



**Decision of the Homeowner Housing Committee
In an Application under section 17 of the Property Factors (Scotland) Act 2011
by**

**Richard Thomas, 11 Amethyst Court, Chelmscote Road, Solihull, West Midlands
B92 8BY (“the Applicant”)**

**Factor4You, 10 River Court, 5 West Victoria Dock Road, Dundee DD1 3JT (“the
Respondent”)**

Reference No: HOHP/PF/14/0006

**Re: Property at 16 Chandlers Lane, Dundee DD1 3DH.
 (“the Property”)**

Committee Members:

John McHugh (Chairman); Ahsan Khan and Mary Lyden (Housing Members).

DECISION

The Committee has no jurisdiction to deal with the part of the Application relating to the validity of the appointment of the Respondent.

The Committee has jurisdiction to deal with the remaining complaints contained in the Application.

The Respondent has failed to carry out its property factor’s duties.

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

- 1 The Applicant is the owner of 16 Chandlers Lane, Dundee DD1 3DH (hereinafter “the Property”).
- 2 The Property is located within a development known as the Panmure Development (hereinafter “the Development”).
- 3 The Development includes a total of 73 individual residential units.
- 4 The Development includes modern flats and modern houses, as well as flats and townhouses converted from older commercial buildings.
- 5 The Property is a converted townhouse.
- 6 The Development contains common areas of pathways and car parking for the benefit of those living on the Development.
- 7 A Deed of Conditions governs the arrangements for the sharing of costs relating to common property within the Development among the proprietors of the properties within the Development.
- 8 The Respondent is the property factor appointed by the owners of the properties within the Development.
- 9 Lighting of the common areas is provided. It includes bollard lights and lights inside the vennel adjacent to the Property.
- 10 A number of the lights are damaged and/or not in working order.
- 11 The common areas are affected by the presence of weeds.
- 12 The property factor’s duties which apply to the Respondent arise from the Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.
- 13 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor (9 January 2013).
- 14 The Applicant has, by his correspondence, including that of 26 February 2013, 16 July 2013, 1 November 2013 and 3 February 2014 notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its property factor’s duties and its obligations to comply with its duties under section 14 of the 2011 Act.
- 15 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Inspection and Hearing

An inspection of the Development took place on 27 August 2014 and a hearing was held immediately afterwards at West Park, Perth Road, Dundee. Only the Chairman and Mr Khan of the Committee attended the inspection as Mrs Lyden was delayed.

The Applicant was present at the inspection and the hearing. No other witnesses were called by him.

The Respondent was represented at the inspection and the hearing by Mr Robert Adams. No witnesses were led on its behalf.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as “the 2011 Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as “the Code”; and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as “the 2012 Regulations”.

The Respondent became a Registered Property Factor on 9 January 2013 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee issued Directions on 2 May and 4 July 2014 and held a telephone hearing on 4 July 2014 with the parties regarding the procedure to be followed in dealing with the Application.

The Committee had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent including those lodged in response to the Committee’s Directions.

The documents before us included a Deed of Conditions by Lindores Ltd registered 8 August 2007, which we refer to as “the Deed of Conditions” and the Respondent’s Written Statement of Services (undated), entitled “Terms and Conditions for the Provision of a Factoring Service”, which we refer to as “the Statement of Services”.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

Various sections of the Statement of Services and the Deed of Conditions are relied upon in the Application as sources of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant had originally framed his application by reference to large sections of the Code. On discussion at the hearing, the Applicant was able to focus his complaint upon Sections 1, 2.2, 2.5, 3.3, 4.1, 4.4-4.7, 4.9, 5.1, 5.2, 5.8, 6.1 and 7.1 of the Code.

The elements of the Code relied upon in the application provide:

"...SECTION 1: WRITTEN STATEMENT OF SERVICES

You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code.

You must provide the written statement:

- *to any new homeowners within four weeks of agreeing to provide services to them;*
- *to any new homeowner within four weeks of you being made aware of a change of*
- *ownership of a property which you already manage;*
- *to existing homeowners within one year of initial registration as a property factor.*
- *However, you must supply the full written statement before that time if you are*
- *requested to do so by a homeowner (within four weeks of the request) or by the*
- *homeowner housing panel (within the timescale the homeowner housing panel specifies);*

- to any homeowner at the earliest opportunity (not exceeding one year) if there are
- any substantial changes to the terms of the written statement.

1.1a For situations where the land is owned by the group of homeowners

The written statement should set out:

A. Authority to Act

- a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;
- where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

B. Services Provided

- the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service);
- the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a menu of services) and how these fees and charges are calculated and notified;

C. Financial and Charging Arrangements

- the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;
- what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;
- confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);
- any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);
- any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);
- how often you will bill homeowners and by what method they will receive their bills;
- how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements

- l. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your inhouse complaints handling procedure (see Section 7: Complaints resolution);*
- m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;*
- n. your procedures and timescales for response when dealing with telephone enquiries;*

E. Declaration of Interest

- o. a declaration of any financial or other interests (for example, as a homeowner or lettings agent) in the land to be managed or maintained;*

F. How to End the Arrangement

- p. clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination.*

1.1b Alternative standards for situations where the land is owned by a land maintenance company or a party other than the group of homeowners

The written statement should set out:

A. Authority to Act

- a. a statement of the legal basis of the arrangement between you and the homeowner;*
- b. a description of the use and location of the area of land to be maintained, including a map where possible (this information must be kept up-to-date);*

B. Services Provided

- c. The services that you will provide. This will include the minimum service delivery standards that can be expected and the target times for taking action in response to requests for both routine and emergency repairs. Any work or services which are a requirement of the property titles should also be stated;*

C. Financial and Charging Arrangements

- d. how many properties contribute towards maintenance costs for the area of land maintained;*
- e. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);*

f. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);

g. any arrangements for funds for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);

h. any services or works that may incur additional fees and charges, including when or how they may arise (this may take the form of a menu of services) and details of how these fees and charges are calculated and notified;

i. how often you will bill homeowners and by what method they will receive their bills;

j. how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements

k. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied after completing your in-house complaints handling procedure (see Section 7: Complaints resolution);

l. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;

m. your procedures and timescales for response when dealing with telephone enquiries;

E. Declaration of Interest

n. a declaration of any financial or other interests (for example, ownership) in the land to be managed;

F. How to End the Arrangement

o. clear information on how to change or terminate the service arrangement between you and the homeowner, including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination...

Section 2: Communication and Consultation

... 2.2 You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action)...

...2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)...

...Section 3: Financial Obligations

...3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance...

...Section 4: Debt Recovery

... 4.1 You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts...

...4.4 You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.

4.5 You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.

4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).

4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs...

...4.9 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...

...Section 5: Insurance

5.1 You must have, and maintain, adequate professional indemnity insurance, unless you are a social sector property factor who can demonstrate equivalent protections through another route.

If your agreement with homeowners includes arranging any type of insurance, the following standards will apply:

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

...5.8 You must inform homeowners of the frequency with which property revaluations will be undertaken for the purposes of buildings insurance, and adjust this frequency if instructed by the appropriate majority of homeowners in the group...

...Section 6: Carrying out Repairs and Maintenance

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

...Section 7: Complaints Resolution

7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors..."

The Factual Complaints

The factual matters underlying the complaint are:

- 1 The validity of the Respondent's appointment as factor.
- 2 The failure of the Respondent to accept the termination of its appointment as factor.
- 3 Failure of the Respondent to provide a Statement of Services.
- 4 Deficiencies in the content of the Statement of Services.
- 5 Failure of the Respondent to apportion costs in accordance with the Deed of Conditions.
- 6 Failure of the Respondent to provide information requested.
- 7 Failure regarding the provision of certain specific services.
- 8 Failure of the Respondent to pay third party costs.
- 9 The adequacy of the Respondent's response to the Applicant's communications.

We deal with these issues below.

1 The validity of the Respondent's appointment as factor.

The Applicant advised that the Development had been built by Lindores Ltd. The factor appointed by Lindores was Ross & Liddell. On or around June 2011, the Applicant discovered that the Respondent had apparently been appointed as the factor of the Development in the place of Ross & Liddell. He had received a letter of resignation from Ross & Liddell. He had not been consulted on the change in factor. He had not been given the opportunity to vote on the issue.

Mr Adams of the Respondent advised that the Respondent had held a vote of proprietors. He advised that 66 votes (out of a total of 73) had been cast in favour of the Respondent. Seven of the properties remained with Lindores and their votes were included among the 66.

Mr Adams was unable to produce the 66 voting papers which he advised he held in his office. Despite being required to produce these by the Committee's Directions of 2 May and 4 July 2014, he had decided not to do so as he regarded copying 66 sheets of papers as "onerous" and "impractical". Mr Adams was also asked by the Committee if he could provide minutes of the meeting with owners where this change of factor had been agreed, but he said he was unable to do so.

Mr Adams considered that all that was required to achieve the change in factors was a simple majority of owners. He said he was "not entirely" familiar with the terms of the Deed of Conditions.

These events took place before the coming into force of the 2011 Act. The Applicant sought to rely upon the provisions of Regulation 28(2) of the Regulations. Regulation 28(2) allows the Committee to take into account circumstances

occurring before 1 October 2012 in determining whether there may have been a continuing failure to carry out the property factor's duties after that date.

We do not consider that there has been "a continuing failure to act" as required by Regulation 28(2). The act complained of appears to have been a discrete event consisting of the Respondent being appointed as factor at a particular date pre-dating the coming into force of the 2011 Act. Although the factor has continued to perform factoring services since that appointment, that does not in our view constitute a continuing failure as envisaged by Regulation 28(2). Accordingly, we consider that we do not have jurisdiction to entertain this head of complaint.

2 The failure of the Respondent to accept the termination of its appointment as factor.

The Applicant had familiarised himself with the provisions of the Deed of Conditions (paragraph 4.1.11.3) which relate to the termination of the appointment of the factor.

He advised that he had followed those provisions by (together with 12 other proprietors) issuing, on 5 August 2013, a notice of intention to call a meeting to all proprietors within the Development. A copy of the notice was also sent to the Respondent who was invited to attend the meeting. The meeting took place on 18 September. A vote was held and the 23 proprietors present or represented unanimously voted to remove and replace the Respondent as factor. The Respondent was not represented at the meeting.

On 20 September 2013, the Applicant wrote to the Respondent intimating the decision taken at the meeting and providing six months' notice of termination of the Respondent's appointment as factor.

The Applicant had lodged documentary evidence of the above process having been followed. It appears to us that the Applicant and his co-proprietors have followed the process set down in the Deed of Conditions and that their actions are sufficient to constitute a valid termination of the Respondent's appointment as factor. The Statement of Services, as well as referring to the Deed of Conditions, asks for only three months notice of termination and six had been provided in this case.

Mr Adams seemed to accept that the process outlined by the Applicant had been followed. His position is that the Respondent did not accept the termination as being valid because his understanding was that the proprietors required to obtain a majority of the votes of the 73 proprietors, which they had not done. Mr Adams confirmed that he was unfamiliar with the Deed of Conditions generally and with its provisions regarding termination of the factor's appointment. He had based his understanding that a majority of 73 votes were required, he said, on the fact that he had been told this at the time when the Respondent had taken over the role of factor from Ross & Liddell. Mr Adams seemed unconcerned about his lack of knowledge of the terms of the Deed of Conditions.

The Committee observed that different provisions of the Deed of Conditions applied when the developers remained in possession of unsold units within the Development from those which applied in 2013, by which time the Developer had sold all of the properties.

Mr Adams had been unaware of the distinction and advised that his understanding remained that a vote of the majority of the 73 proprietors was required. He seemed unwilling to consider any other possibility or to familiarise himself with the Deed of Conditions. His view is that what has been provided does not constitute a majority of the 73 proprietors and until such time as he has received that, the Respondent has no intention of accepting the termination of its appointment as factor. At the hearing, Mr Adams could refer to no document supporting his position on this matter and would not address the fact that his view was directly contrary to the terms of the Deed of Conditions.

Clause 7 of the Statement of Services provides that the factoring arrangement with the Respondent may be ended in accordance with the requirements of the title deeds. The Respondent's failure to observe this constitutes a breach of its property factor's duties.

3 Failure of the Respondent to provide a Statement of Services

The Applicant alleges that he has never been provided with a written Statement of Services as required by Section 1 of the Code. He had obtained a copy from a neighbouring proprietor (which he had lodged with the HOHP) and identified two other neighbours who had received a copy. The Respondent had lodged with the HOHP a copy of the Statement of Services identical to that lodged by the Applicant.

Mr Adams maintains that he hand delivered this document to all of the properties on the Development (including the Applicant's) by placing it in letterboxes. He had not kept a record of the date of delivery. There had been no covering letter.

The Applicant had doubts that the letterboxes were large enough to have received these and believed that delivery had not taken place since he and, it seemed, at least some other proprietors, had not received a copy.

Having regard to Mr Adams' evidence that he had delivered the Statement of Services as against that of the Applicant which was only to the effect that he had not received a copy, and, having regard to the fact that at least some proprietors were known to have received their copies, we accept Mr Adams' evidence and find that the Respondent did supply a Statement of Services and accordingly no breach of the Code or of property factor's duties arises.

4 Deficiencies in the content of the Statement of Services

The Applicant complains that the Respondent's Statement of Services is deficient in that it appears to be a standard form document which the Respondent ought to

have altered to suit the circumstances applying to this Development. In particular, the Applicant observes that Schedule Part 1, which contains tick boxes intended to be completed by the Respondent to indicate which services are being provided, contains no ticks in the version which he has obtained. The version of the document lodged by the Respondent similarly contains no ticks.

When asked about this at the hearing, Mr Adams advised that he could not say whether any boxes had been ticked on any of the copies which he had delivered to proprietors.

Schedule Part 1 is intended to set out which services the Respondent will provide to proprietors and which it will not. On a plain reading of the document, the effect of leaving a box unticked is that the service referred to is not to be provided. However, there is no dispute that the Respondent in fact carried out services such as providing insurance and maintenance to common parts, which services are unticked in the Schedule.

The Statement of Services is therefore inaccurate in that it fails to provide a recipient of the document with an accurate description of which services are to be provided.

We find that the versions delivered to proprietors of the Development were, like those lodged with us by the Applicant and the Respondent, unticked. We find that the Respondent has therefore breached Section 1.1a B of the Code.

5 Failure of the Respondent to apportion costs in accordance with the Deed of Conditions

The Applicant correctly observes that the Deed of Conditions sets out the factoring arrangements which are to apply within the Development. These arrangements have regard to the location and type of property concerned. The Applicant had prepared summary documents for townhouses, “heritage” flats, and flats with lifts being the three kinds of property identified in the Deed of Conditions.

Mr Adams accepted that the Respondent did not apportion charges in accordance with the Deed of Conditions. He was not familiar with its terms. Instead Mr Adams advises that he works out what he considers to be a fair share of factoring costs and applies that across the property types as he considers appropriate. He applies what he considers to be fair. His system is not derived from the Deed of Conditions or any other document but only from his own system which has not been specifically communicated to proprietors, nor approved by them.

The Applicant observed that (from the Respondent’s document entitled “Panmure Town Houses Income & Costs Year to June 2013) the Respondent appeared to roll together costs relating to nine “heritage” flats, being the flats in the Heritage North Block, Chandlers Lane North Block and the Heritage South Block with those

relating to the 27 townhouses, which the Respondent accepted he did because he did not recognise the heritage flats as separate entities.

Although the Committee pointed out to Mr Adams that proprietors purchasing properties in the Development were entitled to expect common charges to be apportioned in accordance with their titles including the Deed of Conditions, Mr Adams appeared unwilling to accept that and was unable to accept that his system was inappropriate because he regarded it as fair.

We accept that the Deed of Conditions provides the Respondent, as property manager, with a high degree of discretion as to the allocation of management costs among those which relate to the whole Development and those which relate to only parts of it. We also have not identified specific instances where the Respondent has allocated costs in a way inconsistent with the Deed where loss has arisen to a particular proprietor. Nonetheless, the Respondent has failed to apply the terms of the Deed of Conditions.

We find that the Respondent has breached its property factor's duties arising under paragraph 4 of the Statement of Services which indicates that costs will be allocated "in accordance with your title deeds" and with Schedule 2 to the Statement of Services which details those shares.

6 Failure of the Respondent to provide information requested

The Applicant complained that the Respondent had failed to provide a range of documents requested and had then refused to allow him access to documents within the Respondent's offices.

The Respondent's position (accepted by the Applicant) was that certain information had been supplied by Mr Adams hand delivering a bundle of documents to the Property on 23 July 2013.

The Applicant wished to go further and to examine source documents relating to certain costs and matters. The Respondent thought it inappropriate to allow the Applicant access to such documentation, particularly where some of it might relate to other properties within the Development and have as its subject matters which were not of concern to the Applicant. The Respondent also was not prepared to unravel source documents relating to this Development from those relating to other developments factored by it. The Respondent thought that it had provided all that it reasonably could.

It was not apparent to the Committee that there were specific documents identified by the Applicant which the Respondent was under a specific duty to produce and which it had failed to do so. The Committee find that there is no breach of property factor's duties or of the Code in this respect.

The Committee however considers the position to be different in relation to insurance documents. The Applicant had asked (including by his letter of 17 June

2013) the Respondent to provide him with a copy of the insurance documents relating to the development. He was concerned, because of other shortcomings which he believed he had identified, that the Respondent may not have obtained, and paid the premiums for, appropriate insurance cover.

In this regard, the Applicant sought to rely upon Section 5.2 of the Code. As we discussed with the parties at the hearing, Section 5.2 allows the Respondent to produce only a summary of cover, as it had done in this case. Section 5.2 does however also oblige a property factor to produce "full details" relating to insurance when asked. We consider that phrase to include an obligation to produce a copy of all policy documents and the certificate of insurance if asked for. These documents have not been provided by the Respondent despite the request of the Applicant. Accordingly, we consider there to have been a breach of Section 5.2 of the Code.

7 Failures regarding the provision of specific services

(i) Failure to maintain the common areas of the Development to an adequate standard

Regardless of the deficiencies in the Statement of Services, there is no dispute that the Respondent is responsible for maintaining the common areas of the Development including the lighting and clearing of weeds and moss. The Applicant complained that weeding and moss clearing of common areas was not carried out. Many lights covering common areas were broken and were not repaired. The Applicant advised that some had been broken for over a year and others for many months.

We observed the broken bollard lights which Mr Adams accepted had been unattended to for a considerable time. He advised that there were problems obtaining replacements which had caused delay and that two lights were being replaced the same day as the hearing. Mr Adams seemed to have no record of which lights had been broken and when, nor any system to deal with light replacement/repairs as part of an ongoing programme of planned maintenance. He could not offer evidence that contradicted the Applicant's evidence as to lighting bollards having been rendered inoperable and not attended to for many months.

Mr Adams advised that weeding and ground maintenance was carried out regularly and satisfactorily. Spraying of weed killer had taken place regularly and the weeds which we had observed had only recently emerged.

We accept Mr Adams' evidence in relation to the weeding and moss clearance although there was a need for action on both matters, it could not be established that maintenance had not been carried out in accordance with the Statement of Services.

As regards lighting repairs, the Statement of Services at Schedule Part 3 provides for these to be completed to an indicative timescale of ten days. The Respondent appears to have had no regard to that timescale, not to have come anywhere near complying with it and not to have had any communication with proprietors regarding the apparent longer term difficulties with finding replacement lights. We therefore find that there has been a breach of the property factor's duties. Further, the same facts constitute a breach of Section 6.1 of the Code which obliges the Respondent to keep homeowners informed of the progress of repairs.

(ii) Failure to hold meetings

Paragraph 8 of the Statement of Services states that the Respondent will arrange and attend an annual meeting of owners. The parties were in agreement that that had not happened. We do not consider that this specific complaint formed part of the matters notified in advance to the Respondent as required by section 17(3) of the 2011 Act and accordingly we cannot make a finding that a breach has occurred.

(iii) Provision of a concierge service

The Applicant complains that the Respondent has appointed a concierge at the Development, which appointment the Applicant did not approve. He considers that the Respondent was not entitled to do this. The Applicant considers that the proprietors of the townhouses are unlikely to benefit from a concierge in the way which the proprietors of the flats might. The Applicant complained of this to the Respondent by letter of 17 June 2013 but received no explanation.

At the hearing, the description of the employee given by Mr Adams was of someone performing duties such as litter picking on the Development and it did not seem that the individual employed performed the role of concierge in the way in which the term might often be understood i.e. operating as a receptionist/assistance point for a block (or blocks) of flats. The Deed of Conditions (Clause 4.10.1) allows the Respondent the discretion to employ labour in the performance of its duties. We consider that there is no evidence that the person described as a concierge was employed to do anything other than to allow the Respondent to carry out the duties of property management which had been delegated to it. Accordingly, we consider there to have been no breach in this regard.

(iv) Failure to pursue debt

The Applicant complains that the Respondent has failed to pursue arrears owed by residents in the Development and that he has failed to sue those who are in debt.

Mr Adams confirmed that he has taken one proprietor to court and a settlement was reached which including him reducing his own monthly fee to that proprietor. He had sought to use persuasion on others. He regarded it as controversial for a factor to sue a proprietor as that would effectively be the factor suing his own employer. He had delayed debt recovery recently as he wanted this complaint to the HOHP to be completed first.

Schedule Part 5 of the Statement of Services sets out a clear process to be followed in relation to debt recovery. From Mr Adams' evidence, it was clear that that policy was not followed. Section 4.1 of the Code requires debt recovery procedures to be consistently applied. This has not happened and we therefore consider there to have been a breach of both property factor's duties and of the Code.

8 Failure of the Respondent to pay third party costs

The Applicant was concerned that the Respondent may have failed to pay the Dock Wall Fee payable to Forth Ports, despite the Respondent having demanded and collected this fee from proprietors of properties in the Development. The Applicant had been dissatisfied with the information provided to him by the Respondent in this regard and had therefore himself telephoned Forth Ports. They had indicated that they would not discuss the detail with him as their relationship was with the Respondent, but the person to whom the Applicant had spoken had been persuaded to provide some information including that the 2012 fee was underpaid by £200 and that the 2013 and 2014 fees were unpaid.

The evidence of Mr Adams was that the Dock Wall Fees for the years 2011 to 2013 had been paid in full. He advised that £5-6,000 of the 2014 amount had been paid so far as he was paying by instalments. He had no specific agreement with Forth Ports to pay by instalments but they seemed to have no problem with that. Mr Adams believes that the arrears which Forth Ports may have referred to were historic arrears which were incurred prior to the appointment of his firm in July 2011. He was not responsible for any such fees.

In the absence of any substantial evidence to the contrary, we accept Mr Adams' evidence that he has been paying the Dock Wall Fees in an appropriate manner. We find no breach of the Code or of property factor's duties.

9 The adequacy of the Respondent's response to the Applicant's communications

(i) Correspondence

The Applicant complains of the Respondent's lack of response to his correspondence and that on those occasions when there have been responses, they have been delayed and inadequate.

Although there is evidence of the Respondent having supplied some responses and information to the Applicant, we observe that the Respondent eventually refused to engage with the Applicant. Mr Adams himself accepted at the hearing that this was the case. He took the view that the Respondent had answered all of the Applicant's queries that it was obliged to, that the Applicant was being unreasonable and that the Respondent would no longer respond to him. An example of this can be seen in the Respondent's email of 5 February 2014 in which

Mr Adams responds to the Applicant's concerns by stating "Please stop sending me more correspondence."

The Respondent is in breach of its obligations under Section 2.5 of the Code to respond promptly to homeowner's correspondence.

(ii) Complaints

The Applicant further complains that the Respondent has failed to follow its own complaints procedure under the Statement of Services. He complains by reference to the property factor's duties arising under Paragraph 9 of (and Schedule Part 4 to) the Statement of Services and Code Section 7.1.

Mr Adams insisted that he was aware of, and applied, the terms of the complaints procedure contained in the Statement of Services. This contains a two stage internal process with relevant timescales. There is no evidence in any of the correspondence produced (including that produced by the Respondent) that the Respondent ever referred to, or sought to apply, its complaints procedure in any of its dealings with the Applicant. Mr Adams at the hearing offered no example of the Procedure having been employed but relied on a bare assertion that it had been. We could not accept this.

Also, part of the Respondent's complaints procedure did not provide any information about how the homeowner may apply to the HOHP in the event that the in-house procedure was exhausted without resolving the complaint. It referred complainers to the Royal Institution of Chartered Surveyors instead.

We consider the failure to follow its complaints procedure to be a breach of Code Section 7.1 which requires factors both to have a procedure and to follow it.

Observations

The Committee had issued a Direction to the parties on 2 May 2014 requiring certain information to be produced. The Respondent failed to respond. A procedural hearing was held by conference call with the parties on 4 July 2014. Mr Adams claimed during that hearing that he had posted a full response to the Direction and could not explain how it had not reached the office of the HOHP. He undertook to send a replacement copy promptly after the hearing. He was reminded at the hearing of the importance of ensuring that the documents reached the HOHP office this time and that he should make contact with the office after sending to ensure their safe receipt.

On 4 July 2014, the Committee issued a further Direction requiring the Respondent to provide an immediate response to the Direction of 2 May 2014.

No documents were received and the Respondent did not contact the office of the HOHP.

On 5 August 2014, the Committee wrote to the Respondent in the following terms:

“The Committee has noted your failure to respond to its Notice of Direction dated 4 July 2014. Please respond immediately. If no acceptable response is received by return, it is likely that the Committee will bring your failure to comply to the attention of the Property Factors Registration Team of the Scottish Government who may have regard to this in considering your continued status as a registered property factor.”

A response was eventually received by the office of the HOHP on 21 August 2014, being the Respondent’s letter dated 15 August 2014. That letter contained no explanation for, or recognition of, its extreme lateness.

At the hearing we asked Mr Adams for his explanation regarding this matter which he said was that he had been busy with other matters. As noted above, he confirmed that he had deliberately chosen not to comply with the Committee’s Direction in that he had retained and not provided to the Committee copies of voting records which he said were in his possession simply because he thought making photocopies of 66 sheets “onerous” and “impractical”.

The Committee found the Respondent’s conduct in this respect to be unacceptable and far beneath the standard to be expected of a professional property factor. The Committee has serious concerns about the fitness of the Respondent to operate as a property factor and considers that the content of this decision should be carefully considered by those responsible for assessing the Respondent’s fitness for registration as a property factor.

We found the Applicant to have presented his case in a careful and detailed manner. We found him to be a credible and reliable witness.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order (“PFEO”). The terms of the proposed PFEO are set out in the attached document.

APPEALS

The parties’ attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides:

“(1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or a homeowner housing committee.

(2) An appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made...”

JOHN M MCHUGH

CHAIRMAN

DATE: 10 September 2014