

Housing and Property Chamber

First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017

Chamber Ref: FTS/HPC/PF/17/0252

Re: Flats 101, 205, 302 and 401 Clarence House, 37 Carnoustie Street, Glasgow, G5 8PN

The Parties:-

Mr Paul Wood, Euro House, 423 Hillington Road, Hillington Park, Glasgow, G52 4BL ("the Homeowner")

Newton Property Management, 87 Port Glasgow Road, Glasgow, G4 OHF ("the Factor")

Tribunal Members

Ms Helen Forbes (Legal Member)

Mr Andrew Murray (Ordinary Member)

Decision

The Tribunal determined that the Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Sections 2.4, 3.3, 4.3, 7.1 and 7.2 of the Property Factor Code of Conduct ("the Code").

The decision is unanimous.

Background

1. By application received in the period from 6th July to 8th November 2017 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") for a determination that the Factor had failed to comply with Sections 2.4, 3.3, 4.3, 4.8, 5.4, 7.1 and 7.2 of the Code.

2. Details of the alleged failures were outlined in the Homeowner's application and associated documents including correspondence to and from the Factor. The failures outlined by the Homeowner related to two main issues:
 - (i) **Legal fees:** The Homeowner complained that the Factor was attempting to recover from all homeowners legal fees incurred in 2015 by an individual homeowner, Nick Swan. The fees related to legal advice taken by Nick Swan regarding the removal and replacement of the previous factor, before the current Factor was appointed. The Homeowner complained that Nick Swan was not the appointed chair of the Owners' Association for the development encompassing Clarence House and The Prism ("CHTP"), and, accordingly, he did not have authority to incur legal fees on behalf of the development. The Homeowner had requested that the Factor produce documentation in relation to this matter, but no documentation had been provided.
 - (ii) **Electricity charges:** CHTP was a later addition to a larger development at 95 Morrison Street, Glasgow. The electricity supply to the common parts of Clarence House comes from 95 Morrison Street, and the owners of Clarence House are recharged for a share of the electricity. The Homeowner complained that some flats within Clarence House do not have electricity meters and their electricity is also coming from 95 Morrison Street. This means the calculation reached by the Factor in relation to charges for the common parts is incorrect as certain homeowners are not paying for their electricity, and the other homeowners are paying an inflated charge. The Homeowner complained that, despite several requests, the Factor has not attempted to address this matter adequately with Scottish Power.
3. By Minute of Decision dated 20th November 2017 a Convenor of the Housing and Property Chamber referred the Application to a Tribunal.
4. On 4th December 2017, Notice of Referral and Hearing was sent to the Parties. A hearing was set down for 18th January 2018. The hearing was cancelled due to the unavailability of a Tribunal member and a further hearing was set down for 15th February 2018. The hearing was cancelled due to the unavailability of the Homeowner. A further hearing was set down for 26th March 2018.
5. On 21st December 2017, the Factor lodged written representations and an inventory of productions comprising various documents, emails and letters, and the Factor's Written Statement of Services and Customer Charter.
6. On 1st March 2018, the Homeowner requested the addition of his joint property owner and business partner, Ms Lynsey McMinimee, as a party to the Application. The Homeowner was informed by the Tribunal that Ms McMinimee could make a written application to be added as a party, in terms of the regulations. No such application was made by Ms McMinimee.

7. On 8th March 2018, a Direction from the Tribunal dated 28th February 2018, was issued to parties in the following terms:

1. "The Property Factor is required to produce a full copy of their document entitled 'Response to Failure to Comply with Code of Conduct'. The two-page document lodged with the Tribunal appears to be missing a page or pages.
2. The Property Factor is required to produce a full copy of Item A6 of their representations - Minutes of Meeting of 8th June 2015 .
3. The Property Factor is required to produce a full set of colour copies of the plans pertaining to Title Number GLA172478. The full set should include the Title Plan and the 9 supplementary plans referred to in the Title Deed.
4. The Property Factor is required to identify to the Tribunal the relevant Deed or Deeds of Conditions registered against the property from which it derives its authority to act on behalf of the homeowners of properties in Clarence House and The Prism ("CHTP").
5. The Property Factor is required to produce all relevant documentation relating to the legal fees incurred by Mr Nick Swan, including any invoices, statements, letters of engagement, breakdown of work carried out, and mandates.
6. The Property Factor is required to produce a breakdown of how the legal costs referred to at the above item 5 have been allocated by the Property Factor between the individual properties within the development at CHTP.
7. The Property Factor is required to produce any email or letter correspondence issued by it in response to the email from Alan Sinclair sent at 16:19 on 23rd June 2015 (Item 84 of the Property Factor's productions).
8. The Homeowner is required to produce full details of the alleged unreasonable or excessive charges imposed by the Property Factor for late payment.
9. The Homeowner is required to produce a copy of the constitution of the CHTP committee, together with details of Ms McMinimee's chairmanship of the CHTP committee, including the date of her appointment, the length of her tenure, and the date on which she ceased to be the chairperson.

The Parties have fourteen days to comply with this Direction from the date of its receipt."

8. On 15th March 2018, the Homeowner lodged a response to the Direction, including a copy of the Constitution for the CHTP Owners' Association, and a letter outlining legal advice obtained by the previous factor.
9. On 22nd March 2018, the Factor lodged a response to the Direction, including documentation relating to each of the matters outlined in the Direction, with the exception of point 7, which was reported as unavailable .

Hearing

10. A hearing took place at 10.00 on 26th March 2018 at Elite Training, 1 Blythswood Square, Glasgow. The Homeowner was present. The Factor's Director, Mr Derek MacDonald, was present, together with Ms Lizanne McHugh, Regional Business Development Manager, and Mr Tom Mccusker, Property Manager. The Factor had previously informed the Tribunal that a witness would be called, however, the witness was unavailable. Neither party called additional witnesses.
11. The Tribunal raised the following preliminary points:
 - (1) There were issues with the information provided as a response to the Direction as follows:
 - (a) The Homeowner had not notified the Tribunal of when Ms McMinimee ceased to be chair of the Owners' Association . The Homeowner said that, due to the change of property factors, it was not clear when her appointment ceased.
 - (b) The colour plans lodged by the Factor with the Title Sheet including Deeds of Conditions did not appear to correspond with the deeds. Ms McHugh confirmed this was what was received from Registers of Scotland.
 - (2) The Homeowner had indicated on the application form that section 5.4 of the Code of Conduct had not been complied with, yet there was no evidence to support this point in the written submissions or productions. The Homeowner said that there were some issues relating to insurance, however, he accepted that this matter was not included in his application and no evidence would be heard.
 - (3) The Homeowner was referred to his written submission where he had stated that, although he had reservations about the way in which the Factor had been appointed, he accepted the Factor was now providing factoring services for the whole development. The Homeowner agreed that the appointment of the Factor was not a matter in dispute, for the purposes of the hearing.
 - (4) The Legal Member raised some issues in an attempt to narrow down the matters in dispute, as follows:

- (a) **Chairmanship of Nick Swan/Lynsey McMinimee:** There was a lack of clarity in the documentation lodged by parties as to who was chair of what committee or steering group at any particular time. The Factor relied upon the fact that Nick Swan was chair of the Owners' Association for CHTP in 2015 when Nick Swan incurred legal costs. The Homeowner believed that Nick Swan was chair of a particular steering group set up for specific purposes, and that Ms McMinimee was chair of the Owners' Association at the time the legal costs were incurred. The Legal Member said that, unless either Party had some additional information that was not before the Tribunal, it may be very difficult to come to a definitive answer on this point. While not wishing to stifle debate or evidence from either Party, and while remaining open to hearing the views of Parties on this matter, the Tribunal wished to flag up the matter at an early stage.
- (b) **Deeds of Conditions:** Conflicting legal advice had been lodged as to the meaning of 'the Development' and the rules around the setting up of Owners' Associations. The Tribunal had requested more information because of the need to be clear from where the Factor gets their authority to act. It would seem that authority comes from the Deed of Conditions registered on 24th March 2000, but the further Deed of Conditions registered on 25th November 2004 introduces some ambiguity about the meaning of 'The Development' and 'proprietors' association'. The Tribunal was not in a position to rule definitively on this. This was a matter that may require specialist legal input. Again, while not wishing to stifle debate or evidence from either Party, and while open to hearing the view of Parties on this matter, the Tribunal wished to flag up the matter at an early stage.

Evidence and Representations

The Tribunal then dealt with each of the Homeowner's complaints in turn.

Failure to comply with Section 2.4

12. Section 2.4 states: *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).*

The Homeowner said that he had not seen anything from any committee giving Nick Swan authority to incur unlimited legal fees. There was no clear written mandate appointing a solicitor to act for the committee, and no record of the budget and objectives of any such appointment. It was clear from the documentation lodged that HBJ Gateley, the firm of solicitors appointed by Nick Swan, had been appointed on a time basis by an individual. He could

not believe that a committee would do that, with no limits and no defined remit. Following questions from the Tribunal, the Homeowner said he had not seen any documentation before the Factor had lodged the response to the Direction, despite repeatedly asking for this from the Factor.

Responding to questions from the Tribunal, the Homeowner said he wasn't aware if the Factor had procedures to consult with homeowners as required by section 2.4 of the Code. He had seen no such procedure in the Deed of Conditions, which only seemed to cover core services.

On behalf of the Factor, Mr Mccusker outlined the history of the development. Mr MacDonald referred the Tribunal to document C4 which laid out the authority to act, derived from the Deeds of Conditions. Ms McHugh explained the background to the removal of the previous factor, City Factoring. She said that some of the homeowners were scared of the factor and wanted to change factors. The Factor (or Greenhome Property Management, as they were then known) was managing 95 Morrison Street, and the homeowners at CHTP wished to have the same factor, as provided for in the Deed of Conditions from 2000. The Factor received mandates from 24 CHTP homeowners agreeing to their appointment. City Factoring did not agree with the method of their removal and they took legal advice. They wrote to owners threatening legal action. CHTP homeowners believed they had to take legal advice. In June 2015, Ms McHugh and Mr Mccusker had attended a meeting where the owners agreed to take on the legal costs incurred by Nick Swan. The minutes of that meeting were not available. HBJ Gateley had said they could only take on Nick Swan as an individual. Nick Swan agreed to this on the basis that the costs would be distributed among the owners. There was an EGM held on 22nd June 2015 where the homeowners voted to change factors, in line with the provisions of the Deed of Conditions, which envisaged one factor managing the whole development.

Responding to questions from the Tribunal as to whether there was any written record relating to the homeowners' agreement to take on the legal costs, Ms McHugh referred the Tribunal to document C9, which was a letter from HBJ Gateley, stating that the solicitor was acting for Nick Swan. The solicitor was preparing for the meeting on 22nd June 2015; however, it was decided before that date to dispense with the legal action. The costs had already been incurred.

Responding to questions from the Tribunal as to whether any correspondence had been sent to homeowners regarding the legal costs, Ms McHugh referred the Tribunal to production A 10 – the agenda for a meeting to be held on 9th July 2015. Item 2)d) was entitled 'Legal costs incurred.' Ms McHugh referred the Tribunal to a further production – A 11 was an email from another homeowner, John Wright, dated 29th June 2015, to the Factor, where he commented 'Do we need to instruct group legal action, if required?'

Mr MacDonald said that their intended witness would have spoken to these matters but he was unable to attend the hearing due to work commitments. It had been expected that he would give evidence to the effect that he was party

to the meeting and that there was agreement that the legal costs incurred by Nick Swan would be shared among all the CHTP homeowners.

Responding to questions from the Tribunal regarding a point made in the Homeowner's written submissions to the effect that the Factor had indicated that they would not become involved in recovering costs incurred before their appointment, Ms McHugh said she did not think that had been said. The Factor was asked to spread the costs between the homeowners. Every other homeowner had agreed. A letter had been sent to the homeowners in this regard. The Legal Member asked why that letter had not been lodged with the Tribunal. Ms McHugh said there were difficulties in accessing documentation from that time. Responding to further questioning as to whether homeowners were informed of the specific costs in that letter, Ms McHugh said she did not believe that the costs were detailed in the letter as the Factor did not have the costs at that time.

Responding to questions from the Tribunal as to whether the Deed of Conditions or Written Statement of Services authorised the Factor to recover sums such as the legal costs incurred by Nick Swan, Mr MacDonald said it was a highly unusual situation. There was a group of highly disillusioned homeowners who wished to change their factor. The homeowners asked the Factor to deal with the issue of distribution of the legal costs. Mr MacDonald said that it was debatable if the homeowners would have moved factor if the current Factor had not agreed to take on the recovery of these costs. Mr MacDonald was candid in saying that, during staff training, the Factor would always say that, if the authority to do something wasn't within the Deed of Conditions, they couldn't do it, but in this case, they were prepared to take the matter on.

Ms McHugh referred the Tribunal to production 812 which was email correspondence between Ms McHugh and John Wright dated 1st July 2015. It became clear at this stage that Tribunal members were missing a page of the correspondence, to which Ms McHugh wished to refer. (NB Following the hearing, the Tribunal administration staff were provided by the Factor, upon request, with a full copy of this document).

The Factor's representatives said there is a procedure for the types of works envisaged by this section of the Code. There had been a £12,000 roof repair required at The Prism and the Factor had written to all homeowners, informing them of the costs and their apportionment prior to the work being carried out.

The Legal Member referred the Factor's representatives to their production 84, which was the subject of point 7 of the Tribunal's Direction. In this email from H8J Gateley, the solicitor was asking on 23rd June 2015, whether the Factor was prepared to become the client on behalf of the owners. Given that there was no email available in response to this question, the Legal Member asked what had been the Factor's response. Ms McHugh said she did not remember what response had been given, but she would imagine that the Factor would not have agreed to taking on this role. In response to questions from the Ordinary Member regarding the comments made by H8J Gateley

about money laundering, Ms McHugh said that the solicitor did not want to have to carry out money laundering checks on all the homeowners individually. Ms McHugh said that the Factor reimbursed Nick Swan for the full amount of fees incurred, and then all homeowners were invoiced. All have paid except the Homeowner, and no other homeowners have queried this sum.

In response to the matters raised by the Factor's representatives, the Homeowner said that he was surprised that the Factor would take on debt incurred by one homeowner. He referred to a situation involving a roof leak where he was not permitted to incur costs and have the Factor recover the costs on his behalf.

The Legal Member asked the Homeowner if he had received a copy of the letter mentioned by Ms McHugh regarding the legal costs incurred. He had not received this letter. Ms McHugh pointed out that all correspondence went to Ms McMinimee, as the Factor did not have contact details for the Homeowner at that time. The Homeowner said that he did not believe Ms McMinimee had received this letter; if she had, she would have mentioned it.

The Homeowner referred the Tribunal to the Factor's production C13, which included a breakdown of the legal costs incurred. It indicated that much of the costs incurred related to discussions and correspondence between the Factor and HBJ Gateley. This raised serious questions in regard to the actions of the Factor. It gave the impression that the Factor was getting legal advice which benefitted their appointment as Factor for CHTP. The Factor was directly benefitting from the advice given, and had facilitated the incurring of the legal costs.

The Homeowner said he was unaware of any threatening behaviour by the previous factor. There were strongly worded debt collection letters, but nothing to suggest the previous factor was not acting professionally. He questioned whether there was an underlying argument between Nick Swan and the previous factor.

At this stage, the Tribunal asked whether Parties wished to make any further comments on the alleged breach of section 2.4, including the matter of whether Nick Swan was chair of the Owners' Association.

Ms McHugh said the Factor would not have agreed to take on the recovery of the legal costs had they not believed that Nick Swan was chair of the Owners' Association. The Factor acted in good faith, and, as far as they were concerned, Nick Swan was recognised as chair. The other homeowners were collectively acting as if he was chair. Nick Swan had signed the document to the solicitor on behalf of all the owners. The Legal Member asked for Ms McHugh's comments in relation to production C10 which was an email from HBJ Gateley to Nick Swan, dated 1st June 2015, indicating that they were acting for Nick Swan as an individual *'to ensure that your position as Chairman of the Owners' Association is beyond question. When that has been achieved, we could discuss then acting for the Owners' Association'*.

Ms McHugh said she was not aware of why there was a question about Nick Swan's position.

The Homeowner said that production C6, a letter from City Factoring to the CHTP homeowners dated 23rd October 2014, makes clear that Nick Swan was chair of a steering group, and not chair of the association. The Homeowner believed that the Owners' Association survived the appointment of a new factor, contrary to the position mentioned in the Factor's written submissions. There had been no meeting to appoint a new committee, so Ms McMinimee continued as chair. Meetings of the Owners' Association had continued around that time, but they were not quorate and little had been achieved.

Failure to comply with Section 3.3

13. Section 3.3 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.*

Legal fees

The Homeowner said that he had requested the supporting documentation in relation to the legal fees incurred by Nick Swan, but the first he had seen of the documentation was when the most recent productions were lodged by the Factor. He said he was happy enough with the information provided by the Factor on a regular basis with invoices, but he was unhappy that the information in regard to the legal fees had not been forthcoming.

On behalf of the Factor, Ms McHugh said that the only documentation they had received initially was a copy of the invoice from HBJ Gateley, which was supplied to Ms McMinimee at the time. It was not supplied to any other homeowner. The invoice did not give a breakdown of the legal fees. Responding to questions from the Tribunal as to why further documentation hadn't been requested from Nick Swan at an earlier stage, Mr Mccusker said that Nick Swan had been asked for the documentation shortly after the appointment of the Factor, but no other documentation had been forthcoming, and no other homeowners asked for the documentation.

The Homeowner disputed the evidence given on behalf of the Factor, stating that he and Ms McMinimee were not given a copy of the invoice, and had not seen it prior to the submission of the Factor's productions for the Tribunal.

Scottish Power

The Homeowner said he had no issue with the calculation of the apportionment of the common electricity supply to Clarence House that came from 95 Morrison Street. His concern and complaint is that he believes that

there are a number of unmetered properties within Clarence House and their electricity is included in the amount that is apportioned among the homeowners. The plans supplied by Scottish Power in relation to the electricity supply do not match what is on the ground. He met with Mr Mccusker in 2016 and it was agreed that the Factor would ask Scottish Power to inspect the supply of electricity to the various parts of the development and clarify the situation. He had suggested to Mr Mccusker that the electricity bills should be disputed, forcing Scottish Power to come and sort out the situation. Scottish Power would not discuss the matter with the Homeowner; they would only deal with the Factor. The Factor has not dealt with the situation and has taken no action to see if any private flats are fed from the common supply. The Tribunal referred to the Factor's production C26, which is an email from the purchaser of flat 401 Clarence House, which was previously owned by the Homeowner, stating that the meter in the property is not registered and the supplier has no record of it. Consequently, no electricity bills are being received. The Homeowner said that he was not aware that the meter in the property was not registered. He had never lived there and none of his tenants had brought this to his attention over the years.

On behalf of the Factor, Mr Mccusker said that the Homeowner had benefitted from having no electricity bills for flat 401 and that all owners in Clarence House had benefitted over the years until the common supply issue was sorted out. There had been a break in the electricity supply to the development in 2014 and it had been noticed at that time that The Prism was unaffected. No one knows where the electricity supply to The Prism is coming from; the owners of The Prism are not paying a share of the common electricity. It took three days for Scottish Power to restore the electricity supply. During the break in electricity, no owner from Clarence House complained to the Factor that they had no electricity, which suggests that their supply is not coming from the same source as the electricity to the common areas. Mr Mccusker has since written to Scottish Power four times and asked them to investigate the situation, with no response. The Factor does not have access to individual flats and could not force the occupiers to allow access to assess whether they have meters. Mr Mccusker said he suspects that any flats that are not being billed for electricity are getting their power from another source, and not from 95 Morrison Street.

Ms McHugh said that there had been a huge project to reduce costs in the common parts and the costs had reduced from £48,000 per year to £12,000 or £13,000 per month.

Responding to questions from the Tribunal as to whether a complaint had been made to Scottish Power regarding these issues, Mr Mccusker said he had complained at the time of the loss of power, but Scottish Power would not address the issue. He said that Scottish Power would be able to access the individual properties and employ investigative engineers to discover the source of the power.

Responding to questions from the Ordinary Member as to whether the Factor had approached the regulator, Mr Mccusker said no, but he may now do that

and ask for an investigation. The Ordinary Member asked if Henderson and Warnock had been involved, as there was mention of this in the papers. Mr Mccusker said they may have been working on the development.

Responding to questions from the Legal Member as to whether Mr Mccusker was satisfied that the Factor had done everything it could, he said this has gone on for years and when he calls Scottish Power, he is told to write to them, and they don't respond to his letters. His last letter was sent in 2017. He is entirely satisfied that the way in which the common charges are billed is the fairest way possible. He doubts that the electricity to the unmetered flats in Clarence House is coming from the common supply. Mr Mccusker said that the electricity matter is a private matter between homeowners and Scottish Power. He said it was not part of his remit. He was of the opinion that the Homeowner must have been well aware that no electricity bills had been issued for flat 401 and that electricity bills were always issued in the name of the owner rather than the tenant.

In response, the Homeowner reiterated that no tenant of flat 401 had ever mentioned not receiving electricity bills. He felt that it was entirely possible that shortcuts had been taken during construction works, due to the situation with The Prism, which received its electricity from an unknown source. The Factor could ask all homeowners to photograph their meters and provide this to Scottish Power, to check the situation. The Homeowner said that he had asked the Factor to approach the regulator in 2016 but this hadn't been done. He referred to the Factor's production A16 which was a document drawn up by the committee of 95 Morrison Street, which states at paragraph 14 that there is a possibility that private properties within Clarence House have no meters and this should be investigated to ensure that 95 are not paying for private usage.

Failure to comply with Section 4.3

14. Section 4.3 states: *Any charges that you impose relating to late payment must not be unreasonable or excessive.*

The Homeowner said he had raised complaints regarding the legal fees and the allocation of common electricity charges at an early stage. He had refused to pay invoices for both matters until his complaints and queries were addressed. Despite being aware of this, the Factor applied charges unreasonably for late payment of the disputed amounts, and failed to deal with the complaints. As the Homeowner originally had four properties within the development, the same late charges were applied to four accounts, which the Homeowner felt was unreasonable. When he sold two properties, his solicitors were instructed to withhold amounts greater than the sum due in respect of each property to be sold. This meant that he was being treated as four homeowners when late charges were applied, thus quadrupling the late charges, but as one homeowner when it benefitted the Factor. The Homeowner said he has paid all other charges due to the Factor and that only the disputed items remain outstanding. Each month, on making payment, he

provides the Factor with a copy of a spreadsheet that he had lodged with his productions that indicates all but the disputed items are being cleared.

On behalf of the Factor, Ms McHugh said that the Homeowner is not clearing undisputed items, although he has consistently paid something towards the accounts. The balance on his accounts is almost £4000 and that indicates there is more than just the disputed items and late fees outstanding. Both Ms McHugh and Mr Mccusker claimed they had not seen the Homeowner's spreadsheet before. It was suggested by Mr MacDonald that the Homeowner may be sending the spreadsheet to an unmonitored email address.

With regard to the matter of charges being added in respect of each property, Ms McHugh said there are four accounts and charges are properly applied to each account. At the time of sale of a property, the Factor makes a recommendation to the seller's solicitor, where there are outstanding debts, that the outstanding amounts are withheld from the sale proceeds. It is no more than a recommendation, and, in this case, the Factor has not received the funds, so they must still be with the Homeowner's solicitor.

Breach of Section 4.8

15. Section 4.8 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.*

It was agreed that, as no legal action had been taken by the Factor, there would be no discussion in relation to this section.

Breach of Sections 7.1 and 7.2

16. Section 7.1 states: *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.*

Section 7.2 states: *When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.*

The Homeowner said that he had never seen the complaints procedure, despite sending a large amount of correspondence to the Factor in relation to various complaints. Responding to questions from the Tribunal, the Homeowner said he had not received a copy of the Factor's Written Statement of Services and did not remember seeing it prior to the Factor lodging it with the written submissions.

The Factor had not replied timeously to the Homeowner's complaints. In response to questions from the Legal Member, the Homeowner accepted that

he had not included a breach of section 2.5 of the Code in his application, therefore, no evidence in this regard would be heard.

On behalf of the Factor, Mr MacDonald said the Factor had provided the Written Statement of Services to all homeowners as part of a welcome pack after becoming Factor for the whole development. The Written Statement is updated annually and the last updated Statement was sent out to homeowners in February 2018.

Mr MacDonald said that the Factor has a complaints procedure which is separate from the Written Statement, but most of the procedure is included within the Written Statement. The actual complaints procedure document is only provided if a homeowner asks for it, or if they specifically state that their enquiry is a complaint. The Factor receives many enquiries which are not complaints. There was clearly a volume of correspondence from the Homeowner, but most of the points related to meetings with Mr Mccusker, and were not considered as complaints.

Mr Mccusker said the Homeowner had emailed him following a meeting to say he was happy with the outcome of the meeting. He'd had more emails from Ms McMinimee than the Homeowner. Ms McMinimee raised the same points, and Mr Mccusker felt they had been answered time and again, and that the Factor had gone as far as they could in addressing the issues.

The Homeowner said it was clear that his issues were complaints, and he would expect to have been given the complaints procedure. He had emailed the complaints email address. He had not seen the Written Statement of Services, as discussed earlier.

The Homeowner's evidence was that he had not received any final decision from the Factor in relation to his complaints, nor had he been provided with notice that the homeowner housing panel/fribunal could become involved, and this was a breach of section 7.2 of the Code.

The evidence on behalf of the Factor was that a letter from Mr MacDonald had been sent to the Homeowner on 15th August 2017, and this satisfied the requirements of section 7.2. This letter was included within the Homeowner's productions, and was in response to an email of complaint from the Homeowner dated 26th July 2017. In the letter, Mr MacDonald stated that he had reviewed the matter as Joint Managing Director, and he made an offer to the Homeowner to refund all late payment fees on the understanding that he settle the remaining outstanding balances. The letter referred to the right to escalate the matter to the First-tier Tribunal for Scotland (Housing and Property Chamber). The letter included a summary of the submissions that the Factor would make to the Tribunal. The application by the Homeowner had been made between 6th July and 8th November 2017, therefore no notification from the Tribunal would have been given to the Factor until after the latter date; however, the Homeowner had mentioned that he had made an application to the Tribunal in his email to the Factor dated 26th July.

The Homeowner brought the attention of the Tribunal to an email to the Factor dated 5th December 2016, which was marked 'N' in his productions. The email was headed 'Ongoing Complaint' and was sent to the Factor's complaints email address. The email referred to the Factor's formal complaints route and the Homeowner's frustration at lack of progress.

Mr MacDonald was offered the opportunity to respond, given his earlier insistence that the Homeowner had not made a formal complaint. Mr MacDonald declined the opportunity to respond.

Expenses

17. The Factor had included in their written submissions a claim for expenses to be awarded against the Homeowner for unreasonable behaviour in causing unnecessary or unreasonable expense to the Factor. Mr MacDonald confirmed that the Factor was insisting on the claim.

Findings in Fact

18.
 - i. The Homeowner and Ms Lynsey McMinimee are joint-owners of the flatted dwellinghouses numbers 205 and 302 Clarence House, 37 Carnoustie Street, Glasgow, G5 8PN, and the former joint-owners of flatted dwellinghouses numbers 101 and 401 Clarence House, 37 Carnoustie Street, Glasgow, G5 8PN.
 - ii. The Factor has been a registered property factor since 1st November 2012, with registration number PF000108. The Factor (previously known as Greenhome Property Management) has provided factoring services for 95 Morrison Street, Glasgow since January 2013.
 - iii. Prior to June 2015, there was an Owners' Association for Clarence House and The Prism. Ms Lynsey McMinimee was appointed chair of the Owners' Association for CHTP on 31st January 2012. There was a separate Owners' Association for 95 Morrison Street.
 - iv. In October 2014, an owners' steering group was formed, facilitated by the then property factor for CHTP, City Factoring, with the remit to improve the development as a whole. Nick Swan was appointed as chair of the steering group.
 - v. On 11th May 2015, Nick Swan, designing himself as 'Chairperson' of the Clarence House and The Prism Owners Committee' wrote to City Factoring stating, among other things, that the owners of CHTP had taken legal advice on the factoring arrangements for the development and had been advised that the terms of the deed of conditions provided for one proprietors' association and one factor.
 - vi. On 22nd June 2015, at an Extraordinary Meeting of the owners of 95 Morrison Street and adjoining buildings, the Factor (then known as

Greenhome Property Management) was appointed as property factor for CHTP, replacing City Factoring.

- vii. The Factor now provides factoring services in respect of the development at 95 Morrison Street, Glasgow, and adjoining buildings, which include Clarence House and The Prism.
- viii. . City Factoring did not accept that the Factor's appointment in June 2015 was carried out in accordance with the Deeds of Conditions pertaining to the development. City Factoring engaged the services of a solicitor and threatened legal action against the Factor.
- ix. Nick Swan engaged the services of solicitors, HBJ Gateley, in late May 2015. HBJ Gateley headed their letter of engagement dated 1st June 2015 'Dispute with City Factoring'.
- x. In an email to Nick Swan dated 1st June 2015, Alan Sinclair of HBJ Gateley wrote that he was acting for Nick Swan as an individual to ensure that Nick Swan's position as chair of the Owners' Association was beyond question, and thereafter to discuss acting for the Owners' Association. Consideration was given to raising an action for interim interdict against City Factoring to prevent them undertaking any of the functions of a property factor for CHTP.
- xi. HBJ Gateley carried out investigations including investigation of the title deeds, and discussion and correspondence with the solicitors acting for City Factoring, with staff employed by the Factor, and with other individuals.
- xii. HBJ Gateley were not appointed by, or to act for, the Owners' Association of CHTP.
- xiii. On or around 1st July 2015, Nick Swan informed HBJ Gateley that he no longer wished to proceed with the case.
- xiv. In the period to 30th June 2015, legal costs in the sum of £4740.50 were incurred by Nick Swan. HBJ Gateley's costs were discounted to £4150 plus VAT. The costs were paid by Nick Swan.
- xv. The Factor agreed to become the conduit for recouping the legal costs incurred by Nick Swan from the homeowners of CHTP. The Factor paid Nick Swan the total sum of the legal costs. The homeowners have been billed for an equal share of the legal costs by the Factor, a cost of £110.67 per property. The Homeowner has refused to pay his share of the legal costs.
- xvi. The Factor derives their authority to act for the properties within the development from a Deed of Conditions registered over the site on 24th March 2000.

- xvii. A second Deed of Conditions was registered in respect of CHTP on 28th June 2002. There is some ambiguity within this deed as to whether CHTP should have a separate proprietors' association from 95 Morrison Street.
- xviii. The electricity for the common areas of Clarence House comes from the supply to 95 Morrison Street. There is one meter situated in 95 Morrison Street. There have been ongoing concerns that the occupiers of 95 Morrison Street have been supplementing other areas of the development by paying for the electricity.
- xix. In 2014 there was an interruption to the electricity supply serving the 95 Morrison Street meter. It was discovered that, during the interruption, all power was lost to the common areas of Clarence House. The Prism was unaffected.
- xx. Prior to June 2015, the residents of Clarence House did not pay a share of the cost of electricity to the common areas. There is now a system of apportionment, put in place by the Factor, to ensure that Clarence House owners are contributing to the cost of the electricity to the common areas. The Homeowner is refusing to pay his share of the charges for electricity to the common areas pending investigation of whether private properties are also supplied from the same supply.
- xxi. The Factor has contacted Scottish Power in an attempt to have a further meter provided, and to have investigations carried out as to the source and supply of electricity to the development. Scottish Power has refused to install a second meter.
- xxii. The Homeowner and Ms McMinimee have been making complaints to the Factor in relation to the matters of legal fees incurred by Nick Swan and the situation regarding Scottish Power and the charges for common electricity for some time as evidenced by productions lodged by the Parties including:
 - (a) email dated 5th April 2016 from Ms McMinimee to the Factor's complaints email address, headed 'Clarence House – complaint', which was chased up by Ms McMinimee on 3rd May 2016;
 - (b) letter from the Homeowner dated 15th June 2016 to Mr MacDonald, headed 'Complaint re account numbers ...';
 - (c) email from the Homeowner dated 8th December 2016 headed 'Ongoing Complaint';
 - (d) email from Tom Mccusker dated 11 December 2016 to A Cruden headed 'On Going Complaint', which email included Tom Mccusker recommending the following statement be included in an email to be sent to HO 'I have been advised of your ongoing complaint';

(e) email from the Homeowner dated 16th January 2017 to the Factor's complaints email address headed 'Ongoing Complaint'.

Determination and Reasons for Decision

19. The Tribunal took account of all the documentation provided by parties and their written and oral submissions.

Failure to comply with Section 2.4 of the Code

20. The Tribunal found that the Factor had breached this section of the Code. The Tribunal was satisfied that the Factor had not consulted with the group of homeowners and sought their written approval before taking the decision to invoice all homeowners for work in addition to those relating to the core service, namely the legal costs incurred by Nick Swan.

Failure to comply with section 3.3 of the Code

21. The Tribunal found that the Factor had breached this section of the Code, in relation to the legal fees incurred by Nick Swan. Although the Factor has provided regular statements with detailed financial breakdown of other charges made, and a description of the activities and works carried out, the Factor has failed to provide this information in respect of the charges for the legal fees incurred by Nick Swan. The Factor failed to provide supporting documentation and invoices or other appropriate documentation in response to the reasonable requests of the Homeowner.

The Tribunal took account of the fact that Mr Mccusker said he had requested the paperwork from Nick Swan and that it was not forthcoming, and that the Homeowner had been informed that the paperwork would be available from Nick Swan. This was not appropriate. If the Factor was unable to access the supporting documentation and invoices, particularly having reimbursed Nick Swan, they ought not to have attempted to collect the sums from the homeowners.

The Tribunal did not find a breach of this section in terms of the complaints related to Scottish Power. There did not seem to be any supporting documentation or invoices that could have been supplied by the Factor to the Homeowner in this regard.

Although the Tribunal found that this section had been breached, it was not persuaded by the Homeowner's assertion that it was unreasonable of the Factor, in principle, to impose the same late charges on the accounts of homeowners with more than one property.

Failure to comply with section 4.3 of the Code

22. The Tribunal found that the Factor had breached this section of the Code by imposing late payment charges unreasonably in respect of both the outstanding legal fees and the electricity charges.

Legal Fees

The Tribunal considered that the Factor did not have the requisite powers in terms of the Deeds of Conditions or the Written Statement of Services to undertake to be the conduit to recover legal fees that were incurred by an individual homeowner, whether or not that homeowner was the chair of the Owners' Association. It was not at all clear whether Nick Swan held that position, or was merely chair of a steering group. If Nick Swan was, indeed, chair of the Owners' Association, the Tribunal questions why HBJ Gateley were giving advice to Nick Swan *'to ensure that your position as Chairman of the Residents' Association is beyond questions'*. In any event, there was no evidence that Nick Swan had the advance authority to incur legal fees on behalf of the homeowners. The Tribunal took account of the Homeowner's submission that it was very unlikely that the Owners' Association would agree to unlimited sums being incurred, on an unspecified remit.

The Tribunal took account of emails from John Wright to the Factor's Ms McHugh, in particular (a) the email dated 30th June 2015 (production 85) which mentioned 'The lawyer (H8 Gately) acting on behalf of the development'; and (b) the email dated 1st July 2015 (production 812) which mentioned possible agenda items for a forthcoming meeting, including 'Legal costs incurred to date. (apportionment between owners).' However, there was no compelling evidence before the Tribunal to indicate that, even if the Factor had the power to undertake to be a conduit for the recovery of the legal sums, the homeowners had given the Factor the authority to do this, or that any consultation had been undertaken with the homeowners.

It was clear from the HBJ Gateley documentation lodged by the Factor, and, particularly, from productions CB, C9, C10, C11 & C13, that H8J Gateley was acting for Mr Swan as an individual. The Tribunal took account of the email from Alan Sinclair, H8J Gateley, to the Factor's Ms McHugh dated 23rd June 2015. Following a request from Nick Swan in an email of the same date to change the client's name to 'Clarence House the Prism owners', Alan Sinclair stated *'I don't act for all those persons at present'*, and he requested of the Factor whether the Factor *'should become the client as acting on behalf of the owners'*; going on to say, *'I presume the legal costs could be recharged to the owners.'* The Factor was unable to provide a copy of their response to that email, or to inform the Tribunal what that response was.

In all the circumstances, it was clear to the Tribunal that the Factor did not have the authority to take on this role. The Homeowner was justified in refusing to pay the charge, particularly in the absence of any supporting documentation. Consequently, any charges imposed due to late payment were unreasonable.

Electricity Charges

It was clear to the Tribunal that the Factor was in a difficult position, particularly given the chaotic arrangements for the supply of power to the development and the alleged intransigence of Scottish Power. The Tribunal accepted that the Factor could not force entry to individual properties to investigate this matter further. However, the Tribunal did not accept that the Factor had done everything it could to investigate and progress this matter. The Factor has a duty to ensure that any sums it demands from homeowners are an accurate reflection of the sums due. Given the suspicion (and not just on the part of the Homeowner – see production A 16, paragraph 14; and production C26 – an email from the owner of 401 Clarence House regarding his problems registering an account with Scottish Power) that certain properties within Clarence House may be receiving free electricity at the expense of other owners, the Factor ought to have taken matters further before deciding they could do no more. In all the circumstances, the Tribunal decided that the Factor ought not to be imposing late payment charges when the Homeowner was, quite correctly, questioning whether the charges for common electricity were accurate.

The Tribunal felt, however, that the Homeowner ought to be paying a share of the common charges for electricity, and that the most pragmatic approach, for the time being, would be to pay the amount requested by the Factor. This is not an ideal situation; however, if the Factor decides to take matters forward in the manner suggested at paragraph 25 below, it is to be hoped that a solution will be forthcoming, and that a final balancing of the accounts could be carried out at that stage, to refund any overpayment for electricity costs to homeowners, if any such overpayment has been made.

Failure to comply with section 7.1 of the Code

23. The Tribunal found that the Factor had breached this section of the Code. The Tribunal accepted the Factor's evidence that they have a written complaints resolution procedure, and that much of the procedure is contained within the Written Statement of Services, which had been provided to the Homeowner on more than one occasion. However, the Factor did not provide a copy of the written complaints resolution procedure to the Homeowner.

The Factor has failed to follow their own procedure in respect of the complaints of the Homeowner. The complaints had been ongoing for some time. Several emails to the Factor were sent to the correct complaints email address, and headed 'Ongoing complaint', and described as such by Mr McCusker.

The timescales within the Written Statement were not followed by the Factor in dealing with the Homeowner's concerns. There could be no doubt that these issues were raised as complaints, contrary to the evidence of the Factor's Mr MacDonald at the hearing.

Failure to comply with section 7.2 of the Code

24. The Tribunal found that the Factor had breached this section of the Code. As mentioned at paragraph 23, the Factor failed to progress the Homeowner's complaints through their in-house procedure, and to confirm a final decision with senior management before the Homeowner was notified in writing. It was only when the matter had been spelled out to the Factor by the Homeowner in his email of 26th July 2017, mentioning his referral to the Tribunal, that the Factor finally sent their letter of 15th August 2017. This letter appears to correspond with the section of the complaints procedure where the matter is escalated to the Managing Director, and Mr MacDonald mentions a period of not more than thirty days to reach agreement, with the possibility of a referral to the First-tier Tribunal for Scotland (Housing and Property Chamber) if the Homeowner remains dissatisfied with the response.

With regard to the Homeowner's allegations that he had not been informed about the possibility of a referral to the Tribunal, the Tribunal was satisfied that this information was available within the Factor's Written Statement of Services, which had been provided to all homeowners initially, and again when updated annually.

Expenses

25. The Tribunal considered the Factor's claim for expenses to be awarded against the Homeowner. The Tribunal did not accept that the Homeowner had put the Factor to unnecessary or unreasonable expense through unreasonable behaviour in the conduct of the case, therefore, no award of expenses was made against the Homeowner.

Observations

26. The Tribunal noted that the Homeowner had not alleged a breach of duty by the Factor in relation to the matter of the electricity and the billing for common charges. Neither had the Homeowner alleged a breach of section 6.9 of the Code, in relation to suppliers. The Tribunal did not feel that it could compel the Factor within a PFEO to carry out further investigations in relation to Scottish Power, however, the Tribunal observed that there are further options open to the Factor in this regard. The Factor could write to the homeowners within Clarence House to inform them of the situation and to request details of whether they have a meter and whether that meter is registered, before providing such information to Scottish Power. The Factor could raise a formal complaint against Scottish Power if they continue to refuse to address this issue. Although Mr McCusker's evidence was that he had complained to Scottish Power, it appeared that this was mainly in relation to the loss of power in 2014, and not to the refusal of Scottish Power to investigate matters. It would also be open to the Factor, in the absence of any action by Scottish Power, to take matters to the regulator, Ofgem.

Proposed Property Factor Enforcement Order (PFEO)

27. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO.
28. The Tribunal proposes to make a PFEO requiring the Factor, within 30 days of intimation of the PFEO to 1) remove the charge for the legal fees incurred by Nick Swan from the accounts of the Homeowner; 2) to remove all late payment charges that relate to (a) the legal fees incurred by Nick Swan; and (b) the charges for electricity to the common areas from the accounts of the Homeowner; and 3) to register with Registers of Scotland a Discharge in relation to all Notices of Potential Liability for Costs that are registered against the Clarence House properties owned by the Homeowner, and provide documentary evidence from the Keeper of the Registers of Scotland to the Tribunal that such Notices have been, or are in the process of being, discharged.

Right of Appeal

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

H Forbes

Legal Member and Chairperson

26th March 2018