



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) in an application under section 17 of the Property Factors (Scotland) Act 2011 (“the Act”)

Property Factor Enforcement Order (PFOE) under Property Factors (Scotland) Act 2011 Section 19 (3)

Chamber Ref: FTS/HPC/LM/23/0214

Re: Property at 97A Candren Road, Paisley, PA3 1DL (“the Property”)

Parties:

Alan Bruce, residing at 4 Haldane Street, Glasgow G14 9QN (“the Applicant”)

Hacking and Paterson, 1 Newton Terrace Glasgow G3 7PL (“the Respondent”)

Tribunal Members:

Jim Bauld (Legal Member)

Helen Barclay (Ordinary Member)

Background

1. By application dated 23 January 2023 the Applicant made an application to the Tribunal alleging breaches of certain sections of the Code of Conduct for Property Factors (“the Code”) issued in terms of the Property Factors (Scotland) Act 2011. (“the 2011 Act”) and that the respondent had failed to carry out the property factor’s duties as defined in section 17 of the 2011 Act..

2. The application was accepted and was referred to a Tribunal for determination and a Case Management Discussion was set to take place on 16 August 2023 via telephone case conference. Appropriate intimation of that hearing was sent to both the Applicant and the Property Factor.
3. By email dated 9 May 2023, the respondent lodged written representations setting out their response to the application

Case Management Discussion

4. The Case Management Discussion (“CMD”) took place on 16 August 2023 by telephone case conference. The applicant was in attendance and the property factor was represented by Mr Daniel Kingham, Associate Factoring Director.
5. The tribunal explained the purpose of the case management discussion and set out the details of the overriding objective of the tribunal as contained in the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.(“the procedure rules”) The tribunal also explained the manner in which the telephone conference call would be conducted

Discussions at the CMD

6. During the course of the case management discussion the tribunal heard from both Mr Bruce and Mr Kingham.
7. In the application, the applicant complained that the respondent had breached two separate sections of the code of conduct.

Section 2... “Communication and consultation”

8. The first alleged breach related to section 2 “Communication and consultation” and in particular sections 2.3 and 2.4.
9. The relevant terms of section 2.3 and 2.4 in the current version of the Code (applicable since 12 August 2021) are as follows.

2.3 The WSS must set out how homeowners can access information, documents and policies/procedures. Information and documents can be made available in a digital format, for example on a website, a web portal, app or by email attachment. In order to meet a range of needs, property factors must provide a paper copy of documentation in response to any reasonable request by a homeowner.

2.4 Where information or documents must be made available to a homeowner by the property factor under the Code on request, the property factor must

consider the request and make the information available unless there is good reason not to.

10. The essence of this complaint was that the applicant had asked the respondent to provide copies of certain documents related to an inspection of the general area which had taken place in January 2022. The respondent had indicated that they did not normally provide these reports as they were internal documents for the own staff to use. It was acknowledged that a previous internal report had been exhibited to homeowners in the development and had been posted on the respondent's website for homeowners to view.
11. In the written response, the respondent indicated that they had provided applicant with the copy note from the site visit that had taken place on 18 January 2022 and enclosed a copy of the actual document together with a copy of the follow-up letter to homeowners dated 20 January 2022.
12. The applicant acknowledged that he had received these documents.

Decision re alleged breach of section 2 “Communication and consultation”

13. The provision of the documents and information by the respondent to the applicant meets the terms of section 2.3 of the Code. There is no breach of that section.
14. The tribunal is satisfied that the documents in question are not documents which "must be made available" to homeowners and therefore there is also no breach of section 2.4.

Section 4... “Debt recovery”

15. The second alleged breach of the code related to section 4 “Debt recovery” and in particular sections 4.3 and 4.4.
16. The relevant terms of sections 4.3 and 4.4 of the code are as follows.

4.3 Any charges that a property factor imposes in relation to late payment by a homeowner must not be unreasonable or excessive and must be clearly identified on any relevant bill and financial statement issued to that homeowner.

4.4 A property factor must have a clear written procedure for debt recovery which outlines a series of steps which the property factor will follow. This procedure must be consistently and reasonably applied. This procedure must clearly set out how the property factor will deal with disputed debts and how, and at what stage, debts will be charged to other homeowners in the group if they are jointly liable for such costs.

17. This complaint relates to the charging of late payment fees, which were added to the applicant's quarterly factoring invoices in the period commencing August 2021
18. It was agreed that the respondents issue factoring invoices in respect of this development on a quarterly basis. Invoices are sent to homeowners in February, May, August and November of each year. Payment is required within 28 days. The respondent's terms of business indicate the following

"Approximately 28 days from the date of issue, if any invoice remains outstanding a reminder, warning of possible court action unless payment is received within a further 7 days, is issued".
19. In respect of the bill issued in August 2021, a late payment fee of £30 had been added. This late payment fee related to the applicant failing to pay the May 2021 invoice within the appropriate period of time. The applicant had complained about the inclusion of this late payment fees to the respondent.
20. By email to the applicant dated 1 October 2021 from Alan Gifford, a director of the respondent, the respondents had indicated to the applicant that the late payment fee would be removed and they sent him a new statement of account confirming his outstanding balance was zero
21. In November 2021 the applicant received his regular quarterly invoice. However, it also contained a late payment fee in respect of his failure to pay the August invoice on time. That invoice had not been fully paid until his complaint about the late payment fee contained within it had been resolved.
22. The applicant conceded that he did not query this late payment fee until early January 2022. He produced with his application a series of emails which she sent to various members of staff at the respondents at that time and at later dates. He did not pay the November invoice within the required payment period of 28 days.
23. He then received his February 2022 invoice which also contained a late payment fee as the November invoice had not been settled in time. He did not pay that invoice until 31 March 2022 when he made a payment to the respondent for the invoices from November 2021 and February 2022 under deduction of the late payment fees.
24. The applicant explained that he had not contacted the respondent until January 2022 to complain about the late payment fee on the November invoice because he had recently had a new baby.
25. At no point during his email correspondence with the respondent after January 2022 was any concession made to him that the late payment fees would be withdrawn.

26. The applicant received a further invoice dated 6 May 2022 which he did not pay until 23 June 2022 again under deduction of another late payment fee contained within that invoice.
27. Further invoices were sent to the applicant in August and November 2022 and February 2023, which at the date of the written representations being lodged by the respondents remained unpaid. These invoices also contained late payment fees.
28. It was also accepted during the course of the case management discussing that further invoices had been issued in May 2023 again also containing a late payment fee.
29. In total by the time of the case management discussion £324 was owed by the applicant to the respondent in respect of a late payment fees. This figure includes VAT at the standard rate.
30. During the course of the case management discussion, the respondent indicated that they had written to the applicant on 6 February 2023 setting out in full their response to the applicant's formal complaint which contain the alleged breaches of the Code .
31. In the response, they indicated that they did not accept that they had breached any aspect of the Code and that the late payment fees had been applied to account in accordance with their terms of service and delivery standards. However they offered to make a payment of £200 to him as a gesture of goodwill to resolve this complaint. The applicant did not accept the offer.
32. On being questioned by the tribunal. Mr Kingham indicated that in an attempt to resolve the matter at the CMD the offer of the goodwill payment of £200 remained in place .
33. There was further discussion between the tribunal members and the Applicant with regard to that offer.
34. It was indicated to the applicant that the tribunal would undoubtedly have sympathy with his position relating to the inclusion of a late payment fee in the November 2021 invoice. Having been told by a director of the respondent that his account was clear in October 2021, the late payment fee should not have appeared on that invoice.
35. It was also indicated to him that if he had complained about that late payment fee instantly and that they respondent had not immediately removed it, then the tribunal would have regarded such a failure by the respondents as a clear breach of the Code.
36. However, he had not been in touch with the respondents for a period of over seven weeks. By the time he contacted them, payment of that invoice was again technically late. It was also pointed out to him that he continued to fail to pay ongoing invoices. It was suggested to him by the tribunal, that the current

situation, while it may have been initiated through an error by the property factor, had been exacerbated by his failure to contact the respondent promptly. His continuing and ongoing failure to pay subsequent invoices as they were issued had also caused the situation to deteriorate.

37. The applicant did not seem to accept that position, although it was effectively the position adopted by the respondent, both in the written representations, and in their oral submissions to the tribunal .
38. It was indicated to the applicant that the tribunal effectively had two options. Firstly, the applicant could accept the offer and the matter would be ended. Secondly, the applicant could reject the offer and tribunal would continue to determine the matter.
39. After some further discussion, it was agreed with the parties that the tribunal would allow the applicant some additional time to consider the offer, and thereafter to write to the tribunal, indicating whether or not he wished to accept the offer. If he accepted the offer. Time would be allowed to the respondent to make the payment and the matter would be treated as resolved.
40. If he decided not to accept the offer the tribunal would then make a determination. The applicant was advised by the tribunal that any decision made would not necessarily be better than the offer which had been made and could be worse..
41. The applicant decided that he wanted time to consider matters and the tribunal therefore brought the CMD to a close and asked the applicant to correspond with the tribunal by email setting out his position. The applicant was asked to indicate his position by email to the tribunal office, no later than close of business on Friday 18th August.
42. By email dated 18 August 2023 and received by the tribunal at 4:57 pm. The applicant indicated that he wished the tribunal to proceed to determine the matter.
43. He indicated that his stance remained the same. He indicated the initial late payment fee was made despite being told his account was clear and all subsequent invoices had carried this charge. He stated that he had now paid £102.25 to his account which was payment of all outstanding invoices again under deduction of the disputed and outstanding late charges. It was his position that all of the difficulties arose from the initial addition of the payment fee in the invoice in November 2021.

Discussion and decision re alleged breach of section 4 “Debt recovery”.

44. The tribunal has carefully noted the evidence led by both parties. The tribunal is satisfied that the late payment charge which was added to the November 2021 invoice constitutes a breach of the Code. That charge should never have

been added to that invoice. That charge was a late payment charge which was unreasonable.

45. Had the applicant contacted the respondent at the time of receipt of that invoice, the tribunal would have expected the respondent to have apologised and immediately removed the charge and perhaps offered a small payment by way of compensation.
46. However, the applicant failed to contact the respondent for a period of almost two months. His explanation for this delay is noted although it is not entirely convincing. While the tribunal understands that the arrival of a new baby can cause significant domestic upheaval, it does not negate ongoing responsibilities to deal with household bills and accounts. By the time he contacted the respondent, he had failed to pay the November invoice itself. That meant that the February 2022 invoice would already be primed to have a late payment fee added to it.
47. Again, the applicant failed to make payment of the February 2022 invoice until the end of March. Again his payment was technically late. He then continued to fail to make payments of further invoices. It is noted that the applicant did send emails to the respondent relating to the issue and asking that the late payment fee be removed.
48. The tribunal has sympathy for the applicant's position with regard to the inclusion of the late payment fee in the November 2021 invoice. The problems which have subsequently arisen, and which have meant that additional late payment fees have been added to subsequent invoices, have been almost entirely the responsibility of the applicant. He is almost entirely the author of his own misfortune in this matter.
49. The tribunal notes the offer which was made by the respondent, both prior to the tribunal and during the tribunal of a reduction of the outstanding charges of £200. The tribunal regards that offer as entirely reasonable.

The proposed PFEO

50. As the tribunal has determined that the initial inclusion of the late payment fee in November 2021 was a breach of the code, the tribunal's responsibility is to decide whether to make a property factor enforcement order (PFEO) in terms of section 19 of the 2011 Act. The tribunal has decided to make a PFEO.

51. When a tribunal proposes to make such an order it must give notice of the proposal to the property factor and also allow parties the opportunity to make representations on the proposed PFEO

52. At present the proposed PFEO would be in these terms

The tribunal proposes to make a PFEO in respect of the application and proposes an order for payment would be made against the property factor in favour of the applicant in the sum of £200.

The payment can be made by Reducing the balance currently OWED by the applicant to the respondent by making an appropriate credit entry on applicant statement of account with the property factor.

Further representations required

53. Parties are asked to make representations as allowed by section 19 of the 2011 Act and upon receipt of same the tribunal will decide on the final terms of the PFEO. Representations should be lodged with the tribunal within 21 days of the date upon which this decision is intimated to the parties.

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.

09/10/2023

Legal Member

Date