Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier tribunal for Scotland (Housing and Property Chamber)

Decision issued under s19 of the Property Factors (Scotland) Act 2011

Chamber Ref: Reference number: FTS/HPC/PF/21/2591

Property: Flat 6, 4 West Pilton Way, Edinburgh, EH4 4GW ("The property")

Parties:

Arron Ashton, residing at Flat 6, 4 West Pilton Way, Edinburgh, EH4 4GW ("the Applicant")

And

Residential Management Group (Scotland) Ltd, a company incorporated under the Companies Acts and having their registered office at Unit 6 95 Morrison Street, Glasgow, United Kingdom, G5 8BE ("the Respondent")

Unanimous Decision of the Tribunal

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the property factor has failed to comply with the code of conduct as required by Section 14 of the Property Factors (Scotland) Act 2011, determined that the property factor has breached the code of conduct for property factors.

Tribunal Members:

Paul Doyle (Legal Member)
Helen Barclay (Ordinary Member)

Background

1. By application dated 19 October 2021, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of his complaint that the respondent has breached the code of conduct imposed by Section 14 of the 2011 Act.

2 The application stated that the applicant considered that the respondent failed to comply with Sections 2.5, 4.1, 4.5, 4.9, and 7.1 of the code of conduct for property factors.

3 By interlocutor dated 11 November 2021, the application was referred to this tribunal. The First-tier Tribunal for Scotland (Housing and Property Chamber) served notice of referral on both parties, directing the parties to make any further written representations.

4 The respondent lodged detailed written representations on 27 January 2022.

5. A Case Management Discussion took place before the Tribunal by telephone conference at 10.00am on 22 February 2022, at which it was established that the dispute to be resolved between the parties is

> has the respondent failed to comply with Sections 2.5, 4.1, 4.5, 4.9, and 7.1 of the code of conduct for property factors?

6. On 17 July 2022 the applicant lodged a supplementary written submission with additional documentary evidence.

7. A substantive hearing took place on 5 September 2022. The applicant was present and unrepresented. The respondent was represented by Mrs L Pieper (who was accompanied by Ms J Bruce).

8. Both parties agreed that they have provided adequate documentary evidence for this application to be determined without further enquiry. Neither party has anything of relevance to add to their written submissions. Mindful of regulations 2, 17, and 18 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, we proceed to determine this application on the documentary evidence placed before us.

Findings in Fact

9. The tribunal finds the following facts to be established:

(a) The applicant is the heritable proprietor of flat 6, 4 West Pilton Way, Edinburgh ("the property"). He purchased the property in September 2015. Between September 2015 and April 2018, factoring services were provided by Places for People Scotland Ltd at an annual cost of approximately £600.

(b) In April 2018 the respondent was appointed as property factor by the developer of the property, Castlerock Edinvar Housing Association Ltd.

(c) In January 2019, the applicant emailed the respondent querying the level of an invoice because he believed he had been overcharged. On 28 January 2019 the

respondent emailed the applicant saying that there had been an administrative error which would be addressed.

(d) On 5 April 2019 the respondent sent the applicant an invoice which the applicant. challenged in a letter dated 11 April 2019. The respondent charged the applicant for factoring services in the year from April 2018 to 2019. The annual charge to April 2019 totalled £1170.53.

(e) The respondent answered the appellant's email dated 11 April 2019 on 27 April 2019, but did not provide a detailed explanation for the charges. The applicant immediately (on 27 April 2019) emailed the respondent challenging the charges and asking for a detailed reply. The respondent did not reply to that email

(f) On 15 May 2019 the applicant emailed the respondent asking for a reply to his email of 27 April 2019. The respondent did not reply.

(g) On 24 May 2019 the applicant sent a further reminder to the respondent, but received no substantive reply.

(h) On 9 July 2019 the applicant received a letter from the respondent's solicitors threatening legal action to recover £512.48.

(i) On 13 July 2019 the applicant telephoned the respondent and was told that his emails have been received. The respondent's staff confirmed that his emails had not been replied to.

(j) Every three months the applicant received invoices from the respondent. On 30 March 2020 the applicant telephoned the respondent to remind the respondent that he was still awaiting a response to his emails.

(k) Throughout December 2020 and January 2021 there was an exchange of emails between the applicant and the respondent about challenges to outstanding accounts and challenges to the level of charges for factoring services made by the respondent.

(l) On 25 January 2021 the applicant sent a subject access request to the respondent requesting copies of the correspondence on his account. The respondent offered no reply until 19 April 2021, when the respondent said that the appellant's email of 25 January 2021 would be dealt with as a stage 1 complaint. On 24 April 2021 the applicant asked for his complaint to be escalated to a stage 2 complaint.

(m) On 1 April 2021 the applicant received a letter from the respondent's solicitors threatening legal action to recover £1,741.17

(n) Between January 2019 and December 2020 the respondent applied eight late payment penalties of £34.00 each to the applicant's account.

(o) On 11 May 2021 the respondent emailed the applicant with the outcome of his stage 2 complaint. On 14 May 2021 the applicant rejected the outcome of his stage 2 complaint and asked that his complaint be escalated to stage 3. The respondent provided a stage 3 response on 25. May 2021, which the applicant does not accept.

(p) On 14 October 2021 the applicant received a letter from the respondent's solicitors threatening legal action to recover £2,394.21. On 19 October 2021 the applicant submitted this application to Housing and Property Chamber.

(q) The applicant says that the respondent failed to comply with Sections 2.5, 4.1, 4.5, 4.9, and 7.1 of the code of conduct for property factors.

(r) The respondent's position is set out in written representations which conclude with the words

> Overall, RMG S accept that there have been occasions where it has not performed in accordance with the Written Statement of Services and Code of Conduct on a 100% compliance basis. The factor has apologised on a number of occasions that enquiries of some years ago were not dealt with. There have also been occasions when debt recovery process was not followed but the factor feels that such occasions did not result in any prejudice to the homeowner.

(s) The dispute between the parties centres around the respondent's charges for the financial year to April 2019. The respondent says that by April 2019 the appellant owed the respondent £1496.17.

(t) The applicant says that in the year to April 2019 he was overcharged by the respondent in the sum of £539, so that the sum due to the respondent should total £957.17, but that figure is arrived at by including late payment charges totalling £272. The applicant believes the respondent should waive the late payment charges, which would result in a net figure due by the applicant to the respondent of £685.17.

Reasons for decision

10. (a) Section 2.5. of the code of conduct says

> 2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers).

(b) In their written submissions, the respondent accepts that there were delays in dealing with "*some of the earlier queries made by the homeowner*". The respondent says that those delays were acknowledged at all four stages of the complaints process, and an apology was tendered. During stages 2 and 4 of the complaints process the respondent told the applicant that further time was required and adhered to the revised timescale.

(c) The applicant complains that the respondent has not provided sufficient detail to enable him to understand the charges to April 2019. The respondent argues that the applicant is asking for details which the respondent is not obliged to provide. Section 2.5 of the code of conduct requires the applicant to deal with enquiries as quickly and as fully as possible

(d) The respondent admits a breach of section 2.5 of the code of conduct. On the facts as we find them to be, the respondent not only failed to respond on time, but failed to reply fully to enquiries made about the charges in the year to April 2019.

11 (a) S.4.1 of the code of conduct says

> 4.1 You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.

(b) The respondent's debt recovery procedure is set out in their written statement of services. The respondent candidly says

> It is accepted that the homeowner was not advised to withhold the disputed amount and to instead pay the debt for the other financial years. This is a requirement on the debt recovery procedure.

(c) The respondent goes on to set out factors which the respondent believes mitigate the breach of the code of conduct, but the respondent's candour is an admission that section 4.1 of the code of conduct was breached because they procedure was not "clearly, consistently and reasonably applied"

12 (a) s.4.5 of the Code of Conduct says

> 4.5 You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.

(b) On the facts as we find them to be, the respondent sent quarterly invoices. There is dispute between the parties about the charges for the year to April 2019, but the weight of reliable evidence tells us that the respondent regularly monitored payments due from the applicant and sent reminders of the amount outstanding. The fact that there is a dispute about the sums due for the year to April 2019 does not mean that regular reminders were not sent, nor that the respondent did not monitor the payments, or lack of payments, made by the applicant.

(c) there is no breach of section 4.5 of the code of conduct.

13. (a) s. 4.9 of the Code of Conduct says

> 4.9 When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position.

(b) The applicant received three letters from three separate firms of solicitors asking for payments of outstanding invoices. That is a standard procedure in the business of debt recovery. There is no reliable evidence placed before us of actions or words which could be interpreted as intimidating or threatening. The weight of reliable evidence tells us that the respondent gave a reasonable indication that they may take legal action.

(c) The weight of reliable evidence tells us that the only invoices disputed by the respondent relate to the year to April 2019, but the applicant has not paid invoices which are not in dispute.

(d) There is no reliable evidence of a breach of section 4.9 of the code of conduct.

14. (a) s.7.1 of the code of Conduct says

> 7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

(b) The applicant says that his emails prior to 25 January 2021 were "*clearly complaints*". On the facts as we find them to be, a number of emails from the applicant to the respondent (between 27 April 2019 and 4 December 2020) went unanswered. On the facts as we find them to be, none of those emails was a formal complaint.

(c) Between 7 April 2021 and 22 June 2021, the respondent followed their complaints procedure. There is no breach of section 7.1 of the code of conduct.

15. The respondent has breached sections 2.5, 4.1 of the code of conduct. The applicant does not say that the respondent has breached the property factors duties.

16. The remedy sought by the applicant is threefold. He wants

(i) an apology
(ii) the outstanding balance on his account to be waived, and
(iii) the respondent to be ordained to make a donation to a charity.

The respondent has already tendered an apology and offered a modest compensatory payment, which the applicant has rejected.

17. The central area of dispute between the parties is the level of charges to April 2019. In an email dated 27 December 2020 the applicant says that he believes he was overcharged £539 in the year 2018 to 2019. Even after considering each piece of evidence in this case, it is still not clear why the applicant believes he was overcharged £539.

18. What we can see from the documentary evidence is that by 2 December 2020 the respondent had applied £272 in late payment fees to the appellant's account.

19. The purpose of the property factor enforcement order is not to enrich the applicant. It is to it is to mark society's displeasure, to sanction an errant property factor, and to ensure future compliance with the code of conduct.

20. In the interests of the establishing a working relationship between the parties and to reflect the nature of the breaches of the code of conduct, we intend to make a property factor enforcement order ordaining the respondent to credit the applicant's account (for the year to April 2019) with £272 being reimbursement of the late payment fees, and an additional £224.17 in compensation.

Decision

21. The tribunal therefore intend to make the following property factor enforcement order (PFEO)

> *"Within 28 days of the date of service on the property factor of this property factor enforcement order the property factor must credit the applicant's account for the year to April 2019 with the sum of £496.17."*

22. Section 19 of the 2011 Act contains the following:

> (2) In any case where the committee proposes to make a property factor enforcement order, they must before doing so—
>
> (a) give notice of the proposal to the property factor, and
>
> (b) allow the parties an opportunity to make representations to them.
>
> (3) If the committee are satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the committee must make a property factor enforcement order.
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> (4) Subject to section 22, no matter adjudicated on by the homeowner housing committee may be adjudicated on by another court or tribunal.

23. The intimation of the tribunal's decision and this proposed PFEO to the parties should be taken as notice for the purposes of s. 19(2)(a) of the 2011 Act, and parties are hereby given notice that they should ensure that any written representations which they wish to make under s.19 (2)(b) of the 2011 Act reach the First-Tier Tribunal for Scotland (Housing and Property Chamber) office not later than 14 days after the date that the Decision and this proposed PFEO is intimated to them. If no representations are received within that 14 day period, then the tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Right of Appeal

24. 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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Signed 5 September 2022

Legal Member