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

Decision on homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/18/0356/0357/0358/0359/0360/0362/0363/0364/0365/0366/0368/0370

1-14 The Beech Tree, Linlithgow, EH49 6PU ("the Property")

The Parties:-

Mr Bob Gehrke, 14 The Beech Tree, Linlithgow EH49 6PU ("the Homeowner") and Homeowners representative in respect of the remaining 11 Homeowners

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

Tribunal Members:
Graham Harding (Legal Member)
Andrew Taylor (Ordinary Member)

DECISION

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

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 1 and 2.1 of the Code

The decision is unanimous

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Factor became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By letter dated 16 February 2018 the Homeowner on his own behalf and on behalf of Richard McLachlan, 1 The Beech Tree, Julie Gillespie, 2 The Beech Tree, Rachael Ellen, 3 The Beech Tree, Jennifer Duff, 4 The Beech Tree, Maureen Currie, 5 The Beech Tree, Helen Quigley, 6 The Beech Tree, James and Anne Thomson, 7 The Beech Tree, Ciaran Johnston, 8 The Beech Tree, Andrew Inglis, 9 The Beech Tree, Lewis Cantwell, 12 The Beech Tree and John Lovatt, 13 The Beech Tree, Linlithgow submitted applications to the Tribunal claiming that the Factors had breached the Code and failed in its Property Factor Duties.
2. The Tribunal obtained confirmation from the other 11 homeowners that they wished Mr Bob Gehrke to act as their representative.
3. Prior to accepting the application, the tribunal requested that the Homeowner write to the Factors setting out the nature of the complaint. The Homeowner did so in his letter of 29 March 2018.
4. Given that all 12 applications related to the same development and the same Property Factor and were identical in nature the Tribunal determined in terms of Rule 12 of the Rules that the applications be heard together and on 2 May 2018 a Convenor with delegated powers determined to refer the application to a Tribunal.
5. Both parties lodged written submissions prior to the hearing.

Hearing

6. A hearing was held at George House, 126 George Street Edinburgh on12 July 2018. It was attended by three homeowners, Mr Bob Gehrke and Mrs Maureen Currie who both gave evidence and Mr Richard McLachlin who attended as an observer. For the Factor, it was represented by its managing director Mr David Reid, Head of Estates Mr Alastair Wallace and Finance Manager Jacqueline Borthwick.
7. The parties were agreed that there were no preliminary matters to be determined.
8. As the letter of complaint of 29th March 2018 set out a number of alleged breaches of the Code and of the Factor's duties, the Tribunal decided that it would be appropriate to deal with each alleged breach in turn and hear from the parties in respect of each alleged breach before moving to consider the next.

Summary of submissions

9. Section 1F.
   The Homeowner explained that at the beginning of the AGM of owners on 27 October 2017 the Factor announced that it had decided to discontinue its services as factors but that it would help the owners to find another factor and would continue to provide a service until a new factor was in place. However, on 4 December 2017 the Factor had advised the owners that its services would cease on 15 February 2018' The Homeowner felt he had been misled.
10. Mrs Currie explained that not all homeowners had attended the AGM in October so only knew of the Factor's decision when they received the letter in December so the owners did not have long to find a new factor and there had

been no discussion about continuing until a new one was in place. The Homeowner reiterated that it had been his understanding that the Factor had agreed to continue to provide its services until new factors had been appointed but had failed to do so.

11. The tribunal queried whether the Statement of Services had provision for termination as this was not apparent from the statement lodged with the application.
12. For the Factor Mr Reid confirmed the circumstances as narrated by the Homeowner were correct. There had been a number of reasons for taking the decision to terminate the contract. The notice period had commenced in November and reviewed at the end of February when the contract was ended. The Factor had provided the owners with the names of other factors and had also provided a tender document. Mr Reid confirmed that the Factor had said it would continue until another factor was found but that it had been running the service at a loss and had therefore decided to terminate the contract although it had continued the buildings insurance on the development which it could have cancelled.
13. In response to a query from the Tribunal with regards to the lack of reference in the Statement of Services to termination of the arrangement the Homeowner advised that the document he had lodged had been provided to him by Mrs Currie. According to Ms Borthwick this was out of date. She explained that when The Homeowner purchased his property he would have been given a welcome pack from the Factor which would have directed him to an updated Statement of Services that was available on the Factor's website. A written Statement of Services was not routinely sent out to Homeowners. The Tribunal queried whether this complied with the provisions of the Code and Mr Reid explained that this was something that had been raised with the Scottish Government as part of its ongoing review into the Code. The Tribunal queried why the updated Statement of Services had not been lodged as a Production by the Factors and Mr Reid accepted this had been an oversight on his part. He explained that the current version provided for both the Homeowners and the Factor to terminate the contract on giving three months' notice.
14. The Tribunal adjourned briefly to allow the Factors to provide copies of the current Statement of Services to the Tribunal and the Homeowner but reserved its position on whether to allow the document to be admitted late in terms of Rule 22(2).
15. Section 2.1.

    The Homeowner said that one example of the Factor providing misleading information was that it had said it would continue to provide its services until another factor was in place and then did not. Another example was that it could not decide if the windows were the responsibility of the individual homeowners or were communal. One homeowner replaced her windows and as time progressed the Factor provided quotes for all the windows to be repainted. The new factors had stated clearly that in terms of the title deeds the windows were the sole responsibility of the homeowners. Because there had been conflicting information provided by the Factors particularly with regards to the sills people had been holding off painting and this had resulted in quite a number of sills rotting.

16. Mr Wallace for the Factors explained that as some of the windows had cladding panels below the frames that were thought to be communal the Estate Manager had queried whether the sill attached were also communal. As a result, he had asked for the sills to be looked at and an estimate provided but this had not included all the windows in the development.
17. The Homeowner commented that a further example of a breach of Section 2.1 was that in its report the Factor states that the external lighting columns are secure when in fact one was blown over at an angle of thirty degrees to the vertical. There was also an issue with regards to bird droppings that had been misleading.
18. Mr Wallace agreed that there had been some confusion with regards to the windows but that it was in fact quite clear that the frames themselves were not communal but that the sills and cladding were. He went on to explain that the Factor had been asked to tender for the painting of all areas so that this would include privately owned areas as well as communal areas. The quotes were provided at the 2016 AGM but none of the quotes were accepted and the Factor was asked to provide further quotes. These were then submitted to the owners in November 2016.
19. Mr Reid pointed out that painting of the windows had been mentioned at the AGMs of 2012, 2015, 2016 and 2017 but no agreement had been reached amongst the homeowners to proceed.
20. Mrs Currie said that this was because the quotes provided by the Factor had not been comparable. There were two separate buildings with different specifications and therefore required two different quotes for each.
21. Mr Reid said that the issue of termination had already been dealt with and that he could not comment on the light fitting as damage could occur at any time. With regards to the bird dropping issue this had been raised at the 2016 AGM and costs obtained. Mrs Currie explained that this related to a different problem with birds. Mr Reid said that this was not an issue in which the Factor had been deliberately misleading.
22. The Tribunal made reference to the photographs of the development in the Factors written submissions Appendix 4 where it appeared that some of the windows had cladding beneath them and that the sills were attached to the cladding. Mr Reid again re-iterated that there had been no deliberate attempt to mislead. The Homeowner agreed that it had not been deliberate but had nevertheless been misleading.
23. Section 2.2.
    With regards to the Factor communicating in ways which were abusive or intimidating the Homeowner said that Mr Reid had referred to the homeowners as being irrational and also to an email of 13th June. The Homeowner agreed that the correspondence was neither abusive nor threatening but did consider it to be intimidating and dismissive.
24. For the Factor Mr Reid said he was astounded at the allegations and took it very personally. He said it was not part of his make up to behave in a manner that was abusive, threatening or intimidating. He said that in using phrases like exhausted he was referring to the relationship with the homeowners being exhausted. He said that the Factor continued to communicate with the homeowners and he did not see how the communications could possibly be considered to be abusive threatening or intimidating.

25. Section 3 Financial Obligations.
    The Homeowner confirmed that issues over an electricity bill with which he had not been involved had eventually been settled but only after a great deal of work had been done by other homeowners.
26. With regards to obtaining financial information regarding the sewage treatment works it was said that despite numerous requests the homeowners had still been left unclear as to what had been covered for example under warranty and what had not.
27. With regards to Section 3.3 it was said by the Homeowner that whilst the Factor did provide some information it involved additional work on the part of the homeowners to obtain further information from them. Mrs Currie explained that they had to ask on numerous occasions as to why the sewage treatment pumps kept failing and also about de-sludging and it was difficult to get any answer from the Factor.
28. Mr Reid explained that the Factor provided a budget for the development each year. The development was billed in arrears based on a float. It provided a Statement of Account all of which was standard practice. It would normally give a treasurer a copy of all invoices and in the current case all residents could access the portal and view all the invoices. If asked the Factor was happy to provide copies of any invoices.
29. Mrs Currie said that although she had asked John Dobbie for such information none had been forthcoming. Mr Reid said that if information had not been provided then it would but they had not seen any evidence that it had been requested. Mr Wallace said that if requests had not been answered they had not been escalated to a complaint. The Homeowner made reference to the Minute of the AGM of 24 October 2016 where it was recorded that homeowners were not being kept informed of upcoming costs relating to the sewage works.
30. Mr Wallace said that the Factor did have a facility to communicate with homeowners but it had recommended that the homeowners form an association and a committee to facilitate such communication but that the homeowners had rejected this idea and opted instead for an annual meeting. Mrs Currie explained that as there were only 14 owners it had not been felt that there had been any need for a committee as the homeowners could all communicate with one another.
31. Section 6.4 Core Services
    The parties were agreed that the Core services consisted of providing Building insurance; ground maintenance; maintenance of sewage treatment plant and pumps; communal electricity supply; reactive repairs and management of the development. It was further agreed that part of the services provided included monthly inspections.
32. Mr Reid said that following the monthly inspections the Estate Manager would provide the owners with a note of any recorded defects. It was for the owners to take decisions on any major expenditure. He confirmed that there had been in place a 10-year maintenance plan since about 2010 although this may not have been distributed to homeowners until 2016 but used internally prior to that date.
33. The Homeowner said that the homeowners expected to have their attention drawn to the plan and to what needed to be looked at and presented so as to give guidance as to what service or contractor should be appointed in order

that the homeowners could decide what course of action would be deemed appropriate.

34. Mr Reid said that his company was one of the first to provide this service and issues of redecoration for example had been raised with homeowners in 2012 but not taken up by the homeowners. Issues with the railings were raised in 2015 and the boundary wall in 2013. He explained that the Factor cannot force homeowners to carry out work. In 2012 the homeowners decided not to carry out redecoration because of the costs involved with the sewage works.
35. The Homeowner pointed out that whilst it was correct that the first time the painting work had been raised it had been deferred because of the cost of repairs to the sewage works there had been ongoing issues the following year and then the following year because of an issue with the Estate Manager no AGM had taken place and this had taken the focus off the exterior decoration. Then the following year the homeowners were not being given like for like quotes to consider. And then it took a further year to sort out by which time the issue of the railings had arisen and there was a question as to whether this had health and safety concerns that might mean their replacement taking precedence over the redecoration.
36. Mr Wallace said that by the 2016 AGM prices for all the work required had been obtained and following that AGM additional quotes were obtained and provided but no instructions to proceed were given. An offer of a further meeting had been made to Mrs Currie and Alison Clark. In response to a question from the Tribunal it was confirmed that no ballot papers had been sent out with the revised quotes nor had there been a proposal sent out to all homeowners to hold a further meeting. Mr Wallace accepted that the Estate Manager may not have completely fulfilled her duties around this time.
37. Section 6.9

    According to the Homeowner it was felt that if the pumps at the sewage works were needing replaced the homeowners should have been provided with information as to which pump it was and whether it was under warranty or not. The homeowner also said that there had been no response from the Factor about the lighting despite the light on the back wall being inoperative for two years and numerous requests for it to be dealt with. According to Mrs Currie an electrical contractor had looked at it but it had never been sorted.
38. Mr Reid said that the sewage works were on a service plan and there will be wear and tear and parts will fail from time to time. He did not recall written requests to supply information until recently. In response to a question from the Tribunal Mr Reid confirmed that the maintenance contractors RitMac recommended de-sludging once per year. The Homeowner advised that the homeowners had been told the cost of this would be £4640. Mr Reid believed that the tanks had been de-sludged only once in 2012. Mrs Currie made reference to the fact that there had in the past been issues with homeowners putting cooking oil and plastic bags down the drains that had caused problems but that this had been sorted. However, there were ongoing problems with breakdowns in 2015 and 2016. She said she had asked John Dobbie for a report but this had not been forthcoming.
39. Mr Reid said that if the drains were used and abused there would be problems with the plant but that the Factors had no obligation to the suppliers.
40. The homeowner went on to say that in April 2016 an email had been sent to Mr Wallace advising that the pumps had cost in excess of £6000.00 but that

the homeowners, despite requests, had never been provided with copy invoices or RitMac reports. The first that they had seen had been in response to their complaint to the Tribunal and even that had not contained a lot of detail. Mr Wallace advised that there had been some correspondence as shown in Appendix 10 but this had not been followed up.

41. Section 17 Duties.

The Homeowner explained that concerns had been raised by the homeowners following a report regarding the condition of the boundary railings. The Factor had been asked repeatedly if this represented a Health and Safety issue; were the railings so weak that they would not support anyone leaning against them? The Factor had not provided an answer.

42. The Homeowner went on to say that the Factor did not bring back to the homeowners on a regular basis the need for pointing the roadside boundary wall and dozens of bricks had fallen out and others were spalling although this was not the fault of the Factor as the builders had used the wrong type of brick but nonetheless the Factor ought to have brought the problem to the homeowners' attention. The homeowners were also surprised that when the issue was finally being addressed the Factors were suggesting replacing like with like.

43. The Homeowner said the Factor had provided misleading guidance with regards to insurance claims regarding the excess to be applied and whilst this was not much when split between 14 owners there was a principle involved. There was also an instance when roof repairs had been carried out to a number of sheds and all the owners had been charged when only six should have paid. Mrs Currie said there had been similar problems in previous years.

44. The Homeowner said the Factor had not been diligent in pursuing the best tariff available for the communal lighting and they had been placed on the Standard Variable Tariff which it was said was not the most favourable.

45. Mr Reid said that the railings issue had been addressed at the AGM in 2015 and there had been no Health and Safety issues raised since then. The pointing had been addressed in 2013 and the owners could have recommended their own suppliers if not happy with the proposed contractor. Mr Wallace confirmed that costings for the railings had been provided at the 2016 AGM and further costs sent out in November 2016. Mrs Currie said the homeowners had wanted clarification on the Health and Safety issue. The Tribunal queried whether this was addressed at an annual risk assessment. Mrs Currie pointed out that the Factors in their written submissions had confirmed that inspection details were not always written up. Mr Wallace said that if the contractors who had looked at and quoted for the painting of the railings had concerns about them they would have said so. The Homeowner repeated that they had asked the question but not given the answer.

46. With regards to the common insurance policy Ms Borthwick said the apportionment had never been questioned. The electricity had always been on a contract for 12 or 24 months to get the best tariff at the point of tender but prices could go up or down as the market was very volatile.

47. The Homeowner felt that whilst the Factor had responded in a general way to the homeowners' complaints it had not dealt with specific issues properly. He thought that the homeowners had been left with very substantial renovation costs that they cannot afford to pay as a result of the failures of the Factor and

he wished the Factor to enter into a repayment plan with the homeowners who have to meet some £50000.00 of expenditure.

48. For the Factors, Mr Reid said that managing the development had been a huge challenge for the Factor as the homeowners had not been willing to spend money to properly maintain their properly. How the Factors could be held accountable was beyond him.

The Tribunal make the following findings in fact:

49. The Homeowner is the owner of 14 The Beech Tree Linlithgow. In addition to representing himself he also had authority to represent the owners of the other Applicants mentioned above.

50. The Property is a flat within The Beech Tree, Linlithgow which is also known as "The Primary". It consists of a development of 14 properties in two blocks (hereinafter "the Development").

51. The Factor performed the role of the property factor of the Development.

52. The Factor was entitled to terminate its service agreement with the Homeowner on giving 3 months' notice however as the Statement of Service that was before the Tribunal did not include this provision there was a technical breach of the Code in this regard.

53. The Factor agreed to continue to provide its service to the Homeowner at the 2017 AGM but then in correspondence dated 4 December 2017 changed its position and gave the Homeowner 3 months' notice.

54. There was a lack of clear communication between the Factor and Homeowners in respect of whether or not the sills of the windows which had cladding beneath were communal. However, the Deed of Conditions burdening the properties clearly stated that the window frames themselves were the responsibility of individual owners.

55. The Factor did not communicate with the Homeowner or other owners in any way that was abusive, intimidating or threatening.

56. As the issue over the electricity bill had already been resolved it did not form part of the Homeowner's complaint.

57. It was more likely than not that Mrs Currie and possibly others had requested more detailed information from the Factor regarding the invoices and work being done by RitMac on the sewage plant but there was no evidence to suggest that the Homeowner or owners had put their complaint about lack of response in writing or that they had been unable to access the requested information via the portal.

58. Whilst there may have been a planned programme of cyclical maintenance prepared by the Factor before or around 2010 it was not made available to homeowners until 2016.

59. It may be that the pumps at the sewage plant were inadequate or incorrectly fitted or it may be that there was nothing wrong with them. There was no evidence before the Tribunal to allow it to determine the matter. Without any defects being identified and followed up the Factor cannot be expected to pursue a contractor or supplier for inadequate work or service.

60. As part of its core service the Factor had a duty to carry out monthly inspections at the development and an annual risk assessment. There was no evidence that the latter had been produced.

61. The Factor failed to properly carry out its duties in respect of its management of the sewage treatment plant. It was aware of the concerns of the homeowner of the cost of continually replacing the pumps. It was aware that the contractors were recommending de-sludging annually. The tanks were only emptied on one occasion. The Factor was not proactive in advising the homeowners on the options that may be open to them with regards to the sewage treatment plant.

62. The homeowners decided against forming a committee to liaise with the Factor and opted to have an annual meeting instead. This resulted in a built-in delay in any work being authorised.

63. Although the Factor made suggestions for planned maintenance such as external painting at an AGM these proposals were not always approved when other expenditure was high. This led to some repairs being deferred on occasions for several years.

64. It was more likely than not that there was a difficulty in obtaining the approval of a majority of owners for items involving high expenditure.

65. The Factor did not send out a ballot form to owners along with quotes for repairs/maintenance but waited until the next AGM for authorisation.

66. The Factor did not suggest holding extra meetings when sending out quotes.

67. The Homeowner did not provide any evidence to show that the Factor had failed to obtain the best contract price for electricity.

68. The title deeds are silent on how any apportionment of any excess for insurance claims should be divided. It would follow however that only those affected by a claim should be expected to pay a share of the excess.

Reasons for Decision

69. Section IF of the Code
Although in terms of its most recent Statement of Services the Factor (which the Tribunal did not allow as a late production) may have been able to

terminate the contract with the Homeowner and the other owners on giving three months' notice the Factor undertook not to terminate its service until another Factor was appointed. There was therefore a technical breach of this section of the Code.

70. Section 2.1 of the Code
By telling the Homeowner and other owners at the AGM in 2017 that the Factor would continue providing its services until another Factor was appointed and then terminating its services on giving three months' notice the Factor provided misleading and false information.

The lack of clarity in communicating with the homeowners regarding the window sills and whether or not they should be communal was misleading but the owners ought to have been aware of the terms of the Deed of Conditions themselves.

71. Section 2.2 of the Code
The Factor did not communicate with the Homeowner or any owners in any way that was abusive threatening or intimidating and therefore did not breach this section of the Code.

72. Section 3 of the Code
Although homeowners may have requested further information from the Factor with regards to the RitMac invoices that was not forthcoming it did not appear to the Tribunal that any attempt was made to escalate the lack of response by way of a formal complaint nor was it at all clear that the information could not have been obtained through accessing the portal. It did not appear to the Tribunal that the Factor had breached this section of the Code.

73. Section 6.4 of the Code
Although the Factor prepared a programme of planned cyclical maintenance from at least 2010 it was not made available to the owners until 2016. The Tribunal was of the view that it would have been good practice to have provided the owners with this document rather than keeping it for internal use.

74. Section 6.9 of the Code
If the owners were concerned about the quality of the servicing of the sewage treatment plant or the quality of the pumps they ought to have instructed the Factor to obtain an independent report. The Factor cannot pursue a contractor without first having the necessary evidence. It therefore cannot be said that the Factors breached this section of the Code.

75. Breach of Property Factors Duties
Although as part of the Core Services the Factor was to carry out an annual risk assessment the Tribunal saw no evidence that this had been done or intimated to the owners.

The Tribunal concluded that the Factor relied too much on the contractors RitMac when it came to the management of the sewage treatment plant.

There had been issues with the plant since 2010 and substantial maintenance costs was a recurring theme. The Factor ought to have been more pro-active in flagging up with owners the options open to them such as obtaining an expert report on how long pumps should last or obtaining competitive quotes for servicing the plant and de-sludging.

The Factor obtained quotes when requested for external painting and repairs to the boundary wall and railings. Had there been an owners committee or more regular owners meetings with the Factor then much of the delays in having work carried out could have been avoided subject to there being agreement of a majority of owners. The arrangement of only having one meeting each year benefited neither the owners nor the Factor.

It did appear likely to the Tribunal that there was resistance from owners to meet the cost of repairs and maintenance hence certain works being deferred in some years. This will have led to additional costs being incurred. The Tribunal found it difficult to understand why owners would allow their window frames or sills to rot rather than incur the cost of having them painted even if there was an issue as to whether or not they were or were not communal particularly as the title deeds make it clear that the frames were the sole responsibility of each owner.

The tribunal had insufficient evidence before it to decide whether the Factor had failed to obtain the best price for the communal electricity.

The Tribunal was of the view that any excess on the common insurance policy should only be applied to those properties affected by any claim and not apportioned over all the properties.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

Appeals

A homeowner or property factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

G Harding

Legal Member and Chair

24th July 2018

Date