



**Statement of Decision with reasons by the First-tier Tribunal for Scotland
(Housing and Property Chamber) in terms of Rule 24 of The First-tier Tribunal
for Scotland Housing and Property Chamber (Procedure) Regulations 2017
("the Rules") in respect of an Application made under Section 17 of the
Property Factors (Scotland) Act 2011 ("the PF Act")**

Reference number: FTS/HPC/PF/24/2145 (the Application")

Property: 106 William Street, Hamilton, ML3 9AX ("the Property")

The Parties:

Mr. Barrie McGarva, residing at the Property ("the Homeowner")

Newton Property Management, having a place of business at 87 Port Dundas Road Glasgow G4 0HF ("the Property Factor") per their agents, Pollock Fairbridge, Solicitors, Pavilion 5, Buchanan Court, Cumbernauld Road, Stepps, Glasgow, G33 6HZ("the Property Factor's Agents")

Tribunal Members

Karen Moore (Chairperson) Helen Barclay (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") having determined that the Homeowne had not complied with Section 17(3) of the PF Act dismissed the Application.

Background

1. By applications received on 30 May 2024 the Homeowner, Mr. McGarva, applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for determinations that the Property Factor had failed to comply with the Code of Conduct for Property Factors 2012 ("the 2012 Code") and the Code of Conduct for Property Factors 2021 ("the 2021 Code").

2. Application referenced FTS/HPC/PF/24/2145 complained of a breach of the 2012 Code at Section 4.8 in respect of incidents which occurred before 16 August 2021, when the 2012 Code ceased to apply.
3. Application referenced FTS/HPC/PF/24/2146 complained of a breach of the 2021 Code at OSP12 in respect of incidents which occurred on and after 16 August 2021, when the 2021 Code came into force.
4. Both applications were accepted by the tribunal chamber and a Case Management Discussion (CMD) was held on 7 October 2024 at 10.00 by telephone conference call for both applications. Mr. McGarva took part and was unrepresented. The Property Factor was represented by Mr. Fairbridge of the Property Factor's Agents supported by Ms. C. Flanagan of the Property Factor
5. At the CMD, the Tribunal explained to Mr. McGarva that the application process was a legal process and, although less formal than court proceedings, the terms of the Act and the Tribunal Rules must be followed. The Tribunal explained that the onus was on him to demonstrate that the applications were compliant with the legislation and, in particular, with Sections 17 (2) and (3) of the Act. The Tribunal adjourned the CMD to a further CMD and issued a Direction in respect of information or evidence required from Mr. McGarva to establish compliance with the Act.
6. Mr. McGarva complied with the Direction sufficiently to allow the applications to proceed.
7. The adjourned CMD was held on 16 January 2025 at 10.00 by telephone conference call. Mr. McGarva took part and was unrepresented. The Property Factor was represented by Mr. Fairbridge of the Property Factor's Agents supported by Ms. C. Flanagan of the Property Factor.
8. The Tribunal noted that Mr. McGarva's complaints had been clarified as the Property Factor proceeding to debt recovery court action in respect of FTS/HPC/PF/24/2145 and the 2012 Code and a meeting in March 2024 at the Property Factor's Agents' offices during which Mr. McGarva claimed to have been intimidated in respect of FTS/HPC/PF/24/2146 and the 2021 Code.
9. For the Property Factor, Mr. Fairbridge stated that the Property Factor has acted properly throughout and had taken steps which were not only reasonable, but necessary.

10. The Tribunal advised that as the applications were opposed the Tribunal would adjourn the CMD to a Hearing of evidence.

Hearing

11. The Hearing was held on 1 August 2025 at 10.00 at the Tribunal Centre, Brandongate, Hamilton. Mr. McGarva took part and was unrepresented. The Property Factor was represented by Mr. Fairbridge of the Property Factor's Agents supported by Ms. C. Flanagan of the Property Factor.

12. The Tribunal dealt with and heard evidence, firstly, in respect of FTS/HPC/PF/24/2145 (form C1) and, at the close of those proceedings dealt with t of FTS/HPC/PF/24/2146. The Tribunal's decision in respect of FTS/HPC/PF/24/2146 is set out in a separate written decision.

Homeowner's Evidence.

13. Mr. McGarva's evidence was as set out in the application form and in his written response to the Direction.

14. Mr. McGarva accepted from the outset that he has owed a considerable debt to the Property Factor for some time and that this debt began prior to the Property Factor taking over factoring of the development of which the Property forms part.

15. Mr. McGarva explained that he has had a medical condition since birth and has been diagnosed with depression since 2001. He explained that he had been open with the Property Factor regarding his medical conditions from the start of their appointment to factor the development of which the Property forms part. Accordingly, the Property Factor ought to have been aware that his condition fell within the protected characteristics as set out in the Equality Act 2010 and that he was entitled to protection in terms of that Act.

16. Mr. McGarva stated that, in or around 2016, he had a telephone conversation with Mr Tom McCusker of the Property Factor in which Mr McCusker referred to Mr McGarva's condition as a "sob story". Following this occurrence, Mr. McGarva attended a meeting at the Property Factor's office. Mr. McGarva's position is that this meeting was not in relation to their debt due by him but was in relation to Mr McCusker's handling off the property management and the way in which Mr. McCusker dealt with Mr. McGarva.

17. Mr. McGarva's evidence was that he did not receive any correspondence from the Property Factor before they raised a debt action against him in Hamilton Sheriff Court and so he had not been given an opportunity to seek debt advice. His further evidence was that he was aware of debt recovery processes as he has multiple creditors.
18. He stated that he first became aware of this court action when the summons was served on him by Sheriff Officer. He confirmed that he did not respond to the court action and so decree was granted against him in 2018. Mr. McGarva's reason for not responding was his "fluctuating" mental health. Mr. McGarva stated that he applied to recall the decree but the recall application but was not successful and the decree stood.
19. Mr. McGarva stated that he is aware of the pre-action steps which creditors must take from his own knowledge and from debt advice agencies' websites and that these steps had not been taken by the Property Factor when dealing with him. He stated that the only intimation of the sums due were given in the routine invoices and statements sent by the Property Factor.
20. Mr. McGarva maintained that, as the Property Factor knew of his medical condition and as his medical condition satisfies the protected characteristic of disability as set out in Section 6 of the Equality Act 2010, the Property Factor ought to have taken this into account before raising the court action against him. Mr. McGarva's evidence was that the Property Factor failed to treat him fairly in this respect and so victimised him in terms of Section 27 of the Equality Act 2010. He stated that the harassment he suffered at the hands of the Property Factor and their then managing director, Mr McDonald, amounted to discrimination in terms of the Equality Act 2010.
21. Mr. McGarva pointed out that the Property Factor had not provided or lodged any of the pre-action letters which it claimed to have sent to him. He stated that he believed this to be because the letters do not exist and so this failure on the part of the Property Factor reinforced and established his position.

Cross examination

22. In response to questions by Mr. Fairbridge on behalf of the Property Factor, Mr. McGarva refuted strongly that the purpose of the meeting in May 2016 was to discuss his level of debt to the Property Factor. Mr McGarva

maintained that, at that meeting Mr. McDonald and Miss McHugh of the Property Factor, only discussed the relationship between Mr. McCusker and Mr McGarva and that the outcome was that Miss McHugh was appointed to deal with Mr. McGarva. Mr. McGarva disputed that there had been other meetings with him to discuss his debt. He maintained that there had only been the meeting in 2016 which did not deal with debt.

23. In response to Mr. Fairbridge asking Mr. McGarva to point out where Mr. McGarva had given prior notice of this complaint to the Property Factor, Mr. McGarva asked the Tribunal to confirm if this was an appropriate course of action as he thought that this point had been settled at the CMD. The Tribunal explained that it was appropriate for Mr. Fairbridge to raise the point that Section 17(3) of the PF Act had not been complied with by Mr. McGarva as it was an essential element of the statutory process. The Tribunal explained that the purpose of the Hearing was to test evidence to establish if the proper procedure had been carried out and if the substantive matters of the complaint had been established. Mr. McGarva did not provide evidence on this point and repeated that the Property Factor had not given him prior notice of the court action as they ought to have done.

Property Factor's Evidence

24. Mr. Fairbridge did not lead any evidence on behalf of the Property Factor

Summing Up

25. In summing up, Mr. McGarva stated that his complaint had gone unchallenged by the Property Factor and that they had not rebutted the facts that he had put forward. Mr. McGarva stated that there was not adequate opposition to undermine his position as no documents to the contrary had been produced.

26. In summing up, Mr. Fairbridge stated that the Property Factor has a comprehensive debt recovery policy and procedures and there was no evidence that these had not been adhered to.

Additional evidence before the Tribunal

27. In addition to the oral evidence, the Tribunal had the written statements which formed part of the Application and in response to the Direction.

Tribunal's assessment of the evidence

28. The Tribunal assessed Mr. McGarva's as not being wholly reliable. Although Mr. McGarva spoke at length, his evidence was repetitive and lacked detail in respect of Section 4.8 of the 2012 Code. The Tribunal took into consideration that Mr. McGarva himself stated that his general health prior to the raising of the court action had fluctuated. The Tribunal noted that the Sheriff Court had refused to recall the decree and considered that it improbable that the court would have done so had the full pre- action procedures and fair notice not been carried out or given by the Property Factor as pursuer.

29. The Tribunal found it unlikely that the level of debt would not have been discussed at the meeting in 2016 and found it unlikely that the Property Factor would not have set out the steps which they could and would take in respect of recovering the debt.

30. Further, given the level of debt due by Mr. McGarva, the Tribunal found it improbable that the Property Factor did not issue arrears letters.

31. The Tribunal had regard to Mr. McGarva's position that the Property Factor had not lodged copies of the debt recovery letters to him. The Tribunal noted that the Property Factor maintained their preliminary plea that Section 17(3) of the PF Act, and as the burden of proof in respect of both compliance with the PF Act and the substantive matters is on the Applicant, placed little weight on that point.

32. With regard to Section 27 of the Equality Act 2010, Mr. McGarva did not expand on this in his oral evidence. His written representations referred to voicemail notes left for him by the Property Factor, to requests made by him to the Property Factor seeking meetings with them and that he had been advised to take advice from Citizens Advice in respect of communications.

The Tribunal's view is that these are examples of the Property Factor attempting to make reasonable adjustment for Mr. McGarva and support the position that the Property Factor had given prior notice of the possibility of court action rather than the opposite. There was no evidence of victimisation, specific or implied.

Section 4.8 of the 2012 Code.

33. The Application complains only of Section 4.8 of the 2012 Code which states:

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

Findings in Fact.

34. The Tribunal made the following findings in fact and that on the balance of probability:

- A. Mr. McGarva is a homeowner in terms of the PF Act;
- B. The Property Factor is a property factor in terms of the PF Act;
- C. Mr. McGarva owes a considerable debt to the Property Factor;
- D. Meetings took place between the Parties from 2016 onwards;
- E. The last meeting took place on 28 September 2023;
- F. The meetings discussed, among other things, Mr. McGarva's indebtedness to the Property Factor;
- G. The Property Factor obtained a decree in respect of the debt in Hamilton Sheriff Court;
- H. The Property Factor has a debt recovery procedure in terms of the 2012 Code of Conduct;
- I. The Property Factor complied with their debt recovery procedure.

Issue for the Tribunal.

35. Regardless of the Tribunal's assessment of the evidence on the substantive aspect of the complaint and the Application, the primary issue for the Tribunal is whether or not Mr. McGarva as the homeowner complied with Section 17(3) of the PF Act.

36. Section 17 (2) states: "An application under subsection (1) must set out the homeowner's reasons for considering that 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".

37. Section 17 (3) of the PF Act states: "No such application may be made unless (a)the homeowner has notified the property factor in writing as to why the

homeowner considers that 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)the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.”

38. Therefore, before making an application to the Tribunal the homeowner must give prior written intimation of the specific breach and the reasons why the homeowner considers there has been a breach.
39. The Tribunal noted that it had specifically pointed this out at the CMDs and provided the wording of both Section 17(3) and Section 17(2) which supports Section 17(3) in the first CMD Note. The Tribunal, in its Direction, had required Mr. McGarva to provide a copy of a letter dated 5 February 2024 which, at the first CMD, he stated he had hand-delivered to the Property Factor's Agents following a meeting between the Parties in September 2023. Mr. McGarva did not produce a copy of this letter. The Tribunal appreciates that the letter was handwritten but noted that Mr. McGarva did not provide a rubric of its content or refer to it in his evidence.
40. The Tribunal had the benefit of the Property Factor's Agents' reply of 14 March 2024 to Mr. McGarva's letter of 5 February 2024. The Property Factor's Agents' letter under heading “Victimisation (Equality Act 2010 S.27) and Rule 4.8 Code of Conduct” refers to Section 4.8 of the 2012 Code. Page 2 of that letter describes the steps taken by the Property Factor in complying with their debt recovery policies and with Sections 4.4, 4.5 and 4.1 of the 2012 Code but does not make any further reference to Section 4.8 of the Code.. The letter does not include specific phrases from Mr. McGarva letter of 5 February 2024. Therefore, even by taking the wording of the Property Factor's Agents' letter of 14 March 2024 at its widest, the Tribunal cannot imply that Section 17(3) of the PF Act was complied with.
41. Accordingly, the Tribunal having neither explicit nor implied evidence of compliance with Section 17(3) of the PF Act, determined that Mr. McGarva had not complied with that Section and so the Tribunal did not have jurisdiction.
42. This Decision is 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.

24 August 2025

Legal Member/Chair

Date

