

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Decision on homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Reference number: FTS/HPC/PF/21/2988

1A Langlands Court, Glasgow, G51 3PZ ("the Property")

The Parties:

Neville Barmack, 20 Broompark Drive, Newton Mearns ("the Homeowner")

**Walker Sandford Property Management, St Georges Building, St Vincent Place,
Glasgow ("the Property Factor")**

Tribunal Members:

Josephine Bonnar (Legal Member)

Mary Lyden (Ordinary Member)

DECISION

The Property Factor has not failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not fail to comply with Section 4 of the Code of Conduct for Property Factors.

The decision is unanimous

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 "the 2012 Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "The Regulations"

The Property Factor became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application received between 2 and 21 December 2021, the Homeowner applied to the Tribunal for a determination that the Property Factor had failed to comply with the 2012 Code of Conduct for Property Factors. The

Homeowner stated that the Property Factor had failed to comply with the opening paragraph of section 4 of the Code by failing to take action to prevent his non-payment of factoring invoices “escalating into a serious problem”. He had failed to pay the invoices because they were sent to the property address which had been purchased as a buy to let property. He did not become aware of the outstanding invoices until November 2021. Had the Property Factor acted promptly this would not have occurred and he would not have been charged interest and administration fees for a three year period. The Homeowner lodged documentation in support of the application including an email to the Property Factor notifying them of the complaint and a response from the Property Factor which states that the complaints procedure had been exhausted and that the Homeowner should escalate his complaint to the Tribunal.

2. On 10 January 2022, a Legal Member of the Tribunal on behalf of the President, referred the matter to a Tribunal for a determination. Both parties were notified that a case management discussion (“CMD”) would take place by telephone conference call on 11 March 2022 at 10am.
3. On 8 February 2022, the Property Factor lodged written representations.
4. The CMD took place by telephone conference call on 11 March 2022 at 10am. The Homeowner participated and the Property Factor was represented by Mr Brown, the Customer Services Manager.

The CMD

5. The Tribunal noted that the application is made in only in relation to the 2012 Code which was replaced by a new version of the Code in August 2021. The Tribunal advised the parties that it could only consider the period up to and including 16 August 2021, as the Property Factor was not required to comply with the 2012 Code after that date.

The Homeowner’s evidence

6. Mr Barmack advised the Tribunal that the Property Factor failed to take prompt action to pursue the debt owed by him and therefore breached section 4 of the Code. The Property Factor sent letters and invoices to the property for three years. These were not paid because it was a “buy to let” property and Mr Barmack did not receive the letters or invoices. The Property Factor ought to have taken action to pursue the debt at a much earlier stage. Had they done so, they would have realised that he did not live at the property and made enquiries to establish his address. Mr Barmack said that he purchased the property in September 2018. Although he was aware that the property was factored, he had a lot on his mind, and it did not occur to him that he should contact the Property Factor to provide them with his contact details. He conceded that it had been his responsibility to do this. He only visited the property once after the purchase, to meet the letting agent and make arrangements for them to manage the property. The property has been

occupied by tenants since January 2019. At no point during the last three years have the letting agents forwarded any mail which was sent to the property. Mr Barmack is of the view that the Property Factor ought to have realised within a few months that he did not reside at the property as no payments had been made. Had they taken action to track him down within a few months, he would not have incurred the interest and administration charges for late payment which have been applied to his monthly invoices. The Property Factor claims to have checked the landlord registration website, but they did not do so until July 2021. As he is registered, the check should have confirmed that the property is a rental.

7. In response to questions from the Tribunal Mr Barmack said that he has one other rented property which he has owned since 1990. It is also factored but the arrangements for paying the factoring charges were set up at the time of the purchase. Mr Barmack also confirmed that his contact address on landlord registration is the letting agent, and not his home address. He advised that he first heard from the Property Factor in November 2021, when a recorded delivery debt letter arrived at his home address.

The Property Factor's evidence

8. Mr Brown advised the Tribunal that he believes that they obtained Mr Barmack's address from the Land Register of Scotland. It was obtained by a colleague who is no longer with the company. They have used this route to obtain addresses in the past although they have no way of knowing whether the address is current until they send a letter and get a response. In response to questions from the Tribunal, Mr Brown said that the decision to escalate a case to debt collection or court proceedings depends on circumstances. If major work is required and the Property Factor requires to obtain consent and ingather funds, action will be taken more quickly. In other cases (such as this case) they usually initiate action when the Homeowner owes about £1000. Mr Barmack owed about £936 just before the 2020 lockdown. Ordinarily, action would have been taken at this point. However, due to financial problems being experienced by many of their clients due to the pandemic, the Property Factor decided to suspend debt recovery between April 2020 and May 2021. During this period, they also suspended interest charges and only applied administration fees to accounts which exceeded £1000. This meant that Mr Barmack was not charged administration fees between April 2020 and September 2020. Mr Brown confirmed that the Property Factor issues monthly invoices. The first invoice issued to Mr Barmack was in November 2018, when they became aware of the change of ownership. None of their letters to the property were returned, including those sent by recorded delivery. They did not realise at the time that during the pandemic, a signature on the Royal Mail website did not necessarily mean that the Homeowner had actually signed for the letter. Mr Brown further advised that non-payment of factoring invoices is most common with "buy to let" properties where contact details have not been provided. Some solicitors provide this information, but others do not. Although he cannot evidence this, he believes that his colleague checked landlord registration before July 2021. This is something they regularly do if payment has not been made. He has recently been in

touch with landlord registration about various issues and discussed this case. They have suggested that they should email the department in the future, rather than relying on the search facility on the website. Mr Brown confirmed that by November 2021 the total sum owed by Mr Barmack was £2573.18. £1750 of this was for common charges. The remainder was for admin charges and interest. He had been willing to negotiate over the admin and interest charges, but Mr Barmack refused to pay any of them. In response to further questions Mr Brown confirmed that Mr Barmack was charged a £12 administration fee each month as an owner occupier and not the landlord fee which is £40. The Tribunal noted that from July 2021 onwards the fee was £40. Mr Brown said that they must have established his home address at that point. He could not explain why Mr Barmack did not hear from them until November 2021 and confirmed that he would arrange to have the invoices amended for this period as they could not be justified.

The Tribunal make the following findings in fact:

9. The Homeowner is the heritable proprietor of the property.
10. The Property Factor is the property factor for the property.
11. The Homeowner did not provide the Property Factor with his contact details, including his home address, following his purchase of the property in September 2018.
12. The Property Factor sent all letters and invoices to the property between November 2018 and November 2021. No payments were made to the common charges account.
13. The Property Factor applied interest to the account between December 2018 and March 2020 and between May 2021 and November 2021.
14. The Property Factor applied administration charges to the account at the rate of £12 per month from February 2019 until March 2020 and September 2020 until July 2021. Administration Charges were applied at the higher landlord rate of £40 per month between July 2021 and November 2021.
15. The Property Factor obtained the Homeowner's address in July 2021 but did not write to him at this address until November 2021.

Reasons for Decision

16. The Homeowner's complaint is that the Property Factor ought to have taken action to recover the sums owned by him at a much earlier stage. Had they done so, they would have located him, and he would have been made aware of the sums which were outstanding. He would have paid the accounts and no

further interest or administration charges would have been incurred.

17. The opening paragraph of the 2012 Code states **“Non-payment by some homeowners can sometimes affect provision of services to the others or can result in the other homeowners being liable to meet the non-paying homeowners debts (if they are jointly liable for the debts of others in the group). For this reason, it is important that homeowners are aware of the implications of late payment and property factors have clear procedures to deal with this situation and take action as early as possible to prevent non payment from developing into a problem”**

18. The Tribunal is not persuaded by the Homeowners argument for the following reasons: -

(a) It was the responsibility of the Homeowner to notify the Property Factor of his contact details following his purchase of the property. As he did not do so, the Property Factor was entitled to assume that the Homeowner was an owner occupier. They issued a welcome pack, letters, and invoices to the property. The Homeowner elected to put the property in the hands of a letting agent. He took nothing further to do with the property. He did not contact the Property Factor to ask about the common charges throughout the relevant period. He did not contact the letting agent to ask about mail. He may have been busy, but that is not a valid excuse for his failure to deal with his obligations.

(b) The Homeowner did not fully articulate what steps he thought should have been taken by the Property Factor. He suggested that they might have contacted his solicitor. However, some time passed before the account reached the stage where debt recovery action was required. The solicitor may have refused to provide the address, due to client confidentiality, or the Homeowner might have moved house. Even if the landlord registration search had confirmed that the property was a rental, the contact address was for the letting agent. The Homeowner seems to have expected the Property Factor to spend time and resources tracking him down. This could have resulted in costs which may have been passed onto the other Homeowners. The Property Factor managed to obtain an address from the Land Register, but this would not have resolved matters if the Homeowner had moved house since 2018.

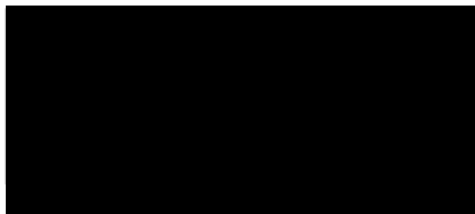
(c) The opening paragraph of section 4 requires action to be taken as “as early as possible to prevent non-payment from developing into a problem”. “Problem” is not defined but earlier in the paragraph there is reference to the provision of services being affected or unpaid charges being passed on to other homeowners. It therefore appears that it is the effect of non-payment on the property and/or the other homeowners which is to be prevented. As Mr Brown said during the hearing, if a major repair had been required they would have had to take action more quickly. There is no suggestion that routine maintenance and repair was affected by the outstanding invoices or that costs were being passed on to other Homeowners. The only consequence was that a Homeowner who had failed to provide his contact details and not given any thought to his factoring charges, incurred fees for non-payment.

(d) The Property Factor advised that they generally start to pursue unpaid invoices when the sum of £1000 is owed. Given the costs associated with debt recovery and court action, this does not seem unreasonable. Similarly, their decision to suspend action during the pandemic is understandable. The Homeowner benefited from a suspension of charges during this period. What is of concern, is the failure by the Property Factor to contact the Homeowner between July and November 2021. It is clear from the invoices that he was known or assumed to be a landlord, rather than an owner occupier, during this period. Mr Brown could not offer an explanation. As this occurred after the 2012 Code ceased to apply, the Tribunal was unable to consider the issue further but notes that Mr Brown intends to amend the invoices which were issued during this period.

19. The Tribunal is therefore satisfied that the Property Factor has not failed to comply with Section 4 of the 2012 Code.

Appeals

A homeowner or property factor 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.



Josephine Bonnar, Legal Member

15 March 2021