Decision: Section 19 Property Factors (Scotland) Act 2011

Notice of proposal to make a Property Factor Enforcement Order made under Section 19(2)(a) of the Property Factors (Scotland) Act 2011 ("the 2011Act") following upon a Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (the tribunal) in an application under Section 17(1) of the 2011 Act

Chamber Ref:HOHP/PF/16/0151

42 Hollybank Street, Glasgow, G21 2EZ
("The House")

The Parties:-

Mrs Bethia Cormack, residing at the House
("homeowner")
(represented by Mrs Anne-Marie Cormack, residing at the House

Copperworks Housing Co-operative Ltd,
43 Tharsis Street, Roystonhill, Glasgow,
G21 2JF
("property factor")

This document should be read in conjunction with the tribunal's Decision under Section 19(1) (a) of the 2011Act of the same date.
The tribunal proposes to make the following Property Factor Enforcement Order ("PFEO") :

The property factor is to credit the sum of £400 to the factoring account which the homeowner has with it in relation to the House. The property factor is to make such a credit within fourteen days of service upon it of the property factor enforcement order.

Section 19 of the 2011 Act provides as follows:

"... (2) In any case where the committee proposes to make a property factor enforcement order, they 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 them.

(3) If the committee are satisfied, after taking account of any representations make 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 committee must make a property factor enforcement order..."

The reference in the 2011 Act to "the committee" has applied to the tribunal since 1st December 2016. Intimation of the tribunal's Decision and this notice of proposal to make a PFEO to the parties should be taken as notice for the purposes of section 19(2) (a) of the 2011 Act and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2) (b) of the Act reach the tribunal's office by no later than twenty one days after the date that the Decision and this notice 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 ("PFEO") 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.

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.

Martin J. McAllister, solicitor,
legal member of the tribunal.

24th February 2017

Housing and Property Chamber
First-tier Tribunal for Scotland

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42 Hollybank Street, Glasgow, G21 2EZ
("The House")

The Parties:-

Mrs Bethia Cormack, residing at the House
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Copperworks Housing Co-operative Ltd,
43 Tharsis Street, Roystonhill, Glasgow,
G21 2JF
("property factor")

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the tribunal') , having made such enquiries as it saw fit for the purposes of determining whether the factor has complied with the Code of Conduct for property factors, as required by Section 14 of The Property Factors (Scotland) Act 2011 (the 2011 Act), Determines that, in relation to the homeowner's Application, the factor has not complied with the Property Factors (Scotland) (Act) 2011 Code of Conduct for Property Factors ("the Code") and proposes to make the following property factor enforcement order:

The property factor is to credit the sum of £400 to the factoring account which the homeowner has with it in relation to the House. The property factor is to make such a credit within fourteen days of service upon it of the property factor enforcement order.

Background

This in an application by the homeowner in which she alleges that the property factor has failed to comply with the Code in respects of Sections 2.1, 2.4 , 2.5, 3.1, 3.3, 6.3,7.1 and 7.2. The application is dated 16th October 2016. On 23rd November 2016 the matter was referred to a homeowner housing committee and the tribunal assumed responsibility for it on 1st December 2016. The members of the tribunal dealing with the application are Martin McAllister, legal member and Robert Buchan, surveyor, ordinary member.

The property factor lodged written representations dated 13th January 2017 which were accompanied by a number of documents set out in numbered appendices.

Hearing

A Hearing was held at Wellington House, Glasgow, on 8th February 2017.

The homeowner was represented by Ms Anne Marie Cormack, the daughter of the applicant who was not present because of illness. Ms Cormack also gave evidence.

The property factor was represented by Mrs Claire Mullen, solicitor. Ms Fiona Murphy, Director and Ms Donna Richardson, Housing Manager, both employees of the property factor were present and gave evidence.

Preliminary Matter

Ms Cormack confirmed that her mother is the sole owner of the house following upon the death of her father.

Issues

The tribunal thought it useful to explore with parties what they consider the fundamental issues to be.

Ms Cormack said that her mother's solicitors had advised that there is nothing in her title that required the property to be factored and that her mother had opted out of the factoring scheme, had stopped paying management fees to the property factor but had paid her share of costs of the landscaping of the common areas of the development in which the house is situated. When challenged on who would pay for the organisation of landscaping works Ms Cormack said that the proprietors could organise it themselves although she conceded that the property factor had been appointed at a meeting of proprietors. She also said that the size of the management fee charged was out of all proportion to the actual cost of the landscaping works.
Ms Cormack said that her mother attended a meeting of proprietors in 2014 where those attending had been told by Copperworks that the properties had to be factored because all properties had to be and that Copperworks' right to factor was contained in all the title deeds of the properties in the development. Ms Cormack said that she was not at the meeting at which her mother had been accompanied by her sister. Ms Cormack had not been present. She said that at the meeting the property factor had cited custom and practice as the basis on which they had been factoring the houses in the development up to then. Ms Cormack stressed that the position advanced by the property factor at the meeting had been that the titles stated that there had to be a factor and that Copperworks had the right to be such a factor. She said that the advice from her mother's solicitor was that this was not the case. She also said that the property factor had referred to the Tenements Act as a reason for it being the factor.
Ms Cormack said that the bills sent out to proprietors were often for different amounts when all proprietors should be charged the same. She said that she also knew that

someone had not been billed at all. Ms Cormack produced no evidence in respect of these two matters.

Ms Richardson said that there had been a meeting of proprietors in May/June of 2014 and that this had been an informal session and that no minutes had been taken. She said that she attended the meeting with Tracy McDonald and Paul Rocks her fellow employees. She said that twenty owners were present and she confirmed that Copperworks currently own twenty nine of the eighty six houses in the development. She said that Copperworks believed that they had the right to factor the properties on the basis of the title deeds and that those attending the meeting were told that. She said that Copperworks had been dealing with matters on that basis since the stock transfer from Scottish Homes. She said that self - factoring was not discussed at the meeting. Ms Richardson said that neither she nor either of her fellow employees at the meeting had cited the Tenements Act as a reason for Copperworks to be factor.

Ms Murphy said that as far as she was aware all proprietors were charged the same. She said that she had checked a significant number of files and had not find any evidence that homeowners had been charged differently. Ms Murphy said that Copperworks had believed that the title deeds gave them the right to factor and to charge for the service. She said that, following the Act, Copperworks sought to have themselves formally appointed and this was done at a meeting of proprietors on 18th October 2015.

Alleged Breaches of the Code

The tribunal considered the alleged breaches of the Code in Turn:

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

Ms Cormack stated that she considered that false information had been provided to her mother at the meeting held in 2014 when she had been told that the title deeds of her house stated that the property had to be factored by Copperworks and she said that this information was misleading because the title deeds do not state this. Ms Murphy said that this had been stated but said that there had been no malice or intent but had been a genuinely held belief of Copperworks. Ms Cormack said that the property factor had said at the meeting that they had to factor the property because of the Tenements Act. Ms Richards said that she was at the meeting and did not accept that there had been reference to the Tenements Act. She said that the property factor believed that it had a right to factor because of custom and practice. The written representations made reference to Copperworks factoring the properties in the development since the stock transfer from Scottish Homes around 1998.
Ms Murphy said that it had not been easy to check the position with the titles because of the way the title had been framed and that titles in the development had to be examined. She said that when the matter was fully investigated the property factor accepted that it had been wrong in its belief that the properties had to be factored and she said that she had offered to waive management fees from the period from 1st October 2011 to 30th September 2013 which amounted to a sum of £252.40 She said the offer was made to the homeowner as a gesture of good faith and because it had taken some time for Copperworks to determine what the position was. She referred

the tribunal to the letter from Copperworks dated 2nd October 2013 which was at Appendix 6 of the papers lodged. This letter set out the offer made and stated that the property factor's solicitor had confirmed that it had the right to factor the properties and to make management charges. She said that this offer had not been accepted by the homeowner.
Ms Murphy said that the right to factor was based on custom and practice but that there had been a vote of proprietors on 18th October 2015 which gave authority to continue with the factoring.
Ms Murphy said that the common areas would have public liability insurance cover which was paid for by the property factor.

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).

Mrs Mullen referred the tribunal to the written statement of services which had been lodged and which contained reference to delegated authority. She said that there is a procedure to consult as envisaged by the Code and that her clients have not breached this particular section of the Code.
Ms Cormack accepted that the necessary matters are covered in the written statement of services and withdrew this part of her application.

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 time should be confirmed in the written statement (Section 1 refers).

Ms Cormack said that her mother's solicitors had written to the property factor on numerous occasions without receiving a response. She said that her mother had not been sent copies of the correspondence sent by the solicitors and could produce no evidence in this regard. Mrs Mullen said that her clients got a letter from Mrs Cormack's solicitor on 3rd October which had been dated 30th September and that it had been replied to on 10th October, all in the year 2016. The tribunal were referred to copies of the letters which are appendices 8 and 9.
Ms Murphy said that no other correspondence had been received from Mrs Cormack's solicitor.

Ms Cormack said that after the meeting of proprietors in May/ June 2014, there had been a two year delay in matters being resolved with regard to what obligations there were in the titles with regard to factoring. Ms Murphy said that during this time the homeowner had been engaging with the complaints procedure and that it would be wrong to say that there had been no action during this period. She said that she did speak to Mrs Cormack and her daughter during this period and that she was also aware that during the period Mr Cormack was seriously ill and that she did not want to trouble Mrs Cormack unduly.

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).

Ms Cormack indicated that she would not insist on this part of her application since the matter that her mother had concerns about in connection with financial information was breach of section 3.3 of the Code.

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.

Ms Cormack said that her mother received no statements setting out what she was charged for. The tribunal were referred to appendix 1 which contained invoices which set out works done, the cost to the homeowner and the management fee. Ms Cormack said that there should be greater clarity and Ms Murphy accepted that the fraction showing the calculation of the amount due was missing. Mrs Mullen said that all homeowners know that the share of what they are being asked to pay for works is a one eighty sixth share.

Ms Murphy said that Mrs Cormack had raised with her a query about the procurement process for works and that this had been fully discussed with and explained to Mrs Cormack's daughter including the strict procurement guidelines followed by Copperworks.

Mrs Mullen said that her clients produced six monthly invoices in compliance with the Code.

6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in- house staff.

Ms Murphy said that she met with Mrs Cormack and her daughter Susan and had explained to them the process of how contractors were appointed. Ms Murphy said that she thought that Susan had been satisfied with the explanation but not the outcome. Ms Murphy said that the homeowner had not asked for any further information.

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.

Ms Cormack said that she accepted that the property factor had a written complaints resolution procedure but that she did not accept that it had been followed by the property factor.

Ms Cormack said that she considered that there had been a big delay in the property factor communicating with her mother.

Mrs Mullen said that the complaints procedure set out that complaints are to be dealt with within a period of 21 days. The tribunal was referred to the property factor's written representations which detailed various letters sent by Mrs Cormack and the responses by Copperworks and Mrs Mullen indicated that the dates showed that all were timeously responded to.

The tribunal noted that a Notice of Potential Liability had been registered against the House and Ms Cormack said that her mother had received no notice that the property factor intended to do this. It was noted that the Notice post dated the date of the homeowner's application and that the legal costs of the Notice had been debited to the homeowner's factoring account with the property factor. Ms Murphy had no information with regard to whether or not the homeowner had been advised that such a course of action was to be pursued.

Submissions

Ms Cormack asked the tribunal to consider all that she had said and the detail within her mother's application. She said that her mother's title had been burdened with a Notice of Potential Liability which had been registered after the application had been made to the homeowner housing panel. She said that the legal costs of this had been added to her mother's factoring accounts.

Ms Cormack said that she accepted that, because of the residents' votes, Copperworks are entitled to factor the development now but she stated that she considered the amounts charged for management fees to be excessive. She said that any communications with the property factor was always initiated by her mother and her family. She said that the property factor should have done more to come to a resolution and she said that her mother had relied on the advice of her solicitor who stated that the property factor had no right to factor.

Mrs Mullen said that her clients' position is that they did not state that every property requires to be factored but that they did accept that they had stated that they had a right to factor in terms of the titles of the properties in the development. She said that this was a genuine misunderstanding on the part of the property factor and had been corrected when the matter had been fully investigated. She invited the tribunal, if it considered there to be a breach of the Code in this regard, to find that the property factor had no intention to mislead.

Mrs Mullen said that, prior to being formally appointed factors by the residents, her clients had carried out factoring duties on the basis of custom and practice. She said that the applicant had paid the factoring bill since 2005 but had stopped some years later. She said that the invoices had always been clear in showing that a management fee had been charged. She said that for many years the applicant had accepted the service provided by the property factor and had paid the invoices.

Mrs Mullen said that, if the tribunal considered that there had been breach of the Code, it takes cognisance of the goodwill gesture offered to waive some of the management fees.

Mrs Mullen invited the tribunal to consider that the property factor had responded in timeous fashion and that there had not been breach of Section 2.5 of the Code. She referred the tribunal to the productions lodged and she also stated that her clients did not accept that Mrs Cormack's solicitors' letters had not been responded to. She stated that the applicant had not produced letters from the solicitors of the homeowner other than the one which it had replied to.

In relation to alleged breach of 3.3 of the Code, Mrs Mullen said that her clients had provided detailed financial information in the six monthly invoices issued to residents and that the Code had been complied with in this regard.

In relation to Section 6.3 of the Code, Mrs Mullen invited the tribunal to consider that no request for information had been made. She said that Mrs Cormack and her daughter had discussions with the property factor on these matters but no evidence had been led to support the contention that a request for information had not been complied with.

Mrs Mullen said that it is accepted that there is a complaints resolution procedure and she invited the tribunal to consider that it was followed by the property factor. She accepted that it had taken time to check the title position.

In relation to alleged breach of Section 7.2 of the Code, Mrs Mullen said that the application to the homeowner housing panel had been made prior to final resolution of the complaints process. She asked the tribunal to accept that the Code had been followed in this regard.

Deliberations

The crux of the homeowner's dissatisfaction with the property factor is clear and centres around what she considered was incorrect information provided regarding the right of the property factor to factor the property and the right to charge a management fee and its level. It seemed to the members of the tribunal that all other allegations of breach of the Code flow from these issues.

The tribunal considered the title to Mrs Cormack's house. It had a copy of the Land Certificate GLA 64535. It is clear from the Land Certificate that the House was formerly part of the stock of the then Scottish Special Housing Association and it had been sold

in terms of the Right to Buy legislation. In the Burdens Section is a Deed of Conditions by Scottish Special Housing Association recorded on 23rd January 1989. This is in fairly typical terms and refers to the ongoing powers of Scottish Special Housing Association to continue to have input in management of the properties in the Development as Feudal Superior. Such references to a Superior are now redundant with changes in legislation. There are provisions in the Title which set out that the proprietor of the House will have ongoing responsibility for maintenance of various items including open spaces. It states that decisions with regard to such maintenance are to be decided by a majority of proprietors but that, where the Superiors own the majority of houses in the development, they shall have the right to carry out such maintenance.

The members of the tribunal considered the evidence relating to the issue of the property factor's right to factor the common areas of the development. The tribunal accepted that Copperworks had such right by custom and practice since it had carried out the duties since the stock transfer around 1998 and that this had been put beyond any doubt when a meeting of proprietors had appointed Copperworks as property factor at the meeting on 18th October 2015. The tribunal noted that the homeowner had concerns at the level of management fee charged and considered that it was not for it to come to a determination as to whether or not it is a reasonable charge. There are provisions within the title deeds for homeowners to take steps to deal with such an issue and, if a majority of homeowners consider the charge to be excessive, they could take steps to have the property factor removed. It also noted that the property factor had provided detailed information to the homeowner which set out the basis of the charge.

The tribunal then considered the homeowner's position that, at a meeting of proprietors in May/June 2014, the property factor had stated that it had a right to factor in terms of the title deeds and that every property had to have a factor. The tribunal considered it helpful that Mrs Mullen had conceded that her clients had stated at the meeting that they had the right to factor because it was contained within the title deeds. The tribunal could make no finding with regard to the homeowner's assertion that the property factor had stated that every property required to have a factor or that reference had been made to the Tenements Act.

The tribunal then considered whether or not the position adopted by the property factor at the meeting of May/June 2014 was false or misleading. There was no question that the information was incorrect. The tribunal accepted that the property factor had no intent to provide false or misleading information but it did not have a right to factor in terms of the title deeds. The property factor then appeared to take some time to resolve matters but the tribunal accepted as reasonable that it required to take legal advice and that a number of titles within the development had to be examined.

The tribunal considered it commendable that the property factor had offered to waive part of the management fee in compensation for the delay in resolution of matters and because of the fact that it had adopted a position which was incorrect.

The tribunal finds that there has been a breach of Section 2.1 of the Code and that it is appropriate that the property factor compensates the homeowner for this. It finds that the property factor should credit the homeowner's factoring account with the sum of £400. For the avoidance of doubt the tribunal consider that this sum should be considered to be inclusive of the previous offer made by the property factor to waive charges.

The tribunal considered the evidence regarding the homeowner's contention that the property factor had not dealt properly with enquiries and complaints. It appeared that a major part of the homeowner's evidence in this regard was in relation to letters from her solicitors which had not been responded to. Ms Cormack could provide no documentary evidence in this regard and Ms Murphy's position was clear and that was that the only letter received from the homeowner's solicitors had been a letter of 30th September 2016 which had been received on 3rd October and responded to on 10th October 2016. The tribunal finds no evidence that letters from the homeowner's solicitors had gone unanswered by the property factor. It considered it somewhat unusual that the homeowner's solicitors had not provided her with copies of such letters.

The tribunal then considered whether or not there was breach of the relevant part of the Code in any other respects. There had been a gap from the meeting in May/June 2014 to resolution of the question of authority to factor but the tribunal accepted the evidence of the property factor that it was not the case that there had been inaction and that there had been contact with the homeowner and her daughter during this period.
The tribunal finds that there is no breach of Section 2.5 of the Code.

The tribunal examined the copy invoices that it had been provided with which gave details of the management fee charged and had items "common repairs" and "grounds winter maintenance." Ms Murphy accepted that greater clarity could be provided by showing the total costs for such works with the proportion due to be paid by the homeowner eg. £xxx and 1/86 £yyy. The tribunal finds that, whilst it would be helpful to provide such further detail, its absence, in itself, did not amount to breach of the Code.
The tribunal finds that the provision of six monthly invoices did provide a detailed financial breakdown of charges made and a description of activities and works carried out. The tribunal had regard to the letter from the property factor to the homeowner dated 26th June 2016 which provided considerable detail on how the management fee had been calculated.
The tribunal finds no evidence to support breach of Section 3.3 of the Code.

Ms Murphy gave evidence that she had met with the homeowner and her daughter and had explained the procurement process and how contractors were appointed. She said that she was not aware that the homeowner had required further information. Ms Cormack provided no evidence in relation to this part of the alleged breach of the Code.
The tribunal finds no evidence to support breach of Section 6.3 of the code.

Ms Cormack indicated that the property factor had a written complaints resolution procedure but her position was that this had not been followed by the property factor. Ms Murphy had given evidence that it had taken time to go through the titles and get legal advice with regard to the issue of whether or not the property factor had the right to factor the property.
She said that the application to the homeowner housing panel had been made before the complaints process had been concluded. The tribunal had no evidence before it that the property factor had not followed its complaints resolution procedure and it did accept that consideration of the homeowner's complaint was still in the process of

being dealt with when she submitted an application to the homeowner housing panel. It noted and accepted the detailed information given within the written representations on this aspect.
The tribunal finds that there is no evidence to support breach of Sections 7.1 and 7.2 of the Code.

Note

The tribunal noted that a Notice of Potential Liability of Costs had been registered against the homeowner's property and that this had been done after she had submitted the application to the homeowner housing panel. The Notice is in respect of arrears on the factoring account. Neither party had made representations on the matter other than to state that it had been made and Ms Cormack stating that her mother had received no notice of the property factor's intention to proceed with such a Notice. The tribunal finds that, since it had been made after the lodging of the application, it could come to no determination on the matter but it did consider it unfortunate that the property factor had chosen to take such action after the making of the application when it would have known that the matter was likely to be resolved by the panel/tribunal. It also considered that, in the circumstances, it is unfortunate that the property factor had debited the homeowner's factoring account with the legal expenses of such a Notice.

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.

Martin J. McAllister, solicitor,
legal member of the tribunal.

24th February 2017