

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: FTS/HPC/PF/21/1543

**The Property: Flat 7 Goldcrest Court, Millbank Road, Wishaw, ML2 0JE
("The Property")**

The Parties:-

**Paul Brown residing at Flat 7 Goldcrest Court, Millbank Road, Wishaw,
ML2 0JE
("the applicant")**

**Charles White Ltd, a company incorporated under the Companies Acts
and having a place of business at City Point, 65 Haymarket Terrace,
Edinburgh EH12 5HD
("The property factor")**

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the property factor has complied with the code of conduct as required by Section 14 of the 2011 Act, determined that the property factor has not breached the code of conduct for property factors and has not failed to carry out its duties in terms of s.17 of the Property Factors (Scotland) Act 2011.

Committee Members

Paul Doyle	Legal Member
Helen Barclay	Ordinary Member

Background

1 By application dated 20 June 2021, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of his complaint that the property factor has breached the code of conduct imposed by Section 14 of the 2011 Act & that the property factor has failed to comply with the property factor's duties.

2 The application stated that the applicant considered that the respondent failed to comply with Section 1 - 1.1, 1.2, 1.4, 1.7; Section 2 - 2.1 & 2.5; Section 4 - 4.1, 4.3, 4.5, 4.7, 4.8 & 4.9 and Section 7 - 7.2 & 7.4 of the code of conduct for property factors and breached the property factor's duties.

3 By interlocutor dated 17 August 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 applicant lodged further written representations on 9 September 2020. The property factor lodged further written representations on 9 and 15 September and 13 October, all 2021.

5. A hearing was held by telephone conference on 18 October 2021. The applicant was present and represented by John Ross. Ms L Rae, a Company Director of the property factor, represented the property factor.

Findings in Fact

6 The tribunal finds the following facts to be established:

(a) The applicant has lived in the property for more than 5 years. The Property factor has been the property factor for the property since 2004. The property factor's services are set out in a written statement of services, a copy of which the applicant has.

(b) The property factor has sent invoices for their services to the applicant throughout his period of occupation of the premises. The property factor sends invoices by uploading them onto an internet portal which the applicant has access to. Invoices sent to the applicant on 01/04/2020, 01/07/2020, 01/10/2020, 05/01/2021 and 14/01/2021 were not paid by the applicant on time. The property factor's records indicate that the applicant did not download the invoices for April and July 2020 until January 2021.

(c) On 14/05/2020 and 28/05/2020 the property factor sent demands for payment to the applicant. At the same time, they charged a late payment administration charge in accordance with their written statement of services.

(d) By 01/07/2020 the applicant's account with the property factor was in arrears totalling £427.97.

(e) The property factor instructed their solicitors to recover the outstanding arrears on the applicant's account. On 26 November 2020 Sheriff Officers served a simplified procedure summons for payment on the applicant. On 6 January 2021 decree (in absence) for payment of a principal sum of £427.97 plus interest at the judicial rate and expenses of £219.64 was granted at Hamilton Sheriff Court.

(f) By 4 February 2021 the total sum due by the applicant in terms of the decree granted at Hamilton Sheriff Court was £656.99. Sheriff Officers served a charge for payment on the applicant on 4 February 2021. When the Sheriff Officers fees were added to the sums due in terms of the decree from Hamilton Sheriff Court, the sums due by the applicant had increased to £709.01.

(g) On 29 January 2021, sheriff officers, acting for the property factor, arrested funds in two bank accounts held by the applicant. The sheriff officers fees for arrestment increased the sum due by the applicant to £745.90

(h) On 23 February 2021, the applicant paid £827.83 in satisfaction of the decree granted at Hamilton Sheriff Court

(i) After the applicant paid the sums due in terms of the decree to the property factor's debt collectors, £745.90 (the funds attached by arrestment) was paid from his bank account to Sheriff Officers. Those funds were credited to his account with the property factor and reduced the outstanding balance on his account (created by invoices and late payment charges in 2021) to £113.28.

(j) An arrestment is a form of diligence which is used to recover funds owed to a creditor by a debtor in Scotland. An arrestment 'ringfences' funds in the bank account up to the value of the decree. The bank must tell the creditor within 3 weeks of the arrestment being served if it has been successful. The bank does not need to disclose anything if the arrestment has been unsuccessful.

(k) A debtor is allowed a period of 14 weeks to contest the arrestment (by application to the appropriate Sheriff Court). If 14 weeks pass without challenge, the funds are automatically released by the bank to the creditor.

(l) The applicant has challenged neither the decree against him nor the arrestment.

(m) On 22 June 2021 the applicant paid the property factor £113.28 and brought his account to a nil balance for the first time since 1 April 2020.

(n) On 1 March 2021 the applicant complained to the property factor about the debt collection procedure, which by that time was complete. The applicant did not contact the property factor between 1 April 2020 and 1 March 2021. The property factor responded to the applicant's complaint in letters dated 10 March and 13 April, both 2021.

(o) The applicant was not satisfied with the response he received from the property factor, and there followed an exchange of emails, leading to a second stage complaint decision dated 14 July 2021. The property factor adhered to the complaint's procedure set out in their written statement of services.

(p) The applicant has not applied for recall of the decree against him. Instead, he paid the sums for which decree had been obtained.

Reasons for decision

7 (a) Section 1 of the code of conduct relates to a written statement of services. In his original application the applicant said that the property factor

breached sections 1.1, 1.2, 1.4 and 1.7 of the code of conduct. That creates difficulty because section 1 has subparagraphs set out in letters rather than numbered subparagraphs. The appellant's representative wrote on 23 July 2021 clarifying that the appellant's complaint relates to section 1. 1.1 C & D.

(b) Section 1 of the code of conduct relates to the existence of the written statement of services and the contents of the written statement of services. The applicant's representative has confused the requirements for certain basic elements in the written statement of services with the question of performance. In reality, the applicant is saying that the property factor's written statement of services contains hollow words because the applicant says that the property factor did not act in accordance with the property factors written statement of services.

(c) The property factor's written statement of services is produced. It contains adequate details of financial and charging arrangements. It contains adequate details of communication arrangements. It sets out clearly the property factor's authority to act. The complaint in relation to section 1 of the code of conduct is misconceived.

(d) The applicants focus turns to section 2 of the code of conduct. The applicant says the property factor breaches Section 2 - 2.1 & 2.5 of the code of conduct.

(e) Section 2.1 of the code of conduct says

2.1 You must not provide information which is misleading or false.

(f) Section 2.2.5 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).

(g) This case is about debt recovery procedure. To a large extent, the facts of the case are not disputed. The key to the case is contained in the statement of account from Charles White Ltd dated 13 October 2021. Reading that statement of account, it can be seen that the applicant's account fell into arrears when he did not pay the invoice for charges dated 1 April 2020. His account remained in arrears until 22 June 2021. The property factor embarked on debt recovery procedures when the outstanding balance on the applicant's account reached £427.97.

(h) The property factor raised an action for payment in Hamilton Sheriff court. That action was for payment of £427.97, plus interest, plus expenses. When decree was obtained, Sheriff officers were instructed. Each time Sheriff officers carried out a step in the enforcement of the decree, further charges were incurred.

(i) The applicant believes that the property factor provided false or misleading information because debt collectors and Sheriff officers told him that slightly different sums were due. The difference is accounted for in judicial interest and the expenses of enforcement. The property factor has not provided false or misleading information.

(j) The applicant's representative sets out a history of the correspondence in response to the applicant's complaint, in his submission dated 9 September 2021, and says that the property factor has not responded to correspondence within a reasonable timescale. The documentary evidence indicates that the property factor adhered to the complaints procedure set out in the written statement of services. The emails and letters produced indicate that the property factor responded promptly, fully, and within a reasonable timescale.

(k) There is no breach of section 2 of the code of conduct for property factors.

(l) The applicant says that sections 4.1, 4.3, 4.5, 4.8 and 4.9 of the code of conduct for property factors has been breached. Section 4 relates to debt recovery.

(m) It is obvious from the written statement of services produced that the property factor has a clear written procedure for debt recovery. The history of this case indicates that the property factor followed that procedure clearly, consistently, and reasonably. There is no breach of section 4.1 of the code of conduct

(n) Section 4.3 of the code of conduct says

Any charges that you impose relating to late payment must not be unreasonable or excessive.

(o) The applicant does not identify any charge as unreasonable or excessive. We can see from the financial statement dated 13 October 2021, produced by the property factor, that the first late payment administration charge totals £30, a second such charge totals £42. Those charges are in line with the written statement of services provided by the property factor. They are neither excessive nor unreasonable

(p) Section 4.5 of the code of conduct says

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.

(q) The applicant's complaint is that the property factor does not provide hard copies of reminders sent to the applicant nor proof of postage and delivery. The weight of reliable evidence indicates that the property factor has a system to ensure the monitoring of payments and issues timely reminders. What is beyond dispute is that the property factor followed their own debt recovery

process and, when their reminders were ignored, obtained a decree for payment against the applicant.

(r) Section 4.8 of the code of conduct says

You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

(s) The applicant's position is that the debt recovery procedure leading to the grant of decree against him is shrouded in mystery. He says that he did not receive any demands for payment and did not receive the service copy simplified procedure summons before decree was granted. What the applicant cannot escape is that the weight of reliable evidence indicates that he was sent to reminders calling for payment in May 2020. He might not have accessed the portal where those reminders were posted, but the fact that he chooses not to open his mail does not mean that the reminders were not sent, nor that the debt did not exist.

(t) The procedure for raising and serving a claim for payment and obtaining decree in the Sheriff court is governed by the Sheriff court rules. The weight of reliable evidence leaves us in no doubt that the Sheriff court rules were followed. Those rules require fair notice. The applicant was given the same notice that any other party to a Sheriff court action would receive. There is no breach of section 4.8 of the code of conduct.

(u) Section 4.9 of the code of conduct says

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.

(v) It is a serious allegation to say that somebody acts in an intimidating and threatening manner and carelessly misrepresents their authority. Having made that serious allegation, all the applicant's representative does is make reference to a sequence of letters and emails. There is nothing in those letters and emails which is intimidating or threatening. We cannot see how the authors of the letters are said to have carelessly misrepresent their authority. There is nothing in that sequence of letters and emails which is different to the ordinary course of correspondence undertaken by professional debt collectors.

(w) There is no breach of any part of section 4 of the code of conduct.

(x) Section 7.1 of the code of conduct says

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.

(y) The applicant's representative says that the property factors

... Have not followed the series of steps set out in CWL written statement of services...

(z) Section 7.1 of the code of conduct says the property factor must have a clear written complaints resolution procedure. In his own submission, the applicant's representative concedes that the property factor has followed section 7.1. The applicant's representative's error is that he has confused the requirement to set out the clear written complaints resolution procedure within the written statement of services with the question of performance of the contents of the written statement of services. In any event, on the evidence placed before us, there is nothing wrong with either the content of the written statement of services, nor with the procedure followed when a complaint was raised.

(aa) Section 7.4 of the code of conduct says

You must retain (in either electronic or paper form) all correspondence relating to a homeowner's complaint for three years as this information may be required by the homeowner housing panel.

(bb) The applicant believes section 7.4 of the code of conduct has been breached because Sheriff Officers are unable to produce copies of certain letters sent to the applicant. There are two points. The first is that all of those letters predate the homeowner's complaint. The second is that none of those letters is a necessary part of the investigation of the applicant's complaint. The relevant documents are the extract decree, the execution of arrestment, and the charge for payment - all of which are produced and all of which predate the applicant's complaint.

(cc) There is no breach of any part of the code of conduct for property factors.

8. Section 17(1), (4) and (5) of the Property Factors (Scotland) Act 2011 say

(1) A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed—

(a) to carry out the property factor's duties,

(b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the "section 14 duty").

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(5) In this Act, "property factor's duties" means, in relation to a homeowner—

(a) duties in relation to the management of the common parts of land owned by the homeowner, or

(b) duties in relation to the management or maintenance of land—

(i) adjoining or neighbouring residential property owned by the homeowner, and

(ii) available for use by the homeowner.

9. No meaningful evidence of a breach of the property factors duties is lead. We have already found that there is no breach of the code of conduct for property factors. By analogy we find that there is no breach of the property factors duties.

10. The applicant was surprised to discover that decree was obtained against him at Hamilton Sheriff court. The applicant's representative wanted to take challenges to the method of service of the simplified procedure summons and pursue tautological argument about the content of emails. There is no merit in any of those submissions.

11. What cannot be avoided is that the applicant implicitly accepts that he allowed his account with the property factor to lapse into arrears. As a matter of law, there is no defect in the service of the simplified procedure summons. If there was, that would be a matter for Hamilton Sheriff court. Hamilton Sheriff court was content that service has been properly affected, and so granted decree.

12. It is not unheard of for a decree in absence to be granted because a party has not responded in time to the service of a simplified procedure summons for payment. The remedy when that happens is to petition the Sheriff court. for recall of the decree. The remedy when an arrestment has been wrongfully, or harshly, used is to apply to the Sheriff court to restrict the arrestment. Neither of those remedies was sought by the applicant. Instead, the applicant paid the sums due.

13. The applicant thinks that he has paid too much because, some weeks after he made payment, his bank automatically remitted funds to Sheriff officers, who then passed the funds to the property factor. Those funds were used by the property factor to reduce the debit balance on the applicant's account. If the applicant thinks that one decree has been used to recover the same amount of money twice, his remedy is to raise an action for wrongful diligence. He has not taken that remedy.

14. For this tribunal's purposes, the applicant's views of the Sheriff court procedures and the applicant's views of Sheriff Officers' practices are irrelevant. Our concern is with the code of conduct for property factors and the property factors duties. On the facts as we find them to be, there has not been a breach of the property factors duties and, for the reasons stated above, there has not been a breach of the code of conduct for property factors.

15. There is no reliable evidence that the property factor has acted unreasonably, nor is there evidence that the property factor failed to carry out its duties to a reasonable standard

16. Having considered each strand of evidence we find that the application is entirely without merit. The application is dismissed.

Decision

17. The property factor has neither breached the Code of Conduct nor the property factors duties.

Right of Appeal

18. 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.

Signe

18 October 2021

Legal Member