

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision of the Tribunal in relation to compliance with a Property Factor Enforcement Order dated 20 March 2018

Property Factors (Scotland) Act 2011, Section 19

Chamber Ref: FTS/HPC/PF/17/0274

Property at 27 Dempsey Court, Queens Lane North, Aberdeen, AB15 4DY (“The Property”)

The Parties: -

Mr David Gordon, residing at the Property (“the Homeowner”)

James Gibb Property Management Ltd, trading as James Gibb Residential Factors, 32 Charlotte Square, Edinburgh, EH2 4ET (“the Factor”)

Tribunal Members: -

Maurice O’Carroll (Legal Member)

Andrew McFarlane (Ordinary Member)

This document should be read in conjunction with the decision of the Tribunal dated 17 January 2018 and associated Notice of Proposed Property Factor Enforcement Order under the reference number noted above.

1. By decision dated 17 January 2018, the Tribunal determined that the Factor had breached its duties in terms of s 17(1)(b) of the 2011 Act in that it had failed to comply with Sections 1 (preamble), 2.1, 2.4, 2.5, 3.3, 6.1, 6.3, 6.4 and 6.6 of the Code of Conduct for Property Factors as required by s 14(5) of that Act.
2. On the same date, it issued Notice of Proposed Property Factor Enforcement Order (“PFEO”). No representations in respect of the Proposed PFEO having been received, the Tribunal issued a final PFEO dated 20 March 2018.
3. The final PFEO was in the following terms:

Within 28 days of the communication of the PFEO to the Factor, the Factor must:

- (i) Pay compensation to the Homeowner in the sum of £750 (Seven hundred and fifty pounds) in respect of the time, irritation and inconvenience

occasioned by the Factor's failure to comply with its duties under the Code.

- (ii) At its own expense, provide an independent audit of the sinking fund applicable to the development from 1 March 2015 (being the date immediately prior to the acquisition by the Factor of Bruce & Partners) to date. Said audit should provide full financial details of all transactions in relation to the sinking fund: detailing payments made in and disbursements out of the sinking fund, both in relation to the Property and the development as a whole of which it forms part. The Factor may redact and anonymise the data provided to an appropriate level only in order to ensure that the identities of individual homeowners (with the exception of the Homeowner) are withheld.

The audit should provide appropriate commentary on the various transactions that have taken place between the said dates and a general explanation of the methodology applied in apportioning the funds ingathered. Any shortfall in funds which cannot be explained by disbursements made require to be clearly indicated. The latter requirement is specifically required to be made clear as at the date of the acquisition of Bruce & Partners and thereafter whilst the sinking fund was under the management of the Factor.

- (iii) Provide copies of all relevant work instructions for repairs and maintenance to be carried out to the Property and the development of which it forms part from the date of taking over as factor. Specifically, the Factor is required to provide all written documentation providing evidence of the competitive tendering exercise for each major piece of work required for the development which was in the hands of the Factor at the time of the 2016 AGM and in respect of which it reported to that meeting.
- (iv) Provide a report on the Factor's consideration of sources of funding for the works required to the development, other than homeowner funds. Said report to confirm approaches to the developer, Scotia Developments Limited (insofar as not already provided to the Tribunal), NHBC and the insurers under the buildings policy, and the outcomes of those approaches.
- (v) At the Factor's own expense, instruct an independent building survey of the external works to the development. The survey requires to ascertain the cost of the contractual works carried out in relation to the original works and whether and if so to what extent additional monies have been expended to remedy the original works. Said survey must also ascertain whether those works have now been completed in accordance with the relevant contractual documentation. If the works have not been so completed, the survey report requires to specify the works required to bring them into compliance with the contractual documents and the likely cost of doing so.

- (vi) Provide documentary evidence of compliance with the above Orders to the Tribunal within 7 days of having done so.
4. Both parties submitted representations to the Tribunal in relation to compliance with the PFEO. The Tribunal had regard to an email dated 20 March from the Homeowner. This was written in response to documentation received from the Factor under cover of a letter with enclosures dated 15 February 2018 further to both the proposed PFEO and the final PFEO, both of which were identical in their terms. The email of 20 March 2018 was copied to the Factor who in turn produced comments in response by email dated 14 May 2018, to which the Tribunal also had regard. The Tribunal accordingly has all of the documentation necessary to ascertain whether or not the terms of the PFEO have been complied with by the Factor.
5. Decision and reasons in relation to compliance
- The Tribunal determined that the Factor has complied with requirements (i) to (iv) and (vi) of the PFEO. A Direction accompanies this decision in relation to requirement (v) which has not been complied with to the satisfaction of the Tribunal.
- Before discussing each of the requirements in turn, the Tribunal notes that the content of the PFEO was intended to require greater transparency in the financial dealings of the Factor in relation to householder funds which it administers for the purposes of carrying out common repairs. This is an important issue, both in relation to what was found to have occurred in the past, as discussed at the hearings held on 8 and 19 December 2017, and as a guide for the conduct of the Factor in relation to these matters in the future. It also provides a basis for the Homeowner to take further proceedings in the ordinary courts should he decide it appropriate to do so.
- (i) Parties are both agreed that the sum of £750 ordered by way of compensation has been paid to the Homeowner. This requirement has been complied with.
 - (ii) The Factor produced a report by Acumen Accountants and Advisors dated 15 February 2018. The report identifies a shortfall in funds amounting to £4,200 which the Factor has admitted it cannot explain. By email dated 20 March 2018, the Homeowner noted that other figures appear to have been left out of account, in particular the sum of £2,028 paid to Simpsons Property Services. By email dated 14 May, this and other observations by the Homeowner were addressed by the Factor to the satisfaction of the Tribunal. Further, the Factor has undertaken to carry out a reconciliation of all costs paid for from the sinking fund once all additional works and snagging have been completed. This requirement has been complied with to the Tribunal's satisfaction.
 - (iii) The Factor has produced all documentation in its possession in relation to the competitive tendering process it undertook in relation to common repairs at the Property. It is clear from what has been produced that a proper competitive tendering exercise had not been carried out by the Factor in relation to the works which were considered by the Tribunal. It is useful to note what the Tribunal stated at paragraph 66 of its decision.

"Mrs Troup gave evidence that she had in her possession all documentation in relation to the competitive quotes relayed to the 2016 AGM. That was the basis upon which it was contended that section 2.4 of the Code had been complied with. *It was stated that the Factor had in fact undertaken a competitive tendering exercise for each major piece of work undertaken.* It therefore appeared to the Tribunal to be reasonable to require the provision of all written documentation which was in the hands of the Factor at the time of that AGM to substantiate that assertion. That will form part of the Property Factor Enforcement Order to follow from this decision."

In its determination of the main dispute, the Tribunal found that the Factor had not complied with section 6.6 of the Code which requires factors to provide evidence of any competitive tendering process. That information has now been provided as required by the PFEO. The documentation produced by the Factor now demonstrates that the assertion outlined above in italics is factually incorrect. This, however, has no bearing on compliance with the third requirement of the PFEO. The Tribunal is not empowered to go back and revisit the decisions made by the Factor in relation to work awarded to contractors without a proper tendering exercise having been carried out. It has awarded compensation for time, irritation and inconvenience. It cannot require works to be re-tendered (even if that were now possible) or award compensation for actual loss arising from the failure to carry out that process correctly. That is a matter for the Homeowner to consider in relation to any future action he may choose to take. This requirement has therefore been complied with to the satisfaction of the Tribunal.

- (iv) The only document submitted by the Factor further to this requirement is a response from Scotia Homes to the Factor dated 16 December 2015 in relation to the warranty over the Property. The warranty under discussion is not provided. The Scotia letter was discussed in evidence at the main hearing, as was the warranty (at paragraphs 51 and 52) so the failure to produce the NHBC certificate as part of the response to the PFEO is of little importance.

Again, what the response to this requirement of the PFEO demonstrates, is that with the exception of the correspondence with Scotia which has been evidenced, the Factor did nothing to consider sources of funding, other than homeowner funds. In making that clear, the Factor has complied with this requirement of the PFEO. At paragraph 55 of its decision, the Tribunal made a finding that the responsibility for the vitiation of the NHBC guarantee through a failure to maintain falls squarely on the Factor. As noted above, this is a matter for the Homeowner to take forward in another forum, if so advised. This requirement has been complied with to the satisfaction of the Tribunal.

- (v) This requirement has not been complied with. Further to this requirement, the Factor submitted a report by Sergon Building Consultants dated 14 February 2018. It also provided the instructions and supporting information that was supplied to Sergon. The Tribunal is not satisfied that the Sergon report adequately addresses the substance of the fifth requirement of the PFEO.

In particular, it considers the report to be deficient in that:

(a) The qualifications and credentials of the author of the report are not narrated. This is necessary to establish the independence of the report which is a requirement of the PFEO.

(b) The Tribunal doubts the adequacy of an inspection which was made externally and at ground level only. It is not clear whether this was sufficient to adequately assess all works that have been carried out to date. Further inspection as specified in the attached Direction is required.

(c) The PFEO required the report to consider whether the works have now been completed in accordance with the relevant contractual documentation. The report states that the works were carried out to a "good standard", which is a different question and not the one addressed by the PFEO. The report does not specifically consider whether the works have now been carried out in accordance with the relevant contractual documentation, whether resulting from a tender or not (as not all of them were). This is now required. Having said that, the Tribunal acknowledges that there may still be some snagging works outstanding. The limitations on the report to that extent are accepted by the Tribunal.

(d) For the sake of accuracy, the amended or supplementary report should narrate that not all of the external painting works have been completed (contrary to what has been stated at page 5). It should also correct the mis-statement that works at number 27 were carried out by another contractor at the Homeowner's request.

(vi) The Factor provided the necessary documentation evidencing attempted compliance with the terms of the PFEO as required. This requirement has been complied with.

6. The Tribunal has therefore produced a Direction requiring compliance with point (v) of the PFEO. This is attached a separate document

Under Section 24(1) of the Property Factors (Scotland) Act 2011, a person who, without reasonable excuse, fails to comply with a PFEO commits an offence.

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.

Signed: M O'Carroll
Legal Member

Date 1 June 2018