

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/22/1581

Property address: Flat 2/2, 283 Kilmarnock Road, Glasgow, G43 1TX ("the Property")

The Parties

Mr Paul MacDonald, Flat 2/2, 283 Kilmarnock Road, Glasgow, G43 1TX ("the Homeowner")

Hacking & Paterson Management Services, 1 Newton Terrace, Glasgow, G3 7PL ("the Property Factor")

Tribunal Members

Ms H Forbes (Legal Member)

Mrs M Lyden (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 paragraphs 2.5, 4.1 and 7.1 of the 2012 Property Factor Code of Conduct ("the Code") 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 24th May and 5th October 2022, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with paragraphs 2.2, 2.5, 4.1, 4.3, 4.8, 4.9 and 7.1 of the Code. Details of the alleged failures were outlined in the Homeowner's application and associated documents.

2. By email dated 1st March 2023, the Homeowner lodged further written representations and a medical letter.
3. A Case Management Discussion (“CMD”) took place by telephone conference on 8th March 2022. The Homeowner was in attendance. The Property Factor was represented by Mr Daniel Kingham. The case continued thereafter to a hearing, and parties were asked to lodge further documentation.
4. By email dated 19th April 2023, the Property Factor lodged further representations and documents.
5. By email dated 9th May 2023, the Homeowner lodged further representations and documents.

The Hearing

6. A hearing took place at the Glasgow Tribunals Centre on 17th May 2023. The Homeowner was in attendance. The Property Factor was represented by Mr Daniel Kingham.

Preliminary Matters

7. There was some discussion about the Homeowner’s complaint around the original invoice that led to the dispute between the parties. The Homeowner said he was unable to remember the details of the dispute. It was his position that he believed the invoice was incorrect, and had asked for clarification on an item in the invoice. He did not receive a response until December, during which time, he received a late payment charge. He said everything had spiraled from there. He had been willing to pay what he owed, but would not do so until a corrected invoice was provided. This was never provided.

Section 2

The Homeowner’s position

Paragraph 2.2

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).

8. The Homeowner said the whole system was set up to be intimidating and threatening. There were incessant letters threatening legal action even when the Property Factor was not responding to the Homeowner’s concerns. The Property Factor’s procedure was to send a solicitor’s letter within a few weeks, when a small amount was due. This was not normal practice in any industry. The Homeowner referred to page 4/41 in his written representations of 9th May 2023. This was a letter from the Financial Conduct Authority regarding a review into credit card fees and charges. The Homeowner said the FCA were

concerned about late payment charges of £12, but the Property Factor has a late payment charge of £36, and they keep on adding more.

Paragraph 2.5

You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.

9. The Homeowner referred to three alleged failures to comply with this paragraph.
 - (i) The Homeowner referred to an email from the Property Factor's Kirstie MacKenzie dated 1st May 2020, where she confirmed that the Homeowner had contacted the office in September 2018 to query a late payment charge on his August 2018 account. She explained the charge had been due to a failure to pay the May 2018 invoice. Ms MacKenzie explained that the Homeowner had been informed in December 2018 that the late payment charge would not be removed. The Homeowner said there had been no contact from the Property Factor between September and December 2018.
 - (ii) The Homeowner said he asked the Property Factor for their complaints procedure form, and it was not provided for 18 months, until 3rd August 2020.
 - (iii) The Homeowner said he sent multiple emails between March 2019 and April 2020. He was getting letters but they did not address the complaint he was making. He would ask a question, but they would answer a different question. He asked for an updated invoice to show only the payments he was due to make, but it was not provided.
10. Responding to questions from the Tribunal as to whether he had considered paying for services provided, the Homeowner said he did not trust the Property Factor to allocate any payments in this way. He said he would not know if they applied the payments correctly. Asked what he expected to happen, when there appeared to be a stalemate between the parties, and charges kept rising, the Homeowner said it seemed logical that the Property Factor would look at their records and see that he had a legitimate complaint as they had failed to respond to his initial query. The Homeowner said there had also been phone calls between the parties but he had not kept records. It had been agreed during a phone call that some charges would be removed. The Homeowner said he wants to pay what he is due, and would do so if the Property Factor would give him an amended invoice.
11. Responding to questions from the Tribunal as to why he had not taken the Property Factor up on offers outlined in the 1st May 2020 email from Ms MacKenzie, such as his account being placed on hold from May to August 2021

to allow him to revert to the Property Factor, he said this was some time later and the stress caused by the situation had increased. There still seemed to be a suggestion that he was liable and they were not accepting that late payment charges had been wrongly applied. Their system had caused the matter to snowball. They could have attempted to sort out the problem much sooner.

The Property Factor's position

Paragraph 2.2

12. Mr Kingham said the Property Factor had not been intimidating or threatening. They have a debt recovery procedure in place and must manage debt effectively. The Property Factor does not agree that the original invoice was incorrect. Ms MacKenzie's email does not state that it was incorrect. An offer had been made to remove £60, incorporating two late payment charges for 4th and 19th October, from the account. As reflected in Ms MacKenzie's email, the Property Factor had offered the Homeowner a credit of £180, including the £60 previously mentioned. The Homeowner had not accepted this. He had been provided with a complaints form in August 2020. He had not returned this until August 2022.

Paragraph 2.5

13. Mr Kingham said the Property Factor does not accept any failure to comply with this paragraph. He responded to the Homeowner's complaints as follows;

- (i) In September 2018, the matter was escalated to director level, and a response was provided in December 2018. Mr Kingham said there was no evidence of communication with the Homeowner between those dates.
- (ii) Mr Kingham said the Homeowner had been offered an opportunity to meet with the Property Factor by email dated 24th April 2019. Asked why the form had not been sent out for 18 months, Mr Kingham said it looked like the Property Factor was trying to sort matters out without going down the complaints route. When that approach failed, the form was issued.
- (iii) Mr Kingham said there were multiple communications between the parties. The Homeowner had lodged his emails, but the Property Factor had not lodged copies of the responses to each one. It was clear the Homeowner was not being ignored, as there was email communication throughout. Responding to questions from the Tribunal as to the usual procedure when someone is late in paying, Mr Kingham said it depends upon the circumstances. The Property Factor may remove a late payment charge if they have made an error or there is a reason for the late payment. They may remove it as a gesture of goodwill.

Section 4

The Homeowner's position

Paragraph 4.1

You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.

14. The Homeowner said the Property Factor had not applied their policy reasonably. They had not replied to him when he was querying an invoice. They continued to send solicitor letters. They did not provide him with a way to pay debts due. There was no opportunity to escalate the matter at an earlier stage when the debt was smaller and he was trying to resolve the issue.

Paragraph 4.3

Any charges that you impose relating to late payment must not be unreasonable or excessive.

15. The Homeowner referred to the FCA letter. It was his position that the charges were unreasonably applied while he was querying matters and his complaint was being ignored. The charge of £36 is gross and excessive and he does not know how the Property Factor can justify it. It is unreasonable to instruct a solicitor after just a few weeks.

Paragraph 4.8

You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

16. The Homeowner said it was clear the Property Factor was not responding or allowing him to follow the complaints procedure, but was continuing to add charges. A Simple Action had been raised on 13th December 2021 and it had been paused to allow the Tribunal application to be considered.
17. Responding to questions from the Tribunal as to whether the Property Factor had given notice of their intention to take legal action, the Homeowner said there were streams of letters, but he did not know what was being said. The Homeowner said he had been given notice of their intention at an early stage, when he received a solicitor's letter in July 2018, despite having made his complaint clear. The Homeowner said he would have tried further to resolve matters if he had been told of the Property Factor's intention.

Paragraph 4.9

When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable

indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position.

- 18.** The Homeowner said the Property Factor misrepresented the correct legal position by not following their own procedure, but insisting that they are right. It was his position that it is down to the individual to decide what is intimidating or threatening, and getting incessant letters from solicitors when you are trying to resolve the situation indicates a failure to comply with this paragraph. Asked whether he had received a reminder invoice at the start of the matter, before charges were applied, the Homeowner said he did not think so, but did not know for certain. Asked why he had not attended the meeting offered by the Property Factor on 24th April 2019, the Homeowner said he did not see the point. He preferred to have a record of correspondence by email. He found the situation intimidating. He did not see the invitation as a serious gesture and did not see what could be resolved. Instead, he asked the Property Factor to phone him. The Homeowner said he had taken advice regarding a previous case with the Property Factor but he had not found the advisor very knowledgeable on property factor matters.

The Property Factor's position

Paragraph 4.1

- 19.** Mr Kingham said the debt recovery procedure is available on their website. It has been applied correctly in this case.

Paragraph 4.3

- 20.** Mr Kingham said the late payment fees are in line with the Property Factor's procedure costs, including computer software and staff costs. There are seven members of staff in their credit control department. In this case, there were 18 late payments applied, totaling £552. Responding to questions from the Tribunal as to whether there is guidance for property factors on the level of late charges to be applied, Mr Kingham said he was not aware of it. He confirmed that the £36 late payment fee includes a solicitor letter. Asked whether he had any comment to make on the FSA letter lodged by the Homeowner, Mr Kingham said no.

Paragraph 4.8

- 21.** Mr Kingham said the email correspondence showed that offers had been made to meet with the Homeowner and to reduce the amount due. There was no record that there had ever been a mistake in an invoice. Responding to questions from the Tribunal as to why the Property Factor's Paul MacDonald had stated in an email of 13th September 2021 'All corrections have been completed from my review', Mr Kingham said he thought this referred to a previous dispute prior to May 2018, but he did not know for sure.

Paragraph 4.9

22. Mr Kingham said the Property Factor had not failed to comply with this paragraph. They have a procedure in place. They took the view that all the charges were due, but they had made a goodwill gesture of offering £180 to the Homeowner. Responding to questions from the Tribunal as to the procedure where one homeowner was not paying their invoices, Mr Kingham said they will carry the debt until they can remove it, but they may have to apportion it to other homeowners in due course. They have not done so in this case.

Further comments from Homeowner

23. The Homeowner said the Property Factor was not making a goodwill gesture. They had failed to respond to his communication. They had failed to provide a corrected invoice, and did not remove the late payment charges. He had no record of any corrections to his account and could not get any further information.

Section 7

Paragraph 7.1

You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

The Homeowner's position

24. The Homeowner referred to the excerpt from the complaints procedure included at page 18/41 of his representations. Instead of receiving the application form to complete when he had asked for it, his request was completely ignored. The Property Factor did not attempt to address his complaint. The situation felt hopeless and pointless. He was not provided with contact details for a team manager or director, as set out in the complaints procedure.

The Property Factor's position

25. Mr Kingham said the Property Factor had followed their procedure. The complaint had been reviewed by a director, although Mr Kingham had signed the final letter as Team Lead on 9th September 2022. He was due to become a director the following January.

26. Responding to questions from the Tribunal regarding their frontline response and the timescale of 18 months to send a form to the Homeowner, Mr Kingham said there had been correspondence between the parties in that time. It is not uncommon to try and get resolution before down this route. Many of the people involved at that time have now left the company, so it is difficult to say what their through process was at that time. If they had been ignoring the

Homeowner and not responding to him, it would have been a clear breach, but that was not the case.

27. Responding to questions from the Tribunal, Mr Kingham said there is regular training given to staff on how to handle complaints, at induction of new staff and at other times. All feedback is monitored, and the staff will liaise with a director. There is a director within that particular team. Asked whether any lessons had been learned from this case, Mr Kingham said it may have been better to have issued the form sooner, but there was correspondence and an offer to resolve matters during the 18 months.
28. Responding to questions from the Tribunal as to when a case is put on hold to consider queries and complaints, Mr Kingham said if a homeowner disputes charges, the charges are put on hold. Asked what would have happened if the Homeowner had made payment and asked that it be set only against outstanding service charges, Mr Kingham said that could have been done.

Further comments from Homeowner

29. The Homeowner said the correspondence mentioned by the Property Factor does not exist. There was correspondence in 2019, then nothing until May 2021. There was no attempt to resolve the matter. He had wished to follow the complaints procedure. He felt the Property Factor was deliberately ignoring the issues, perhaps to try and force him to give up. He requested a call back from a director at the beginning of 2019. When they called, their number was showing as an unknown number, and he did not want to take the call.
30. The Homeowner said he felt the Property Factor's behaviour had been disgusting, and criminal. Although they had acknowledged failures in black and white, they did not follow their own complaints procedure, and there had been no movement towards a solution. He had not been offered the opportunity to pay anything against outstanding service charges, and did not trust the Property Factor to allocate any sums paid in that way.

Further comments on behalf of the Property Factor

31. Mr Kingham said he was satisfied the late payments charges were correct, but the Property Factor had offered payment, which they would now be prepared to increase that £250, if that would resolve matters. It had not been helpful that the Homeowner had taken two years to return the complaints form.

Decision of the Tribunal

Paragraph 2.2

32. The Tribunal did not find that there had been a failure by the Property Factor to comply with this paragraph. The Property Factor has not been intimidating or threatening in its communications with the Homeowner. The Property Factor has a robust debt recovery procedure, which it has followed.

Paragraph 2.5

33. The Tribunal found there had been a failure to comply with this paragraph in respect of the first and second matters complained about. The delay in responding to the Homeowner from September to December 2018 was not acceptable. The delay in issuing the complaints form was not acceptable. The Tribunal did not have sufficient evidence to make any findings about the third matter complained of, as it was not clear whether the Property Factor had delayed in answering communication at that time. It was noted that the Homeowner stated that he was getting letters at that time, although they did not address the complaint he was making.

Paragraph 4.1

34.

The Tribunal found there had been a failure to comply with this paragraph in that the procedure had not been reasonably applied while the Property Factor delayed in responding to the Homeowner and in providing the complaints form.

Paragraph 4.3

35. The Tribunal did not find that there had been a failure to comply with this paragraph. There was insufficient evidence before the Tribunal to indicate that the Property Factor's late payment charges are unreasonable or excessive. There was no evidence of other comparative charges within the factoring industry. The Tribunal did not find the FSA letter to be of any assistance as it related only to credit card charges.

Paragraph 4.8

36. The Tribunal did not find that there had been a failure to comply with this paragraph. The Property Factor enforced their debt recovery procedure by making late payment charges as set out in the procedure. By his own admission, the Homeowner said he received a significant number of letters warning of legal action.

Paragraph 4.9

37. The Tribunal did not find that there had been a failure to comply with this paragraph. There was no evidence of intimidating or threatening behaviour, or of any knowing or careless misrepresentation of their authority or the correct legal position.

Paragraph 7.1

38. The Tribunal found there had been a failure to comply with this paragraph by the Property Factor taking 18 months to send the complaints form to the Homeowner, and by failing to have the final letter signed off by a director.

Further documentation

39. As a response to a request from the Tribunal for further information following the hearing, the Property Factor provided a summary of fees by email dated 2nd June 2023.

Findings in Fact and Law

40.

- (i) The Homeowner is the heritable proprietor of the Property.
- (ii) The Property Factor is registered as a Property Factor under registration number PF000288.
- (iii) The Property Factor provides factoring services to the development of which the Property forms part.
- (iv) In or around May 2018, the Homeowner queried an item on an invoice from the Property Factor.
- (v) The Homeowner did not pay his quarterly common charges for May 2018 until July 2018.
- (vi) The Property Factor applied late payment charges to the Homeowner's July 2018 account.
- (vii) In September 2018, the Homeowner requested that the late payment charge be removed from his account.
- (viii) During the period that the Homeowner was waiting for a response from the Property Factor, late payment charges were applied to his account on 4th and 19th October 2018.
- (ix) On 10th December 2018, the Property Factor emailed the Homeowner to confirm that the request to have the July late payment charge removed was refused.
- (x) Late payment charges were applied to the Homeowner's account on 3rd and 18th January 2019.
- (xi) The Homeowner's account was placed on hold until a further late payment fee was applied on 4th April 2019.
- (xii) In April 2019, the Property Factor offered to meet the Homeowner to discuss matters. The Homeowner asked that discussion take place by telephone.
- (xiii) The Homeowner's account was placed on hold from May to August 2019.

- (xiv) Late payment charges were applied to the Homeowner's account on 18th September and 2nd October 2019.
- (xv) The Property Factor attempted to contact the Homeowner in December 2019 without success.
- (xvi) The Homeowner's account was placed on hold from October 2019 to March 2020.
- (xvii) A late payment charge was applied to the Homeowner's account on 17th March 2020.
- (xviii) By email dated 14th April 2020, the Property Factor offered to credit £150 to the Homeowner's account on the understanding that the remaining outstanding balance of £581.03 be paid.
- (xix) By email dated 24th April 2020, the Homeowner offered to pay £266.98 to settle his account.
- (xx) On 1st May 2020, the Property Factor offered to resolve the complaint by crediting the Homeowner's account with the sum of £180, in respect of 6 late payment fees, including those applied on 4th and 19th October 2018, as the Homeowner had been in communication with the office at that time.
- (xxi) Late payment charges were applied to the Homeowner's account on 4th May, 24th June, 8th July and 12th December 2020, and 6th January, 16th June and 30th June 2021.
- (xxii) In February, March, April 2019, and April and July 2020, the Homeowner requested the Property Factor's application form for formal complaints resolution.
- (xxiii) The Property Factor's application form for complaints resolution was issued to the Homeowner on 3rd August 2020.
- (xxiv) A Notice of Potential Liability was registered against the Property on 1st November 2021.
- (xxv) The Homeowner completed and returned the complaint form in August 2022.
- (xxvi) By letter dated 9th September 2022, the Property Factor confirmed that the complaint was not upheld. The letter was issued by a Team Lead.
- (xxvii) The Homeowner has made no payment to his account since 13th July 2018.

(xxviii) The Property Factor has applied the sum of £480 in late payment charges to the Homeowner's account.

(xxix) The Property Factor has applied the sum of £240 for registration of a Notice of Potential Liability to the Homeowner's account.

Reasons for the decision

- 41.** The Tribunal considered that there was a surprising lack of information on both sides regarding the details of the initial event that led to the first late payment charge, and eventually the current situation. The Tribunal noted that personnel within the Property Factor's company had changed, and it was not possible to determine exactly what took place at that time. However, the Tribunal was satisfied that there was a considerable delay by the Property Factor in responding to the Homeowner in respect of the initial matter, during which time, further late payment charges were applied to his account. The account ought to have been placed on hold while the matter was being investigated.
- 42.** The Tribunal noted that the Homeowner first requested the complaints form in February 2019. The Property Factor ought to have complied with their complaints procedure and provided the form at that stage, and the matter may have been settled to the satisfaction of both parties within a relatively short time. Instead, for reasons that were not entirely clear, not least because the personnel involved are no longer with the company, the Property Factor delayed in providing the form. Over the lengthy period during which the Homeowner continued to request the form, the debt continued to rise, with further late payment charges applied.
- 43.** Given the Property Factor's failures, the Tribunal took the view that the sum of £360 in respect of late payment charges and the charge for the Notice of Potential Liability should be removed from the Homeowner's account.
- 44.** The Tribunal decided not to order that the Notice of Potential Liability should be removed from the Property, as there is a considerable sum due by the Homeowner to the Property Factor, leaving aside the late payment fees. The Tribunal did not accept the Homeowner's position in continuing to fail to make payment of his ongoing common charges as reasonable. The Homeowner claimed not to know that he could have made payment of his ongoing common charges, yet the Property Factor's debt recovery procedure makes clear that non-disputed sums must be paid while other sums are in dispute.
- 45.** The Tribunal considered that the Homeowner ought to have made payment of his management and common charges as they arose. There was no reason that he could not have made payment of the charges by specifying clearly that they must only be attributed to management and common charges. Although it was not argued before the Tribunal, it is noted that the Homeowner states within the application that management charges should be removed as he has not received any management of services. The Tribunal does not accept this position, and takes the view that all management and common charges are payable.

Proposed Property Factor Enforcement Order (PFEO)

- 46.** 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.
- 47.** 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.
- 48.** 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.

Legal Member and Chairperson
20th June 2023