

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/18/1789 AND FTS/HPC/PF/18/1791

**Flat 2/1 6 Ratho Drive, Springburn, Glasgow G21 1NA and Flat 1/2, 14 Memel Street, Springburn, Glasgow G21 1LL
("the Property")**

The Parties:-

**Ms Fiona Taylor, 57F Drumbathie Mansions, Drumbathie Road, Airdrie ML6 6EW
("the Homeowner")**

**James Gibb Residential Factors, 65 Greenbank Street, Glasgow G1 5PX
("the Factor")**

Tribunal Members:

**Graham Harding (Legal Member)
Mary Lyden (Ordinary Member)**

DECISION

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with section 4.3 of the Code

The decision is unanimous

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Factor became a Registered Property Factor on 23 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By applications dated 19 July 2018 the Homeowner complained to the Tribunal that the Factor was in breach of Section 4.2 of the Code in respect

that it had applied late payment charges to her accounts at both her properties.

2. By Minute of Decision dated 14 August 2018 a Convenor with delegated powers accepted the applications which were conjoined and referred to a Tribunal.
3. A hearing was arranged to take place on 8 October 2018 at the Glasgow Tribunals Centre 20 York Street, Glasgow.
4. Both parties submitted written representations to the Tribunal.
5. The Factor indicated it did not intend to attend the hearing and wished to rely on its written submissions.
6. At the hearing the Homeowner sought leave to amend her application to include a complaint that the Factor had breached Section 4.3 of the Code. The Tribunal allowed the amendment subject to adjourning the hearing and giving the parties further time to lodge submissions on the amended complaint.
7. A fresh hearing was assigned to take place on 7 December 2018 at Glasgow Tribunals Centre, 20 York Street, Glasgow.
8. Both parties submitted further written submissions to the Tribunal in advance of the hearing. The Factor advised the Tribunal that it did not intend to be present or represented at the hearing.

Hearing

9. The hearing was attended by the Homeowner. The Factor did not attend and was not represented. The Tribunal determined to proceed with the hearing in the absence of the Factor in accordance with Rule 29 of the Rules.
10. The Tribunal noted that the Homeowner's latest written submissions may have been lodged and intimated outwith the time limit for submission in advance of the hearing in terms of Rule 22. The Homeowner asked the Tribunal to allow the documents to be received although late as this had been due to her being unable to open the documents lodged by the Factor and these had to be sent to her again. The Tribunal considered there was no prejudice in allowing the documents to be admitted and granted the Homeowner's application.

Summary of submissions

11. The Homeowner referred the Tribunal to her written submissions of 30 November 2018 and her earlier productions. Essentially the Homeowners

position was that she had queried with the Factor certain charges for landscaping, cleaning, door repairs and insurance but had failed to obtain replies to her satisfaction.

12. The Homeowner said that as a result of the Factor failing to deal adequately with her queries, she had withheld payment of certain items on her quarterly invoices. As a result, the Factor had applied late payment charges of £24.00 on the property at 6 Ratho Drive on 6 separate occasions namely 23/9/15, 18/1/16, 15/4/16, 30/6/16, 7/7/17 and 3/8/17. The Factor had also applied a late payment charge of £24.00 on the property at 14 Memel Street on one occasion and the Factors predecessors in office Grant and Wilson who had been taken over by them had applied late payment charges of £18.00 on two occasions on 10/4/15 and 19/8/15.
13. The Homeowner went on to say that she had in 2017 become ill and had decided to make payment of all the sums demanded by the Factor partly because she wanted to ensure her affairs were in order in the event of her not making a recovery from her illness. She had also been concerned that she had been threatened with her name being placed on a bad debt register.
14. The Homeowner went on to refer to her written submissions of 11 November 2018 in support of her application. She pointed out that it appeared from the invoices that late payment charges were being applied on invoices in advance of the invoice being due for payment.
15. In response to a question from the Tribunal the Homeowner confirmed that she had attempted to recover the late payment charges during her previous application to the Tribunal (Ref FTS/HPC/PF/17/0346) but that this had not been successful as she had applied under the wrong section of the Code. She said that she had been told by the Tribunal dealing with that application that she would have to make a fresh application if she wished to pursue her complaint regarding the late payment charges.
16. The Homeowner went on to say that when she had bought the properties her solicitor had told her that the factoring charges were likely to be about £400.00 per year instead of which they were more like double that amount.
17. The Homeowner also said that due to the way in which the Factor prepared its accounts there was never a zero balance on her account despite being paid up to date. She felt that this was always to her detriment.
18. The Homeowner in reply to a question from the Tribunal accepted that in her applications she had suggested that matters could be resolved if the Factor removed the late payment fees and debt recovery fees. The Homeowner also accepted that prior to the original hearing the Factor had offered to settle matters by crediting her accounts with the full amount of the late payment charges and the Sheriff Officers' fee. The Homeowner however felt that the offer had come very late in the day and by that time she had been put to a great deal of worry and distress and she was now looking for a significant

award to reflect that. Also, the Factor had not intimated that offer to settle to the Tribunal at the time it was made.

19. The Tribunal queried with the Homeowner if she had made a formal complaint in accordance with the Factor's complaint procedures. The Homeowner thought that she had made a formal complaint and did not understand why the Factor had suggested she had not.

The Tribunal make the following findings in fact:

20. The Homeowner is the owner of Flat 2/1 6 R فهو Drive and Flat 1/2 14 Memel Street, Springburn, Glasgow ("the Property")
21. The Property is a flat within the Hawthornhill Estate, Glasgow (hereinafter "the Development").
22. The Factor performed the role of the property factor of the Development.
23. The Homeowner queried certain charges for landscaping, door repairs and cleaning with the Factor and withheld payment in respect of certain charges.
24. The Factor delayed providing the Homeowner with adequate responses to her queries over a prolonged period of time.
25. The Factor applied late payment charges on the Homeowners accounts together with Sheriff Officers fees amounting to £167.03.
26. The factor's predecessors in office Grant and Wilson applied late payment charges of £36.00.
27. The Homeowner made an earlier application to the Tribunal under Reference FTS/HPC/PF/17/0346.
28. The Factor offered to reimburse the late payment charges totalling £203.03 if the Homeowner withdrew her application to the Tribunal.

Reasons for Decision

29. The Homeowner clearly felt strongly about the way in which the Factor had dealt with what she believed to be legitimate queries that she had raised regarding issues around landscaping, cleaning, insurance and other matters. The Homeowner felt that the Factor had failed to properly address these legitimate concerns and this had in part led to an earlier application to the Tribunal in which there had been a finding in favour of the Homeowner. The Tribunal noted in the course of the hearing that the issue around the imposition of late payment charges had been raised at that time but had been withdrawn as the Homeowner had not applied under the correct section of the Code.

30. Although the Factor had queried why the Tribunal was considering the Homeowners claim when its formal complaints procedure had not been exhausted the Tribunal was of the view that the Factor had unreasonably delayed in attempting to resolve the Homeowners complaints and would have been well aware of the issues that had been raised. The Tribunal was satisfied therefore that the Homeowner was entitled to make an application to the Tribunal. It did seem to the Tribunal that the Factor's formal complaints procedure appeared somewhat complex to initiate. If a homeowner's complaint was not resolved then perhaps it should proceed to the next stage as a formal complaint rather than require a homeowner to specify that they were making a formal complaint.
31. The Tribunal was of the view that where a homeowner raised a query regarding a charge levied by a factor it would not be appropriate for a factor to impose a late payment charge pending that query being determined by the factor. It may well be reasonable to impose a late payment charge on a homeowner who was without good reason refusing to pay a fee or outlay as long as the charge was reasonable. The Factor's Written Statement of Services at Section 5.7.6 provided for a homeowner disputing an item within seven days of receipt of an invoice but it did not appear to make any provision in that section for the waiving of late payment charges whilst an item was disputed. The Tribunal felt there could be greater clarity in this regard in the Written Statement of Services.
32. In the Homeowner's case she had queried the charges repeatedly and did not receive any adequate replies from the Factor over a prolonged period of time. In the circumstances the Tribunal was of the view that although the charges themselves were reasonable, it was not appropriate for the Factor to apply any late payment charges.
33. The Tribunal considered the Homeowner's claim for an award to be made in respect of the delay, worry, stress and inconvenience she has suffered as a result of the Factor imposing late payment charges. The Tribunal in making its decision considered that an earlier Tribunal has made a similar award to the Homeowner. Furthermore, the Homeowner herself in her application indicated to the Tribunal that what she was looking for was for the late fees and debt recovery fees (total £203.03) to be taken off her bill and to ensure thereafter there was accurate accounting. In addition, the Factor did in advance of the initial hearing offer to credit the Homeowner's account with a full refund of the late payment and other charges if she withdrew her application. Taking everything into account the Tribunal did not consider an award beyond the repayment of the late payment charges and Sheriff Officers fees would be justified.
34. The Homeowner had suggested that late payment charges were being applied by the Factor in advance of invoices becoming due for payment. Whilst the Tribunal accepted that this might appear to be the case it suspected that these charges were in fact being applied in respect of non-payment of items on previous invoices. It would therefore recommend that the Factor when applying late payment charges clearly state what they are for

and not just advise "James Gibb residential factors Late Payment Administration Charge" as this does not tell a homeowner what the charge relates to.

35. The Tribunal was satisfied that the Factor did not ensure compliance with Section 4.3 of the code.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

Appeals

A homeowner or property factor 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.

Graham Harding _____ Legal Member and Chair

28 December 2018 _____ Date