Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier Tribunal for Scotland (Housing and Property Chamber)

Decision on homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/LM/17/0260

Raeburn Common, Pettinain ("The Property")

The Parties: -

Mrs Shelagh Craig, 8 Grange Road, Pettinain, Lanark, ML11 8SP ("the Applicant")

Park Property Management Ltd, 11 Somerset Place, Glasgow, G3 7JT ("the Respondent")

Tribunal Members:

Josephine Bonnar (Legal Member)

Ahsan Khan (Ordinary Member)

DECISION

The Respondent has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with sections 2.5, 6.1 and 7.2 of the Code of Conduct for Property Factors.

The decision is unanimous

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

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

Background

1. By application received on 12 July 2017 the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Respondent had failed to comply with the Code of Conduct for property factors. The Applicant stated that the Respondent had failed to comply with sections 1.1a, 3.2 and 4.6 of the Code. The Applicant lodged a bundle of documents with the application.

2. On 12 September 2017, an In- House Convener on behalf of the President referred the matter to a tribunal for a determination. A hearing was assigned to take place at Brandon Gate, Ground Floor Block C, Leechlea Road, Hamilton on 17 November 2017.

3. Prior to the hearing both parties confirmed that they intended to attend the hearing.

Hearing

4. The hearing took place before the Tribunal on 17 November 2017. The Applicant, Mrs Shelagh Craig attended. Also present was Mr Prentice, the Applicant in a related case against the Respondent under reference FTS/HPC/PF/0258. He was accompanied by his wife, who attended as a supporter. Both applications were being heard together in terms of Regulation 16(1)(b). Mr Paul McDermott, a director of the Respondent also attended. The parties and Mrs Prentice confirmed that they had been advised that the cases were being heard together. The Applicant and Mr Prentice confirmed that they had no objection to this. Mr McDermott indicated that he had some concerns in relation to data protection and that disclosure of the information during the hearing might lead to a breach of the Data Protection Act. The Tribunal considered his concern but noted that the hearing was a public hearing and that the applicants in both cases did not object to the hearing of both cases together. Mr McDermott then confirmed that he had no objection to the hearing proceeding.

5. The hearing started with Mr Prentice giving evidence in relation to his application. He explained that the applications relate to the maintenance of a piece of ground known as Raeburn Common, Pettinain, which is part of a development of houses. The builder had appointed Be Factored Ltd/ Be Maintained Ltd as property factor at the time of construction of the development and they remained the factor until October 2016. A letter was received by Mr Prentice dated 3 October 2016 from Park Property Management Ltd. The Be Factored and Be Maintained logos were on the letter and it was signed by Mr McDermott, on behalf of the Respondent and by Graham McEwan, the Managing Director of Be Factored and Be Maintained. The letter (which was lodged by both applicants) states that Be Factored/Be Maintained had amalgamated its factoring resources with Park Property Management Ltd. Mrs Craig confirmed that she had received a similar letter. The letter advised that it would be the "same people plus some new ones", who would be providing the service. Mr Prentice advised the tribunal that he didn't know whether the letter meant that the Respondent had bought the company or just the book. However, he accepted that the Respondent became their factor at that point. He did not contact them to challenge the letter. He further explained that, at that time, there was no resident's association for the development. He thinks all the residents just accepted the position. Mrs Craig also confirmed that she accepted the letter as fact. Mr Prentice advised that the factoring contract with the Respondent is now at an end. He is unhappy that the Respondent does not intend to refund the residents' entire floats, following that termination. This is because there is development debt, caused by some residents not paying their share of common charges, which the Respondent intends to divide up among the other proprietors. Mr Prentice has a number of concerns about this. Firstly, the title deeds do not make provision for the debt to be passed on to other residents. Instead, the property factor is empowered to take legal action for recovery. The second issue is that there is some uncertainty about the number of properties in the development. There are 36 houses and a schoolhouse. The latter may or may not be part of the development. It is his understanding that the schoolhouse owners did (at one point) pay a share of the maintenance of the common ground and then stopped, reason unknown. Mr Prentice says that in correspondence with the Respondent, Mr McDermott disclosed the identity of one of the non-payers as the school house. Mr Prentice is concerned that the schoolhouse owner is not being pursued because of the uncertainty surrounding their liability, and meantime the other owners are being expected to carry that share and any others which remain unpaid. Mr Prentice went on to say that he is extremely concerned about the existence and level of development debt. The previous factor told them nothing about it and since taking over, the Respondent waited until a meeting on 2nd February 2017 to mention it. Following that meeting he asked for and was given a breakdown of what was owed. Mr Prentice referred to the title deeds and to a document - the Spice report – as authority for his claim that the factor cannot pass on to other homeowners, the shares not paid by some proprietors.

6. Mr McDermott firstly addressed the issue of the Respondent's appointment. He explained that his company bought a large number of factoring contracts from Be Factored Ltd and Be Maintained Ltd. The companies were, and are, completely separate. He wanted the changeover to be smooth and seamless, so the initial letter was signed by both companies. He bought the logos from the other companies as well and used them for a while, on his letterhead, to re-assure people about the change. Some staff members also transferred. He confirmed that prior to the purchase of the contracts he had no information about the level of development debt. It was not part of the deal that he would be given this information, and that was a commercial risk that he took. At transfer he was given the funds held by the previous companies. Some residents were in credit, some in debit, and the floats had been partially used to cover development debt so that contractors could be paid. He referred to a letter issued to the homeowners on 11 November 2016 (within the documents lodged by the Applicant). It was a follow up to the earlier letter and referred to final accounts being issued. Mr McDermott advised that the staff members who had transferred had spent time making up the Be Factored final accounts. The letter advises homeowners that any credit balances would be automatically transferred unless the homeowner asked for a refund. He said that homeowners who applied for refunds, were provided with same. However, as there was development debt, the refund would be subject to a deduction for the homeowner's share of that. Mr McDermott further advised the Tribunal that he believes that he is entitled to do this, although there is no provision in the title deeds. He stated that the residents are responsible for the common repairs, not the factor. He doesn't know whether there are 36 or 37 liable properties and said that legal advice is needed on that point. In early 2017 the Respondent arranged meetings of homeowners for all of the contracts that it had purchased. The meeting at Pettinain was arranged for 2 February 2017. One of the purposes of the meeting was to ratify the Respondent's appointment. Voting forms were issued at most of the meetings. He advised that tribunal that, until the meetings, he considered that the Respondent was acting as property factor with the tacit authority of the homeowners. However, by the time of the Pettinain meeting he had received a letter from the recently formed residents' association terminating the factoring contract. This letter was received the day before the meeting. Despite the letter, the meeting went ahead. Various matters were discussed. His colleague (who attended the meeting) advised the homeowners that there is development debt which is due to some homeowners failing to pay. There was also discussion of the termination letter and the possibility of a new "factor lite" contract being agreed. It was agreed that this would be progressed with the respondent preparing a draft contract for them to consider. In the meantime, Mr McDermott indicated that he had not charged any management fees to the development and considered that, subject to seeing evidence that the termination had been a valid one, the Respondent was no longer the appointed factor. Subsequently, he was provided with evidence that the termination complied with the title deeds. The negotiations about a new factor lite contract were unsuccessful. He accepted the termination and confirmed that

final statements would be issued. He confirmed that he currently holds the sum of £1300 for the development. However, some residents owe money and others are owed money. He does not feel that he can pass this money or the debt files to the residents' association because of data protection issues and because the residents' association is not a registered factor. He also advised the Tribunal that had the homeowners not terminated the Respondent's services, he would have taken legal action against the homeowners who had not paid their share of common charges, but he was not given the opportunity.

7. Mr Prentice confirmed to the Tribunal that he did not contact the Respondent on receipt of the letter of 3 November 2016 to ask for a refund. Mr Prentice also advised that he has no recollection of receiving a final Be factored/ Be maintained account and this was also Mrs Craig's position. Mr Prentice also stated to the tribunal that he takes a different view of the meeting on 2 February 2017. While he accepts that a letter was issued dismissing the Respondent, that was before the meeting. Following the meeting he is of the view that they were in fact re-appointed but based on a factor lite arrangement with the residents' association taking a leading role. The precise terms of the contract were to be agreed, but the homeowner/property factor relationship continued. This is still his view although he understands that there might be a question over whether that meeting complied with the title deeds and therefore may not have had the necessary authority to overturn the previous decision taken at a meeting of homeowners on 21 January 2017. Mrs Craig seemed unsure as to the respondent's status following the meeting of 2nd February but certainly confirmed that negotiations were underway with regard to a new factoring arrangement.

8. Mrs Craig confirmed that she agreed with much of Mr Prentice's evidence in relation to the appointment of the Respondent, the termination and the issue of the floats. Her application relates to the Code of conduct. She advised the tribunal that her husband had started the process but had passed away earlier in the year. She also advised the tribunal that in November 2016, she had telephoned to query an invoice which she had already paid and spoken to a member of staff, Lisa Piper. She had asked if her float was to be returned to her. Lisa Piper had said no and had advised that the floats were to be transferred from the previous factor. Although she wasn't happy with the response, she didn't take the matter further. She confirmed to the tribunal that she too had been confused by the amalgamation or transfer, and didn't really understand what had taken place. She further advised that Lisa Piper explained to her that the previous property factor and the Respondent were two separate companies

9. **Section1. You must provide each homeowner with a written statement. 1.1a The written statement should set out A. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group.** Mrs Craig advised the Tribunal that following intimation from the Respondent that they were now the factor for the development, she was not provided with a written statement of services. She sent an email on 28 March 2017 asking for

same. In response an email was received on 30 March 2017, which referred her to the company website. This contains a generic written statement which was not specific to her development. She did not receive a hard copy of the written statement until August 2017. She advised the Tribunal that as it is not pertinent to the development it does not comply with the code and furthermore does not detail the Respondent's authority to act. In response, Mr McDermott stated that the written statement on the website was compliant with the code and that the issue of authority to act was not clarified until the homeowner meeting which was arranged for 2 February 2017, by which time the contract had been terminated. At the time of the request in March 2017, the respondent was no longer the factor. He confirmed that the written statement lodged by Mrs Craig with her documents is the version which would have applied at the relevant time.

10. **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.** Mrs Craig advised the Tribunal that she had enquired about the return of her float when the Respondent took over and the staff member, Lisa Piper had refused this. The letter she had received had stated that she should make contact if she wanted this refund. She telephoned and asked if the floats were being refunded, and was told that they were being transferred from the previous factor. She advised that she had not pursued the matter further, but remained dissatisfied with the situation. On termination of the contract with the respondent, she had not received a final statement until September 2017. Her statement indicated that she was due a refund of £245.55. She could not understand this figure, as she had paid all invoices and her float and believed that she was due to receive £301.25. She was not provided with a breakdown of the figure. The figures were discussed and confirmed that she now understands that the difference between the 2 figures, is her share of development debt which has been deducted from her float. She does not accept that the Respondent is entitled to do this and considers their actions in refusing to refund her float and offering to send her £245.55 to be a breach of this section of the code. Mr McDermott disputed that Mrs Craig had been refused a refund of her float. Other homeowners had requested and been provided with same and he does not believe that Lisa Piper would have refused. He confirmed however that any refund may have been subject to a reduction. In terms of the £245.55, Mr McDermott advised that this is what is owed to Mrs Craig, after deduction of her share of development debt and that he is happy for that sum to be paid over to her, even if she continues to dispute it.

11. **Section 4.6 "You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).** Mrs Craig advised that she was unaware of any debt problems at the development until the meeting of homeowners on 2 February 2017. The Respondent had been in post since October 2016 and ought to have made her aware of the situation. The previous factors had similarly not advised homeowners of the situation which, it

appeared, had been in existence for some years. She mentioned again the passing on of development debt to other homeowners, which is not consistent with the title deeds, which allow the factor to pursue non payers, but say nothing about passing on unpaid debts to other proprietors. Mr McDermott indicated that he accepts that the title deeds are silent on the issue, but that homeowners cannot expect the respondent to take debt recovery action when they were not being paid for their services. The sums which were owed had to be covered in some way. He advised that one of the reasons for withdrawing from the factor lite discussions was that he was being expected to take on the debt. In relation to the delay in informing homeowners of the development debt, he advised that he had not wanted to alarm homeowners by notifying them straight away, and in any event, it took a few weeks before the extent of same was established. It had always been the intention of the respondent to advise homeowners of the situation at the February meeting.

The tribunal make the following findings in fact:

(i) The Applicant is the owner of a dwellinghouse at 8 Grange Road, located within a development of houses in Pettinain, Lanark. Within the development there is an area of land, owned in common by the proprietors of the dwellinghouses. The Applicant together with the other proprietors are liable for the maintenance of the area of land.

(ii) The Respondent was the Property Factor for the development between 3 October 2016 and 1 February 2017.

(iii) The Respondent purchased the contract for the provision of factoring services at the development from the previous property factor. The Applicant, along with other homeowners, were not consulted by either company regarding the purchase.

(iv) Following a meeting of proprietors on 21 January 2017, at which a vote was taken, a letter was sent to the Respondent terminating the factoring arrangement with them.

(v) In September 2017 the Respondent issued a final statement to the Applicant, showing a credit balance of £245.55. A share of development debt, caused by some proprietors failing to pay their share of common charges, has been deducted from the credit balance due to the Applicant.

Reasons for Decision

12. In her application, the Applicant states that the Respondent has breached Sections 1.1a, 3.2 and 4.6 of the Code of Conduct. The Tribunal first considered whether the Respondent was in fact a property factor for the development in terms of the Act and if so, whether it has ceased to be the property factor, and when that occurred. The circumstances of the Respondent's appointment do not appear to comply with the title deeds. No doubt the sale by the previous factor to the Respondent of its portfolio of property factor contracts is not unusual. However, the Tribunal is of the view that homeowners ought to have been notified about the transaction by both seller and purchaser. It therefore appears to the tribunal that there are issues regarding authority to act. However, between 3 October 2016 and 1 February 2017 it appears that the Applicant, Mr Prentice and the other homeowners regarded the Respondent as their property factor, as did the Respondent. In the circumstances, the Tribunal concluded that the Respondent had the "tacit" authority of the homeowners referred to in his evidence, although the circumstances are somewhat unsatisfactory. In terms of the termination of the "contract" the tribunal accepted the Respondent's evidence that, having received a letter terminating the services on 1 February 2017, that is when the arrangement came to an end. Whether or not the meeting on 2 February 2017 could have revoked the decision or not, the written termination letter which was subsequently accepted by the Respondent appears quite clearly to bring the arrangement to an end. The tribunal proceeded to consider the application.

13 **Section 1.1a.** The first issue which the tribunal considered was whether the Respondent had failed to issue the Applicant with a written statement of services in breach of the code. The tribunal concluded that the Respondent ought to have issued a written statement to all homeowners in the development within 4 weeks of becoming the property factor in October 2016, and did not do so. It is therefore in breach of this section of the code. The tribunal is of the view however, that when the Applicant requested a copy of the statement in March 2017, the Respondent was entitled to refer her to the website to access a copy. There was no suggestion in the evidence that the Applicant could not access the document on the website, only that she expected a paper copy. The tribunal therefore concluded that the Respondent had not failed to provide the statement when this was requested. The Tribunal noted that the written statement is not specific to the Applicant's development. The Applicant did not identify the specific deficiencies in this respect, although the Tribunal notes that Mr Prentice had pointed out that the percentage share of common charges payable by each proprietor is not stated. The Tribunal accepted the Applicant's evidence that there is a requirement in the code that the property factor's authority to act be stipulated. It is not, and notwithstanding the Respondent's evidence, it appears that this is mandatory and therefore a breach of this section of the code is therefore established. However, given the circumstances of the case, and in particular the respondent's very short tenure as property factor for the development, the tribunal is of the view that no order regarding this breach is appropriate.

14 **Section 3.2.** The tribunal considered whether the Respondent had breached this section by failing to return the applicant's float, when asked to do so, at the time of the transfer. It concluded first of all that the obligation to return the float rested with the previous factor who ought to have obtained the sanction of homeowners before passing on their floats to the respondent. The tribunal also concluded that the failure by the respondent to return the float when the applicant telephoned to ask appears to have been the result of a misunderstanding. In her evidence she advised that she asked if the floats were to be returned and was advised that they were to be transferred. It does not appear to the tribunal that she insisted that she wanted her float refunded and that the staff member perhaps did not appreciate that was her wish. The tribunal concluded that there has been no breach by the Respondent in relation to that event. However, the Tribunal accepts that the contract with the Respondent for the provision of factoring services came to an end at the beginning of February 2017. The Respondent did not issue a final statement to the Applicant until September 2017, and when it did so it appears to have deducted a sum of money amounting to a share of development debt which (in terms of the title deeds) it was not entitled to do. It has therefore failed to refund all sums due to the Applicant at the conclusion of the contract. Although the figure of £54 has been identified, the tribunal notes that the issue of 36 or 37 liable properties, currently unresolved, may have a bearing on that figure. The Tribunal concludes that the respondent is in breach of that section of the code.

15 **Section 4.6.** The tribunal then considered whether the Respondent's failure to notify the applicant before 2 February 2017 of the issue of development debt amounted to a breach of this section. The Respondent accepted that the first intimation of the issue was at the meeting, and that was partly due to the time taken to ascertain the exact figure and a deliberate decision to tell people at a meeting rather than by letter. The tribunal is of the view that the delay is not excessive. The tribunal notes that the previous factor had failed for a number of years to advise people of the debt, almost certainly in breach of the code, but the Respondent cannot be held responsible for that failure. The tribunal concluded therefore that there has been no breach of this section of the code.

16 The tribunal therefore concluded that the Respondent has not breached section 4.6 of the Code. It has breached section 1.1a of the code, but does not propose to make a property factor enforcement order with regard to same, as previously indicated. With regard to the breach of section 3.2 of the code, the Tribunal considers that an award of compensation in the sum of £60 is appropriate. The tribunal notes that Mr McDermott is willing to pay Mrs Craig the credit balance on her statement and has not done so because she has indicated an unwillingness to receive it while the figure is in dispute. The Tribunal notes that Mr McDermott is willing to pay the sum even if it is not accepted as being in full and final settlement and recommends that parties make arrangements for this sum to be paid. The Tribunal recommends that if it receives the written authority of all homeowners in the development, the Respondent should pass the factoring files to the Residents' association who now appear to be dealing with

the maintenance of the common ground. Lastly, the Tribunal notes that if the Respondent had remained the property factor for the development, amendments to the written statement of services would also be required in terms of the proposed PFEO. However, in the circumstances, this is not necessary.

Proposed Property Factor Enforcement Order

The tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

Appeals

A homeowner or property factor 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 Bonnar

Josephine Bonnar, Legal Member

8 December 2017