

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)**

Chamber Ref: FTS/HPC/LM/22/3463 and FTS/HPC/LM/22/3860

**PENTLAND View Estate Straiton, EH20 9NE
("the Development")**

The Parties:-

**Mr Peter McCarter, 24 Burnbank, Straiton, Loanhead, Midlothian EH20 9NE
("the Homeowner")**

**Charles White Limited, 65 Haymarket Terrace, Edinburgh EH12 5HD
("the Factor")**

**Tribunal Members:
Graham Harding (Legal Member)
Ahsan Khan (Ordinary Member)**

DECISION

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 1Cj. and 2.1 of the 2011 Code nor did it comply with Sections OSP4, 1.5C(10) and 2.1 of the 2021 Code.

The decision is unanimous.

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors 2011 is referred to as "the 2011 Code"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors 2021 is referred to as ("the 2021 Code") and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Factor became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By applications dated 18 September 2022 and 13 October 2022 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 1 j and l., 2.1 and 7.1 of the 2011 Code and Sections OSP1, OSP4, 1.2, 1.5(C)(10), 1.5(D), 2.1 and 7.1 of the 2021 Code and had also failed to carry out its property factor's duties.
2. The Homeowner submitted substantial documentation including email exchanges between himself and the Factors setting out the details of his complaints.
3. By Notice of Acceptance dated 7 November 2022 a legal member of the Tribunal with delegated powers accepted the applications and a hearing was assigned.
4. By email dated 2 December 2022 the Factor submitted written representations to the Tribunal.
5. By email dated 19 December the parties were advised that the applications would call at a Case Management discussion rather than a hearing.

The Case Management Discussion

6. A Case Management Discussion ("CMD") was held by teleconference on 6 February 2023. The Homeowner attended in person. The Factor was represented by its Associate Director, Miss Carrie Borthwick.
7. By way of a preliminary matter the Tribunal noted that the Homeowner had made reference in his application to the Factor failing to carry out its Property Factor's duties in that it was in breach of the Consumer Protection Act and also the Unfair Practices Regulations. The Tribunal pointed out that the Consumer Protection Act 1987 concerned product liability and it could see no relevance to the current proceedings. With regards to the Consumer Protection from Unfair Trading Regulations 2008, the Tribunal explained that as these related to potential criminal breaches the Tribunal did not have jurisdiction to consider them.
8. The Homeowner referred the Tribunal to his written representations and went on to explain that in September 2013 the Factor's Mr Lee Collins had proposed introducing a charge of 1.00 per month for paper invoices. However the charge had not been made due to concerns about the factor's services at that time. The Homeowner went on to say that from November 2017 almost every Newsletter sent out by the Factor contained a reference to a saving that could be made of £3.00 per quarter by signing up to the Client Portal. The same offer was also included in the Factor's Written Statement of Services ("WSS"). The Homeowner explained that eventually as a result of these offers, he was persuaded to sign up to the Client portal but when he asked about his discount, he was told no-one was entitled to it as the additional quarterly charge had never been added.

9. The Homeowner said that because of not receiving the discount he decided to make a formal complaint to the Factor. However, he thought that the complaints procedure had not been properly followed as the second stage of the complaint had been conducted by a director of the Factor and not a line manager who should be neutral.
10. The Homeowner said that during this time he had become aware that the Factor was not a member of the Property Managers Association Scotland ("PMAS") despite its WSS and the Client Feedback Information Sheet saying it was.
11. The Homeowner also explained that there had been a second incentive to signing up to the client portal in that Newsletters throughout 2021 had referred to a quarterly prize of £100 for owners who signed up to the Client Portal. The Homeowner said that he was told that the draw was only open to new owners who signed up and not to those who had already signed up. He thought the wording was misleading.
12. For the Factor Miss Borthwick said that in 2013 the Factor had discussed introducing a charge for paper billing but had agreed at that time not to apply the charge and it was never introduced thereafter. She went on to say that the WSS had been revised to take account of the fee but although it did state that there was a charge that was in general terms for all the Factor's developments and did not apply to the Homeowner's development. She went on to say that as no fee for paper billing was being charged there was no fee to reimburse. Miss Borthwick said that the Factor had absorbed the additional cost of paper billing at the development because of the service concerns raised by owners back in 2013.
13. The Homeowner queried how the costs were calculated as there had been increases in the management fees year on year since 2013. Miss Borthwick was unable to explain exactly how the costs were calculated other than to say the management fee covered all costs. She also confirmed that the issue of charging for paper billing was currently under review. After some further discussion on the subject Miss Borthwick accepted that the reference to the discount being available in the WSS and the Newsletters was false and misleading.
14. With regards to the prize draw, Miss Borthwick explained that with hindsight the wording of the offer should have been clearer and that this was also false and misleading.
15. With regards to the Homeowner's formal complaint, Miss Borthwick explained that the Factor had a two step complaints procedure. The Homeowner's initial complaint had been responded to by the property manager who would normally have referred it on to his line manager but on this occasion as the line manager was on holiday and in order to avoid any delay the second stage was dealt with by Lorna Rae one of the directors who was acting as line manager in the line manager's absence..

16. The Homeowner submitted that Mrs Rae as a director of the company would not be neutral when dealing with the Homeowner's complaint.
17. In conclusion the Homeowner said that he felt duped into registering for the Client Portal. He said he felt he was entitled to the quarterly deduction and had refused to pay his management fee of about £100.00 until the matter was resolved. He said he would also like an apology and that the outcome of the applications should be put in the Newsletter.

The Tribunal make the following findings in fact:

18. The Homeowner is the owner of 24 Burnbank, Straiton, Loanhead, Edinburgh EH20 9NE
19. The land that is subject to the dispute between the parties is located at Pentland View Estate, Straiton, Edinburgh ("the Development").
20. The Factor performed the role of the property factor of the Development.
21. The Factor's WSS does not state whether owners will receive paper or online bills or can choose either method.
22. The Factor's WSS and Client Feedback Information Sheet contained references to the Factor being a member of the PMAS when it was not.
23. The WSS and Newsletters contained an offer to owners of a discount of £3.00 per quarter if they signed up to the Client Portal.
24. This offer was not open to owners at the Development as they were not being charged for paper bills.
25. A prize draw for owners in 2021 Newsletters did not make it clear that owners who had already signed up for the Client Portal would not be entered into the draw.
26. The Factor has a two step complaints procedure. The second stage of the procedure is carried out by a line manager.

Reasons for Decision

27. There is a requirement in both Codes that the WSS sets out the methods of billing owners and the Tribunal was satisfied that owners should be clearly told if quarterly invoices will be sent by post or email or can choose either option and if any additional costs will apply. In this regard although no

additional costs were charged to the Homeowner the WSS did make reference to such charges and also did not make it clear which method of billing would be used. Therefore, the Tribunal found that the Factor was in breach of Section 1Cj. of the 2011 Code and Section 1.5C(10) of the 2021 Code.

28. The Tribunal was satisfied from the written representations and documents together with the oral submissions that the Factor, by referring in its WSS and Newsletters to the discount available to owners for signing up to the Client Portal, was providing information that was both false and misleading. This was acknowledged during the course of the CMD by Miss Borthwick.
29. The Tribunal was also satisfied that the wording of the prize draw in the 2021 Newsletters did not make it at all clear that the draw was only open to owners who had not previously signed up to the Client Portal. Once again this was acknowledged by Miss Borthwick during the course of the CMD.
30. It was apparent to the Tribunal that although the Factor was no longer a member of the PMAS it had continued to refer to it being a member in various documents. Once again, the Tribunal found this to be false and misleading.
31. The Tribunal was therefore satisfied that the Factor was in breach of section 2.1 of the 2011 Code and OSP4 and 2.1 of the 2021 Code.
32. Although the Homeowner had misgivings about the neutrality of a director of the Factor undertaking step 2 of the complaints procedure the Tribunal did not consider this amounted to a breach of either Code. It is not at all uncommon for senior management to deal with client complaints and on this occasion Mrs Rae was temporarily in the line manager's role. Accordingly, this part of the Homeowner's complaint is not upheld.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

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.

Graham Harding Legal Member and Chair

17 February 2023 Date