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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Chamber Ref: FTS/HPC/PF/17/0127

18 Silvertrees Wynd, Bothwell, Glasgow, G71 8FH ("The Property")

The Parties: -

Mrs Caroline Adams, 18 Silvertrees Wynd, Bothwell, Glasgow, G71 8FH ("the Applicant")

Miller Property Management Ltd, 27 Bothwell Road, Hamilton ML3 0AS ("the Respondent")

Tribunal Members:
Josephine Bonnar (Legal Member)
Mary Lyden (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Respondent to pay to the Applicant the sum of £75 as compensation for her time, effort and inconvenience within 28 days of intimation of the Property Factor Enforcement Order.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Josephine Bonnar,
Legal Member

17 June 2017 Date

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/17/0127

18 Silvertrees Wynd, Bothwell, Glasgow, G71 8FH ("The Property")

The Parties: -

Mrs Caroline Adams, 18 Silvertrees Wynd, Bothwell, Glasgow, G71 8FH ("the Applicant")

Miller Property Management Ltd, 27 Bothwell Road, Hamilton, ML3 0AS ("the Respondent")

Tribunal Members:
Josephine Bonnar (Legal Member)
Mary Lyden (Ordinary Member)

DECISION

The Respondent has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with sections 2.1 and 3 of the Code of Conduct for Property Factors.

The decision is unanimous

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 First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 as "The Regulations"

The Respondent became a Registered Property Factor on 1 November 2012 and it's duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application received on 3 April 2017 the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Respondent had failed to comply with the Code of Conduct for

property factors. The Applicant stated that the Respondent had failed to comply with sections 2.1 and 3 of the Code. The Applicant lodged an Inventory of documents with the application.

2. On 18 April 2017, the President referred the matter to a Tribunal for a determination. A hearing was assigned to take place at Wellington House, 134 – 136 Wellington Street Glasgow on 6 June 2017.

3. On 22 May 2017, the Tribunal issued a direction to parties requiring them to lodge certain documents. In response to the direction both parties lodged documents and in addition provided written representations in advance of the hearing.

Hearing

4. The hearing took place before the Tribunal on 6 June 2017. The Applicant was present accompanied by Eileen Wright, a supporter. Harry Miller, a director of the Respondent appeared accompanied by Bill Findlay and David Burns, committee members of the Silvertrees Owners Association, who also attended as supporters.

5. The Applicant gave evidence is relation to the application. She confirmed that she considered the Respondent to be in breach of the Code by including in a factoring invoice to her, a charge of £20 which, although described on the invoice as "sundry development expenditure – SOA", was in fact the membership fee for an owner's association of which she was not a member. The charge amounted to an improper payment and the description of same was misleading. (Section 3 of the Code). Furthermore, both in relation to the charge on the invoice and the Respondent's subsequent explanation for same when the charge was queried by the Applicant, the Respondent had provided information that was misleading and false (Section 2.1 of the Code)

6. The Applicant had submitted an Inventory of 31 documents which were referred to during her evidence. She advised the Tribunal that she had resided at the property since 2014. An ad hoc owner's association had been set up and she had been a committee member of same. The current association had come into being in 2015, when the present committee had taken over. A £20 membership fee was levied by the association, payable to committee members, and used for hiring halls for meetings, paying for the Christmas tree among other things. Document number 3 on the Inventory was identified as a copy of the owner's association constitution which stipulated that membership attracted a subscription fee of £20 and that membership terminated when a member chose to leave. The Applicant confirmed that she had elected to leave the association in October 2016 when she did not renew her membership. She explained that her reason for leaving was that she was unhappy with the close relationship between the factor and the association.

7. The Applicant referred to item 1 on her Inventory, an invoice from the factor dated 18 March 2017 which contained a charge for £20 described as "sundry development expenditure – SOA". She advised that SOA is the Silvertrees Owners Association. The Applicant went on to refer to the Deed of conditions for the property, stating that this document makes no reference to an owner's association. The Applicant thereafter referred to an email from the association dated 16 March 2017 and sent to her supporter Ms Wright, who is a member of the association, which states that "the deed of conditions has an owner's association written in" and that all "60 properties should pay a subscription". It goes on to state that the factors quarterly account would show a "charge and a credit" for those who had paid the £20 fee. Those who had not paid would only have the charge and that in future the subscriptions would be collected by the factor. The Applicant referred to her own account for the month of March 2017 which only contained the charge and to Ms Wright's account, which contained both a charge and a credit.

8. The Applicant emailed the Respondent on 20 March 2017 to challenge the £20 charge. A response was received the following day in which Mr Miller stated that he had acted in accordance with the title deeds, that he was required to conduct business with the owner's association, that the association acted for the majority of owners, that it was standard practice for the factor to provide funding to an association for sundry items and that all owners had been charged. The Applicant responded, asking for an explanation of the charge and the "sundry" funding referred to. The factor responded in similar terms to before and suggested that the Applicant take her concerns up with the association. The Applicant sent a further email detailing her concerns. The response received from Mr Miller was that the funding being provided to the association was for "sundry enhancements for the development" and again referred her to the association without providing answers to the matters which had been raised. The Applicant thereafter issued a detailed letter to the Respondent which detailed her concerns and advised that she intended to apply to the Tribunal. The Respondent replied stating that the £20 charge was not related to subscriptions, that he had acted in accordance with the deed of conditions and all owners had been charged equally. The applicant also received an email from the association chairman which stated that the factor was not collecting subscriptions but was collecting money for association expenditure related to the development.

9. Thereafter the Applicant referred to a SOA Newsletter dated 12 February 2017. There are a number of references to the close working relationship with the factor in this document. Paragraph 6 of the newsletter states "Our current bank balance is around £920 to which will be added further subscriptions. The factor will collect from owners not currently SOA members as the title deeds require the development to have an association" She indicated that this supported her claim that the factor was collecting subscriptions for the association. She also referred to the minutes of a meeting which took place on 19 April 2017. This was a meeting of owners, called in accordance with the title deeds, rather than the association and she attended. The purpose of the meeting was to determine whether membership of the association should be compulsory. The Applicant did not vote at the meeting. Some other

owners objected to compulsory membership. The possibility of free automatic membership was discussed. It was suggested that the £20 invoiced be refunded to all those who had paid and in future, no monies would be collected in advance, but invoiced by the factor. After the meeting, the Applicant received a letter from the association's Chairman addressed to all owners and dated 10 May 2017. It stated that at the meeting it was agreed that the SOA funding of £1200 would be returned by way of credits from the factor and that all future SOA expenditure would be processed through the factor. The Applicant had lodged and referred to a credit note received by her dated 24 April 2017 which referred to £1200 being refunded by the owner's association by cheque received dated 24 April 2017, her share being £20 – 1/60th as per the title deeds.

10. Mr Miller for the Respondent had lodged written submissions in advance of the hearing. He read these out at the hearing when giving his evidence. He stated – that the association provided him with a cheque for £1200 so that he might refund to each of the owners the sum of £20 following the owners meeting on 19 April, that the association had previously requested this funding to enable them to enhance the development, that he had ensured that the association was properly constituted with its own bank account, that clause 3(vi) of the deed of conditions allowed the factor to approve items of this nature, that he had responded to the applicants queries but had refused to comment on false assumptions, that the claim that the £20 charge was a subscription was only the applicant's assumption. In relation to clause 2.1 of the code he had provided appropriate information in a true and fair method. That the matter was now closed in that the association would no longer hold a fund for sundry items and instead these would be charged by the factor in the usual way. In relation to Section 3 of the Code Mr Miller indicated that in terms of "homeowner's funds", he made sure that the association was official, with an elected committee and a bank account, "Clarity and transparency" – factor and committee had meetings to discuss quarterly statements and expenditure. He also pointed out that the factor is not a signatory to the owners account and that there is no sinking fund at the development. With regard to the details of the complaint in the application, Mr Miller rejected the reference to membership or subscriptions, that the applicant was causing disharmony among the owners and that the refund of the £1200 had resolved the matter with all owners being refunded the £20.

11. In response to questions by the Tribunal Mr Miller indicated that, as factor, he was obliged to recognise and acknowledge the status of the owner's association. However, he was unable or unwilling to fully articulate the role he played in the association's activities. He stressed that the factor was independent of the association, and that he was not answerable for their correspondence or actions. However, as factor, he had to support them. The Tribunal asked Mr Miller about the £20 charge which he disputed was the membership subscription. He indicated that he had charged all 60 owners £20 which was for sundry expenditure by the association. He explained that when the applicant had been Chair of the association, she had arranged for the removal of a number of trees which should not have happened in terms of planning consent. The £1200 was collected with a view to replacing these

trees. However, when asked if the £1200 was supplied for this specific purpose he indicated that it was for the association to decide how to spend the funds as they represented the majority. They could decide what "enhancements" were needed – these might be the addition of a path or a disabled parking space. He referred to clause third (vi) in the title deeds which states "the factor shall have full power and authority to instruct and have executed from time to time such works for the repair, maintenance or renewal of the common subjects as specified in articles SECOND (ONE), SECOND(TWO) and SECOND (THREE) hereof or any part thereof, as he in his judgement shall consider necessary, provided always that in the case of major work (being work the cost of which is estimated by the factor to exceed £100 per dwelling.....the factor shall before instructing the same obtain the authority of the proprietors...". The Tribunal pointed out that there was no reference to enhancements nor to providing funding to an owner's association to spend as they saw fit. Mr Miller was however adamant that the clause permitted his actions.

12. The Tribunal sought to clarify with Mr Miller the nature of the £20 charge. Reference was made to the association paperwork which referred to subscriptions being collected by the factor but he said he could not comment on their statements. He stated categorically, that the £20 was not a subscription. The Tribunal then asked whether there were in fact two £20 payments involved – a subscription by members, paid to the association but refunded by the Respondent via the factoring accounts in March 2017 and a charge for sundry items collected by him in March 2017. He confirmed that this was the case and said that the paperwork supported this. He said that he had told the association he could only work with them if they represented the whole development so they had refunded subscriptions. He had undertaken this on their behalf as they didn't have enough cheques. Later, he had done the same with the £20 sundry expenditure charge. It was, he said, just coincidence that both sums were for the same amount. The Tribunal then asked, why he did not offer this explanation to the Applicant in the many emails that passed between them when, if it was the case, it would have been very easy to do so. No explanation was provided. At this juncture, a copy of a bank statement was tendered showing one transaction – the sum of £1200 coming out of the SOA account on 27 April 17.

13. Following the hearing the Respondent lodged further documentation and the Applicant further representations. As the hearing had been concluded, and as the Tribunal did not consider there to be a good reason for allowing same in terms of regulation 19(2) of the regulations, said documents and representations were not taken into account by the Tribunal in reaching its decision.

The tribunal make the following findings in fact:

(i) The Applicant is the owner of the property. There are 60 properties in the development.

(ii) The Respondent if the factor for the development in which the property is located.

(iii) On 18 March 2017, the Respondent issued an account to the Applicant which contained a charge of £20 for "sundry development expenditure". On the same date the Respondent issued an account to another resident of the development. This account had a charge for £20 for "sundry development expenditure". It also had a credit of £20 being "refund of recent payment to SOA".

(iv) The Silvertrees Owners Association advised its membership in March 2017 that subscription fees of £20 were to be collected by the factor.

(v) The Applicant notified the factor that she was not prepared to pay the £20 charge as she is not a member of the association to which it relates and therefore not liable for the subscription.

(vi) The Respondent advised the Applicant that the charge was not a subscription but was to fund the association in relation to sundry expenditure for enhancements to the development which was a valid factoring charge in terms of the deed of conditions.

(vii) The Respondent sent a credit note to the Applicant for the sum of £20 on 24 April 2017.

(vii) A letter was issued by the association on 10 May 2017 which indicated that all owners were to receive a credit being their share of the funding of £1200. On 27 April 2017, the sum of £1200 was withdrawn from the association's bank account.

Reasons for Decision

14. In her application, the Applicant states that the Respondent has breached Sections 2.1 and 3 of the Code of Conduct. Section 2.1 states "You must not provide information which is misleading and false". Section 3 states "Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved".

15. The first issue which the Tribunal considered was whether the Respondent has charged the Applicant, as part of a factoring account, the membership fee for an owner's association. Although documents were produced which indicated that the association's committee considered an owners association to be mandatory in terms of the deed of conditions for the development, it appeared to be accepted by both parties that residents, including the Applicant, could not be required to join the association or pay a subscription for same. The deed of conditions makes no reference to any such association. From the evidence, it appears that in recent weeks the position regarding the status of the association had been clarified and that it is now

generally accepted that residents could not and would not be expected to pay for membership of such an association. However, in March 2017 it was clearly the association's position that residents could be compelled to pay the £20 subscription and an email was issued stating that this would now be via the factors accounts. This coincided with the issue of a factoring account to the Applicant which had a charge of £20 for the SOA. Her neighbour, a member of the SOA who had paid her subscription, received an account at the same time which also contained the charge but also a credit – "refund of recent payment to SOA". The Applicant, comparing the 2 accounts, reached the logical conclusion that the reason for the discrepancy was her non-payment of the subscription which the factor was now seeking to recover from her. The Tribunal noted that the Applicant had gone to considerable efforts to document her claim and indeed, the paperwork referred to in her evidence supported her position. The Applicant gave her evidence on the issue in a clear and concise manner and the Tribunal was satisfied that she genuinely believed her explanation and indeed had grounds for doing so.

16. While adamant that he had at no time included membership fees in factoring accounts, the Respondent was not convincing when he gave his evidence. His position was that the charge in the March account was for funding for the association to spend enhancing the development. When specifically asked whether that meant that members ultimately paid two £20 charges – a fee to the association and a charge on their factoring account he reluctantly confirmed this to be the case but did not do so with conviction. He refused to comment on the SOA documents which appeared overwhelmingly to support the Applicant. However, the explanation that in April 2017 all residents, not just the Applicant, received a credit of £20 being a refund of the charge in the March 2017 account appears to be supported by the bank account produced showing a withdrawal of £1200 from the association bank account at the date of the credit note. It therefore seems likely that this is true. The Tribunal was however concerned that the Respondent had not provided a proper explanation of the charges and credits when he issued the March accounts and (assuming his explanation was correct) that he had effectively refused to clarify matters when responding to the Applicant's complaint. His claim that he was acting in accordance with the title deeds (21 March 2017) and repeated suggestion that she direct her complaint to the association (22 March 2017) is of particular concern. His failure both in terms of the description of charges in the accounts and the content of his responses to the Applicant in March 17 led to the tribunal concluding that breaches of the said sections of the code have occurred, even if the charge was not a membership fee for the association. The Applicant's conclusion was a reasonable one based on the paperwork that she had available to her. The Tribunal were of the view that the accounts were "misleading", in breach of section 2.1 because they did not give sufficient detail of the charge. The Respondent's email responses were also misleading as they failed to provide a full explanation of the charges, and in particular that there were two separate £20 charges involved. In addition, the Respondent is in breach of Section 3 of the Code. The homeowner in this case did not know what she was being asked to pay for and the Respondent failed to rectify this situation when called upon to do so.

17. The Tribunal went on to consider whether the Applicant had grounds to challenge the charge even if it was not a subscription fee. The Respondent justified the collection of £20 per household by reference to clause third (vi) of the Titled deeds. This states "...*that the factor shall have full power and authority to instruct and have executed from time to time such works for the repair, maintenance or renewal or the common subjects as specified in articles SECOND (ONE), SECOND (TWO) and SECOND (THREE) hereof, as he in his judgement shall consider necessary, provided always that in the case of a major work ((being a work the cost of which is estimated by the factor exceed £100 per dwelling....*" and essentially allows him to instruct work for repair, maintenance or renewal up to a value of £100 per property without obtaining authority. The initial explanation advanced was that trees removed from the development by the Applicant when she was chair of the association had to be replaced but when pressed he offered a contradictory explanation, that it would be for the association to decide how to spend the money, that it was for unspecified enhancements and that the association represented the majority of owners. The Tribunal was not persuaded by this argument. It was clear that whatever the association decided to spend the money on it was not work instructed by the respondent who was to take no further part in the use of those funds. Furthermore, if the fund was to be used for "enhancements" this would fall out with clause (vi) of the deed of conditions which related only to repair, maintenance and renewal. The Tribunal therefore concluded that the inclusion of the charge in the Applicant's account was an "improper payment", in breach of section 3 of the code. It is a matter of agreement that the Respondent has now refunded the charge to the Applicant. Lastly, as the Respondent (by his own admission) did not know what the fund was to be spent on, the reference in the account "sundry development expenditure" amounted to "information which is misleading or false", a breach of section 2.1. The Tribunal was therefore satisfied that the Respondent did breach Sections 2.1 and 3 of the Code of Practice.

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) 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.

Legal Member

17 June 2017 Date