

Housing and Property Chamber First-tier Tribunal for Scotland



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

by

Stuart Barnett, 3 Linnet Drive, Woodilee, Glasgow G66 3DG (“the Applicant”)

RMG Scotland, Unit 6, 95 Morrison Street, Glasgow G5 8BE (“the Respondent”)

Re: Property at 3 Linnet Drive, Woodilee, Glasgow G66 3DG
 (“the Property”)

Chamber Ref: FTS/HPC/PF/23/1960

Tribunal Members:

John McHugh (Chairman) and Elizabeth Dickson (Ordinary (Housing) Member).

DECISION

The Respondent has failed to comply with its property factor’s duties and its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

- 1 The Applicant and his wife are the owners of 3 Linnet Drive, Woodilee Village, Lenzie, Glasgow G66 3DG (hereinafter "the Property").
- 2 The Property is a house located within a residential development (hereinafter "the Development").
- 3 The Respondent is the property factor responsible for the management of common areas of the Development.
- 4 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from 5 April 2018. From 16 August 2021, it was under a duty to comply with the updated 2021 Code.
- 5 The Respondent provides factoring services and invoices homeowners including the Applicant on a regular basis.
- 6 From March 2021, the Respondent advised the Applicant that invoices were overdue for payment.
- 7 The Applicant's wife engaged with the Respondent.
- 8 She indicated that she was unable to understand the amount claimed as being overdue. She was unable to reconcile the amount claimed with the invoices she had received.
- 9 No reconciliation was provided. The Respondent sent only general statements showing the whole history of payments demanded and received.
- 10 The Applicant was unable to reconcile these general statements with her specific enquiry.
- 11 On or around early 2022, the Respondent instructed its solicitors to raise a court action for the sums which it believed were outstanding.
- 12 On 8 February 2022, the Applicant's wife emailed the Respondent's solicitor advising that she was unable to reconcile the sum sued for with her invoices from the Respondent.
- 13 A Simple Procedure Action was raised in Glasgow Sheriff Court. Decree was granted for the payment of the sum of £372.98 on or around April 2022.
- 14 The Applicant paid that amount to the Respondent on 21 April 2022.
- 15 The Applicant's wife indicated in her email of 21 April 2022 to the Respondent that she was paying not as an admission of liability, but because she was concerned that the decree would have an adverse effect upon the Applicant's credit history.
- 16 The Applicant was subsequently asked to meet the legal expenses of £220.60 and did so on or around 17 May 2022.
- 17 The Respondent directed its solicitors to issue a letter of satisfaction.
- 18 On or around March 2023, the Applicant applied to Virgin Money for a new mortgage. This was to allow him to re-mortgage at a cheaper rate.
- 19 At around the same time, he applied for a loan to purchase a car for his son.
- 20 Both applications were refused by reason of the existence on the Applicant's credit record of details of the decree obtained by the Respondent.
- 21 The Applicant instead bought a cheaper car for his son without finance.
- 22 He was unable to re-mortgage at a favourable rate. He was concerned that mortgage rates were rising at that time.
- 23 The Applicant applied for a recall of the decree.
- 24 Decree of absolvitor was granted by the court on 24 May 2023.
- 25 The Applicant has now been able to access credit facilities again.
- 26 The Applicant suffered inconvenience and stress as a result of the existence of the decree.

- 27 The Applicant had previously been the victim of identity theft which had damaged his credit rating. It had taken him considerable time and effort to resolve that situation. He was upset to find himself in a similar situation again as a result of the decree.
- 28 On 21 April 2022, the Applicant's wife made a formal complaint to the Respondent on the Applicant's behalf that the Respondent had failed to provide a reconciliation of the sums sued for with its invoices and payments made.
- 29 The Respondent acknowledged the complaint on 6 May 2022.
- 30 On 19 May 2022, the Respondent contacted the Applicant's wife to advise that its Finance Department was dealing with the complaint as they were best placed to do so.
- 31 No further contact was received from the Respondent regarding the complaint.
- 32 The Applicant has, by his correspondence, including his letter delivered to the Respondent on 21 September 2023 informed the Respondent of the reasons why he considers the Respondent has failed to carry out its property factor's duties and its duties under section 14 of the 2011 Act.
- 33 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A Case Management Discussion took place by telephone conference on 11 January 2024. Neither party appeared. A new CMD was fixed for 29 May 2024.

The application was allocated to a Hearing to take place in September 2024. That Hearing was cancelled because of illness on the part of the Tribunal Chairman. A fresh hearing date of 10 January 2025 was assigned.

The Hearing took place at the Glasgow Tribunals Centre on 10 January 2025. The Applicant was present and was represented by a family member, Victoria Lonie. The Respondent was represented by Imogen Harrison from its Finance Department and Darren Gallagher, its Property Manager.

At the Hearing, the Applicant asked to be allowed to lodge a late item of evidence which was an extract from the Applicant's banking application which showed the payment of the sum of £372.98 to the Respondent. The Respondent indicated that it had no objection to the admission of the late item. The Tribunal resolved that no prejudice would arise, that the late evidence would assist the Tribunal and that it should be allowed to be received.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as revised with effect from 16 August 2021 as "the Code" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the 2017 Regulations".

The Respondent became a Registered Property Factor on 5 April 2018 and its duty under section 14(5) of the 2011 Act to comply with the Code (and later the amended Code) arises from that date.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent as well as their oral representations. These include the Respondent's Written Statement of Services which was undated ("the Written Statement of Services"). The Applicant relied upon the following sections of the Written Statement of Services: Section 1 Income Recovery; Section 6 Communication Arrangements; and Section 7 Complaints.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out property factor's duties arising under the Written Statement of Services.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant originally complained of breaches of the Overriding Standards of Practice and of Sections: 2.2, 2.5, 2.7, 3.1, 3.3, 4.1, 4.2; 4.3, 4.5, 4.6, 4.8, 4.9, 4.11, 7.1 and 7.4 of the Code although, on discussion at the hearing, the Applicant recognised that Code Section 2.2 was not relevant and so did not insist upon that.

The elements of the Code relied upon provide:

"Section 2: Communication and Consultation...

...2.5 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...

...2.7 A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale...

...Section 3: Financial Obligations...

3.3 All property factors should be aware of the threat of money laundering and must comply with all relevant legislation and guidance to minimise the risk that they and their business will be used to launder the proceeds of crime...

...Section 4: Debt Recovery

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.

4.2 It is a requirement of section 1 of the Code (written statement of services) that a property factor informs homeowners of any late payment charges and the property factor's debt recovery procedure is made available to homeowners.

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...

...4.5 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.

4.6 A property factor must have systems in place to ensure the monitoring of payments due from homeowners and that payment information held on these systems is updated and maintained on a regular basis. A property factor must also issue timely written reminders to inform a homeowner of any amounts they owe...

...4.8 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.

4.9 A property factor must take reasonable steps to keep homeowners informed in writing of outstanding debts that they may be liable to contribute to, or any debt recovery action against other homeowners which could have implications for them, while ensuring compliance with data protection legislation...

...4.11 A property factor must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice to the homeowner of its intention to raise legal action (see also section 4.7)...

...Section 7: Complaints Resolution

Property Factor Complaints Handling Procedure...

7.1 A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of section 1 of the Code: WSS that the property factor must provide homeowners with a copy of its complaints handling procedure on request.

The procedure must include:

- The series of steps through which a complaint must pass and maximum timescales for the progression of the complaint through these steps. Good practice is to have a 2 stage complaints process.
- The complaints process must, at some point, require the homeowner to make their complaint in writing.
- Information on how a homeowner can make an application to the First-tier Tribunal if their complaint remains unresolved when the process has concluded.
- How the property factor will manage complaints from homeowners against contractors or other third parties used by the property factor to deliver services on their behalf.
- Where the property factor provides access to alternative dispute resolution services, information on this...

...7.4 A property factor must retain (in either electronic or paper format) all correspondence relating to a homeowner's complaint for a period of at least 3 years from the date of the receipt of the first complaint.”

The Matters in Dispute

The Applicant complains in relation to the following issues:

1. The Respondent's failure to provide clear communications regarding the sums due to it.
2. The Respondent's failure to follow its Debt Recovery Procedure
3. The Respondent's failure to follow its Complaints Procedure including not disposing of the court action appropriately.

Background

The Applicant is the owner of the Property.

The Respondent is the property factor responsible for the Development.

The Respondent provides factoring services and issues periodic invoices to homeowners on the Development including the Applicant.

There is no, or at least no substantial, disagreement between the parties as to the history of events which are briefly summarised as follows:

On 15 March 2021, the Applicant was contacted by the Respondent in relation to an outstanding balance on his account. His wife requested a breakdown of the balance.

A "tenant history report" document was provided by the Respondent on 18 March 2021.

A payment was made for some of the sum sought as the Applicant remained uncertain about the basis for the remainder.

On 12 July 2021, further sums were demanded. The Applicant again complained that he could not reconcile the claimed balance with the Respondent's invoices and his payments.

On 22 July 2021, a "tenant history report" was again sent.

The tenant history reports were documents showing a long series of transactions beginning at the time the Respondent first began providing services to the Applicant. They were not easy to understand and did not provide a direct answer to the Applicant's question.

In early 2022, the Respondent demanded the sum of £372.98 from the Applicant.

The Applicant queried this amount as it did not match the invoices received.

The Respondent raised a Simple Procedure action in Glasgow Sheriff Court for the sum of £372.98.

The Applicant responded to the court and to the solicitors for the Respondent that he would pay the sum sued for if evidence was provided that it was due. A breakdown to reconcile the balance pursued with invoices received was requested but not provided.

Decree was obtained in or around early April 2022.

The Applicant paid the decree amount of £372.98 on 21 April 2022.

On 21 April 2022, the Applicant's wife emailed the Respondent to indicate that she wished to make a formal complaint regarding the Applicant's failure to provide a reconciliation of the sums demanded.

The Applicant when making the payment indicated that this was being done only to avoid adverse credit consequences as opposed to being an acceptance that the sums were due.

The Applicant subsequently paid the court expenses of £220.60 on 17 May 2022. The actual amount paid seems to have been £219.93 because of a small credit balance on the Applicant's account.

The Respondent first responded to the complaint of 21 April on 6 May 2022. That was an acknowledgement which indicated that a substantive response would be provided within ten working days.

On 19 May 2022, the Respondent emailed the Applicant's wife indicating that the Respondent's Finance Team were in direct contact with her and would be best placed to resolve her concerns. There was no further attempt to resolve the complaint.

The Respondent did not advance the matter further as a formal complaint under its Complaints Process.

A letter of satisfaction was issued by the Respondent's solicitor.

The Applicant discovered that the decree continued to exist on his credit records in March 2023.

The Applicant decided that the only way to address the credit issue was to obtain a decree of absolver from the court.

The Respondent consented to that process and decree of absolver was issued by the court on 24 May 2023.

Complaints

1 The Respondent's failure to provide clear communications regarding the sums due to it.

As noted in more detail above, the Applicant's wife engaged in correspondence with the Respondent from March 2021 in response to its demands for payment. Throughout, the Applicant's position is that payment would be made if the Respondent could explain why the balance was due ie provide a reconciliation of the amounts claimed with invoices rendered and payments received.

The Respondent failed to provide a meaningful response in the form of a reconciliation or detailed explanation but instead simply sent multi-page line by line statements of all payments and receipts. These were not clear and did not provide a direct response to the question.

We consider that the Respondent's failure to respond to the Applicant's complaint of 21 April 2022 within 5 working days as required by Section 6 of its Written Statement of Services constitutes a breach of its property factor's duties. The same conduct also constitutes a breach of Section 2.7 of the Code.

In addition, the Respondent's consistent failure to communicate an explanation for the calculation of the sums it was pursuing against the Applicant over the period up to the enforcement of the decree constitutes a breach of its obligation under Code Section 2.7 to deal with enquiries and complaints as quickly and as fully as possible.

2 The Respondent's failure to follow its Debt Recovery Procedure

The Applicant complained that it had not been provided with a copy of the Respondent's Debt Recovery Procedure. We reject this aspect of the complaint because the Written Statement of Services is accepted as having been provided by the Respondent to the Applicant. The Written Statement of Services, under the heading "Income Recovery" on page 9, indicates that the Procedure is available on request and on the Respondent's website.

The Applicant also complained about how the Respondent had pursued the alleged debt as not being in compliance with its procedure. The Respondent's Debt Recovery Procedure states that where a homeowner has a valid dispute, they are entitled to pay only the undisputed amount and to withhold the disputed balance.

The Respondent has failed to apply this aspect of its policy and instead pursued enforcement action including court proceedings. We accordingly find that the Respondent is in breach of its property factor's duties. We also find that the same conduct constitutes a breach of Sections 4.5 and 4.11 of the Code.

3 The Respondent's failure to follow its Complaints Procedure including not disposing of the court action appropriately.

The Applicant complains that the Respondent failed to follow its Complaints Procedure. The Written Statement of Services contains a four stage Complaints Process. Stage 1 involves a response within 10 working days. The first response was an acknowledgement dated 6 May 2022 which was within the time period. However, this was simply an acknowledgement which promised a substantive response within a further ten working days.

Section 6 of the Communication Arrangements section of the Written Statement requires written acknowledgement within five days.

The next step was an email by the Respondent to the Applicant in which it was stated that the Respondent's Finance Department would deal with the matter. There was no further contact regarding the complaint.

The Respondent has failed to apply its own Written Statement of Services and Complaints Procedure and is, accordingly, in breach of its property factor's duties. The same conduct also amounts to a breach of Code Section 7.1.

Observations

The Respondent's representatives acknowledged that there had been failings in their internal communications and in their procedures for ensuring that mail was collected. They advised that new arrangements were in place including a new invoicing system which produced clearer invoices. The Applicant acknowledged that bills recently received from the Respondent were clearer than those issued to him under the previous system

PROPERTY FACTOR ENFORCEMENT ORDER

A property factor enforcement order ("PFEO") will be made. The Tribunal has a wide discretion as to the terms of any PFEO. The Tribunal finds that the Respondent's failings are significant and had a material effect upon the Applicant.

The Tribunal has accepted the Applicant's submission that the Respondent's actions have caused him significant distress and inconvenience. He had been unable to access finance when he had wanted to. The Application had suggested that any PFEO granted might contain an amount to reflect an extended period when the existence of the decree had caused the Applicant not to be able to access finance at a reduced rate. However, the evidence is that the Applicant only applied for finance in March 2023 and that the decree of absolver which resolved the finance issue was obtained in May 2023. Therefore, there is no evidence of a sustained period of lack of access to finance at a lower interest rate. In addition, the Applicant has incurred the court fees of around £220. These factors have been taken into consideration in setting the amount contained in the PFEO.

APPEALS

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.

JOHN M MCHUGH

CHAIRMAN

DATE: 27 January 2025