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

Decision on homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/17/0407

10/2 WESTERN HARBOUR MIDWAY, EDINBURGH EH6 6PT ("the Property")

The Parties:-

Ms Ann Marie Macaskill, residing at 10/2 Western Harbour Midway, Edinburgh EH6 6PT ("the Homeowner")

The Element Factors Ltd, Western Harbour, Edinburgh EH6 6PN ("the Respondent")

Tribunal Members:
Richard Mill (Legal Member)
David Godfrey (Ordinary Member)

In this Decision the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 are referred to as "the Regulations"

Decision

The Tribunal unanimously determines that the Respondent has complied with all of their duties in terms of the Code and that they have complied with all of their property factor duties.

Procedural Background

The Homeowner's application to the Tribunal is dated 1 November 2017. Following further information being received from the Homeowner, the application was referred to the Tribunal under Section 18(1) of the Act on 7 December 2017.

Following receipt of the application and supporting documents, the Tribunal issued a Direction on 22 December 2017. This set out for clarity, that the Tribunal could not, as the Homeowner sought, establish breaches under the Human Rights Act 1998, the Regulation of Investigatory Powers (Scotland) Act 2000 and the Data Protection Act 1998. The Homeowner was required to produce at that time a copy of the relevant Deed of Conditions. The Tribunal also asked for additional clarification from the Respondent information in relation to their use of CCTV being the issue which the Homeowner was complaining about.

The Tribunal subsequently received the Deed of Conditions from the Homeowner. The Respondent indicated an inability to comply with the existing timescale to produce their written representations. They produced further information in respect of the use of CCTV within the Development which incorporated significant information from The Element Newhaven Owners' Association (TENOA).

By way of correspondence dated 17 January 2018, the Respondent produced a large volume of indexed productions. Their formal written representations were included as part of this bundle.

At the same time that the Respondent's large inventory of productions was received, the Homeowner lodged substantial further paperwork in support of her case.

The Tribunal having regard to the need to case manage the proceedings effectively, and to ensure that the overriding objectives to deal with the proceedings in a manner which is proportionate determined that there was little prospect of the Hearing then fixed to take place on 2 February 2018 being conducted in a manner which was likely to be focused and that there were issues regarding fair notice of the parties respective positions being intimated to one another and, indeed, to the Tribunal. There was a regrettable delay in the Homeowner receiving the Respondent's written representations and large Inventory of Productions which would have caused difficulty for her being fully prepared for the hearing on 2 February 2018.

A further Direction (2) was therefore issued on 19 January 2018 converting the Hearing assigned to take place on 2 February 2018 to a Procedural Case Management Hearing.

At the Case Management Hearing, with the assistance of both parties, the Tribunal was able to establish the main background facts in order to set the context within which the Homeowner's complaints arise.

A further Direction (3) was issued after the Case Management Hearing confirming the further procedure to be adopted which was set out at the hearing. A written witness statement from an acquaintance of the Homeowner named Judy Law was thereafter lodged. The Respondent indicated that the terms of her evidence were not in dispute and accordingly there was no requirement for her to attend the final hearing.

The Hearing

The Homeowner appeared personally and gave evidence and made submissions in support of her application. She was also accompanied by her father, Donald Macaskill who acted as her supporter. The Respondent was represented by Marc Myburgh (Operations Director) and Simone Myburgh (Director) who in response, gave evidence and made submissions in response.

Findings in Fact

1. The Homeowner is the heritable proprietor of 10/2 Western Harbour Midway, Edinburgh EH6 6PT ("the Property"). The Property is one of a number of apartments forming the Elements Development in the north of the city of Edinburgh ("the Development").

2. The Development is a modern housing complex. It is located on the banks of the Firth of Forth and is one of Scotland's largest residential developments. There are a total of 276 residential units and 2 commercial units spread over 11 buildings, built around a large communal courtyard. There is basement car parking within the Development and all buildings benefit from elevator access.

3. A Deed of Conditions ("the Deed of Conditions") registered on 25 November 2004 by FM WH Limited, Forth Property Developments Limited and Forth Ports PLC sets out the arrangements for, amongst other items, maintenance, repair and renewal of the common parts of the Development, including provision for a property manager or property factor.

4. In accordance with the Deed of Conditions each proprietor (ie all 278 within the Development) are equally responsible for the maintenance, repair and renewal of the common parts.

5. The Element Newhaven Owners' Association (TENOA) is the association of owners of properties in the Development. The current active membership is in excess of 200.

6. The Property Manager/Property Factor for the Development is not responsible for the actions of TENOA nor any of their office bearers.

7. The Development was built over the period 2004-2010. This was a troubled project throughout and included the period of global commercial downturn which involved numerous liquidations of those involved in the building of the Development. The first appointed property factor, Ross & Liddell, terminated their contract in a dispute with the developer who had taken over from the previous company that had gone into liquidation before the building was complete. The second factor, A & K Ltd, went into liquidation in 2014 and was taken over by City Factoring Ltd.

8. The Respondents are the third appointed property factor and were formally appointed by TENOA at the AGM on 15 July 2015 in accordance with the Deed of Conditions.

9. The Respondent is a registered property factor, registration number PF000590. The Respondent only manages the one Development which the Homeowner resides within. No other sites are managed. There is a site office on the Development and there is easy access to the Respondent's personnel at all times.

10. The Respondent's issued a written statement of services to all homeowners in the Development in July 2015 following their appointment.

11. TENOA has a written Service Level Agreement with the Respondent which was executed by both parties on 29 November 2017. The terms of this Service Level Agreement is attached to the updated version of the Respondent's written statement of services which was issued to all homeowners.

12. The initial Written Statement of Services issued by the Respondent in July 2015 and the updated version of the Written Statement of Services issued in November 2017 contain the following provision:- The services provided include "... Security systems such as entry phones and videos, electric garage doors, entry barriers, bollards, fire alarms, firefighting equipment, smoke detectors, stairwell vents and emergency lighting". (Section 3 of the 2015 Written Statement of Services and Section 5.2 of the 2017 Written Statement of Services).

13. The Written Statement of Services issued in November 2017 are clear that for non-emergency repairs, the ultimate decision to authorise any work up to the value of £5,000 (excluding VAT) per property will be made by the Respondent. Any works that are likely to exceed this cost will require the approval of the TENOA (Clause 4.2).

14. There have been CCTV cameras at the entrances to each block of residential flats. There are two entrances to each block, one at ground level and one at basement level. Until mid-2017 the Respondent had no control or access to the monitoring system. Earlier attempts to obtain relevant information for this purpose from former factors had been unhelpful and unsuccessful.

15. The Written Statement of Services issued in November 2017 is clear in respect of non-emergency repairs.

16. The Respondent's operate a green fund and a red fund to which all proprietors contribute. Each proprietor contributes £150 per calendar month towards the funds. The green fund covers standard anticipated planned costs

and the red fund is for unplanned additional work. When the Respondent took over as the relevant property factor for the Development, the Development was in significant debt, extending to some £70,000 in total.

17. Both the 2015 and 2017 Written Statement of Services contain a clear written complaints policy.

18. Quarterly invoices are issued to all homeowners in the months of March, June, September and December each year. These highlight the expenses incurred to both the green fund and red fund. The specifics of the costs incurred are provided and are clear.

19. In mid-2017 additional CCTV cameras were installed in the car park areas. The firm used for installation and repair is Nanogate.

20. Each block of flats has its own fire panel situated at ground level near the front entrance door. Historically the fire panels have been linked to one another, meaning that if the fire alarm is sounded in one block all blocks are affected. The fire panels have been de-linked since 29 November 2017.

21. The system which has been maintained by Chubb since prior to 2015 is designed to summon the direct assistance of the Fire Brigade when a fire detector is triggered. This has not always happened.

22. The Development has had historical problems with false fire alarms sounding. Block 8 within the Development has been particularly adversely affected. An analysis of the statistics show that Block 8 accounts for approximately 60% of the false and unnecessary fire alarms. The most likely cause of this is due to smoking within the common areas of the blocks of flats. There have been other difficulties within Block 8 including damage to lifts and damage to the front doors of individual flats. Many of the residential units are non-owner occupied and are being let frequently as short-term holiday lets. The occupants accordingly have little or no vested interest in the community of the Development nor do they have regard for occupiers of the Development who reside there full-time.

23. Chubb routinely inspect and maintain the fire alarm system every 2 months. They are additionally called out in respect of specific difficulties arising. Additional difficulties have included the physical removal of the individual sensors/alarms and the fire panel being accessed and overridden manually to stop the alarm sounding.

24. On some occasions when the fire brigade have attended they have been unable to quickly and safely identify the source of the trigger alarm and the source of any potential fire due to manual overriding having taken place on the relevant fire switchboard. Historically there has been direct access to the fire panels with the closet doors not being locked. This has been the historical

default position. The Respondent has received conflicting advice about the fire panels being unlocked or locked.

25. The Homeowner resides in the ground floor of her block (Block 10). The fire panel is close to her front entrance door. The panel uses DualCom which uses both the phone network and GPRS for secure alarm reporting. If one network fails, a signal is sounded from the fire panel. This can happen occasionally. When this happens, the sound from the fire panel causes a nuisance to the Homeowner and other owners on the ground floor of the block.

26. At the TENOA Annual General Meeting (AGM) on 1 November 2017, the fire brigade was represented by Watch Manager, Steven McCurry, and Crew Manager, Scott from McDonald Road Fire Station. The problems with the fire panels being tampered with hampering the Fire Services ability to know where the fire had started was discussed. Advice was tendered that the unauthorised tampering with fire panels was highly dangerous and illegal. One solution suggested was the introduction of CCTV.

27. Following the TENOA AGM on 1 November 2017, the Respondent sought instructions from TENOA regarding the provision of CCTV specifically within Block 8 within the Development. TENOA subsequently provided their authorisation of the installation. The total cost of the installation was priced at less than £5,000 being the ceiling of the Respondent's delegated authority.

28. CCTV cameras have been installed within Block 8 of the Development only. There were former plans to install CCTV in all blocks. There are no current plans to install further CCTV within any other blocks, including the Homeowner's block which is Block 10.

29. Within Block 8 sixteen CCTV cameras have been installed. There is one within the basement level at the site of the lift, three on the ground level directed at the fire panel, front entrance door and lift and thereafter two on each stairwell/floor (of which there are six) totalling sixteen CCTV cameras.

30. The system operating the sixteen new CCTV cameras installed within Block 8 within the Development was installed in January 2018. The system is entirely separate from the other CCTV equipment used throughout the Development, including the car park areas. The footage is recorded and stored securely with limited access. The Police can request access if desired.

31. The Respondent is registered with the Information Commissioner's Office under registration reference ZA230051. The annual registration is between 27 January in year 1 and 26 January 2019 in year 2. The current expiry date is 26 January 2019.

32. The Homeowner complained to the Respondent's about paintwork carried out within her block. She first raised her complaint on 3 October 2017. Over the following month numerous exchanges of correspondence by email took place between the Homeowner and Respondent. None of the Respondent's replies were tardy. The Homeowner refused to meet with the Respondent to discuss this issue. Within one month, the defects with the paintwork carried out had been rectified. The Homeowner has refused to meet the Respondent face to face about any of her concerns or complaints. She has chosen not to attend AGM's of the resident's association as she sees them as a waste of her time.

Reasons for Decision

The Tribunal had regard to all of the documentary and oral evidence placed before it. The Tribunal was satisfied that it had sufficient evidence upon which to reach a fair determination of the reference.

The Tribunal had regard to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016. The Tribunal had regard to the overriding objective to deal with the proceedings in the manner which is appropriate to the complexity of the issues and the resources of the parties.

The Homeowner complained that the Respondent had breached the following components of the Code of Conduct:-

i. 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).

a. The Appellant complained that signage placed in hallways on or around 26 October 2017 had been intimidating. This was a sign stating that CCTV cameras were being installed. The Respondent advised that they had not put the signs up. The signs had been put up by the chairman of TENOA. The Respondent accepts that there had been a joint decision reached in the background between their organisation and TENOA regarding the instalment of CCTV. There was no suggestion that the language used was unprofessional. The Tribunal concluded that the signage, which the Respondent did not have full responsibility for was not intimidating.

b. The Homeowner complained about the terms of an email she received on 19 September 2017. This has been conveyed to all homeowners, including herself, and indicated that in future when smoke alarms were triggered by smoking that the individual blocks themselves would attract additional expense. It was not suggested by the Homeowner that any of the language used was unprofessional. Some of the wording used was underlined

and there were some statements which were followed by exclamation marks. Again the Tribunal concluded that the terms of this communication were not in any way threatening or intimidating.

c. The Appellant states that she was intimidated by being persistently requested to meet with the Property Factor to resolve the issues of dispute between them. This was set against the background where she had made it clear that she only wished to communicate by email. She advised that she feels her views had not been respected. The Tribunal were satisfied that the Respondent had not made any demands to meet and the suggestion to meet face-to-face occurred by way of offer and invitation. Whilst it is recognised that the Homeowner may have subjectively felt uncomfortable, the Tribunal is satisfied that such invitations to meet were objectively reasonable and due to a genuine desire to resolve the issues.

ii. 2.4 - You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).

a. The Homeowner complained about the decision to install CCTV cameras. She stipulated that this had been undertaken without consent or consultation. The Tribunal was satisfied that there had been no relevant breach. Firstly, there had been relevant consultation with TENOA. Approval had been given to proceed. In any event, the total costs were below the delegated authority of £5,000 and specific instructions would not therefore be required. The Homeowner also complained that the provision of such equipment would not be part of the core services. The Tribunal disagrees. The Written Statement of Services in 2015 and updated in 2017 both contain reference to "videos" and the provision of CCTV is in keeping with this description. Whilst there is no specific reference to CCTV within the Written Statement of Services, there had been pre-existing CCTV equipment in the blocks which would tend to suggest in favour on the interpretation which includes CCTV.

b. The Homeowner disputed that the Fire Brigade had provided advice to explore the use of CCTV. She was not present at the Annual General Meeting when representatives of the Fire

Brigade attended and could not give the best evidence about this. Both representatives of the Respondent were present and gave clear unequivocal evidence that such statements were made by representatives of the Fire Brigade. The Tribunal notes that reference to the Fire Brigade raising this issue is clearly contained within the TENOA Minutes of the Meeting. The Homeowner's claim that such discussions had not emanated from the Fire Brigade are based upon the fact that in one of the written submissions made by the Respondent such reference was not contained. The omission regarding this within one item of the Respondent's submissions does not negate the fact it exists within other documents and ultimately the Tribunal is satisfied beyond any doubt that such advice was tendered.

iii. 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 time should be confirmed in the written statement.

The Homeowner's assertion that this section had been breached relate solely to a complaint first raised by her on 13 October 2017. She conceded that within the required timescale (7 days) she had received an initial response on 19 October 2017. This contained reference at that time to enquiries being undertaken and the relevant contractor (Chubb) making their own investigations. The Homeowner then made a further formal second complaint which was on 26 October 2017. This was not replied to within the required 7 days. The Respondent provided detailed and credible evidence which was not the subject of challenge that the Homeowner had subsequently instructed her MSP to communicate with the Respondent in relation to the same issues. The Respondent had accordingly communicated and provided further information to that source believing that they were acting as the Homeowner's agent. When it had become apparent that the Homeowner wished a direct response this was issued on 16 November 2017. It perhaps would have been good practice for the response sent to the Homeowner's MSP to have been copied into her directly. The Tribunal is satisfied that there was no malice on the part of the Respondent to fail to communicate with the Homeowner and that attempts were made to communicate effectively within a reasonable timescale.

iv. 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.

The Homeowner complained about the lack of transparency and the lack of production of original invoicing in connection with issues billed for. She made specific reference about a request made by her on 19 September 2017 in relation to clarification over additional callout charges which had been billed for. She stated that this had not been complied with. Upon further enquiry it was identified that the Homeowner's request was fully complied with on 18 October 2017. She accepted this. This was following her formal complaint being raised. Full invoices from Chubb and Orona (the lift company) were provided to the Homeowner. Whilst the information was provided following a delay of some 4 weeks and in the context of a formal complaint being made, it has to be seen in the context of the broader picture whereby clear detailed quarterly billing is being issued. There are no specific timescales expected in terms of the Code for the production of such material and the timescales in this instance appears reasonable.

v. 6.3 - On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.

a. In the Homeowner's original application the complaint in respect of this related to painting work undertaken by in-house staff of the Respondent. The Respondent engaged in-house staff to keep costs down. The Homeowner otherwise complained about the quality of the work which was undertaken which is probably irrelevant for the purposes of this Section of the Code, but there was agreement between the parties that ultimately the paint job was completed successfully. The Tribunal notes that there was a delay in this occurring and that the Homeowner had complained on a number of occasions regarding the quality and standard of the work. She had been invited to discuss the matter face-to-face to identify her specific concerns. She refused and if she had done so it may have led to an early resolution of the difficulties.

b. In the course of the Hearing, though not previously intimated, the Homeowner raised an issue as to why Chubb was the relevant alarm contractor and why G4S had been instructed to provide an on call service out of hours to assist with any fire alarms. The Respondent replied by indicating that Chubb has been historically in place for the Development prior to their appointment. There was significant debt due to them (and other

companies) and accordingly it would not have been possible to change provider. The provision of G4S assistance was engaged so that they could be a relevant key holder and direct the Fire Brigade if necessary onsite. The Homeowner did not appear concerned about the identity of G4S as the relevant contractor but raised concerns about their effectiveness. The Respondent undertook to make investigations.

vi. 7.1 - You must have a clear written complaints resolution procedure which sets out the 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 Homeowner complained that she could not find the Written Complaints Resolution Procedure when she required it, but concedes that it does exist. She complained that she was ultimately directed to a link on the Respondent's website and that submitting a complaint involved the completion of an online form which she was concerned that she would not have a receipt for. It is clear that an appropriate procedure was and is in place. The Respondent indicated that a full copy of the procedure could have been obtained at anytime from the onsite office and from the website which is where the Homeowner was ultimately directed to. The Tribunal does not find the Homeowner's complaints to be well-founded in this respect.

Two additional issues arose throughout the course of the Hearing which had not previously been raised by the Homeowner.

(i) On 5 November 2016, the Homeowner had been unable to summon assistance from the Property Factor on the out of hours emergency telephone number. The provision of emergency assistance in such a scenario is a core service of the Respondent and this is confirmed in Section 6.6 of the updated Written Statement of Services. The emergency out of hours telephone number is not provided within the Written Statement of Services and is only accessible on the Respondent's website. In the course of the Hearing, the Respondent agreed to amend the terms of the Written Statement of Services to incorporate reference to the telephone number. The Tribunal was in no doubt that this is necessary so as to avoid a breach of Section 2.3 of the Code of Conduct. Details of arrangements on dealing with out of hours emergency is a necessary component of the Code.

(ii) The Homeowner raised concerns over the lack of transparency regarding the Respondent's connection with Ocean Serviced Apartments. The Respondent's representatives, Marc and Simone Myburgh, who are the two Directors of the Respondent, are also two of

four Directors of Ocean Serviced Apartments. Ocean Serviced Apartments manage 52 flats within the Development which are all of the flats within blocks 1 and 4 of the Development. The company of Ocean Serviced Apartments does not own the flats. The flats are owned by a consortium of 11 landlords. Ocean Serviced Apartments pay the Respondent for their relevant shares of the Property Factor charging. Ocean Serviced Apartments ie Marc and Simone Myburgh in practice - have the authority by proxy to cast 52 votes in connection with matters pertaining to the Development. They do not own any properties on the Development. This block vote amounts to some 19% of the total of 278 units on the Development. Given the explanations by and on behalf of the Respondent regarding the manner in which blocks 1 and 4 are managed, the Tribunal formed the view that in order to ensure transparency and so as to avoid unnecessary complaints that the proper way to proceed is for the Respondent to ensure that their interest in Ocean Serviced Apartments is clearly disclosed to all homeowners. An undertaking was given that this would be done. It is probably best done within the Written Statement of Services. The Tribunal was equally satisfied that there has been no misuse of this relationship and block vote to date.

The Tribunal concludes that the Respondent has undertaken all of their responsibilities and duties to an acceptable standard. The Development has been fraught with difficulties from the beginning and it seems that the Respondent took over the management of the Development at a time when most Property Factors would have deemed it to have been a poisoned chalice and refused to act. There have been times when perhaps the levels of service have fallen a little short, but taken as a whole the Respondent is entirely committed to the Development and continual progress appears to have been made in respect of numerous difficult issues. The application by the Homeowner has been productive in that information has been passed to the Homeowner voluntarily in advance of the hearing and further aspects raised in the hearing have also been resolved for the future.

It is regretful that the Homeowner has decided not to participate in any face-to-face communications with the Respondent nor attend any meetings of the Residents Association, TENOA. This is, of course, her choice. The reality of the situation is that the Homeowner's property comprises one of a large number of flats on a modern Development which is managed by a Property Factor. There have been multiple problems for many years which the Respondent has been prepared to inherit and seek to resolve. The choice to live in such an environment is one which the Homeowner has made after being fully informed about the existence of a Property Factor and the arrangements for the maintenance renewals and upgrading of the common areas. The Tribunal notes that out of the large Development no other homeowners have any grievances with the Respondent.

Ultimately the Tribunal were satisfied that the Respondent has not breached any sections of the Code of Conduct and has fulfilled all of the relevant Property Factor duties. In the circumstances, no Property Factor Enforcement Order is necessary.

Appeals

A homeowner or property factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Richard Mill

Legal Member

19 March 2018 Date