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/24/2715

Flat 33, 1 Donaldson Drive, Edinburgh, EH12 5FA ("the Property")

Parties:

Dewar Place Lane Ltd, Flat 33, 1 Donaldson Drive, Edinburgh, EH12 5FA ("the Applicant")

First Port Property Services Ltd, PO Box 7730, New Milton, BH25 9EP ("the Respondents")

Tribunal Members:

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

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Property Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Sections 3.1 and 3.2 of the Property Factor Code of Conduct 2021 ("the Code"). The Tribunal made a Proposed Property Factor Enforcement Order, which should be read with this decision.

Background

1. By application dated 14 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 Section 2.7 (Communication and Consultation); Sections 3.1, 3.2 and 3.4 (Financial Obligations) and Section 7.1 (Complaints Resolution) of the Property Factors (Scotland) (Act) 2011 Code of Conduct for Property Factors ("the Code") in terms of section 14(5) of the 2011 Act and also failed to carry out their Property Factor Duties. Supporting documentation was also submitted by the Applicant. Further documentation

was received from the Applicant by email on 16 July 2024, attaching a copy of the Respondent's Written Statement of Services, and 29 July 2024, attaching a copy of the Applicant's notification of his complaint to the Respondent and their response of the same date which essentially stated that they would await hearing from the tribunal in due course.

2. On 13 August 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.

3. On 1 September 2024, the Applicant lodged further representations and supporting documentation by email, including copy invoices dated 15 November 2023 and 1 March 2024 and a 'Statement of Anticipated Service Charge Expenditure' dated 1 December 2023, all issued by, or on behalf of, the Respondent.

4. On 17 September 2024, by email, the Respondent lodged their written representations dated 13 September 2024 in response to the application.

5. On 19 September 2024, the Applicant responded by email, attaching a copy of the Respondent's written representations, marked up with his own comments in response, shown in red ink.

Case Management Discussion

6. The CMD took place by telephone conference call on 10 December 2024 at 2pm. The Applicant was represented by Mr Ronald Gauld, Director of the limited company. The Respondent was represented by Mr Richard Montgomery (Property Manager), Mr Brendan O'Connell (Area Manager) and Mr Abdul Calum (Head of Finance) of the Respondent. It was indicated that Mr Calum would take the lead in the CMD, due to the subject matter of the complaint.

7. Following introductions and introductory remarks by the Legal Member, the purpose of the CMD was explained. Reference was made to the written representations lodged by the Respondent and the Applicant's comments lodged in relation to that.

8. There followed discussion about the basis of the Applicant's application and reference was made throughout the discussion to the supporting documentation lodged by the Applicant. The application alleged various breaches of the Code under the sections on Communication and Consultation; Financial Obligations and Complaints Resolution, and also breaches of the Property Factor Duties, with reference to the Respondent's Written Statement of Services paragraphs 2.10 (management services), 3.1 (management fees), 3.5 (invoicing) and 5 (complaints); and VAT legislation. The Respondents had responded in detail to the application in their written representations. However, the focus of the Applicant's complaint was quite narrow, alleging that the

Respondent had failed to properly account for the VAT they had charged on their management fees by refusing to issue the Applicant with VAT invoices, which the Applicant, being a VAT registered limited company required in connection with their own accounting requirements in respect of VAT.

9. The Applicant had referred in his written representations to an extract which he stated was from an HMRC circular/guidance entitled "VAT Notice 700/21" – *"Only VAT-registered businesses can issue VAT invoices and if you're VAT-registered, you **must** issue a VAT invoice whenever you supply standard rate or reduced rate goods or services to another VAT-registered person. Normally you must issue a VAT invoice within 30 days of the date you make the supply."*

10. The Applicant had raised with the Respondent and thereafter the Tribunal, various discrepancies in the documentation which had eventually been produced to them, following the Applicant's complaints about the lack of valid VAT invoices being produced in respect of the VAT they had been charged at the rate of 20% on the Respondent's management fees. The discrepancies pointed out by the Applicant included the following:-

- Invoice number 7010289 dated 15 November 2023, although properly addressed to the Applicant company was issued by a limited company other than the Respondent, FirstPort Bespoke Property Services Limited, and contained no VAT registration number. The Invoice stated that it was in connection with "service charges" and showed no VAT added, although the Applicant's position was that the service charges shown incorporate the management fee on which the Applicant was charged VAT at the rate of 20%.

- Invoice number PSM129101 dated 1 March 2024 headed "Service – Invoice" was issued to the customer "The Playfair Estate Accounts", rather than to the Applicant company by the Respondent. This invoice contained a VAT registration number 108 2381 35 and showed VAT at the rate of 20% being added to the management fees [for the whole development of 110 flats] for the period 1/3/24 to 31/3/24. However, the Applicant's position was that "The Playfair Estate Accounts" is not a legal entity which can be charged VAT and that this invoice does not show the VAT actually charged to the Applicant company. It appears to be some sort of 'internal invoice'. The Applicant also stated that the Respondent company is not VAT registered and that the VAT registration number shown is that of "FirstPortRetirement Property Services Ltd" with which the Applicant has no contractual relationship.

- The Statement of Anticipated Service Charge Expenditure dated 1 December 2023 issued by the Respondent shows the figure for the management fees charged for the period 1 December 2023 – 30 November 2024 as £349.20, which the Applicant states is the management fee of £291 plus VAT at the rate of 20% which the Applicant says they were charged and that this total figure is incorporated into the total "Half Year Service Charge" figure shown of £1,154.56. This figure corresponds with that shown in the Invoice number 7010289 mentioned above as a "Half Yearly Service Charge" to which VAT at

the rate of 0% was shown as being charged, even although the management fee proportion was charged at 20% VAT.

- The Budget for year ending 31st October 2022 in respect of The Playfair development issued by the Respondent shows in the entries related to "Management Fees" the sum of "£250 plus VAT per property agreed in award of contract in May 2021" totalling £33,000 in respect of the 110 properties in the development.

  The Applicant stated in their application that the Respondent has therefore provided misleading and inaccurate information to the Applicant and alleged that the invoices produced are false, or possibly even fraudulent.

11. It was noted by the Tribunal that the Respondent had stated at the end of their written representations that if the Tribunal considered that they had a case to answer in relation to the VAT invoices issue that they would provide a further response. The Legal Member advised that the Tribunal did consider, from their prior consideration of the documentation lodged in advance of the CMD, that the Respondent did have a case to answer. The Respondent was asked if they intended to lodge further written representations on the matter or if they were happy to state their position verbally. Mr Calum stated that this was essentially why he was in attendance at the CMD.

12. Mr Calum explained that VAT is a complex issue. First Port is a group of companies and the VAT registration number shown in the documentation referred to was legitimate. The Respondent's accounting practice was to issue the VAT invoices in respect of maintenance to "The Playfair Estate Accounts" and that the Applicant is not entitled to, nor requires, to be issued with an individual VAT invoice in respect of the management fee paid by the Applicant. It was not disputed that the Respondent applies VAT at the rate of 20% to their management fee and that this is what the Applicant and the other homeowners are asked to pay. Service charges in respect of common repairs/maintenance are exempt from VAT and the VAT applied to those charges is therefore zero. Mr Calum disputed that the invoice dated 15 November 2023 which was issued to the Applicant was a VAT invoice. He stated that it was, in fact, a "service charge demand" and that, as it relates to service charges, no VAT was included in that invoice. When asked by Mr Gauld about the management fee plus VAT of 20% thereon being incorporated as a total into the service charge which is then shown as having zero VAT applied to it, Mr Calum maintained that this was a legitimate practice and that the Respondent's external accountants had advised that there was no issue with this as far as HMRC are concerned and that VAT is a very complex issue.

13. Mr Calum stated that, nonetheless, he considered that it should be possible for Mr Gauld to be issued with the three VAT invoices he is seeking for the years 2021, 2022 and 2023 in respect of the management charges in order to resolve this issue. Mr Gauld confirmed that this is all that is required to resolve this application to the Tribunal. However, when Mr Gauld elaborated and sought confirmation from Mr Calum that the invoices would contain a VAT registration

number and be addressed to the Applicant limited company, Mr Calum then clarified that the only VAT invoices that could be issued were to "The Playfair Estate Accounts". Mr Gauld stated that this was the same as had already occurred and did not resolve his complaint about not being issued with an individual VAT invoice in respect of the VAT added by the Respondent to their management fees and charged to the Applicant limited company as the homeowner.

14. Following some further discussion, Mr Calum confirmed that, in an effort to resolve matters, he was prepared to look further into the matter and the documentation lodged with the Tribunal and referred to by Mr Gauld as he himself had not seen all of this in advance. He would then confirm the Respondent's position in writing as to whether they could issue the three invoices sought by Mr Gauld. It was agreed that consideration of the application would be adjourned to a further hearing in order that it could be ascertained whether a resolution could be found. The Legal Member stated that, in the event that this was not possible, the Tribunal would require the Respondent to lodge further written representations in justification of their refusal to issue the VAT invoices sought by the Applicant, with reference to appropriate authorities supporting the Respondent's stance on this matter eg. from HMRC or the Respondent's external accountants mentioned in their original representations.

15. The Legal Member confirmed that the Tribunal would issue a formal Direction in this regard, requiring the Respondent to lodge their further written representations or other required documentation with the Tribunal within a designated timeframe [subsequently agreed, for practical reasons, to be a date after the festive period]. Mr Calum agreed to copy Mr Gauld in to his communication with the Tribunal so that Mr Gauld has sight of this as soon as possible and does not require to wait until the Tribunal Administration circulate it out to him. Mr Gauld confirmed that he would also respond in writing to confirm his position on receipt of the further submissions from the Respondent. Parties were thanked for their attendance and the CMD brought to a close.

16. The application was therefore adjourned at the CMD to allow the Respondent to further consider their position and for it to be ascertained whether resolution could be reached between the parties or whether a further hearing would require to be scheduled. Following the CMD, a detailed CMD Note and Direction were issued by the Tribunal to parties.

Direction

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

"1. The Respondent is required to submit to the Tribunal and copy to the Applicant on or before 10 January 2025:-

(a) Their written proposals as to resolving this issue, or alternatively, their written representations in respect of their justification for not producing the

VAT invoices sought by the Applicant in respect of the management fees plus VAT charged to the Applicant since they took over management of this development, together with any legal or other authorities supporting their position, issued by HMRC or otherwise; and

(b) A copy of the "Development Schedule", title deeds or deed of conditions referred to in paragraph 3.5.1 of the Respondent's Written Statement of Services under the heading "Invoicing".

2.The Applicant is thereafter required to submit to the Tribunal and copy to the Respondent on or before 24 January 2025 their written response to the Respondent's proposals or submissions."

Further Procedure

18. On 11 January 2025, the Applicant emailed the Tribunal referring to the Direction and advising that he had not heard anything direct from the Respondent. On 13 January 2025, the Tribunal Administration issued a reminder to the Respondent regarding the matter and advised the Applicant that the Tribunal had not received any response to the Direction and had issued a reminder. On 13 January 2025, the Respondent emailed the Tribunal to acknowledge the reminder and confirmed they would arrange a response as soon as possible. The Applicant responded to this on 17 January 2025, following which the Respondent further emailed the Tribunal on 20 January 2025 reiterating that they would respond as soon as possible.

19. On 21 January 2025, the Respondent emailed the Tribunal their response to the Direction, being their written representations regarding the VAT position and referring to VAT information sheet 0718, extra statutory concessions 3.18 and Land and Property Notice 742, paragraph 12.6. They also attached 6 months of management fee invoices for the development covering the period November 2023 to March 2024, which they stated would enable the Applicant to reclaim his share of the VAT. They stated that they were unable to issue individual VAT invoices to each owner.

20. On 21 January 2025, the Applicant responded to the Respondent's Direction response. He stated that there was nothing of substance in it; that they had simply repeated their representations regarding service charges being exempt from VAT (which was not in dispute); that their representations regarding "opting into VAT" were irrelevant as this relates to the purchase of properties and not to residential properties; and that the Respondent had not put forward anything to rebut their requirement to issue VAT invoices in respect of their management fees. The Applicant also raised an issue concerning conflicting bank account details being provided by the Respondent which he considered was in breach of part 3.8 "Development Bank Account" of their Written Statement of Services. The Applicant produced the relevant extract from part 3.8 and some extracts from communications received from the Respondent containing bank account details. He also put forward an eight-point settlement

proposal to the Respondent including a proposal that the parties enter into a 'self-billing' arrangement in respect of VAT, whereby the Applicant would produce their own VAT invoices and issue those to the Respondent.

21. On 22 January 2025, the Respondent acknowledged the response from the Applicant and confirmed they would respond further.

22. On 28 January 2025, the Applicant emailed the Tribunal referring to the fact that the Respondent had failed to properly respond to the Direction or justify their position in respect of their refusal to issue VAT invoices. He reiterated his settlement proposal and requested that the Tribunal instruct the Respondent to agree to the "self-billing" protocol proposed by him.

23. On 31 January 2025, the Tribunal emailed the Respondent, referring to their response dated 21 January 2025 to the Tribunal's Direction and to the further representations from the Applicant in response. The Tribunal requested further response to the Direction, given that it had not been fully complied with, as well as any further submissions the Respondent wished to make to the Applicant's further representations, within 10 days. On 4 February 2025, the Tribunal referred to the further representations from the Applicant dated 28 January 2025 and requested that the Respondent incorporate their response to that in their overall response.

24. On 11 February 2025, the Applicant emailed the Tribunal referring to the Respondent's further failure to comply with the Tribunal's requests.

25. On 14 February 2025, the Respondent emailed the Tribunal with their further representations in response to those of the Applicant. They stated that they had evidenced their external tax advice to the Applicant directly in previous correspondence; that they had provided management invoices payable by the development, which the Applicant requires to pay a contribution towards, in terms of the title deeds; that they have a designated bank account for the development funds and providing the details of same; that they do not accept the "self-billing" method; and that VAT is not applicable on residential properties as per their previous responses. The Respondent also attached copies of the Deed of Conditions, bank statements and the Development Specification.

26. On 17 February 2025, the Applicant responded stating that:-

(1) the Respondent had still not provided the necessary justification sought by the Tribunal for not producing VAT invoices in respect of their management fees;
(2) that the external tax advice referred to has not been provided to the Applicant or the Tribunal;
(3) the Applicant referred to HMRC Vat Notice 700/21, paragraphs 16.2.1 – 'VAT invoices and when they should be issued' and 16.2.2 – 'Exceptions', the only relevant one being "self-billing" which the Applicant has offered and the Respondent refused, without valid reason;

(4) the Applicant also referred to VAT ESC 3/18 which exempts 'service charges' from VAT but not management fees;
(5) the Applicant referred to the bank statements produced by the Respondent and to the anomaly of two different companies being involved;
(6) he requested that the Respondent produce a copy of their Certificate of Appointment in order to identify which company is the legally appointed manager of the development;
(7) that although paragraph 19.3.1 of the Development Management Scheme (DMS) refers to the payment of service charges, it does not refer to the payment of management fees; and
(8) that the Applicant's settlement proposal dated 28 January 2025 remains on the table.

27. On 27 February 2025, the Tribunal wrote to parties commenting on their most recent representations and requesting that the Respondent submits any further submissions or documentation that they wish to do so, within 14 days. It was explained that, on expiry of that period, the Tribunal intended to determine the application without a further hearing, on the basis of all the written representations and documentation lodged, in terms of Rule 18 of the Tribunal Procedure Rules, the text of which was incorporated in the Tribunal's communication.

28. On 27 February 2025, the Applicant responded to the Tribunal referring to the fact that the Tribunal had not specifically requested that the Respondent produce their Certificate of Appointment which he stated was essential to identify which company is legally responsible.

29. On 10 March 2025, the Respondent lodged further written representations in response to the further points raised by the Applicant in their representations of 17 February 2025, as narrated in paragraph 26 above. They stated:-

(1) the VAT position stated by them is correct and they do not propose any changes, their management fees do include VAT but their management services are provided to the scheme [development], not to an individual;
(2) the Respondent stated that this was "attached" [external tax advice] but it was not;
(3) the Respondent does add VAT to management fees supplied to the scheme but the onward supply of all charges to the scheme is exempt from VAT – reference made to VAT notice 742, section 12.6 which shows the Respondent is compliant;
(4) the Respondent stated that they agreed [VAT ESC 3/18] but reiterated that although they add VAT to management fees supplied to the scheme, the onward supply of all charges to the scheme is exempt from VAT – reference made to VAT notice 742, section 12;
(5) Firstport Property Services Ltd and Firstport Retirement Services Ltd are the same entity; the development funds are held in an interest-bearing Barclays Trust account;
(6) the Respondent stated that they had been unable to source a copy of their Certificate of Appointment and had contacted the POAAC who had confirmed

that they did not hold a copy; they went on to explain how their appointment had come about, through a tender process, and that it was the responsibility of the POACC to provide this document which the Respondent would be willing to sign;
(7)reference was made to paragraph 7.1.2 of the DMS which refers to the property factor's entitlement to receive reasonable remuneration for their services; a budget is issued at the start of the financial year for the development, including an estimate of all costs to be contributed to by the owners, which includes the Respondent's management fees; VAT invoices for these charges are available once raised through the financial year.

30. On 14 March 2025, the Applicant emailed the Tribunal in response to the Respondent's representations dated 10 March 2025, commenting further on their numbered responses narrated in paragraph 29 above and reiterating the points that he had made in his earlier representations. He added to these representations by further email dated 16 March 2025 in respect of point (5) above and requested that the Respondent provide copies of any relevant correspondence with the Developer regarding the Certificate of Appointment.

31. On 24 March 2025, the Tribunal confirmed in writing to parties that all written submissions received to date had now been circulated and that the Tribunal would now convene and reach a decision on the application. It was explained that, as per previous communications, the Tribunal was likely to determine the application without a further hearing, noting that there had been no objection from parties to that proposal. It was explained that due to Tribunal Member leave and availability, it was likely to be several weeks before a Decision would be issued.

32. The Tribunal Members subsequently convened to consider the application in detail and reach a decision.

Findings-in-fact

1. The Applicant (Homeowner) is the proprietor of Flat 33, 1 Donaldson Drive, Edinburgh, EH12 5FA, having purchased the Property in or around March 2019.

2. The Respondent (Property Factor) has been the Property Factor in respect of the Property which is part of a development called "The Playfair" since in or around 2021.

3. The Respondent's written statement of services is contained in a document entitled "Written Statement of Services", first release in February 2013, version 2 in November 2021 and currently version 3.

4. The Respondent's authority to act and terms of appointment are outlined in a document entitled "Development Schedule 16845 – The Playfair" and the 'Deed of Conditions' contained in the title deeds applicable to the development.

5. The ‘Deed of Conditions’ consists of a document entitled “Deed of Application of Development Management Scheme and Deed of Servitude” registered in 2018, applied by a document entitled “Deed of Conditions” also registered in 2018, and varied in terms of a document entitled “Minute of Variation of Development Management Scheme registered in 2019 (Burden Documents numbered 6, 7 and 10 in the title deeds).

6. The Respondent charges each homeowner in the development an annual management fee, to which VAT at the rate of 20% is applied.

7. The Respondent does not issue individual VAT invoices to each of the homeowners in respect of their management fees, although each homeowner is individually charged VAT on the management fees paid by them.

8. The Applicant is a limited company which is VAT registered.

9. The Applicant has requested that the Respondent issue them with individual VAT invoices in respect of each of the annual management fees plus VAT that they have been requested to pay in 2021, 2022 and 2023 in order that the Applicant can reclaim the VAT paid by them.

10. The Respondent has refused to issue the Applicant with the individual VAT invoices that they have requested.

11. The Applicant has also raised concerns about the validity of invoices produced by the Respondent in respect of their management fees and service charges.

12. The Applicant engaged in prior correspondence with the Respondent regarding these matters but the issues were not resolved.

13. The Applicant submitted this application to the Tribunal on 14 June 2024.

14. The Applicant formally notified the Respondent on 29 July 2024 of their application to the Tribunal which the Respondent responded to on the same date, indicating that they would await further correspondence from the Tribunal on the matter.

15. The application was subsequently accepted by the Tribunal on 13 August 2024.

16. The Respondent submitted written representations to the Tribunal, attended the CMD and opposed the application.

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 detailed discussions which had taken place at the CMD. Having regard to the extensive written representations and submissions lodged, the Tribunal decided to determine the matter without a further hearing in terms of Rule 18 of the Tribunal Procedure Rules which is as follows:-

"Power to determine the proceedings without a hearing
18.—(1) Subject to paragraph (2), the First-tier Tribunal—
(a)may make a decision without a hearing if the First-tier Tribunal considers that—
(i)having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and
(ii)to do so will not be contrary to the interests of the parties; and
(b)must make a decision without a hearing where the decision relates to—
(i)correcting; or
(ii)reviewing on a point of law,
a decision made by the First-tier Tribunal.
(2) Before making a decision under paragraph (1), the First-tier Tribunal must consider any written representations submitted by the parties."

The Tribunal notified parties in advance that they were considering determining the matter without a hearing and invited parties to lodge any further written representations or documentation that they wished the Tribunal to take into account. Neither party objected to this proposed course of action and both did submit further representations to the Tribunal. The Tribunal proceeded to consider the alleged breaches of the Code in turn, and thereafter considered the alleged breach of Property Factor duties.

2. Breaches of the Code

2.7 A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.

The Tribunal did not find a breach of this section of the Code to have been established. As the Respondent had stated in their initial response to the application dated 17 September 2024, the Applicant had not specified particular instances of the Respondent failing to respond to the Applicant's enquiries and complaints within the timescales stipulated in their Written Statement of Services. The Applicant's issue was more of a general one – that he had been requesting VAT invoices repeatedly over a lengthy period of time and, although he had received responses, the Applicant had not been satisfied with these responses.

3.1 While transparency is important in the full range of services provided by a property factor, it is essential for building trust in financial matters. Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment requests are included on any financial statements/bills. If a property factor does not charge for services, the sections on finance and debt recovery do not apply.

3.2 The overriding objectives of this section are to ensure property factors:

- *protect homeowners' funds;*

- *provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor;*

- *make a clear distinction between homeowners' funds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property factor's own funds and fee income.*

The Tribunal did find the Respondent to have breached parts of both of these sections of the Code in that the Tribunal was not satisfied that the Respondent had been transparent in financial matters nor had provided clarity and transparency for homeowners in all accounting procedures undertaken by them. The Applicant had made very specific requests for valid VAT invoices to be issued to him in respect of the annual management fees that he was charged, which had VAT applied to them at the rate of 20%. The Applicant had explained repeatedly to the Respondent that they themselves were a VAT registered limited company and required valid VAT invoices in order to claim back the VAT they had paid ie. in respect of their own accounting procedures. The Applicant had produced several references to HMRC VAT guidance/circulars that appeared to support his position, as mentioned above, namely:-

1. **HMRC circular/guidance VAT Notice 700/21** – *"Only VAT-registered businesses can issue VAT invoices and if you're VAT- registered, you **must** issue a VAT invoice whenever you supply standard rate or reduced rate goods or services to another VAT-registered person. Normally you must issue a VAT invoice within 30 days of the date you make the supply.";*

2. **HMRC VAT ESC 3/18** which exempts 'service charges' from VAT but not management fees; and

3. **HMRC Vat Notice 700/21**, paragraphs **16.2.1** – 'VAT invoices and when they should be issued' and **16.2.2** – 'Exceptions' ("self-billing");

The Tribunal considered that, in the circumstances, the Applicant's request for valid VAT invoices was a legitimate one. In terms of VAT Notice 700/21 above, only VAT registered businesses can issue VAT invoices. In response to the Applicant's concerns that there are various different FirstPort limited companies

and that the VAT registered number appearing on some of the invoices produced do not match up to the particular limited company listed on the invoice, the Respondent has explained that the FirstPort group of companies have a 'group' VAT registration which presumably covers each of the limited companies in the group. As the Respondent is claiming to be properly VAT-registered and thereby entitled to charge VAT on certain supplies, in terms of VAT Notice 700-21, they ***must*** then issue a VAT invoice when supplying *"another VAT-registered person".* As the Applicant is such a VAT-registered person, the Tribunal was satisfied that the Respondent should accordingly have issued the Applicant a valid individual VAT invoice within 30 days of the 'supply', in this case their annual management fee for providing management services to the Applicant. It may be that the Respondent was justified in not automatically issuing individual VAT invoices to every homeowner, perhaps on the assumption that most homeowners were individuals and not VAT-registered limited companies. However, given that the Applicant had specifically informed the Respondent that they were VAT-registered and had specifically requested VAT invoices, the Tribunal could see no justification for the Respondent's continuing refusal to issue the Applicant with individual VAT invoices, containing a valid VAT registration number for the Respondent, in respect of the management fees plus VAT charged to the Applicant since 2021 when the Respondent had been appointed.

The Respondent had been requested several times during the Tribunal process to produce their authority, from HMRC or otherwise, or a copy of their independent tax accountant's advice to justify their refusal to issue the invoices requested. In the Tribunal's view, the Respondent did not produce any such evidence, to counter the Applicant's position. The Respondent's position essentially remained the same throughout the Tribunal process. They claimed that they were entitled to charge management fees and to apply VAT to these at the rate of 20%, which was not disputed by the Applicant. However, they claimed that they did not require to produce individual VAT invoices to the Applicant showing this. Instead, they had produced a series of different documents to the Applicant which were discussed in detail at the CMD (narrated in paragraph 10 above). They produced a "Service-Invoice" in the name of a separate company "FirstPort Property Services Scotland Ltd", containing a VAT registration number, showing the 20% VAT being charged to "The Playfair Estate Accounts" on the total management fees for the development (110 flats). The Applicant described this as an 'internal' invoice and that it was of no use to him for HMRC/VAT purposes as it did not show a chargeable supply being made to the Applicant and it did not make it clear that it related to 110 flats. The Respondent did produce an individual "Invoice" addressed to the Applicant but it came from another separate company "FirstPort Bespoke Property Services Limited", it was stated to be in respect of "service charges" and showed VAT being charged thereon at the rate of 0%. Again, the Applicant stated that this was accordingly not sufficient for his HMRC/VAT purposes. It was also clear from a comparison of this "Invoice" and the "Statement of Anticipated Service Charge Expenditure" document relating to the Applicant's property, that the management fee plus 20% VAT figure was incorporated into the "service charges" figure shown in the "Invoice" and that a

0% VAT figure was then applied to the cumulative figure. The Respondent argued that this was a legitimate practice, based essentially on the fact that "service charges" are exempt from VAT. They made reference to **VAT information sheet 0718, extra statutory concessions (ESC) 3.18 and Land and Property Notice 742, paragraph 12.6.** The Applicant accepted that service charges are exempt from VAT, but reiterated that management fees are not in terms of **VAT ESC 3/18**) and that the Respondent's comments about 'opting-in' to VAT were irrelevant as they relate to property purchase transactions. The Respondent maintained that their external tax accountant had approved their practices. The Tribunal had directed them to produce a copy of this tax advice but they did not do so. They stated that they were producing it to the Tribunal, but did not, and also that they had produced it previously to the Applicant direct, which he denied. The Tribunal noted from the Respondent's original written representations that they referred to their external tax accountant's advice, being simply an extract from **Notice 742.** It was noted by the Tribunal that this Notice essentially makes a distinction between services provided by a property factor in terms of how the services are treated for VAT purposes. Whilst service charges in respect of maintenance of common parts, etc are exempt from VAT, management fees are "a separate taxable supply" and attract VAT. None of that was disputed by the Applicant. What was disputed by the Applicant was that it was then a legitimate practice to incorporate the 20% VAT figure payable on the management fee into a total figure which was then included as part of the "service charges" which then attracted no VAT. The VAT figure of 0% was the only figure which appeared on any "VAT invoice". The Applicant had explained and produced authority to the effect that if different charges on a VAT invoice attracted different rates of VAT, they should be listed separately, with the separate applicable VAT rates shown.

As had been stated by the Respondent, VAT is a complex issue. The Tribunal is not expert in VAT-related matters and this was the reason for the Tribunal requesting authorities or sight of the VAT tax advice from a suitably qualified accountant that the Respondent stated they had received. The Tribunal carefully considered the various HMRC notices/guidance referred to by each of the parties in support of their respective positions and found the Applicant's submissions more persuasive than those of the Respondent. The Tribunal was not qualified to determine that the Respondent was in breach of VAT legislation/regulations or was engaged in any fraudulent practices as the Applicant had suggested. However, the Tribunal was satisfied that the Applicant had established breaches of Sections 3.1 and 3.2 of the Code in that the Respondent had not been transparent in financial matters nor had they provided clarity and transparency for homeowners in all accounting procedures undertaken by them. In the Tribunal's view, there were many discrepancies in the invoicing and accounts documentation issued by the Respondent to the Applicant, as detailed above, which the Tribunal did not consider the Respondent had adequately explained, either to the Applicant nor the Tribunal. In addition, there did appear to be a complex invoicing arrangement in place, involving several FirstPort limited companies in addition to the Respondent company. Whilst the Tribunal was unable to determine if this was a 'legitimate' arrangement or not, the fact that the arrangement did raise questions in the

Tribunal's mind which had been left unanswered led the Tribunal to the conclusion that there was a definite lack of transparency and clarity in financial and accounting matters.

The Applicant had also raised concerns during the Tribunal proceedings concerning the bank accounts operated by the Respondent company or related FirstPort company which the Tribunal considered in the context of the parts of Section 3.2 of the Code above relating to protection of homeowners' funds and the required distinction between those funds and the property factor's own funds. The Respondent had provided detailed representations in respect of these matters and the Tribunal did not consider it established that those parts of Section 3.2 of the Code had been breached.

3.4 A property factor must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial statement showing a breakdown of charges made and a detailed description of the activities and works carried out which are charged for.

The Tribunal did not consider this section of the Code to have been breached. As the Respondent had submitted, it appeared that a full reconciliation was provided to homeowners at least once per year. The Tribunal had had sight of a "Statement of Anticipated Service Charge Expenditure" dated 1 December 2023 which showed a detailed breakdown of the estimated expenditure for the year ahead, which contained a calculation of the half yearly service charge in advance, due on 1 December 2023. It was explained that the Respondent would subsequently produce an "annual reconciliation report" once per year, extending to around 12-14 pages showing actual spend versus budget values. This documentation was produced for the AGMs which the Respondent stated lasted approximately 3 hours and provided the homeowners with an opportunity to query and discuss the figures. The Applicant's issue with the documentation produced by the Respondent was that he felt it was misleading and contained discrepancies, but the Tribunal considered that this complaint fell under other sections of the Code to this particular one.

7.1 A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of section 1 of the Code: WSS that the property factor must provide homeowners with a copy of its complaints handling procedure on request.

The procedure must include:

- *The series of steps through which a complaint must pass and maximum timescales for the progression of the complaint through these steps. Good practice is to have a 2 stage complaints process.*
- *The complaints process must, at some point, require the homeowner to make their complaint in writing.*
- *Information on how a homeowner can make an application to the First-tier Tribunal if their complaint remains unresolved when the process has concluded.*

- *How the property factor will manage complaints from homeowners against contractors or other third parties used by the property factor to deliver services on their behalf.*
- *Where the property factor provides access to alternative dispute resolution services, information on this.*

The Tribunal did not consider that a breach of this part of the Code had been established by the Applicant. Whilst the Applicant did not consider that his complaints had been satisfactorily answered by the Respondent, this part of the Code is focused on the property factor having a written complaints handling procedure and providing it to the homeowner on request. The Applicant did not put forward any evidence that he had requested a copy of the complaints procedure or that the Respondent had failed or refused to provide a copy to him. The Respondent explained that, in their view, the Applicant had never invoked their formal complaints handling procedure which includes a stage 1 and stage 2 process and that his enquiries/complaints had been dealt with as general queries and dealt with by their Operations & Finance Teams due to their subject matter being finance/VAT related.

3. Breach of Property Factor Duties

The Applicant had also alleged failure to comply with the Property Factor Duties, with particular reference to the Respondent's Written Statement of Services. paragraphs 2.10 (management services), 3.1 (management fees), 3.5 (invoicing) and 5 (complaints) and to their alleged breaches of VAT legislation.

The Respondent had provided detailed representations in respect of the above paragraphs of their Written Statement of Services in their original response to the application.

The Tribunal agreed with the Respondent's representations in respect of paragraphs 2.10 and 3.1 in that the Applicant had not really specified relevant claims in respect of these paragraphs, stating simply that the Respondent had failed to provide VAT invoices for management fees paid. The Tribunal did not consider that the Applicant had established that the Respondent had breached the terms of these paragraphs.

The Tribunal also considered that it had not been established by the Applicant that the Respondent had breached paragraph 3.5 in respect of their invoicing. This was because paragraph 3.5 referred to invoicing being carried out in accordance with the title deeds/deed of conditions and with reference to the "Development Schedule". The Tribunal had examined all of this documentation and although there was reference to the Respondent being able to charge management fees and VAT thereon, there was nothing more specific requiring the Respondent to produce VAT invoices to homeowners. Nor did the Written Statement of Services itself require the Respondent to do this.

As to paragraph 5 regarding complaints, the Applicant had made a general claim that the Respondent had failed to respond within a reasonable time to the Applicant's complaint regarding the failure to provide VAT invoices. The Tribunal noted that paragraph 5 essentially narrates the formal internal complaints procedure of the Respondent and, accordingly, the same reasoning of the Tribunal as narrated above in respect of the alleged breaches of paragraphs 2.7 and 7.1 of the Code applies. The Tribunal did not accordingly consider it established that the Respondent had breached paragraph 5 of their Written Statement of Services.

Finally, in the context of alleged failure to comply with the Property Factor duties, the Tribunal considered whether the Respondent had been shown to be in breach of the law (specifically VAT legislation) or the fiduciary duties they owed to homeowners as their 'agent' which require a high degree of trust and loyalty, as was submitted by the Applicant. As narrated above, in respect of alleged breaches of sections 3.1 and 3.2 of the Code, the Tribunal did not consider it could determine that the Respondent was in breach of VAT legislation or was involved in fraudulent practices. The Tribunal considered that these were matters which the Applicant may wish to refer to HMRC, if he had not already done so, as HMRC was the body best placed to consider these issues. Accordingly, the Tribunal did not consider it could determine that the Respondent had failed to comply with their Property Factor Duties in these respects either.

4. In summary, therefore, the Tribunal found the Respondent to be in breach of Sections 3.1 and 3.2 of the Code only and not to have failed to comply with their Property Factor Duties.

5. The remedy that the Applicant was seeking from the Tribunal was for the Respondent to be ordered to produce valid VAT invoices in respect of their management fees for the years since 2021, to which they had applied VAT at the rate of 20%. The Tribunal did not consider it within its remit to do so. The Tribunal's remit was to establish if the Respondent had breached the Code or failed to comply with their Property Factor duties and, if so, to consider making a Property Factor Enforcement Order (PFEO) aimed at rectifying the situation. The Tribunal had determined that the Respondent had breached Sections 3.1 and 3.2 in terms of lack of transparency in financial matters and lack of transparency and clarity in their accounting procedures to homeowners. Accordingly, the Tribunal considered that it was appropriate to make a PFEO aimed at the Respondent producing sufficiently transparent and clear documentation to the Applicant in respect of their management fees and service charges, including with regard to the VAT they charge the Applicant on their management fees. In the Tribunal's view, this could either be by the Respondent issuing individual, valid VAT invoices to the Applicant in respect of the management fees and VAT of 20% thereon that they have charged the Applicant in the years since 2021; or satisfactory evidence, such as confirmation from HMRC, that their existing invoicing and accounting practices are complaint with VAT legislation; or confirmation that they will accept the

Applicant adopting the practice of “self-billing” in respect of the VAT on their management fees, as proposed by him, backdated to 2021.

6. The Tribunal proposes to make a PFEO dealing with the above. 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 May 2025**

Legal Member/Chair **Date**