

# Housing and Property Chamber

## First-tier Tribunal for Scotland



**Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, in an application made to the Tribunal under Section 17 of the Act**

**Chamber reference: FTS/HPC/PF/18/1477**

**The Property: Flat 41 Dorchester Court, Dorchester Place, Glasgow G12 0BS ("the property")**

**The Parties:**

**Mrs Linda Kirk-Wilson, Flat 41. Dorchester Court, Dorchester Place, Glasgow G12 0BS ("the homeowner")**

**James Gibb Property Management Limited, incorporated under the Companies Acts (SC299465) and having their Registered Office at 32 Charlotte Square, Edinburgh EH2 4EY, trading as James Gibb Residential Factors, having a place of business at 65 Greendyke Street, Glasgow G1 5PX ("the property factors")**

**Tribunal Members - George Clark (Legal Member) and Mary Lyden (Ordinary Member)**

**Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011**

**The Tribunal has jurisdiction to deal with the application.**

**The property factors have not failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011 and have not failed to carry out the property factor's duties. Accordingly, the Tribunal does not propose making a Property Factor Enforcement Order.**

## **The Decision is unanimous.**

### **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 as "the Code of Conduct" or "the Code"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the 2017 Regulations"; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as "the Tribunal". The owners of the block of which the Property forms part are referred to as "the owners".

The property factors became a Registered Property Factor on 23 November 2012 and their duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it and gave consideration to: the application by the homeowner received by the Tribunal on 21 June 2018, with supporting documentation, namely copies of a letter dated 18 April 2018, advising the property factors of the decision to terminate the factoring agreement and giving the property factors three months' notice of the intention of the owners of the 6 flats at 1 Dorchester Place to transfer the management to Redpath Bruce Property Management Limited ("Redpath Bruce"), a letter of acknowledgment from the property factors dated 27 April 2018, the property factors' written statement of services (June 2016 Issue), e-mail exchanges between the homeowner and Redpath Bruce dated 7 and 8 May 2018, an e-mail from Redpath Bruce to the property factors dated 8 May 2018, a letter from the homeowner to the property factors dated 3 June 2018, comprising the formal complaint by the homeowner, factoring invoices issued by the property factors, covering the period from 28 February 2018 to 27 May 2018 and a factoring invoice from Redpath Bruce dated 28 May 2018.

The homeowner made further written representations to the Tribunal dated 24 June 2018, with which she enclosed copies of a reply from the property factors to her letter of 3 June 2018, the reply being dated 19 June 2018 and a letter from the homeowner to the property factors dated 25 June 2018. The homeowner also sent the Tribunal on 3 July 2018 a copy of a letter from the property factors to her dated 27 June 2018, with which they had enclosed a copy of their written statement of services which, she stated, differed radically from the one with which the owners had been provided in September 2016.

The property factors did not make any written representations to the Tribunal.

## **Summary of Written Representations**

### **(a) By the homeowner**

The following is a summary of the content of the homeowner's application to the Tribunal and the further written representations made on 24 June and 3 July 2018 :-

In their written statement of services, the property factors stated that "Block insurance is offered to all developments by James Gibb Residential Factors". Following the owners' termination of their contract with them, the property factors had given the owners a closing date of 18 July 2018, but had terminated block insurance cover on 28 May 2018, seven weeks earlier. Since that date they had been unable to deal with emergencies or make insurance claims. In The Development Schedule attached to the written statement of services, the section relating to termination of services stated that a notice period of three months was required by the development. There was no mention of changes in the services. By terminating the insurance seven weeks early, the property factors had broken their contract with the owners and had failed to comply with the property factors' duties.

The property factors had failed to comply with Section 1.1a.F.p of the Code of Conduct, which required that the written statement of services must include "clear information on how to terminate the service agreement, including signposting to the applicable legislation". The Section also stated that "This information should state clearly any "cooling off" period". The property factors had given no signposting, nor had they given any information of any "cooling off" period.

The property factors had also failed to comply with Section 5.4 of the Code of Conduct, which states that "If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly". At the time of the application, the property factors could not make claims on behalf of the owners, although their contract had not yet ended. Redpath Bruce had arranged insurance with their broker, but the owners would be reluctant to ask them to activate any claim, as they were not yet in place as factors.

The homeowner stated that, as at the date of her application (19 June 2018) she had not received a reply from the property factors to her letter of complaint of 3 June 2018. In her later written representations, she confirmed having received, on 23 June 2018, a reply dated 19 June 2018.

The supporting documentation included an e-mail from Redpath Bruce to the property factors dated 8 May 2018. It referred to an earlier conversation, from which Redpath Bruce understood that the property factors were in a position to arrange a

new policy for the co-owners for the period between renewal and termination, but that this would incur large exit fees and was probably not cost effective for the co-owners. As an alternative, Redpath Bruce had requested the property factors to reconsider the termination date to allow Redpath Bruce to arrange insurance from the renewal date. Later that day, Redpath Bruce e-mailed the homeowner, confirming that the property factors were unwilling to allow the co-owners to terminate on 14 May and that the property factors could arrange buildings insurance for the forthcoming year, but this would incur large cancellation fees. Redpath Bruce were, therefore looking into whether they could arrange a policy from 28 May 2018 on behalf of the co-owners.

The homeowner stated in the application, that the property factors had failed to comply with Section 1: 1a.F.p and Section 5: 5.4 of the Code of Conduct and that the complaint also related to a failure to carry out the Property Factor's Duties.

### **(b) By the property factors**

The property factors did not make any written representations, but in their written response of 19 June 2018 to the letter of complaint of 3 June 2018, the property factors stated that they did offer buildings insurance to all developments within their management, but this was a consensual arrangement between agent and client and was not an obligation where there was no obligation on the owners to be part of a communal insurance arrangement. In this case, there was no obligation on the owners to maintain a communal policy and, within the Code of Conduct, there was no obligation on the agent to provide communal buildings insurance. As there was no such obligation, nor any obligation on the clients to be party to a communal policy offered by the agent, the property factors did not agree there could be a breach of contract.

Section 3 of the Code of Conduct attempted to strengthen the relationship between client and agent by demonstrating transparency in all accounting procedures. The property factors had made the decision not to renew the policy, as the subsequent cancellation would result in a large terminatioin fee for early cancellation, as per Section 11.5 of their written statement of services, version dated January 2018. They understood that Redpath Bruce had also agreed with this and had assumed responsibility for common buildings insurance and added the development to their own portfolio at the renewal date. This was evidenced by the production of an invoice from the new property factor, dated 4<sup>th</sup> June 2018 which showed insurance cover for the period from 28<sup>th</sup> May 2018 to 14 May 2019.

The property factors stated that Section 1.1a.F.p of the Code of Conduct did not apply as there were no penalty charges. It was their decision not to renew that had protected the owners' interests and ensured they would not be penalised by having to pay an early cancellation fee. Given that insurance had continued, without a

break, from the renewal date, the property factors did not agree that the owners had been penalised. The homeowner had not provided any evidence of any penalty.

The property factors contended that Section 5.4 of the Code of Conduct only applied in the case where they were providing the policy, the pertinent word being "if applicable". They had provided sufficient notice to the owners to make alternative arrangements for their insurance cover and believed their actions in this matter had been to the benefit of the owners and, in fact, to the financial detriment of the property factors.

The property factors did not uphold the complaint as they saw no breach of contract, nor had the homeowner provided any evidence of a penalty. The letter concluded by advising the homeowner that if she disagreed with the findings of the property factors' investigation, she could submit an appeal which would be dealt with under section 5 of the property factors' complaints policy, a copy of which they attached to their letter.

## **THE HEARING**

A hearing took place at Glasgow Tribunals Centre, 20 York Street, Glasgow on the morning of 11 September 2018. The homeowner was not present at the hearing and had submitted a letter to say she could not attend the hearing on 11 September due to a back injury, . The property factors were represented at the hearing by David Smith, their Operations Manager.

### **Summary of Oral Evidence**

The chairman told the parties that they could assume that the Tribunal members had read and were completely familiar with all of the written submissions and the documents which accompanied them. He then invited the homeowner to address the Tribunal with reference to the complaints under each Section of the Code of Conduct. The wording of the relevant portions of each Section of the Code included in the application is set out below, followed by a summary of the oral evidence given by the parties in respect of that Section.

**Section 1.1a. F.p "The written statement of services should include clear information on how to change or terminate the service arrangement between you and the homeowner, including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination."**

The property factors told the Tribunal that the homeowner had been relying on outdated information, in that the version of the written statement of services she had included with her application was dated June 2016, but there had been two updates since then.

The property factors stated that they provide, in Section 11 of their written statement of services, clear information on how to terminate the contract. Also, they do not send out a new hard copy each time there is an amendment to the written statement of services, but advise owners through their Newsletters, and these go out at the same time as their invoices. The Newsletter sent out in August 2017 told owners that the written statement of services was now Issue 7, available on their website to download and that owners could also obtain a copy on request. That Newsletter specifically mentioned the inclusion of Section 11.5 as an amendment. It also stated that the property factors were having to pay for insurance on an annual renewal basis, paying it in full and re-charging it to the owners quarterly in arrears.

The property factors also told the Tribunal that they did not have a cooling-off period, so had nothing to intimate in this regard in their written statement of services.

**Section 5.4. “If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly.”**

The homeowner had raised concerns in her application that there was a period of seven weeks during which the owners had not been insured through the property factors, so the property factors would be unable to submit any insurance claims and the new factors, having put cover in place, would not be able to make a claim, as they were not yet in post.

The property factors advised the Tribunal that they do have a procedure in place for submitting insurance claims, adding that there is no “industry norm” in relation to insurance arrangements when owners decide to change factors. Some factors hold on to the insurance until the next renewal date, some do not. The property factors in this case did not think it practical to continue to hold insurance for 48 weeks or so, when they were no longer in a contractual relationship with the homeowner and her co-owners. The property factors had been able in this case to give a month's notice of the requirement to make alternative insurance arrangements through their new factors and the property factors had known, 3 or 4 days after writing to the owners, that Redpath Bruce would be picking the policy up as at 28 May 2018.

If the property factors had renewed the insurance cover and then cancelled it at the end of their contract, there would have been a cancellation fee of £453.87, including VAT. This would have amounted to £65.46 per owner. They had known there would be a substantial cancellation charge, but by the time they had the precise figure, they

already had confirmation from Redpath Bruce that they were arranging insurance with effect from 28 May 2018.

The homeowner had, therefore, known before making her application to the Tribunal that there was not going to be a period during which the owners would be uninsured. There was nothing in the Code of Conduct which said that property factors must maintain the status quo until the end of their contract, when issues such as block insurance, garden maintenance contracts and so on may come up for renewal or review during the period of notice given by the owners. Asking owners to pay nearly £70 each in cancellation charges just to have cover for seven weeks did not seem fair to the property factors, so they said that the new factors should pick up the policy as at 28 May 2018. It would have been a churlish approach to have committed the owners to a renewal which was going to result in cancellation charges so soon afterwards. The property factors accepted that their initial letter did not make clear to the homeowner the reason for their decision not to renew, and that they were actually operating in the interests of homeowners by not renewing the common buildings insurance, but they had clarified matters in their response to the homeowner's complaint and, in any event, the homeowner was aware that there was not going to be a gap in insurance cover.

### **Failure to comply with the factor's duties**

The homeowner's complaint related to the failure of the property factors to respond to her letter of complaint of 3 June 2018, but the homeowner accepted in later correspondence with the Tribunal that she had, on 23 June 2018, received their response, which was dated 19 June 2018. As the written statement of services stated that process of investigation of a complaint "should take no longer than 4 weeks" and the reply had been received within 3 weeks of the letter of complaint, the Tribunal did not hear further evidence on this aspect of the application. The homeowner also contended that the property factors had failed in their duties by terminating the insurance cover 7 weeks early, when the termination provisions in the Development Schedule attached to the written statement of services made no mention of possible service changes during the notice period.

### **Closing Remarks**

In the absence of the homeowner, the property factor was then invited to make any closing remarks. The property factor agreed that had they been clearer in their communication with the homeowner about the reasons for not renewing their common buildings insurance, they would have been able to demonstrate that they were still operating in the interests of all the homeowners in the development.

The property factor then left the hearing and the Tribunal members considered the evidence that they had heard, along with the written representations and other documentation before them.

The Tribunal makes the following findings of fact:

- The homeowner is the owner of the property.
- The property forms part of a block of flat dwellinghouses.
- The property factors, in the course of their business, manage the common parts of the development (including the block) 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").
- 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.
- The date of Registration of the property factors was 23 November 2012.
- 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.
- The homeowner made an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") dated 19 June 2018 and received on 21 June 2018 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.
- On 25 July 2018, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

### **Reasons for the Decision**

**The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 1.1a.F.p of the Code of Conduct.**

The Tribunal held that the version of the written statement of services which applied at the time of the intimation to the property factors of the termination of their contract was the January 2018 version, not the June 2016 one which had been included with the application. Section 11.5 made it clear that cancellation of longer-term contracts or premiums might incur charges. The Tribunal accepted the property factors' statement that updates were notified in Newsletters which directed clients to their website and advised that a copy of the latest version was available on request. As

the Newsletters were distributed with their invoices, the Tribunal held that the amendment which introduced Section 11.5 had been intimated to the homeowner in August 2017.

The Tribunal held as a matter of fact that both parties knew by 28 May 2018 that there would be no break in insurance cover. The Tribunal had seen an e-mail exchange between the homeowner and Redpath Bruce of 7 and 8 May 2018, in which Redpath Bruce confirmed that the property factors had told them that, whilst they could arrange to renew the insurance, this would incur large cancellation fees. The e-mail from Redpath Bruce also stated that they were looking into whether they could arrange an insurance policy from 28 May 2018 and the Tribunal had seen confirmation from Redpath Bruce in their Invoice dated 28 May 2018 of payment of the buildings insurance premium. It was not a matter that had been raised again by the homeowner at the date of the termination, so the Tribunal was satisfied that she had been aware by then that cover would be unbroken.

The Tribunal noted that the written statement of services (issued in January 2018) contained a "Version History", which provided clients with a useful summary of changes made, including, in issue 7, the introduction of "Section 11.5 - "Inclusion of cancellation charges". The Tribunal recommends, however, that the property factors review the terms of the letter that they send out when homeowners intimate their intention to terminate the factoring arrangement. The letter of 27 April 2018, in response to the letter from the owners of 18 April 2018, confirmed that management of the property would cease on 18 July 2018 and stated that it would be impractical for them to manage communal claims when they no longer acted for the owners, so they were not renewing the common insurance policy on 28 May 2018 and the owners should make alternative arrangements from that date. It did not mention the issue of cancellation charges and, had it done so, the Tribunal felt that the matter might not have led to a complaint and thereafter to the application to the Tribunal. It would have better demonstrated that they were still looking after the homeowner's interest if the property factors had clarified in that letter the likely repercussions were they to renew the insurance, even if at that stage they were unable to quantify the precise figures involved. The wording they had used in their letter of 27 April 2018 might imply an element of "sour grapes" at losing the contract, when in fact, the property factors were acting in the owners' best interests by saving them £65.46 in cancellation charges that would have arisen had they renewed the insurance.

**The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 5.4 of the Code of Conduct.** The Tribunal was of the view that Section 5.4 of the Code of Conduct was applicable to the present situation, as the agreement included arranging block insurance, but was satisfied that the property factors do have in place a procedure for submitting insurance claims on behalf of homeowners and for liaising with the insurers to check

that claims are dealt with promptly and correctly, as required by Section 5.4 of the Code of Conduct. Section 8.1 of the written statement of services states that details of the property factors' claims handling procedures are available on their website or by request at their office. The Tribunal has not seen details of these procedures, but is satisfied that they exist, as the matter was not challenged by the homeowner either in her written representations or at the hearing.

**The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with the property factor's duties.** The Tribunal was satisfied that the property factors had responded to the homeowner's complaint within the timescales set out in their written statement of services. The homeowner would, of course, have been unaware that her application, dated 19 June 2018 would, in effect, cross in the post with the property factor's letter of the same date. The homeowner had also contended that the property factors had failed in their duties by terminating the insurance cover seven weeks early, but, having held that the property factors had acted in the best interests of the homeowner in avoiding cancellation charges and that there had in any event been no break in insurance cover, the Tribunal was unable to uphold this element of the complaint.

**The Tribunal does not propose to make a Property Factor Enforcement Order.**

### **Appeals**

**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.**

Signature of Legal Member/Chair

..... Date:11 September 2018