

# Housing and Property Chamber First-tier Tribunal for Scotland

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## **First-tier Tribunal for Scotland (Housing and Property Chamber) Property Factors (Scotland) Act 2011 (“the Act”)**

Statement of reasons for decision in terms of the First-tier Tribunal for Scotland, Housing and Property Chamber (“the Tribunal”) (Rules of Procedure) Amendment Regulations 2017 (“the regulations”)

**Chamber Ref:** FTS/HPC/PF/20/2597

**Re.:** 54 Eden Court, Cupar, Fife, KY15 5US (“the property”)

### **The Parties:-**

Mrs Margaret Smith, 54 Eden Court, Cupar, Fife, KY15 5US (“**the homeowner**”) represented by Mr Gordon Smith, 1402 Kew Eye Apartments, Ealing Road, Brentford, TW8 0GA

FirstPort Property Services Scotland, 199 St Vincent Street, Glasgow, G2 5QD (“**the property factor**”)

**The Tribunal members:** Simone Sweeney (legal chairing member) and Elaine Munroe (ordinary housing member)

### **Decision of the Tribunal**

The Tribunal unanimously determined that the property factor has failed to comply with sections 3 and 3.3 of the Code of Conduct for Property Factors (“the Code”) as required by section 14(5) of the Act.

In terms of section 19(1) (b) of the Act the Tribunal proposes to make a Property Factor Enforcement Order (“PFEO”) and gives notice of that proposal and allows parties to make representations in terms of section 19 (2) of the Act.

## **Background**

1. By application dated 8<sup>th</sup> December 2020, the homeowner applied to the Tribunal for a determination on whether the property factor had breached sections 3 and 3.3 of the Code. There was no allegation of any failure on the part of the property factor to comply with the Property Factor’s duties.
2. A Notice of acceptance of the application was issued on 20<sup>h</sup> January 2021 by a legal member of the Tribunal under Rule 9 of the regulations. The application was referred to a telephone hearing before the Tribunal on 22<sup>nd</sup> March 2021.
3. A written response to the application together with an inventory of productions was received from the property factor under cover of email dated 2<sup>nd</sup> March 2021.
4. At the telephone hearing on 22<sup>nd</sup> March 2021 the homeowner was absent but represented by her son, Mr Gordon Smith. The property factor was represented by Mr Roger Bodden. Also in attendance was Ms Holmes, a colleague of Mr Bodden who was simply observing proceedings.

## **Evidence of the homeowner**

### **(i) Section 3 of the Code**

5. Section 3 of the Code sets out the minimum standards of practice for the property factor in relation to financial obligation. The preamble to section 3 provides,

*“While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.*

*The overriding objective of this section are:*

- *Protection of homeowners’ funds*
- *Clarity and transparency in all accounting procedures*

- *Ability to make a clear distinction between homeowners' funds and a property factor's funds."*

6. By way of background, Mr Smith explained that his mother, the homeowner, had received a letter from the property factor dated, 24<sup>th</sup> July 2020 containing draft budget for the following financial year. Listed under the heading, 'Professional services' was estate management fees, accounts administration and audit fees. The homeowner had concerns about the amounts for accounts administration (over £5,000) and estate management fees (more than £13,000) and was unclear about how these charges compared. There was insufficient information provided with the letter for the homeowner to understand which services were covered by each fee.

7. By email of 1<sup>st</sup> August 2020 Mr Smith requested from the property factor the following information:-

*"Accounts administration First Port are proposing a charge of £5496 for the forthcoming year, I would like to understand what actually is provided for this amount?"*

8. Mr Smith was of the opinion that his mother was entitled to a breakdown of the cost so that she could satisfy herself that she was receiving value for money from the property factor. It was unclear how accounts administration and estate management differed in terms of services provided and there was a concern of duplication of costs.

9. Mr Smith expressed concern that, without greater understanding of how these figures were broken down, it may prove difficult to monitor or control the costs of the property factor in the future. He referred to the fact that the property factor reserves the right to increase management fees on an annual basis. The forecasted costs for 2020 to 2021 were an increase of 3.4%. Moreover there had already been a 3.3 % increase for 2019 -2020. Mr Smith submitted that the increases exceeded inflation and retail price index figures.

10. In response to the homeowner's request for information, the property factor sent an email on 10<sup>th</sup> August 2020 in the following terms,

*“Regarding the Management Charges we have six information sheets one of which advises on the Management Charges I will ask David to send you a copy of all six documents.”*

11. There being no documents forthcoming, Mr Smith contacted the property factor on 27<sup>th</sup> August requesting, again, a breakdown of the accounts administration fee. The response from the property factor enclosed a copy of the property factor’s document, ‘Our Management Fees Explained.’ The property factor replied in the following terms:-

*“We have two charges in the budget Management charge and Accounts Administration. The accounts administration is the cost for preparing end of year accounts and preparing development budgets and paying contractor invoices and answering questions on expenditure preparing end of year audit trails for the auditors. We have a document call (sic) management charges explained...”*

12. The property factor’s document ‘Our Management Fees Explained’ was produced for the Tribunal by both parties. The content of the document caused the homeowner concern. Mr Smith drew the Tribunal’s attention to the first paragraph of the document. Insofar as is relevant this provided,

*“Our Management Fee is the fee you pay to FirstPort Scotland to cover the costs of a wide range of activities we carry out to manage your development. Historically, the total fee is split between Property Management and Accounts Administration as highlighted and explained at your annual Accounts and Budget meetings.”*

13. The document divides into five sections the categories of services which are included in the management fee. The five sections are financial; communications; development management; regulatory compliance and; operational costs.

14. In his submission Mr Smith claimed that the document should have been divided into these two sections, only given that the document provided that, historically, the management fee was divided between property management and accounts administration,. There ought to have been headings, ‘property management’ and ‘accounts administration’ and thereafter a list of the services provided by the property factor which fall under each of these categories. Mr Smith submitted that this would

have provided a clearer understanding of how the fees are broken down. The document he had received from the property factor was unclear in his submission.

15. Mr Smith submitted that the budget document provided no transparency to homeowners. The document, 'Our Management Fees Explained' from the property factor did not provide assistance. He was unable to understand what his mother was being charged for and how her money was being spent.
16. Mr Smith referred to copy audited accounts lodged on behalf of the property factor. He directed the Tribunal to the section headed, 'Professional services.' Despite requests for clarity from the property factor, Mr Smith was still unable to understand the difference between 'estate management fees' and 'accounts administration' as they appeared on the accounts.
17. In his submission, Mr Smith argued that the accounts information failed to provide clarity or transparency. The homeowner did not know what she was paying for or how the charges were calculated with regards to accounts administration and estate management fees. There could be duplication and Mr Smith was concerned that the property factor may increase the fee further. For these reasons, Mr Smith submitted that the property factor had failed to comply with section 3 of the Code.

**(ii) Section 3.3 of the Code**

18. Section 3.3 of the Code provides that the property factor,

*"must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance."*

19. Mr Smith admitted that the property factor had provided the homeowner with accounts. The copy audited accounts within the property factor's inventory had been received by his mother. However he submitted that the accounts did not provide a detailed financial breakdown of charges made and a description of the activities and

works carried out which are charged for and that this had, still, not been provided to him, despite requests. Therefore, in his submission, Mr Smith said that the property factor had failed to comply with section 3.3 of the Code.

20. In support of his submission, Mr Smith explained that the property factor's failure to meet his request for a breakdown of fees became the subject of a complaint by Mr Smith. A copy of the email containing the complaint was before the Tribunal. Insofar as is relevant the email provided,

*"The owners of properties at Eden Court have been charged £13,692 for Estate Management Fees and £5,868 for Accounts Administration, a total £19,560 representing 19.4% of the total expenditure of £100,855. Mrs Smith is responsible for paying a percentage share of these fees. On examining First Port Documents, it clearly states that there are Financial Fees within the Estate Management charges of £13,692, therefore, to charge an additional fees of £5,868 for Accounts Administration on top can only be viewed as excessive and disproportionate. In addition, First Port do not provide monthly, quarterly or 6 monthly management accounts, so therefore the charge of £5,868 for "Accounts Administration" requires to be explained and justified by First Port. I have asked for a monetary breakdown of these charges, which is a reasonable request."*

21. The response from the property factor dated 7<sup>th</sup> October 2020 explained that the homeowner had not previously been provided with the correct document. The correct 'Our Management Fees Explained' document was attached to the email. The email advised Mr Smith,

*"The document indicates that Management Fees and Accounts Administration Fees are separate. In our budget notes sent with the 2020/2021 budget, you will see the two headings Management Fees and Accounts Administration this has been the format for a number of years. We provide a budget from the 1<sup>st</sup> September to the 30<sup>th</sup> August each year. We also provide financial information to owners as requested by owners throughout the year. At the end of the year we provide year end accounts throughout the year. At the end of the year we provide year end accounts which are audited. We can provide audit trails each quarter to owners if required. End of year trails are also*

*available after audit. We cannot provide a monetary breakdown of every item within the Management and Accounts Administration. Our charges are based on the size of the development."*

22. Mr Smith explained that the substitute, 'Our Management Fees Explained' document failed to provide him with any greater detail or breakdown of the accounts administration fee which he wanted. It contained the same opening paragraph which had caused him concern with the last document. Therefore, Mr Smith felt he had no option but to submit a stage two complaint on 9<sup>th</sup> November 2020 to which the property factor replied on 17<sup>th</sup> November 2020. Dissatisfied with the response, the homeowner had brought an application before the Tribunal.
23. In terms of resolving the issue, Mr Smith wanted a detailed breakdown of the accounts administration costs so his mother knows what her money is paying for and assurance that she is getting value for money and; a greater understanding of the document, "Our Management Fees Explained.' Mr Smith explained that he simply wanted to understand which of the property factor's services falls under accounts administration and which services fall under management fee. Mr Smith was of the opinion that this would provide the homeowner with greater transparency.

#### **Property Factor's responses**

24. On behalf of the property factor, Mr Bodden denied any allegation that the property factor had failed to comply with section 3 or 3.3 of the Code.
  - (i) **Section 3 of the Code**
25. In response to the allegation that the property factor had not responded to a request for a breakdown for the accounts administration fee, Mr Bodden insisted that the property factor's document, 'Our Management Fees Explained' had been provided to Mr Smith in response to his request and that this document provided the information requested on behalf of the homeowner.
26. The Tribunal highlighted the section of that document which had caused Mr Smith concern,

*“Our Management Fee is the fee you pay to FirstPort Scotland to cover the costs of a wide range of activities we carry out to manage your development. Historically, the total fee is split between Property Management and Accounts Administration as highlighted and explained at your annual Accounts and Budget meetings.”*

27. By way of explanation, Mr Bodden advised that, historically, the management fee has been split between property management and accounts administration. On the document, ‘Our Management Fees Explained,’ the management fee is divided into five separate categories to detail what the property factor identifies as the five key areas of activities undertaken at the development. The lists of activities on the document are not exhaustive but enable the property factor to provide homeowners with transparency of many of the services undertaken on their behalf.
28. Mr Bodden accepted that Mr Smith took issue with the presentation of the document and would prefer to see accounts administration with its own heading and list of services falling into this category and the same for management fee. However Mr Bodden argued that there was no requirement under the Code for the property factor to do that and the document, in its current form, complies with the requirements of the Code.
29. Mr Bodden denied that the document and, in particular, the opening paragraph was confusing to a reader. In response to Mr Smith’s lack of understanding about what the homeowner is paying for under the term, accounts administration, Mr Bodden argued that the money which the property factor receives in fees is spent on the extensive list of activities provided on this two page document. The document shows homeowners the wide range of activities which the property factor undertakes on behalf of homeowners for a fee.
30. Further, Mr Bodden referred the Tribunal to the copy accounts for the year end 31<sup>st</sup> August 2020 (production number 10 in the property factor’s inventory). The accounts show a figure of £13,241.80 for estate management fees. Mr Bodden submitted that the homeowner is paying a share of all the services undertaken by the property factor as listed in the document, ‘Our Management Fees Explained.’ The average fee charged



to homeowners is £291 plus VAT. The homeowner's share for this year is £252.75 plus VAT.

31. The Tribunal enquired twice from Mr Bodden how the property factor reaches the figure of £13,241.80. Mr Bodden submitted that it is quantified in the way that any property management fee is quantified. He explained that a flat fee is applied. This fee was agreed between the builders McCarthy Stone and the property management company when the development was built. A percentage increase is then applied to the fee by the property factor.
32. The Tribunal requested that the property factor provide authority for applying this approach. Mr Bodden submitted that there is nothing within the deed of conditions but the property factor's authority to apply this practice comes from custom and practice. Mr Bodden suspected that this information would be shared with any prospective purchaser through their solicitor.
33. Mr Bodden submitted that there was no legal requirement on the property factor to break down their fees to the level requested by Mr Smith. He compared the property factor to other service providers which charge for services and then invest the money as they see fit without any requirement to justify their internal expenditure to customers. Not providing the homeowner with the level of detail which Mr Smith requested did not mean that the property factor had failed to provide clarity or transparency as required by section 3 of the Code.
34. Mr Bodden referred to the homeowner's concerns about fees increasing and in the future. Mr Bodden referred to Mr Smith's comments that recent increases had exceeded the retail price index. The property factor challenged any suggestion that there should be a cap on how much fees should increase and directed the Tribunal to the deed of conditions (lodged within the property factor's inventory) and to the Code, neither of which obliged a property factor to place any cap on fees.
35. In recognition of the homeowner's concerns that fees may continue to increase in the future, Mr Bodden confirmed that the fees were expected to rise by 1.9% this year. The increase is arrived at by the business looking at external and internal influences and considering their impact, if any, on their business going forward. For these reasons,

the property factor could not provide any guarantee to the homeowner of how fees will increase in the future.

**(ii) Section 3.3 of the Code**

36. Mr Bodden denied that the property factor had failed to comply with section 3.3 of the Code by not providing an itemised breakdown of fees. He referred to production number 10 within the property factor's inventory. This was a copy of the development's audited accounts for the year ending 31<sup>st</sup> August 2020 together with a copy of the independent auditor's report to the property factor dated 11<sup>th</sup> January 2021. Mr Bodden submitted that all expenditure incurred at the development over any financial year is reconciled by the accounts department and Area managers before being audited by independent auditors, BDO, and then presented to homeowners. The accounts are intimated to the homeowner, annually; the accounts provide a balance sheet and detailed financial breakdown of charges made and a description of the activities and work carried out which are charged for and; satisfy the requirements of section 3.3 of the Code.
37. Mr Bodden submitted that the homeowner would have received a similar document the previous year. As well as issuing a copy of the accounts to homeowners, annually, the information is available online and can be provided to a homeowner from the development manager, on request. Further, the practice is to invite the homeowners to a meeting to communicate any queries about the accounts to the property factor. With Covid-19 restrictions, this had not been possible in 2020. Mr Bodden submitted that this practice was evidence of compliance with the requirements of section 3.3 of the Code.
38. In terms of resolving the complaint, Mr Bodden submitted that he remained unclear what more could be provided to the homeowner by the property factor. Mr Bodden accepted that Mr Smith would like a more detailed breakdown but that is not possible as that is not how the property factor operates. Again, Mr Bodden explained that the property factor charges a flat fee, as permitted by the Code. To provide a more detailed breakdown would mean measuring and monitoring everything which the property factor does on behalf of homeowners, recording the time spent on each activity and

applying a price to that. Whilst this may be the practice of solicitors or other professionals in how they breakdown their fee structure, Mr Bodden insisted this was not a practice which could be adopted by the property factor. The property factor did not have nor was prepared to invest in a system which would enable them to record their time in that way.

39. In an effort to address the homeowner's concerns, it had occurred to Mr Bodden that, rather than providing separate costs for administration fees and management fees in the annual accounts, he could simply add the two figures together and they would appear as one entry.
40. Mr Smith challenged this suggestion, highlighting that it would not provide him with an explanation of how the figures are reached and therefore not resolve his complaint.

#### **Findings in Fact**

41. That the homeowner owns the property.
42. That the property factor manages the development in which the property is situated and charges fees to the homeowner for her share of estate management and accounts administration.
43. That fees for estate management and accounts administration appear separately on the copy accounts for year end 31<sup>st</sup> August 2020.
44. That Mr Smith contacted the property factor in August 2020 asking what is covered by accounts administration.
45. That, by email of 27<sup>th</sup> August 2020, the property factor confirmed that management and accounts administration are two charges.
46. That the property factor provided Mr Smith with their document, 'Our Management Fees Explained.'
47. That this document provides that, historically, the management fee is split between property management and accounts administration.
48. That the document provides no information about how the management fee is calculated by the property factor.

49. That copy accounts are provided to homeowners annually by the property factor.
50. That the accounts provide a breakdown of charges.

### **Reasons for decision**

51. The overriding objective of Section 3 of the Code is that a property factor provides clarity and transparency in all accounting procedures. Section 3 provides that a homeowner should know what it is that they are paying for. The copy accounts lodged before the Tribunal show entries for accounts administration and estate management. There is no description of these entries provided on the accounts. It was entirely reasonable that a homeowner may query what each of these entries are and how they compare. When he enquired about the accounts administration fee on behalf of the homeowner, Mr Smith was advised that, *"accounts administration is the cost for preparing end of year accounts and preparing development budgets and paying contractor invoices and answering questions on expenditure preparing end of year audit trails for the auditors."* The property factor, in an effort to be helpful, also provided Mr Smith with their document, 'Our Management Fees explained.' Somewhat, unhelpfully, the document explains that the management fee was historically split between property management and accounts administration. This suggests that the management fee includes a fee for accounts administration. It is entirely reasonable that a homeowner may think that there is duplication in the fees for estate management and accounts administration, therefore. Notwithstanding requests for a breakdown of the accounts administration fee, the homeowner remains unclear what his mother is paying for. The evidence from the property factor's representative was confused. Despite being asked twice how the estate management fee was quantified, Mr Bodden failed to answer the question. There was no evidence before the Tribunal of how the property factor reached the figures within the audited accounts for estate management or accounts administration. Neither was there evidence which enabled the Tribunal to understand how the estate management and accounts administration fees compared. Mr Bodden made reference on several occasions to the financial information issued to homeowners by the property factor satisfying the requirements of the Code and that the level of detail requested by Mr Smith was not something which the property factor was required to provide. In order that the meet the overriding objective of section 3 of the Code, the

property factor must provide transparency and clarity in all accounting procedures. In relation to the estate management and accounts administration fees, the Tribunal remains unclear about what the property factor is charging for or how the charges are calculated. The Tribunal accepts that the homeowner does not know what she is paying for in relation to these fees. To that end, the Tribunal was not satisfied that there was clarity and transparency in relation to these fees and determines that the property factor has failed to comply with section 3 of the Code.

52. The property factor's document, 'Our Management Fees Explained,' did little to assist the homeowner. The homeowner found the opening paragraph confusing. Mr Bodden confirmed that the management fee had been split between property management and accounts administration, historically. It was unclear to the Tribunal if that remained the position. If accounts administration fee is no longer included under management fee, this should be explained. By email of 27<sup>th</sup> August 2020, the property factor advised that accounts administration and management fees are two separate charges. An explanation of accounts administration was provided in the email. The opening paragraph of the document contradicts this information. This lack of clarity also makes it difficult for a homeowner to understand what they are paying for with regards to the fees. The evidence for the property factor was that the management fee is based on a flat rate to which the property factor applies an increase annually. The flat rate was not specified. The evidence before the Tribunal about how the management fee is reached was vague. Notwithstanding its title, the document fails to provide information to homeowners about how the management fee is quantified. The Tribunal determines that, by failing to provide the clarity and transparency in this document, the property factor has failed to comply with section 3 of the Code.

53. Parties were in agreement that the property factor provided copy financial accounts to the homeowner at least once a year. The copy accounts before the Tribunal showed a financial breakdown of charges. However the property factor failed to provide sufficient description of the activities and works carried out which are charged for. Rather, for the reasons already provided, the Tribunal found the additional document confusing and unhelpful to the homeowner. By failing to provide the homeowner with a description of the activities and works carried out which are charged for, the

Tribunal determines that the property factor has failed to comply with section 3.3 of the Code.

## **Decision**

54. In all of the circumstances narrated, the Tribunal finds that the property factor has failed in its duty to comply with the preamble to section 3 and section 3.3 of the Code.

55. The Tribunal determine to issue a PFEO.

56. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the property factor and to allow parties to make representations to the Tribunal.

57. The Tribunal proposes to make the order in the following terms:

*Within 28 days from the date of issue of this order, for the property factor to:-*

- *revise its document, 'Our Management Fees Explained' to provide clarity on whether the accounts administration fee is included within the management fee and to provide an explanation of how the estate management fee is quantified.*
- *provide a copy of this revised document to the homeowner.*
- *provide a copy of this revised document to the Tribunal's administration.*
- *provide to the homeowner payment of £150 by way of compensation for the time, preparation and inconvenience she has experienced in having to bring this application.*

## **Appeals**

58. 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 within 30 days of the date the decision was sent to them.

Legal Chair, at Glasgow on 3<sup>rd</sup> May 2021