Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/PF/17/0338

The Property: 18 Almondvale Lane, Livingston EH54 6GL ('the property')

The Parties:

Mrs Elizabeth Boyers, residing at 18 Almondvale Lane, Livingston EH54 6GL ("the homeowner")

Park Property Management Limited,incorporated under the Companies Acts (SC413993) and having a place of business at 11 Somerset Place, Glasgow G3 7JT ("the property factors")

Tribunal Members – George Clark (Legal Member) and Helen Barclay (Ordinary Member)

Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

The Tribunal has jurisdiction to deal with the application.

The property factors have failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") in that they have failed to comply with Sections 1.1a.A and 2.1 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

The Tribunal proposes making a Property Factor Enforcement Order in respect of the failure by the property factors to comply with their duties under Section 14 of the Act.

The Decision is unanimous.

Introduction

In this decision, the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code of Conduct" or "the Code"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations as "the 2016 Regulations"; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as "the Tribunal".

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

The Tribunal had available to it and gave consideration to the application by the homeowner received on 1 September 2017 with supporting documentation, namely a formal letter of complaint to the property factors dated 16 June 2017, a letter from the property factors dated 8 February 2017, stating their intention to resign as property factors with effect from 31 March 2017, a copy Invoice from the property factors dated 21 December 2016, Minutes of a meeting of the Almondvale Heights Residents' Association held on 17 January 2017, a letter from Weslo Property Management & Letting confirming their appointment as factors with effect from 1 April 2017 and copies of e-mail correspondence between them and the property factors dated 24 and 27 February and 2 March 2017, a copy of the property factors' Written Statement of Services, the property factors' Stage 2 response, dated 17 August 2017. to the homeowner's complaint, an extract of the Deed of Conditions affecting the Property and a letter from the property factors dated 3 October 2016, confirming the amalgamation of factoring resources of Be-Factored/Be-Maintained and Park Property Management Limited.

The property factors did not make any written representations to the Tribunal.

Summary of Written Representations

The following is a summary of the content of the homeowner's application to the Tribunal:-

The key complaint was the application of a "Termination Charge" of £60 in her final bill from the property factors.

The property factors had taken over the factoring contract on 1 October 2016 from Be-Factored with no consultation. They had sent a letter on 3 October once the deal had been done, indicating an amalgamation of the two companies, but later clarified this to say that they had bought the contract as part of a larger deal with Be-Factored. Neither the factoring contract nor the title deeds allowed for the contract to be sold on and the residents were not consulted at all about the sale until after completion. The homeowner contended that they should have been given notice in

advance to allow the residents the opportunity to seek an alternative factor if that was their preference.

The property factors had advised the residents on 11 November 2016 that they were aiming to close out the quarterly invoice from Be-Factored for Q3 and it was sent later that month.

Two days before Christmas the homeowner and the other residents received imvoices for £1,446.30. Their previous invoices had been around £120 per quarter and many of the residents were concerned that they would be unable to afford the new costs even if spread over 12 months with the property factors' budget system.

The property factors were asked to attend a residents' meeting on 19 January 2017. The homeowner had worked closely with Mr Paul McDermott of the property factors to try and understand their new annual invoice in advance of the meeting, but it was riddled with errors and misleading information. The property factors made many changes prior to the meeting , but on the day they still presented data errors, which resulted in lack of confidence from the residents that they were being told the truth.

In his letter rejecting the homeowner's complaint at Stage 2 of the process. Mr McDermott stated that he believed he was given authority to act at the residents' meeting of 19 January 2017, when the residents had said his company could continue, but the residents only gave the property factors permission to continue if they complied with the terms of the title deeds by resorting back to charging in arrears and asking in advance for permission for pro-active maintenance work. Mr McDermott had agreed to that at the meeting, should that be the decision of the residents, but when he was told of the decision, he followed that up quickly with a resignation letter, saying that they would not comply. The homeowner was of the view that this confirmed the property factors had no authority to act throughout the 6 month period for which they had charged.

The homeowner commented on the fact that she felt that part of the property factors' tactics had been to make processing the complaint as difficult as possible. She believed that the complaint was simple. She did not believe it was legal to make a termination charge for the following reasons:-

- The property factors never had authority to act.
- It was the property factors, not the residents, who had terminated the contract and the homeowner did not believe that she and the other residents should incur the cost of the property factors' decision.
- The property factors had failed to meet the requirements of Section 2.1 of the Code of Conduct, as they had continually provided false and misleading data, causing significant anxiety amongst the residents, the majority of whom are young people or pensioners with no experience of how to deal with a factor. The property factors had told the residents they were out of touch with factoring costs and that they needed to accept a significant increase to align

with the market, but this was simply not true, as the new factor (Weslo) was costing less than Be-Factored and was doing a fantastic job.

- The property factors had stated in their Stage 2 response that the £60 charge was a closing out fee rather than a termination charge, but there is no reference in their Written Statement of Services that allows for that and the homeowner and other residents had not agreed to any terms or written statement anyway.
- The property factors had stated that they had made huge endeavours to help with the transition to Weslo. This was simply not true, as not only did Weslo struggle with getting basic information from the property factors (as an exchange of e-mails which accompanied the application showed), but the homeowner and the other residents had incurred extra costs as the property factors had not provided basic things like safety check records or even spare keys, which had to be cut again at cost to the residents.

The homeowner stated in the application that the property factors had failed to comply with Sections 1.1a.A (Authority to Act) and 2.1 of the Code of Conduct.

THE HEARING

A hearing took place at George House, 126 George Street, Edinburgh EH2 4HH on the morning of 9 November 2017. The homeowner was present at the hearing and was assisted by her husband, Mr Martin Boyers. The property factors were represented at the hearing by Mr Paul McDermott, their Managing Director.

Summary of Oral Evidence

The chairman told the parties that they could assume that the Tribunal members had read and were completely familiar with all of the written submissions and the documents which accompanied them. He then invited the homeowner to address the Tribunal with reference to her complaints under each Section of the Code of Conduct. The wording of the relevant portions of each Section of the Code included in the application is set out below, followed by a summary of the oral evidence given by the parties in respect of that Section.

Section 1.1a.A " The written statement should set out a statement of the basis of any authority you have to act on behalf of all the homeowners in the group

The homeowner told the Tribunal that, with Be-Factored, apart from standard things such as landscaping, stair cleaning and the management fee, everything was charged in arrears. Normally, she would have received the quarterly invoice from Be-Factored in October, but the close-out invoice came in mid-November and the

Invoice received two days before Christmas covered charges from 1 October 2016 to 1 January 2018. The homeowner had gone round the other flats with a view to holding a meeting to form a Residents' Association and this meeting took place on 19 January 2017, with Mr McDermott there to represent the property factors. A Minute of that Meeting was with the papers that accompanied the application. The first part of the meeting was to set up the Association and appoint office-bearers and the second part was a presentation by the property factors.

The homeowner told the Tribunal that, after the property factors' representatives had left the meeting, she and the other residents present had agreed that the property factors could continue, but only provided they complied with the title deeds by continuing to charge in arrears. The homeowner and other residents could not afford to pay in advance for things that might not happen and decided at the meeting that the property factors could continue only if they met these criteria. This decision was intimated to the property factors, who then informed the residents of their resignation on 1 February. Accordingly, as they had not been prepared to undertake factoring work on the terms decided by the homeowner and the other residents at the meeting, they had no authority to act.

Mr McDermott accepted at the hearing that the Minute adequately covered the meeting and that it was a meeting at which the property factors would be seeking authority to act. They had acquired Be-Factored, who factored the present development and 46 other developments. Between January and April 2017, the property factors had attended meetings at all of these developments to discuss the budgets they had issued. Mr McDermott accepted that there had been several errors in the budget, but commented that they had been given no data prior to settlement, so could not contact owners prior to that date. That was the reason for their letter of 3 October 2016. Be-Factored had wanted to use the word "amalgamation", which appeared in the letter, but in essence, the property factors had acquired their business.

The property factors had taken a decision to run a 15-month budget period, as they were already two months into that period. The budget invoice provided a default payment system which allowed for payment over a 12-month period. If floats were excluded, the actual cost was approximately £65 per month per flat.

The homeowner told the Tribunal that it was upsetting to be told that she was being given a 3-month payment holiday when hitherto they had paid in arrears. The Invoice stated that it was payable within 28 days, with a monthly payment plan as a default position, but there were also "threats" of late payment charges.

The homeowner then referred to the Termination Clause which had resulted in the charge of £60 per flat. She told the Tribunal that she and the other residents had never agreed to the property factors' Written Statement of Services anyway. It had not been sent to them, although at the meeting on 19 January, Mr McDermott had

referred to the fact that it was on their website. She accepted that it did state that an account closure fee would apply, but pointed out that this was in a paragraph which related only to the situation where the residents wished to consider terminating the relationship. The view of the property factors was that the particular paragraph allowed them to charge additional fees, irrespective of which party wanted to terminate the factoring relationship. Mr McDermott told the Tribunal that, whilst he would abide by the decsision of the Tribunal in relation to all residents in the development, he thought the property factors were entitled to the additional fee in respect of the work they had done at that point.

Section 2.1. "You must not provide information which is misleading or false."

The homeowner told the Tribunal that there had been many false and misleading statements in the budget calculations and that these had been admitted by Mr McDermott. The residents had also been so concerned about the errors in the budget that they were unsure they could trust the comments Mr McDermott made about having to align with the real world. As a result, the residents had done a benchmarking exercise, the results of which were summarised in the Minute of the meeting of 19 January 2017 and demonstrated that the monthly fees they had been paying to Be-Factored were not out of line with those being charged by a number of other factors in the Livingston area. Accordingly, the statement by Mr McDermott that the residents were out of touch with factoring costs was misleading and false.

Mr McDermott told the hearing that, at the meeting on 19 January 2017, he had apologised for the many errors which had appeared in the initial budget. He also stated that no credit control action had been taken prior to the date of the meeting. When he had been advised of the outcome of the vote at the meeting, namely that the property factors would be required to continue billing on an actual basis, they reconsidered their position. They were only prepared to operate on a budgeted approach, so in early February, they intimated their decision to resign, with a handover date of 31 March 2017. They had issued their final invoices on an actual cost basis in early June.

Closing Remarks

The homeowner concluded by telling the Tribunal that, in relation to Section 1.1a.A of the Code of Conduct, her contention was that the property factors had no authority to act. The factoring work had been transferred to them without the authority or prior knowledge of the residents, who then later only agreed to the property factors continuing to work for them subject to the caveats she had set out in relation to observing the provisions of the Deed of Conditions and charging in arrears on an actual basis rather than in advance on a budget basis. In relation to Section 2.1 of the Code of Conduct, the homeowner reminded the Tribunal that Mr McDermott had openly admitted that the budget information was poor and wrong in many respects,

which led the homeowner and the other residents to have a real lack of confidence in the property factors and in particular in any move to a budgeted system of charging.

The property factors referred in Mr McDermott's closing remarks to an e-mail trail of December 2016 and January 2017 which, he said, showed exceptional response times and demonstrated that he was fully engaged and was prepared to correct the errors. There had been no errors for which he had not apologised,

The parties then left the hearing and the Tribunal members considered the evidence that they had heard, along with the written representations and other documentation before them.

The Tribunal makes the following findings of fact:

- The homeowner is an owner of the property.
- The property forms part of a development of 28 flatted dwellinghouses.
- The property factors, in the course of their business, managed the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 13 March 2013.
- The homeowner has notified the property factors in writing as to why she considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- The homeowner made an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") received by the Tribunal on 1 September 2017 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.
- On 28 September 2017, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

Reasons for the Decision

The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with Section 1.1a.A of the Code of Conduct. The Tribunal noted that the property factors had been advised, following the decision of the residents on 19 January 2017, that their appointment was conditional upon their agreeing to charge in arrears on an actual basis rather than in advance on a budget basis. The

Minute of that meeting, which the property factors confirmed at the hearing was accurate, states that the property factors had indicated at the meeting that they would be prepared to work with the residents in that way, but when the decision was intimated to the property factors, on their own admission, they reconsidered their position and resigned. Accordingly, as the property factors were not prepared to accept the conditions laid down by the residents, the Tribunal held that the property factors did not have authority to act for the homeowner and the other residents in the development.

The Tribunal observed that the property factors had not sent the homeowner and the other residents a copy of their Written Statement of Services. The Tribunal was of the view that reference at the meeting of 19 January 2017 to the fact that it was available on their website was insufficient, particularly as the meeting had not been attended by all residents. The Tribunal accepted that this point might normally be regarded as academic, given that the property factors had "resigned " so soon after the meeting, but the property factors had relied on their Written Statement of Services when invoicing the homeowner and the other residents the sum of £60 as an account closure fee. The Tribunal held that the property factors had not provided the homeowner with a Written Statement of Services, setting out the basis of any authority they had to act on behalf of all the homeowners in the development and upheld the homeowner's complaint under Section 1.1a.A of the Code of Conduct.

In any event, even if the Tribunal had held that the property factors had authority to act, it was of the view that the words "An account closure fee will apply" in the Section headed "Changing Property Factor (Agent)" in the Written Statement of Services could not reasonably be interpreted as applying to every situation of termination. They were included as a sentence in a paragraph which referred only to the right of homeowners to dismiss the factors if dissatisfied with the level of service provided. The Tribunal understood that closing a factoring account was a time-consuming process for property factors, but there was no provision in the Written Statement of Services regarding termination by the property factors or any right to charge a closure fee in that situation.

The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with Section 2.1 of the Code of Conduct. The property factors had accepted the complaint of the homeowner that the budget presented to the residents contained many errors and Mr McDermott had described it at the hearing as one of the worst his office had produced. The Tribunal accepted that Mr McDermott had apologised for the errors and had corrected them, but nevertheless there had been false and misleading statements in the budget, which had caused anxiety to the homeowner and the other residents and which could not be regarded as a "one-off" mistake. Accordingly, the Tribunal upoheld the homeowner's complaint under Section 2.1 of the Code of Conduct.

The Tribunal determined that, the property factors having failed to comply with the requirement under Section 1.1a.A of the Code of Conduct, the homeowner was not bound by their Written Statement of Services, in terms of which an account closure fee of £60 had been applied. Accordingly, this sum should be repaid to the homeowner.

The Tribunal considered whether to order a further payment by way of compensation for the upset and inconvenience caused to the homeowner by the property factors' failure to comply with the Code of Conduct, but, taking into account the fact that the property factors had apologised for their budget errors and had corrected them and that they had confirmed that they would, without the necessity of further applications by other residents, apply the Tribunal's decision across the development, the Tribunal determined that no further compensation should be ordered.

Property Factor Enforcement Order

The Tribunal proposes to make a Property Factor Enforcement Order, as detailed in the accompanying Section 19(2) Notice.

Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014, 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.

G Clark

Signature of Legal Chair

Date 9 November 2017