



Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/PF/21/2349

The Parties:

Mr Alexander Carmichael, 2 Cambrae, Cromdale, Grantown on Spey PH26 3LL ("the homeowner")

and

James Gibb Property Management Limited, registered as a limited company in Scotland (SC299465) and trading as James Gibb Residential Factors, with places of business at Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ and at 4 Atholl Place, Edinburgh EH3 8HT ("the property factors")

The Property: 11 Hopper Gardens, Newcraighall, Edinburgh EH21 8RJ

Tribunal Members – George Clark (Legal Member/Chairman) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") decided that the property factors have failed to comply with their duties in terms of Section 3.2 of the Property Factors Code of Conduct ("the Code of Conduct") made under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act"). The Tribunal proposes to make a Property Factor Enforcement Order as set out in the accompanying Notice under Section 19(2)(a) of the Act.

Background

1. By application, received by the Tribunal on 26 September 2021, the homeowner sought a Property Factor Enforcement Order (“PFEO”) against the property factors. His complaint was that they had failed to comply with their duties under Sections 2.2, 3.2, 4.2 and 7.1 of the Code of Conduct. The complaint under Section 7.1 of the Code of Conduct was subsequently withdrawn.
2. The homeowner’s stated in his application that his solicitors, Lindsays LLP, Edinburgh, had advised the property factors on 21 August 2020 that the homeowner had sold the Property with effect from 16 October 2020. In November 2020, an inaccurate invoice had been raised by the property factors. A late payment fee was raised and a menacing letter issued by the property factors, warning of the dire consequences of failure to make payment. The property factors had continued throughout to hold the homeowner’s float payment. Through numerous telephone calls and emails, the homeowner had tried to resolve the matter, but had been met with denials and blandishments, culminating in the demand letter of 22 February 2021. The property factors had failed to meet their own stated deadline for replying to the homeowner’s letter of 3 June 2021, taking 44 days to do so, when it should have been within 25 working days. The property factors had replied to the complaint by saying that things would change in the future and a minor apology had been given in relation to the late response to an email. Nine months was an unrealistic time in which to resolve an incorrect invoice. The property factors’ letter of 22 February 2021 had contained the threat of action and disproportionate costs to the homeowner for his failure to pay the alleged debt and had caused him anxiety, inconvenience and annoyance between the date of his sale of the Property and August 2021. The property factors had attempted to impose a £30 late payment fee, which had now been withdrawn. The homeowner wished the Tribunal to order the property factors to pay him £30 for the delay in reaching a resolution and a further £30 for the delay in making payment of the sum owed to him. He had still not received payment.
3. The homeowner stated that the crux of his complaint was the manner in which the property factors had dealt with him as a customer who had always paid invoices in full and on time and was, in fact, owed money by them. Nobody should be subjected to the level of threat or menace contained in the property factors’ letter of 22 February 2021 and the Tribunal was asked to require the property factors to alter the wording in their correspondence with customers, to eliminate any suggestion of the threat of financial or legal sanction. Any mention of such sanctions should be made only after counter-allegations of indebtedness or service performance issues are resolved.
4. The application was accompanied by a copy of the property factors’ Written Statement of Services and copies of various emails between the Parties between 9

December 2020 and 5 August 2021. On 9 December 2020, the homeowner told the property factors that their invoice was incorrect and that he had emailed them telling them that he was not responsible for the Property after 15 October 2020. He asked them to send an accurate invoice. On 10 December, the property factors responded that his email was not sufficient for them to close the account and that it was necessary for the homeowner's solicitors to email to them a Notification of Sale letter, to include the date of entry and the name of the purchaser. They could not process the sale without this legal document and the account would continue in the homeowner's name until they received it. Later that day, the property factors confirmed that as soon as they had the letter from the solicitors, they would close the account and open a new one for the new owner and would apportion factoring costs at the date of sale. The homeowner then confirmed that his solicitors had sent a letter to the property factors, copying to them the letter they had sent in August 2020.

5. On 15 December, the property factors confirmed that they had received confirmation of the sale from the homeowner's solicitors and that the account was closed as of 16 October. They had asked their accounts department to issue an amended invoice and apologised for the length of time it had taken to finalise this process.
6. In a number of emails of 25 January 2021, the property factors attached a Stage 1 reminder, stating that a late payment charge of £30 would be added if the invoice was not paid within 7 days. The homeowner responded that the account had been closed at 16 October 2020 and he understood that there would be a payment due for part of the quarter, but he referred to the fact that he had lodged a float and asked that an accurate invoice be sent to him. The property factors replied that the amount due was the final invoice and that the float would be refunded after their next quarterly billing at the end of February. The homeowner then referred them to their Written Statement of Services, which stated that any float is included as a credit on the seller's final invoice. On 26 January, the property factors said that as they were not informed about the property sale until after the date of entry, an invoice for the full quarter to 27 November 2020 had already been produced. That invoice was amended after they were informed of the sale. A final invoice with the homeowner's float refund would be produced at the next billing run at the end of February. This was in line with their terms which stated that the final invoice is sent in the billing run two full months after the date of sale. As the date of sale was 16 October 2020, the next billing run two full months after that would be 27 February 2021. The property factors apologised for any confusion caused.
7. On 5 November 2021, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the Parties were invited to make any further written representations by 26 November 2021.

8. On 17 November 2021, the property factors provided the Tribunal with written representations. They said that they did not receive the solicitors' letter of 21 August 2020, advising them of the sale of the Property. Following the homeowner's email of 9 December, they had emailed him on 10 December to request that he ask his solicitors to send a copy of their letter, as they required legal confirmation of transfer of ownership. The solicitors' emailed them later that day but did not attach the copy of their letter. The property factors' quarterly invoices were generated on 14 December 2020, with the invoice for the full period to 27 November being generated to the homeowner's account. The sale had been processed on 16 December, resulting in an amended invoice covering the period from 28 August to 16 October. As per the Development Schedule attached to their Written Statement of Services, the date of the final invoice was determined by the sale date. If the sale date was not at least two full months prior to the next quarter end, the final invoice and return of float would not be produced until one full quarter after the next quarter end. The date of sale was less than two months prior to the period end of 27 November 2020, so the final invoice including return of the float, would be produced at the period end of 27 February 2021. The amended balance on the account to 27 November should have been paid within the 14-day payment terms detailed on the invoice.
9. As the float would not be refunded until the final invoice was produced, and as there was a balance of £60.56 on the account, a Stage 1 letter was sent to the homeowner on 25 January 2021 and as no payment was received, a Stage 1 reminder was sent on 25 January and a Stage 2 reminder on 22 February. The homeowner's email of 7 March 2021 had not been responded to and his solicitors emailed the property factors on 8 March asking when the final invoice would be produced. The response to them had been that it would be generated the same week and it was generated on 9 March, refunding the float. The content of reminder letters had not been threatening or menacing but factual, stating the further steps that would be applied should the balance remain outstanding.
10. The property factors stated that they had added a late payment fee as the balance remained unpaid. This had been queried by the homeowner's solicitors on 7 April and the Income Recovery Team had responded on 20 April. The homeowner had emailed that Team on the following day, and their response of 26 April stated that the late payment fee was due as the balance had not been paid. £30 was not an unreasonable or excessive late payment fee.
11. The view of the property factors was that if they had been in receipt of the solicitors' letter of 21 August 2020, the invoice to 27 November would have been correct and payable. The amended invoice generated on 16 December was correct and due for payment, as was the late payment fee applied to the invoice dated 9 March 2021. On reviewing the homeowner's complaint, the property factors had chosen to remove the late payment fee, as the communication with the homeowner could have been clearer in explaining what had happened, what required to be paid, why

and when. It was unfortunate that the property factors had not received the homeowner's email of 4 August 2021 containing his bank details. The property factors had tried to resolve the complaint outwith the Tribunal process by offering to refund the sale administration fee of £40 and paying a further £100 to compensate him for the amount of time it had taken to resolve his complaint, but that offer had been rejected. The float refund had been transferred to his account on 3 December 2021.

12. The property factors' representations included 21 Appendices, including their Written Statement of Services and Development Schedule and copies of emails and invoices to which they had referred in their written representations.
13. On 26 November 2021, the homeowner provided the Tribunal with further items of email correspondence, namely the offer to resolve the complaint outwith the Tribunal process to which the property factors had referred in their written representations, and the homeowner's response, which stated that the offer was not acceptable and that the time for resolving amicably was one year ago. The property factors had departed from "amicable" when they sent him a menacing letter in February. They took until August to agree the sum owed and he provided bank details for this, but no payment had been forthcoming four months later. In their email of 25 November 2021, the property factors had stated that they had emailed the homeowner's solicitors on 15 December 2020 requesting the attachment that had been omitted from their email of 10 December, but nothing was received. They had then carried out a Land Register search to confirm the sale of the Property and the sale was processed on 16 December.

Case Management Discussion

14. A Case Management Discussion was held by means of a telephone conference call on the morning of 22 December 2021. The homeowner was present. The property factors were represented by Ms Debbie McDonald and Mr Nic Mayall. Their Operational Director.
15. The Tribunal Chair advised the Parties that they could assume that the Tribunal Members had read and were fully conversant with their written representations and that it would not, therefore, be necessary to lead the Tribunal through that evidence in detail again.
16. The homeowner referred the Tribunal to the property factors' email of 25 November 2021 and told the Tribunal that their statement that they had had to go to the Land Register was incorrect, as they had said in an email to him on 15 December "I have received the confirmation of the sale from your solicitors today." He referred to a pattern of things going missing, namely the letter from his solicitors of 21 August

2020, the attachment to his solicitors' email of 10 December 2020 and his email of 4 August 2021, with which he provided the property factors with his bank details. The homeowner regarded the property factors' letter of 22 February 2021 as a threat, and it had come after repeated attempts by him to resolve the matter. His main concern was the manner in which the property factors had dealt with him, when at all stages they held more money than he owed. The level of threat had been disproportionate, and that was the reason for his having rejected their offer to settle the matter outwith the Tribunal process. He was asking the Tribunal to order the property factors to alter the wording of their correspondence with customers to eliminate the threat of legal sanctions. They had said in December 2020 that the account was closed, but nothing then happened for two months, when an incorrect invoice was issued, including a late payment charge. The property factors' Written Statement of Services clearly states that any float account is included as a credit in the final invoice.

17. The property factors told the Tribunal that the homeowner's solicitors had not attached to their email of 10 December 2020 a copy of their letter of 21 August providing details of the sale, and they had carried out their own due diligence by checking the Registers. The amended invoice generated in December 2020 had not been the final invoice, but had been an amended version of the invoice for the period to 27 November. The float would be included in the invoice to 27 February 2021, in accordance with their Written Statement of Services. The amended invoice to 27 November had remained payable and due. There needed to be a full two months between the date of sale and the quarter end, so, in the present case, the final invoice would always have been included in their February billing. The issue had been that the homeowner did not think that the November invoice was payable.
18. The homeowner contested this last point, stating that at no point had he disputed any of the amounts that he owed, apart from the late payment charge. Between March and September 2021, emails had passed between the Parties to try and resolve the situation. The homeowner had taken up the issue of the threatening letter and had tried to make contact with a senior executive of the property factors. The homeowner had provided his bank details to the property factors, who had then claimed that they had not received his email. At that point he had registered his complaint. The property factors told him on the same day that they had cancelled the late payment charge, but he had responded that this did not resolve his complaint, which he would now be taking to the Tribunal.
19. The property factors accepted that the final payment to the homeowner had not been made until December 2021, but the reason for that had been that they had not received the response to their email requesting the homeowner's bank details. Questioned by the Tribunal, they confirmed that they did not have a system which alerted them to the fact that they did not appear to have received a response for bank details from a customer to whom they owed money.

20. The homeowner told the Tribunal that he considered it unacceptable that there was no system for reconciling debits and credits on customers' accounts, such as would have resulted in the November balance being shown as a debit on the final invoice, when the consequence was the sending of menacing letters. He wanted the property factors to alter their procedures. That was more important to him than any monetary compensation.
21. The property factors stated that the Tribunal had to restrict itself to considerations of the Sections of the Code of Conduct under which the homeowner's application had been made. They felt that the tone of the letters they had sent was not "threatening" but had been proportionate and in accordance with their procedures. They had told the homeowner in January 2021 that the invoice rendered to November 2020 remained payable and that he would receive his final invoice in February.
22. The Parties then left the Hearing, and the Tribunal Members then considered all the evidence, written and oral, that had been presented to them.

Findings in Fact

- (i) The homeowner is the former proprietor of the property.
- (ii) The property factors, in the course of their business, manage the common parts of the Newcraighall development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
- (iii) The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- (iv) The date of Registration of the property factors was 23 November 2012.
- (v) The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- (vi) The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber, received on 26 September 2021, under Section 17(1) of the Act.
- (vii) The concerns set out in the application have not been addressed to the homeowner's satisfaction.

- (viii) On 5 November 2021, the Housing and Property Chamber intimated to the Parties a decision by the President of the Chamber to refer the application to a Tribunal for determination.

Reasons for Decision

23. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required to determine the application without a Hearing.
24. The Tribunal considered first the homeowner's complaint under Section 2.2 of the Code of Conduct, which provides as follows: "*You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action)*".
25. The Tribunal did not uphold the complaint under Section 2.2 of the Code of Conduct. The homeowner had stated at the Hearing that he wanted the Tribunal to order the property factors to change the wording on their standard letters, but the view of the Tribunal was that the wording of the Stage 1 and Stage 2 credit control letters was not abusive or intimidating. They set out the possible consequences, including legal action, of non-payment of their invoice and were very much in line with normal credit control systems of commercial organisations. The issue in the present case was that the homeowner had queried the invoice and whether, in such circumstances, the Stage 2 letter of 22 February 2021 should have been sent. The Tribunal found the terms of the letters themselves to be unexceptionable in the situation in which they would normally be issued, namely where a homeowner had failed to pay an invoice timeously.
26. Section 3.2 of the Code of Conduct provides: *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*".
27. The Tribunal upheld the complaint under Section 3.2 of the Code of Conduct. The final invoice, dated 9 March 2021, closed with a balance due to the homeowner of £34.38 and, whilst that too was queried by the homeowner, the property factors could not say, on the one hand, that the amended invoice of November 2020 remained payable when it had been queried and on the other hand fail to seek to repay immediately the credit balance due to the homeowner at the point of issue of the final invoice. That payment had not been dependent on the homeowner approving the final invoice. The property factors, on 26 April 2021, stated that the

late payment fee would stand and requested the homeowner's bank details. This was after an exchange of emails between the property factors and the homeowner's solicitors, who had queried the late payment charge, but the Tribunal noted that the property factors did not appear to have taken any steps to remind the homeowner that they still awaited his bank details. They should have requested bank details when they sent out the final invoice, not 7 weeks later. The person who requested the bank details should have had an operating system, whether electronic or manual, to provide a reminder to check whether the details had been provided. The property factors do not appear to have such a system.

28. Section 4.3 of the Code of Conduct states: "*Any charges that you impose relating to late payment must not be unreasonable or excessive*".
29. The Tribunal did not uphold the complaint under Section 4.3 of the Code of Conduct. The late payment charge made by the property factors was £30 and, although it related to a purported debt of just over £60, the view of the Tribunal was that the charge related not to the amount of a debt, but to the administrative burden of pursuing it by issuing reminder letters. That burden would be the same regardless of the amount being pursued. The Tribunal did not regard the late payment charge as unreasonable or excessive. The Tribunal also noted that the late payment charge in the present case had later been withdrawn.
30. Although the homeowner did not, in his application, include a complaint of failure to carry out the property factor's duties, the Tribunal felt it appropriate to make a recommendation that the property factors undertake a complete review of their internal processes, as it seems that the various departments are acting in silos. In the present case, they said that they had not received a letter from the homeowner's solicitors in August 2020 and had not received bank details which the homeowner said he had emailed to them. They had not responded to the homeowner's complaint within the timescales set out in their Written Statement of Services and had failed to follow up on their request for bank details when they knew that money was owed to the homeowner. There also appeared to be no effective communication between those dealing with homeowners and the company's Income Recovery Team and it had been, at best, insensitive to send the Stage 2 letter on 22 February 2021, when there were those within the company who were aware that the homeowner was querying the invoice. The Tribunal accepted that the COVID-19 pandemic had placed huge strains on organisations of all sizes and that the property factors had credited back the late payment charge and their management fee and had offered a payment in compensation, but in essence, the issue in the present case was very simple. The homeowner had assumed that the amended invoice of December 2020 was his final invoice and that it should, therefore, have included the refund of his float payment. He was mistaken in that assumption, but it should have been obvious to the property factors that the homeowner did not understand the situation, and a clearer explanation that the

amended November fee remained payable and that his final fee would not be issued until February, even if they had received the formal notification of sale effective on 16 October, and would include the float, together with an instruction to the Income Recovery Team to suspend recovery action meantime, might have made the homeowner's complaint and his application to the Tribunal unnecessary.

31. Having decided that the property factors had failed to comply with Section 3.2 of the Code of Conduct, the Tribunal then considered whether to make a Property Factor Enforcement Order. The view of the Tribunal was that there were no specific actions that it could require the property factors to take, as the money due to the homeowner had now been paid to him and the Tribunal had not upheld the complaints under Sections 2.2 or 4.3 of the Code of Conduct.
32. The Tribunal also considered whether an award of compensation should be made against the property factors. The Tribunal's view was that the failure of the property factors to comply with Section 3.2 of the Code of Conduct had exacerbated an already anxious situation for the homeowner, who had spent months trying to sort out what he saw as "denials and blandishments". The amount of money due to him may have been relatively small, but it should have been paid to him in March or early April 2021 and it had not been paid until 3 December. The consequences of that failure had been that he had suffered the inconvenience and stress of going through a formal complaints procedure and then an application to the Tribunal. Having taken all the facts and circumstances into account, the Tribunal decided to order the property factors to pay to the homeowner the sum of £250 by way of compensation.
33. The Tribunal's Decision was unanimous.

Right of Appeal

In terms of Section 46 of the Tribunal (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.

Legal Member/Chairman:

George Clark

22 December 2021