Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/PF/17/0391

The Property: 3 Dempster Street, Greenock PA15 4QE ('the property")

The Parties:

John Miller, residing at Flat 2E Dempster Court, 3 Dempster Street, Greenock PA15 4QE ("the homeowner")

Speirs Gumley Property Management, registered in Scotland under the Companies Acts (SCO78921) and having their registered office at 194 Bath Street, Glasgow G2 4LE ("the property factors")

Tribunal Members – George Clark (Legal Member) and Susan Napier (Ordinary Member)

Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

The Tribunal has jurisdiction to deal with the application.

The property factors have failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") in that they have failed to comply with Section 6.9 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

The Tribunal proposes making a Property Factor Enforcement Order in respect of the failure by the property factors to comply with their duties under Section 14 of the Act.

The Decision is unanimous.

Introduction

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

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

The Tribunal had available to it and gave consideration to the application by the homeowner dated 9 October 2017 with supporting documentation, including copies of e-mails between the parties, a letter to the property factors from building contractors (throughout this Decision referred to as "CBL") dated 4 May 2017, an Intumescent Paint Survey Report by Orr Fire Protection dated 19 April 2017 and an estimate from that company dated 6 August 2017, a letter from the property factors dated 14 August 2006, with copy quotation from CBL attached, a quotation from CBL dated 6 October 2011, letters from the property factors to the homeowner dated 4 and 30 May 2017, photographs of the steel beams in the basement car park of the block of which the property forms part taken at various times between March 2012 and May 2016, a copy of the property factors' written Statement of Services, an e-mail by the homeowner to the property factors dated 4 November 2017, setting out the Sections of the Code of Conduct that he believed had been breached, the property factors' response dated 22 December 2017 and subsequent e-mails between the parties dated 5 and 11 January 2018, a file of Productions submitted by the homeowner; and written representations of the property factors dated 7 February 2018 with supporting documentation, including (apart from copies of documents also submitted by the homeowner) copies of correspondence between the property factors and CBL dated between 20 August 2012 and 16 May 2017, a letter from Nullifire to the property factors dated 6 June 2013, a letter from Nullifire to Inverclyde Council dated 1 August 2013 and a letter from Inveclyde Council to the property factors dated 13 August 2013.

Summary of Written Representations

(a) By the homeowner

The following is a summary of the content of the homeowner's application to the Tribunal:-

The property factors had created a contract with CBL to provide 60 minute fire protection to the structural steel beams within the basement car park at Dempster

Court. They had failed to ensure that CBL carried out the works strictly in accordance with the specification. CBL had, without prior approval, changed sections of the intumescent paint materials. This change may have contributed to the later failure, and breakdown of the paint system. Nullifire's Carbomastic was the preferred specified primer. CBL had used a primer calles Sigmafast, which was not a Nullifire product. CBL began this project on 2 October 2007 and completed it on 19 October 2017. Within 18 months, areas of rust began to appear on the beams. The homeowner had informed the property factors of this problem on 20 May 2009, together with photographs. It had been 23 October 2009 before the property factors and CBL had decided to make a visit to the site to see the rusting problem for themselves. The first attempt at remedial works took place on 26 April 2012. Nullifire's recommended repair procedures had been issued on 14 September 2010 and 6 September 2011. On both occasions, Carbomastic had been the repair primer, with recommendations to ensure the proper thickness of paint was achieved. CBL had not used Carbomastic and no measurements of film thicknesses had ever been taken.

The homeowner also believed that the property factors had failed to instruct CBL to include in their contract bid sufficient time, materials and funds to apply intumescent paint to the diagonal cross-ties. The Building Standards Department of the local authority would not sign off the building warrant unless the cross-ties were protected, since they are an integral part of the support system for the structural beams. At the time of original construction of the building, the cross-ties had been protected using the same materials as for the steel beams. The property factors, in an e-mail of 19 June 2013. had stated that the cross-ties would be included in the next redecoration programme., but this was a fire protection issue, not a redecoration matter. The homeowner had lived in the property since 2003 and during that period he had never seen a programme of cyclical maintenance. The property factors had failed to comply with Section 6.4 of the Code of Conduct.

During the past 10 years of the painting project, the homeowner had been disappointed with the property factors' efforts in trying to pursue CBL to produce the results of any dry film thickness tests ("DFT"), to ensure that the intumescent paint had achieved the correct thickness. He had never seen any such results. Nullifire, the paint manufacturer, had submitted their recommendations for a repair procedure when dealing with paint defects to the steel beams. Both procedures, set out on 14 September 2010 and 6 September 2011, made reference to applying the paint up to the required thickness for the specified fire rating. DFT tests were required to confirm that the correct thickness had been achieved.

This painting problem was now in its 10th year. Rusting and flaking paint areas could plainly be seen. The last attempt at remedial repairs had been 14 June 2012, but the homeowner had sent to the property factors 2 days later photographs showing areas of rust that had received no remedial repairs. These were the areas not visible at

ground level. During all of the remedial repairs, the property factors had provided no hands-on supervision and had failed to comply with Section 6.9 of the Code of Conduct.

The owners at Dempster Court had been with the property factors for some 20 years, but the homeowner felt that they had not been well served in this matter. They had paid almost £6,000 for the work, only to be told that it was not fit for purpose. CBL had made it clear that they were not prepared to do anything further and the one estimate for repair that the owners had indicated a likely cost of nearly £20,000.

The view of the homeowner was that, because fire protection to the diagonal cross-ties had to be included to satisfy Building Regulations and Fire Standards, it was reasonable to ask the property factors to contribute 50% of the total cost to reinstate the fire protection.

During their activities on site, CBL had removed unwanted sections of insulation from the steel beams, but they had also removed perfectly sound insulation from 4 pvc soil pipe penetrations at ceiling level in the car park. The homeowner was of the view that CBL should be responsible for replacing them. They had formed no part of CBL's contract. The property factors had then given the contract to GDN, who had replaced fire protection to all 6 pipe penetrations at a cost of £700 to the owners. GDN had claimed that they had had to alter two of the pipes, but when the homeowner had asked the property factors to show him which two pipes were altered, they had refused to do so. The property factors should return this amount in full to the owners.

The homeowner stated in the application that the property factors had failed to comply with Sections 6.4, 6.9 and 7.2 of the Code of Conduct and that they had failed to carry out the Property Factor's duties. At the hearing, however, the homeowner was asked by the chairman if the reference to Section 7.2 of the Code should actually have been to Section 7.1, as the written representations suggested that was the case. The homeowner agreed that the complaint should be regarded as referring to Section 7.1 and this was accepted by the property factors.

(b) By the property factors

The following is a summary of the written representations made by the property factors in their letter of 7 February 2018:-

At the time of the work, they had acted as factors on behalf of the co-owners of Dempster Court and had passed instructions on their behalf to CBL on 29 July 2007 to proceed with their estimate to "strip off the remainder of insulation to car park steel beams and paint with fire retardant paint for the sum of £5,983 plus VAT."

The specification of work had been detailed in the property factors' letter to the owners of 14 August 2006. These works were completed in October 2007. The

property factors' proposal had not allowed for them specifying works, supervising work or inspecting the work following completion.

Some two years after completion of the work, the property factors had received notification from the homeowner that there might be issues with the paintwork due to the appearance of rust on the steel I-beams and they had approached the contractors for their views.

CBL had eventually re-attended to carry out some remedial work to the I-beams, as set out in the property factors' letter sent to all owners on 23 January 2012. Following completion of this work, further concerns had been raised by the homeowner in relation to the work carried out, which the property factors again referred to CBL. During this time, the property factors had also engaged with Inverclyde Council and Nullifire on numerous occasions, which included site meetings with these parties as well as with the homeowner.

Nullifire had carried out their own assessments whch included visits to site and had ultimately confirmed that the products used were compatible with their own and that the materials used provided sufficient fire proofing, as detailed in their correspondence to Inveclyde Council dated 1 August 2013.

In addition to this remedial action, the Building Standards Officer of Inverclyde Council had requested certain works to fire collars and diagonal cross-beams before the Council would issue a Completion Certificate. This was detailed in the Council's letter of 13 August 2013. Notably, this letter did not detail the requirement for any additional work to the I-beams.

Following further exchanges with Inverclyde Council, quotations had been obtained to carry out work to the fire collars and these were proposed to the owners on 25 April 2014. The property factors had not received any objection from the owners, therefore GDN were instructed to carry out the work.

The diagonal cross-beams had never been part of the original specification by CBL and, as they were refusing to do any remedial work there, the property factors had suggested that, due to the passage of time since the original work and as the next decoration work was inevitably due to take place soon, the work to this area could be addressed at that time. At no time had the property factors stated that the cross-beams would simply be "redecorated". They had confirmed to owners that any subsequent work would have to comply with Inverclyde Council's requirements and it was the property factors' intention to fully liaise with them prior to instructing any work.

The property factors had, on behalf of the owners, pursued CBL on a number of occasions regarding work to the steel I-beams, but, beyond their attendance in 2012, CBL had refused to accept that their work was unsatisfactory or that further work

was required, nor would they agree to any work to the cross-beams, as it had never been in their quotation to perform this work.

In light of CBL's refusal to re-attend, and considering that Nullifire had confirmed the work and material used appeared to be acceptable, the property factors had considered it reasonable at the time for owners to focus on the fire-proofing works required as part of cyclical maintenance. They had proposed this to the owners by letter dated 6 February 2017, but the owners had decided not to proceed and, on 5 April 2017, the property factors had received notification that, following a meeting of owners, their management appointment was to be terminated. The notice of termination mandate had been signed by 14 of the 24 owners, but did not provide specific details of why their services were being terminated.

The property factors' Managing Director and Inspection Director had met with the homeowner on site on 18 April 2017 to discuss concerns. In terms of the work to the I-beams, it had been agreed that the property factors would instruct Orr Fire Protection, at no cost to the owners, to help clarify matters, despite the property factors no longer managing the property. The matter of the cross-beams had been referred to, but again it had been made clear to the homeowner that the cross-beams had never been included in the specification by the contractor and that there was no basis for insisting that they did this work at no cost. The homeowner had accepted in his discussions that he had not objected at the time of the property factors' proposal, to work to the fire collars being carried out and that, notwithstanding his "oversight" the work had been properly authorised.

Orr Fire Protection had stated in their report dated 19 April 2017 that, based on their inspections, they believed that the specification that had been applied to the steelwork was not suitable for the environment and would continue to degrade and that the thickness of paint applied did not look suitable to achieve a 60 minute fire rating. On receipt of this information, the property factors had suggested to the homeowner that the owners might consider raising an action against the contractor. As they were no longer managing the development, the property factors were unable to take this further on the owners' behalf, although they had agreed to co-operate fully and liaise with the owners' new agent or legal representatives.

The property factors had been advised by the homeowner that any such action was time-barred. They had sought their own informal legal advice, which indicated that owners might be able to pursue a claim against CBL, as there was sufficient evidence on file to show that deficiencies existed and had been raised within 5 years of completion, with the contractor being given an opportunity to make good. In addition, significant new information had come to light suggesting this was a latent defect, which might allow owners to proceed with a case against CBL.

The property factors concluded their written representations by pointing out that, even if the work had been completed 100% satisfactorily in 2007, time had long

since passed whereby owners ought to have instructed further redecoration of the steel beams and cross-ties. The property factors had issued a proposal for this work early in 2017, but had been advised to withdraw their formal proposal and their management appointment had been terminated shortly thereafter.

THE HEARING

A hearing took place at Gamble Halls, 44 Shore Road, Greenock PA19 1RG on the morning of 14 May 2018. The homeowner was present at the hearing. The property factors were represented at the hearing by Bryan McManus, one of their Directors, and Gillian McPeake, their Inspection Team Leader.

Summary of Oral Evidence

The chairman told the parties that they could assume that the Tribunal members had read and were completely familiar with all of the written submissions and the documents which accompanied them. He then invited the homeowner to address the Tribunal with reference to his complaints under each Section of the Code of Conduct. The wording of the relevant portions of each Section of the Code included in the application is set out below, followed by a summary of the oral evidence given by the parties in respect of that Section.

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

The parties were agreed that there was not a planned programme of cyclical maintenance in place, although there had been an intention to introduce one. The property factors stated that the Deed of Conditions did not require such a programme. Regular inspections were carried out, but there was no cyclical maintenance programme in place for the development.

The property factors explained to the Tribunal that they had no specific delegated authority. Inspections would be carried out by their Property Inspection team, but the inspector would not be someone with a building surveying qualification, The purpose of the inspection would be to note any obvious defects. The homeowner asked how the property factors could analyse whether work had been properly done by suitably qualified workmen. The response by the property factors was that they were not surveyors and did not sign off on contracts, but of course a surveyor could be appointed if the owners wanted one. The homeowner pointed out that the report by Orr Fire Protection had backed up what he had said all along, but the property

factors referred the Tribunal to the e-mail that Nullifire had sent to Inverclyde Council on 1 August 2013, confirming that both the primer system used and top seal were compatible with their Nullifire system, which they were confident would provide the required fire rating. In response to a question from the homeowner, The property factors told the Tribunal that it was CBL who had prepared the specification for the work. The property factors would then compare estimates to see that they were comparable and would then put them to the owners. They relied on the contractors to determine what works they recommended.

Section 6.9. "You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided..."

The homeowner told the Tribunal that the last attempt at remedial works had been in June 2012 and there had been a gap from 29 April 2013 until 3 May 2017 in any attempts to pursue the contractor. The property factors responded that they considered that the Nullifire report in August 2013 brought an end to the matter, although they accepted that the homeowner did not agree with the report. The Council had suggested further work was required, which the property factors had recommended to the owners, and that work had been done.

The homeowner pointed out that the Completion Certificate had still not been issued because the Council are not satisfied that the work to the cross-ties has been completed. The cross-ties had been fire protected when the building had been completed and the property factors must have seen during their quarterly inspections that they had deteriorated. The property factors said that CBL had not included it in their recommended works for which they had quoted. There had been in effect sign-off from the Council in August 2013. They had agreed to accept the Nullifire report, had recommended that fire collars be added and this work had been done in 2014.

The homeowner contended that the fire collars were necessary as a result of CBL's negligence. Until the matter was raised by Inverclyde Council, the owners had not been aware that the fire collars were not going to be attended to. The property factors emphasised that the first idea they had had of the requirement for fire collars had been the Council's letter of 13 August 2013. No owner had mentioned it to them prior to that date.

The homeowner then questioned why the propery factors had not suggested court action long before they did. The property factors reiterated to the Tribunal that they had considered the matter closed. Latterly, there had been correspondence with the homeowner regarding a redecoration programme, which would have included the work to the cross-ties and the question of advance funding had been raised, but the owners had said they did not want to go ahead and had terminated the service of the property factors. The homeowner insisted again that this was not redecoration. It depended on a qualified coatings contractor being appointed and he did not think

that the property factors had checked to see if CBL were qualified to carry out that sort of work.

The homeowner felt that the property factors had let down the owners by not pursuing the contractors. He admitted that he had not opposed the appointment of GDN to carry out the fire collar work, but said that he had made it clear that he had no objection provided the owners did not have to pay for it. He had also asked the property factors to get GDN to come to the property to point out the two collars that they had altered, but had received no response. The property factors stated that the pipes were all encased by this time and the job had been completed. They denied that any correspondence had not been answered.

Section 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."

The homeowner told the Tribunal that his complaint under this Section of the Code was really about a failure to comply with time limits and the fact that the property factors say they will deal with complaints promptly, but this matter had taken from 2009-2017.

The property factors said that they had responded to every piece of correspondence the homeowner had sent in. They accepted that there might have been odd times when they had not met their stated time limits and apologised for that.

Failure to carry out the Property Factor's duties

The homeowner did not provide any evidence at the hearing in respect of this aspect of his complaint.

Closing Remarks

The homeowner concluded by telling the Tribunal that he still did not know who was responsible for making up the specification for the job in the first place. The property factors were saying it was not them and the contractors were saying it was not them. CBL had not used the materials they said they would. Nullifire made recommendations on how to fix it. CBL had not followed those recommendations. Inverclyde Council were only concerned that like for like fire protection was in place, and, before CBL had come along, the cross-ties had been protected and fire collars were in place. The owners accepted that the fire protection work needed to be done, as Inverclyde Council will not issue a Completion Certificate unless the cross-ties are protected and the owners were in the process of getting agreement and funding to carry it out.

The property factors did not add any closing remarks to the evidence they had given.

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

The Tribunal makes the following findings of fact:

- The homeowner is the owner of the property.
- The property forms part of a development of 24 flats, completed in 1997.
- The property factors, in the course of their business, managed the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 1 November 2012.
- The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- The homeowner made an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") dated 9 October 2017 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.
- On 17 January 2018, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

Reasons for the Decision

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 6.4 of the Code of Conduct. The Tribunal found that there was no agreement between the parties that there would be a programme of cyclical maintenance in respect of the development of which the property forms part. The homeowner had not produced any evidence to support his contention that the property factors had failed to comply with the Section.

The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with Section 6.9 of the Code of Conduct. The homeowner had included in his written representations, a helpful timeline of events and a synopsis of his diary notes from 11 May 2009 to 26 March 2013. Although the Tribunal could only have regard to events that occurred after the property factors became subject to

the Code of Conduct on 1 November 2012, the diary notes gave a clear indication of the very large number of e-mails that the homeowner sent to the property factors and of the many telephone calls he made to them during this period. The diary notes do not indicate any pattern of delay in responding on the part of the property factors. The property factors, in their e-mail to the homeowner of 22 December 2017, list 17 dates on which they contacted CBL regarding the points raised by the homeowner and from 23 July 2012 to 3 October 2012, they were in contact on a very regular basis. Then, however, there is a gap to 7 March 2013. There are then 5 contacts between 7 March 2013 and 29 April 2013, but there is no further contact recorded after that until 3 May 2017, although the Tribunal has also seen a letter from CBL to the property factors dated 21 December 2016. The Tribunal noted that the property factors had stated that they had regarded the matter as resolved following receipt of the Nullifire report in August 2013, but on 13 August 2013, Inverclyde Council had written to the property factors indicating that the cross-beams did not appear to have had remedial work carried out and that fire collars had not been fitted. The Tribunal found no evidence that the property factors had communicated this to CBL at the time and sought their further comments. Admittedly, CBL had made it clear in their letter to the property factors of 22 April 2013 that they would not be returning to the property again, as they had completed the job originally estimated for and confirmed by Nullifire as compliant to satisfy the Building Control department of the Council, but when it became clear that this was not the case, the Tribunal would have expected the property factors to at least attempt to re-open discussion with CBL, even if the prospects of success were not good. They did write to CBL in April 2017 with a copy of the report by Orr Fire Protection and there was subsequent correspondence.

On the basis of the evidence presented by the parties, the Tribunal found that the property factors failed to comply with Section 6.9 of the Code of Conduct in that they failed to pursue the contractors between August 2013 and December 2016, despite being aware that the homeowner was still not satisfied with the situation and that Inverclyde Council would not accept the Certificate of Completion without further work being carried out. The view of the Tribunal is that the property factors should have raised the issue again with CBL in August 2013 and if, notwithstanding the Council's view, CBL remained unwilling to do anything further, the property factors should have written to the owners to let them know that they could not take the matter any further and that it was for the owners to decide whether to resort to court action.

The Tribunal makes no comment on the prospects of success of any court action or whether or not it might be time-barred. The situation that has arisen might have been averted if a fuller specification of work had been agreed at the outset, but the Tribunal is unable to find that the specification was provided by the property factors. CBL indicated in their letter of 4 May 2017 that a specification was provided by the property factors, but the Tribunal has seen no evidence of that. The wording of the quote, with language such as "timber dooks" was such as to suggest significant input

from the contractors, given that the property factors' Property Inspector did not have a building surveying qualification.

The Tribunal did not uphold the homeowner's complaint under Section 7.1 of the Code of Conduct. The property factors' written Statement of Services says that they will deal with complaints relating to contractors in the same way as complaints relating to their own service. Their Complaints Procedure states that they will investigate the complaint and endeavour to resolve it within 28 days.The homeowner's complaint was about the time that it had taken the property factors to pursue the complaint about CBL, with lengthy periods of delay and inaction and, in the view of the Tribunal, this was more appropriately dealt with as a failure to comply with Section 6.9 of the Code. The Tribunal held that the property factors did have a clear written complaints resolution procedure which set out a series of steps and a timescale and included how they would handle complaints against contractors and that, accordingly, the property factors had not failed to comply with Section 7.1 of the Code of Conduct.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with the Property Factor's duties. No evidence relating specifically to this aspct of the complaint was provided to the Tribunal.

Property Factor Enforcement Order

The Tribunal proposes to make a Property Factor Enforcement Order, as detailed in the accompanying Section 19(2) Notice.

Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

G Clark

Signature of Legal Chair

Date 20 June 2018