

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision on homeowner's application:

Property Factors (Scotland) Act 2011 Section 19(1)(a)

Of

the Housing and Property Chamber of the First-tier Tribunal for Scotland

(Hereinafter referred to as "the Tribunal")

Case references : FTS/HPC/PF/18/2092

**Re: Property at 93 Millcroft Road, Cumbernauld, G67 2QE
 ("the Property")**

The Parties :

**Mandie Hetherington, 93 Millcroft Road, Cumbernauld, G67 2QE
 ("Applicant")**

(represented by Working Legally Ltd, 2/2, 11 Western Avenue, Rutherglen, South Lanarkshire G73 1LQ)

Apex Property Factor Ltd, 46 Eastside, Kirkintilloch, East Dunbartonshire G66 1QH ("Respondents")

Tribunal Members:-

David Bartos	- Chairperson, Legal member
Sara Hesp	- Ordinary (Surveyor) member

DECISION

1. The Tribunal having no jurisdiction to deal with the Applicant's complaints of the Respondents' failure to comply with section 14(5) of the Property Factors (Scotland) Act 2011 or failure to carry out property factor's duties as defined in section 17(5) of that Act, dismisses the application.

Introduction

2. 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 rules in schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".
3. On 15 August 2018, an application was received by the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") from the Applicant's representative seeking a decision that the Respondents had failed to comply with the Property Factor Code of Conduct and other property factor's duties. The application alleged breaches of sections 1, 2.1, 2.2, 2.4, 2.5, 3.3, 4.9, 6.3, 6.4, and 7 of the Code. It also alleged that the Respondents had breached their duties:
 - (1) In not carrying out grass cutting;
 - (2) In not cleaning internal common hallways and stairs;
 - (3) In not carrying out repairs to stairs, hallways and the roof.

Findings of Fact

4. Having considered all the evidence, the Tribunal found the following facts to be established:-
 - (a) The Property is a flat within the development of 57 flats numbered 1 to 103 Millcroft Road, Cumbernauld. The 57 flats are in a row of 6 blocks (numbered blocks 16 to 21). The Property includes common parts of the development. The development is from the 1980s.

- (b) The development is situated on the south-east side of Millcroft Road at the west of the neighbouring development. That neighbouring development consists of a row of 7 blocks of flats numbered 137 to 259 Greenrigg Road.
- (c) The Applicant is a co-owner of the Property and has been so since 1989.
- (d) The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 1 November 2012.
- (e) The flats within the development are all subject to a deed of conditions recorded in the General Register of Sasines on 9 February 1988 ("the Deed of Conditions").
- (f) At the beginning of 2015 there were no factors in place for the development. Since August 2015 the Respondents have purported to act as factors for the development. There has been no meeting of the homeowners in the development appointing the Respondents as factors for the development. There has been no vote of a majority of the homeowners in the development appointing the Respondents as factors. No factoring contract or agreement has been entered into between the homeowners of the development and the Respondents.
- (g) In about September 2016 the Respondents issued a "Property Factoring Statement of Service" to homeowners in the development.
- (h) In August and September 2017 the Respondents did not carry out cleaning works and maintenance of the common parts of the development including the verges of the access road and car park, the outside stairs of the development and the internal stairwell of the block comprising numbers 21 to 35 Greenrigg Road.
- (i) On or about 28 September 2017 the Respondents issued invoices to homeowners in the development seeking payment for cleaning, landscaping and litter-picking services allegedly carried out in August 2017.

- (j) By letter dated 4 July 2018 Working Legal wrote to the Respondents on behalf of the Applicant and certain owners of properties at numbers 7, 13, 27, 29, 83, 85c, 99, 101, 109, 125 and 131 Greenrigg Road in the development complaining of breaches of sections 1, 2.1, 2.2, 2.4, 2.5, 3.3, 4.9, 6.3, 6.4 and 7 of the Code.
- (k) By letter to Working Legal dated 27 July 2018 the Respondents rejected the claimed breaches of the Code.
- (l) Applications to the Tribunal purporting to be on behalf of the Applicant and the owners of 7, 13, 27, 29, 85c, 99, 101, 125 and 131 Greenrigg Road were lodged on 15 August 2018.

Procedure

5. The application to the Tribunal sought in the first place an order declaring that the Respondents were not as a matter of law factors for the development. It also sought a determination of failure to comply with the Code and also with other property factor's duties. On or about 27 September 2018 a Convener with delegated power of the President of the Tribunal referred the application to the present Tribunal for its determination. This was notified to the parties by letters from the Tribunal's casework officer dated 17 October 2018 which also invited the parties to make written representations to the Tribunal and to lodge supporting documents known as productions.
6. The Applicant's representatives lodged productions with the Tribunal on 6 September, 6 November, 20 December all 2018, and on 10 January 2019. The Respondents lodged productions with the Tribunal on 18 December 2018 and on 3 January 2019 but the latter of these were lodged late and not relied on by the Respondents. The Applicant's representatives lodged written representations comprising (1) a skeleton argument; (2) a letter dated 29 November 2018 in response to the Tribunal's direction dated 20 November 2018; and (3) a letter dated 8

December 2018 in response to the Tribunal's direction dated 5 December 2018. The Respondents lodged written representations on 7 November 2018 and on 18 December 2018 (in a letter dated 14 December).

7. A hearing was fixed to take place at the Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT on 4 January 2019 at 10.00 a.m. The date and times were intimated to the Applicant and the Respondents by letters from the Tribunal's casework officer dated 22 November 2018. The application was to be heard together with those for case references FTS/HPC/PF/18/2086-2091; 2093-2100, 2937, and 2939-2941.
8. The hearing took place on 4 January 2019 at 10 a.m. at the venue fixed for it. Mr James Collier of Working Legally appeared for the Applicant. Mr Neil Cowan appeared for the Respondents. The hearing was continued to the same venue and time on 11 February 2019 when it concluded.

Jurisdiction - Summary

9. Two matters arose at the outset. Both had the potential of excluding the jurisdiction (power) of the Tribunal to make the order sought in the application. In other words if any of them excluded the jurisdiction of the Tribunal it could not consider the breaches of Code and property factor's duties alleged.
10. The first matter was the absence of a title deed or extract from a title entry in the Land Register evidencing that the Applicant was the owner of the Property. The second matter was that even if it was established that the Applicant was the owner of the Property, there did not appear to be any factoring contract in place between her and the Respondents. In that case it might be difficult to see how the Respondents could owe any

duty to the Applicant whether under the Code or as (another) property factor's duty.

Jurisdiction – Non-ownership of Property

11. The Tribunal can only consider applications from owners of land or buildings (heritable property). That is the effect of section 17(1) as read with section 10(5) of the 2011 Act. In this instance the Tribunal had directed the Applicant to provide it with the title deed or title entry from the Land Register of Scotland evidencing her ownership of the Property. Mr Collier was unable to present this to the Tribunal. He did not have any explanation for this.
12. However he had lodged a letter from Tindal Oatts to "Miss M. Liddell and A. Hetherington, Esq." dated 13 October 1989 enclosing a copy of a deed of conditions which stated "The Conditions in this Deed affect all the proprietors in the tenement of which your flat forms part." In spite of the absence of the title deed or title entry the Tribunal inferred from this evidence that the Applicant was at least a co-owner of the Property. This entitled her to apply to the Tribunal.

Jurisdiction – Issue of Existence of Factoring Contract/Appointment

13. The key remedy sought in the application was an order declaring that the Respondents had not been appointed as property factor. In other words it sought a binding declaration from the Tribunal that the Respondents were not the agents for the homeowners in the development.
14. The jurisdiction (power) of the Tribunal is set out in sections 17(1) and 19(1) and (3) and 20 of the 2011 Act. Section 17(1) gives it power to decide, on the application by a homeowner, whether a property factor has failed (a) to carry out property factor's duties; or (b) to ensure

compliance with the Code of Conduct. Section 19(1) gives it the power and section 19(3) the duty, to make a property factor enforcement order in the event that it finds any of those failures to have taken place. Section 20 specifies that such an order may require the factor to execute such action as the Tribunal considers necessary or to make payment which the Tribunal considers reasonable.

15. Property factors existed before the 2011 Act. As noted already a property factor is an agent of the owner or owners of property who manages the property on behalf of the owners. That relationship is one of contract in which the owners are the principals or clients of the factor who is their joint agent. Before the 2011 Act if there was no contract of agency with the homeowners there was no property factor. An example of this was in the case *Hanover (Scotland) Housing Association v. Reid* 2006 Scots Law Times 518 where it was found that there had been no valid appointment of the factor.
16. The aim of the 2011 Act was to provide a remedy to homeowners in respect of their property factors and to improve the service provided by such factors. This was reflected in the Policy Memorandum supporting the Bill which became the Act, which stated in paragraph 16:

“This new form of alternative dispute resolution would enable a homeowner to apply in writing to the homeowner housing panel for a determination of whether *their* property factor had failed to comply with any term of the contract between the parties or with the statutory code of conduct.” (Tribunal’s emphasis).

That the Act was designed to deal with the relationship between homeowners and “their” accepted factors is emphasized further in paragraph 6 of the Policy Memorandum. In listing the mischiefs which the Act was to deal with, paragraph 6 refers to homeowners and “their”

factors and nowhere mentions disputes over appointment of factors such as that in the *Reid* case.

17. The Code underlines the purposes of the Act in its provisions. Almost of all of these deal with the nature of an existing relationship between a factor and his clients. The principal provision of the Code is the requirement that the factor provides the homeowner with a written statement of services. Such services can only be provided (legitimately) as part of a contract between the factor and homeowners. Absent a valid appointment no services would be due and no written statement would be appropriate.
18. If there were no definitions of "homeowner" or "property factor" in the 2011 Act it would be plain that without a contract of agency between homeowner and factor there could be no "property factor's duty" owed by the factor to the homeowner which could be adjudicated on by the tribunal under section 17(1)(a). Equally given that the Code of Conduct is intended to govern the conduct of a factor towards their client the homeowner, there could be no duty to comply with the Code of Conduct on which the tribunal could adjudicate under section 17(1)(b).
19. Do the definitions in the Act extend the jurisdiction of the tribunal under section 17(1) ? "Homeowner" is defined in section 10(5) of the Act. For that to be satisfied an owner must :
 - (a) own land (or other immoveable property) the common parts of which are "managed" by a "property factor" or
 - (b) own residential property neighbouring the land managed by the factor which neighbouring (factored) land is available for the owner's use.

All of that is entirely consistent with the requirement of a contract of agency between factor and owner. Nothing in section 10(5) appears designed to extend the jurisdiction to situations where there has been no contract between an owner and a person claiming to be the owner's factor.

20. The expression "property factor" is itself defined in section 2(1). That definition while differing in its precise wording from section 10(5) essentially mirrors it. It too is consistent with the requirement for the existence of a contract between the owner and the person who falls within the definition in section 2(1). Again there is no suggestion that the Scottish Parliament intended the jurisdiction of the tribunal to cover situations where there was no contract between the parties to the dispute.
21. Leaving aside any case law it appears plain that the jurisdiction in section 17(1) assumes the existence of a contract of agency between the applicant homeowner and the respondent factor at the time of the alleged factor's failure. On the basis of that assumption the only question for a tribunal will be whether during the duration of a factor/homeowner contract there has been a breach of factor's duty or breach of the Code of Conduct.
22. It follows that the jurisdiction of the tribunal is not there to make a binding order on the issue of whether the contract of agency (factoring) does or does not exist. The jurisdiction to make such an order remains with the court. The words "property factor" in section 10(5) should be interpreted as meaning "property factor validly appointed on the owner's behalf" and in section 17(1) as "property factor validly appointed on the homeowner's behalf".

23. However there have been suggestions in previous cases that a tribunal can make an order against a person who may be registered as a factor even where the applicant and factor have never been party to a factoring contract. The principal case is *FTS/HPC/PF/17/0023*. At Upper Tribunal the case name *McNaught v. Apex Property Factor Limited* was used. The case is unreported. It involved the current Respondents. It involved the current development.
24. In *McNaught* the applicant complained of breaches by the Respondents of sections 2.2, 2.5, 4.7, 4.8 and 4.9 of the Code. He did not complain of breach of property factor's duties. The breaches alleged were all based on the Respondents not having been appointed factors and despite their lack of appointment having sent invoices to the applicant demanding payment and disregarding the applicant's requests for confirmation of their authority to act as factors.
25. The First-tier Tribunal found that the Respondents did not have the authority of the homeowners or their residents' association to act as factors. Nevertheless the tribunal went on to find that there had been breaches of sections 2.2, 2.5, 4.8 and 4.9 of the Code and proposed an order requiring the Respondents to issue a credit note to the applicant for the illicit invoices.
26. The Respondents sought permission to appeal to the Upper Tribunal on the basis that as the First-tier Tribunal had found that they had not been factors the tribunal lacked jurisdiction to propose the order requiring the credit note.
27. The Upper Tribunal refused permission to appeal. In its refusal of permission the Upper Tribunal judge referred to the definition of "homeowner" in section 10(5) of the Act, stating, in paragraph [6] :

"It is a necessary component of this definition that the homeowner's property be managed by a property factor. The provision contains no express requirement that the property factor who carries out that management should be validly appointed; to imply that condition would not be consistent with the legislative intention of setting minimum standards of practice for all registered property factors (section 14(1)). All that is required is that the property factor who is the subject of the complaint did in fact manage or maintain common property pertinent to the homeowner's property."

The mention of legislative intention appeared to be a reference back to paragraph [4] of the refusal where the Upper Tribunal judge stated that the obligation to comply with the Code applied to a property factor whether validly appointed or not because,

"When the various breaches of the code identified [sections 2.2, 2.5, 4.8 and 4.9] are considered it is apparent that no other interpretation would make sense. . . These duties are all aimed at setting minimum standards of practice for registered property factors generally (section 14(1))."

28. However the Upper Tribunal judge had not been given the information in the Policy Memorandum already noted. He was unaware of the assumption of the Scottish Parliament was that there would be a factor in place and that the tribunal (formerly committee) would decide disputes between such factors (validly appointed) and "their" clients, the homeowners.
29. In addition, the Upper Tribunal judge had not taken account of the provisions of the Code as a whole and the key duty in section 1 of the Code, namely to provide a written statement of services with details of the "arrangement in place" between homeowner and factor. It would be most odd if a registered factor who had not been validly appointed by homeowners should require to provide a statement of services. The supply of such a statement would be misleading for homeowners and potentially lead some of them thinking that the factor had been validly appointed when that was not the case. In turn it might lead to factors

being forced onto homeowners against their will. None of that can have been the intention of the Scottish Parliament in the 2011 Act.

30. It would also be odd if some parts of the Code were applicable to validly appointed registered factors only and other parts of the Code (e.g. sections 2.2, 2.5, 4.8 and 4.9) to all registered factors whether validly appointed or not. There is no suggestion within the Code that it is to be applied in that manner.
31. In these circumstances it appeared to the Tribunal that the Upper Tribunal had erred in its refusal of permission to appeal in *McNaught*. No doubt this was due to full argument not having been put to the judge. The decision of the Upper Tribunal in *McNaught* was given on an application for permission to appeal and without full submissions. In these circumstances the Tribunal did not consider it bound by the rationale in *McNaught*.
32. The other previous case was FTS/HPC/PF/17/0285/0286-0287. It involved the Respondents and a nearby similar development. The property involved was 65 Greenrigg Road. In that case the applicants complained of breaches of sections 1A, 3.3, parts of section 4, 6.2 and 6.3 of the Code and breach of property factor's duties. It was decided on 8 February 2018.
33. In that case the first-tier tribunal found that the Respondents had not been appointed as factors in accordance with the Deed of Conditions which governed appointment. Nevertheless the tribunal went on to find that there had been various breaches of the Code and proposed a property factor enforcement order.

34. The issue of the lack of jurisdiction was not focussed in that case and the points raised in the current case were not argued. In these circumstances that case did not assist the current Tribunal.
35. Returning to the current case, Mr Collier submitted that despite the lack of appointment the Tribunal still had jurisdiction to make a determination of whether the Code had been complied with. In short he wished the Tribunal to declare that the Respondents were not property factors of the owners of the development but at the same time to determine that the Respondents had failed to comply with the Code and other property factor's duties.
36. The Tribunal found Mr Collier's submission inconsistent. On this branch of the submissions in the present case the Tribunal concluded that if it was established that the Respondents had not been validly appointed as factors for the Properties it would have no jurisdiction to consider the breaches of the Code and property factor's duties alleged in the application under section 17(1)(a) or (b) of the 2011 Act.

Factoring Contract/Appointment of Respondents for Properties

37. The Tribunal considered whether the Respondents had been validly appointed as factors for the Property. It was accepted that there had been no factor in place at the beginning of 2015. It was also accepted that there was no residents' association in operation for the development.
38. The development consisted of more than one tenement. In that situation the default rules for the appointment of a factor were as set out in section 28 of the Title Conditions (Scotland) Act 2003 (2003 Act, s.31A). Section 28(1) provided that subject to certain other sections (which did not apply

in the present case) and, importantly, any provision made in community burdens, the owners of a majority of the units in a community could:

- (a) appoint a person to be the "manager" of the community on such terms as they may specify;
- (b) confer on such manager the right to exercise such of the owners' powers as they may specify (including maintenance powers);
- (c) revoke or alter the manager's rights to exercise those powers; or
- (d) dismiss the manager.

39. In the present case, however, there was a community burden which overrode the default rules. It was in the Deed of Conditions recorded in the General Register of Sasines on 9 February 1988. The development and community covered by the 1988 Deed of Conditions was the 57 dwellinghouses numbered 1 to 103 Millcroft Road within 6 tenements (blocks 16 to 21). The Deed of Conditions provided :

"8. . . . (1) 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 amongst the proprietors in accordance with this Clause."

"11.(1) 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; 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 fifty-seven Dwellinghouses known as numbers 1 – 103 Millcroft Road, Cumbernauld.

9.(2) Subject as aftermentioned the Residents Association may convene a general meeting of residents at not less than seven days notice with a quorum no less than seven proprietors shall have power
 (i) to appoint a Factor . . ."

"9(4) The proprietors of any seven of the fifty seven Dwellinghouses shall have the power to call a meeting of the Residents Association to be held at such reasonably convenient time and place as the conveners of the meeting may determine and which time and place of meeting at least seven days' notice in writing shall be given . . . to the other proprietors. . . DECLARING THAT . . . all resolutions of the Residents Association will be passed by a majority of the votes cast and the resolution so passed will be binding upon all proprietors whether assenting or not.".

The question was whether the Respondents had been appointed in accordance with these provisions.

40. The Tribunal heard evidence from Miss Leeann Semple, owner and occupier of 101 Greenrigg Road on a nearby similar development. She said that she had never attended any meeting with the Respondents. She had never seen any document calling a meeting prior to the Respondents claiming that they had been appointed. She said that she had not signed anything agreeing to the Respondents' appointment. She had not received any letter from the residents' association proposing the Respondents as factors. She had found out about the Respondents initially from a letter from North Lanarkshire Council. She had not received any letter of introduction from the Respondents or letter from the Respondents proposing their appointment. The first communication from the Respondents had been a bill, perhaps dealing with insurance.
41. Miss Semple spoke to there having been a meeting of residents of the Applicant's development and neighbouring developments of Greenrigg Road and Millcroft. She confirmed the accuracy of the minutes of the meeting which had taken place at Carbrain Baptist Church (production 10). That had been about a year after the Respondents had initially claimed appointment although she could not be sure of the date. She

had received a copy of the minutes from Angie Inch. She noted that she was one of the persons who had agreed to provide assistance on the way forward.

42. Under cross-examination she was presented with a mandate dated 24 August 2015 with her signature "confirming acceptance" of the Respondents as a factor. She accepted that the writing and signature was hers although she had no recollection of signing it. She said that she was unable to remember whether she had signed it before or after she had received the first bill from the Respondents. She had been going through a difficult time in 2015 with a 4 year old disabled child.
43. The Tribunal heard evidence from Shabir Ahmed, owner of 27 Greenrigg Road. He said that the first he was aware of the Respondents was in 2015 when he received a letter stating that a payment was overdue. He had never been invited to any meeting to appoint the Respondents. He had never received anything suggesting that the Respondents should be appointed as factors. He did not recall receiving any document asking him to confirm the Respondents as factors. Nor had he received any letter from other owners stating the the Respondents had been appointed factors. The first he was aware of the Respondents was their claim for an overdue bill of £ 10 to £ 15.
44. Mr Ahmed said that he had contacted the Respondents to find out what was happening. He had asked them for evidence of their appointment many times but had never received any evidence. His request had been made over the telephone and face to face with their Mr Cowan. Each request had been refused apparently on grounds of data protection. He had received the same response by letter.

45. He confirmed that he had never attended any meeting where the Respondents had been confirmed as factors, nor was he aware of any such meeting having taken place.
46. There was no cross-examination of Mr Ahmed on the issue of appointment. The Tribunal accepted Mr Ahmed's evidence as credible and reliable.
47. The Tribunal found Miss Semple's evidence not reliable on some aspects. Although she appeared to be doing her best to recall the initial contacts with the Respondents, it was clear that her memory was hazy on exactly what she had received and what she had signed. While she said that she had not signed anything agreeing to the Respondents, under cross-examination she accepted that she had signed the confirmatory document. In addition her oral evidence to the tribunal did not fit with her written statement where she stated that she had received an introductory letter from the Respondents.
48. However the Tribunal was prepared to accept that Miss Semple had not seen any document calling a meeting prior to the Respondents claiming that they had been appointed, nor received any letter from the residents' association proposing the Respondents as factors. This corresponded with Mr Ahmed's evidence the written statement of Maqsood Mustafa to the Tribunal (production 1a) and the e-mail from the Applicant (before his death) to his representative dated 31 July 2018 (production 1i)
49. For the Applicant, Mr Collier submitted that while the Residents' Association was inactive, given that the owners of each of the 57 units was by virtue of ownership a member of the Association there was nothing to prevent the owners of 7 units calling a general meeting at which a factor could be appointed. However this had not happened.

Absent such appointment the Respondents had not been validly appointed as factors. The signature of some mandates by some homeowners was insufficient to allow the Respondents to be appointed factors for the whole community.

50. For the Respondents, Mr Cowan submitted that the Residents' Association did not exist when they had begun to act as factors for the Property in the development and neighbouring developments. He submitted that the Respondents had been approached by several homeowners with a request to become factors. He was unable to provide any evidence of this, however. He then submitted that the Respondents had written to all owners in Greenrigg Road asking if they would consider appointing the Respondents as factors. The letter (production 5b) dated 3 August 2015 was the letter that they had sent. He submitted that the Respondents had been appointed "close by close". If a close had 8 properties its proportion of the whole community was over 10% and it was therefore entitled to appoint its own factor. He made no specific mention of the Applicant's development but accepted that there had not been any general meeting of residents of the development appointing the Respondents. He accepted that nothing in the deed of conditions allowed the Respondents to be appointed. Furthermore the Respondents were not relying on the procedures in the Tenements (Scotland) Act 2004 (the other basis of appointment given in the Property Factoring Statement of Services).
51. The Tribunal accepted Mr Collier's submission in relation to the validity of the Respondents' appointment. There had been no residents' meeting either called or taken place at which the Respondents had been appointed. Indeed this was accepted by the Respondents. The Respondents' approach to assessing whether they had been appointed or not was fundamentally flawed. Each of the owners in the 57 unit

community had bought their properties on the basis that they were part of a 57 unit community that could appoint a factor on their behalf in accordance with the provisions in the Deed of Conditions clauses 10, 11(1), 11(2) and 11(3). There was no legal basis for the owners to appoint a factor “close by close” or “tenement by tenement”. That was excluded by the Deed of Conditions which treated 6 tenements as one community of properties. The appointment procedure in the Deed of Conditions had not been followed. That being the case no factoring contract had been created between the Respondents and the homeowners of the community in the 6 blocks covering 1 to 103 Millcroft Road, Cumbernauld.

52. The Tribunal was surprised that the Respondents were claiming any basis for a valid appointment. They had not sought to appeal the *McNaught* case on the grounds of a valid appointment. A straightforward reading of the deed of conditions (which was publicly available and had been highlighted in the *McNaught* case) would have made it clear that (1) the community in question was 57 units; (2) under clause 11(3) any 7 owners could call a meeting of the residents’ association (even if it was inoperative); (3) under clause 11(2) a meeting with a quorum of 7 was required to appoint the factor. Even if the Respondents had believed (erroneously) that the Residents Association could not be revived, then it was clear from the Deed of Conditions that the community comprised 57 units and under section 28 of the Title Conditions (Scotland) Act 2003 their appointment as factors required a majority of the owners of units in the community, something which they have never claimed to have obtained. The Tribunal deprecated the Respondents’ “parachuting” of themselves onto the development as factors accompanied by the unwarranted sending of invoices to unsuspecting homeowners.

53. Given the Respondents' lack of appointment and consequent lack of jurisdiction to consider the application the Tribunal did not require to consider the alleged breaches. Nevertheless, given the detailed submissions and evidence that had been put to it, the Tribunal considered each alleged breach.

Section 1 of the Code

54. Section 1.1a A (a) of the Code provides,

"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. . . You must provide the written statement to any new homeowners within four weeks of agreeing to provide services to them . . . The written statement should set out . . . a statement of the basis of any authority you have to act on behalf of all the homeowners in the group."

55. Mr Collier submitted that the Respondents' written statement had not set out any basis of authority at all. All it said was they had been appointed, "in accordance with the provisions of the 'Title Deeds' for the Development or The Tenements (Scotland) Act 2004 as appropriate."

Furthermore, it had not been given within 4 weeks of any agreement of the Respondents to act. He led Miss Semple and Mr Ahmed as witnesses. Mr Cowan submitted that the written statement had been given in August 2015. However he could produce no evidence in support of this. He did not put himself forward as a witness.

56. Miss Semple spoke to having received the undated written statement "Property Factoring Statement of Services" (enclosed with the Respondents' letter to Mr Collier dated 27 July 2018) ("the WSS") from the Respondents only after having received their "five thousand pound bill". She said that it had been after 1 September 2016 when according to her statement of account from the Respondents (production 13i) she

had received two invoices totalling £ 4850. Under cross-examination she said that it was possible that she might have received the WSS in 2015 when she signed the mandate received from the Respondents as "so much was going on" at that time.

57. Mr Ahmed said that he was unable to say the exact date when he had received the WSS but that it was after he had met Mr Cowan and received the outstanding bill. He had asked Mr Cowan if anyone else had agreed to the Respondents to which Mr Cowan had replied "yes". On hearing this Mr Ahmed confirmed that he had paid £ 100 to the Respondents. He thought that he would probably have received the WSS around 21 October 2015 which is stated to be the date of payment in the Respondents Statement of Account of Mr Ahmed with them (production 13h). The meeting had been before that date. There was no cross-examination of Mr Ahmed.
58. The Tribunal accepted Mr Ahmed's evidence which was given without hesitation or qualification. While Miss Semple said that it was possible that she had received the WSS in 2015, her evidence is supported by that of Aidan Henderson, owner of a property in the neighbouring development who stated in writing (production 1j) that he had received the WSS on or about 1 September 2016. Given that it is accepted that the Respondents treated both developments as one, and Mr Ahmed's receipt of the WSS followed his individual meeting with the Respondents, on a balance of probabilities the Tribunal accepted the evidence of Ms Semple and Mr Henderson as to the date when the WSS was sent to owners in both developments as a whole.
59. With regard to the date when the Respondents first provided services (even if unauthorised), the Tribunal took note of the dates of the Respondents' demands for payment to various homeowners. Thus Mr

Ahmed's Statement of Account indicated the invoicing of him for £ 100 at the end of July 2015. The Respondents' list of work (production 5h) states that they cut grass and picked litter for the first time on 12 August 2015. Their "POLITE REMINDER" letter to Yvonne Rivera seeking payment of £ 100 is dated 24 August 2015 (production 7d) which is the same date as the mandate signed by Ms Semple.

60. The Tribunal found that the WSS failed to comply with section 1 of the Code in three respects. Firstly it was provided no earlier than September 2016 which was more than 4 weeks after the Respondents had, on their own initiative, started to provide services. Secondly, it failed to give a transparent statement of their actual authority to act to homeowners. To merely state that the appointment is in accordance with the provisions of unspecified title deeds was too vague. It was not transparent. How was the homeowner meant to know which title deed ? It was not for the homeowner to be searching for the deed to justify the factor's authority. It was for the factor to be clear about the basis of their authority and to justify it. This vagueness was compounded by the reference to the Tenements (Scotland) Act 2004 as an alternative means of appointment, again without any reference to the actual process under that Act, such as the date of appointment. A factor is reasonably expected to know the basis of appointment. If a factor is unable to give these details, the factor should question whether it should be acting at all for the properties in question or seek to put the matter beyond doubt by following the proper process. Thirdly, there was no authority to act at all for the reasons given in relation to lack of jurisdiction.

Section 2.1 of the Code

61. Section 2.1 of the Code provides that a factor must not provide information which is misleading or false.

62. Mr Collier submitted that the statements in the WSS (a) as to the authority to act; and (b) that invoices would be sent monthly were misleading or false. Mr Cowan denied that was so. The Tribunal found that the statement in the Written Statement of Services as to the authority to act was false and misleading. In their submissions to the Tribunal the Respondents accepted that their authority was not to be found in the 2004 Act. They claimed that their authority to act was under the deed of conditions while stating that they were appointed "close by close". If the Respondents had read the deed of conditions it would have been plain that appointment was not done on a "close by close" basis and that a general meeting of the residents of the 57 unit community was required. On any view there was no justification for a "close by close" appointment if they were relying on the deed of conditions. The Tribunal found that the statement in the WSS as to invoices was a statement of future intent. It was not false and misleading in itself.
63. Mr Collier also submitted that the Respondents' invoices produced as numbers 14a, 14n, 14o, and 14p contained false statements. Invoice 14p, addressed to the Applicant and her husband, related to the current development. That invoice was :
- No. 38854 dated 1 October 2018 for "Management Fee – Sept 2018" for £ 10.15 plus VAT for proportion "1/1"; for "Cleaning – Sept 2018" for proportion 1/57; for "Landscape/L pick – Sept 2018" for proportion 1/57
64. Mr Collier led Mr Ahmed as a witness to the alleged falsity of that invoice. Mr Ahmed said that as far as he was aware the Respondents had not carried out any work at or near his tenement at 27 Greenrigg Road since 2015. For example while the Respondents had claimed to have removed rubbish, this had in fact been done by North Lanarkshire Council. He referred to various photographs which he had taken and had been

produced by Mr Collier to the Tribunal. These photographs related to the communal carpark opposite block 1 (numbers 1 to 20 Greenrigg Road), the southern verge of the vehicle entry to Greenrigg Road, a plant bed near the garages facing the block with numbers 21 to 35 Greenrigg Road, the outside stairways leading to numbers 21 to 35 Greenrigg Road, and the internal stairwell of Mr Ahmed's flat which is 27 Greenrigg Road. He confirmed that the photographs had been taken on the dates shown on them which were in August and September 2017. Under cross-examination he reiterated that the invoices that he had received from the Respondents included charges for cleaning and litter picking but these did not bear a resemblance to the reality regarding cleaning and litter picking. The Tribunal found that in the development at 1 to 135 Greenrigg Road and in Mr Ahmed's stairwell the Respondents had not carried out these services in August and September 2017.

65. However the Tribunal was not presented with similar evidence for the non-performance of work charged in the Applicant's invoice. Accordingly the Tribunal was unable to find that there were false and misleading statements in the invoice to the Applicant.

Section 2.2 of the Code

66. Section 2.2 of the Code provides,
"You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).".

The Applicant complained that she had felt threatened and intimidated by correspondence sent to her and her husband by the Respondents. This was :

- Letter to the Applicant (production 7o) requesting payment of £ 406.19 stating :

"Please note failure to contact us or make payment will result in late payment charges being added to your account."

- Letter to the Applicant (production 7v) requesting payment of £ 416.88 stating :

"The consequences of such [simple procedure action] may result in . . . Sequestration (Personal Bankruptcy). . . We will also notify the holder of your Standard Security of your indebtedness. If you are a private landlord we will advise the Landlord Registration Unit of your failure to pay your share of the cost of communal repairs. **We enclose an extract of the Small Claim Application which will be lodged with Glasgow Sheriff Court.**"

and enclosing pages from a Simple Procedure Claim Form (production 11d) including the wish that the court order the payment of the sum together with interest at 8% per annum thereon.

- Letter to the Applicant and her husband stamped "FINAL DEMAND" seeking payment of a balance of no more than £ 327.49 (production 7rr) stating that as a result of non-payment they might commence "insolvency proceedings".

67. In her written statement (production 1g) the Applicant also founded on telephone calls being made to her and her husband regularly in connection with the non-payment of invoices. However Mr Collier did not rely on these in his submissions.

68. Mr Collier submitted that the correspondence set out above was threatening and intimidating to the Applicant. It went far beyond a reasonable indication of legal action. At the second hearing Mr Collier founded also on :

- Circular letter to all homeowners dated 25 October 2017 (production 5q) stating :

" . . . there appears to be a malicious minority who have their own agenda, which is not for the benefit of the majority of the Owners.

You may have received correspondence from "Greenrigg and Millcroft Resident's Association"; we would comment as follows: -

. . . 3. All correspondence received by us is completely anonymous; if you are aware of the identity of any of the participants we would appreciate this information, to enable us to instigate legal proceedings against them, to protect your position.

4. We have had a meeting with North Lanarkshire Council who indicated that the interference of this group could hinder any progress towards possible grant funding."

69. The Respondents' Mr Cowan submitted that there was nothing threatening or intimidating in the letter to the Applicant . Sequestration for a debt of £ 416 was foreseeable.
70. Section 2.2 is concerned with communications by factors to homeowners. Was any of these communications in any way intimidating or threatening (apart from a reasonable indication of legal action) ? This had to be assessed objectively by reference to a homeowner reacting reasonably upon receipt of the communication but also taking account of the personal sensitivities of the homeowner if these were known to the factor at the time of communication.
71. The Tribunal took the view that the following aspects of the above correspondence were threatening and intimidating and did not constitute a reasonable indication of legal action:
 - (a) Threat of sequestration (bankruptcy) or insolvency proceedings given that at the material time sequestration on the application of a creditor was competent only for a minimum of total debts of £ 3000;
 - (b) Threat of reporting to the standard security (mortgage) holder of a homeowner;
 - (c) Enclosure of a copy of the small claims form (in whole or in part) – whilst this might be seen as a reasonable indication of legal action if

the recipient was a lawyer, it was threatening and intimidating when sent to a lay homeowner;

(d) Description in a circular letter to all homeowners of a group homeowners seeking to revive the Residents' Association as a "malicious minority" and seeking information as to their identity to raise (unspecified) legal proceedings against them – this general threat designed to pressurize one group of homeowners by setting the others into conflict against them was clearly threatening and intimidatory to those seeking to revive the Association. The Tribunal found this letter quite outrageous and tended to show that the Respondents were not fit and proper to be property factors.

72. In all of these respects the Tribunal found that the Respondents had communicated with the Applicant in a way contrary to section 2.2 of the Code.

Section 2.4 of the Code

73. The Applicant complained that the Respondents had breached their duty under section 2.4 of the Code which provides, among other things, "you must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service.

Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)"

74. Mr Collier submitted that the Respondents did not have such a procedure. He relied on evidence relating to neighbouring developments in Greenrigg Road. He did not produce any evidence relating to the Applicant's development. In these circumstances the Tribunal concluded that non-

compliance with section 2.4 for the Applicant's development was not established.

Section 3.3 of the Code

75. Section 3.3 of the Property Factor Code of Conduct provides, "You must provide . . . 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."

Mr Collier submitted that no breakdown of charges had been provided at all since the alleged appointment in 2015. The irregular issue of invoices did not amount to compliance with section 3.3. A homeowner had no overview of what the factor was doing and charging for over a fixed period of time. As an example the invoice to Mr Mustafa dated 3 September 2018 (production 14a) did not mention any cleaning even though cleaning works of the common areas such as stairwells was part of the core services. The invoice to EML dated 1 September 2016 (production 14h) was the first invoice issued by the Respondents despite them having begun acting in August 2015. Furthermore it did not mention when the works charged for had taken place. Some of the charges on that invoice had in fact been withdrawn by the Respondents.

76. Mr Cowan submitted that the delay in issue had been caused by the Respondents' principal Mrs Bakhshaei-Davidson having suffered a serious spinal injury together with computer software problem. He submitted that the invoices sufficed to comply with section 3.3.

77. The Tribunal found that the invoices issued to homeowners failed to contain a detailed financial breakdown of charges. It was quite unclear how the figures in the invoices were reached. The fraction of overall cost being charged to a homeowner was unclear. The dates of the work charged for were not stated. The location of the works within a total of 8 blocks was not stated. The Respondents left homeowners in the dark as to an overview of all charges over a certain period. Transparency was lacking. In these circumstances the Tribunal found non-compliance with section 3.3.

Section 4.9 of the Code

78. Section 4.9 of the Code provides,
- “When contacting debtors, you or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position.”
79. Mr Collier submitted that this had been breached for the same reasons as section 2.2. Mr Cowan opposed this submission on the same basis as for section 2.2. The Tribunal found that it had not been established that the homeowners who had been threatened in the way found for section 2.2 were debtors of the Respondents. It therefore found that for that reason there was no non-compliance with section 4.9.

Section 6.3 of the Code

80. Section 6.3 provides,
- “On request you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.”
81. Mr Collier founded on requests made by Mr John Connor, an owner in both Greenrigg Road developments in his letters to the Respondents dated 4 November and 15 December both 2016 and an undated letter

(productions 6a to 6c). He did not find on any requests by the Applicant. In these circumstances the Tribunal found no non-compliance with section 6.3 in respect of the Applicant.

Section 6.4 of the Code

82. Section 6.4 of the Code provides,
“If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.”
83. Mr Collier accepted that he had no evidence in support of this. In these circumstances the Tribunal found that there had been no non-compliance.

Section 7.1 of the Code

84. Section 7.1 of the Code provides,
“You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.”
85. Mr Collier founded on the requests made by Mr John Connor in his letters to the Respondents dated 4 November and 15 December both 2016 and an undated letter (productions 6a to 6c). He did not find on any requests by the Applicant. In these circumstances the Tribunal found no non-compliance with section 7.1 in respect of the Applicant.

Property Factor's Duties

86. Mr Collier submitted that the Respondents had failed to carry out :
 - (a) Grass cutting,
 - (b) Cleaning of internal hallways and stairs;
 - (c) General repairs to stairs, hallways and roof.

He relied on the evidence of Mr Ahmed presented in relation to section 2.1 of the Code for a development in Greenrigg Road. This had amounted to a failure to carry out the core services in the WSS which included "cyclical maintenance to communal areas of the Development" and "preserving the amenity of common or shared areas . . by means of instructing regular gardening, cleaning works, repair and maintenance of common areas.".

87. No evidence was supplied in respect of the Applicant's development. In these circumstances a breach of property factor's duties would not have been established.

Expenses

88. At the end of the hearing Mr Collier requested the Tribunal to make an award of expenses in respect of the cost of him requiring to attend at the second day of the hearing. He submitted that this had been caused by the unreasonable behaviour of the Respondents at the first day when they requested time to make an oral response in connection with the alleged breaches of sections 3.3, 4.9, 6.3, 6.4 and 7.1 of the Code. He estimated the wasted cost at the rate of £ 7.83 per hour to cover the hearing on the second day (2 ¼ hours) plus the duration of travel from the Tribunals Centre to Rutherglen which was 50 minutes.
89. The Tribunal did not find that the request by the Respondents to make an oral response to the alleged breaches of the sections of Code was unreasonable behaviour. Whilst at the end of the first day Mr Collier had indicated that he did not wish to add to his written submissions on those sections of the Code that did not mean that it was unreasonable behaviour for the Respondents to wish to add or even consider adding oral representations to their written submissions on those sections at a

Opportunity for Review, Representations and Rights of Appeal

89. The Applicant and Respondents may seek a review of and make representations to the First-tier Tribunal on this decision. Any request for a review or the making of such representations must be made in writing to the Tribunal by no later than 14 days after the day when this decision was sent to the parties. It must state why a review is necessary.
90. The opportunity to make representations and to seek a review is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their request for a review and written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.
91. **In the meantime and in any event, the Applicant or the Respondents may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission.**
92. **All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016. The seeking of a review and the making of representations does not suspend or otherwise affect this time limit.**
- D Bartos

Signed ..

Legal Member and Chairperson

.....8 April...2019..... Date