

Housing and Property Chamber

First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Reference: FTS/HPC/PF/22/0721 & FTS/HPC/PF/22/1317

Property address: 54 Eden Court, Cupar, Fife, KY15 5US (“the Property”)

The Parties

Mrs Margaret Smith, 54 Eden Court, Cupar, Fife, KY15 5US (“the Homeowner”)

First Port Property Services, 199 St Vincent Street, Glasgow, G2 5QD (“the Property Factor”)

Tribunal Members

Ms H Forbes (Legal Member)

Mrs E Dickson (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with paragraph 2.1 of the 2012 Property Factor Code of Conduct and paragraphs OSP2, OSP4, 2.7 and 7.2 of the 2021 Property Factor Code of Conduct as required by section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”).

The decision is unanimous.

Background

1. By application received in the period between 13th March and 18th April 2021, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with paragraphs 2.1 and 2.5 of the 2012 Code and paragraphs OSP2, OSP3, OSP4, 2.4, 2.7 and 7.2 of the 2021 Code. Details of the alleged failures were outlined in the Homeowner’s application and associated documents.

2. By email dated 1st June 2022, the Property Factor requested additional time to lodge written representations. Additional time was provided but no representations were lodged.
3. A Case Management Discussion (“CMD”) took place by telephone conference on 28th June 2021. The Homeowner was not in attendance and was represented by Mr Gordon Smith. The Property Factor was represented by Mr Andrew Grant, Mr Richard Rogers and Ms Kirsty Nicol.
4. The Tribunal discussed the presentation of the application and associated documents, and suggested that three PDF documents which replicate the case file could be circulated so that parties can refer the Tribunal to relevant documents within the case file by reference to the page number of the PDF.
5. Mr Grant undertook to lodge written representations on behalf of the Property Factor prior to the hearing, and the Tribunal ordered that these and any documentation be lodged no later than 21 days before the date of the hearing.
6. Notification of a hearing to take place on 7th September 2022 was made upon parties on 8th July 2022.
7. By email dated 2nd September 2022, the Property Factor submitted written representations and productions.

The Hearing

8. A hearing took place by telephone conference on 7th September 2022. Neither party was in attendance. The Homeowner was represented by Mr Gordon Smith, who was supported by Mr Brian Smith.
9. The Tribunal considered the terms of Rule 29. The Tribunal determined that the Property Factor had been given reasonable notice of the time and date of the Hearing. The Tribunal determined that the requirements of Rule 24(1) had been satisfied and that it was appropriate to proceed with the application in the absence of the Property Factor upon the representations of the Homeowner and the material before the Tribunal.
10. The Tribunal informed those present of the role of a Supporter in terms of Rule 11 of the Procedure Rules.

Preliminary Matters

11. The Tribunal raised the following preliminary matter:

- (i) **The late lodging of the Property Factor’s representations and productions** – Mr Smith said he was not opposed to the documents being lodged late. He stated that, although the Property Factor had referred to compensation being offered in respect of delays, he had not received any such offer.

- (ii) **Documentation** – The Tribunal confirmed that everyone present had the correct documentation in PDF format, namely:

Homeowner

Part 1 2012 Code
Part 2 2021 Code
Part 3 2021 Code

(Where productions from these PDF files are referred to in this Statement of Decision, the abbreviation 1, 2 or 3, followed by '/[page number]' is used)

Property Factor

Written representations of 2.9.22

2012 Code – Paragraph 2.1

The Homeowner's Position

12. Mr Smith referred the Tribunal to correspondence to homeowners from the Property Factor dated 11th June 2021 (1/30), whereby it was stated *There has been a slight increase in the unit rate for electricity to supply communal areas and FirstPort has secured a contract with EDF for electricity, which enables you to benefit from the preferential rates we're able to negotiate. These savings are passed directly on to you.*
13. Mr Smith said, upon examination of the proposed budget to 31st August 2022, he wrote to the Property Factor's Richard Rogers by email dated 22nd June 2021 with various questions (3/12). In response to queries regarding electricity costs, Mr Rogers replied that the increase in electricity costs would not be known until October 2021 (1/25).
14. A meeting of the residents' association took place on 4th November 2021, and it was stated on behalf of the Property Factor that an electricity price rise of 33% had been negotiated (1/31). The unit rate was not published until 12th April 2022.
15. It was the Homeowner's position that she had been misled by the Property Factor that there was to be a slight increase, that preferential rates had been secured, and that a contract had already been secured at the time that the letter was written on 11th June 2021. The price rise was not slight and no contract had been secured at that time.

The Property Factor's position

16. The Property Factor stated the following in their written representations:

We can confirm our communication did advise of an expected increase in relation to the communal electricity costs. A further note was provided within the budget notes in further detail. As the development works to a budget and this is set prior to the confirmed costs being received we take the advice from the appropriate team when preparing this. The actual costs are presented to owners upon the year-end account being prepared. Should our office receive any further queries or requests for information this will be duly provided by the appropriate team.

Decision of the Tribunal

- 17.** The Tribunal found the Property Factor had failed to comply with paragraph 2.1 of the 2012 Code by stating that a contract had been secured with a slight increase and preferential rates, when no such contract had been secured and the rate of increase was unknown. This was false and misleading.

2012 Code – Paragraph 2.5

- 18.** Mr Smith referred to a complaint made to the Property Factor on 23rd December 2021 on behalf of the Homeowner (1/42). On that date, he received a holding response stating that he would receive a response within 14 working days (2/26). No response was received and Mr Smith had to chase the Property Factor up. He received an email from the Property Factor's CEO Office on 25th January 2022 (1/41) stating that a response would be received shortly. No response was received. Mr Smith chased the matter up again by email dated 14th February 2022 (1/41). There was no reply, and the Homeowner decided to progress matters to the Tribunal. The Homeowner was unsure which Code this should fall under, as the matters complained off occurred before the 2021 Code came into force, although the complaint was made thereafter.

The Property Factor's position

- 19.** The Property Factor stated the following in their written representations:

We acknowledge that the customer service level in relation to response times fall short from what we consider acceptable and have detailed this in our response and apologized for this. Furthermore, we have offered Mr Smith compensation for this and our office has received no response to our offer.

Decision of the Tribunal

- 20.** The Tribunal found that the alleged breach, which was also brought under the 2021 Code, ought properly to be considered under the 2021 Code as the complaint was made after the Code came into force. Therefore, there was no breach of the 2012 Code in this regard.

2021 Code – Paragraphs OSP2, OSP3 & OSP4

- 21.** Mr Smith referred to the Service Charge Budget for the year ending 31st August 2022 (3/46). This was issued to homeowners on 11th June 2021. The projected

insurance cost was £11,681 to August 2022. This was a significant increase from the previous year. On 20th August 2021, the Property Factor stated that the insurance would be £13,192 (3/44). Correspondence issued to the Homeowner by the Property Factor on 1st September 2021 stated the insurance would be £11,681 (3/15). It was Mr Smith's position that incorrect figures would cause a shortfall when the accounts were published the following year. The true insurance cost was known to the Property Factor when the correspondence was issued on 1st September 2021. This was not honest, open or transparent, as required by paragraph OSP2 of the Code.

- 22.** The Minutes of the Development Manager Meeting of 4th November 2021 (3/20) mention a 25% increase in the insurance costs. This figure, put forward by the Property Factor, was incorrect. The increase was 33%. It was Mr Smith's position that this was a breach of paragraph OSP4 as the information was misleading or false. He had already brought the matter to the attention of the Property Factor and they had still failed to provide the correct information. Homeowners were notified of the true position on 15th December 2021 after Mr Smith had threatened to notify the homeowners himself of the increase.

The Property Factor's position

- 23.** The Property Factor stated the following in their written representations:

Our team receives all insurance information from the broker and will be provided with an expectant increase in relation to insurance premiums, however these are estimates. The figure provided initially we acknowledge was incorrect. It was corrected and the increase confirmed by our Area Manager and also Development Manager. The buildings insurance schedule was provided to the owner and also displayed on our residents notice board. We now understand that owners may wish to receive this information/updates in another format and our Development Manager will note this and ensure this is fulfilled.

Decision of the Tribunal

- 24.** The Tribunal found that there had been a failure by the Property Factor to comply with paragraphs OSP2 and OSP4. The Property Factor was not open and transparent in their dealings with the Homeowner, and they provided information that was negligently misleading or false. Homeowners should be able to rely on the information provided by the Property Factor as accurate, and, in this case, even after the new figure had been provided, the Property Factor continued to disseminate the old figure. The Property Factor also provided misleading and false information in regard to the percentage of the increase.
- 25.** The Tribunal did not find there had been a failure to comply with paragraph OSP3. The problem was not in the way the information was provided, but in the information itself.

2021 Code – Paragraph 2.4

26. Mr Smith withdrew the Homeowner's allegation that the Property Factor had breached paragraph 2.4.

2021 Code – Paragraph 2.7

The Homeowner's position

27. Mr Smith reiterated his previous concerns, which were also included under the 2011 Code regarding a lack of response. He wrote to the CEO Office three times and received no response.

The Property Factor's position

28. The Property Factor stated the following in their written representations: *We acknowledge that the customer service level in relation to response times fall short from what we consider acceptable and have detailed this in our response and apologized for this. Furthermore, we have offered Mr Smith compensation for this and our office has received no response to our offer.*

Decision of the Tribunal

29. The Tribunal found there had been a failure to comply with this paragraph of the Code, as accepted by the Property Factor. No evidence was put forward to indicate that the Homeowner had been offered compensation.

2021 Code – Paragraph 3.1

The Homeowner's position

30. Mr Smith referred to the inclusion of management fees within the charges made to homeowners. This increases each year and there is no transparency in how the increase is reached. It is almost always above RPI, with the exception of the period 2020/2021, when it was 1.4%, which was below RPI. There is no breakdown showing how the management fees have been calculated, therefore there is no transparency. The Property Factor has stated that this is enclosed within the documentation they provide to homeowners. It was Mr Smith's position that all the activities listed in the documentation are not carried out. He said there were concerns over the fact that insurance is provided by a sister company of the Property Factor and they benefit twice from the arrangement. The electricity provision is outsourced and there is no transparency in showing how it is calculated. Mr Smith has requested information from the Property Factor as to how the increase is reached.

31. Mr Smith included this matter in his stage one complaint of 2nd December 2021 to the Property Factor (3/29), asking how he would know if the management charge was fair, justified and competitive, and complaining of a lack of transparency in how the management fee was reached. It was his position that there must be a calculation undertaken by the Property Factor to ensure they

are making a profit. A breakdown of the management fee is required so homeowners can see what it is they are paying for and how the charges are calculated. Otherwise, the Property Factor can put up charges with no control over this, and no justification. It was his position that the Property Factor is taking advantage of older people.

- 32.** The Tribunal had noted reference to a previous Tribunal decision on this point within the written representations. Mr Smith said this took place around 18 months ago and the Property Factor was found to have breached the Code, as the documentation provided at that time seemed to show the Property Factor was charging twice for the same thing within the management fee.

The Property Factor's position

- 33.** The Property Factor stated the following in their written representations:

Details concerning the management fees have been provided along with our information sheet "Our Management Fees explained" also detailed in our statement of services. These documents are enclosed for your ease of reference.

Decision of the Tribunal

- 34.** The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Tribunal considered that the document 'Our Management Fees Explained', when read with section 3.1 of the Property Factor's Written Statement of Services, indicated the range of activities covered by the management fee, and, consequently, explained to homeowners what they were being asked to pay for and what factors are taken into account during the management fee review process.
- 35.** The Tribunal did not consider that the Property Factor should have to explain in detail how it reached the increase in the fee each year, how it paid for any overheads and the running cost of its commercial business. If homeowners are dissatisfied with the management fees, the level of information provided should be sufficient to allow the homeowners to seek competitive quotes with a view to seeking factoring services from an alternative provider.
- 36.** The Tribunal considered Mr Smith's point that not all activities listed on the document were carried out; however, the document referred to states *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.* Furthermore, it states *Whilst none of the list below is exhaustive, they provide examples of what our management fee covers.*
- 37.** The Tribunal is satisfied that the activities associated with the management of the development will fluctuate and that the information provided gives the homeowner adequate detail of what is covered by the management fee.
- 38.** The Tribunal noted that the issue in relation to the previous Tribunal case was different, in that it involved a previous version of the document 'Our

'Management Fees Explained', and whether or not the management fee was split between property management and accounts administration. The Tribunal noted that the revised version of the document appeared to have come into existence as a direct result of the decision in the previous case.

2021 Code – Paragraph 7.2

The Homeowner's position

39. Mr Smith said he had not received a final decision in writing in regard to his complaint. He received a response from the Property Factor's Andrew Grant dated 17th April 2022 (1/33) but it was not a final decision.

The Property Factor's position

40. The Property Factor stated the following in their written representations:

We acknowledge that the customer service level in relation to response times fall short from what we consider acceptable and have detailed this in our response and apologized for this. Furthermore, we have offered Mr Smith compensation for this and our office has received no response to our offer.

Decision of the Tribunal

41. The Tribunal found there had been a failure to comply with this paragraph of the Code. No evidence was put forward to indicate that a final decision had been made and provided in writing to the Homeowner.

Findings in Fact and Law

42.

- (i) The Homeowner is the heritable proprietor of the Property.
- (ii) The Property Factor is registered as a Property Factor under registration number PF000095.
- (iii) The Property Factor provides factoring services to the development of which the Property forms part.
- (iv) By correspondence dated 11th June 2021 the Property Factor stated that there had been a slight increase in the unit rate for electricity to the development and that the Property Factor had secured a contract with EDF for electricity, enabling the homeowners to benefit from preferential rates.
- (v) As at 11th June 2021, the Property Factor had not secured a contract with EDF or negotiated the electricity rates.

- (vi) A contract was subsequently negotiated between the Property Factor and EDF with an electricity price rise of 33%. This was notified to homeowners on 4th November 2021.
- (vii) The unit rate of electricity was published by the Property Factor on 12th April 2022.
- (viii) The Property Factor provided information that was both misleading and false.
- (ix) The Homeowner's representative made a formal complaint to the Property Factor on 23rd December 2021.
- (x) A holding response was received from the Property Factor on 23rd December 2021 stating that a response would be issued within 14 working days. No response was received despite prompts from the Homeowner's representative.
- (xi) The Property Factor acknowledged that response times fell short of their acceptable standard.
- (xii) The Property Factor did not respond within prompt timescales.
- (xiii) The Service Charge Budget issued by the Property Factor on 11th June 2021 stated that the insurance cost for the year ending 31st August 2022 would be £11,681.
- (xiv) On 20th August 2021, the Property Factor stated that the insurance cost for the year ending 31st August 2022 would be £13,192.
- (xv) Correspondence issued to the Homeowner by the Property Factor on 1st September 2021 stated the insurance would be £11,681, which was incorrect.
- (xvi) The Minutes of the Development Manager Meeting of 4th November 2021 (3/20) mentioned a 25% increase in the insurance costs. This figure, put forward by the Property Factor, was incorrect. The increase was 33%.
- (xvii) The Property Factor has acknowledged that the insurance figures provided were incorrect.
- (xviii) The Property Factor was not open or transparent in their dealings with the Homeowner in respect of the insurance figures.
- (xix) The Property Factor provided information that was negligently misleading and false in respect of the insurance figures.
- (xx) The Homeowner's representative has requested a breakdown of the management fees charged by the Property Factor.

- (xxi) The Property Factor has refused to provide a breakdown of the management fees charged.
- (xxii) The information provided by the Property Factor provides sufficient detail of the activities included within the management fees charged.
- (xxiii) The Property Factor did not provide a final decision in writing to the Homeowner's complaint.

Proposed Property Factor Enforcement Order (PFEO)

- 43.** Having determined that the Property Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.
- 44.** In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Property Factor's failure to comply with the Code.
- 45.** Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.
- 46.** A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Right of Appeal

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.