Housing and Property Chamber
First-tier Tribunal for Scotland

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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules").

Reference number: FTS/HPC/PF/20/1377

Re: Property at Flat 1/9, 240, Wallace Street, Glasgow, G5 8AS ("the Property")

The Parties:
Dr. Mohsan Mallick having an address at 25, Ettrick Drive, Glasgow G61 4RB ("the Homeowner") per his representative, Mr Farid Mallick, residing at 25, Ettrick Drive, Glasgow G61 4RB ("the Homeowner's Representative")

MXM Property Solutions Limited care of TLT LLP, solicitors, 140 West George Street, Glasgow, G2 2HG ("the Property Factor")

Tribunal Members

Karen Moore (Chairperson)

Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Property Factor: -

(1) has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct ("the Code") at Section 2 and Sections 2.1, 2.2 and 2.5; Section 3 and Section 3.3;

(2) has failed to comply with the Section 17 duty in terms of the Act ("the Property Factors' Duties") and

(3) has not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Code at Sections 4.3 ,7.1,7.2 and 7.4

Background

1. By application received between 15 June 2020 and 15 September 2020 ("the Application") the Homeowner's Representative on behalf of the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Factor had failed to comply with the Code of Conduct for Property Factors ("the Code") and had failed to comply with the Property Factor Duties.

2. The Application comprised the following documents: -application form dated 25 May 2020 comprising the First-tier Tribunal standard application form with supplementary annotated extracts from the Code indicating that the parts of the Code complained of are Sections 2 , Sections 2.1, 2.2 and 2.5, Section 3and 3.3 and Sections 7.1,7.2 and 7.4; copy correspondence between the Homeowner; the Homeowner's Representative and the Property Factor; prints of photographs of the Property; copy invoices issued by the Property Factor; a copy of the Property Factor's Written Statement of Service and, with reference to the complaint of breach of Property Factor Duties, a copy of pages 1, 17- 22 and 28, of that Written Statement of Service.

3. On 8 October 2020, a legal member of the Chamber with delegated powers of the Chamber President accepted the Application and a Hearing was fixed for 4 December 2020 at 10.00 by telephone conference call.

4. In response to the Application, the Property Factor lodged written representations and productions in support of the written representations comprising:- copy correspondence between the Homeowner, the Homeowner's Representative and the Factor; invoices from TLT LLP, solicitors to the Property Factor; copy correspondence with the Homeowner's conveyancing solicitors relating to the sale of the Property and to the statutory Notices of Potential Liability ("the NOPLs"); copy correspondence and documents relating to a Sheriff Court action; copy Deed of Conditions relating to the Property and copy Decision FTS/HPC/PF/17/0229 issued on 19 February 2019.

Initial Hearing

5. A Hearing took place on 4 December 2020 at 10.00 by telephone conference call. The Homeowner did not take part and was represented by the Homeowner's Representative. Mr Mark Allan of the Property Factor took part.

6. The Tribunal noted that the Homeowner's complaint had similarities to the matters dealt with in the copy Decision FTS/HPC/PF/17/0229 issued on 19 February 2019 as lodged by the Property Factor. The Tribunal was mindful of Rule 8 of the Rules which states that the Tribunal must reject an application if it is identical or substantially similar to an application already determined.

Accordingly, the Tribunal was bound to enquire if the Application was identical or substantially similar to the application dealt with by Decision FTS/HPC/PF/17/0229. The Tribunal asked the Homeowner's Representative to comment on the difference between the Application and Decision FTS/HPC/PF/17/0229. It became apparent to the Tribunal that the Homeowner's Representative might not have received a copy of the Decision FTS/HPC/PF/17/0229. It also became apparent to the Tribunal that the Tribunal might not have received all of the productions as lodged by the Property Factor.

7. Therefore, the Tribunal continued the Hearing to a later date and issued the following Direction: -

"With reference to the copy of Decision FTS/HPC/PF/17/0229 issued on 19 February 2019 ("the 2019 Decision") lodged by the Respondents and copied to the Applicant's Representative, the Parties are Directed as follows:

1. *Mr Farid Mallick, the Applicant's Representative, is directed to lodge a written note to explain in what way the Application FTS/HPC/PF/20/1377 ("the Application") differs from the application which was determined by the 2019 Decision. The written note should address the following points: -*

i) The Application alleges that MXM Property Solutions Limited breached the Code of conduct for Property Factors ("the Code") at paragraph 2.5 which states:

"2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement"

This breach of the Code is dealt with in the 2019 Decision. The written note should set out which enquiries and complaints were not responded to within the timescales set out in MXM Property Solutions Limited's written statement of service and in what way these differ from the breach dealt with in the 2019 Decision.

The Application alleges that MXM Property Solutions Limited breached the Code of conduct for Property Factors ("the Code") at paragraph 3.3 which states:

"3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance."

This breach of the Code is dealt with in the 2019 Decision. The written note should set out how and when MXM Property Solutions Limited failed to provide this information and should set out how this differs from the breach dealt with in the 2019 Decision.

The Application alleges that MXM Property Solutions Limited breached the Code of conduct for Property Factors ("the Code") at paragraphs 7.1, 7.2 and 7.4 which state:

"7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.

7.4 You must retain (in either electronic or paper form) all correspondence relating to a homeowner's complaint for three years as this information may be required by the homeowner housing panel".

Breaches of all of Part 7 of the Code, including these sub-paragraphs, are dealt with in the 2019 Decision. The written note should set out how and when MXM Property Solutions Limited failed to comply with each of these sub-paragraphs of Part 7 of the Code and should set out how these differ from the breaches dealt with in the 2019 Decision.

The Application alleges that MXM Property Solutions Limited failed to comply with their Property Factor Duties. This failure is also dealt with in the 2019 Decision.

The written note should set out what the failure of the Property Factor Duties is and how and when MXM Property Solutions Limited failed to comply with these Property Factor Duties. The written note should set out how these differ from the complaint dealt with in the 2019 Decision.

2. *With regard to the Respondent's reply to the Tribunal's Direction dated 25 November 2020 which requested that the Respondent submit certain documents, the Respondent is Directed to :-*

    i) *Resubmit Section 4 as that part of the Respondent's submission appears not to have been received in full by the Tribunal and*
    ii) *With reference to the TLT invoices submitted, provide a narrative of the legal work carried out by TLT.*

The said documentation should be lodged in hard copy or by email attachment with the Chamber and copied to the other Party no later than close of business on <u>FRIDAY 8 JANUARY 2021.</u>

A copy of the 2019 Decision is annexed for ease of reference."

8. A further Hearing was fixed for 29 January 2021 at 10.00 by telephone conference call.

9. By email dated 7 January 2021, the Homeowner responded to the Direction with written representations explaining the differences between the Application and Decision FTS/HPC/PF/17/0229. In that email, the Homeowner made reference to Sections of the Code not included in the Application and not referred to in the letters sent by the Homeowner's Representative to the Property Factor giving notice of the complaint. Therefore, the Tribunal's view was that, unless these Sections of the Code can be shown to be part of the initial Application, the Tribunal was unable to consider these references as part of the proceedings.

10. By letter dated 23 December 2020 and received on 13 January 2021 and by email dated 28 January 2021, the Homeowner's Representative made further written representations. The written representations explained that the Application related to the NOPLs and legal fees neither of which was dealt with in Decision FTS/HPC/PF/17/0229.

11. By email received by the Tribunal on 12 January 2021, the Property Factor responded to the Direction and re-submitted Section 4 of the productions previously lodged.

Continued Hearing

12. The continued Hearing took place on 29 January 2021 at 10.00 by telephone conference call. The Homeowner did not take part and was represented by the Homeowner's Representative. Mr Mark Allan of the Property Factor took part.

13. The Tribunal advised the Parties that it was satisfied that the Application is not identical or substantially similar to Decision FTS/HPC/PF/17/0229 and so, as Rule 8 of the Rules does not apply, the Tribunal is able to continue with the Application.

14. Before proceeding further, the Tribunal asked Mr. Allan to confirm that he had received the Homeowner's and the Homeowner's Representative's responses to the Direction. Mr. Allan stated that he had not received either of these. The Tribunal adjourned the Hearing briefly to make enquiries with the Chamber administration. Although it appeared that the Homeowner and the Homeowner's Representative's responses to the Direction had been emailed to the Property Factor by the Chamber administration, the Tribunal accepted that these had not been received. The Tribunal arranged for the responses to be emailed directly to Mr. Allan and advised the Parties that it would continue the Hearing further to allow Mr. Allan time to review and consider the responses.

15. The Tribunal, having drawn the Parties attention to Rule 2 of the Rules at the outset, and in particular to Rules 2(b) which obliges the Tribunal to conduct proceedings with informality and flexibility, advised the Parties that it proposed to ask Mr. Allan to clarify factual points arising from the productions lodged on behalf of the Property Factor. The Tribunal advised the Parties that, in addition to continuing the Hearing to a future date, it would make a Direction requesting

further submissions and documents to assist the conduct and progress of the Application.

16. The Tribunal, having regard to the factual position as set in both the Application and the Property Factor's written response to the Application, noted that the Homeowner's complaint centred on the Property Factor's use of the NOPLs to recover costs due to the Property Factor, some of which costs arose from a court action. The Tribunal asked Mr. Allan to explain the reason for the court action which appeared to have been settled in 2016. Mr. Allan explained that this had been a debt action to recover unpaid common charges and that the matter was settled on the basis that an agreement was reached. Mr. Allan referred the Tribunal to a letter from TLT LLP, solicitors, as agents for the Property Factor, to Hughes Dowdalls, solicitors, conveyancing solicitors for the Homeowner, dated 28 March 2018 for the detail of this. He advised that an email from Lucy Harrington of TLT LLP, solicitors, dated May 2015 sets out the agreement between the Parties and details a breakdown of the costs.

17. The Tribunal asked Mr. Allan to confirm if there had been one or two NOPLs registered against the Property and the reason for the NOPLs. Mr. Allan confirmed that there had been two NOPLs and that these were for outstanding common charges and outstanding legal expenses. The Tribunal gave notice to Mr. Allan that, in its opinion, statutory Notices of Potential Liability are for common works and maintenance and not for other expenses.

18. The Tribunal referred Mr. Allan to the Direction and asked if he had lodged the narrative of the legal work carried out by TLT solicitors. Mr. Allan advised that he had lodged the narrative recently, explaining that he had been unable to access his office records due to the current Covid-19 restrictions. Unfortunately, the narrative has not been made available to the Tribunal and the Tribunal could not be certain if it had been received by the Chamber administration.

19. The Tribunal asked Mr. Allan to explain the status of the Kingston Quay Owners referred to in the Property Factor's productions. Mr. Allan explained that the Kingston Quay Owners are not a legal entity but is the name given to the owners of the Kingston Quay Owners Development by the Property Factor in its accounting records.

i) The Tribunal continued the Hearing further to 10 March 2021 at 10.00 by telephone conference call and issued the following Direction:-

"With reference to the oral enquiries made by the Tribunal of the Factor at the Hearing proceedings on 29 January 2021, <u>the Tribunal directs the Factor</u>: -
To provide or extract from the productions already lodged and resubmit as separate productions, the correspondence and documents relevant to:
The sum sued for in Court Action reference SA633/14;
ii) The name of the Pursuer or Pursuers in that Court Action;
iii) The written agreement reached by the Parties in settlement of that Court Action or if there was no written agreement reached exchanges of correspondence

which show that an agreement was reached;

iv) *The extent of the legal fees which the Homeowner agreed to meet as part of that agreement and*

v) *The payments made by the Homeowner, if any, in implementation of that agreement.*

1. *To provide copies of the two Notices of Potential Liability registered against the Property and the reason for the Notice or Notices;*

2. *With reference to the Notices of Potential Liability registered against the Property, provide or extract from the productions already lodged and resubmit as separate productions, the invoices relevant to those Notices;*

3. *With reference to the Tenements (Scotland) Act 2004, to provide a Note on its power and entitlement to register Notices of Potential Liability for costs which are not "relevant costs" as defined by that Act, and in particular, Sections 8, 10 and 12 of that Act and Schedule 2 to that Act;*

4. *To explain the relationship, if any, between MXM Property Solutions Limited and TLT LLP, solicitors;*

5. *To explain the basis and authority of MXM Property Solutions Limited's appointment of TLT LLP, solicitors, to act in on its behalf in respect of the matters raised by the Homeowner in the Application and to lodge a copy of the terms and conditions relating to that appointment;*

6. *For the sake of completeness, to provide the narrative of the legal work carried out by TLT as required by the Direction dated 10 December 2020;*

7. *With reference to the Kingston Quay Owners referred to in the Factor's productions and on the TLT invoices as lodged by the Factor as part of its productions, to provide copies of correspondence, if any, to the Homeowner explaining to what the phrase "Kingston Quay Owners" refers;*

8. *With reference to the written representations lodged by and on behalf of the Homeowner on 7 and 13 January 2021 and emailed to Mr. Allan of the Factor on 29 January 2021, the Tribunal directs the Factor to provide a written response to the points raised by and on behalf of the Homeowner and*

9. *To provide the documents in response to this Direction in one tabbed bundled, consecutively numbered, with a contents page.*

10. *<u>The Tribunal directs both Parties</u> that, at the Hearing fixed for 10 March 2021, it intends to deal, firstly, with the Notices of Potential Liability, and, then, with each of the Homeowner's complaints as set out in the written representations lodged by and on behalf of the Homeowner on 7 and 13 January 2021 in turn and will require the Factor to respond to each complaint in turn in the following order: Sections 2.5, 3.3, 7.1, 7.2 and 7.4 of the Code of Conduct for Property Factors.*

The said documentation should be lodged in hard copy or by email attachment with the Chamber and copied to the other Party no later than close of business on FRIDAY 28 FEBRUARY 2021."

Further continued Hearing on 10 March 2021

20. A further continued Hearing took place on 10 March 2021 at 10.00 by telephone conference call. The Homeowner did not take part and was represented by the Homeowner's Representative. Mr Mark Allan of the Property Factor took part. Prior to the date of this Hearing, Mr. Allan wrote to the Tribunal requesting an adjournment as he had been unable to comply with the Direction dated 29 January 2021 due to a combination of ill health and Covid-19 restrictions. The Tribunal dealt with this as a preliminary matter on 10 March 2021. The Tribunal was satisfied in terms of Rule 28 of the Rules that Mr. Allan's request for an adjournment was reasonable and so adjourned the Hearing to Friday 9 April 2021 at 10.00 am by telephone conference call.

21. The Tribunal advised the Parties that it intended to focus on the competence of the NOPLs and so would deal with this first at the continued Hearing. Mr. Allan helpfully and fairly advised the Tribunal that the NOPLs had been registered in respect of both the Tenements (Scotland) Act 2004 and the Title Conditions (Scotland) Act 2003 and indicated that, in his view, the terms of Clause 9 of the Deed of Conditions relative to the Property at Clauses 9.3, 9.4 and 9.5 permitted use of the NOPLs to recover legal costs.

22. The Tribunal noted that the Homeowner's Representative had lodged a letter on 26 February 2021. For the sake of completeness, the Tribunal advised the Parties that it considered that this letter had been lodged late in terms of the Rules, which at Rule 22, states that documents must be lodged no later than 7 days prior to the Hearing. In this matter the Hearing date was 4 December 2020 and so this letter should have been lodged by 26 November 2020. The Tribunal had not directed the Homeowner to lodge this letter and so the Tribunal advised the Parties that it did not intend to include it as part of the proceedings.

23. The Tribunal further continued the Hearing to Friday 9 April 2021 at 10.00 am by telephone conference call and issued a further Direction amending the time limit for compliance of the Direction as narrated at paragraph 20 above to close of business on Thursday 1 April 2021 and extending statutory references to the NOPLs to the Title Conditions (Scotland) Act 2003.

Further continued Hearing on 9 April 2021

24. A further continued Hearing took place on 9 April 2021 at 10.00 by telephone conference call. The Homeowner did not take part and was represented by the Homeowner's Representative. Mr Mark Allan of the Property Factor took part.

25. Immediately prior to this continued Hearing, it became known to the Tribunal that

the Property Factor had submitted its responses to the last mentioned Direction by submitting documents in a zip file at 17.02, and so shortly after close of business being 16.30, on 1 April 2021. The First-tier Tribunal's Operation Policy as stated on its website is that the Chamber is unable to accept anything that includes a zip file document as it can contain viruses which could disrupt the Chamber's service.

26. The Tribunal considered if it should accept the lodging of the Property Factor's responses as they had been received late and in an unacceptable format. The Tribunal took the view that the late lodging might have been due to the time taken to complete the electronic lodging. The Tribunal also took the view that the First-tier Tribunal's Operation Policy on lodging documents might not have been made fully clear to the Property Factor. The Tribunal had regard to Rules 2 and 3 of the Rules, and, took the view that, on balance, and as there was no apparent prejudice to the Homeowner, it was in the interests of justice to allow the Property Factor's responses to be lodged late.

27. As the zip file could not be opened by the Chamber administration, the commencement of this Hearing was delayed to 11.45 to allow the Tribunal Members to receive and consider pdf versions of the Property Factor's written responses.

28. Before, adjourning to consider the Property Factor's written responses to the last mentioned Direction, the Tribunal reminded the Parties that, as previously advised at the earlier Hearing sessions, it considered the Homeowner's case to be closed in respect of evidence submitted.

29. The Tribunal advised the Parties that it had given consideration to the written evidence, written representations and responses to the Directions submitted by both Parties with regard to the various breaches of the Code and the Property Factor Duties and was of the view that the Homeowner had not established any breaches of Sections 7.1,7.2 and 7.4 of the Code.

30. The Tribunal further advised the Parties that it had noted that the Homeowner, in his written representations of 7 January 2021, had made reference to Sections 2.1, 2.2 ,4.2,4.3,5.1, 5.2,5.9 ,6.1, 6.3 and Section 7 of the Code and advised the Parties that, of these breaches, Sections 4.2,4.3,5.1, 5.2,5.9 ,6.1, 6.3 and Section 7 had not been included in the Application and no prior notice of them had been given to the Property Factor as required by the Act. Therefore. the Tribunal would not consider them, save for Section 4.3 which, from the Application, might be capable of being implied as having been notified.

31. The Tribunal advised that it would, therefore, consider the breaches complained of as set out in the Application, being Sections 2 and Sections 2.1, 2.2 and 2.5, Section 3, Section 3.3 and Section 4.3 of the Code, if Section 4.3 of the Code could be justifiably implied based on the notification given to the Property Factor, and the Property Factor's Duties.

32. The Hearing reconvened, at around 11.45 and it then became known to the Tribunal that the Homeowner's Representative had not had an opportunity to review the Property Factor's responses to the last mentioned Direction. The Tribunal explained to the Homeowner's Representative that the greater part of these documents was correspondence and paperwork between the Parties and that the only new matter appeared to be the Property Factor's written opinion on the status of the NOPLs and offered the Homeowner's Representative a short adjournment until 13.00 or to a later date to review these documents. The Homeowner's Representative advised the Tribunal that he was content to proceed without an adjournment.

33. Having had the benefit of both Parties' written representations and having intimated to the Parties at the earlier Hearing sessions and in the Directions of 29 January 2021 and 10 March 2021 that it intended to deal, firstly, with the NOPLs, and, then, with each of the Homeowner's complaints, the Tribunal, therefore, dealt with the NOPLs first.

NOPLs

34. As intimated to the Parties previously, the Tribunal's opinion is that the purpose of statutory Notices of Potential Liability are to give notice of common works and maintenance and not for other expenses such as common charges and legal costs.

35. Therefore, the Tribunal had directed the Property Factor to address the competence of the NOPLs in writing which the Property Factor did in its response to the Directions of 29 January 2021 and 10 March 2021. The Property Factor set out its argument and also set out its interpretation of the relevant legislation, being the Title Conditions (Scotland) Act 2003 ("the 2003 Act") and the Tenements (Scotland) Act 2004 ("the 2004 Act") in Document 16 ("Document 16") of the responses lodged by it on 1 April 2021.

36. In Document 16, the Property Factor argues that the work of a property manager can be construed as "maintenance and work" and that unpaid factoring charges and legal costs can be construed as "relevant costs" for the purposes of the 2004 Act, and, can be construed as a "relevant obligation" for the purposes of the 2003 Act. The Property Factor's position, therefore, is that the Property Factor was entitled to register the NOPLs against the Homeowner's title to the Property.

37. The Tribunal advised the Property Factor that it disagreed with this interpretation and that, in its opinion, a Notice of Potential Liability must relate directly to maintenance and works to common property. The Tribunal referred the Property Factor to Section 11(1) of the 2004 Act which defines "relevant costs" as costs arising from a scheme decision and advised the Property Factor that its view is that factoring and legal costs incurred by a factor do not arise from a scheme decision. Similarly, with reference to Notices of Potential Liability, the 2003 Act at Section 10(2A) refers to "maintenance and works" arising from a "relevant obligation", being an affirmative obligation to maintain common property. The Tribunal's view is that factoring and legal costs arise from an ancillary burden, not

an affirmative burden. Therefore, the Tribunal's view is that it is not competent to use a Notice of Potential Liability to give notice of costs other than those directly relating to maintenance and works to common property.

38. Mr. Allan of the Property Factor requested an adjournment of the Hearing to a later date to take legal advice. The Tribunal adjourned to consider this request. The Tribunal took the view that, as it had intimated to the Parties on several occasions that the NOPLs would be an issue and as it had advised the Property Factor of its likely views on the competence of the NOPLs, the Property Factor, as a commercial organisation with access to solicitors and legal advice as stated in its Written Statement of Services, had had sufficient opportunity to take legal advice. The Tribunal, therefore, refused the Property Factor's request to adjourn further.

39. The Tribunal reminded the Parties that its view on the NOPLs was only part of its decision making process and that, regardless of that view, the Tribunal required to consider how it impacted on the Homeowner's complaint.

40. The Tribunal advised that it would set out its reasoning and decision making on these points in full in its Decision and does so later in this Decision under heading "Competence of the NOPLs"

Homeowner's Position

41. The Tribunal asked the Homeowner's Representative if he had anything further to add to the matters set out in the Application and the various written representations and responses to the Directions. The Homeowner's Representative advised the Tribunal that the case had been set out in full in the Application and written representations. He reiterated that he and the Homeowner had sought detail of the invoices but none had been forthcoming. He advised the Tribunal that, in spite of paying the sum agreed with the Property Factor to settle the court action raised by the Property Factor, and, although the court action had been dismissed with no costs to be paid by either Party, the Property Factor had sought payment of these court costs and had instructed solicitors to register the NOPLs in 2018 at the time when the Homeowner was selling the Property.

42. The Homeowner's Representative advised the Tribunal that there were falsehoods in the addresses given by the Property Factor as he had not been able to locate the Property Factor at the Dalsetter Avenue address and that there were contradictions in paragraphs 3.2.1 and 3.4 of the Property Factor's Written Statement of Services relating to the Property Factor's accounts.

Property Factor's Position

43. The Tribunal asked Mr. Allan if he had anything further to add in addition to the matters set out in the Property Factor's response to the Application and the various written representations and responses to the Directions. Mr. Allan advised the Tribunal that the Property Factor's position was set out in the written representations and responses to the Directions and that the issue with the

Homeowner could have been avoided if the Homeowner had not ignored correspondence from the Property Factor.

44. With regard to the NOPLs, Mr. Allan agreed that these were for unpaid factoring charges and the legal costs of the court action which is referred to in the Application and also in the Homeowner's and the Homeowner's Representative's written submissions. In answer to questions from the Tribunal, Mr. Allan agreed that the Homeowner's Representative's written submission of 13 January 2021 was correct in stating that the court action was Case Number SA633/14 at Dumbarton Sheriff Court and that the court action had been dismissed on 4 February 2016 on joint motion of the Parties on the basis of no expenses due to or by either party. Mr. Allan agreed, that, notwithstanding that the court action was dismissed on the basis of no expenses due to or by either party, the Property Factor had sought payment of its legal costs from the Homeowner and had included these in the NOPLs. He stated that the extent of the legal costs was £7,723.36 and that the whole sum sought in terms of the NOPLs was £9,896.13 He confirmed that this had been paid to the Property Factor by the Homeowner to discharge the NOPLs and confirmed that the funds had been used by the Property Factor's to pay its solicitors, TLT LLP.

45. With regard to pursuing the Homeowner for the legal costs of the court action notwithstanding that the Parties had agreed to dismiss it on the basis of no expenses due to or by either party, Mr. Allan explained that it was his understanding that the "expenses" only related to "judicial expenses" which he understood to be the court fees of around £66.00. He explained that this understanding was based on a written agreement reached between the Parties during the court action, a copy of which written agreement was lodged by both Parties. He pointed out that that the written agreement stated that "no interest, judicial expense or late payment fees" would be paid by the Homeowner and that he understood that the Homeowner would still be liable for legal costs in terms of the Deed of Conditions. Mr. Allan stressed that the copy correspondence between the Property Factor's solicitors and the Homeowner as submitted by him reserved his right to recover legal costs due in terms of the Deed of Conditions. However, he accepted that there had been a joint application by both Parties to dismiss the court action on the basis of no expenses due to or by either party, that the Property Factor had not asked the court to grant an order for expenses against the Homeowner and that the order granted by the court was for no expenses due by either party

46. With regard to the Homeowner's Representative's allegations of falsehoods, Mr. Allan advised the Tribunal that the Property Factor has an address at the Business Unit at Dalsetter Avenue. With regard to the contradictions in paragraphs 3.2.1 and 3.4 of the Property Factor's Written Statement of Services, Mr. Allan explained that the Homeowner's Representative had misunderstood the reference to "assets" and "bank accounts" and that the Property Factor's financial governance as agents for homeowners was more robust and transparent than was required.

47. With regard to the breaches of the Code complained of in the Application, Mr. Allan advised the Tribunal that the Property Factor refuted these.

48. With reference to Section 2.1 of the Code: *You must not provide information which is misleading or false,* Mr. Allan stated that all the information given by the Property Factor to the Homeowner was factually correct and had not been misleading.

49. With reference to Section 2.2 of the Code: *You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).* Mr. Allan's position was that any threats were legitimate correspondence in accordance with debt recovery actions.

50. With reference to Section 2.5 of the Code: *You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement*. Mr. Allan's position was that the correspondence lodged by the Property Factor shows compliance with this part of the Code.

51. With reference to Section 3 and Section at 3.3 of the Code: W*hile transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved and You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance*. Mr. Allan's position was that the correspondence lodged by the Property Factor shows compliance with this part of the Code and that all information requested by the Homeowner had been supplied with clear breakdowns.

52. With reference to Section 4.3 of the Code: *Any charges that you impose relating to late payment must not be unreasonable or excessive.* Mr. Allan stated that the previous tribunal Decision FTS/HPC/PF/17/0229 had held that the Property Factor's charges were reasonable, that there had been no overcharging and stated that this was his view in respect of this part of the Homeowner's complaint.

53. With reference to Property Factor's Duties, Mr. Allan advised the Tribunal that the Property Factor always acted in the best interests of the collective owners and acted in ways to protect the development of which the Property forms part ("the

Development"). He stated that all costs collected were collected on behalf on the Kingston Quay Owners and paid into their fund, with the Property Factor not benefitting in anyway. He stated that the Property Factor continued to act in the best interests of the Development, even though there have been continual problems with the Development and payment of accounts.

54. Mr. Allan maintained the Property Factor's entitlement to pursue the cost of the court action in terms of the Deed of Conditions as this had been agreed by the Homeowner as part of the settlement of the court action and maintained the Property Factor's entitlement to register the NOPLs for factoring charges and the legal costs.

Findings in Fact

55. The Tribunal had regard to the Application, all of the written submission, written representations and documents lodged by both Parties and to the oral submissions and statements made at the series of Hearings, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.

56. The Tribunal found the following facts established:

i) The Parties are as set out in the Application;
ii) The Development is governed by a Deed of Conditions by Barratt Homes Limited registered against the Property on 1 April 2004 ("the Deed of Conditions");
iii) The Homeowner had accrued arrears and debts of common charges and factoring charges;
iv) The Property Factor sued the Homeowner for these arrears and debts in Dumbarton Sheriff Court under Case Number SA633/14 ("the court action");
v) The Parties reached agreement to settle the sum sued for in the court action;
vi) The agreement was set out in writing and stated that the Homeowner would not be liable for, amongst other things, "judicial expenses";
vii) The Homeowner settled the sum sued for in the court action;
viii) That court action was dismissed on 4 February 2016 on joint motion of the Parties on the basis of no expenses due to or by either party;
ix) Notwithstanding the joint application to dismiss the court action on that basis, the Property Factor had sought payment of its legal costs from the Homeowner for pursuing the court action;
x) The Property Factor instructed its solicitors, TLT LLP, to register the NOPLs against the Property;
xi) The NOPLs were for factoring charges and the legal costs of the court action;
xii) An NOPL was registered under each of the 2003 Act and the 2004 Act;
xiii) The NOPLs were registered on 21 March 2018 when the Property Factor became aware that the Homeowner was selling the Property;
xiv) The Homeowner required the NOPLs to be discharged to allow his sale of the Property to proceed
xv) The Property Factor used the NOPLs as a means of securing payment of factoring charges and the legal costs of the court action by refusing to

discharge the NOPLs until payment of these sums was made;

xvi) The Homeowner paid the sum of £9869.13 as requested by the Property Factor to discharge the NOPLs albeit that he did not accept liability for this sum;

xvii) The Property Factor discharged the NOPLs on payment of the factoring charges and the legal costs of the court action;

xviii) The Property Factor issued regular invoices and statements to the Homeowner and reissued these when requested by the Homeowner's conveyancing solicitors;

xix) With the exception of the invoices for the court action legal costs, the invoices and statements provided detail and breakdowns;

xx) The Homeowner's Representative corresponded with the Property Factor by email on 24 August 2018, on 7 and 9 September 2018 and wrote to the Property Factor on 18 January 2019 and on 26 July 2019 regarding the subject of the Application;

xxi) The Homeowner's Representative corresponded with the Property Factor's solicitors by email on 2 and 6 September 2018 regarding the subject of the Application;

xxii) In the Homeowner and the Homeowner's Representative's said correspondence, they requested detail of the legal costs of the court action;

xxiii) Neither the Property Factor nor its solicitors provided this detail;

xxiv) The Property Factor responded to the Homeowner's Representative by email on 7 September 2018 indicating that the information requested had been provided to the Homeowner on 25 July 2018 and 3 August 2018 explaining that there was no further information which could be provided;

xxv) The Property Factor levied a charge of £14.40 for late payment of invoices as set out in its Written Statement of Services;

xxvi) The Property Factor issued credits for some of the late payment charges;

xxvii) The Development carries debt due to the Property Factor;

xxviii) The Homeowner notified complaints to the Property Factor in respect of the condition of the Development;

xxix) The Property Factor was reluctant to incur expense in attending to these complaints but continued to as property manager;

Issues for Tribunal

57. The issues for the Tribunal are: (i) has the Property Factor breached those parts of the Code as complained of in the Application and not already determined by it and (i) has the Property Factor failed to comply with its general Property Factor Duties.

58. Core to these issues is the competence of the NOPLs and the Property Factor's entitlement to seek payment of its legal expenses for the court action in circumstances where there was a joint application to dismiss the court action on the basis of no expenses due to or by either party.

59. Therefore, the Tribunal addresses these points first before determining if the Property Factor breached those parts of the Code as complained of in the

Application and if the Property Factor failed to comply with its general Property Factor Duties

Competence of the NOPLs

60. The Property Factor set out its position in respect of the competence of the NOPLs in Document 16 of its written responses to the Directions of 29 January 2021 and 10 March 2021.

61. The Tribunal has two key issues with the Property Factor's argument as set out in Document 16. These are (i) the Property Factor's interpretation of "relevant costs" and "relevant obligations" and (ii) the Property Factor's view of the purpose of the legislation.

62. Document 16 states that both the 2003 Act and the 2004 Act apply to the Property and to the Homeowner in respect of continuing liability for costs. It states that, in terms of Sections 12 and 13 of the 2004 Act and Section 10A of the 2003 Act, a property factor is entitled to register Notices of Potential Liability. The Tribunal takes no issue with these points. It agrees that both the 2003 Act and the 2004 Act apply to the Property, that the Homeowner has or had a continuing liability for certain costs and that a property factor is entitled to register Notices of Potential Liability in respect of certain costs. The Tribunal's issue is in respect of the Property Factor's proper application of Sections 12 and 13 of the 2004 Act and of Sections 10 and 10A of the 2003 Act with regard to the nature of the costs.

63. As the NOPLs relate to two separate pieces of legislation, the 2004 Act and the 2003 Act, the Tribunal sets out its view in respect of each in turn.

2004 Act - Relevant Costs

64. In Document 16, the Property Factor explains that their *"charges comprise their management fees and the outlays (including legal costs) which they have incurred on behalf of the proprietors during the course of discharging their duties as the managers of the development"* and explains that *"the Property Factor's fees are relevant costs in terms of section 11(9), the Homeowner being liable for these in terms of the Deed of Conditions. It is further submitted that the Property Factor's management of the development is "work" for the purposes of s.12(3) and is work carried out for the benefit of the Property and the development as a whole. The Property Factor's management of the development includes taking steps (such as the raising of Court proceedings) to ensure that each proprietor pays the costs for which they are liable in terms of the Deed of Conditions. Further, a significant part of the Property Factor's management of the development is to ensure the effective maintenance of the building and the development as a whole. The Property Factor instructs independent contractors to undertake maintenance work and recovers the cost of this from the proprietors of the development. The proprietors are liable for these costs in terms of the Deed of Conditions. It is therefore submitted that the said Property Factor's charges and legal costs are clearly "relevant costs relating to any maintenance or work (other than local authority work) carried out" in terms of s.12(3) of the 2004 Act."*

65. The Tribunal agrees with the Property Factor that the Development is a tenement.

66. Document 16 goes on to state that, in terms of Section 27 of the 2004 Act, *"management scheme"* includes *"any tenement burdens relating to maintenance, management or improvement of the tenement".* The Tribunal agrees that this is wording taken from Section 27 of the 2004 Act. However, the full wording of Section 27 of the 2004 Act is: "*References in this Act to the management scheme which applies as respects any tenement are references to (a)if the Tenement Management Scheme applies in its entirety as respects the tenement, that Scheme; (b)if the development management scheme applies as respects the tenement, that scheme; or (c)in any other case, any tenement burdens relating to maintenance, management or improvement of the tenement together with any provisions of the Tenement Management Scheme which apply as respects the tenement."*

67. In this matter, the Deed of Conditions, is, in terms of Section 4(2) of the 2004 Act, a development management scheme. Therefore, the Tribunal is of the opinion that the correct reference of Section 27 of the 2004 Act ought to be to the development management scheme. However, this is not a significant point as the effect of Section 27 of the 2004 Act is to assist in defining "relevant costs" by reference to the obligation to maintain common property regardless of how that obligation is constituted.

<u>2004 Act – Relevant sections</u>

68. Document 16 refers to Section 11(9) of the 2004 Act for the definition of "relevant costs". It is the Tribunal's opinion that a wider reading of the 2004 Act is required for the definition and that the relevant parts of the 2004 Act are: Section 11 at 11(1), at 11(5) and at 11(9), Section 4 at 4(1) and at 4(14) and Rule 1 of Schedule 1 at 1.4 and 1.5 as follows:

i) Section 11(1) of the 2004 Act states that "relevant costs" are "*costs (other than accumulating costs) arising from a scheme decision*".

ii) Section 11(5) states that *"An owner is liable for any accumulating relevant costs (such as the cost of an insurance premium) on a daily basis."*

iii) Section 11(9) of the 2004 Act states that "relevant costs" means *"(a) the share of any costs for which the owner is liable by virtue of the management scheme which applies as respects the tenement".*

iv) Section 4(14) of the 2004 Act states that a "scheme decision" has the same meaning as it has in the "Scheme".

v) Section 4(1) of the 2004 Act defines the "Scheme" as Schedule 1 to that Act. Rule 1.4 of Schedule 1 to the 2004 Act states: *"A decision is a "scheme decision" for the purposes of this scheme if it is made in accordance with*

…..the… burdens providing the procedure for the making of decisions by the owners."

vi) Rule 1.5 of Schedule 1 to the 2004 Act defines *"maintenance"* with reference to "scheme" as *"repairs and replacement, the installation of insulation, cleaning, painting and other routine works, gardening, the day to day running of a tenement and the reinstatement of a part (but not most) of the tenement building, but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance*".

69. In addition, Sections 12 and 13 of and Schedule 2 to the 2004 Act cross-reference with the foregoing Sections of the 2004 Act and the relevant wording is as follows:

i) Section 12(3) of the 2004 Act states: *"A new owner shall be liable … for relevant costs relating to any maintenance or work (other than local authority work) carried out before the acquisition date only if (a)notice of the maintenance or work (i)in, or as near as may be in, the form set out in schedule 2 to this Act…*(such a notice being referred to in this section and section 13 of this Act as a "notice of potential liability for costs").

ii) Section 13(2) of the 2004 Act states*: "A notice of potential liability for costs may be registered (a)in relation to more than one flat in respect of the same maintenance or work; and (b)in relation to any one flat, in respect of different maintenance or work."*

iii) Schedule 2 to the 2004 Act sets out the prescribed form of the notice of potential liability for costs and states: "*This notice gives details of certain maintenance or work carried out or to be carried out, in relation to the flat specified in the notice. The effect of the notice is that a person may, on becoming the owner of the flat, be liable by virtue of section 12(3) of the Tenements (Scotland) Act 2004 (asp 11) for any outstanding costs relating to the maintenance or work…."Description of the maintenance or work to which notice relates:(see note 2 below)…2Describe the maintenance or work in general terms."*

Application of the facts to the 2004 Act.

70. The Tribunal's view is that the starting point in identifying *"relevant costs*" in terms of Sections 11(1), 11(5) and 11(9) of the 2004 Act for the purposes of Sections 12 and 13 of the 2004 Act, is identifying the relevant scheme decision in terms of the Deed of Conditions.

71. The Deed of Conditions sets out various conditions and obligations for the use of the development of which the Property forms part. These conditions and obligations are a mix of affirmative, negative and ancillary burdens. It is the Tribunal's view that it is only the affirmative burdens relating to the maintenance of the common parts of the development which are the development

management scheme as it is these burdens which correspond to the terms of Section 4 of and Rule 1.5 of Schedule 1 to the 2004 Act as narrated above.

72. Clause 9 at 9.1 and 9.2 of the Deed of Conditions states: *"9.1 The Proprietors of any ten Flats and/or Commercial Units shall have power at any time to call a meeting of all of the Proprietors of Flats and Commercial Units within the Development….). 9.2 It shall be competent at any relevant meeting of the Proprietors of the Flats and Commercial Units within the Development by a majority of the votes of those present (One) to order the execution of any common maintenance, redecoration, cleaning, repairs, alterations or renewals to the Development Common Parts (Two) to effect, maintain, alter and renew the common insurances herein provided for (Three) to employ development operatives to carry out concierge, cleaning, refuse collection and other services as may be considered appropriate (Four) to make any regulations which may be expedient or necessary with regard to the preservation, cleaning, operation and use and enjoyment of the Development Common Parts (Five) to appoint any one qualified person or firm or company ("the Managing Agents") to have charge and perform the various functions in relation to the maintenance, management, operation, repair, redecoration, alteration and renewal of the Development Common Parts;…."*

73. The Tribunal's view is that Clause 9 of the Deed of Conditions at 9.1 and 9.2 set out the development management scheme and set out the way in which a scheme decision is to be made. Clause 9.2 sets out the scope of the scheme decisions and does not include recovery of managing costs or legal costs.

74. Clause 9 goes on at Clauses 9.3 and 9.4 to set out the powers of the Managing Agent as follows*: "9.3 The Managing Agents, …. shall be entitled during the continuance of their appointment to exercise the whole rights and powers which may competently be exercised by a majority of those present at a meeting of Proprietors …. 9.4 All expenses and charges and premiums incurred for any work done or undertaken or services performed in terms of or in furtherance of the provisions herein or otherwise (including the Managing Agents management charges as fixed by them) shall be payable by the respective Proprietors whether consenters thereto or not …. In the event of any Proprietor or Proprietors so liable failing to pay his, her or their proportion within one month of such payment being requested the outstanding amount shall bear interest …. and the Managing Agents or other person or persons appointed as aforesaid shall (without prejudice to the other rights and remedies of the other Proprietors of Flats and Commercial Units) be entitled to sue for and to recover the same in his/her/their own name from the Proprietor or Proprietors so failing together with all expenses incurred by the Managing Agents or other person or persons thereanent; …"*

75. It is the Tribunal's opinion that Clauses 9.3 and 9.4 of the Deed of Conditions is not the development management scheme but is the way in which an agent of the owners is entitled to act. It is the Tribunal's view that Clauses 9.3 and 9.6 of the Deed of Conditions are not an affirmative burden as they do not require an owner to take a particular action but are an ancillary burden as they support the

affirmative burden to maintain. Clause 9.3 permits the managing agent "*to exercise the whole rights and powers which may competently be exercised by a majority of those present at a meeting of Proprietors".* However, as Clause 9.2 does not include a right or power to make a scheme decision on the recovery of managing costs or legal costs, Clause 9.3 cannot confer this right or power on the managing agent.

76. Accordingly, it is the Tribunal's view that as the factoring charges and legal costs cannot arise from a scheme decision, these costs are not "relevant costs" for the purposes of Sections 11(1) and 11(9) of the 2004 Act. Following on from that, neither Section 12 nor Section 13 of the 2004 Act apply to the factoring charges and legal costs.

    Even if the Tribunal is wrong in its interpretation of the effect of the Deed of Conditions, the Tribunal is of the view that Sections 12 and 13 and Schedule 2 of the 2004 Act do not assist the Property Factor's argument that factoring charges and legal costs are *"works".*

77. Sections 12 and 13 of, and Schedule 2 to, the 2004 Act consistently use the phrase "*maintenance or work"* throughout. The 2004 Act does not define *"maintenance or works as a single phrase"*. Rule 1.5 of Schedule 1 to the 2004 Act defines *"maintenance"* with reference to "scheme" as *"repairs and replacement, the installation of insulation, cleaning, painting and other routine works, gardening, the day to day running of a tenement and the reinstatement of a part (but not most) of the tenement building, but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance*". There is no definition of "works".

78. The Explanatory Notes which accompany the 2004 Act are not law but are a helpful insight into the purpose and interpretation of the legislation. The Tribunal considers paragraphs 5,and 8 (which are an overview of the 2004 Act) and paragraphs 61,62,63,64,65 and 66 (which relate to Section 11) of the Explanatory Notes to be relevant.

79. Paragraphs 5 and 8 state:
    "5. Common law rules governing the maintenance and management of tenements have developed since the 17th Century, but these are not comprehensive nor without anomaly. The development of the law on real burdens, however, has helped to impose obligations on successive owners to adhere to a detailed regime for management and repair of a tenement. These burdens are drawn up to suit the particular circumstances of the tenement.

    8. The Act introduces a statutory management scheme called the Tenement Management Scheme which will act as a default management scheme for all tenements in Scotland (this is set out in schedule 1 to the Act). It will provide a structure for the maintenance and management of tenements if this is not provided for in the title deeds. …. The Tenement Management Scheme also

introduces the new concept of scheme property. This comprises the main parts of a tenement that are so fundamental to the building as a whole that they should be managed and maintained in accordance with the management scheme of the tenement".

80. Subsections 61,62,63,64,65 and 66 all refer to "works" and none refers to factoring charges or costs.

81. Therefore, it is clear to the Tribunal that the purpose and intention of the 2004 Act is to legislate for the maintenance of tenement common property and to ensure that an incoming owner is made aware of unpaid or potentially unpaid costs relating to common property. There is no reference in the 2004 Act or the Explanatory Notes to support the Property Factor's view that the routine management of common property is "works".

82. Even if, "works" could be interpreted as including routine management of common property, the "works" would fall under the definition of "accumulating relevant costs" as defined by Section 11(5) of the 2004 Act and so are expressly excluded from the definition of "relevant costs" for the purposes of Sections 12 and 13 of the 2004 Act.

83. Accordingly, the Tribunal's view is that factoring charges are specifically excluded from the application of Sections 12 and 13 of the 2004 Act, regardless of whether they arise from a scheme decision.

84. Therefore, the Tribunal does not agree with the Property Factor's position and analysis of the 2004 Act as set out in Document 16.

Purpose of the 2004 Act

85. The Property Factor, in Document 16, states *"The purpose of the section (Section 12) is to facilitate the recovery of such costs by providing that such liability lies not only with the owner at the time when the costs are incurred but also, subject to a requirement for registration of a notice of potential liability, with any new owner who acquires the flat from a former owner who is liable."* The Tribunal's view is that this is fundamentally incorrect: the purpose of the legislation is to warn of certain potential costs, not to recover debt. There is no mention in the 2004 Act or in the Explanatory Notes to either monetary value or debt recovery.

86. Schedule 2 to the 2004 Act sets out the format of the Notice of Potential Liability and makes no mention of monetary value, cost or debt. There is no provision in the Act to accord the Notice of Potential Liability the status of a charge to be secured against property. The notice is a Notice of Potential Liability not a notice of a liability which is actual or proved and so it is inequitable that it should be treated as a debt let alone a secured debt.

87. In any event, the Tribunal is of the view that it is not within the legislative competence of the Scottish Government to legislate for a notice such as this to have the effect of a charge or standard security. The Insolvency Act 1986 sets

out the hierarchy of creditors as secured, preferential, and unsecured creditors. This is the order in which debts are to be paid in an insolvency. Insolvency is not a matter devolved to the Scottish Parliament in terms of the Scotland Acts 1998 and 2016, but is a matter reserved to the UK Parliament. As stated in the foregoing paragraph, a Notice of Potential Liability is not a proved debt and, in fact, can relate to a cost yet to fall due. Were it intended that the Notice of Potential Liability should secure a debt which is neither proved nor had fallen due, in the event of an insolvency, this would have the effect of affording the party who registered it the status of secured creditor ahead of preferential creditors with a proved debt. As the 2004 Act applies only to Scotland, the legislative effect would be to create a category of debtor unique to Scotland. The Tribunal's view is that this is not legislatively competent and so the Scottish Parliament could not have intended that a Notice of Potential Liability is a debt recovery tool.

2003 Act - Relevant Obligation

88. In Document 16, the Property Factor states that it *"is entitled to register a notice of potential liability in respect of costs relating to maintenance or work"* in terms of the 2003 Act and argues that, similar to the proposition that factoring charges and legal costs are "works" in terms of the 2004 Act, these costs fall under the definition of "maintenance or work" in the 2003 Act.

89. As previously stated, the Tribunal takes no issue with the fact that the 2003 Act applies to the Property, that the Homeowner has or had a continuing liability for certain costs and that a property factor is entitled to register Notices of Potential Liability in respect of certain costs. The Tribunal's issue is in respect of the Property Factor's proper application of Sections 10 and 10A of the 2003 Act with regard to the nature of the costs.

2003 Act – Relevant Sections

90. Document 16 sets out Sections 2,10,10A,122 of the 2003 Act as the relevant Sections. The Tribunal agrees that these are the relevant Sections of that Act and that Sections 2,10(1),10(4) are of particular relevance. It is the Tribunal's opinion that Schedule 1A to the Act is also of relevance. The terms of these parts of the 2003 Act are broadly in line with the terms of the above mentioned parts of the 2004 Act and so the Property Factor's argument and the Tribunal's opinions are also broadly in line with those relating to the 2004 Act.

91. The wording of these Sections is as follows:

i) Section 2 of the 2003 Act states:

(1) Subject to subsection (3) below, a real burden may be created only as (a)an obligation to do something (including an obligation to defray, or contribute towards, some cost); or (b)an obligation to refrain from doing something.

(2) An obligation created as is described in (a)paragraph (a) of subsection (1) above is known as an "affirmative burden"; and (b)paragraph (b) of that subsection is known as a "negative burden".

(3) A real burden may be created which (a)consists of a right to enter, or otherwise make use of, property; or (b)makes provision for management or administration, but only for a purpose ancillary to those of an affirmative burden or a negative burden.
(4) A real burden created as is described in subsection (3) above is known as an "ancillary burden"
(5)In determining whether a real burden is created as is described in subsection (1) or (3) above, regard shall be had to the effect of a provision rather than to the way in which the provision is expressed.

ii) Section (2A) of the 2003 Act states: *"A new owner shall be liable as mentioned in subsection (2) above for any relevant obligation consisting of an obligation to pay a share of costs relating to maintenance or work (other than local authority work) carried out before the acquisition date only if (a)notice of the maintenance or work (i)in, or as near as may be in, the form set out in schedule 1A to this Act; and (ii)containing the information required by the notes for completion set out in that schedule,(such a notice being referred to in this section and section 10A of this Act as a "notice of potential liability for costs") was registered in relation to the burdened property at least 14 days before the acquisition date"*

iii) Section 10(1) of the 2003 Act states: "*An owner of burdened property shall not, by virtue only of ceasing to be such an owner, cease to be liable for the performance of any relevant obligation."*

iv) Section 10(4) of the 2003 Act defines "a relevant obligation" as "a*ny obligation under an affirmative burden which is due for performance….".*

a. Therefore, in the Tribunal's opinion the crux of the matter regarding the NOPL relating to the 2003 Act is establishing whether or not the burden which obliges the Homeowner to pay factoring charges and legal costs is an affirmative burden in terms of Section 2(2)(a) of the 2003 Act or if it is an ancillary burden in terms of Sections 2(3)(b) and 2(4) of the 2003 Act, having regard to Section 2(5) of the 2003 Act.

Application of the facts to the 2003 Act

92. As with the Tribunal's views on the 2004 Act, the starting point is identifying the relevant burden or burdens in the Deed of Conditions. In Document 16, the Property Factor submits that *"the obligations contained in clause 9.4 of the Deed of Conditions are affirmative burdens in terms of s.2 of the 2003 Act and therefore relevant obligations for the purposes of s.10 of the 2003 Act."*

93. Section 2(5) of the 2003 Act states that, in determining the categorisation of a burden, "*regard shall be had to the effect of a provision rather than to the way in which the provision is expressed."*

94. The Tribunal sets out the wording of the relevant parts of Clause 9 of the Deed of Conditions in previous paragraphs and so the Tribunal does not set out these again here.

95. The Tribunal, however, sets out Clause 3.2 of the Deed of Conditions which states:
"The Proprietor of each Flat and each Commercial Unit shall along with the Proprietors of the other Flats and Commercial Units in the Development uphold in all time coming the Development Common Parts in good order and repair and shall contribute a share in common with the Proprietors of the other Flats and Commercial Units towards the expense of maintaining, managing, cleaning, lighting, redecorating, operating, altering, repairing, renewing the Development Common Parts …shall contribute an equal share in common with the other Proprietors of Flats and Commercial Units (excluding the Developers as aforesaid) towards the expense of maintaining, managing, operating, cleaning, lighting, redecorating, altering, repairing and renewing the Development Common Parts."

96. It is the Tribunal's view that Clause 3.2 of the Deed of Conditions is the affirmative burden in respect of both carrying out maintenance and works to the common parts and the obligation to pay a share of the same as it obliges the Homeowner "*to do something (including an obligation to defray, or contribute towards, some cost)*" as set out in Section 2(2)(a) of the 2003 Act and that Clause 9 of the Deed of Conditions, by operation of Section 2(5) of the 2003 Act, is an ancillary burden conditioning how Clause 3.2 is to be performed.

97. It is the Tribunal's view that Clause 9.4 is a mechanism for the Managing Agents as agents of the Proprietors to collect the payment obligation set out in Clause 3.2 of the Deed of Conditions and is not an affirmative burden in its own right but is an ancillary burden.

98. In any event, with reference to the Property Factor's entitlement to register a Notice of Potential Liability, Section (2A) of the 2003 Act restricts this to *"an obligation to pay a share of costs relating to maintenance or work"* and does not extend it to factoring or other costs. Further, the statutory form of the 2003 Act Notice of Potential Liability as set out in Schedule 1 to that Act and which is broadly in line with the 2004 Act Notice of Potential Liability, refers to liability *"by virtue of section 10(2A) of the Title Conditions (Scotland) Act 2003 (asp 9) for any outstanding costs relating to the maintenance or work."*

99. The 2003 Act does not define "maintenance or works" or "works" but at Section 122 (1) states: *"In this Act, unless the context otherwise requires .."maintenance" includes (cognate expressions being construed accordingly) (a) repair or replacement; and (b)such demolition, alteration or improvement as is reasonably incidental to maintenance".* This wording relates wholly to physical works carried out on common property. There is no reference to services or activities which relate to the management of common property or any other costs such as legal costs.

100. There is no Explanatory Note to assist in reference to services or activities.

101.It is the Tribunal's opinion that, without an express reference to factoring charges and legal costs and without statutory guidance to indicate that this was intended, "maintenance or work" does not include these costs.

102.Therefore, the Tribunal does not agree with the Property Factor's position and analysis of the 2003 Act as set out in Document 16.

Duplication of NOPLs

103. The Tribunal notes that Section 10(5) of the 2003 Act states: "This section does not apply in any case where section 12 of the Tenements (Scotland) Act 2004 (asp 11) applies" and so prohibits the registering of a Notice of Potential Liability for the same purpose under both the 2003 and the 2004 Acts. In this matter, the NOPLs registered by the Property Factor are for the same debt and so the NOPL registered under the 2003 Act is contrary to Section 10(5) of that Act

Conveyancing Practice

104.The Tribunal is aware from its own professional expertise that it has become general conveyancing practice, particularly where the buyer has a mortgage lender, that all notices must be cleared from the Title Sheet by the seller. In terms of the 2003 Act and the 2004 Act, only the party who registers the Notice of Potential Liability is entitled to discharge it. Therefore, it has become routine practice, that buyers insist that sellers arrange for the discharge of Notices of Potential Liability regardless of whether or not the notices comply with these Acts. It is the Tribunal's view that this is a misuse or abuse of Notices of Potential Liability and is not supported by the legislation.

Effect of dismissing a court action on the basis of no expenses due to or by either party.

105.The Tribunal is aware from its own professional expertise that, in respect of court costs, it is accepted court practice that the entitlement to claim recovery of costs follows success. In the court action, there was no "success" as the matter was settled by the Parties and so there was no right by convention to the Property Factor to recover costs.

106.The Property Factor's position is that, when agreeing to dismiss the court action on the basis of no expenses due to or by either party, it understood the "expenses" only related to "judicial expenses" as set out in the written agreement reached between the Parties during the court action. However, the Property Factor and the Homeowner agreed by joint application to dismiss the court action on the basis of no expenses due to or by either party. It is the Tribunal's view that, regardless of the written agreement, by doing so, the Property Factor forfeited the right to recover legal costs incurred in pursuing the court action.

107.It is the Tribunal's view that, although the Parties agreed to dismiss the court action because it had settled, it was still open to the Property Factor to seek an order for the expenses of the action. The Property Factor had the benefit of professional legal advice during the court action and did not seek an order for the expenses of the action. It is the Tribunal's view that by doing so, the Property Factor gave up the right to recover legal costs incurred in pursuing the court action.

The Property Factor's entitlement to seek payment of legal costs in terms of the Deed of Conditions.

108.The Tribunal had regard to the Property Factor's argument that, regardless of the joint motion to settle the court action on a no expenses basis, the Homeowner is, nevertheless, liable contractually for the legal costs in terms of the Deed of Conditions.

109.As previously set out, Clause 9.4 of the Deed of Conditions states: "the Managing Agents shall …be entitled to sue". Clause 9.4 goes on to state "sue for and to recover the same in his/her/their own name from the Proprietor or Proprietors so failing together with all expenses incurred by the Managing Agents that in the event of failure to recover such payments and/or the expense of any action then such sums will fall to be paid by the Proprietors of the other Flats and Commercial Units as the Managing Agents shall determine." In the Tribunal's view the effect of this wording is that, in the event of an unsuccessful court action where the costs are not recovered from the proprietor, the costs are to be met by the co-owners. In the matter before the Tribunal, the Homeowner paid what was asked in terms of the court action and so there was no failure to recover the sum sued for. In any event, the Property Factor's entitlement and recourse to recover unpaid costs rests against the other co-owners and not the Homeowner.

110.Accordingly, it is the Tribunal's view that the Property Factor is not entitled in terms of the Deed of Conditions to recover the legal costs incurred in pursuing the court action.

Decision of the Tribunal with reasons.

112.As narrated above, the Tribunal advised the Parties at the Hearing on 9 April 2021 that, having considered all of the evidence before it, the Homeowner had not established any breaches of Sections 7.1,7.2 and 7.4 of the Code. Therefore, the Tribunal determines that there has been no breach of these Sections of the Code.

113.The Tribunal further advised the Parties that it would consider a breach of Section 4.3 of the Code if it could be justifiably implied based on the notification given to the Property Factor. The Tribunal is of the view that there is not sufficient evidence to justify this implication and so determines that there has been no breach of Section 4.3 of the Code.

Section 2 of the Code

114.The preamble states: *Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes."*

115.The Tribunal had regard to the correspondence between the Parties relating to the legal costs of the court action wherein the Homeowner and the Homeowner's Representative request "details of the legal work" invoiced and the Property Factor refers them to its solicitors' invoices. In particular, the Property Factor's email of 7 September 2018 states "there is no further information available". In the Tribunal's view, this response is incorrect. The Property Factor ought to have had the information requested to hand or ought to have obtained this information from its solicitors. In the Tribunal's view the Property Factor did not demonstrate "good communication" and, by doing so, perpetuated the dispute.

116.Therefore, the Tribunal had no difficulty in finding that the Property Factor has breached this part of the Code.

Section 2.1 of the Code.

Section 2.1 states:"*You must not provide information which is misleading or false."*

117.As narrated in above under the heading "Competence of the NOPLs", the Tribunal reached the view that the NOPLs as registered by or on behalf of the Property Factor, are not competent in terms of either the 2003 Act and the 2004 Act as they are not for "relevant costs" or for the performance of a "relevant obligation".

118.As narrated above under heading "Competence of the NOPLs", the Tribunal reached the view that the Property Factor was fundamentally wrong in treating the NOPLs as a debt recovery tool.

119.As narrated above under heading "Effect of dismissing a court action on the basis of no expenses due to or by either party", the Tribunal having reached the view that by dismissing court action SA633/14 on joint motion with the Homeowner on the basis of no expenses due to or by either party, the Property Factor had no entitlement to recover its legal expenses.

120.As narrated above under heading "The Property Factor's entitlement to seek payment of legal costs in terms of the Deed of Conditions.", the Tribunal having reached the view that the there is no contractual right to the Property Factor in the Deed of Conditions, the Property Factor had no entitlement to recover its legal expenses.

121.Accordingly, the Tribunal determined that by pursuing the factoring charges and legal costs of the court action, the Property Factor had provided both misleading and false information to the Homeowner.

122.By insisting that these sums amounting to £9,689.13 must be paid before it discharged the NOPLs, the Property Factor had provided both misleading and false information to the Homeowner via his conveyancing solicitors.

123.Therefore, the Tribunal had no difficulty in finding that the Property Factor has breached this part of the Code and did so in the most serious manner.

124.The Tribunal had regard to the Homeowner's Representative's allegations of falsehoods in respect of the Property Factor's business premises and the contradictions in paragraphs 3.2.1 and 3.4 of the Property Factor's Written Statement of Services, and accepted Mr. Allan's explanation that these are misunderstandings rather than misleading and false information.

Section 2.2 of the Code

Section 2.2 states*: "You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action)"*

125.As narrated above under the heading “Competence of the NOPLs”, the Tribunal reached the view that the NOPLs as registered by or on behalf of the Property Factor, are not competent in terms of either the 2003 Act and the 2004 Act as they are not for “relevant costs” or for the performance of a “relevant obligation” and as narrated in paragraphs 86 – 88 under Heading “Competence of the NOPLs”, the Tribunal reached the view that the Property Factor was fundamentally wrong in treating the NOPLs as a debt recovery tool.

126.By pursuing the factoring charges and legal costs of the court action without just cause and that to the extent that the Property Factor, in effect, held the Homeowner to ransom in respect of the Property sale, the Tribunal determined that the Property Factor communicated with the Homeowners in a way which was intimidating, and so breached this part of the Code.

Section 2.5 of the Code

Section 2.5 states: “*You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.”*

127. Again, the Tribunal had regard to the correspondence between the Parties relating to the legal costs of the court action wherein the Homeowner’s and the Homeowner’s Representative request “details of the legal work” invoiced and the Property Factor’s response refers them to its solicitors’ invoices. The Property Factor ought to have responded to these requests fully and provided sufficient detail of its solicitors’ invoices. The Property Factor asked the Homeowner to pay £9,869.13 to settle its accounts and it is wholly reasonable that the Homeowner should expect an explanation for this amount. The Property Factor’s response failed to answer these enquiries to any extent and did not answer them “as fully as possible”. In fact, the Property Factor only provided a breakdown of the legal costs and work carried out to justify the costs when directed to do so by the Tribunal.

128.Therefore, the Tribunal had no difficulty in finding that the Property Factor has breached this part of the Code.

Section 3 of the Code

The preamble states*: While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved”*

129.Having reached the view that the Property Factor was not entitled to either register the NOPLs or to recover the legal costs of the court action, the Tribunal determines that the Property Factor has breached the principles of this part of the Code by making “improper payment requests”.

Section 3.3 of the Code

Section 3.3 states: *“You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of*

charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance."

130. From the documents lodged by the Parties, the Tribunal is of the view that the Property Factor ought to have provided the Homeowner with detail of the legal costs requested by him but refused to do so. Accordingly, the Tribunal determines that the Property Factor had breached this part of the Code.

Property Factor Duties

131. Property Factor Duties are defined in Section 17(5) of the Act as: "(a)duties in relation to the management of the common parts of land owned by the homeowner, or (b)duties in relation to the management or maintenance of land (i)adjoining or neighbouring residential property owned by the homeowner, and (ii)available for use by the homeowner. Section 17(4) of the Act states "References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard."

132. The Chamber website provides the following guidance under FAQs : *"Property factor duties complaints … can include alleged breaches of the written Statement of Services (which is a service level agreement), or title deed conditions or a factoring contract or contraventions of the law of agency."*

133. Property Factor Duties, therefore, are the general fiduciary duties of a professional agent acting on behalf of a client to a reasonable standard. In the Tribunal's' view that standard includes understanding the laws relevant to common property and debt recovery and acting within those laws.

134. Having reached the view that the Property Factor was not entitled to either register the NOPLs or to recover the legal costs of the court action, and, having reached the view as set out above that the 2003 Act NOPL registered by the Property Factor is contrary to Section 10(5) of that Act, the Tribunal determines that the Property Factor has failed to apply the laws relevant to common property and debt recovery and has failed to act within those laws. Accordingly, the Tribunal determines that the Property Factor has failed to carry out its Property Factor Duties to a reasonable standard.

135. The Property Factor is an agent of the homeowners to whom it provides services, including the Homeowner, and as an agent, the Property Factor has a general duty of care to act in the best interests of the homeowners including the Homeowner. In this matter, the Property Factor raised the court action being a Small Claims Summons for the sum of £1.729.80 and claims to have incurred legal fees of £7,723.36 in doing so. In settling the court action, the Property Factor agreed to dismiss the action on the basis that no expenses were due by the Homeowner as defender. The Tribunal finds that firstly, incurring legal fees of more than three times the debt and, secondly, forfeiting recovery of these sums are serious breaches of the duty of care as no agent exercising a reasonable duty of care could place its principal in such a precarious financial position with exposure to costs, nor could any agent exercising a reasonable duty of care write-off such a large sum of money on behalf of its principals. Accordingly, the Tribunal determines that the Property Factor by

failing to act as an agent of the Homeowner to a reasonable standard has failed to carry out its Property Factor Duties to a reasonable standard.

136. In its response to the Direction dated 10 March 20, the Property Factor lodged its solicitors fee structure which shows the fee for a debt less than £3,000.00 for "raising and obtaining decree" to be fixed at £150.00. Hourly rates for a solicitor and a paralegal are given as £150.00 and £100.00 per hour respectively. Breakdowns of the legal work carried out and invoices for this works were also lodged by the Property Factor. Regardless of the fact that there appears to be a fixed fee, the Property Factor's solicitors have charged additional fees for work relating to "raising and obtaining decree" and the Property Factor has accepted this charging without question. The Tribunal finds that no agent exercising a reasonable duty of care to its principal could accept this fee invoicing without question. Accordingly, the Tribunal determines that the Property Factor by failing to act as an agent of the Homeowner to a reasonable standard has failed to carry out its Property Factor Duties to a reasonable standard

137.In the Application, with reference to the complaint of breach of Property Factor Duties, the Homeowner's Representative refers to pages 1, 17- 22 and 28, of the Property Factor's Written Statement of Service. These pages set out the Property Factor's undertakings in respect of Financial and Charging Arrangements. In his letter to the Property Factor of 20 January 2019 giving notice of failure to comply with its Property Factor Duties, the Homeowner's Representative cites failures in respect of Sections 3.1.3, 3.1.54;3.1.5.6; 3.19 and 4.1.2 of the Written Statement of Service arising from the Property Factor's failure to provide detail of the court action legal costs. In Section 3.1.3 of the Written Statement of Service, the Property Factor sets out the way in which it will charge a fee for providing "details" of costs required to be paid when a property is being sold. In spite of the Property Factor charging a fee for this service, it did not provide detail of the court action legal costs. Therefore, the Tribunal determines that the Property Factor, by failing to comply with its Written Statement of Services failed to carry out its Property Factor Duties to a reasonable standard.

138.Section 3.1.9 of the Written Statement of Service advises owners that "any queries" on common charges should be "taken up with the credit control team". The Homeowner's Representative followed this advice and emailed the credit control team on 2 and 6 September 2019 requesting detail of the court action legal costs. The reply issued by the credit control team on 9 September 2019 stated that this information could not be released because it was information between the credit control team and the Property Factor. The Tribunal finds this to be a ludicrous situation and in direct contradiction of the terms of the Written Statement of Service. Therefore, the Tribunal determines that the Property Factor, by failing to comply with its Written Statement of Services failed to carry out its Property Factor Duties to a reasonable standard.

139.The Tribunal notes that the Homeowner, in the Application refers to loss of value to the Property. However, no information or evidence was provided to show that any such loss could be attributed to the Property Factor. Therefore, the Tribunal finds Therefore, the Tribunal determines that the Property Factor has not failed to carry out its Property Factor Duties to a reasonable standard in this regard.

140.The Tribunal notes that the Homeowner, in the Application refers to the Property Factor failing to take action in respect of the condition of the Development. However, insufficient evidence was provided to show that the Property Factor failed to carry out its Property Factor Duties to a reasonable standard in this regard.

Property Factor Enforcement Order (PFEO)

141.The Tribunal having so determined, then considered whether to make a PFEO in terms of Section 19 of the Act.

142.The Tribunal took into account the seriousness of the Property Factor's breaches of the Code and failure to comply with the Property Factor Duties and, with reference to the Application, the magnitude of the effects, both financial and emotional, which this had on the Homeowner.

143.The Property Factor's breaches of the Code and its failure to comply with its Property Factor Duties falsely induced the Homeowner to pay a considerable sum for which, in the Tribunal's' view, he was not liable to pay in order to secure the sale of the Property. In the Tribunal's' view, the Property Factor abused its statutory entitlement to register the NOPLs to collect its own debts and compounded this by acting unlawfully in respect of the 2003 Act NOPL. The consequences for the Homeowner were significant as he was forced to pay an account for which he was not liable in order to complete his sale of the Property. It was clear to the Tribunal that the Homeowner, as stated by him in his correspondence to the Property Factor, paid the sum requested under extreme duress and without accepting liability for it, solely to allow the sale of the Property to proceed. In terms of the 2003 Act and the 2004 Act, the Property Factor as the party who had registered the NOPLs was the only party entitled to discharge them. In the Tribunal's view the Property Factor abused this entitlement to the detriment of the Homeowner and having had no lawful right to register the NOPLs, acted unlawfully. Accordingly, the Property Factor caused the Homeowner unnecessary and significant distress and considerable expense.

144.It was clear to the Tribunal that the Property Factor's refusal to provide the information required in breach of the Code and its Property Factor Duties caused the Homeowner further distress, frustration and inconvenience. When questioned by the Homeowner and the Homeowner's Representative on its refusal to provide information on the legal costs, the Property Factor persisted with its refusal to provide an adequate breakdown. 146. Accordingly, the Tribunal determined that a PFEO should be made.

145.In considering the content of the PFEO, the Tribunal had regard to the actual loss suffered by the Homeowner in the sum of £9896.13 which he had been wrongly induced to pay and took the view that the Property Factor ought to refund this sum.

146.The Tribunal then had regard to the significant emotional impact which the Property Factor's actions have had on the Homeowner. Whilst the Tribunal is mindful that compensation should not be punitive, the Tribunal considers that the sum of £5,000 is commensurate with the impact on the Homeowner.

148.Therefore, the Tribunal proposes to make a PFEO which will follow separately to conform with Section 19 (2) of the Act which states: - *"In any case where the First-tier Tribunal proposes to make a property Respondents enforcement order, it must before doing*

so (a)give notice of the proposal to the property Respondents, and (b)allow the parties an opportunity to make representations to it."

150. The decision is unanimous.

Appeal

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

Karen Moore

Chairperson

30 April 2021