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/17/0395

The Property: 20 Old School Wynd, Ochiltree, Ayrshire KA18 2DA ('the property')

The Parties:

Mr Howard Johnston, residing at 23 Finlayson Way, Coylton, Ayrshire KA6 6GW ("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 David Godfrey (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 not failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") and, accordingly, the Tribunal does not propose making a Property Factor Enforcement Order.

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 dated 15 October 2017, with supporting documentation, letters from the homeowner to the property factors dated 29 October and 1 December 2017, the latter setting out the details of the homeowner's complaint by reference to various Sections of the Code of Conduct, the Stage 1 and 2 Complaints process response letters to the homeowner dated 4 April and 12 May 2017 repectively and files provided to the Tribunal by the property factors on 23 March 2018 by way of written submissions, including a Site Report dated 1 December 2016, a Budget Invoice, with Budget Notes, dated 21 December 2016, the property factor's notes of a telephone call from the homeowner to the property factor which took place on 3 March 2017 and the Budget Reconciliation dated 1 June 2017 with a letter to the homeowner dated 2 June 2017.

Summary of Written Representations

(a) By the homeowner

The following is a summary of the content of the homeowner's application to the Tribunal, as clarified by his letter to the property factor dated 1 December 2017:-

The owners at Old School Wynd had received an upfront invoice from the property factors which lacked any form of transparency and contained potential upfront charges with no detail and initial communication. The upfront annual invoice (as opposed to the standard quarterly billing in arrears which the previous factors had used) featured little detail on future items and was not discussed or agreed with the owners. This included excessive increases for landscaping and general repairs with no breakdown and, when pressed for further information, the property factors confimed that costs were not based on specific items or quotes (never having visited), but were simply generic totals. The costs had been apportioned in the final accounts, but did not indicate what they were actually claiming as expenditure, with no clarity or even short phrase indications for the owners on what work had been done. The property factors had failed to comply with Sections 2.1 and 3.3 of the Code of Conduct.

There was a further lack of clarity with regard to the development account. Despite requests, no reconciliation or sight of the development bank account had been made available. The owners needed to understand where all payments (including floats) had gone. Although it was accepted that the property factors had only commenced management in 2016, they had inherited balances owed to the accounts and the float moneys, so were fully accountable for providing these answers to owners. It was unacceptable to expect owners to make payments with no transparency, especially when many of them had been in dispute with the now liquidated Be-Factored. The property factors had failed to comply with Section 3.1 of the Code of Conduct.

It had been confirmed in recent communication by the property factors that no inspection of the development had taken place since their purchase of the previous factors' business in 2016. It did not seem unreasonable to expect that owners would have been visited during this period and various significant issues addressed. This included choked gutters which subsequently led to water ingress. Owners had been informed that it was their responsibility to report problems, but a proactive management service would have eliminated the issue with the gutters which should be part of a standard cyclical maintenance programme. Given the increase in management fee when the property factors took over, an improved service would have been expected. Furthermore, it was concerning that a new company would take over the development and have no live knowledge of it but produced an upfront repair budget based on no actual visitation. The property factors had failed to comply with Section 6.4 of the Code of Conduct.

Owners had serious reservations about the management of the debt at the development. To date, no information had been given (despite legal entitlement) of the property addresses with debt and what actions had been taken to recover it. The property factors had stated that they had taken no action to pursue debt since their purchase of the previous factors' business and owners had never been informed of development debt at any point. Owners required to see the background to the debt, what action had been taken and why the debt had been allowed to accumulate. Owners should not be expected to cover debt that could not be supported by evidence and structure. It was the role of the property factors to pursue development funding and communicate with property owners if services were impacted by debt. The homeowner did not believe suitable procedures were in place to deal with the debt transferred and owners had not been made aware of any issues. The homeowner questioned the acquisition of the development without due cause or care. The property factors had failed to comply with Sections 3.4, 4.1 and 4.7 of the Code of Conduct.

Many of the items listed were covered under the generic heading of communication, but the homeowner wished to confirm various other concerns. The property factors had not sought the owners' permission to transfer the floats from the previous factor and simply implied the cross over via an entry on an invoice (a failure to comply with

Section 3.4 of the Code of Conduct). Owners should have been made aware of the process regarding their floats and that live debt was current, meaning that floats were not being refunded, but in effect transferred to the property factors while potentially facilitating the debt. This was a complete failure to communicate with the owners.

There also appeared to be dubiety from the property factors about the transferring of staff from Be-Factored. The property factors had clearly stated in communication to owners that no property management staff were transferred over. This was directly contradicted by the email footers of employees who had been involved with both firms (a failure to comply with Section 2.1 of the Code of Conduct).

The homeowner also wanted to raise a complaint about the behaviour of employees of the property factors with phone calls not returned, emails not answered, abusive attitude on the telephone and hang ups (breaches of Section 2.2 of the Code of Conduct).

The homeowner stated in the application, as clarified in the letter of 1 December 2017, that the property factors had failed to comply with Sections 2.1, 2.2, 3.1, 3.3, 3.4, 4.1, 4.7 and 6.4 of the Code of Conduct.

(b) By the property factors

The property factors' written representations comprised a number of documents, but did not include a summary of their response to the application. The documents included a Budget Invoice dated 21 December 2016, which listed items of anticipated expenditure under the headings of AGM Venue Hire, Careline, Electrical Maintenance, Electricity (Development), External Maintenance, Gardening/Landscaping, Insurance, Insurance Placement Fee, Management Fee (Development), Reserves–General and Float Charge. Beside each item was a code number. Electrical Maintenance, for example, was coded 20310. Notes to the Budget extending to three pages were also provided in a letter to the homeowners dated 21 December 2016, which explained that the budget was designed to enable owners to understand the planned expenditure for the year and to know what their monthly costs would be throughout the budget year.

The documents also included the property factors' Stage 1 and Stage 2 responses to the homeowner's complaints. In the Stage 1 response, dated 4 April 2017, the property factors stated that they had been planning a meeting of owners and had a venue booked, but that the owners had given notice of termination of the factoring contract before this meeting could take place. They also pointed out that each item of expenditure was coded and Notes had been provided. A full list of codes was available on request. In the Stage 2 response, dated 12 May 2017, the property factors added that they did not believe that any formal request had been made by

any owner in the Development for further clarity on the budget and that they could not trace any record af the homeowner requesting further clarification.

The documents provided by the property factors included a Site Report prepared by Park Property Management dated 1 December 2016. It showed photographs of 21 potential items of repair, including a photograph showing that gutters on Building 3 required to be cleaned. The Budget Notes stated that as part of a regular proactive maintenance programme the property factors would be inspecting the roofs and cleaning gutters on an annual basis. In the Stage 1 response letter, the property factors said that the gutter cleaning would have been carried out, but the factoring contract had been terminated.

In relation to Debt Management, the property factors stated in their Stage 2 response of 12 May 2017 that addresses of owners with debt could not be disclosed as this would allow them to be identified. The debt position would crystallise into actual liabilities at the reconciliation, which was imminent and, once the final figures were issued, the property factors would be more than happy to discuss how they arose. Full invoicing functions had been performed but formal collection action had not been able to be created due to the notice of termination of their contract given in January 2017.

The Stage 2 response also included a statement that no staff from Be-Factored that had moved to the property factors under TUPE regulations had visited the development or were responsible for such visits. Only some office based staff had moved to the propery factors during the transaction (whereby the business of Be-Factored was acquired by the property factors).

In the Stage 2 response letter, the property factors said that they had investigated the allegation that they had hung up on the homeowner and other residents. There had only been one occasion when a member of the property factors' team had hung up on a client and that had not been the homeowner, Mr Johnston. The documents provided by the property factors included a Note of an out of hours telephone call of 3 March 2017.

THE HEARING

A hearing took place at North West Kilmarnock Area Centre, Western Road, Kilmarnock KA3 1NQ on 13 April 2018. The homeowner was present at the hearing and was assisted by his wife, Mrs Karen Johnston. 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 his 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 2.1. "You must not provide information which is misleading or false" and Section 3.3. "You must provide to homeowners, in writing at least once a year...a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for."

The homeowner told the Tribunal that there should have been a meeting with the owners before the Budget was sent out in December 2016. The Budget made no sense, as there was no indication where the property factors were getting their figures from. They could not know in advance how much the maintenance and gardening were going to cost. The factoring contract had been handed over without any consultation with the owners, who had just been moved from one factor to another.

The property factors told the hearing that they had acquired a large portfolio from Be-Factored. In all the of developments whose factoring contracts they had acquired, their process was to issue estimated invoices and then call extraordinary general meetings of the owners. These meetings were to be held between January and April 2017. The owners of Old School Wynd had, however, before the meeting for their development could take place, decided to give notice of termination of the contract. The property factors had been appointed on 1 October 2016 and the notice of termination was given on 1 January 2017. Had this not happened and had the meeting taken place, they would have gone over all the Budget figures at that time. The actual figures would have crystallised at the year end, but for the purpose of the Budget, the property factors had historical records of, for example the electricity charges for the previous 2/3 years as a basis from which to work. Maintenance too was based on historical cost and there was a contract already in place for landscaping, so that cost was fixed. With regard to insurance, the property factors did not take any commission, but they charged a placement fee, as there was management work involved. Owners would have received a standard letter setting out the position in relation to the Float charge. The homeowner told the Tribunal that he had never received a letter offering him the option to have the previous float balance returned rather than rolled over to the new factors' account. The property factors said that they could not say with absolute certainty that the homeowner had received the letter, but they had sent out 2500 such letters in standard form and had no reason to think that the one to the homeowner had not been sent.

The property factors then explained that they did not consider there had been any lack of clarity in relation to the Budget. The homeowner had acknowledged that he had received the Budget, the covering letter and three pages of explanatory notes about the budget system. The property factors conceded that this had not been discussed with the owners, but, had the notice of termination not been given, a meeting at which it would have been discussed would have taken place in January or February 2017. The estimated invoice had been issued after a site visit on 1 December 2016, so there had been an inspection of the development. At the meeting, had it taken place, the property factors would have discussed the Site Report and suggested proposed works for agreement.

The property factors added that they had written to all owners in early October 2016 to say that Be-Factored would be issuing a final statement of account and that two letters had been sent to all owners across the portfolio before the budget invoice was sent out. The homeowner confirmed to the Tribunal that he had not asked Be-Factored to repay the credit balance on his account, but explained that the owners did not really know what was going on and, by then, they had been told the new factor was taking over.

When asked by the Tribunal about the debt situation at the point at which they took over from Be-Factored, the property factors responded that debt was not a liability on them as factors. It was due by defaulting owners to their co-owners in the development. The price the property factors had paid would have reflected the fact that some of the debt would be easy to collect and some would not. The property factors had taken a commercial view. They were prepared to pursue the debt by credit control and, if necessary, court action, rather than simply redistribute it across the development.

Section 2.2. "You must not communicate with homeowners in any way which is abusive or intimidating or which threatens them (apart from reasonable indication that you may take legal action."

The issue here is set out in the summary of written representations and related to a telephone conversation of 3 March. The homeowner's wife told the Tribunal that they had been getting nowhere and she had made the telephone call, but the homeowner could hear all that was being said. They had just wanted to know when they would get their money back, as the new factor had told them they should be entitled to get it back within 3 months and that period had passed.

The property factors referred to the two Notes of the telephone conversation which were amongst the documents they had submitted to the Tribunal. They acknowledged that the homeowner would have been angry as the property factors had money of theirs, but the homeowner's wife and the homeowner were insisting that they were entitled to a complete immediate refund. The property factors did not deny that one of their staff had hung up on somebody and accepted that the second

note of the telephone conversation, which indicated that the caller had been the homeowner's daughter might not be an accurate recollection, the note having been prepared on 20 April 2017, a few weeks after the call, in response to Mr McDermott's request to staff for a response to the allegation contained in the homeowner's letter to him of 17 April. The first note of the conversation had been a contemporaneous account. The property factors accepted that the second note was incorrect, in that it indicated the caller was the homeowner's daughter, not his wife. It was for that reason that the Stage 2 response letter, which was addressed to the homeowner Mr Johnston, had indicated that on the one occasion that a member of staff had hung up on a client, that client had not been the homeowner.

Section 3.1. "If a homeowner decides to terminate their arrangement with you...you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement..."

No further evidence was led on this matter, but the property factors commented that the complaint from the homeowner had come in on 10 March 2017, during the three month period.

Section 3.4. "You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property)."

Section 4.1, "You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to."

And

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

The property factors confirmed to the Tribunal that they had taken no steps to pursue debt after they were given notice of the termination of their contract. When they had the Decision of the Tribunal they would reconcile and issue their final accounts. They had refused, on Data Protection grounds, to give the homeowner the names and addresses of those in debt, but would be happy to provide the debt files to the new factors of the development. The debt was owed by the debtors to the owners, not to the property factors. The balances due had not crystallised until Be-Factored issued their final invoice and the property factors had taken the view that the efficient way to deal with this was to carry forward the debt to the new account and then start credit

control measures based on that. Their treatment of the balances had been shown in their Reconciliation Invoice dated 1 October 2016.

The homeowner told the Tribunal that it was not fair that the remaining owners had to split up the debt just because the factors had not pursued it.

Section 6.4. "If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works."

The property factors stated that they had highlighted in their Site Report of 1 December 2016 that the gutters needed cleaned. Gutter cleaning would have been part of cyclical maintenance, normally done annually, unless owners decided in any particular year that it was not necessary.

The homeowner said that the property factors had been aware of the problem on 1 December 2016 and it should have been fixed straight away. He had submitted photographs showing how bad the problem had become. The property factors responded that these photographs showed a position which was much worse than it had been at the time of the Site Report, but they had not had them during the period that they were providing factoring services and had not received any report of water ingress.

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, along with his wife.
- The property forms part of a development comprising a former school building now converted into six flats and 2 additional blocks each containing 8 flats.
- 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 he 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") dated 15 October 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 22 February 2018, 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 did not uphold the homeowner's complaint that the property factors had failed to comply with Sections 2.1 or 3.3 of the Code of Conduct. By definition, a budget will contain estimated costs and the property factors confirmed the basis on which the figures had been arrived at, namely estimates based on the best information available at the time, historic costs of this and other developments, with actual figures for landscaping and insurance, as these were already fixed.

The Tribunal accepted that the process was changing from one based on actual costs and charged in arrears to one based on anticipated costs and charged in advance by way of budget estimates, but accepted the evidence given by the property factors that any concerns of owners regarding the process would have been addressed at the meeting which would have followed on the Budget Invoice, had the owners of the development not decided to terminate the property factors' contract.

The Tribunal did not uphold the complaint that there was no clarity in relation to the itemns of expenditure in the Budget Invoice. Each item is accompanied by a code number and the explanatory notes sent with the Budget Invoice clearly stated that a full list of Budget codes and items was available on request.

In relation to Section 3.3 of the Code of Conduct, the Tribunal held that the property factors had provided a budget and accepted that a detailed financial breakdown could not have been produced until the end of the financial year, when the actual outturn would have been known.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 3.1 of the Code of Conduct. The property factors had issued a financial breakdown on 1 June 2017. The Section provides that the financial information to be made available to a homeowner who decides to terminate the factoring arrangement should be provided within three months of termination unless there is a good reason not to. The factoring arrangement appears to have ended on 31 March 2017, that being the date to which the final account was made up. This fell within the three month period. The Tribunal understood the frustration felt by the homeowner that the amount due to him had not

been repaid as yet, but accepted from the terms of the property factors' letter to the homeowner of 2 June 2017 that there was significant debt within the development and that, as a result, there were insufficient funds within the development bank account to pay refunds.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 2.2 of the Code of Conduct. There was a degree of dispute as to what had been said in the telephone conversation of 3 March 2017 and as to the tone adopted by both parties. The Tribunal was not satisfied that the Memo from "Tom" to "Elaine" dated 20 April was an accurate note of the telephone call which had been made some weeks before, but was satisfied that the first note of that call, headed "Out of hours call 03-03-2017 20 Old School Wynd Approx 5.30pm" was a contemporaneous account and, therefore, more likely to be an accurate record. It was at odds with the homeowner's version of events and, in the absence of other independent evidence to support either account, the Tribunal was unable to prefer one party's evidence over that of the other party and could not uphold the complaint. The Tribunal commented, however, that, even if it had preferred the homeowner's evidence, it would not have regarded the termination by the property factor of that single telephone call as being sufficient to constitute a breach of the Code of Conduct, as, whilst it would have been regarded as unprofessional, it was not abusive or intimidating.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Sections 3.4, 4.1 or 4.7 of the Code of Conduct. The Tribunal held that the property factors did have a procedure in place for dealing with payments made in advance by homeowners in cases where the homeowner requires a refund or needs to transfer his share of the funds (for example on sale of the property) and that it would not be possible for the property factors to pay out credit balances due to a homeowner if, due to debt through non-payment by other owners in the development, there were insufficient funds in the development account.

The Tribunal did not have sight of the property factors' Debt Recovery Procedure, but accepted the evidence from the property factors (which was not challenged by the homeowner) that there was in place a procedure and a credit control system, which would start with a reminder if a bill was outstanding for more than 28 days. The Budget Invoice dated 21 December 2016 stated that it was due for payment within 28 days but, by then, the owners had given notice that they were terminating the contract. As a result, the property factors did not have in place the necessary funds to pursue those owners who were in debt. The Tribunal accepted the evidence given by the property factors that their policy was to pursue debt rather than simply reallocate it amongst the owners who were paying their bills on time. The property factors felt that they were doing this with good intentions. They had not been aware of the debt position until they saw the final accounts from Be-Factored in late November 2016 and the Tribunal held that their decision to carry forward debt to the

Budget Invoices was a reasonable one to take in the circumstances and that it was not misleading to have taken that approach. The debt in respect of the previous factors did not crystallise until their final accounts were sent out in late November and the Budget Invoices including the debt were sent out on 21 December.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 6.4 of the Code of Conduct. The homeowner had contended in his written representations that the property factors had never carried out an inspection of the development, but the Tribunal held that there was clear evidence that an inspection had been carried out on 1 December 2016. The Tribunal accepted that the homeowner might have been unaware of that fact until he saw the documentation supplied to the Tribunal by the property factors, but held that it was reflected in the explananatory notes to the Budget Invoice sent on 21 December 2016, which referred, amongst other things, to the fact that some of the internal and emergency lighting had failed, some of the control gear on the smoke vent systems and fire systems needed refurbishment and that there were several issues with the door entry system. The property factors would have been unaware of these issues if they had not inspected the development, The Site Report of 1 December 2016 highlighted the fact that the gutters of the homeowner's block needed to be cleaned out. The Tribunal accepted the evidence of the property factors that the Site Report would have been discussed at the meeting which would have taken place early in 2017, had the owners not decided to terminate their contract. The homeowner had submitted a photograph as part of the written representations, which showed the vegetation growth in the gutter to be much worse than appeared from the property factors' photograph of 1 December 2016 and the Tribunal concluded that the homeowner's photograph had been taken at a later date. The Tribunal held that the property factors and the owners at the development had never agreed a core service and/or a planned programme of works, because the meeting at which such matters might have been agreed never took place. Accordingly, the Tribunal could not find that the property factors had failed to comply with Section 6.4 of the Code of Conduct.

The Tribunal was of the view that the problems which had arisen in this case were largely the consequence of the owners at the development taking the decision to terminate the property factors' contract at such an early stage, the result being that the property factors did not have the opportunity to meet with the owners in early 2017 to explain both the budget process and the fact that adjustments would be made at the end of each financial year to reconcile the budget figures with the actual moneys spent. The property factors also did not have the opportunity to discuss the Site Report and agree a programme of maintenance, which would have included cyclical items such as gutter cleaning. The owners at the development were perfectly within their rights to decide to terminate the contract, but that decision did have consequences. Some owners did not then pay the sums requested in the Budget Invoice, which increased the debt to such an extent that those with surpluses could

not be paid out when the property factors prepared their final account. It also resulted in a period of some months during which maintenance work was not carried out, as no programme had been agreed and there were in any event insufficient funds in the development bank account to meet the cost of work. The Tribunal had sympathy with the homeowner's situation, but could not uphold his complaints that the property factors had failed to comply with the Code of Conduct.

The Tribunal does not propose to make a Property Factor Enforcement Order.

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.

George Clark

Signature of Legal Chair

Date 13 April 2018