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

DECISION: Property Factors (Scotland) Act, section 19

Chamber Ref: HOHP/PF/16/0087

4 Fitzallan Place, Bathgate, EH48 2UN
("the Property")

The Parties:-

Ms Vera Tens, 4 Fitzallan Place, Bathgate, EH48 2UN
("the Applicant")

Life Property Management, Regent Court, 70 West Regent Street, Glasgow, G2 2QZ
("the Respondent")

Tribunal members

Susanne L M Tanner Q.C. (Legal Member)
John Blackwood (Ordinary Member)

DECISION

1. **The Respondent has not failed to ensure compliance with the Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act").**

2. **The Respondent has not failed to carry out its property factor's duties.**

3. **The decision of the tribunal was unanimous.**

Procedural Background

4. The Respondent became a Registered Property Factor on 7 December 2012 and its duty under **section 14(5) of the 2011 Act** to comply with the Code arises from that date.

5. The Applicant is the owner of the Property (Title number WLN42917), which is a dwellinghouse in the Castlepark View Development in Bathgate ("the Development"). The "Development" is a mixed residential development of 65 properties, 53 of which are dwellinghouses and 12 of which are flats (situated in two "Blocks"), together with a *pro indiviso* share along with the proprietors of the flats and the dwellinghouses to "Mutual Areas" which are defined in the **Deed of Conditions for the Property** by BDW Trading Limited which was registered on 17 June 2008, which appears as Entry 10 on the Burdens Section of the Title Sheet for the Property.

6. The Respondent is the registered factor with responsibility for the management of the "Mutual Areas" of the Development in which the Property is situated, as well as the "Common Parts" relating only to the two Blocks of flats.

7. The Applicant lodged an **Application dated 14 June 2016** ("the application") with the former Homeowner Housing Panel ("HOHP"), now "the tribunal".

8. The documentation which was lodged with the Application included a letter of complaint from the Applicant to the Respondent dated 4 May 2016 stating the reasons why the Respondent had failed to comply with the Code and failed to carry out its property factor's duties.

9. The Applicant's original complaints were that there had been a failure on the part of the Respondent to comply with the **Code, Section 1.1aCe., Section 3: overriding principles and 3.6a, and Section 4.1**; and a failure to carry out its property factor's duties.

10. The parties agreed to mediation and a mediation agreement was signed by the parties on 31 October 2016.

11. It appears that the majority of the complaints raised in the Application were resolved during the mediation but not all of them. In a letter to the tribunal dated 12 April 2017 the Applicant confirmed that "points 1-5" as agreed at the mediation had been resolved. However, "point 6" was, in the view of the Applicant, outstanding. "Point 6" appears to be restricted to the issue of apportionment of the costs for debt recovery amongst all the Proprietors in the Development. The Respondent, by letter of 24 April 2016 indicated that it disagreed with the Applicant's statement that the matter remained unresolved.

12. The Applicant submitted further documentation to the tribunal and the tribunal took into account all documentation submitted between 15 June 2016 and 10 May 2017. Said documentation included a further complaint relative to the apportionment of costs for public liability insurance ("PLI") on the Development, which is referred to further below.

13. On 15 May 2017 the application was referred to the tribunal in terms of **Section 18A of the 2011 Act.**

14. A hearing on the Applicant's application was fixed for 26 July 2017.

Directions

15. Although the Application as originally framed alleged a number of failures to comply with the Code and a failure to carry out property factor's duties it appears that the majority of the matters complained of had been resolved to the Applicant's satisfaction by 12 April 2017 and do not require to be determined by the tribunal. The tribunal sought confirmation from the Applicant as to which alleged breach(es) were being insisted upon with reference to the Code and/or property factors' duties, as may be, by issuing Directions in terms of **The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 ("the Rules"), para. 20**, dated 8 June 2017.

16. The **First Direction** was issued in the following terms:

> "The Applicant is to provide to the tribunal and to the Respondent as soon as possible and **no later than fourteen days prior to the Hearing** confirmation of which parts of her original complaint are being insisted upon and which matters have been resolved."

17. The tribunal also directed the Applicant to lodge written submissions, an inventory of Productions upon which she intended to rely in accordance with Practice Direction 3 of 2016 (which had already been provided to her) and copies of a document which had been referred to but not produced, all no later than fourteen days prior to the hearing.

18. The Respondent was directed to produce written submissions in response to those of the Applicant, an inventory of productions upon which it intended to rely, and two stated documents, no later than seven days prior to the hearing.

Summary of the Issues to be determined by the tribunal

19. The issues to be determined by the tribunal are whether the Respondent has complied with the **Code** in terms of **Section 14(5) of the 2011 Act**, in particular **Section 1.1aCe., Section 3: overriding principles and 3.6a, and Section 4.1**; and whether the Respondent has failed to carry out its property factor's duties.

20. However, as outlined above, following the said mediation and the introduction of a further complaint as regards apportionment of costs for PLI, only two live matters appeared to remain outstanding as at the date of the hearing, namely:

    20.1. lack of clear and transparent accounting as regards the apportionment of PLI for the development in that it should have been divided amongst all 65 dwellinghouse proprietors in the Development and not only amongst the 53 dwellinghouse proprietors; which potentially engages **Section 3 of the Code and / or property factor's duties**; and

    20.2. the apportionment of debt recovery costs against the whole development in respect of debtors having a liability to costs for "Mutual Areas" and "Common Areas", which potentially engages **Section 4 of the Code and / or property factor's duties**.

Hearing – 26 July 2017

21. The Applicant confirmed before the scheduled hearing that she did not wish to attend the hearing as she was living abroad and intended to sell the Property in the near future. On 7 June the tribunal offered her the opportunity to request an adjournment and she did not do so. She stated that everything she wished to be considered was contained in her Application and documentation already submitted. She did not comply with the tribunal's Direction dated 8 June 2017. In response to a reminder sent by the tribunal offices on 13 July she replied on 14 July 2017 confirming that she was not coming to the hearing and was not intending to submit anything further. She was later offered the opportunity to participate in the hearing by conference call but she did not respond to the tribunal administration and the hearing proceeded in her absence.

22. A hearing took place at George House, 126 George Street, Edinburgh, on 26 July 2017.

23. David Reid, Managing Director and Alistair Wallace, Head of Estates, from the Respondent attended the hearing.

Preliminary matter – Applicant's failure to comply with Direction

24. A preliminary matter was raised by the Respondent and by the tribunal in relation to the Applicant's failure to comply with the **Direction dated 8 June 2017**, in that she did not produce to the tribunal and to the Respondent no later than fourteen days prior to the hearing confirmation of which parts of her original complaint were being insisted upon and which matters have been resolved; nor did she lodge written submissions, an inventory of productions or the requested letter.

25. In relation to the failure of the Applicant to specify which issues were outstanding or to lodge written submissions, David Reid for the Respondent indicated that his understanding was that, following the mediation process, there were only two live issues outstanding, one from the original complaint and the complaint about PLI which was made before the matter was referred to the tribunal. He made reference to correspondence from the Applicant which indicated that the outstanding matters concerned (i) allocation of the cost of PLI amongst the proprietors; and (ii) allocation of debt recovery costs which related to Mutual Areas and Common Areas.

26. The tribunal had regard to the documents before it including correspondence from the Applicant and the submissions made on behalf of the Respondent.

27. The tribunal decided that the only two outstanding matters in dispute were those outlined above, as understood by the Respondent. Having regard to the overriding objective to deal with the proceedings justly, in terms of **Rule 3 of the Rules**, the tribunal directed that the hearing would proceed on the basis that those were the only two live matters which remained to be determined, albeit that a formal decision would be required on all of the Applicant's complaints from the original Application and additional documents, which was taken to include the PLI complaint.

Oral Submissions on behalf of the Respondent

28. David Reid for the Respondent confirmed that the Respondent took over management of the Development in 2008 (partial handover) with full handover in 2010.

29. The following submissions were made on behalf of the Respondent in relation to both of the alleged failures to comply with the **Code** and alleged failure of the Respondent to perform its factoring duties.

30. Section 3: Financial Obligations

30.1. In relation to the complaint about apportionment of costs for PLI, the Respondent stated that the Applicant did not make reference to this in her original complaint raised with the tribunal but added it the complaint following the EGM which was held on 27 February 2017. The Respondent, however, accepted that this 'new' complaint was contained in the documentation considered by the tribunal when the matter was referred to the tribunal in May 2017 and formed part of the matters to be determined by the tribunal.

30.2. Mr Reid explained that the Respondent had changed insurance brokers and had then been told that the previous broker had wrongly advised the Respondent that the block insurance for the flats would cover the flat owners' liability for Mutual Areas as well as the Common Areas of the Blocks. In effect, this meant that those 12 flatted properties had to pay a share of the greater estate PLI in respect of the Mutual Areas; and that the said liability should have been charged to the proprietors of the flats over a period of around five years, rather than simply being divided between the 53 house proprietors.

30.3. The Respondent advised all of the proprietors in the Development and indicated that there would need to be an accounting in respect of the underpayment by some proprietors and overpayment by others. However, this issue arose at the same time as another issue in the Development with apportionment of electricity which had been overpaid by the flat proprietors. The flat proprietors had already agreed that they would only seek reimbursement over a one year period rather than back to inception of the Respondent's management. The Respondent's proposal was that the same approach would be taken to the PLI issue, and that the two issues could be offset against one another. The amounts involved were very small, particularly that for the PLI, which was a total cost of £315 for the Development. The matter was tabled for the EGM and discussed.

30.4. Mr Reid stated that he had written to the Applicant on 6 March 2017, following the EGM, and further explained the position regarding PLI and the proposal as to how the matter should be dealt with. He accepted that the cost for the same should be apportioned between the owners of all of the houses and the flats, which had not been done up until that time, with the cost only being apportioned amongst the house owners. He advised the Applicant that the flat owners would be added to the policy and that he would write to all homeowners advising them of this, with the question of costs being dealt with at the next AGM. He also suggested that based on the flats not backdating electricity charges beyond a year this may be an opportunity to propose that the PLI is only backdated a year and effectively one offset against the other; give or take a few pounds. He hoped that the proposal would be acceptable

to the Applicant and invited her to contact him should she require any further information.

30.5. A quorate majority of proprietors at an AGM could accept the Respondent's proposal and it would be binding on all proprietors.

30.6. In further correspondence with the Applicant, Mr Reid suggested to her that it may not be a good idea to go back to inception as the flats might want to backdate the electricity claim. In recent communications with the Respondent in July 2017 she advised Mr Reid that she still wanted the PLI overpayment credited back to her. Mr Reid has asked the finance department to calculate the Respondent's share over a 5 year period. The total was £3.12 (12 properties share of £315 a year for 5 years.) The Respondent intends to make this payment to the Applicant. Mr Reid wrote to the Applicant on 6 March 2017. She replied in early July but he did not have the letter with him at the tribunal. He advised that the letter could be sent to the tribunal offices in the week following the hearing. To date the tribunal has not seen the Applicant's response.

30.7. Once the repayment has been made the Respondent is of the view that the matter will be entirely resolved as all that the Applicant has requested is a repayment of the sum overpaid.

31. Section 4: Debt Recovery

31.1. Mr Reid indicated that the Applicant had expressed some concerns about how the Respondent applied legal costs to the proprietors in the Development. The basis of complaint was that the homeowner was invoiced for legal costs for pursuing debt recovery procedures against owners of flatted properties with common areas, as well as debt recovery procedures in respect of non-paying house owners. Mr Reid said that the process had been explained to the Applicant on numerous occasions.

31.2. The Respondent sought legal advice from a solicitor (BTO, Glasgow) on a number of issues including the question of liability for expenses incurred in recovery of debt relating to the Development. In summary, the advice received was that the debt recovery costs were properly attributed amongst all 65 property owners in the development in accordance with the Deed of Conditions, Clause 5 (iii) and (iv). The legal advice to that effect was presented to homeowners in advance of the AGM and was discussed. The Applicant attended the AGM and did not challenge the tenor of the advice.

31.3. Mr Reid made some general submissions relating to the Respondent's procedures for accounting and debt recovery. He advised that the

Respondent treats every development as an individual business with a separate bank account. If any interest granted it is applied to the Development account. All income and expenditure is applied to the Development account. There is a clear debt recovery procedure. Homeowners received an invoice, a statement 45 days later, then a '7 days' letter cost free to the development, inviting an owner to raise any objections to paying. The next step would be standard debt recovery at court, with the legal costs applied to the development, highlighted in invoices. If the Sheriff puts a ceiling on expenses, there may be a cost to the Development. The Respondent credits any expenses recovered back to the development.

31.4. Financial Obligations and Debt Recovery procedures are in the Written Statement of Services ("WSS") (**Respondent's Production 4**) as well as the Respondent's website. They followed the normal procedures in the WSS in accordance with the Deed of Conditions.

32. **Failure to carry out the property factor's duties**.

33. The Respondent's position is that they have complied with their property factor's duties regarding the Mutual Areas of the Development.

34. In relation to the PLI the Respondent has advised the Applicant of their position in respect of the issue which was identified; shown how the money was apportioned; calculated the overpayment made by her over a period of around five years; and offered to credit back to the Respondent in full the amount of £3.15 in respect of the overpayment over the full period.

35. In relation to the apportionment of costs for debt recovery procedures the Respondent has followed the specified procedures in the WSS in accordance with the Deed of Conditions.

Reasons for the Decision

36. The tribunal made the following findings-in-fact:

36.1. The Respondent became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

36.2. The Applicant is the owner of the Property (Title number WLN42917) which is a house in the Castlepark View Development in Bathgate ("the Development"). The "Development" is a mixed residential development of 65

properties, 53 of which are dwellinghouses and 12 of which are flats (situated in two "Blocks"), together with a *pro indiviso* share along with the proprietors of the flats and the dwellinghouses to "Mutual Areas" which are defined in the **Deed of Conditions for the Property** by BDW Trading Limited which was registered on 17 June 2008, which appears as Entry 10 on the Burdens Section of the Title Sheet for the Property.

36.3. The Respondent is the registered factor with responsibility for the management of the "Mutual Areas" of the Development in which the Property is situated, as well as the "Common Parts" relating to the two Blocks of flats.

36.4. The Applicant was the occupant of the Property at the material time. She currently resides abroad is intending to sell the Property in the near future.

36.5. A mediation was agreed to by the parties and a mediation agreement was signed on 31 October 2016. In terms of that agreement and subsequent correspondence with the tribunal the Applicant confirmed that there were only two live issues of complaint which required to be determined by the tribunal.

36.6. The first live issue was whether the Respondent breached the **Code Section 4.1** and/or its factoring duties in relation to the apportionment of costs for PLI.

36.7. The second live issue was whether the Respondent breached the **Code Section 3** (general principles) and/or its factoring duties in relation to the apportionment of costs for debt recovery procedures to all proprietors in the Development.

36.8. Having identified that it had been attributing liability for PLI incorrectly between proprietors on the Development, the Respondent notified all proprietors and made proposals to the proprietors to reallocate the funds to them in a way which offset the house owners' liability for underpayment of electricity charges over a year against the flat owners' liability for overpayment of PLI for a year.

36.9. The Applicant indicated to the Respondent that she was unhappy with the above proposal. Despite the fact that a quorate majority at an AGM could make a resolution which would make the proposal binding, the Respondent made arrangements to calculate the Applicant's share and offered to refund to her the sum of £3.15 which was the total overpayment made by her in respect of PLI for the period since inception of the factoring duties.

36.10. Once the issue with liability for PLI had been identified, the Respondent dealt with matters in relation to accounting procedures in a clear and transparent way.

36.11. There is no failure to comply with the general principles specified in **Section 3 of the Code**.

36.12. No live complaint was expanded by the Applicant in relation to **Section 3.6a** of the Code which related to sinking or reserve funds.

36.13. The Respondent apportioned costs for debt recovery between all 65 proprietors in the development.

36.14. Clause 5 of the Burdens Section of the title deeds for the Property provides that in relation to Liability for Costs: *"... (iii) The factor can recover unpaid costs on behalf of the Proprietors and may do so in his own name; (iv) where a cost cannot be recovered from a proprietor for some reason ... then that share must be paid by the other Proprietors equally."*

36.15. The Respondent outlines it procedure for Debt Recovery in the **WSS** and on its website.

36.16. The Respondent followed its specified procedure in respect of the apportionment of costs amongst proprietors on the Development in respect of legal costs for debt recovery procedures, in accordance with the Deed of Conditions.

36.17. There is no provision in the Deed of Conditions that the Respondent should seek to identify whether the debt recovery procedure in question relates to a house owner or a flat owner and only apportion the costs amongst that sub-category of Proprietor. There is no legal basis for such an approach on the Development.

36.18. The Respondent did not fail to provide a clear written procedure for debt recovery which outlines a series of steps which [they] will follow unless there is a reason not to. The Respondent applied the procedure clearly, and consistently. The procedure set out how they will deal with disputed debts.

36.19. There was no failure on the part of the Respondent to comply with **Section 4.1 of the Code**.

36.20. Although reference was made by the Applicant in the original application to **Section 1.1aCe** of the Code, there was no complaint by the Applicant that the Written Statement of Services did not set out the

management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee.

36.21. There is no sufficiently specific complaint relative to the Respondent's failure to perform its factoring duties.

36.22. The tribunal is satisfied that in relation to the two live issues the Respondent has complied with its factoring duties.

37. **The tribunal found that the Respondent had not failed to comply with Section 1.1aCe, 3 (general principles or 3.6a) or 4.1 of the Code** and rejects those parts of the Applicant's application.

38. **Factoring duties**. The tribunal found that the Respondent had complied with its factoring duties arising from the Deed of Conditions and the Written Statement of Services and rejects the complaint made in relation to a failure to perform factoring duties.

No proposal to impose a Property Factor Enforcement Order ("PFEO")

39. As the tribunal has not found any breaches of the Code or a failure in the Respondent's factoring duties the tribunal does not propose to make a Property Factor Enforcement Order ("PFEO") in terms of the **2011 Act, Section 20**.

Right of Appeal

40. A homeowner or factor aggrieved by the decision of the tribunal may seek permission to appeal from the First-tier Tribunal on a point of law only within 30 days of the date the decision was sent to them.

Signed ..... Susanne L M Tanner, Queen's Counsel, Legal Member and Chairperson of the tribunal

Date 30 August 2017