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

Decision on Homeowner's application: Property Factor (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/Property Factors /22/2635

Re: Property at B/1, 46 Bentinck Street, Glasgow, G3 7TT ("the Property")

The Parties: -

Emily Raine, B/1, 46 Bentinck Street, Glasgow, G3 7TT ("the Homeowner")

Hacking and Paterson, 1 Newton Terrace, Glasgow, G3 7PL ("the Property Factor")

The Tribunal: -

Melanie Barbour (Legal Member)

Helen Barclay (Ordinary Member)

Decision

The Factor failed to comply with its Property Factor duties by failing to charge Homeowners in accordance with the provisions set out in the Tenement (Scotland) Act 2004 when they determined that the title deeds provision for maintenance was not workable. The decision is unanimous.

Introduction

1. In this decision the Property Factor (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factor (Scotland) Act 2011 Code of Conduct for Property Factor is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".

2. The Factor is a Registered Property Factor and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that registration.

3. By application dated 25 July 2022, the Homeowner complained to the Tribunal that the Property Factor had failed to carry out its Property Factor duties in relation to two matters:
    (1) that it related to a failure to carry out the Property Factor's duties, namely they have failed in their duty to keep the common close in a reasonable state of repair and cleanliness. They have breached their duty to maintain the common areas by appointing suitable contractors (Terms of Service: Sections 3.1/3.2). The Homeowners sought by way of resolution an effective deep clean completed by a reputable company. Having a more in-depth regular clean as opposed to just mopping for a few minutes every fortnight. An apology from the Property Factors for the time, effort and injury that this has caused.
    (2) That the property Factor had failed to carry out their property Factor duties by failing to uphold the title deeds and therefore charge fairly for common maintenance and repair. By way of resolution, they advised that they would like their title deeds to be adhered to and therefore pay a lower proportion of the 1/11th share. They also asked that this be backdated to at least the date when they first contacted the property Factor (August 2021).

4. By Notice of Acceptance dated 19 August 2022 a legal member of the Tribunal with delegated powers accepted the applications and a case management discussion ("CMD") was assigned to take place on 1 November 2022; that CMD was subsequently postponed with a new date being fixed for 11 January 2023. Written representations were submitted by the Property Factor on 16 September 2022.

5. A case management discussion (CMD) took place on 11 January 2023. It was attended by the Homeowner, Miss Raine and also the other Homeowner Mr Wilson; and Mr Henderson attended on behalf of the Property Factor. The CMD proceeded as a discussion by telephone. Reference is made to the full terms of the CMD note. A Direction was issued reference is made to its terms. Both parties submitted documents in response to the direction.

6. The Property Factors advised that they not attend the second CMD and would rely on their previous submissions and their supplementary paperwork submitted in response to the Direction. Both Homeowners attended the second CMD on 18 April 2023. The tribunal proceeded to determine the first part of the Homeowner's complaint in May 2023. The tribunal sought further information from the Factors on the second part of the complaint. The tribunal issued a direction dated 22 May 2023 seeking the further information. The Factor's submitted further written submissions on 1 June 2023 and attached the further information requested.

Discussion

COMPLAINT 2: APPORTIONMENT OF CHARGES

7. In terms of the second complaint "the apportionment". The Homeowners advised that the title deeds set out the apportionment between themselves and the flat above. The title deeds showed that they had a 1/16th share. However, the Property Factor had decided to apportion the common charges on a basis that was different from % set out in the title deeds.

8. The Homeowner considered that if there was a dispute as to the proper apportionment of common charges etc, then reference should be made to the Tenements (Scotland) Act 2004. They advised that they had always paid 1/11th share, however, this was their first house purchase, and they had not appreciated that their title deeds had provided for a different apportionment. They confirmed they and the hotel were the only basement properties.

9. The Homeowner advised that they considered that the breach was based on the duty of the Factor to adhere to the title deeds. They considered that the Factor was legally bound to apportion charges in terms of the title deeds; failing which they should determine the apportionment on the basis of the statutory tenancy management scheme.

10. The Homeowners advised that the title deeds set out in Burden 4 show that they have a contribution to the common charges of 1/16th and not 1/11th. They are charged 1/11th share of the common charges by the Factors.

11. They considered that the division of the block was complicated, but that said they did not agree with the Property Factors, that one property "had been removed". Given the

complexities they considered that resort could be had to the tenancy management scheme. This would determine common charges by floor space in the building. They considered this would be fairer.

12. They said the amount of insurance they have to pay is unfair. Particularly as there is a commercial property which is part of the building. They pay insurance per year of £1,600, it is £15,000 for the full building. They had obtained a quote for insuring their own home and the quotes coming in were in the region of £200 a year.

13. They considered that the evidence provided by the Property Factors does not show that the Property Factors were entitled to rely on *custom and practice* as a means of apportioning the charges 1/11th each. They said that even if they accepted that there was evidence of custom and practice being used to apportion the charges, it was extremely prejudicial to them and why should they pay the insurance premiums at the increased rate they do in comparison to other Homeowners and at an increased % of the property that they own as a part of the whole block. They advised that the Property Factors only have evidence about custom and practice being in place from 2006.

14. There was reference to a consultation being underway with owners regarding the common charges. The Homeowners advised that there was no consultation underway regarding the apportionment of the common charges. They advised that the consultation had ended as two top-floor flats had not responded.

15. They would also be happy if the apportionment of the charges was based on the title deeds. The Property Factors had said that the shares did not add up to 100%. The Factors had written to Homeowners on 31 August 2022 advising that they were going to charge based on the title deeds in light of legal advice they had received.

16. By way of resolution, the Homeowners asked for the charges to be paid based on floor space.

17. In terms of complaint 2 “the apportionment”. The Factor advised that there had previously been another property which was part of the common scheme, it later left the common scheme. A new apportionment was agreed in around 2006. He advised that the Factors had looked at all the title deeds and the shares of the properties did not total 100%. Further, he believed that there had been further division to the top floor properties since the title deeds had apportioned the common charges. The Factors had written to the top floor proprietors about the apportionment to see if they would

agree a new apportionment, one had agreed, one had refused and the other two had not responded.

18. He advised that there are 11 properties in the block (4 top floor; 2 1st floors; 2 2nd floors; main door hotel; main door property; and basement.). He advised that the properties were all different sizes.

19. The 1/11th apportionment goes back to 2006, there was an agreement with the owners at that time to apportion the charges on the basis of the 1/11th share to each property. Since then, the share has continued to be 1/11th each, he considered it is now in place based on custom and practice. The common charges cover cleaning, building insurance, electricity, common repairs and maintenance.

20. After the direction had been issued the property Factors provided copies of the title deeds. They advised further in their letter that the complaint is that *"the Factor had failed to carry out their Property Factor duties by failing to uphold the title deeds and therefore charge fairly for common maintenance and repair."* The Factor said that they have no such duty. As per their terms of service, their authority to act and their contract is not related to the title deeds or deeds of conditions.

21. It is not a duty upon the Factor to demonstrate the Homeowner's conditions, or if or how the shares do or do not reach 100%. Rather it was incumbent upon the Homeowner to evidence the apportionment they collectively wish to use and any basis for the same.

22. They did enclose the title deeds. They noted that there were 11 properties, and in terms of the title deeds 9 had 1/8 share, and 2 had a 1/16 share. They stated that the title deeds percentages evidently do not reach 100% and the practice of apportioning their common charges by 1/11th appeared to be in line with the requirements of the Tenement (Scotland) Act 2004, where the shares in the title deeds do not reach 100%.

23. They referred to enclosed letters dated 8 July 2022, 4 August 2022, 3 October 2022 and 5 December 2022 and stated that the collective homeowners failed to reach agreement on alternative shares to use and were therefore unable to amend the shares to apportion the common charges. They advised that no instruction to use a different share has been received from the collective homeowners and the homeowners' practice of apportionment continues. They suggested that if the applicant continues to wish for the collective homeowners to apportion their common

charges by another share, this is a matter for the applicant to address with their co-owners and seek a collective agreement.

Findings in Fact

24. In relation to complaint 2 – apportionment of title deeds the tribunal makes the following findings in fact: -

25. The Homeowners own the flat at B/1, 46 Bentick Street, Glasgow. That flat is part of a larger building.

26. The property Factors appointed in relation to the larger building are Hacking and Paterson.

27. The title deed description is subjects within the land edged red on the title plan being the basement floor flat 46 Bentinck Street, Glasgow, of the tenement 44-50 (even numbers) Bentinck Street, together with an irredeemable servitude right of access and egress to the said basement flat. Together with the rights set out in the Deed of Conditions in entry three of the burdens section.

28. The Homeowners' title deeds at Burden 3 refer to a Deed of Conditions recorded 22 January 1976 with tenements 34-40, 44-50 and 56 Bentinck Street and 46 Gray Street, Glasgow. The burden confirms that the burden of upholding and maintaining in good order and repair the various parts hereof to be common property jointly with the other proprietors in the same tenement in equal portions so far as regards the tenant 44 to 50 Bentinck Street a one-eight share in each case. The Deed of Conditions goes on to set out various maintenance conditions.

29. Burden 3 contains a condition regarding common insurance, and it confirms that the proprietors shall have a common insurance policy and it shall be paid by the proprietors in the same proportion as they bear common repairs and be recoverable in the same manner.

30. Burden 3 also makes provision for the appointment of a factor.

31. The Homeowners' title deeds also have a Burden 4 which provides that the burden of common property shall be a 1/16th share.

32. There are currently 11 properties at the subjects 44-50 Bentinck Street.

33. Since 2006 each homeowner pays 1/11th share of the maintenance of the common parts.

34. The Homeowner contacted the Property Factor by email on 31 August 2021 to question the share allocation.

35. There was a copy letter from the Factors dated 6 March 2006 which advised that we are in receipt of consent form from all owners to apportion common repairs on an equal 1/11th share basis.

36. The Factors advised that using the % share in the title deeds does not amount to 100%,

37. During 2022 the Factors consulted on a revised apportionment with homeowners.

38. On 8 July 2022, the Factors wrote to the Homeowners about apportioning common charges, they noted the terms of the title deeds, the current 1/11th apportionment, that they do not have authority to alter the title deeds, and it is for the homeowners to determine the apportionment of the charges and asked the owners to provide feedback on apportionment.

39. On 4 August 2022, they wrote to the homeowners to advise that they had been contacted by homeowners who had advised of the reasons for the apportionment policy being based on an equal 1/11th share which change was made in March 2006. They state that as there is no appetite to deviate from the present arrangements they intend to continue to apportion forthcoming common charges on an equal 1/11th share basis.

40. On 12 August 2022, the Factors emailed the Homeowners about the apportionment and in that email, they noted that flat 3/1 was divided to create attic flat 3/3; flat 3/2 was divided to create attic flat 3/ 4 and the basement was made into 2 properties. They advised that these divisions were the basis of the owners instructing the Factors to apportion changes on a 1/11 equal basis.

41. On 31 August 2022, the Factors wrote to the Homeowners advising that they had taken legal advice with regard to the apportionment of shares as the Homeowner was refusing to acknowledge the existing arrangement made by the collective ownership

in 2006. They advised that they now write to the owners to advise of their intention to apportion all future common charges and insurance premiums in line with what is stated in each title deed and the reasons behind that.

42. By email dated 5 December 2022, the Factors advised the Homeowners that they had been unable to obtain consent from the top floor flat owners to enable the Factor to amend the existing apportionment of shares in line with the shares that are outlined within the Deed of Conditions.

Reasons for Decision

43. The title deeds are referred to above.

44. The Applicable Law is also set out in the Tenements (Scotland) Act 2004.

Section 4 Application of the Tenement Management Scheme

(1) The Tenement Management Scheme (referred to in this section as "the Scheme"), which is set out in Schedule 1 to this Act, shall apply in relation to a tenement to the extent provided by the following provisions of this section.

(2) The Scheme shall not apply in any period during which the development management scheme applies to the tenement by virtue of section 71 of the Title Conditions (Scotland) Act 2003 (asp 9).

…

(6) Rule 4 of the Scheme shall apply in relation to any scheme costs incurred in relation to any part of the tenement unless a tenement burden provides that the entire liability for those scheme costs (in so far as liability for those costs is not to be met by someone other than an owner) is to be met by one or more of the owners.

SCHEDULE 1 TENEMENT MANAGEMENT SCHEME

(introduced by section 4)

RULE 1—

SCOPE AND INTERPRETATION

This scheme provides for the management and maintenance of the scheme property of a tenement.

1.2 Meaning of "scheme property".

For the purposes of this scheme, "scheme property" means, in relation to a tenement, all or any of the following– any part of the tenement that is the common property of two or more of the owners, (b) any part of the tenement (not being common property of the type mentioned in paragraph (a) above) the maintenance of which, or the cost of maintaining which, is, by virtue of a tenement burden, the responsibility of two or more of the owners, (c) with the exceptions mentioned in rule 1.3, the following parts of the tenement building (so far as not scheme property by virtue of paragraph (a) or (b) above)– the ground on which it is built, (ii) its foundations, (iii) its external walls, (iv) its roof (including any rafter or other structure supporting the roof), (v) if it is separated from another building by a gable wall, the part of the gable wall that is part of the tenement building, and (vi) any wall (not being one falling within the preceding sub-paragraphs), beam or column that is load bearing.

1.4 Meaning of "scheme decision".

A decision is a "scheme decision" for the purposes of this scheme if it is made in accordance with– (a) rule 2, or (b) where that rule does not apply, the tenement burden or burdens providing the procedure for the making of decisions by the owners.

RULE 2—

PROCEDURE FOR MAKING SCHEME DECISIONS

2.1 Making scheme decisions.

Any decision to be made by the owners shall be made in accordance with the following provisions of this rule.

2.2 Allocation and exercise of votes

Except as mentioned in rule 2.3, for the purpose of voting on any proposed scheme decision one vote is allocated as respects each flat, and any right to vote is exercisable by the owner of that flat or by someone nominated by the owner to vote as respects the flat.

2.3 Qualification on allocation of votes

No vote is allocated as respects a flat if– (a) the scheme decision relates to the maintenance of scheme property, and (b) the owner of that flat is not liable for maintenance of, or the cost of maintaining, the property concerned.

2.5 Decision by majority

A scheme decision is made by majority vote of all the votes allocated.

2.6 Notice of meeting

If any owner wishes to call a meeting of the owners with a view to making a scheme decision at that meeting that owner must give the other owners at least 48 hours' notice of the date and time of the meeting, its purpose and the place where it is to be held.

2.7 Consultation of owners if scheme decision not made at meeting.

If an owner wishes to propose that a scheme decision be made but does not wish to call a meeting for the purpose that owner must instead– unless it is impracticable to do so (whether because of absence of any owner or for other good reason) consult on the proposal each of the other owners of flats as respects which votes are allocated, and count the votes cast by them.

2.9 Notification of scheme decisions

A scheme decision must, as soon as practicable, be notified– (a) if it was made at a meeting, to all the owners who were not present when the decision was made, by such person as may be nominated for the purpose by the persons who made the decision, or (b) in any other case, to each of the other owners, by the owner who proposed that the decision be made.

2.11 Time limits for rule 2.10

The time within which a notice under rule 2.10 must be given is– if the scheme decision was made at a meeting attended by the owner (or any of the owners), not later than

21 days after the date of that meeting, or (b) in any other case, not later than 21 days after the date on which notification of the making of the decision was given to the owner or owners (that date being, where notification was given to owners on different dates, the date on which it was given to the last of them).

RULE 3-

MATTERS ON WHICH SCHEME DECISIONS MAY BE MADE

3.1 Basic scheme decisions

The owners may make a scheme decision on any of the following matters– (a) to carry out maintenance to scheme property, (b) to arrange for an inspection of scheme property to determine whether or to what extent it is necessary to carry out maintenance to the property, (c) except where a power conferred by a manager burden (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) is exercisable in relation to the tenement– to appoint on such terms as they may determine a person (who may be an owner or a firm) to manage the tenement,(ii) to dismiss any manager, (d) to delegate to a manager power to exercise such of their powers as they may specify, including, without prejudice to that generality, any power to decide to carry out maintenance and to instruct it, (e) to arrange for the tenement a common policy of insurance complying with section 18 of this Act and against such other risks (if any) as the owners may determine and to determine on an equitable basis the liability of each owner to contribute to the premium, (f) to install a system enabling entry to the tenement to be controlled from each flat, (g) to determine that an owner is not required to pay a share (or some part of a share) of such scheme costs as may be specified by them, (h) to authorise any maintenance of scheme property already carried out, (i) to modify or revoke any scheme decision.

RULE 4—
SCHEME COSTS: LIABILITY AND APPORTIONMENT

4.1 Meaning of "scheme costs".

Except in so far as rule 5 applies, this rule provides for the apportionment of liability among the owners for any of the following costs– any costs arising from any

maintenance or inspection of scheme property where the maintenance or inspection is in pursuance of, or authorised by, a scheme decision, (b) any remuneration payable to a person appointed to manage the carrying out of such maintenance as is mentioned in paragraph (a) running costs relating to any scheme property (other than costs incurred solely for the benefit of one flat), (d) any costs recoverable by a local authority in respect of work relating to any scheme property carried out by them by virtue of any enactment, (e) any remuneration payable to any manager, (f) the cost of any common insurance to cover the tenement, (g) the cost of installing a system enabling entry to the tenement to be controlled from each flat, (h) any costs relating to the calculation of the floor area of any flat, where such calculation is necessary for the purpose of determining the share of any other costs for which each owner is liable, (i) any other costs relating to the management of scheme property, and a reference in this scheme to "scheme costs" is a reference to any of the costs mentioned in paragraphs (a) to (i).

4.2 Maintenance and running costs.

Except as provided in rule 4.3, if any scheme costs mentioned in rule 4.1(a) to (d) relate to– (a) the scheme property mentioned in rule 1.2(a), then those costs are shared among the owners in the proportions in which the owners share ownership of that property, (b) the scheme property mentioned in rule 1.2(b) or (c), then– in any case where the floor area of the largest (or larger) flat is more than one and a half times that of the smallest (or smaller) flat, each owner is liable to contribute towards those costs in the proportion which the floor area of that owner's flat bears to the total floor area of all (or both) the flats,(ii) in any other case, those costs are shared equally among the flats, and each owner is liable accordingly.

4.3 Scheme costs relating to roof over the close

Where– (a) any scheme costs mentioned in rule 4.1(a) to (d) relate to the roof over the close, and (b) that roof is common property by virtue of section 3(1)(a) of this Act, then, despite the fact that the roof is scheme property mentioned in rule 1.2(a), paragraph (b) of rule 4.2 shall apply for the purpose of apportioning liability for those costs.

4.4 Insurance premium

Any scheme costs mentioned in rule 4.1(f) are shared among the flats– (a) where the costs relate to common insurance arranged by virtue of rule 3.1(e), in such proportions as may be determined by the owners by virtue of that rule, or

(b) where the costs relate to common insurance arranged by virtue of a tenement burden, equally, and each owner is liable accordingly.

4.5 Other scheme costs

Any scheme costs mentioned in rule 4.1(e), (g), (h) or (i) are shared equally among the flats, and each owner is liable accordingly.

45. The Scottish Government have guidance on the Tenement (Scotland 2004. It provides at paragraph 9 page 3 that “if existing tenements have defective title deeds or if their title deeds are silent on a particular matters the rules of the tenement management scheme be will be applied to them. Thus, if the title deeds say how expenditure is to be apportioned, but the shares do not add up to 100% the new law will supersede what is in the title deeds, but if the title deeds make proper provision for the allocation of costs, they will prevail.

46. At paragraph 12, it confirms that the scheme will only apply where the title deeds do not make provision on the matters covered by the rules in the scheme. Chapter 3 talks about what will happen if your title deeds are unworkable and paragraph 25 states that if the title deeds allocate expenditure between various flats, but the total does not add up to 100% the rule 4 of the scheme will apply and it will allocate costs between the flats equally, unless one flat is much larger than the others.

47. Where owners are in dispute then a majority will be able to take a decision and that will be binding.

48. Rule 2 of the Tenement Management Scheme makes provision for making decisions. Once a scheme decision is made, it is binding on all owners and if the flat changes hands, it is binding on any incoming owner as well (rule 8.2).

49. Rule 4 deals with scheme costs, liability and apportionment. Rule 4.4 explains how the cost of common insurance is shared. Under rule 3.1(e) owners may make a scheme decision to arrange a common policy of insurance for the tenement. Rule 3.1(e) also provides that owners may decide the insurance premiums share to be paid on an equality basis. If the common insurance policy is arranged in order to comply with one of the title deeds provisions then in the absence of the title provision to the contrary addressing the contribution to be paid, then they will pay an equal share of the premium.

50. The complaint is that the Factor had failed to carry out their Property Factor duties by failing to uphold the title deeds and therefore charge fairly for common maintenance and repair. By way of resolution, they advised that they would like their title deeds to be adhered to and therefore pay a lower proportion of the 1/11th share. They also asked that this be backdated to at least the date when they first contacted the property Factor (August 2021).

51. The Homeowner's complaint is that they pay a share larger than the share specified in their title deeds. As set out the title deeds provide for common maintenance responsibilities. The tenement is made up of properties 44-50 Bentinck Street, Glasgow. Whilst the Homeowner's title deeds narrate that they are liable for a 1/16th share, it appears that other flats in the tenement, which were subsequently also divided, did not make provision for a revised share, and therefore the total shares for the whole tenement is now total over 100%. Consequently, shares exceed 100%. The Tenement (Scotland) Act 2004 makes provision for situations where title deeds do not add up to 100%.

52. Where the matter to be determined relates to the correct share for common maintenance, then Rule 4 of the scheme will apply. The rule is that the costs will be allocated equally between properties unless one flat is much larger (i.e., one and a half times larger than the smallest flat). In that case, the costs would then be allocated according to the floor area (see rule 4.2(b)).

53. As noted, rule 4.4 explains how common insurance is shared, i.e., on an equitable basis. If the common insurance is arranged in order to comply with one of the title deed provisions, then in the absence of a title provision to the contrary, they will pay equal shares of the premium.

54. The tenement management scheme is used to supplement the title deeds, where the title deeds for the property fail to address rules for apportionment or are not workable. In this case it appears that if the divided upper flats' deed had made amended provisions to the maintenance share, then the title deeds would been sufficient to determine this matter. As the Factor states that the title deeds exceed 100%, then the tenement management scheme is triggered. We note that the Factor made reference to a property coming out of the tenement, we are not clear which property that is, given the list of properties provided by the Factor. The Homeowner also made reference to the Hotel being more than "one property" in the tenement however it was also not clear

to the tribunal what size the Hotel property is. We do not therefore know if the Hotel is 1 and half times larger than the smallest property in the tenement. If it is then maintenance shares should be based on property floor area. If the Hotel is not a "large" property, then the cost of maintaining the common parts would appear to be equal shares.

55. We note that the owners appear to have agreed on a 1/11th share of maintenance in 2006. This was after the Tenement (Scotland) Act 2004 was in force. While we do not know if that decision to apportion shares on a 1/11th basis was made in accordance with the terms of the tenancy management scheme, the Factors did carry out a consultation process in 2022 looking at amending the maintenance shares for the owners, their correspondence to the tribunal refers to them going through a legal process regarding apportionment. Given this, we presume that the Factor did not consider that the 1/11th share was a binding matter in terms of the 2004 Act. The issue of share apportionment must still be at large for the homeowners.

56. The title deed states that decisions are made by a majority. We do not therefore understand the Factors' position that a revised share agreement could not be put in place because the two upper flats had to agree to it, as provided by the title deeds only a majority need to agree to change. We were not advised how many properties responded to the consultation and what number of properties voted in which direction.

57. If the consultation was to be carried out under the Tenement (Scotland) Act 2004 provisions, and we believe it should have been, then in the event of a decision being made, the homeowners should have been advised that they had a right to appeal the decision to the sheriff. We see no evidence of advice being given to the homeowners that they had such a right.

58. On the basis of the evidence before the tribunal, while a consultation was carried out in 2022 regarding apportionment. It does not appear that it was carried out having regard to the terms of the Tenement (Scotland) Act 2004. We consider that had the Factor applied the 2004 Act's provisions, it would have been able to work out what the correct apportionment should be in terms of that Act. That apportionment would then be intimated to the owners and any homeowner aggrieved at the outcome, would have been entitled to appeal the decision to the Sheriff Court. The benefit of applying the terms of the 2004 Act would have been to put in place a binding determination about the division of shares, with the division being what the Act stipulated.

59. The complaint by the Homeowners is that the Property Factor had failed to carry out their property Factor duties by failing to uphold the title deeds. As the title deeds do not add up to 100%, we do not find that the Factors were in breach of any duty in terms of the Written Statement of Service or the title deeds, as the title deeds were unworkable.

60. We also have regard to the letter of 2006 whereby it appears that the owners at that time all agreed to pay a 1/11 share of the maintenance costs. If none of the properties are one and a half times larger than the smallest property, then in line with the 2004 Act and the Tenement Management Scheme, it appears to us that the shares imposed on each homeowner will be in line with that Tenement Management Scheme. We do not consider this would therefore amount to a breach of the Factor's duties.

61. Where we find that there was a breach of the Factor's duties, was in their consultation process with the owners about amending the share liability. Simply put as the shares exceeded 100% then any consultation should have been in compliance with the Tenement (Scotland) Act 2004. From the information provided to the tribunal, it does not appear that the terms of the 2004 Act were properly implemented. The Factor states that it has no duty to uphold the title deeds and charge fairly for common maintenance and repair. We do not agree Burden 3 (Eighth) Management (Tertio) provides that the owners can appoint a factor to take charge of all such matters and perform the various functions to be exercised in the care, maintenance and management of the common portions of the tenement. Declaring that it shall be competent to agree to delegate to said factor the whole rights and powers exercisable by majority vote. We note that the Factor states that they were appointed on the basis of custom and practice, this does not in our opinion mean that the Factor would not have to consider the title deeds when seeking to apportion charges, and the consultation shows that that did consider the deeds and have made an effort to agree with the homeowners an amended apportionment foe the common charges, as they took responsibility for this exercise they had a duty to undertake it properly.

62. The Homeowner referred to wanting to pay their share of maintenance and common insurance in accordance with their title deeds or failing which their % of floor area as a % of the tenement as a whole. As set out above, we do not consider that we can order the Homeowner to pay any share in accordance with the title deeds given that the title deeds do not add up to 100%. We do consider that they would be entitled to insist that

the other homeowners pay their share following the rules under the Tenement Maintenance Scheme.

63. We note that the Homeowners wish to pay in terms of the amount of floor space. The 2004 Act states that common insurance will be paid on an equitable share basis or in equal shares. That said, the 2004 Act also states that the Act only applies where the title deeds are silent or not workable, in this case, the title deeds say that common insurance will be paid on the basis of maintenance shares, and where the Hotel is a larger property (in terms of the Act's definition) then maintenance would be assessed on floor space % and so then would common insurance too. In the event that the majority of the homeowners did not agree with whatever proportion was used for common insurance, then an owner would be able to appeal to the sheriff court if they did not agree with the decision. The tribunal is not in a position to determine the correct allocation of the maintenance costs.

64. We also note that the 1/11 share was agreed with owners in 2006. We consider therefore that the Property Factor has been acting on the authority of the homeowners until they commenced their consultation. We consider that once it was brought to their attention that there was an issue with the percentage shares then they should have addressed that issue in accordance with the rules in the 2004 Act. We consider that they did not do so, and this is a breach of their duties.

65. We would also observe that while we consider that the Factors did carry out a consultation exercise, it was not clear the basis of their consultation. We also consider that some of their correspondence was misleading to the Homeowner, and we refer to their letter of 8 July 2022 which stated that the 1/11th share has been in place for over 20 years, (this appears incorrect as agreement was made in 2006); their email of 31 August 2022 states that they would be apportioning all future common charges and insurance premiums in line with the title deeds and the reasons behind this (this was not correct as they later changed their mind, and in any event, if the title deeds did not add up to a total share of 100%, they could not have apportioned changes in terms of the deeds); and their email of 5 December 2022 they state that they have not obtained the necessary consent of the top floor flat owners and without their consent they could not amend the existing apportionment (this is not correct as the title deeds make provision for decisions to be made by majority, and if it is was only the top floor flats

who did not consent the proposed change, then it seems that it would have been competent to implement the change by majority).

Remedy

66. We consider that the Property Factor should now ascertain the size of each property and ascertain if rule 4.2(b) of Schedule 1 of the 2004 Act applies. If it does not, then in our opinion the costs would be shared equally having regard to the Tenement (Scotland) Act 2004. If rule 4 .2 (b) does apply, then the Factor should carry out a further consultation with homeowners and advise them of the proper apportionment of maintenance charges as provided for in terms of the Tenement (Scotland) Act 2004. They should ensure that the correct apportionment is then implemented.

67. Once the correct apportionment has been determined, if it is no longer equal 1/11th shares, then the Factor should reimburse the Homeowner additional costs that they paid for maintenance and common insurance; and these costs should be backdated to the date when the Factors commenced their consultation on 8 July 2022.

68. Given the misleading correspondence, the failure to apportion the costs in accordance with the Tenement (Scotland) Act 2004 when requested to do so, and the efforts that the Homeowner made to resolve the matter, we would also award the Homeowners £500 as compensation.

PROPOSED PROPERTY FACTOR ENFORCEMENT ORDER

69. The Tribunal proposes to make a property Factor enforcement order ("Property Factors EO"). The terms of the proposed Property Factors Enforcement Order are set out in the attached Section 19(2) (a) Notice.

Appeals

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.

Melanie Barbour Legal Member and Chair

05 December 2023 Date