

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Note of Hearing: First-tier Tribunal for Scotland Housing and Property
Chamber (Rules of Procedure) Regulations 2017, rule 17**

Chamber Ref: FTS/HPC/PF/21/2686

**Property at Flat 3/1, 98 Turnberry Road, Glasgow, G11 5AS
("The Property")**

The Parties: -

Mr Callum Anthony Hiller *qua* Executor Dative of the late Ann Andrea Hiller ("the Homeowner")

Walker Sandford Property Management Limited ("the Factor")

Tribunal Members: -

**Maurice O'Carroll (Legal Member)
Elaine Munroe (Ordinary Member) (Housing)**

Summary of Discussion

Background

1. A Case Management Discussion (CMD) was held at 10am on 4 February 2022 by means of a telephone conference. The Homeowner was represented by Mr David Watson, Solicitor with Messrs Wilson McKendrick. The Factor was represented by Mr Douglas Brown, Customer Services Manager.
2. The Case concerns an application dated 31 October 2021 submitted on behalf of the Homeowner. A notification letter dated 4 October 2021 was sent to the Factor by the Homeowner detailing alleged breaches of the Code of Practice (2012 version). The sections referred to were 1.3, 4.3 and 4.5. Following discussion, it was agreed by the Mr Watson that the only relevant section of the Code referred to was section 4.3.
3. That section under the heading Debt Recovery states the following: "Any charges that you impose relating to late payment must not be unreasonable or excessive." It was agreed by the parties that the 2012 Code applied, rather than the most recent version dated 16 August 2021. It was also agreed that it

was for the Tribunal to decide whether charges applied were in its judgment “unreasonable or excessive.”

4. The late Mrs Hiller was sent a copy of the Factor’s Written Statement of Services (WSS) on 31 August 2016. The version sent to her on that date was the one considered by the Tribunal. The WSS embodies the contract between homeowners and the Factor in relation to the property management services provided by the Factor to the Homeowner.
5. The late Mrs Hiller’s account with the Factor has been continuously in arrears with no payment made since 2016. At the date of the CMD, the arrears amounted to £6,299.52.

Preliminary issue

6. Mr Brown for the Factor produced written submissions dated 11 January 2022 which he spoke to during the CMD. A preliminary issue which was raised was whether Mr Hiller could competently raise an application. Section 17 of the Property Factors (Scotland) Act 2011 provides that an application may be brought by a “homeowner.” As Mr Callum Hiller did not own the Property, it was argued that he was not a homeowner entitled to bring an application in terms of the Act.
7. In response, Mr Watson explained that although not yet confirmed, Mr Hiller acted as Executor Dative and therefore Trustee of the Estate of the late Mrs Hiller. He therefore effectively “stepped into the shoes” of the deceased and could act on her behalf in that function. The Tribunal agreed with that interpretation and decided that the application had been competently made.

Substantive issue

8. The substance of the application was succinctly put in an email by Mr Watson to the Tribunal on 16 January 2022: He questioned whether it is reasonable for the Factor to be charging 1.5% per month on the outstanding debt in respect of the Property and moreover a monthly administration charge of £12 for correspondence in relation to the account in circumstances where the debt is admittedly due and will be paid once the Estate is ingathered and where the Factor has registered a Notice of Potential Liability over the Property.
9. In answer, Mr Brown pointed out that the block in which the Property has been located has been operating at a loss with the Factor being forced to pick up the shortfall. Further, it has no redress in the event that emergency or other major works are required in the future. The Property benefits from block insurance and communal cleaning and other communal works provided by the Factor but with no indication as to when the Estate will finally be ingathered and its costs reimbursed.
10. Mr Brown also discussed other properties which he manages (18 in number) which are presently executries. In those cases, it is his experience that those managing the executory estates themselves pay the factoring invoices thereby

avoiding them going into arrears. A consequence of not falling into arrears is that interest and administration charges are avoided.

11. Clause (f) of section C of the WSS under the heading Debt Recovery states the following:
“(i) When the account is overdue an ‘interest on overdue account’ is applied. The rate is currently 1.5% per month...
(ii) Any account over 28 days outstanding from the invoice date and in excess of £30 becomes liable for an administration charge for correspondence in relation to the account. This is presently £12.00.”
12. Both the interest charge and the administration charge therefore have a contractual basis in the WSS. All other homeowners under the management of the Factor are subject to those charges.

Conclusion on the substantive issue

13. In the view of the Tribunal, those charges, whilst relatively high, are neither unreasonable nor excessive. Interest charges are a normal commercial function to recompense creditors while they are deprived of the benefit of funds due to them. Those charges are clearly intended to act as a disincentive to homeowners from falling behind on their factoring accounts. Although the term “penalty interest” was used by Mr Watson in submission, no legal basis was advanced was put forward to justify such a description.
14. The Tribunal was of the view that the applicant was effectively inviting the Tribunal to re-write the terms of the WSS contract. The Tribunal does not have the jurisdiction to do that.
15. Accordingly, the Tribunal declined to uphold the sole remaining complaint based upon section 4.3 of the 2012 Code and dismissed the application.

Undertakings

16. The above decision was sufficient to conclude the application. However, the Tribunal suggested to Mr Brown that whilst the Factor was contractually within its rights to send monthly reminders to the Homeowner and thereby levy a £12 administration charge, this was not strictly speaking necessary as the Homeowner was well aware of the debt due and would pay it as soon as the executory had been concluded.
17. In response to that suggestion, Mr Brown gave an undertaking to the Tribunal that the Factor would put a hold on the Homeowner’s account in order to the extent of ensuring that there would be no further monthly letters incurring the £12 administration charge from the date of the CMD.
18. To be clear, that undertaking still permits the Factor to apply normal maintenance and other management charges to the Homeowner account as well as the 1.5% interest on the outstanding invoice until payment.

19. For his part and on behalf of his client, Mr Watson gave the Tribunal an undertaking that he would provide to the Factor a monthly update regarding the progress of the executory starting 5 March 2022.
20. He also provided assurance that the Estate was solvent and undertook that once the Estate was ingathered, the Factor would be paid its outstanding invoice. To be clear, payment of the Factor's invoice is not contingent on the Property being sold. There was therefore no danger that if, for example, the Property were transferred for nil consideration, the debt to the Factor would thereby be avoided. Payment will follow the winding up of the Estate.
21. The Tribunal would like to express its gratitude to the parties for making the above undertakings.

Signed: Maurice Carroll

Date: 4 February 2022

Legal Member and Chair