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 2016, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/PF/17/0525

The Property: 28-31 Simpson Loan, Edinburgh EH3 9GG ('the property')

The Parties:

Mr James Young, 31/27 Simpson Loan, Edinburgh EH3 9GG ("the homeowner")

Quartermile Estates Limited, incorporated under the Companies Acts (SCO288158) and having their Estate Office at 2 Lister Square, Edinburgh EH3 9GL, represented by GVA Grimley Limited, 127 Fountainbridge, Edinburgh EH3 9QG ("the property factors")

Tribunal Members - George Clark (Legal Member) and Helen Barclay (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 not failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") and, accordingly, the Tribunal does not propose making a Property Factor Enforcement Order.

The Decision is unanimous.

Introduction

In this decision, the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code of Conduct" or "the Code"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the 2017 Regulations"; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as "the Tribunal". The block of which the property forms part is referred to as "Q4".

The property factors became a Registered Property Factor on 28 January 2013 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 dated 19 December 2017, with supporting documentation, namely a covering letter, a document headed "Complaint History", dated 19 December 2017, a copy of an email from the property factors to the homeowner dated 7 June 2016 which contained an arrears report, a copy of the property factors' Written Statement of Services, dated 15 June 2016, a Minute of a Q4 Block Committee meeting held on 11 October 2016, and a copy of a letter from the homeowner dated 19 January 2018, notifying the property factors of the alleged breaches of the Code of Conduct by reference to particular Sections of the Code; and to the Written Representations made by the property factors by letter dated 29 March 2018.

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 property factors had provided misleading information to residential owners in relation to the expenditure accounts covering the years from 2009 to 2015, which made no mention of the use of moneys belonging to the Estate and other blocks on the Quartermile development to balance Q4's accounts, had failed to make accruals in accounts to cover, for example, gaps known to the property factors between electricity usage and billing carried out on estimated accounts. They had also provided misleading information in an assurance given in October 2016 that Q4 had been kept afloat financially only be delaying maintenance work and extending payment times to contractors, whilst the property factors were in the late stages of a 20-month exercise to calculate what to charge owners for what they called "implementation arrears", sums diverted from other accounts to Q4's to cover payments for goods and services. The existence of this liability (in the region of £40,000) was not made known until December 2016. These were breaches of Section 2.1 of the Code of Conduct.

In relation to Section 2.4 of the Code, the so-called "implementation arrears" had not had prior written approval, as no itemised bill had been presented, but they had still been included as a liability in the 2016 accounts.

Section 2.5 of the Code requires property factors to respond to enquiries and complaints within prompt timescales. Since December 2016, requests for an itemisation of the implementation arrears had not been fulfilled.

Regarding Section 3.3 of the Code of Conduct, the property factors had not disclosed until December 2016 their use of Estate and other blocks' funds in the Q4 accounts, nor did they disclose the very high levels of debt. Additionally, their management of the electricity account, shared by Q4 and the New Central Car Park had led to gross, false charges being attributed to Q4 residential owners, a problem which had taken 8 months and much effort on the part of the Q4 Block Committee to unravel.

The property factors had placed an unsubstantiated liability of over £40,000 into the Q4 accounts for 2016. They had been asked on several occasions for an itemised invoice for this sum, which they had changed on several occasions over many months and there were grounds to suspect the accuracy of their calculations. For example, according to the property factors' agents, a sum of £2,652.98 had been charged to Q4's accounts for a legal action in 2011, when it should have been charged to the whole Estate. The homeowner could not find this sum in the Q4 expenditure accounts.

The property factors had failed to comply with Section 4.4 of the Code. The debt problem had been growing for years, but it was only on 7 June 2016 that the property factors or their agents revealed that it stood at more than £90,000 and that essential services were at risk. One defaulter alone had a debt of £34,389.42, having withheld payments for four and a half years in connection with a dispute he had with the property factors. In June 2016, the homeowner had asked for the inspection of a suspected roof leak above the property, to be told that there was no money in the Q4 account to cover the cost. In failing to keep homeowners informed of any debt recovery problems of other homeowners that could have implications for them, the property factors had also failed to comply with Section 4.6 of the Code of Conduct.

The homeowner stated in the application that the property factors had failed to comply with Sections 2.1, 2.4, 2.5, 3.3, 4.4 and 4.6 of the Code of Conduct and that the complaint also related to a failure to carry out the Property Factor's Duties. By email dated 22 January 2018, the homeowner withdrew his complaint in relation to failure to carry out the Property Factor's duties and the application proceeded in respect only of the alleged breaches of the Code of Conduct.

(b) By the property factors

The property factors' written representations were contained in a letter to the Tribunal dated 29 March 2018. They explained that Block Q4 had some long-standing arrears. The extent of the arrears had been discussed with the homeowner and the Block Committee for some time. Decree had been granted in the court action in respect of the highest and longest-standing arrears case in 2012. Not only had this been discussed with the homeowner, but it had been noted in Minutes of Estate Committee meetings, which were issued to all homeowners. The homeowner had been the chair of that Committee. The Q4 Block Committee had since pursued the owner for sequestration and were taking action against another owner for arrears.

Each year, a service charge budget was established. The charge was issued quarterly in advance to each homeowner. Some of the service charge was a contribution to the running of the estate as a whole. At the end of each financial year, the expenditure was independently reviewed and certified. If there was an underspend against budget, a balancing credit was issued to each owner and if there was an overspend, a balancing charge invoice was issued to each owner. The Block Committee, including the homeowner did not appear to be questioning those charges, as they were pursuing legal action on behalf of the Block against other owners, based on those charges.

Given the Block had significant arrears (calculated at 31 December 2017 to be £59,163.65), it was reasonable to assume there would be a shortfall in the cash held by the Block. The statement of assets and liabilities as at 31 December 2017 demonstrated that the Block was being supported by accruals (amounts due but not yet invoiced by suppliers or paid) amounting to £42,164 and by amounts due to the Estate (£33,306.36).

There had not been cross-funding of blocks as the homeowner was suggesting. Q4 had simply not paid the element of the service charge due to the Estate. The balance had not arisen on "implementation", a term which had arisen when the financial function was transferred to GVA Grimley. As part of the transfer exercise, GVA Grimley had implemented all balances across the Estate on to their financial system. This migration included the amounts owed to the Estate by Q4.

The property factors' response in relation to Section 2.1 of the Code of Conduct was that each owner had received audited certificates of annual expenditure and that the existence of arrears had been communicated through Minutes over several years. Services were maintained with cash reserves or through careful management of suppliers' payment terms. The matter of recharging the arrears in terms of the Deed of Condition had been raised in 2016 when the ability to manage the shortfall became difficult due to the scale of arrears of two or three owners. The property factors did not accept that the homeowner had been provided with misleading information.

With regard to Section 2.4 of the Code, the property factors stated that the "implementation arrears" were not work or services in addition to the core services.

The additional charges raised to each owner following the year ended 31 December 2017 were the recovery of arrears, the existence of which had been well documented and discussed with the Block Committee. Under Section 2.5 of the Code, the homeowner had repeatedly requested "an itemised bill" in relation to the implementation arrears, but the property factors had repeatedly advised him that the arrears related to a shortfall in the Block accounts caused primarily by two significant non-payers.

In relation to Section 3.3 of the Code of Conduct, the property factors explained that the main electricity supply to Q4 was partly recharged to the car park with whom the supply was shared, the recharge being calculated each month through a submeter which recorded the car park usage. They accepted that there had been an under recovery of the car park recharge in 2015, but this had been corrected in the 2016 service charge reconciliation. Homeowners were provided with an independently certified expenditure account each year and the charges being levied on homeowners were a reallocation of homeowners' debt, the existence of which had been well known.

The homeowner had complained under Section 4.4 of the Code that the property factors or their agents had not taken early action in relation to debt recovery. The property factors had instigated debt recovery proceedings in 2011, with a court proof in June 2011 and decree being granted on 21 March 2012. This action had been discussed at various meetings. A further decree had been granted in an undefended case. Further action was required to implement the decree and recover the debts and the homeowner, as Chair of the Quartermile Management Committee, advised of potential cost of this action, would not, as Chair, sanction the further procedure. As a Block representative, the homeowner had been involved in the budget setting process. He had attended regular meetings where the existence of significant debt was discussed and it was reasonable to assume that he was fully aware of the threat to budgeted services and non-budgeted services arising due to lack of funds held by Q4.

As regards the complaint under Section 4.6 of the Code, the property factors stated that, as a Block representative and as Chair of the Residents' Committee meetings, the homeowner had been present at a number of meetings where the issue of outstanding debts and recovery was discussed. For reasons of data protection and ongoing legal action, the property owner in arrears had not been identified in Minutes of meetings, but there was no doubt that each representative at these meetings was aware of the identity of the person concerned. It had been the homeowner, as a Block representative, who had proposed at a Management Committee meeting that the debt should be spread across all residents in the Estate. The property factors concluded by saying that the debtor position had been discussed at meetings since 9 November 2010 and most recently on 28 February 2018.

THE HEARING

A hearing took place at George House, Edinburgh on 20 April 2018. The homeowner was present at the hearing and was assisted by Ms Karen Brown. The property factors were represented at the hearing by Mr Mike Milligan, one of Quartermile Directors and by Mr Graham McPhail, a Director of GVA Grimley Limited.

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. He then invited the homeowner to address the Tribunal with reference to his complaints under each Section of the Code of Conduct. The wording of the relevant portions of each Section of the Code included in the application is set out below, followed by a summary of the oral evidence given by the parties in respect of that Section.

Section 2.1. "You must not provide information that is misleading or false."

The homeowner told the Tribunal that he had been aware of one debtor, against whom legal action, costing approximately £35,000, had been taken, but it was not until 7 June 2016 that he had become aware of the other significant debtors, including one of £35,000 resulting from a homeowner having withheld payment of service charges pending resolution of a dispute over a broken window. A deal had been brokered and after the window had been repaired and the homeowner concerned had repaid his debt.

The homeowner said that he had also been unaware of a third debt amounting to some £10,000 and, when the owners were told that there were arrears of £90,000, they could not believe that could happen without financial support from other blocks or from the Development as a whole, but they were told by the property factors at a meeting in October 2016 that the only mechanisms that had been used were delays in maintenance work and extended payment terms agreed to by suppliers. GVA Grimley had told them that there had been no cross-subsidies and in September 2016 they had indicated that there would be a small credit balance on the homeowner's account of approximately £300. This made it all the more surprising when the homeowner found out about the "implementation arrears", which the homeowner understood to be the debt owed by Q4 as at 31 March 2015, the day before GVA Grimley took over the management role on behalf of the property factors. No liabilities had ever been shown on the accounts until 2016 and that was also the first time that a balance sheet was prepared in relation to the service charges.

The property factors told the hearing that the factoring costs within Q4 ranged from approximately £1,500 per annum to £3,000 per annum, depending on the size of flat. The total budget for 2017 was £123,000 and around one-sixth of that, £19-20,000,

was apportioned to the Estate. Mr McPhail stated that where there were arrears of service charges, the options were either not to pay suppliers or not to make the contributions to the Estate. There was reference at Committee meetings to the pursuit of arrears. There would always be arrears on a development and they only become an issue when they reach a certain level. Generally, if an individual's arrears reached three quarters, that would trigger a 14 day letter, followed by a 7 day letter. Normally, that resolved the issue, but in Q4 there had been two "serial" non-payers.

The information that goes to homeowners is generally an expenditure account. It is not normally accompanied by a Balance Sheet, but in this case a Balance Sheet had been requested by the owners in Q4. The Minutes of the meetings of the Management Committee going back to 9 November 2010 referred to discussions about arrears and, at the meeting on 24 October 2011, the Estates Manager had advised that two arrears cases were going through legal channels. GVA Grimley hold regular meetings with the Block representatives, who report back to their Block Committees.

The homeowner stated at this point that he had known a considerable amount about the first case, but in relation to the second one, whilst he accepted that he was aware of it from the meeting in 2010, it had dropped out of discussions after that and he had assumed it had been sorted out.

The property factors explained to the Tribunal that the service charge was billed quarterly in advance, so there were always funds available for the next quarter. They could deal with a shortfall for a number of years, until it reached a certain level. By not paying sums due to the Estate, arrears could be managed. There had never been any cross-subsidy.

The homeowner said that if the actual debt situation was a developing problem, the accounts should at least have shown the headline figures. The property factors responded that if Blocks wanted more detailed accounting it could be achieved, but the Block owners would have to be prepared to pay for the additional work involved.

Section 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 services."

The homeowner stated that the "implementation arrears" had not had prior written approval and if the owners could not see what made up that £42,000 figure, they could not be satisfied with them. It would have been useful to break the figure down year by year to show that the arrears were building up, but one of the Directors of GVA Grimley had said that that would require a complete audit, incurring a huge cost.

The property factors reminded the homeowner that the £42,000 balance was in fact owed by the defaulting owners within Q4. It was not a sum that related to work or services outwith the core service.

Section 2.5. " You must respond to enquiries and complaints received by letter or email within prompt timescales."

The homeowner accepted that his concerns in relation to this Section had been dealt with in the discussion relating to Section 2.4.

Section 3.3. "You must provide to homeowners, in writing at least once a year...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 ."

The homeowner told the Tribunal that the problem regarding the electricity accounts was that the arrangement was that the Block paid the whole bill, then recovered the proportion that was due by the Car Park. The annual bill for Q4 was approximately £12-13,000, so when a bill for £37,000 came in, it should have been immediately investigated by the property factors, but the owners knew nothing about it until they received the accounts in the following September. In essence, in 2015, the owners had been charged £20,000 more than they should have been, and it had taken an enormous amount of work by the Block Committee to sort out. It highlighted the problem of not having complete transparency. Meantime, the Car Park had had the cash flow advantage resulting from the under-recovery.

The property factors accepted that there had been an under-recovery in 2015, but explained that it had been the result of a failure to put accruals through. It had been a single accrual error which had been corrected in the following year's accounts and the most likely explananation was a failure to accrue the most recent bill prior to the year end.

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

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

The homeowner told the Tribunal that he was not referring here to the first debt case, but to the two other defaulting owners, although there had never been a statement by the property factors as to what the implications of that first case might have for the remaining owners. The property factors were telling the owners there was debt, but were not telling them who was in default.

The property factors stressed that the homeowner had been aware of the debt recovery position and he had said that he was not inclined to pursue the debt further to enforce the decree, because of the anticipated costs involved, as the Block would have to fund that action. The debt recovery case had been a defended action, with very large legal costs, but the developers had seen it as a "test case" , so had decided that the Estate should bear the cost. At that stage, 70% the Estate was still in the ownership of the developers, so they bore the main share of the costs. Enforcing the decree, however, would have been at the expense of the Q4 owners.

The homeowner confirmed that his share of the cost had only been about £15 and he had been very grateful that the developers had borne most of the expense. The estimated costs of enforcing the decree had been put at £55,000 and the owners could not pursue it without great care and caution. It had never been the case that there was reluctance to pursue the debt, but there was no point in only achieving a Pyrrhic victory. Consequently, the Q4 owners had taken on the enforcement action themselves, so that they could keep a close eye on costs and keep the matter under constant review.

The property factors said that, as the Q4 owners had wanted to take charge of this themselves, they could not contend that the property factors had not taken action early enough.

The homeowner repeated that in relation to this part of the complaint, he was not talking about the first debt, which had been the subject of the court case, but about the other two main debtors.

The property factors told the Tribunal that at one point there had been a suggestion that GVA Grimley write to the Q4 residents setting out the debt position, but the Block Committee had said that they were concerned that if the letter as drafted went out, it might result in other owners refusing to pay their charges. The property factors were entitled to assume that the Block representatives had the full authority of the Block owners and that they were making them aware of the hole in the finances, which was a matter of regular discussion between GVA Grimley and the Block representatives.

The property factors stated that they had taken the decision to include as part of a balancing charge and in line with the Deed of Conditions for the Estate, the debts due by defaulting owners. If arrears were recovered, the incoming funds would be credited back to the owners, but the Block was in financial crisis and needed funds now.

The property factors contended that it was in the gift of the Block Committee to make the financial position clear in their Minutes which went to all Q4 owners, but the homeowner told the tribunal that the Block Committee did not have the power to prevent GVA Grimley from sending the letter they had drafted and he felt that the Committee should not be seen as a substitute for the managing agents on a matter of such importance, where the debt had reached such a level that the ongoing provision of services was at risk.

Closing Remarks

The parties were then invited to make any closing remarks. The homeowner hoped that in the course of the discussion, the Tribunal had seen how important it was that the owners of Q4 had clarity in relation to management information. There had to be some appropriate explanation of the "implementation arrears", especially as the managing agents on behalf of the property factors could simply apportion the arrears and take the money from them. There had to be more clarity and transparency in the accounting processes, especially now, when the developers might be moving out and the factors might then bale out.

The property factors told the Tribunal that there was a misunderstanding in relation to the balance. They had clearly demonstrated that debt had arisen and was due to the Estate and the constant request for itemisation demonstrated that misunderstanding. It was only fair to assume there would be a level of debt if some owners were not paying. There was the ability to communicate with the other owners through Block Committee Minutes and GVA Grimley had been discouraged from communicating directly with the Q4 owners on the debt issue.

The homeowner said that it was not just the defaulting owners' non-payment that made up the arrears to the Estate. Representatives of the managing agents had stated at meetings that there had been cross-subsidies that affected many if not all of the Blocks. It was not just a matter between Q4 and the Estate.

The property factors again denied that there had been any cross-subsidy. Basically, the Estate was subsidising Q4 by not receiving the proportion due to it of the factoring charges paid by the Q4 owners. Ther was no question of Q4's bills being picked up by, say, Q11 or any other Block.

The parties then left the hearing and the Tribunal members considered the evidence that they had heard, along with the written representations and other documentation before them.

The Tribunal makes the following findings of fact:

- The homeowner is the owner of the property.
- The property forms part of Block Q4 of the Quartermile Development and comprises 63 apartments and, at ground level, 3 retail units .
- The homeowners make quarterly factoring payments to cover communal repairs to their Block and a proportion (approximately one-sixth) of the sums

they pay are in respect of liability for a share of maintenance of the Estate of which the Block forms part.

- There is a Block Committee for Q4 and also, for the Estate, a Management Committee to which each Block sends representatives.
- The property factors, in the course of their business, manage the common parts of the development of which the Property forms part. 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 28 January 2013.
- GVA Grimley act as managing agents for the property factors.
- 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") dated 19 December 2017 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.
- On 19 February 2018, 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

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 2.1 of the Code of Conduct. The Tribunal understood that from 2009 to 2015, the owners only received from the property factors expenditure accounts, which allowed them to compare actual with budgeted expenditure. These would not have shown shortfalls on contributions either by owners to the fund or by the Block to the Estate. It was not for the Tribunal to dictate how accounts should have been run, but the Tribunal was unable to find that, in presenting the accounts in this way, the property factors had given any information that was false or misleading. The issue of Q4 being kept afloat by non-payment of the sums due to the Estate was a matter of fact which was made known to the homeowner, so was not misleading. The homeowner was aware about the extent of the arrears

and the identity of the defaulting owners from at least 7 June 2016, as evidenced by an e-mail sent on that day by Mr Stuart Young of GVA Grimley to, amongst others, the homeowner.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 2.4 of the Code of Conduct. The Tribunal determined that the matter covered by the complaint under this Section of the Code was part of the core service, so the Section was inapplicable. The implementation arrears would not in any event have required any form of prior approval. The Tribunal appreciated that the homeowner might have wished further details from the managing agents as to the make-up of the figure, but they were not in a position to provide that, as it was the result of non-payment by some owners in Q4 prior to their taking over as managing agents for the property factors. In addition, the accounts were approved and audited each year.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 2.5 of the Code of Conduct. The homeowner's complaint was that the property factors had failed to provide an itemised breakdown of the arrears. The Tribunal accepted the evidence of the property factors that it would be a difficult and expensive exercise to carry out retrospectively, although if the owners of Q4 wanted this to be done and were prepared to meet the cost, the property factors would do it. The Tribunal held, however, that the homeowner was well aware that the figure comprised primarily sums due by a small number of non-payers. Initially, the property factors had been unwilling (for reasons of data protection) to identify them in correspondence, but in his capacity as a Block representative and Chair of the Block Committee, the homeowner would know who they were. In the e-mail sent by Mr Stuart Young on 7 June 2016, the detail required by the homeowner was provided and, accordingly, the Tribunal did not uphold this aspect of the complaint.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 3.3 of the Code of Conduct. The Tribunal noted that, prior to 2016, the accounts had been expenditure accounts only, so would not show the arrears position, but held that the homeowner would have been aware that Minutes of meetings referred to the problem of arrears and, therefore, the issue had not been concealed by the property factors. The owners of Q4 discussed the matter at length at their Block Committee Meeting on 11 October 2016 and the position had been clearly set out in the e-mail by Mr Stuart Young of 7 June 2016. The Tribunal accepted that a different accounting system might have included a Balance Sheet, which would have made clear the amount of arrears of owners' contributions, but that was not the way in which the accounts were dealt with before 2016 and the approach taken by the property factors prior to then did not constitute a failure to comply with Section 3.3 of the Code of Conduct.

The Tribunal accepted the evidence of the property factors that there had not been a practice of cross-subsidisation and that the implementation arrears figure comprised accumulated amounts due by non-payers. In relation to the electricity under-recovery, the property factors had accepted that an error had been made in relation to apportionment of the electricity charges between Q4 and the Car Park in the 2015 Accounts, but that this had been identified and corrected in the following year's accounts. This was a one-off error, which the Tribunal determined did not merit the making of a Property Factors Enforcement Order.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 4.4 of the Code of Conduct. The Tribunal held that this particular Section of the Code refers to the Written Statement of Services as well as the ongoing conduct of the property factors. The property factors' Written Statement of Services states that the Managing Agent, in addition to the power to sue for recovery, is entitled to require payment from the other owners by way of an additional levy, in the event of non-payment by an owner, in which event those other owners will be entitled to sue the defaulting owner for recovery. Further, property owners must be deemed to know that, sooner or later, non-payment by an owner or owners will affect the ability of the property factors to continue to provide services at the budgeted level.

The homeowner's complaint was that the property factors had not taken action soon enough, but there was undisputed evidence that they had initiated debt recovery proceedings early in 2011 against one owner and that decree had been granted in March 2012 and that a decree had also been granted in respect of another owner's default. Once the decrees were granted, it was for the owners of Q4 to decide whether they wanted to pursue their implementation, by further court action and, if necessary, sequestration. It appeared to the Tribunal that the homeowner, correctly mindful of the costs involved in further procedure, had been reluctant to pursue that option, so the Tribunal could not uphold a complaint that there was a failure on the part of the property factors.

The property factors had told the Tribunal that the Minutes of meetings as far back as 2009 had shown unpaid debts and that the arrears had been discussed at the meeting of 9 November 2010, at which point the homeowner had suggested spreading the arrears across the whole Estate. The level of arrears might have come as a surprise when set out in the e-mail of 7 June 2016, but the Tribunal was satisfied that the homeowner was aware long before that that there were at least two very significant debtors.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 4.6 of the Code of Conduct. The Tribunal was satisfied that the problem of debt was known to the owners of Q4 by 2009, was regularly discussed at Management Committee Meetings attended by the homeowner, as well as being set out in Mr Stuart Young's e-mail of 7 June 2016 and

was discussed at length at the Block Meeting of 11 October 2016. Further, the Block Committee has taken over the pursuit of two serial non-payers, so must be deemed to be aware of the implications for them. The Tribunal makes no finding on whether the property factors were justified, on data protection grounds, in not identifying the individual defaulters prior to the e-mail of 7 June 2016.

The Tribunal sympathised with the homeowner in relation to the fact that the arrears were not shown in the accounts prior to 2016, but accepted that there was no failure to comply with the Code of Conduct resulting from the form of accounting used by the property factors until then. It was an expenditure account only, to enable reconciliation against budget, so would not disclose any arrears position. This may have contributed to the homeowner, who knew that arrears were building up, believing that Q4 must be being subsidised by the other Blocks in the Estate, but the Tribunal is satisfied that this has been consistently denied by the property factors and that the breakdown shown in the e-mail of 7 June 2016, together with their explanation that the shortfall was funded by non-payment of the sums due to the Estate and by management of creditors, demonstrates that cross-subsidisation by the other Blocks in the Estate has not been happening. The shortfall is due to non-payment of factoring charges by a small number of Q4 owners and a situation has been reached where the property factors cannot continue to offer the budgeted level of service, give the impact on the Block's cash flow of such a high level of debt. Accordingly, the property factors have redistributed the debt as permitted in the Written Statement of Services (which reflects the Deed of Conditions for the Estate) and the Q4 owners have taken on themselves the recovery of sums due by the defaulting owners. The Tribunal accepts that this may be a lengthy and costly process with an uncertain outcome, but it may result in payments being brought up to date, or at least partial recovery, and the Q4 owners will be in control of the process. The pursuit to decree of the first action commenced in 2011 resulted in a legal bill many times the amount sued for and, whilst the Q4 owners paid only a very small proportion of that bill, they have taken control of the further debt recovery action, mindful of the fact that any expenses they are unable to recover will have to be borne by themselves alone.

The Tribunal does not propose to make a Property Factor Enforcement Order.

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.

G Clark

Signature of Legal Member/Chair Date 14 May 2018