



**Statement of Decision to serve a Notice of Failure to comply with a Property Factor Enforcement Order under Section 23(1) of the Property Factors (Scotland) Act 2011**

Hohp ref: HOHP/PF/14/0144

**Re: 100 Hawk Brae, Livingston EH54 6GF (the property)**

**The Parties:**

**Miss Patricia Quin, 100 Hawk Brae, Livingston EH54 6GF ('the homeowner')**

**Be Factored Ltd (formerly Property 2 Ltd), 2a North Kirklands, Eaglesham Road, Glasgow G76 0NT ('the factor')**

**Committee members:** Sarah O'Neill (Chairperson), Elizabeth Dickson (Housing member)

**Decision of the committee**

The committee determines that the factor has failed to comply with the Property Factor Enforcement Order (PFEO) issued by the committee in respect of the property on 14 May 2015. The decision of the committee is unanimous.

**Background**

1. The PFEO contained the following provisions:

Within 3 months of the communication to the factor of this Property Factor Enforcement Order, the factor must:

1. Provide written statements to all homeowners within the development, setting out the balance due to them or owed by them in respect of the communal electricity which owners within the homeowner's stair paid between 2006 and the date when the meter within that stair was registered.
  2. Provide documentary evidence to the committee of its compliance with the above by sending such evidence to the office of the Homeowner Housing Panel by recorded delivery post.
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2. The property factor wrote to the panel on 12 June 2015, seeking clarification as to whether the written statements were to be sent to owners in the homeowner's stair only, or to all homeowners within the development. Enclosed with its letter was a breakdown of electricity charges going back to 2009. The property factor said that it was unable to go back beyond 2009, as it had not

kept records prior to this. The letter also advised that the property factor was no longer factoring the development (as at 31 May 2015), and had no control over the registration of the electricity meter for the homeowner's stair.

3. The panel wrote to the parties on 8 July, confirming that the PFEO applied to all homeowners within the development, rather than just the homeowner's stair. The letter also indicated that the committee was considering a variation of the terms of the PFEO, in terms of section 21 of the Act, to require the property factor to provide written statements to all homeowners within the development going back to the beginning of 2009, rather than 2006. The parties were invited to send written representations to the committee within 7 days. The property factor in its reply of 13 July advised that it wished to 'appeal' the requirement to send the information to the whole development, because it had ceased managing the development and it was no longer active on their system software. It said that the balance due had been sent to homeowners in their final invoices on 10 June. It made no reference to the proposal to backdate the requirement to 2009. The homeowner objected to the proposed variation, and the committee decided not to vary the terms of the PFEO.
4. The committee issued a direction to the parties on 24 July. In this direction, the committee observed that:
  - the property factor had the opportunity to raise concerns about the terms of the PFEO when the Notice of Proposal to make a PFEO was issued to the parties alongside the committee's decision on 7 April 2015.
  - the property factor submitted written representations in response to the said Notice of Proposal on 10 April 2015, which stated: "*The only item we are working upon is section "2a" which is in relation to the electricity and will advise once complete*". This suggested that the property factor had no objection to the content of the PFEO at that stage.
  - the final PFEO clearly stated that the parties had 21 days to appeal the decision, but the property factor had not done so.
5. The direction also noted that the property factor appeared to be arguing in its letter of 13 July that because it was no longer managing the development, it was unable to comply with the PFEO. The committee did not accept this. At the time of the committee's decision and the issue of the PFEO, the property factor was still factoring the development. The property factor was not released from its obligation to comply with the PFEO simply because it was no longer factoring the development. In any case, the PFEO was issued to the parties on 14 May 2015, while the property factor remained the factor for the development

arrangement, the electricity meter in the homeowner's stair had not been registered (despite the homeowner's evidence to the committee, which was not disputed by the property factor, that it had been registered on 4 March 2015); that it did not have an up to date invoice from the electricity supplier; that the accounts had been transferred to the new property factor; and it was unable to clarify the position.

11. The property factor enclosed a copy of a final bill from an owner within each stair of the development, noting '*your request for copies of final invoices in respect of all homeowners in the development*', but stating that the paper and printing costs involved a massive cost for a small business.

#### **Reasons for the committee's decision**

12. Having considered the parties' written representations, the committee determined that the property factor has not complied with the terms of the PFEO. The final accounts sent to the committee by the property factor did not include any reference to balances due to or owed by homeowners in respect of the communal electricity between 2006 and 4 March 2015, as required by the PFEO.
13. The committee considered whether it was satisfied that the property factor was unable to comply with the order because of a lack of necessary rights (of access or otherwise), despite having taken reasonable steps for the purpose of acquiring those rights, in terms of section 23 (3) of the Act. The committee was not satisfied that the property factor was unable to comply with the order, either because it was no longer factoring the development, or because it did not have an up to date electricity invoice from the supplier. The property factor was obliged to comply with the PFEO, regardless of the termination of its appointment, for the reasons set out in the committee's direction of 24 July.
14. It was clear from the evidence before the committee at the hearing that the property factor was aware of the issue with the electricity as far back as 2012, and it had in fact produced some evidence of electricity charges going back to 2009 in its letter of 12 June 2015. The property factor was also aware of the proposed terms of the PFEO from the issue of the Notice of Proposed PFEO on 7 April, nearly 2 months before the factoring arrangements were terminated. The evidence before the committee was that the meter within the homeowner's stair was registered on 4 March 2015, nearly three months prior to this date, making it difficult to see why the lack of a final invoice from the supplier would have prevented compliance with the PFEO. In light of these considerations, it is not clear to the committee why the property factor has failed to comply with the terms of the PFEO.

15. Notice of this decision will be served on the Scottish Ministers, as required under section 23(2) of the Act. The property factor is reminded that a person who without reasonable excuse fails to comply with a property factor enforcement order commits a criminal offence.

### **Right of appeal**

The parties' attention is drawn to the terms of section 22 of the Act regarding their right to appeal, and the time limit for doing so. It provides:

- (1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or homeowner housing committee.
- (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made.

More information regarding appeals can be found in the information guide produced by the homeowner housing panel. This can be found on the panel's website at:

<http://hohp.scotland.gov.uk/prhp/2649.325.346.html>

Sarah O'Neill

Chairperson Signature

Date..... 5/10/15