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

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

**Chamber Ref: FTS/HPC/PF/19/4027**

**Flat 8, 55 Waterfront Park, Malmo, Edinburgh, EH5 1BA
("The Property")**

**The Parties:-**

**Mrs Jennifer Taylor, 4 Barnton Park Gardens, Edinburgh, EH4 6HN
("the Applicant")**

**Mr David Taylor, 4 Barnton Park Gardens, Edinburgh, EH4 6HN
("the Applicant's Representative")**

**Hacking and Paterson Management Services, 103 East London Street, Edinburgh, EH7 4BF
("the Respondent")**

**Tribunal Members:
Ms Susanne L M Tanner QC (Legal Member)
Mr Robert Buchan (Ordinary Member)**

**DECISION**

1. **The Property Factor has not failed to comply with the Code of Conduct for Property Factors, Sections 6.1 and 6.9.**

2. **The Property Factor has not failed to carry out its property factor's duties.**

3. **The decision of the tribunal is unanimous.**

## STATEMENT OF REASONS

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

## 2. Findings in fact

2.1. The Applicant became the registered proprietor of the property at Flat 8, 55 Waterfront Park, Malmo, Edinburgh, EH5 1BA on 27 August 2018, with a date of entry on 24 August 2018.

2.2. The Applicant's property is a flat in a development known as Waterfront Park ("the Development").

2.3. There are 153 Properties in the development.

2.4. The common property at the development includes the car park steel works.

2.5. The Respondent registered as a property factor on 1 November 2012 and renewed its registration on 2 April 2019.

2.6. The Respondent became the property factor of the development when by appointment in terms of the Deed of Conditions.

2.7. Homeowners are asked to pay a float of £300.00 to the Respondent on moving into their properties in the Development.

2.8. The float fund is used to meet ongoing items of regular expenditure for the Development.

2.9. Homeowners including the Applicant are invoiced quarterly in arrears in respect of ongoing charges. Their payments are added to the float fund.

2.10. There is no sinking fund for the Development.

2.11. The running balance of the float fund as at 4 November 2020 was £3592.32, taking into account total float funds, total arrears, total contractor invoices paid to date for the current quarter and total common charges outstanding for the current quarter.

2.12. Some one-off items of expenditure can be met from the float fund depending upon the funds available at the time of instruction.

2.13. Some one-off items of expenditure require funds to be requested and in-gathered from homeowners and those funds are then allocated and ring fenced for the specific works.

2.14. The car park steelwork was erected by the original developer, Bellway Homes.

2.15. The ten year warranty had expired prior to the Applicant's purchase of the Property.

2.16. Maintenance is required to the car park steel works to scrape and repaint the steelwork in the underground car park ("phase 2 car park steelwork").

2.17. The cost of the phase 2 car park steelwork was estimated at £7150.00.

2.18. The Respondent has made repeated requested for funds from homeowners on the Development for the cost of the phase 2 car park steelwork to enable those works to be instructed.

2.19. As at 4 November 2020, homeowners have paid £2009.42 towards the phase 2 car park steelworks, which is 28.1 per cent of the total amount requested by the Respondent.

2.20. The Applicant has paid her requested share of the phase 2 car park steelwork.

2.21. Without the allocated ring fenced funds the Respondent cannot instruct the phase 2 car park steelwork from current Development operational funds.

2.22. The Respondent had intended to instruct the phase 2 car park steelwork in summer 2020 if sufficient funds had been in place to do so.

2.23. As the phase 2 car park steelwork has not yet been instructed, there is no update on progress and estimated timescales for the Respondent to provide to homeowners including the Applicant.

2.24. There are no arrears by homeowners on the Development specifically relating to the phase 2 car park steel works as the work has not been instructed by the Respondent.

2.25. The Written Statement of Services ("WSS"), Clause 3.2 provides a list of the Core Services which the Respondent will provide to homeowners at the Development, including: "arranging and administering maintenance of common property by appointing contractors and service suppliers"; and "Enforcing debt recovery procedures for unpaid common charges accounts including instruction of legal action";

*2.26.* The Written Statement of Services, Clause 4.6 provides, *"The Property float is reviewed from time to time to ensure availability of funds to meet common works and services costs… The float is held in an account, separate from HPMS funds"; (with HPMS being Hacking and Paterson Management Services)*

2.27. The Written Statement of Services, Clause 4.13 provides that "*HPMS has a clear procedure for debt recovery. … outlines a series of steps which HPMS will take on behalf of homeowners".*

2.28. The Written Statement of Services, Clause 4.14 provides, *"If one or more homeowners fails to pay any common charges account, property float or contribution to advance or sinking / reserve fund … in a timely manner this may prevent HMPS delivering some or all of the Core Factoring Services…"*

2.29. There is a Constitutive Deed of Conditions and Real Burdens, registered 31 Aug. 2006, by Bellway Homes Limited for the Proprietors of the subjects known as The Malmo, Granton, Edinburgh.

2.30. The Deed of Conditions, Clause (NINTH) provides: "The administration of dealing with the upholding and maintenance, repair and re-erection and restoration of all common parts as hereinbefore specified shall be conducted through the medium of a Property Manager, the cost of whose services will be met by the proprietors of the estate in accordance with the formula specified at Clause Eighth hereof… All costs payable to the aforesaid Property Manager in reimbursement of his costs and outlays and professional services shall be paid by the proprietors quarterly, upon receiving an accounting to that effect from the aforesaid Property Manager and to assist in defraying the said cost each proprietor will be responsible for payment of a deposit of TWO HUNDRED POUNDS (2OO) Sterling in respect of each plot (or such other increased sum as the Property Manager may reasonably request) to the Property Manager upon taking entry to any plot"

2.31. The client account for the Development is held with other client funds in a separate account from the Respondent's business account.

2.32. The Respondent's debt recovery on the development paused as a result of court closures due to Covid-19 but it has now recommenced.

2.33. The float amount per property was increased to £300.00 per property in or about 2018.

## 3. Findings in fact and law

3.1. As the phase 2 car park steelwork has not been instructed, the second requirement of Section 6.1 of the Code of Conduct, that the Respondent must inform homeowners of the progress of this work, including estimated timescales for completion, is not engaged.

3.2. Bellway Homes is not "contractor" or "supplier" in terms of Section 6.9 of the Code of Conduct, in that they erected the steelwork in the Development over 10 years ago and were not instructed by the Respondent to provide work or service on the Development.

3.3. As no contractor has been instructed by the Respondent to carry out the phase 2 car park steelwork, Section 6.9 of the Code of Conduct, to remedy the defects in any inadequate work or service provided is not engaged.

3.4. The duty on the Respondent to provide the "Core Services" in Clause 3.2 is qualified by the availability of homeowners' funds, with reference to Clause 4.14 and the Respondent has therefore complied with the duties to arrange and administer maintenance of common property by appointing contractors and service suppliers in so far as funds permit.

3.5. The Respondent has complied with the duty to enforce debt recovery procedures for unpaid common charges, including taking legal action, in so far as the Covid-19 court closures and restrictions have permitted such legal action since March 2020.

3.6. As the client account for the Development is held with other client funds in a separate account from the Respondent's business account, there is no breach of the WSS, Clause 4.6.

3.7. The Written Statement of Services, Clause 4.6 does not impose a positive duty on the Respondent to review the float amount at any particular time intervals.

3.8. The Deed of Conditions, Clause Ninth permits the Respondent to reasonably request increases to the float sum but does not impose a positive duty on the Respondent to increase the float sum.

## 4. The Application

4.1. On 18 December 2019, the Applicant lodged an application ("the Application") with the tribunal.

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

*4.2.1. Section 6.1; and*
*4.2.2. Section 6.9.*

*4.3.* In Section 7 of the Application the Applicant alleged that the Respondent has failed to comply with its property factor's duties for the following reasons*: "Failure by the factor to maintain a common area, namely the steelwork in the car park area".*

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

*4.4.1. What is your complaint? "Failure by the factor to maintain the steelwork in the car park area".*

*4.4.2. What are your reasons for considering that the Property Factor has failed to resolve the complaint? "Factors are contracted to maintain common areas. The steelwork is a common area."*

*4.4.3. How has this affected you? "The poor state of the steelwork could lead to a reduction in the value of the property. Potential health and safety issues due to the poor state of the steelwork".*

*4.4.4. What would help to resolve the problem(s)? "The resolution would be for the factor to provide for the steelwork to be maintained".*

4.5. The Applicant provided the following documents with her Application:
4.5.1. Letter from the Applicant to the tribunal's administration dated 18 December 2019;
4.5.2. Letter from the Applicant to the tribunal's administration dated 24 May 2019;
4.5.3. Document A: Notification letter from the Applicant to the Respondent dated 21 April 2019;
4.5.4. Document B: Letter from the Respondent to the Applicant dated 14 May 2019;
4.5.5. Document C: Written Statement of Services dated 6 September 2018;
4.5.6. Documents numbered 1-36

4.6. On 8 January 2020, the tribunal requested further information from the Applicant.

4.7. On 7 February 2020, the Applicant submitted:

4.7.1. a signed page Application,

4.7.2. proof of posting of a copy of a letter to the Respondent on 8 February 2020; and

4.7.3. copy title deeds for the Property dated 31 July 2018 (showing a different registered proprietor from the Applicant).

4.8. On 26 March 2020, the Applicant submitted:

4.8.1. a copy of a letter from the Applicant to HPC (undated)

4.8.2. a copy of a letter from the Respondent to the Applicant dated 18 March 2020

4.8.3. a copy of a letter from the Respondent to the Applicant dated 12 March 2020

4.8.4. a letter from the Applicant to the tribunal's administration dated 23 February 2020; and

4.8.5. a copy letter from the Respondent to the Applicant dated 21 February 2020.

4.9. On 29 June 2020, the Application, comprising all documentation received in the period between 18 December 2019 and 26 March 2020, was accepted for determination by the tribunal.

4.10. The tribunal's administration confirmed that the Respondent registered as a property factor on 1 November 2012 and renewed its registration on 2 April 2019.

4.11. On 17 August 2020, the tribunal's administration wrote to the parties to advise that the Application had been referred to the tribunal for determination.

4.12. A hearing was fixed for 29 September 2020 at 10.00am by conference call. The parties were asked for any written submissions by 7 September 2020. Parties were provided with information about lodging documents in accordance with Practice Direction number 3. The hearing date and details for joining the conference call were intimated to parties.

4.13. On 28 August 2020, Ms Emma Blair of the Respondent produced written representations and confirmed that the Respondent wished to participate in an oral hearing. A list of documents was attached containing 4 pieces of copy correspondence.

4.14. The hearing was postponed to 4 November 2020.

4.15. On 27 October 2020 the Applicant submitted an additional document which he wished to add and consideration of whether to allow the document was continued until the hearing.

## 5. Hearing – 4 November 2020 (teleconference)

5.1. A hearing took place on 4 November 2020 by teleconference.

5.2. The Applicant's Representative, Mr Taylor, attended the hearing on behalf of his wife.

5.3. Ms Emma Blair from the Respondent attended the hearing.

### Additional documents lodged at hearing

***Applicant's Representative***

5.4. Mr Taylor made reference to the document submitted on 27 October 2020 which he wished to lodge. He indicated that the document related to a different issue from that raised in the Application, namely roof repairs at the Development that have not yet been done. He stated that it is symptomatic of the current issues in that it shows the inability of the Respondent to maintain the development as a whole.

5.5. Ms Blair stated that the letter is not related to the present dispute which relates to steelwork at the Development. The Respondent has not been given an opportunity to consider this wider issue as the Application does not include a complaint about the Respondent's inability to maintain the Development as a whole.

5.6. The tribunal members determined that the new correspondence was irrelevant to the matters under consideration and that the tribunal was unable to consider the matter of the roof repairs or other issues at the Development as the alleged breaches of the Code of Conduct / property factor's duties arising therefrom did not form part of the present Application and had not been notified as required by the 2011 Act.

***Respondent***

5.7. During the hearing Ms Blair produced information requested by the tribunal in terms of the current float balance in an email and a screen shot from the

Respondent's system in relation to the funding for the phase 2 car park steel work. The late lodging was not opposed and they were considered by the tribunal to be directly relevant to the matters in dispute. The documents were added as Document 5/1 and 5/2 for the Respondent.

**Parties' evidence and submissions**

5.8. The tribunal heard evidence and oral submissions on behalf of both parties in relation to the alleged failures to comply with the Code Sections 6.1 and 6.9 and alleged failures to comply with property factors' duties.

**5.9. Section 6.1 of the Code of Conduct**

***"6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required."***

**Applicant's Representative**

5.10. Mr Taylor stated that he was submitting that there had been a failure by the Respondent to comply with both parts of Section 6.1 of the Code of Conduct.

5.11. In relation to the first part, *"You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention",* Mr Taylor stated that there are no procedures that he is aware of to allow homeowners to notify the Respondent. He stated that if matters required attention, he would contact the Respondent and let them know. He stated that there is also an online portal for the Development but that he had only used the portal in respect of emails from the Property Factor requesting homeowners to respond and not to notify the Respondent of any work he might want undertaken.

5.12. In relation to the second part, *"You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required",* Mr Taylor stated that the steelworks in the Development have not been maintained since the property was new in 2004. Mrs Taylor bought the Property in August 2018. It is a flat in an all flatted development. During the purchase she was informed by the

Respondent that there was a quote to re-paint the steelwork in the carpark. It still has not been done and they have had no timescale.

5.13. Mr Taylor stated that since Mrs Taylor bought the Property, they have written to the Respondent approximately eight times advising of works required to the steelwork in terms of the painting.

**Respondent**

5.14. Ms Blair stated that the Respondent became property factor for the Development at the outset, in terms of the Deed of Conditions by Bellway Homes. She stated that there are 153 flats. There is another Deed of Conditions in relation to the wider areas which they are not involved in. The Respondent has responsibility for the management of the common areas in relation to 153 flats. Sarah Kinnaird is the property manager for the Development.

5.15. In relation to the first part of the Code of Conduct Section 6.1, Ms Blair disputed that there was a lack of procedures in place. She observed that Mr Taylor had himself stated that if something needs attention, he will contact the factor. She referred to the Written Statement of Services ("WSS") for the Development, Section 5. The Respondent expects homeowners to notify the Respondent in writing electronically, by telephone, or in person at their offices. The online portal has a process that can be used which comes through as an email. There are email links on the Respondent's website which include contact details for each of the property managers.

5.16. Ms Blair stated that the flats in the Development form a 'U' shape. In the middle there is a central courtyard area. Underneath the courtyard area is a carpark. The level above acts as a garden or central courtyard. There is exposed steelwork in the garage and the courtyard area. That is the only exposed steelwork in the Development. It requires to be painted. Some painting was carried out in summer 2019 and phase two will be carried out by the same contractor for phase 2, as completed phase 1. The hold up is funding. Phase 1 cost £7,000. Funds were obtained from homeowners in advance. The Respondent was also able to look at the Development float fund and arrears to make up the shortfall to allow phase 1 works to progress.

5.17. Ms Blair stated that in respect of phase 2 of the painting, the Development is nowhere near the required funds. They have about 20% of funding. The Respondents have written to the homeowners approximately six times asking for funding. So far, they have been unable to place an instruction for phase 2 to be carried out.

5.18. Ms Blair referred to three of the four letters submitted by the Respondent as additional productions on 28 August 2020; and letters lodged by the Applicant.

5.19. Applicant Documents page 6 – 20 November 2018 to all homeowners
5.20. Applicant Documents Page 8 - 17 December 2018 to all homeowners
5.21. Applicant Documents Page 16 – 6 March 2019 to all homeowners
5.22. PF Pro 1 – 14 January 20 to all homeowners
5.23. PF Pro 2 – 3 February 20 to all homeowners
5.24. PF Pro 3 – 22 July 2020 to all homeowners.

5.25. Ms Blair stated that in all six letters they had written to the homeowners requesting funds for the painting of the steelworks. The Respondent cannot provide timescales for completion until the works are actually instructed. The purpose of the letters is to ask for funding from the homeowners so that the Respondent can instruct the works.

5.26. Ms Blair stated that the Respondent has been a bit confused in relation to the complaint in this regard, particularly in relation to the second point. The Applicant has never specifically complained about where he alleges that the Respondent has failed.

5.27. Ms Blair stated that the Respondent issues invoices on a quarterly basis in arrears. Those quarterly invoices itemise what has been spent. All the charges paid out come from the float. Per property it is £300. She stated that Mrs Taylor has chosen to settle quarterly invoices by way of monthly Direct Debit. That takes the annual cost and divides by 12. There is a balance throughout the year. The same cannot be said for everyone else in the Development. There is not a monthly charge per property.

5.28. The services within the Development are substantial. There are various mechanical and electrical facilities. All of the charges come out of the float. Where there are larger one off non-recurring repairs to be dealt with, for example painting of steel works, repairs to water pumping systems, etc, the Respondent needs to look at the float fund. The Respondent will consider what expenditure is available, how much the arrears are and make a decision as to whether they can instruct that repair. The painting work original cost was almost £15,000. The float would not cover that level of expense. The float is £45,000 and there is quarterly expenditure of around £45,000 per quarter. There is very little leeway in terms of what the Respondent can instruct. Some quarters use the full float, some use less. The Respondent makes a judgment using financial controls. When the Respondent instructed phase 1 of the painting of the steelworks, the Respondent asked for £95 per

property for phase 1. They received 30% of the funding. The Respondent wrote several letters. They seemed to be met with general apathy. They had a discussion with the contractor. The contractor indicated that there was a possibility that the work could be done on a phased basis, in which the payment of £7,000 would be made for phase 1. As the Respondent had received 30% of the higher value, based on the float fund and arrears, the float could be used to 'bump up' the funds required. The Respondent took the decision that they could instruct the works.

5.29. Ms Blair stated that this matter relates to funding. As soon as the work is instructed the work is carried out. Once the Respondent has a contractor's invoice, they can include it in their quarterly invoicing and charge it to the 153 owners for their equal share. It may become a debt recovery issue. Everybody then pays their equal share. If they have paid it the float balance is topped up again and the Respondent has the next quarter's share. For phase 2 of the painting of the steelworks, quarterly charges are ongoing. There is a level of debt. The Respondent does not have the funding to meet the shortfall.

5.30. Ms Blair stated the pump works were instructed at the end of last year. The Respondent made a decision on whether they could instruct £5000 to repair pumps to enable water to be provided to flats. It was not a situation of authority, it was a financial decision. In terms of the Deed of Conditions the Respondent can instruct works without the homeowners' authority up to £100 per property. Ms Blair does not think that there has been an issue where the level of funding was in excess of £100 per property.

5.31. The steelworks, in total, amounted to about £95 per property. The Respondents believe that they had the appropriate authority to instruct the works but it was a question of funding. It is a decision-making process as to when the repairs are necessary versus the funding we held.

**Applicant's Representative's response**

5.32. In relation to the first part of Section 6.1, Mr Taylor conceded that there are procedures in place and stated that he no longer insisted on the first part of 6.1.

5.33. Mr Taylor stated that he knows that the whole matter hangs around funding. The Respondent invoices the Applicant £157 per month as a monthly charge by direct debit. He stated that if the Respondent has insufficient funds they should charge more; and that there are a number of properties in arrears so the people who are paying are funding the arrears.

5.34. Mr Taylor stated that the Respondent canvassed all the homeowners in respect of funding. The did not get a good response so they did not carry on with the work. He stated that in relation to the water pumps, rather than canvas all the homeowners, the Respondent said that they were going to go ahead. Mr Taylor wondered why they do not adopt that method for painting the steel. Mr Taylor stated that he understands that there is a lack of funding. He thinks that is down to the fact the Respondent does not ask for enough money. The total float for the development is £45,900. The amount remaining to pay for the steelwork is not significant in respect of the float.

5.35. Mr Taylor does not agree that there have been progress reports because there is no definitive end date. The Respondent does not canvas positively, they canvas negatively and people do not respond to that. He suggested that the Respondent should say: 'we are going to proceed unless you object'. The water pump works are about £50 per property. The homeowners get a quarterly account and they are part of that. The steelworks were about £90.

5.36. Mr Taylor asked if Ms Blair could indicate the amount of arrears in the development as there is a lack of funding and he wants to know why. He stated that the homeowners are paying £120 per year and there seems to be continual lack of funding. He wishes to know how many properties are in arrears and what work has been done; how many times have the Respondents have used the debt recovery service.

**Respondent's further response**

5.37. Ms Blair responded that she did not have the requested information in front of her but could potentially obtain it during the course of the hearing day. She stated that she believes that historically here has been a debt problem on the development. The Respondent uses its debt recovery procedure continually throughout the year. However, with Covid-19, the courts did close down for a period. The Respondent did not pursue recovery through legal channels for an extended period this year. Ms Blair agreed to attempt to source and provide the requested information. Following a short adjournment, Ms Blair stated that the only thing that she could confirm at that time was that the arrears figure is £9540.87. She stated that she would obtain further information later in the day.

**5.38. Code of Conduct, Section 6.9**

> ***"6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor."***

**Applicant's Representative**

5.39. Mr Taylor stated that the contractor was Bellway. In his opinion, the steelworks have deteriorated beyond what they should have done since erected. He and his wife pointed that out to the Respondent. Mr Taylor and his wife both contacted Bellway. The Respondent had not done that. There was a 10 year warranty. It expired in 2014. Mr Taylor thinks poor materials have been used and that there is poor coating on the steel. In his opinion, the deterioration would have occurred prior to the end of the warranty and he thinks that the Respondent should have pursued Bellway. When Mr Taylor spoke to Bellway, they said that he should phone the property factor.

5.40. Mr Taylor wondered why the Respondent did not contact the contractor Bellway prior to the end of the warranty because in his opinion the deterioration would have occurred prior to that point.

5.41. In response to questions from the ordinary member, Mr Taylor stated that he is not qualified to comment on steelwork. He stated that he asked a Quantity Surveyor to have a look at it informally. Mr Taylor confirmed that he has not obtained any professional report available to say that there is a defect in the steelwork. Mr Taylor confirmed that the work required at the moment is maintenance, to take off the corrosion and re-paint it. He stated that the works were phased and that half has been done and not the other half.

**Respondent**

5.42. Ms Blair stated that Bellway are not a contractor that the Respondent has appointed on behalf of the homeowners to maintain the Development. Bellway were involved in the original construction. That was well in advance of the Applicant's purchase of the Property. The Applicant purchased after any warranty had expired. Ms Blair submitted that the Applicant's case is irrelevant. In addition, the Applicant has not provided any evidence to suggest that there is a defect. The Applicant's argument is based purely on their own submissions. Ms Blair submitted that section 6.9 of the Code only applies where the property factor has appointed the contractors. Bellway constructed properties and sold to homeowners. The Applicants have title.

The Respondent has no contract with Bellway. The Respondent has made contact with Bellway in relation to the steelwork on the request of the Applicant, in order to clarify the position. It was the previous property manager, Lucy Edgar, who no longer works with the firm. The outcome was that Bellway would not become involved and they considered it a matter of general maintenance which the homeowners are responsible for.

5.43. Ms Blair stated that the Respondent had no reason to believe that there was a defect. The contractors that the Respondent had contacted for quotations suggested that it was purely wear and tear. The contract between the developer Bellway (who Ms Blair does not believe is a contractor in terms of the Act) is with individual homeowners. It would have been up to individual owners to notify Bellway or NHBC when a warranty was provided to the homeowners. The Respondent cannot be held accountable for the actions of Bellway. She does not know if any other owners contacted. Bellway or NHBC about steelwork.

**5.44. Alleged breach of duties**

**Applicant's Representative**

5.45. The Applicant's Representative alleged various breaches of property factor's duties. They were not clearly separated out in the Applicant's oral submissions but they can be broadly summarised under the following three headings:

> (i) WSS, clause 3.2, Core Services, two points: *"arranging and administering maintenance of common property by appointing contractors and service suppliers"*; and "*Enforcing debt recovery procedures for unpaid common charges accounts including instruction of legal action";*
>
> (iii) WSS, Clause 4.6 *"The Property float is reviewed from time to time to ensure availability of funds to meet common works and services costs… The float is held in an account, separate from HMPS funds";*
>
> (iv) Deed of Conditions, Clause Ninth: *"to assist in defraying the said cost [common charges] each proprietor will be responsible for payment of a deposit of TWO HUNDRED POUNDS (2OO) Sterling in respect of each plot (or such other increased sum as the Property Manager may reasonably request)"*

5.46. Mr Taylor stated that the Respondent has not arranged and administered maintenance of the steel work. He stated that in his opinion it is an unqualified duty regardless of funding as it does not mention funding in Clause 3.2.

5.47. Mr Taylor referred to HO Doc p14, dated 18 February 2019. It is a letter which was sent by Lucy Edgar, the previous property manager, regarding the float. Mr Taylor stated that he does not know the balance of the float account as it is being used to handle the monthly charges. He stated that if it had been held as a float it would have been sufficient to handle the steelworks. The response received from Lucy Edgar was that the float is used to settle common charges. Mr Taylor stated that the float should be used as per the website to accommodate excessive charges. He would not have thought £7,000 out of £180,000 would be deemed to be excessive.

5.48. Mr Taylor referred to the general pages of the Respondent's website (not specific to the development) in relation to maintenance of common property. Mr Taylor stated that it is in respect of any of their developments. It says *"…often maintenance or repair works of a larger scale are identified. ... generally where this exceeds the level of the float held. … Held by us until satisfactory completion."*

5.49. Mr Taylor stated that 153 flats at £300 per flat = £45,000 and that homeowners paid £300 in August 2018 for phase 1 of the car park steel works.

5.50. Mr Taylor referred to a letter, page 21 and Respondent's WSS, Clause 4.6. "*The float is to meet common works and services. The float is held in a fund separate from HPMS."* He submitted that the float should be held separately from the running account for the Development. *"The property float is reviewed from time to time to ensure availability of funds".* He asked, if the float account is not held separately, how can it ever be reviewed to ensure availability of common funds. He still thinks that the property float should be maintained and that the property float should be reviewed from time to time to ensure availability of funds.

5.51. Mr Taylor stated that he and his wife have paid funds for phase 1 and phase 2 for the works to be carried out. He stated that if the Property Factor is responsible for charging the homeowners and there is insufficient funding, why do they not increase the monthly amount.

5.52. Deed of Conditions, Clause Ninth. The Applicant's submission under this provision in the Deed of Conditions appeared to be that the Respondent could reasonably request an increase in the float amount from existing and

new proprietors. There had been a previous increase in about 2018 from £200.00 to £300.00. The Applicant did not submit that there was a positive duty on the Respondent to request an increase in the float amount. In response to a question from the ordinary member, Mr Taylor confirmed that he has not asked for the float to be increased. He stated that he thought "that the float was a float and obviously it is not".

5.53. Mr Taylor also wondered whether the Respondent had ever thought of taking a loan and charging interest to the homeowners in order that the works might be instructed.

**Respondent**

5.54. Ms Blair stated that from hearing what had been said by Mr Taylor, it appeared that there was confusion in his mind over how this float works. She stated that the float is constantly being used. It is not sitting in a reserve fund. The Respondent is using the float on a weekly basis to pay contractors. The Respondents send quarterly invoices that itemise expenditure. They do not show a running float. They itemise what costs have been incurred and the individual homeowner's share.

5.55. Ms Blair stated that the Respondent has an account for the Development. The client accounts are held in an account separate from the Respondent's business funds. All of the client accounts are held in one account. There is not a separate account for the Malmo development and the Malmo deposit. The funds in the client account provide the operational funds for the development. That is to say, the float account is the operational account. The quarterly invoices itemise all expenditure incurred during the quarterly period and the Respondent asks clients to pay the invoices on top of that.

5.56. Ms Blair stated that some developments have a sinking fund but it is not common, in which homeowners pay into a bank account entirely separate for any float, ring fenced for that Development. It is interest bearing and there is a pocket of money. There is no such provision in the Deed of Conditions for this development. A majority of homeowners could agree to put one in place. It is difficult to do retrospectively. The Respondent proposed a sinking fund several years ago and they did not have the homeowners' support. Because it is not in the Deed of Conditions, it may not be down to a simple majority vote. It may not be something that a quorate group of homeowners can choose to agree on. It needs cooperation from the homeowners. The proposal was included in one of the letters that the Applicant has supplied. As there was insufficient support there was no sinking fund set up.

5.57. Ms Blair stated that the property float is reviewed continually. It should be available or sufficient to meet regular items of expenditure. It is not there to cover all eventualities. As and when one off or larger repairs are required further funds will require to be sought from homeowners to allow those to be instructed. At the moment the £300 float per property meets regular items of expenditure. When larger items come up it is not sufficient to meet larger items. That is why the Respondent asks for expenditure in advance to cover larger items.

5.58. Ms Blair referred to the WSS, Clause 4.7 and stated that there is no sinking fund and no reserve fund for this development.

5.59. Ms Blair stated that the float fund is a moving target. It is constantly changing. One day there may be funds available to instruct work. It does not mean that three months later there will be funds. The Respondent assesses the nature of the works and their importance. The water pump repairs were carried out last winter when the Respondent would not be instructing decoration works. Bearing in mind that the water pump is supplying water to houses, the works were deemed to be fairly urgent. At that date and time the Respondent assessed the level of the funds available and it was deemed that the Respondent held sufficient Development funds.

5.60. In response to a question from the chair about the Respondent's intention in relation to phase 2 of the works, Ms Blair stated that it had been the intention to collect funds to have phase 2 instructed in summer 2020. At the proposed point of instruction the Respondent did not have the funds available at that time. The Respondent's problem now is that today's float could be a different picture. The Respondent cannot look at a particular point in time and advise the balance. There are insufficient funds to commit to instruct the works today. The Respondent has to pay electricity and other services and regular maintenance. If more money is obtained that would have to go into the float. The reason the Respondent asks for funds in advance is so that funds are allocated to an individual job. The Respondent has written the homeowners on various occasions for funds to be made available for this project. When the Respondent receives those funds they will be ring fenced and accounted for separately purely for the painting works. The Respondent has received roughly 20 per cent of the funds. They are sitting in a ring-fenced account.

5.61. Ms Blair stated that the Respondent has increased the float previously. At the moment it is currently sufficient to deal with ongoing items of expenditure. It is unlikely to cover all eventualities. It may not be enough to cover one off roof works or steelworks painting. For non-recurring items the

Respondent asks for funds in advance. At the time of the previous increase in the float amount, the Respondent recommended to the homeowners that they considered it appropriate to increase the float amount.

5.62. The float is paid once when homeowners take entry to the property. In relation to ongoing factoring charges, which are billed quarterly in arrears, the Applicant has chosen to pay monthly by direct debit. The purpose is to pay a set sum every month. That does not mean that other homeowners have chosen to do that. Some pay on receipt of the quarterly invoice. When the Respondent is reviewing direct debits, it looks at charges for the individual and assesses whether the individual is paying enough. When the quarterly invoices are issued, the Respondent uses the money collected by direct debit to meet them. The relevant amount to consider is the quarterly invoices and not the amount a homeowner pays by direct debit. There are 153 homeowners and they may choose to pay quarterly in arrears or they may pay by direct debit. It is irrelevant to the overall sufficiency of funds for one off repairs whether homeowners choose to pay one way or the other. Mrs Taylor chooses to make contributions on a monthly basis.

5.63. Ms Blair stated that in relation to the alleged breach of property factor's duties arising from section 4.14 from WSS: "If one or more homeowner ….". She stated that they have asked for advance funds to enable them to progress repairs. They have 20 per cent of funds. The Respondent does not have sufficient funds to allow phase 2 to progress so the Respondent cannot deliver its services in relation to section 3 as referred to by the Applicant.

5.64. Ms Blair adopted what is said in her written submissions in relation to the alleged breaches of property factor's duties.

5.65. Ms Blair produced additional documents as noted above (PF Doc 5/1 and 5/2), an email with information about funds in the Development; and a screen shot showing the ring-fenced funds for the car park steelworks painting project phase 2; and

5.66. 5/1 shows that the total float balance as at 4 November 2020 is £46,200. The total arrears are £9540.87. Total contractor invoices paid to date for the current quarter is £21,813.07 and total common charges outstanding for the current quarter is £11,253.74. Ms Blair advised that the running balance is £3592.32. This is a snapshot as at today's date. She is unable to provide a snapshot from July/August when the phase 2 works were proposed to be instructed, funds permitting.

5.67. 5/2 shows the funds requested for the car park steelwork as £7150.00 and the funds achieved as £2009.42. They have achieved 28/1%. These are ring fenced funds.

5.68. In response to a question from the ordinary member, Ms Blair stated that there are no annual meetings at the moment. As far as she is aware there has never been a request to do that. The Property Factor suggested some years ago to form some kind of steering group. It was not set up by the homeowners. There are no regular meetings. There is not even a management committee.

5.69. In response to a question from the ordinary member, Ms Blair stated that no homeowner – including the Applicant - has asked for the float to be increased.

5.70. In response to a question from the ordinary member about what the practice is where homeowners do not do maintenance and then it becomes a repair, Ms Blair stated that they take it on a case by case basis. The Respondent looks at the circumstances and the funding involved. The Respondent cannot push it through if one, or both, of authority or funding are absent.

5.71. The ordinary member asked whether the Respondent feels that it should be proactive to increase the float, as presumably if the steelwork is not protected it could become quite serious in terms of a repair and/or a health and safety issue. Ms Blair stated that it would be considered if it comes to that and agreement would be sought from the homeowners to increase the float. The Respondent would need to inform homeowners. An increase would then have to be included in a common charges account. That is likely to cause significant backlash but she believes that the deed of conditions allows it. She stated that it might suit this current situation by increasing the float by an extra £50 but is that something the Respondent has to do on an annual basis. She does not believe that that is the purpose of the float. Any increase would be requested from both existing owners and any new owners. It would be invoiced through the next quarterly invoice.

5.72. In response to Mr Taylor's suggestion that the Respondent could take out a loan and add interest, Ms Blair stated that it is not the Respondent's legal position to do so.

5.73. The Property Factor is still hopeful that the phase 2 car park steel work will happen. If the Respondent does not receive funding from the homeowners the only real opportunity would come from an increase in the

float. It is something that the Respondent would need to consider if it is appropriate.

5.74. In response to a question from the Chair, Ms Blair stated that she would suggest that the maintenance on the steelwork is carried out every five years. She does not believe that it has ever been painted. Ms Blair stated that in time, it may be crossing from maintenance into repair.

5.75. In response to a question from the chair, Ms Blair stated that if Mr Taylor wanted to put a proposal to the other owners to collect the balance of the funds to have works carried out, the Respondent would disseminate the proposal to the other owners.

5.76. The ordinary member asked Ms Blair whether it was intended that a more proactive tone would be used in the letters, stating that it should be dealt with sooner rather than later or will become much more expensive. Ms Blair responded that ultimately the homeowners need to take responsibility for their maintenance obligations and that ultimately the Respondent's hands are tied without funds. She does not know what the float position will be in four months. There may be sufficient in four months. If there are funds available to undertake these works then the Respondent will instruct it, whether or not it is an emergency. The Respondent can continue to request funds from homeowners. It is the Respondent's intention to ask for the homeowners' support and funding. Ms Blair intends to send a letter to owners.

5.77. Ms Blair stated that at the moment there is no insured event in order to deal with this as an insurance matter.

5.78. Ms Blair stated that at the moment all she can say is that she will send one or more letters to the homeowners. She does not want this from a practical point of view to continue for any significant length of time. She would like it dealt with as well.

**Applicant's Representative's Response**

5.79. Mr Taylor indicated that he appreciated that in order to instruct the phase 2 car park steel work, it requires funding and that the amounts are significant compared to what is available in the current float fund. Mr Taylor stated that he appreciates that the Respondent is in a difficult position.

5.80. Mr Taylor stated that he does not want to be become involved in a management committee at the Development.

## 6. Discussion

6.1. The tribunal made findings in fact and findings in fact and law on the basis of the evidence, having heard both parties' submissions.

### 6.2. Section 6.1 of the Code of Conduct

6.3. Section 6.1 provides: **"You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required."**

6.4. The Applicant's Representative withdrew the first part of this complaint during the hearing, as above. In relation to the complaint that the Respondent has failed to inform homeowners of the progress of the work, including estimated timescales for completion, the tribunal found that no work has been instructed due to insufficient funding being put in place by homeowners. Therefore section 6.1 is not engaged and there is no requirement on the Respondent to inform proprietors of the progress of work which has not yet been instructed.

6.5. **Having considered the evidence and submissions and made findings in fact and findings in fact and law, the tribunal determined that the Property Factor has not failed to comply with Section 6.1 of the Code of Conduct.**

6.6. The tribunal observes that, as a matter of fact, there have been six letters from the Respondent to homeowners letting homeowners know that funding is required to instruct the works and that these have resulted in only 28.1% of homeowners committing funds to the project.

### 6.7. Section 6.9 of the Code of Conduct

**6.8.** Section 6.9 of the Code of Conduct provides: ***"You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor."***

6.9. The tribunal did not accept the Applicant's Representative's submission that Bellway, the original developer of the Development, was a "contractor or supplier", nor had they provided any "work or service", within the meaning of

Section 6.9. Bellway was not instructed by the Respondent to provide any work or service. The 10 year guarantee has expired in around 2014. The Respondent had no contract with Bellway. As a result, the tribunal formed the view that there was no requirement on the Respondent to pursue Bellway in respect of any alleged defects.

6.10. In any event, there was no evidence led by the Applicant that there was any defect in any work or service; nor any defect in the car park steelwork. The proposed works are routine maintenance comprising scraping and re-painting. No maintenance of this type has been carried out since the Development was completed.

**6.11. Having considered parties' evidence and submissions, the tribunal determined that the Respondent has not failed to comply with Section 6.9 of the Code of Conduct.**

## 7. Property Factor's Duties

7.1. The tribunal attempted to separate out the Applicant's complaints with reference to the alleged duties, before considering the alleged breaches of said duties.

**7.2. (i) WSS 3.2 Core Factoring Services, two points: arranging and administering maintenance of common property and enforcing debt recovery procedures for unpaid common charges accounts**

7.3. The Applicant complained that two aspects of the Core Services were not being provided: arranging and administering maintenance of common property by appointing contractors and service suppliers; and enforcing debt recovery procedures for unpaid common charges accounts including the instruction of legal action.

7.4. The tribunal did not accept the Applicant's Representative submission that the Core Services give rise to an absolute duty with no reference to funding or the remainder of the terms of the WSS. The Respondent cannot proceed to instruct one-off maintenance works of this type unless there is funding in place. Clause 4.14 clearly outlines the consequences of one or more homeowner failing to pay float or common charges invoiced to them, including an inability of the Property Factor to provide the Core Services.

7.5. The tribunal accepted Ms Blair's evidence that the Respondent is enforcing debt recovery now that courts have re-opened following Covid-19 restrictions. In any event, the arrears balance of £9,000 does not seem particularly high

for 153 flats, particularly as there may have been a pause or difficulty amongst some homeowners as a result of the financial impact of Covid-19 in 2020.

**7.6. The tribunal determined that the Property Factor had a duty arising from the WSS 3.2 to provide Core Services; but that said duty was subject to Clause 4.14, namely sufficient funds from homeowners; and that the Property Factor had not failed to comply with the duty in Clause 3.2.**

**7.7. (ii) WSS, Clause 4.6 "The Property float is reviewed from time to time to ensure availability of funds to meet common works and services costs… The float is held in an account, separate from HMPS funds";**

7.8. The float was originally £200 per property and was increased to £300 per property in 2018. There is no positive duty on the Respondent to review the float at particular intervals.

7.9. The float is held in a client account separate from the Respondent's business account.

7.10. The tribunal observed that it has been three years since the Respondent started the process of writing to homeowners about the car park steel work and it has been two years since the float was increased to £300. The Respondent instructed Phase 1 of the works as funds permitted them to do so. The Respondent intends to write again to owners in more proactive terms to ingather the funds required to instruct phase 2. It is observed that if that is unsuccessful, it would be open to the Respondent to review the float and the Respondent recognised during the course of the hearing that this may become necessary if they cannot in-gather sufficient funds after writing again to homeowners.

7.11. The tribunal observed that while the proposed phase 2 works are maintenance works, the issue could develop into a repair and/or health and safety issue if the maintenance works are not carried out. The tribunal observed that the six letters which had been referred to during the course of the hearing were fairly passive. The original letter was sent three years ago. The most recent letter was in July 2020 and could have been more proactive and inform the homeowners of the potential repercussions if they do not commit funds to allow the maintenance works to be instructed.

**7.12. The tribunal determined that the Respondent does not have a positive duty to review the float at any particular time intervals and that**

**the Property Factor had not failed to comply with the duty to review the float from time to time.**

**7.13. The tribunal determined that the Respondent has complied with the duty to hold the float in a separate account from the Respondent's business account.**

**7.14. (iii) Deed of conditions ("DOC"), Clause Ninth – increase in float amount**

7.15. Clause Ninth makes provision for various matters in connection with the appointment of a property manager for the Development for "the administration of dealing with the upholding and maintenance, repair and re-erection and restoration of all common parts"; including the payment by proprietors of a float of £200 per property, which sum may be increased by the property factor to such sum as they may reasonably request.

7.16. This float sum was increased to £300 per property in or about 2018 following review by the Respondent.

7.17. Despite the increase there remains insufficient funds at present in the operational float account to instruct phase 2 of the car park steel work.

7.18. The funding requested from owners in order to allow the instruction of the works has resulted in only 28.1 per cent of the required amount being collected by the Respondent and is inadequate to meet the costs of the maintenance works. The Applicant is one of the 28.1 per cent of homeowners who have paid a contribution towards the funding for the maintenance works.

7.19. On the evidence, the Applicant is the only homeowner who has raised this issue of the delay in the instruction of phase 2 car park steel work maintenance. The tribunal understands the frustration of the Applicant that the maintenance works require to be carried and have not been instructed by the Respondent due to a lack of funding from homeowners. The tribunal also understands why the Applicant had looked at the Respondent to resolve matters but ultimately if the homeowners do not assume the responsibility of paying and looking after their common property, they cannot then criticise the factor for not instructing maintenance works or repairs.

7.20. The Applicant's case under this provision in the Deed of Conditions appeared to be that the Respondent could reasonably request an increase in the float amount from existing and new proprietors. There is no obligation on the Respondent to increase the float. The Respondent explained to the

satisfaction of the tribunal that the preference was to request and collect funds from homeowners to be ring-fenced for this one-off maintenance work, rather than to increase the general operational float.

**7.21. The tribunal determined that there is no positive duty on the Property Factor arising from Clause Ninth to increase the float amount and that the Property Factor had therefore not failed to comply with any duty.**

## 8. Property Factor Enforcement Order

8.1. Because the tribunal determined that there had not been a breach of the Code of Conduct Sections 6.1 and 6.9 or of the specified Property Factor's duties, the tribunal did not make a Property Factor Enforcement Order.

## 9. Appeals

**9.1. 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.**

Ms Susanne L M Tanner QC
Legal Member
15 December 2020