Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 17 of the Property Factors (Scotland) Act 2011 ("the 2011 Act")

Chamber Ref: FTS/HPC/PF/24/2699

The Beresford Flat, 4/06, 460 Sauchiehall Street, Glasgow, G2 3JU ("the Property")

Parties:

Miss Sarah Watson, 22 Village Green Lennoxtown, G66 7BD ("the Applicant")

Speirs Gumley Property Management Ltd, Red Tree Magenta, 270 Glasgow Road, Glasgow, G73 1UZ ("the Respondents")

Tribunal Members:

Nicola Weir (Legal Member) and Elizabeth Dickson (Ordinary Member)

Summary of Discussion

Background

1. By application dated 13 June 2024, the Applicant (the Homeowner) applied to the Tribunal for a determination on whether the Respondent (the Property Factor) had failed to comply with Paragraphs 1, 2 and 5 of the Overarching Standards of Practice ("OSP1, OSP2 and OSP5") of the Property Factors (Scotland) (Act) 2011 Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the 2011 Act. Supporting documentation was also submitted by the Applicant, including some written representations and a detailed common charges invoice dated 22 January 2024 issued by the Respondent to the Applicant.

2. As part of the initial procedure, the Applicant was asked on 2 July 2024 to provide proof that she had notified the Respondent of the alleged breach(s) of the Code or their property factor duties prior to submitting her application, as required by section 17(3) of the 2011 Act. In a subsequent communication, lodged on 7 July 2024, the Applicant made reference to her email of 29 April 2024 lodged as part of an email chain between the parties in terms of the prior

notification required and also sought, in her response, to add alleged breaches of Sections 2.4 and 2.6 of the Code which relate to Communication and Consultation.

3. On 23 July 2024, a Legal Member on behalf of the Chamber President accepted the application and referred it to a Tribunal for a Case Management Discussion ("CMD"). Both parties were notified of the details of same.

4. The Respondent lodged written representations in response to the application, together with supporting documentation including a copy of the Deed of Conditions and their Statement of Services, on 25 September 2024, indicating that they would not be attending the CMD but requesting that their written representations be taken into account at the CMD. The Applicant emailed the Tribunal on 26 September, confirming that she would attend the CMD and would be bringing a Ms Rolland, as a supporter.

Case Management Discussion

5. The CMD took place by telephone conference call on 10 December 2024 at 10am. The Applicant and Ms Nicola Rolland (supporter) attended. As had been intimated previously, the Respondent did not attend.

6. Following introductions and introductory remarks by the Legal Member, she explained the purpose to the CMD. Reference was made to the written representations lodged by the Respondent. The Legal Member raised a preliminary issue which had been noted by the Tribunal, namely that, the prior notification by the Applicant to the Respondent of 29 April 2024 only made reference to OSP 2 and 5 of the Code, whereas the Applicant's initial application also mentioned paragraph OSP1 and the amendment she sought to the application was to also include Sections 2.4 and 2.6 of the Code. The Applicant explained that she had gone through the Respondent's complaints procedure initially and that, although she may not have stated "OSP1", she had asked specifically in her email of 29 April 2024 for a copy of the legislation that the Respondent was relying upon to support their actions, given that she was alleging that they had not complied with the Deed of Conditions. It was only after asking for this and it not being provided that it became apparent to her that the other sections of the Code had also been breached. The Tribunal noted that the Respondent had specifically responded in their written representations to the alleged breaches of OSP1, 2 and 5 but not to Sections 2.4 and 2.6 of the Code. The Legal Member explained regarding the strict requirements for prior notification to the Property Factor prior to submission of an application to the Tribunal, in terms of the 2011 Act, and confirmed that the Tribunal was prepared in the circumstances to proceed with this application on the basis of the alleged breaches of the OSP only. It was explained that the OSP likely encapsulated the issues the Applicant was complaining about concerning Communication and Consultation in any event. The Applicant was given the alternative option of withdrawing this application, sending a more comprehensive prior notification

to the Respondent, and then re-submitting a fresh application. The Applicant chose to proceed with the present application to avoid further delay.

7. OSP 1, 2 and 5 are as follows:-

   OSP1 – You must conduct your business in a way that complies with all relevant legislation

   OSP2 – You must be honest, open, transparent and fair in your dealings with the homeowners

   OSP5 – You must apply your policies consistently and reasonably

8. There followed discussion about the basis of the Applicant's application and her comments were noted to the response submitted by the Respondent. The crux of the Applicant's complaint is that the Respondent consulted with the homeowners of the development on a common charges issue and conducted a vote by email which did not comply with the procedure laid out in the Deed of Conditions and that the Respondent's approach to calculating the result of the vote was inconsistent and, in fact, the opposite to similar email votes which had taken place before. The vote was to do with outstanding common charges owed by two homeowners in the development, which amounted to £22,846.94. Homeowners were asked on 1 August 2023 to vote either for the Respondent pursuing the debt recovery option of bankruptcy proceedings against the two homeowners concerned or redistributing the debt between all 112 homeowners. Only 7 homeowners voted, 6 of whom voted for the bankruptcy option and 1 voting for debt redistribution. According to the Applicant, the Respondent appears to have treated this as 106 votes for debt redistribution ie. counting the abstentions as votes for this option and 6 for bankruptcy. The practical effect of this was that the Respondent proceeded to redistribute the debt, adding the sum of £203.99 to each of the homeowners' final accounts, issued in January 2024. The Respondent is no longer the Property Factor for the development.

9. The Applicant explained that she did not take part in the vote as she missed it, due to working abroad at the time. She explained that a number of the homeowners are 'absent landlords' like her and that they had faith in the system used by the Respondent in respect of email votes, until this one. The Applicant considers that the outcome of this vote should have been taken as 85% of the votes cast in favour of bankruptcy, equating this to the procedure laid out in the Deed of Conditions, where votes were taken at a meeting of homeowners and a majority vote meant a majority of the homeowners who were present and the meeting and voted. The Respondent's position was that this procedure did not apply as it only relates to votes taken at a meeting and that they considered that they needed a majority of all the homeowners to carry a decision to proceed with the bankruptcy option. In their view, 6 votes in favour of bankruptcy only represented a very small percentage of all the homeowners entitled to vote. The parties appeared to be in dispute as to the procedures followed by the Respondent in previous email votes which had taken place. The Applicant

stated that abstentions were always previously taken as a vote in favour of the proposal and that the Respondent had chosen to do the opposite here. She further stated that the Homeowners' Committee (thought to be the homeowners who had voted) challenged the Respondent following this vote, as two of the Committee Members had picked up from paperwork produced that this was the Respondent's intention. However, the Respondent maintained their position and this ultimately led to them resigning as Property Factors for the development at the AGM towards the end of 2023, citing a lack of engagement from the homeowners in such decisions. One of the Committee Members informed the Applicant what had happened and it is her understanding that there are several other Tribunal applications anticipated in respect of this matter. The Applicant considers that the Respondent has breached the terms of the Deed of Conditions or the relevant legislation and has not been open, transparent or consistent in their dealings with the homeowners in respect of this matter.

10. There was discussion as to the usual practices regarding common repairs at the development. The Applicant confirmed that voting on matters by email had been done regularly. She does not remember being issued with any formal note of voting procedures by way of email, to update the procedures in the Deed of Conditions which it was noted had been drawn up some years ago. The Applicant is certain that the homeowners were not informed at the time of this vote in August 2023 of how the vote would operate or how abstentions would be dealt with, etc. The Applicant thinks that she would be able to produce evidence of how similar type votes were carried out previously. The Ordinary Member asked about the Managing Agents report for the AGM referred to by the Respondent in their representations relating to 11 October 2023. The Applicant confirmed she had this and read out the relevant part but it was agreed by the Tribunal that they would have to have sight of this document.

11. The Tribunal confirmed that the application would have to be further considered at an Evidential Hearing when the case would be fully heard, given that the application was clearly opposed by the Respondent and that there are various issues in dispute. The Legal Member confirmed that a Note of the CMD discussions would be issued shortly, together with a Direction regarding the lodging of further documentation and other requirements in respect of the Evidential Hearing, including details of any intended witnesses. It was explained to the Applicant that if she wished her supporter, Ms Tolland (another homeowner) to give evidence at the Evidential Hearing, she would require to attend as one of the Applicant's witnesses. The Applicant asked how many witnesses she could bring and it was explained that there is no maximum number but that, generally speaking, the Tribunal would only wish to hear from witnesses who can add additional evidence to that provided by the Applicant herself. It was agreed that an in-person or video-conference hearing would be more suitable than a telephone-conference hearing and there was brief discussion regarding dates to be avoided.

12. At the CMD, the application was adjourned to an Evidential Hearing, subsequently scheduled to take place in-person at Glasgow Tribunals Centre on 12 March 2024 at 10am.

13. Following the CMD, the Tribunal issued a CMD Note detailing the discussions which had taken place, together with a Direction to parties.

Direction

14. The Direction dated 10 December 2024 directed the parties as follows:-

"1. The Respondent is required to submit to the Tribunal:-

(a) A copy of any documentation setting out the Respondent's general procedures for conducting and counting homeowners' votes in respect of common charges or related issues either by post, email or other electronic means, together with the Respondent's authority for conducting such votes by this method(s);
(b) A copy of all documentation issued to the Applicant on 1 August 2023 in connection with this particular vote;
(c) A copy of any documentation issued to the Applicant after 11 August 2023 and before 11 October 2023, reporting on the outcome of this particular vote;
(d) A copy of the communications to the Applicant sent on 11 October 2023, including a copy of the Managing Agents Report referred to therein, and 13 October 2023;
(e) Any documentation supporting their position as regards previous such votes conducted by email, including how the majority was calculated and how abstentions were dealt with; and
(f) Any other documentation supporting their position.

2.The Applicant is required to submit to the Tribunal:-

(a) Any documentation supporting their position as regards previous such votes conducted by email, including how the majority was calculated and how abstentions were dealt with; and
(b) Any other documentation supporting their position.

In respect of the documentation specified above, both parties should provide a numbered list or index page of said documentation, together with numbered copies of any such documents, the pages of which should also be numbered (if possible) if the document consists of multiple pages.

3.The Applicant and Respondent are required to submit to the Tribunal a list of any witnesses that the parties wish to call to give evidence on their behalf at the Evidential Hearing to be fixed in respect of this application, and to make arrangements for the attendance at the Hearing of any such witnesses;

The documentation referred to in paragraphs 1, 2 and 3 above should be lodged

with the Tribunal Administration no later than 14 days prior to the Evidential Hearing to be scheduled in this matter."

Further Procedure

15. The parties were notified of the date, time and arrangements for the Evidential Hearing, scheduled to take place on 12 March 2025.

16. The Applicant responded to the Tribunal's Direction by emails dated 20 and 22 February 2025, advising of the details of her intended witness and attaching a number of documents, which included:-

    - A statement from the Applicant's intended witness, Ms Nicola Rolland dated 19 February 2025;
    - An extract from the Deed of Conditions in respect of the development from her title deeds, Land Certificate GLA 189341;
    - A copy message from the Respondent's credit control department dated 19 March 2024 relating to the Applicant's common charges account and confirming the outcome of the relevant vote;
    - Copy letters from the Respondent to the Applicant dated 22 September 2021, 29 January 2021, 7 September 2021, 21 November 2018, 29 April 2021, 28 January 2021, 13 October 2023, 1 August 2023, 9 February 2021, 27 August 2021 and 1 July 2020.

17. On 26 February 2025, by email, the Respondent responded to the Tribunal's Direction and to the Applicant's Direction response. The Respondent stated that they would not be in attendance at the Evidential Hearing but requested that their written submissions be taken into account. They attached:-

    - their written submissions;
    - copy letters from the Respondent to the Applicant dated 11 August 2023; 4 October 2023; 11 October 2023, together with their Report to the Applicant of the same date; and 13 October 2023; and
    - their written representations in response to the Applicant's Direction response, in particular, in respect of the witness statement of Ms Nicola Rolland.

Evidential Hearing

1. The Evidential Hearing took place in-person at Glasgow Tribunals Centre on 12 March 2025, commencing at 10am. Only the Applicant, Miss Sarah Watson, and her witness, Ms Nicola Rolland, were in attendance. Miss Watson presented her own case. Ms Rolland was only in attendance whilst giving her own evidence. She thereafter remained in the hearing, but only in a supportive capacity, at Miss Watson's request, and did not participate any further.

2. Following introductions and introductory remarks, it was ascertained from Miss Watson that she had received a copy of the Respondent's written representations and documentation which had been lodged with the Tribunal in advance of the Evidential Hearing and in response to the Tribunal's Direction.

Preliminary Issues raised by Respondent

3. The Tribunal raised the preliminary issues mentioned by the Respondent in their recent representations where the Respondent states as follows:-

"In our written submission dated 25 September 2024, we provided reasons why it was our view that the complaint should be rejected. The notes from the Case Management Discussion (Point 6), detail the introductory discussions and references a preliminary issue concerning the applicant's initial application and Sections 2.4 and 2.6 of the Code. The notes do not however comment on the preliminary matters for consideration that we put forward and would ask that this now be raised at the evidential hearing and noted accordingly."

The Respondent's written submission dated 25 September 2024, under the heading "Preliminary matters for consideration" stated the following:-

"The homeowner submitted their written representations and C2 form on 12 June 2024. The tribunal acknowledged the application on 2 July 2024 and the homeowner was asked to provide additional information to support their application, this included a request for the homeowner to provide a copy of their letter of complaint and a copy of any response from the factor.

The homeowner responded to the tribunal on 7 July 2024 however they have failed to provide the documents requested by the tribunal in their productions. The homeowner has not provided a copy of their complaint dated 21 March 2024 and a copy of our Stage 1 Complaint response dated 19 April 2024."

The Respondent had gone on to state that the Applicant *"has evidently been selective in providing evidence to support their application and has not provided other important documents relative to this case"*. The Respondent had attached four such documents to their representations and stated that, in their view, the application should be rejected and the Tribunal should consider awarding expenses against the Applicant.

In explanation, the 'prior notification' by the Applicant to the Respondent referred to in paragraph 6 of the CMD Note refers to notification by the Applicant of the alleged breaches(s) of the Code or the property factors duties prior to submitting her application to the Tribunal, as required by section 17(3) of the 2011 Act, as explained in paragraph 2 of the CMD Note. Section 17(3) states as follows:-

"17(3)No such application may be made [to the Tribunal] unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to…..comply with the section 14

duty [the Code]" "No such application may be made [to the Tribunal] unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to…..comply with the section 14 duty [the Code]"
In response to the initial request by the Tribunal dated 2 July 2024, the Applicant had submitted an email chain, incorporating both her 'prior notification' email of 29 April 2024 in respect of the alleged breaches of the Code and the Respondent's email in response dated 2 May 2024, together with subsequent emails from the Applicant dated 3 May 2024 and from the Respondent dated 13 May 2024. The application had then been accepted by a Legal Member of the Tribunal on this basis on 23 July 2024. The Tribunal does not consider it necessary for all prior complaint or other prior documentation between the parties to be lodged by the Applicant at that initial stage in order for the applicant to be deemed competent to proceed. At the CMD, given the position of the Respondent, the Tribunal had considered it appropriate to adjourn the application to an Evidential Hearing.

Given the contents of the Applicant's prior notification email dated 29 April 2024 and her stated position at the CMD in this regard, the Tribunal had also decided at the CMD to restrict the Applicant to proceeding with her claim under OSP 1, 2 and 5 only. This was reiterated to the Applicant at the outset of the Evidential Hearing and she confirmed that she understood the position and also that the Respondent was maintaining their position that the application should be rejected.

4. The Tribunal proceeded to hear evidence from Miss Watson, followed by Ms Rolland. Reference was made throughout to the documentation lodged in support of the application and the documentation lodged by the Respondent. The Tribunal asked Miss Watson and Ms Rolland a number of questions during their evidence. Miss Watson then summed up briefly and the Evidential Hearing was concluded. The Legal Member confirmed that the Tribunal would deliberate and issue its written decision in due course.

Evidence of Miss Sarah Watson – Applicant/Homeowner

5. Miss Watson confirmed that her position in relation to the matter had been accurately stated in the CMD Note. Her claim hinges on the procedures followed by the Respondent in respect of the particular vote and the manner in which the outcome of the vote had been calculated. The vote was taken among the homeowners of the building, in respect of a large amount of debt in respect of common charges which one or two homeowners had not paid. The vote was conducted by email, which was how votes had been happening during Covid. The relevant email was dated 1 August 2023, copies of which had been lodged by both parties. The vote was to determine whether the homeowners wished the Respondent to pursue the bankruptcy option in respect of the unpaid debt, or whether to re-distribute the debt between all the homeowners. Out of the 113 homeowners, only 7 voted – 6 in favour of bankruptcy and 1 in favour of debt re-distribution. Miss Watson's view is that, as the majority of the votes cast were in favour of the bankruptcy option, that is the option which should have carried

and been actioned by the Respondent. However, the Respondent decided that this was a vote against the bankruptcy option. In other words, the Respondent counted all the abstentions as votes against bankruptcy and in favour of debt-redistribution. They argued that they would have required a majority of all the homeowners to vote in favour of bankruptcy in order to pursue that option. The Respondent's decision in this matter was only made known to the homeowners in their Management Report issued on 11 October 2023 in advance of the AGM, which also took place on 11 October 2023. On 13 October 2023, following the AGM, the Respondent intimated to homeowners their resignation as Property Factor for the building, which had effect from 28 November 2023. The final common charges invoice was issued by the Respondent in January 2024 and included an additional charge to the Applicant and the other homeowners of £203.99, being their share of the re-distributed debt. Miss Watson also stated that she over-paid on her common charges account by £40 to £50 and had been trying, unsuccessfully, to recover that amount since. Miss Watson had not participated in the particular vote as she worked abroad at the time and nor did she reside in the building, but she stated that she had challenged the Respondent regarding the £203.99 that she had been charged, on receipt of the final common charges invoice. She was involved in correspondence back and forth with them regarding the matter and eventually received the message from their credit control section dated 19 March 2024 which confirmed the details of the vote which had been taken and the outcome of the vote. Miss Watson then invoked the Respondent's formal complaints procedure and, on not being happy with the outcome of that, made this application to the Tribunal.

6. Miss Watson explained that her view of the Respondent having acted wrongly in respect of this particular vote was based on a number of factors. It went against the title deeds, the law and previous practice. She referred to the Deed of Conditions and the extract she had highlighted in the documentation lodged. It was noted that Clause 7 of the Deed of Conditions relates to "*a meeting of the Proprietors to decide any matter relating to the Building falling to be determined by the Proprietors in terms of this Deed or otherwise…".*

   In particular Clauses 7.2 and 7.3 state :-

   "7.2 At any such meeting (i) any Proprietor may be represented by any other person as his mandatory appointed by written mandate to attend, vote and act on behalf of the Proprietor granting the mandate, (ii)the chairman of the meeting shall be appointed by those present and entitled to vote, (iii) each Proprietor's vote shall be weighted according to his liability for the Common Charges and (iv)all matters shall be determined by a vote of the Proprietors or their mandatories present and shall be carried by majority of at least 50% of those Proprietors present and voting.

   7.3 All decisions and regulations regularly made at any such meeting shall be binding up on all the Proprietors whether or not present in person or represented and whether or not consenting to any such decision, unless any Proprietor shall within 14 days of the making of such decision refer the matter to arbitration in accordance with Clause 10 hereof."

Miss Watson was asked to comment on the position of the Respondent in relation to this matter, that in their view this clause in the Deed of Conditions did not apply as it only referred to meetings and votes taking place at meetings. Miss Watson stated that, in the absence of any new formal written procedure having been put in place to deal with votes conducted by email which before Covid would have taken place at homeowners' meetings, the same principles should apply, as outlined in the Deed of Conditions. Therefore it was only the votes actually cast in this particular email vote which should have counted. There was a clear majority of 6:1 of the 7 votes cast in favour of the bankruptcy option and that decision bound all the homeowners, as per the Deed of Conditions. This decision should have been respected by the Respondent, rather than effectively ignored.

7. Miss Watson also referred to the Tenements (Scotland) Act 2004 ("the 2004 Act") which should have been followed by the Respondent in a situation where the title deeds are silent on a particular matter. She referred to the Respondent's Written Statement of Services where they set out their 'Authority to Act' and specifically states that if the Deed of Conditions are silent, they will apply relevant legislation, being here the 2004 Act. Miss Watson commented that she has noticed that the Respondent's Written Statement of Services is no longer available online. She considers that the Respondent has gone against the terms of the 2004 Act with particular reference to rule 2.5 of the Tenement Management Scheme which states:-

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

   Miss Watson stated that she considers this means the majority of the votes cast.

8. Miss Watson considers that the Respondent acted against custom and practice and inconsistently in how they had interpreted the outcome of the vote as they had treated all the abstentions as votes in favour of the outcome they wished to achieve, namely debt-spreading. She said that this went against the procedures which had been followed in previous votes and, in fact, was the opposite to what had been done before. She considered this very unfair to the homeowners who had been expecting the vote to be dealt with by the Respondent in the same way as votes had historically been dealt with, where the majority of only the votes cast counted. So, in this particular vote, 6 of the 7 votes cast were for the bankruptcy option. As this was the overwhelming majority of the votes cast, the Respondent should have honoured the majority vote and pursued the bankruptcy option. Miss Watson explained that it was the easier option for the Respondent to share the outstanding debt between all the homeowners. They may have been wanting to give up the management of the building but Miss Watson said she considered they still had the responsibility to deal fairly with the homeowners. Although she had not participated in the vote, she would definitely have voted in favour of bankruptcy, but, in abstaining, she had no reason to think that the vote would be interpreted differently to what had

happened in the past. Miss Watson confirmed that she had not attended the AGM either as she was still abroad at the time.

9. Miss Watson then referred to the documentation she had lodged in advance of the Evidential Hearing which included communications from the Respondent regarding previous votes which had been taken and the outcomes of those votes. Miss Watson explained that her witness, Ms Rolland, would be able to provide more detail on this as she had been on the Residents' Committee at the relevant time and had been more involved in matters. Miss Watson referred to the various letters from the Respondent and made the following comments:-

    - 21 November 2018 re Keysafe Boxes. The Respondent stated that keysafe boxes were "not permitted to be installed on any common area of the building unless the permission of all owners has been provided. This has recently been discussed with your Residents Committee who are of the opinion that keysafe boxes are considered to be a security risk and have confirmed that they will not give consent for these to be fitted to any common area." Miss Watson said this was evidence of how things operated before Covid, where the Respondent took instruction from the Committee on behalf of the homeowners and implemented the decision of the Committee.

    - 1 July 2020 re Construction Identification Survey. The Respondent stated that "Your residents committee have approved the fee from [the contractor] and confirm they will now be instructed to proceed." Miss Watson said that this was evidence of the Respondent taking instruction from the Committee on behalf of the homeowners.

    - 9 February 2021 re Flat Roof Repairs. The Respondent stated "Providing there is no objection from a majority of Owners by Monday 15 February 2021, we will authorise the surveyor to proceed on your behalf."

    - 29 April 2021 re Various Matters. The Respondent stated that after reviewing the content of a survey report obtained "your residents Committee provided some comments which require to be clarified by [Wiseman Associates]" and once their response was received, the owners would be updated. Again, Miss Watson said that this was evidence of the Respondent taking instruction from the Committee on behalf of the homeowners.

    - 28 January 2021 re GSM Door Entry System. The Respondent referred to their earlier letter of 20 January 2021 and confirmed that the installation of the system had been instructed. Miss Watson thought that she had lodged the letter of 20 January 2021 but the Tribunal checked the position and noted that it had not been lodged. Miss Watson confirmed that that letter had stated that, unless there were objections from a majority of homeowners, this work would be instructed.

- 29 January 2021, 27 August 2021, 7 and 22 September 2021 re Fabric Repair Scheme. The Respondent stated in their letter of 29 January 2021 by 2 February 2021 that "providing there is no objection from a majority of Owners" they would issue the proposed 'pay less notice' to Wiseman Associates; in their letter of 27 August 2021 the Respondent then stated that the homeowners' agreement to issue that notice had not been valid but then that "In line with the wishes of the Committee" they would issue the notice. They also stated in that letter that they intended to progress mediation with RICS "unless we hear otherwise from a majority of owners by 3 September 2021; then in their letter of 7 September 2021 the Respondent stated "there were no objections from the co-owners to enter into formal RICS mediation". They also stated in that letter "If you object to this course of action [instructing solicitor] please let me know immediately upon receipt of this letter"; and then in their letter of 22 September 2021, the Respondent stated "there were only 4 objections received, all from representatives of the Committee….. therefore we appointed them [the solicitors] on your behalf". Miss Watson stated that Ms Rolland was involved as a member of the Committee who objected to the appointment of those solicitors and will be able to provide further detail on what happened. Miss Watson stated that these letters demonstrate the lack of consistency in the Respondent's approach to votes which had taken place and how they interpreted votes in the way that suited the approach that they wished to take.

- 1 August 2023 (Development Debt Update) and 13 October 2023 (Termination of Management). The Respondent stated in their letter of 1 August 2023 "We are now opening this up for consultation with the owners. Please write to, or email us before close of business on Friday 11 August 2023, confirming whether or not you are in favour of bankruptcy proceedings. At the end of the consultation period we will confirm the decision of the majority of owners and proceed accordingly." Miss Watson stated that the outcome of this process was not confirmed at the end of the stated period and was not communicated to the homeowners. Homeowners first learned of the Respondent's decision to spread the debt by reference to this being made in the Respondent's Report issued to homeowners just before the AGM on 11 October 2023. Under the heading "Building Debt" in the Report the Respondent referred to their letter of 1 August 2023 and stated "We previously suggested the option of bankruptcy however there was a poor response with only 6 owners supporting this and one objecting. A letter will now be issued to the owners confirming that the debt [£16,375.88] will be spread on our November account with each owner's share being £144.92. In their subsequent letter dated 13 October 2023, under the heading "Building Debt", the Respondent stated "In accordance with clause 3.24 of the Deed of Conditions, the following debts will now be spread" [£16,375.88 plus Nov 23 charges and £6,023.05 plus Nov 23 charges]. Miss Watson confirmed that in the final common charges bill issued in January 2024, each owner's share of the shared debt had increased to £203.99. Miss

Watson stated that this again demonstrated a lack of consistency and the Respondent determining the outcome of the vote in the way that suited what they wanted to do. She explained that all the votes cast were of the Committee members and that although the Respondent had in the past been happy to accept decisions of the Committee on behalf of all the homeowners, here they were effectively going against the outcome of the vote.

10. Miss Watson was then asked to make comments on the particular sections of the Code that she considered the Respondent had breached with reference to the evidence that she had just given.

OSP1. *You must conduct your business in a way that complies with all relevant legislation.*

Miss Watson referred to what she had stated regarding the Deed of Conditions being silent on the issue of homeowner votes being taken by email or methods other than at residents' meetings. The Respondent should have complied with the 2004 Act and the relevant part of the Tenement Management Scheme (2.5) but, in her opinion, had failed to do so.

OSP2. *You must be honest, open, transparent and fair in your dealings with homeowners.*

Miss Watson stated that she did not think the Respondent had been honest, open, transparent or fair to herself and the other homeowners in how they dealt with this particular vote. They had treated all the abstentions as votes in favour of the debt-spreading option that they wished to pursue. They had ignored the majority of 6 out of 7 of the votes cast. These were also Committee Member votes which they had previously accepted on behalf of all the homeowners. Miss Watson said the Respondent had not explained why this vote was treated differently to those that went before and considers that the Respondent has been dishonest both in respect of this vote and in relation to previous matters concerning the Fabric Repair Scheme. She thinks that they were not transparent in the way they went about this vote in advance. They knew from past experience that most people would not respond or vote but did not explain in their letter of 1 August 2023 that they intended to treat abstentions in this way. Homeowners like herself had no reason to believe that this vote would be treated any differently from previous votes. This only became clear at the AGM as the Respondent had not confirmed to homeowners the outcome of the vote at the time.

OSP5. *You must apply your policies consistently and reasonably.*

Miss Watson does not think the Respondent applied their policies consistently or reasonably for the same reasons as stated in respect of OSP2 above. She referred to the lack of consistency with this vote compared to the voting provisions contained in the Deed of Conditions and with the multiple owner

votes previously taken by email and detailed in all the documentation from the Respondent that she had produced.

11. Miss Watson was then asked about the remedy she was seeking in respect of this application, should the Tribunal decide to grant a PFEO against the Respondent. As the Respondent no longer factored the development, the Tribunal noted that imposing, for example, changes to procedures on the Respondent would be of little practical benefit now. It was noted that the building is now factored by an English company of property factors and this was working well. For example, they have been able to make big savings on the insurance costs payable by the homeowners. In terms of financial loss, Miss Watson stated that she had the sum of £203.99 added to her last common charges account issued by the Respondent as a result of the debt-spreading which she does not think should have happened. She mentioned also being due money back (in the region of £40-£50) which she overpaid to the Respondent in respect of common charges. She stated that she had been trying to recover this from the Respondent since that time but has still not been refunded this sum. It was noted by the Tribunal that there was mention in the original application form (part 7) of the Applicant being "outstanding the monies I have overpaid on my account". However, the Tribunal explained that it had thought that the Applicant meant here that she was due to get back the £203.99 that had been applied to her common charges account and had not considered this was a claim for a separate overpayment. In any event, it was explained that the Tribunal's view was that this claim had not been specified in detail or vouched for in terms of the application and nor had the Respondent lodged representations in this regard. It was considered by the Tribunal that such a claim might be more appropriately made under a separate section of the Code, such as those dealing with the property factor's Financial Obligations but that a separate application in that regard would be required. Miss Watson confirmed that she understood and accepted this position. The Tribunal also asked Miss Watson to comment on the fact that, had the bankruptcy option been pursued, this may have ended up costing the homeowners more money, as the Respondent had explained in their documentation relating to the vote. Miss Watson said that she was aware of this but that, this was not the Respondent's decision to make. It was the majority decision of the homeowners who had cast votes and that decision should have bound all the homeowners and been accepted and implemented by the Respondent, as had previously been the case. She stated that she was also aware that debt-spreading is a legitimate course of action and was referred to in both the Deed of Conditions and the Respondent's Statement of Services. However, she stated that this was not the point. The Respondent's had rightly chosen to take a vote from the homeowners on the matter and, having done so, were required to respect that decision.

12. Miss Watson confirmed that, in challenging the Respondent regarding the debt-spreading of the unpaid common charges, she did have to engage in several communications back and forth with the Respondent before being given, on 19 March 2024, the details of the vote which had taken place in August 2023. She does not consider that the Respondent had been open or transparent in this

regard. She invoked the Respondent's formal complaints procedure but was not satisfied that she had been given a satisfactory explanation for what had happened with that vote and the Respondent' s decision-making following the vote. This all took time and caused her inconvenience. Miss Watson confirmed that she is aware of other complaints ongoing against the Respondent arising out of these matters, particularly the Fabric Repair Scheme dispute, which the Committee members had been heavily involved in. She does not think that there are other claims at the Tribunal stage as yet. The Tribunal clarified that, as this application had been focused only on the vote regarding the debt-spreading, it would not be making any findings regarding the Fabric Repair Scheme or other issues of dispute between the homeowners and the Respondent. The Tribunal confirmed, however, that the documentation produced regarding previous votes which had taken place was relevant background to this dispute and had been requested by the Tribunal in terms of its Direction.

Evidence of Ms Nicola Rolland – Applicant/Homeowner's witness

13. Ms Roland confirmed that she still resides in the building and was a member of the Residents Committee until around November 2023. In terms of the constitution of the Committee there are to be a minimum of 6 and maximum of 12 Committee Members although latterly there were between 6 and 8 Members. Ms Roland had been on the Committee for around 12 years but had become particularly active in the Committee from around 2020. She confirmed that the Respondent had been the Property Factor for the building for all of the time she was on the Committee. The reason she had become more active was due to concerns arising about the Respondent and their dealings as property factor on behalf of the residents.

14. Reference was made to the written statement of Ms Rolland dated 19 February 2025 which had been lodged by the Applicant in advance of the Evidential Hearing. It was noted by the Tribunal that her statement dealt mostly with a separate dispute which had arisen with the Respondent involving the Fabric Repair Scheme and the involvement of a contractor, Wiseman Associates, in that project. The Respondent had made this point in their written representations lodged after having sight of Ms Rolland's statement. It was explained to Ms Rolland that the Applicant's claim was centred on the residents' vote that had taken place in relation to the unpaid common charges and that the Tribunal wished to hear evidence from Ms Rolland primarily on that issue, although information she could provide regarding previous votes which had taken place may be relevant background.

15. Ms Rolland said that before 2020, there were no issues with how the Respondent dealt with votes. There had, however, always been a lack of engagement from the homeowners in the building, many of whom are absent owners and let out their properties. There was accordingly a silent majority of homeowners who did not tend to participate in resident's meetings or votes in respect of common repairs. Most decisions were therefore made on behalf of

homeowners by the Residents' Committee and meetings, quorums and decisions operated in terms of the Deed of Conditions. Decisions were made on the basis of majority votes of those present at the meeting and voting, as per the Deed of Conditions. Things changed when everything went online during Covid and in-person meetings could no longer take place. It was recognised among the Committee that new procedures should be put in place to deal with this new situation. Problems were also being experienced in Zoom meetings with the Respondent which were not very well-managed. However, the Respondent had advised that in order to do this, there would have to be a formal change to the Deed of Conditions. However, such a change needed a 100% in favour vote from the homeowners and it was recognised that, due to the history of non-engagement, this would be impossible to achieve.

16. Votes were subsequently conducted by email and these always operated in the same way where the Respondent would put forward a proposal and ask for any objections from homeowners to be made. Only if a majority of the homeowners who voted objected would the proposal not be implemented. In practice, it was generally only Committee Members who voted, so many decisions were effectively made by the Committee during this period. Reference was made to the documentation the Respondent had lodged relating to several of these votes. However, things started to go wrong and disagreements arose between the Respondent and the Committee. The Committee started to notice discrepancies in the procedures being followed by the Respondent where they would give very short periods of notice for objections against their proposals being lodged. They would say one thing in their communications in advance of the votes but subsequently change their position if they did not like the outcome of the vote. An example of this happening was in connection with the Fabric Repair Scheme where concerns arose within the Committee about the relationship between the Respondent and the contractor, Wiseman Associates. The majority of the Committee voted to issue a 'pay less notice' but the Respondent sought to delay this being implemented, although it was eventually issued. Due to the concerns the Committee had concerning the Respondent, they wanted to seek advice from a different solicitor to the solicitor the Respondent had chosen. The Respondent had put forward their proposal to instruct their chosen solicitor by email on 7 September 2021, giving less than 24 hours' notice for objections to be lodged. 4 Members of the Committee, which was a quorum, had voted against this but this was ignored and the Respondent's chosen solicitor was appointed on 8 September 2021. Similarly, a majority of the Committee voted in favour of proceeding to mediation with RICS over the dispute. There were no objections from homeowners at all, but yet the Respondent did not respect the outcome of this vote and ignored it. It was clear to the Committee that the Respondent was no longer acting on the outcome of homeowner votes if it was not what they wanted to do.

17. However, Ms Rolland stated that the Committee Members were still totally bamboozled by the Respondent's actions in respect of the vote on the unpaid common charges debt. She confirmed that of the 7 votes cast, 6 were votes of Committee Members in favour of the bankruptcy option and there was only one vote in favour of the debt-sharing option. The Committee accordingly believed

that the bankruptcy option would then be pursued on behalf of the homeowners, given the clear majority vote in favour of that and the fact that all the homeowner abstentions from voting had always in the past been disregarded. There had been nothing in the communication issued by the Respondent dated 1 August 2023 to indicate that they were intending to divert from their usual practice. However, the Respondent did exactly that and calculated the result of the vote to tie in with their preferred option of the debt-sharing. Some of the Committee Members had picked up on what the Respondent was intending to do from their Management Report which was circulated to homeowners on the day of the AGM on 11 October 2023. The AGM was due to take place in the evening of 11 October 2023 by Zoom. The Committee Members who had noticed this had called round the other Committee Members to bring it to their attention and some of them emailed the Respondent in advance of the AGM to query this issue. The AGM did not go well and differences arose. One of the Respondent's Directors chaired the meeting rather than Mr Moffat who was their usual point of contact. Ms Rolland asked why the normal voting procedures had not been followed by the Respondent. The Respondent's explanation was that they needed a majority vote from all the homeowners in the building to proceed with the bankruptcy option. The Committee Members present took objection to this and the Respondent had ended up muting everyone's microphones. Ms Rolland confirmed that it was the day after the AGM that the Respondent resigned as property factor for the building. They issued their letter dated 13 October 2023 confirming this to the homeowners. In Ms Rolland's view, that letter does not accurately represent what had occurred at the AGM.

Summing-up

18. Miss Watson then briefly summed up. She referred to her application and the three OSPs that she considered the Respondent had breached. In respect of OSP1, the Respondent had gone against the terms of the Deed of Conditions and the 2004 Act which are the basis of the Respondent's authority to act. In terms of OSP2, there had been no transparency as to the process that the Respondent adopted or as to their authority for adopting that process. No reasons for this had been given. In respect of OSP5, there had been no consistency demonstrated by the Respondent who had carried out multiple such votes in the past but suddenly, and without reasonable explanation, had departed from the usual practice in respect of this particular vote. Miss Watson confirmed that Ms Rolland's evidence had demonstrated this. As to the Respondent's position, as put forward by Mr Moffat, she does not consider that they adequately answered the questions asked of them or specified the system they had adopted or their authority for adopting this system. She considered it unfair for Mr Moffat to have asked for Ms Rolland's statement to be dismissed as she had a lot of experience as a Committee Member and her evidence was therefore relevant.

The Respondent's position (written representations)

19. The Respondent's position was outlined in their written representations dated 25 September 2024 lodged before the CMD and their further written

representations dated 26 February 2025 lodged in response to the Tribunal's Direction and prior to the Evidential Hearing, both lodged with supporting documentation.

20. The documentation produced by the Respondent with their initial representations included their Written Statement of Services, the Deed of Conditions, their letter of 1 August 2023 to the homeowners and copy correspondence between the Applicant and Respondent between March and May 2024 before and during the formal complaints process. Their representations first stated some Preliminary Issues which have already been dealt with in detail in paragraph 3 above under the heading "Evidential Hearing". The representations went on to explain the background circumstances; their authority for debt-spreading in terms of the Deed of Conditions and the homeowner vote they had carried out in respect of this matter; the outcome of the vote; a detailed chronology of the correspondence and documentation they had issued to the homeowners in respect of this matter; and their comments in respect of their alleged breaches of OSP1, 2 and 5, all of which they denied. Their position in respect of the vote and its outcome was clear. They did not require to take a vote on this in the first place as they were authorised in terms of the Deed of Conditions to debt-spread. However, they had consulted with homeowners, presented the two options to them and given them the opportunity to vote on the matter. They had required a majority decision in favour of the bankruptcy option and did not regard the 6 out of 7 votes cast as a majority decision of all the homeowners of which there were stated in these representations to be 115. Rather, they calculated the 6 votes in favour as equating approximately to 5% of the building. They stated that such a small proportion of homeowners could not bind all the homeowners in the building. They asked the Tribunal to dismiss the application and to consider finding the Applicant liable in expenses.

21. The further documentation lodged by the Respondent with their subsequent representations included their written submissions; copy letters from the Respondent to the Applicant dated 11 August 2023; 4 October 2023; 11 October 2023, together with their Report to the Applicant of the same date; and 13 October 2023; and their written representations in response to the Applicant's Direction response, in particular, in respect of the witness statement of Ms Nicola Rolland. They stated that the witness statement was misleading, not factual and much of the content was irrelevant to this application as it dealt with other issues, particularly the dispute regarding the fabric repairs scheme. The Respondent's submissions firstly requested that the Tribunal deal with the Preliminary Issues they had raised in their original representations which they considered had not been properly covered at the CMD which, again, has already been covered above. They provided further background detail regarding the further documentation they had now lodged in response to the Tribunal's Direction. They also explained that they had been unable to lodge their written procedures for conducting homeowner votes by email or means other than at homeowners' meetings as they did not have such a written procedure, it not being a requirement of the Deed of Conditions to have one. They reiterated the number of votes cast in favour of the bankruptcy option and

the need for a majority of all the homeowners to have voted for bankruptcy. Finally, they clarified their reason for resigning as property factor for the building and that this was neither due to the building debt issue or the lack of engagement of the homeowners in these matters. They stated that this had been due to the actions of the Residents Committee in respect of other building issues in providing incorrect information to the homeowners concerning the Respondent's management of the building.

Findings-in-fact

1. The Applicant (Homeowner) is the proprietor of The Beresford Flat 4/06, 460 Sauchiehall Street, Glasgow, G2 3JU ("the Property").

2. The Respondent (Property Factor) is the properly appointed Factor in respect of the Property.

3. The Respondent's written statement of services is contained in a document entitled "Speirs Gumley Written Statement", version 3 of which was dated 9 August 2021.

4. The Written Statement explained the Respondent's 'authority to act' with reference to the Deed of Conditions contained in the homeowners' title deeds and (where the Deed of Conditions was silent on a particular matter) with reference to legislation such as the Tenements (Scotland) Act 2004.

5. The Deed of Conditions is incorporated in a Minute of Agreement registered in Registers of Scotland on 21 February 2006.

6. Prior to the Covid Pandemic, votes in respect of matters concerning common repairs, etc were generally taken at homeowner meetings, following the procedures set out in Clause 7 of the Deed of Conditions.

7. Decisions were made on the basis of majority vote of the homeowners present at the meeting or who had provided a mandate to a person present to vote on their behalf.

8. Decisions made as above were binding on all the homeowners.

9. There was an active Residents' Committee in respect of the building/development.

10. During and after the Covid Pandemic, meetings took place online and homeowner votes were conducted by email/correspondence between the Respondent and homeowners.

11. Decisions on common repairs, etc were generally made by majority vote of the Residents' Committee on behalf of the homeowners.

12. Homeowners were generally given the opportunity to object to proposals but the vast majority (other than the Committee Members) tended not to participate in votes or abstain.

13. In or around 2021, some disagreements began to arise between the Resident's Committee and the Respondent, including disagreements as to decision-making.

14. On 1 August 2023, the Respondent emailed homeowners regarding an unpaid common charges debt of £15,957.74 and presented two options in respect of this, either pursuing bankruptcy against the defaulting homeowner or redistributing the debt amongst all the homeowners.

15. Redistribution of such debt is permitted in terms of the Clause 3.24 of the Deed of Conditions and is also referred to as a debt recovery option in the Respondent's Written Statement.

16. The Respondent's email of 1 August 2023 asked homeowners to confirm in writing by 11 August 2023 whether or not they were in favour of the bankruptcy option.

17. The outcome of this vote was that 7 votes were cast, 6 being Committee Member votes for bankruptcy and the remaining vote for debt redistribution.

18. The outcome of this vote was not notified to homeowners following the end of the consultation period on 11 August 2023.

19. The Respondent determined this to be a minority vote and that a majority of all 113 homeowners would have been required to pursue the bankruptcy option.

20. This method of calculating the vote was a departure from the previous practice of the Respondent in respect of email votes and the practice laid out in the Deed of Conditions relating to votes taken at meetings.

21. There was no prior notification from the Respondent that this is how they intended to determine this particular vote.

22. Homeowners only learned of the Respondent's intention to redistribute the debt when the Respondent issued their Management Report by email on 11 October 2023, in advance of the AGM taking place that evening.

23. At the AGM, the Respondent was challenged regarding this matter by a Residents' Committee Member(s).

24. The Respondent resigned as Property Factor following the AGM by letter to homeowners dated 13 October 2023.

25. The Respondent's resignation took effect from 28 November 2023 and they no longer factor the building.

26. On 22 January 2024 the Respondent issued their final common charges account to the Applicant.

27. The final common charges account included two charges of £150.44 and £53.55, totalling £203.99, being the Applicant's 1/112 share of the redistributed unpaid common charges debt which had risen to £22,846.94.

28. The Applicant challenged this charge and corresponded with the Respondent by email between 17 and 19 March 2024 inclusive, seeking an explanation.

29. On 19 March 2024, the Respondent confirmed the outcome of the vote as narrated in Finding-in-fact number 17 above.

30. On 21 March 2024, the Applicant invoked the Respondent's formal complaints procedure regarding this matter.

31. The formal complaints process involved emails between the parties between 21 March 2024 and 13 May 2024 inclusive.

32. During the complaints process, by email of 29 April 2024, the Applicant notified the Respondent of the parts of the Code that she considered they had breached.

33. The Respondent did not uphold the Applicant's complaint and notified the Applicant of her right to apply to the Tribunal if she remained dissatisfied.

34. The Applicant was dissatisfied with the Respondent's response to her formal complaint and lodged her application with the Tribunal on 13 June 2024.

35. The Respondent was not open, transparent and fair in their dealings with the Applicant in respect of this particular matter.

36. The Respondent did not apply their policies consistently and reasonably in respect of this particular matter.

37. The Respondent opposed the Applicant's application and denied having breached the Code.

Reasons for Decision

1. The Tribunal gave careful consideration to all of the background papers including the application and initial supporting documentation; the further

written representations and supporting documentation from the Applicant; the initial written representations, together with supporting documentation from the Respondent, their further written representations, together with supporting documentation and the oral evidence given at the Evidential Hearing by the Applicant and her witness.

2. The Tribunal considered that both parties had complied with the Tribunal's Direction issued following the CMD and presented their respective positions to the Tribunal thoroughly and clearly, the Applicant both by way of written representations/documentation lodged and in-person at the Evidential Hearing. The Tribunal found both the Applicant and her witness to be credible witnesses and to have given their oral evidence to the Tribunal in a straightforward manner and to have answered all questions put to them. The Respondent did not attend either the CMD or Evidential Hearing to give oral evidence which meant that the Tribunal did not have the opportunity to ask further questions of them. However, the Respondent had submitted detailed written representations, submissions and supporting documentation which assisted the Tribunal in understanding their position in respect of the particular vote and also their efforts to deal with the Applicant's queries regarding the matter and subsequently, her formal complaint.

3. Preliminary Issues

   The Tribunal considered the Preliminary Issues raised by the Respondent at the outset of the Evidential Hearing, as detailed in paragraph 3 (page 7) above. Their reasoning for their decisions as to the sufficiency of the supporting documentation lodged by the Applicant in the initial stages of her application and to allow the application to proceed on the basis of alleged breaches of OSP1, 2 and 5 is also set out in paragraph 3 (page 7) above.

4. Breaches of the Code

   OSP1. You must conduct your business in a way that complies with all relevant legislation.

   The Tribunal considers that the Respondent was not in breach of the Tenements (Scotland) Act 2004, rule 2.5 of the Tenement Management Scheme which is as follows:-

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

   The Tribunal considers that this hinges on the word "allocated". The Applicant considered this to mean the majority of all the votes cast. However, the Tribunal had regard to rule 2.2 which is as follows:-

   "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."

The Tribunal's view, given the wording of rule 2.2, is that the "majority vote of all the votes allocated" in stated in rule 2.5 means the majority vote of all the homeowners who are entitled to vote, not the majority of all the votes actually cast.

OSP2. You must be honest, open, transparent and fair in your dealings with homeowners.

The Tribunal was satisfied that the Respondent had breached OSP2 in that the Tribunal did not consider that they had been open, transparent and fair in their dealings with the Applicant in respect of this particular matter. Having considered the evidence before them, the Tribunal did not consider that it had been established by the Applicant that there had been dishonesty on the part of the Respondent. However, the Tribunal was satisfied from the evidence of both the Applicant and her witness, together with the supporting documentation lodged regarding several previous such votes that had taken place, that the Respondent had departed from their usual practice in respect of such votes. They had not given prior notification of this intention to the Applicant and other homeowners in their email communication of 1 August 2023. They had not sufficiently explained how they would calculate the vote and specifically that they intended to count any abstentions as being votes <u>against</u> the bankruptcy option or <u>for</u> the debt spread option. When they referred to "the decision of the majority of owners", they did not clarify that they meant the majority of all the homeowners, as opposed to the majority of the homeowners who voted. The Tribunal considers that this phrase was open to interpretation given the Respondent's practice of considering votes for a course of action unless the majority objects. They agreed with the Applicant that, given the manner in which votes at meetings were to be counted in terms of Clause 7 of the Deed of the Conditions, and the manner in which votes had been counted since the Covid pandemic had put an end to in-person meetings, she had been entitled to assume that it would be the majority of the votes actually cast that would count. The Tribunal considered this to be an either or scenario rather than for or against a certain course of action. The Tribunal understands the argument put forward by the Respondent that they were not in breach of the Deed of Conditions in respect that this vote was not taken at a homeowners' meeting. Whilst that may be technically correct, the Tribunal would have considered this argument to have more merit if the same principle of 'the majority of the votes cast' had not subsequently been followed in a number of email votes which had taken place since the Covid pandemic began and in-person meetings had stopped and they had explained how votes would be assessed as they had done in previous instances. It appeared to be the case, from the Applicant's evidence, that she and the vast majority of the other homeowners had tended not to participate in these votes and essentially left it to the members of the Residents Committee to vote on their behalf and this is something that was clearly known to the Respondent when conducting this particular vote. In these circumstances, it appeared to the Tribunal that there was some merit in the view

of the Applicant and her witness that the Respondent had interpreted the outcome of the vote in favour of their own preferred option of spreading the debt. The Tribunal was also of the view that the Respondent was not particularly open and transparent in how and when they communicated the outcome of this vote to the Applicant and other homeowners. Despite having stated in their communication of 1 August 2023 that *"At the end of the consultation period we will confirm the decision of the majority of owners and proceed accordingly."*, the Respondent did not do so. The consultation period ended on 11 August 2023 but it was not until two months later, on 11 October 2023, that the Respondent let it be known that they were proposing to spread the debt, rather than pursue bankruptcy. Moreover, this was also done by inclusion within their Management Report, as opposed to a direct communication to the homeowners, which the Tribunal considered may have more effectively brought the issue to the attention of the homeowners earlier and would have been more in keeping with previous practices. The Tribunal considered that this was not a particularly "open" way of communicating the outcome of the vote to the homeowners. It was apparent from the terms of the Respondent's communication dated 1 August 2023 that they were aware that debt-spreading was unlikely to be a popular option as they stated *"We appreciate that this course of action will not be well received by many owners who pay their common charges in good faith…"* . However, by communicating the outcome of the vote in the manner they did, the Tribunal considered that the Respondent had given homeowners very little chance to react and to have instead presented the issue to the homeowners as a '*fait accompli'*. For all these reasons the Tribunal determined that the Respondent, in their dealings in this matter, had not been open, transparent or fair to the Applicant and other homeowners.

OSP5. ***You must apply your policies consistently and reasonably.***

The Tribunal was also satisfied on the evidence before it that the Respondent had not applied their policies consistently and reasonably and therefore was in breach of OSP5. As outlined above in respect of OSP2, the Tribunal did not consider that the Respondent had been consistent in how they had handled this particular homeowner vote, compared to what had gone before. Nor did the Tribunal consider their actings to have been reasonable. As explained, the Tribunal did not find that the Respondent had acted contrary to relevant legislation nor, in the very narrow sense, to have breached the Deed of Conditions. However, given the voting provisions in the Deed of Conditions and the way that votes had operated, until this particular vote, the Tribunal considered that the Applicant and other homeowners had been justified in their expectations as to how this vote would be dealt with and in being aggrieved to learn that the Respondent had decided, without advance notification, to deal with this vote differently. The Tribunal was not satisfied that the Respondent had provided an adequate explanation in this regard nor established that they had dealt with this matter consistently or reasonably.

In summary, the Tribunal accordingly determined that the Respondent is in breach of OSP 2 and 5 of the Code.

5. The Respondent had requested that the Tribunal dismiss the Applicant's claim and also consider finding her liable in expenses. The premise of their arguments was that they considered that they had fully explained and justified their actings in relation to this particular homeowner vote to the Applicant in their correspondence and documentation produced to her before and during the formal complaints process. Their view was that her application to the Tribunal had no merit and also that she had been selective in the documentation she had produced initially in support of her application. As outlined above, the Tribunal was not satisfied that the application had been invalidly made nor that it was without merit or should be dismissed. In terms of Rule 40 of the Tribunal Procedure Regulations 2017, expenses may only be awarded against a party *"where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense."* The Tribunal does not consider that there was any such conduct on the part of the Applicant in these proceedings and accordingly, no expenses will be awarded.

6. The Tribunal considered the representations of the Applicant in respect of the remedy she was seeking and the fact the Respondent no longer factored the building. The Tribunal did not consider it appropriate, in these circumstances, to require the Respondent to put in place any different practices or procedures to address something which had already occurred. However, the Tribunal did consider it appropriate and reasonable to make a financial award in favour of the Applicant, in the sum of £250 to compensate her for the time and effort she had expended in trying to obtain a satisfactory explanation from the Respondent in respect of their actings, the inconvenience, anxiety and upset caused to her as a direct consequence of the Respondent's breaches of the Code and their attitude towards her complaint.

7. The Tribunal proposes to make a property factor enforcement order ("PFEO") dealing with the above compensation award. The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

Right of Appeal

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

_____ **12 March 2025**

Legal Member/Chair **Date**