

# Housing and Property Chamber

## First-tier Tribunal for Scotland



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

**Decision: Section 19 of the Property Factors (Scotland) Act 2011 and Rule 16A of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”)**

**Applicants, Properties and Tribunal reference numbers:**

Agnes McIlvride	Flat 7H Glenford Place, Ayr, Ayshire, Scotland, KA7 1LB	FTS/HPC/PF/18/3296
Myra Hessett	4D Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3309</u>
William Purdie	4E Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3310</u>
Alan Mora	4F Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3312</u>
William Adams	Flat 4G, Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3313</u>
Julian Mithoff	4H Glenford Place, Ayr, South Ayrshire, KA7 1LB	FTS/HPC/PF/18/3315
Myra Jones	4A Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3316</u>
John Struthers	7J Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3317</u>
Jacqueline McLean	4b Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3318</u>
Ian Stuart	6B Glenford Place, Ayr, KA7 1LB	FTS/HPC/PF/18/3338

Bruce McMaster	5B Glenford Place, Ayr, South Ayrshire, KA7 1LB	<u>FTS/HPC/PF/18/3339</u>
Anne McBride	6D Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3340</u>
Bogdan Tataru	5A Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3341</u>
Claire Cadger	6H Glenford Place, Ayr, South Ayrshire, KA7 1LB	<u>FTS/HPC/PF/18/3342</u>
Marina McLean	6G Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3343</u>
Alma Kinnaird	6E Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3344</u>
W Alan Galloway	3G Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3345</u>
Anne-Marie Conway	1F Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3346</u>
Gordon Phillips	3E Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3347</u>
Craig McVicar	3F Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3348</u>
Isabelle Grogg	- 5D Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3349</u>
Wellwood Grierson	8A Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3350</u>
Andrew McDowall	9B Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3351</u>
John Miller	9C Glenford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3352</u>
Gordon Anderson	9E Gleniford Place, Ayr, KA7 1LB	<u>FTS/HPC/PF/18/3353</u>
Aileen Scott		<u>FTS/HPC/PF/18/3354</u>

	<b>9F Glenford Place, Ayr, KA7 1LB</b>	
<b>Gordon Lancaster &amp; Magdalena Lancaster</b>	<b>9A Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3357</b>
<b>Margaret Rodie</b>	<b>2G Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3358</b>
<b>Melanie Travis</b>	<b>2 Wexford Way, Ayr, KA7 1LA</b>	<b>FTS/HPC/PF/18/3359</b>
<b>Euphemia Holmes &amp; Frederick Holmes</b>	<b>8 Wexford Way, Ayr, KA7 1LA</b>	<b>FTS/HPC/PF/18/3361</b>
<b>Malcolm Foster</b>	<b>12 Wexford Way, Carrick Quay, Ayr, KA7 1LA</b>	<b>FTS/HPC/PF/18/3363</b>
<b>Ian Hessett</b>	<b>3D Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3364</b>
<b>Alan Roseweir</b>	<b>3C Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3365</b>
<b>Angela Lafferty</b>	<b>3B Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3366</b>
<b>Sandra Ratcliffe</b>	<b>1H Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3367</b>
<b>Alan Roseweir</b>	<b>1G GlenfordPlace,Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3368</b>
<b>Rae Clark</b>	<b>1A Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3370</b>
<b>Elaine Flannigan &amp; Ronnie Bradley</b>	<b>1C Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3371</b>
<b>Andrew Streets</b>	<b>2H Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3355</b>
<b>Eric Armstrong</b>	<b>Flat 8P, Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3314</b>
<b>Andrew McLean</b>	<b>Flat 7F, Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3299</b>

<b>John Wotherspoon</b>	<b>Flat 4C, Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3311</b>
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(the "Homeowners")

**James Gibb Property Management Ltd  
65 Greendyke Street, Glasgow, G1 5PX  
("the Property Factor")**

**Tribunal Members:**

**Martin J. McAllister (Legal Member)  
Andrew McFarlane (Ordinary Member)**

### **Introduction**

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules" and the First- tier Tribunal for Scotland (Housing and Property Chamber) is referred to as "the Tribunal." James Gibb Property Management Ltd is referred to as "James Gibb" and the Development at Glenford Place and Wexford Place, Ayr is referred to as "the Development." This Decision should be read in conjunction with the Tribunal's Decision of 6<sup>th</sup> January 2020.

### **Background**

These are conjoined applications under Section 17 of the Property Factors (Scotland) Act 2011 (the Act).

The Tribunal had considered matters in terms of the provisions of Section 19 of the Property Factors (Scotland) Act 2011. It made a determination and issued a proposed property factor enforcement order. In terms of Section 19 (2)(a) and 2(b), the Tribunal intimated the proposed property factor enforcement order to parties and, having considered representations determined that there was merit in the representations of the Respondent.

The Tribunal had determined that the proposed property factor enforcement order which accompanied its Decision dated 6<sup>th</sup> January 2020 be set aside and the matter be further considered at a meeting of the members of the Tribunal where parties would have an opportunity to make submissions. The decision of 6<sup>th</sup> January 2020 had followed upon a Hearing which had been held on 10<sup>th</sup> December 2019. A date for a meeting was fixed but had to be postponed because of the Covid-19 restrictions and was rearranged for 15<sup>th</sup> September 2020.

## **Representations of the Parties in respect of the proposed property factor enforcement order.**

1. The Property Factor's solicitors wrote to the Tribunal on 15<sup>th</sup> January 2020 with representations. The letter stated that the representations should not be considered an application for review until the Tribunal makes a final order. The letter states that, if the tribunal went ahead with the property factor enforcement order, their said letter was to be considered an application for review under Section 43 of the Tribunal (Scotland) Act 2011.
2. The thrust of the representations of the Property Factor's solicitors is that, at the case management discussion on 26<sup>th</sup> September 2019, one of the outcomes was that the Hearing was to be restricted to claims for financial loss only and that the Tribunal made a determination proposing a property factor enforcement order which was decided on a basis other than financial loss. The letter stated that the solicitor representing the Property Factor at the Hearing had not made submissions with regard to matters other than financial loss because of the outcome referred to from the case management discussion and that the Tribunal had no discretion to make an award for a head of claim which had been dismissed prior to the Hearing. It stated that the Tribunal erred in law in exercising discretion when it is not competent to do so. The letter also stated that the Tribunal had made the order without any evidence of "homeowner concern" and made the order on the basis of the substituted views of the tribunal.
3. Mr Lush, representing the Homeowners was sent a copy of the letter from the Property Factor's solicitors and responded by email on 17<sup>th</sup> January 2020 referring to an earlier case where an award had been made for "worry and concern." He had previously made written representations on 10<sup>th</sup> January 2019 where he had expressed disappointment at the level of compensation being only £50 per claimant considering that some homeowners were required to pay over £270 for repairs whilst others had paid £61. He stated that the awards were at odds with the award made in a previous case before the Tribunal (FTS/HPC/PF/17/0340).
4. The Property Factor's solicitors responded to the email of Mr Lush dated 17<sup>th</sup> January 2020 and referred to Res Judicata in respect of the earlier case. They stated that the tribunal had previously determined that the earlier case referred to by Mr Lush was not relevant. This response also referred to the note of the case management discussion in which it is stated that the Homeowners' representative accepted that the claims would be restricted to financial loss and not in respect of any claim for damages for worry or concern.

## **Relevant Statutory Provisions to be considered by the tribunal.**

5. Section 19 of the Property Factors (Scotland) Act 2011 contains the following provisions:

*19 (2) In any case where the Tribunal proposes to make a property factor enforcement order, they 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.

*19 (3) If the 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 Tribunal must make a property factor enforcement order.*

### **Consideration of Representations.**

(6) The Tribunal heard submissions of the parties on 15<sup>th</sup> September 2020. The proceedings were held by audio conference because of the restrictions as a result of the Covid-19 pandemic.

(7) Ms Wark, solicitor, represented the Respondents and Mr Lush represented the Homeowners.

(8) Both Mr Wark and Mr Lush said that they were treating this as a Review Hearing. This would be in terms of Section 43 of the Tribunal (Scotland) Act 2014. The members of the Tribunal indicated that this was not the case since a final property factor enforcement order had not been made. Miss Murray, solicitor for the Respondents, had agreed with this interpretation in the letter which she sent to accompany her representations. The Tribunal indicated that the proceedings were to give parties an opportunity to make submissions on the proposed property factor enforcement order.

(9) Ms Wark said that she was relying on the detailed written submissions submitted by her colleague Ms Murray. She said that the fundamental matter is that no evidence was led in relation to worry and inconvenience which was the basis of the proposed property factor enforcement order. She said that the Tribunal had heard nothing to support its findings that homeowners suffered worry and inconvenience and that, in making such a proposed property factor enforcement order it had substituted its own view rather than one supported by evidence.

(10) Mr Lush said that it was correct that the Homeowners were not seeking compensation for inconvenience, worry and distress. He said that the claim was in respect of financial loss and conceded that there had been difficulties in assessing this but that it was obvious that there had been loss. Mr Lush said that, until the new property factor had been appointed, he and other owners were unaware of the fact that the safety systems in the Development had not been maintained. He said that they were therefore not worried because they could not have such worry until they had knowledge of the issue. Mr Lush referred to the "original tribunal" by which he meant the application where he was the sole applicant and where a property factor enforcement order had been made which awarded him compensation for worry and inconvenience.

(11) Miss Wark said that, at the Hearing which considered the application of Mr Lush, the Tribunal was able to hear evidence of Mr Lush and make an assessment on that. She said that, to find that the Homeowners experienced worry and distress, it would have to hear evidence from each of the Homeowners and assess such evidence.

(12) Miss Wark accepted that her clients' position had been consistent during consideration of the application and that this was that they had not dealt with the emergency lighting and dry riser systems consistent with what a property factor should have done and had therefore breached the Code. She also accepted that, in terms of Section 19(3) of the 2011 Act the Tribunal must make a property factor enforcement order where a property factor has failed to comply with the Code but she said that such an order need not include compensation.

### **Consideration by Tribunal.**

(13) The Tribunal considered the oral and written submissions. It reviewed the Note on the case management discussion and considered that it was in conflict with the findings of its Decision dated 6<sup>th</sup> January 2020. It was clear that the Hearing should have been restricted to consider financial loss and that the Tribunal had heard no evidence regarding distress, worry and inconvenience. Mr Lush, in his representations and submissions, did not challenge this and was clear in stating that he believed that there had been financial loss and that this was what the Homeowners should be compensated for.

(14) The Tribunal accepted that it had heard no evidence at the Hearing to support it making a property factor enforcement order involving damages awarded for inconvenience, worry or distress. It also accepted that parties had agreed at the case management discussion that the Hearing would be restricted to financial loss. The Tribunal determined that it should set aside the proposed property factor enforcement order which accompanied its Decision of 6<sup>th</sup> January 2020 and that it should make no property factor enforcement order which included payment of compensation in respect of inconvenience, worry and distress.

(15) The Tribunal maintained its finding that a property factor enforcement order should be made. Neither of the parties submitted that a property factor enforcement order should not be made. The Property Factor had breached the Code and had not carried out the property factor's duties. The Tribunal considered whether or not such an order should be for compensation to be paid by the Property Factor. The Tribunal considered the evidence it heard at the Hearing on 10<sup>th</sup> December 2019. It was clear that Homeowners incurred costs in bringing the emergency lighting and dry riser systems up to standard but the Tribunal accepted that the Homeowners would not have paid costs in respect of these systems during the Property Factor's management of the Development. The Tribunal could not determine whether or not the costs saved by the Homeowners between March 2015 and July 2017 equated with the costs incurred by them when the work to both systems was carried out under the management of the property factors who took over from James Gibb.

(16) The Tribunal determined that, since the Property Factor had failed to carry out the property factor's duties and had breached the Code, it required to make a property factor enforcement order. This was in accordance with Section 19(3) of the 2011 Act.

(17) The failure of the Property Factor in relation to the safety systems of the Development was significant. Although it had "inherited" the management of the Development from another property factor and had followed its maintenance processes it should have been clear to an experienced property factor, that such safety systems require to be maintained and this should have been reinforced during its inspections of the Development. The Property Factor no longer manages the Development but the Tribunal considered that a property factor enforcement order should be made to underline the importance of maintenance of safety systems and that an undertaking should be provided by the Property Factor in this regard.

(18) The Tribunal determined that a property factor enforcement order be made in the following terms:

**James Gibb Property Management Ltd will provide an undertaking to the Tribunal that it will comply with the Code of Conduct for Property Factors and the property factor's duties and, in particular, will ensure that appropriate inspections and maintenance of common safety systems are carried out in developments which they manage.**

**Such an undertaking will be provided within twenty one days of service of the property factor enforcement order.**

**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 from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.**

**Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.**

Martin J. McAllister, Legal Member

3 October 2020