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

Decision on Respondent's request for review of a Decision in terms of Rule 39(1) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Regulations") and Section 43(2)(b) of the Tribunals (Scotland) Act 2014 ("the 2014 Act")

Chamber Ref: FTS/HPC/PF/19/2093

Property at 20/7 Coburg Street, Edinburgh, EH6 6HL
("The Property")

The Parties:-

Carol Black, 20/7 Coburg Street, Edinburgh, EH6 6HL
("the Applicant")

James Gibb Property Management Limited, 4 Atholl Place, Edinburgh, EH3 8HT
("the Respondent")

Tribunal Members:
Ms Susanne L M Tanner QC (Legal Member)
Mr David Godfrey (Ordinary Member)

DECISION

The tribunal, having considered the Applicant's request dated 18 February 2021 for review of the tribunal's decision dated 3 February 2021:

(1) The tribunal corrected a number of clerical mistakes and other accidentalslips or omissions contained in its decision and sent notification of the amended decision to all parties; and made necessary amendment to the decision published in relation to the decision; and
(2), thereafter, determined that the Applicant's application for review was wholly without merit and refused the application.

The decision of the tribunal was unanimous.

STATEMENT OF REASONS

Procedural Background

1. The tribunal made a decision dated 3 February 2021 in terms of Section 19(1) of the Property Factors (Scotland) Act 2011. The tribunal issued a proposed Property Factor Enforcement Order (PFEO).

2. The tribunal's decision and PFEO were intimated to both parties by email on 4 February 2021.

Applicant's Request for review of the tribunal's directions

3. On 18 February 2021, the Applicant submitted an application for review of the tribunal's decision of 3 February 2021, as follows:

   "I refer to your email of 4th February 2021. I have attached a document with comments which refer to the specific sections of the Written Decision document. I would like these to be reviewed.

   Reasons for Review Request
   -I have read the 70 pages of the Written Decision document and there are a number of inaccuracies, ranging from small to more serious. I have provided corrections which may (or may not) affect some outcomes.
   -I have also made some further comments where there may have been transcription errors.
   -Due to COVID-19, the Oral hearing moved to Confracall after Day 1. At times, I found it difficult to hear the Respondent and this impacted some of my responses. Now that I have read the transcript of the Respondents' oral submissions, I have provided some comments, where applicable.
   -Note that any comments I have made may affect multiple other sections of the Written Decision document.
   -The Guidance provided does not make it clear that my written submissions must be in breach order.
   After Oral Hearing Day 1 on 16th March 2020, Tribunal Chair directed me to produce Written Submissions in breach order within 14 days which I did. I would like my revised Written Submissions covering breaches discussed on Day 1 to be revisited (unless done already), especially as there has been a long delay to Oral Hearing resumption on 1st October 2020.
   -The Guidance states that 'all the evidence, including the documents sent to the Chamber before the notice of referral' is considered. However, when I explained that I had not included certain documents in my Written

Submissions as I had already submitted them with my Application, I was under the impression from Tribunal Chair that not everything at Application was considered.
-I am unclear why there is no Order in relation to 6.9 Code Breach - Schindler. I have received no updates from JG on this subject since an email dated 18th June 2020 which I forwarded to Tribunal Tue 03/11/2020 16:44 but was rejected as a submission. I have also asked for the latest January 2021 (done Jan/July) Zurich Lifts Inspection reports to see if older defects still exist. Not yet received. I have sight of Zurich July 2020 report for my block 20 lift and old defects still exist.
-I am unclear why there is no PFEO in relation to WSS breaches. However, perhaps my comments may change this outcome.

The paper apart reads as follows:

"Comments re Written Decision Document FTS/HPC/PF/19/2093

2.27, 2.28 The letter from Nic Mayall stated that the January letter had been sent to ALL Homeowners. I now accept that some Homeowners (in other blocks) did receive the January letter.
My issue is with the word ALL. I checked at the time that around 8 others in my block had not received this letter either. Most of our development receive e-comms, with a small proportion in hard copy. I also checked my Junk email, nothing there and e-comms from JG always arrive to my Inbox. During Tribunal proceedings, I have not received 2 further important e-comms dated 6/12/2019 and 14/10/2020, the latter being an invite to a Zoom meeting. Steve Paterson did resend the latter email and stated that he was unsure why the system didn't send this email. It appears possible to check if the system has sent a communication to an individual or not. I'm not sure if this is deliberate or a system glitch. I also stated that if an email is sent but failed to arrive for any reason, JG should receive a failure notification.
2.31 The list of 6 issues is MY only snagging list. I think the misunderstanding came from previous snagging issues from other Homeowners which was part of the Factor's snagging list of which I was aware. I thought Nic Mayall meant I personally had sent a further snagging list, which is not true. It was a question of interpretation, which I attempted to clarify. His statement was ambiguous.
2.44 'Supporting documents or invoices' in a Property Factor context is one I would use to ask for evidence of contractor quotes or contactor invoices to back up costs on my own James Gibb quarterly invoice. I use this request at those times. This would not have been the correct term to use in the case of the increased float numerical figure which is why I used the word 'analysis'. It also would have been too vague. Furthermore, an analysis would normally be interpreted as a numerical

analysis and this is normal business practice. The Factor continued to provide written explanations with no breakdown or numerical analysis. I would never think (as a person who works in Finance) that I had to add the word 'numerical' or explain what would be a sufficient level of breakdown (for the finance department) within JG. I have never needed to do that with any other company.

2.45 I would expect a request for an analysis of a number to be received in numerical terms, not words which the Factor provided. Which is why all of the Homeowners/HC in dispute (including myself) maintain that an analysis was not received. If a numerical analysis had been received in the first place, I would have been able to see what had gone wrong as we subsequently proved the calculation was incorrect.

2.56 plus additional charges classified by Schindler/Lift Control as outwith contract costs of £24,597 at time of Application (Appendix 1).

2.57 'LOLOR' should read TUV-SUD. (LOLER are Lifting Operations and Lifting Equipment Regulations). 'and has identified action points for future maintenance and improvements.' This was not the purpose of the report. I sent the cover email received from Steve Paterson JG in June 2020 (which was attached to the TUV-SUD report) to Tribunal Tue 03/11/2020 16:44. Its purpose is to establish whether works should have been carried out under lift contract and not charged to Homeowners. It should be noted that it only covers the last few years. I have received no update since. A quick scan of this report shows that it does not capture the fact that my block 20 were later charged again for the same item listed on this report. This Type A defect still shows on the July 2020 Zurich report. This part should have been replaced by Schindler as still under warranty, having failed within the year. I will not check other blocks on this report, although their costs affect me personally with regard to the Development Float Calculation.

2.73 Issue 10 should read Issue 9 and 10.

3.11 WSS para 2.5 should read Code of Conduct Section 2.5.

3.16 I am unclear if Factor therefore failed in its duties to comply with WSS Issue 8, 5.3.5.

3.17 'The legal basis for the float increase is in the DOC for the Development which allows the Respondent to set the float at the appropriate level.' Refer to Written Decision 202. 'with reference to the Deed of Conditions, that it does not provide float details but provides on Page 12 of the Deed of Conditions, 2.6, Clause 13. "the factor's decision in regard to the apportionment of common charges shall be final and binding upon the proprietors." This relates to apportionment of common charges, not decisions regarding the Float.

In addition, the following is an extract from a JG Tribunal case dated 2nd November 2020, which appears to have a similar situation where the WSS would override the DOC if it is silent on Float details:

'The process for reviewing floats was governed not by the title deeds but by the contract between the owners and the property factors.'

35.3 Some of this statement is true but other parts have been misunderstood. This point was discussed on Day 1 when I was new to the Tribunal process and my bundle was not in Code/WSS breach order but Issue order. I can see from reading the transcript that 2 issues have become confused. Inventory Page 9 of my original bundle referred to in the transcript was in relation to alleged WSS Breach 2.4 which I withdrew at a later date. I did that mainly on the basis that JG wrote in both sets of written representations 0.6 'it is not accepted that constitutes a challenge to committee authority; it was a request for clarity' and 0.11 (previously un-numbered) 'It is confirmed that verification was requested as to the authority and set up of the Committee and that this has been produced'. Also, this issue was covered on Day 1 under alleged Code breach 2.1, albeit from a different angle which appears to have confused matters further. The issue becomes the interpretation of the meaning of 'authority of HC' and whether it extends to 'instruct expenditure'.

Some corrections required

-'The expenditure levels were jointly agreed with the Respondent.' Not true. This refers to the Authority to Act levels of expenditure and were solely agreed within the HC who then advised JG.

-The extract of Constitution was replaced by full document at Appendix 7. The full document (emailed to Tribunal 4th July 2019) was also in the original Application as confirmed at Written Decision 39 (3). The relevant section to be considered is 4(a).

-'HC will consult with Block Reps.' Replace Block Reps with Homeowners as HC ARE Block Reps.

36(4) Four lines from bottom - Keystone 'build' should read building clean.

40.3 The Crescent Constitution was in original Application and revised bundle as Appendix 7. With regard to not being able to provide evidence to support, I explained that I had not kept the 37 underlying emails to support the votes on the spreadsheet at Appendix 10 from 37 Homeowners at end 2012 as I had deleted them some years ago. If the voting spreadsheet is not acknowledged as legitimate it may bring a separate challenge as it is the same one which was used to record the votes to appoint the Factor. Unless the Factor has also kept the 35 underlying voting emails sent from Homeowners to a JG DM who left around 2014.

40.4 I stated that the amounts were around £225 average for Coburg Street (Appendix 2).

40.7. I confirm that I did not use the words 'supporting document' as 'analysis' is more specific which meant a numerical breakdown which would effectively be a 'supporting document'. Also, it appears that I would have had to stipulate that the analysis should come in number form, but that should not be necessary. I find it difficult to accept that the precise wording in the Code has to be used which does not make sense in this context. I would not have knowledge of the Code wording at the time of request.

40.8 The HC Secretary has been retired for years and I do not know if he has a Finance background.

'There were wordings that said that the Respondent does not exclude one-offs and does not exclude contingencies. The Applicant stated that she kept trying to explain that their contingency had already been agreed'. I said that the Contingency had been suspended to zero (from £100 per flat per quarter from June 2018) See Development Schedule 4A Section 12. This is the critical point that I believe had not been shared between internal departments at JG. Due to this, the Float increase calculation was misleading, proven to be wrong and finally accepted by JG. I believe Angela Kirkwood/Nic Mayall had not grasped this point during the Complaint process. DM Steve Paterson did.

It has also been proven during this case that we have incurred unnecessary financial expenditure due to lift costs (at least) which also impacted the Development level Float calculation.

51. 'an independent lift inspection twice a year by Zurich, which then became Alliance.' This should read twice a year by Zurich, formerly done by Allianz. (Allianz is a different company).

62. Produced at a hearing in March 2020 not 2019. I believe TUV spreadsheet was altered to 24.1-24.3.

67. JG Bundle 8.15 Pickerings quote Page 2 Control Panel Key recommended and these reports exist for each block.

69. Block 19 should read Block 9. Sodima should read Sodimas.

70. Comprehensive 'insurance' should read 'maintenance'.

107. Footpath. 'He does not have a proposed date but stated that he can speak to the contractor. He would not anticipate any significant delay. Ms Bole stated that in PF Doc 23.1 they stated that the Respondent as a gesture of goodwill will pay for this.' I believe this has not been done but it is not part of the proposed PFEO.

145.1 WSS para 2.5 should read Code of Conduct Section 2.5

149. Writmac should read Ritmac.

187. 'the solicitors who wrote the Deed of Conditions have been liquidated'. Solicitors should read Developers Gregor Shore.

195. 'Then the Applicant proposed a figure at the meeting after the first hearing day at Riverside House in November 2019 and they had agreed to compromise.' No. JG proposed the £250 at Riverside House which the HC had proposed months earlier but was not accepted by JG. The Applicant accepted this after checking this was the figure previously proposed in writing by the HC.

203. 'Applicant's position that there is any requirement whatsoever to consider it on a block-byblock basis.' I have never said there is any requirement. I have said 'Perhaps Floats need set on a per block basis as Coburg Street tends to be lower maintenance.' Appendix 24. Also 'I ask again if it is possible to calculate a Float increase at Block level if deemed necessary?' Appendix 8.7.

207. The Applicant referred to page 6 of her written submissions, '3rd line from the bottom and Appendix 1.' should read 2nd paragraph from the bottom and Appendix 2.

209. 'that the Applicant had stated that she was on the committee and represented its interests.'

First, my notes say that I was talking about November 2019 at Riverside House'. Second, I did not say I represented its (the HC) interests. I said I was negotiating as HC Chair and I represent the interests of all Homeowners.

214. 'the Applicant stated that she was "probably vague" in the letter.' Not exactly. I added that it was vague in the 3rd July letter as it had said 'the details were provided during Complaints Process.'

Furthermore, the letter of 3rd July 2019 (the day before Tribunal Application) is simply the Notification to Factor that I am applying to Tribunal and detailing the alleged breaches. I would not 'request supporting documentation' at this point.

216. This is untrue. The communication issue has never been resolved to this day. Requests for information, progress updates etc. remain outstanding from months/years ago (pre COVID) and I have just complained again to Angela Kirkwood (Edinburgh Operations Director) that nothing has changed. No communication method has brought meaningful progress including telephone calls and emails with yet another new DM (replaced since Nov. 2020). I may shortly have to commence another Formal Complaint with JG regarding issues which occurred after this Tribunal Application.

Therefore, I believe an Order is required.

217. Monthly Inspections - although Inspections have been suspended again since 6th January 2021 due to COVID, there has been no change since Tribunal hearing. No further reports posted to Portal since 9th March 2020 to evidence visits.

218. The lift consultant report by TUV-SUD and its purpose has not been communicated to Homeowners who have no idea what is happening with regard to lifts, including myself. The last communication I received on this issue was from Steve Paterson on 18th June 2020 which I emailed to Tribunal on 3rd Nov. 2020 at 16.44.

232. It is due to the DOC being silent on HC authority that we operate in this way (Custom and Practice) as nothing would be done otherwise as it is impossible (due to DOC restrictions re quorate meetings) to gain agreement of Homeowners, particularly at Development wide level.

234. 'The factor has sole discretion on what they do and do not do.' I believe that the WSS can override the DOC in some cases and also The Tenements (Scotland) Act 2004, especially when the DOC is silent on certain issues. Refer to 3.17 above. Also, unless an Emergency repair, the Factor must operate within Authority to Act limits which the HC provided.

232. and 236. 'The Applicant did not prove that the HC, as an entity, had any legal authority to incur expenditure on behalf of the other homeowners in the Development.'

If Tribunal decides there is not sufficient evidence of 'legal' authority of the HC to instruct expenditure, I would like consideration given to the following which were examples discussed during this case where HC (or myself as HC Chair) has given instructions to JG which impacted expenditure of The Crescent Development, affecting either Homeowners in a block or all 62 Homeowners. All without consultation of Homeowners. Note that for larger costs, Homeowners are consulted and agreement obtained by HC.

- Summer 2018, I requested that Lift Control be brought in. A quote for Block 9 was received as £700 and £200 for my Block 20. Block 9 was over any Authority to Act Limits available to the Factor and I gave the go-ahead. At that point, Homeowners could have been charged.

-I instructed DM Steve Paterson to proceed with the increased frequency to twice yearly servicing of water pumps for ALL 6 blocks. This doubled our annual service costs.

-Float Increase Negotiation - this was concluded by myself as HC Chair with JG.

This provides a few examples to demonstrate that this has been the way we have operated for many years which should be considered as 'Custom and Practice'. The oral evidence at 35.3 refers to 'Custom and Practice' in relation to HC Authority. This is to overcome the DOC with onerous restrictions which means nothing would be progressed as we are unable to achieve quorate meetings or majority decisions. No quorate AGMs have ever been called or held to date by any Factor. Any attempts to vary the DOC conditions would be hampered by similar problems.

235. An extract of the Constitution was provided with full document at revised bundle Appendix 7. Section 4a) refers to how the HC functions which impacts financial expenditure. Even if there is no legal authority conferred by the DOC (and Tribunal considers the 2012 voting spreadsheet not to be legitimate), we have operated in this 'Custom and Practice' way as stated at Appendix 9 published on all Noticeboards. I believe that any challenge now has only occurred due to the change of DM and going through the formal complaint process with JG Senior Managers who do not understand our Development. Every time a DM changes (currently annually), the rules change which should not be the case.

240. It is not the 'the way in which the Respondent performed its calculation I disagreed with.' It was the fact that I knew what had caused the incorrect calculation and a numerical analysis/breakdown would have shown this. Along with someone internally informing JG 'finance' department that our Contingency amount had reduced during the calculation period from £100 to £0 per flat per quarter.

The accounting system was not sophisticated enough to build that in to any float calculation. Other Property Factors have budget (advance) capabilities for forecasting expenditure. Indeed, I understand that LPM which JG took over in 2019 has this ability.

248. Again, when I ask JG for information to justify another figure, it would not be reasonable to expect a Homeowner to use the exact words 'supporting documentation' in the Property Factor's Code which I hadn't even read at that point. It would be reasonable to expect the Code to be read when the Tribunal Application process is considered. The only document a Homeowner could be reasonably expected to read is the WSS. The response from JG did not meet the approval of any Homeowner in dispute, including the HC, which is why we continued to reject the increase as we knew it was incorrect and the reason why it was incorrect.

258. LOLOR should read TUV-SUD.

271. 'timescales have since been extended in issue 10 of the WSS but the tribunal did not require to determine whether this contravened Section 7.1 as it did not form part of the complaint which was notified / in the Application.' Issue 10 should read Issue 9 (when first extended) and I did include the fact that Issue 9 (May 2019) had extended timescales further in my Application and 3rd July Notification letter to Factor. I did expect the new extended timescale to be considered for 'reasonableness' as it is this new timescale which will apply going forward.

278. 'A photocopy of one small section of the British Standard is not sufficient as proof. The manufacturer's recommendation was not referred to by either party in their evidence and submissions.'

The email from Ritmac to Steve Paterson Appendix 16 showed both the BS details and reference to the manufacturer's recommendation 'below'. For some reason the manufacturer's recommendation section did not show in the hard copy Appendix 16 as it was an image. I then resent the email on Tue 10/11/2020 17:16 FTS/HPC/PF/19/2093 - Appendix 16 with Manufacturer's Manual Recommendation Section and checked during the next day's Hearing that Tribunal Chair could read it. This is the reason why I subsequently received the email from Steve Paterson suggesting to increase the servicing to twice per year. I agreed (in HC capacity) and this has been in place since. Therefore, I still believe that the water pumps failed due to a lack of regular and timely servicing at a cost of around £2,040 to replace.

291. 5.3.3 should read 5.3.5.

294. The two letters. 'The Respondent offered homeowners the chance to raise any queries or concerns.' I cannot see this in either letter."

Statutory provisions relating to review

4. The tribunal may review a decision made by it in any matter in a case before it and the decision is reviewable at the tribunal's own instance or at the request of a party to the case (Section 43 of the 2014 Act).

5. Rule 39 of the 2017 Rules provides:

   "(1) The First-tier Tribunal may either at its own instance or at the request of a party review a decision made by it … where it is necessary in the interests of justice to do so.
   (2) An application for review under section 43(2)(b) of the Tribunals Act must—
   (a) be made in writing and copied to the other parties;
   (b) be made within 14 days of the date on which the decision is made or within 14 days of the date that the written reasons (if any) were sent to the parties; and
   (c) set out why a review of the decision is necessary.
   …
   (6) Where practicable, the review must be undertaken by one or more of the members of the First-tier Tribunal who made the decision to which the review relates."

6. Rule 39(3) of the 2017 Rules provides:

   "(3) If the First-tier Tribunal considers that the application is wholly without merit, the First-tier Tribunal must refuse the application and inform the parties of the reasons for refusal."

Statutory provision relating to correction of clerical mistakes and accidental slips or omissions

7. Rule 36 of the 2017 Rules provides that:

   "The First-tier tribunal may at any time correct any clerical mistake or other accidental slip or omission contained in a decision, order or any document produced by it, by-
   (a) sending notification of the amended decision or order, or a copy of the amended document to all parties; and
   (b) making any necessary amendment to any information published in relation to the decision, order or document.

Tribunal's Consideration of Applicant's request for review

8. Given that the Applicant's request was received within 14 days of the date upon which the decision was sent to parties the request was made within the specified timescale.

9. The review was undertaken by the members of the tribunal who issued the directions which the Respondent seeks to review, in terms of Rule 39(6).

10. The Applicant has presented her request for review in the form of an email containing comments and statements; and a paper apart with comments relating to numbered paragraphs of the tribunal's decision. However, the Applicant has not requested that any particular part of the tribunal's decision is reviewed. The Applicant has failed to acknowledge that the tribunal found in her favour in relation to each of the alleged breaches of the Code of Conduct and breaches of property factors' duties, other than the Code of Conduct Section 2.1 and 3.3; and has issued a proposed PFEO in relation to which parties had the opportunity to comment in the specified period, following which the tribunal will proceed to consider the terms of the PFEO.

11. The content of the Applicant's request falls generally under four headings:
    a. The Applicant's view that there are some clerical mistakes and accidental slips or omissions in the decision which she would wish the tribunal to correct;
    b. The Applicant's attempts to rehearse evidence or submissions already made; or to introduce new evidence or submissions (which overlap with some of the suggested "corrections");
    c. The Applicant's comments on other matters of process and procedure, such as audibility and lodging of submissions and bundles of documents for the hearing; and
    d. Comments on the proposed PFEO.

12. The Applicant's view that there are some clerical mistakes and accidental slips or omissions in the decision which she would wish to tribunal to correct

In relation to the Applicant's suggested "corrections" to the decision, the tribunal has considered each of these.

a. Where the tribunal considers that a clerical mistake, accidental slip or omission has been made, it has been corrected in terms of Rule 36 of the 2017 Rules and will be notified to all parties; with the necessary amendments being made in relation to information published in relation

to the decision. None of the corrections which have been made affect the substantive decision made by the tribunal.

b. In relation to the Applicant's suggested corrections which have not been adopted by the tribunal, it should be noted that the tribunal's decision is not a transcript of proceedings. It is a written statement of the tribunal's decision and the reasons therefor. As such, it contains, amongst other things, the tribunal's summary of the parties' evidence and parties' submissions, in so far as the tribunal found them to be relevant to the matters under consideration in relation to the Application.

The Applicant's attempts to rehearse evidence or submissions already made; or to introduce new evidence or submissions (which overlap with some of the suggested "corrections")

13. A request for review of a decision of the tribunal is not an opportunity for a party to rehearse evidence or submissions which have already been considered by the tribunal; or to introduce additional evidence or submissions which were not before the tribunal at the time it reached its decision. The majority of the comments in the Applicant's request for review fall into this category.

The Applicant's comments on other matters of process and procedure, such as audibility and lodging of submissions documents for the hearing

14. In relation to the comment in the Applicant's email about audibility of the other parties' evidence and submissions during the hearing (after it switched to teleconference in October 2020), the Applicant raised issues of audibility on a number of occasions during the teleconference, all of which were confirmed by her to be resolved to her satisfaction. On any occasion that the Applicant indicated that she was having difficulty hearing the other party's representatives, the Respondent's representatives were asked to adjust their positions relative to the phone and to repeat what had been said. The tribunal chair then asked the Applicant whether the matter had been resolved and if she had heard what had been said and the Applicant confirmed that she had. The tribunal chair went through this process on every occasion that an issue was brought to the tribunal's attention. In addition, both parties had lodged extensive written submissions prior to the oral hearing and the Applicant had full notice of the Respondent's position in defence of the Application. As stated above, the tribunal's decision is not a transcript of proceedings; and an application for review is not an opportunity for a party to lead additional evidence or to make additional submissions which could have been made either in written submissions or in oral submissions during the hearing.

15. In relation to the format in which written submissions and lists/bundles of documents required to be lodged; and the delay between the first and second hearing days:

    a. **Lists/Bundles of Documents**. All the documentation submitted with the Application was considered by the tribunal as part of the sifting process, following which a decision was made to accept the Application for determination. Both parties were issued with the tribunal's Practice Direction Number 3, requiring parties to lodge a paginated (i.e. numbered) and indexed inventory of the productions in hard copy at the same time as lodging the productions; and further Directions in terms of Rule 16 of the 2017 Rules were issued by the tribunal to both parties in this regard, requiring each of them to lodge a numbered bundle of documents to which they intended to refer at the hearing. Both parties did so. During the hearing, a number of additional documents were added by parties, with the consent of the tribunal, in accordance with Rule 22 of the 2017 Rules. All documents referred to by the parties in evidence and submissions were considered by the tribunal in reaching its decision on the Application.

    b. **Written submissions**. Directions were issued to both parties in relation to lodging written submissions. This was a complex case with multiple alleged breaches of the Code of Conduct and property factors' duties. Both parties lodged written submissions. The Applicant was required by Directions of the tribunal to re-frame her written submissions in order to provide specification of her allegations with reference to the Sections of the Code of Conduct and property factors' duties, which she did. Both parties supplemented their written submissions with oral submissions at the hearing, over a number of days. The tribunal considered all evidence lead and submissions made in reaching its decision, including those made on the first hearing day.

    c. **Delay between first and second hearing days**. The delay between the first and second hearing days from March to October 2020, was caused as a result of the Covid-19 pandemic and consequent closure of the tribunal between 19 March and mid-July 2020 and delays in scheduling hearings thereafter. The tribunal made notes of the evidence and submissions made on the first hearing date and they were taken into account in reaching its decision. Reference is made to that evidence and those submissions in the written decision with statement of reasons. The tribunal had sufficient information to make its decision.

Applicant's comments on proposed PFEO

16. The Applicant has made two comments / queries in her email about the terms of the proposed PFEO. The tribunal proposes to make a PFEO in respect of all breaches, which includes the orders it considers to be appropriate.

17. As noted above, both parties have been notified by the tribunal's administration that there is a process within the 2011 Act in which parties are permitted to make representations upon the terms of the proposed PFEO before the tribunal decides whether to make the final PFEO. Such comments/queries are not properly matters for "review" of a decision as the tribunal's decision is in relation to the breaches of the Code of Conduct and breaches of property factors' duties.

18. In addition, the tribunal's decision on the Application relates to allegations which are now historical, in that the complaints were notified to the Respondent prior to July 2019 and relate to matters before that time. The tribunal does not have jurisdiction to manage ongoing factoring arrangements in the Respondent's relationship with homeowners on the Development, including the Applicant.

19. The Applicant has indicated that she wishes to make a further Application to the tribunal about alleged breaches of the Code of Conduct and property factors' duties. It is open to her to do so, having first notified the Respondent of the alleged breaches.

Comments in Applicant's paper apart to review request

20. The tribunal has considered all of the Applicant's comments in the paper apart, which are made by reference to the numbered paragraphs in its written decision. However, the tribunal reiterates that the purpose of a request for review of a decision in terms of Section 43(2)(b) of the 2014 Act and Rule 39 of the 2017 Rules is to review the decision; and the only allegations in relation to which the tribunal did not find in favour of the Applicant were those made under the Code of Conduct, Sections 2.2 and 3.1. The Applicant's request for review is not directed towards reviewing the decision in relation to those matters.

Applicant's comments about findings-in-fact

21. The Applicant has made a number of comments about the tribunal's findings in fact; and findings in fact and law.

a. **Para 2.27 and 2.28**. The tribunal considered both parties' evidence and submissions and made the said findings in fact. The Applicant may not agree with the tribunal's findings but no grounds for a review are specified. In addition, the Applicant is attempting to make additional submissions about matters which post-date the Application.

b. **Para 2.31**. The tribunal considered both parties' evidence and submissions and made the said finding in fact. As above, a request for review is not an opportunity for the Applicant to introduce new evidence or submissions.

c. **Para 2.44 and 2.45**. The tribunal considered both parties' evidence and submissions and made the said findings in fact. The wording in Code of Conduct, Section 3.3 is clear in that it specifies "supporting documentation or invoices". It does not say that a factor has to provide a breakdown of every bill that comes in. A request for review is not an opportunity for the Applicant to rehearse her submissions simply because she disagrees with the tribunal's finding in fact.

d. **Para 2.56**. The tribunal considered both parties' evidence and submissions and made the said finding in fact. The Applicant's comment is just additional detail which is in any event included within the tribunal's words "financial implications" and is not framed as a request for review.

e. **Para 2.57** The tribunal considered both parties' evidence and submissions and made the said finding in fact. Both parties referred to the spreadsheet entitled "LOLER Report review TUV SUD" which was produced and lodged during the hearing process. It was lodged as a spreadsheet rather than a written report. It was the only such report produced. However, for the sake of clarity and consistency, every reference to this report in the decision has been changed to "LOLER Report review TUV SUD" and has been treated as correction of a clerical mistake in terms of Rule 36 of the 2017 Rules. In addition, the tribunal has added to the findings in fact the words which were omitted in error: "*to establish whether works should have been carried out under lift contract",* as correction of an accidental omission in terms of Rule 36. Neither correction affects the substance of the tribunal's decision in relation to the Code of Conduct, Section 6.9, which was in any event in favour of the Applicant. In relation to the Applicant's other comments about the lack of an update on matters contained in the report, in order to reach its decision, the tribunal required to consider whether there had been breaches of the Code of Conduct and property factors' duties prior to the time that the Application was made. Any

comments made by the Applicant about whether she has received an update on works recommended in the Report is irrelevant to the tribunal's decision.

f. **Para 2.73**. The tribunal considered both parties' evidence and submissions and made the said finding in fact.

g. **Para 3.11**. The tribunal agrees that there is an accidental slip in the finding in fact and law and has therefore deleted reference to the WSS para 2.5.5. (The Code of Conduct, para 2.5 is already dealt with in another finding of fact and law, so the tribunal is not inserting the words suggested by the Applicant). Correction of the clerical error does not change the tribunal's decision that the property factor breached its property factors' duties. The tribunal's decision paragraphs 274 and 275 have also been deleted as correction of an accidental slip on the same matter.

h. The tribunal determined that there was a failure to comply with the WSS para 5.3.5, in that the tribunal determined that the proposed increase was "significant"; and that the Respondent had failed to comply with the duty to seek agreement from the HC or from a majority of homeowners for the proposed float increase. The tribunal's decision, page 1, point 3 is that the property factor breached its property factors' duties, including the duty arising from WSS Issue 8, para 5.3.5. For clarity and consistency, an additional finding in fact and law has been added as para 3.18 and a corresponding paragraph has been added to the decision, at paragraph 299, as correction of accidental omissions, in terms of Rule 36 of the 2017 Rules.

i. **Para 3.17.** The Applicant's comments about other decisions of the First-tier Tribunal Housing and Property Chamber in relation to other applications are irrelevant in law, as decisions of the First-tier Tribunal do not bind the tribunal in its determination of this matter. In any event, the float increase is an issue in relation to which the tribunal found in the Applicant's favour, as the Respondent did not seek the requisite consent for a significant float increase. No relevant reason has been advanced by the Applicant for the tribunal to consider reviewing its decision on this issue.

22. Other than the accepted corrections noted above, the tribunal considered that all comments in relation to the tribunal's findings in fact and findings in fact and law were wholly without merit as grounds for review.

23. The remainder of the Applicant's comments in the paper apart were considered by the tribunal, as follows:

    a. **Para 35.3**. There was no confusion on the part of the tribunal as to the point being made. It was clearly stated in parties' written submissions and supplemented by oral submissions. The issue was whether the HC had the authority to incur expenditure on behalf of other homeowners in the Development. Having heard parties' evidence and submissions, the tribunal was not satisfied that the Applicant had established that the HC had the authority to incur expenditure on behalf of other homeowners. This paragraph contains a summary of what was said and is not a transcript of evidence or submissions. The comments now made by the Applicant are an attempt to re-frame her complaint. There is no basis for the tribunal to review its decision on this issue. With reference to the Applicant's three further bullet points the tribunal does not consider that any further corrections are required. The tribunal summarised what the Applicant stated during the hearing. The tribunal is not prepared to change its decision to state what the Applicant thinks she said or would like to have said during the hearing. This part of the ground of review is wholly without merit.

    b. **Para 36(4)**. The Applicant's suggested correction is accepted by the tribunal. The words have been changed to "building clean", as correction of an accidental slip, in terms of Rule 36 of the 2017 Rules.

    c. **Para 40.3**. The paragraph of the decision referred to by the Applicant contains the tribunal's summary of the Applicant's response to the Respondent's submissions in relation to her third "false and misleading information" complaint. The tribunal is satisfied that this is an accurate summary of what was said. This ground of review is wholly without merit.

    d. **Para 40.4**. The tribunal is satisfied that this is an accurate summary of what the Applicant said. In any event, the Applicant's suggested change would make no difference to the tribunal's decision that the statement was not false or misleading and that the Respondent had not breached the Code of Conduct, Section 2.1. This ground of review is wholly without merit.

    e. **Para 40.7**. The Applicant alleged a breach of the Code of Conduct, Section 3.3, in that she alleged that the Respondent failed to supply supporting documentation. The tribunal required to consider whether that Section of the Code of Conduct had been breached. The Applicant

simply disagrees with the tribunal's decision. This ground of review is wholly without merit.

f. **Paragraph 40.8**. This paragraph is the tribunal's summary of the Applicant's submissions in relation to the Code of Conduct para 3.3. This ground for review is wholly without merit.

g. **Para 51**. The tribunal accept the recommended correction of a spelling mistake of the insurer and an accidental slip in relation to the order of inspections and makes a correction in terms of Rule 36 of the 2017 Rules. The spelling of the insurer has therefore been changed to "Allianz"; and as reflected in the remainder of the decision the reports were carried out by Allianz and then Zurich, so this has been corrected as an accidental slip in this paragraph. In any event, whatever order the inspections were carried out in is not material to the tribunal's decision in relation to this breach of the Code of Conduct. The tribunal found of the favour of the Applicant on this issue and she is not actually asking the tribunal to review its decision. This ground of review is therefore wholly without merit.

h. **Para 62**. The tribunal accepts the recommend correction and has made it in terms of Rule 37 of the 2017 Rules.

i. **Para 67**. This paragraph contains the tribunal's summary of the examination of Ms Bole by the Applicant during the hearing and the tribunal is satisfied that it has accurately recorded the summary. The Applicant's comments in her review request are, in fact, an attempt by the Applicant to add additional evidence. This ground of review is therefore wholly without merit.

j. **Para 69**. The tribunal accepts the recommended correction to the spelling of "Sodimas" and has made the correction in terms of Rule 36 of the 2017 Rules in this paragraph and where it appears in para 76. As regards the Applicant's comments about the evidence of Ms Bole, the tribunal is satisfied that it has accurately recorded a summary of what was said, whether or not the Applicant agrees with what Ms Bole said and there is no basis for changing it. The tribunal does not require to resolve the matter of which block was referred to because it does not form the basis of a finding in fact and whichever block it was makes no difference to the tribunal's decision on this point. The ground of review is therefore wholly without merit.

k. **Para 70**. The tribunal is satisfied that it has accurately recorded a summary of what was said by Ms Bole in evidence and there is no

basis for changing it. The ground of review is therefore wholly without merit.

l. **Para 107**. The tribunal found in favour of the Applicant in relation to its decision that the Respondent failed to comply with the Code of Conduct, Section 6.9. The tribunal also determined that it should not form part of the orders in the proposed PFEO due to the historical nature of the breach. The PF gave an undertaking to attend to the work which is outwith the scope of the PFEO. What may or may not have been done since November 2020 is not a basis for requesting that the tribunal review its decision in relation to the breach of the Code of Conduct, Section 6.9. The ground of review is therefore wholly without merit.

m. **Para 145.1**. The tribunal has considered the matter raised, as noted above. The tribunal determined that it is an accidental slip and should not be included, so the whole paragraph has been deleted as have paragraphs 178 and 179, in terms of Rule 36 of the 2017 Rules.

n. It is agreed that all references to “Writmac” should be corrected to “Ritmac”, as a clerical mistake in terms of Rule 36 of the 2017 Rules.

o. **Para 187**. This paragraph contains a summary of the Applicant’s submissions during the hearing and the tribunal is satisfied that that it has accurately summarised was what was said by the Applicant, whether or not the Applicant is now of the opinion that it is the factually correct position. The ground of review is therefore wholly without merit.

p. **Para 195**. This paragraph contains a summary of the Respondent’s evidence and submissions and the tribunal is satisfied that it has accurately summarised what was said. The fact that the Applicant does not agree with what the Respondent said but that is not a basis for review. The ground of review is therefore wholly without merit.

q. **Para 203**. This paragraph is a summary of the Respondent’s evidence and submissions, and the same applies as stated in relation to para 195, see above.

r. **Para 207**. This paragraph contains a summary of what the Applicant said during the hearing and the tribunal is satisfied that it accurately summarised what was said. This ground of review is therefore wholly without merit.

s. **Para 209**. This paragraph contains a summary of Ms Kirkwood's evidence. Whether or not the Applicant agrees with Ms Kirkwood's evidence is not a basis for review of the tribunal's decision. This ground of review is therefore wholly without merit.

t. **Para 214**. This paragraph contains a summary of what the Applicant said during the hearing and the tribunal is satisfied that it accurately summarised what was said. This ground of review is therefore wholly without merit.

u. **Paras 216, 217 and 218**. These paragraphs contain a summary of what the Respondent said when offered the opportunity to make submissions about the terms of the proposed PFEO. The tribunal is satisfied that it has accurately summarised what was said. Whether or not the Applicant agrees with the Respondent's position is not a ground for review of the tribunal's decision. This ground of review is therefore wholly without merit.

v. **Para 232** states: *"The Applicant did not prove that the HC, as an entity, had any legal authority to incur expenditure on behalf of the other homeowners in the Development."* The tribunal made this finding after considering the parties' evidence and submissions. The tribunal was not satisfied that the Applicant had established on the balance of probabilities that the HC had such authority. This ground of review is therefore wholly without merit.

w. **Para 234**. The Applicant's comments are an attempt to make additional legal and factual submissions. The tribunal has already taken into account the parties' submissions made during the hearing. This ground of review is therefore wholly without merit.

x. **Para 232 and 236**. This is a matter which was not under consideration by the tribunal. None of it forms the basis of the breaches of the Code of Conduct or the breaches of property factors' duties. The only reason that the question of the HC's authority to instruct was under consideration was in relation to the allegation that the Respondent had breached the Code of Conduct, Section 2.1, in issuing a letter in which it was stated that the HC did not have such authority. Both parties had ample opportunity to lead evidence and make submissions, both written and during the hearing. The tribunal was not satisfied that the Applicant had proved on the basis of the evidence that the HC had such authority. A request for review is not an opportunity to make fresh arguments, such as the "custom and practice" argument which the Applicant is now seeking to advance.

y. **Para 235**. Whether or not the Applicant included the Constitution in her revised bundle as Appendix 7, the Applicant did not take the tribunal to the document at any point in her evidence or submissions or seek to argue the 'custom and practice' argument which she is now trying to make as a fresh argument. For clarity, the tribunal has corrected a typographical error in terms of Rule 36 of the 2017 Rules, by including the word "or" which was accidentally omitted. In any event, there is nothing in the Constitution which says that the HC have the authority to incur expenditure on behalf of other owners in the Development. The tribunal considered the parties' evidence and was not satisfied on the balance of probabilities that they had such authority. As noted above, the question of whether or not such authority existed related only to a single allegation that a statement made in a letter by the Respondent was false, and therefore a breach of Section 2.1 of the Code of Conduct. This ground of review is wholly without merit.

z. **Para 240**. The Applicant's comments are an attempt to introduce further evidence on a matter which has been decided on the basis of parties' evidence and submissions. This ground of review is wholly without merit.

aa. **Para 248**. The tribunal determined on the basis of the parties' evidence that the Applicant had not requested supporting documentation; and that there was no breach of Section 3.3 of the Code of Conduct. This ground of review is wholly without merit.

bb. **Para 258**. The tribunal accepts the suggested correction and it is made in terms of Rule 36 of the 2017 Rules.

cc. **Para 271**. The Applicant's comments relate to an observation about the subsequent extension of timescales in later versions of the WSS. WSS 8 was in force at the time and was the version under consideration. The tribunal's observation does not affect the tribunal's decision about the timescales at the relevant time. This ground of review is wholly without merit.

dd. **Para 278**. The tribunal decided on the basis of the evidence that the Applicant had not proved on the balance of probabilities that the pumps had failed due to a lack of servicing. No expert report was produced and there was no evidence whatsoever about the effect of the gap in servicing on the condition of pumps. This ground of review is wholly without merit.

ee. **Para 291**. It is agreed that “Para 5.3.3” should read “para 5.3.5” and it has been corrected as a clerical mistake in terms of Rule 36 of the 2017 Rules.

ff. **Para 294**. The paragraph relates to an issue in relation to which the tribunal found in the Applicant’s favour, in that the Respondent had failed to seek the requisite consent for a significant increase in the float. No basis for review of the tribunals decision in favour of the Applicant is advanced. This ground of review is wholly without merit.

24. For all of the reasons given above, the tribunal is of the view that other than the corrections which have been made in terms of Rule 36 of the 2017 Rules, the Applicant’s request for review is wholly without merit and it is therefore refused in terms of Rule 39(3) of the 2017 Rules.

Appeals

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.

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Ms. Susanne L M Tanner Q.C.
Legal Member and Chair

2 March 2021