Upper Tribunal for Scotland

2022UT24
Ref: UTS/AP/21/0018

**DECISION OF**

Sheriff O'Carroll

**IN AN APPEAL**
**IN THE CASE OF**

MXM Property Solutions Limited, c o TLT LLP Solicitors, 140 West George Street, Glasgow, G2 2HG
Per Mr Ross Anderson, Advocate, instructed by TLT LLP Solicitors, Glasgow

Appellant

- and -

Dr Mohsan Mallick, 25 Ettrick Drive, Bearsden, Glasgow, G61 4RB
per Mr Ahsan Mallick, lay representative, Glasgow

Respondent

FtT reference FTS/HPC/PF/20/1377

**25 July 2022**

**Decision**

The appeal by the appellant against the decision of the First Tier Tribunal for Scotland dated 30 April 2021 succeeds. That decision of the First Tier Tribunal for Scotland is set aside. The whole matter is remitted to a freshly constituted FTS for redetermination in accordance with the terms of the judgment of this Upper Tribunal.

**Judgment**

**Background**.

1. This appeal is against the decision of the First Tier Tribunal for Scotland ("the FTS") dated 30 April 2021 which determined that the property factor MXM Property Solutions Limited, the present Appellant, failed to comply with its duties under the Code of Conduct for Property Factors ("the Code"), in particular sections 2, 2.1, 2.2, 2.5, 3, 3.3, , 4.3, 7.1, 7.2 and 7.4, contrary to its duty under section 14 of the Property Factors (Scotland) Act 2011 ("the Act"). The FTS also determined that the Appellant had failed to comply with its duties under section 17 of the Act by breaching its property factor duties in a similar way. Those duties were said to have been due to the homeowner, Dr Mohsan Mallick, the present respondent.
2. The remedy proposed by the FTS by way of a Property Factor Enforcement Order was that the appellant should refund to the respondent the sum of £9,896.13 which the tribunal held the respondent had been wrongly induced to pay by the actions of the appellant. Furthermore, the FTS proposed that "compensation" in the sum of £5,000 should also be payable by the appellant to the respondent.
3. It is against those decisions that appeal is taken.
4. To say that this case has a lengthy and complicated background is something of an understatement. The parties have been in dispute over a variety of issues since the middle of the last decade. Fortunately, in order to make sense of the background, it is not necessary to rehearse the full background. The following represents the essentials relevant to this appeal.
5. The appellant is a firm of property factors. In 2014, it successfully tendered for appointment as Management Agent over the development known as Kingston Quay Development in Glasgow. That appointment was authorised by a meeting of the proprietors of that

development. That appointment as management agent, effective around June 2014, meant that they acted for all proprietors at Kingston Quay, including any proprietors who did not vote at that meeting and or voted against. The present respondent now accepts that the appellant was properly appointed by the proprietors of the Kingston Quay development and had authority to do so. The full terms of the bid and the letter of appointment are found in the joint bundle at pages 90 *et seq* of the joint bundle. The development is a large modern development on more than one site with a large number of individual units, as may be seen from the title information which includes importantly the Deed of Conditions applying to all units within this development. That material is found at pages 51 *et seq* of the joint bundle. Clause 9.4 of that deed of conditions (at 71 of the joint bundle) contains conditions regarding expenses, charges, cost etc and payment of same by the proprietors of the development. Reference will be made to clause 9.4 further below. The Deed of Conditions was registered in 2004 against all properties in the development including the property with which this case is concerned.

6. In 2014, the predecessors of the current appellants instructed the law firm of TLT LLP to raise a summary cause action in Dumbarton Sheriff Court under reference SA633/14 seeking payment of £1,729.80 from the respondent in respect of unpaid charges which the appellant claimed were due from the respondent. The current appellant was sisted as pursuer in place of its predecessor on taking office and it continued the action, continuing to instruct the same law firm.
7. On 4 February 2016, the summary cause action appears to have been dismissed on joint motion, in which the firm of TLT LLP acted for both parties. The FTS found as fact at paragraph 56 as follows: the parties reached an agreement to settle the sum sued for in the court action; the agreement was set out in writing; the agreement was that the homeowner would not be liable for amongst other things "judicial expenses"; the homeowner settled the sum sued for in the court action and the court action was dismissed on 4 February 2016 on joint motion on the basis of 'no expenses due to or by'. However, I observe that no findings in fact have been made as regards the conditions on which the action settled and

in particular whether there were any conditions which remain to be satisfied. I note that it is plain from the joint bundle the resolution of that court case followed discussions and negotiations of some description between the parties though no findings are made about that. Further, although the tribunal records that the homeowner settled the sum sued for, that does not sit easily with the findings of the 2019 FTS: see below at paragraph 13. Neither does the FTS make any findings as to whether the parties' agreement concerned legal costs or outlays other than judicial expenses. I will return to that issue in due course.

8. Unfortunately, settlement of the summary cause action did not resolve disputes between the parties as regards payments. The appellant's position is that the respondent continued to be in arrears of common charges from 2016 to shortly before the property was sold in 2018.

9. The respondents say that at least during 2016 and 2017, the appellants made no attempt to demand payment in respect of non-judicial legal expenses arising from the summary cause action. The FTS finds in fact that the appellant sought payment of its legal costs from the homeowner for pursuing the court action but does not find when that was done.

10. Sometime in 2018, the appellant learned that the respondent intended to sell his property. The FTS found as a fact that as a result of that knowledge, the appellant registered two Notices of Potential Liability, ("NOPL") against the property in the Land Register on 21 March 2018 with the intention of attempting to obtain payment of unpaid sums. I shall return to the significance of such notices in due course. Those unpaid sums it said, were of two types: factoring costs and legal costs incurred as a result of the summary cause action.

11. The appellant, through the firm of TLT LLP solicitors, offered to obtain discharge of those two NOPLs only if sums claimed to be outstanding were paid. As a result, the respondent paid £9,869.13 so that the sale of the property could be completed. While the FTS made no findings in fact as regards the breakdown of that sum, it is agreed by the parties in this appeal, that sum comprised two elements: common charges (not factoring costs) of about £2,145 and legal expenses of £7,723.86. The sale of the property was completed on 20 August 2018.

12. In 2018, the present homeowner made an application to the FTS ("the 2019 FTS") founding on alleged breaches of around 13 parts of the Code plus alleged breaches of the property factor duties. The 2019 FTS is *not* the same FTS which was responsible for making the decisions against which the current appeal is taken. The parties however are the same, for all material purposes (Faaiza Mallick being at that time a joint proprietor, but no longer by the time of these proceedings apparently, but nothing turns on that), the property is the same and the dispute concerned *inter alia* the same type of common charges as the summary cause action.
13. The 2019 FTS found as a fact that the homeowner was in arrears of common charges for the period 1 July 2014 to 1 February 2018 and that the total sum owed by the homeowner as at 1 February 2018 was £2,133.17 (see findings in fact 2.54 and 2.56). It also found that the homeowner was in arrears of common charges throughout the period 1 February 2018 until the sale of the property on 20 August 2018. That tribunal dismissed every complaint by the homeowner with the exception of an alleged breach of the Code at section 2.5 (see findings in fact 3.21 to 3.24). However, the 2019 FTS declined to make a Property Factor Enforcement Order for the reasons given at paragraphs 11.4 to 11.9. In short, the 2019 FTS found that the homeowners did not adhere to the Minute of Agreement and continue to allow arrears to accrue and so the Tribunal was not prepared to order any payment to be made in respect of that breach of the Code: see paragraph 11.4.
14. The 2019 FTS was not asked to deal with the legal expenses issue. There was no appeal against the decision of the 2019 FTS. That decision, so far as the matters it decided, is final and may not be reviewed by any other tribunal or court: see section 19(4) of the Act. It binds this Upper Tribunal.
15. The parties at the present appeal were agreed that the FTS in this case had not taken proper account of the decision of the 2019 FTS. In particular, the parties agreed that this FTS had erred in finding that the respondent had suffered "a loss" of £9,896.13 which he had been wrongly induced to pay (see paragraph 145 of the FTS reasons) since that sum includes unpaid common charges which it is now accepted by the respondent were properly due to

the appellant and which were due and resting owing as at the date of the sale of the property in August 2018. Thus, in the present appeal, it is conceded by the respondent that the FTS erred in law in finding that the whole of that sum ought to be refunded to the respondent. It is accepted that common charges were in arrears at the date that both of the NOPLs were registered. Further, it is agreed during the course of this appeal that the dispute between the parties now concerns two distinct sums only being (a) the total amount which the appellant claims is due in respect of legal expenses associated with the summary cause action amounting to £7,723.86 and (b) the sum of £5,000 in respect of "compensation" which the FTS proposes to find due to the respondent in a Property Factor Enforcement Notice.

16. It will be noted that there is a slight discrepancy in the calculation of the sums outstanding in respect of common charges as at the date of the sale of the property but the parties were agreed that for the purposes this litigation hereon, nothing turns on that and should be ignored to enable focus to be placed on the substance of the real dispute between the parties.
17. The ultimate position of the parties was clarified during the course of this appeal. The appellant maintains its position that the FTS also erred in law by making a finding that the legal expenses paid by the respondent to it ought to be refunded and also by finding that the respondent was entitled to compensation of a sum as large as £5000 in respect of shortcomings on the part of the appellant. This tribunal was invited to sustain the appeal in respect of both matters leaving the ultimate disposal in the hands of this Upper Tribunal. By contrast, the position of the respondent was that, subject to the agreed reduction in the amount of the refund, the FTS decision ought to be upheld.
18. *The FTS judgment and decisions summarised*. I now turn to examine the FTS judgment. That was decided after hearing from the parties, both orally and by way of written submission, neither of whom were legally represented. Therefore the FTS did not have the advantage of considered submissions from qualified representatives. The following represents a

summary of the approach taken by the FTS and its decisions, so far as is relevant for the purposes of this judgment.

19. The FTS directed itself (see paragraph 58) that the "core matters" for the Tribunal to consider were firstly "the competence of the NOPLs" and secondly the entitlement of the appellant to seek payment of its legal expenses associated with the summary cause action. So far as the first core matter is concerned, the FTS engaged in a lengthy analysis at paragraphs 60 to 104, concluding at paragraph 101 that neither factoring charges nor legal costs were "relevant costs" entitling the appellant to register an NOPL under either the Tenements (Scotland) Act 2004 ("the 2004 Act") or the Title Conditions (Scotland) Act 2003 ("the 2003 Act"). So far as the second core matter was concerned, the FTS found (paragraphs 105 to 107) that the appellant, having joined with the respondent in having the summary cause action dismissed with no expenses due to or by, it thereby forfeited any right to claim from the defender its expenses or outlays in respect of legal costs.
20. Furthermore, the FTS found at paragraphs 108 to 110, that in any event the appellant had no contractual right to recover legal costs from the respondents in reliance on the terms of clause 9.4 of the Deed of Conditions applicable to the subjects.
21. So far as remedy is concerned, the FTS decided at paragraphs 141 to 146 that the respondents had suffered a loss of £9,896.13 (being the sum which they had paid to the appellant before the appellant would agree to obtain discharge of the NOPLs) and that the appellants ought to repay that sum. Further, in view of its finding that the appellant "had abused its statutory entitlement to register the NOPL… and acting unlawfully in respect of the 2003 Act NOPL…", taking account of the appellant's actions and the "significant emotional impact on the home owner", "compensation" of £5,000 should be paid by the appellant to the respondents.
22. *Grounds of appeal summarised.* The grounds of appeal are unusually long, amounting to some 15 separate grounds in the original notice of appeal. At the appeal hearing, those grounds were supplemented by a skeleton note of argument for the appellant and a supplementary note of argument for the appellant which helpfully refined those grounds

of appeal but which are nonetheless, taken together lengthy and detailed. Given the terms of the FTS judgment and the complexities of this case, the length and complexity of those pleadings is quite justified and were helpful.

23. In summary, so far as is relevant for the purposes of this judgment, the appellants argue the FTS has gone wrong in law as follows.

24. The FTS was wrong to find that the sums claimed by the appellant in the summary cause action were not "relevant costs" recoverable by the factor. Legal costs are recoverable costs in terms of the contract between the parties and under the Tenements (Scotland) Act 2004. No account was taken of the 2019 FTS findings. Both arrears of common charges and unpaid legal charges are relevant costs.

25. The FTS was wrong to find that the two NOPLs were invalid. Again, no account was taken of the 2019 FTS findings as regards arrears of common charges.

26. The FTS misunderstood the nature of an NOPL and the rights of the appellant to register such a notice. The FTS was wrong to find that in the circumstances, the registration of the NOPLs was any kind of abuse or breach of the code.

27. The FTS was wrong in its approach to the question of judicial expenses and its understanding of the 2016 agreement and the effect of the subsequent disposal of the summary cause action by the Sheriff on the right of the appellant otherwise to recover legal costs or outlays from the respondent as a matter of contract.

28. The FTS was wrong to find that the appellant was liable to refund £9,869.13. It failed to take account of the binding finding of the 2019 FTS that £2,133.17 of that sum represented arrears of common charges lawfully due by the respondent to the appellant.

29. The FTS was wrong to find that the appellant was liable to refund that part of the sum of £9,869.13 representing unpaid legal costs as that sum was legally due to be paid by the respondent to the appellant as a matter of contract and such a demand was not a breach of the Code.

30. The FTS was wrong to propose making an award of compensation in the sum of £5,000, being unsupported by sufficient findings in fact and being, in any event, grossly excessive.

31. *The respondents' response to the grounds of appeal*. The respondent has set out in the response to the appeal, the note of argument and his supplementary note of argument in some detail his contentions. They too were lengthy and helpful. In so far as is relevant to determination of this appeal, they can be summarised as follows.
32. The FTS decisions and reasons, in almost all respects, should be supported by this Upper Tribunal and the appeal dismissed (while conceding the FTS wrongly included in the refund figure £2133.17 in unpaid common charges).
33. Particular emphasis was placed on the following contentions. The effect of settling the summary cause action was that the appellant was thereby debarred from claiming any amount in respect of legal expenses. Moreover, the Deed of Conditions did not provide a contractual basis for recovery of legal expenses or outlays either. The appellant did not have a right to register either NOPL. Even if it did have such a right, it had no right to do so at this stage that it did shortly before the property was due to be sold which had the effect of forcing payment under duress. In particular, it had no right to register an NOPL only having issued an invoice in respect of the legal costs until shortly before the sale of the property, thus providing no opportunity for effective query or challenge to the sum claimed to be due. The FTS did have jurisdiction to consider the competency of the NOPLs. The legal expenses claimed, amounting to over £7,700, were unreasonable, illegitimate and disproportionate and not vouched for. The compensation of £5,000 was reasonable considering the great emotional distress caused to the homeowner.
34. I propose now to analyse the principal issues. In doing so, I approach them in a different order to that taken by the FTS which I hope leads to a clearer and more accurate result. I commence with the issue of liability for costs arising from the summary cause litigation.

**Contractual liability by the homeowner to pay non-judicial legal costs.**

35. The starting point in my view is to examine the legal basis for the appellant recovering non-judicial expenses from the respondent. In my view, it is plain, as a matter of law, that in principle the Appellant had a right to recover from the respondent those legal costs or outlays incurred by the Appellant as property factor, which were properly and fairly

incurred by the Appellant as a result of the respondent delaying or refusing to pay sums legally due by the respondents attributable to property factor charges or share of common charges and like charges. That right of course was subject to any agreement to the contrary between the parties. It was also subject to the Appellant being able to demonstrate that such legal costs are correctly calculated, properly incurred and attributable to the respondent, in the same way as it was obliged under the Code to account for any other costs demanded of a homeowner. I shall explain why shortly.

36. The FTS approach to this question at paragraph 108 to 110 conflated the separate issues of: (a) whether legal costs or outlays are in principle recoverable by the Appellant from the respondent as a matter of contract, with the entirely separate issue of: (b) the effect of a finding in a particular action that no judicial expenses are due to or by either party. It thereby fell into error on the first issue (and as will be seen, for different reasons on the second issue).

37. The reason why legal costs or outlays are in principle recoverable from the respondent by the appellant is because of the terms of clause 9.4 of the Deed of Conditions. As was conceded correctly by the respondent, that Deed binds both parties contractually. See paragraph 5 above for the Title background. Paragraph 9.4 provides in part as follows [emphasis added]: …..

> *All expenses and charges and premiums incurred for any work done or undertaken or services performed in terms of or in furtherance of the provisions herein or otherwise (including the Managing Agents management charges as fixed by them*) shall be payable by the respective Proprietors whether consenters thereto or not in the proportions fixed hereunder in the same way as if their consent had been obtained and shall be collected by the Managing Agents or by any other person or persons appointed at a meeting convened as aforesaid*….and the Managing Agents or other person or persons appointed as aforesaid shall (without prejudice to the other rights and remedies of the other Proprietors of Flats and Commercial Units) be entitled to sue for and to recover the same in his/her/their own name from the Proprietor or Proprietors so failing together with all expenses incurred by the Managing Agents or other person or persons thereanent*; provided always that it shall

be in the option of the Managing Agents or other person before or after taking any action to call a meeting of the relevant Proprietors to decide if and to what extent such action should be pursued 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 Managing Agents shall determine. The Managing Agents shall provide a quarterly Statement of expenses, charges and premiums (without prejudice to the Managing Agents right to collect same at any time).

38. In my view, on a plain reading of the clause, the proprietors are liable to pay all costs incurred by the managing agents for work or services provided in furtherance of the terms of the Deed (which includes the relevant share of repair and maintenance costs as well charges for the factors fees and relevant outlays). Further, where those charges are unpaid, the managing agents are entitled to raise legal proceedings to recover unpaid charges. It further provides that the managing agents can instruct others (such as a legal firm) to raise the legal action and that the managing agents are entitled to recover "*all expenses incurred by the managing agents or other persons…*"

39. So, it is plain that the managing agents can recover from the defaulting homeowner all legal costs and outlays arising from the need to raise legal action (and not restricted to whatever a court may award by way of judicial expenses which is an entirely separate question which I discuss below). That type of provision is common if not universal in such Deeds. Without such a provision, a managing agent would be unable to perform effectively its duties. Furthermore, again contrary to the findings of the FTS, legal costs and expenses are not, at first instance, a liability falling on all homeowners governed by the same Deed of Conditions. The liability rests primarily, as one would expect, on the homeowner whose default has caused the legal action. In this case, that is the present respondent. It is only where there is a "failure" to collect the legal costs from the defaulting homeowner that they fall to be paid by other homeowners.

40. The findings of the FTS on the construction of this document to the contrary are an error of law in my view (see paragraphs 108-110 of the FTS judgment). I also note that the terms of the service agreement binding the parties provides at clause 3.1.6 (see page 230 of the Joint

Bundle) that where a debt has been outstanding for more than 28 days, the legal firm TLT will be instructed to pursue the debt and that the homeowner "will be responsible for all costs of seeking to recover payment from you". That is consistent with the terms of the Deed of Conditions and likewise, makes the defaulting homeowner liable for all legal costs, not just judicial expenses, incurred in recovering the unpaid debt. That provision applied to the respondent in this appeal. The FTS failed to take account of that provision as well.

**Judicial expenses.**

41. I turn now to the question of judicial expenses and its relevance to the liability of the respondent for payment of legal charges/outlays. I find that the FTS erred in law in its determination at paragraphs 106-107 that by being a party to a joint application that the summary cause action be dismissed with no expenses due to or by, the appellant thereby forfeited its right to recover legal costs incurred in pursuing the court action. In so finding, the FTS has in my view misunderstood both law and practice. It has confused judicial expenses on the one hand with legal costs/outlays on the other. Judicial expenses are those awarded, at the discretion of the court, to a party during or at the conclusion of litigation. Those judicial expenses are usually taxed or assessed on a scale according to well understood rules, as explained in chapter 19 of McPhail: *Sheriff Court Practice* and in more depth: MacLaren: *Expenses*.

42. There is a fundamental difference between judicial expenses and the client account of expenses incurred: c.f *Cabot Financial UK Ltd v Weir* [2021] CSIH 64. The question of whether judicial expenses are awarded and the amount thereof is determined entirely separately from the way in which a solicitor or a party may charge a client or another person for the legal work done. So, to take a commonplace illustration, where a litigant instructs a solicitor to pursue litigation which results in a finding of expenses in favour of that litigant, the final invoice from the solicitor is not determined by the award of judicial expenses in favour of the litigant but is determined according to the contract between the litigant and the solicitor. Sometimes, the contractual liability of the litigant to his solicitor will be greater than the amount recovered by way of judicial expenses. In that event, the judicial expenses

recovered will offset the sum due by way of contract between the litigant and his solicitor. Thus, the question of judicial expenses and the question of contractual entitlement are separate although they may overlap.

43. Thus, in a case where the parties to a litigation have a contractual arrangement which includes an obligation to pay legal costs incurred by one party as a result of the default of the other, the determination by the court of the question of judicial expenses, whether that is done by way of joint motion to the court or otherwise, does not determine the entitlement of one party or the other, as a matter of contract, to recover legal costs or charges incurred as a result of pursing legal action arising from the default. In such cases, it is necessary to examine the contractual arrangements between the parties to determine whether non-judicial legal expenses may be recovered. Those contractual arrangements include, importantly, not only the terms of the pre-existing contractual arrangements but also the terms of any settlement. Thus, the parties to a contractual arrangement which might otherwise render one party liable to the other in respect of legal costs incurred as a result of the default may nonetheless agree that no claim relying on such an arrangement will be made. So, an agreement may be made by the parties that as part of the settlement of the litigation not only will the court be invited to make a finding of no expenses due to or by but that neither party will be liable to the other in respect of legal costs arising from contract. Of course, any such innovation on the contractual arrangements by way of settlement may itself be made subject to conditions such as for example an obligation to make payment of any sums claimed in the litigation itself whether by way of instalment or otherwise, with or without express or implied conditions as to the consequences if any such additional conditions were not complied with.

44. Returning to the present case, it is apparent from the approach taken by the FTS (see paragraphs 105 to 107 of the FTS judgment) that it has failed to understand the legal distinction between judicial expenses on the one hand and contractual entitlement to reimbursement of legal costs/outlays/expenses on the other. It has failed properly to consider the terms of the settlement between the parties and in particular whether the

agreement leading to settlement of the summary cause action dealt with the contractual entitlement said to exist in respect of legal costs. It failed to consider whether there were conditions attaching to that settlement and if so whether the conditions were breached and if so, what the consequences are of that.

45. What the FTS ought to have done, before making findings as regards the interrelationship between the contractual right of the Appellant to recover legal outlays (which it misunderstood) and the judicial determination that the dismissal of the summary cause action would be made together with a finding that neither side be liable to the other in respect of *judicial expenses* was firstly to determine exactly what was agreed between the parties leading to the settlement of the action in 2016. That is especially so since the position consistently taken by the respondent is precisely that the settlement of the summary cause action included an agreement that no legal costs whatsoever, not just judicial expenses, would be payable by the homeowner. That is disputed by the appellant. In the voluminous joint bundle lodged for this appeal, I note that there are contemporaneous written communications concerning settlement of the litigation in 2015 and 2016. That includes at page 137 a document said to be the written agreement between the parties which does indeed refer to expenses, various conditions and the sisting of the cause until payment was made. As regards whether there were conditions agreed to in that settlement which were subsequently broken, although the FTS find at paragraph 56 (vii) that the homeowner settled the sum sued for in the court action, that finding does not sit easily with the finding of the 2019 FTS at paragraph 11.4 that the homeowner failed to adhere to a Minute of Agreement concerning unpaid common charges.

46. So, the FTS ought first to have asked the question, what exactly was agreed between the parties, making findings in fact after taking evidence and considering all relevant productions and hearing evidence. Then the FTS ought to have made findings in fact as regards what was the agreement, what were the conditions, what the parties agreed by way of expenses, the implementation of the settlement agreement, whether it was or was not complied with and then reached a conclusion on the basis of those findings as to

whether the homeowner was liable to contractual legal costs of any amount or whether, the Appellant did indeed agree that if conditions were met, not only would no judicial expenses be sought but no other payment in respect of legal costs would be payable.

**Quantification of legal costs/outlays/expenses.**

47. Given the erroneous approach taken by the FTS to the question of non-judicial legal expenses, it is understandable why no attempt was made by the FTS to enquire into the basis for the quantification of those legal costs. The view taken by the FTS, I infer, was that none were payable by the respondent and therefore it mattered not how those purported costs were calculated.

48. However, if once this case is remitted to a fresh FTS, that Tribunal were to conclude that in principle, there was a contractual liability by the respondent to the Appellant in respect of legal costs or outlays arising from the summary cause action, it would have to determine whether all, or only some, were payable by the homeowner. That is because of the requirement in section 3 of the Code of Practice that: "Homeowners should know what they are paying for, how the charges were calculated and that no improper requests were involved." That is the property factor's obligation. A demand for payment which is improper, because for example it seeks money which is not due, because it seeks payment for services not actually rendered or seeks payment in respect of a matter for which the homeowner is not liable, is likely to amount to a breach of the Code. The FTS jurisdiction extends to making a determination of that kind.

49. The homeowner asserts that the invoices for the legal costs are grossly excessive. The position of the Appellant appears to be that the sum claimed is simply the costs charged on to it by TLT LLP, invoices for the sum claimed have been exhibited which demonstrate the sums due and that is what the homeowner is therefore liable for. If I have correctly understood the position of the Appellant, I do not think that can be right. The respondent is entitled to have the whole costs claimed set out in detail, in a comprehensible fashion with a clear account given of the work said to have been done by the firm on behalf of the Appellant, when it was done, by whom (trainee, associate, partner etc), for what and what

fee was charged. The homeowner would thus be able to see what he is paying for, check that each entry relates to the summary cause action and would be in a position to challenge any entry that he believes is unwarranted. The FTS would then require to determine whether there is a breach of the Code as regards that claim by the Appellant and if so, to make an appropriate determination. That exercise has not been carried out thus far. That is unfortunate, not least since the claim for that sum, in excess of £7,700 is at the centre of this dispute between the parties.

50. Of course, if the freshly constituted FTS were to find that the settlement of the 2016 summary cause action included an agreement that no legal costs or outlays referable to the 2016 action would be claimed from the respondent, that might well be an end of the matter.

**Was the appellant entitled to register the NOPLs**?

51. In my view, the FTS erred in law in concluding that the Appellant had no legal entitlement to register an NOPL under either the Tenements (Scotland) Act 2004 ("the 2004 Act") or the Title Conditions (Scotland) Act 2003 ("the 2003 Act"). I deal first with the 2004 Act. I first explore the nature of an NOPL then go on to examine the FTS conclusions on this question and explain why it erred.

52. The 2004 Act provides that where title conditions make provision for a given cost, the titles prevail: sections 1 and 4. Here, part of the title, clause 9.4 of the Deed of Conditions (see above for analysis) does deal with all the costs claimed. An owner is liable for "relevant costs" (2004 Act, section 11(1), (9)) and that includes (a) the share of costs for which the owner is liable by virtue of the management scheme which applies as regards the tenement and (b) any costs which the owner is liable for in terms of the 2004 Act. The term "management scheme" includes any tenement burden relating to maintenance, management or improvement of the tenement [such as the Deed of Conditions] together with any applicable provisions of the tenemental management scheme which are applicable. There had been a scheme decision to appoint the Appellant as managing agent: see paragraphs 2.5 and 2.6 of the 2019 FTS decision. Reading the Deed of Conditions together with said terms of the 2004 Act, it is plain in my view (even if one sets aside for

the moment the legal costs liability question) the outstanding liabilities owed by the homeowner to the Appellant as at the date of registration of the NOPL in 2018, being his share of the common charges and late payment charges amounting to £2,133.17 (see 2019 FTS, paragraph 2.53 to 2.56, binding on the FTS and this UT) were relevant costs in terms of the 2004 Act and they were unpaid as at the date of the registration of the NOPLs. I note that in *Cumbernauld Housing Partnership Ltd v Davis* 2015 SC 532, at [2], management charges including contributions to a common fund were the basis for the NOPLs under examination in that case, without any adverse comment.

53. The importance of that conclusion is when one turns to section 12 and 13 of the 2004 Act. The point of those provisions is to enable preservation of the liability of the owner and successors in title for certain "relevant costs". They permit *inter alia* a manager of the tenement to register a "notice of potential liability for costs" ("an NOPL") in the Land Register if at the time of registration, the owner has an outstanding liability for certain "relevant costs". Those certain costs are relevant costs which relate to "any maintenance or work (other than local authority work) carried out before the acquisition date" [of the property by a new owner]: section 12(2),(3). Once a NOPL is registered, the new owner becomes severally liable (not jointly and severally liable) with the old owner for payment of those costs. If the new owner pays the outstanding costs, s/he is entitled to recover that payment from the former owner: Section 12(4). The form of the notice requires only that the nature of the liability is very briefly described. It does not require detail of the costs said to be due. It does not specify the amount that is said to be due. It does not amount to a security over the property of any kind. It does not establish as a matter of law or fact that any sums are due. Whether the sums are in fact due could ultimately only be determined by litigation in the usual way. The NOPL lasts for three years unless either discharged (with the consent of the registrant) or renewed.

54. Its effects are firstly, to put a prospective buyer on notice that in the opinion of the registrant, the current owner has an undischarged liability for certain relevant costs and secondly to provide an additional means whereby any outstanding liability, if established,

might be satisfied. Because the effect of the provision is to make the new owner severally liable, naturally it will often only be when the claimed creditor becomes aware that the homeowner is selling that such a notice is registered. That is a consequence of the legislation. That is what occurred as a matter of fact in this case.

55. Registering a NOPL in such a circumstance is not an abuse of the legislation: it is one anticipated effect of the legislation. One effect of the legislation is that although the NOPL itself (unlike for example an inhibition or standard security) has no direct effect on the right of the homeowner to sell his property, in practice it is not unlikely that a prospective buyer may require discharge of the NOPL before s/he will agree to completion of the sale. But anyone who believes they are owed money relating to maintenance or works, who seeks to protect their position by the registration of an NOPL before an anticipated sale cannot, without more, be said to be acting unlawfully or abusing its position. (I note in passing that in this case, there is a fall-back position by the respondent which is that even if the appellant was entitled to register a NOPL, and even if the legal costs were due (which is denied) it acted in breach of the Code by invoicing so late and unexpectedly, see below. That of course is a separate matter).
56. In the present case, the FTS found that the Appellant has breached the Code in a number of respects and also its property factor duties because it did not as a matter of law have the right to register an NOPL. That conclusion in my view is erroneous for the following reasons.
57. The FTS failed to take account of the terms of the 2019 FTS, whose findings bound it and which held (as I have noted above) that until the sale of the property, the respondent was in arrears of "common charges" and late payment charges and had been since 1 July 2014. The term "common charges" is apt to include as a matter of normal usage a share of maintenance of common parts. The NOPL registered by the appellant under the 2004 Act makes reference to "unpaid common charges, common repair and factoring accounts". However, the FTS appears to have worked on the assumption that the unpaid amounts

were referable solely to "factoring charges" and "legal costs" and then went on the conclude that neither were "maintenance or works": FTS paragraph 101.

58. There are two difficulties with that conclusion. The first is that the FTS, in failing to take account of the 2019 FTS decision, in failing to understand that aside from legal costs, there were other debts undoubtedly due by the respondent to the Appellant and in failing to make findings in fact as to exactly what the sums owed were for, was therefore unable correctly to determine whether the "relevant costs" in fact related to "any maintenance or work". The second difficulty is its conclusion that only costs "directly relating" to physical works carried out to common property permitted registration of an NOPL (see paragraph 37 of the FTS judgment) despite the terms of the legislation which provides simply that the relevant costs must be "related to" maintenance or work. It is difficult to see why, for example, the administration costs (which might be encompassed by the term factoring costs) of instructing and supervising a contract for the maintenance of the common parts cannot be "related to" the cost of doing that maintenance or work. Equally, it is difficult to see why the costs of pursuing homeowners for the recovery of their share of the maintenance, including legal costs, cannot be "related to" that maintenance. The FTS has innovated on the legislation and has misconstrued it in my view.

59. In summary, in my view, the FTS conclusion that the NOPL was invalid because the Appellant had no legal right to register the NOPL under the 2004 Act is an error of law. It proceeds on inadequate findings in fact and an erroneous interpretation of the relevant legislation. It follows that the FTS conclusions as to breach of various parts of the Code and of the property factor duties arising from the "unlawful" registration of the NOPL under the 2004 Act cannot be supported.

**Dual Registration of NOPLs**.

60. The FTS found that the Appellant acted unlawfully in registering the NOPL under both the 2003 and 2004 Acts (paragraph 103). I do not accept that. I accept the contention of the Appellant that the Deed of Conditions apportions liabilities for the "Development Common Parts" between the proprietors of *two* separate buildings. Thus, the nature of the

owner's obligation to pay for work undertaken by a property manager is founded partly on a tenement burden so far as it applies to the tenement: (the 2004 Act) and partly as an affirmative burden in relation to the obligation to pay for work on the Development Common Parts, which form part of a different tenement building being however part of the same physical development (2003 Act). Some of the Development Common Parts could not be a pertinent of the tenement at 40 Wallace Street because, physically, they were part of the tenement building on Wallace Street which lies to the east of Laidlaw Street. In short, NOPLs were registered twice for technical reasons. Nothing turns on that however in my view since the legislation permitting the registration of a NOPL under each of the two Acts is for all practical purposes to the same effect.

61. Even if it be the case that registration under the 2003 Act was unnecessary or unwarranted or I am wrong on the question as to whether a NOPL was also registerable under the 2003 Act, that does not in any way affect the legitimacy or otherwise of the NOPL registered under the 2004 Act. The conclusion of the FTS to contrary effect was in my view an error of law.

62. Furthermore, whether or not an NOPL is registered in respect of any alleged unpaid obligation has no effect whatsoever on the existence of that obligation. If a homeowner owes money, that obligation continues regardless of whether a NOPL is registered. Equally, if the homeowner does not owe money, the registration of a NOPL does not alter that fact. Thus, when an FTS comes to examine this case afresh, although it may well require to determine whether the appellant was entitled to register the NOPL, even if the FTS were to find that it had no such entitlement, that would not have any effect on whether the respondent did owe money to the appellant at the time the property was sold and the amount owed.

**The Proposed Property Factor Enforcement Order**

63. What I have set out is sufficient to determine the appeal, which succeeds. The whole matter falls to be remitted to a differently constituted FTS for redetermination on the true questions raised by the initial application.

64. Given the faulty findings of the FTS it follows that the appeal against the terms of the PFEO, which founds on those findings, must also succeed. I should very briefly add the following however.

65. Even if the Appellant's appeal had not otherwise succeeded, it would have done so far as the terms of the proposed PFEO are concerned for the following reasons. First, as has already mentioned, the FTS in making the order required repayment to the respondent of sums which the respondent accepts were owed by him to the appellant. Secondly, as regards the FTS calls "compensation", and the proposed order for payment of £5,000, the FTS failed to make any findings of fact as to exactly what distress was caused by whom and when and how: see paragraph 56 which is silent on such matters. There were at that time two joint homeowners, no distinction is drawn between them. Elsewhere in the lengthy judgment, and in its reasons, the FTS states that distress, upset and like effects resulted from the actions of the appellant but these statements are not findings and are in any event generalised statements without a stated evidential basis.

66. Furthermore, the FTS gives no reasons for reaching the figure that it did. Why £5,000 and not, say, £500 or £2,000. The figure chosen gives the impression of being arbitrary. Although the FTS correctly recognised that "compensation should not be punitive", (leaving aside for the moment that the legislation does not use the term "compensation"), if one has regard to other decisions of the FTS where payment has been ordered in response to some breach or another of the Code, one sees that typically awards are in the low to mid-hundreds of pounds, not into four figures. That is not to say that the FTS might not determine in a suitable case that an appropriate level of payment could be valued in thousands rather than hundreds of pounds. But before that could be done, one would expect to see a sound evidential base, findings in fact and an attempt to gauge or correlate the proposed award against other awards. Section 20(1)(a) of the Act provides that the FTS may in an appropriate case order such "payment" as it considers "reasonable". So clear reasons must be given for "payment".

**The respondent's case**

67. Last, but certainly not least, is the fall-back contention of the respondent about how and why he was wrongly treated has to some extent been obscured by the erroneous approach taken by the FTS in this case.

68. The respondent contends that even if the NOPLs were properly registered and even if the appellant was entitled to recovery of some or all of the legal costs, the *manner* in which the appellant went about dealing with both of these matters was deficient and amounted to a breach of the Code. He says that so far as the demand for legal costs were concerned, he believed that there was a settlement of that matter in early 2016 and that there was no demand for payment of such costs in 2016, 2017 or early 2018, which reinforced his belief that the matter had been settled. The demand for payment was late and unexpected and unfair. Further, despite his repeated requests for clear accounting of the legal costs, that was slow in coming, was incomplete and unclear and in any event failed to justify the large sum claimed. Furthermore, even if the appellant was entitled to register the NOPLs, the timing of the registration of the NOPLs and manner of doing so, including negotiations on the discharge of the NOPLs was unfair and was a breach of Code. These matters may well require to be freshly determined by the fresh FTS depending on what decisions it makes as regards the other matters.

**Conclusions**

69. I find that the appeal succeeds in that the FTS has erred in law as regards various matters. I have set those out above and need not rehearse them, I trust that my findings and reasons will be sufficient to enable the freshly constituted FTS to reconsider the appeal and come to a fresh determination in due course.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the*

*Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*