Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/PF/19/2658

The Parties:

Dr Kirsten Swindells, 2/6 Bethlehem Way, Edinburgh EH7 6FB ("the homeowner")

And

Life Property Management Limited, incorporated in Scotland (SC253869) and having their Registered Office at 11 Somerset Place, Glasgow G3 7JT ("the property factors")

Property: 2/6 Bethlehem Way, Edinburgh EH7 6FB ("the Property")

Tribunal Members – George Clark (Legal Member/Chairman) and Andrew Murray (Ordinary Member)

Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

The Tribunal has jurisdiction to deal with the application.

The property factors have failed to comply with their duties in terms Section 6.1 of the Code of Conduct made under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act"). The property factors have not failed to carry out the Property Factor's duties.

The Tribunal proposes to make a Property Factor Enforcement Order.

The Decision is unanimous.

Introduction

In this decision, the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code of Conduct" or "the Code"; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as "the Tribunal".

The property factors became a Registered Property Factor on 7 December 2012 and their duty under Section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it and gave consideration to the application by the homeowner received on 27 August 2019, with supporting documentation, namely a copy of the Written Statement of Service and copies of email correspondence between the Parties between 22 June 2019 and 19 August 2019, further written representations on 11 September 2019, with a copy of the Deed of Conditions for the development of which the Property forms part, a copy of the property factors' rwritten response to the homeowner's complaint, and written representations from the property factors, dated 4 December 2019.

Summary of Written Representations

(a) By the homeowner

The following is a summary of the content of the homeowner's application to the Tribunal:

The homeowner's complaint was that the property factors had failed to comply with Sections 2.5, 4.6 and 6.1 of the Code of Conduct and had failed to carry out the property factor's duties.

Section 2.5 of the Code of Conduct states "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."

The homeowner stated that she had contacted the property factors on several occasions regarding unsocial behaviour in her block of flats. She had first emailed the property factors on 8 January 2019 and had received an automated response saying she would receive a reply within 7 days. She had sent a chasing e-mail on 18 January 2019, as she had not received a reply. The property factors still had not replied. Her emails had related to conduct (repeated buzzing of the door buzzer system at unsocial hours and leaving the secure entry door off the latch) which was

a security issue as well as being highly distressing. Since raising the complaint, all she had been offered was a £30 reduction in management fees for the quarter.

Section 4.6 of the Code of Conduct states "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)."

The homeowner stated that on 21 June 2019, along with her quarterly invoice, she had received correspondence from the property factors stating that she was being charged an extra £126.04. £122.61 was "irrecoverable service charges" and £3.43 was "legal costs for the recovery of debt". The correspondence stated that remaining homeowners were responsible for debt unpaid by other homeowners as set out in the Deed of Conditions. At the time, the homeowner did not have a copy of the Deed of Conditions, nor had she signed or agreed to such. The documentation had not been supplied to her prior to, or after, purchase of her property. The first correspondence she had from the property factors was on 3 August 2017, 14 days after she moved in to the Property. That letter stated that documentation (such as the Deed of Conditions) would be available on the homeowner's online account with the property factors, but the Deed of Conditions had only been uploaded to her account after she raised the present complaint. Prior to receiving the invoice on 21 June 2019. the homeowner had had no communication telling her there was ongoing debt recovery which would impact her.

The homeowner's view was that it was unconscionable to be a homeowner in a block of six flats, yet to be partially liable for the debt of 102 homeowners in the area. She could not afford to pay other people's factoring charges or any legal fees in pursuing them. The property factors received the benefit from their business of factoring properties, so they should also bear the risk that a customer might not pay.

Section 6.1 of the Code of Conduct states "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."

The homeowner stated that she had contacted the property factors by phone on 16 April 2019 to make them aware of an issue with the buzzer entry system and lock. The buzzer was sounding, but the door release button was not allowing any flat in the block to release and open the secure entry door. The homeowner had been told by the property factors that the matter would be passed on to their contractor. She had contacted the property factors again when, after six weeks, the issue had not been resolved. The invoice of 21 June 2019 contained a fee for a callout to the door entry on 2 April 2019, but there should have been no fee as the issue was clearly not

fixed. Throughout the last four months, the property factors had never informed the homeowner of the progress of the work and had never given her an estimated timescale for completion. Furthermore, it was likely that the broken door entry system had been a consequence of the antisocial behaviour to which the homeowner had referred in her application. Had her initial emails been responded to in January 2019, the door entry system would likely not now be broken.

(b) By the property factors

The following is a summary of the written representations made by the property factors on 4 December 2019:

The property factors accepted in previous correspondence on 1 August 2019 that they had not responded in the timelines stated in their written Statement of Services, namely that they should respond to email queries within 7 working days. They had apologised and had offered the homeowner a 20% reduction in the management fee as a gesture of goodwill. They believed that this, balanced against an annual management fee for all the work they carried out in the provision of services was reflective of this item which they had overlooked.

In relation to the complaint under Section 2.5 of the Code of Conduct, the property factors stated that they had recognised at Stage 2 of their complaints procedure their delay in dealing with the homeowner's query about antisocial behaviour and had offered, in their letter to the homeowner of 12 July 2019, a goodwill gesture of £30.

In their response to the complaint under Section 4.6 of the Code of Conduct, the property factors recognised that as a result of past apathy on the part of the homeowners, their Estate Manager had not arranged an Annual General Meeting of the homeowners at which a debt report would have been provided, highlighting the debt level which would require to be invoiced to all homeowners. The property factors' finance department had not been aware of the lack of opportunity to arrange an AGM, so the homeowners had not been notified in advance of the debt position. This was why the property factors had offered a 12 month delay in the requirement to have to pay for the irrecoverable debt.

The property factors had continued to manage the development whilst pursuing debtors, but there comes a point where action has to be taken when the debt process has been exhausted, that action being either to pursue or to write off debt or to invest further funds. The debt was a development debt, not the property factors' debt, as the property developers received no benefit from services delivered to the development. Their remit was to manage the development for and on behalf of the owners and to ensure services were managed and sufficient funds were made available to ensure the development continued to run correctly It was the homeowners who received the benefit by way of susrtained property values. The

only income received by the property factors came from their management fees and insurance commission. On numerous occasions over the years they had arranged AGMs for the development and had faced apathy from the homeowners, with small numbers attending. The Deed of Conditions for the development provided a process for arranging meetings and for setting up an Owners' Association or Committee. In this development, the best the property factors had achieved was a Steering Group, but that had ceased when the active homeowners moved on from the development. Although insufficient numbers had attended the last AGM, the matter of debt had been discussed.

With regard to irrecoverable service charges, the property factors had confirmed they would be happy for homeowners not to pay until they had received the required legal confirmation and, as a further gesture of goodwill, recognising their delay in notification to the homeowner in this case, they were content to allow the homeowner to pay these sums over a period of 12 months and would offer a further gesture of a reduction in the specific sum.

It was not part of the property factors' remit in terms of the 2011 Act to provide the homeowner with the Deed of Conditions and they could not be held responsible if the homeowner's solicitor had not highlighted and discussed all legal obligations which ran with the Property, including those in the title deeds and, in particular, the Deed of Conditions. When the property factors were informed by a solicitor of a property sale, they would provide a welcome letter and a copy of the written Statement of Services. It was the housebuilder, not the property factors, who applied the title conditions. The property factors did not believe that they were in breach of their obligations under the 2011 Act.

In relation to the complaint under Section 6.1 of the Code of Conduct, the property factors set out a timeline (all dates in 2019). On 2 April, an owner had called their office and reported a fault which was attended to. On 16 April, the homeowner had reported the door entry not working. The Estate Manager had believed the homeowner to be the original caller. On 2 June, the homeowner had reported that the door entry was still not working. The reason the issue had not been resolved was that spare parts were required. The property factors had investigated the issue when the homeowner escalated the complaint and had confirmed that the main repair had been completed, but the electrics for the entry system required to be re-activated. This would be completed on 17 July. There had been some confusion as to whether the fault was electronic or lock related and this had caused a delay in the repair.

On 1 August, the property factors had reported to the homeowner that, following the most recent visit by the supplier, it had been noted that there had been further problems with the door entry system and that the parts required to rectify the problem could no longer be obtained. A replacement system was required. As the problem related to security, the property factors could make arrangements to have the system replaced as an issue of public safety, the alternative being to ballot the

owners in the stair to try and obtain majority agreement and receipt of funds in advance. The response of the homeowner, on 7 August, had been to tell the property factors that she assumed she would not have to pay a share of "repair" fees, since the door had not been repaired. The property factors then confirmed on 19 August that if their contractor attended the development and was unable to repair an issue, the cost of the contractor's attendance and of any materials was charged to the development and, likewise, if the system could not be repaired, the cost of replacement was also the responsibility of homeowners. The cost of door entry replacements were specific to the owners on the particular stair.

The property factors received no confirmation from the homeowner that she was agreeable to the replacement being progressed. On 11 September, the homeowner had written to the property factors to say that the intercom system in her block of flats had ceased to work and noting that there had been no communication about a homeowners' meeting or a poll regarding a repair to the door entry system. On 16 September, the property factors confirmed that they would now ballot all homeowners.

The property factors apologised for the earlier confusion regarding the call back on the repair to the door entry. They had actioned the repair, but the problem had gone beyond a simple repair to the replacement of an obsolete system. The property factors disagreed with the homeowner's complaint that they had failed to comply with Section 6.1 of the Code of Conduct. Other than the earlier confusion over who had reported the fault, for which they had apologised, they had communicated with the homeowner the progression of the work.

The Hearing

A hearing took place at George House, 126 George Street, Edinburgh, on the morning of 16 January 2020. The homeowner was present at the hearing and was accompanied by her husband. The property factors were represented by their Property Manager, Mr Fraser Dunlop, and Mr David Reid, their Managing Director.

Summary of Oral Evidence

The chairman told the Parties that they could assume that the Tribunal members had read and were completely familiar with all of the written submissions and the documents which accompanied them.

The homeowner told the Tribunal that she had emailed the property factors on 8 January 2010 regarding someone leaving the entry door to the block of flats "off the latch". She had chased it up on 18 January 2019, but, again, the property factors had not responded. Her view was that, had they responded promptly, the door would not

subsequently have been broken. The issue of the buzzer not releasing had been reported by her on 2 April 2019 and, if contractors did come out at that time, they failed to fix the problem. On 16 April 2019, owners had been told that it would be passed to the contractors. By 3 June 2019, the buzzer was not working at all. The owners were told it was fixed but, shortly afterwards, they were told a new system was required.

The property factors told the Tribunal that there were two separate issues, namely the door lock and the door entry system. The system now needed to be replaced. The view of the homeowner was that the property factors should have acted to ask owners not to leave the door off the latch.

The property factors repeated what they had said in their written representations, namely that they accepted they had fallen short in contacting the wrong person following the initial report by the homeowner. They had accepted that communication on the door entry system issue was not good enough and had looked at the management fee and made an offer based on the percentage referable to that aspect of their service. They were going to continue to try and get the other owners to agree to the replacement that was required, but stressed that anything which fell outwith their core service required consultation with homeowners, although they had considered whether this was such a public safety issue that they could proceed without obtaining consent.

The homeowner commented that the common stair in the block had not been cleaned for 5 months, as the cleaners could not get in because of the problem with the door entry system. The condition of the stair was deteriorating as a result. The property factors replied that the cleaning contractors had been replaced in December 2018 and the new contractors had not complained that they could not get in to the block. The property factors would, however, now arrange a deep clean. This would include shampooing the carpet, but the property factors would not be replacing the carpet as it is 15 years old.

The property factors told the Tribunal that the development had 140 units. One individual had bought most of the flats in one block for short-term lets, but he would not pay the factoring charges or other costs for the block. The property factors had told the homeowners at an AGM that they would no longer be maintaining that block. They agreed to continue to provide services to the remaining 102 flats. An AGM was called in 2014, but only 3 owners responded. In 2017, only 7 owners had responded. The property factors had asked that the 2019 AGM include a discussion on debt recovery and irrecoverable service charges, as the individual who had already defaulted in relation to the block which they were not now factoring had bought other flats in the development. The property factors had chosen to try and manage the debt and it was still going through court proceedings, but the property factors required additional funds if they were to continue to manage the development. The

property factors told the Tribunal that on two previous occasions, the owners at the development had had to top up their floats to cover unpaid debt.

The homeowner said that, until she had received the bill, she had had not been aware of any problem with accumulated historical debt. Debts from 2015 sprung on homeowners in 2019 suggested the issue had not been managed properly, so management fees should be rebated.

The property factors said that, as they recognised the homeowner might not have been aware of the issue, they had offered to allow the cost to be spread over 12 months, but, if they were expected to continue to pursue the debt, they had to ask the owners to meet the deficit, as they could not continue to fund it themselves and would have to stop maintaining the development. If the litigation was successful, the moneys recovered would be credited back to the owners. It was anticipated that an AGM would be held on 29 January 2020, when the matter would be discussed further.

The homeowner then referred to an item on her bill which related to a water damaged property in another block, where the property factors had decided not to submit an insurance claim, but had instead spread the cost across all the owners in the development. The property factors explained that they had taken that decision, which was within their delegated spending authority, as an insurance claim would have resulted in an increase in premiums for all owners.

The homeowner, in her closing remarks, wondered whether she had been wise to purchase the Property at all, as she was now having to pay for debts that had accrued long before her ownership began, for replacement of the door entry system and for something that might have been covered by insurance that was nothing to do with her block. As a decent homeowner, having raised issues, having to live with a dirty stairwell and a broken door lock, she should be entitled to some form of compensation.

The Parties then left the Hearing and the Tribunal members considered all the evidence, written and oral, before them.

Findings of Fact

The Tribunal makes the following findings of fact:

- The homeowner is a homeowner within a block of six flats which form part of the development known as Sapphire Point, Lochend Road, Edinburgh .
- The property factors, in the course of their business, manage the common parts of the development. The property factors, therefore, fall within the definition of "property factor" set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").

- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 7 December 2012.
- The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- The homeowner made an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") received on 27 Aiugust 2019 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.
- On 15 November 2019, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

Reasons for the Decision

Section 2.5 of the Code of Conduct states "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."

This ground of complaint related to the issue of the door lock. The Tribunal noted that the property factors had acknowledged they had fallen short and had offered to reduce their factoring charge as a result. That offer had not been accepted by the homeowner.

The property factors' immediate acknowledgement and offer of compensation was regarde by the Tribunal as reasonable in all the circumstances and the view of the Tribunal was that it would not be appropriate to make a Property Factor Enforcement Order in respect of the complaint under Section 2.5 of the Code of Conduct.

Section 4.6 of the Code of Conduct states "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)."

The Tribunal sympathised with the situation in which the homeowner had found herself with regard to historical development debt. The property factors had highlighted the difficulty they had encountered in holding quorate AGMs, at which matters such as this could have been discussed. They had also pointed out that the

significant debt was not yet regarded as irrecoverable, as court proceedings were ongoing.

The Tribunal had no knowledge of what correspondence had passed between the solicitors involved at the time of the homeowner's purchase and could not speculate on whether the issue of historical debt might have been discussed at that time and on what questions might have been asked by the homeowner's solicitors or what information might have been passed on by the solicitors acting for the seller. The Tribunal, however, agreed with the property factors that it is for purchasers' solicitors to inform their clients about the rights, burdens and conditions that affect their title. Individual purchasers have no power to alter these conditions, but, having been advised of them by their solicitors, should be in a position to make an informed decision on whether or not to proceed with the purchase.

The property factors had told the Tribunal that on two previous occasions, the owners at the development had had to top up their floats to cover unpaid debt. The Tribunal was satisfied that, as a development, owners knew that there was a significant issue which might have implications for them, but the difficulty of obtaining a quorum at successive AGMs meant that the homeowner had not actually been aware of the historical position. The Tribunal noted that the property factors, recognising this, had offered to allow the homeowner to defer the cost for 12 months and that it was anticipated that an AGM would be held at the end of January 2020, when the matter would be further discussed. Accordingly, hte Tribunal did not uphold the complaint under Section 4.6 of the Code of Conduct.

Section 6.1 of the Code of Conduct states "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."

The Tribunal noted the timeline provided by the property factors in relation to their dealings with the entry door system at the block of which the Property forms part . There was a gap between 16th April 2019 and 12 July, when the property factors had told the homeowner that the work would be carried out on 17 July. This communication had only been sent when the homeowner had escalated her complaint after having reported on 2 June 2019 that the door entry system was still not working. By 19 August 2019, the property factors were saying the door entry system would need to be replaced, but it had taken from April to August to ascertain and inform the homeowners that the existing system could not be repaired.

The view of the Tribunal was that the property factors had failed to adequately inform homeowners of the progress of the work, a matter which they knew affected the

security of the building, and had failed to ensure the proper diagnosis of the problem and to keep the homeowners informed between April and August 2019. Accordingly, the Tribunal upheld the complaint that the property factors had failed to comply with Section 6.1 of the Code of Conduct.

The Tribunal was satisfied that, from 19 August 2019, the communication had been satisfactory, as the property factors were seeking approval for the work and, following the homeowner making contact on 11 September 2019, they said on 16 September that they would ballot all the owners in the block.

The Tribunal could not speculate on whether leaving the entrance door off the latch had contributed to the door entry system ultimately having to be replaced. The Tribunal accepted that a repair to the door entry system was not possible, as the necessary spare parts could not be sourced. It is for the owners within the block to communicate to the property factors their decision on whether to proceed with the work, as the present delay is helping nobody.

Failure to comply with the property factor's duties

The Tribunal did not uphold this ground of complaint. No evidence specific to it had been presented to the Tribunal and all the issues raised by the homeowner had been considered under specific Sections of the Code of Conduct.

Decision

The property factors have failed to comply with their duties in terms of the Section 6.1 of the Code of Conduct made under Section 14 of the Property Factors (Scotland) Act 2011. The property factors have not failed to carry out the Property Factor's duties. The Tribunal proposes to make a Property Factor Enforcement Order as detailed in the accompanying Section 19(2) Notice.

Appeals

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

George Clark

Signature of Legal Chai Date 29 February 2020