, 9, 14, 15, 16, 25, 26, 28). Mr Bissett has, on receiving these threats, advised the Factors that he would welcome court proceedings in order that the issues between the parties can to be determined. None of these points are in dispute.

42. In the Tribunal's view, "reasonable steps to resolve the matter", in this type of case, would entail that the factors follow their own complaints procedure, formulated in accordance with sections 1 and 7 of the Code. When Mr Bissett indicated that he was withholding payment of factoring invoices, because the Factors had failed to resolve his complaints, it was obvious, at that stage, that he was dissatisfied with the Factors' attempts at resolution. He should then have been invited to initiate the Complaints Procedure. That would have been in accordance with the Factor's own policy, as described by Mr Devon. That did not happen. Instead, the Factors referred the matter to their solicitors, and arranged for the registration of a notice of potential liability. To that extent, they did not take reasonable steps to resolve the matter before taking legal action.

43. The Tribunal accordingly finds this complaint to be established.

Further observations

44. The Tribunal wishes to comment on the approach adopted by the Factors to the hearing. Reference is made to paragraphs 3 and 4 above. The Tribunal made a Direction, at the request of Factors, which applied to both parties. The Factors did not comply. They did not lodge written representations, as directed. No explanation was provided by Mr Devon for that failure. That is regrettable. It ill befits the Factors to complain of a lack of specification in the Homeowner's case, when they have provided no written representations at all, even after having been directed to do so. In the Tribunal's view, Mr Bissett's email of 14 July was clear

enough to enable the Factors to provide written representations in response. That would have been of assistance to the Tribunal, in preparing for the hearing.

45. The Tribunal also discerned in Mr Devon's submissions a focus on critically examining the manner in which the Homeowner had presented his application, rather than the substance of his complaints. The Tribunal considered that overall, the Factors' approach was incompatible with regulations 3 and 4 of the Procedure Regulations, which are of fundamental importance to the way in which both the Tribunal, and parties, should approach hearings. In this case, reference is made, in particular, to rules 3(1), 3(2)(b), and 4(3):

3.— The overriding objective

- (1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.
- (2) Dealing with the proceedings justly includes—
 - (a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;
 - (b) seeking informality and flexibility in proceedings;
 - (c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take;

...

4.— Application of the overriding objective

- (1) The Chamber President and the First-tier Tribunal must seek to give effect to the overriding objective when—
 - (a) exercising any power under these Rules; and
 - (b) interpreting any rule.
- (2) In particular the Chamber President and the First-tier Tribunal must manage the proceedings in accordance with the overriding objective.
- (3) The parties must assist the Chamber President or the First-tier Tribunal to further the overriding objective.

Disposal under section 19, appeal, etc

46. The Tribunal decided that, given the Factors' failure to comply with the section 3.3 of the Code they should be required to provide all supporting invoices for bills rendered by the Factors to the Homeowner, from 1 January 2009 to date, at no charge. Also, given its finding that no statement of services has ever been provided to the Homeowner, the Tribunal has ordered that to be done.

47. The Tribunal also decided to order the Factors to pay the sum of £400 in respect of the breaches of the Code, in particular those described at paragraphs 33 to 43 above. In the Tribunal's view, the Factors' continuing failure to provide the Homeowner with a copy of their complaints procedure, and their decision threaten legal proceedings, and then register a notice of potential liability, without attempting to resolve the parties' dispute through the complaints procedure, are significant breaches of the Code. It was clear, from Mr Bissett's evidence before

the Tribunal, that the Factors' actions were a source of considerable frustration to him.

48. The Tribunal's decision was unanimous.

49. The Tribunal has accordingly issued a separate Proposed Property Factor Enforcement Order, to which reference is made.

50. **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.**

51. Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

A Stalker

Signed

Date 8 September 2017

Chairman