

Housing and Property Chamber First-tier Tribunal for Scotland



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

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/18/1810

**Flat 2/2, 665 Cumbernauld Road, Alexandria View, Glasgow G33 2EA
("the Property")**

The Parties:-

**Miss Deborah Scott, Flat 2/2, 665 Cumbernauld Road, Alexandria View,
Glasgow G33 2EA
("the Homeowner")**

**Park Property Management Limited, 11 Somerset Place, Glasgow G3 7JT
("the Factor")**

**Tribunal Members:
Graham Harding (Legal Member)
David Hughes Hallett (Ordinary Member)**

DECISION

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 2.1, 2.5, 3, 3.3 and 7.2 of the Code.

The decision is unanimous.

Introduction

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

The Factor became a Registered Property Factor on 13 March 2013 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By application dated 12 July 2018 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 1.1aB, D1, Dm, 2.1, 2.5, 3.3, 3.5a, 3.6a, 7.1 and 7.2 of the Code. The Homeowner also complained that the Factor had failed to carry out its property factor duties. Specifically, the Homeowner's complaint was in respect of the Factor's response times to

dealing with the Homeowner's queries, its complaint procedures, its financial and charging arrangements and its communication arrangements as well as its management of the property.

2. The Homeowner provided the Tribunal with copies of correspondence and email exchanges between herself and the Factor covering the period from October 2016 to June 2018.
3. By Minute of Decision dated 31 July 2018 a Convenor with delegated powers referred the application to a Tribunal and a hearing was fixed to take place at the Glasgow Tribunals Centre, 20 York Street, Glasgow on 26 September 2018.
4. The Homeowner submitted further written representations to the Tribunal received on 20 August and 25 September 2018. The Factor did not submit any written representations to the Tribunal.

Hearing and Summary of Submissions

5. The hearing took place on 26 September at the Glasgow Tribunals Centre, 20 York Street, Glasgow. It was attended by the Homeowner supported by her father, Donald Scott and for the Factor by its Director, Paul McDermott.
6. At the commencement of the hearing the Homeowner confirmed she was not seeking to complain that the Factor's written statement of services did not include the provisions set out in the Code at Section 1 but rather that the services provided by the Factor fell short of what was expected.
7. The Tribunal sought clarification from the Factor as to the relationship between Park Property Management Limited and the Homeowner's previous Factor Be-Factored Ltd. Mr McDermott explained that his company had acquired Be-Factored Ltd's contracts and had taken on some of their staff under a "TUPE" arrangement. The companies had not amalgamated and Mr McDermott's company had not assumed Be-Factored's assets or liabilities.
8. The Homeowner queried why, if that was the case, did the letter sent to her on the Factors headed notepaper dated 3 October 2016 and signed by both Mr McDermott and Mr McEwan of Be-Factored refer to there being an amalgamation and to PPM incorporating Be-Factored/Be-Maintained.
9. For his part Mr McDermott distinguished between Be-Factoring and Be-Maintained amalgamating its factoring resources and an amalgamation of the companies themselves and thought an ordinary person on reading the letter of 3 October would not assume that the companies had amalgamated.
10. Mr McDermott confirmed that following the acquisition of Be-Factored's contract for factoring the Homeowner's development the float held by Be-factored had been passed to PPM net of any outstanding liabilities.

11. The Homeowner explained that she had previously made an application to the Homeowner Housing Panel in respect of a complaint against Be-Factored Limited which she had won. She had therefore been very pleased when she had been told of the amalgamation with the Factor and had high hopes for the future.
12. The Homeowner explained that following the issue of a final invoice by Be-Factored she had been concerned that her float had been used to pay for certain charges that had been disputed. These were in respect of deep cleaning by Caledonian Maintenance, a payment to Mr Locksmith and Be - Factored 's management fees. She had asked the Factor to investigate these payments in emails commencing in November 2016. According to the Homeowner despite numerous emails and being told that the matter was under investigation she never had any satisfactory outcome to her requests.
13. For the Factor Mr McDermott said that his staff had looked into the Homeowner's queries but as the Homeowner had not been paying her factoring fees over a lengthy period he was not prepared to do a lot of work if his client was not paying. He said his initial reaction when being advised of the issues raised had been to have his staff investigate matters but when it became apparent that the Homeowner was paying nothing at all he took the decision to do nothing further. He said that the Homeowner's record of payment over an eighteen month period was atrocious. The Homeowner had made one payment of £300.00 in 2017 and had only commenced making monthly payments since February this year. The Factor could have taken further steps to enforce payment or apply additional late payment charges beyond the single one charged but had not done so.
14. Mr McDermott said he could perhaps understand if a client had a dispute over a specific item that had been charged that they might refuse to pay that whilst it was being investigated but he did not accept that a client should be able to pay nothing at all and expect to get the same standard of service.
15. The Homeowner's position was that by sending the letter to her of 3 October 2016 indicating that there had been an amalgamation of Be-Factored/Be-Maintained and Park Property Management and that the letter had also spoken of PPM incorporating these companies this had in fact been misleading and false and a breach of Section 2.1 of the Code. She also felt that the Factor's failure to respond to her enquiries and complaints was a breach of Section 2.5 of the Code. This was disputed by Mr McDermott for the Factor.
16. The Homeowner referred to the budget reconciliation that had been prepared by the Factor. Her concern here was that some of the charges for what was said to be actual charges were in fact not for actual charges at all but were in fact funds that were being retained by the Factor in case they were going to be required in the forthcoming year. The Homeowner's position was that to be told that these were actual charges when they were not was false and misleading and a breach of Section 3 of the Code.

17. In response to queries from the Tribunal Mr McDermott accepted that the references in the Budget Reconciliation dated 28/03/18 to actual costs incurred in respect of Fire Precautions, Insurance Excess and Roof Repairs were in fact accruals and not actual spends and therefore should not have been shown as such.
18. The Homeowner had in her complaint requested sight of the actual account showing the Development Homeowners' funds. For his part Mr McDermott had brought with him a copy of the account confirming that Homeowners' funds were held in a separate account.
19. With regards to the complaint by the Homeowner that the Factor had failed to deal with her complaint adequately Mr McDermott accepted that the Homeowner's initial complaint in her letter of 27 October 2017 had not been dealt with and explained that he had offered the Homeowner an unreserved apology in his letter of 14 May 2018 in response to the Homeowner's second letter of complaint. He felt that letter had properly dealt with the issues raised by the Homeowner. Mr McDermott confirmed that he had not responded to the Homeowners subsequent letter of 11 June 2018 as he had taken that as the Homeowners precursor to making an application to the Tribunal and therefore no reply was necessary.
20. The Homeowner explained to the Tribunal that the ongoing issues with the Factor had an adverse effect upon her health and she had given up work. Despite a significant drop in her income she was maintaining monthly payments to the Factor in respect of their fees.
21. The Homeowner had sought to raise fresh issues with regards to the Homeowners decision to discontinue with a reserve fund but as this had not formed part of the Homeowner's original complaint the Tribunal declined to hear submissions in connection with this matter.

The Tribunal make the following findings in fact:

22. The Homeowner is the owner of the property
23. The Property is a flat within Alexandria View (hereinafter "the Development").
24. The Factor performed the role of the property factor of the Development.
25. The Factor issued a letter to the Homeowner dated 3 October 2016 which appeared to the ordinary person reading it that Park Property Management Limited and Be-Factored Ltd/Be-Maintained Ltd were amalgamating or Park Property Management Limited were incorporating the other two companies.
26. The Factor failed to address the Homeowner's queries with regards to the final invoice from Be-Factored Ltd over an eighteen month period.

27. The Factor had not amalgamated with Be-Factored Ltd/Be-Maintained Ltd but had acquired their contracts and some of their staff. This was not made clear to the Homeowner.
28. The Homeowner withheld payment of her share of the factoring charges due to the Factor other than one payment of £300.00 for a period of about eighteen months.
29. The Factor adopted a position that a client who did not pay their fees was not entitled to the same service as a client who paid their fees. This was not made clear to the Homeowner until referred to in the Factor's letter of 14 May 2018.
30. The Factor's Budget Reconciliation of 28 March 2018 did not differentiate between charges for actual spend and those that were accruals.
31. The Factor's letter of 14 May 2018 to the Homeowner was incorrect when it suggested that the budget reconciliation itemised the actual expenditure for the previous period and copy invoices were available for all works.
32. The Factor has lodged the homeowners' funds in a separate clients' account.
33. The Factor has a clear written complaints procedure.
34. The Factor failed to provide details in its letter of 14 May 2018 to the Homeowner of how to apply to the Tribunal if the Homeowner was not satisfied with the outcome.
35. The Homeowner has suffered a degree of stress and inconvenience as a result of her dispute with the Factor.

Reasons for Decision

36. Section 2.1 of the Code.

The Tribunal was satisfied that on any ordinary reading of the letter of 3 October 2016 a homeowner would be likely to conclude that the Factor had amalgamated with Be-Factored Ltd and Be-Maintained Limited. The Tribunal was not persuaded that the inclusion of the word "resources" significantly altered the interpretation that would be assumed by any ordinary person reading the letter. Furthermore, the mention in the final paragraph to PPM incorporating Be-Factored Ltd and Be-Maintained Ltd simply reinforced the assumption made by the Homeowner. In the absence of any subsequent clarification in correspondence from the Factor to the Homeowner the Tribunal had little difficulty in concluding that the Factor's letter of 3 October 2016 did provide information that was at best misleading and at worst false.

37. Section 2.5 of the Code.

The Tribunal considered that the length of time taken to respond to the Homeowners legitimate queries was unacceptable. Whilst it did seem to the Tribunal that the Homeowner ought not to have withheld all payment to the Factor there was undoubtedly faults on both sides. There is nothing in the

Code that allows a Factor to fail to respond to enquiries and complaints promptly because the Homeowner is not paying its fees. The Factor is entitled to take action against a homeowner to recover payment of outstanding charges. It can charge late payment fees. That however is the extent of its remedy, not failing to comply with the Code.

38. Section 3 and 3.3 of the Code

The preamble to section 3 of the Code provides that there must be clarity and transparency in all accounting procedures. By not making separate provision in the budget reconciliation statement for actual charges and accrued charges the Factor did not comply with this part of the Code. By indicating in its letter to the Homeowner of 14 May 2018 that all the charges shown on the budget reconciliation were actual and that copy invoices were available on request the Factor was offering to provide documents that in fact it could not provide as there had in fact been no expenditure on Fire Precautions, Insurance Excess or Roof Repairs.

39. Sections 3.5a and 3.6a of the Code

The Tribunal was satisfied that the Factor kept the homeowners' funds in separate accounts and had therefore complied with the Code in these respects.

40. Section 7.1 of the Code

The Tribunal was satisfied that the Factor did have a clear written complaints resolution procedure. The Factor had failed to deal properly with the Homeowner's initial complaint but had acknowledged this when dealing with the second complaint and had offered an unreserved apology for this.

41. Section 7.2 of the Code.

Whilst the Homeowner's complaint was dealt with in the Factor's letter of 14 May 2018 the Tribunal did note that much of the comments were directed at the Homeowners failure to maintain payment of the Factors charges and did not really address the Homeowners initial complaint. It also failed to direct the Homeowner as to how she could complain to the Tribunal if not satisfied with the outcome of her complaint.

42. Property Factors Duties

The Tribunal did not feel it had been addressed to any extent on any specific failing by the Factor in respect of its duties under Section 17(1) of the 2011 Act and considered that the Homeowners complaints had been properly considered under the various alleged breaches of the Code.

43. The Tribunal was of the view that given the length of time it had taken the Factor to address the queries and complaints made by the Homeowner and given that the Tribunal had found that the Factor had breached Sections 2.1, 2.5, 3, 3.3 and 7.2 of the Code that the Homeowner was entitled to compensation of £200.00 and that the Tribunal should make a Property Factor Enforcement Order. As the Factor had not assumed the liabilities of Be-Factored Ltd it could not be held liable for any failing on the part of that company.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

Appeals

A homeowner or property factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Graham Harding

Legal Member and Chair

8/10/2018

Date