

Housing and Property Chamber

First-tier Tribunal for Scotland



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

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

Chamber Ref: FTS/HPC/PF/17/0229

The Parties:-

**Dr Mohsan Mallick, 25 Ettrick Drive, Glasgow, G61 4RB and Ms Faaiza Mallick,
25 Ettrick Drive, Glasgow, G61 4RB
("the Homeowners")**

**MXM Property Solutions Limited, Baltic Chambers, Suite 544-545, 50 Wellington
Street, Glasgow, G2 6HJ
("the Property Factor")**

Tribunal members

**Susanne L M Tanner Q.C. (Legal Member)
Robert Buchan (Ordinary Member)**

DECISION

- 1. The Property Factor has failed to comply with the Code of Conduct for Property Factors, Section 2.5.**
- 2. The Property Factor did not fail to comply with the Code of Conduct for Property Factors, Sections 2.1, 2.2, 3.3, 4.3, 5.1, 5.2, 5.6, 5.9, 6.1, 6.3, 6.7 and 7.**
- 3. The Property Factor did not fail to comply with its Property Factor's duties.**
- 4. The decision of the tribunal is unanimous.**

STATEMENT OF REASONS

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

2. Findings in fact

2.1. The Homeowners were joint owners of the Property from 18 May 2004 until on or about 20 August 2018 when the Property was sold.

2.2. The development in which the Property is situated is known as Kingston Quay ("the Development").

2.3. The Homeowners delegated most day-to-day management of the Property to their father, Mr Farid Mallick.

2.4. The Property Factor became a registered property factor on 1 November 2012 and renewed its registration on 8 July 2016.

2.5. The Property Factor was appointed as the property factor for the Development in June 2014 following a proprietors' meeting on 19 June 2014 at Lourdes Academy for that purpose which was organised with the assistance of Nicola Sturgeon, MSP for Glasgow Southside and at which the Property Factor had the majority of the votes and was appointed as managing agent.

2.6. There is a written statement of services ("WSS") for the Development.

2.7. The Property Factor has a written Complaints Procedure (version 4, July 2016).

2.8. The Property Factor provides an online portal with information about the factoring Development which can be accessed via log in details provided to each proprietor, including the Homeowners.

2.9. Service issues could be raised by proprietors in the Development via the online portal for the Development.

2.10. The Homeowners and their father Mr Farid Mallick were provided with log-in details which enabled them to log on to the online portal for the Development.

- 2.11. The Homeowners and Mr Farid Mallick communicated with the Property Factor principally by email.
- 2.12. A Customer Statement was issued on behalf of the Property Factor to the Homeowners dated 4 February 2018 (**PF Doc 27**).
- 2.13. **PF Doc 27** is a true statement of payments, including late payment charges, due by the Homeowners to the Property Factor; payments made by the Homeowners and Mr Farid Mallick for the period 1 July 2014 to 1 February 2018; and the arrears balance outstanding as at that date.
- 2.14. The information in the Customer Statement **PF Doc 27** is not false.
- 2.15. The information in the Customer statement **PF Doc 27** is not misleading.
- 2.16. The Property Factor's credit control solicitors, TLT, issued automated and personal credit control letters to the Homeowners in respect of debts owed to the Property Factor in respect of its management of the Development.
- 2.17. The credit control letters issued by TLT solicitors to the Homeowners were in line with the process specified in the **Written Statement of Services** for non-payment of common service charges.
- 2.18. The credit control letters issued by TLT Solicitors to the Homeowners were not abusive, intimidating or threatening (apart from a reasonable indication that the solicitors may take legal action on behalf of the Property Factor and co-proprietors of the Development).
- 2.19. An email was sent by the Homeowner on 27 December 2016 to the Property Factor raising complaints about a number of repairs issues and the cleaning service (**HO Doc 72**).
- 2.20. There was no acknowledgement of receipt of the Homeowner's email **HO Doc 72** by the Property Factor.
- 2.21. The Homeowners were in arrears at the time that the email of 27 December 2016 (**HO Doc 72**) was sent to the Property Factor.
- 2.22. The Property Factor had sent 17 communications to the Homeowners in the period from 1 June 2016 to November 2016, principally in relation to arrears in common charges, prior to the Homeowner's email of 27 December 2016.

- 2.23. There was no response by the Property Factor to the Homeowner's email (**HO Doc 72**) by the Property Factor until 19 September 2017 (**HO Doc 102** attaching **HO Doc 74**).
- 2.24. The Property Factor did not respond to the Homeowner's enquiries and complaints received by email **HO Doc 72** within prompt timescales.
- 2.25. The Property Factor did not deal with the Homeowner's enquiries and complaints received by email **HO Doc 72** as quickly and fully as possible.
- 2.26. The Property Factor did not keep Homeowner informed if he required additional time to respond to the Homeowner's email **HO Doc 72**.
- 2.27. The Property Factor did not have response times in the **Written Statement of Services** for emails sent by homeowners directly to named employees of the Property Factor, rather than to the general email address.
- 2.28. The Homeowner sent an email complaint on 19 September 2017 to Mark Allan at the Property Factor (**HO Doc 76**).
- 2.29. The Homeowner's email of 19 September 2017 (**HO Doc 76**) referred to the Homeowner's email of 27 December 2016 (**HO Doc 72**) and stated that no reply had been received until 19 September 2017 (**HO Doc 74**).
- 2.30. In the Homeowner's email of 19 September 2017 (**HO Doc 76**) the Homeowner repeated the complaints in the 27 December 2016 email.
- 2.31. There was no acknowledgement or response by the Property Factor to the Homeowner's email of 19 September 2017 (**HO Doc 76**).
- 2.32. The Property Factor did not respond to the Homeowner's enquiries and complaints received by email on 19 September 2017 (**HO Doc 76**) within prompt timescales.
- 2.33. The Property Factor did not deal with the Homeowner's enquiries and complaints received by email of 19 September 2017 (**HO Doc 76**) as quickly and fully as possible.
- 2.34. The Property Factor did not keep the Homeowner informed if he required additional time to respond to the Homeowner's email of 19 September 2017 (**HO Doc 76**).
- 2.35. The Homeowner lodged a complaint with the Property Factor through support@mxmps.com on 30 June 2017.

- 2.36. On 30 June 2017, there was a system acknowledgement issued to the Homeowner's complaint (**HO Doc 101**).
- 2.37. The Property Factor did not provide any substantive response to the Homeowner's complaint of 30 June 2017.
- 2.38. The Property Factor did not respond to the Homeowner's enquiries and complaints received by on 30 June 2017 within prompt timescales.
- 2.39. The Property Factor did not deal with the Homeowner's enquiries and complaints received on 30 June 2017 as quickly and fully as possible.
- 2.40. The Property Factor did not keep Homeowner informed if he required additional time to respond to the Homeowner's complaint of 30 June 2017.
- 2.41. The Homeowner sent an email to Mark Allan of the Property Factor on 23 November 2017 (**HO Doc 81**) raising complaints and enquiries.
- 2.42. There was no response from the Property Factor to the Homeowner's email of 23 November 2017 (**HO Doc 81**).
- 2.43. The Property Factor did not respond to the Homeowner's enquiries and complaints received by email on 23 November 2017 (**HO Doc 81**) within prompt timescales.
- 2.44. The Property Factor did not deal with the Homeowner's enquiries and complaints received by email of 23 November 2017 (**HO Doc 81**) as quickly and fully as possible.
- 2.45. The Property Factor did not keep Homeowner informed if he required additional time to respond to the Homeowner's email of 23 November 2017 (**HO Doc 81**).
- 2.46. The Property Factor provided to the Homeowners in writing a detailed financial breakdown of charges made and a description of the activities and works which are charged for, by means of publishing the information on the Property Factor's website and providing a link to the Homeowners to access the information.
- 2.47. The Homeowners did not use the link provided to them to access the available financial information on the Property Factor's website.
- 2.48. Copies of original invoices were available to the Homeowner on request at a cost of 11p per sheet.

- 2.49. The Homeowners did not request or make payment for copies of any original invoices.
- 2.50. The **WSS** notified the Homeowners about the circumstances in which a late payment fee of £14.40 would be applied to a homeowner's account and the reasons for the imposition of such a fee.
- 2.51. A late payment fee of £14.40 was applied to the Homeowners for payments of common charges which were over 14 days late.
- 2.52. The individual charge of £14.40 for late payment of common charges was not excessive.
- 2.53. **PF Doc 27** is a true statement of what was due to be paid by the Homeowners between 1 July 2014 and February 2018, including common charges and late payment charges and what was paid by the Homeowner.
- 2.54. The Homeowners were in arrears of common charges throughout the period from 1 July 2014 to 1 February 2018.
- 2.55. The Homeowners were in arrears of common charges throughout the period from 1 February 2018 until the sale of the Property on 20 August 2018.
- 2.56. The total sum owed by the Homeowner as at 1 February 2018 was £2133.17.
- 2.57. The Property Factor was entitled to impose charges for late payment in terms of the **WSS** and the terms were repeated on individual invoices issued to the Homeowners.
- 2.58. The charges imposed on the Homeowners for late payment of common charges are not unreasonable.
- 2.59. The charges imposed on the Homeowners for late payment of common charges are not excessive.
- 2.60. The Property Factor has and maintains a policy of Professional Indemnity Insurance ("PII").
- 2.61. The Property Factor's PII policy was issued and available to the Homeowners.
- 2.62. The Property Factor has provided the Homeowners with clear information showing the basis upon which their share of the buildings'

insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance and the terms of the policy.

2.63. The Property Factor had a procedure to allow the Homeowners to notify them of matters requiring repair, maintenance and attention.

2.64. At the time of the Homeowners' Application to the tribunal and formal notification of alleged failures to comply with the Code of Conduct and property factor's duties, there were no works for which the Property Factor required to update the Homeowners in terms of progress and estimated timescales for completion, as no such works had been instructed due to a lack of Development funds for the same.

2.65. The Property Factor did not instruct any additional works at the Development which would have required a competitive tendering exercise.

2.66. The Property Factor has a clear written complaints procedure.

2.67. The Property Factor's written complaints procedure specifies situations in which it will not apply.

2.68. The Property Factor's complaints procedure will not apply where the owner is in litigation with the development and is being pursued by MXM on behalf of the owners due to unpaid common service charges.

2.69. The Property Factor's complaints procedure will not apply where owners are in arrears with more than three months outstanding on their account and have not followed clause 3.1.9 in the **WSS**.

2.70. The Homeowners had been in litigation with the Property Factor on behalf of the Development in relation to unpaid common service charges, following which a Minute of Agreement was entered into between the parties in May 2015 and the action was dismissed with no expenses due to or by either party in February 2016.

2.71. At the time of the Homeowners complaints, the Homeowners were in arrears with more than three months' outstanding. The Homeowner had not followed Clause 3.1.9 of the WSS.

2.72. The Property Factor did not treat the Homeowner's post-litigation concerns as a formal complaint which necessitated the written complaints procedure being followed.

2.73. The Property Factor discharged its duties in relation to management of the Development Common Property in accordance with the Deed of Conditions and Written Statement of Services.

3. Findings in fact and law

- 3.1. The Homeowners became the registered proprietors of the Property equally between them and the survivor of them on 18 May 2004 and ceased to be the registered proprietors on or about 20 August 2018.
- 3.2. The Property is a first floor Flat tinted blue on the Title Plan for Title GLA175477 together with (1) the exclusive right to use and enjoyment of the basement car parking space tinted brown on said plan; (2) a right in property in common along with the other proprietors and flatted dwellinghouses and commercial units within the development in and to the Development Common Parts as that expression is defined in the Deed of Conditions in entry 5 in the Burdens Section of the title sheet and (3) all servitude rights and other rights and privileges (whether common or exclusive) in favour of the subjects in the said Title as specified in the said Deed of Conditions.
- 3.3. The Deed of Conditions for the Development was registered on 1 April 2002 by Barratt Homes Limited, the Developer and former proprietor of the Development.
- 3.4. The Homeowners were owners of land used to any extent for residential purposes the common parts of which are managed by a property factor.
- 3.5. The Homeowners are a "homeowner" as defined in Section 10(5) of the Property Factors (Scotland) Act 2011.
- 3.6. The Property Factor manages the common parts of land owned by two or more other persons and used to any extent for residential purposes.
- 3.7. The Property Factor is a "property factor" as defined in Section 2(1)(a) of the Property Factors (Scotland) Act 2011.
- 3.8. The "Development Common Parts" for the Development are defined in the said Deed of Conditions.
- 3.9. The Proprietor of each Flat and each commercial unit in the Development, shall along with the Proprietors of the other Flats and Commercial Units in the Development possess a right of common property in and to the Development

Common Parts without reference to the location of their individual properties in the development.

- 3.10. 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 in accordance with the percentage contribution set out against the same in Column C of the Schedule to the Deed of Conditions, subject to Condition 11 of the Deed of Conditions.... .
- 3.11. The Homeowners, as proprietors of the Property, had an obligation in terms of the percentage contributions specified in Column C of Schedule 3 to the Deed of Conditions to contribute 0.27% of the costs of maintenance etc. of the Development Common Parts and common buildings insurance as referred to in Conditions 3.2 and 8.2 of the Deed of Conditions.
- 3.12. 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 to (1) order the execution of any common maintenance, redecoration, cleaning, repairs, alterations or renewals to the Development Common Parts ... (5) 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.
- 3.13. The Property Factor, as Managing Agents, unless otherwise determined at a meeting of proprietors held as aforesaid 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 of Flats and Commercial Units as aforesaid (save for appointment / removal of the Managing Agents and the duration of their appointment).
- 3.14. All expenses, and charges and premiums incurred for any work done or undertaken or services performed in terms of the provisions in the Deed of Conditions or otherwise (including the Property Factor's management charges as fixed by them) shall be payable by the respective proprietors whether consenters thereto or not in the proportions fixed in the Schedule to the Deed of Conditions in the same way as if their consent had been obtained and shall be collected by the Property Factor or by any other person or persons appointed at a meeting convened as provided for in the Deed of Conditions.

- 3.15. In the event of any proprietor in the Development failing to pay his proportion within one month of the payment being requested, the outstanding amount shall bear interest at the rate of four per centum per annum above the base lending rate of the Royal bank of Scotland plc ... from the date on which it is requested until payment and the Property Factor ... shall (without prejudice to the other rights and remedies of other Proprietors in the development) be entitled to sue for and recover the same in his/her/their own name from the Proprietor so failing together with all expenses incurred by the Property Factor ... and 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 Property Factor shall determine.
- 3.16. The Property Factor is obliged in terms of the Deed of Conditions to provide a quarterly statement of expenses, charges and premiums (without prejudice to the Property Factor's right to collect same at any time).
- 3.17. The Homeowners, as Proprietors of a Flat in the Development, were bound to pay to the Managing Agents at the date of entry the sum of £500 as a float for the fund for the execution of necessary maintenance, redecoration, repairs, alterations, renewals, operating, cleaning and lighting charges, insurance premiums and management charges.
- 3.18. The Property Factor is entitled to set up a sinking fund for the Development and require proprietors to pay £50 annually into the fund, to be held in trust for the proprietors from time to time.
- 3.19. As the information in **PF Doc 27** is not false or misleading, the Property Factor has not failed to comply with Section 2.1 of the Code of Conduct.
- 3.20. As the credit control letters issued by TLT Solicitors to the Homeowners were not abusive, intimidating or threatening (apart from a reasonable indication that they may take legal action in respect of non-payment of debts due to the Property Factor in respect of its management of the Development) the Property Factor did not fail to comply with Section 2.2 of the Code of Conduct.
- 3.21. As the Property Factor did not respond to the enquiries and complaints received by email from the Homeowner on 27 December 2016 (**HO Doc 72**) within prompt timescales or deal with the enquiries and complaints as quickly and as fully as possible and/or keep the Homeowners informed if they required additional time to respond or confirm response times for emails to individual employees in the WSS, the Property Factor failed to comply with Section 2.5 of the Code of Conduct.

- 3.22. As the Property Factor did not respond to the enquiries and complaints received by email from the Homeowner on 19 September 2017 (**HO Doc 76**) within prompt timescales or deal with the enquiries and complaints as quickly and as fully as possible and/or keep the Homeowners informed if they required additional time to respond or confirm response times for emails to individual employees in the WSS, the Property Factor failed to comply with Section 2.5 of the Code of Conduct.
- 3.23. As the Property Factor did not respond to the enquiries and complaints received via support@mjmps.com from the Homeowner on 30 June 2017 within prompt timescales (other than an automatic system acknowledgement, **HO Doc 101**) or deal with the enquiries and complaints as quickly and as fully as possible and/or keep the Homeowners informed if they required additional time to respond or confirm response times for emails to individual employees in the WSS, the Property Factor failed to comply with Section 2.5 of the Code of Conduct.
- 3.24. As the Property Factor did not respond to the enquiries and complaints received by email from the Homeowner on 23 November 2017 (**HO Doc 81**) within prompt timescales or deal with the enquiries and complaints as quickly and as fully as possible and/or keep the Homeowners informed if they required additional time to respond or confirm response times for emails to individual employees in the WSS, the Property Factor failed to comply with Section 2.5 of the Code of Conduct.
- 3.25. As the Property Factor provided to the Homeowners, in writing at least once a year, a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for, the Property Factor did not fail to comply with Section 3.3 of the Code of Conduct.
- 3.26. As the Property Factor would have provided copies of original invoices on request for payment of the sum of 11p per sheet which was reasonable and notified to the Homeowners in advance, the Property Factor did not fail to comply with Section 3.3 of the Code of Conduct.
- 3.27. As the charges imposed on the Homeowners for late payment of common charges are not unreasonable or excessive the Property Factor has not failed to comply with Section 4.3 of the Code of Conduct.
- 3.28. As the Property Factor has and maintains a policy of Professional Indemnity Insurance ("PII") the Property Factor has not failed to comply with Section 5.1 of the Code of Conduct.

- 3.29. As the Property Factor has provided the Homeowners with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance and the terms of the policy the Property Factor has not failed to comply with Section 5.2 of the Code of Conduct.
- 3.30. As at the time of the Homeowners' Application to the tribunal and formal notification to the Property Factor of alleged failures to comply with the Code of Conduct and Property Factor's duties there were no works about which the Property Factor required to update the Homeowners, in terms of progress and estimated timescales for completion, as none had been instructed due to a lack of Development funds, the Property Factor has not failed to comply with Section 6.1 of the Code of Conduct.
- 3.31. As the Property Factor was able to show how and why it appointed contractors, on request, and as there were no proposed works which required consideration of competitive tendering, the Property Factor did not fail to comply with Section 6.3 of the Code of Conduct.
- 3.32. No failure having been specified or established by the Homeowners, the Property Factor did not fail to comply with Section 7 of the Code of Conduct.
- 3.33. As the Property Factor discharged its duties in relation to management of the Development Common Property in accordance with the Deed of Conditions and Written Statement of Services, and no failure having been specified or established by the Homeowners, the Property Factor did not fail to comply with its property factor's duties in relation to management of the Development Common Property.

4. The Application

- 4.1. The Homeowner lodged an application ("the Application") with the tribunal on 16 June 2017.
- 4.2. In Section 7 of the Application the Homeowners alleged that the Property Factor has failed to comply with the Code in the following respects:
- 4.2.1. Section 1 "*B. Services not Provided*"
 - 4.2.2. Section 2, from 2.1 to 2.5, "*D. No action taken on complaints*"
 - 4.2.3. Section 3.3 "*C. Charges received but no repairs*".
 - 4.2.4. Section 4 "*No idea what measures taken*"
 - 4.2.5. Section 5.1 to 5.7 "*No details, no claims settled*"
 - 4.2.6. Sections 6.1 to 6.9 "*No repairs and no maintenance*"

4.2.7. Section 7.7 “*No procedure in practice, no action taken on complaints*”.

4.3. Separately, the Homeowners alleged that the Property Factor had failed to carry out its property factor’s duties for the following reasons: “*Correspondence enclosed. MXM does not act on complaints. No repairs are carried out although they charge 10% extra for maintenance and repairs. They are not an elected body. 4/5 owners appointed and all correspondence is done by their solicitors in the name of “Kingston Quay Owners”. Who are they? Only 4/5 owners whose names are never disclosed in spite of long correspondence. They use their own solicitors TLT who are MXM’s solicitors as well. No action taken on repairs complaints.*”

4.4. In Section 7 of the Application the Homeowners provided further details of the complaints, their reasons for considering that the Property Factor has failed to resolve the complaint, how this has affected them and what would help to resolve the problem.

4.5. Various documents were attached to the Application and form part of the Application paperwork.

4.6. Of the complaints in the Application Form, only the following were notified to the Property Factor on behalf of the Homeowners (by letter of 4 September 2016) in advance of the Application being made:

- 4.6.1. Section 2.1 and 2.5,
- 4.6.2. Section 3.3,
- 4.6.3. Section 4.3,
- 4.6.4. Section 5.1, 5.2, 5.6 and 5.9,
- 4.6.5. Section 6.1, 6.3 and 6.7; and
- 4.6.6. an alleged failure to comply with Property Factor’s duties in relation to the management of the common parts of the building owned by the owners.

4.7. Following the Application being made notification was made on behalf of the Homeowners to the Property Factor by a template letter dated 15 October 2017 in relation to the following Sections of the Code of Conduct:

- 4.7.1. Section 2.1, 2.2 and 2.5,
- 4.7.2. Section 3.3,
- 4.7.3. Section 4.3,
- 4.7.4. Sections 5.1, 5.2, 5.6 and 5.9
- 4.7.5. Sections 6.1, 6.3 and 6.7;
- 4.7.6. In addition to an alleged failure to discharge duties under the provisions of Section 17(5) of the 2011 Act.

4.8. Between 16 June 2017 and 1 December 2017, further information was requested from the Homeowners by the legal member with delegated powers under Section 18A of the 2011 Act and additional information was supplied by and on behalf of the Homeowners.

5. Referral of Application

5.1. On 13 December 2017, the Application, which comprised documents submitted in the period of 16 June 2017 to 1 December 2017 ("the Application"), was referred to the tribunal in terms of Section 18 of the 2011 Act and Rule 43 of the 2017 Rules. The decision to refer the application to a tribunal was sent to parties on 21 December 2017.

5.2. An oral hearing was fixed for 5 February 2018 and on 21 December 2017 the tribunal notified parties of the date, time and place of the hearing.

6. Directions

6.1. The following Directions were issued by the tribunal:

- 6.1.1. First to Third Directions dated 18 January 2018;
- 6.1.2. Fourth and Fifth Directions dated 8 February 2018;
- 6.1.3. Sixth Direction dated 23 March 2018;
- 6.1.4. Seventh to Ninth Directions dated 7 November 2018.

6.2. Reference is made to the full terms of those Directions.

7. Decisions on Procedural Matters

7.1. Reference is made to the Decisions of the tribunal dated 2 February 2018 and 8 June 2018 in relation to applications for postponement of hearing dates.

8. Written representations and documents

8.1. The following written submissions and documents were lodged by parties (with the permission of the tribunal where required):

8.1.1. Homeowners' written representations and documents

- 8.1.1.1. 9 January 2018 – written representations from Mr Farid Mallick (stated by Dr Mallick to be on behalf of the Homeowners) on the tribunal's template form;
- 8.1.1.2. 12 February 2018 – written representations from Dr Mohsan Mallick, with accompanying documents (no list of documents lodged and documents not numbered);
- 8.1.1.3. 12 February 2018 – written representations from Mr Farid Mallick, with documents numbered 51 to 68;
- 8.1.1.4. 9 March 2018 – written representations from Dr Mohsan Mallick;
- 8.1.1.5. 30 March 2018 - list of documents for the Homeowners numbered 1 to 111;
- 8.1.1.6. 4 September 2018 - Document 112 – lodged at hearing with permission of tribunal;
- 8.1.1.7. 4 September 2018 - Document 113 – lodged at hearing with permission of tribunal;
- 8.1.1.8. Photographs taken in and around the Development Common Property.

8.1.2. Property Factor's written representations and documents

- 8.1.2.1. Ring binder containing (1) Written Representations and (2) Supporting Documents 1-31;
- 8.1.2.2. 5 March 2018 – Ring binder containing (1) written representations (revised) by Property Factor; (2) Kingston Quay Communications Summary Log; and (3) Supporting Documents 1-41;
- 8.1.2.3. Documents 42 – 45 – lodged at hearing with permission of tribunal.

9. Oral Hearing

9.1. An oral hearing took place over the following dates:

- 9.1.1. 5 February 2018
- 9.1.2. 15 March 2018
- 9.1.3. 8 May 2018

- 9.1.4. 4 September 2018
- 9.1.5. 19 November 2018
- 9.1.6. 5 December 2018 (tribunal members' deliberations, parties not required to be present).

- 9.2. In the initial stages of the hearing the Homeowners were represented by their father, Mr Farid Mallick, as a lay representative although Dr Mohsan Mallick, one of the joint Homeowners also attended some of the hearing dates with his father. At a later date Dr Mohsan Mallick advised the tribunal that he had removed his father as lay representative of the Homeowners following what he perceived to be inappropriate communications made by his father with the tribunal's administrative staff. At a further later date prior to the adjourned oral hearing on 19 November 2018, Dr Mohsan Mallick sought to reinstate his father as lay representative of the Homeowners due to leave difficulties at his own employment.
- 9.3. On 7 November 2018, in its Directions, the tribunal directed that Mr Mallick was not suitable to act as a lay representative, for the reasons stated in the Direction. Thereafter Dr Mohsan Mallick appeared at the final day of the oral hearing and presented the remainder of the case on his own behalf and on behalf of his sister, the other Homeowner. Mr Farid Mallick was called as a witness by the Homeowner in relation to certain matters.

10. Discussion of oral submissions and evidence at hearing

- 10.1. The tribunal invited the parties to address each of the alleged failures to comply with the Code of Conduct and failure to comply with Property Factor's duties. A summary of parties' evidence and submissions and the tribunal's reasons in relation to its decision on each alleged failure to comply with the Code of Conduct / property factor's duties are outlined below:

10.2. Alleged failure to comply with Section 2.1 of the Code of Conduct

- 10.2.1. **Section 2.1 of the Code of Conduct provides:**

"2.1 You must not provide information which is misleading or false."

10.2.2. Summary of Homeowner's submissions and evidence in relation to alleged failure to comply with Section 2.1 of the Code of Conduct

10.2.3. The Homeowners' Complaint was that **PF Doc 27**, a Customer Statement produced for Kingston Quay Owners c/o TLT LLP for the Homeowners dated 4 February 2018, was both misleading and false.

10.2.4. The Homeowner's submission was that the Homeowners have made overpayments to their account because nothing is reflected on the account for payments that were made by the Homeowners in relation to a Minute of Agreement which was entered into following a court case in which the Property Factor sued the Homeowners on behalf of the proprietors of the development in respect of unpaid invoices.

10.2.5. The Homeowner referred to **HO Doc 69B** which was the Minute of Agreement entered into on behalf of the parties in terms of which the Homeowners agreed to pay the arrears in five instalments of £317.16; in addition to paying further invoices from the Property Factor as they fell due.

10.2.6. The Homeowner referred to **PF Doc 19**, an email from Gillian at Kingston Quay Owners, Credit Control, TLT LLP, dated 30 November 2016, and submitted that this document could be interpreted as providing evidence that there was a zero balance at that time in that it could be interpreted that all invoices were paid up to December 2015. The Homeowner further submitted that such a zero balance is not reflected in the Statement of Account **PF Doc 27**.

10.2.7. The Homeowner's father, Mr Farid Mallick, gave evidence in relation to payments he said had been made to the Property Factor by him which he said were not shown on the account. The Homeowner did not refer Mr Mallick to any independent documentary evidence in relation to any such payments.

10.2.8. The Homeowner accepted that he had not lodged any evidence of the payments he said had been made by the Homeowners or Mr Farid Mallick to the Property Factor or TLT. The Homeowner accepted that as a result, any additional payments he claims have been made to the Property Factor and TLT LLP could not be cross-checked with independent supporting evidence.

10.2.9. In relation to the Homeowner's complaint that the Customer Statement PF Doc 27 was misleading, the Homeowner submitted that it

was confusing because of allocation of payments against older debts and he submitted that even if he had a list of payments he and his father had made it would be difficult to check against the Property Factor's list.

10.2.10. Property Factor's evidence and submissions in relation to alleged failure to comply with Section 2.1 of the Code of Conduct

10.2.11. The Property Factor's position in summary was that the information in **PF Doc 27** is not false because it includes all payments made by the Homeowners and Mr Farid Mallick and the total shown on the last page is correct for that date (1 February 2018).

10.2.12. Mr Allan spent time taking the tribunal through the document in detail.

10.2.13. Mr Allan showed the tribunal members and the Homeowner the live system which showed invoices issued and payments received and submitted that the same information is included in **PF Doc 27**.

10.2.14. Mr Allan stated that the accounting system cannot produce a zero balance. The system allocates payments against the oldest debts so the amounts shown have to be totalled for the same date.

10.2.15. Mr Allan explained to the tribunal that the Property Factor had sued the Homeowners in the Sheriff Court in respect of unpaid invoices and that the parties had entered into a Minute of Agreement. Mr Allan said that in addition to failing to pay ongoing invoices, the Homeowners had failed to keep up with payments in terms of the Minute of Agreement. **PF Doc 21** is the Minute of Agreement which was entered into by parties. The Homeowners agreed to pay five instalments of £317.16 in respect of arrears starting on 28 May 2015. In addition the Homeowners agreed to pay future invoices as they were rendered. **HO Doc 69** shows that on 4 February 2016 the Sheriff recalled the suit and dismissed the action. Mr Allan stated that the Homeowners had not met the terms of the Agreement, in that they had not paid the arrears in full as agreed; nor had they paid the ongoing invoices for the development.

10.2.16. Mr Allan further explained that late payments had been levied to the Homeowners, which the Property Factor was entitled to levy and that these were reflected on the Customer Statement. Mr Allan took the tribunal to evidence in relation to each of the late payments which had been levied. Mr Allan further explained that he had reimbursed the late payment fees

rendered after the date of the Application being made to the tribunal and this was shown on the Statement.

10.3. Tribunal's determination in relation to alleged failure to comply with Section 2.1 of the Code of Conduct

10.3.1. The tribunal took the view that **PF Doc 27** accurately recorded the invoices issued to the Homeowners, late payment charges added and the payments received by the Property Factor and TLT from the Homeowners / Mr Farid Mallick, which were then allocated against the oldest outstanding debt.

10.3.2. The tribunal accepted that the information presented via the Property Factor's live system supported the information in **PF Doc 27**.

10.3.3. The tribunal did not accept Mr Farid Mallick's claim to the effect that there were other payments which had been made to the Property Factor by him on behalf of the Homeowners which were not shown on the statement. No evidence was led by the Homeowner that he had personally made any payments which were said to be missing from the account.

10.3.4. The tribunal took account of the fact that the Homeowners had not lodged any proof of any payments made by them or their father to the Property Factor / TLT and there was no evidence to dispute the Property Factor's evidence.

10.3.5. The tribunal took the view that on a proper reading of the email **PF Doc 19**, Gillian did not say that there was a zero balance on the account as at that time (December 2015) and it was clear from the live system and the Customer Statement that there was, in fact, not a zero balance.

10.3.6. The tribunal accepted that after Mr Allan took the tribunal through **PF Doc 27** in evidence and submissions, it was clear that the Statement was accurate, although the tribunal observed that the way the information was presented to the Homeowner was rather difficult to follow. The tribunal observed that as a means of communicating with homeowners, in particular to answer queries and/or resolve disputes, the Property Factor should consider setting out the information in such statements in a more user-friendly format. The tribunal observed the significant amount of time spent in the oral hearing trying to understand the document and the fact that tribunal members had to be taken to a live system and supporting documents and be provided with an explanation from the Property Factor, which might be indicative of the problems faced by the Homeowners in

following the information. There is a double accounting system. The tribunal observed that there was no column with a running balance on the Statement and there was no column showing actual payments made before they were split and allocated against the oldest outstanding debts. The tribunal was of the view that there was no intent on the part of the Property Factor or TLT to mislead the Homeowners. When the Statement was interrogated it was possible to understand the dates upon which payments were received from the Homeowners and/or Mr Farid Mallick and how they were allocated to the oldest outstanding debt (including late payment charges). The tribunal observed that as the heading "payments received" was used it might be difficult for the Homeowners to follow unless the Homeowners had all the invoices in front of them and their own record of the actual amounts paid.

10.3.7. However, the Homeowners did not appear to be challenging that any of the invoices were issued to them or that the invoices were due to be paid. The Homeowners knew that payments were due and had been missed or paid late. The tribunal also observed that the Homeowners knew or should have known that as they had not met the terms of the Minute of Agreement which had been entered into, by failing to pay the arrears as agreed and by failing to pay new invoices which were issued, there would not be a zero balance at any point and they would also be subject to late payment charges as a result of continual late payments.

10.3.8. The tribunal was also of the view that the Homeowners could have kept their own record and evidence of payments they claimed to have made to the Property Factor, particularly in circumstances where they were alleging that payments which had been made were missing from the Statement.

10.3.9. The tribunal was satisfied that each of the late payment charges which was imposed was justified as the payment by or on behalf of the Homeowners was late.

10.3.10. The tribunal was satisfied on the balance of probabilities that the information in **PF Doc 27** was not false.

10.3.11. The tribunal was satisfied on the balance of probabilities that the information in **PF Doc 27** was not misleading.

10.3.12. The tribunal was satisfied on the balance of probabilities that the Property Factor did not fail to comply with Section 2.1 of the Code of Conduct.

10.4. Alleged failure to comply with Section 2.2 of the Code of Conduct

10.4.1. **Section 2.2 of the Code of Conduct** provides:

“2.2 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).”

10.4.2. Summary of Homeowner’s evidence and submissions in relation to alleged failure to comply with Section 2.2 of the Code of Conduct

10.4.3. The essence of the Homeowner’s complaint appeared to be that communications were received by them from TLT, the Credit Control solicitors appointed by the Property Factor which were sent at unsociable hours and showed a lack of empathy and that that amounted to abusive, intimidating or threatening behaviour.

10.4.4. The Homeowner had complained to the Property Factor that the automated emails were sent at unsociable hours. The Homeowner complained to the Property Factor about a lack of empathy in the emails. The Homeowner stated that the response from the Property Factor was that if payment was not made, the emails would continue to be issued.

10.4.5. Summary of Property Factor’s Evidence and Submissions in relation to alleged failure to comply with Section 2.2 of the Code of Conduct

10.4.6. Mr Allan referred to the **Written Statement of Services (“WSS”)**, in particular Section 3, which says that there is an automated credit control process.

10.4.7. Mr Allan submitted that the communications complained about are standard credit control letters.

10.4.8. Mr Allan stated that as Property Factor of the Development, the Property Factor has a duty and a responsibility to the other owners to pursue debts.

10.4.9. Tribunal’s determination in relation to alleged failure to comply with Section 2.2 of the Code of Conduct

10.4.10. The tribunal found the Homeowner's written and oral submissions under this subsection difficult to follow. No evidence was led or submissions made by the Homeowner that there was anything out of the normal processes in terms of credit control that would amount to a breach of Section 2.2.

10.4.11. Whilst there may have been an underlying dispute about whether and how much money was owed the communication was not abusive, intimidating or threatening and appeared to be a reasonable indication that outstanding payments were to be pursued by the Property Factor or its lawyers on behalf of the proprietors of Kingston Quay, as they were entitled and under a duty to do.

10.4.12. The tribunal was satisfied on the balance of probabilities that the Property Factor did not fail to comply with Section 2.2 of the Code of Conduct.

10.5. Alleged failure to comply with Section 2.5 of the Code of Conduct

10.5.1. **Section 2.5 of the Code of Conduct provides:**

"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 (Section 1 refers)."

10.5.2. The Homeowner's complaint in terms of Section 2.5 was in four parts, which are summarised separately, below:

10.5.3. Summary of Homeowner's evidence and submission re. Part (1) of the complaint under Section 2.5 of the Code of Conduct

10.5.4. The Homeowner referred to HO Doc 72, an email sent by the Homeowner "Mohsan Mallick" to Mark Allan at the Property Factor on 27 December 2016.

10.5.5. Within that email the Homeowner complained about the condition of the common areas relating to the Development, in particular: 1. the storage of bicycles; 2. The mould growing on the ceilings; 3. The luggage life; 4. The walls being heavily marked, especially the one next to the lift

and 5. The security doors having been left open causing damage to the carpets. There was also a complaint about invoices relating to cleaning and the Homeowner intimated that no future invoices would be paid as the Property Factor was not sticking to the contract.

10.5.6. The Homeowner's position is that he did not get a response from the Property Factor to that email until 19 September 2017, **HO doc 102** with attached letter **HO doc 74**.

10.5.7. The Homeowner further referred to **HO Doc 82** (email 23 January 2017), **HO Doc 84** (duplicate of **HO Doc 82**), **HO Doc 87** (31 May 2017), **HO Doc 88** (1 June 2017), **HO Doc 90** (29 June 2017), all emails from the Homeowner to the Property Factor asking for a responses and **HO Doc 91** (email from Homeowner to Mark Allan dated 30 June 2017 and response from Carol at TLT LLP on the same date).

**10.5.8. Summary of Property Factor's evidence and submissions
re. Part (1) of the alleged failure to comply with Section 2.5**

10.5.9. Mark Allan admitted that there was no response by the Property Factor to the Homeowner's email of 27 December 2016, until 19 September 2017.

10.5.10. By way of explanation for his failure to respond to this piece of correspondence, Mr Allan said that in total he had sent out 17 communications to the Homeowners in the period from 1 June 2016 to November 2016. Mr Allan's view was that the matters raised in the 27 December 2016 email had all been covered in earlier communications and that he did not require to respond to the email in December 2016 (albeit that he did reply in his letter of 19 September 2017).

10.5.11. Mr Allan stated that the Homeowner had been advised repeatedly in previous correspondence that there were no funds to attend to maintenance matters in the Development unless and until the proprietors agreed to such works and paid in funds to allow any such works to be instructed. Mr Allan also stated that the Homeowners continued to be in arrears throughout this period up to and including December 2016, despite the Minute of Agreement which had been entered into and were refusing to pay invoices as they were issued.

10.5.12. Tribunal's determination in relation to alleged failure to comply with Section 2.5 (part 1)

10.5.13. The tribunal was of the view that the Property Factor should have responded to the Homeowner's email of 27 December 2016 rather than ignore the piece of correspondence and attempting to rely on the content of previous communications relative to lack of funds in the Development as an answer to all of the points raised.

10.5.14. The tribunal had some understanding of the stance adopted by the Property Factor given the amount of communications sent to the Homeowner prior to receipt of the December 2016 email and the fact that the Homeowners were in arrears throughout the period but took into account Mr Allan's own admission that he did not acknowledge or respond in substance to the email of 27 December 2016, even to refer to the content of previous correspondence.

10.5.15. The first identifiable response to the email of 27 December 2016 was sent by TLT solicitors in relation to the ongoing credit control issue and did not address the repairs matters or cleaning service which had been raised in the Homeowner's email.

10.5.16. The tribunal observes that in the Property Factor's WSS Section 4, which deals with Communication arrangements, there is no provision in relation to emails sent to named employees. There is a company email specified for communications. There is no response time specified in 4.1.2 for emails to the company email.

10.5.17. The tribunal was satisfied on the balance of probabilities that in respect of Part 1 of the Homeowner's complaint in terms of Section 2.5 of the Code of Conduct, there was a failure to comply by the Property Factor.

10.5.18. Summary of Homeowner's evidence and submission re. Part (2) of the complaint under Section 2.5

10.5.19. The Homeowner referred to HO Doc 76 an email from him to Mark Allan dated 19 September 2017, in response to the letter referred to above (HO Doc 74). The Homeowner stated that he took issue with the points made in Mark Allan's email.

10.5.20. The Homeowner stated that he got no response to his email HO Doc 76 from the Property Factor or TLT at any time.

10.5.21. The Homeowner submitted that TLT did not respond to the substance of the complaint and said that they only deal with financial management. He submitted that the response from TLT was inappropriate.

10.5.22. Summary of Property Factor's evidence and submission re. Part (2) of the complaint under Section 2.5

10.5.23. Mr Allan accepted that there had been no reply sent to the Homeowner's further email of 19 September 2017 (**HO Doc 76**). Mr Allan submitted that all of the correspondence from the Homeowner was a delaying tactic, in that Mr Allan had already clearly set out the position that there were no funds in the Development to address the maintenance matters which had been raised, and the Homeowners continued to be in arrears and failing to make payments as they fell due. Mr Allan referred to the financial statement which had been sent out to all of the Proprietors in the Development which showed a shortfall of £106,000. On that basis Mr Allan said that he had decided that there was no point in responding to the Homeowner's email.

10.5.24. Tribunal's determination of alleged failure to comply with Section 2.5 (part 2)

10.5.25. The tribunal accepted the Homeowner's evidence and the Property Factor's admission that there had been no reply to the Homeowner's email of 19 September 2017 (**HO Doc 76**).

10.5.26. The tribunal did not accept that the reasons given by Mr Allan for failing to reply to the Homeowner provided an excuse for the failure. There ought to have been some sort of reply to the Homeowner, even if it was a reference to previous correspondence including the state of the finances at the Development.

10.5.27. The tribunal notes again that the WSS para 4.1.2 does not specify a time for responding to such enquiries.

10.5.28. The tribunal was satisfied on the balance of probabilities that in respect of Part 2 of the Homeowner's complaint in terms of Section 2.5 of the Code of Conduct, there was a failure to comply by the Property Factor.

**10.5.29. Summary of Homeowner's evidence and submission re.
Part (3) of the complaint under Section 2.5**

10.5.30. The Homeowner's third complaint is that he put a formal complaint on the website on 30 June 2017 to support@mxmps.com and there has never been a formal response by the Property Factor to the complaint.

10.5.31. HO doc 101 is an acknowledgement of the complaint being lodged on the website on 30 June 2017.

**10.5.32. Summary of Property Factor's evidence and submissions
re. Part (3) of the complaint under Section 2.5**

10.5.33. Mr Allan accepted that the Property Factor never acknowledged or responded to this communication from the Homeowner on 30 June 2017, other than the automatic system acknowledgement.

10.5.34. Mr Allan said that the failure to respond was for the same reason as outlined in relation to the second complaint, above, in that the Property Factor had set out the position a number of times that there were no funds available to address the maintenance issues complained of.

10.5.35. Tribunal's determination in relation to alleged failure to comply with Section 2.5 (part 3)

10.5.36. The tribunal accepted the Homeowner's evidence and the Property Factor's admission that there had been no reply to the Homeowner's website communication of 30 June 2017 (HO Doc 101).

10.5.37. The tribunal did not accept that the reasons repeated by Mr Allan for failing to reply to the Homeowner provided an excuse for the failure. There ought to have been some sort of reply to the Homeowner, beyond the system acknowledgement, even if it was a reference to previous correspondence in relation to the state of the finances of the Development.

10.5.38. The tribunal notes again that the WSS para 4.1.2 does not specify a time for responding to such enquiries.

10.5.39. The tribunal was satisfied on the balance of probabilities that in respect of Part 3 of the Homeowner's complaint in terms of Section 2.5 of the Code of Conduct, there was a failure to comply by the Property Factor.

**10.5.40. Summary of Homeowner's evidence and submission re.
Part (4) of the complaint under Section 2.5**

10.5.41. The Homeowner stated that he sent Mark Allan another email on 23 November 2017 (**HO Doc 81**), asking for a proposal to reach a conclusion, in which he reiterated that he wanted an amicable solution.

10.5.42. The Homeowner stated that he had had no response to that email.

**10.5.43. Summary of Property Factor's evidence and submissions re.
Part (4) of the Complaint under Section 2.5**

10.5.44. Mr Allan accepted that there has been no reply to **HO doc 81**, which was received by him on 23 November 2017.

10.5.45. Mr Allan stated that he has been dealing with this case since July 2014. Mr Allen repeated his view that with the litigation he had dealt with the matters exhaustively and all of the correspondence from the Homeowners and Mr Farid Mallick was a delaying tactic relating to non-payment of sums due by the Homeowners. Mr Allan repeated the fact that he had already set out the position that there were no funds in the Development and questioned why the Homeowners were asking for improvements to be carried out on the instructions of the Property Factor when they know that there is no money in the Development.

10.5.46. Tribunal's determination in relation to alleged failure to comply with Section 2.5 (part 4)

10.5.47. The tribunal accepted the Homeowner's evidence and the Property Factor's admission that there had been no reply to the Homeowner's communication of 23 November 2017 (**HO Doc 81**).

10.5.48. The tribunal did not accept that the reasons stated by Mr Allan for failing to reply to the Homeowner provided an excuse for the failure. There ought to have been some sort of reply to the Homeowner, even if it was a reference to previous correspondence in relation to the state of the finances of the Development.

10.5.49. The tribunal notes again that the **WSS para 4.1.2** does not specify a time for responding to such enquiries.

10.5.50. The tribunal was satisfied on the balance of probabilities that in respect of Part 4 of the Homeowner's complaint in terms of Section 2.5 of the Code of Conduct, there was a failure to comply by the Property Factor.

10.6. Alleged failure to comply with Section 3.3 of the Code of Conduct

10.7. Section 3.3 provides:

10.7.1. *"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."*

10.7.2. Summary of Homeowner's evidence and submissions relative to alleged failure to comply with Section 3.3 of the Code of Conduct

10.7.3. The Homeowner's complaint under Section 3.3 of the Code was not clearly focussed on the requirements of Section 3.3.

10.7.4. The notification to the Property Factor stated "you do not produce original electricity bills, invoices of contractors and suppliers for inspecting".

10.7.5. The Homeowner referred to the PF's letter of 19 September 2017 (HO Doc 74), stating that the Property Factor did not provide any breakdown in that letter of the costs incurred. The Homeowner also stated that he had asked for further information and for work to be done.

10.7.6. Summary of Property Factor's evidence and submissions relative to alleged failure to comply with Section 3.3 of the Code of Conduct

10.7.7. Mr Allan's response was that all of the required information is available on the Property Factor's website and that links are provided and a full report is available. There were around 500 pages of supporting information available.

10.7.8. Mr Allan stated that each proprietor is provided with a log on, including the Homeowner. Mr Allan submitted, with reference to the system reports produced in evidence, that the Homeowner had not been logging on. **PF Doc 22** shows that the link was provided to the Homeowner on 31 October 2016

10.7.9. Mr Allan further advised the Homeowner that he could have copies of invoices on request for 11p per sheet.

10.7.10. Tribunal's determination in relation to alleged failure to comply with Section 3.3 of the Code of Conduct

10.7.11. The tribunal was satisfied on the evidence that the Property Factor provided to the Homeowners in writing a detailed financial breakdown of charges made and a description of the activities and works which are charged for by means of the Property Factor's website.

10.7.12. The tribunal was satisfied that the link to the area on the website was provided to the Homeowner and available by the Homeowners logging in. The tribunal was also satisfied on the evidence that the Homeowners had not logged into the system to access the available information.

10.7.13. The tribunal was satisfied that copies of invoices were available to the Homeowner on request at a cost of 11p per sheet.

10.7.14. **The tribunal was satisfied on the balance of probabilities that in respect of the Homeowner's complaint in terms of Section 3.3 of the Code of Conduct, there was no failure to comply by the Property Factor.**

10.8. Alleged failure to comply with Section 4.3 of the Code of Conduct

10.8.1. Section 4.3 of the Code of Conduct provides:
"Any charges that you impose relating to late payment must not be unreasonable or excessive".

10.8.2. **Summary of Homeowner's evidence and submissions relative to the alleged failure to comply with Section 4.3 of the Code of Conduct**

10.8.3. The Homeowner's notification to the Property Factor stated that "*late payment fees are high and you add them to the account even if cheques are received in your office*".

10.8.4. The argument about cheques "lying in drawers" which had been mentioned at an earlier stage in the proceedings by Mr Farid Mallick was not insisted on by the Homeowner in his submissions at the final adjourned oral hearing day. The Homeowner developed a different line in the hearing, stating that every time a payment was made by the Homeowner and allocated against arrears by the Property Factor, a late payment fee of £14.40 would be triggered in respect of the sums falling due in terms of the monthly invoice. The individual late payment fees of £14.40 were not complained about by the Homeowner, it was the cumulative effect of the late payment fees on the account which was said to be unreasonable and/or excessive.

10.8.5. The Homeowner referred again to **PF Doc 27**, the Customer Statement dated 4 February 2018 which includes a summary of the late payment charges applied in the period 1 July 2014 to 1 February 2018 (as well as those which were refunded by the Property Factor). The Statement was said to include numerous late payment charges, some of which were refunded. The Homeowner stated that there were 11 late payment charges in a row from 16 June 2017 onwards which were not refunded.

10.8.6. Property Factor's evidence and submissions in relation to alleged failure to comply with Section 4.3 of the Code of Conduct

10.8.7. The Property Factor's response to the new argument from the Homeowner that was the Property Factor was entitled to apply all of the late payment charges which had been levied, on the basis that any payment received would be allocated to the oldest debt first.

10.8.8. Mr Allan stated that the Property Factor imposed a late payment on the Homeowner when payments were not made within 14 days, in terms of the **WSS, para 3.1.4**, which specifies the procedure relating to "*Late payment admin fee*". If the Property Factor issues more than one reminder to an owner for their monthly common service charge they reserve the right on behalf of the co-owner's association to raise a late payment fee on the next account. The charge is specified as £14.40. The invoices state "to avoid please pay in the time stated in the invoice".

10.8.9. **PF Docs 34 and 35** are examples of an invoice with terms and conditions. If any payment remains unpaid after 14 days a charge is applied on the next invoice.

10.8.10. Mr Allan stated that the Homeowners have been in arrears throughout the period covered in **PF Doc 27**, from 1 July 2014 to 1 February 2018.

10.8.11. Mr Allan referred again to the fact that the parties went to court after an action was raised against the homeowners in respect of non-payment of factoring fees, and a settlement agreement was entered into. Mr Allan repeated his submission that the Homeowner has not kept to the terms and common charges have continued to accrue and have either not been paid or been paid intermittently. Some payments have been made to the Property Factor, MXM, and others to TLT credit control. Some payments were made to Kingston Quay bank account. The payments are all reflected in the statement **PF Doc 27**. Mr Allan submitted that what is apparent is the intermittent and chaotic nature of the payments, for example no payments between March and September 2016. One of the stated reasons for non-payment at an early stage was that the Homeowners were not aware that the Property Factor had been appointed by the requisite number of proprietors in the Development and was challenging the appointment. Later, the argument about non-payment related to complaints by the Homeowners about repairs.

10.8.12. Mr Allan stated that the Homeowners' account is still in arrears.

10.8.13. Mr Allan responded to Mr Farid Mallick's evidence about a "cheque lying in the drawer" that on the occasion when a cheque was received on a Friday and cashed at a later date, no late payment fee was in fact applied to the account even though the payment should have been received in time and in cleared funds so he submitted that that was irrelevant to the complaint now being made.

10.8.14. Mr Allan stated that the Property Factor refunded charges for the whole period from 1 August 2014 to 1 February 2015 as part of the agreement arising out of the court action, as could be seen in **PF Doc 27**.

10.8.15. Mr Allan stated that the Property Factor also credited the Homeowners' account for the period from 15 December 2017 to February 2018 in respect of late payment charges from the date the Application was made to the tribunal. **PF Doc 34** shows a credit adjustment of £43.20.

10.8.16. Mr Allan said that the late payment charges which had been applied and not refunded were reasonable and not excessive, even when looked at cumulatively, taking into account the Homeowners' ongoing arrears.

10.8.17. Tribunal's determination in relation to alleged failure to comply with Section 4.3 of the Code of Conduct

10.8.18. The tribunal was satisfied on the basis of the evidence that the late payment charges imposed by the Property Factor were provided for in the **WSS**, mentioned in the invoices rendered to the Homeowner, were reasonable in the circumstances of ongoing non-payment of invoices by the Homeowners in the time period stipulated and against a background of outstanding arrears of the Homeowners; that the allocation of payments against the Homeowners' oldest debts was reasonable; and that the late payment charges were not excessive either individually at £14.40 or cumulatively, in the said circumstances.

10.8.19. **The tribunal was satisfied on the balance of probabilities that in respect of the Homeowner's complaint in terms of Section 4.3 of the Code of Conduct, there was no failure to comply by the Property Factor.**

10.9. Alleged failures to comply with Section 5 of the Code of Conduct

10.9.1. Homeowner's submissions relative to alleged failure to comply with Section 5.1 of the Code of Conduct

10.9.2. The Homeowners appear to have misunderstood the requirements imposed on the Property Factor by Section 5.1, which provides:

"You must have and maintain adequate Professional Indemnity Insurance..."

10.9.3. The Homeowner in submissions stated that he is not aware of the Property Factor's PII as it has never been a topic discussed by the Homeowner.

10.9.4. No other submissions were made or evidence led from the Homeowner.

10.9.5. Property Factors' submissions and evidence relative to alleged failure to comply with Section 5.1 of the Code of Conduct

10.9.6. Mr Allan stated that the Property Factor denies this complaint and has provided a copy of the PII policy schedule, with the tender proposal **PF doc 22**, page 3. Mr Allan also referred to a screen print taken from the

website PF Doc 33; the page from the tender proposal PF doc 36; and the web page PF Doc 37.

10.9.7. Tribunal's determination regarding alleged failure to comply with Section 5.1 of the Code of Conduct

10.9.8. The tribunal was satisfied on the basis of the evidence and submissions by the Property Factor that the Property Factor had and maintained a policy of Professional Indemnity Insurance and that it was issued and available to the Homeowner via a number of methods.

10.9.9. The tribunal was satisfied on the balance of probabilities that there was no failure to comply with Section 5.1 of the Code of Conduct.

10.9.10. Alleged failures to comply with Sections 5.2, 5.6 and 5.9 of the Code of Conduct

10.9.11. **Section 5.2 of the Code of Conduct** provides that:

"You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this."

10.9.12. Homeowners - no evidence or submissions

10.9.13. The Homeowners made no complaint in their written representations or in oral representations at the hearing. The Homeowner stated at the hearing that "*no concerns are being raised in this matter*" and that he believed that his father had made this complaint.

10.9.14. Property Factor's submissions and evidence

10.9.15. The Property Factor's written representations stated that the information about the percentage share was provided in the tender

document and included it in the financial reports. Mr Allan stated that there have been five communications issued to **Homeowner updates 7, 9, 18, 19 and 33**. Mr Allan stated that the Property Factor also provides details of the policy and the broker on its public website; and policy details are held on the KQ private owners' website which owners can obtain at any time.

10.9.16. Tribunal's determination relative to the alleged failure to comply with Section 5.2 of the Code of Conduct

10.9.17. The tribunal decided that there was a want of insistence on this complaint on the part of the Homeowners. No written submissions were lodged and no oral arguments were advanced at the hearing at any stage. The Homeowner had no idea, when asked by the tribunal, what his father may have had in mind when he made this complaint.

10.9.18. The tribunal was satisfied on the basis of the evidence produced by the Property Factor that the Property Factor has provided each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance and the terms of the policy.

10.9.19. The tribunal was satisfied on the balance of probabilities that there has been no failure to comply with Section 5.2 of the Code of Conduct.

10.9.20. Alleged failure to comply with Section 5.6 of the Code of Conduct

10.9.21. There was no complaint made by the Homeowners in written representations or oral representations.

10.9.22. The tribunal did not require to hear from the Property Factor.

10.9.23. The tribunal was satisfied on the balance of probabilities that there was no failure to comply with Section 5.6 of the Code of Conduct.

10.9.24. Alleged failure to comply with Section 5.9 of the Code of Conduct

10.9.24.1. **Section 5.9 of the Code of Conduct** provides an “Additional standard for situations where a land maintenance company owns the land” and further provides that:

“5.9 On request you must provide homeowners with clear details of the costs of public liability insurance, how their share of the cost was calculated, the terms of the policy and the name of the company providing insurance cover.”

10.9.25. The Homeowners’ only notified complaint was that they had no information about public liability insurance and other details of the insurance policy. The Homeowners led no evidence and made no submissions relating to an alleged failure to comply with Section 5.9 of the Code of Conduct.

10.9.26. The tribunal did not require to hear from the Property Factor.

10.9.27. Tribunal’s determination relating to alleged failure to comply with Section 5.9 of the Code of Conduct

10.9.28. The standard in Section 5.9 is a standard for situations where a land maintenance company owns the land which is not applicable to the Development, so the tribunal rejected the complaint.

10.9.29. The tribunal was satisfied on the balance of probabilities that there was no failure to comply with Section 5.9.

10.10. Alleged failure to comply with Section 6.1 of the Code of Conduct

10.10.1. **Section 6.1 of the Code of Conduct** provides:

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

10.10.2. Homeowners’ evidence and submissions relating to alleged failure to comply with Section 6.1 of the Code of Conduct

10.10.3. The Homeowners' complaint was that in spite of many reminders to the Property Factor about rattling and banging entrance doors; holes on the walls and ceiling; repairs in the corridor; the fact anyone can walk through due to lack of security; that the Property Factor did nothing about the requested repairs.

10.10.4. The Homeowner said that there had been a meeting on 22 November 2016, the purposes of which was to discuss repairs to the Development Common Property and that the Property Factor had agreed to carry out works to the Development Common Property and thereafter failed to do any of the agreed works.

10.10.5. As such, the Homeowner submitted that this was a failure of the Property Factor to inform the Homeowners of the progress of the work and estimated timescales for completion.

10.10.6. Property Factor's submissions and evidence relating to alleged failure to comply with Section 6.1 of the Code of Conduct

10.10.7. The Property Factor's response throughout was that the maintenance at the Development was always driven by available funds and owners were communicated with this message in the **WSS, para 2.7** on Repairs.

10.10.8. Mr Allan stated that due to the lack of funds most repairs cannot just happen and require additional time as funds are collected each month and full funds are required before works can be instructed.

10.10.9. Mr Allan also referred to **updates to the Communications Group 10, 15, 20, 23, 27, 28, 29, 36, 44, 51**, all of which referred to the issues with lack of funds.

10.10.10. Mr Allan referred to his summary of the cash flow problems for the Development in his written submissions.

10.10.11. Mr Allan stated that as part of the tender process they obtained cost proposals for repairs but that funds would be required from the owners before these could be instructed.

10.10.12. In relation to the meeting of 22 November 2016, Mr Allan disagreed with the Homeowners' suggestion that it was arranged in relation to repairs issues; rather, he stated that it related to the Homeowners' arrears of common charges. He also refuted any suggestion that he had agreed during that meeting to carry out any repairs, referring

again to the fact that he was not in a position to instruct any such works in the absence of funds to do so.

10.10.13. Tribunal's determination in relation to alleged failure to comply with Section 6.1 of the Code of Conduct

10.10.14. The tribunal accepted that the Property Factor could not have been clearer and more consistent with the Homeowners in its communications that there was a lack of funds at the Development which the factor inherited and which was perpetuated by non-payment of common charges by a large number of homeowners, including the Homeowners.

10.10.15. The tribunal preferred the Property Factor's evidence in relation to the purpose and outcome of the meeting of 22 November 2016. While repairs issues may have been raised by the Homeowners during the meeting about the arrears, the tribunal did not accept that the Property Factor had agreed during that meeting to instruct any works on behalf of the owners in the Development, given the lack of funds to do so.

10.10.16. The tribunal was struck by the fact that at no point in the tribunal process had the Homeowners acknowledged the cashflow problems on the Development caused by non-payment of common charges by owners (including themselves) with the result that many repairs and maintenance items which had been notified could not be attended to even if reported; and additionally the Homeowners failed to appreciate that some of the items complained about were not the Property Factor's responsibility in terms of the Deed of Conditions.

10.10.17. The tribunal was satisfied on the evidence and submissions of the Property Factor that there were no works about which the Property Factor required to update the Homeowners, in terms of progress and estimated timescales for completion, as no such works had been instructed due to a lack of Development funds.

10.10.18. The tribunal was satisfied on the balance of probabilities that there was no failure on the part of the Property Factor to comply with Section 6.1 of the Code of Conduct.

10.11. Alleged failure to comply with Section 6.3 of the Code of Conduct

10.11.1. **Section 6.3 of the Code of Conduct provides that:**

"On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff."

10.11.2. Homeowner's submissions relating to alleged failure to comply with Section 6.3 of the Code of Conduct

10.11.3. The Homeowner's complaint was that there was no evidence of the Property Factor carrying out competitive tendering. However, there was no properly specified complaint relating to any particular works for which there was a lack of information about why competitive tendering was not carried out.

10.11.4. Property Factor's evidence and submissions relating to alleged failure to comply with Section 6.3 of the Code of Conduct

10.11.5. Mr Allan's response was that as previously advised, the Property Factor has not carried out any additional projects, because funding is required for these, so this complaint is irrelevant.

10.11.6. Mr Allan referred to the information provided on the website where there has been tendering, **PF Doc 22**, page 3.

10.12. Tribunal's determination of alleged failure to comply with Section 6.3 of the Code of Conduct

10.12.1. The tribunal took the view that the Homeowner's complaint was both irrelevant and lacking in specification.

10.12.2. The tribunal determined on the balance of probabilities that there was no failure to comply with Section 6.3 of the Code of Conduct.

10.13. Alleged failure to comply with Section 6.7 of the Code of Conduct

10.13.1. Section 6.7 of the Code of Conduct provides:

"6.7 You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you."

10.14. The Homeowner made no written or oral submissions in relation to the alleged failure to comply with Section 6.7 of the Code of Conduct, so the complaint was rejected by the tribunal without the necessity of hearing from the Property Factor.

10.15. The tribunal was satisfied on the balance of probabilities that there had been no failure to comply with Section 6.7 of the Code of Conduct.

10.16. Alleged failure to comply with Section 7 of the Code of Conduct

10.16.1. **Sections 7.1 to 7.5 of the Code of Conduct provide:**

"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.

7.3 Unless explicitly provided for in the property titles or contractual documentation, you must not charge for handling complaints.

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.

7.5 You must comply with any request from the homeowner housing panel to provide information relating to an application from a homeowner."

10.16.2. Although included in the Homeowner's Application, there are no subsections specified in relation to the complaint and the further details provided state "*no procedure in practice; no action taken on complaint*". In addition, no complaint in terms of any subsection of Section 7 was notified to the Property Factor even when an opportunity was provided by the tribunal for the Homeowners to notify the Factor on the tribunal template which was provided to them.

10.16.3. However, the Homeowners produced written submissions and these have been responded to by the Property Factor, so having regard to the tribunal's overriding objective, the tribunal has considered the alleged failure on the basis of the parties' written submissions.

10.16.4. Summary of Homeowners' written submissions

10.16.5. The Homeowners stated that the email trails demonstrate that the Homeowners have raised concerns on multiple occasions.

10.16.6. The Homeowner is effectively complaining that the complaints procedure has not been followed by the Property Factor, despite complaints being made.

10.16.7. The complaint was not specified by the Homeowners beyond delay or failure to respond to letters.

10.16.8. Summary of Property Factor's written submissions in relation to alleged failure to comply with Section 7

10.16.9. The Property Factor stated that the Homeowner requested a copy of the **complaints procedure** on 14 July 2017. The Property Factor arranged for a hard copy to be delivered to his property with the **WSS**.

10.16.10. The Property Factor further stated that when the Property Factor received the Homeowner's letter on 11 September 2017 it provided comment back on the matters raised in the letter of 19 September 2017 (**PF Doc 16**).

10.16.11. **WSS, Para 2** relates to the Written Complaints procedure. It does not cover "*Owners who are in litigation with the development and are being pursued by MXM on behalf of other owners due to unpaid common service charges*".

10.16.12. Mr Allan stated that he considered that the Property Factor was "still in litigation" with the Homeowners because they had not adhered to the terms of the Minute of Agreement and that therefore the complaints procedure did not apply.

10.16.13. Similarly, Mr Allan stated that according to the **WSS**, the complaints procedure does not apply to owners in arrears with more than 3 months outstanding on their account who have not followed clause 3.1.9

with in the WSS (which relates to account queries, although common charges must be paid in full in accordance with the Deed of Conditions).

10.16.14. The Property Factor's position is that as the owner was over three months in arrears and had not followed Clause 3.1.9, they did not believe this should proceed as a formal complaint.

10.16.15. Tribunal's determination relative to the alleged failure to comply with Section 7 (no subsection specified) of the Code of Conduct

10.16.16. The Property Factor had a clear written complaints procedure which was provided to the Homeowners.

10.16.17. The complaints procedure specifies situations in which it will not apply.

10.16.18. The tribunal does not accept the submission made on behalf of the Property Factor that the parties were "*still in litigation*" throughout the period that complaints were being made by the Homeowners. A Minute of Agreement was entered into between the parties in May 2015 which provided for payments to be made in relation to arrears at that time and that the Homeowner would make payments falling due on a monthly basis. On 4 February 2016 the court action was dismissed with no expenses due to or by either party.

10.16.19. The Homeowner made complaints about the common charges; repairs to common areas and the cleaning service after that date.

10.16.20. The Homeowner still had arrears throughout the period during which complaints were made after the Minute of Agreement was entered into.

10.16.21. The Property Factor treated the default of the terms of the Minute of Agreement as the fact that the parties were still in dispute.

10.16.22. The tribunal was not satisfied on the balance of probabilities on the basis of the submissions made by the Homeowner that there was a failure to comply with the Code of Conduct any subsection of Section 7 as the complaint was not specified beyond delay or failure to respond to letters.

10.16.23. The tribunal observes that because the complaints process was not embarked upon the Homeowner was not told about the tribunal by the Property Factor. The Homeowner only found out about the tribunal from the Ombudsman and not from the Property Factor.

10.16.24. The tribunal is satisfied on the balance of probabilities that there has been no failure to comply with Section 7 of the Code of Conduct.

10.17. Alleged failure to comply with Property Factor's duties

10.17.1. Homeowner's evidence and submissions relating to alleged failure to comply with Property Factor's duties

10.17.2. In the notification 4 September 2016 of the complaint the Homeowner stated: "*you are not discharging Property Factor's duties in relation to management of common parts of the building owned by the building*".

10.17.3. At the oral hearing, the Homeowner produced photographs of Development Common Areas stating that they illustrated that the Property Factor was not carrying out his duties to maintain the development. In particular, the Homeowner referred to bikes in the stairwell, ceiling panels missing and stained, damage to the walls and lift and the entrance door.

10.17.4. The Homeowner stated that when he went back to the Property in December 2016, having moved away, he was shocked at the state of the Development and he complained to the Property Factor and stated the repairs that he considered were required.

10.18. Property Factor's evidence and submissions relating to the alleged failure to comply with Property Factor's duties

10.19. Mr Allan said that for quarter 2 in 2016, the cash in the bank was £73,639, creditors were £187,920 and the deficit was £114,281. This was when the complaints about repairs were made by the Homeowner. Mr Allan stated that since they began managing the Development there has consistently been a large deficit.

10.20. The Property Factor referred to the Deed of Conditions for the Development and the WSS.

10.21. The Property Factor's response to the alleged failure to comply with its duties was that there was no such failure because there were no funds in place for the works and the state of the finances were such that normal management was dependent on funds available. Mr Allan stated that there is no float and no capital projects are being undertaken. Routine maintenance relies on payment by homeowners, including the Homeowners, of common charges. Homeowners are notified of this position and the financial situation at the development via the website and updates to owners.

10.22. The Property Factor stated that there were arrears until the Homeowners sold the Property on or about 20 August 2018.

10.23. The Property Factor also stated that the initial complaint made on behalf of the Homeowners by Mr Farid Mallick was to fail to accept that the Property Factors had been appointed as managing agents for the Development; and that later the complaints turned to maintenance issues, all while the Homeowners remained in substantial arrears and should have been aware of the general arrears position in the Development as a result of information provided and available to them.

10.24. Tribunal's determination relating to alleged breach of Property Factor's duties

10.25. The tribunal was not satisfied on the evidence and submissions that there was a breach of property factor's duties arising from their failure to deal with the maintenance issues which were complained about, in the absence of Development funds to allow them to do so.

10.26. The Homeowner did not state in his submissions where the duties could be found which he was stating rested on the Property Factor in the absence of Development funds to allow the Property Factor to instruct repairs. No reference was made by the Homeowner to any terms of the Deed of Conditions or the Written Statement of Services for the Development.

10.27. The Homeowner failed to acknowledge throughout the tribunal process that at the time of the complaints in December 2016 there were in excess of £104,000 of arrears on the Development and that the effect of that was that the Property Factor could not instruct repairs in the absence of funding.

10.28. The tribunal had regard to all relevant terms of the Deed of Conditions for the Development and the Written Statement of Services.

10.29. The tribunal was satisfied that the Property Factor discharged its duties in relation to management of the Development Common Property in accordance with the Deed of Conditions and Written Statement of Services.

10.30. The tribunal was satisfied on the balance of probabilities that there was no failure by the Property Factor to comply with its property factor's duties.

11. Property Factor Enforcement Order

11.1. Section 19 of the 2011 Act provides that:

*"(1) The First-tier Tribunal must, in relation to a homeowner's application referred to it under section 18(1)(a), decide—
(a) whether the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and
(b) if so, whether to make a property factor enforcement order."*

11.2. The tribunal decided for the reasons stated above that the Property Factor has failed to comply with the section 14 duty in so far as four failures to comply with **Section 2.5 of the Code of Conduct**.

11.3. However, the tribunal does not propose to make a property factor enforcement order ("PFEO").

11.4. The tribunal decided not to propose making a PFEO because of the background to this Application being made to the tribunal which included a court action being raised by the Property Factor on behalf of the co-proprietors of the Development against the Homeowners in respect of unpaid common charges and a Minute of Agreement being entered into between the parties, to which the Homeowners did not adhere, as well as continuing to allow arrears to accrue for payments falling due; against the background of particular difficulties of which the Homeowners should be aware that the Property Factor is facing in the Development due to lack of Development funds.

11.5. Although the background circumstances are not an excuse for the Property Factor's admitted failures to comply with Section 2.5 in not responding to the four particular pieces of correspondence from the Homeowners, the Property Factor's view was that it had addressed the issues in substance in other information provided to the Homeowners.

11.6. The Homeowners did not pay off the arrears in common charges and management charges and late payment fees until the property was sold on or about 20 August 2018, so there was an arrears balance throughout the period

of their ownership, including the period over which the Homeowners sent the correspondence complained of. During the same period the Property Factor was issuing information relative to the Development via the Kingston Quay website and the Property Factor and its solicitors were corresponding with the Homeowners in relation to ongoing arrears in common charges.

11.7. The Homeowners knew or ought to have known as a result of the information available to them as homeowners on the Development that there was a significant deficit in Development funds which prevented the Property Factor from instructing any additional works on the Development, whether or not the same were notified to them and that the complaints being made in correspondence could not result in any action in the absence of funds.

11.8. The Homeowners in all of their complaints have failed to have regard to the terms of the Deed of Conditions for the Development and the duties imposed therein on the Property Factor and the Homeowners.

11.9. For all of these reasons the tribunal did not consider it appropriate to order the Property Factor to take any further steps in relation to the four identified failures to reply to the four pieces of correspondence complained of.

12. Observations on Homeowners' father's complaints to the local authority during the tribunal process

12.1. The Property Factor advised the tribunal members on the final hearing day that he had been made aware that the Homeowners' father, Mr Farid Mallick, had recently made contact with the local authority to complain about the Property Factor and the ongoing tribunal process.

12.2. The tribunal observed that at the time of his complaints the tribunal proceedings were not concluded and Mr Farid Mallick had no locus at that time as a property owner, former property owner, a party in the tribunal proceedings or a lay representative in proceedings. His only involvement in the tribunal proceedings at that time was as a witness, the tribunal having directed that he was unsuitable to act as a lay representative when the Homeowner attempted to reinstate him as such, having previously removed his father, stating the reason to be his father's inappropriate conduct.

12.3. The tribunal asked the Homeowner at the hearing about his father's contact with the local authority and Dr Mallick stated that he was unaware that his father had taken any such steps but would ask his father to refrain from making any further such approaches or comments during the tribunal process.

12.4. The tribunal considered that it did not have powers to take any further action against Mr Farid Mallick at that time on the basis of the information available.

13. Appeals

13.1. 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.

Susanne L. M. Tanner Q.C.
Legal Member and Chair of the tribunal

15 February 2019