Decision of the Homeowner Housing Committee
In Applications under section 17 of the Property Factors (Scotland) Act 2011

by

1. Roger Marchant, 8 Fairmount Drive, Sauchie, Clackmannanshire FK10 3HN
2. Russell Bowen, 27 Clepington Road, Dundee DD4 7EL
3. Murray Philips, 51/11 Rattray Drive, Edinburgh EH10 5TH
4. Lorraine Findlater, 29 Rosehill Road, Montrose, Angus DD10 8ST
5. Deirdre Langton, The Cottage, Mannings Opening, Strand Street, Sherries, County Dublin, Republic of Ireland.
6. Jill Sim, Flat 17, Royal apartments, 15 Union Street, Dundee DD1 4BN

and

7. Fiona Taylor, 24 Flass Road, Wormit, Newport-on-Tay, Fife DD6 8NL

("the Applicants")

Be-Factored Ltd, 2a North Kirklands, Eaglesham Road, Glasgow G76 0NT ("the Respondent")

Reference Nos: HOHP/PF/15/0037/38/49/59/70/86 & 91

Re: Property known as Royal Apartments, Union Street, Dundee DD1 ("the Property")

Committee Members:

John McHugh (Chairman) and David Hughes Hallett (Housing Member).

DECISION

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

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1 *Each of the Applicants is the owner of a flat within the Royal Apartments development, Union Street, Dundee (hereinafter "the Development").*

2 *The Development consists of two linked blocks of flats with the postal addresses of 5 and 15 Union Street.*

3 *There are 33 flats in the Development, 15 in No.5 and 18 in No.15 Union St.*

4 *The Respondent assumed the role of property factor from the previous factor, Countrywide on or around March 2014.*

5 *The Respondent ceased to be the factor on or around 28 February 2015.*

6 *The Respondent factored no other properties in Dundee at the relevant time.*

7 *The Respondent employed sub-contractors to carry out the day to day maintenance of the Development.*

8 *The Respondent employed Tayside Security Ltd to perform almost all of the maintenance works at the Development.*

9 *Undesirable persons came into the common areas of the development and were engaged in drug taking.*

10 *The Respondent employed Tayside Security Ltd to provide security services to discourage such persons from entering the Development.*

11 *Two Deeds of Conditions govern the arrangements for the management of, and sharing of costs relating to, common property within the Development among the proprietors of the flats within the Development.*

12 *The respondent charged £100 per flat per year by way of management charges.*

13 *Many of the flats within the Development are occupied by tenants of the owners.*

14 *The property factor's duties which apply to the Respondent arise from the Written Statement of Services and the Deeds of Conditions. The duties arose with effect from 1 October 2012.*

15 *The Respondent became a registered property factor on 7 December 2012.*

16 *The Respondent is under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration.*

17 *The Applicants have, by their correspondence (including Mr Marchant's letters of 18 February and 11 March 2015, Mr Phillips' letters of 15 April and 28 May 2015, Mr Bowen's letter of 14 December 2014, Mrs Findlater's letters of 8 June 2015, Ms Langton's email of 23 June 2015 (issued by Mr Burke on her behalf), Mrs Sim's letters of 7 June and 11 August 2015 and Dr Taylor's letter of 4 May and her email of 11 June 2015) notified the Respondent of the reasons why they consider the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.*

18 *The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicants.*

Hearing

A hearing took place at Caledonian House on 4 December 2015.

The following were present at the hearing on behalf of the Applicants:
Roger and Anne Marchant; Murray and Sarah Phillips, Lorraine Findlater, Fiona and Ian Taylor, Russell Bowen; Patrick Skehan; Paul Ayles and George Wilson.

Mr Skehan and Mr Ayles were witnesses called by Dr Taylor. Mr Skehan is an employee of the replacement factor, J Reavley Factoring Ltd, and Mr Ayles is her accountant.

The Respondent was represented at the hearing by its Managing Director, Graeme McEwan. No other witnesses were called by the Respondent.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as "the 2012 Regulations".

The Respondent changed its name from Property 2 Ltd to Be Factored Ltd on or around 30 June 2015.

The Respondent became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee had available to it, and gave consideration to, the documents lodged on behalf of the Applicants. The Respondent had not lodged any documents at the hearing but produced a few copies of documents on an ad hoc basis at the hearing.

This Decision relates to seven, separate applications to the HOHP concerning the Development ("the Applications"). Although not identical, the Applications all raise common complaints and they have therefore been heard together.

The documents before us included two Deeds of Declaration of Conditions by Century 21 (Homes) Limited registered 6 December 1995 and 24 April 1996 in respect of No.s 15 and 5 respectively. These are in near identical terms and are identical for all material purposes in connection with these applications. We refer to these as "the Deeds of Conditions". We refer to the Respondent's Written Statement of Services, Revised December 2013 as "the Written Statement of Services".

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

All of the Applicants except Ms Sim (Application No.90) complain of failure to carry out the property factor's duties.

The Written Statement of Services and the Deeds of Conditions are relied upon in the Applications as sources of the property factor's duties.

The Code

All of the Applicants complain of failure to comply with the Code.

There is substantial overlap among the sections of the Code relied upon by the various Respondents.

The Applicants complain in relation to the following sections of the Code.

37 Mar chant	1A,B,C,D	2.1, 2.4,2.5	3.1, 3.3, 3.5	4.1, 4.5,4.6		6.1, 6.6, 6.7, 6.9	7.1, 7.2
38 Bowen	1Aa,b, Bc,Dl,m	2.1, 2.2, 2.4,2.5	3.1, 3.2, 3.3, 3.5a, 3.6a, 3.6b			6.3, 6.6, 6.7,6.9	7.1
49 Phillips		2.4, 2.5	3.1, 3.3, 3.4, 3.5a, 3.6a	4.5, 4.6		6.1, 6.3	7.2
70 Findlater			3.1,3.2.3.5a, 3.6a				
86 Langton	All	2.4,	3.3		5.3	6.3,6.6,6.7	All

91 Sim			3.3	4.8			
59 Taylor		2.4, 2.5	3.1, 3.2, 3.3, 3.5a, 3.6a	4.8	5.3, 5.8?	6.3,6.7, 6.8, 6.9	

The elements of the Code relied upon in the Applications provide:

*"...**SECTION 1: WRITTEN STATEMENT OF SERVICES***

You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code.

You must provide the written statement:

- *to any new homeowners within four weeks of agreeing to provide services to them;*
- *to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage;*
- *to existing homeowners within one year of initial registration as a property factor. However, you must supply the full written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies);*
- *to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement.*

1.1a For situations where the land is owned by the group of homeowners

The written statement should set out:

A. Authority to Act

a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group3 ;

b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

B. Services Provided

c. the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service);

d. the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified;

C. Financial and Charging Arrangements

e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;

f. what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;

g. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);

h. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);

i. any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);

j. how often you will bill homeowners and by what method they will receive their bills;

k. how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements

l. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your in house complaints handling procedure (see Section 7: Complaints resolution);

m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;

n. your procedures and timescales for response when dealing with telephone enquiries;...

*...**Section 2: Communication and Consultation***

2.1 You must not provide information which is misleading or false,

2.2 You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).

...2.4 You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)...

...2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)...

SECTION 3: FINANCIAL OBLIGATIONS

While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The overriding objectives of this section are:

- *Protection of homeowners' funds*
- *Clarity and transparency in all accounting procedures*
- *Ability to make a clear distinction between homeowners' funds and a property factor's funds*

3.1 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).

3.2 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.

3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

3.4 You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).

If you are a private sector property factor:

3.5a Homeowners' floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners.

3.6a In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened in the name of each separate group of homeowners...

...SECTION 4: DEBT RECOVERY

Non-payment by some homeowners can sometimes affect provision of services to the others, or can result in the other homeowners being liable to meet the non-paying homeowner's debts (if they are jointly liable for the debts of others in the group). For this reason it is important that homeowners are aware of the implications of late payment and property factors have clear procedures to deal with this situation and take action as early as possible to prevent non-payment from developing into a problem. It is a requirement of Section 1 (Written statement of services) that you inform homeowners of any late payment charges and that you have a debt recovery procedure which is available on request.

4.1 You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.

4.2 If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case.

4.3 Any charges that you impose relating to late payment must not be unreasonable or excessive.

4.4 You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.

4.5 You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.

4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation)...

...4.8 You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention...

SECTION 5: INSURANCE

...5.3 You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance...

...Section 6: Carrying Out Repairs and Maintenance

6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.

6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.

6.6 If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.

6.7 You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.

6.8 You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.

6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

...Section 7: Complaints Resolution

Section 17 of the Act allows homeowners to make an application to the homeowner housing panel for a determination of whether their property factor has failed to carry out their factoring duties, or failed to comply with the Code. To take a complaint to the homeowner housing panel, homeowners must first notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties, or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them. It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in-house complaints procedure and how they make an application to the homeowner housing panel

. 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.

7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.

7.3 Unless explicitly provided for in the property titles or contractual documentation, you must not charge for handling complaints.

7.4 You must retain (in either electronic or paper form) all correspondence relating to a homeowner's complaint for three years as this information may be required by the homeowner housing panel.

7.5 You must comply with any request from the homeowner housing panel to provide information relating to an application from a homeowner...".

The Matters in Dispute

Sinking Fund

The Applicants complain that when the factoring of the Development was taken over by the Respondent it inherited the sums of approximately £7000 (relating to No.5) and £20,000 (relating to No.15). These sums were passed by the previous factor, Countrywide to the Respondent. An email by the Residents Association Chairman, Robin Bruce dated 26 June 2015 states that Countrywide had confirmed that they had made over the sum of £27,261.01 to the Respondent.

It was explained that the previous factor had been Carol Whyte but that the business of Carol Whyte had been taken over by Countrywide shortly before the change of factor to the Respondent. Accordingly, references have been made to the previous factor in the Applications using both the Carol Whyte and Countrywide names.

There was some disagreement among the Applicants and the Respondent about the exact amounts transferred. The Applicants spoke of the sums of £8102.24 and £19173.77 whereas Mr McEwan spoke of the sums of £6937 and £17726.89 with some smaller amounts having been forwarded later.

Mr McEwan did not know why the payments had been made in separate batches.

The Applicants' position is that these sums were sinking funds relating to each block (ie No 5 and 15). The Applicants' position is that these funds had built up over the years from surpluses achieved in fees charged to owners of properties within the Development and should have been kept in ring fenced accounts for each block for the purpose of major items of expenditure.

The Deeds of Conditions at Clause (FOURTEENTH) set out the mechanism which is to apply to maintenance charges. This is that each flat is to be charged a fixed maintenance charge (based on its number of bedrooms). In the event that the annual expenditure on maintenance exceeds the fixed maintenance charge, then the factor may immediately recover the difference from the owners. In the event that it is beneath the fixed maintenance charge, then the factor is to retain the surplus towards the following year's maintenance expense. In the next again year, the remaining surplus is to be placed in an "Owner Sinking Fund...for exceptional repair works."

Mr McEwan's position is that the funds were treated by the Respondent as general funds available to spend on maintenance of the Development. No mention had ever been made to the Respondents of a sinking fund. Mr McEwan advised that if he had known that the funds were to be treated as a sinking fund, he would have placed them in separate ring fenced bank accounts. That never happened and the sums were used for day to day maintenance.

It was put to Mr McEwan that these amounts might be unusually large amounts for general maintenance and that the size of the sums involved ought to have alerted the Respondent to the fact that the funds might be sinking funds. He did not accept that. He thought that the Development was "a shambles" when the Respondent took over the factoring, which matched with little money having been expended on maintenance.

An email from the Respondent's Ashleigh Ogilvie to Mr Bowen refers to an amount of £16380.87 having been transferred from Countrywide and to Countrywide advising that the funds were for "planned maintenance" which would seem more in keeping with being part of a sinking fund as opposed to more general, day to day maintenance.

Mr McEwan was asked about the provisions of the Deeds of Conditions regarding sinking funds. Mr McEwan conceded that he did not have sight of the Deeds of Conditions right away when the Respondent took over the factoring of the Development and so had not been aware of the provisions regarding the sinking funds. He was unaware of when he did first see the Deeds of Conditions, although he believed that he had at some point.

It is common ground among the parties that the sums received from Countrywide (as well as those collected from owners) were substantially exhausted during the course of the year. Mr McEwan reported that there were outstanding debts including to Tayside Security Ltd who were due £14,044.21 (but had informally indicated to him that they might settle for £10,000).

Mr Skehan confirmed that the new factor had received no funds from the Respondent on takeover of the factoring of the Development.

The Applicants queried why, if the Respondent had thought that the sums inherited from Countrywide were available for general maintenance, it had asked for a float. Mr McEwan advised that it was his normal practice to obtain a float to provide cashflow. He also stated that the provision of 24/7 security was expensive and that was a reason, although it was pointed out that that was not an issue at the beginning of the factoring contract.

It appears to us that the Respondent should have been alive to the issue of the sinking funds right from the start. The Respondent should not have taken over factoring without access to the Deeds of Conditions. These documents were the foundation of its appointment and the source of the Respondent's rights and obligations as a factor. Had the Respondent examined the Deeds of Conditions, it would have been alerted to the likelihood of the existence of a sinking fund.

Further, it would reasonably have been expected that the Respondent would have clarified with the previous factor whether the sums being transferred were intended to be ring fenced for specific purposes as a sinking fund or whether they were intended to be generally available. The Respondent observes that Countrywide, when transferring funds to it, made no mention of sinking funds.

Nonetheless, we consider that that was something that the Respondent would reasonably have been expected to have asked of Countrywide. It did not do so.

We consider that the Respondent is in breach of Section 3.6a of the Code which required it to maintain the sinking funds in a separate interest bearing account. There is no dispute that it failed to do so.

We further consider that the Respondent is in breach of its property factor's duties in respect of its failure to maintain the sinking funds in accordance with Clause (FOURTEENTH) of the Deeds of Conditions.

Security Costs/ Obtaining Commission from Tayside Security Ltd

Shortly after the Respondent commenced factoring of the Development, problems began in the Development. Undesirable persons came into the common areas of the development and were engaged in drug taking.

The Respondent employed Tayside Security Ltd (hereinafter "Tayside") to provide security services to discourage such persons from entering the Development.

The Applicants take no issue with the original decision to employ security guards on an emergency basis. However, they complain that the Respondent continued to employ Tayside on a continuing basis. The cost was very high and the service was regarded as of questionable value.

The Applicants complain that the Respondent employed Tayside without regard to the fact that the cost was in excess of the limit of its authority (£2500) or to the requirement to obtain three competitive quotations, both as contained in the Written Statement of Services.

Mr McEwan explained that he had had no previous knowledge of Tayside Security Ltd. They had been employed by the Respondent's predecessor as the cleaning contractors.

Mr McEwan advised that he was not sure if the Respondent sought any quotes from third parties before employing Tayside.

Mr McEwan accepted that Tayside received the contracts to do almost all maintenance for the Development. He confirmed that a competitive tendering exercise had never been carried out. He expected tenders only to be sought once a year and advised that a full year had not elapsed during which the Respondent was the factor of the Development.

Mr McEwan considered the contract with Tayside to be a rolling contract.

It was put to Mr McEwan that the Respondent's property manager, Ashleigh Ogilvie, had advised that there was a 10% commission received by the Respondent from Tayside.

Mr McEwan could not explain why Ms Ogilvie had referred to a 10% commission. He confirmed that there was no 10% commission but that the contractor would offer a discount for prompt payment of its invoices. He advised that there was absolutely no question of the Respondent receiving undisclosed commission from Tayside. There was no relationship between Tayside and the respondent prior to the Respondent commencing the factoring of this Development. There was no connection or financial link between the two companies and therefore the Respondent would have no reason to unreasonably favour Tayside with contracts.

Mr McEwan offered to have a reconciliation produced which would show the sums handled by the Respondent and which would demonstrate that sums had been expended appropriately.

The Written Statement of Services (Clause B - Services Provided Core Services (f)) specifies either the limit contained in the Deeds of Conditions (in this case £200) or £2500 as the limit up to which the Respondent can instruct contractors without seeking three quotations from contractors and the prior authority of "the Residents" "if appropriate".

Reading the clause as a whole, we consider that the clause intends to indicate that for repairs in excess of either the limit set in the Deeds of Conditions or the sum of £2500, the Respondent will endeavour to obtain three quotations and approval from the *owners*, unless there are circumstances which are deemed to be an emergency, meaning that such a process need not be followed.

It may be accepted that the limit of £200 imposed by the Deeds of Conditions had been superseded by the agreement of the parties to the £2500 limit in the Written Statement of Services.

Mr McEwan was of the view that he had kept owners informed about the security costs. He was uncertain about whether the owners had (or had ever been asked to) authorise the security expenditure beyond £2500. He said that he would have to ask his colleague, Ashleigh Ogilvie.

Mr Bowen and Mr Philips gave evidence that, in fact, he and other proprietors had been very concerned about the cost of security and had specifically asked that the Respondent stop instructing the security guarding. Despite this the security was continued.

Mr Skehan was of the view that significant expenditure was in any event unnecessary, indicating that free assistance was available from the police and the Council's City Centre Team who could set up mobile CCTV. He spoke to there being little in the way of difficulties with undesirable visitors since his company had become the factors of the Development.

Mr McEwan advised that Tayside were reporting the continued presence of undesirables at the Development and so had felt the need to continue with the security guarding. The Respondent's representatives were dependent on Tayside as the Respondent was remote from the Development.

Mr McEwan accepted that the security was a "major cost" to owners and understood why they would be concerned about the issue. He thought it a commercial judgment call for the Respondent to make as to whether to continue with the security contract.

We do not accept that there was sufficient evidence to establish any breach of the Code or of property factor's duties in relation to the alleged receipt of commission from Tayside. Nor are we able to find on the available evidence that the security guarding services or the Respondent's monitoring of them were in any respect inadequate.

We do, however, consider that the Respondent is in breach of its property factor's duties in that it has instructed works by Tayside in excess of £2500, being the limit contained in the Written Statement of Services, without following the provisions contained in the Written Statement of Services.

We further consider that the Respondent's actions in respect of the instruction of Tayside constitute a breach of sections 6.3 of the Code.

Failure to Respond/Deal with Complaints

The Applicants complain of the Respondent's failure to respond meaningfully, or at all, to their complaints.

Mr McEwan accepts that the Respondent's approach was originally to follow its Complaints Handling Procedure. Mr Marchant has produced a copy of that policy with his Application. Additionally, Clause D of the Written Statement of Services appears to set out a complaints procedure.

Mr McEwan indicated that at the beginning of the Respondent's involvement with the Development, the Respondent would deal with complaints by allocating them a reference number and providing a tailored response. He advised that there was a change of practice whereby individual complaints would no longer be responded to and, instead, where there were common complaints, he would take the main points and summarise them and respond.

The Respondent was limited in the information which it could share about non-payers by data protection legislation.

Mr McEwan felt that if an owners association had been set up, the communication might have improved.

A letter dated 25 July 2014 by the Respondent advised that it would not deal with complaints. The Applicants regard this as an abrogation of responsibility.

Mr Skehan complained that the quality of information handed over was poor. He had asked for an account reconciliation. Mr McEwan agreed that it was a poor handover but that there was a limit to what the Respondent could do.

We consider that the Respondent is in breach of Sections 2.5 and 7.1 of the Code in respect of its admitted failures to respond to complaints and correspondence from owners and to follow its complaints handling procedure.

We further consider that the Respondent is in breach of its property factors duties in respect of its failures to respond to correspondence and to handle complaints in accordance with the provisions of Clause D of the Written Statement of Services.

Debt Recovery - lack of effort

The Applicants complain that the Respondent has not been active in the pursuit of non-paying owners and has instead allowed significant arrears of maintenance charges to build up.

Mr McEwan advised that the Respondent had made efforts to pursue non-paying owners.

The Respondent's policy was to allow 21 days to pay invoices. This would be followed by a first and second reminder and then Sheriff Officers would be instructed to write to any non-payer. The course to be followed would depend on the advice which the Respondent received from the Sheriff Officers as to further action which could be achieved on an economic basis. A Notice of Potential Liability could be considered.

Mr McEwan considered that the amounts outstanding are relatively low when considered in the light of the high amount of charges.

It was suggested that the reason for much of the non-payment was the failure to provide information. The Applicants wanted to have sight of contractors' invoices. The Respondent would only provide those if a charge was paid or would make them available for inspection at its office.

In an exchange with Dr Taylor, Mr McEwan accepted that owners should not be expected to pay contractors' charges until they have been satisfied that the invoices from the contractors are appropriate.

Mr Ayles confirmed that he had been instructed by Dr Taylor to examine the invoices sent to her by the Respondent. He had been unable, on the basis of the information available from the Respondent, to reconcile that information to his satisfaction and had advised Dr Taylor that she should not pay the Respondent's invoices. The situation was exacerbated by the Respondent having used more that one account number on Dr Taylor's invoices (for which Mr McEwan could offer no explanation).

We do not consider that we may draw any inference that the Respondent has failed in respect of its property factor's duties or duties under the Code in relation to its alleged failures to adequately pursue the recovery of debt.

Debt recovery - inappropriate action

Ms Sim complained that the Respondent had instructed Sheriff Officers to pursue sums alleged to be owing to the Respondent. The Sheriff Officers first issued a demand letter on 4 June 2015. This was issued against the background of Ms Sim having notified the Respondent (including by emails of 14 and 20 December 2014) that her account was in dispute and requesting information which had not been forthcoming. A second Sheriff Officers' letter was issued on 7 August 2015 despite the fact that the account remained in dispute and that, by that time, Ms Sim's application had been submitted to the HOHP.

Mrs Langton complained of a similar situation, having received correspondence from Sheriff Officers dated 6 June 2015 at a time when she had expressed her complaint about disputed charges and had applied to HOHP.

The Respondent did not offer any denial of the facts presented in the Applications.

We find the Respondent's actions to constitute a breach of Code Sections 3.3 and 4.8. We have not identified a breach of the property factor's duties.

Repairs to Lift and common aerial

There is a common aerial serving the Development. There was a complaint that the Respondent failed to fix it. The Respondent failed to bring the need for the repair to the attention of the owners. It was eventually fixed by J Reavley Factoring Ltd. The problem with the aerial proved to be that it had been blown over.

The lift was switched off on 24 July 2014. The complaint was that the owners were not informed of this by the Respondent until the end of November 2014.

No response was forthcoming to Mr Marchant's complaint letter of 26 January 2015 regarding the lift. The Respondent's Ashleigh Ogilvie eventually explained that the cost of the repair would be £24,000 and that the repair would not be instructed until funds were available. It appeared to take the Respondent around six months to obtain a quotation for the lift repair. The replacement factor, J Reavley obtained a quote within a matter of days. Mr Skehan was able to confirm that the lift contractor, Caltech, informed him that they had originally quoted for this repair in May 2013 and updated their quotation on 4 February 2015.

Mr McEwan's response on these issues was that he did not know whether what was complained of had happened. He did not know whether the lift had been broken. He confirmed that if funds were not available, then repairs would not be carried out.

We consider that there was insufficient evidence regarding the common aerial for us to make any finding since the Applicants appeared to be referring to circumstances in which they had not been personally involved.

As regards the delay by the Respondent to inform owners of the need for a lift repair, we consider that the Respondent is in breach of Code Section 6.1. We have not identified a breach of the property factor's duties in this respect.

Door Works/poor quality service

In order to assist with security at the Development, the Respondent arranged for Tayside to install locks on the internal doors in the common areas. These were locks which were operated by the input of a code number. These were known as "digilocks". The Applicants complained that the locks had not been fitted properly. Further, the code numbers were not provided.

Although the Respondent may not be criticised for the failure of the locks nor any difficulties concerned with their installation by third party contractors, the Applicants complain that the Respondents failed to swiftly remedy the situation by having the difficulties with the locks resolved and/or by recognising the failures by not passing on the related charges to them.

Mr McEwan responded that he did not know the position regarding the locks but that the Applicants should not pay for these locks if they had not been installed properly.

We consider that the Respondent's actions in this respect constitute a breach of Section 6.9 of the Code.

Obtaining commission on insurances

This was the complaint of Mrs Langton. She complains that the Respondent received an undisclosed commission of £500 upon placing buildings insurance for the Development.

Mr McEwan advised that the Respondent is paid a commission on insurances which it places. He advised that the Respondent's practice is to write to owners to tell them that this is the case. This would however only happen at renewal time. Mr McEwan thought that the Respondent's period as factor of the Development might not have covered the insurance renewal date, although he was uncertain.

He thought that the Respondent had been compliant with the Code by intimating the fact of the receipt of commission (which is contained in the Written Statement of Services) although not the amount.

We consider that there is no breach of property factor's duties in this respect.

We consider that there is no breach of the Code in that the general fact that commission would be payable had been disclosed but not the actual amount on the basis that we accept that the Respondent would have disclosed the amount at the time of renewal.

Billing

Mr Marchant complained that from 1 March to 31 May 2014, the practice followed by the Respondent was to divide common maintenance charges by 33 (except for the lift which was split 15 ways, as there were only 15 flats served by it). Without warning, this then changed to splitting all costs by 15. No explanation for the change had been provided.

It seems that the charging regime was carried out without reference to the Deeds of Conditions.

Mr Phillips advised that before the Respondent became involved with the Development, the owners already had an informal agreement among themselves that charges would be split evenly among the 33 flats.

Mr Skehan confirmed that a similar arrangement is being followed now.

In the circumstances, where the basis of charging specified in the Deeds of Conditions has not been followed for some time, apparently by the agreement or at least with the acquiescence of the owners, we do not consider it reasonable to find there to have been a breach of the property factor's duties in this respect.

We do however consider that the unannounced and apparently unilateral, decision by the Respondent to change the basis of charge is a breach of the introductory paragraph of Section 3 of the Code.

PMP

The Respondent instructed a report on the condition of the Development building to be carried out by an independent company, PMP. The Applicants were concerned, firstly, that there had been an insufficient number of votes in favour of instructing the report and, secondly, that they may have been charged twice for the same work.

The works cost £3000, in excess of the £2500 threshold contained in the Respondent's Statement of Services and, accordingly, the approval of the owners was required to be obtained.

Mr McEwan was unable to confirm whether owners had voted in favour of the PMP survey being carried out as he advised that he had not been involved in the matter. This is despite the matter having been contained in the Applications.

In the circumstances, we accept the evidence on the point from the Applicants that their authority was not obtained. Accordingly, we find there to have been a breach of the property factor's duties arising from the Statement of Services.

Further, we consider the Respondent's actions to amount to a breach of Section 6.3 of the Code in respect that the Respondent cannot show how it instructed the contractor, PMP.

It is not clear to us on the basis of the available information whether the Respondent may have charged owners twice for the PMP report and we therefore make no finding in that regard.

Original authority

It was agreed that there had been a meeting or meetings at the premises of the previous factor, Countrywide, at which it had been decided that the Respondent would become the new factor.

Mr McEwan advised that he was uncertain whether he had the Deeds of Conditions at any such meeting. Without those he would have been unable to establish whether the necessary number of owners had voted for him to become the new factor.

Mr McEwan described the situation as being a friendly takeover of the Development because Countrywide had not wanted to retain this work as they were not going to be continuing in the property factoring business.

Mr Skehan gave evidence to the effect that when intending to assume the role of factor he would expect the prospective factor to familiarise himself with the Deed of Conditions governing arrangement for his appointment in order to ensure that he was validly appointed.

Mr McEwan explained that he had relied upon information from Countrywide that 19 of the 33 owners had voted in favour of the appointment of the Respondent.

There is no doubt that the Respondent did go on and factor the Development.

We had insufficient information to reach the conclusion that the Respondent was not properly appointed as, on the one hand, we have only the suspicion of the owners that the appointment was defective as against the positive assertion (albeit unsupported by documentary evidence) by Mr McEwan that the necessary mandate was obtained.

Breaches of the Code/Property Factors Duties

We have indicated by reference to each of the factual areas of dispute above where we consider it to have been established that there has been a breach of the property factor's duties or of the Code. Any other duties or sections of the Code which may have been referred to in the Applications but which are not specifically mentioned above, are not considered relevant to the factual disputes and, accordingly, we have not found there to be breaches of those duties or Code sections.

Observations

Mr McEwan found himself unable to deal with many of the points raised by the Applicants and the Committee at the hearing. This was the case although the Respondent had had ample warning of the subject matter of the hearing. He explained in relation to many of the issues that there may be information on the

Respondent's files or that another employee of the Respondent might be able to answer. The Respondent had not lodged any documents in advance of the hearing and had no witnesses or representatives present at the hearing other than Mr McEwan.

Mr McEwan suggested that he might be able to produce relevant information at a later date. He however accepted that it was for the Respondent to attend the hearing fully prepared with relevant information, documents or witnesses and that it had failed to do so.

Separately, we would observe that our remit is limited to establishing whether there has been a breach by the Respondent of its property factor's duties or of the Code. There may be other disputes to be heard elsewhere arising out of matters connected with those considered by us and the information which we have ordered to be produced may be of assistance in that regard. Our remit in this process is not to find that sums are or are not due among the parties based on their contractual relationship.

Representations received post hearing

We received written representations after the date of the hearing from certain of the Applicants. We have decided that we should not properly consider these as to do so would be unfair to the Respondent without giving the Respondent a further chance to respond.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

APPEALS

The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides:

> "...(1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or a homeowner housing committee.
>
> (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made..."

JOHN M MCHUGH

CHAIRMAN

DATE: 16 December 2015