

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland Housing and Property Chamber in relation to an application made under Section 17(1) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/24/5675

Property: 4A East Netherton Street, Kilmarnock KA1 4AX (“the Property”)

The Parties:-

Mr Robert Fulton, 4A East Netherton Drive, Kilmarnock KA1 4AX (“the homeowner”)

Newton Property Management Limited, registered in Scotland under the Companies Acts (SC224378) and having their registered office at 87 Port Dundas Road, Glasgow G4 0HF (“the property factors”)

Tribunal Members: George Clark (Legal Member/Chairman) and Sandra Brydon (Ordinary Member)

Decision

The First-tier Tribunal for Scotland Housing and Property Chamber determined that the property factors have not failed to comply with OSP2, OSP6 or Section 3.2 of the Property Factors Code of Conduct effective from 16 August 2021 and have not failed to comply with the property factor’s duties.

Background

1. By application, dated 11 December 2024, the homeowner sought a Property Factor Enforcement Order against the property factors under the Property Factors (Scotland) Act 2011 (“the Act”). He alleged failures to comply with OSP2 and OSP6, and Section 3.2 of the Property Factors Code of Conduct effective from 16 August 2021 (“the 2021 Code”), and a failure to carry out the property factor’s duties.
2. The homeowner’s complaint, in summary, is that the property factors failed to discuss their failure to properly charge owners over the electricity supply for the

communal entrance light. This cost him £147.09 on Invoice 1699611. His complaint took months to resolve, and he was awarded £87.12 back on Invoice 1753364 as the property factors recognised the error, but that Invoice had made the same mistake for a later period, with the homeowner being charged £87.19 for the error. The property factors had failed to comply with the Section 3.2 requirement to protect clients' funds. They had refused him a further refund even though they accept that they are at fault. The homeowner wished to be refunded all the money overcharged and to be awarded compensation for the time he had had to spend on the issue.

3. The homeowner provided the Tribunal with copies of the two relevant Invoices. Invoice 1699611 was dated 28 August 2024 and contained two common electricity accounts from Opus Energy Electric ("Opus"). They covered the period from 1 May to 30 June 2024 and the homeowner's allocated share was £147.09, being one-half of the cost. Invoice 1753364 was dated 22 November 2024. It included a "refund of overpaid standing charges" (£87.12) and accounts from Opus for the period 1 July to 23 August 2024 (£87.19) and from Ecotricity from 24 August to 1 October 2024 (£36.39).
4. The homeowner provided the Tribunal with copies of email exchanges between the Parties. They included an email from the property factors of 2 September 2024 in which they said they had reviewed the Invoices and had discussed the matter with the manager responsible for dealing with the electricity charges. They stated that the problem appeared to go back to April 2024 in an electricity bill marked for 28 February to 31 March. The standing charge was given in that invoice as 17 days at 33.335p per day, then 14 days at £2 per day. On the following invoice the standing charge increases to £3 per day. The property factors had advised Indigo Swan, their electricity supply broker, that they were changing broker and had given them notice. The building communal electricity contract had expired and Indigo Swan did not renew it. There was now a new broker in place and the homeowner should see the charges come down significantly.
5. On 3 July 2025, the property factors made written representations to the Tribunal. They denied that they had ever accepted that they had made a mistake. At the time of the expiry of the "deal" with Opus on 31 March 2024, the property factors were in negotiations to change brokers and suppliers, as the present incumbents had not provided a suitable "deal" for any of the developments they were managing. The new contract was not in place until 23 August 2024. Indigo Swan had not initially advised the property factors that they had not renewed their fixed price contracts. The property factors wrote to the homeowner on 5 September 2024 letting him know that they would be crediting his account with an amount still to be worked out. The amount of the refund (£87.12) was calculated on the basis of the new contract daily standing charge

rate compared to the Opus rate from the day after the expiry of the last Opus contract to the first day of the new contract. There was no overcharge. The amount on the Invoices is the amount the property factors paid to Opus and the property factors' Client Relationship Manager arranged for the difference to be paid to the homeowner as part of their complaints process.

6. On 4 July 2025, the homeowner responded to the property factors' representations. He contended that, in their email of 5 September 2024, the property factors acknowledged their mistake. It seemed nonsensical to him that they would make a partial refund for a mistake they did not make. They had also not meaningfully responded to the fact that this had been stressful for the homeowner. There was an effective overcharge due to the property factors' failures. The price rose significantly as they had failed to get things changed over in time. If there was no overcharge, why was there a partial refund? OSP2 requires property factors to be open in dealings. As the record shows, they refunded him for the first Invoice that was overcharged without telling him that a second one was coming. OSP6 states that they must have care and skill in dealings. By letting one electricity broker expire without having another ready, they failed in this. Financial obligation Section 3.2 related to protecting homeowners' funds. The failure with the broker had breached that Section. Also, the continued charge of £30 per month for a small entry light is a continued breach.

Case Management Discussion

7. A Case Management Discussion was held by means of a telephone conference call on the morning of 28 July 2025. The homeowner was present. The property factors were represented by Ms Catherine Flanagan, their Customer Relationship Manager. Ms Flanagan told the Tribunal that charges had gone up because the previous brokers had failed to get a new contract in place and the charges reverted to out-of-contract rates. In early 2024, the property factors had requested information from the electricity brokers, who failed to provide it. The information they were seeking included details of contracts that were coming to an end. The contract with Indigo Swan was, therefore, terminated and U-Switch put a new contract in place, but this process took about six months. There was a significant difference in the daily standing charges, and Ms Flanagan's superior agreed that they would pay the difference up to the date of the actual change. There was an Opus bill that had arrived too late to be included in Invoice to 30 June 2024 Invoice, so it appeared in the next one. Indigo Swan were due to carry out the terms of the contract during the period of notice, but the property factors still made good by refunding the difference to owners so that they were not out of pocket.

8. The homeowner stated his view that the property factors did not seem to have a process for changing brokers and now they were blaming the brokers. He did not remember hearing anything about it until he himself reported the issue.

Findings of Fact

- i. The homeowner is the proprietor of the Property, which is an upper floor flat in a development of 14 flats. The ground floor flats have their own entrance doors, and it is the upper flats only that are served by the common emergency lighting.
- ii. The property factors, in the course of their business, manage the common parts of the block of which the Property forms part. The property factors, therefore, fall within the definition of “property factor” set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 (“the Act”).
- iii. The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- iv. The property factors were registered on The Scottish Property Factor Register on 1 November 2012. Their current registration is dated 12 February 2019.
- v. The homeowner has notified the property factors in writing as to why he considers that the property factors have breached the Codes of Conduct under the Act.
- vi. The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber on 11 December 2024, under Section 17(1) of the Act.

Reasons for Decision

9. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required to enable it to decide the application without a Hearing.
10. The Tribunal considered carefully all the evidence before it, namely the written representations of both Parties and the oral evidence given at the Case Management Discussion. Not every document forming part of the written representations is referred to in the following statement of Reasons for Decision, but the Tribunal took all of them into account in arriving at its Decision.
11. The Tribunal’s view was that, whilst the issues arising from a change of broker had not been well communicated to the owners, the property factors had limited control over the pace of the process, which would have involved giving notice to Indigo Swan and then undertaking an exercise to replace them, with the new brokers, then advising the owners on electricity providers. The reason for giving notice to Indigo Swan appeared to be that they had failed to respond to requests for information, including details of contract that might be coming to an end. It was

for Indigo Swan to monitor that situation and to keep their clients (the property factors) advised and also to continue to fulfil their contractual obligations during the period of notice. The Tribunal had no way of knowing what those obligations were, so expressed no view as to whether Indigo Swan fulfilled their obligations, but the Tribunal was satisfied that the property factors were entitled to assume that their brokers would respond appropriately where supply contracts were coming to an end.

12. In the event, the contract with Opus came to an end without being renegotiated by the brokers and, as a result, it reverted to an out-of-contract rate. This caused considerable additional expense to the owners. The Tribunal was satisfied on the basis of the evidence before it that the property factors had dealt with the homeowner's complaint in a pragmatic manner by agreeing to write off the difference between the charges that were applied and the charges that would have arisen had a new contract been in place by 31 March 2024, when the Opus "deal" expired. They recognised that the owners were not in any way at fault for what had happened and took it upon themselves to absorb the cost, rather than the owners being out of pocket. They failed, however, to properly communicate this to the owners at the time, and, as a result, the homeowner felt compelled to bring his complaints to the Tribunal.
13. The Tribunal then considered the evidence in relation to the alleged failure to comply with each Section of the 2021 Code.
14. **OSP2** states "You must be honest, open and transparent and fair in your dealings with homeowners". The Tribunal did not uphold the complaint under OSP2 as, whilst the communication and explanation of the issues that had arisen could have been better, their conduct was not dishonest and there was no evidence that they had tried to conceal the problem. They simply did not explain it when they issued their Invoice showing the refund.
15. **OSP6** states "You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including making sure that staff have the training and information they need to be effective." The Tribunal did not uphold the complaint under OSP6. The view of the Tribunal was that the staff involved had used reasonable skill and care and there was no evidence to suggest they did not have adequate training. The process of changing brokers was inevitably going to take some time and, recognising that the owners had suffered financially as a result, the property factors acted to ensure the owners did not lose out. The Tribunal could not speculate on whether this would have happened had the homeowner not made a formal complaint,
16. **Section 3.2** states the overriding objectives are to ensure property factors protect homeowners' funds and provide clarity and transparency for homeowners in all accounting procedures undertaken by them. There was no evidence that the property factors had failed to protect owners' funds and, whilst the communication

could have been better, the Tribunal was not satisfied that the property factors' conduct had fallen below the standard set out in Section 3.2. Accordingly, the Tribunal did not uphold the complaint.

17. The homeowner's complaint was not made under Section 2 of the Code, which covers Communication and Consultation, so could not be considered by the Tribunal under that Section, but the Tribunal regards it as appropriate to make the point that the property factors failed to communicate clearly the possible implications of any delay in appointing new brokers and the fact that the owners were now being charged on an out-of-contract basis. By making a refund, they did restore the owners to the position they would have been in had the problems not arisen, but they should reflect on the need to communicate better. They should have explained the refund and the inclusion of an Opus Invoice received late when they issued their own Invoice on 22 November 2024.

Property Factor's Duties

18. The homeowner's complaint did not make reference to any specific failure of the property factors to comply with their Written Statement of Services, where the property factors' duties would be set out, so the Tribunal did not uphold the complaint.
19. The Tribunal's Decision was unanimous.

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

13 August 2025
Date