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The Element Newhaven Owner's Association as represented by the TENOA Committee

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Dear Sirs

**The Element Newhaven Owners Association  
City Factoring Limited**

**A.      Introduction**

1. We are instructed by the Element Newhaven Owners Association (the "**Association**"), as represented by the TENOA Committee (the "**Committee**") to provide advice on the following matters:
  - 1.1. Whether it is possible to terminate the arrangement that exists between the Association and City Factoring Limited (the "**Factor**") whereby the latter provides factoring services to the Element Development in Newhaven, Edinburgh (the "**Development**").
  - 1.2. If it is possible to terminate the arrangement between the Association and the Factor, how this should be achieved.
2. It is noted that both the Association and TENOA are unincorporated associations. Further, the following advice is based solely on the information provided to MacRoberts LLP by the Association.

**B.      Executive Summary**

3. In summary we are of the view that the arrangement between the Factor and the Association can be terminated. This can be achieved by terminating by virtue of clause 2 of the Level Services Agreement provided with the Factor's tender, which entitles the Association to terminate the arrangement in writing at any point after the first anniversary of the arrangement.
4. Alternatively, the arrangement may be terminated on the basis that the Factor has committed a series of material breaches of contract, entitling the Association to treat it at an end.

### C. Background

#### *The Deed of Conditions*

5. A Deed of Conditions concerning the Development was made by FM WH Limited ("FM") and Forth Property Developments Limited ("**Forth Property**") and Forth Ports Plc ("**Forth Ports**") on 24 November 2004 (the "**Deed**").
6. At the point the Deed was made the heritable and beneficial owners of the Development were FM, Forth Property and Forth Ports. The purpose of the Deed was to set out the real burdens, conditions and others which would apply to the Development following its subdivision in to flatted dwelling houses, commercial premises and parking spaces and sale of the same.
7. Pursuant to Clause 1.23 of the Deed the "Property Manager" is defined as the person firm or company responsible from time to time for the general management and administration of the Development.
8. Under Clause 14.1 of the Deed the Property Manager was initially to be appointed by FM and Forth Property. However, by Clause 14.2 of the Deed, the proprietors of the flats or commercial units of the Development (as defined in the Deed) are entitled to change the Property Manager, determine its remuneration or the terms and conditions of its appointment after two years had elapsed from the sale of the last flat by Forth Property or FM.

#### *The Constitution*

9. Two years after the sale of the last flat, a Constitution was entered into between the proprietors of any flat or dwelling house within the Development (the "**Constitution**").
10. Amongst other things, this document constituted the Association and empowered the Association to elect a committee to manage the administrative and executive affairs of the Association. That committee is currently the TENOA. Committee
11. At Clause 3 of the Constitution the purpose of the Association is stated to be to provide for all matters of common interest within the Development. In particular the Association will be responsible for
  - 11.1. Implementing the Deed so far as it relates to the whole of the Development and to the preservation of the amenity and enjoyment thereof by the proprietors of any dwelling within the Development.
  - 11.2. Ensuring compliance by the proprietors of any dwelling within the Development, of the obligations incumbent upon them in the Deed so far as they relate to the maintenance, repair and renewal of the Amenity Areas and Common Services (as defined in the Deed).
12. The main task of the Committee is to create a healthy and happy living environment for all members of the Association and their tenants while also positively working towards improving the values of all properties forming the Association. The Committee is also responsible to the Association for fulfilling the purposes of the Association as set out in the Constitution (Clause 9 of the Constitution).

#### *The Invitation to Tender for the Provision of Factoring Services*

13. In order to fulfil the purpose of the Association, as set out above, and in particular to satisfy and

fulfil the requirements of the Deed as it relates to the requirements and obligations of the Property Manager, the Committee sought to engage a factor to commence work on 21 August 2014.

14. Accordingly, on or around June 2014, the Committee put out an Invitation to Tender for the provision of factoring services. Pursuant to this invitation to tender, the Association set out a series of matters it expected the successful tenderer to meet. It is not necessary for the purposes of this advice to set these out in full.

#### *The Factor's Tender*

15. On 23 July 2014, the Factor submitted its tender. There are a number of points in the tender that are of note :
16. The tender states that the Factor was registered under property factor registration number PF: 000504. At the date of this advice, the Factor remains registered.
17. The Factor also stated in its tender that it managed three other developments, being Skyline Glasgow, Lancefield Quay and Clarence House the Prism.
18. It is confirmed in the tender that the Factor was willing to enter into a Service Level Agreement ("SLA") and enclosed a "live" example of its SLA from another development (the "Example SLA"). The relevant terms of this SLA are set out below.
19. The Factor did not, as requested in the tender, provide a pro-forma contract for the provision of its services. Instead it stated that *"the contract is based on"* the Example SLA in line with the Deed.
20. It was clear from the tender that the Factor proposed working in partnership with the Committee. Further that the Factor and the Committee would act as a board of directors and the Factor would be the "CEO". The CEO would, pursuant to the tender, make decisions based on the SLA and other decisions would require board approval.
21. The Factor's tender also stated that the Development's account would be a client account with two members of the Committee having *"visual 24/7"* access to the account. It was also proposed that an independent accountant inspect the accounts annually.
22. It was proposed in the tender that there would be on site staff to manage the Development and that there would be two such staff members who would undertake financial and maintenance management respectively.
23. The tender also offered opening up an additional account which required the signature of two Committee members along with the Factor. This account was to cover major events and would allow the Committee the required control.
24. The tender further proposed taking a float from owners who were not willing to pay monthly or refusing to pay additional funds. Moreover the debt handling procedure was stated to be *"Letters. Emails. Telephone calls. Legal"*. It was also stated that:
  - 24.1. All account disputes would be passed to the Committee for its consideration;
  - 24.2. All proprietors of dwellings in the Development were to have the opportunity to inspect the account;
  - 24.3. Monthly accounts would be displayed on the proprietor's web;

- 24.4. Quarterly accounts would be presented and the accounts would be subject to annual independent inspection; and
- 24.5. Monthly invoices would be provided on request showing the breakdown of services provided and their cost.
25. The crucial provisions in the Example SLA are as follows.
- 25.1. The Factor undertook to observe the Property Factors (Scotland) Act 2011 and the Code of Conduct for Property Factors;
- 25.2. The Factor's appointment was to continue until terminated by it or by the owners in terms of the Deed of Conditions.
- 25.3. Either the Factor or the owners could terminate the arrangement by written notice given after its first anniversary.
- 25.4. Any notice of termination given by the Factor or the owners would take effect on a transfer date at which the Factor's appointment would come to an end. The transfer date must be fixed so as to allow an orderly transfer of the appointment of factor to a new factor without causing arrears of service charge or owners' floats to be written off.
- 25.5. Under the Example SLA the Factor was to be responsible for:
- 25.5.1. The maintenance of common areas; taking steps promptly to remedy defects and to prevent future ingress of water; cleaning; decoration; maintenance of the landscaped areas; maintenance of lighting and electrical services; maintenance of the garage doors;
- 25.5.2. Inspection of the roof and gutter cleaning at least twice per year.
- 25.5.3. Maintaining a high standard of security, including door access and door keypads and loudspeaker systems; maintenance of fire safety systems;
- 25.5.4. Collection of service charges from owners and provision to owners of information about how the charge is calculated; taking available action to collect unpaid arrears of service charge from owners;
- 25.5.5. Collection and administration of floats as required by the Deed; and
- 25.5.6. Arrangements of contracts for major items, if necessary with professional survey assistance.
- 25.6. As regards core services the target response time to instruct a contractor for a routine repair was 2 days and an emergency request concerning core services was to be dealt within 24 hours.
- 25.7. The target time for an emergency repair or maintenance was for it to be dealt with in 24 hours and in relation to routine repairs and maintenance a contractor was to be instructed within 48 hours.

### *The Agreement*

26. On or around 21 August 2014 the Factor commenced work at the Development. By a letter

dated 6 September 2014 the Committee wrote to the Factor formalising its engagement and informing it that the tender was accepted.

*The Conduct of the Factor*

27. Since the Factor commenced work in August 2014, the Association has been very concerned with the work of the Factor. In particular, the following matters are considered by the Association to be wholly unsatisfactory and not in line with the tender:
- 27.1. City has failed to secure a significant amount of unpaid factoring fees from proprietors of the dwellings on the Development;
  - 27.2. City has failed to secure a significant amount of unpaid additional maintenance fund payments from proprietors of the dwellings on the Development;
  - 27.3. City has not completed the required work to address the serious issues with the electrics in the past 12 months;
  - 27.4. City has not undertaken any fire risk assessment in the past 12 months as advised by the insurance broker;
  - 27.5. City has allowed a significant debt to Scottish Power and Scottish Gas for electrical supply to accumulate resulting in a threat of disconnection of the supply on several occasions by Scottish Power;
  - 27.6. City ignored a direct instruction from the Committee in March 2015 to make a payment to Scottish Power;
  - 27.7. City has failed to provide the Association or the Committee with full details of creditors and the sums owing to the same;
  - 27.8. City has not produced monthly accounts;
  - 27.9. City refused to allow the Committee to instruct an audit of the owners' account which is held by City;
  - 27.10. City has failed to undertake a critical risk analysis of key areas such as lifts, power supply, maintenance of water pumps, car park extractor fans and dry riser maintenance;
  - 27.11. City has failed to produce quotes, to be seen by the Committee, from contractors for work planned not has the Committee given authorisation for works to be undertaken or for payment of work completed;
  - 27.12. City has failed to address serious health and safety issues including a significant number of emergency lights in the staircases of each block remaining non-operational despite numerous requests for them to be fixed;
  - 27.13. City has failed to advise the Committee that Orona, which was responsible for the maintenance of the lifts, had withdrawn its services on the basis it has not been paid;
  - 27.14. City has failed to advise the Committee that Chubb, which was responsible for the maintenance dry risers etc, had withdrawn its services on the basis it has not been paid;

- 27.15. City has failed to provide updates on the completion of outstanding works covered under the insurance claim;
- 27.16. City has allocated some income received for an outstanding insurance claim to cover factoring costs, resulting in some of the works covered by the insurance claim remaining outstanding;
- 27.17. City has generally failed to respond to many of the numerous emails sent by the Committee requesting updates on various outstanding issues.

**D. Is Termination of the Arrangement with the Factor Possible and if so, how?**

*The Terms of the Agreement*

28. In determining whether the agreement with the Factor can be terminated, it is first necessary to establish the terms on which the Factor was engaged.
29. The Factor's tender was its formal offer to the Association. This is made up of two documents, as set out above, the answers to the questions posed in the invitation to tender and the Example SLA.
30. Following receipt of this tender, the Factor commenced work in August 2014. The Committee wrote to the Factor on 6 September 2014 advising that the Factor's offer (i.e. the tender) was accepted. No other document was subsequently produced by either party setting out the scope of the Factor's services.
31. In the circumstances, it would seem most likely that the terms of the relationship between the Factor and the Association, are to be found in the Factor's tender and the letter from the Committee accepting that offer.
32. It is the case that there are a number of terms in the Example SLA which do not make sense in the context of the provision of factoring services to the Development as that document was provided initially as an example and relates to another development. However, in these circumstances, it would be possible for a Court to imply terms into the contract based on the facts and circumstances of the case and the conduct of the parties. Accordingly, any nonsensical provisions could be overcome by implying terms which give effect to the clear commercial intentions of the parties, which in this case are (put simply) the provision of adequate factoring services to the Development.

*Termination*

33. On the basis that the terms of the agreement for the provision of factoring services are set out in the Factor's tender documentation, then it seems possible to terminate the contact in one of two ways.
34. Clause 2 of the Example SLA provides that the Association may terminate the arrangement by written notice given after its first anniversary. The notice of termination would take effect on a transfer date at which the Factor's appointment would come to an end. The transfer date should be fixed so as to allow the transfer of the appointment of the Factor to a new factor without causing arrears of service or owner's float to be written off.
35. The first anniversary of the Factor's appointment will be in or around 21 August 2015. Accordingly, the Committee could write to the Factor on the basis of the terms of the tender, terminating its

appointment, subject to a "transfer date".

36. Alternatively, the agreement may be terminated under common law on the grounds that the Factor has committed a material breach of contract, entitling the Association to terminate the agreement.
37. A material breach can occur when one party does not perform its obligations which go to the root of the contract. The other party may then choose to either affirm the contract and raise an action for specific implement to remedy the material breach, or elect to rescind the contract, bringing the contractual relationship between the parties to an end. If the contract is rescinded this relieves the party rescinding from its obligation to perform its part of the bargain, but does not absolve the party in breach from obligations already incurred under the contract. Accordingly, it may still be liable for damages for example.
38. In the present case, it seems that there is a strong argument that based on the conduct of the Factor, set out above, the latter has committed a material breach (or indeed breaches) of the terms of the agreement. In particular, a number of service providers have withdrawn their services as they have not been paid. There are serious health and safety issues in the Development as the property has not been maintained adequately. Further, the Factor has failed to successfully collect fees owing by a number of proprietors of the Development. Moreover, there has been little to no transparency concerning the accounts of the Development and it is likely that the value of the dwellings in the Development have depreciated as a consequence of this.
39. Accordingly, the Factor has not performed its main obligations in terms of the contract and has therefore materially breached the contract thus entitling the Association to elect to rescind the contract.
40. It is also of note that the Association in these circumstances may also be able to claim damages from the Factor for its breach of contract. Additionally the Association may be able to withhold payment of monies owing to the Factor on the basis that it considers that it is entitled to such damages. However, it is understood that the Association does not wish to commence Court proceedings against the Factor, but simply to terminate the relationship. Accordingly, this point will not be considered further in this advice. However, should you like further input on this matter, we would be happy to advise.

**E. Way Forward**

41. In the circumstances, we would advise the Association to write to the Factor terminating the agreement on the basis that the Factor has repeatedly committed a material breaches of the contract and the Association is electing to rescind the agreement.
42. This can be done by sending a letter of termination to the Factor setting out the nature of the breaches and terminating the agreement. We can draft that letter and send it on your behalf.

Yours Sincerely



**MacRoberts LLP**