**Statement of Decision under Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (contained in Schedule 1 of the Chamber Procedure Regulations 2017 (SSI No 328)) ("the Procedure Rules") in relation to a request for a review of the Tribunal's decision under section 43(2) (b) of the Tribunals (Scotland) Act 2014 following a hearing.**

**In connection with**

**Chamber Ref: FTS/HPC/PF/22/3616**

**Parties:**

**Mr William McGibbon, Flat 10, 12 Ravelston Terrace, Edinburgh EH4 3TP ("the Applicant")**

**Hacking & Paterson Residential Management Services, 103 East London Street, Edinburgh EH7 5BF ("the Respondents")**

**Tribunal Member:**

**Graham Harding (Legal Member)**
**Andrew Murray (Ordinary Member)**

## 1. DECISION

The Tribunal having carefully considered the application by the Homeowner for a review of its decision finds that the application should be granted in part and the decision amended. The decision of the Tribunal was unanimous.

## 2. BACKGROUND

**i.** On 20 January 2023, the Tribunal issued its decision to the parties. The Tribunal found that the Factor had not failed to comply with its duties under Section 14(5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act").

**ii.** By letter dated 7 February 2023 the Homeowner wrote to the Tribunal commenting on the decision and seeking a review. The application for review was timeous.

iii. The Respondents did not submit any written representations to the Tribunal in respect of the review application other than to say that it was their intention to leave matters to the Tribunal to determine the application.

iv. The Tribunal considered that there may be merit in the applicant's arguments and fixed a hearing.

## 3. THE HEARING

1. A hearing was held at George House, Edinburgh on 25 May 2023. The Applicant attended in person supported by Mrs Marjorie McGibbon. The Respondents did not attend and were not represented.

2. The Applicant advised the Tribunal that he had contacted the Factor of the adjoining development, James Gibb and had explained to them the issues he had with the street lights and other matters affecting the developments. He said he had also had a meeting with the Respondents. He submitted that there were three parties who had to share the costs and not two as had been said by the Tribunal in its decision.

3. The Tribunal referred the Applicant to his comments in his application for review with regards to the charges for gritting the access road in winter. He submitted that there may not be any need for gritting and queried whether there was any legal obligation on private owners to grit access roads. He suggested that commercial proprietors may be in a different position. He said that the local authority provided private owners with yellow boxes of grit for use in winter.

4. The Homeowner challenged what could meet the definition of maintenance in terms of the title deeds and queried if this could be legitimately extended to include the gritting of the access road. The Applicant explained that in his view his choice as to whether to have the road gritted or not had been taken away from him and he had a concern that if allowed to continue there was a big chance that costs could get out of hand if the Respondents were given more leeway. There had been no vote on the gritting service and the Factor had gone ahead without any communication with homeowners.

5. With regards to the communal lighting the Applicant said that there was no evidence as to the history of the lights and how they had been connected. He submitted that the two lights that were still inoperative and marked "6 & 7" on the plan submitted with his review application had at some point been connected to the adjoining development's electric supply. He went on to say that he thought it likely that lights "4 & 5" on the plan had also been similarly connected and had never been connected to the applicant's development electric supply. He submitted that that was the reason it had been necessary for the contractors to dig

a trench and install a new cable from light “3” to lights “4 & 5”. The Applicant again submitted that there had been a lack of communication on the part of the Respondents when dealing with this matter.

6. With regards to the CCTV installation the Tribunal noted that the Applicant had spoken to the contractor who had installed the new system and had been advised that it had been incorrectly installed in 2011. He said he now accepted that the new system was not an upgrade that would have required 100% approval from owners. Nevertheless, the Applicant suggested that there had still been an issue with communication on the part of the Respondents.

7. In conclusion the Applicant submitted that the Respondents relied upon its administrators who had perhaps some experience in repairs and maintenance but who had no technical experience and therefore did not understand issues when presented with complex matters that could involve owners in substantial costs. The Applicant referred the Tribunal to recent works not related to this application.

8. The Tribunal noted the Applicants more detailed submissions in his application and confirmed these would be taken into account by the Tribunal when reaching its decision.

## 4. REASONS FOR DECISION

9. The Applicant took issue with the Tribunal’s interpretation of the burden relating to the maintenance and keeping of the access roadway referred to in the Applicant’s title deeds. The Applicant elaborated on his written submission at the hearing. Notwithstanding any agreement between the Respondents and the Factor for the neighboring development, James Gibb the Tribunal is satisfied that the Applicant along with the other development owners of the of the 1.431 acres of ground as successors to the previous owners Dove Conversions Limited are, in terms of a Deed of Conditions recorded in G.R.S. (Midlothian) 26 January 1966, liable to contribute a 50% share of the cost of maintaining and keeping the access roadway tinted brown on the title plan. The fact that the neighboring 1 acre of ground has been subdivided would not of itself vary that condition. However, it may well be that there exists an informal agreement between James Gibb and the Respondents that as there are now three developments sharing use of the access road the cost of maintaining and keeping should be

shared by each development contributing one third of the cost. Although the Tribunal's decision of 20 January did not reflect that there are three developments burdened with liability for the cost of contributing to maintaining the access road that did not materially affect the reason for the Tribunal's decision.

10. The Applicant has referred in his application to Clause Sixth of Burden 1. That clause simply confirms as far as the Applicant's development is concerned that it shall have no liability for maintaining the northern boundary of the adjoining development.

11. The Tribunal accepts that it should not speculate in its decision making as to what might happen if the Respondents decided not to pay James Gibb for its share of the cost of gritting and that this should not have formed part of the Tribunal's decision-making process.

12. The issue that remains therefore is whether the Respondents exceeded their authority by agreeing to meet the gritting cost requested by James Gibb without first seeking the approval of the development owners.

13. From the information before it the Tribunal accepted that although at a meeting of owners, concerns had been raised at Balfour Beattie no longer carrying out the gritting of the road, the Respondents did not then seek approval from owners to instruct gritting in winter. That may be because James Gibb had taken it upon themselves to do it but for whatever reason owners' approval was not sought. The question for the Tribunal is whether approval was necessary. It should be noted that the Respondents did not instruct the gritting. They agreed to pay one third of the cost of gritting instructed by James Gibb. Therefore, although they did not need to seek approval to instruct any gritting, they ought to have sought the approval of owners to agree to pay the share of the cost requested by James Gibb. They did not do so and that leaves them facing the consequences of Rule 6.2 of the Scheme Rules contained in Burden 12 of the Title Deeds, the Deed of Conditions by Yor Limited Registered 20 August 2008. This makes provision for the Applicant to be reimbursed for any costs incurred. The Tribunal accepts that its earlier decision requires to be corrected.

14. The Tribunal whilst acknowledging that the Applicant's theory with regards to the lighting and which development might have supplied the different lights had a degree of logic there was no evidence to support his position. The Tribunal was satisfied that the 5 lights adjoining the access road and within the development boundary should be connected to the development electric supply. The reason why lights 4 and 5 were previously inoperative remains unknown but the Tribunal was satisfied that the Respondents did have authority to instruct contractors to ensure that all five lights were in working order.

15. The Respondents had previously accepted that they ought not to

have referred to the replacement CCTV system as an upgrade and the Applicant having discussed matters with the contractor who installed the system now accepts that this is the case.

16. The Applicant has submitted that the Respondents have breached Section 2.1 of the Code by failing to communicated and consult and provide required information. He has referred the Tribunal to this in the context of the provision of gritting by James Gibb, the lighting repairs and the CCTV renewal. There is no doubt that good communication between a Factor and its clients is key to ensuring positive relationships. The Respondents acknowledged in their written submissions that they had erroneously referred to the new CCTV system as an upgrade. With regards to the gritting of the access road and having regard to the Applicant's further submissions the Tribunal now considers that the Respondents ought to have communicated with owners to advise them either that they had been contacted by James Gibb who were proposing instructing gritting and that owners should pay one third of the cost or that James Gibb had instructed gritting without consultation and were claiming one third of the cost. In either case the Tribunal is satisfied that the Respondents should have asked owners for approval or explained what repercussions there might be, if any, for not paying. There was therefore a breach of Section 2.1 of the Code. It also follows that the Respondents then are caught by the terms of Rule 6.2 of the Scheme Rules and the Applicant is not liable for the gritting costs from since they were incurred. Although the Respondents referred to the installation of the new CCTV system as an upgrade when in fact it was not. The Tribunal did not consider that the Applicant had made out any significant grounds to persuade the Tribunal to alter its position in respect of this aspect of the complaint. With regards to the access road lighting the Tribunal whilst understanding the logic behind the Applicant's submissions did not find that there was any evidence to back up the submissions and it therefore remained the Tribunal's position that the Respondent's had the necessary authority to proceed as they did.

17. Having fully considered the Applicant's request for a review it finds that the application should be granted in part and the decision of 20 January 2023 amended.

**Graham Harding**
**Chairing Legal Member of the Tribunal**
**Dated: 10 June 2023**