



Statement of Decision with Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) in respect of an application made under Section 17 of the Property Factors (Scotland) Act 2011 ("the Act")

Reference number: FTS/HPC/LM/22/2043

Re: Property at 32, Linnet Drive, Kirkintilloch, G66 3DG ("the Property")

The Parties:

Miss Cheryl Clark and Mr. Darren Cossar both residing at the Property ("the Homeowners")

Residential Management Group Scotland Limited, Unit 6, 95, Morrison Street, Glasgow, G5 8BE ("the Property Factor")

Tribunal Members

Karen Moore (Chairperson) and Elaine Munroe (Odinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Property Factor: -

- (i) has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct Section 1. 1b, Section 2.5, Section 4.8; and Section 7.2
and
- (ii) has failed to comply with the Property Factor's Duties.

Background

1. By application received between 27 June 2022 and 19 August 2022 ("the Application") the Homeowners applied to the First-tier Tribunal for Scotland (Housing and Property Chamber for a determination that the Factor had failed to comply with the Code of Conduct for Property Factors ("the Code") and had failed to comply with the Property Factor Duties.
2. The Application comprised the following documents: -(i) application form in the First-tier Tribunal standard application form indicating that the parts of the Code complained of are Written Statement of Services at Section 1.1.B; Communications and Consultation at Section 2.5; Debt Recovery at Section 4.8 and Complaints Resolution at Section 7.2 and alleging a failure to comply with the property factor

duties (ii) copy correspondence between the Homeowner and Property Factor and (iii) copy Simple Procedure Order GLW-SG3539-21.

3. The Application was accepted by the tribunal and a Case Management Discussion (CMD) was fixed for 15 November 2022 at 10.00 by telephone conference call. Prior to the CMD, the Property Factor submitted copy correspondence chain between it and the second-named Homeowners dated between 6 September 2022 and 6 October 2022.

Case Management Discussion

4. The CMD took place on 15 November 2022 at 10.00 by telephone conference call. The Miss Clark, the first-named Homeowner, was present on the call and supported by her father, Mr. M. Clark. The Property Factor was represented by Ms. Pieper, Ms. Harrison and Mrs. Neilson who spoke on behalf of the Property Factor.
5. On behalf of the Property Factor, Mrs. Neilson advised that the Property Factor accepted that there had been a breakdown in communications and that the Property Factor had made errors but the Property Factor did not accept the full extent of the complaints as set out in the Application.
6. The outcome of the CMD was that a Hearing was fixed and a Direction was issued by the Tribunal in respect of the evidence required at the Hearing. The Direction was as follows: "*With reference to the Application lodged by the Homeowner, the Tribunal directs the Homeowner to submit:*
(i) A copy of the correspondence (not already been lodged with the Application) sent by the Homeowner to the Property Factor;
(ii) A copy of the correspondence received from the Homeowner's conveyancing lawyers relating to the factoring at the Property and the change of ownership to the Homeowner.
The Tribunal directs the Property Factor to submit:
(iii) A copy of all correspondence (not already been lodged with the Application) sent by the Property Factor to the Homeowner at the Homeowner's previous address and at the Property throughout the Homeowner's ownership;
(iv) A copy of the correspondence received from the Homeowner's conveyancing lawyers and the previous owner's conveyancing lawyers relating to the change of ownership and
(v) A print of the Homeowner's title sheet to the Property.
The said documentation should be arranged in one bundle in date order and lodged in hard copy or by email attachment (not zip file) with the Chamber and copied to the other Party no later than close of business seven days before the date of the Hearing to be fixed."
7. The Homeowners complied with the Direction but the Property Factor did not do so.

8. Prior to the Hearing, the Homeowners submitted a letter from the Property Factor dated 8 and received on 15 February 2023 headed "final reminder" and requesting payment of £153.06 within seven days.

Hearing

9. A Hearing by video conference took place on 20 February 2023 at 10.00 am. The first and second-named Homeowners were present and unrepresented. The Property Factor was represented by Ms. Lisa Pieper, the Property Factor's Regional Manager. Although two of Ms. Pieper's colleagues were present as observers, Ms. Pieper confirmed to the Tribunal that neither would be called to give evidence.
10. Ms. Pieper advised the Tribunal that the Property Factor had lodged productions in response to the Direction on Friday 17 February 2023 and confirmed that these had not been sent to the Homeowners. The Tribunal clerk was unable to locate the productions and so, as neither the Homeowners nor the Tribunal had received the productions, and, as the productions had been lodged late both in terms of the Direction and the Tribunal Rules, the Tribunal advised that it would proceed in the absence of the productions.
11. Miss Clark for the Homeowners confirmed the position had not changed since the CMD on 15 November 2022. She advised the Tribunal that she had received a phone call from the Property Factor on 15 November 2022 to discuss the outstanding balance on their account after which the Property Factor raised a credit note for £192.00 to reduce the Homeowners' account. Miss Clark stated that the Homeowners considered that further sums should also have been credited to reduce the balance to £12.00.
12. Ms. Pieper advised the Tribunal that further sums of £600.76, being £150.00 compensation awarded by the Sheriff at Glasgow and £450.76 being further court related costs have now been credited to the Homeowner's account but accepted that the Homeowners had not been made aware of this. She advised that she agreed with Miss Clark that the Homeowners' account now shows an outstanding balance of £12.00. Ms. Pieper further advised that the Property Factor's solicitors, bto, have been instructed to discharge the Notice of Potential Liability registered against the Homeowners' title at no cost to the Homeowners. Ms. Pieper understood that this required a court process which was underway.
13. With regard to the Homeowners' complaints, Ms. Pieper advised the Tribunal that the Property Factor accepted these in their entirety and apologised for the reminder letter sent on 8 February 2023. Ms. Pieper agreed that the content of her statements to the Tribunal were in mitigation to explain what had gone wrong with the Property Factor's processes and attributed these in part to human error and to mistakes.
14. Miss Clark for the Homeowners advised the Tribunal that she and Mr. Cossar have been under significant stress since receiving the Simple Procedure summons in February 2022. She confirmed that the sum sued for, £845.06, had been paid in full ahead of the recall case being heard and that, since that time, the Property Factor's

have not been able to resolve matters. Ms. Peiper agreed that there have been delays and stated that the Homeowners' account has only been corrected in the last few days. She indicated that she would provide the Homeowners with full details.

15. In response to questions from the Tribunal, Miss Clark confirmed that she estimated the effect of the Property Factor's mishandling of matter equated to around £1,500.00 in monetary value as set out in the Application and that she has had further loss of wages in having to attend the CMD and the Hearing. With regard to re-mortgaging, Miss Clark advised that the Homeowner's current mortgage expires in November 2023 and that she and Mr. Cossar have been concerned that the court action and the Notice of Potential Liability will impact negatively on their ability to secure another mortgage. She explained that they have two small children and the stress of this matter is taking a toll on family life.

Findings in Fact.

16. The Tribunal had regard to the Application in full, the written submissions and productions as properly lodged and the statements made at the CMD and the Hearing, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.
17. The Tribunal found the following facts established:
 - i) The Parties are as set out in the Application;
 - ii) The Homeowners are "a homeowner" in terms of the Act;
 - iii) The Property Factor is a property factor in terms of the Act and is bound by Sections 14 and 17 of the Act, being the duty to comply with the statutory codes of conduct and the duty to comply with the Property Factor's Duties;
 - iv) The services provided by the Property Factor relate to land management;
 - v) The Homeowners purchased and took ownership of the Property on or around 9 November 2018;
 - vi) The solicitor acting for the Seller to the Homeowners notified the Property Factor of the change of ownership in accordance with accepted conveyancing practice;
 - vii) The Property Factor erroneously updated its records in respect of the Homeowners' address;
 - viii) The Property Factor should have updated its records to show the Homeowners' address as that of the Property but updated the records to show the Homeowners' previous address;
 - ix) The Property Factor did not issue a Written Statement of Services to the Homeowners until October 2022;
 - x) The Property Factor issued accounts to the Homeowners at their previous address;
 - xi) The accounts were not received by the Homeowners and so were not paid by them;
 - xii) The Property Factor raised debt recovery proceedings in Glasgow Sheriff Court against the Homeowners in respect of the unpaid accounts and obtained a decree for payment;

- xiii) The Homeowners became aware of the decree when a payment charge was served by Sheriff Officers in or around February 2022;
- xiv) The Homeowners paid the sum sued for in the amount of £845.06 on or around 8 February 2022;
- xv) The Homeowners applied to recall the decree and were successful in that application;
- xvi) The Sheriff at Glasgow recalled the decree, dismissed the Property Factor's claim and awarded the Homeowners the maximum sum of £150.00 in expenses;
- xvii) In addition to raising the court action, the Property Factor lodged a Notice of Potential Liability against the Homeowners' title, DMB85581;
- xviii) The Notice of Potential Liability remains lodged against the Homeowners' title;
- xix) The Property Factor credited the Homeowners' account to the extent of £600.76, being the award of court expenses of £150.00 and the Property Factor's court costs of £450.76, on or around September 2022
- xx) The Property Factor credited the Homeowners' account to the extent of £192.00, being further court costs, on or around 23 December 2022;
- xi) The Property Factor continues to pursue the Homeowners for sums which the Property Factor has claimed as being due;
- xxii) The Homeowners have repeatedly confirmed that they are willing to pay the sum properly due by them;
- xxiii) The Homeowners have set out their understanding of the sum which they are due as being £12.00;
- xxiv) The Property Factor now accepts that the balance due by the Homeowners is £12.00 and
- xxv) The Homeowners have been caused unnecessary stress and financial worry as a direct result of the Property Factor's actions.

Decision of the Tribunal with reasons.

18. Section 19 of the Act states: “(1) *The First-tier Tribunal must, in relation to a homeowner's application referred to it ... decide (a)whether the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and (b)if so, whether to make a property factor enforcement order.”*
19. Having heard the Parties and, in particular, having heard that the Property Factor accepted the complaints raised in the Application, the Tribunal advised the Parties that it would make a finding in favour of the Homeowners and would consider making a property factor enforcement order.
20. Section 1.1 of the Code states: “*A property factor must provide each homeowner with a comprehensible Written Statement of Services (WSS) setting out, in a simple, structured way, the terms and service delivery standards of the arrangement in place between them and the homeowner. If a homeowner makes an application under section 17 of the 2011 Act to the First-tier Tribunal for a determination, the First-tier Tribunal will expect the property factor to be able to demonstrate how their actions compare with their WSS as part of their compliance with the requirements of this*

Code. Factor accepted that there had been a breakdown in communications, including common charges accounts” and Section 1.B states “Services Provided the core services that the property factor will provide to homeowners. This must include the target times for taking action in response to requests from homeowners for both routine and emergency repairs and the frequency of property visits (if part of the core service); the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a ‘menu’ of services) and how these fees and charges are calculated and notified to homeowners.” As the Property Factor accepted that it did not issue the Written Statement of Services until October 2022, four years after the Homeowners took ownership of the Property, the Tribunal found that the Property Factor has breached this part of the Code.

21. Section 2.5 of the Code states: “*A property factor must provide a homeowner with their contact details, including full postal address with post code, telephone number, contact e-mail address (if they have an e-mail address) and any other relevant mechanism for reporting issues or making enquiries. . If it is part of the service agreed with homeowners, a property factor must also provide details of arrangements for dealing with out-of-hours emergencies including how a homeowner can contact out-of-hours contractors.*” As the Property Factor accepted that it did not issue the Written Statement of Services which contained this information, the Tribunal found that the Property Factor has breached this part of the Code.
22. Section 4.8 of the code states: “*On request, a property factor must provide homeowners with a statement of how service delivery and charges will be affected if one or more homeowners does not pay their bills.*” As the Property Factor accepted that it did not provide this information, the Tribunal found that the Property Factor has breached this part of the Code.
23. Section 7.2 of the Code states: “*When a property factor’s in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed in writing.*” Although the Property Factor had not fully completed its complaints process, the Tribunal took the view that the Property Factor could and should have provided the Homeowners with a clear decision on their complaint and so found that the Property Factor has breached this part of the Code.
24. With regard to Property Factor Duties, as the Property Factor accepted that it did not comply with the Property Factor Duties and accepted that it continued to pursue an incorrect debt after the date of the CMD, the Tribunal found that the Property Factor failed to comply with the Property Factor Duties.

Property Factor Enforcement Order (PFEO)

25. Having made a decision in terms of Section 19(1)(a) of the Act that the Property Factor failed to comply with the Section 14 duty and has failed to carry out the Property Factor's Duties, the Tribunal then proceeded to consider Section 19(1) (b) of the Act which states "*(1) The First-tier Tribunal must, in relation to a homeowner's application referred to it ... decide ... whether to make a property factor enforcement order.*"
26. The Tribunal had regard to the fact that, although the Property Factor's breaches of the Code and its failure to comply with the Property Factor's Duties are several, they emanate from the same core issues being the failure to record the Homeowners' address properly, the ensuing erroneous pursuit of debt at the wrong address, and the continued failure to understand the extent and nature of the Homeowners' complaints resulting in a failure to rectify accounting errors. Therefore, the Tribunal is mindful not to penalise the Property Factor for this duplication of failings.
27. The Tribunal takes the most serious view of the Property Factor's actions following the decision made by the Sheriff at Glasgow to dismiss the Property Factor's Simple Procedure claim. The Property Factor ignored the Sheriff's decision and continued not only to pursue the debt unlawfully but failed to make payment of the court expenses due to the Homeowners for a considerable time. Further, the Property Factor has only rectified the Homeowner's account in recent days, and, that due to the persistence of the Homeowners. The Tribunal notes that although the Property Factor has instructed solicitors to discharge the Notice of Potential Liability, the Notice remains on the Homeowner's title without justification. Whilst the Tribunal appreciates the candour with which Ms. Pieper set out the Property Factor's position and the apologies which she tendered to the Homeowners, the Tribunal takes the view that the Property Factor's conduct has been inexcusable.
28. The Tribunal has no doubt that the Property Factor's actions and inactions have caused and continue to cause the Homeowners significant and unnecessary stress and worry about their financial dealings with the Property Factor and the effect that these dealings might have on their credit worthiness. The Homeowners have also been caused considerable inconvenience in having to repeatedly contact the Property Factor setting out their position and, given the poor and unacceptable way in which the Property Factor has dealt with them, have done so in a respectful and measured way.
29. Therefore, the Tribunal proposes to make a PFEO.
30. Section 20 of the Act states: "*(1) A property factor enforcement order is an order requiring the property factor to (a) execute such action as the First-tier Tribunal considers necessary and (b) where appropriate, make such payment to the homeowner as the First-tier Tribunal considers reasonable. (2) A property factor enforcement order must specify the period within which any action required must be executed or any payment required must be made. (3)A property factor enforcement order may specify particular steps which the property factor must take.*"
31. The Tribunal proposes to make a PFEO to order the Property Factor (i) to provide the

Homeowner with a detailed statement to the date hereof showing all of the financial intromissions on their account, (ii) to discharge the Notice of Potential Liability without delay at its own cost and (iii) to compensate the Homeowners for the inconvenience, worry, stress and time spent.

32. With regard to the matter of compensation, the Tribunal considers that taking all matters into account, including loss of wages, a sum of £2,000.00 is fair and reasonable.
33. Section 19 (2) of the Act states: - *"In any case where the First-tier Tribunal proposes to make a property Respondents enforcement order, it must before doing so (a)give notice of the proposal to the property Respondents, and (b)allow the parties an opportunity to make representations to it."* The Tribunal, by separate notice intimates the PFEO it intends to make and allows the Parties until 8 march 2023 to make written representations on the proposed PFEO. It is open to the Parties to request a hearing on the proposed PFEO if they so wish.
34. The decision is unanimous.

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.

20 February 2023

Legal Member

Date

