



STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Ref: FTS/HPC/PF/23/0621

Re: 10/2 Gayfield Street, Edinburgh, EH1 3NR (“the Property”)

Parties:

Mrs Sarah Pritt, 53/1 East Claremont Street, Edinburgh, EH7 4HU (“the Homeowner”)

Charles White Ltd., 65 Haymarket Terrace, Edinburgh, EH12 5HD (“the Property Factor”)

Tribunal Members:

Ms H Forbes (Legal Member) and Mrs M Lyden (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with paragraphs 2.1 and 4.1 of the 2021 Property Factor Code of Conduct (“the Code”) as required by section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”).

The decision is unanimous.

Background

1. By application received in the period between 27th February and 12th April 2023, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with paragraphs 3.6, 3.7, 4.4, 4.5, 4.6, 4.7 and 4.9 of the Code. The application included a notification to the Property Factor notifying alleged failures to comply with paragraphs 2.1, 3.1, 4.1, 4.5 and 4.7. The Homeowner lodged correspondence between the parties and a copy of the Property Factor’s Written Statement of Services (“WSS”)
2. A Case Management Discussion (“CMD”) took place by telephone conference on 28th August 2023. The Homeowner was in attendance. The Property Factor was represented by Ms Robyn Rae. The Homeowner said she raised

the application under the 2021 Code because the communication issues that she complained of occurred after 2021. There was some discussion about the fact that the Homeowner's notification to the Property Factor did not match the alleged breached paragraphs in the application form. The Tribunal indicated it was likely only to hear evidence in relation to the paragraphs of the Code set out in the notification to the Property Factor. The Tribunal explained the possible outcomes of a hearing, saying that, although no decision will be made until the evidence has been heard, it is unlikely they would find that sums due for factoring services were not due to be paid by the Homeowner, who should have been aware that services were being provided, notwithstanding any communication issues.

3. The Property Factor lodged written representations on 10th and 15th November 2023.
4. The Homeowner lodged written representations on 15th November 2023.

The Hearing

5. A hearing took place by telephone conference on 22nd November 2023. The Homeowner was in attendance. The Property Factor was represented by Ms Robyn Rae.

Preliminary Issues

6. There was a discussion about the late lodging of documents. The Tribunal decided to accept the documents.
7. The Tribunal noted a reference to an alleged failure to comply with paragraph 3.2 in the recent representations. The Tribunal pointed out it would not be considering any new alleged breaches, and if the Homeowner wished to pursue this, a new application would be required.
8. During the discussion on preliminary issues, it became evident that a document lodged by the Property Factor showing itemised charges due by the Homeowner had not been circulated to the Tribunal or parties. The Tribunal Clerk undertook enquiries to trace the document.

Paragraph 2.1

Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations.

- 9.** The Homeowner said the Property Factor stopped communicating with her in September 2020, when she received a quarterly invoice. She had notified the Property Factor of the change of ownership and her email address after taking over the Property in August 2018. The invoices were sent to that address until September 2020, and she was paying the factoring invoices until they stopped arriving. The Property Factor then blamed her for not paying the invoices. It was her position that the Property Factor could have looked back to see that she was the person communicating with them. They had her email address and there had been communication about bushes. This was a clear breach of paragraph 2.1.
- 10.** The Homeowner said the Property Factor had previously admitted there was a communication issue, but now they were accusing her of not being in contact. The Homeowner began to pay invoices in April 2023.
- 11.** Ms Rae said the Property Factor added a new email address for the Property in 2018, but they do not have permission to change the portal email address. There were two email addresses on the system. The Property Factor can send a homeowner a link to sign up to the portal. The homeowners receive a notification by email that explains the requirement to log in. Ms Rae said she did not know if a link had been sent to the Homeowner in 2018. Ms Rae was unaware of how the invoices had been paid up to September 2020 if the Homeowner did not have a link to access the portal.
- 12.** Ms Rae said there was no breach of this paragraph. It is the Homeowner's responsibility to provide the correct information to the Property Factor. They have over 10,000 clients and cannot make sure each one is receiving correspondence. The responsibility lies with the individual. Ms Rae said the Homeowner began paying invoices on 1st June 2023, and full payment of all sums has not been made.
- 13.** Asked by the Tribunal what the procedure is when a solicitor notifies the Property Factor of the sale of a property, Ms Rae said they close down the old account and set up a new account. In this case, the old account was not closed. The Property Factor changed the name on the account. That is where the error arose. Emails were sent to the new email address, but they did not have invoices attached. Ms Rae said the new email address may have been removed when the Property Factor did a system update. Ms Rae said there was no tracking ability on the system to check if this was the reason the Homeowner stopped receiving notifications. Because the Homeowner had not closed down the old account, the Property Factor did not issue new documents. It was simply a name change. There was no evidence available to say that the Homeowner had been made aware she had to do more than this. The Homeowner eventually closed the old account and set up a new one on 23rd May 2023. Asked whether the Property Factor would expect to see evidence of a change of owner, Ms Rae said there is no evidence available to say that the Homeowner was given this advice. The Property Factor can do a title search to confirm ownership but that was not done in 2018.

14. The Homeowner said the Property Factor sent a link to her new email address, and she used the old log-in details to access the account. She disagreed that she had not done her part. She was not told to set up a new account. The Homeowner disputed that she had not made full payment of all sums due. The only sums she has not paid are the late payment sums of £30 per month relating to the disputed debt.

15. Ms Rae said there had been no late payment charges since 13th June 2023.

Paragraph 3.1

While transparency is important in the full range of services provided by a property factor, it is essential for building trust in financial matters. Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment requests are included on any financial statements/bills. If a property factor does not charge for services, the sections on finance and debt recovery do not apply.

16. The Homeowner said this paragraph had been breached because she had not received any invoices. Asked by the Tribunal whether she would be aware some charges were due, the Homeowner said she did not live at the Property and did not see what was being done. It was also during lockdown. The Homeowner said she had phoned the Property Factor during lockdown and got an answering machine. She left a message asking them to get in touch with her, and there was no response.

Additional document

17. At this point, the Tribunal Clerk indicated she was unable to locate the document that had not been lodged, so Ms Rae sent a further copy of the email lodging the document. This was passed to parties and the Tribunal. The Tribunal adjourned to allow Members and parties to consider the document.

18. Upon reconvening, the Tribunal heard from parties on the matter of the document and whether the hearing could continue. The Homeowner asked for an adjournment, stating initially that she wished to get legal representations and that she also had to go to work. The Tribunal said it would not adjourn the hearing for the latter reason, as the day had been set down for the hearing. The Homeowner said she required time to consider the document and whether it was a correct representation of her account. This would involve logging into her account. She also questioned why it did not show transactions to November 2023.

19. Ms Rae said she would prefer to continue with the hearing without an adjournment, in order to resolve the matter. She said the document had come from the Property Factor's system and had not been amended. Ms Rae said she understood that the Homeowner may require time to check the document.

- 20.** The Tribunal adjourned to consider matters. The Tribunal decided it was in the interests of justice to adjourn the hearing to another date to allow the Homeowner to consider the document. There was some further discussion about documentation for the next hearing. The Tribunal decided to issue a Direction to parties.
- 21.** By email dated 28th November 2023, the Property Factor responded to the Direction.
- 22.** By email dated 6th February 2024, the Homeowner responded to the Direction.
- 23.** The Property Factor made further representations by emails dated 7th and 21st February 2024.
- 24.** The Homeowner made further representations by emails dated 8th February and 22nd April 2024.

The Hearing

- 25.** The Hearing continued by telephone conference on 16th May 2024. The Homeowner was in attendance. The Property Factor was represented by Ms Rae.

Paragraph 3.1

While transparency is important in the full range of services provided by a property factor, it is essential for building trust in financial matters.

Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment requests are included on any financial statements/bills. If a property factor does not charge for services, the sections on finance and debt recovery do not apply.

- 26.** The Homeowner reiterated her earlier submissions. Responding to questions from the Tribunal as to how she paid invoices up to September 2020, the Homeowner said the account remained in her parents' name. She logged in using the link provided by the Property Factor each time an invoice was sent. She used the old email address to log in. The emails from the Property Factor stopped from September 2020.
- 27.** Ms Rae said it is the responsibility of homeowners to make sure they are receiving invoices. They must choose how to receive the invoices, and if they are not receiving them, they should inform the Property Factor. It is the position of the Property Factor that the Homeowner left matters for an extremely long period of time without notifying them of the problem. There was no record of a telephone call from the Homeowner on the answering machine. The office was manned during Covid, so the call should have been answered. Responding to questions from the Tribunal, Ms Rae said the Property Factor has a responsibility to issue invoices, but they cannot police

matters to make sure they are received. The homeowners have a responsibility to tell the Property Factor how they wish to receive invoices.

- 28.** Responding to questions from the Tribunal as to why the matter was not picked up sooner by the Property Factor, Ms Rae said the Property Factor only had the email address for the previous homeowner. The new email address was not logged on the account. During debt recovery, the contact email address stored on the system is automatically selected. Ms Rae said the normal sales procedure was not followed, as there was no contact from a solicitor as required by paragraph 6.7 of the WSS. This paragraph reads:

When properties are sold, CWL will apportion the service charge and management fees between the seller and the buyer on notification of the sale by the seller's solicitor.

- 29.** The Tribunal referred Ms Rae to the Homeowner's production of an email dated 7th August 2018, whereby she notified the Property Factor that she was now the owner of the Property. Ms Rae said the Property Factor requires this information from a solicitor as they need to know the person has legal ownership of the property. Asked whether the Homeowner ought to have been told of this, Ms Rae said yes, and issued an apology that her colleague had not done so.
- 30.** Responding to questions from the Tribunal as to how many unpaid invoices there would be before debt recovery commenced, Ms Rae said debt recovery commences when the account balance reaches £500. The matter is then passed to an external debt recovery agency. The Property Factor will phone a homeowner to discuss debt, and had tried, using the phone number on the account.
- 31.** The Homeowner said she expected the Property Factor to close the old account and open a new account in her name, however, the system was working initially, so she continued with it until it stopped working.

Paragraph 4.1

Non-payment by some homeowners may affect provision of services to others, or may result in other homeowners in the group being liable to meet the non-paying homeowner's debts in relation to the factoring arrangements in place (if they are jointly liable for such costs). For this reason it is important that homeowners are made aware of the implications of late payment and property factors have clear procedures to deal promptly with this type of situation and to take remedial action as soon as possible to prevent non-payment from escalating.

- 32.** The Homeowner said the Property Factor had failed to prevent the debt from escalating. The Property Factor had her mobile phone number, and she received a phone call in September 2023. She had assumed she had not been contacted due to the pandemic. She did not have any missed calls on

her phone. She did not receive any letters until she provided her home address to the Property Factor. Asked whether she had considered calling into the Property Factor's office over the two-year period to discuss the fact that she was not receiving invoices, the Homeowner said she forgot all about it. It was during the pandemic. The Property is let and managed by a letting agent, so she does not have to do anything. There is now an app portal for paying invoices.

33. Ms Rae clarified that contact was made with the Homeowner in September 2022, by contacting her by telephone. The Property Factor had decided to pass the debt to the outside agency in July 2022 and this took place in August 2022. The parties began negotiating in September 2022. The matter was passed back to the outside agency in April 2023. The Homeowner provided her home address in April 2023.
34. Ms Rae said the Property Factor obtained a copy of the Title Deed for the Property in 2022 and this confirmed the Homeowner was the legal owner. This was prompted by the fact that the Property Factor was taking legal action. Ms Rae said the proper procedure after a change of ownership was to contact the solicitor or get the Title Deed, and this should have been followed in 2018.
35. The Homeowner pointed out that the old account had still not been closed.

Paragraph 4.5

When dealing with customers in default or in arrears difficulties, a property factor should treat its customers fairly, with forbearance and due consideration to provide reasonable time for them to comply. The debt recovery procedure should include, at an appropriate point, advising the customer that free and impartial debt advice, support and information on debt solutions is available from not-for-profit debt advice bodies.

36. The Homeowner said the Property Factor offered to remove the late payment charges from her account. Before she could respond, the Property Factor tried to invoice the Homeowner's Letting Agent for the outstanding debt. The Homeowner said this was underhand and unethical. The Homeowner accepted that the Property Factor may have contacted the Letting Agent initially in August 2022, which was before she and the Property Factor began to negotiate, but she thought this was in relation to ownership of the Property. Emails on the application file showed the Property Factor contacted the Letting Agent in October 2022 with outstanding invoices, while the parties were in discussion. There had never been any arrangement for factoring invoices to be paid by the Letting Agent under the previous ownership.
37. Responding to questions from the Tribunal as to why the Homeowner had offered the sum of £211 in settlement in her email of 5th October 2022, the Homeowner said it was an amount she came up with.

38. Ms Rae said the first contact with the Letting Agent was in August 2022. It was done in good faith, and the Property Factor often does this. The Property Factor does not accept it was underhand to do this. Referred by the Tribunal to the emails that showed the Letting Agent was contacted while negotiations about payment were ongoing, Ms Rae said the Property Factor had been transparent about this, and had not acted unethically.

Paragraph 4.7

If an application against a property factor relating to a disputed debt is accepted by the First-tier Tribunal for consideration, a property factor must not continue to apply any interest, late payment charges or pursue any separate legal action in respect of the disputed part of the debt during the period from when the property factor is notified in writing by the First-tier Tribunal that the application is being considered and until such time as they are notified in writing of the final decision by the First-tier Tribunal or the Upper Tribunal for Scotland (if appeal proceedings are raised).

39. The Homeowner said she received a debt collector's letter, which may have been after the application was accepted, and the Property Factor notified, but she was unable to provide the date of the letter. Following investigations by the Tribunal Clerk, it was ascertained that the Property Factor was notified of the application on 5th June 2024. No late payment fees had been added after that time. The Homeowner withdrew the allegation.

Representations on remedy

40. The Homeowner said she understands she will have to pay some of the factoring fees. The Property Factor had offered to remove the late payment fees, but had not offered any compensations. The Homeowner said she felt she was due some compensation for the situation, and having to go through the Tribunal procedure.

41. Ms Rae said the Property Factor had offered to remove the late payment charges. This would be a form of compensation, as the Property Factor incurs these charges through work done on debt recovery.

Findings in Fact

42.

- (i) The Homeowner is the heritable proprietor of the Property, which is let.
- (ii) The Property Factor is registered as a Property Factor under registration number PF000153.
- (iii) The Property Factor provides factoring services to the development of which the Property forms part.

- (iv) The Property was previously owned by the Homeowner's parents, who were invoiced by the Property Factor for factoring services.
- (v) The Homeowner notified the Property Factor by email on 7th August 2018 that she was the new owner of the Property.
- (vi) The Property Factor failed to provide instruction to the Homeowner on what was required of a new owner in terms of setting up an account.
- (vii) The Property Factor communicated with the Homeowner, including sending notifications of outstanding invoices, using her personal email address until around September 2020.
- (viii) The Homeowner was able to log into the Property Factor's system using the previous email address used by her parents to pay invoices until around September 2020.
- (ix) From October 2020, the Homeowner did not receive any notification of outstanding invoices from the Property Factor, and the Homeowner made no payment of invoices to the Property Factor.
- (x) From October 2020, the Property Factor sent notification of invoices to the old email address.
- (xi) From February 2021, late payment charges were added to the Homeowner's account.
- (xii) In or around August 2022, the Property Factor passed the Homeowner's debt to a debt collection agency.
- (xiii) Parties began to negotiate in or around September 2022.
- (xiv) In October 2022, the Property Factor contacted the Homeowner's Letting Agent to request payment of outstanding fees.

Tribunal Decision and Reasons

Paragraph 2.1

43. The Tribunal found that the Property Factor failed to comply with this paragraph of the Code by failing to communicate with the Homeowner in respect of the matter of ongoing invoices, service delivery and an accruing debt. The Code under which this application was made came into effect on 16th August 2021, and the Tribunal was only able to make findings in respect of that Code. The Property Factor failed to communicate with the Homeowner properly until 2022, failing to consult her in decision making and failing to provide her with necessary information. The Tribunal makes further observations on this matter below.

Paragraph 3.1

44. The Tribunal did not find that there had been a failure to comply with this paragraph of the Code. This was a matter of failed communication rather than a lack of transparency.

Paragraph 4.1

45. The Tribunal found that the Property Factor had failed to comply with this paragraph of the Code by failing to deal promptly with the situation and failing to take remedial action as soon as possible to prevent non-payment from escalating. The Property Factor had notice of the Homeowner's email address after receiving the email of 7th August 2018. The Property Factor ought to have contacted the Homeowner before 2022, using that email address. The Property Factor could also have carried out other checks such as a title search, or contacted the Letting Agent at an earlier date to investigate the matter and prevent the debt from escalating.

Paragraph 4.5

46. The Tribunal did not find there had been a failure to comply with this paragraph of the Code in respect of the matter of the Property Factor contacting the Letting Agent in October 2022. The Tribunal considered it unfortunate that the Property Factor saw fit to do this while parties were negotiating, but it did not consider the Property Factor's actions to have been unfair, underhand, or unethical. No payment was made by the Letting Agent, and there was no prejudice to the Homeowner.

Observations

47. The Tribunal was unable to make any findings under the 2012 Code, as the application was made under the 2021 Code. The Tribunal observed that the Property Factor may have failed to comply with the 2012 Code at the time of notification of transfer of ownership. The email from the Homeowner of 7th August 2018 was clear in its terms, and it was incumbent upon the Property Factor to inform the Homeowner at that stage of what was required by way of information. As a solicitor is not necessarily required in order to carry out conveyancing of a property, the Property Factor cannot claim that they only take information from a solicitor. The Property Factor ought to have acted upon the Homeowner's notification, ensuring that their system was properly updated. Had the Property Factor communicated as required, and undertaken the proper procedures for closing one account and opening another, it is likely that this situation would not have arisen.

48. The Property Factor also failed to close the old account, as required by the Code. The Tribunal noted the Homeowner had included this failure in the application form, but had not notified the Property Factor, as required. In any event, any application for a determination in this regard would have had to have

been made under the 2012 Code, as the timing of the failure fell within the ambit of that Code.

49. The Tribunal did not consider it appropriate to order the Property Factor to remove any factoring fees from the outstanding sum. The factoring services were provided, and the Homeowner ought to have been aware, notwithstanding the lack of emails and invoices, that the sums were due. The Tribunal considered the Homeowner could have made more of an effort to contact the Property Factor to find out why she was not receiving emails, however, the Tribunal accepted the evidence that a phone call had been made to the Property Factor, and no response was received.

Proposed Property Factor Enforcement Order (PFEO)

50. Having determined that the Property Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.

51. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.

52. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Right of 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.



Legal Member and Chairperson
22nd May 2024