

# Housing and Property Chamber

## First-tier Tribunal for Scotland



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

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

**Chamber Ref: FTS/HPC/PF/18/0822**

**Flat 2/1, 27 Napiershall Street, Glasgow, G20 6EZ ("The Property")**

#### **The Parties:-**

**Shawbrook Bank Ltd, Lutea House, Warley Hill Business Park, The Drive, Great Warley, Brentwood, Essex, CM13 3BE – represented by David Watson, Wilson McKendrick Solicitors LLP, Queens House, 29 St. Vincent Place, Glasgow, G1 2DT ("the Homeowner")**

**First Port Property Services Scotland Limited, 3<sup>rd</sup> Floor, Troon House, 199 St Vincent Street, Glasgow, G2 5QD – represented by Michael Ritchie, Hardy Macphail Solicitors, 5<sup>th</sup> Floor, Atlantic Chambers, 45 Hope Street, Glasgow, G2 6AE ("the Property Factor")**

#### **Tribunal Members:-**

**Ms Helen Forbes (Legal Member)  
Mrs Helen Barclay (Ordinary Member)**

#### **Decision**

The Tribunal determined that the Factor has failed to comply with the Section 14 duty in terms of the Property Factors (Scotland) Act 2011 ("the Act") in respect of compliance with Sections 3 and 4.9 of the Property Factor Code of Conduct ("the Code").

The decision is unanimous.

#### **Background**

1. By application received on 9<sup>th</sup> April 2018 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber)

(“the Tribunal”) for a determination that the Factor had failed to comply with Sections 2.1, 2.2, 3 and 4.9 of the Code. Details of the alleged failures were outlined in the Homeowner’s application and associated documents comprising letters and emails to and from the Factor, the Factor’s Written Statement of Services, the Title Sheet GLA159522, Extract Decree, Legal Report, stage 1 and stage 2 complaints correspondence, Opinion by Professor Robert Rennie, and an excerpt from the Keeper’s Manual. The alleged failures were in relation to Notices of Potential Liability for Costs (“NPLC”) which had been lodged by the Factor in relation to the Property. The Homeowner took possession of the property as heritable creditor after the sequestration of the previous owner, who had amassed significant factoring debts. One NPLC was lodged in 2015. A further NPLC was lodged in 2017. When the Homeowner came to sell the property, the Factor refused to discharge the NPLCs unless the outstanding sums to which the NPLCs related, namely £5910.09 was paid. The Homeowner paid the sums under protest so that the sale could proceed. The Homeowner claimed that, because the previous owner had been sequestered on 18<sup>th</sup> January 2016, he no longer had any liability to pay the debt due, and, therefore, liability for the debt could not pass to the Homeowner under the Tenements (Scotland) Act 2004 (“the 2004 Act”). The Homeowner also claimed that the second NPLC lodged on 28<sup>th</sup> November 2017, which was after the date on which the Homeowner took possession of the Property, could not make the Homeowner liable for repayment of the previous owner’s debts. The Homeowner also claimed that ‘relevant costs’ in relation to a NPLC can only relate to maintenance or work. The Homeowner asked that a full or partial refund be granted.

2. By Minute of Decision dated 10<sup>th</sup> April 2018, a Convenor of the Housing and Property Chamber referred the Application to a Tribunal.
3. Notice of Referral and Hearing was sent to the Parties on 8<sup>th</sup> May 2018. A hearing was set down for 26<sup>th</sup> June 2018.
4. On 23<sup>rd</sup> May 2018, written representations and a First Inventory of Productions were received on behalf of the Factor. The productions comprised email and letter correspondence between the parties.
5. By letter dated 23<sup>rd</sup> May 2018, the representative for the Factor, who had recently been appointed, requested an extension to the time allowed for making written representations to 13<sup>th</sup> June 2018, due to staff leave and complexity of the issues.
6. By email dated 29<sup>th</sup> May 2018, the representative for the Homeowner objected to an extension being granted to the Factor, given that his application had been made in April 2018, allowing the Factor sufficient time to take legal advice.
7. The Tribunal allowed the extension requested on behalf of the Factor, deciding it was in the interests of justice to do so.
8. On 6<sup>th</sup> June 2018, further written representations and a Second Inventory of Productions were lodged on behalf of the Factor. The productions, comprised

copy Interlocutor, Extract from the Register of Insolvencies, Land Certificate GLA159522, section 55 of the Bankruptcy (Scotland) Act 1985, section 145 of the Bankruptcy (Scotland) Act 2016, and the Tenements (Scotland) Act 2004.

9. On the application of the Homeowner, the Tribunal issued a Notice of Direction dated 14<sup>th</sup> June 2018, in the following terms:

"The Property Factor is required to lodge the following information with the First-tier Tribunal for Scotland (Housing and Property Chamber), Glasgow Tribunals Centre, 20 York Street, Glasgow, G2 8GT by 20<sup>th</sup> June 2018:

1. Details of all action taken to recover funds due by Shaban Rehman during her ownership of the Property;
2. A breakdown of sums due under the Notices of Potential Liability registered against the Property, in order to indicate how the sums relate to 'relevant costs' as defined in the Tenements (Scotland) Act 2004."

10. On 14<sup>th</sup> June 2018, the Factor lodged their Third Inventory of Productions comprising pre- and post- sequestration statements of account and breakdown of charges.

11. On 18<sup>th</sup> June 2018, the Factor lodged their Fourth Inventory of Productions, comprising their response to the second part of the Notice of Direction, and notification to the Tribunal that the Third Inventory addressed the first part of the said Notice of Direction.

12. The Homeowner requested and was granted a period to 22<sup>nd</sup> June 2018 in which to make supplementary submissions on behalf of the Homeowner. On 20<sup>th</sup> June 2018, the Homeowner lodged supplementary submissions and an inventory of productions comprising section 12 and schedule 2 of the Tenements (Scotland) Act 2004, an excerpt from Conveyancing Practice in Scotland, and part 1-1 of the Private Rented Housing (Scotland) Act 2011

## **Hearing**

13. A hearing took place at 10.00 on 26<sup>th</sup> June 2018 at Glasgow Tribunals Centre, 20 York Street, Glasgow. Mr David Watson, representative for the Homeowner, was present. Mr Michael Ritchie, representative for the Factor, was present, together with Mr Steven Maxwell on behalf of the Factor.

## **Preliminary points**

14. The Legal Member raise some preliminary points:

- (i) The date of discharge of the previous homeowner, Mr Rehman, from his sequestration – Mr Ritchie clarified that Mr Rehman had not yet been discharged from his sequestration as there had been objections to his automatic discharge, due to non-compliance with the Trustees.

- (ii) The date on which the Homeowner could be said to have entered into lawful possession of the Property, in terms of section 28(3) of the 2004 Act – there were differing views on this in the written representations. Parties' representatives agreed that the relevant date was not the date on which decree was granted (19<sup>th</sup> May 2017), but the date on which the heritable creditor took legal possession (18<sup>th</sup> August 2017).
- (iii) Alleged failure to comply with Section 3 of the Code – Mr Watson clarified that the Homeowner's complaint was in relation to the point in the heading of the section that states 'no improper payment requests are involved.'

## **Evidence and Representations**

### **Sequestration of the previous homeowner**

15. Mr Watson indicated that his submissions in this regard were largely as set out in his written submissions. He summarised that the questions to be answered were in relation to whether the previous owner was still liable for the factoring debts, and whether the relevant date in relation to liability for debts was the date of sequestration or the date of the debtor's discharge. Mr Watson submitted that as soon as Mr Rehman was sequestrated on 18<sup>th</sup> January 2016, he was no longer liable to pay his factoring debt.

In response, Mr Ritchie referred to his written submissions and added that the terms of the bankruptcy legislation were clear. In terms of section 55 of the Bankruptcy (Scotland) Act 1985, the relevant date was the date of discharge. The previous owner had not yet been discharged.

It was accepted by both representatives that transitional provisions applied to any sequestration under the 1985 Act, which had now been repealed.

### **Definition of relevant costs and what costs can be included in a NPLC**

16. Mr Watson submitted that legal costs cannot be included in the sums covered by a NPLC. He referred the Tribunal to the opinion of Professor Rennie in his Note to Edinburgh and Glasgow Conveyancers Forum dated 4<sup>th</sup> September 2013, where he makes it clear that a NPLC should only refer to costs for maintenance or work. Mr Watson referred to section 12(3) of the 2004 Act where it states clearly that a NPLC can only cover relevant costs relating to any maintenance or work. The sum of £3289.62 included in the first NPLC did not relate only to maintenance or work. He referred the Tribunal to his production 3 on his second Inventory, the excerpt from Conveyancing Practice in Scotland, which refers to registration of a notice against the title of a property where there is an obligation to pay a share of costs relating to maintenance or other work. He referred to his production 1, the explanatory notes for the 2004 Act, relevant to section 12(3) where it states '*an incoming owner will be liable for the cost of maintenance which has been carried out prior to the date on which the new owner becomes the owner of the flat only if a notice of potential liability for costs ... has been registered*'. He referred to

a notice of potential liability for costs ... has been registered'. He referred to production 2, the statutory style of NPLC, contained at Schedule 2 of the 2004 Act, which states that the 'notice gives details of certain maintenance or work carried out or to be carried out in relation to the flat specified in the notice.' Mr Watson said there is nothing contained in any of the sources to say that costs other than for maintenance or work can be included in the sums to which the NPLC relates.

In response, Mr Ritchie referred the Tribunal to page 3, paragraph 2.3 of Professor Rennie's note, where he writes 'Section 12 begins by referring to 'any relevant costs''. Mr Ritchie referred to section 12(1) of the 2004 Act, which states that '*Any owner who is liable for any relevant costs shall not, by virtue only of ceasing to be such an owner, cease to be liable for these costs.*' Section 12(2) addresses liability for 'any relevant costs'. Turning to section 12(3), Mr Ritchie submitted that 'relevant costs' is not restricted by the reference to maintenance or work. Section 12 refers to relevant costs – looking back to section 11(9)(a) relevant costs is defined as '*the share of any costs for which the owner is liable by virtue of the management scheme which applies as respects the tenement.*' In clause (THIRTEENTH) of the Deed of Conditions pertaining to the Property (Production 23) it is clear and explicit that the owner is liable judicially and extra-judicially for all expenses and charges. In this particular case, the relevant costs includes these costs. This position is not universal. One has to look at the management scheme to see if the owner is liable for these costs. In this case, the Factor was entitled to recover all costs.

Responding to questions from the Legal Member as to whether it might be considered that relevant costs in section 11 covers all costs, but section 12(3) restricts relevant costs for which a NPLC can be registered to costs relating to maintenance and work, Mr Watson disagreed and said if that was correct, an incoming owner could be liable for significant sums with no notice that this was the case. The purpose of the NPLC was to give notice of any liability. He referred the Tribunal to page 6 of Professor Rennie's opinion where the writer states '*I do not think that the notice would cover legal expenses of registration or costs of recovery. Again, I should state that the individual deeds may define common charges more widely, but the statutory provisions only relate to maintenance or work costs.*'

Mr Ritchie submitted that it was either all or nothing. The word 'work' is not defined or restricted. Professor Rennie refers to the owner being liable for anything in the maintenance scheme. The notice, therefore, covers these charges.

#### **Second Notice of Potential Liability registered 28<sup>th</sup> November 2017**

17. Mr Watson said that ownership passed to his client on 18<sup>th</sup> August 2017, therefore, the second NPLC was registered after ownership was acquired, and it falls due to the 14 day rule contained at section 12(3) where it states that a new owner will be liable ... '*for relevant costs relating to any*

*maintenance or work ... carried out before the acquisition date only if notice of the maintenance or work ... was registered in relation to the new owner's flat at least 14 days before the acquisition date ...*' The NPLC was registered without the knowledge of the Homeowner and the costs of registration were added to the outstanding sums. At that time, agreement had been reached in terms of the first notice. The Factor's representative emailed the purchaser, rather than Mr Watson, to let them know about the NPLC. Mr Watson described an ensuing 'battle of emails' in this regard between representatives as settlement approached. Settlement was delayed by 3 or 4 days. Meanwhile, the Factor was also issuing notices of court action to the Trustees in Sequestration. The Trustees were liable for factoring fees until settlement.

Responding to questions from the Tribunal as to what was covered by the Factor's production 2, an invoice for an administration fee dated 7<sup>th</sup> September 2017, Mr Watson said some solicitors will not issue a response to correspondence until an administration fee is paid. This is common throughout the factoring industry.

Mr Watson said a figure of £2337.02 had been agreed between parties, as set out in the email from Gillian Wilkie of Gebbie & Wilson dated 23<sup>rd</sup> November 2017 (page 46 in the first Inventory for the Homeowner). There were earlier letters referring to higher amounts. This was because the Factor had originally tried to recover costs incurred after the date of registration of the NPLC. It was then accepted by the Factor's representatives that the first NPLC could only cover costs up to the date of registration.

Responding to questions from the Tribunal regarding the delay of settlement of the sale, Mr Watson said the Factor's representatives went into 'shut down' and did not respond to correspondence. Effectively, the Homeowner was forced to pay the outstanding amounts or the sale could not settle.

Mr Ritchie responded that it was decided by the Factor to lodge the second NPLC after a sale of the property in November 2017 fell through. As a result, the Factor registered the second NPLC. It was not his position that the Homeowner was necessarily due to pay all the sums, rather that liability fell on one of the new owners. He referred to section 12 where it states 'any owner', not just the preceding owner. The Factor was entitled to give notice to the Homeowner and incoming owner that sums were due. In response to questions from the Legal Member as to why there was no discussion with the Homeowner about the sums before registering the NPLC, Mr Ritchie said the Homeowner could have refused to pay. Asked why a NPLC was not registered sooner, Mr Ritchie said that was an oversight. It was his submission that the statute allows such action to be taken.

In response, Mr Watson said that no sale of the property had 'fallen through'. He described the situation as akin to blackmail. The statute was not designed to allow a NPLC to be registered in such circumstances. If that was the case, an owner could own a property for 10 months before a NPLC was registered and the next owner would then become liable.

The Legal Member asked Mr Maxwell why there had been no negotiation with the Homeowner regarding the sums due. Mr Maxwell said the Factor was very aware of the dates in relation to the second NPLC. When the sale fell through, they registered the new NPLC. The Legal Member asked about the delays in relation to responding to the Homeowner's representative around the time of the eventual sale. Mr Maxwell said he was not aware of any delays on their side. It could be the case that the solicitor was delaying responding, but this was not down to the Factor. He accepted that the solicitor was acting as an agent for the Factor.

#### **Further matters referred to**

18. Mr Watson referred to matters he had raised in his supplementary submission. In relation to the statement of account, the Factor float had not been refunded. Mr Ritchie said the Factor accepted that this sum should have come off the first account.

Mr Watson referred to his submission that the Factor ought to have informed the local authority that Mr Rehman was in significant debt, in terms of section 1(b)(8) of the Private Rented Housing (Scotland) Act 2011, which states that when considering whether a landlord is a fit and proper person in relation to landlord registration, the local authority must take into consideration fulfilment of any financial obligation in respect of any house included in the application. If the Factor had made the local authority aware of Mr Rehman's debts, he may have been removed from the register at an earlier date. Responding to a question from the Legal Member as to whether the Factor was bound to do this, Mr Watson said no, but given that it was clear that Mr Rehman was a rogue landlord, something could have been done about this in 2014. Mr Rehman had over 30 properties, eight of which had been repossessed by the Homeowner. Mr Rehman had not paid factoring fees for any of the properties. He questioned how landlord registration was supposed to work if people didn't notify the local authority of such matters.

In response, Mr Ritchie said that this was an irrelevant matter and did not form part of the subject matter of the Homeowner's complaint.

In response to questions from the Legal Member as to what Mr Watson considered constituted maintenance or work, Mr Watson said repairs and cleaning would be covered. Legal fees, and, arguably, insurance fees, were not included.

Mr Ritchie said it would be extraordinary if insurance costs were not included. Relevant sums means sums due in terms of the Deed of Conditions.

There was some discussion about sums relating to the first and second NPLCs. Mr Ritchie provided colour copies of spreadsheets that indicated the breakdown of costs.

## **Code of Conduct**

### **Failure to comply with section 2.1 of the Code**

19. Section 2.1 of the Code states: *You must not provide information which is misleading or false.*

Mr Watson submitted that the Factor's representative had provided misleading information by stating that the NPLC was a charge over the property.

Mr Ritchie responded that there was no false or misleading information provided by the Factor.

### **Failure to comply with section 2.2 of the Code**

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

Mr Watson submitted that the Factor had, effectively, issued a threat to the Homeowner by stating that they would not discharge the NPLCs if the Homeowner did not make payment of all sums due.

Mr Ritchie responded that nothing constituting a threat was made by the Factor.

### **Failure to comply with section 3 of the Code**

21. The introduction to section 3 of the Code states: *While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.*

Mr Watson said that the Factor had failed to comply with this section by making improper payment requests for sums that should not be included in the NPLC, and by registering a second invalid NPLC.

Mr Ritchie responded that no improper payment requests were made.

### **Failure to comply with section 4.9 of the Code**

22. Section 4.9 of the Code states: *When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position.*

Mr Watson said the Factor had both threatened the Homeowner, as previously referred to, and misrepresented the correct legal position.

In response, Mr Ritchie said even if the Tribunal was to find that the legal position adopted by the Factor was incorrect, there was no knowing or careless misrepresentation involved.

### **Findings in Fact**

23.

- (i) The Property, a second floor flat within block 27 Napiershall Street, Glasgow, registered in the Land Register of Scotland under Title Number GLA159522, was in the ownership of Shaban Rehman from 30<sup>th</sup> January 2006.
- (ii) The Factor became a registered Property Factor with registration number PF000095 on 1<sup>st</sup> November 2012. The Factor's duty under section 14(5) of the Act to comply with the Code arises from that date.
- (iii) The Factor derives its authority to act from the Deed of Conditions registered on 20<sup>th</sup> November 2001 by the Miller Group Limited.
- (iv) A Notice of Potential Liability for Costs was registered by the Factor against the Property on 24<sup>th</sup> November 2015 in respect of costs relating to maintenance or work described therein as outstanding factoring and management costs to the sum of £3289.62.
- (v) Shaban Rehman was sequestrated on 21<sup>st</sup> March 2016.
- (vi) The Homeowner was the heritable creditor for Shaban Rehman in respect of the Property. Following decree granted under the Conveyancing and Feudal Reform (Scotland) Act 1970 at Glasgow Sheriff Court on 19<sup>th</sup> May 2017, the Homeowner entered into possession of the Property on 18<sup>th</sup> August 2017.
- (vii) Between late September and late November 2017, the parties corresponded in respect of outstanding sums due by Mr Rehman, and discharge of the NPLC registered on 24<sup>th</sup> November 2015.
- (viii) On 23<sup>rd</sup> November 2017, the Factor informed the Homeowner that the sum due to be paid to settle outstanding liabilities was £2337.02.
- (ix) On 28<sup>th</sup> November 2017, the Factor registered a further NPLC against the Property in respect of outstanding factoring and management costs to the sum of £5920.09.
- (x) The Homeowner disputed the validity of the second NPLC, as it was not registered 14 days before the Homeowner's acquisition date.

Correspondence between the parties indicates a dispute over the sums due.

- (xi) The Homeowner was due to settle a sale of the Property in January 2018. The Factor refused to discharge the NPLCs against the Property unless all sums due were paid. The Factor failed to respond timeously to correspondence regarding the outstanding sums, thus delaying the date of settlement.
- (xii) On 26<sup>th</sup> January 2018, the Homeowner paid the sum of £5910.09 to the Factor on a without prejudice basis to facilitate settlement of the sale, stating that the payment should not be taken as an admission of liability. Consequently, both NPLCs were discharged.
- (xiii) On 20<sup>th</sup> February 2018, the Homeowner raised a complaint with the Factor in respect of alleged failures to comply with the Code. On 23<sup>rd</sup> February 2018, the Factor informed the Homeowner that the complaint was not upheld.
- (xiv) On 8<sup>th</sup> March 2018, the Homeowner raised a stage 2 complaint with the Factor. On 20<sup>th</sup> March 2018, the Factor informed the Homeowner that the complaint was not upheld.

### **Determination and Reasons for Decision**

24. The Tribunal took account of all the documentation provided by parties and the oral submissions and evidence led on behalf of both parties.

### **Sequestration of the previous homeowner**

25. The Tribunal found that the previous homeowner, Mr Rehman, continued to be liable for the debts to the Factor, following his sequestration, albeit the Factor could no longer pursue him personally to recover the sums. A debtor is only discharged from their liability or debts on being discharged from their sequestration. There can be no other interpretation of section 55(1) of the Bankruptcy (Scotland) Act 1985. It follows, therefore, that the Homeowner became severally liable with Mr Rehman on 18<sup>th</sup> August 2017 in terms of section 12(2) of the 2004 Act.

### **Definition of relevant costs and what costs can be included in a NPLC**

26. The Tribunal found that a NPLC can only cover costs relating to 'any maintenance or work', and not legal costs or costs of recovery. The Tribunal noted that there is ambiguity in this regard in the 2004 Act. Relevant costs in relation to a flat are defined in section 11(9)(a) of the 2004 Act as 'the share of any costs for which the owner is liable by virtue of the management scheme which applies as respects the tenement ...'.

In this case, the management scheme allows, at clause (THIRTEENTH) of the Deed of Conditions for recovery by the Factor of 'all expenses and charges

incurred by the Factor, together with all interest accrued thereon ... and the whole expenses judicial and/or extra judicial incurred in such recovery ...'

The 2004 Act then goes on to state at section 12(3):

(3) A new owner shall be liable as mentioned in subsection (2) above for relevant costs relating to any maintenance or work (other than local authority work) carried out before the acquisition date only if—

- (a) notice of the maintenance or work—
  - (i) in, or as near as may be in, the form set out in schedule 2 to this Act; and
  - (ii) containing the information required by the notes for completion set out in that schedule,

It is clear, therefore, that the legislature, in drafting the Act has intended that the only relevant costs that can be covered by the use of a NPLC are costs relating to maintenance or work.

In coming to its decision, the Tribunal took account of the form of NPLC contained at Schedule 2 of the 2004 Act. The form is headed:

'This notice gives details of certain maintenance or work carried out [ , or to be carried out.]'

There is a section entitled: 'Description of the maintenance or work to which notice relates:'

Given the ambiguity within the 2004 Act, the Tribunal also gave consideration to the terms of the explanatory notes to the 2004 Act, as an external aid to interpretation. The Tribunal accepted and bore in mind Mr Ritchie's caution that it is the legislation itself, and not the explanatory notes that must be given effect to; however, the explanatory notes explain the purpose of a bill and can be used where there is ambiguity, in trying to determine the intent of the legislature. The explanatory notes refer to an incoming owner being 'liable for the costs of maintenance which has been carried out prior to the date on which the new owner becomes the owner of the flat only if a notice of potential liability for costs ... has been registered in the property registers ...' The Tribunal noted that only maintenance, and not maintenance or work, was referred to in the explanatory notes.

The Tribunal gave consideration to the Homeowner's production 3, the excerpt from Conveyancing Practice in Scotland, which refers to registration of a notice against the title of a property where there is an obligation to pay a share of costs relating to maintenance or other work. The Tribunal also gave consideration to Professor Rennie's Note, and particularly paragraph 2.3 and his response to question 3 on page 6.

Regarding the question as to whether insurance should be included in 'relevant costs relating to any maintenance or work', the Tribunal found that insurance costs should be included, as they are a service charge and directly relevant to maintenance and work.

In all the circumstances, the Tribunal found, notwithstanding that individual title deeds may provide a wider definition of common charges, as they do in this case, the intention of the legislature was that the statutory provisions and the NPLC should relate only to maintenance or work costs. The Factor, therefore, ought not to have included any costs in the NPLCs other than those relating to maintenance or work.

### **Second Notice of Potential Liability for Costs registered 28<sup>th</sup> November 2017**

27. The Tribunal found that the registration of the second NPLC on 28<sup>th</sup> November 2017 was competent. The legislation allows the registration of a NPLC at least 14 days before the acquisition date. The effect of the NPLC is that a new owner becomes severally liable with any former owner. The registration of the second NPLC could not make the Homeowner severally liable with the defaulting owner for any debts in relation to maintenance or work that were incurred after the Homeowner's acquisition date. It did, however, mean that the incoming owner was severally liable with the defaulting owner for the debts.

The Tribunal noted that the heading of section 12 reads 'Liability of owner and successors for certain costs.' If the liability was limited to the immediate successor of the defaulting owner, it is likely the heading would read 'successor' in the singular.

Looking at the explanatory notes to the 2004 Act, in respect of section 12, at paragraph 68, it is stated: 'A new owner is severally liable with the outgoing owner'. The use of 'the' rather than 'an' suggests support for the position taken by the Homeowner, however, the wording of the relevant section of the 2004 Act is clear.

### **Further matters referred to**

28. The Tribunal noted Mr Ritchie's concession regarding the float, and that the Factor accepted that the sum should have come off the first account. The Tribunal trusts that the Factor will address this matter.

In relation to the matter raised by the Homeowner in relation to section 1(b)(8) of the Private Rented Housing (Scotland) Act 2011, the Tribunal considered that this was an irrelevant matter and did not form part of the subject matter of the Homeowner's complaint. Accordingly, no finding has been made in this regard.

### **Failure to comply with section 2.1 of the Code**

29. The Tribunal did not find that the Factor had failed to comply with this section by stating that the NPLC was a charge over the property. The Tribunal took account of the terms of the letter from the Factor date 20<sup>th</sup> March 2018, where the Factor agrees that the purpose of the NPLC is merely publicity.

### **Failure to comply with section 2.2 of the Code**

30. The Tribunal did not find that the Factor had failed to comply with this section of the Code. The effect of having a NPLC registered against the property is that an interested buyer is unlikely to proceed with the sale unless the notice is discharged. The Factor is entitled to request payment in respect of sums properly due before discharging a NPLC.

### **Failure to comply with section 3 of the Code**

31. The Tribunal found that the Factor had failed to comply with this section. By including costs other than those relating to maintenance or work in the NPLCs and by demanding the payment of those sums, the Factor made improper payment requests.

### **Failure to comply with section 4.9 of the Code**

32. The Tribunal found that the Factor had failed to comply with this section of the Code by carelessly misrepresenting the correct legal position in relation to the sums covered by the NPLCs.

### **Observations**

33. The Tribunal was concerned by the actions of the Factor in registering a second NPLC with no previous discussion with the Homeowner, particularly given the terms of the email dated 23<sup>rd</sup> November 2017 from the Factor's representative, which appeared to give a final figure due for payment. The Tribunal was further concerned about the Factor's failure to respond timeously to the Homeowner in January 2018, thus delaying the settlement of the sale of the Property. However, the delays did not form part of the complaint to the Tribunal, so no finding has been made in that regard.

### **Proposed Property Factor Enforcement Order (PFEO)**

34. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO.

35. The Tribunal proposes to make a PFEO requiring the Factor to carry out the following within four weeks of the date that the PFEO is issued:

(1) Repay to the Homeowner all sums referred to in the Notices of Potential Liability for Costs that relate to anything other than maintenance or work.

**Right of Appeal**

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

Helen Forbes

**Legal Member and Chairperson**

**26<sup>th</sup> June 2018**