

# Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision on homeowner's application: Property Factors (Scotland) Act 2011  
("the 2011 Act"), Section 19(1)

Chamber Ref: FTS/HPC/PF/18/0157

Shop, 140 Gorgie Road, Edinburgh, EH11 2NS  
(Title Number MID61796)  
("The Property")

## The Parties:-

Nadia Cusmano, 250 High Street, Prestonpans, EH32 9BD  
("the Homeowner")

James Dromey, 250 High Street, Prestonpans, EH32 9BD  
("the Homeowner's representative")

James Gibb, 65 Greendyke Street, Glasgow, G1 5PX and 4 Atholl Place,  
Edinburgh, EH3 8HT  
("the Property Factor")

## Tribunal Members:

Susanne L M Tanner QC (Legal Member)  
Andrew Taylor (Ordinary Member)

## DECISION

1. The Property Factor has failed to comply with the Code of Conduct for Property Factors, Section 1 (preamble).
2. The Property Factor did not fail to comply with the Code of Conduct for Property Factors Section 1.1a Aa, 2.2, 2.4, 2.5, 4.1, 4.8, 4.9, 6.3 and 6.9.
3. The decision of the tribunal is unanimous.

## **STATEMENT OF REASONS**

1. In this decision the tribunal refers to the Property Factors (Scotland) Act 2011 as "the 2011 Act", the Code of Conduct for Property Factors as "the Code of Conduct" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the 2017 Rules".

### **2. Findings in fact**

- 2.1. The Property is ground floor shop in a tenement which comprises the properties at 140 to 148 Gorgie Road ("the Tenement"),
- 2.2. The properties in the Tenement are a mix of residential and commercial properties.
- 2.3. The Respondent became a Registered Property Factor on 23 November 2012 and renewed its registration on 17 May 2016
- 2.4. The Property Factor was appointed as the property factor for the Tenement in January 2017.
- 2.5. The Property Factor obtained the title deed for one property in the Tenement but did not obtain the title deed for the Property.
- 2.6. There is a written statement of services ("WSS") for the Tenement which includes a Development Schedule.
- 2.7. The Development Schedule to the WSS is headed "144 Gorgie Road" but lists each of the residential and commercial properties in the Tenement from 140 to 148 Gorgie Road.
- 2.8. The Development Schedule to the WSS contains information about the appointment of the Property Factor.
- 2.9. On 10 January 2017 the Property Factor sent a Welcome Pack containing the WSS and Development Schedule to the Property addressed to "Gouranga Mantra Centre, Occupier Mr Robert J Stainton ?; Director: Ian James McDonald, Secretary Mr John Owen McAreavey" and another copy to Lanark Road Property Limited, Drylaw House, 32 Groathill Road North, Edinburgh, EH4 2SL or EH11 2NS".
- 2.10. The information about the proprietor and the correspondence address for the Property was provided to the Property Factor by a proprietor of Flat

9/144 Gorgie Road and was not independently checked by the Property Factor.

- 2.11. The Property Factor did not send a WSS with Development Schedule to the Homeowner's home address.
- 2.12. The Property Factor could have obtained the Homeowner's address by checking the Title Deed for the Property.
- 2.13. The Property Factor's first invoice for the Property was rendered in February 2017 and was sent to the Property.
- 2.14. The Homeowner's representative contacted the Property Factor on 8 March 2017 to query the first invoice which had been rendered to the Homeowner and to raise concerns about the Property Factor's appointment.
- 2.15. The Property Factor did not send the WSS to the Homeowner's home address after it had updated its records with the Homeowner's address.
- 2.16. In May 2017, the Property Factor sent the second bill in respect of the Property to the Homeowner's home address.
- 2.17. The WSS and Development Schedule were available on the Property Factor's website via a client portal which could be accessed by means of information on invoices rendered to the Homeowner from February 2017 onwards but the portal was not drawn to the Homeowner's attention by the Property Factor despite ongoing concerns being raised by the Homeowner relative to the Property Factor's appointment and other matters.
- 2.18. The email communication from Stuart Smith at the Property Factor to the Homeowner dated 16 January 2018 (HO Doc A) does not go beyond a reasonable indication that the Property Factor may take legal action and is not threatening.
- 2.19. The roof works instructed by the Property Factor in January 2017 were outwith the level of delegated authority permitted to the Property Factor (costs to a value of £30 per property).
- 2.20. The Property Factor had authority to act without seeking further approval in emergencies.
- 2.21. The roof works were emergency works due to water ingress and further potential water ingress to the Tenement.

- 2.22. The Property Factor did not require to consult with the property owners in the Tenement prior to instruction of the roof works because they were emergency works.
- 2.23. The Property Factor was not involved in the canvassing of votes from proprietors in the Tenement relative to the proprietors' appointment of a factor.
- 2.24. The Property Factors was told by Ms Gribble, the proprietor of Flat 144/9 that a majority of owners in the Tenement had voted for its appointment.
- 2.25. No other proprietors in the Tenement, including the proprietors of the other three commercial properties have challenged the validity of the Property Factor's appointment.
- 2.26. In response to the Homeowner's enquiries about the quorum of votes and the validity of the Property Factor's appointment, the Property Factor responded to the Homeowner's enquiries about quorum and the Property Factor's authority to act as quickly and as fully as possible, in so far as it had the information to do so.
- 2.27. The Property Factor has a clear written procedure for debt recovery which outlines a series of steps which it will follow unless there is a reason not to.
- 2.28. The Homeowner has not paid any bills since the Property Factor began managing the Tenement in January 2017.
- 2.29. The Property Factor has referred the matter to debt collectors.
- 2.30. The Property Factor has not instructed any legal proceedings against the Homeowner.
- 2.31. The Property Factor reasonably applied its debt recovery procedure in respect of the Homeowner.
- 2.32. No legal action has been taken by the Property Factor in relation to the Homeowner's debts.
- 2.32.1. The letter from Alex Adamson to the Homeowner (**HO Doc B**) made the Homeowner aware of the potential right of the Property Factor through its debt collectors to consider a court action and seek expenses.

2.32.2. The said letter from Alex Adamson was a reasonable indication that they may take legal action and seek expenses in the event that the debt was not paid.

2.32.3. The Homeowner and her Representative did not make a request to the Property Factor as to why Martin Burns was appointed to carry out roof works.

2.32.4. There was no obligation on the Property Factor to provide information to the Homeowner about how and why Martin Burns was instructed to carry out roof works in the absence of a request from the Homeowner or her Representative.

2.32.5. Roof works of the type carried out by Martin Burns in January 2017 are not suitable for collateral warranties.

2.32.6. There was no requirement on the Property Factor to seek a collateral warranty from Martin Burns for the roof works carried out in January 2017.

### **3. Findings in fact and law**

3.1. The Homeowner became the registered proprietor of the Property on 20 March 2015.

3.2. The Homeowner, as proprietor of the Property, is under the burden of paying a share along with the other proprietors in the Tenement in proportion to the combined amount of the feu duty and ground annual payable by them respectively of the expense of maintaining and upholding the roof, cupola therein, chimney stalks and hatchways, rain water conductors and drains, stair and passages and all others common and mutual to the said tenement and ground, but not of the back green and walls surrounding or bounding the same or the access thereto which shall be maintained by the proprietors who have right to the said back green.

3.3. The Homeowner" is an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor.

3.4. The Homeowner is a "homeowner" as defined in Section 10(5) of the Property Factors (Scotland) Act 2011.

3.5. The Property Factor manages the common parts of land owned by two or more other persons and used to any extent for residential purposes.

- 3.6. The Property is a "property factor" as defined in Section 2(1)(a) of the Property Factors (Scotland) Act 2011.
- 3.7. The Property Factor's failure to send a WSS to the Homeowner's home address at any time is a failure to comply with the preamble to Section 1 of the Code of Conduct in circumstances where the Property Factor could have checked and information supplied to it by the proprietor of Flat 9/144 Gorgie Road and could have ascertained the correct address by obtaining the Title Sheet for the Property; it should have been apparent to the Property Factor after the email on 8 March 2017 that the WSS had been sent to the wrong businesses and addresses; the Homeowner and her Representative raised concerns about the Property Factor's appointment and other matters from 8 March 2017; and the Property Factor updated its records and sent the second bill in May 2017 to the Homeowner's home address.
- 3.8. The information in the Development Schedule relative to the appointment of the Property Factor complies with Section 1.1a Aa of the Code of Conduct.
- 3.9. The email communication from Stuart Smith at the Property Factor to the Homeowner dated 16 January 2018 (**HO Doc A**) is not a failure to comply with Section 2.2 of the Code of Conduct.
- 3.10. The roof works instructed by the Property Factor in January 2017, being emergency works, were not a failure to comply with Section 2.4 of the Code of Conduct.
- 3.11. The Property Factor's responses to the Homeowner's enquiries about quorum and the Property Factor's authority to act were made as quickly and as fully as possible and were not a failure to comply with Section 2.5 of the Code of Conduct.
- 3.12. The application of the Property Factor's debt recovery procedure in respect of the Homeowner, including the instruction of debt collectors, was reasonably applied and was not a failure to comply with Section 4.1 of the Code of Conduct.
- 3.13. As no legal action had been taken by the Property Factor in relation to the Homeowner's debt there is no failure to comply with Section 4.8 of the Code of Conduct.
- 3.14. The letter from Alex Adamson to the Homeowner (**HO Doc B**) being a reasonable indication that they may take legal action against the Homeowner

and seek expenses in the event that the debt was not paid was not a failure to comply with Section 4.9 of the Code of Conduct.

3.14.1. The Homeowner and her Representative did not make a request to the Property Factor as to why Martin Burns was appointed to carry out roof works.

3.14.2. There was no obligation on the Property Factor to provide information to the Homeowner about how and why Martin Burns was instructed to carry out roof works in the absence of a request from the Homeowner or her Representative.

3.14.3. As there was no obligation on the Property Factor to provide information to the Homeowner about how and why Martin Burns was instructed to carry out roof works in the absence of a request from the Homeowner or her Representative there was no failure to comply with Section 6.3 of the Code of Conduct.

3.14.4. As there was no requirement on the Property Factor to obtain a collateral warranty for the roof works carried out by Martin Burns in January 2017, there was no failure to comply with Section 6.9 of the Code.

#### **4. The Application**

4.1. The Homeowner lodged an application ("the Application") with the tribunal on 18 January 2018.

4.2. In Section 7 of the Application the Homeowners alleged that the Property Factor has failed to comply with the Code in the following respects:

- 4.2.1. Section 1.1a Aa, b, Bd, Ce, f, g, Dh, Eo.
- 4.2.2. Section 2.1, 2.2, 2.4, 2.5
- 4.2.3. Section 3.3
- 4.2.4. Section 4.1, 4.2, 4.4, 4.8, 4.9
- 4.2.5. Section 5.3, 5.7, 5.9
- 4.2.6. Sections 6.3, 6.6, 6.7, 6.8
- 4.2.7. Section 7.1, 7.2.

4.3. In Section 7 of the Application the Homeowner alleged that the Property Factor has failed to comply with its Property Factor's duties for the following reasons:

4.3.1. "Failed to comply with Factor Code. Failed to comply with Factor's Act (Property Factor's Act). Failed to comply with Tenement Act. Failed to comply with HOHP Regulations. Failed to offer any resolve. Failed to provide written evidence of quorum. Failed to provide any written evidence of vote. Failed to disclose any/terms of relationship with top flat. Failed to address possibility of in-canvassing / in-voting. Failed to abide by debt recovery law. Refused to provide any breakdown of roof work. Failed to explain roof debacle. Failed to give contact details of HOHP to resolve. See Deed Copy. See email support docs. See tenement law and related."

4.4. The Homeowner completed the following four parts of Section 7 as follows:

4.4.1. *What is your complaint? "James Gibb erroneously billed my shop (not a tenement not a dwelling) and threatened debt recovery as I contested the illegalities, the contrivance of works and all other matters outlined in details of my complaint."*

4.4.2. *What are your reasons for considering that the Property Factor has failed to resolve the complaint? "I have listed all the reasons in details of my complaint (see page details of my complaint). No effort to resolve complaints, denial of complaints, and all factors listed 1-7 in failure to comply with factor code and tenement law"*

4.4.3. *How has this affected you? "I feel very ill and depressed due to James Gibb's threatening debt recovery constantly and making no effort to resolve, address or comply with Scottish law."*

4.4.4. *What would help to resolve the problem(s)? "Property Factor must resolve any bills re. my shop (my independent shop) and apologise for not complying with Scottish law. Apologise for threatening / harassing me for bills that I am not liable for. Apologise for not complying with Factor Code. Apologise for not complying with Property Factor's Act / Tenement law and apologise for not providing me with "hohp" contact details. Apologise for continuance and possible in-canvassing".*

4.5. Various documents were attached to the Application and form part of the Application paperwork.

4.6. Between 22 January 2018 and 5 April 2018 further information was requested from the Homeowner by the legal member with delegated powers under Section 18A of the 2011 Act and additional information was supplied by the Homeowner.

4.7. On 4 April 2018, the Homeowner's Representative amended the Application as follows:

4.7.1. A complaint was added under Section 1 in relation to the Property Factor's failure to provide a WSS at any time

- 4.7.2. They wished to add complaints under Sections 5.1, 5.4, 6.9 and 7.3 as the Property Factor (specifically Stuart Smith) had been notified of these alleged code breaches on 23 February 2018
- 4.7.3. They did not wish to insist on complaints under Sections 2.1, 4.2, 4.4 and 5.9, as they stated that notifying the Property Factor again was pointless.

## 5. Referral of Application

- 5.1. On 10 April 2018 the amended Application, which comprised documents submitted in the period of 22 January to 5 April 2018 ("the Application"), was referred to the tribunal in terms of Section 18 of the 2011 Act and Rule 43 of the 2017 Rules. The decision to refer the application to a tribunal was sent to parties on 2 May 2018.
- 5.2. An oral hearing was fixed for 20 June 2018 and on 2 May 2018 the tribunal notified parties of the date, time and place of the hearing.

## 6. Property Factor's Application for Review

- 6.1. On 16 May 2018 the tribunal received what was treated as an application by the Property Factor in terms of Rule 39 of the 2018 Rules and Section 43 of the Tribunals (Scotland) Act 2014 ("the 2014 Act"), to review the decision dated 10 April 2018 of the legal member with delegated powers to refer the Application to the tribunal; and an application for postponement of the hearing on 20 June 2018.
- 6.2. The hearing fixed for 20 June 2018 became a hearing on the review application.

## 7. Written Representations and documents lodged prior to review hearing

- 7.1. On 12 June 2018 the Property Factor submitted written representations and an Inventory of Documents **5.1.1 to 5.1.11**.
- 7.2. On 18 June 2018 the Homeowner / Homeowner's Representative submitted two pages of written representations on behalf of the Homeowner and accompanying documentation labelled **HO Docs A-Z**.
- 7.3. The tribunal considered all of the submissions and documents which had been lodged.

## **8. Summary of oral submissions and evidence at hearing on 20 June 2018**

- 8.1. The Homeowner's Representative attended the hearing. The Property Factor submitted the said written representations and documents prior to the hearing but did not attend the hearing.
- 8.2. The issue to be determined at the hearing in relation to the Property Factor's application for review was whether the Property Factor had refused to resolve or unreasonably delayed to resolve the Homeowner's concerns.
- 8.3. On the first day of the hearing, Mr Dromey, the Homeowner's Representative, explained that he was a colleague of the Homeowner and that she had asked him to deal with this matter as she was stressed by a continuous barrage of debt recovery by the Property Factor and its appointed debt collectors.
- 8.4. At the review hearing the tribunal heard evidence and general submissions from Mr Dromey. He was advised by the tribunal the purpose of the hearing so he did not directly address the alleged failures of the Property Factor to comply with the Code of Conduct and alleged breaches of property factor's duties. As many of the factual matters raised at the review hearing were discussed again at the hearing on 27 August (see below) a summary of his submissions is outlined below:
  - 8.4.1. Mr Dromey said that the Property is a small Class 1, 300 square foot shop with no pertinents, no common stair and no shared access. He said that the Homeowner has owned it for about 2.5 years. (The tribunal noted that the title sheet shows that the Homeowner became the registered proprietor of the Property on 31 March 2015). It is let by the Homeowner to another person for the purposes of their business.
  - 8.4.2. Mr Dromey referred to the two-page written submissions on behalf of the Homeowner dated 18 June 2018 and accompanying documentation labelled **HO Doc A-Z**.
  - 8.4.3. Mr Dromey said that the Homeowner was left with no option but to contact the tribunal. **HO Doc A** is an email of 17 January 2018 from the Homeowner to Stuart Smith / Mike Grehan at the Property Factor notifying them that an application was going to be made to the tribunal. Mr Dromey said that numerous contacts had been made to James Gibb prior to the email. Stuart Smith was in the Property Factor's debt recovery team. He took over the whole case. The matter went straight to debt recovery without any complaints guide being issued. Mike Grehan is

the Property Manager. Nick Mayall is the acting head of the Property Factor.

- 8.4.4. Mr Dromey said that the Property Factor did not send a complaints guide to the Homeowner. **HO Doc Z**, an email from Stuart Smith to the Homeowner dated 12 March 2018 shows that that was the first time that complaints guide was ever addressed and the email also stated "should you wish to submit a formal complaint I would request you follow the information provided in the link below. The Complaints Guide was not provided to the Homeowner. There was a link in the email. That was following the Application being made to the tribunal on 17 January 2018.
- 8.4.5. Mr Dromey said that the final straw was that debt collectors Alex Adamson, were engaged without any effort to resolve the matter. HO Doc B is a letter from Alex Adamson dated 27 February 2018. This was over a month after the Application had been made to the tribunal.
- 8.4.6. Mr Dromey said that James Gibb was not the factor when the Homeowner purchased the Property. There was no factor. The tenement was self-managed. Mr Dromey understands that James Gibb was targeting Gorgie Road properties for property management.
- 8.4.7. The ordinary member asked Mr Dromey when the Property Factor was appointed. Mr Dromey replied that they claim that they were appointed in January 2017. The ordinary member asked the date of the first point of contact with the Homeowner. Mr Dromey said that the first contact with the Homeowner was March 2017, in the form of a bill issued to the Homeowner. Mr Dromey did not have the bill but referred to **HO Doc C**, an invoice dated 29 May 2018, which was said to be in similar terms as it is a standard invoice from the Property Factor. Mr Dromey referred to **HO Doc Y, which is an invoice** dated 7 February 2017 from Martin Burns at Burns and Watson in respect of building works. Mr Dromey said that he had requested this after the March 2017 bill was received as it mentioned roof works and he asked for an itemised bill for roof works which were said to have been carried out.
- 8.4.8. The ordinary member asked for clarification from Mr Dromey as to whether, after the factor was appointed in January 2017, there was any letter of introduction or written statement of services ("WSS") sent to the Homeowner. Mr Dromey said that there was no letter of introduction or WSS. He said that he has asked the Property Factor for the WSS and he still does not have a copy. He said that no reason has been given by the Property Factor as to why that has not been provided. Mr Dromey said that the only correspondence received since the Application has been

made to the tribunal has been a further debt collector's letter from Adamson and further debt recovery letters from Stuart Smith at the Property Factor. There has been no letter from Mike Grehan or Nick Mayall or any correspondence in response to the matters raised as complaints in the Application. Mr Dromey said that Stuart Smith sent the complaints guide link, as per **HO Doc Z** but nobody has sent the WSS. His "MO" in Dromey's opinion was just to refer the matter to income recovery or debt collectors.

8.4.9. The ordinary member asked whether the Homeowner / Mr Dromey have seen the Development Schedule and he replied that they have not.

8.4.10. Mr Dromey moved on to say that he had requested from the Property Factor evidence of a quorum vote and a list of the voting properties from over 9 proprietors of the 16 that the Property Factor claims are in the building (Number 140 – shop; tenement owners 144; shops at ground floor level up to 148 as per the title deeds). Proceeding on the assumption that that is correct, Mr Dromey wanted to see evidence of a majority vote to appoint the Property Factor. Mr Dromey referred to **HO Doc D – H** which is an email notification to the Property Factor dated 23 February 2018. Mr Dromey requested sight of the Property Factor's authority to act. In relation to Section 1 of the Code, he said that the requests in **HO Doc F** Section 1 relate to the fact that the Homeowner has not been provided with a WSS.

8.4.11. Mr Dromey said that he had made multiple queries to the Property Factor, such as: in-gathering of votes; canvassing and feedback of votes; appointment of the roofer. In relation to the last matter, Mr Dromey said that in relation to the roofer's bill the Property Factor provided, it was claimed that Barry O'Kane from Flat 9 had contacted Mike Grehan of James Gibb and that Mike Grehan then had appointed his roofer Martin Burns to check out flat 9 at 144 Gorgie Road. Mr Dromey said that he spoke to the roofer and the roofer said to him re. bill **HO Doc Y** that he had found no leak of any description. He said that he was instructed by James Gibb. At the time that Mr Dromey spoke to the roofer he did not know that the Property Factor was carrying out any factoring services at the development. Having spoken to Martin Burns, Mr Dromey asked Nick Mayall whether there was any connection between Mike Grehan and 144/9 so as to eliminate any possibility of canvassing or in-gathering of votes. Mr Dromey wanted to know if there was a connection between the Property Factor and the owner of Flat 9. Mr Dromey thought that there might be some relation between Mike Grehan and Barry O'Kane, the owner of Flat 9. The date of that roofing work was 7 February 2017.

8.4.12. Shortly after that, Mr Dromey received a reply from Mike Grehan and Nick Mayall. **HO Doc K**, an email of 22 March 2018 (with Mr Dromey's handwriting on the email.) It is part of a chain of emails which starts at **HO Doc N** on 8 March 2018. HO Doc K – states that he is attaching a copy of the original proposal but that was not submitted. Prior to the Property Factor being appointed, the Homeowner had never been sent a copy of the proposal. Mr Dromey stated that the Property Factor says that they can allegedly not reach the owner of the property but they sent a debt recovery letter straight away. On that basis Mr Dromey said that no effort was made to contact the Homeowner.

8.4.13. Mr Dromey referred to **HO Doc O**, a letter sent by Mike Grehan at the Property Factor to the Homeowner dated 28 June 2017. In it he refers to an email from the Homeowner to the Property Factor dated 8 June 2017 (not in bundle) and an initial reply from the Property Factor dated 13 June 2017 (not in bundle), saying that they would investigate and reply further. Mr Grehan provided information about the appointment process but said they had not fully answered the Homeowner's query as to the Property Factor's appointment. Mr Dromey stated that nothing else has been provided by the Property Factor relative to the appointment process. Mr Dromey said that he queried the quorum vote and nothing has been provided. He reiterated that at no stage has he or the Homeowner received a WSS or a Complaints Guide. He repeated that by the Property Factor's own admittance a Complaints Guide was not sent prior to 12 March 2018: See **HO Doc Z** dated 12.3.2018.

8.4.14. Mr Dromey referred to **HO Doc T**, an email from the Homeowner to Mike Grehan at the Property Factor dated 2 July 2017 responding to the letter of 28 June 2017 and stating that the Property Factor has not fully answered multiple queries which the Homeowner had made.

8.4.15. Mr Dromey referred to **HO Doc S**, an email from the Homeowner to Mr Grehan/ Accounts at the Property Factor dated 3 August 2017, in which she is contesting three bills. This email refers to earlier emails 27 June 2017 to 2 July 2017 and states that the queries in those emails have not been answered.

8.4.16. Mr Dromey referred to **HO Doc R**, an email from the Homeowner to the income recovery team and Stuart Smith at the Property Factor dated 11 January 2018. It refers to previous correspondence said to have been sent by the Property Factor relative to invoicing and contests bills which have been issued.

8.4.17. Mr Dromey again referred to **HO Doc Z** again, the email from Stuart Smith at the Property Factor to the Homeowner dated 12 March 2018. Mr Dromey says that since receipt of that email the Homeowner has not submitted a "formal complaint", as requested by the Property Factor, because the matter was already being investigated by the tribunal.

8.4.18. Mr Dromey again referred to **HO Doc Y**, the copy roofer's invoice dated 7 February 2017. The ordinary member asked whether the roofer relayed to Mr Dromey during their conversation that other works were carried out. In answer, Mr Dromey stated that he went up on the roof and did not see any evidence of works having been carried out. On the basis of this he said that he was suggesting that this invoice has been rendered for works that have not been done and/or the quality of the works is such that there is no evidence of the works. The ordinary member asked when the conversation took place relative to the works being done and Mr Dromey replied that the conversation with the roofer may have been March 2017.

8.4.19. Mr Dromey referred to **HO Doc C**, an Invoice to the Homeowner dated 29 May 2018. Mr Dromey said that the billing appears to be quarterly as this is for the period 28.2.18 – 27.5.18. The management fees are £22.50 per quarter inclusive of VAT. Mr Dromey said that he had available to him the quarterly invoices from the supposed appointment date in January 2017, although they were not lodged. The management fee of £22.50 per quarter including VAT for 16 flats totals £1,440 including VAT per annum. For the 1.5 year period of the appointment it totals £2160. Mr Dromey stated that he is complaining about the service provided during that period. He added that there is another invoice attached to the original Application dated 30 May 2017 which includes the share of original roofing bill to Burns and Watson.

8.4.20. Mr Dromey referred to **HO Docs D-H**, which is the Homeowner's notification to the Property Factor dated 23 February 2018 of the alleged breaches of the Code and the alleged breaches of Property Factor's duties. (This was forwarded to the tribunal as requested after the Application was made on 18 January 2018). Mr Dromey said that there has been no response to the notification letter and that none of the queries or issues have been answered by the Property Factor.

8.4.21. Mr Dromey referred to **HO Docs U – X**, an email from the Homeowner to Stuart Smith, Property Factor accounts team, dated 27 June 2017; **HO Docs T-U**, an email of 2 July 2017; and **HO Docs S-T**

dated 3 August 2017. Mr Dromey stated that there were no replies, to his knowledge, to these emails which were sent by the Homeowner. There was the letter dated 28 June 2017 to which he has already referred. In the interim, between August 2017 and January 2018, Stuart Smith of the Property Factor took over debt recovery. He referred again to **HO Doc R-S**, an email of 11 January 2018 from the Homeowner to the income recovery team and Stuart Smith.

8.4.22. Mr Dromey said that the Property Factor has refused to resolve or unreasonably delayed to resolve the Homeowner's concerns. Mr Dromey referred to **HO Doc A**, the email from the Stuart Smith to the Homeowner dated 16 January 18 in which Stuart Smith says that the property manager has advised he is content with previous explanations provided in respect of the appointment as factor and the invoices issued. Mr Dromey said that the length of time waiting for a response was from summer 2017 to 16 January 2018. Mr Smith did not acknowledge that there was any outstanding conversation. The following day, 17 January 2018, the Homeowner responded by email in **HO Doc A**, stating that the Property Factor has refused to address or resolve her concerns.

8.4.23. Mr Dromey stated that none of the invoices issued to the Homeowner have been paid. Mr Dromey said that he contacted Mr Adamson on 16 March 2018 to advise that there was an ongoing issue with the Property Factor. Another bill was issued after that and court action has been threatened. They have threatened interest and late payment charges but they have not applied them.

8.4.24. **HO Doc Page N** is an email from Mr Dromey to "property manager" and "accounts" at the Property Factor dated 8 March 2017 in which he refers to "an unsigned odd illegal bill" which had been sent to the Homeowner. Mr Dromey stated that there had been no itemisation on the bill but that he did not know what date the bill was. It may have been the first bill received after the appointment of the factor. Mr Dromey said that he has records of all the bills.

8.4.25. Mr Dromey referred to **HO Doc L-M**, an email from him to Mike Grehan, accounts and property manager at the Property Factor dated 13 March 2017 in which he asked for a list of items.

8.4.26. Mr Dromey referred to **HO Docs P and Q**, an email from Mr Dromey to James Gibb which he said was sent on or after 30 May 2017 as it refer to an invoice of that date.

8.4.27. The tribunal adjourned for a short period in order for the Homeowner's Representative to consider the written representations which had been received from the Property Factor shortly before the review hearing as he had not received these in advance of the hearing.

8.4.28. When the hearing resumed, Mr Dromey made oral representations in response to Property Factor's written representations:

8.4.29. (1) He stated that the WSS has never been provided directly to the Homeowner and the one now provided not does not have the development schedule attached.

8.4.30. (2) He stated that it is admitted by the Property Factor that the Complaints Guide was not sent prior to 12 March 2018 even when the tribunal complaint was made.

8.4.31. (3) He stated that the WSS has no development schedule.

8.4.32. (4) He stated that no complaints procedure was offered. He has never seen an email phone call or letter inviting him to embark on the formal complaints procedure. His reason for not embarking on it now is because the matter is with the tribunal.

8.4.33. (5) He said that the wrong date had been given. It was 17 January 2018. "The response", even if it was a response, did not come until 12 March 2018.

8.4.34. (6) This was the Property Factor's response to the **HO Docs D, E, F, G, etc.**, the Homeowner's notification letter of 23 February 2018. Mr Dromey stated that the notification letter contained direct questions to the Property Factor in terms of the Factors' Code. He does not accept that there has been any prior enquiry that he is aware of and he does not accept that answers have been provided by and large in the main to the queries. He disputes that any answers have been provided at all to these three pages **HO Docs F, G and H** and considers that none have been answered at this time. The only letter was the one from 28 June 2017 and **HO Doc K** from Nick Mayall on 21 March 2017.

8.4.35. In relation to the statement "Additional clarity may resolve these", Mr Dromey stated that it is not clear whether this means clarity from the Homeowner or the Property Factor. Mr Dromey stated that he would say that the questions in the notification email are very clear and could not be clearer than that.

8.4.36. In relation to the statement that "answers have been provided to some points", Mr Dromey said that he has not received any answers unless the Property Factor was referring to the letters to which Mr Dromey had already referred in earlier submissions.

8.4.37. (7) Mr Dromey stated that the Property Factor has never asked for copies of the emails without the handwriting. He noted that the Property Factor is not refuting that the emails were received. Mr Dromey stated that he believed the context could not be clearer with the reference to the law and Code of Conduct.

8.4.38. (8) Mr Dromey stated that this point relates to the Title Deeds which is a substantive complaint.

8.4.39. (9) Mr Dromey stated that he addressed this in his cover letter. Jeni Boyle uses the word "precipitous". He said that he utterly refutes the suggestion that they have not been afforded the opportunity to respond to the Homeowner's concerns. Nick Mayall, Mike Grehan, Stuart Smith and accounts have all been copied into the bulk of these queries and complaints and concerns. Mr Dromey referred to the fact that Mr Grehan and Mr Mayall refuse to contact him or the Homeowner and the fact that Stuart Smith farmed it out to debt collectors. All those four departments of James Gibb were very much notified by him or the Homeowner and the complaints process was never mentioned, nor had it been provided.

8.4.40. (10) Mr Dromey stated that there does not appear to have been asked for nor offered the opportunity for both parties to meet. He said that the onus would be surely on the Property Factor to offer a meeting. The first time that they offered a meeting, to his knowledge, was on 28 May.

8.4.41. Mr Dromey stated that the WSS minus the Development Schedule has been provided (for the first time) and so has the Complaints Guide, on 28 May 2018, as part of the tribunal process.

## 8.5. The hearing adjourned.

8.6. On 22 June 2018 the tribunal issued a decision following review of the decision dated 10 April 2018 of the legal member with delegated powers to refer the Application to the tribunal. The tribunal decided to take no action in relation to the decision of 10 April 2018, in terms of Section 44(1)(a) of the 2014 Act, for the reasons stated in the decision of 22 June 2018.

## **9. Further procedure**

- 9.1. The tribunal proceeded to determine the Homeowner's Application in terms of Section 19 of the 2011 Act.
- 9.2. A hearing was fixed for 27 August 2018 at 10.00am at George House, 126 George Street, Edinburgh.
- 9.3. The date, time and place of the hearing were notified to parties and parties were invited to lodge any written representations and to lodge any documents in accordance with Practice Direction number 3.

## **10. Directions**

- 10.1. On 24 June 2018, the tribunal on its own initiative issued the following Directions to parties in terms of Rule 16 of the 2017 Rules in relation to the conduct and progress of the Application:
- 10.2. **The First Direction** required **the Property Factor by 14 July 2018** to submit to the tribunal's offices and the Homeowner:
  - 10.2.1. The Development Schedule which forms part of the Written Statement of Services ("WSS") for the development in which the Property is situated ("the Development").
  - 10.2.2. A list of all residential and commercial properties in the Development together with the names and correspondence addresses for each property.
  - 10.2.3. The title deeds for each property in the Development.
  - 10.2.4. The Property Factor's factoring proposal which was submitted to an owner or owners in the Development, together with a list of all owners to whom it was sent and the correspondence addresses to which it was sent; together with proof of postage or delivery for each owner in the Development.
  - 10.2.5. Copies of the mandates and/or voting feedback from owners in the Development relative to the Property Factor's factoring proposal; including the names and addresses of all those voting in favour of the Property Factor's appointment, any abstentions or votes against the appointment of the Property Factor and any owners from whom there was no response.
  - 10.2.6. A written submission by the Property Factor outlining its authority to act as property factor for the Development, including its authority to act as the property factor for the Homeowner's Property. If reference is made to any documents, copies of the documents should be numbered and appended to the written submission; if reference is made

to any statutory provisions, copies of the statutory provisions should be appended to the written submission.

10.2.7. A written statement from the Property Factor of the basis upon which shares of costs are apportioned amongst the owners of properties in the Development.

10.2.8. Any evidence that the WSS (including the Development Schedule) was sent to the Homeowner.

10.2.9. All invoices issued by the Property Factor to the Homeowner since its date of appointment as Property Factor of the Development; together with details of any payments made by the Homeowner.

10.2.10. Written confirmation as to whether the Property Factor has any financial or other interests in Martin Burns and/or Burns & Watson, 78 North Gyle Loan, Edinburgh, roofer; and confirmation as to whether the Property Factor received any commission, fee or other payment or benefit in respect of the roof work at the Development for which an invoice was issued on 7 February 2017.

10.2.11. A copy of the letter from the Property Factor to the Homeowner dated 13 June 2017.

**10.3. The SECOND DIRECTION required the Homeowner by 31 July 2018 to submit to the tribunal's offices and the Property Factor:**

10.3.1. A written submission in relation to the Property Factor's authority to act, or otherwise, as factor for the Development, including the Homeowner's Property, which should include a response to the written submission by the Property Factor in relation to the same point (see paragraph 5.1.6). If reference is made to any documents, copies of the documents should be numbered and appended to the written submission; if reference is made to any statutory provisions, copies of the statutory provisions should be appended to the written submission. For the avoidance of doubt, if the Property Factor fails to comply with the Direction to submit a timeous written representation, the Homeowner should still produce a written submission by the date stipulated.

**10.4. The THIRD DIRECTION required the Homeowner and Property Factor by 31 July 2018 to submit to the tribunal's offices and to the other party:**

10.4.1. A numbered List of Documents and (ii) a bundle of documents, containing copies of each of the numbered documents on the List of Documents, upon which the party wishes to rely at the hearing; and

10.4.2. A list of any witnesses that the party wishes to call to give evidence at the hearing.

10.5. Reference is made to the full terms of the Directions.

## **11.Further written representations and documents lodged by parties**

- 11.1. On 1 August 2018 the Property Factor submitted:
  - 11.1.1. A further written submission
  - 11.1.2. Second Inventory of Documents (A-E)
  - 11.1.3. Attached documents
  - 11.1.4. Attendees to Hearing.
  
- 11.2. A copy of the above was sent to the Homeowner and the Homeowner's Representative.

## **12.Hearing – 27 August 2018 at George House, 126 George Street, Edinburgh**

- 12.1. The hearing on substantive matters took place on 27 August 2018 at George House, 126 George Street, Edinburgh. Thereafter the Members sat to determine the matters in the Application.
  
- 12.2. The Homeowner and Homeowner's Representative were in attendance.
  
- 12.3. The Property Factor was represented by Nik Mayall, Managing Director and Jeni Bole, Operations Manager.
  
- 12.4. The Property Factor also arranged for the attendance of a witness, Martin Burns

### **12.5. Property Factor's opening submissions**

- 12.5.1. Ms Bole stated that as far as the original approach to the Property Factor was concerned, it was fairly typical of many new business enquiries. The Property Factor was contacted by an individual acting on behalf of proprietors in the flatted stair at 144 Gorgie Road. They asked the Property Factor to submit a tender document with respect to various common services and the external fabric of the building. The Property Factor automatically downloads one deed from Registers of Scotland and usually gets a Deed of Conditions. In this case there was no Deed of Conditions. The burdens could be seen in one title. The Property Factor does not as a matter of practice get all of the deeds. Ms Bole stated that there is no requirement to do so. In this case the central burdens were in a previous disposition.

12.5.2. The tenement, it is mixed commercial and residential. 144 is a common stair with residential properties starting on the 1st floor. There are 12 flats accessed through one stairwell, with none at ground floor level. It is a four-storey tenement. On the ground floor there are commercial properties at street level at 140, 142, 146 and 148.

12.5.3. The ordinary member asked Ms Bole about "Lot 1", numbers 130-138, which is mentioned in the deed for the Property. Ms Bole said that the Property Factor is not concerned with 130 to 138, which is simply a neighbouring property and it does not share the roof.

12.5.4. Ms Bole said that the Property Factor received a contact from one of the residential property owners in the tenement, Simone Gribble, who lives in one of the top floor properties. The tender documentation was sent to her. She had mentioned that they were speaking to a number of companies.

12.5.5. The appointment of the Property Factor was confirmed by email by Ms Gribble dated 13 November 16 – **PF Doc 5.1.5.**

12.5.6. Ms Bole said that the Property Factor has a normal procedure for communicating with owners. They normally fix a prospective date to start management services, prepare a welcome pack and a WSS. Within the WSS there is a generic section and there is a Development Schedule. The Property Factor normally sends out documents to owners to coincide with the start date of management services, to advise who the Property Factor is.

12.5.7. The tribunal Chair asked whether the Property Factor's normal process was followed in respect of this tenement in relation to the residential and four commercial properties. Ms Bole replied that as part of process they ask the contact they have to provide names and addresses of owners in the block, where possible. The Property Factor was provided with names and addresses for the shop properties. They were given a list. She said that the welcome packs were sent out to all owners to coincide with the start date of management. Ms Bole stated that the Development Schedule intimates the start date of management and that they would always send out documentation to coincide with that date.

12.5.8. The tribunal noted that the Development Schedule which has been lodged with the tribunal shows a Management Appointment date of 9 January 2016. However, the Property Factor's position appears to be that the appointment date was in fact in January 2017.

12.5.9. The tribunal asked for evidence that the Development Schedule had been sent out to the Homeowner. Ms Bole said that the Property Factor does not keep proof of postage. She referred to the Property Factor's letter dated 10 January 2017 which was sent as a covering letter in response to the tribunal's First Direction. There is no evidence that it was sent. The response to the Direction stated that the Property Factor does not have proof of posting as they are not sent by recorded delivery.

12.5.10. Ms Bole stated that invoices are issued to the same property address unless an owner provides a correspondence address. The invoice cycle is quarterly in arrears. The service commenced on 9 January 2017. The first billing date was February 2017, followed by bills in May, August and November. The billing cycle is centralised across all properties factored by the Property Factor.

12.5.11. The tribunal clarified with the Homeowner and her Representative whether it was still in dispute that the WSS was sent to the Homeowner. The Homeowner said that she received the invoice of February 2017 and that was the first she knew of appointment. Email contact was made with the Property Factor shortly after that to ask for information about the appointment.

12.5.12. The tribunal asked the Property Factor to address the burdens on the Homeowner's in terms of her title for the Property. The Property Factor stated that the only maintenance charged to the shops is roof maintenance. It was only ever the Property Factor's intention to charge commercial units with respect to the roof as they do not have access the common stair. (The tribunal noted that the title for the Property in fact includes a real burden of a share of maintaining the stairwell.) The Management fee for residential properties is £150 per annum plus VAT. The Management fee for commercial premises is at a 50% discount. In terms of the service provided, there is annual inspection of the roof and any emergency work required is arranged in addition to ongoing maintenance.

### **13. Discussion**

14. The tribunal invited parties to address each of the alleged failures to comply with the Code of Conduct and failures to comply with Property Factor's duties. Parties' submissions and the tribunal's decision in relation to each alleged failure are outlined below:

**14.1. Section 1 – general preamble in relation to provision of WSS in stipulated timescale**

14.2. The preamble to Section 1 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. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code.*

*You must provide the written statement:*

- to any new homeowners within four weeks of agreeing to provide services to them;*
- to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage;*
- to existing homeowners within one year of initial registration as a property factor. However, you must supply the full written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies);*
- to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement."*

14.3. **The Homeowner's Representative** said that the complaint regarding the WSS is that it was not provided to the Homeowner in accordance with the preamble to Section 1. The WSS was first provided after the Application was made. It did not contain the Development Schedule when it was lodged by the Property Factor. The Homeowner's Representative first received a copy at the first hearing day on 20 June 2018. Having now considered the WSS, the Homeowner's Representative is satisfied that it does contain most of the required information so he is not insisting on the alleged failures to comply in terms of the various subsections of Section 1 which are specified in the Application other than **Section 1 – 1.1a Aa (see below)**.

14.4. **The Property Factor's position** is that the WSS was provided to the Homeowner on 10 January 2017. The Property Factor stated that not only do they send out a hard copy, it is provided on the Property Factor's website. There is also a client portal available to each client which contains WSS and

Development Schedule. The reference number (JG+) and account number are available on the bills. The client portal is heavily advertised on the website. The hard copy welcome pack they issue has a section about it. There is also reference made periodically in bills.

14.5. In response **the Homeowner** stated that the Homeowner and her Representative have never looked on the website or used the client portal. The Homeowner's Representative stated that it is not clear on the document and there is no instruction in big enough print otherwise he is sure that the Homeowner would have followed that procedure. He said that the Homeowner has been in conflict with the Property Factor since February 2017 and that has affected the way that she has engaged with company, to an extent.

14.6. The tribunal Chair asked **the Property Factor** when invoices would be sent to a correspondence address, such as in the case with this Homeowner. The Property Factor replied that the default position is that the Property Factor sends to the properties in the building, unless provided with another correspondence address. Normally if they receive information about another address they amend from that point onwards. The Property Factor further stated that they would need to check to which address the WSS was sent and whether it was the same address as the first bill. The Property Factor stated that it would depend what address was provided by the owner who contacted them (Ms Gribble).

14.7. At the end of the hearing, the **Property Factor** gave an undertaking that it would look for the date that the Welcome Pack was sent out to the Homeowner/Property and the address to which it was sent. They agreed to do so by the Monday following the hearing and the tribunal advised parties that it would be sent to the Homeowner for comment.

14.8. By letter of 29 August 2018 the Property Factor provided the following information relative to the WSS:

14.8.1. It confirmed that the Welcome Pack, which included the WSS, was "posted to all on 10 January 2017" (a redacted schedule with properties in the Tenement and proprietors' details was attached to the letter); and

14.8.2. The Welcome Pack for 140 Gorgie Road was sent to two business names/addresses: "Gouranga Mantra Centre", "Occupier Mr Robert J Stainton? Director Ian James McDonald, Secretary Mr Q John Owen Mcareavey", at the Property; and to a limited company at its registered address at "Lanark Road Property Ltd, Drylaw House, 32

Groathill Road North, Edinburgh, EH11 2NS". (On the schedule there is also an address shown for Ian James McDonald at 402 Lanark Road, Edinburgh, EH13 0LX.)

**14.9. Tribunal's determination in relation to the alleged failure to comply with Section 1.1 of the Code of Conduct.**

14.9.1. There was a dispute as to whether the Written Statement of Services (including the Development Schedule) was ever supplied to the Homeowner.

14.9.2. The obligation on the Property Factor is to provide the Homeowner with the WSS within the stipulated timescale.

14.9.3. The tribunal accepted the evidence and submissions made on behalf of the Homeowner that she was not provided with a WSS at her home address at any time; nor was it emailed to her. The tribunal accepted that the first time the Homeowner saw the WSS was as a lodged document in the tribunal proceedings.

14.9.4. The Development Schedule to the WSS which is headed "144 Gorgie Road" lists the Property as one of the addresses in the Tenement.

14.9.5. The tribunal took account of the Property Factor's standard procedure to send documents to the property addresses in the Tenement unless another correspondence address had been provided. The tribunal accepted the Property Factor's evidence that welcome packs were sent by normal post to addresses provided by the proprietor of Flat 9/144 Gorgie Road, on 10 January 2017. However, the information supplied by the Property Factor after the hearing showed that nothing was addressed to the Homeowner, either at the Property or at her home address and that the WSS for 140 Gorgie Road was addressed to a business at the Property and to a limited company at its registered address.

14.9.6. A Title Search would have shown the registered proprietor to be the Homeowner and would also have provided the Property Factor with her home address. The Property Factor's practice to obtain only one title deed in the Tenement meant that the Property Factor relied on incorrect information supplied to it by one proprietor from Flat 9/144 Gorgie Road.

14.9.7. **HO Doc N**, the email from Mr Dromey to "property manager" and "accounts" at the Property Factor dated 8 March 2017 complained that "*an unsigned odd illegal bill was sent to my client Nadia Cusmano at*

*address shop 140 Gorgie Road".* The tribunal inferred that that was the first contact received by the Homeowner from the Property Factor and that from that date the Property Factor was on notice that anything it had posted had not been sent to the Homeowner.

14.9.8. The tribunal also took account of the fact that the invoice of May 2017 was sent to the Homeowner at an address in Prestonpans, so the Property Factor had obviously updated the contact address by then, although there is no evidence as to when this occurred.

14.9.9. From 8 March 2017 onwards the Homeowner and her Representative raised concerns about the Property Factor's appointment and other matters and the Property Factor took no steps to ensure that the Homeowner had been or was provided with a WSS.

14.9.10. The tribunal considered the fact that there was a method for having sight of the WSS via a client portal on the Property Factor's website by using log in details available on an invoice. However, the tribunal took the view that as this had never been drawn to the Homeowner's attention by the Property Factor, this did not meet the requirements of the preamble to Section 1 of the Code of Conduct.

14.9.11. On the balance of probabilities, the tribunal is satisfied on the evidence that the Welcome Pack, WSS, and Development Schedule were not provided to the Homeowner by the Property Factor and that the first time these documents had been seen by the Homeowner was after the tribunal proceedings commenced and the documents were lodged by the Property Factor.

**14.10. The tribunal determined that there was a failure by the Property Factor to comply with the preamble in Section 1 of the Code.**

**14.11. Alleged failure to comply with Section 1 – 1.1a Aa of the Code**

14.12. Section 1.1a Aa of the Code provides:

*"The written statement should set out:*

*A. Authority to Act*

*a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group..."*

14.13. **The Homeowner's Representative** stated that the WSS which he has now seen does not set out authority to act on behalf of all the Homeowners in the group.

- 14.14. **The Property Factor** replied that the WSS would not necessarily detail the authority to act but would say that they have been appointed by a majority of Homeowners. The Property Factor referred to **PF Doc 5.1.1**. Section 2 of the WSS is headlined authority to act. It is a generic statement. The Property Factor then made reference to the **Development Schedule** and said that they mentioned the appointment within the welcome pack. The tribunal noted that the Development Schedule just details the management appointment date. The Property Factor said that it is in the welcome pack and made reference to **Item B** in the second written submission, in the opening paragraph. The Property Factor calls this development "*144 Gorgie Road*". However, they say it applies to the whole development, including the commercial properties. When asked if there was a reason why it stated "*144 Gorgie Road*" the Property Factor replied that this is how this came in. It is a colloquial use of "144" as opposed to "140-148".
- 14.15. In response to a question from the tribunal, the Property Factor accepted that questions would be raised by the owner of number 140 when the properties are referred to as "144".
- 14.16. **The Homeowner** said that the Development Schedule was not received by her and the first time it had been seen was when it was lodged as a document in the tribunal proceedings.
- 14.17. **The Property Factor** then said that the complaints procedure clearly was not followed in this case. The Property Factor said that its issue with the whole reason that they are sitting at a tribunal is that the Code clearly specifies that they are meant to have a complaints procedure. They have a clear one, it has not been followed and exhausted, so they should not have ended up at the tribunal.
- 14.18. The ordinary member asked whether any of the owners of the other three commercial properties have questioned authority to act. The Property Factor replied that none of the other commercial owners are challenging their appointment as a factor. There is no problem with arrears in the building.
- 14.19. The Property Factor repeated its position that the complaints procedure has not been followed. The tribunal Chair asked what the Property Factor would have expected the Homeowner to do. The Property Factor said that the Homeowner should have initiated a formal complaint because they have a written complaints procedure which is available on request. The tribunal Chair asked the Property Factor what procedure would be followed if a Homeowner raised a concern rather than what the Property Factor had described as "initiating a formal complaint". The Property Factor replied that a

lot of low level complaints are resolved as they always strive or answer or deal with concerns. However, if the property manager is not able to satisfy a client then the client has recourse to initiate a formal complaint and follow the procedure. The tribunal chair asked how that would be done by a homeowner in practical terms. The Property Factor said it is usually by email or letter. It is enough for the homeowner to mention the complaints procedure although most people use the words "formal complaint". The Property Factor has a brochure about the complaints procedure. Stuart Smith was in income recovery. He passed the complaints brochure to the Homeowner in March 2018. It is accepted that that was after the point at which the Application came in to the tribunal. Obviously the tribunal is a formal procedure. It is the Property Factor's contention that the procedure has not been followed at all in this case. The Property Factor stated that the vast majority of complaints tend to be addressed or resolved. The issues raised by the Homeowner are not necessarily different from the vast majority of complaints. However, they do not deal with a lot of complaints from homeowners who are challenging the Property Factor's appointment. It might have been resolved if the procedure had been followed. It is very often easier for a factor to look at ways of resolving rather than being involved in the tribunal process.

#### **14.20. Tribunal's determination on Section 1.1a Aa complaint.**

14.20.1. The WSS contains generic information about how the Property Factor was appointed. In this instance, the tribunal considered the content of the WSS as a separate issue from whether it had actually been provided to the Homeowner (see the tribunal's determination in relation to the alleged failure to comply with the preamble to Section 1, above). The welcome pack included the WSS and was part of the bundle issued to the properties in the Tenement on appointment. The tribunal has now seen the WSS which was lodged by the Property Factor in the tribunal proceedings.

14.20.2. Even though the document refers to a majority of "144", the Development Schedule lists all 16 properties in its annex.

14.20.3. It appears that the owners misconstrued the voting procedures by discounting the commercial properties and seeking a majority of the 12 residential properties. However, the property Factor was not involved in this process and was told when appointed that a majority of owners had voted for its appointment. No other owners have complained. Everyone in the commercial units is paying the management fees and other invoices items, other than the Homeowner.

**14.20.4.** The tribunal determined that there has been no failure to comply with Section 1.1a Aa of the Code of Conduct.

**14.21. SECTION 2.1 (not in Notification to Property Factor; Application Amended 4.4.18)**

14.21.1. The Homeowner's Representative began to make submissions on his allegations in relation to Section 2.1. However, as noted above this alleged failure was not contained in the Homeowner's notification to the Property Factor and by email of 4 April 2018 Mr Dromey withdrew this allegation on behalf of the Homeowner by amending the Application.

**14.22. Alleged failure to comply with Section 2.2 of the Code of Conduct**

14.22.1. **Section 2.2 of the Code of Conduct** 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)."*

14.22.2. The tribunal chair asked the Homeowner which communication(s) is/are being complained about.

14.22.3. The Homeowner stated that it is the email communication from Stuart Smith dated 16 January 2018, in HO Doc A.

14.22.4. The tribunal Chair asked whether the email was sent to Mr Dromey or to the Homeowner as the "sent to" name is not shown, although the reply to the email has come from the Homeowner. Mr Dromey said that he believed it was sent to Ms Cusmano. He said that it "threatened" her.

14.22.5. The tribunal Chair asked in what way it threatened the Homeowner. Mr Dromey replied that it is dismissive in the context of stating that the standard reminder process will be followed and stated that if required court action will be considered as a form of debt recovery.

14.22.6. The tribunal Chair asked Mr Dromey whether he was submitting that this went beyond a reasonable indication that the Property Factor might take legal action. Mr Dromey said that he was, as the same individual later admitted that there was no complaints guide sent: HO Doc Z – the email of 12 March 2018, to which he has already referred.

Mr Dromey said that Mr Stuart Smith had also refused to attend the hearing after being requested to do so. Mr Dromey said that it could be inferred that he may have been aware in January 2018 that no complaints guide had been sent. Following his email of 16 January 2018, Mr Smith immediately contacted a debt recovery firm.

14.22.7. **The Property Factor's response** to the allegation that they have failed to comply with Section 2.2 of the Code is that Stuart Smith was merely pointing out what their process of income recovery would be and that what he stated was absolutely correct. Further, it was submitted that they have a duty as factors to intimate to their clients what their standard procedures are. It was submitted that the email was only intimating steps and was nor more than a reasonable indication that if payment was not made, legal action would be taken.

14.22.8. In response to a question from the tribunal Chair, the Property Factor replied that they did not know when it was discovered that the Complaints guide had not been sent to the Homeowner. The ordinary member asked whether it is part of the welcome pack. The Property Factor replied that it is available on the public website and the portal. The tribunal chair asked the Property Factor for its submissions in relation to **HO Doc Z**. The Property Factor's response was that he is not sure that the two are linked, in that one can have a complaints procedure ongoing and it does not halt the income recovery process. The Property Factor has a duty to provide a customer complaints guide so they try to make it available but the onus is on the owner to raise a formal complaint. Stuart Smith referred to it. The Property Factor is not sure if the Homeowner requested it in the email of 12 March 2018. However, the Property Factor would say it is readily available. Additionally, it was suggested that if the Homeowner has looked at the First-tier Tribunal's website, they could look for the Property Factor's complaints procedure.

14.22.9. In summary, the Property Factor's position in relation to the email of 16 January 2018 which has been complained of is that it is a reasonable indication that the Property Factor may take legal action. It is only saying that there is a potential. It is not saying that they are taking legal action.

14.22.10. The Homeowner's Representative added that as a result of the admission that no complaints guide had been sent out, the onus should be on the Property Factor. In addition, immediately after the email of 16 January 2018 was received from Stuart Smith, the matter was "farmed out" to debt collectors.

14.22.11. The Property Factor's response to that point was that that was in accordance with normal procedure and in the absence of a formal complaint.

14.22.12. The Homeowner's Representative repeated his assertion that no complaints guide had been provided.

14.22.13. After a short adjournment, the tribunal discussed the terms of the amended Application so that both parties were clear about what allegations were being made in terms of the amended Application (as notified to the Property Factor).

**14.23. Tribunal's determination of alleged failure to comply with Section 2.2 of the Code of Conduct**

14.23.1. The tribunal determined that the letter complained of does not go beyond a reasonable indication that they may take legal action.

**14.23.2. The tribunal determined that there is no failure to comply with Section 2.2.**

14.23.3. The tribunal observes, however, that the whole issue of the Property Factor not instigating their complaints procedure runs through the matters giving rise to this Application including the Homeowner's complaints about being issued with debt collection letters rather than receiving responses to her concerns and queries from the property manager.

**14.24. Alleged failure to comply with Section 2.4 of the Code of Conduct**

14.24.1. Section 2.4 of the Code of Conduct provides:

*"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)."*

14.24.2. In relation to the allegation that the Property Factor had failed to comply with Section 2.4 of the Code of Conduct, the tribunal Chair asked

the Homeowner's Representative what work or services were being complained about.

14.24.3. The Homeowner's Representative stated that it was the roof works.

14.24.4. The tribunal Chair asked the Homeowner's Representative what the core services are in relation to the roof works. Mr Dromey's reply was that he was not informed about proposed works nor was his written approval sought. He contested that the fact that the roofer could be appointed by the Property Factor.

14.24.5. As Mr Dromey had not answered the question, the tribunal Chair asked the Property Factor what roof works were provided as part of the core service. The Property Factor referred to the **Development Schedule** in the PF's first Bundle 1 and stated that in Section 2 it was specified it had delegated authority to instruct repairs up to the value of £30 plus VAT per property. That would be  $16 \times £30$  if it is a roof repair. In terms of repairs to the roof they would follow their main WSS which make distinction between emergency repairs and routine repairs. If it is within the delegated authority they do not need to consult with the owners. For routine repairs they would always look for the delegated authority. If it is an emergency repair they would just get the work done, however much it costs, within reason. WSS, Section 4 relates to maintenance and response arrangements. 4.2 routine repairs, 4.3 emergency repairs.

14.24.6. Mr Dromey said that the roof works were carried out by Martin Burns. They were supposedly carried out prior to 7 February 2017 (when the invoice was issued). To his knowledge, he does not know if they were part of the core service. The total costs was £696, which would exceed the £480 delegated authority. They were not, in his opinion, emergency works. Mr Dromey spoke to roofer once he received the receipt which he requested from the Property Factor. The roofer said that he was called to flat 9 on the top floor in relation to some historical spotting. The proprietors are Simone Gribble and Barry O'Kane. Mr Dromey made notes of the conversation he had with Mr Martin Burns on invoice **HO Doc Y**. In the top box it says "144 Gorgie Road, Flat 9, Edinburgh". All the scribbles are Mr Dromey's handwriting. Mr Dromey recorded the fact that Mr Burns said he was called to flat 9. Mr Burns said that there was no evidence of a leak at Flat 9.

14.24.7. The tribunal chair asked how one would obtain access to the roof. Mr Dromey confirmed that there was a hatch on the top floor, accessed via the common stairwell.

14.24.8. Mr Dromey reserved his position further until the tribunal had heard evidence from Mr Burns.

14.24.9. The Property Factor responded that as the roof works were emergency works, consultation did not need to take place. Mike Grehan was the property manager and he instructed it. The invoice **HO Doc Y** says "144 Gorgie Road, Flat 9, Edinburgh" just because the original enquiry came from that particular flat.

14.24.10. The ordinary member asked why at the first line it says "As per estimate" which would tend to indicate that the roofer had been up and reported back to the property manager, rather than acting in an emergency situation. The Property Factor replied that there were other elements involved which did not proceed at that time. The roofer found boarding on the roof. The sequence of events was: a report from Flat 9 of water ingress. In January, not 100% sure of the date; a report from Burns and Watson on 16 January. **PF BUNDLE 2, C**, accompanied by photos; Mike Grehan accepted that these were emergency repairs and instructed them. He was concerned that not to do something quickly would have resulted in water ingress. A couple of items were not deemed to be an emergency, for example the lead apron recommendation to apply flashband tape. Mike Grehan took decision about whether it was an emergency or not (which would have meant looking to the level of delegated authority).

14.24.11. The tribunal chair asked the Property Factor when the works were carried out. The property Factor did not know but stated that normally they send invoices fairly rapidly thereafter and invoice is dated 7 February 2019.

14.24.12. The ordinary member asked Mr Dromey if he ever seen any of the documentation relating to the quotation before it was submitted to tribunal. Mr Dromey replied that he has never seen it before.

14.24.13. Mr Dromey also commented that these works appear to have been done the same week that authority to act was given to the Property Factor. The Report may have come on 16 January.

14.24.14. The Property Factor then called Martin John Burns to give evidence.

**14.25. Witness - MARTIN JOHN BURNS (called by PROPERTY FACTOR)**

14.25.1. The Property Factor began by asking questions in Evidence in Chief.

14.25.2. The witness's full name is Martin John Burns and he is 52.

14.25.3. His Business address is 70 North Gyle Loan, Edinburgh

14.25.4. He is Director of a roofing and building company, Burns and Watson. It is a Limited company.

14.25.5. He has worked there for 35 years, 15 of which he has been a Director.

14.25.6. Mike Grehan of the Property Factor contacted him to ask him to have a look at the tenement building based on concerns about water ingress and so on.

14.25.7. He had a Copy of his Report and photographs which he sent.

14.25.8. He originally visited the property. He removed a chimney pot which was a danger. It was at the side of the skylight. It was taken away as a safety concern.

14.25.9. After Mike Grehan was in receipt of the Report that he then produced he asked him to go ahead with what he deemed emergency repairs from that.

14.25.10. The tribunal members asked a number of follow up questions.

14.25.11. In answer to the date of first contact, he said that he gave the email to James Gibb. He waited for Mike Grehan to instruct them to carry out the work.

14.25.12. When asked the date of his first visit to the site he asked to consult his telephone and the tribunal gave him permission to do so. He read from an email dated 10.1.17 – Mike – “Hi Martin can you give me a call about the attached report”. He saw the Report. A survey report he was given from Mike. That had been sent to Jeni.

14.25.13. The ordinary member asked who had carried out the survey. Mr Burns said that it was DCPM (one of the other factors bidding for the factoring of the block). They had produced a survey report which highlighted some concerns with the roof.

14.25.14. Mr Burns thinks that they went out on 16th January 2017. He was not provided with any report at that time that the owner of the top floor property had water ingress. Possibly during a conversation over the phone he was told about water ingress to flat 9. He was asked to go and have a look at the roof with reference to the survey report and the Property Factor said they had limited funds but wanted to carry out emergency repairs as there had been lead stolen from roof and there were general maintenance issues, for example, a bit of gutter cleaning at rear flat roof area. He sent his pictures on to Mike and costings. Mr Burns was not in the property at Flat 9 that day. There is a roof hatch onto flat roof from the close.

14.25.15. In response to a question as to when the works were carried out, Mr Burns stated that it was "a couple of days before the invoice".

14.25.16. When asked if he could explain why "144 Gorgie Road, Flat 9" is on the invoice, he said he did not know if that was specified by James Gibb.

14.25.17. When asked if he recalled being in flat 9 to look at water ingress, he said it could have been one of his guys or his business partner. He did not know personally.

14.25.18. He was asked about the fact that the dangerous chimney does not seem to feature and replied that because of due care and safety, they took it away as a health and safety matter.

14.25.19. When asked which of the works on the invoice he would class as being emergency repairs, he said all of them. Lead had been stolen from cupola and hatch area. "Source and investigate ingress into flat 9, compound cracks to raggles and chimney £60 + VAT".

14.25.20. Mr Burns stated that there was another invoice regarding water into flat 9 at another time. He produced the **Invoice** (not yet lodged) which he had with him and the tribunal allowed him to refer to it. That was in August 2017. They did an investigation into ingress in Flat 9. (The invoice has no flat number on it). He may have found ingress into Flat 9, plus other repairs which were carried out.

14.25.21. Returning to the issue of the February 2017 invoice, he said that compound cracks to raggles and chimney are emergency repairs. If anyone gets water ingress it is classed as an emergency to him. "Re-felt flashing" – wall head, against chimney" were necessary repairs. It was

possibly because of ingress into the property or Mike had picked it up at the time. The assessment as to whether it was an emergency was carried out by Mike and him, a bit of both. There was water into the stairwell as well due to lead flashings being stolen.

14.26. Mr Dromey then asked Mr Burns questions in cross-examination.

14.26.1. Mr Dromey asked about the contact with Mike Grehan on 10 January and the fact that Mike Grehan supplied a report from DCPM. Mr Burns said that the information on the DCPM Report extended to a fair bit of work on the tenement. He was concentrating on roof area.

14.26.2. Mr Burns was asked whether Mike Grehan been in contact with him before 10 January 2017 and Mr Burns replied not to his knowledge, he does not know really.

14.26.3. Mr Dromey asked the witness if he recalled talking to him (Mr Dromey) on any occasion. Mr Burns replied that he talks to lots of people during the day and at night. He recalled Mr Dromey phoning him recently, a couple of weeks ago. Mr Dromey said that they had a call shortly after receiving this receipt from the Property Factor as he wanted to know what the nature of the emergency was and that Mr Burns had said to him that he had been to Simone Gribble's at flat 9 and there was just historical spotting on the ceiling but no evidence of any ingress on that rainy day. The witness was asked whether her remembered visiting the flat and seeing the historical spotting. Mr Burns replied that the day he went up was in August 2017. He said that he did not recall a conversation with Mr Dromey in February 2017. He said that did not remember having a conversation at any point with Mr Dromey to say that no water ingress was found. The witness said that he was not saying it did not happen, he was just saying that he could not remember.

14.26.4. Mr Burns stated that he does not know if it was him who did the inspection. He has four guys working for him.

14.26.5. When asked if he could remember a call with Mr Dromey a few weeks before the hearing, the witness replied that he would be a tad uncertain. If put on oath, he could not say that is the voice. He would err on the side of caution.

14.26.6. Mr Burns was asked about the work in January 2017 and replied that he did the work. He thinks he was on site a couple of hours or so. His business partner and other guys also did the work.

14.26.7. He was asked by Mr Dromey how re-felting flashings to raggles constituted emergency work. He replied that it does not say it is emergency work. Any water ingress would be classed as emergency work. To prevent further water ingress, repairs are necessary. If someone was getting water ingress he would class that as an emergency. They gave an estimate to the Property Factor. They did not need to take the estimate. They gave recommendations. The Property Factor said limited costs but they were trying to keep the roof wind and watertight. He did not see anything wrong with that.

14.26.8. The ordinary member asked about the photo of a lead flashing missing and whether he had remedied that. The witness said that he had and that there is boarding up there which had been thrown onto the roof and left there. He told the Property Factor it was lying there but to take away it is a bit of a job. The Property Factor just wanted to do the necessary repairs which he did.

14.26.9. The witness said that the other invoice is another investigation a few months after that. It was a small item relating to a water gate.

14.26.10. Mr Dromey asked the witness to explain how he could remember a conversation he had with Mike Grehan in early 2017 but not remember any conversation with Mr Dromey at all. Mr Burns replied that Mr Dromey could have been talking to any one of his guys or his business partner. His phone could have been on divert as it often is.

14.26.11. Mr Dromey asked about the entry "removing debris on completion and slate repairs" and stated that the rear slope is over 20 metres away from the flat roof. He asked how carrying out slate repairs is emergency works. The witness replied that there could be possible ingress through dislodged or broken slates.

14.26.12. Mr Dromey asked whether any work Mr Burns does is emergency work. Mr Burns first replied that he believed so, but added that if maintenance is required, recommendations are given.

14.27. The witness was thanked for his evidence and left. The tribunal adjourned for lunch.

14.28. After the adjournment the parties continued with their submissions.

14.28.1. Mr Dromey stated that he thinks it is odd that a roofer should be brought in straight away the day after there is an alleged appointment of the Property Factor. He also thinks that it is odd that a survey belonging

to a different company on a different date can then be submitted "willy nilly" after the fact, to support an argument that these were in fact emergency works. In his experience of dealing with roofing companies, emergency repairs are done and have to be done on the spot.

14.28.2. Mr Burns may not have remembered him, having had a five minute conversation with him, where he admitted being in flat 9 where he said there was no leak at all on the day. The tribunal chair asked if Mr Dromey was suggesting that was some time in March 2017. Mr Dromey said that he is not sure but that it would not have been closer to June 2017. Mr Dromey sent a text to Mr Burns at some point after that asking if he could explain the two references on the receipt. It could possibly have been between those dates. He questioned the roofer on how he could classify flashing as emergency. He inspected it on a rainy day on his own admission and said that there was no leak. If it was an emergency you would fix it on the spot. Why did it take so long to conduct the repairs after the fact if it was an emergency? Mike Grehan dealt with roofer on 10 January 2017 and to submit it as part of an emergency procedure and it does not seem right to him.

14.28.3. The Property Factor responded by stating that a condition survey was undertaken by DCPM as part of their tender process and that was provided to the Property Factor by the owners. The Property Factor submitted that the timeline is consistent with prudent management. The owners said that there were issues with the roof, the Property Factor instructed the roofer, he produced a report and carried out work. The photos from 16 January 2017 were taken on a sunny day with no rain. The Property Factor had to take at face value the advice by roofers as to what is an emergency repair. The fact that the lead flashing had been stolen would indicate to the Property Factor that something ought to be done. The Property Factor does not accept that the fact the repairs were not done there and then on sight means that they were not emergency repairs. The roofers wanted to consult with them. The Property Factor thinks a small window in order to make a decision is acceptable.

14.28.4. The Homeowner's further response was that the Property Factor accepts that the roof works were over the limit for delegated works.

#### **14.29. Tribunal's determination about alleged failure to comply with Section 2.4**

14.29.1. The tribunal is satisfied on the basis of the evidence of Mr Burns as well as the submissions made by the Property Factor that the roof works which were carried out in January 2017 were emergency works.

14.29.2. The tribunal was assisted in reaching this view by the fact that other works which were in the estimate were removed prior to instruction. Further, works Mr Burns identified which were desirable but not emergencies were omitted.

14.29.3. It appeared from the report which was produced by Dunedin Canmore, another factor who was tendering for the business that the roof may have been neglected for a while at the time the owners began looking for a factor; as part of the tender process they had the benefit of the report from Dunedin Canmore which identified problems with the roof. The Property Factor acted quite quickly after its appointment. Within a week, the roofer had been instructed and carried out works.

14.29.4. The tribunal does not need to determine whether there was a leak into 144/flat 9 at that time. There was water in the stairwell. Because of the problems with the roof there was the potential of further water ingress. The tribunal accepted Martin Burns' evidence that he was addressing water ingress and potential water ingress in common areas.

**14.29.5. The tribunal determined that there was no failure to comply with Section 2.4 of the Code of Conduct.**

#### **14.30. Alleged failure to comply with Section 2.5 of the Code of Conduct**

14.30.1. Section 2.5 provides:

*"You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)."*

14.30.2. The Homeowner's Representative stated that this complaint related to the quorum for authority to act. There is an absence of any written evidence of a proven majority. He made reference to the code requirement that "*overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible...*"

14.30.3. The tribunal chair asked when Mr Dromey when he first made the enquiry. He replied that it was 13 March 2017. **HO Doc L/M.** There are four questions and a request to provide something to evidence it. **HO**

**Doc K** is the response from Nik Mayall on 21 March 2017. Mr Dromey had requested the names and some evidence of the authority to act and it was not provided. There is a lack of content. The enquiry was not responded to as fully as possible. It still has not been. He said "The majority of owners in the block 140-148" is not sufficient to answer Mr Dromey's query. He said that Mr Mayall has provided answers but they are not comprehensive and they are not full. He is not answering the question in relation to the share addresses. Nik Mayall said a vote was taken with the owners. Mr Dromey has never seen any evidence of that. He still does not accept that until somebody shows him the paper. That has never been presented to him. He said that he believes the majority voting is addressed in Tenement law, rather than in the Code. There is more detail but the email of 21 March 2017 still does not fully answer his queries. His overall position is that he was never provided by the Property Factor with the information requested about voting shares. The quorum was supposed to be 9 out of 16 but Simone and Barry claimed they had 7 responses. They would need 9.

14.30.4. The Property Factor's Response to the section 2.5 complaint was that they have tried to respond as best they can to the queries that were raised.

14.30.5. The tribunal chair asked if there was a reason why he did not say what the position was when he replied by letter. Mr Mayall said not that he could recall. The Property Factor was not part of the canvassing or initial voting. He is not sure if it was explained before but he took the opportunity to explain it then. His understanding from the owners was that a majority had been reached and that is what they had been told. Simone Gribble said that there were 7 out of 16 votes. The Property Factor's understanding was that enough people within the whole block were in favour of that. Going forward everyone was content to pay bills other than the Homeowner.

#### **14.31. Tribunal's determination of alleged failure to comply with Section 2.5 of the Code of Conduct**

14.31.1. The tribunal considered whether the Property Factor responded as quickly and as fully as possible in relation to the Homeowner's concerns.

14.31.2. In relation to the vote to appoint the Property Factor, there was nothing else that the Property Factor could say about who voted for them. They do not know who voted for them. They were advised by Ms Gribble at the time of instruction that a majority of the proprietors in the

Tenement had voted for their appointment and they provided this information to the Homeowner and her Representative. Regarding the validity of its appointment, the Property Factor stated its position.

14.31.3. The tribunal observed that in relation to the Homeowner's concerns about the Property Factor's authority to act and the application of tenement law, matters could perhaps have been handled better by the Property Factor as a matter of good communication but there was no information which was known to the Property Factor and which should have been provided to the Homeowner beyond that which was provided.

14.31.4. **The tribunal decided that there was no failure to comply with Section 2.5.**

**14.32. Alleged failure to comply with Section 3.3 of the Code of Conduct**

**14.33. Section 3.3 provides:**

14.33.1. *"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."*

14.33.2. Mr Dromey stated that the Homeowner was not provided with a detailed financial breakdown at least once a year. There was a statement provided but no detailed financial breakdown of what those bills were for.

14.33.3. The Property Factor responded that quarterly bills which they sent out are full itemised for all expenditure in the previous 3 months. The Property Factor also provided a statement of account from day 1 up until date of submission so that all of the invoices could be looked at.

14.33.4. The tribunal Chair asked Mr Dromey if he could point a statement and say why it is lacking. Mr Dromey said that the specific problem they had was that a document was sent on for Property Factor's activity for 30.5.17. It has a roof bill of £696 and it says repair to roof. There is no breakdown of the roofing bill. They want to know about supporting documentation and invoices.

14.33.5. The tribunal chair asked whether he and the Homeowner were supplied with supporting documentation and invoices on request and he said that they were.

14.33.6. The tribunal chair asked whether there was an outstanding complaint. Mr Dromey replied that there does not seem to be one.

**14.33.7. The complaint in terms of Section 3.3 was withdrawn on behalf of the Homeowner.**

**14.34. Alleged failure to comply with SECTION 4.1 of the Code of Conduct**

14.34.1. Section 4.1 of the Code provides:

*"You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts."*

14.34.2. Mr Dromey said that the Property Factor does not have a clear procedure for debt recovery. There are numerous routes that could have been taken prior to debt recovery and that was not pointed out to the Homeowner by the Property Factor. Stuart Smith could have said the Homeowner had the right to refer this matter to the tribunal, or that they could try to find a resolution or that there was a complaints guide online or taken some steps to resolve instead of kicking into touch with a debt collector.

14.34.3. Mr Dromey submitted that the debt procedure has not been reasonably applied as the Property Factor, as it could have pointed the Homeowner down the complaints route instead of debt collection; the complaints guide link was provided but debt collectors were appointed who threatened further action. Perhaps there could have been some resolve. The tribunal Chair asked whether Mr Dromey had looked at the complaints guide lodged by Property Factor and provided by weblink in March 2018. Mr Dromey said that he did not use the link provided. He said he has now looked at the complaints guide.

14.34.4. Mr Dromey said that the Property Factor did not seem to be phased by the tribunal. On 5 July Mr Dromey had to send him an email to ask him to stop sending bills until the matter was resolved by a tribunal.

Having a debt collector send letters was very stressful, so Mr Dromey said while the tribunal was taking place could he update his system and desist in sending billing data. He agreed on 5 July. Nothing has been sent out since 5 July. Mr Dromey gave him the HPC reference number. He said that Stuart Smith "washed his hands of it" and said it was with the debt collectors.

14.34.5. The Property Factor's response in relation to the Section 4.1 complaint was that they do not issue reminders and they withdraw findings to the FMA but quarterly bills do still go out. They have an income recovery procedure in the WSS. Regarding the complaints process that was provided after Adamsons told the Property Factor that there was a complaint. The Property Factor did not initially know that there was an Application to the tribunal. The Property Factors complaints procedure does refer owners to the FTT. The Property Factor contended that the procedure has been reasonably applied. The Property Factor referred to HO doc A, the email dated 17 January 2017. At that point they had issued a full year's worth of bills with no payment, so the matter was passed to the debt collectors. The credit control procedure standard process is that there are 1st and 2nd reminders. The debt collectors were not instructed in the previous 3 billing cycles while we were answering queries. By time it was issued a full year's billing cycle had been issued with no payment. The Property Factor stated that they also have a duty and obligation to other homeowners to ensure that debts are met on time. The Property Factor stated that the debt collection letters ended in February 2018. The June 2018 correspondence would be the May quarter end billing.

**14.35. Tribunal's determination in relation to the alleged failure to comply with Section 4.1**

14.35.1. The main thrust of the Homeowner's complaint was that matters were escalated up the debt recovery side of the Property Factor's business, while not providing the complaints procedure until March 2018 after the Application was made to the tribunal and even then not acknowledging the matter as a complaint.

14.35.2. From early on after the Property Factor's first invoice was issued to the Homeowner, the Homeowner has been expressing dissatisfaction about a number of issues and the Property Factor has not recognised it as a complaint or provided or signposted the complaints procedure until March 2018.

14.35.3. The tribunal considered whether the debt recovery procedure was reasonably applied. On the evidence, it was accepted by the Homeowner that she has not paid anything since the appointment of the Property Factor. The tribunal accepted the Property Factor's evidence that they have a procedure, they have gone through that procedure, they have not gone to debt collection for a year and that they have not raised legal proceedings. The tribunal also acknowledged that the Property Factor has a duty to other owners in the Tenement to consistently apply its debt collection procedure against debtors.

14.35.4. The tribunal decided that the Property Factor's failure to refer the Homeowner to the complaints procedure in relation to the concerns she had raised was not directly relevant to this subsection of the Code and did not amount to unreasonableness on the part of the Property Factor in relation to its debt collection procedure.

**14.35.5. The tribunal determined that there was no failure to comply with Section 4.1 of the Code.**

**14.36. Alleged failure to comply with Section 4.8 of the Code of Conduct**

14.36.1. Section 4.8 of the Code of Conduct provides:

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

14.36.2. The tribunal enquired as to whether any legal action has been taken against the Homeowner. The Property Factor confirmed that it has not.

14.36.3. Mr Dromey stated that he would have considered debt collectors' letters to be legal action. There is no court documentation, only debt recovery letters asking for the debt to be paid. The last issuance was the end of February 2018. The last contact he had was in March 2018 by phone.

14.36.4. Mr Dromey accepted that no legal action has been taken against the Homeowner that he knows of.

14.36.5. The Property Factor repeated that no legal action has been taken. In normal procedure, they are usually looking for sum outstanding to be anything over £350 to £400 otherwise costs are prohibitive.

**14.36.6. Tribunal's determination in relation to alleged failure to comply with Section 4.8 of the Code of Conduct**

14.36.7. The Tribunal accepted the Property Factor's evidence, which was not contradicted by the Homeowner or her Representative, that no legal action had been taken in relation to her debt.

**14.36.8. The tribunal determined that there was no failure to comply with Section 4.8 of the Code.**

**14.37. Alleged failure to comply with Section 4.9 of the Code of Conduct**

14.37.1. Section 4.9 of the Code of Conduct 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."*

14.37.2. Mr Dromey stated that Court action was threatened and expenses were threatened to be added to the account.

14.37.3. The tribunal Chair asked in what way he submits that that goes beyond a reasonable indication that the Property Factor may take legal action. Mr Dromey replied that there was no effort made at resolve by the Property Factor. He would construe this as acting in an intimidating manner. He would certainly consider it as a form of threat. No complaints guide was sent out. There was no effort. It was "deal with debt collectors or else".

14.37.4. The tribunal Chair asked whether the Homeowner considered paying the debt and making a complaint in tandem. Mr Dromey replied that in the early days they debated going to the tribunal with this. He said to her that they could go to the tribunal or she could pay. However, he said that the Property Factor has not honoured any of their requests. They decided to go to the tribunal because someone might get some good out of this despite the fact that it would take time and energy and attitude to put some clarity on the matter and discover what is going on here. There has been no effort by the Property Factor to resolve the debt collection matter. It went beyond a reasonable indication that legal action might be taken. Had there been some reasonable effort made by the

Property Factor, things might have been different and the Homeowner might have paid her bills.

14.37.5. The ordinary member asked Mr Dromey what sort of effort he would have expected. Mr Dromey replied that he would have expected the complaints guide to be sent out or they could go to the tribunal and do the complaints process in tandem.

14.37.6. The ordinary member asked whether there was ever any offer of a meeting to discuss matters. Mr Dromey replied not to his knowledge. The Homeowner's principal reason for not paying the bills was that she did not think that the PF had authority to act. That remains her position.

14.37.7. The Property Factor's response to the Section 4.9 complaint was that they disagree with the allegation of a failure to comply. The nature of debt collection letters is that the wording has to be reasonably strong. Obviously it is right and correct to say that we may take legal action because we reserve the right to do so. The only letter from Alex Adamson which has been lodged is **HO Doc B**, making the Homeowner aware of the potential right of considering a court action and expenses. This is a statement making the Homeowner aware of what could happen in the event that correspondence was ignored. The Property Factor does not see that as threatening. The Property Factor could understand it being concerning but not of a threatening nature.

14.37.8. The ordinary member asked the Property Factor whether they offered a meeting. The Property Factor said that they did not.

14.37.9. The ordinary member asked whether, alternatively, the Property Factor opened up the complaints procedure. The Property Factor responded that if someone has a complaint they wish to formalise, they leave it to the homeowner, they will not pre-empt it.

14.37.10. The ordinary member asked if that would remain the case if someone was obviously unhappy. The Property Factor replied that it is for the client. They had continuing dialogue in which they refuted what the Property Factor said. The Property Factor continued debt recovery but that does not preclude at any stage someone has the right to initiate the formal complaints procedure.

14.37.11. The Property Factor referred to the section in the Code of Conduct relating to complaints and stated that it has a clear procedure which sets out a series of steps, which is what the code of conduct says. The Property Factor said that they would say that they do signposting of

their complaints procedure. It is their documentation and on the website. It is not buried. It is open to the Homeowner to do. They would not necessarily encourage a Homeowner to lodge a formal complaint. They are keen to ensure compliance with the Code.

14.37.12. The tribunal Chair asked the Property Factor what they considered to be the difference between a "complaint" and a "formal complaint". The Property Factor replied that a "formal complaint" would be on their complaints procedure which kick starts time limits. There are Stages 1-5 of a procedure that the Property Factor expects a Homeowner to go through before coming to the tribunal. The ordinary member asked the Property Factor if it was aware that several tribunals have not taken that view. The Property Factor replied that it was aware which is why it was raised.

14.37.13. The tribunal Chair asked the Property Factor what disadvantage there have been to point the Homeowner to the complaints procedure rather than debt collection. The Property Factor replied that it was a "low level complaint". If the Property Factor does not agree they would say so. They would take the appropriate action regarding debt recovery. If the complainant still wishes to raise a complaint they have the possibility of doing that through the complaints procedure. The disadvantage to the Property Factor in pointing the Homeowner to the complaints procedure is to encourage people to go down a time consuming route. The procedure takes a lot of time for all members of the company.

14.37.14. The other point is that there was a series of communications with Mr Grehan and a number of emails submitted from the Homeowner and the Homeowner's Representative. The Property Factor was providing responses to the queries they were asking. There were also a number of assertions and allegations made which the Property Factor chose not to address. Conclusions were drawn with no basis and there was no production of evidence. The Property Factor was being requested to produce evidence as proof that they had not done something, which is plainly not possible. The Property Factor has tried to respond. In general terms, someone may choose not to accept what is being said. The Complaints procedure will be forwarded if the Property Factor can see that they are going backwards and forwards with no resolution.

14.37.15. The tribunal Chair asked if the Property Factor was saying that they had not reached that stage. The Property Factor did not reply but said that some of the tone of the communications gave the indication that there were less questions to answer. The Property Factor was not going to respond to the baseless accusations. The Property Factor said that

they get lots of communications with the word "complaint". They think they had provided all of the information which had been requested as far as they were in a position to provide it. They do not know that it had reached the position where they had to provide the complaints procedure. The income recovery team took over.

14.37.16. The tribunal chair asked about **HO Doc A**, the email of 17 January 2018 and the fact that **HO Doc Z** gives a clear indication of complaints procedure not being provided until March. The Property Factor said that they would expect the Homeowner to raise it through their formal complaints procedure which is referred to in its WSS. The Complaints procedure does not involve any external bodies or mediation. It is all done internally.

**14.38. Tribunal's determination of alleged failure to comply with Section 4.9 of the Code of Conduct**

14.38.1. The tribunal considered the letter from the debt collector which was complained about (the letter from Alex Adamson **HO Doc B**). It made the Homeowner aware of the potential right of the Property Factor through its debt collectors to consider a court action and seek expenses. The tribunal decided that there was nothing out of the ordinary for a debt collection letter and it appeared to be industry standard. The only reference to legal action was the potential for legal action and expenses. It was a reasonable indication that they may take legal action and seek expenses in the event that the debt was not paid.

**14.39. The tribunal determined that there was no failure to comply with Section 4.9.**

**14.40. Alleged failure to comply with Section 5 of the Code of Conduct**

14.40.1. Sections 5.2 to 5.9 of the Code of Conduct apply where the agreement with homeowners includes arranging any type of insurance.

14.40.2. The Homeowner's Representative accepted that there was no insurance for the Tenement which was arranged by the Property Factor.

**14.40.3. All of the Section 5 complaints were withdrawn on behalf of the Homeowner.**

**14.41. Alleged failure to comply with Section 6.3 of the Code of Conduct**

14.41.1. Section 6.3 of the Code of Conduct provides that:

*"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."*

14.41.2. Mr Dromey stated that in relation to Burns and Watson no evidence was presented that the Property Factor had sought a fair price and put this out to tender. The roofer admitted that he was given an estimate, a specification, his estimate was accepted and he was appointed. There is no indication that the Property Factor had carried out a competitive tendering exercise to get the best price. It was never shown how and why the Property Factor appointed a particular contractor. Mr Dromey said that the request as to how and why Martin Burns was appointed was made by Mr Dromey after the invoice from Martin Burns was supplied by the Property Factor.

14.41.3. The tribunal Chair asked how the request was made. Mr Dromey replied that he could not recall. Mr Dromey said that there was nothing lodged, he may have an email but he could not find it at the moment.

14.41.4. The Property Factor's response was that there was no tendering exercise and only one contractor was approached. They tribunal chair asked whether they were ever asked by the Homeowner or the Homeowner's Representative why Burns & Watson was appointed. The Property Factor replied "not that we have a record of" and said had they been asked they would have responded.

**14.42. Tribunal's determination of alleged failure to comply with Section 6.3**

14.42.1. The Homeowner was unable to prove that she or her Representative had made any request to the Property Factor as to why Martin Burns appointed so the tribunal decided that there was no corresponding obligation on the Property Factor to provide information to the Homeowner.

**14.42.2. The tribunal determined that there was no failure to comply with Section 6.3.**

**14.43. Alleged failure to comply with Section 6.6 of the Code of Conduct**

14.44. The tribunal asked which tendering process the complaint related to.

**14.45. Mr Dromey withdrew the complaint on the basis that there was no tendering process.**

**14.46. Alleged failures to comply with Sections 6.7 and 6.8 of the Code of Conduct**

14.46.1. Sections 6.7 and 6.8 provide:

*"6.7 You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.*

*6.8 You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed."*

14.46.2. Mr Dromey said he may have misinterpreted the provisions in Sections 6.7 and 6.8 and he accepted that there is no evidence that any of these situations exist.

**14.46.3. Mr Dromey withdrew the complaints in terms of Sections 6.7 and 6.8.**

**14.47. Alleged failure to comply with Section 6.9 of the Code of Conduct**

14.47.1. Section 6.9 of the Code of Conduct provides:

*"You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor."*

14.47.2. Mr Dromey said that the issue he had at the time the Application was made was that there was no warranty sent out for the works done by Burns & Watson. Mr Burns was back up on the roof again this year fixing things.

14.47.3. The Property Factor responded that there would not be a warranty applicable. They were not replacing a felt roof. The return visit was to repair a water gate. The work that was carried out would just be

covered as maintenance works. With the first heavy rainfall, if the same area had failed, they would expect the contractor to go back. There were no further reports from the proprietors in the tenement about water ingress into the stairwell. Typically the Property Factor would look for warranties with larger works, e.g. insurance backed warranty for product itself. A Builder's warranty or promise or guarantee goes with them. With significant work, they would be looking for an insurance backed warranty.

14.47.4. Mr Dromey said that Martin Burns said he had been up and repaired the roof section then he furnished another receipt for other works. If there is a warranty in place there is no need to pay extra money.

14.47.5. The Property Factor replied that the situation with warranties is only there for work carried out, it does not cover further works.

14.47.6. The ordinary member said that it would be very difficult for someone to give a warranty on the whole roof.

14.47.7. Mr Dromey stated that it was the warranty issue that he was complaining about. He can appreciate that there are some things for which you cannot get warranty. It would be good to tell homeowners that this work has been done, this is the company who did it and it is not covered by warranty.

14.47.8. The tribunal Chair asked Mr Dromey whether that was a communication complaint rather than one under this Section of the Code. Mr Dromey said that arguably it was.

**14.48. Tribunal's determination of alleged failure to comply with Section 6.9 of the Code**

14.48.1. The complaint related to whether the Property Factor should have obtained a collateral warranty. Having considered the evidence relating to the nature of the works, the tribunal concluded that minor works of this nature associated with tenement roofs are not suitable for collateral warranties.

14.48.2. The tribunal determined that there was no failure to comply with Section 6.9 of the Code.

**14.49. Alleged failure to comply with Section 7.1 of the Code of Conduct**

14.49.1. Section 7.1 of the Code of Conduct 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."*

14.49.2. Mr Dromey repeated the complaint that the Homeowner had not seen evidence of a clear written complaints resolution procedure as it was not provided to him or the Homeowner, nor was it addressed by the Property Factor until the web link was sent on 12 March 2018, HO Doc Z, after the Application had been made to the tribunal.

14.49.3. The tribunal Chair asked Mr Dromey whether now that you he has seen the complaints procedure during the tribunal proceedings, whether he was still alleging it is not a clear written complaints procedure with steps and timescales. Mr Dromey replied that they may have a clear customer complaints document but it should have been sent to the Homeowner.

14.49.4. Mr Dromey said that he had no real complaint under Section 7.1 now that the document had been lodged.

**14.50. The complaint under Section 7.1 was withdrawn.**

**14.51. Alleged failure to comply with Section 7.2 of the Code of Conduct**

14.51.1. Section 7.2 of the Code of Conduct provides:  
*"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."*

14.51.2. The tribunal Chair indicated to Mr Dromey that on the basis of both parties' submissions the tribunal's preliminary view is that it does not apply to the facts in this case as the in-house complaints procedure was never started by the Property Factor.

14.51.3. Mr Dromey accepted that now that the discussion had progressed, Section 7.2 did not apply.

**14.51.4. The complaint under Section 7.2 was withdrawn.**

14.51.5. The tribunal observes that it is regrettable that the Property Factor did not offer to embark on the complaints procedure at a reasonably early stage when there were such obvious expressions of concern on the part of the Homeowner; and that a link to the procedure was not provided until March 2018, two months after the Application had been made to the tribunal.

14.51.6. The tribunal also observes that it seems incongruous that during the tribunal proceedings the Property Factor has sought to criticise the Homeowner and her Representative for not availing themselves of its complaints procedure.

**14.52. Alleged failure to comply with Section 7.3 of the Code of Conduct.**

14.52.1. **The complaint under Section 7.3 was withdrawn.**

14.52.2. Mr Dromey stated that he thought he had withdrawn the complaint at an earlier stage of procedure.

**14.53. Property Factor's duties**

14.53.1. Mr Dromey referred to his written summary of his points in "Annex A".

14.53.2. In particular, he submitted that he had a point in relation to the meaning of property factor and the fact that this is not a residential property. He submitted that property factors are only permitted to deal with residential properties.

14.53.3. The tribunal Chair indicated to Mr Dromey that even if he was right about that point (which was not the tribunal's position) he had not stated where the duties could be found or alleged a breach of property factors' duties.

14.53.4. Mr Dromey said that his complaint was that the Property Factor's duties are in relation to the Homeowner and as her property is commercial and not used for residential purposes, in theory they do not have the right to send such bills.

14.53.5. The tribunal Chair asked whether Mr Dromey was submitting that Ms Cusmano is not a Homeowner and the Property Factor is not a

property factor within the definition in the 2011 Act. The Title deeds show that she has a clear share of liability for the roof. The tribunal Chair also indicated that all the Code complaints relied on the parties being in the position of Homeowner and Property Factor so this position, if maintained, might affect the rest of the Application, depending upon the tribunal's view on the submission.

14.54. The tribunal allowed the parties an adjournment for the Homeowner and the Homeowner's Representative time to discuss the matter.

**14.55. Following the adjournment the Homeowner's Representative indicated that the Homeowner wished to withdraw the allegation that there was a failure to comply with property factors' duties.**

15. The tribunal informed parties that the tribunal members would fix another date to determine the Application and advised them about further procedure in such Applications once a decision had been reached. The tribunal adjourned at 16.30h.

## **16. Property Factor Enforcement Order**

16.1. Because the tribunal decided that there was a breach of Section 1 of the Code of Conduct the tribunal proposes to make a property factor enforcement order ("PFEO").

16.2. The terms of the proposed PFEO are set out in the attached Notice in terms of Section 19(2) of the 2011 Act.

16.3. Because the WSS and Development Schedule have now been provided to the Homeowner in the context of documents lodged in the tribunal proceedings no order is necessary in relation to provision of the same to the Homeowner.

16.4. The tribunal decided that it was appropriate to order the Property Factor to pay to the Homeowner the sum of £150 in respect of the distress and inconvenience she has suffered. This takes into account the length of time over which the Homeowner had no copy of the WSS or Development Schedule. The provision of the same in a "Welcome Pack" (together with the Complaints procedure) may have prevented some of the matters in dispute from arising as the first invoice issued by the Property Factor would not have come as a surprise to the Homeowner.

16.5. The parties will be allowed to make representations on the proposed PFEO within the timescale stipulated in the letter with the Decision and proposed PFEO.

## **17. Appeals**

**17.1. A homeowner or property factor aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.**

S Tanner

Legal Member

24 December 2018