Upper Tribunal for Scotland

2025UT37
Ref: UTS/AP/25/0024

DECISION OF

Sheriff Ian Hay Cruickshank

ON AN APPLICATION TO APPEAL IN THE CASE OF

Mr Adam Kindreich

Appellant

- and -

James Gibb Residential Factors

Respondent

FTS Case Reference: FTS/HPC/PF/23/1675

10 June 2025

Decision

Upholds the appeal in part; Quashes part of the decision of the First-tier Tribunal for Scotland Housing and Property Chamber dated 10 December 2024; Re-makes the decision by deleting certain findings in fact, as they appear in the original decision, and substituting therefore new findings in fact as set out in the conclusion hereto; In re-making the decision finds that the respondent failed to comply with OSP6, OSP11 and section 2.7 of the Property Factors (Scotland) Act 2011: Code of Conduct for Property Factors (2021) and finds that the respondent is in breach of section 14(5) of the Property Factors (Scotland) Act 2011; Proposes a draft Property Factor Enforcement Order in terms as set out in the conclusion hereto and allows parties 28 days from the date hereof to provide representations in writing on the terms of the proposed Order.

Introduction

[1] Adam Kindreich ("the appellant") appeals the decision of the First-tier Tribunal for Scotland Housing and Property Chamber ("the FTS") dated 10 December 2024. This can be regarded as the final decision of the FTS following upon a review instigated by the appellant. In terms of that decision the appellant's application, to have James Gibb Residential Factors ("the respondent") found in breach of various sections of the Property Factors (Scotland) Act 2011: Code of Conduct for Property Factors 2021 ("the Code"), was refused.

[2] The appellant sought leave to appeal from the FTS. This was refused by the FTS on 27 January 2025. The appellant thereafter sought leave to appeal from the Upper Tribunal for Scotland ("the UTS"). The UTS granted leave to appeal on 31 March 2025.

[3] An appeal hearing before the UTS proceeded on 3 June 2025 by Webex. The appellant represented his own interests. The respondent was represented by one of its employees, Miss Holt.

The Property Factors (Scotland) Act 2011: Code of Conduct for Property Factors (2021)

[4] The current Code of Conduct was published in July 2021. It replaced a previous Code and came into force on 16 August 2021 (per Property Factors (Code of Conduct) (Scotland) Order 2021/113 SSI). The Code contains Overarching Standards of Practice ("OSP") which property factors should apply in conducting their work. The Code thereafter contains seven headed sections, each having a number of subsections.

[5] In his original application the appellant sought to establish that the respondent had breached three specified OSP's and nine subsections of the Code. In this appeal argument is restricted to the FTS having erred in refusing the application as far as relating to three OSP's and

two subsections: namely OSP4, OSP6, OSP11, section 2.7 and section 4.10. I will outline the terms of these parts of the Code in detail below.

Grounds of appeal

[6] In relation to the above parts of the Code the appellant argues that the FTS reached a decision which was in direct contradiction to the evidence before it. The decision of the FTS was based on findings not supported by the facts. There was a lack of detail contained in the decision and the FTS failed to explain the legal tests it applied when determining whether an OSP or a section of the Code had been breached. Furthermore, the decision of the FTS failed to provide adequate reasons.

The Application before the FTS

[7] The FTS found in fact that the appellant's property was within a development factored by the respondent commencing on an unspecified date but ceasing in May 2022. All homeowners in the development had received a final invoice for factoring services in September 2022 asking that they contact the respondent to obtain a refund. The applicant received his refund on 9 December 2022. Although not specified in the findings in fact the balance received by the appellant at that time amounted to £65.67. The appellant submitted that the respondent had breached the Code by the delay involved in receiving the refund.

[8] A second matter related to the appellant having received an invoice reminder on 5 July 2022 although he had not received the original invoice. The respondent had emailed the appellant stating there would be a late payment fee of £30 in the event that the original invoice was not settled within 7 days.

[9] The appellant also sought to establish that there had been a breach of the Code as the respondent had failed to supply the appellant with insurance statements for the years 2020 to 2022 inclusive and other documentation including copies of invoices which had been requested by various emails. A further breach was advanced based on the respondent's failure to adequately inform the appellant of the measures taken to recover non-payment of fees from certain other homeowners within the development. Finally, by treating the appellant's email of 28 April 2023, intimating his intention to raise proceedings before the FTS, as a complaint it was argued that the respondent again breached the Code. The email of 28 April 2023 was not to be looked at in isolation as previous emails of 5 December and 14 December, both 2022, and 11 April 2023 (requesting the documentation referred to above) had been ignored.

The Relevant Law

[10] The Code was introduced by virtue of section 14 of the Property Factors (Scotland) Act 2011 ("the 2011 Act"). The purpose of the Code is to set out minimum standards of practice for registered property factors. A registered property factor must ensure compliance with the Code for the time being in force (section 14((5) of the 2011 Act) and to that effect has a statutory duty to comply with the Code.

[11] A homeowner may apply to the FTS for a determination as to whether a property factor has failed to carry out the property factor's duties or to ensure compliance with the Code (section 17(1) of the 2011 Act). A failure to carry out such duties for the purposes of the 2011 Act includes a failure to carry out such duties to a reasonable standard (Section 17(4) of the 2011 Act). To reach a determination the FTS must apply section 19 of the 2011 Act which is in the following terms:

"19 Determination by the First-tier Tribunal

(1) The First-tier Tribunal must, in relation to a homeowner's application referred to it under section 18(1)(a), decide—

(a) whether 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, and

(b) if so, whether to make a property factor enforcement order.

(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it 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 it.

(3) If the First-tier Tribunal is 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 First-tier Tribunal must make a property factor enforcement order.

(4) Subject to section 22, no matter adjudicated on by the First-tier Tribunal may be adjudicated on by another court or tribunal."

[12] The Act allows for the terms of a PFEO to be wide and varied. In that respect, section 20 of the 2011 Act applies:

"20 Property factor enforcement orders

(1) A property factor enforcement order is an order requiring the property factor to—

(a) execute such action as the First-tier Tribunal considers necessary,

(b) where appropriate, make such payment to the homeowner as the First-tier Tribunal considers reasonable.

(2) A property factor enforcement order must specify the period within which any action required must be executed or any payment required must be made.

(3) A property factor enforcement order may specify particular steps which the property factor must take."

[13] A PFEO may therefore require the property factor to take such steps to correct any failure as the FTS considers to be necessary. Whereas this can include a payment to the homeowner, that is to be in circumstances where the FTS considers a payment to be appropriate having applied its mind to whether such payment is reasonable. The FTS can only fulfill that task having given the parties an opportunity to make representations. The provisions of the 2011 Act do not require the FTS to make a PFEO in all cases even where the Code has been breached. (For a helpful analysis of the task of the FTS in this respect see Sheriff O'Carroll's observations in the recent decision of *Sheikholeslami* v *Speirs Gumley Property Management Ltd* 2025 UT 36 at paragraphs 40-42)

Discussion

[14] I have determined the most expeditious manner of considering this appeal is to focus on each part of the Code where the appellant submits the FTS erred in refusing his application. I will consider first each OSP and thereafter the subsections of the Code which form the basis of this appeal. Under each heading I will consider the reasoning provided by the FTS. I will outline the submissions I heard on appeal and determine whether based on its written decision the FTS has erred in law.

[15] On the matter of submissions, I have considered the appellant's written submissions as supplemented by his further oral submissions. The respondent did not lodge a written response to the appeal. Miss Holt provided brief oral submissions at the hearing the crux of which was that the FTS had not erred. The reasons for the decision were sufficient, albeit it was conceded that the written decision did not contain as much detail as might have been expected based on all the materials that had been before the FTS and referred to by the parties. Miss Holt also submitted that

the correct legal tests had been applied. This sufficiently addresses the respondent's submissions without the necessity of repeating these under each of the following headings.

OSP4 – You must not provide information that is deliberately or negligently misleading or false.

[16] The FTS considered that this paragraph of the Code had not been breached. It referred to the "voluminous exchanges" between the parties and concluded that the respondent had acted professionally. The FTS did not find that the respondent had acted in a manner that was deliberately misleading or false. The FTS referred to the fact that the appellant had submitted a complaint email when the respondent had ceased to be the relevant property factor for a substantial period of time. The relevant finding in fact was as follows:

"X. The applicant emailed the respondent on 28 April 2023 stating his intention to raise these proceedings. The respondent initially treated this as a "complaint" which they said must follow their complaint procedures."

[17] The appellant submitted that the FTS had failed to apply the correct legal test, and that the decision rested on irrelevant factors which should not have influenced the decision. The correct legal test was whether the respondent's response to the appellant's email of 28 April 2023 contained information which was either misleading or false. The purpose of sending the email had been a legal pre-requisite before initiating legal action via the FTS (as required by section 17(3) of the 2011 Act). The email response stated that the appellant's email "must follow our advertised complaints procedure". By using the word "must" the respondent had attempted to mislead the appellant into thinking he had to follow the complaints procedure before applying to the FTS which was a factually incorrect statement. The appellant also pointed to irrelevant factors where

the FTS had referred to "voluminous exchanges" between the parties which had no bearing on whether the respondents had provided false or misleading information. The FTS had not applied the correct legal test and had failed to give adequate reasons for its decision.

[18] The FTS decision does not cross-reference what issue or issues of fact were relied upon by the appellant to persuade the FTS that this OSP had been breached. With that acknowledged, in his oral submissions, I understood the appellant to accept that the respondent's various actions had not been malicious but simply suggested a lack of competence. My interpretation of OSP4 is that to be breached it requires there to be an intentional and purposeful act on the part of the property factor for the purpose either to mislead or knowingly to give false information. Negligence sets a higher bar than is found in many of the other paragraphs of the Code. On that basis, reading the decision of the FTS as a whole, it was reasonable for the FTS to conclude that none of the respondent's actions were sufficiently culpable to breach this OSP. On that basis I do not uphold this part of the appeal.

OSP6 – You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information that they need to be effective.

[19] The FTS concluded that for the purposes of this OSP the respondent had carried out services using reasonable skill and in a timely way. Nothing suggested that staff of the respondent did not have training or information that they needed to be effective. No further reasoning was provided by the FTS. Of relevance to the issue of the refund the FTS made the following finding in fact:

"III. The respondent ceased to be the relevant property factor for the property in May 2022. All homeowners in the development received a final invoice in September 2022 asking them to contact the respondent to obtain a refund. The respondent was somewhat tardy in issuing the applicant's refund, which was not received by the applicant until 9 December 2022."

[20] On the matter of the email threatening a late payment fee the FTS found in fact that the email had been sent and that the appellant had not received the original invoice. A further finding in fact was that the respondent had accepted their software had made an error in sending the chaser email in relation to an invoice that had not been issued.

[21] The appellant submitted on appeal that there were two matters to which this section of the Code related. This was (a) the lateness of the refund and (b) the sending of an invoice reminder threatening a penalty charge where the invoice itself had not been received. The appellant stated that the facts which should have been found by the FTS, and indeed had been found by the FTS, would have supported the conclusion that the respondent had failed to carry out its services with reasonable care and had failed to do so in a timely way.

[22] The appellant referred to the fact that the FTS written decision noted that the respondent in evidence had admitted there had been a delay and had apologised for this. Similarly, there had been an admission as to a software error. In acknowledging in a finding in fact that the respondent had been "somewhat tardy" in issuing the refund it was not reasonable for the FTS to conclude that the respondent had acted "in a timely way". No explanation was given by the FTS to justify its conclusion in these circumstances.

[23] On the matter of the late return of the refund, the appellant's submissions are compelling. Whilst acknowledging that FTS decisions are reached in proceedings which are less formal than in

other courts, the findings in fact in any written decision are of critical importance. In any decision the findings in fact should list the facts which have been established and are the facts necessary to reach a legal conclusion when a legal proposition is applied to those facts. Findings in fact should be easy to follow and use plain language which is not susceptible to different interpretations. Whatever interpretation is applied to being "somewhat tardy" it is all but impossible to equate that to providing a service "in a timely way" On the evidence accepted by the FTS its correct conclusion should have been that the late refund breached the requirements of OSP6 of the Code.

[24] On the matter of the chaser email sent where no earlier invoice had been issued the FTS accepted that this was due to a software error. The respondent apologised for this technical issue. Whereas the written decision does not explain why, standing the software error, the respondent had carried out the service in this respect using reasonable care and skill, from the evidence as recorded, the FTS accepted the respondent's explanation and noted that an apology had been proffered. Based on that explanation and the isolated incident which involved one email, with no further consequences for the appellant as recorded in the original decision and no suggestion that the FTS had failed to record any such consequences as brought to its attention, the FTS was justified in concluding that this issue did not breach OSP6. Accordingly, I uphold the appeal that the FTS on the evidence should have concluded that there had been a breach of OSP6 only in relation to the late payment of the balance due to the appellant.

OSP11 – You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.

[25] The FTS concluded there was no basis to support this. It concluded that responses to enquiries and complaints had been given within reasonable timescales and in line with the

complaints handling procedure. The FTS made no findings in fact as to what the complaints handing procedure was.

[26] The appellant submitted that the FTS required to consider whether the respondent had (a) responded within reasonable timescales, and (b) that the response was in line with their complaints handling procedure. The facts should have led the FTS to conclude there had been a breach. None of the appellant's emails of 5 and 14 December 2022 and 11 April 2023 had received any response. The FTS was aware of the respondent's procedures in this respect and were further aware that these provided for a complaint to be acknowledged within 10 working days.

[27] The reasoning of the FTS lacks the necessary detail to justify the decision it reached in relation to OSP11. I agree with the appellant that the FTS required to consider the terms of the respondent's complaints procedure, reflect on the facts they found proved and measure this against the complaints procedure in order to determine whether the respondent's actions led to a response being given within a reasonable timescale. If the FTS did carry out this exercise it fails to record that anywhere in the written decision.

[28] The evidence which appears to have been accepted is that the appellant did not receive any response. The respondent accepted as much. I therefore accept that the decision of the FTS in this respect cannot be justified. Without further explanation by the FTS for its conclusion the decision is contrary to the evidence. I uphold the appellant's appeal that the FTS should have found there to a breach of OSP11.

Section 2.7 – A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall a property factor

should aim to deal with enquiries and complaints as quickly and as fully as possible, and keep the homeowner(s) informed if they are not able to respond within the agreed timescale.

[29] The FTS concluded it did not consider there was a sufficient basis to support this. They repeated that the responses to enquiries and complaints had been made within reasonable timescales and in line with the complaints handling procedure. The FTS made no findings in fact as to what the timescales for responses were as contained in the respondent's WSS (written statement of services). No reference to the respondent's WSS is to be found anywhere in the decision.

[30] The appellant renewed his earlier submission that the evidence should have led to the FTS concluding there was a breach of this section. The correct test was to consider whether the respondent had responded within the timescales confirmed in its WSS. It had not done so, and this was clear from the evidence before the FTS.

[31] For the reasons I have stated regarding OSP11 I uphold the appeal to the extent that the FTS should have found that section 2.7 of the Code had been breached.

Section 4.10 – A property factor must be able to demonstrate it has taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging other homeowners ((if they are jointly liable for such costs). This may include providing homeowners with information on options for accessing finance eg for major repairs. Any supporting documentation must be made available if requested by a homeowner (subject to data protection legislation).

[32] The FTS concluded that the respondent's debt recovery policy was published on their website. This explained the steps which would be taken to recover unpaid debts. The respondent's invoices referenced the costs occasioned by taking professional advice and the respondent's online

portal provided further information about this. A finding in fact reflected this conclusion. A further relevant finding in fact was in the following terms:

"VIII. The respondent had made all this information available to the applicant by means of an online portal during the currency of their business relationship. The applicant's motivation for requesting the information long after the cessation of the provision of service was opaque and may very well have been simply to continue an ongoing general grievance against the respondent…."

[33] The appellant submitted that the crucial word in this section was "demonstrate". The FTS reached its conclusion based on the fact that the respondent's debt recovery policy was published on its website. This was only a general statement, and it was not the disclosure of the information which the appellant had sought, being specific information about the steps taken to recover debt from certain homeowners on the development in question. The respondents had only directed the appellant to the action which could be taken, not the action that it had taken in the specific circumstances which formed the basis of the appellant's request.

[34] It is clear from reading the decision as a whole that the FTS spent time exploring the issues in relation to this matter. The appellant criticised the FTS for questioning his motives for requesting this information. The appellant sought to argue that his motivation was an irrelevant consideration. I agree that the appellant's motivation is not the only factor to be considered but I do not agree that this was irrelevant.

[35] The appellant's submissions focused on the importance of the word "demonstrate" as used in this section. By my interpretation of section 4.10 there is an important qualification. A property factor must be able to demonstrate it has taken the necessary steps as outlined "prior to charging other homeowners". The evidence as recorded by the FTS did not find that this was the purpose

for which the appellant sought that information. The appellant did try to convince me that this had been the evidence before the FTS, but I am not in a position to accept that was the case.

[36] I would observe that in its findings in fact the FTS found that the appellant's motivation for requesting the information was "opaque and may very well been simply to continue an ongoing general grievance against the respondent". I do not find that to be a very helpful finding. It is not clear and concise as a finding in fact should be. It is not a definite factual conclusion. That said, I do not uphold the appeal to the extent that the evidence supported there had been a breach of section 4.10 of the Code.

Conclusion

[37] I uphold this appeal in part. This relates to the FTS decision in relation to OSP6, OSP11 and section 2.7 of the Code. In so doing, the issue now becomes what disposal I should make in order to progress this matter. I sought parties' submissions on how they would wish me to proceed if the appeal was successful.

[38] The appellant was keen that this matter was not to be remitted back to the FTS. His preference was for me to re-make the decision and invited me to find it was appropriate to make a Property Factor Enforcement Order. In making this submission the appellant accepted that I may not have sufficient information to determine what the terms of the PFEO should be. He queried whether there was a mechanism whereby further submissions could be made in this respect. Miss Holt for the respondent also acknowledge that there would be a preference for this not to be returned to the FTS. That process would take too long, and it was in the interests of both parties to get a final resolution in this matter.

[39] In terms of section 47 of the Tribunals (Scotland) Act 2011 the UTS may uphold or quash the decision of the FTS on a point of law. If the Upper Tribunal quashes the decision, it may—

re-make the decision, remit the case to the First-tier Tribunal, or make such other order as the Upper Tribunal considers appropriate. In re-making the decision, the Upper Tribunal may do anything that the First-tier Tribunal could do if re-making the decision or reach such findings in fact as the Upper Tribunal considers appropriate.

[40] It is unnecessary to remit this matter to the FTS. There has been presented to the UTS sufficient information, which was factually not disputed to any materially degree, which allows me to properly re-make the decision. I can do this by deleting certain of the original findings in fact and substituting new findings in fact. I do this on the following basis (by using or adding to the numeric numbering used in the original decision):

A. Delete the last sentence in original finding in fact III and insert the following – "The applicant did not receive his refund of £67.65 until 9 December 2022. The respondent apologised for the delay and recognised that a delay of over two months was not acceptable."
B. Delete original finding in fact VII and substitute with the following –
   "The applicant sought annual insurance statements for the years 2020, 2021 and 2022. He sought copy invoices from October 2019 to May 2022. He sought further detailed information relating to insurance cover, including how the insurance premium was calculated, the sum insured, and the premium paid. The applicant requested this information by emails of 5 and 14 December 2022. A further email of 11 April 2023 requested this information. The respondent did not respond to these enquiries within the timescales confirmed in either their WSS or complaints procedures."
C. Delete the second sentence of original finding in fact VIII.

[41] In re-making the decision, the Upper Tribunal may do anything that the First-tier Tribunal could do if re-making the decision. On re-making this decision I have determined that the respondent failed to comply with OSP6, OSP11 and section 2.7 of the Property Factors (Scotland) Act 2011: Code of Conduct for Property Factors (2021) and find that the respondent is in breach of section 14(5) of the Property Factors (Scotland) Act 2011. In such circumstances, in terms of section 19(1) of the 2011 Act, having decided that the respondent has failed to comply with his duty in terms of section 14(5) of the 2011 Act, I must also decide whether to make a PFEO. That can only be determined by giving notice of the proposed PFEO to the property factor and allowing both parties an opportunity to make representations. Clearly, that resolves the appellant's query as to whether he could make representations on the terms of any proposed PFEO.

[42] I will allow parties a period of 28 days to make written representations to the UTS. In terms of section 19(3) of the 2011 Act, after taking account of any representations, if I am satisfied that the respondent has failed to comply with its section 14 duty then I am obliged to make a PFEO either in the terms I originally proposed or in such amended terms which I consider to be reasonable in the exercise of my discretion as any representations may have persuaded me to do.

[43] The basis of the breaches of the Code are as outlined above. In reality this equates to a delay in refunding the sum of £65.67 within a reasonable period. In addition, there was a failure to respond to enquiries/complaints within a reasonable time and in contravention of time scales provided for by the respondent's own WSS/complaints handling procedure. In the overall context of the factual background, and based on the appellant's grievances, I do not consider these to be

serious breaches but there would have been a degree of frustration and inconvenience caused by these failures over several months.

[44] The PFEO which I propose is in the following terms:

"The Upper Tribunal for Scotland orders the respondent to make payment to the appellant in the sum of £150.00 as monetary payment to compensate the appellant for the inconvenience caused by the respondent's failure to comply with OSP6, OSP11 and section 2.7 of the Property Factors (Scotland) Act 2011: Code of Conduct for Property Factors 2021. The respondent is ordered to make payment of that sum within 28 days of the date of this Property Factor Enforcement Notice."

[45] I await any written representations within the period specified.

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within ***30 days*** *of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Sheriff Ian Hay Cruickshank
Member of the Upper Tribunal for Scotland