

Housing and Property Chamber

First-tier Tribunal for Scotland



**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal")
Property Factors (Scotland) Act 2011 ("the Act")**

Statement of reasons for a decision in terms of the First-tier Tribunal for Scotland, Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the regulations")

Chamber Ref: FTS/HPC/PF/21/0602 and FTS/HPC/PF/21/0603, 0605, 0608, 0609, 0610, 0611, 0612, 0614, 0615, 0616, 0617, 0618, 0619, 0620, 0621, 0622, 0623, 0624, 0625, 0626, 0627, 0628, 0630, 0631, 0632, 0633, 0634, 0635, 0636, 0637, 0638, 0639, 0640, 0641, 0642, 0643, 0644, 0645, 0646, 0647, 0648, 0649 and 0650

Re.: Flat 60, Kyle Court, Smith Street, Ayr, KA7 3AW ("the property")

The Parties: -

Mr James Crichton, Flat 60, Kyle Court, Smith Street, Ayr, KA7 3AW (**"the homeowner"**) and 43 others

First Port Property Services Scotland, Troon House, 3rd Floor, 199 St Vincent Street, Glasgow, G2 5QD (**"the property factor"**)

Tribunal Members: - Simone Sweeney (Legal Member) Mary Lyden (Ordinary Member)

Decision of the Tribunal

The Tribunal unanimously determined that the application of the homeowner under reference, FTS/HPC/PF/20/0602, will be considered on its own. Applications brought by the other 43 owners under references, FTS/HPC/PF/21/0603, 0605, 0608, 0609, 0610, 0611, 0612, 0614, 0615, 0616, 0617, 0618, 0619, 0620, 0621, 0622, 0623, 0624, 0625, 0626, 0627, 0628, 0630,

0631, 0632, 0633, 0634, 0635, 0636, 0637, 0638, 0639, 0640, 0641, 0642, 0643, 0644, 0645, 0646, 0647, 0648, 0649 and 0650 are dismissed and will not be determined by this Tribunal. It is open to these 43 owners to pursue complaints against the property factor through its complaints procedure and to bring separate applications before the Tribunal should their complaints not be resolved to their satisfaction.

Background

1. Reference is made to the homeowner's application dated, 15th March 2021 and to mandates signed by each of the 43 other owners who brought applications provided with the Tribunal references, above.
2. Further reference is made to the Notice of Acceptance of the application of 2nd June 2021 by a legal member of the First-tier Tribunal with delegated powers of the Chamber President, having considered that there were no grounds for rejection in terms of Rule 8 of the regulations.
3. A copy of that Notice was intimated to parties by letter dated 25th June 2021 (sent by email) together with intimation of the hearing of the application to proceed by way of telephone conference on 6th August 2021 at 10am. Parties were advised that written representations required to be lodged with the Tribunal's administration no later than 16th July 2021.
4. Both parties responded to the letter. The homeowner confirmed that he would be in attendance at the hearing with a supporter, Mr Robert Watson and would be relying on the evidence submitted, previously. By email dated 15th July 2021, the property factor's Ms Elaine Bauld, sought an extension to allow the property factor's representations to be received, late. Reference is made to the terms of the Tribunal's direction.
5. Written representations were received from the property factor dated, 23rd July 2021. Within those representations, the property factor referred to various procedural matters including lack of specification of the allegation of a failure to comply with the property factor's duties, alleged inaccuracies with the names and addresses of seven of the owners, whether all owners had intimated letters to the Tribunal and, at page 10 of the representations, under the heading, "*Additional information,*" the

property factor's view that the homeowner could not act for other owners based on signed mandates.

6. No request for direction was made by the property factor.
7. The application proceeded to a hearing at the telephone on 6th August 2021 at 10am. The homeowner was present with his supporter, Mr Watson. The property factor was represented by Ms Elaine Bald, Interim Regional Manager and Mr Steven Maxwell, Credit Control Manager. At commencement of the hearing, parties were asked if there were any questions or issues which they wished to raise. Ms Bald confirmed that the property factor had no issues to be raised. Accordingly the Tribunal proceeded to hear evidence and submissions from both parties.
8. The hearing was lengthy and concluded at approximately 4.15pm. At conclusion of the evidence the Tribunal chair enquired if there were any final issues which parties wished the Tribunal to take into account in relation to the application and answers. The homeowner submitted that he had nothing to add. Ms Bald invited the Tribunal to reject the applications of the 43 other owners on the basis that the homeowner cannot represent other owners in a group application. The homeowner disagreed.
9. In light of the matter having been brought so late in the day by the property factor and this being a potentially significant matter, the Tribunal directed the property factor to address the Tribunal, in writing and intimate their request to the homeowner, who would be afforded an opportunity to respond, in writing.
10. The Tribunal delayed issuing its determination on the application until this matter had been exhausted.

Property factor's request for dismissal of applications from 43 owners

11. By email dated 15th August 2021, the property factor sought dismissal of the following applications, FTS/HCPF/21/0603, 0605, 0608, 0609, 0610, 0611, 0612, 0614, 0615, 0616, 0617, 0618, 0619, 0620, 0621, 0622, 0623, 0624, 0625, 0626, 0627, 0628, 0630, 0631, 0632, 0633, 0634, 0635, 0636, 0637, 0638, 0639, 0640, 0641, 0642, 0643, 0644, 0645, 0646, 0647, 0648, 0649 and 0650.
12. The basis for dismissal was that the 43 owners, above, had not exhausted the property factor's formal complaints' procedure, denying the property factor an

opportunity to resolve their individual complaints. It was admitted that the homeowner had exhausted the complaints procedure.

13. The property factor alleged that, having failed to do so, the 43 owners had not complied with the requirements of section 17 (3) of the Act.
14. Further, the property factor submitted that the homeowner maintains his complaint is a, "*class action*" on behalf of himself and the 43 owners, that there is no provision for a class action in terms of the Act and this is an attempt to, "*manipulate the application procedure.*"
15. The homeowner had failed to recognise that each of the owners has an obligation to afford the property factor an equal opportunity to resolve their complaint and that, having failed to meet this obligation, the overriding objective of the regulations had not been met, ie. parties were not on an equal footing procedurally and able to participate fully in proceedings.
16. The property factor relied upon a Tribunal decision under reference, FTS/HPC/PF/19/4092 and 19 others. The property factor alleged that the circumstances presented in that case were similar. The Tribunal had dismissed the applications of all but the homeowner because the complaints procedure had not been exhausted.
17. Finally, it was alleged that the homeowner had failed to produce all correspondence between himself and the property factor in the course of the complaint. The property factor submitted that,

"it cannot be assumed that the 43 other applicants would have drawn the same conclusion as Mr Crichton if they had engaged in our complaint procedure and received all of the relevant communication."

Response of the homeowner

18. A response from the homeowner was received by email, dated, 23rd August 2021, opposing the property factor's request for dismissal of the applications of the other owners.

- 19.** The homeowner submitted that this was a new argument, not introduced, previously.
- 20.** In preparation of the applications, the homeowner had exchanged more than thirty emails with the Tribunal's administration about how to pursue a complaint as a group. He had been directed to an information guide and had followed the advice provided under the heading, "*Can a group of homeowners apply to the Housing and Property Chamber for a determination by a tribunal?*"
- 21.** The homeowner did not dispute that the 43 owners had not pursued individual complaints through the property factor's complaints' procedure. Rather, the homeowner submitted that the 43 owners had,

"consistently voiced their concerns about First Port's management and had initiated their decision to dismiss First Port as a direct consequence of First Port's reluctance to engage with the said homeowners."

- 22.** And,
- "It surely cannot be maintained that all homeowners in a retirement home with over 50 residents, in varying states of health, have each to write individual letters to the factor before their complaints are considered?"*
- 23.** The homeowner referred to signed mandates produced by the 43 owners who authorised the homeowner to represent them in his role as chairman of the homeowners' committee at the development.

Section 17(3) of the Act

- 24.** Section 17(3) of the Act provides:-
- "(3) No such application may be made unless—*

 - (a) the homeowner has notified the property factor in writing as to why the homeowner considers 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, and*

(b)the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern."

25. For an application to be determined by a Tribunal, section 17 (3) requires a homeowner to have provided written notification to the property factor why the homeowner considers the property factor to have failed to carry out the property factor's duties or failed to comply with the section 14 duty **AND** the property factor has refused or unreasonably delayed to resolve the homeowner's concern.
26. There is no evidence before the Tribunal that, prior to lodging applications with the Tribunal, each of the 43 owners had written to the property factor setting out why they considered there to have been a failure to comply with the duties. Indeed, it is admitted by the homeowner that this was not the case.
27. There is no evidence before the Tribunal that, prior to lodging applications with the Tribunal, the property factor has refused or delayed resolving complaints because 43 of the owners did not exhaust the property factor's complaints process.
28. The homeowner was directed to the FAQ section of the Tribunal website and specifically to the section which bears the heading, "*Can a group of homeowners apply to the Housing and Property Chamber for a determination by the tribunal?*"
29. Insofar as is relevant, the document provides,

"The Property Factors (Scotland) Act provides that only a homeowner can bring an application... there is nothing to prevent a group of the individual homeowners making identical applications and naming the same representative to attend and to represent them throughout the process and at the hearing. The procedural rules allow two or more applications to be heard together where the applications have been made by different homeowners and relate to the same property factor. The decision as to whether this is appropriate will rest with the Tribunal."

30. This procedural rule referred to is regulation 12 which permits two or more applications to be heard together in certain circumstances. Regulation 12 provides :-

Hearing two or more applications together

12.—(1) The First-tier Tribunal may direct two or more applications to be heard together where they are under consideration by the First-tier Tribunal at the same time and relate to the same—

1. (a) *property;*
2. (b) *required work;*
3. (c) *property factor;*
4. (d) *letting agent; or*
5. (e) *landlord.*

(2) The First-tier Tribunal may require the parties to take any steps necessary to enable two or more applications to be heard together.

31. However regulation 12 must be read in conjunction with section 17 (3) of the Act. For the 43 applications to be heard with that of the homeowner, under regulation 12, each of the owners is expected to have complied with the requirements of section 17 (3). Given that the 43 owners have not exhausted the property factor's formal complaints procedure, it is not competent for the applications to be determined together.
32. The Tribunal recognises that the homeowner and the 43 owners will be disappointed with this decision. It is open to these owners to explore their remedies with the property factor.
33. Regulation 2 provides-

The overriding objective

“2.—(1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.

(2) Dealing with the proceedings justly includes—

- (a) *dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;*
- (b) *seeking informality and flexibility in proceedings;*

(c)ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take;

(d) using the special expertise of the panel and the committees effectively; and

(e) avoiding delay, so far as compatible with the proper consideration of the issues."

- 34.** The Tribunal is of the view that, for the overriding objective of the regulations to be met (ie to ensure that parties are on an equal footing procedurally and able to participate fully in proceedings) as set out at regulation 2 of the regulations, only the application which has satisfied the requirements of section 17 (3) of the Act should proceed against the property factor.

Appeals

- 35.** In terms of section 46 of the Tribunals (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 within 30 days of the date the decision was sent to them.

.....Legal Member, 15th September 2021

