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

Decision and Statement of Reasons on Homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/LM/22/3876 and FTS/HPC/PF/23/0003

The Parties: -

Alan Slater, 67 Eastwoodmains Road, Glasgow, G76 7HQ ("the Homeowner")

Trinity Factoring Services Ltd, 209-211 Bruntsfield Place, Edinburgh, EH10 4DH ("the Property Factor")

The Tribunal: -

Melanie Barbour (Legal Member)

John Blackwood (Ordinary Member)

Decision

The Factor failed to comply with (First Application) (C1) dated 23 October 2022 Sections 3 (general) and 3.3 of the 2012 Code of Conduct; and (Second Application) (C2) dated 28 December 2022 Sections 3.1 and 3.2 of the 2021 Code of Conduct. The decision is unanimous.

BACKGROUND

1. By the first application (C1) dated 23 October 2022, the Homeowner complained to the Tribunal that the Property Factor was in breach of Sections 3 general and 3.3 and 4.5 of the 2012 Code of Conduct; and had failed to carry out its Property Factor duties as set out in section 7B of the application form, in summary, it had failed since 2007 to apportion the

common area charges correctly in the development. The Property Factor had admitted that in writing. The debtor had admitted that they had not paid the correct charges and had apologised. The Homeowner’s complaint was that it had been 2.5 years since the matter was discovered but the debt remains uncalculated and uncollected.

2. By the second application (C2) dated 28 December 2022 the Homeowner complained to the Tribunal that the Property Factor was in breach of Sections 3.1, 3.2, 4.1 and 4.9 of the 2021 Code of Conduct and had failed to carry out its Property Factor’s duties as set out in section 7B of the application form, in summary, it had failed since 2007 to apportion the common area charges correctly in the development. The Property Factor had admitted that in writing. The debtor had admitted that they had not paid the correct charges and had apologised. The Homeowner’s complaint was that it had been 2.5 years since the matter was discovered but the debt remains uncalculated and uncollected.

3. By Notices of Acceptance dated 9 January 2023 and 15 February 2023, legal members of the Tribunal with delegated powers accepted both applications and a case management discussion was assigned to take place on 17 March 2023. Both parties submitted written representations in response to a direction issued.

4. The applications proceeded to a hearing which took place on 15 June 2023 and was continued until 16 February 2024.

5. Both the Homeowner and Property Factor attended the case management discussion and hearing. Calum Seale and George McGuire appeared for the Property Factor.

6. The Homeowner made a further written submission prior to the continued hearing on 16 February 2024.

FINDINGS IN FACT

7. The Tribunal made the following findings in fact: -

8. The Property Factors are Trinity Factoring Services Ltd.

9. The Homeowner is Alan Slater.

10. The property is Princes Court Development, 19/11 High Riggs, Edinburgh, EH3 9BW.

11. The development is defined in a deed of conditions recorded in GRS (Midlothian) 6 November 1998 by Tulloch Homes (Tollcross) Limited and includes all Flatted Dwellinghouses in the Blocks of Flats and the Lauriston Street Block.

12. There is a service level agreement for the development issued by the Property Factor. It contains a section on accounting, it confirms that the Property Factor will prepare an estimated annual budget at the start of each financial year. The budget is levied in advance and is development specific. Following the end of the financial year, the Factor will issue each proprietor with a budget reconciliation statement showing the budget against actual expenditure. The budget reconciliation statement will show how actual costs have been apportioned between proprietors. Copies of all invoices and other financial information will be available for a period of 12 months following the end of the financial year. Original invoices can be inspected by appointment in the Factor's office.

13. The deed of conditions for the development recorded in GRS (Midlothian) 6 November 1998 by Tulloch Homes (Tollcross) Limited confirms that the developer is about to erect blocks of flatted dwellinghouses known as "Princes Court", it includes the following clauses: -

    a. First Definition Clause includes the following: -

    b. The "Block of Flats" means the building containing flatted dwellinghouses the solum of which is owned jointly by the proprietors of the flatted dwellinghouses within the Block of Flats but excluding for the avoidance of doubt the Lauriston Street Block.

    c. The "common area" is defined and means the Development under exception of all Flatted Dwellinghouses, and all parking spaces exclusively conveyed with any Flatted Dwellinghouses; the Common Parts; and the Lauriston Street Block.

d. The “common parts” is defined and means in relation to the Block of Flats those parts and pertinent of the Block of Flats which do not pertain to any Flatted Dwellinghouse including without prejudice to the foregoing …. [list of items].

e. “Lauriston Street Block” means the building, car parking spaces, and amenity areas forming part of the development shown delineated and hatched in blue on the Plan and forming part of the Development.

f. Clause 3 deals with common parts including maintenance.

g. Clause 8 deals with the “Common Area” and provides that “… being such portions as are not included specifically with any Flatted Dwellinghouse and /or any Block of Flats to which any Flatted Dwellinghouse pertains and/ or the Lauriston Street Block and any car parking spaces specially conveyed, the same shall be laid out … and each and every Flatted Dwellinghouse being held under burden of each individual Proprietor thereof being liable for an equal 1/86th share, or such other equitable share as may be determined by us or by the Factor of maintaining the same as public open spaces, amenity ground, car park, roadway, and or footpaths … with the Lauriston Street Block being liable for a *cumulo* share of 20/86th of said liabilities; …”

h. Clause nine provides for setting up a resident’s association and a committee and for the appointment of a Factor.

i. Clause 12 provides for an arbitration clause.

14. The Homeowner considers that the common area charges should be apportioned on an equal 1/86th basis.

15. The Lauriston Street Block considers that the Factor should be able to determine the appropriate apportionment of common area charges when the matter cannot be agreed by

the residents' committee and that this includes determining that the Lauriston Street Block does not have a 20/86th share for charges of some items being part of the common area.

16. The owner of the Lauriston Street Block in an email to the Property Factor dated 12 August 2022 raised a number of different issues about charges for the common area which he considered should either be treated as not part of a 20/86th share and on some other basis; or which were matters which were at least in part not wholly common area and may be common parts.

17. That the deed of conditions does not precisely define certain matters which incurred charges for example electricity and insurance.

18. That the Property Factor admitted on 6 April 2020 that they had not ensured that the Lauriston Street Block had been charged their share of the communal area expenses over the years.

19. That there had been discussion between the owners and Factor about what may be due by the Lauriston Street Block for historic common area charges which they had not been asked to pay. There had been no agreement about what the appropriate amount should be.

20. That the terms of the Deed of Conditions defines common areas and common parts; and provide a basis for the apportionment of charges for those areas.

HEARING

21. The Homeowner confirmed that the issue that he sought to have resolved was that since 2007 the Factor had failed to correctly apportion the common charges for the common area. He advised that the Factor had admitted this. He had not received accurate invoices from the Factor since this had come to light. The debtors (the Lauriston Street Block) had admitted that they had not been charged correctly. For the previous two and a half years this matter had remained outstanding and the correct charges uncalculated.

22. The Factor advised that they had been appointed as Factors for the properties in 2007. The agreement to charge unequal shares in relation to the properties at the Lauriston Street Block and the Princes Court Development had been determined by the owners of these properties before the Factor had been appointed. The Factor submitted that this issue was a matter for the owners to determine and resolve. It is not a matter to be determined by the Factor. The Factor advised that they had tried to encourage the Homeowner to resolve the matter through arbitration with the other owners, as it is provided for in the title deeds as a way of determining disputes, however, this had not happened.

23. The Homeowner confirmed that the relevant properties affected by the common charges were 66 residential flats and 20 serviced flats. The Homeowner advised that the charges for the common area were to be split 1/86, this was in terms of the deed of conditions. He was unaware of any other split. He submitted that in the past, it was never agreed that there would be an unequal split of the common charges and he was not unaware of when changes to the split were made; and the split was the same since the property was bought in 2004. He also referred to the legal advice he had obtained which had advised in order to change the title deeds a deed of variation was required, and this has never been done. As there had never been a change in the apportionment of the charges then, therefore, the mechanism for splitting the charges was that set out in the title deeds.

24. The Homeowner advised that the Factors had failed to make the changes to their procedure as they stated they would in their email of 6 April 2020, when they had apologised for not ensuring that the Lauriston Street Block had not been charged with their share of the common area expenses and they had committed that would not happen again. The Homeowner raised this matter in the 4th quarter in 2019. It was raised for the first time about the common area and the common parts; the response about the common parts came back quickly. It took 5 months to respond to the common area. He explained the accounts for the common parts: they are basically for budgeting and expenditure parts and the general repairs element. Ad hoc repairs and not specific, likely maintenance and general catch-all category. The issue is that this repair element has been used by the Property Factor to represent all the repairs in that budget line were common parts, and invoices on the basis of a 1/66th share, but this had been incorrect when looking at the individual invoices, there was a mixture of common area and common parts, and they should have been apportioned

out, and invoices in that category should have been separated into common area (1/86th) and common parts (1/66th).

25. In response the Property Factor said that there was a blurring of the common parts and common areas. Usually, if there was a common area expense it was split for the stairs and the block. The residents' association have moved away from the deed of conditions. The Property Factor has highlighted this to the resident's association, and they have corrected this, but they said that other repairs may not have been properly allocated.

26. The Homeowner advised that to the best of his knowledge, the resident's association have never instructed the Property Factor to change the apportionment of the common area charges.

27. The Homeowner referred to the summary of accounts for 2017/2018. The Homeowner would have expected all invoices to be reconciled and they were not as was required in terms of the service level agreement. The Homeowner had been looking to see the invoice amounts (not the actual invoice) and see how it was apportioned among the 86 properties. He, the Homeowner advised that they are getting that now and seeing how it was apportioned between the other houses.

28. The Homeowner referred to [See F1] which shows detail but only for general repairs, but no Lauriston Street Block column there. He could see all the charges but no indication of any sharing with the Lauriston Street Block at all during 2010 to 2020 from the repairs analysis. He advised that this does not show the owners the full picture of how all the costs were apportioned at the end of the year. It also confused the common area and the common parts. He advised that all the bills should have been issued to the owners, but they just had not been given to us. When he got them, he asked for that level of detail for all years, but this was refused, he said that he would have expected that level of detail with the apportionment of the charges too. The documentation in those years was not transparent enough.

29. The Homeowner advised that he consistently asked for a written financial process; he asked how it worked. He had never received it, beginning with the accounting process to

the end. He had never received one. The Property Factor advised that this was not true in their opinion. The Homeowner considered the service level agreement and the written statement of service, does not give clarification as to the extent of the Factor's duties in this matter.

30. The tribunal asked about the extent of the Factor's duties and powers to issue accounts and ingather funds on the basis of a revised allocation of the shares. The Homeowner said he was unsure how to answer the question as it relates to the use of Clause 8 and the Property Factor says it is in force, but the first he heard of it, was at the case management discussion. He said Clause 8 needed to be considered against the legal advice he had obtained and lodged. The Homeowner said he would not accept that the Property Factor had the right to apply different apportionment even if they were instructed by the resident's association to do so, as they have to protect his interest too.

31. The Factor said that in relation to Clause 8 a decision was taken at the AGM in 2012 the residents association were given the power to manage the budget and became a mechanism to manage the Property Factor.

32. The Homeowner advised that the Factor had breached its duties in relation to the Code of Conduct and Property Factor's duties by not apportioning the common area charges correcting and the Property Factor breached his own agreement. Several areas of the account were unsafe. They had misled the owners on the legality of Clause 8. The Property Factor gave legal advice to the owners on this at the AGM in March 2023. The Homeowner said that the Property Factor had made mistakes in basic accounting. Apportionment process not being correctly implemented and there was a failure to keep proper accounts. The Homeowner had also raised the issue of debt recovery on 6 April 2020 the Factors said they would issue an invoice, but they still have not issued an invoice. The Homeowner considered that there was an issue with transparency, the Homeowner considered that the Factor had not delivered on their full range of service, and it is essential and important to build trust in financial matters and to protect the Homeowner. The summary of account did not achieve that level of necessary detail to allow the Homeowner to understand what had been spent and how it had been apportioned. The Property Factor prepares final-year accounts. The residents' committee would look at the individual year accounts and then

decide who pays which invoice. Then in theory they give it to the Property Factor as the final accounts. The Homeowner advised that there was a period when the Lauriston Street Block was never charged anything.

33. At the AGM in March 2023 the owners looked at the issues of historic charges and agreed that no action would be taken on the expenses or the common areas up to 2019. The Homeowner advised that the Factors considered that the mechanism to be used to determine a dispute between owners in relation to the proper apportionment of common charges was by arbitration in terms of Clause 12 of the deed of conditions.

34. The Property Factor said they were not disputing that funds are due; the question is just what is due. The Property Factor advised that the Lauriston Street Block are not included in the budget process. The Property Factor have updated the budget, and things have changed substantially.

35. Mr Colin Stone owner of the Lauriston Street Block gave evidence for the Property Factor He had provided a statement setting out his position on the apportionment of common area charges, common area electricity and repairs analysis omissions. He referred to the 20/86th share being payable as common charges by the Lauriston Street Block. He disputed that the Lauriston Street Block should contribute to improvements to the common areas where he did not consider that they benefited from those. He advised that the residents association had agreed not to seek any contribution from the Lauriston Street Block for those improvements, and he considered that the deed of conditions did not oblige the Lauriston Street Block to pay for improvements. He asserted that the deed of conditions allowed the superior or Factor to vary the apportionment. He submitted that the Lauriston Street Block is not obliged to pay utility costs, it is only obliged to maintain and repair common lighting in good order. He confirmed that the Lauriston Street Block had agreed to pay a share of the common area charges from 2019 onwards. In terms of repairs analysis omissions, he advised that in 2019 the Property Factor had contacted him to advise that the annual repairs adjustment process had not been carried out properly in recent years. The Princes Court development had a general repairs budget for ad hoc repairs to the blocks. Repairs to the common areas were also charged to that budget and at the end of each fiscal year, it was determined which line items the Lauriston Street Block should be charged a share of on a

20/87th basis. Investigations showed that this assessment had not been done for the previous 4 years up to 2019. He submitted that he had apologised and suggested that it could have been resolved, however, agreement could not be reached on which items should be included as common area repairs, as they included improvements, common electricity costs and other questionable repairs. The matter was aired at the AGM in March 2023 and the Homeowner's claims were ignored and the meeting voted in favour of leaving all aspects of previous apportionment in the past.

36. The Homeowner advised that the Property Factors failure fell into three areas. (1) Failing to charge the Lauriston Street Block their share of the common charges from 2010 -2020; (2) failing in their financial management account incorrectly applying common stair charges; and (3) failing to follow the financial process to common area and common charges including bookkeeping. The Property Factor's interpretation of Clause 8 of the deed of conditions has complicated the issue.

37. The Property Factor advised that the owners have directed them in how the apportionment of the charges was to be made. The residents' committee made financial decisions on behalf of the owners.

38. Regarding the failure of common area charges, this failure is solely due to financial process failure. The financial process was set out in the Property Factor's tender document [X2]. The tender proposal for the annual budget shows that the figures are based on the deed of conditions. The correct process was followed from 2007-2009. However, in 2010 the same process was not followed and the share of the 1/86 costs were not identified and shared with the Lauriston Street Block from 2010-2020. He referred to his productions [P23, X3 and P45] all show the Property Factor admitting that the charges had not been correctly apportioned. In 2022 unbeknownst to the Homeowner, the Factor had done a calculation of the deed of conditions apportionment and looking at the years 2014-2019 (P45) and he came up with a number of £9,500 for those years. In August 2022 the Property Factor considered the common areas charges had to be resolved and the Lauriston Street Block agreed that they had to pay something.

39. The Property Factor also said [P23] they proposed to change the procedures to make sure this does not happen again from 1 May 2020 and costs would be apportioned for the end

of the financial year. The Property Factor had failed in their duty, and they needed to fix the accounting errors. Until August 2022 Property Factor had advised that this was their mistake, and this was, therefore, a breach of the code of conduct and their written statement of services.

40. The second failure was that the Property Factor has been apportioning some of the common part charges wrongly since 2007. This is a separate issue from the "common area" charges complaint. Again, the Property Factor have advised this error in writing [P23]. This part of the complaint does not affect the Lauriston Street Block as they do not pay common part charges (they only pay common area charges). The Property Factor then started to defend this failure by several different methods.

41. The Property Factor said that the previous Property Factor used that method. The Homeowner said that this statement was not true as the previous Property Factor was apportioning the common parts costs equally across the development not stair by stair Property Factor was given this information [see emails X5, X6 and X7]. So, in the transition from previous Factors to the current Factors the information passed over was that the common repairs were not done on a stair-by-stair basis but were split equally between all the owners. Therefore, the Homeowner challenged that historically these charges were apportioned on a stair-by-stair basis.

42. The Factors said that they are only acting as agents and following owners' instructions. They point to the 2012 AGM as evidence of the relationship change and the approved budget, as confirmation from the owners that the function has changed. The Homeowner said that this was not true. They were a year behind in accounts for approval and the treasurer said that the accounts were 12 months out of date so reviewing them was of diluted value. (section 6). The budget needed to be set, and they were delegated to give budget approval even though the budget had not been agreed by the AGM, but at no time was there any change in the relationship between the Factor and the committee. The only decision was to propose the AGM 2013 and the approval for the budget would still be sought in June 2013. Also, the responsibility under the title deeds has not changed.

43. Thirdly, the Property Factors say that owners have made very specific decisions about spending money. The Homeowner submitted that the committee would normally spend

money, but they did not apportion costs, they set out what it wanted to spend money on. It was not apportionment as no invoices to discuss.

44. The Common Parts process was created by the Property Factor at the time of transition, and it is not in accordance with the deed of conditions.

45. The third complaint is the Property Factors' failure to keep proper accounts. He advised that the Factor had changed and amalgamated some of the cost codes, but they were not split into common part and common areas charges. Again, it was self-evident as they admitted that they had failed in their duty. The Homeowner asked for a copy of the accounting process in 2020 and it has never arrived at this date (see P24).

46. The current Property Factor processes are different from the previous Property Factor. (See X5,6,7). The Property Factor used a budget float of their own design. No input from the committee. The previous Property Factor billed four times a year in arrears and reconciled at the year's end. The current Property Factor billed two times a year in advance on the budget forecast and then does a single reconciliation in the terms of the deed of conditions and tender as proposed. They did not adjust their revenue billing. Two processes were far apart. At the Case Management Discussion, the Factor advised that they charged as instructed by the committee, the Homeowner disputed this and said that the Factor had implemented a totally different system to create a float. The only part that they used from the previous Property Factor was the cost centre and used this to raise a revenue budget. He referred to document [X6] and compared the previous Factors to the current Factors. The former Factors columns all for fixed amounts as fixed price contracts, so that the sum at the end of the year did not change, and all invoices for repair bills were gathered under common repair bills, therefore, one cost centre which was apportioned at the end of the year. The present Property Factor did not do that. They gathered in repairs in the various cost centres, and they spread them across the cost centre rather than keeping them in one place.

47. The Homeowner on 30 April 2020 sent an email with calculations on common parts charges [See P26] he had found £66,000 of invoices that had been invoiced incorrectly. He also referred to discrepancies with repair to the main gate of the development, claimed on the insurance and billed at 1/66th when it was a common area [see P31]. The Lauriston Street

Block did not contribute to the insurance policy, however, have now agreed to do so. [Prod X22]. He referred to electricity charges [X21] The Property Factor inherited this from the previous Factor and the Homeowner said that the charges are not an easy matter to split. However, the Lauriston Street Block had not been paying any for 20 years. The previous Factor had been apportioning those charges on a 1/66 basis and only residential owners which were paying for common area electricity. The Homeowner had worked out a formula to make "a good guess" at what the common area electricity charges should be. He was not blaming Property Factor for this situation or the insurance issue, other than to ask why it took him to raise it. The reserve fund, when he reviewed the accounts, the numbers did not add up [see P25]. Reserve fund numbers from one year were not the same as the next financial year and it was never properly explained. He took advice from accountants, and they could not explain it. It was never properly resolved and another example about where he thought the accounts were lacking.

48. The Factor advised that the Committee were fully involved in the financial arrangements in Princess Court. The owners made the decision that retrospectively no costs would be paid from the Lauriston Street Block. The Homeowner has been involved with the Property Factors' Accounts Department a lot, in the summary of accounts from 2019 onwards and reviewing the expenditure and making sure it is correct.

49. The Factor has made attempts to calculate the figures due by the Lauriston Street Block, but the figures had not been agreed by either party. The Property Factor advised that they stand by their position that this is an owners' dispute.

50. The definition of common areas and common parts is not clear in the title deeds, for example electricity is not covered. The Factors have discussed with owners the common parts and common areas. The owner of the Lauriston Street Block does not agree with electricity costs. The Property Factor accepted that it had not all been done correctly but they had agreed to try and work and progress forward. He advised that they are Property Factor and agents for the owners. There has been a breakdown in repairs adjustment. He submitted that there is a reference to the "stair basis" and the Homeowner's submission is purely speculative on this apportionment of common part charges.

51. In response to [P24] “accounts process not provided” in that email thread there is a description of the process, therefore the information has been provided to the Homeowner.

52. The reference to the estimate of expenditure only for the repairs expenditure, insurance (X22) is a complicated issue. There is a reference to building insurance and then also to engineering insurance. Building insurance does not cover the gate, engineering insurance refers to the motor. Therefore, it will depend on what the question is, and the Property Factor did not know if the gate was covered. Lifts are covered under the motor insurance, there is nothing in the Deed of Conditions as to how that is apportioned. There is a trend of owner’s involvement in these charges.

53. Final point, the owner of Lauriston Street Block’s staff has done work cleaning the car park and there was some agreement this was in lieu of payments. Some discussion of charges at committee level. A lot of these questions go back 17 years ago, and they cannot be proved either way. The Factors have attempted to find a way to resolve it.

54. The Lauriston Street Block has now made a payment to the charges. The committee and Lauriston Street Block calculated it. The Property Factors were not at that meeting. The Property Factors suggested that the Homeowner go to arbitration if they remain unhappy.

55. The Homeowner advised that he does consider the electricity and insurance to be unique cases and a very small part of the case, fand he would abide by the decision of an arbiter, but he is not prepared to accept that there is any divergence for the common areas on the deed of conditions. The Homeowner submitted that the question of electricity and insurance is not 100% all other matters can be determined by the title deeds.

56. The Factor queried the gate at the development and discussed if it was a common part or common area. There were some other very specific issues and no allowance for them in the deed of conditions.

57. The Homeowner advised that for a resolution his main hope is that the Property Factor prepared the correct invoices. No debt was recovered as no invoice was sent. Code of conduct where the Property Factor had failed in their duties then they should be instructed

to calculate all missing charges back to 2007 and issue revised invoices to owners. The validity of the charges as per the deed of conditions should be reviewed independently.

58. The Property Factor hoped that there could be an agreement as to what the definition is first on common area charges. What period can we go back to. Can we collect funds back to 2007? Owners have made decision at the AGM, and they have acknowledged the previous errors. The Lauriston Street Block has made a payment, and it has been agreed by the committee for 2016 to 2019.

59. The Homeowner submitted that the Property Factors have stated several times that there is an agreement in place in reference to not including the Lauriston Street Block. He considered that this was false.

DECISION

60. The Homeowner has complained that the Property Factor has breached the following sections of the 2012 and 2021 Code of Conduct: -

Property Factor's Code of Conduct 2012

Section 3

General: 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. The overriding objectives of this section are: 1. Protection of Homeowners' funds; 2. Clarity and transparency in all accounting procedures; and 3. Ability to make a clear distinction between Homeowners funds and a property Factor's funds.

61. The tribunal finds that there has been a breach under this part of the Code given that the Factors accept that they have breached this section. In their email of 6 April 2020, they

apologise that they have not ensured that the Lauriston Street Block have been charged their communal area expenses, this email also shows that this section has been breached.

62. It appears that the situation where the Lauriston Street Block has not paid its share of the common area charges has existed for a number of years since around 2010. It is not entirely clear how the failure to charge them for the common area arose in 2010 given that there was evidence they had been charged in accordance with the title deeds from 2007-2010.

63. Since 2020 the Property Factors and the Lauriston Street Block had both recognised that there were omissions in billing the Lauriston Street Block.

64. Since April 2020 the Property Factor has not been able to issue retrospective invoices and accounts showing what was owed as common area charges by the Lauriston Street Block due to disagreement between the owners in the development and the Factors taking the view that these were matters for the owners to resolve.

65. The Property Factors indicated that the owners had agreed to a payment with the Lauriston Street Block. The tribunal had not been provided with evidence of this. The Property Factors and Colin Stone also submitted that the AGM in March 2023 agreed to not pursue the historic charges due by the Lauriston Street Block. The tribunal has considered this AGM Minute, and it is not entirely clear what in fact was agreed at the AGM, and in our opinion, it is not at all clear that the Committee wrote off the historic debts of Lauriston Street Block. We are also not certain that the AGM would be entitled to write off the debts of some owners, which other owners may have a legal right to bring an action for and to seek recovery of those debts. It appears to us that the question of outstanding common area charges owed by Lauriston Street Block for the prescriptive period remains to be determined.

66. It appeared to be the case that the Factors had undertaken to ensure that they will now bill all owners for the common area charges. However, it appeared that the Factors are waiting on instruction from the owners as to whether or not certain costs are common area charges.

67. It also appeared to be by the case that the Factors had put in place new accounting software which should also help ensure that the accounts were transparent and clear; and Homeowners would be able to see what they were paying for.

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.

68. In relation to the first part of this section we find no breach in that detailed financial breakdowns were provided. We find that there has been a breach under the second part of this section of the code. We consider that this breach is accepted by the Factors. We would acknowledge that the Factors have provided a detailed financial breakdown of charges made and a description of the activities and works carried out which were charged for. Their service level agreement also allows for supporting documentation and invoices to be inspected. The breach however relates to the accuracy and completeness of the information provided we consider that there was an error in placing common area and common part charges in the same columns and therefore, the invoices and supporting documentation could not clearly show what those charges were for.

Section 4: Debt Recovery 4.5 You must have systems in place to ensure the regular monitoring of payments due from Homeowners. You must issue timely written reminders to inform individual Homeowners of any amounts outstanding.

69. We understood that this section was no longer part of the Homeowner's case, his complaint does not relate to a failure to have systems in place to ensure the regular monitoring of payments from Homeowners. We do not find that there is a breach under this section of the Code.

Property Factor's Code of Conduct 2021

Section 3: Financial Obligations

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

70. We find that there was a breach under this section of the Code for the same reasons that we find that there was a breach under the 2012 Code Section 3 General.

3.2 The overriding objectives of this section are to ensure property Factors: • protect Homeowners' funds; • provide clarity and transparency for Homeowners in all accounting procedures undertaken by the property Factor; • make a clear distinction between Homeowners' funds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property Factor's own funds and fee income.

71. We find that there has been a breach under this section of the Code. The Factor accepted that they had made a mistake in not ensuring that the common area charges were also billed to the Lauriston Street Block. In view of this fact, it must also be correct that they had failed to protect homeowner's funds, as some homeowners were paying additional common area charges because other owners had not been charged. We also note that it was the Homeowner himself who uncovered these issues with the error in the common area charging regime. In his evidence, he spoke about the failure to clearly place the different charges into their own accounting lines with the outcome where some common part charges and some common area charges were grouped together and then charged as common parts.

72. It is not entirely clear why the changes to the charging regime in place in 2007-210 were made, moving from charging in terms of the title deeds to some other method. It is also not

clear who instigated those changes. We consider however the important issue to be that the title deeds dictate how the charges should be apportioned between the parties, we agree with the legal advice provided that unless there is a Deed of Variation granted by the owners, the title deeds should continue to regulate those charges. If owners do not agree with the terms of the title deeds, then they can pursue the making of a deed of variation, until such time however, as there is a registered deed of variation then the common area and common parts charges should be made in accordance with the terms of the existing title deeds.

73. If an owner does not agree with what constitutes a common charge or a charge for a common part, then that party would have the right to go to arbitration on the point or seek a declarator at court.

74. It was put to us that the Factor had also erred in billing for the common parts and had billed each block of flats separately rather than the whole development excluding the Lauriston Street Block. We have considered the terms of the Deed of Conditions; we do not agree with the Homeowner on this point. We considered the definition of Block of Flats and Clause Third "maintenance of common parts". Our reading of this Clause is that each Block of Flats would be separately billed for work to the common parts of that block, and not that all blocks would pay collectively.

Section 4: Debt Recovery

4.1 Non-payment by some Homeowners may affect provision of services to others or may result in other Homeowners in the group being liable to meet the non-paying Homeowner's debts in relation to the Factoring arrangements in place (if they are jointly liable for such costs). For this reason, it is important that Homeowners are made aware of the implications of late payment and property Factors have clear procedures to deal promptly with this type of situation and to take remedial action as soon as possible to prevent non-payment from escalating.

4.9 A property Factor must take reasonable steps to keep Homeowners informed in writing of outstanding debts that they may be liable to contribute to, or any debt

recovery action against other Homeowners which could have implications for them, while ensuring compliance with data protection legislation

75. We do not find these sections to be relevant to the complaint before the tribunal and we do not find the Property Factor to be in breach of them.

PROPOSED PROPERTY FACTOR ENFORCEMENT ORDER

76. In terms of resolution, the Homeowner seeks reissued invoices and accounts from 2007.

77. The tribunal was not provided with information as to what arrangements have been put in place for the Lauriston Street Block to make appropriate reparation to the other owners for the failure to charge the Lauriston Street Block since 2007. We also note the AGM in March 2023 discussed the issue of the historic accounting errors and this was considered by the parties. As noted, the tribunal has considered this AGM Minute and it not entirely clear what in fact was agreed at the AGM. In our opinion it is not at all clear that the Committee wrote off historic debts of Lauriston Street Block. Further, we are not certain that the AGM would be entitled to write off the debts of some owners, which other owners may have a legal right to pursue and seek recovery of. It appears to us that the question of outstanding common area charges owned by Lauriston Street Block for the prescriptive period remains to be determined and remains outstanding.

78. The tribunal considers that the appropriate way to determine what charges should have been levied and paid by owners is to have regard to the deed of conditions. The deed of conditions sets out what is a common area and what is a common part, and who is liable to pay charges incurred for those areas.

79. The tribunal notes that there are some additional issues the insurance and electricity which are not clearly defined in the deed of conditions and appear to have been a source of ongoing disagreement in terms of payment.

80. The tribunal notes that the deed of conditions at Clause 8 states that all parties are liable for a 1/86th share, or such other equitable share as may be determined by us or the Factor.

We also note that the Lauriston Street Block are liable to pay a 20/86th share of the common area charges. We do not consider the deed of conditions at Clause 8 allows for the Factor to amend or alter the 20/86th share of the common area charges by the Lauriston Street Block. Accordingly, as far as common area charges are concerned, we consider that invoices should be re-issued with the appropriate apportionment of a 1/86th share for all owners in the development including the Lauriston Street Block.

81. We note the Lauriston Street Block's position regarding the common electricity, we do not agree that a proper reading of the deed of conditions would not require the Lauriston Street Block to contribute their 20/86th share towards the use of common area electricity. We also note that the insurance appears to cover matters which may be both common parts and common area, and therefore the apportionment of those common area charges is more complicated. We consider that the Factor should be able to use its professional expertise and make appropriate apportionment for these items and thereafter issue accounts to the owners which include apportioned shares of electricity and insurance.

82. We do not consider that there is anything in the deed of conditions which provides owners with an ability to refuse to contribute to common area charges because they do not agree with them. We consider therefore that all matters which are common area charges should be apportioned between all owners.

83. We consider if the Lauriston Street Block were carrying out common area works, then they would be entitled to bill the other owners for these works and these invoices could be included in the accounting which takes place.

84. We consider therefore that the Factors should therefore prepare accounts and reissue invoices having regard to the common area works and common part works which have taken place in the previous five years. We do not consider that the Factors require to be instructed by the owners as to what charges apply to what areas. The Factor should assess this matter in terms of the title deeds.

85. We consider that once owners have been issued with invoices, they can either settle them, or if they do not consider that they are due to pay those sums then they can go to arbitration on the matter or seek a declarator at the sheriff court. What in our opinion is not helpful is

the current stalemate. The Factors require to do the accounting and then issue the accounts and invoices for the common area charges. The tribunal considers that each owner would have a right to seek recovery of overpayments from other owners any such right to recover a debt is subject to prescription, and in our opinion, the prescriptive period runs for five years from the raising of an action at court. It is important therefore that the owners are able to determine what sums they are being asked to pay/or are owed in order that they can consider if they have any right of action against other owners.

86. In this case, we understand that the Lauriston Street Block have agreed to pay their share of the costs from at least 2019. We also note that they dispute that they are liable for certain matters as they do not agree that they are common area matters.

87. We consider that this matter has not been progressed since April 2020. We note that the Homeowner, had felt hurt that his attempts to clarify accounts had been seen in a negative light by other homeowners, we consider that the Factor could have done more to assist in the timeous progress of this issue. By issuing revised accounts and invoices it would have allowed parties to move on from the matter or pursue legal redress. We find that the ongoing stalemate has not been helpful to any owner and would appear to have led to ongoing ill-feeling we consider that the Property Factor could have taken a more decisive role.

88. We consider that as part of the order we should make an award to the Homeowner to compensate for the stress and inconvenience caused by the Property Factor's actions in issuing incorrect accounts and invoices, and then in failing to re-issue accounts and invoices. We will order that they pay the sum of £1,000.00 in compensation.

89. The 2011 Act seeks to resolve disputes between a Factor and a Homeowner. Having regard to the application, evidence before the tribunal and current circumstances of the parties as we understand them (as set out in the previous paragraphs) we consider that the most appropriate remedy would be to make an order.

90. Accordingly, we intend to make a Property Factor Enforcement Order in the following terms:-

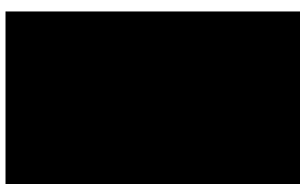
a. We will instruct the Property Factor to calculate and reissue statements of account and invoices for 5 years to the date of the Order.

b. We consider that they should provide those accounts and invoices within a period of 2 months from the date of the Order being made.

c. We order that the Property Factor pay the Homeowner compensation of £1,0000 for the inconvenience caused by the Factor's failure to bill the development owners correctly since 2010, and thereafter to re-issue correct accounts and invoices from becoming aware of the error.

Appeals

A Homeowner or Property Factor 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.



Melanie Barbour Legal Member and Chair

15 April 2024 Date