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

Property Factors (Scotland) Act 2011 ("the Act"), section 19

The First-tier Tribunal for Scotland, Housing and Property Chamber (Rules of Procedure) Regulations 2017 ("the 2017 Regulations")

Chamber Ref: FTS/HPC/PF/18/0796-0799 and 0801-0809

Properties at 14A-C, 15 A-H Wellington Square and 1A - 1B Cassillis Street, Ayr ("The Properties")

The Parties: -

Mr Ronald Baird, residing at 14B Wellington Square, Ayr, KA7 1EN, representing himself and twelve other homeowners residing at the Properties ("the Homeowner")

First Port Property Services (Scotland) Limited, Troon House, 199 St Vincent Street, Glasgow, G2 5QD ("the Factor")

Tribunal Members: -

Maurice O'Carroll (Legal Member)
Mary Lyden (Ordinary Member)

Decision of the Tribunal Chamber

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Factor has failed to comply with the Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the Act.

It also finds that the Factor has failed to comply with its property factor duties in terms of section 17(1) of the Act as set out below.

Background

1. By application dated 3 April 2018, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with parts of sections 2, 3, 4 and 5 of the Code of Conduct for Property Factors ("the Code"). The application also raised issues regarding property factor duties arising from the law of agency and the Deed of Conditions applicable to the Properties.

2. On the same date, applications from twelve other homeowners within the same development as the Homeowner were received by the Tribunal. Those

applications all named the Homeowner as their representative and were in identical or nearly identical terms to the Homeowner's application.

3. Formal notification of the Code breaches in compliance with section 17(3) of the Act was intimated to the Factor by the Homeowner on 12 March 2018. The parts of the Code specifically addressed in the notification and which therefore formed the basis of the application and consideration by the Tribunal were: Sections 2.1, 3 (preamble) 3.1, 3.2, 3.3, 4 (preamble) 4.1, 4.6 and 5.4 which are dealt with in turn below. The terms of the Code are well known to the parties and are therefore referred to in summary form, rather than their full terms.

4. By decision dated 27 June 2018, a Convenor on behalf of the President of the Housing and Property Chamber decided to refer all of the applications to the Tribunal for a hearing. Notices of referral were sent to the parties on 13 July 2018 and a hearing was set down for all thirteen cases to be heard on 6 September 2018 in Ayr.

5. A hearing took place within the Mercure Hotel, Ayr on 6 September 2018 at 10.30am. The Homeowner was personally present, accompanied by his wife and gave evidence on his own behalf. The Factor was represented by Mr Michael Ritchie, Solicitor, of Messrs Hardy Macphail. He attended along with Mr Roger Bodden, the Factor's Regional Manager, Mr Steven Maxwell, the Factor's Credit Control Manager and another of the Factor's employees, Ms Diane Bateman.

6. The written submissions and documentation produced by each of the parties were taken into account by the Tribunal, in addition to the oral evidence led at the hearings.

7. The Tribunal was greatly assisted by the clear, detailed and comprehensive written submission produced by the Homeowner dated 5 April 2018 included with his Inventory of Productions running to 134 pages in total. The written submissions concerned with the substantive complaints as set out above ran to 40 pages and is identical to the notification dated 13 March 2018 sent to the Factor and the Tribunal on 12 March 2018. For the sake of brevity and further to the Tribunal's duty to deal with matters expeditiously, these were taken as read, subject to any oral submissions made in supplement at the hearing. Those submissions will be referred to in summary form for the purposes of the present decision without the need for repetition.

8. By Direction dated 24 July 2018, the Tribunal found that the other twelve applications in respect of the Properties were in near identical terms to that submitted by the Homeowner. It was therefore directed that the Homeowner's application be treated as a "lead application" and that all findings in respect of application PF/18/0796 be applied to the other twelve applications, including remedy.

9. The present decision therefore relates to all thirteen applications without the need for consecutive identical findings in each case. At the hearing, neither

party sought to differentiate any of the factual circumstances pertaining to any of the twelve applications lodged at the same time as the Homeowner's application.

10. For its part, the Factor lodged written submissions which were received under cover of a letter dated 10 August 2018. The Factor relied upon those submissions, together with its letters to the Homeowner in response to his complaints dated 22 November 2016, 13 June 2017 and 30 October 2017. Again, the contents of those letters are known to the parties and will therefore be referred to in summary form rather than being repeated.

11. The Factor also submitted an Inventory of Productions comprising 30 items and a second Inventory of Productions, containing a single item, the Factor's insurance claim procedure.

Tribunal findings

The Tribunal makes the following general findings in fact pursuant to rule 26(4) of the 2017 Regulations:

12. The Homeowner's flat is part of a development in Ayr which he occupies with his wife. It was completed in February 2008, being part of a conversion of a 19th Century building into 16 flats. It is registered under Title Number AYR82417.

13. The Properties are subject to a Deed of Conditions registered by the developer on 15 February 2008, the terms of which were provided to the Tribunal by both parties. The addresses of the flats within the conversion are 14A-C and 15A-H Wellington Square, 1A and 1B Cassillis Street and 33, 35 and 37 Mews Lane ("the Mews Lane flats"). The owners of those flats (with the exception of the Mews Lane flats) have formed an Owners' Association ("WSOA") of which the Homeowner is Chairman.

14. The Mews Lane flats are under a single ownership and are currently let out to tenants. The owner of the Mews Lane flats is not an applicant under the present proceedings. He has been the subject of insolvency proceedings and has failed to contribute towards his share of common repair and maintenance costs. He has incurred a substantial factor debt which remains unpaid and which continues to accrue. This has been the source of complaint under a number of headings of the Homeowner's application.

15. The Factor was appointed in 2008. It was at that time known as Peveril Scotland Limited and subsequently changed its name to First Port Property Services Scotland.

16. It has been registered as a property factor since 1 November 2012 and its duty to comply with the Code of Conduct for Property Factors ("the Code") arose from that time.

17. The Factor ceased to be property managers for the development with effect from 18 January 2017 following their resignation from that appointment. A new factor has been appointed.

Further findings

The Tribunal makes the following specific findings in relation to the alleged breaches of the Code (including relevant preambles) and other factor duties:

Section 2.1 – Misleading or inaccurate statements

18. The complaint falls under two heads: Firstly, in relation to the proceedings being taken against the owner of the Mews Lane flats and secondly, in relation to the statement of accumulated reserves issued by the Factor.

19. The Tribunal considered that in relation to the second of these issues, whilst technically (if proved) could constitute a misleading or inaccurate statement, is more properly dealt with under section 3 of the Code dealing with financial obligations.

20. In relation to the first issue, the complaint arose in relation to the description of the insolvency proceedings affecting the owner of the Mews Lane flats. On 19 April 2016, the Factor informed the Homeowner that the owner involved with those flats, and in respect of whom a substantial debt had accrued, had signed a Trust Deed [for the benefit of creditors]. In fact, the correct description of the proceedings was that the debtor had signed an Individual Voluntary Agreement ("IVA") in Northern Ireland in February 2014.

21. As a result of that misinformation, the Homeowner had spent a considerable amount of time attempting to investigate the position in order to ascertain the nature of those arrangements and ultimately whether the sums due by the debtor would ever be recoverable. In the absence of recoverability, the sums due by the debtor would, in terms of the Title Deeds, be payable in *pro rata* shares by the remaining owners of the development.

22. The nature of the proceedings against the debtor were therefore of direct importance to the Homeowner and the members of the Owners' Association whom he represented. It was therefore foreseeable that the Homeowner would expend considerable time and effort in order to investigate the position in relation to those missing funds. The Tribunal accepts that the Homeowner suffered considerable inconvenience in fruitlessly attempting to investigate the situation where a Trust Deed had been entered into by a debtor as opposed to the actual position which related to an IVA entered into in Northern Ireland.

23. By letter dated 30 October 2017, the Factor wrote to the Homeowner stating "It is regrettable that we referred to the IVA as a Trust Deed and for this we offer an unreserved apology." That admission of error was repeated at the hearing. It was stated that the mis-statement was one borne of ignorance, rather than intent.

24. Section 2.1 of the Code does not make any reference to motive, merely whether misleading or inaccurate statements were made. Given the Factor's admissions, the Tribunal finds that the Factor breached section 2.1 of the Code.

Section 3.1 – Financial information upon termination of factoring

25. The preamble to section 3 of the Code makes clear that the overriding objectives of that section are the protection of homeowners' funds and clarity and transparency in accounting procedures.

26. Section 3.1 of the Code applies since there was a change in property factor. The Factor was required to make available to the Homeowner all financial information that related to his account within three months of termination.

27. The Homeowner calculated the position as at 18 January 2017 and calculated a balance being due before adjustments of £10,656.06. The Factor in its letter to him dated 30 October 2017 stated that the sum transferred to the new property managers was £7,128.19. No breakdown or explanation of this figure was given.

28. At the hearing it was submitted that the statement at pages 130-135 of the Factor's inventory of productions complied with this section of the Code. Having looked at the tables produced there, the Tribunal is unable to agree with that assertion. It was accepted in the course of the hearing by the witnesses for the Factor that it is not possible to piece together how the figure of £7,128.19 was made up. All the Tribunal was given was an assertion that it was the correct amount. By contrast, although not required, pages 80-84 of the Homeowner's bundle of documents clearly demonstrate how he had arrived at his figure of £10,656.06.

29. It was denied that the Homeowner had sought such clarification, although in the view of the Tribunal (a) he clearly had done and (b) the Code section required such information to have been provided, notwithstanding the absence of any specific requests. Further, on questioning from the Ordinary Member, it was accepted by the Factor that it would have been best practice to have passed on a final statement of accounts to individual homeowners but that this had not been done. The Tribunal finds that concession to have been correctly made given that it is required in terms of section 3.1 of the Code itself.

30. The Homeowner submitted that the Factor's accounting procedures are not of an acceptable standard and that to this day, he does not know how their final figures have been arrived at. From the documentation produced and what was stated at the hearing, the Tribunal agrees with that view. The Factor has a general duty to provide clear and transparent accounting procedures.

31. Accordingly, it finds that the Factor breached section 3.1 of the Code and its general duty to have in place clear and transparent accounting procedures. The Property Factor Enforcement Order to follow the present decision will require a full and comprehensive breakdown and explanation of the sum passed to the new factors upon termination of the factoring contract between

the parties. Any shortfall which cannot legitimately be accounted for must be made up by the Factor from its own funds.

Section 3.2 – Return of funds following termination

32. It was stated by Mr Bodden for the Factor that there was no requirement to return funds as there were none to return to individual homeowners, only to the new factors. Clearly, since £7,128.19 was passed to the new factors, who act on behalf of homeowners as their agents, there were indeed funds due. However, funds were in fact returned by the Factor at the point of handover (albeit indirectly, the amount of which is disputed and subject to clarification).

33. Accordingly, there was no breach of section 3.2 of the Code.

Section 3.3 – Detailed financial breakdown

34. The Tribunal adopts its findings in relation to section 3.1 of the Code in relation to a lack of clarity transparency in the Factor's financial records. The Factor referred to pages 89-91 and 95 to 99 of its Inventory of Productions as demonstrating compliance with section 3.3 of the Code. It was stated that these showed the anticipated annual budget for the development and actual expenditure incurred against that with an actual cost to each homeowner being stated.

35. However, even by the date of the hearing, the Tribunal was not provided with a balance brought forward from previous years (showing the starting point for the figures) detailing all Income and Expenditure with a statement of irrecoverable debts due so that the true financial position of the homeowners' funds could be clearly and transparently ascertained.

36. It was submitted by the Homeowner that to this day, he still does not know the full details of the amount of debt that was due by the non-paying proprietor of the Mews Lane flats. The submissions he made at pages 32-34 of his submission in relation to this issue have still not been addressed. He accepts that he and the other applicants require to pay their share of the non-payer's debts, but that they should only have to pay the amount that is legitimately due. Until there is a proper accounting, it is not possible to ascertain that amount. The Tribunal accepts that submission and finds that the current accounting provided by the Factor is inadequate for that purpose.

37. Therefore, the Tribunal finds that the Factor has breached section 3.3 of the Code. Similar clarification regarding the final financial position as narrated above in relation to Code section 3.1 will be required as part of the Property Factor Enforcement Order to follow the present decision in terms of section 3.3.

38. On production of such a clear and transparent accounting, where there is a shortfall in funds which cannot legitimately be accounted for, the Factor will be required to make up such a shortfall from its own funds.

Section 4.1 – Procedure for debt recovery

39. This section requires factors to have a clear written procedure for debt recovery which must be clearly, reasonably and consistently applied.

40. Page 39 of the Factor's Inventory of Productions sets out its Credit Control Procedures which, on the face of it, complies with section 4.1 of the Code. The Homeowner argued that although the procedure exists, the second part of the clause was not complied with in that it was not applied consistently.

41. The Tribunal noted that the debt recovery procedures had been invoked by the Factor in relation to the owner of the Mews Lane flats only. A lack of consistency could not therefore be demonstrated as there was no comparator provided in evidence. The exercise of those procedures was admittedly dilatory, but that failure falls under section 4.6 of the Code which is considered below.

42. In relation to section 4.1 of the Code, the Tribunal found there to have been no breach.

Section 4.6 – Informing homeowners of debt recovery problems

43. Section 4.6 of the Code requires factors to keep homeowners informed of debt recovery problems of other homeowners which may affect them.

44. In this instance, the debt recovery issue in relation to the owner of the Mews Lane flats arose in January 2014 (due to the IVA) and yet it was not until 22 December 2015, almost two years later, that the Homeowner was informed of that difficulty. The letter of 22 December 2015 to the Homeowner narrates that an irrecoverable debt had arisen at that time in the amount of £9,526.34. The Tribunal heard evidence that the debt had continued to accumulate after that time.

45. In evidence, the Factor accepted that there had been a failure to inform homeowners of the difficulty which had arisen in relation to the defaulting homeowner. The Tribunal therefore finds that the Factor has breached section 4.6 of the Code.

46. Although there was no complaint under section 4.7 (reasonable steps to recover unpaid charges), the Tribunal notes that an action was raised against the debtor in Glasgow Sheriff Court and that a decree in absence was eventually obtained on 16 August 2011. Attempts at enforcement by way of bank arrestment and rent arrestment ultimately proved fruitless. The Homeowner considered that the judgment ought to have been pursued in Northern Ireland where the debtor homeowner is domiciled. However, the Factor had elected to pursue the debt by passive means by way of a Notice of Potential Liability, rather than actively pursuing the debt in the Northern Irish courts for reasons of cost. The Tribunal makes no finding in relation to that course of action since the issue was not before it.

Section 5.4 – procedure for submitting insurance claims

47. Production 31 contained within the Factor's second Inventory of Productions is the Factor's Insurance Claims Procedure dated 1 July 2016. As with the complaint under section 4.1 of the Code, the simple submission by the Factor was that it had the necessary procedure in place and therefore section 5.4 had been complied with.

48. The Tribunal agrees with that submission insofar as the bare terms of section 5.4 of the Code is concerned. There Tribunal finds no breach of section 5.4 of the Code. However, the Homeowner's submission went further than that and related to action taken by the Factor with disregard to the development's interests and a failure to comply with the factor duties in terms of section 17(1)(a) of the 2011 Act.

Factor duties not arising under the Code

49. At common law, the duties of an agent are to act with ordinary care and to exercise the same prudence as they would in their own affairs.

50. The development was subject to an NHBC (Buildmark) ten-year warranty which ran until February 2018, which is to say, covering the entire period when the Factor was property manager of the development. It was submitted on behalf of the Factor that it had no duty to liaise with NHBC further to that warranty, it being a matter for individual homeowners to take up. The Tribunal, however, accepted the Homeowner's evidence that NHBC will not deal directly with homeowners where a factor has been appointed. Further, it was the evidence of Mr Bodden on behalf of the Factor that the first port of call in relation to any repairs was with the insurers.

51. Taking these matters together, it would mean that in the view of the Factor, that where there was a roof leak caused by a building defect, rather than by a storm, they would seek indemnification from the insurer in either case. The difficulty with this approach is that the insurer will apply an excess to the claim which will deplete the homeowners' reserve fund, whereas a claim under the NHBC guarantee would not.

52. Putting it more starkly, it could potentially mean that the roof leak would not be dealt with at all by the Factor in the first scenario, whereas it would in the second, even although the same loss and damage would occur in either case.

53. The Tribunal could see no principled reason for this approach if ordinary care in the best interests of the development were applied. In either case, administrative resources would be applied to obtain redress from a third party (whether insurer or NHBC), the only difference being in relation to the cost to the development of each.

54. It was stated in submission that the Factor has no contractual relationship with NHBC whereas it does with the insurer. That submission is also untenable. The Factor only has a contractual connection with the insurers as agent for the

homeowners as principals in accordance with the Title Deeds, even it if is involved in setting up the annual insurance contract. Similarly, the NHBC guarantee is a contract with the homeowners which the Factor is in a position to administer on their behalf as their agents, just as the homeowners would themselves.

55. In the opinion of the Tribunal, there is therefore no justification in ignoring the existence of the benefit of the NHBC warranty and proceeding to make a claim on the insurance in each and every case regardless of the circumstances of the loss incurred. This is especially so where NHBC claims may only be pursued by a factor in circumstances where one has been appointed.

56. Where these issues actually arose is set out at pages 36, 37 and Schedules 16.1 and 16.2 of the Homeowner's submissions. He set out a number of instances where insurance claims were made and excess charges incurred, where he states a claim under the Buildmark Guarantee ought to have been made. He also claims that this had a knock-on effect on insurance premiums. He claims that the expense to the development amounts to £14,361.12 in total. This is denied by the Factor. Reference was also made to page 136 of the Factor's productions which sets out all insurance claims made. Again, the Homeowner's position that an excess charge was paid by the development's reserve fund in each case, whereas such claims did not require to be pursued via the insurer.

57. Unfortunately, while agreeing with the submissions put forward by the Homeowner, the Tribunal was not in a position to adjudicate on each of the aspects referred to by the Homeowner since the evidence led did not allow for that level of detailed determination. It is not therefore possible to ascertain which of the claims referred could more properly have been made under the NHBC Buildmark Guarantee and which were properly insurance claims. The Tribunal does however find that the Factor failed in its factor duty to act in the best interests of the applicants in the manner in which it considered those claims.

58. Finally, in relation to factor duties not arising under the Code, there was an issue in relation to the demolition of a chimney stack at the development. It had fallen into disrepair and required to be either demolished or reinstated. Ironically, despite the position taken in evidence and submissions at the hearing in relation to insurance claims, the Factor negotiated with NHBC with regard to the works required.

59. The evidence of the Homeowner was that he had instructed reinstatement of the chimney stack and yet it had nonetheless been demolished on the instructions of the Factor. The Factor drew the Tribunal's attention to page 181 of the Factor's productions to show the written consent of the Homeowner and his wife to the demolition works.

60. The Homeowner's evidence was that by the time of his signature on 28 November 2014, the chimney stack had already been demolished. Had he not signed the consent, the sum of £5,303 agreed by NHBC would not have been

paid for the works and charge would instead have been borne by the development. He and his wife were therefore forced into that agreement in relation to a situation which was by then a *fait accompli*, although not one of their choosing.

61. The Tribunal accepted and preferred the Homeowner's evidence on that point and therefore finds that the Factor failed in its duty to carry out the instructions of the Homeowner at the appropriate time when the repair to chimney stack issue arose.

Conclusion

62. The Tribunal finds there to have been breaches of sections 2.1, 3.1, 3.3 and 4.6 of the Code. It also finds the Factor has breached its property factor duties to the extent set out above.

63. A proposed Property Factor Enforcement Order ("PFEO") will accompany this decision. Representations are permitted in relation to the proposed PFEO only and must be submitted within 14 days, all as narrated within the body of that document. Separately, the appeal provisions in relation to the present decision are set out below.

Appeals

64. 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 within 30 days of the date the decision was sent to

M O'Carroll
Legal Member

Date: 24 September 2018