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

Decision on the Factor's Application for a Review of the Tribunal's Decision under Section 44 of the Tribunals (Scotland) Act 2014

ChamberRef:
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 Tribunal considered matters and following upon representations received from the Factor and the Homeowners and the submissions made at the review hearing on 19 November 2018, upheld in part its original decision dated 24 July 2018 and found the that the Factor had failed to carry out its property factor's duties and 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".

This Decision should be read in conjunction with the Tribunals decision of 24 July 2018.

BACKGROUND

1. On 24 July 2018 the Tribunal issued a decision in respect of the Homeowners applications to the Tribunal and determined to propose to make a Property Factors Enforcement Order. As a consequence of representations made by the Factor's representatives, BTO Solicitors LLP, 48 St Vincent Street, Glasgow the Tribunal considered matters and decided to review its decision. The Factor's representatives subsequently sought permission to appeal the Tribunals decision to the Upper Tribunal but this was refused partly on the grounds that the issues raised could be addressed on review.

2. A Review hearing was assigned to take place at George House, 126 George Street, Edinburgh on 19 November 2018.

3. Both parties lodged written submissions and productions in advance of the hearing.

HEARING

4. The Hearing was attended by Mr Bob Gehrke and Mrs Maureen Currie on behalf of the Homeowners and by Mr David Reid for the Factor represented by Mr James Reekie and Mr David Young of BTO Solicitors, Glasgow. The Factors called one witness, Ms Jacqueline Borthwick. Another Homeowner, Ms Helen Quigley was in attendance as an observer.

5. By way of preliminary matters, the Tribunal confirmed that it did not intend to review its decision in respect of Sections 2.2, 3, 6.4, and 6.9 of the Code.

6. For the Factors, Mr Reekie had two preliminary matters. Firstly, he had a bundle of Authorities that he wished to submit and would refer to in the course of his submissions and secondly, he had a late inventory of Productions that he also wished to lodge. The Tribunal allowed the List of Authorities to be received. Mr Reekie explained that the Inventory was late as the documents had only been brought to his attention not long before the hearing. For the Homeowners Mr Gehrke complained that this was typical of the way in which the Factor operated. After a short adjournment to consider matters the Tribunal allowed the Inventory to be received although late.

Summary of submissions

7. For the Factor Mr Reekie submitted that the Tribunal had said in its decision that there had been a technical breach of Section 1 of the Code as the Written Statement of Services ("WSS") that had been before the Tribunal

had no provision for the Factor terminating its services. However, there were now updated WSS that had been lodged as productions. Mr Reekie also pointed out that according to the record produced in the Supplementary Inventory at item 4 a Web Tracker Screenshot, Mr Gehrke had on 30 January 2018 downloaded the current WSS.

8. For his part Mr Gehrke said that he had submitted to the Tribunal the copy of the WSS that the Homeowners had been using and could not remember downloading the document from the web but accepted that according to the screenshot he had. He did not know if the documents were any different. It was part of the Homeowners submissions that the Factor should have sent each Homeowner a copy of any updated WSS. Mrs Currie supported this view.

9. There then followed a discussion with regards to the points made at the original hearing (paragraph 13) but which had not required to be considered at that time by the Tribunal. This was whether, in respect of a new homeowner directing him or her in the welcome pack that was sent out by the Factor, to a link on the Factor's website complied with the terms of the preamble to Section 1 of the Code to "provide" each homeowner with WSS. Also, whether if there were any substantial changes to the terms of the WSS was it again sufficient to refer Homeowners to the new document available on the website.

10. In this regard the Tribunal heard from Mr Reid who said that previously new owners had been given a hard copy of the WSS and existing owners had been given a copy when there had been updates. However, the Factor had taken the view since 2016 as there had been three versions of the Factor's WSS prepared that it was reasonable to refer to it in the welcome pack or newsletter and if any new owner or existing owner requested a hard copy this would be sent out.

11. For her part Mrs Currie said that she did not recall receiving other copies of the WSS beyond the copy she had provided to Mr Gehrke.

12. The Tribunal then heard evidence from Ms Jacqueline Borthwick, the Factor's Head of Finance who explained that any major changes to the WSS were sent to Homeowners by post or email depending on how the Homeowner had chosen to communicate with the Factor. Ms Borthwick went on to say that new Homeowners were given a welcome pack but that did not contain the WSS but referred the owner to the website.

13. Mr Reekie did not direct the Tribunal to any reference in either of the WSS submitted in the Inventory of Productions that made reference to the Factor being entitled to terminate its service agreement with the Homeowner on giving three months' notice as suggested at the original hearing.

14. Mr Reekie submitted that the Factor was entitled to terminate its appointment on giving notice and that had been provided to the Homeowners at the AGM on 27 October 2017 when they had been told that

the Factors would continue in place until 15 February 2018 and that had again been confirmed in the letter to Homeowners of 4 December 2018. In Mr Reekie's submission the information provided by the Factor was not misleading or false.

15. Mr Gehrke advised the Tribunal that he had submitted proposed corrections to the minute of the AGM of 27 October 2017 to Mr Alastair Wallace as it had not been an accurate reflection of the meeting. Mr Gehrke also commented that the Homeowners had been advised that the minute would be produced within days of the AGM when in fact it was not received until 4 December. In particular Mr Gehrke said it was the Homeowners' position that no termination date had been stated at the AGM. According to Mr Gehrke what had been said was that the Factor would see them through to enable the Homeowners to find a new factor. There had not been a specific date but a general indication of three to six months had been given Mr Gehrke then referred to the letter from the Factor of 30 November 2018 which was entirely different from what was then said four days later in the letter of 4 December and that this had been misleading. Mr Gehrke went on to say that there were other examples where the Factor had not produced accurate information with regards to site visits and the work that required to be done at the development and that all of these should be taken together. Mr Gehrke also said that the minute of the AGM of 27 October 2017 had never been agreed.

16. Mr Reekie suggested that whilst the information provided in the letter of 30 November may have been inaccurate it was not misleading and Mr Young submitted that the Factor was entitled to change its mind for commercial reasons and again the information in the earlier letter would not be misleading.

17. Mr Reekie then referred the Tribunal to the meaning of property factors duties and explained how the wording of the Act had been amended during the Bill stages as it progressed through the Scottish Parliament to take account of non-contractual obligations arising from the title deeds or the Title Conditions (Scotland) Act 2003. In the current case the Factor's duties were, he submitted, contractual.

18. Mr Gehrke said he was amazed at how it was being argued for the Factor on wording and technicalities and it was unsatisfactory when the owners had been left with so much work because the Factor had been unwilling to progress it. The Factor was willing to employ solicitors to act for them when all the owners were looking for were competent factors who would deal with meetings properly and look after the development.

19. With regards to any failure on the part of the Factor to properly mange the sewage treatment plant Mr Young referred the Tribunal to the reports from Ritmac that indicated that the failure of the pumps may have been due to the materials being put in the drains by the owners and queried whether it could be determined that the problem lay with lack of de-sludging.

20. For her part Mrs Currie said that the problem with inappropriate material being put down the drains had been dealt with a number of years previously and that this had been raised at the previous hearing.

21. According to Mr Gehrke since the system had been de-sludged in June this year there had not been any further issues with the sewage plant.

22. Mr Reekie referred the Tribunal to his written submissions the productions and the reports by Ritmac and their invoices and suggested that there had been regular inspections and repairs and that the Factor had therefore performed its duties in this regard and queried how far a Factor could be expected to go.

23. Mr Reekie then addressed the Tribunal on loss and again referred the Tribunal to the written submissions and to the authority provided in Wilkie v Brown 2003 SC573 and suggested that the Homeowners had provided no evidence of loss.

24. Mr Reekie also suggested that if the Tribunal did make a finding that a financial award should be made to homeowners, they should not all be treated the same as they had different periods of ownership. The Tribunal accepted this may be a cogent factor and gave a verbal direction to the Factor's representatives to provide confirmation of the dates each owner took entry to their property within two days of the hearing.

25. Mr Gehrke thought that there should be a refund of the management fees paid by the owners as the Factor's had failed in their duties and had not provided an adequate service.

DELIBERATIONS AND REASONS

26. The Tribunal felt there were inconsistencies in the evidence of Mr Reid and Ms Borthwick over how changes to the WSS were provided to Homeowners with Ms Borthwick saying that significant changes to the WSS were issued to Homeowners by post or email whilst Mr Reid saying that Homeowners were directed to the portal. This taken with Mrs Currie's assertion that she had not received more recent updates to the WSS beyond the one given to Mr Gehrke and Mr Gehrke being quite vague in his recollection of what he viewed on the portal does in the Tribunal's view highlight the inadequacy of putting important information like the WSS in such a form. In addition no documentary evidence was offered on behalf of the Factor that owners were directed to links by email, mail or newsletter.

27. As the version of the WSS that was current prior to the Factor withdrawing its services from the Homeowner is now before the Tribunal it is necessary to determine whether it is a breach of the Code to "provide" homeowners with only a means of accessing the WSS rather than giving them a hard copy. Whilst the Tribunal accepts that there have been rapid developments in technology in the past few years that may well mean that many homeowners are able to access documents through the internet and are

being encouraged by various suppliers to do so the word "provide" if given its natural meaning would mean that a Factor should give a homeowner a hard copy at the commencement of providing its service and also in the event of any substantial change. The Tribunal is therefore of the view that in this regard the Factor is in breach of the Code. However, given that there is no continuing contract between the parties it would be pointless to make any order in this regard now requiring the Factor to send copies of the WSS to the Homeowners.

28. It had been suggested at the original hearing that whilst the WSS that was before the Tribunal did not make provision for the Factor terminating its services the then current WSS did. Whilst continuing to accept that the Factor was entitled to terminate its relationship with the Homeowners the Tribunal was not directed to, and following the hearing, on reading the WSS could not identify any reference to the Factor's right to terminate on giving three months' notice. The Tribunal was therefore of the view that there was a breach of the Code in this regard. The Tribunal felt however that this breach did not have any significant adverse impact upon the Homeowners other than in respect of a degree of trouble and inconvenience.

29. The Tribunal noted that the minutes of the 2017 AGM were never finalised or approved and there was clearly a factual dispute as to what had been said by Mr Wallace at the AGM about the Factor terminating its services and this was further confused by the letter of 30 November 2017 being contradicted by the letter of 4 December 2017. The Tribunal did consider that overall the information provided around this time by the Factor was misleading.

30. The Tribunal accepted the Factor's representative's submission that there was no duty on the Factor arising out of the title deeds and therefore any duties were contractual and based on the core services provided for in the WSS. It was clear from the discussion that management of the sewage treatment plant formed part of the Factor's duties.

31. There is no doubt that the Factor ensured that there were regular inspections and servicing of the plant on what was from the documents provided an approximately six-monthly cycle.

32. Between 2008 and 2016 there are reports by Ritmac of inappropriate debris such as cooking fat, plastic bags and sanitary towels being put down the drains causing failure of the pumps and drainage system. These problems were pointed out by the Factor in correspondence from the Factor to the Homeowners up to 2013. The Tribunal was not directed to any documents that suggested that the Factor raised the issue of inappropriate items being put down the drains by homeowners after that date. However, it appeared from the Ritmac inspection report of 10/9/14 that the SSR pump was blocked up with rags and sanitary towels and again in the report of 9/3/15 it was blocked with ragging. In the report of 21/4/16 there was a comment that the tank was in a bad condition with a build-up of ragging and debris. The Tribunal noted that it appeared that there was an inspection report around

September/October 2016 missing as in the report of 25/4/17 reference is made to pump 2 having previously been removed and in the report of 21/4/16 all four pumps were working OK. Also, at page 95 of the Factor's Inventory submitted for the Review there is a Ritmac invoice dated 31/10/17 that refers to an attendance on site to carry out service checks. It was not clear to the Tribunal if any steps had been taken by the Factor to draw the failure of pump 2 to the attention of homeowners. If there had been there was no documents or submissions in support of such a position. The Tribunal also noted that in the Minutes of the AGM of 24 October 2016 there was a reference to Ritmac providing full information on de-sludging as well as the property manager going to write to homeowners and tenants regarding items not permitted to be flushed down the toilet. The Tribunal was not directed to any further correspondence in this regard.

33. The Tribunal acknowledged that there were competing views on the part of the contractors instructed by the Factor and the Homeowners as to the cause of the failure of the pumps and the Homeowners had not lodged an independent report to support their claim that the primary problem lay with the lack of de-sludging rather than debris fouling the pumps. It did appear that long after 2013 homeowners were still putting inappropriate material down the drains despite the efforts on the part of the Factor to persuade them otherwise. Against that it did appear to the Tribunal that the Factor in 2016 /2017 and possibly even in the years before that could have been more proactive in explaining to the homeowners that Ritmac were continuing to find pumps jammed due to rags and sanitary towels being put down the drains. The Tribunal also noted that although de-sludging had apparently been recommended by Ritmac this did not appear to have been raised with owners either in correspondence or at annual meetings.

34. The Homeowners did in their original submission set out what they felt had been their loss amounting to a global figure of about £60000.00. In the original decision the Tribunal did not uphold several of the Homeowners complaints and indicated that it appeared likely that resistance from owners to meet the cost of repairs and maintenance over a number of years had led to additional costs being incurred. The Tribunal has not changed its view in this regard. The Tribunal in making its original award of £600.00 to each Homeowner did not have as much information before it with regards to the issues around the sewage treatment plant as it had at the Review hearing. The additional information largely provided by the Factor's representatives did assist the Tribunal in clarifying its thought in this regard. Whilst the Tribunal remained of the view that the Factor could have been more proactive particularly latterly, the situation was not as clear-cut as the Tribunal had previously thought. Homeowners were long after 2012/2013, still putting inappropriate material down the drains so must take some responsibility themselves for the pumps failing and that is clear from the Ritmac inspection reports. The greatest part of the original award had been made by the Tribunal to reflect its concerns over the way in which the Factor had handled its management of the sewage treatment system. Having had the opportunity to hear further from the parties and to consider the Ritmac inspection reports and invoices lodged as productions, whilst the Tribunal

remain of the view that the Factor has failed to properly carry out its duties, in the absence of expert opinion as to the extent of any loss that can be directly attributed to the failings of the Factor, the Tribunal is unable to make any assessment of loss in this regard.

35. The Tribunal in its earlier decision did not explain how it had arrived at the level of compensation awarded and in that regard the Tribunal accepts its decision was flawed. The Tribunal whilst finding that the Factor was in breach of Section 1 of the Code in the original decision viewed this as a technical breach as it believed that the then current WSS provided for the Factor giving three months' notice of its intention to withdraw it services. Therefore, the tribunal had not intended to make any compensatory award to the homeowners in this respect. As a result of the review the Tribunal still find the Factor to be in breach as the 2017 and 2018 WSS do not have any reference to the Factor being able to give three months' notice. However, the Tribunal whilst acknowledging that the Homeowners will have suffered a degree of trouble and inconvenience as a result of this breach and which is dealt with below did not consider that the Homeowners suffered any direct loss as a result of the breach.

36. The Tribunal has adhered to its original view that the information provided by the Factor with regard to when it would terminate its services was misleading. The letters of 30 November 2017 and 4 December were clearly at odds with each other and there was no agreement as to what had been said by Mr Wallace at the AGM on 27 October 2017. It cannot be said however that this has led to a direct loss incurred by the Homeowners. They have been able to find new property factors. Once again however the Tribunal is of the opinion that they will have suffered a degree of trouble and inconvenience as a result of the breach.

37. The Tribunal was of the view that all of the Homeowners would have suffered a degree of trouble and inconvenience as a result of the Factors breaches of Sections 1 and 2 of the Code and are of the view that an award of £100.00 to each Homeowner would be appropriate compensation. The Tribunal did not consider it appropriate to make any award of compensation for trouble and inconvenience to Mr Inglis. The Tribunal also noted that as the Homeowners' representative Mr Gehrke had prior to applications being made to the Tribunal been involved in dealing with various complaints to the Factor and for that reason the Tribunal considered that it would be reasonable to award him an additional £50.00 for his trouble and inconvenience.

The Tribunal confirms its Findings in Fact in its Decision of 24 July under exception of Finding number 52 and makes the following additional Findings:

38. The Factor failed to provide Mr Bob Gehrke with a WSS in compliance with the Code but instead directed him to a link on the Factor's website where it could be accessed.

39. The Factor failed to provide existing Homeowners with a hard copy of amended WSS after 2016.

40. The Factor wrote to the Homeowner on 30 November 2018 providing a commitment to assist the Homeowners in finding an alternative property manager and to continue to manage the development until this was achieved but not indefinitely.

41. The Factor wrote to the Homeowner on 4 December 2017 stating its services would cease on 15 February 2018.

42. Homeowners continued to put inappropriate material into the drainage system after they had been advised not to by the Factor in 2013.

43. Ritmac found pumps clogged and inoperative in 2014, 2015 and 2016.

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

8 January 2019 Date