Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19 of the Property Factors (Scotland) Act 2011 and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016

Chamber reference: FTS/HPC/PF/17/0101

Re: 5/4 The Pinnacle, 160 Bothwell Street, Glasgow G2 7EA ('the property')

The Parties:

Mr Nicholas Timmins and Mrs Agnes Timmins, both residing at Palma, North Biggar Road, Airdrie, Lanarkshire ML6 6EJ, ('the homeowners");

and

Park Property Management Limited registered under the Companies Acts in Scotland (SC413993) and having a place of business at 11 Somerset Place, Glasgow G3 7JT, ("the property factors')

Tribunal members: Mr George Clark (Legal chair) and Mrs Elizabeth Dickson (Ordinary member)

Decision by a 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 not failed to comply with their duties under section 14 of the 2011 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"; 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 13 March 2013 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 homeowners received on 14 March 2017 with supporting documentation, namely notification from the homeowners to the property factors for the purposes of Section 17(3)(a) of the Act dated 17 October 2016, written responses by the property factors to that Notification dated 14 and 24 November 2016, a letter from the homeowners to the property factors dated 7 March 2017, advising that the the complaint was being referred to the Tribunal, a copy of the property factors' written Statement of Services, a copy of the Burdens Section relative to the homeowners' Land Certificate under Title Number GLA168892, copy correspondence between the homeowners and the previous property factor, a letter from the property factors to the homeowners dated 9 September 2014, attaching a Reconciliation account, and a letter from the property factors to the homeowners dated 14 November 2016 relating to late payment charges.

Summary of Written Representations

(1) By the Homeowners.

The homeowners'application and supporting documentation referred to possible failures by the property factors to comply with Sections 1.1.C.e, 2.1, 3.1, 3.2 and 4.5 of the Code of Conduct. By letter dated 25 March 2017, the homeowners advised the Tribunal that they now wished to pursue only their complaints under Sections 3.1 and 3.2 of the Code. The following is a summary of the content of the homeowners' application to the Tribunal, insofar as it relates to their complaints under Sections 3.1 and 3.2 of the Code of Conduct :- The homeowners purchased the property on 28 August 2013. At that time, the property factors had been Peverel Scotland. The homeowners considered that the Deed of Conditions for the development of which the property is part, formed the basis of their contract with Peverel Scotland and with the property factors, who succeeded them. Peverel Scotland had resigned with effect from 31 December 2013. At no time during the period from August to

December 2013 had Peverel Scotland acknowledged or recognised their obligations under the Deed of Conditions.

The Deed of Conditions made provision to keep the factor in funds based on incremental increases in the factor's float, but the homeowners had discovered that an informal arrangement had been introduced whereby budgeted service charge payments were collected in advance. Thus, on 1 November 2013, Peverel Scotland had invoiced a service charge covering the period ending 30 April 2014, which was four months after they had ceased to act as factors for the property. The property factors' manager had advised the homeowners not to pay the invoice, so they had not done so.

On 4 April 2014, following issue of their closing account, the homeowners had drawn the attention of Peverel Scotland to Clause (FOURTEEN)(g) of the Deed of Conditions, as they had done in September and October 2013, but all three letters had been ignored. That Clause provided that each proprietor should receive an account from the Property Manager at regular intervals in the year and that the accounts should contain a detailed statement of the common charges incurred in respect of that period. On 24 April 2014, the homeowners had telephoned the property factors' manager for advice on what would be an appropriate settlement sum for the 126 days of their ownership that Peverel Scotland had provided factoring services and they concluded with her that £512.28 would be a fair sum. They had paid that sum, net of the float refund of £350, on 24 April 2014, but the payment had not been acknowledged by Peverel Scotland, who continued to send statements demanding moneys for the period from January to April 2014, less a small credit.

At the beginning of May 2016, in their budgeted estimate for the financial year commencing 1 May 2016, the property factors had included a line item "Previous Balance of £769.62" without further explanation. After protracted correspondence, the property factors had acknowledged and apologised for an accounting error on their part and reduced the "Previous Balance" to £457.75 which, it transpired, had carried over from Peverel Scotland's account. The property factors stated that the homeowners were still liable for this amount because, in their view, the debt attached to the property , irrespective of the homeowners' contractual position with Peverel Scotland or the terms of the Deed of Conditions.

The property factors had produced a reconciliation for the period from January to April 2014. The homeowners had pointed out to them that when there is a change of ownership, the liabilities of the outgoing and incoming owners must be based on actual costs incurred during the respective periods of ownership and not on a pro rata calculation derived from the number of days of ownership. Thus, costs incurred but not billed before the change of ownership could not be charged to the incoming owner unless a Notice of Potential Liability

had been registered. The homeowners maintained that they were only liable for outgoings incurred between 28 August 2013 and 31 December 2013 and that this would not include any part of the "irrecoverable debt" items (£39,004.00) that became due before 28 August 2013 but was redistributed amongst the remaining owners at that time.

The homeowners had been informed that Peverel Scotland had improperly charged items to the Reserve Account and that efforts were now being made by the property factors to recoup part of those monies, but contended that where any such improper charge was made before 28 August 2013, the homeowners would not be liable for a share of the cost of its reinstatement. The property factors had argued that the question of inaccurate billing by Peverel Scotland was a matter that the homeowners should take up with Peverel Scotland, but the homeowners disagreed. They had made concerted efforts to draw the attention of Peverel Scotland to their contract with the homeowners as defined in the Deed of Conditions and had kept the property factors informed of what they were doing. No amount of correspondence would have convinced Peverel Scotland of their obligations per the Deed of Conditions. A change of property factor did not diminish the homeowners' real rights per their title deeds. They did not dispute that the sum of £457.75 was owed to Peverel Scotland but maintained that it had been wrong to allocate it wholly to them. The homeowners had never been party to any contract which made them liable for any costs which pre-dated 28 August 2013.

As the homeowners went on to refer to the provisions of the Deed of Conditions relating to the property, it is appropriate at this point to set out the terms of the Clauses to which they referred. The Deed was registered by FM Homes Limited on 27 August 2002 in advance of the sub-division of the subjects which were formerly known as 140-160 Bothwell Street and 255 St Vincent Street Glasgow into flatted dwellinghouses, commercial premises and parking spaces.

Clause (FOURTEEN)(h)(i) and (ii) provide as follows:

"(h)(i) Each Proprietor shall make payment to the Property Manager of the proportion of the Common Charges and the Management Fee applicable in respect of his Flat, Commercial Unit or Parking Space within 28 days of receipt of the said statement of Common Charges payable for said accounting period. The Certificate of the Property Manager as to any sum outstanding shall, subject as aftermentioned, be binding on the Proprietor. Any dispute or difference to the amount payable by a Proprietor as shown in the said statement shall be determined by the Arbiter on application by the Proprietor or the Property Manager, but the amount showing any arrears of payments due shall be paid by the Proprietor before the matter is considered by the Arbiter and the adjustment thereof, if any, shall be made and

settled within seven days after the Arbiter's decision has been intimated to the Proprietor concerned and to the Property Manager. The Property Manager shall have power to sue for and recover by legal process the amount of any sum due and payable in terms of this deed which has not been paid, together with the interest hereon as hereinafter provided and the whole expenses, judicial and/or extra judicial incurred in such recovery;

"(h)(ii) In the event of the Property Manager after using all reasonable endeavours being unable to recover payment of Common Charges or expenses referred to in Sub-clause (i), interest referred to in Clause (THIRTEEN) or any part thereof, from any Proprietor or Proprietors then these sums shall be divided equally between the remaining Proprietors who are liable and responsible for the Common Charges as defined herein."

In their letter of complaint of 17 October 2016 to the property factors, a copy of which was included with the written representations, the homeowners referred to the fact that the property factors had stated in correspondence that the shared liability under Clause (FOURTEEN)(h)(ii) of the Deed of Conditions could pass to a new owner on a change of ownership, on the basis that the property factor might still be attempting to recover the unpaid debt long after it became overdue. The view of the homeowners was that this was incorrect and that shared liability under the Clause occurs at the time the debt becomes overdue after any period of grace outlined in the Deed of Conditions. They felt that the property factors were mismanaging their account by making them responsible for retrospectively paying in to the reserves when they had no such liability and by incorrectly apportioning their charges for a period when they were not in ownership. They referred to Clauses (FOURTEEN)(g) and (h)(ii) of the Deed of Conditions and stated again that the property factors were seeking to charge them for a period when they were not in ownership. It was, they said, wrong to employ a pro rata calculation to apportion charges between the incoming and outgoing owners. Charges should be allocated to the period where they became due and, as regards Clause (FOURTEEN)(h)(ii), the homeowners were liable only in those instances where owners' debts became overdue during the homeowners' period of ownership.

The homeowners concluded in their letter of complaint that the property factors had inherited the file of outgoings pertinent to the period 28 August 2013 and 31 December 2013 and that relevant costs during that period, less advance monies paid, defined their liability for that period. The change of property factor had no bearing on the homeowners' real rights in terms of the Deed of Conditions.

(2) By the Property Factors

The property factors did not make any written representations to the Tribunal, but it is relevant to note the terms of their written response to the homeowners' letter of complaint of 17 October 2016. The response, signed by Head of Customer Service, Elaine Adams, was dated 14 November 2016 and in it the property factors stated that there had been no change of ownership of the property during their period of management and that this appeared to be an issue between the homeowners and Peverel Scotland. Ms Adams was unsure how she could assist with this. Peverel Scotland had applied their charges on 31 December 2013 and whether they used all reasonable endeavours was for the homeowners to question, not Park Property Management as the incoming property factors. Ms Adams would have been willing to assist in an official complaint against Peverel Scotland back in 2014, but was unable to do so now after so many years and she asked whether the homeowners had submitted a complaint to Peverel Scotland at the time and, if so, what the outcome had been.

The property factors did not agree that they were making the homeowners pay retrospectively into reserves. They had a debt to the building that had been invoiced on 31 December 2013 which was being pursued. The property factors had not made any apportionment of charges when the homeowners were not the owners of the property. Their ownership predated the management of the building by the property factors and it was not possible for the property factors to retrospectively re-apportion charges relating to periods that they were not responsible for issuing bills for managing the building. The property factors were obliged to pursue all debts to the building regardless of who was liable and the homeowners should have taken this up with the previous factor at the time.

The property factors' Founder, Mr Paul McDermott wrote to the homeowners on 24 November 2016, having reviewed their letter of complaint of 17 October and Ms Adams' reply of 14 November, together with all the e-mails between the parties over the previous three years and other information held on file. He stated that the homeowners had received a statement from Peverel Scotland for the period to 31 December 2013 and that they had acknowleged receipt and stated their intention not to pay it by e-mail dated 31 March 2014. In all his correspondence with the homeowners, Mr McDermott had advised that they should pay the invoice prior to raising any query with Peverel Scotland. He had referred them to Clause (FOURTEEN)(h)(ii) of the Deed of Conditions and had pointed out on 29 April 2014 that Peverel Scotland had certified the balance due. He added that the Deed of Conditions stated quite clearly that "The certificate of the Property manager as to any sum outstanding shall, subject as aftermentioned, be binding on the Proprietor".

Mr McDermott concluded that the homeowners were aware of the sums due and had received the statement certifying the debt. The homeowners had acted unreasonably in certifying their own liability and paying a nominal sum of £162.28 against a debt of £620.00 , contrary to the provisions of Clause (FOURTEEN)(h)(i) of the Deed of Conditions. They had been querying this ever since with the property factors rather than raising a formal complaint against Peverel Scotland. They had refused to settle the outstanding balance of £457.72, contrary to the Deed of Conditions. The debt was valid.

Mr McDermott concluded that it was not for him to answer for the actions of the previous factor. He was surprised that the homeowners had introduced to his company issues that related to the actions of another factoring company from three years previously. The matter was, he said, between the homeowners and Peverel Scotland.

THE HEARING

A hearing took place at Wellington House, 134/136 Wellington Street, Glasgow G2 2XLG on 25 May 2017. The homeowners were present at the hearing. The property factors were represented at the hearing by their Founder, Mr Paul McDermott.

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 homeowners to address the Tribunal with reference to their complaints under each Section of the Code.

The homeowner, Mr Timmins, told the Tribunal that the homeowners had moved from a flat in Edinburgh, where he had been the chair of the owners' association. As such, he was very familiar with title deeds and he worked on the basis that the titles governed the relationships amongst the owners and between the owners and the factors. In relation to the property, it had become clear that practice had deviated from the title provisions. When Peverel Scotland had stopped acting as the factors, the homeowners had asked them three times to issue accounts in terms of the title deeds, but they had failed to do so. They had issued accounts on 31 March 2014. Mr Timmins had spoken to Elaine Adams of the property factors, who had suggested they pay Peverel Scotland on a pro rata basis, using the property factors' estimates of the annual charges. The homeowners had done this and had never

heard from Peverel Scotland again. Over a year went past and, when they received a bill from the property factors, they queried it and a minor inaccuracy in it was corrected.

At this point Mr McDermott interjected to advise the Tribunal that the account also showed the outstanding balance that the homeowners had not settled with Peverel Scotland, namely the difference between Peverel Scotland's final account and the amount that the homeowners had paid towards it. He did not dispute what the homeowners were saying, but their dispute was with Peverel Scotland. He did not think that they had carried out a reconciliation, but he could not speak for them. The property factors had secured the files, including the debt file, from Peverel Scotland and had been pursuing outstanding debts. He had recommended to the homeowners that they pay the balance on the account and then complain to Peverel Scotland.

The homeowners responded that they had on three occasions asked Peverel Scotland for a bill and all they were trying to do was to get a valid bill, which they would have settled immediately.

The property factors told the Tribunal that the only disagreement they had with the homeowners was as to who was responsible, together with recovery of the debt charge which had been applied according to the title deeds as it had been certified by Peverel Scotland. The homeowners should have complained to Peverel Scotland three years ago and, if necessary, should have referred that complaint to the Tribunal. The property factors had no input into the final account from Peverel Scotland and had no means of unravelling it. The money was owed not to the property factors, but to the owners as a whole. From the property factors' point of view, there was a certified figure which met the requirements of the Deed of Conditions, so they had nowhere to go. The reason that they had originally indicated to the homeowners that they should not pay the bill which was issued by Peverel Scotland to 31 December 2013 was that it appeared to include service charges to 30 April 2014, but the property factors had then noticed that a reconciliation showed a surplus which took into account a "roll-back" of the service charge to 31 December 2013. The property factors provided to the Tribunal a copy of their communication to owners of 28 April 2014, which had not been amongst the supporting papers with the application, but which the homeowners agreed at the Hearing that they had received. That letter raised issues with the final accunt from Peverel Scotland, including what appeared to be a massive overspend up to 31 December 2013 and a bad debt write off of £39,004 which, they said, had been "hidden" in the reserves over a number of years without the authority of the owners. They had also included a closing account fee of £6,647.99 without the authority of the owners. On 2 April 2014, the property factors had issued a standard complaint letter and encouraged all owners to send it to Peverel Scotland and had recommended at that

time that owners should not pay the final invoice. Peverel Scotland had issued reminder letters to owners on 23 April 2014, highlighting their debt recovery procedures and, in their letter of 28 April 2014, the property factors informed the owners that they had taken legal advice to the effect that Peverel Scotland were entitled to pursue the debt and that if an owner disputed an invoice, it had to be settled first and then contested after the fact. Accordingly, the property factors reluctantly advised the owners to pay the Peverel Scotland invoice, as they could not recommend a course of action that might incur additional charges, but reiterated the request that all owners submit a Stage One complaint to Peverel Scotland.

The homeowners stressed that it was the method that was wrong. It should have been self-evident to the property factors from the paperwork handed over to them that the method applied by Peverel Scotland was wrong. They were charging the homeowners money which they knew was not accurately calculated and there was no requirement in the title deeds to pay for items of expenditure that were not incurred during their period of ownership.

Closing Comments

The homeowners told the Tribunal that, regardless of any change of factor, they had real rights in the property that should remain undiminished. It was as if they had become the victims of circumstances as a result of a change of factor five months after they bought the property, then Peverel Scotland ignoring their correspondence and the debt simply being passed on to the property factors. There was nothing that they could have done to make it any different.

The property factors stated that they could not say absolutely what the correct figure should have been, without a full audit of the accounts for 2013. Peverel Scotland had, however, produced a certified figure, which the property factors were entitled and obliged to pursue on behalf of the owners as a whole. The homeowners were victims of the previous factor rather than victims of circumstances. They should have taken Peverel Scotland to the Tribunal or used the arbitration provisions in the Deed of Conditions. The property factors did not think they had a case to answer, as neither of the Sections of the Code of Conduct referred to in the application was relevant to them. They related to the obligations and duties of outgoing factors where homeowners decided to terminate their arrangement and not to the incoming factors. The homeowners should have asked Peverel Scotland for a full audit, as it appeared they had spent 85% of the entire budget in the first 8 months of 2013, but there was no doubting the fact that the owners were jointly

responsible for debts and the property factors were merely the agents of the co-owners when it came to debt recovery. The final accounts were cerified by Peverel Scotland and there was nothing the property factors could do to change that.

Having concluded giving oral evidence, the paries withdrew and the Tribunal gave careful consideration to all the evidence before it.

The Tribunal makes the following findings of fact:

- The homeowners are the owners of the property.
- The property forms part of a block of some 130 flats and a number of commercial units.
- The property factors, in the course of their business, manage 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' duties arise from a Written Statement of Services, a copy of which has been provided to the Tribunal and from the Deed of Conditions relative to the development of which the property forms part.
- The date from which the property factors' duties in respect of the property arose was 1 January 2014.
- 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 13 March 2013.
- The homeowners have notified the property factors in writing as to why they consider that the property factors have failed to carry out their duties arising under section 14 of the Act.
- The homeowners made an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland received on 14 March 2017 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowners' satisfaction.
- On 4 April 2017, a Convener of the Housing and Property Chamber intimated to the parties a decision to refer the application to a Tribunal for determination.

Reasons for the Decision

The Tribunal considered the application, with its supporting papers, the written representations of the homeowners and the evidence given by the parties at the hearing. The Tribunal made the following findings:

The Tribunal did not consider the homeowners' complaints under Sections 1.1.c.e, 2.1 and 4.5 of the Code of Conduct as these complaints were withdrawn by the homeowners prior to the hearing.

Section 3.1 of the Code of Conduct states:-

"If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services)."

The Tribunal accepted the evidence led by the property factors that this Section imposed obligations on outgoing factors, not on incoming factors. In this case, therefore, it applied not to the property factors but to Peverel Scotland, so the complaint under this Section could not be upheld. The Tribunal noted the terms of the Deed of Conditions and held that the final statement of account issued by Peverel Scotland amounted to a Certificate of the Property Manager in terms of Clause (FOURTEEN) (h)(i) and that the property factors were entitled to rely on the figures certified by Peverel Scotland in their final statement of account. They did not have a duty to carry out any sort of audit of the figures, nor would they have had the information necessary to enable them to carry out such an audit. It was clear, however, that the property factors recognised that there were potential grounds of complaint against Peverel Scotland which were open to the homeowners and the Tribunal noted that it was still open to the homeowners to pursue that course of action. The right to proceed with a complaint against Peverel Scotland had not been closed off as a consequence of the change of factor and the property factors had taken the step of providing all the owners on 2 April 2014 with a standard complaint letter which they could have used. The Tribunal was not provided with any evidence as to whether any of the owners had submitted the letters of complaint that the property factors had provided.

The Tribunal understood that it might not have been until the budgeted estimate issued by the property factors arrived in May 2016 that the homeowners realised that the balance

between the amount claimed by Peverel Scotland in their final account and the amount paid by the homeowners had not been written off, but at that point the property factors were acting on certified figures, so they had no option but to include the balance as arrears.

The Tribunal accepted that there might have been items in the final account from Peverel Scotland which related to work and services carried out prior to the homeowners' purchase in August 2013, but the incoming property factors would have had no validation of or responsibility for such a situation and it was for the homeowners to take up the matter with Peverel Scotland.

In passing, the Tribunal noted that the homeowner had deducted the float of £350 from the part-payment they had made of the final statement of account from Peverel Scotland, but that the float had already been included as a refund in the final statement of account.

Accordingly, and for the reasons set out above, the Tribunal did not uphold the homeowner's complaint under Section 3.1 of the Code of Conduct.

Section 3.2 of the Code of Conduct states:-

"Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor."

The Tribunal agreed with the evidence led by the property factors that this Section of the Code applied not to them, but to the outgoing factors, Peverel Scotland, and that the complaint under this Section could not, therefore, be upheld. The Tribunal noted that the final statement of accounts closed with a balance due by the homeowners, so that, in terms of those accounts, there were no funds due to the homeowners at the point of settlement. It was possible that a complaint against the previous factors would result in an adjustment of the figures, particularly if the homeowners were successful in their argument that they should not be liable for any charges or accumulated arrears that related to the period prior to their purchase date. The Trubunal specifically makes no comment on the likelihood of success of such an argument, as that would involve interpretation of both the Deed of Conditions and the contract that had been in place with the previous factors and of the interaction between those two documents.

Accordingly, and for the reasons set out above, the Tribunal did not uphold the homeowner's complaint under Section 3.2 of the Code of Conduct.

As the Tribunal did not uphold the homeowner's complaints that the property factors had breached the Code of Conduct, the Tribunal does not propose to make a Property Factors Enforcement Order.

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.

Chairperson Signature G Clark Date 25 May 2017