



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

by

**Jim Mannix, 38 Brook Court, Monkstown, County Dublin, Republic of Ireland
A94 Y5A4("the Applicant")**

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

Reference Nos: HOHP/PF/15/0126

Re: 25 Royal Apartments, 15 Union Street, Dundee DD1 4BN ("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 The Applicant is the owner of 25 Royal Apartments, 15 Union Street, Dundee DD1 4BN (“the Property”)
- 2 The Property is a flat within the Royal Apartments development, Union Street, Dundee (hereinafter “the Development”).
- 3 The Respondent performed the role of the property factor of the Development.
- 4 Undesirable persons came into the common areas of the Development and were engaged in drug taking.
- 5 The Respondent employed Tayside Security Ltd to provide security services to discourage such persons from entering the Development.
- 6 The property factor’s duties which apply to the Respondent arise from the Written Statement of Services. The duties arose with effect from 1 October 2012.
- 7 The Respondent became a registered property factor on 7 December 2012.
- 8 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.
- 9 The Applicant has, by his correspondence, including his two letters dated 26 October 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.
- 10 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicants.

Hearing

The parties requested that the application be determined without an oral hearing and the Committee agreed to do so in terms of Regulation 18 of the 2012 Regulations.

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 other than its completed response form. The brief written representations contained therein referred to the hearing of applications by other homeowners against the Respondent in similar cases. The representations seemed to indicate the Respondent's understanding that the current application would have been heard at the same time as those earlier applications. The representations make no specific reference to the facts of the current application and contain no answers to the points raised by the Applicant in his application.

Although the Committee has no relevant responses from the Respondent to the matters which are complained of in the application, the Committee has adopted a critical analysis of the Applicant's complaints to ensure that the Respondent has been fairly treated.

The documents before us included the Respondent's Written Statement of Services, Revised December 2013 which we refer to as "the Written Statement of Services".

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Written Statement of Services is relied upon in the application as the source of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

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

“...Section 2: Communication and Consultation

...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)...”

The Matters in Dispute

Security Costs

The Respondent wrote to the Applicant on 16 April 2014 indicating its intention to employ Tayside Security (hereinafter "Tayside") to provide security services to discourage unwanted persons from entering the Development.

The cost was very high. The Applicant has calculated that the cost was the equivalent of around £23000 per year for the whole Development. The Applicant complains that the Respondent did not have the authority to instruct expense of this magnitude.

The Respondent's letter of 16 April advised any residents who had concerns about the costs to contact its author, Ashleigh Ogilvie. The Applicant reports that he tried on several occasions to reach her by telephone but was unsuccessful, with his calls not having been returned.

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 assumed 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.

We 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 section 2.4 of the Code.

Failure to Respond/Invoicing irregularities

The Applicant complains of the Respondent's failure to respond to his correspondence.

On 3 August 2015, the Applicant wrote to the Respondent complaining that he had received a letter demanding payment by him to the Respondent of the sum of £649.87. The Applicant complains that he did not receive a response to his letter. He complains that he had previously written to the Respondent on 27 January 2015 in response to a demand for payment, complaining that he had not authorised the expenditure being charged.

The Applicant complains that he has been provided with inconsistent information by the Respondent regarding the balance of his account.

He complains that correspondence which had been sent by him to the Respondent on 31 October and 28 November 2014 was similarly ignored. He further complains that numerous telephone calls to the Respondent's Ashleigh Ogilvie were never returned.

A general letter dated 23 July 2015 by the Respondent had advised that the Respondent intended not to respond to individual homeowners' complaints although we do not consider that letter to offer any justification for the Respondent's failures to respond to the Applicant.

We consider that the Respondent is in breach of Sections 2.5 of the Code in respect of its failures to respond to complaints and correspondence from the Applicant.

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

PMP

The Respondent instructed a report on the condition of the Development building to be carried out by an independent company, PMP. The works cost over £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.

The Applicant was concerned that there had been an insufficient number of votes in favour of instructing the report.

The Respondent had sought the approval of all homeowners in the Development to the instruction of the PMP report by its letter of 26 March 2014. The mandate enclosed with that letter sought the payment of the sum of £109.10 from each

homeowner. The mandate indicated that if there were insufficient votes in favour of the instruction of PMP, then the Respondent would “file the quotes and not action”.

The Applicant paid the sum of £109.10 and voted in favour of the report being carried out, which it duly was.

The Applicant’s information is that there were insufficient votes in favour of the report being commissioned and so, he considers that in those circumstances, the funds of those voting in favour ought to have been returned or allocated to them and the report not commissioned.

No evidence has been produced by the Respondent to answer the point and, accordingly, we accept the evidence of the Applicant and find that there was no majority vote in favour of the carrying out of the report.

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 2.4 of the Code.

Original authority

The Applicant complained that there was some doubt about the original appointment of the Respondent as factor and whether the appropriate number of votes from homeowners had been secured at the relevant time. Other than a statement to this effect, no evidence on the matter has been presented.

Even in the absence of a detailed response by the Respondent, we consider that we have insufficient information to reach the conclusion that the Respondent was not properly appointed.

Accordingly, we make no finding of any breach of property factor's duties or of the Code.

Sinking Fund

The Applicant complains that "*the owners collectively believe that [the Respondent] is unjustifiably holding £27,276.01 in a sinking fund, transferred to them in error by [the previous factor]*". The Applicant provides no further information.

There is no evidence available to the Committee that the Applicant has intimated this head of complaint to the Respondent.

We therefore consider that in absence of the notification by the Applicant to the Respondent required by section 17(3) of the 2011 Act that we may not make any finding in this regard.

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 Application 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.

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: 15 February 2016