

# Housing and Property Chamber First-tier Tribunal for Scotland

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**Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011**

**Chamber ref:HOHP/PF/16/0111**

**Flat 0/1, 50 Garscadden Road, Glasgow, G15 6UL ('the Property')**

**The Parties:**

**Mrs Irene Purdie residing at the Property ('the Homeowner')**

**Be-factored Limited, 2A North Kirklands, Eaglesham Road, Glasgow, G76 0NT ('the Factor')**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Committee) ('the Tribunal') comprising: Jacqui Taylor (Legal Member) and Jean Thomson (Ordinary Member).**

**Decision of the Tribunal**

The Tribunal determines that the Factor has failed to comply with Sections 2.5 and 3.2 of the Code of Conduct.

The decision is unanimous.

**Background**

1. The Factor's date of registration as a property factor is 7th December 2012.
2. By application dated 15<sup>th</sup> August 2016 the Homeowner applied to the Homeowner Housing Panel ('the Panel') for a determination that the Factor had failed to comply with specified sections of the Property Factor Code of Conduct ('The Code') and also the Property Factor's duties.

By email dated 23<sup>rd</sup> August 2016 the Homeowner advised that she wished to amend the application and now sought a determination that the Factor had failed to comply with the following sections of The Code:

- Section 1: Written Statement of Services.
- Section 2.1: You must not provide information which is misleading or false.

- Section 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 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. The application had been notified to the Factor.

4. By Minute of Decision by Patricia Pryce, Convener of the Homeowner Housing Panel, dated 21<sup>st</sup> September 2016, she intimated that she had decided to refer the application (which application paperwork comprises documents received in the period 16<sup>th</sup> August 2016 to 17<sup>th</sup> September 2016) to a Homeowner Housing Committee. On 1<sup>st</sup> December 2016 jurisdiction of the Homeowner Housing Committee passed to The Housing and Property Chamber.

5. An oral hearing took place in respect of the application on 29<sup>th</sup> November 2016 at Wellington House, 134/136 Wellington Street, Glasgow, G2 2XL.

The Homeowner appeared on her own behalf. She was accompanied by her friend and neighbour Amanda Reid.

The Factor was represented by Graeme McEwan, a Director of Be-factored.

As a preliminary matter Graeme McEwan advised the Committee that the Factor was deregistered as a property factor on 10<sup>th</sup> November 2016. The Company has been sold to Park Property Management Ltd.

The details of the application and the parties' written and oral representations are as follows:

**Section1: Written Statement of Services.**

**The Homeowner's Complaint:** She has been resident of the Property since 2006 and was not provided with a written Statement of Services within the specified 4 week period.

At the hearing the Homeowner explained that she first became aware that she should have received a Statement of Services from the Factor when she contacted the HOHP. She confirmed that she did receive the written Statement of Services in May 2016.

**The Factor's response:**

Graeme McEwan explained that he was not involved in the day to day administration of the business. When the Property Factors (Scotland) Act 2011 came into force they sent all homeowners a copy of their written statement of services. It was also published on their website and referred to in their regular newsletter. He was not able to provide a copy of the letter to the Homeowner sending her a copy of the written statement of services or a copy of the newsletters. He explained that the written statement of services works for both the company and the individual owners. It is not in the Company's interest not to provide the owners with a copy of the written statement of services.

**The Tribunal's Decision:**

This head of complaint is not upheld as neither the Homeowner nor the Factor provided sufficient evidence to enable the Tribunal to make a decision on this point.

**Section 2.1: You must not provide information which is misleading or false.****The Homeowner's Complaint:**

Approximately 12 months ago they had the front gates on Garscadden Gate locked with a security keypad. At the time, a sign was requested to be installed on both gates to advise any delivery drivers to enter via the rear of the property. In the August 2015 newsletter they were advised that these signs had been ordered and would be erected soon to the gates.

The signs never did appear and when she enquired about it she was informed that the signs had been made and were in fact sitting in their office waiting to be fitted. The explanation for this not being done was that they couldn't find anyone that could fit them.

When the new factor took over and made enquiries about the signs, they were told that they never existed and had never in fact been made up. This was misleading or false as it was not consistent with the earlier explanation given.

Also the Homeowner had sent the Factor a letter dated 17<sup>th</sup> June 2015. The letter was sent recorded delivery and the Factor had not collected the letter. Amanda Reid explained that she considered this to be false or misleading as they had effectively bypassed the system by not collecting the letter.

**The Factor's response:**

Graeme McEwan advised that he did not know anything about the sign. He explained that there is still one sign in the office but it is a 'No Ball Games' sign. There was a large amount of debt for this development and this was an incidental matter in comparison.

In connection with failing to collect the letter of 17<sup>th</sup> June 2015, he did not agree with the suggestion that failing to collect the sign was misleading or false. He explained that the Factors get a lot of mail. He wouldn't know who the letter was from and does not single out letters from Garscadden Gate.

**The Tribunal's Decision:**

This head of complaint is not upheld in relation to the signs as no evidence was provided that the new factor had been told that the sign had never been made up.

However the Tribunal noted that it did not appear that the Homeowner had been charged for the sign and consequently the Homeowner has not suffered any loss in relation to this matter.

This head of complaint is not upheld in relation to failing to collect the letter of 17<sup>th</sup> June 2015. The Tribunal accepts that the Factor would not know who the letter was from and in any event failing to collect a recorded delivery letter could not be construed to be false or misleading.

Section 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.

**The Homeowner's Complaint:**

She did not receive a response to recent complaint letters that have been sent.

She sent the Factor letters dated 5<sup>th</sup> July 2016 and 4<sup>th</sup> August 2016 advising that she would be applying to the Panel. The letters were sent recorded delivery but were never collected.

She sent an email to the Factor dated 9<sup>th</sup> August 2016 with a copy of Step 2 complaint letter and also stating that they had refused to collect delivery. She never received a reply to that email.

**The Factor's response:**

Graeme McEwan made no response.

**The Tribunal's Decision:**

This head of complaint is upheld in relation to failure of the Factor failing to respond to the Homeowner's email of 9<sup>th</sup> August, and attached step 2 complaint.

Section 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.

**The Homeowner's Written Complaint:** Be-factored intend on charging residents a termination fee of £55 plus VAT. They state that the fee is due in terms of the Written Statement of Services. She never received any paperwork from Be-factored to state that a termination fee would be charged. She first received the Written Statement of Services on 17<sup>th</sup> June 2016.

According to the title deeds they are not liable for the debt unless the persons in question are bankrupt or cannot be found. The owners know that this is not the case therefore they are contravening the Code of Conduct.

She requires a refund of the following amounts:

Gate Repair:£20.20

Insurance Overcharge: £80.89

Float: £250

Credit balance on her account £80.90.

**The Factor's response:**

Graeme McEwan explained that the Factor is limited in what they can do as they are no longer factors of the development. They have a credit balance of £2217.48 and outstanding debt of £3414.73. He confirmed that the credit balance will be remitted to the new factor. His company has taken a commercial decision in relation to the outstanding debt. There are six debtors and he obtained court decrees in relation to four of them. There are eight homeowners whose accounts are in credit.

In connection with the alleged insurance overcharge, he suspects that the insurance company will have charged a penalty for cancelling the policy when a new policy was taken out by the new factor.

**The Tribunal's Decision:**

This head of complaint is upheld as the Factor has delayed in remitting the retained funds either to the homeowners or to the new factors.

The Factor is only entitled to charge a termination charge if this charge is part of the contract he had with the Homeowner. The Factor has not demonstrated to the Tribunal that the Written Statement of Service including provision for payment of the termination fee was provided to the Homeowner.

The Tribunal do not accept the Homeowner's position that the Deed of Conditions does not permit the Factor to charge the Homeowners for unpaid accounts of other owners.

Clause 14 of the Deed of Conditions for the development states:

*'Maintenance and other costs arising out of a binding decision on a matter specified in Condition 15 are shared equally among the Plots, and each Plot Proprietor is liable accordingly.'*

*14.2 The Factor can recover unpaid costs on behalf of the Plot Proprietors and may do so in his own name.*

*14.3 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 sequestered, 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 Homeowner's submission is that this clause of the Deed of Conditions means that the owners can only be responsible for unpaid accounts where an owner has been sequestered or cannot be found. The Tribunal do not agree with this interpretation of this clause. The clause states at paragraph 14.3 that the other owners are responsible where a cost cannot be recovered from a Plot Proprietor for some reason. The clause gives the example of the Plot Proprietor being sequestered or cannot be found but these are just examples.

The Tribunal were mindful that Graeme McEwan has confirmed that the credit balance remaining on the account of £2217.48 will be sent to the new factor for payment to the Homeowners.

However the Tribunal acknowledged that they can only make an order in relation to the sums due to the Homeowner. They consider it to be reasonable that this retained amount is divided among the homeowners' whose account is in credit as the arrears amount to £3414.73.

### **Property Factor Enforcement Order.**

In all of the circumstances narrated above, the Tribunal finds that the Factor has 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 2.5 and 3.2 of the Code.

The Tribunal 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 Property Factor and allow parties an opportunity to make representations to the Tribunal.

The Tribunal proposes to make the following Order:

*'Be-factored Limited are directed to remit the sum of £277.18 to the new factor within 14 days of the date hereof and request them to forward this sum to the Homeowner in respect of her share of the retained sums, within 14 days of the said request.'*

### **Appeals**

**A party 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.**

J Taylor

Signed

..Date 25<sup>th</sup> January 2017

Chairperson