**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/18/0445**

**17M Riverside Drive Aberdeen AB11 7DG**
**("the Property")**

**The Parties:-**

**Iplux Ltd, 22 North Anderson Drive, Aberdeen AB15 5DA**
**("the Applicant")**

**Aberdeen Property Leasing Limited, 138 Rosemount Place, Aberdeen AB25 2YU**
**("the Respondent")**

**Tribunal Members:**
**Graham Harding (Legal Member)**
**Angus Anderson (Ordinary Member)**

**DECISION**

The Respondent has failed to carry out its property factor's duties in terms of Section 17(5) 0f the 2011 Act.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with section 6.3 of the Code.

In all the circumstances the Tribunal did not find it necessary 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 is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Factor became a Registered Property Factor on 1 November 2012 and its

duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By application dated 25 February 2018 Mr Ike Ibekwe on behalf of the Applicant applied to the Tribunal for a determination that the Respondent was in breach of sections 6.3 and 6.6 of the Code in that it had failed to show how and why it had appointed contractors to replace the lift ropes in the property when it had previously been agreed that it would first obtain alternative quotes. The Applicant also alleged that in so doing the Respondents had breached its property factor's duties.

2. Following clarification of the application a convener with delegated powers under section 18(a) of the 2011 Act referred the application to the Tribunal.

3. Both parties lodged written representations with the Tribunal prior to the hearing.

4. A hearing was assigned to take place at Ferryhill Community Centre, Albury Road, Aberdeen on 12 June 2018.

**Hearing**

5. The Applicant was represented by Mr Ike Ibekwe. The Respondent was represented by Marjory Davison and Deborah Poppleton.

6. By way of a preliminary matter the Tribunal explained to the parties that as title to the property had been taken in the name of Iplux Ltd and was not in fact owned by Mr Ibekwe the application ought to have been running in the name of Iplux Ltd and not in Mr Ibekwe's name. In the circumstances the Tribunal proposed that the application be amended going forward into the name of Iplux Ltd and this amendment was agreed by both parties.

**Summary of submissions**

7. The Tribunal outlined the substance of the Applicant's complaint as narrated in its application and the Applicant's representative Mr Ibekwe confirmed that summarised the essence of his complaint and that at that stage he had nothing further to add.

8. For the Respondent it was said that it did try to obtain quotes from two other firms namely Consult and Atlas. Ms Poppleton for the respondents said that both firms knew the Riverside Development as they had previously wanted the maintenance contract for the lifts. She said that in a

phone call with Consult she told them that she was looking for a comparable quote to that obtained from Kone however she had been told by Consult that it would be better to go with the existing service provider. She explained that Consult would have had to have purchased the lift ropes from Kone and she thought they would probably have been more expensive but she had not actually obtained a price from them. She went on to say that she had phoned Atlas two or three times but no one had got back to her. Following on from that this Ms Poppleton said that she had then contacted the committee of the Riverside Drive Owners Association and following discussions with the committee members it had been agreed to go ahead and instruct Kone to carry out the works in November 2017.

9. In response to a question from the Tribunal Ms Poppleton confirmed that all the discussions with Consult had taken place by telephone and there were no emails or other correspondence to back up what had been said. Ms Poppleton confirmed that the Respondent did have contacts with other lift companies such as Otis and Thyssenkrupp but these companies had not been approached.

10. Ms Poppleton confirmed that the Respondent started to factor the development in 2005 and that she was aware that the Riverside Drive Owners Association was formed in 2013 following discussions between the Respondent and the owners regarding the erection of car park barriers.

11. Mr Ibekwe said that he was certainly aware of and had participated at meetings of the Residents Association but that the association had no decision-making powers it was essentially a conduit for the homeowners to refer matters to the Respondent.

12. For the Respondent's part Ms Davison said that the Respondent took the committee as being the residents and homeowners representatives and that it accepted instructions from the committee. Ms Poppleton said that following the formation of the Residents Association it had been necessary to amend the Respondent's Statement of Services at the request of the Residents Association committee. As far as the Respondent was concerned there was a degree of established practice that had existed for some years. When the Respondent obtained quotes for various works they were sent to the Owners Association committee who approved the quotes.

13. The Tribunal queried with the Respondent's representatives whether the replacement of the lift ropes had been considered to be major additional works in terms of the Respondents Statement of Services. The Respondent's representatives confirmed that it had not and that no additional charges had been levied against the homeowners for this work. The cost had been included in the annual budget for the year 2017, having been approved at the Owners Association AGM in February 2017. It was considered that the lift ropes replacement was routine maintenance that

did not come under the additional works category. That was confined to major refurbishments where the Respondent might charge an additional 10%.

14. The Respondent's representatives confirmed that in terms of the service contract there was no defined cost limit for authorised works. The Respondent prepared a budget at the beginning of each year for approval by the homeowners and a contingency element would be built in to the budget to allow for any additional unplanned expenditure.

15. The Applicant's representative Mr Ibekwe explained to the Tribunal that he had requested copies of all of the minutes of the general meetings of the Residents Association and the committee's minutes but that these had been refused. Ms Davison pointed out that the Association chairman had not refused to produce the documents but had explained to Mr Ibekwe that because of the volume of documents requested it would take time to produce them. The Tribunal did indicate that it would have been helpful to have had sight of these documents and that it was unfortunate that they had not been requested earlier or that they had not been more readily available as it appeared from the constitution of the Residents Association that they should be available on request to any homeowner.

16. Mr Ibekwe explained to the Tribunal that he did not accept that the Respondent had done all that it could to obtain alternative quotes. He said that he had written to 5 lift suppliers and that they had all responded saying that they would be happy to provide quotes. He felt that the Respondent should have done more to comply with the agreement that had been reached at the Owners Association AGM in April 2017 to obtain alternative quotes. He also felt that there was no need to use Kone's own replacement parts as other lift suppliers' parts would not necessarily be any inferior to those supplied by Kone.

17. The Respondent's representatives remained of the view that there could be issues using other manufacturers parts and referred the Tribunal to the email correspondence from John Herd of Kone dated 1 May 2018. Ms Davison said that the committee had been concerned that Kone might not continue to service the lifts if they had used non-Kone parts. She said that from the outset the principal concern had been one of safety and that was also the reason why it had been decided to carry out the replacement of all the lift ropes in the one year and not stagger them over the different blocks over two years.

18. Mr Ibekwe queried why as this was a cyclical maintenance the cost of replacing the lift ropes was not spread over a number of years. Ms Davison explained that this would lead to problems over keeping track of payments particularly when properties were being sold and funds having to be paid to sellers and then new funds gathered from purchasers. The

current system of budgeting for expenditure in each year was a simpler system

19. Mr Ibekwe queried why when the Deed of Conditions suggested that contracts should be reviewed periodically that the lift contract with Kone did not appear to have been reviewed over a lengthy period of time. The Respondent's representatives did not respond to this point other than to say they were very satisfied with the service provided by Kone.

20. Ms Davison went on to say that the Residents Association committee had decided that in future they wished a surplus of funds to be carried forward at the end of each year to take account of the fact that the development was getting older and that there were likely to be greater refurbishment costs in the future.

21. Ms Davison said that the Respondent did not write the committee minutes. It was given a copy of the minute of the meeting of April 2017 and had not taken from the minute that it was necessary to go back to all the owners and explain that it had been unable to obtain further quotes for the replacement of the lift ropes. She pointed out that Mr Ibekwe was the only person at the meeting wanted further quotes. This was disputed by Mr Ibekwe.

22. Ms Poppleton said that as far as she was aware the Owners Association had monthly committee meetings and from that any points arising were sent to the Respondent for it to deal with. These were generally maintenance issues dealing with items such as the replacement of numbers on parking bays or similar issues. When it came to a decision about the lift ropes Ms Poppleton said that she had spoken on the phone to Chris Morrison who was on the committee and that she had confirmed with Kone in September 2017 that they were still adhering to the quote provided in February 2016 and that the work would be able to go ahead in November 2017 as by that time there would be sufficient funds ingathered to meet the cost. The committee had then given the go-ahead for the work to proceed. The owners had been told about two weeks before the work was due to start that the work had been instructed. Ms Davison said that in hindsight the Respondent could have done a lot better in informing the homeowners that the work was going to be instructed, that Kone would carry out the work and that the Respondent had not obtained other quotes. She said that the Respondent had already apologised for that oversight. She said that this could have been done in a group email.

23. The Tribunal pointed out that in terms of clause 3.4 of the Deed of Conditions any proprietor who thought that any repairs were unnecessary was entitled to refer the question to the Property Manager who would then determine whether or not such repairs were necessary. By failing to communicate timeously it did appear that proprietors were being deprived of an opportunity to lodge any objection.

24. For the Applicant Mr Ibekwe explained that his reason for lodging the application was to highlight that when things went wrong it was necessary to make changes to put them right. For the Respondents Ms Davison made reference to certain matters relating to outstanding payments due by the Applicant that were not relevant to the application.

**The Tribunal make the following findings in fact:**

25. The applicant is the owner of 17 M Riverside Drive Aberdeen.

26. The property is a flat within the Riverside Development ("the development").

27. The Respondent performed the role of the Property Factors of the development.

28. The lift ropes at the development were in need of replacement. For reasons of safety and economy it was sensible that the replacement of all the ropes be carried out at one time rather than staggered over two years.

29. At the Riverside Drive Owners Association meeting held on 20th April 2017 it was agreed that the Respondent would obtain alternative quotes for the cost of replacing the lift ropes at the development. The respondents did not obtain any alternative quotes. The minutes of the meeting of 20th April record that a decision would be taken at a later date on replacing the ropes after the alternative quotes had been obtained.

30. The Respondent routinely accept instructions from the committee of the Riverside Drive Owners Association. The Respondent communicated with the Owners Association committee that they had been unable to obtain other quotes for the replacement of the lift ropes and the Owners Association committee authorised the Respondent to proceed to instruct Kone to go ahead with the work.

31. The aims and objectives of the Riverside Drive Owners Association are set out in clause 2 of its Constitution. There is nothing in that clause or in any other clause in the Constitution that specifically authorises the committee to instruct work on behalf of the owners without the consent of the majority of the owners.

32. There is no provision within the Deed of Conditions burdening the property for an Owners Association being formed and therefore no powers are delegated to such a body although that would not preclude the owners agreeing to form such an association.

33. The Respondent failed to take all necessary steps to try to obtain alternative quotes for the replacement of the lift ropes.

34. The Respondent failed to communicate the fact that it had been unable to obtain alternative quotes for the replacement of the lift ropes to the Applicant.

35. The Respondent failed to give adequate notice to the Applicant that it intended to instruct Kone to go ahead with replacing the lift ropes.

36. The Respondent was in breach of section 6.3 of the Code and also failed in its duties in terms of the 2011 Act by failing to communicate properly with the applicant.

37. The Respondent was not in breach of Section 6.6 of the Code.

**Reasons for Decision**

38. The Tribunal was not convinced that the Respondent had shown that it had taken all reasonable steps to obtain alternative quotes from other lift suppliers. Whilst the Tribunal could understand that as the Respondent had a good relationship with Kone and may well wish to instruct them it had nonetheless been instructed to obtain alternative quotes and it should have done more to find quotes from alternative suppliers in order to justify continuing to instruct Kone. The Respondent was therefore in breach of Section 6.3 of the Code.

39. As no tendering process had been carried out by the Respondent the Tribunal did not find there had been a breach of Section 6.6 of the Code.

40. Whilst it appeared to the Tribunal that over a number of years a practice had developed that the committee of the Riverside Drive Owners Association would routinely instruct the Respondent to carry out work on behalf of the owners it did not appear to the Tribunal that any evidence had been presented to it to show that the committee had such authority delegated to it. With respect to the replacement of the lift ropes the Tribunal was not provided with any evidence that the committee had authorisation from the majority of homeowners to act on their behalf in this regard. As far as could be ascertained there had been no further meeting

of homeowners to discuss the issue when it was clear that a decision on the replacement of the lift ropes had been deferred to a later date.

41. Although the Respondent was in breach of the Code and had failed to carry out its duties there was no evidence presented to the Tribunal to show that the Respondent could have obtained a cheaper comparable quote from another supplier.

42. It was acknowledged by Ms Davison that the Respondent could have done better in communicating with homeowners such as the Applicant with regards to the replacement of the lift ropes. The Tribunal acknowledge that the Respondent has apologised for its failure in this regard. The Tribunal also acknowledge that the Respondent appeared to be acting in good faith when accepting instructions from the Riverside Drive Owners Association Committee. It is out with the jurisdiction of the Tribunal to become involved in any dispute between the Applicant and the Committee but it did appear to the Tribunal that some clarity was required as to the constitutional standing of the committee vis a vis instructing the Respondent particularly in issues of importance to homeowners. Taking everything into account the Tribunal was of the view that notwithstanding the breach of the Code and the failure to carry out its duties it would not be appropriate or necessary in all the circumstances to make a Property Factor Enforcement Order.

43. The decision of the Tribunal was unanimous.

**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.**

Graham Harding

Legal Member and Chair

16 June 2018

Date