

# Housing and Property Chamber

## First-tier Tribunal for Scotland



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

**Decision of the First-tier Tribunal for Scotland Housing and Property Chamber in relation to an application made under Section 17(1) of the Property Factors (Scotland) Act 2011**

**Chamber Ref: FTS/HPC/PF/23/1527**

**Property: 18 Silvertrees Wynd, Bothwell G71 8FH (“the Property”)**

### **The Parties:-**

**Mrs Caroline Adams, 18 Silvertrees Wynd, Bothwell G71 8FH (“the homeowner”)**

**Miller Property Management Limited, registered in Scotland under the Companies’ Acts (SC352726), having their registered office at 29 Brandon Street, Hamilton ML3 6DA and having a place of business at Suite 2, Waverley House, Caird Park, Hamilton ML3 0QA (“the property factors”)**

### **Tribunal Members:**

**George Clark (Legal Member/Chairman) and Kingsley Bruce (Ordinary Member)**

### **Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) decided that the property factors had failed to comply with OSP2, OSP4, OSP10, OSP11, OSP12 and Sections 2.1 and 2.2 of the Property Factors Code of Conduct effective from 16 August 2021 and had failed to carry out the Property Factor’s duties. The Tribunal proposes to make a Property Factor Enforcement Order as set out in the accompanying Notice under Section 19(2)(a) of the Act.**

### **Background**

1. By application, dated 9 May 2023, the homeowner sought a Property Factor Enforcement Order against the property factors under the Property Factors (Scotland) Act 2011. She alleged failures to comply with OSP2, OSP4, OSP10, OSP11, OSP12 and Sections 2.1 and 2.2 of

the Property Factors Code of Conduct effective from 16 August 2021 (“the Code of Conduct”). The complaint also related to a failure to carry out the property factor’s duties.

2. The homeowner stated in her application that the property factors had made false, defamatory and misleading accusations against her and that they had failed in their fiduciary duties by causing disharmony amongst neighbours. They had also ignored emails of complaint. This had caused the homeowner a great deal of embarrassment and anguish and she believed the property factors should provide a letter of apology and pay compensation to her.
3. In the paperwork that accompanied the application, the homeowner stated that in the absence of an owners’ association, the owners in Block One, which has four stairwells, agreed in the majority to have stairwell representatives. The homeowner is the representative for stairwell 2. An email had been sent to the property factors on 17 March 2022, advising them of this. The property factors do not operate an out-of-hours service but have repeatedly refused owners a key to the caretaker’s building. The building belongs to the owners, and it is only with owners’ consent that the caretaker is permitted to use it for a few hours each morning. Owners also want to use it for social activities such as charity coffee mornings when the caretaker is not in it, but the property factors have refused them this facility. The building houses the keys to the individual stairwell fire alarm boxes and owners had expressed concerns about being unable to access these keys should the fire alarm sound during out-of-hours.
4. The property factors refused to provide a copy of the key for the caretaker’s building, on the basis that the Fire Service had a key should the need arise. The homeowner had telephoned the Fire Service, who advised that they did not hold a key to any part of the development and that it was not their policy to do so. They had confirmed in an email that this was the case. A number of owners wrote by email to the property factors on 23 December 2022 and stated that they wanted a key to this area. Instead of addressing the issue directly with them, the property factors took deliberate steps to escalate matters and wrote to all owners on 22 March 2023, copying them into the email of 23 December without consent. Not only was this entirely unprofessional, but it also breached the property factors’ fiduciary duties. In their letter they made defamatory, false and misleading statements. They made capricious, damaging and demonstrably untrue allegations against the owners who had put their names to the letter of 23 December, in a deliberate attempt to distract and deflect attention from the property factors’ own

behaviour. They had also taken it upon themselves to address matters which were not subject of complaint, accusing a number of owners of being self-appointed, which was categorically untrue. They also intentionally misled owners regarding the mechanics of appointing representatives.

5. The homeowner provided the Tribunal with copies of the property factors' Written Statement of Services ("WSS"), an email of 17 March 2022 from four owners, including the homeowner, advising the property factors that the owners in Block One, in their majority, had organised the four signatories as stairwell representatives to look after their interests, and an email of 23 December 2022, in the names of three owners, including the homeowner, advising the property factors that they had confirmation from the Fire & Rescue Service that they did not at any time accept a key from the property factors, contrary to what the property factors had stated verbally and in writing, that the property factors had spread information that was both false and misleading and that if this was not rectified and keys supplied to the stairwell representatives as previously requested, they would proceed with an application to the Tribunal. The homeowner also included copies of an email of 9 December 2021, in which the property factors stated that the fire department had their own key and an email dated 27 March 2023 from the local Watch Commander of the Fire & Rescue Service confirming that they did not have keys to the property and if required would request the attendance of a keyholder through their Operations Control.
6. The homeowner also provided a copy of a letter of 22 March 2023 from the property factors to all owners in which they stated that, as factors, they "require to inform all owners of two new erroneous issues relating to 3 individual owners, in case any owner falsely presumes that their comments and claims are in any way accurate..." The letter went on to say that "these individuals have not only set out to deceive and attempt to influence the owners against the factor – but disrupt the local Fire Station personnel with these false accusations." The letter described the stairwell representatives as "self-appointed" and added that "other owners and Factor have no knowledge of how this came into place." The property factors stated that the title deeds were quite specific as to how stairwell representatives required to be legally appointed and invited any owner able to do so to provide copies of a notification calling a stairwell meeting, the paperwork showing the date, time and location of the meeting, the Agenda and the Minutes stating the number of owners who attended, points discussed, and votes taken. The owners were advised to "be aware that these individuals do not appear to have

your best interest in mind when they produce emails, like the one attached”, which proved that these individuals “are the ones spreading ‘information that is both false and misleading’.”

7. On 8 April 2023, the homeowner set out her formal complaint in an email to the property factors headed “**OFFICIAL COMPLAINT**”. She referred to the property factors’ letter of 22 March to all owners and stated that the content was demonstrably untrue, being both false and misleading, malicious in its intent and designed to cause division within the Silvertrees Community. It was also clearly defamatory and indisputably contained several breaches of the Code of Conduct. The unequivocal facts were that the property factors had stated in writing and verbally that they had given the Fire Service keys to the caretaker’s office to facilitate entry should the need arise. Any attempt to deceive and influence residents had been by the property factors, not the stairwell representatives. The office belonged to the owners, not to the property factors, and should be available as a recreational building when the caretaker is not there. The property factors had no legal right deriving from the title deeds or anywhere else to deny owners access. On the issue of stairwell representatives, the property factors’ narrative was entirely fictitious. The deeds only mention the mechanics of “calling a meeting” to discuss repairs and maintenance. Given that this was during the height of COVID restrictions, it would have been irresponsible to call a meeting. Instead, as the property factors were aware, the homeowner and others had personally canvassed those in their respective stairwells to ensure majority agreement and the property factors had been advised at the time of the formation of stairwell representatives within Block One. The property factors’ comments about the legality pf providing Minutes etc, was, therefore, spurious. The homeowner set out the various Sections of the Code of Conduct which would be the subject of an application to the Tribunal if she did not receive a retraction of the letter of 22 March 2023 and a full apology within 7 days.
8. On 13 June 2023, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the property factors were invited to make any written representations by 4 July 2023. The property factors did not make any written representations to the Tribunal.

### **Case Management Discussion**

9. A Case Management Discussion was held by means of a telephone conference call on the morning of 5 October 2023. The homeowner was

present. The property factors were represented by their Director, Mr Harry Miller.

10. The homeowner told the Tribunal that the keys to the fire control panels are kept in the caretaker's office, so the owners could not obtain them, should access be required out-of-hours, as the property factors do not provide an out-of-hours service. Mr Miller said that an individual in each block was able to access the control panel in the stairway and it was not necessary for owners to have access to the caretaker's office. Mr Miller said that the property factors had provided the Fire Service with a key in 2014, but, after investigation in January 2023, it transpired that the Fire Service no longer hold keys. The homeowner stated that a Mr Nuttall had held a key for the caretaker's office, but the property factors had changed the lock and had then refused to provide the owners with a key. The property factors had told the Tribunal that various documents, including technical drawings of the blocks were kept in the office, but the homeowner's response was that any such documents could be kept in a locked cabinet within the office.
11. Mr Miller told the Tribunal that it was in order for him to have circulated to all owners the letter of complaint from four of their number. He referred to the procedures set out in the title deeds for calling a meeting of all the owners in a stairwell or Block, with a quorum being one-third of owners. The property factors had asked all 60 owners to provide any paperwork they had in relation to the appointment of the stairwell representatives, but not even those who stated that they had been nominated had produced anything. One of them had even denied being a stairwell representative. The homeowner responded that this individual had originally agreed but had stood down as she was moving to Edinburgh. Due to COVID restrictions, it had not been possible to have a meeting, so the homeowner and others had called at each door and asked owners if they were happy with the suggested stairwell representatives. She accepted there was no written record of the appointments and contended that the title provisions only covered the procedure for calling a meeting to discuss repairs and maintenance. Mr Miller said that he was receiving comments from owners saying they knew nothing about the appointment of stairwell representatives and, in circulating the complaint from four owners, he was acting in the interests all the owners as he was obliged to do.
12. The view of the homeowner was that the property factors do not foster good relationships within the Development.

13. Mr Miller advised the Tribunal of his personal health issues which had resulted in his being off work for more than two months from 26 March 2023. He also stated that the caretaker's office was too small for any meetings, charity coffee mornings or the like to be held there.
14. The Parties then left the Case Management Discussion, and the Tribunal Members considered all the evidence, written and oral, before them.

### **Findings of Fact**

- i. The homeowner is the proprietor of the property, which is situated within one of two blocks at the Silvertrees Development in Bothwell. The block of which the Property forms part contains 40 flats (Block 1), divided across four stairwells, and the other Block contains 20 flats. In addition, there is a separate building containing a caretaker's office within the curtilage of the Development.
- ii. The property factors, in the course of their business, manage the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
- iii. The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- iv. The date of Registration of the property factors was 25 January 2022.
- v. The homeowner has notified the property factors in writing as to why she considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- vi. The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber, dated 9 May 2023, under Section 17(1) of the Act.
- vii. The concerns set out in the application have not been addressed to the homeowner's satisfaction.

### **Reasons for Decision**

15. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it

had before it sufficient information and documentation it required to enable it to decide the application without a Hearing.

16. **OSP2** of the Code states that property factors must be honest, open, transparent and fair in their dealings with homeowners. The Tribunal upheld the homeowner's complaint under OSP2. The view of the Tribunal was that the property factors' letter to all owners on 22 March 2023 was wholly inappropriate. They had received an email from three owners on 23 December 2022, advising them that The Fire and Rescue Service had confirmed that they did not at any time accept a key for the communal office and that the property factors had, therefore, spread information that was false and misleading. They added that unless this breach of the Code of Conduct was rectified and keys supplied to the stairwell representatives as previously requested, they would proceed with an application to the Tribunal. Instead of treating this email as a complaint (which it clearly was) and handling it in terms of their formal complaints procedure, the property factors copied their email to all the owners in the Development, accusing the three senders of the email of having set out to deceive and attempt to influence other owners against the property factors. This was, in the view of the Tribunal, an entirely unfair way in which to respond to the email of 23 December 2022.
17. **OSP4 of the Code** states "You must not provide information that is deliberately or negligently misleading or false." The Tribunal upheld the complaint under this heading. The papers submitted with the application indicated that, on 9 December 2021, the property factors emailed Mr Gordon Nuttall and told him that the Fire Department "now have their own key to the fire alarm system therefore there is no requirement for any owners to hold a key or any access requirement by owners as this is not a communal area." This was in response to an email from Mr Nuttall of 3 December 2021 stating that he was issued a key to the caretaker's office when he was chairman of the "SOA" but that the property factors had changed the lock and had not issued a new key to any owner. He had been concerned that if there was a "trip" in the electricity supply to the external Christmas lights, the owners had no access to the office. Earlier on 3 December 2021, the property factors had told him by email that a key would not be provided "as stated by Mr Miller in previous correspondence to you."
18. On 23 December 2022, the homeowner was a signatory to an email to the property factors reporting that they had confirmation from Strathclyde Fire & Rescue that they categorically did not at any time accept a key from the property factors for the caretaker's office and that the crew commander had inspected the Development and had told the property factors that they should provide keys to residents in the event of a false alarm happening outwith the property factors' opening hours.
19. The homeowner also provided a copy of an email of 27 March 2023 from the Watch Commander, Scottish Fire and Rescue Service, Lanarkshire Area, Hamilton Amber Watch which stated "I confirm that

we don't have keys to the property at Silvertrees Wynd, Bothwell and if required we would request the attendance of a keyholder through our Operations Control.”

- 20.The view of the Tribunal was that the statement in the property factors' email of 9 December 2021 that the Fire and Rescue Service “now have their own key to the fire alarm system” was clearly untrue and that it had been made deliberately, as it was made after the lock was changed by the property factors, who must have known that any key they had previously provided to the Fire and Rescue Service would not now open the door. Accordingly, the Tribunal upheld the complaint under OSP4 of the Code of Conduct.
- 21.The homeowner had also complained that the property factors had stated that the stair representatives were self-appointed, which was, she said, also untrue. They had canvassed residents in their stairwells and ascertained the necessary majority in favour of acting in this capacity. They had also written to Mr Miller when they became established. The Tribunal noted that in an email of 19 February 2023, the property factors were advised that, as the Silvertrees Owners' Association was no longer active/operational the owners in Block One had, by majority, organised stairwell representatives. In their letter to owners of 22 March 2023, the property factors had described them as “self appointed”. The Tribunal recognised that the property factors were entitled to seek clarification of the process by which they had been appointed, but to describe them, in a letter to all owners as “self appointed” was misleading, standing the email of 19 February 2023, and had been deliberate. Accordingly, the Tribunal upheld this aspect of the complaint under OSP4 of the Code of Conduct.
- 22.**OSP10 of the Code** states “You must ensure you handle all personal information sensitively and in line with legal requirements on data protection.” This was dealt with by the Tribunal alongside the complaint under **Section 2.2 of the Code, which** states “Factors are required to comply with current data protection legislation when handling their client's personal data, and to ensure that this information is held and used safely and appropriately.”
- 23.The homeowner's complaint related to an emailed formal complaint of 23 December 2022. It came from 3 named residents, including the homeowner. Instead of dealing with it as a private complaint, the property factors had circulated it to all the owners within the Development. The Tribunal did not make a finding as to whether this constituted a failure to comply with data protection legislation but was satisfied that the manner in which the property factors had handled the personal information, namely disclosing, without permission, to other owners the identities of those who had put their names to the email, amounted to a failure to handle personal information sensitively and appropriately. Accordingly, the Tribunal upheld the complaints under OSP10 and Section 2.2 of the Code of Conduct.

**24. OSP11 provides** “You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.” The Tribunal upheld the complaint under this Section. The property factors failed to provide a substantive response to the homeowner. It was clearly a formal complaint. It was headed “**OFFICIAL COMPLAINT**” and was acknowledged as such by the property factors on 25 April 2023. In their email of that date, the property factors asked for evidence of the accusations, but the view of the Tribunal was that, whilst it would have been reasonable for the property factors to seek clarification on any element of the complaint of which they were unsure, its terms were unequivocal and should have been received a substantive response in line with the property factors’ complaints procedure. Mr Miller confirmed at the Case Management Discussion that there had been no further correspondence. He told the Tribunal that, due to a health condition, he had been off work for more than two months from 26 March 2023, but the acknowledgement of 25 April 2023 stated that the complaint had been passed to him and that “a formal response should be issued within our normal time-frame”. It did not indicate, as it could have done, that, due to illness, there might be a delay in sending the formal response.

25. The Tribunal also held that the failure to comply with OSP11 also constituted a failure to carry out the Property factor’s duties.

**26. OSP12 of the Code** states “You must not communicate with homeowners in any way that is abusive, intimidating or threatening.” The Tribunal upheld the complaint under OSP12 insofar as it related to the correspondence sent by Mr Miller of the property factors to all the owners in the Development on 22 March 2023. Using phrases such as “these individuals have...set out to deceive and attempt to influence other owners against the Factor” and “be aware that these individuals do not appear to have your best interests in mind when they produce emails” was wholly inappropriate in a communication to all the owners and could reasonably be interpreted by the homeowner, who was one of the complainants, as designed to intimidate the homeowner, amongst others. Accordingly, the Tribunal upheld the complaint under OSP12 of the Code of Conduct and also held that it constituted a failure to carry out the Property Factor’s duties, as the Wrotten Statement of Services states that the property factors “will communicate with homeowners in a polite, courteous and professional manner.”

27. The relevant portion of **Section 2.1 of the Code** states that “Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect.” The homeowner had stated in her application that the property factors did not attempt to foster good relations or mutual respect, nor did they seek amicable resolution. Indeed, they employed tactics designed to cause division. The Tribunal’s view was that the homeowner’s opinion was justifiable, given

the contents and tone of the letter of 22 March 2023, and upheld the complaint under Section 2.1 of the Code.

- 28.Having decided that the property factors had failed to comply with OSP2, OSP4, OSP10, OSP11, OSP12 and Sections 2.1 and 2.2 of the Code of Conduct and had failed to carry out the Property Factor's duties, the Tribunal then considered whether to make a Property Factor Enforcement Order. The Tribunal's view was that the failures on the part of the property factors had been very serious and had caused the homeowner considerable distress and inconvenience. The Tribunal decided that it would be appropriate to make a Property Factor Enforcement Order.
- 29.The Tribunal proposes, therefore, to make a Property Factor Enforcement Order requiring the property factors to pay the homeowner the sum of £250 as reasonable compensation for the inconvenience and distress caused by the property factors' failures to comply with the Code of Conduct. The Tribunal also proposes to require the property factors to issue a letter of apology to the homeowner for any distress and inconvenience caused to her by their failure to comply with the Code of Conduct and to carry out the Property Factor's duties.
- 30.The homeowner had requested that the Tribunal instruct the property factors to issue homeowners with a key to the office. The Tribunal does not have the power to issue such a Direction but would urge the property factors to agree with the owners a satisfactory solution, in order to improve the relationship between them and the owners, who are their clients.
- 31.The decision of the Tribunal was unanimous.

#### **Right of Appeal**

**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.**

Signed

Date: 5 November 2023

George Clark (Legal Member/Chairman)