Housing and Property Chamber
First-tier Tribunal for Scotland

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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016

Chamber Ref: FTS/HPC/LM/17/0245

Re: Development at Caldermains Estate, Cleland, Motherwell

The Parties:-

Mr Kieran McKay, residing at 20 Baxter Brae, Cleland, Motherwell, ML1 5FG ("the Homeowner")

Life Property Management, Regent Court, 70 West Regent Street, Glasgow, G2 2Q7 ("the Factor")

Tribunal Members

Helen Forbes (Legal Member)

Helen Barclay (Ordinary Member)

Decision

The Tribunal determined that the Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Sections 1.1a Ce and 2.5 of the Property Factor Code of Conduct ("the Code").

The decision is unanimous.

Background

1. By application received on 29th June 2017 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") for a determination that the Factor had failed to comply with Sections 1.1a Ce, 2.4, 2.5, 6.3 and 6.6 of the Code. Details of the alleged failures were outlined in the Homeowner's application and associated documents comprising letters and emails to and from the Factor, the Homeowner's title deeds, and LPM's Statement of Services. The failures outlined by the Homeowner comprised:

(a) A competitive tendering exercise was not carried out by the Factor when a new gardening and grounds maintenance contract was awarded. Residents were not consulted about replacing the previous contractor. There was no procedure in place for consulting with homeowners in this regard. The Factor had produced a back-dated tender document when further information had been requested by the Homeowner.

(b) There was a lack of clarity over the management fees charged by LPM and their process for reviewing fees had not been communicated properly to homeowners.

(c) Timescales for dealing with complaints and communication were regularly exceeded.

The Homeowner also applied (by lodging an email dated 12th July 2017 amending his application) for a determination that the Factor had failed to comply with its duties under section 17 of the Act in respect of a failure to:

(i) Comply with the Data Protection Act 1998;
(ii) Carry out duties in regard to setting up a residents association and meeting with said association quarterly, as stated on the Factor's website.

2. By Minute of Decision dated 10th August 2017 a Convenor of the Housing and Property Chamber referred the Application to a Tribunal.

3. On 11th September 2017, the Factor lodged submissions and five appendices containing the Deed of Conditions relevant to the development, the Factors Statement of Services, copies of communications between the parties, copies of communications with contractors, photographs pertaining to ground maintenance works, and documentation relating to previous meetings of the residents association.

Hearing

4. A hearing took place at 10.00 on 12th October 2017 at Hamilton Brandon Gate, Brandon Gate, Ground Floor Block C, Leechlea Road, Hamilton, ML3 6AU. The Homeowner was present. The Factor was represented at the hearing by Mr David Reid, Managing Director. Mr Reid was supported by Mr Fraser Dunlop, Property Factor.

Neither party called additional witnesses.

5. The Legal Member raised a preliminary point in relation to the Homeowner's complaint that Data Protection legislation had not been complied with and that this was a breach of the Factor's duties in terms of section 17 of the Act. She informed parties that the Tribunal would not hear any arguments in this regard at this hearing as the most appropriate body to deal with any such complaint was the Scottish Information Commissioner. This body has the appropriate specialist expertise in this area, and a homeowner would be expected to have approached this body in the first instance. The Homeowner indicated that he had already done so, and was awaiting a response.

6. The Tribunal then dealt with each of the Homeowner's complaints in turn.

Evidence and Representations

Failure to comply with section 1.1a Ce of the Code

7. Section 1.1a Ce of the Code states *'[The written statement should set out] the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee.'*

The Homeowner said that he received a welcome pack when he moved to the development in March 2016. Upon making enquiries to ascertain the level of management fee to be paid to the Factor, he noticed that the fee on the website was different to the fee quoted to him by the Factor by email. Furthermore, when he divided the total development sum payable to the Factor by the number of properties in the development, the management fee per property was different again. Thus, there were three different management fees quoted for the same service.

The Homeowner also said that there was no process in place for reviewing and increasing or decreasing the fee, as required by the Code. He had asked the Factor what the process was, and he was told that the fee would be increased every two years. There seemed to be no consideration that the fee might decrease rather than increase.

On behalf of the Factor, Mr Reid said that he accepted the wrong management fee had been quoted on the firm's website and by email to the Homeowner, due to administrative error. The correct fee had been circulated to homeowners prior to Mr McKay moving into the development.

He said the management fee is reviewed every two years. It is not a foregone conclusion that the fee will increase; however, that is the likelihood, in reality. He pointed out that in 2014 the developer had a higher budget in place for management fees and this was reduced. The homeowners are written to three months before the fees are changed. They then have an opportunity to arrange a meeting of the residents association or question the management fee. The Factor is now looking to review the fee annually as the operating costs are increasing.

Mr Reid said a schedule of fees is issued with the Statement of Services to homeowners. The Statement of Services is generic. Homeowners can go the portal on the firm's website to access all relevant documents. It is noted in the Statement of Services that the fee will be reviewed on an annual basis. The Statement of Services is to be amended next month to state that the fees are on the website. Following questions from Tribunal Members, the Factor confirmed that the generic Statement of Services goes to all developments, and that the schedule of fees is development specific.

Failure to comply with Section 2.4

8. Section 2.4 of the Code states: *'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. 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 emergencies).'

The Homeowner said that the Factor's website states that the Factor will set up a residents association and that this has not happened. There was a residents association set up some years ago but he understands that the homeowners had to do that themselves. It is not currently active. The lack of a residents association means there is no procedure to consult with the homeowners and seek their approval for work or services required. This was clear when the maintenance contractor was changed and the homeowners were not consulted. Following questions from Tribunal Members as to whether the Homeowner was stating that work or services had been carried out 'in addition to those relating to the core services' as mentioned in the particular section of the Code, he said that a padlock on an area housing a Sustainable Urban Drainage System ('SUDS') had been changed without any consultation and the residents were charged £75 for this, even though workmen had broken the original padlock.

Responding to questions from Tribunal Members, the Homeowner said that he accepted that the Deed of Conditions for the development formed part of his title deeds and that it laid out the Property Factor's authority to carry out certain works; however, he said it was not available to him at the time of moving in to the property. He only became aware of it when making the application to the Tribunal. He said it would be helpful if it was referred to in the welcome pack from the Factor, as there can be up to a year's delay in waiting for a Title Sheet from Registers of Scotland. The Homeowner accepted, following questions from Tribunal Members, that the Statement of Services provided by the Factor refers to deeds of conditions as the possible source of authority to act; however, he said that the Statement of Services did not fully explain what this meant. He was aware that the Deed of Conditions was available on the Factor's website portal, but not all homeowners have access to the internet. Some of the properties in the development are rented and the tenants would have no knowledge of the contents of the Deed. The Homeowner said there is an expectation that the Factor will take the lead in matters relating to meetings and the residents association. It is not good enough for the Factor to shrug off their responsibility and leave it to the homeowners.

Mr Reid said that the padlock on the SUDS was broken by Scottish Water contractors. The Factor put another padlock in place for safety reasons as this was considered an emergency. The developer, Loch Tay Homes, has been asked to pay the bill for the padlock, and if the Factor is successful in recovering the cost, the homeowners will be reimbursed. Mr Reid outlined that the Factor's authority to carry out core services and other works is detailed in 1) the Statement of Services; 2) the Deed of Conditions; and 3) the Title Conditions (Scotland) Act 2003.

With regard to the residents association, Mr Reid said that when the Homeowner asked for an Annual General Meeting, plans were put in place, however, the plans had to be stalled due to significant drainage problems experienced by one homeowner. There are also issues to be discussed about the homeowners maintaining the drainage system. These matters have implications for the whole development and there have been meetings with the local authority and Scottish

Water, and further information was required from the developer. It was felt that there was no point in having the AGM until the Factor had all the information. They now have the information and the AGM was due to take place on the evening of 12th October 2017. It was originally scheduled for an earlier date but had to be re-scheduled. At the meeting, homeowners will be informed that maintenance of the drainage system is going to mean higher costs for each homeowner.

Mr Reid said that, with the exception of the padlock, there had never been any additional works required. He felt that large works were unlikely to be required, but in the event that such works were necessary, the Factor would consult with all the homeowners before carrying out any such work. In response to questions from Tribunal Members, Mr Reid said the Factor would call an AGM or EGM of the residents association, and write to all the homeowners before carrying out any work.

Mr Reid said he had doubts about whether the original committee of the residents association had been properly constituted and the three previous AGMs had not been quorate; however, they had continued to deal with the committee in good faith until the Chair of the association moved away. The Factor had attempted to communicate with the association after that, but there was no response. The Factor has had meetings with any homeowners that have problems.

With regard to the Deed of Conditions, Mr Reid said he was aware that some solicitors do not bring the Deed to the attention of their clients upon purchase of a property, but the Factor could not be held accountable for this. The Deed of Conditions is available online on the Factor's portal, and it is referred to in the Statement of Services. In the event that they are contacted by a homeowner about the Deed, the Factor will try and summarise it, and make it more understandable.

Failure to comply with Section 2.5

9. Section 2.5 of the Code states: *'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 HOs informed if you require additional time to respond. Your response times should be confirmed in the written statement.'*

The Homeowner said that he had contacted the Factor when he moved into the development to request further details in relation to the fees, as previously mentioned. He did not receive a response to his initial email on 13th April 2016, so he had to chase them up by telephone and he was advised to send his email again. He was informed that all the information was online, but he found that he couldn't register online in order to access the information, so he had to contact the Factor repeatedly and they failed to give him clear answers as to how to register. They did not respond to his requests timeously.

More recently, following discussion regarding the three different levels of fees, the Homeowner had been in touch with Alasdair Wallace of LPM. The Homeowner had been told that the Factor would waive part of his fees in recognition of their error. The Homeowner asked for a new bill to reflect the situation and he has never

received that. He emailed Alasdair Wallace and received an automated out of office response. He has never received any further response to his email.

Mr Reid said that the Homeowner had been written to on 18th May 2017 regarding the offer to waive part of the fees. As far as Mr Reid had been aware, the Homeowner had not responded to Alasdair Wallace; however, he accepted the Homeowner's submission that a response had been made, and that the Homeowner had received an out of office email. The matter had not been passed on to Mr Reid. He said he could only apologise to the Homeowner on behalf of the Factor for this oversight.

Mr Reid said that a new online system had been put in place in 2015 and there were technical problems in accessing the portal. He accepted that a better response should have been received from the Factor's Client Services Department. The emails from the Homeowner should have been passed to the relevant department. The technical problems have now been addressed and emails go straight to Support Services. The Factor had accepted that they had not responded to the Homeowner within their preferred timescales and this was taken into account in offering to waive the fee. They had apologised to the Homeowner for the situation.

Mr Reid was asked by Tribunal Members about the wording of timescales for response to queries, as set out in the Statement of Services on the page entitled 'Communication and Consultation', noting that it is stated that the Factor '**should** contact you within 48 hours' in relation to telephone queries, and '**should** acknowledge within 3 working days' in relation to letters. Mr Reid was asked whether he thought the wording ought to be 'will' rather than 'should', given that the Code states 'your response times should be **confirmed** in the written statement'. The Factor said that the Statement of Services was to be reviewed and they will look at this issue. He conceded that the Factor had not responded as they would expect to on the occasions outlined by the Homeowner.

Failure to comply with Section 6.3

10. Section 6.3 of the Code states: *'On request, you must be able to show how and why you appointed contractors, including cases where you have decided not to carry out a competitive tendering exercise or use in-house staff.'*

In relation to the complaint that the Factor had failed to carry out a competitive tendering exercise for the appointment of contractors for grounds maintenance, the Homeowner said that the first he knew of the change of contractor was when he received an invoice. He asked the Factor for the reasons for the change and he was told there had been complaints from homeowners regarding the previous contractors. He was told that, given that the problems had arisen mid growing season, new contractors had to be appointed quickly. He was given the impression that it was being treated by the Factor as an emergency situation. His concern was that the new contractor had not been appointed in terms of the Code. This was not an emergency situation and the principles of best value had not been applied by the Factor. He felt the Factor should have a) contacted the homeowners; and b) carried out competitive tendering before the appointment was made. As far as he was

aware, there were very few complaints about the previous contractors. He felt it was disingenuous to treat the situation as an emergency. The Homeowner said he accepted there was no active residents association in place but he felt that the appointment of the new contractor without consultation set a dangerous precedent and was unfair. The new contractor's fee was more than double the fee of the previous contractor, which meant a significant increase for the homeowners.

Mr Reid said that the Factor received a significant number of complaints about the work carried out by the initial contractor. This contractor was not a dedicated grounds maintenance contractor, but a handyman. The handyman had been put in place by the residents association some years previously. In 2015, the Factor brought in a health and safety consultant and several issues in relation to the handyman were highlighted. The Factor was already aware that every contractor required to have public liability insurance and health and safety documentation in place, and had been asking the handyman to supply this. The handyman eventually provided evidence of public liability insurance, but no health and safety documentation was provided despite repeated requests by the Factor. Mr Reid said that the matter was escalated to him for his attention. He made the decision that the handyman must be replaced. This was mid growing season and another contractor was required as a matter of urgency. No consideration was given to consulting the homeowners before replacing the handyman, as it was felt that the lack of health and safety documentation left the Factor exposed. The Factor had dealings with a grounds maintenance contractor that carried out work on another development that they managed. That contractor was approached, and he agreed to step in until the close of the season. The contractor carried out some improvement works free of charge. In November, a competitive tendering exercise was carried out and the same contractor provided the lowest quote and was appointed. The new contractor provided the relevant health and safety and insurance documentation. Mr Reid said that the Factor has the authority in terms of the Deed of Conditions to manage core services, and thus, to replace the contractor in such a situation.

Failure to comply with Section 6.6

11. Section 6.6 of the Code states *'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.'*

The Homeowner said that he had requested sight of a quotation that had been provided to the Factor by the new contractor in November 2015. He had been provided with a Word document dated 11th November 2015, but it was clear that the document had been created in May 2016. This gave him concern that the quotation had been provided retrospectively, and that the Factor may have been using it 'to cover their tracks'. He said he was not suggesting that the quote had been 'doctored', but he was concerned that the original documentation was not available on request, and the document provided did not constitute what might be expected by the Code.

Mr Reid refuted any claim that the document had been adjusted by the Factor. He referred the Tribunal to emails lodged between himself and the contractor (Appendix 4) that clarified the situation. He said that the Factor's office had been paperless since 2013/2014. All hard copy documents are archived. The hard copy of the quotation would have been scanned and archived. The relevant box had been retrieved from the archives but the hard copy of the quotation was not there, so the Factor had asked the contractor to supply a copy. The Factor could not be held responsible for the way in which a supplier created or retained documents.

Failure to carry out the Property Factor's duties

12. The Homeowner's said his complaint was that the Factor was failing in their duties which they state they will carry out on their website. The website states the following:

'On completion of a Development and full occupation of all properties, the Property Manager will call a Residents Meeting as per the timescales laid down in the Deed of Conditions. If at the meeting there is a sufficient majority of Residents (majority percentage is detailed in the Deed) in favour of setting up a Residents Association, then a Committee will be formed of interested Residents to make decisions regarding maintenance and costs for the Development. An ***Ipm*** *representative will meet with the Committee once a quarter to discuss the Development Issues.'*

The Homeowner has been calling for a residents meeting since April 2016, but this has not happened and residents have not received the service that they should have received and could reasonably expect to receive. There have been no quarterly meeting with the Factor.

Mr Reid said that the Factor was no longer aware of the identity of committee members in the residents association. He felt that homeowners could have contacted the Factor if they were unhappy with the Factor's performance or wished to discuss consultation with the residents association, but they had received no communication other than from the Homeowner, Mr McKay. Mr Reid pointed out that the Deed of Conditions provides that the homeowners can call meetings. Mr Reid said that they would prefer to work with an active residents association, as they do in other developments. The Deed of Conditions makes it clear that the responsibility for maintaining the association rests with the homeowners. No other homeowners have contacted the Factor to request an AGM. Mr Reid acknowledged that the Factor has responsibilities to work with any residents association.

Findings in Fact

13. (i) The Homeowner has been the proprietor of the property at 20 Baxter Brae, Cleland, ML1 5FG since March 2016.

(ii) The Factor was appointed as Manager of the development of 86 properties by the developer in 2012.

(iii) Each property is subject to the terms of a Deed of Conditions executed by Highmore Homes (UK) Limited dated 14th and registered 17th March 2008.

(iv) The Factor is a registered Property Factor with registration number PF000203.

(v) The Deed of Conditions provides that, by virtue of acceptance of their respective titles to the properties, the proprietors shall be held to have accepted membership of the Calder Mains Residents Association. The object of the Association is to maintain the common areas to the satisfaction of a) the developer, until the last property is sold, and b) the proprietors. Meetings of the Residents Association took place in April, October and November 2012. The meetings were facilitated by the Factor.

(vi) The Factor has had no notice of any meetings of the Association since 2012. The Factor is not aware of any existing committee members of the Association.

(vii) The Deed of Conditions provides at paragraph NINTH that by virtue of acceptance of their respective titles the proprietors shall be held to have accepted the Manager to be their Factors and Agents for maintaining the respective portions of the common areas and retained areas

(viii) The Deed of Conditions provides at paragraph NINTH that if the Proprietors fail to form or sustain the Residents Association, the Manager is empowered to carry out the powers and duties of the Residents Association.

(ix) The constitution of the Association is incorporated into the Deed of Conditions at paragraph NINTH.

(x) The said constitution provides that, unless otherwise determined at a properly convened meeting of the Association, the Manager shall have power during its appointment to order and arrange to be executed any maintenance of the common and retained areas and any other common property as they in their judgement shall consider necessary to implement their obligations and duties, including *inter alia* the payment of wages of gardeners and the cost of maintenance of planted common or retained areas.

(xi) An annual levy is collected from each homeowner by the Factor.

(xii) The Homeowner has raised various issues with the Factor including concern over fees, lack of consultation with homeowners, difficulties in accessing the internet portal, the identification of communal areas and the appointment of contractors.

Determination and Reasons for Decision

14. The Tribunal took account of all the documentation provided by parties and their oral submissions.

Section 1.1a Ce

With regard to the alleged breach of Section 1.1a Ce of the Code, the Tribunal found that the Factor had breached this section. The Statement of Services provided by the

Factor does not set out the management fee charged, including any fee structure. The Statement of Services refers homeowners to the Deed of Conditions and their invoices for details, stating 'The management fee is charged at a flat rate and will be reviewed on an annual basis.' There is an insufficiency of information within the Statement of Services itself to satisfy the requirements of this section of the Code. The Tribunal noted that the Statement of Services is a generic document provided to all developments managed by the Factor. The Tribunal makes the observation that what is required by the Code is a specific Written Statement of Services for each development. This observation is borne out by the level of detail specified in footnote number 3 to Section 1.1a A of the Code, e.g. the period of time for which, and the date on which, the Factor is appointed. This is information specific to each development. The Tribunal notes that the Factor intends to review the Statement of Services, and the Factor may be advised to take note of the observations of the Tribunal.

Section 2.4

With regard to the alleged breach of Section 2.4 of the Code the Tribunal did not find that the Factor had breached the Code in terms of its procedure for consulting with homeowners and seeking their approval before providing work or services which will incur charges or fees in addition to those relating to the core service. The Factor explained that the procedure, in the event of seeking such approval, would be to write to homeowners and call a meeting. This had not been necessary to date, and the only instance of spending by the Factor for work in addition to the core service was the purchase of a new padlock by the Factor at a cost of £75. The Tribunal observed that it would have cost the Factor, and, ultimately, the homeowners more than the cost of the padlock in postage fees, had the Factor written to every homeowner in advance of purchasing and fitting a padlock, in what could properly be described as an emergency situation. Furthermore, the Factor was attempting to recover the cost of the padlock from the developer, and, if successful, the homeowners will be reimbursed.

Section 2.5

With regard to the alleged breach of Section 2.5 of the Code, the Tribunal found that the Factor had breached this section. By their own admission, the Factor had failed to respond to enquiries and complaints received by letter or email within prompt timescales, in respect of the initial queries submitted by the Homeowner in 2016 and email communication in relation to the proposal to waive part of the fees due to the Homeowner in 2017. The Tribunal agreed that there was a lack of clarity in the wording of the relevant section on timescales for response in the Factor's Statement of Services, which should confirm their response times.

Section 6.3

With regard to the alleged breach of Section 6.3 of the Code the Tribunal did not find that the Factor had breached the Code in terms of showing how and why they had appointed contractors in a case where they decided not to carry out a competitive tendering exercise. On the request of the Homeowner, the Factor showed how and why they had acted as they did. The Tribunal accepted the explanation given by Mr Reid that there was an element of urgency in appointing the contractor mid growing

season. The Tribunal also took cognisance of the fact that the residents association appeared to be dormant at that time, and the Factor was taking appropriate steps in terms of its legitimate authority to ensure the upkeep of the common and retained areas.

Section 6.6

With regard to the alleged breach of Section 6.6 of the Code the Tribunal did not find that the Factor had breached the Code. The Factor did all that they could to provide the documentation requested by the Homeowner, free of charge. The Factor provided to the Tribunal an adequate explanation, including documentation from the contractor, for the fact that the document provided by the grounds maintenance contractor appeared to have been backdated.

Breach of section 17 duties

With regard to the alleged failure to carry out the Property Factor's duties created by section 17 of the Property Factors (Scotland) Act 2011, the Tribunal did not find that the Factor had failed in carrying out their duties. On completion of the development, a committee had been formed, albeit the Factor was concerned that the committee may not have been properly constituted. The Tribunal agreed that it is not the Factor's duty to ensure that the committee or the residents association is sustained, and that, in the absence of an active committee, the Factor is unable to hold quarterly meetings. The Tribunal observed that the Factor could have been more active in encouraging the residents to meet and form a committee, but did not accept that the Factor had failed to carry out its duties in this regard.

Proposed Property Factor Enforcement Order (PFEO)

15. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO.

16. The Tribunal proposes to make a PFEO requiring the Factor to draft and provide to each homeowner and to the Tribunal within a period of six weeks a written statement of services taking cognisance of the requirements of the Code in regard to Sections 1.1a Ce and 2.5.

17. The Tribunal found that the Homeowner, had been subjected to strain and anxiety over the lack of compliance with Sections 1.1a Ce and 2.5 of the Code, and his repeated attempts to gain clarity in this regard. The Tribunal determined that the Factor should pay to Mr McKay, from their own funds, the sum of £100.

Right of Appeal

18. 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.

H Forbes

Legal Member and Chairperson

12th October 2017