**First-tier tribunal for Scotland (Housing and Property Chamber)**

**Property Factors (Scotland) Act 2011, Section 17**

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

**Chamber Ref: hohp.pf.16.0115**

**Flat 0/2, 48 Garscadden Road, Old Drumchapel, Glasgow, G15 6UL ("the Property")**

**The Parties:-**

**Dr Gemma McGrory residing at Flat 0/2, 48 Garscadden Road, Old Drumchapel, Glasgow G15 6UL ("the Homeowner")**

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

**Committee Members:**

**Mr E K Miller, Chairman and Legal Member**
**Ms E Munroe, Housing Member**

**Decision**

**The First-tier tribunal for Scotland (Housing and Property Chamber) determined that the Factor had failed to comply with Section 1 (Written Statement of Services) and Sections 2.5 and 3.2 of the Property Factors Code of Conduct.**

**The Decision was unanimous.**

**Background**

1. The Factor's date of registration as a Property Factor was 7 December 2012. As a preliminary point, subsequent to the events complained of by the Homeowner, the Factor de-registered following upon the sale of its factoring business to another property factor. Nonetheless, the Factor retained funds belonging to the Homeowners and others within the larger development. The Tribunal was of the view that, as a result, the obligations due by the Factor in terms of the Code were still relevant and the Factor subject to the jurisdiction of the Tribunal.

2. By application dated 19 August 2016, the Homeowner applied to the Homeowner Housing Panel for a determination that the Factor had failed to comply with Sections 1(b) and 1(f) of the Written Statement of Services part of the Code and also Sections 2.5 and 3.2 of the Property Factor Code of Conduct ("the Code") and also the Property Factors Duties. The Homeowner set out in more detail the grounds for complaint to the Factor by way of letter dated 9 September 2016. No meaningful submissions were made in advance by the Factor

3. The application and letter of 9 September 2016 was notified to the Factor. On 7 October 2016, Maurice O'Carroll, Convenor with delegated powers under Section 96 of the Housing (Scotland) Act 2014 intimated that he had decided to refer the application to a Homeowner Housing Committee for determination. The Convenor considered there was no reasonable prospect of the dispute being resolved between the parties.

4. In the intervening period the Housing and Property Chamber First-Tier Tribunal came into being and gained jurisdiction of the case from the Panel with effect from 1 December 2016.

5. An oral hearing took place in respect of the application on 4 December 2016 at Wellington House, 134/136 Wellington Street, Glasgow, G2 2XL.

6. The Homeowner appeared on her own behalf. The Factor was represented by Mr Graeme McEwan, a director of the Factor.

**Section 1- Written Statement of Services**

7. Section 1 of the Code of Conduct specifies that a written statement of services must be provided to any new homeowner within 4 weeks of a factor becoming aware of a change of ownership of a property which the factor already manages.

8. The Homeowner submitted that she had never received a written statement of services until 24 June 2016. This was 3 years after she had moved in.

9. The Factor submitted that a written statement of service would have been provided to the Homeowner with the welcome pack that they sent out when a change of ownership was notified to them. The Homeowner disputed this. The Homeowner produced the welcome pack provided by the Factor shortly after her purchasing the Property. This undated letter did not make any reference to a statement of service being provided. The letter specifically stated that the items enclosed were a customer contact detail form, a standing order form, an information booklet as well as landscaping and cleaning remits. The Homeowner had copies of these and it was apparent that these did not comprise a written statement of services. The Homeowner had provided the written statement of services that she had received from the Factor in correspondence of 24 June 2016.

The written statement of services enclosed with that letter stated that it had been revised in 2015.

10. The Tribunal considered the evidence. The Tribunal was satisfied that the Homeowner's version of events was correct. The Factor had produced no evidence to show that a written statement of services had been sent within the requisite timescale. The Homeowner, on the other hand, had produced documentation received from the Factor at the time of her purchase which showed clearly that no written statement of service had been provided. Accordingly this was a breach of the Code of Conduct.

**Code of Conduct Section 2.5**

11. The Code specifies:- "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 as fully as possible and keep the homeowner informed if you require additional time to respond. Your response time should be confirmed in the written statement".

12. The Homeowner alleged that the Factor had failed to comply with their complaints procedure. She had followed the complaints procedure as outlined on their website but they had not acknowledged her complaint nor given her complaint a reference number nor corresponded within the specified timescales on their website.

13. The Factor acknowledged that not all timescales had been complied with but stated that they had set out the position to the Homeowner a couple of times in general correspondence.

14. The Tribunal reviewed the paperwork within the file. The Tribunal noted that a formal complaint had been sent to Lisa Pieper of the Factor on 21 June 2016 which had been responded to. However, a second sent on 27 June and resent on 9 July had been ignored. The Homeowner had sent further correspondence, none of which had been responded to. The Factor did not appear to have signposted the Homeowner to the Tribunal nor had they given any indication to the Homeowner that they had exhausted the complaints procedure.

15. Overall the Tribunal was satisfied that the Factor had been dilatory in dealing with the Homeowner's complaint and had not dealt with it clearly nor within the required timescale. Accordingly the Tribunal was satisfied that there was a breach of the Code of Conduct in this regard.

**Code of Conduct Section 3.2**

16. This section of the Code specifies that "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."

17. There were three elements to the Homeowner's complaint in this regard;-

    1. The proposed imposition of a termination fee of £55.

    2. A failure to return sums arising from the cancellation of the insurance policy upon change of factor.

    3. The use of the Homeowner's funds being used to offset against accounts of homeowners within the development who were in arrears on a joint and several liability basis.

18. **Termination fee** – the Homeowner highlighted a letter of 14 April 2016 from the Factor that stated that a termination fee of £55 plus VAT would be imposed upon the change of factor as per the written statement of services. The Homeowner was of the view that this was unfair and inappropriate given that she had never had sight of the written statement of services until 24 June 2016. It appeared, therefore, that the Factor was imposing this as a penalty without any proper notification. The Factor stated that this was common practice within the industry and they did not see why they should not be entitled to do this. It was narrated within their statement of services.

    The Tribunal considered matters and determined that in the ordinary course of events can be competent for a factor to charge a termination fee. However, as had been already determined by the Tribunal, in this particular case it was apparent that the written statement of services had not been served at the appropriate time. Accordingly it would be inappropriate for the Factor to be entitled to charge a termination fee when they had never advised homeowners of the terms of their appointment. It appeared that the imposition of the termination fee was being imposed unilaterally by the Factor and without any contractual basis. Accordingly the Tribunal was satisfied that no termination fee should apply. In the event that the termination fee had already been applied to the Homeowner's account then this should be reversed. If it had not yet been charged, then the Factor should not then charge it.

19. **Return of insurance funds** – the Homeowner had calculated that 218 days remained on the insurance policy upon its calculation. A proportionate refund would have been £77. However after discussion with the parties on the day, it was apparent that a full proportionate refund had not been provided by the insurance company. The refund was much smaller and had been credited back. The parties accepted on the day that this matter had been dealt with correctly and no determination was required by the Tribunal.

20. **Apportionment of non-paying owners to paying owners** - the Homeowner complained that the Factor had failed to return the credit

sitting within her account of £367.22. The Homeowner was aware that the Factor was looking to offset this amount against the shortfall within the development account that had been created due to other owners within the development not paying their share of costs. The Factor had advised that there was at credit of the account of £2217.48 but that outstanding sums were still due of £3,414.71. The Homeowner highlighted the relevant section of her title deeds which, she maintained, did not allow the Factor to use funds at credit of her individual account on a joint and several basis to offset against the debts of the overall development.

The relevant clause of the Deed of Conditions was 14.3 which stated:-

"where a cost cannot be recovered from a plot proprietor for some reason such as that:- (a) the estate of that plot proprietor has been sequestrated, or (b) that plot proprietor cannot, by reasonable enquiry, be identified or found then that share must be paid by the other plot proprietors as if it were a cost mentioned in Condition 14.1".

The Tribunal considered the interpretation of this clause. Whilst the Tribunal appreciated the Homeowner's frustration, the Tribunal did not view this clause in the prescriptive manner that the Homeowner did.

The Homeowner read the clause as allowing her monies to be offset against non-paying members only if the other proprietors had been sequestrated or could not be found. However the Tribunal was satisfied that the correct reading of that clause was not prescriptive. The clause simply gave a couple of obvious examples where irrecoverable sums would require to be offset against the other parties within the development. The Tribunal was satisfied that it would be appropriate and allowable for a Factor to offset against other parties within the development for other valid reasons. An obvious example of this was where it was uneconomical to pursue outstanding debts. If, for example, £10 was outstanding on a former proprietor's account, it was uneconomical for a Factor to chase this and would, in fact, cost the remaining proprietors if the Factor was to pursue uneconomic debt. Accordingly, in principle, the Tribunal was satisfied that the Factor may be entitled to proportion the Homeowner's credit to offset debits of other proprietors within the development.

Whilst the Tribunal accepted the possibility of the Factor carrying out such an apportionment justifiably in terms of the title deeds, the Tribunal required to determine whether it was appropriate for the Factor to do so in the particular circumstances of this case.

The Tribunal noted the terms of Section 4 of the Code of Conduct and in particular sections 4.6 and 4.7. Section 4.6 states that:-

"you must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them".

Section 4.7 states:- "you must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowners who have not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs".

The Factor produced, on the day of the hearing, a spreadsheet showing the overall accounts within the development and who was sitting at credit and debit. This was the first time that the Homeowner had seen the overall account position. Accordingly the Tribunal was satisfied that Section 4.6 of the Code had not been complied with.

The Tribunal questioned, at length, Mr McEwan as to the steps he had taken in terms of Section 4.7. Mr McEwan advised that he did not have any documentation with him but advised that he had still been chasing individual proprietors and had a modicum of success in persuading some other non-paying proprietors to pay. He tried to contact his solicitor during the course of the hearing to ascertain the position and to clarify what debts he had already passed to them to recover. He was unsuccessful in this regard.

The Tribunal wished to be fair to the Factor and to give him a chance to show that he had complied with his duties in Section 4.7 of the Code. If he had done so, the Tribunal would have accepted that it was appropriate for him to apportion the appropriate sum at credit of the Homeowner's account against the liabilities of non-paying proprietors within the development.

It was agreed at the hearing that Mr McEwan would have 7 days in which to forward the necessary documentation. Subsequent to the hearing a couple of weeks passed and no documentation had been provided by Mr McEwan.

A reminder was issued to Mr McEwan by the Tribunal office towards the end of December. No response was received from the Factor until an email of 1 February 2017. The Factor gave very limited information which specified that their solicitors had raised a 7 day demand letter following a 21 day letter from them. The email stated that the Factor would now determine the next action and financial feasibility.

The Tribunal considered matters and determined that this was insufficient. The Factor had delayed in providing any information to the Tribunal, notwithstanding the timescale agreed at the hearing. The Tribunal had asked for information regarding the larger debts and to be given copies of documentation and information as to exactly what had been done with each proprietor who was in default. Mr McEwan's attitude within the hearing had been generally negative and unhelpful and this attitude appeared to have carried over into providing the information requested.

The Tribunal considered matters. Whilst the Tribunal would have been prepared to concede the right of the Factor to carry out an apportionment

of the Homeowner's funds at credit in accordance with the Deed of Conditions, the Tribunal was not satisfied that the Factor had shown proper evidence as required by Section 4.7 that they had taken reasonable steps to recover unpaid charges from the other homeowners. Accordingly, in the absence of such evidence, it was not appropriate for the sums at credit of the Homeowner's account to be set off.

Accordingly the Tribunal resolved that the sum of £367.22 sitting at credit of the Homeowner's account with the Factor should be remitted to the Homeowner within 14 days.

The Tribunal was cognisant of the fact that by ordering the return of the Homeowner's monies to her this would create a larger shortfall within the development account as there would be less sums at credit to be offset against the debt of non-paying owners. The Tribunal could not make any order regarding the return of funds at credit of other owners as they had not made a complaint to the Tribunal. Nonetheless, it would be inappropriate for other owners who were at credit to have to pay a bigger proportion to clear the debt as a direct result of the Tribunal's order. Accordingly the Factor should note that in the event that they wish to carry out an apportionment on a joint and several basis the sum of £367.22 will require to be removed from the calculation and treated as the Factor's contribution towards the outstanding debt due within the overall development.

**Property Factor Enforcement Order**

21. In all of the circumstances narrated above, the Tribunal found that the Factor had failed in its duty under Section 17(1)(b) of the 2011 Act to comply with the requirements of the Code of Conduct in respect of Sections 1, 2.5 and 3.2 of the Code.

The Committee therefore determined to issue a Property Factor Enforcement Order.

Section 19 of the 2011 Act requires the Tribunal to give notice of any proposed Property Factor Enforcement Order to the Factor and allow parties an opportunity to make representations to the Tribunal. The Tribunal proposes to make the following order:-

- The Factor is directed to remit the sum of £377.62 to the Homeowner within 14 days of the date of this Order.

**Right of Appeal**

**22. A landlord, tenant or third party applicant aggrieved by the decision of the tribunal may seek permission to appeal from the First-tier Tribunal on a point of law only within 30 days of the date the decision was sent to them.**

**Effect of section 63**

23. Where such an appeal is made, the effect of the decision and of the order is suspended until the appeal is abandoned or finally determined, and where the appeal is abandoned or finally determined by confirming the decision, the decision and the order will be treated as having effect from the day on which the appeal is abandoned or so determined.

E Miller

Signed .....

Date .....7/3/17.....

Chairperson