Proposal regarding the Making of a Property Factor Enforcement Order

Following Upon a
Decision of the the First-tier Tribunal for Scotland Housing and Property Chamber
In an Application under section 17 of the Property Factors (Scotland) Act 2011

by

Stuart Hogg, 4 Campbell's Close, Edinburgh EH8 8JJ ("the Applicant")

Trinity Factoring Services Ltd, 209/211 Bruntsfield Place, Edinburgh EH10 4HD ("the Respondent")

Chamber Ref: HOHP/PF/16/0128

Re: 4 Campbell's Close, Edinburgh EH8 8JJ ("the Property")

Tribunal Members:

John McHugh (Chairman) and David Hughes-Hallett (Housing Member).

This document should be read in conjunction with the Tribunal's Decision of the same date.

The Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

"Within 31 days of the date of the communication to the Respondent of this property factor enforcement order, the Respondent must:

1 *Pay to the Applicant the sum of £600.*
2 *Confirm in writing to the office of the Tribunal that step 1 above has been carried out."*

Section 19 of the 2011 Act provides as follows:

"...(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order..."

The intimation of the Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the Tribunal office by no later than 14 days after the date that the Decision and this proposed PFEO is intimated to them. If no representations are received within that timescale, then the Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a property factor enforcement order may have serious consequences and may constitute an offence.

J McHugh

JOHN M MCHUGH

CHAIRMAN

Date: 27 February 2017

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DECISION

The Respondent has failed to carry out its property factor's duties.

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner and occupier of a flat at 4 Campbell's Close, Edinburgh.

2 The flat is located within a development known as "Blair's Brewery" (hereinafter "the Development").

3 The Development consists of two historic buildings and associated parking and common areas. The conversion of the buildings into modern flats took place in around 1984.

4 The Respondent commenced as factor of the Development around 15 years ago.

5 A Deed of Declaration of Conditions by Kantel Developments (Edinburgh) Limited recorded 6 February 1984 ("the Deed of Conditions") governs the arrangements which apply among the Respondent and homeowners within the Development including the Applicant.

6 The Applicant bought his flat on or around September 2013 and remains its owner.

7 The Respondent employs sub-contractors to perform maintenance works at the Development.

8 The property factor's duties which apply to the Respondent arise from the Respondent's Written Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.

9 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor (7 December 2012).

10 The Applicant has, by his correspondence, including that of 23 May and 8 August 2016 notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.

11 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at George House, Edinburgh on 13 January 2017.

The Applicant was present at the hearing. He called no witnesses.

The Respondent was represented at the hearing by Alasdair Seale, Managing Director and Gillian Reekie, Property Factor.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 as "the 2016 Regulations".

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.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included a Deed of Declaration of Conditions by Kantel Developments (Edinburgh) Limited recorded 6 February 1984 which we refer to as "the Deed of Conditions" and the Respondent's Client Service Level Agreement which we refer to as the "Written Statement of Services".

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Deed of Conditions and the Written Statement of Services are relied upon in the Application as sources of the property factor's duties.

The Code

The Applicant complains of failure to comply with Sections 1.1a; 2.1, 2.4, 2.5; 3; 4.4, 4.6, 4.7; 5.2; 6.1, 6.4, 6.6 and 7 of the Code.

The elements of the Code relied upon in the application provide:

*"...**SECTION 1: WRITTEN STATEMENT OF SERVICES***

You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code.

You must provide the written statement:

- *to any new homeowners within four weeks of agreeing to provide services to them;*
- *to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage;*
- *to existing homeowners within one year of initial registration as a property factor.*
- *However, you must supply the full written statement before that time if you are*

requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies);

- *to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement….*

1.1a For situations where the land is owned by the group of homeowners
The written statement should set out:

A. Authority to Act
a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;
b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

B. Services Provided
c. the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service);
d. the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified;

C. Financial and Charging Arrangements
e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;
f. what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;
g. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);
h. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);
i. any arrangements for collecting payment from homeowners for specific

projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);
j. how often you will bill homeowners and by what method they will receive their bills;
k. how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements
l. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your inhouse complaints handling procedure (see Section 7: Complaints resolution);
m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;
n. your procedures and timescales for response when dealing with telephone enquiries;

E. Declaration of Interest
o. a declaration of any financial or other interests (for example, as a homeowner or lettings agent) in the land to be managed or maintained;

F. How to End the Arrangement
p. clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination....

...SECTION 2: COMMUNICATION AND CONSULTATION

2.1 You must not provide information which is misleading or false...

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

...2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)...

...SECTION 3: FINANCIAL OBLIGATIONS

While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The overriding objectives of this section are:
Protection of homeowners' funds
Clarity and transparency in all accounting procedures
Ability to make a clear distinction between homeowners' funds and a property factor's funds

3.1 If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

3.2 Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.

3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

3.4 You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the

property).

If you are a private sector property factor:
3.5a Homeowners' floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners.

3.6a In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened in the name of each separate group of homeowners…

…SECTION 4: DEBT RECOVERY…

…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…

…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).

4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs…

…SECTION 5: INSURANCE…

… 5.2 You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this…

…SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE

6.1 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…

…6.4 If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works…

…6.6 If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance…

…SECTION 7: COMPLAINTS RESOLUTION

Section 17 of the Act allows homeowners to make an application to the homeowner housing panel for a determination of whether their property factor has failed to carry out their factoring duties, or failed to comply with the Code.

To take a complaint to the homeowner housing panel, homeowners must first notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties, or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them.

It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in-house complaints procedure and how they make an application to the homeowner housing panel.

7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.

7.3 Unless explicitly provided for in the property titles or contractual documentation, you must not charge for handling complaints.

7.4 You must retain (in either electronic or paper form) all correspondence relating to a homeowner's complaint for three years as this information may be required by the homeowner housing panel.

7.5 You must comply with any request from the homeowner housing panel to provide information relating to an application from a homeowner."

The Matters in Dispute

The factual matters complained of relate to:

(1) Deficiencies in the Written Statement of Services

(2) Failure to allocate charges in accordance with the provisions of the title deeds.

(3) Repairs

(4) Insurance Arrangements

(5) Debt recovery

(6) Complaints/Failures of Communication

(7) Other Matters

We deal with these issues below.

(1) Deficiencies in the Written Statement of Services

The Applicant complains that, contrary to the provisions of Section 1 of the Code, the Respondent's welcome letter, budget and Client Service Level Agreement fail to identify: (a) the basis of its authority to act; (b) the core services provided; (c) the proportion of charges each homeowner is responsible for; and (d) the arrangements for collecting payments for projects or maintenance.

(a) We find that the Respondent's welcome letter of 5 September 2013 ("the Welcome Letter") explains in its first paragraph the Respondent's authority to act and so we identify no breach of the Code in this respect.

(b) We find that, although the term "core services" is not specifically used, the Welcome Letter and the Written Statement of Services do set out the core services provided by the Respondent. We find no breach of the Code.

(c) The only reference to the proportion of charges is to be found in the Welcome Letter which, in turn, refers to the Deed of Conditions. The Code (Section 1.1a C f) requires the relevant proportion "expressed as a

percentage or fraction" to be stated. The Respondent's documents do not do this and we do not consider a general reference to the Deed of Conditions to constitute compliance with the requirement. We therefore consider that there has been a breach of Code Section 1.1a C f.

(d) As regards the arrangements for collecting payments for projects or maintenance on change of ownership, we note, and the Respondent has admitted, the failure of its documents to comply with Code Section 1.1a C i. We therefore consider that there has been a breach of Code Section 1.1a C i.

Property factor's duties are not relevant to this section and we make no finding in respect of them.

(2) Failure to allocate charges in accordance with the provisions of the title deeds

The Respondent acknowledged that it had originally allocated factoring costs among owners in accordance with the properties' rateable values (RV) but without making any allowance for the fact that there are two blocks. That meant that charges were split 16 ways instead of by 12 (in one block) and 4 (in the other).

The Applicant was concerned that the Respondent had not been following the terms of the title deeds in allocating costs both in relation to the two separate blocks but also in other respects. He found it difficult to follow how the allocations had been performed from the bills provided by the Respondent.

The Respondent had written to the Applicant on 17 June 2016 to confirm its misallocations and to advise of the adjustments required based on the previous five year history of allocations. The Respondent has now had regard to the terms of the title deeds and devised a "Charge Key", which identifies five different ways in which charges are to be allocated, depending on their nature.

The Respondent believes that it has corrected past mistakes regarding allocation and is now following the practice required by the titles. The Applicant disagrees. He notes that costs relating to the garage are being shared on an equal basis – not on the basis of RV. Clause (FIFTH) of the Deed of Conditions relates to the garage and provides that each owner of a parking space is to pay an equal share of costs. The Applicant believes costs are, in fact, being allocated by RV. The Respondent says it is being done by

equal share. The Applicant highlighted that RV is wrongly then applied by the re-allocation process. It became apparent that the sums involved were low – estimated at around £4 and the Respondent undertook to resolve the matter by recalculating and paying any shortfall to the Applicant, bearing any resulting cost itself.

Mr Seale was able to contact his office during the lunch break to seek some clarification on the allocations which had been employed. He calculated that the total value of the mis-allocation was likely to be around £125. The Applicant accepted this. Mr Searle undertook that the Respondent would pay to the Applicant the appropriate sum and, in return, the Applicant agreed that he would no longer insist upon this element of the Application. On 20 January 2017, the Respondent emailed the office of the Tribunal confirming that payment had been made to the Applicant. This was subsequently confirmed by the Applicant on 9 February 2017. He confirmed that he had received a payment of £102.65. The Respondent's email to the Applicant detailing the figure to be paid invited the Applicant to advise if he had any disagreement on the figure calculated. He has expressed none and we accordingly take it that the figure of £102.65 is the agreed figure between the parties.

(3) Repairs

A wall within the Development required repair. The Applicant complains:

(a) that the Respondent is in breach of Code Section 2.4 in respect that it failed to consult with the relevant homeowners or to allocate costs properly

(b) in relation to the information provided to him in relation to the prices quoted by contractors

(c) that the Respondent failed to provide copies of quotations

(d) in relation to the materials used for the repair

(e) that the Respondent failed to manage the works adequately

Mr Seale explained the history of the matter was that painting of the wall had originally been instructed but the painter reported that there was bossing of the render which required remedial work. Flashing in the same area was missing and required to be replaced.

(a) **Consultation and allocation** The Applicant complains that the Respondent either had no policy in place for consulting with owners or at least that it did not follow it. It was agreed that the Respondent had written to a group of owners about the repair and that that group did not accurately represent those who were liable, in terms of the titles, for the repair. The Respondent accepted that a mistake had been made and that it had written to a group of owners being those whom it had perceived as likely to be affected by the repair. The Respondent originally thought that the only proprietors with an interest in the wall in question were the owners of flats with a Campbell's Close address. Its letter of 19 April 2016 sought to allocate wall repair costs among those five.

The Respondent's mistake was highlighted by the Applicant and acknowledged in Ms Reekie's email of 27 April 2016.

The Respondent accepts its error in this matter although it indicates that it does have a policy in place for consulting on non-core services. The Respondent's position in any event is that this matter was a core service in respect of which a separate approval procedure was not required. The Respondent has, under Clause (NINETEENTH) of the Deed of Conditions a wide discretion to carry out works and did not need to consult at all. The Welcome Letter indicates that "larger repairs and maintenance works" would be the subject of advance "notification" (not consultation). We accept that these repairs were not large in nature. We find there to have been no breach of property factor's duties or of the Code.

The misallocation of the render repairs proved to be the tip of the iceberg in that it revealed a wider practice of incorrect allocations and we deal with this aspect elsewhere in this Decision.

(b) **Information re Quotations** Quotations had been sought from three contractors. One had refused to quote. The cheaper of the remaining two could not start work for some time. In the circumstances, the Respondent approached the second contractor, Dunwell (which had better availability) and asked it to match the lower tender price of £1520, which it agreed to do.

A mistake was made in a letter by the Respondent dated 10 May 2016 to the Applicant in that a wrong figure (of £2000) had been quoted but only the lower figure had in fact ever been charged. Although the Respondent appears to have made a mistake in the information provided, we do not consider there to have been a breach of the Code or of property factor's duties.

(c) **Quotations** The Applicant had asked for sight of the quotations but complained that there had been a delay. On 29 June 2016 the Respondent by email undertook to provide copies of the quotations on the return from holiday of Ms Reekie.

The Respondent does not accept that there was a delay in providing the information regarding the quotations but accepts that there was a delay in providing copies of the actual quotations themselves. The copy quotations were enclosed with the Respondent's letter of 3 August 2016. We find there to have been a breach of Code Section 6.6 in this respect. We identify no breach of property factor's duties.

(d) **Materials** The Applicant is unhappy that the successful contractor, Dunwell, used an alternative to lead known as IKO, when another contractor had specified the use of lead. The Respondent advised that Dunwell recommended using the IKO material as there had been problems with lead theft. The Applicant feels that lead would look better. He feels that a specification of materials should have been produced for contractors to work to rather than the contractors recommending and quoting for the use of different materials.

The Respondent does not consider these works to be major works and, in these circumstances, it relies upon the advice of its trusted regular contractors. It would not have attempted to prepare a specification of works for a job of this size and type as that would have required an external surveyor's services which would have been an unnecessary expense. We identify no breach of the Code or property factor's duties in this respect.

The Applicant complains that the Respondent failed to respond to his enquiries in accordance with its obligations in terms of Code Section 2.5. In particular, in addition to the delay in supplying quotations, the Applicant complains that the Respondent has failed to respond to email correspondence within stated timescales. The Respondent does not accept this. The Respondent considers that the Applicant has raised detailed and complex enquiries which cannot properly be answered quickly. Overall, it is true that it took the Respondent some time from the original raising of the misallocation query by the Applicant in April 2016 until the formal admission and correction of this on 27 June 2016. The Applicant has identified that the Respondent had indicated that a response expected on 29 July 2016 would be delayed until 1 August 2016. The Applicant chased for a response on 2 August and was advised it would then be produced the following day, which it was. Although the Respondent failed to respond by the date it had stated it would and left the Applicant in the undesirable position of having to chase the Respondent for progress, we do not consider this situation as constituting a breach of the Code or of property factor's duties.

(e) **Management of the work** The render works were delayed to accommodate a short holiday let but the owners were not informed of this. The Respondent's letter of 19 April 2016 had advised the timescale which was

to apply to the repair but this was never updated. We do not consider this to constitute a breach of the Code. Section 6.1 of the Code requires notification to be given regarding progress but in this instance any gap in information does not appear unreasonable given the short delay and that the repair was itself of a minor nature. We find no breach of property factor's duties.

(4) Insurance Arrangements

The Applicant complains that the Respondent has provided information which is misleading or false (contrary to Code Section 2.1) in relation to insurance in two respects: firstly, that the Welcome Letter wrongly advises that there is in place block buildings insurance when there is, in fact, none; and, secondly, that the title deeds require the owners to obtain insurance. He also complains in relation to a lack of information in relation to the calculation of the insurance premium share.

There is no disagreement between the parties as to the facts. Both agree that the there is no block buildings insurance in place and that none is required by the title deeds. It is also agreed that the Welcome Letter is incorrect in that it refers to an insured value of £5m, something which would only apply if the buildings were insured for re-instatement, which they are not.

The "POL insurance" referred to in the Welcome Letter is "Property Owners Liability Insurance" which is intended to provide cover for public liabilities ie those to third parties and not for re-instatement of the buildings themselves.

Mr Seale explained that the Welcome Letter is a standard document sent to new owners in all developments managed by the Respondent. He also confirmed that the vast majority of those developments have buildings insurance and that the Development is unusual in not having this. Mr Searle observes that the mistake ought to have been obvious to recipients because the premium mentioned in the Welcome Letter is very low which would alert the reasonable recipient to the fact that re-instatement cover is unlikely to be included. He advised that the insurance position is also the subject of correspondence with purchasing solicitors when flats change ownership and is a matter of discussion at AGMs. Further, the Respondent had written to owners regarding renewal of the POL insurance on 5 May 2014 (although that letter refers to the insurance as "Public Liability Insurance"). He therefore feels that, in practical terms, it would be unlikely for an owner to be misled by the mistake in the Welcome Letter.

Mr Seale advises that the annual budget makes it clear that the POL insurance is not compulsory but is recommended. He advises that the POL

policy had first been recommended to, and accepted by, owners some years earlier and has been obtained each year since.

Reference was made to Clause (FOURTEENTH) of the Deed of Conditions. It obliges owners to have re-instatement insurance but contains no obligation to insure against other risks of the kind covered by the POL insurance.

We have identified no instance of the Respondent specifically representing that POL is compulsory in terms of the title deeds although we note the reference in the Welcome Letter to its cost being divided *"in accordance with the Deed of Conditions which states all flats are to be billed equally"* and it is easy to see that an owner receiving the Welcome Letter might wrongly infer from this that the POL insurance is a requirement of the Deed of Conditions.

We consider that Section 2.1 of the Code which prohibits the giving of "misleading" or "false" information to require something more than simply providing information which is inaccurate. In our opinion it requires knowingly providing false information or an intention to mislead. In this instance, the reference to the insured sum in the Welcome Letter appears to us to be an innocent mistake. The reference in the Welcome Letter to the arrangements for billing POL are, again, obviously incorrect. While the Respondent has been careless, we do not consider it to have intended to provide information which was false or misleading and, accordingly, we find there to have been no breach of Code Section 2.1 or of property factor's duties.

The Applicant complains that the Welcome Letter fails to comply with Code Section 5.2 in respect that it fails to set out how the premium share was calculated. We do not consider there to be a breach of Code Section 5.2 in respect that the Welcome Letter does state the actual basis of apportionment (equal shares) although, as noted above, it incorrectly refers to the Deed of Conditions. We identify no breach of property factor's duties.

(5) Debt Recovery

The Applicant had a concern regarding the Respondent's debt recovery procedures. The Respondent explained that there had been a history of non-payment by one owner. Full recovery had now been made from that owner. The Applicant complained that the Respondent failed to make a statement in its Written Statement of Services in accordance with Section 4.4 of the Code and the Respondent, correctly, admitted this. We therefore find there to be a breach of the Code. We find no breach of property factor's duties.

The Applicant complained of a failure to keep owners informed of debt recovery problems contrary to Section 4.6 of the Code. The Respondent confirmed that the matter had been resolved without the need for litigation and therefore it considered that there was no obligation to supply information. Mr Searle understood that it would be inappropriate to release information concerning the non-payment to other owners when the matter was not in the public domain. He advised that there was no indication that any owner had wanted this information. He advised that there had been discussion of the matter at the AGM.

The Applicant feels that the only information supplied was the level of arrears which he was able to deduce from the budget/invoice.

We do not consider the Respondent's actions to amount to a breach of the Code or of property factor's duties. The Respondent's actions appear to have been appropriate given that the matter was dealt with prior to court determination and that implications for other owners were unlikley.

The Respondent advises that as full a recovery as was possible had been made from the non-paying owner in question although this left an out of pocket sum of around £15 in respect of irrecoverable debt recovery expense. The Applicant complains that the Respondent has breached Code Section 4.7 by sharing this cost among proprietors. We do not, however, consider that Section 4.7 applies as it relates only to an unpaid charge as opposed to expenses of pursuing debt. We find there to have been no breach of the Code or of property factor's duties.

(6) Failures of Communication/Complaints handling

The Applicant complains of the Respondent's failure to respond to his complaint timeously.

The Respondent has a Complaints Procedure. Mr Searle highlighted the wording of the Respondent's Complaints Procedure and, in particular, that it does not guarantee a detailed response within the specified timescale but merely indicates that the Respondent will "endeavour" to respond within 20 days, which failing an explanation and indication of the anticipated date for a full response would be provided. He considers that the Respondent's response times had, overall, been consistent with its policy. We have not identified any reach of the Code or of property factor's duties in this respect.

The Applicant complains that his complaint regarding the misleading insurance information was not acted upon appropriately. The Respondent wrote to all owners to highlight the issue, but not until 19 December 2016. The Applicant is concerned that owners would have been misled in the meantime and might have delayed in putting appropriate insurance cover in place. The Respondent indicates that the insurance issue was highlighted to owners at the AGM in August 2016. The Applicant could not respond to that as he was not himself present at the AGM.

The Applicant was aware that at least one owner had been under the misapprehension that buildings insurance was provided via the Respondent. He has produced a copy of a Home Report relating to the sale of a neighbouring flat in which the seller has, in the questionnaire section, wrongly advised that there is a common buildings insurance policy. The Applicant uses this to show that confusion does exist regarding the insurance position.

The Respondent's letter of 22 August 2016 is considered by the Applicant to be the final response to the complaint by the Respondent. It makes no reference to the Applicant's right to complain to the Homeowner Housing Panel (being the relevant body at the time). The Applicant complains that this is a breach of Code Section 7.2. It is correct that the letter makes no reference to the right to complain to the HOHP. It is, however, unclear whether the letter of 22 August 2016 was intended to be the Respondent's final response in that it does not actually state that it is, although that might reasonably be inferred from its content and that the letter comes from the Respondent's Director of Operations, which is stated to be the third and final step of the Respondent's Complaints Procedure. We therefore find there to

have been a breach of Code Section 7.2. We have identified no breach of property factor's duties.

(7) Other Matters

Budgets The Respondent sent an annual budget to owners each year. Bills are issued six monthly. The Respondent acknowledged that it had in recent budgets introduced percentages but that these had not been included originally. We consider that the failure to provide this information in earlier budgets such as the 2013-14 budget constituted a breach of the introductory section of Section 3 of the Code which requires it to be made clear how charges are calculated. We identify no breach of property factor's duties

Programme of Works It was admitted that the Respondent had no programme of works for the Development. This had been confirmed by Ms Reekie's email of 6 July 2016. Mr Searle confirmed that the Respondent has a diary system and a quarterly inspection regime which identifies matters likely to require maintenance. While that system may have worked well for the Respondent, Section 6.4 of the Code specifically requires a programme of works which does not exist in this case and so we consider there to be a breach of Code section 6.4. There is no breach of property factor's duties.

Observations

The Applicant has made his complaint by reference to a wide range of Code provisions and property factor's duties and we have had full regard to these. The absence of a specific reference to a particular provision of the Code or to a particular document as a source of property factor's duties in any section of this decision is for reasons of brevity and should not be taken as an indication that it has been overlooked by us.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

Having regard to the significant failures of the Respondent which we have identified, we have decided that the Respondent should be ordered to pay to the Applicant the total sum of £600 which approximately reflects the management fees charged by the Respondent to him during the period of his ownership.

Section 20 of the 2011 Act provides the Committee with a wide discretion as to the terms of any PFEO. In particular, section 20(2) allows us to award such sum as we consider to be reasonable. In all the circumstances of this case, we consider payment of the sum of £600 to be reasonable.

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.

J McHugh

JOHN M MCHUGH

CHAIRMAN

DATE: 27 February 2017