

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 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber references: FTS/HPC/PF/20/2316, FTS/HPC/PF/20/2319, FTS/HPC/PF/20/2315 and FTS/HPC/PF/20/2411

The Parties:

Mr Paul Brown, 488/3 Gilmerton Road, Edinburgh EH17 7SA (“the homeowner”)

and

James Gibb Property Management Limited, registered as a limited company in Scotland (SC299465) and trading as James Gibb Residential Factors, with a place of business at 4 Atholl Place, Edinburgh EH3 8HT (“the property factors”)

Property: 488/3 Gilmerton Road, Edinburgh EH17 7SA (“the Property”)

Tribunal Members – George Clark (Legal Member/Chairman) and Ahsan Khan (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 Act')

The Tribunal has jurisdiction to deal with the application.

The property factors have not failed to comply with their duties in terms of Sections 2.1 and 7 of the Property Factors Code of Conduct made under Section 14 of the Property Factors (Scotland) Act 2011 (“the Act”). The property factors have not failed to carry out the Property Factor’s duties.

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

The Decision is unanimous.

Introduction

1. In this decision, the Property Factors (Scotland) Act 2011 is referred to as “the 2011 Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as “the Code of Conduct” or “the Code”; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as “the Tribunal”.
2. 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.
3. This was a conjoined Hearing of four separate applications made by the homeowner to the Tribunal and the Tribunal considered each application separately.
4. The Tribunal had available to it and gave consideration to four applications by the homeowner, all dated 24 September 2020. At the Hearing, the homeowner contended that one of the applications (FTS/HPC/PF/20/2315) should be considered as a complaint under Section 6.4 of the Code of Conduct as well as a complaint about a failure to carry out the Property factor’s duties. He stated that the Form C application for this case had been amended. The Tribunal noted this and said that it would hear evidence on it, then consider the matter when it had the opportunity to examine again the Form C application following the conclusion of the Hearing. The Tribunal subsequently examined the four Form C applications again and none of them make any reference to Section 6.4 of the Code of Conduct, although the homeowner’s intimation to the property factor, dated 29 November 2020, made reference to the fact that the homeowner believed that the property factors had failed to comply with Section 6 of the Code of Conduct. Accordingly, the Tribunal did not consider Section 6.4 of the Code of Conduct in arriving at its Decision under FTS/HPC/PF/20/2315.

FTS/HPC/PF/20/2319

5. The homeowner’s complaint in this case was that the property factors had failed to comply with Section 2.1 of the Code of Conduct, which states that property factors must not provide information that is misleading or false. At the Hearing, the homeowner, while evidence was being led by the Parties, requested permission to withdraw the application, as he now realised that he had not provided the Tribunal with certain documentary evidence that would assist his case. Allowing the homeowner to withdraw the application without a Decision would, he stated, enable him to re-apply to the Tribunal. Ordinarily, the Tribunal would have decided that it would continue to hear evidence and would make a determination on the application based on the evidence presented to it, as it was not prepared to permit a party to lodge additional productions during a Hearing when the sole motive was to try and improve that party’s case. The homeowner had to prove his case and he had had

many weeks within which to lodge any productions on which he intended to rely at the Hearing. It would be unfair to the property factors if, suddenly realising that there might be further documentation that would help his case and that the Tribunal would not accept such late lodging of documents, the homeowner could simply withdraw the application and start again. In this particular case, however, the property factors also stated that there was a further document that they would wish to lodge in response to the additional material that the homeowner wanted to produce so, on balance and with some reluctance, the Tribunal agreed to accept the homeowner's request to withdraw the application and did not consider this case further.

Summary of Written Representations

6. The following is a summary of the content of the homeowner's applications to the Tribunal, and of the property factors' written representations in response:

FTS/HPC/PF/20/2316

7. The homeowner's complaint was under Section 7 of the Code of Conduct and was that the property factors did not follow their complaints procedure or have any working formal procedure in place at all. They refused to register that matter as a complaint. None of the laid down steps or actions in the written formal complaints procedure had been followed. The homeowner's time had been wasted writing several hundred letters of complaint and he estimated that he had sent between 750 and 2,000 emails, many of which were several pages long.
8. The response of the property factors was that for prolonged periods up until February 2020, the homeowner had received letters from them, but the property factors had decided that all complaints by the homeowner would henceforth be dealt with directly by their Group Managing Director. The homeowner, when he received a response that he did not believe was accurate, had been sending in volumes of emails, some, in their opinion, abusive, aggressive and confrontational. This made it increasingly difficult to address the complaints constructively. Members of the property factors' staff had raised concerns regarding stress in managing the Development, and the complaints manager also had concerns, so the Group Managing Director, Mr David Reid, took over the management of the homeowner's complaints. In November 2020, the property factors had advised the homeowner that they would no longer communicate with him by email, as they had received some abusive, confrontational and slanderous content in emails over sustained periods and in unnecessary volumes to significant numbers of people within their organisation. They would now only communicate with the homeowner by letter.

FTS/HPC/PF/20/2315

9. The homeowner's complaint in this case was that the property factors had failed to comply with the property factor's duties in that they had not carried out maintenance in accordance with the Deed of Conditions for the Development. They had failed to carry out a survey or put in place the other requirements of a contract with Thistle Decorators for external redecoration. They had admitted their failings two years ago, but no rectification action had been taken and they refused to raise the matter as a formal complaint. The painting work was still not complete. The homeowners continued to be treated by the property factors in a high-handed and contemptuous manner.
10. The property factors' response was that in a previous case, the Tribunal had commented on the submissions by both Parties in relation to the external painting contract, and they raised concerns that the present application had been permitted by the Tribunal to go ahead. They stated that a combination of suppliers' timelines, over which the property factors had no control, seasonal weather, COVI-19 lockdown restrictions from March to July 2020 and the fact that the homeowner, as Chair of the Owners' Association Committee had disagreed with the approach they had proposed to take, had resulted in a delay in the contractors dealing with issues arising from the contract. The duties set out in the Deed of Conditions were on homeowners and it was for them collectively to decide if they wished the property factors to commence legal action on their behalf. The property factors did not believe they had breached their factoring duties.

FTS/HPC/PF/20/2411

11. This was a complaint that the property factors had failed to comply with Section 2.1 of the Code of Conduct, which says that property factors must not provide information that is misleading or false. The homeowner's contention was that the property factors had provided photographs of a different building to "prove" that works had been undertaken when they had not been. He believed this could be considered "fraud". Again, they had refused to register this as a complaint and the view of the homeowner was that he had been undermined in his position as chairman of the Owners'; Association Committee by what he described as "the lies" of the property factors which were part of a wider campaign of dishonesty, lies and misrepresentation. He provided the Tribunal with a copy of a page of 4 photographs on paper headed "Forsyth Roofing" and "Photographs of gutters at The Stables, Edinburgh. Photo's (sic) taken on 25th March 2014". The sheet of photographs had been attached to an email from Mr Steve Paterson of James Gibb to the homeowner and two others on 11 May 2015, which said "See attached pics taken by Burns and Watson".
12. The property factors referred to the homeowner's contention of a wider campaign to undermine his position as Chair of the Owners' Association

Committee and responded that it was an unqualified allegation with no real supporting evidence to substantiate it and it was speculative at best.

13. The property factors recognised some shortcomings in service delivery but said that they had acted upon those with a reduction in their management fee and this had been accepted by the owners of the Development at an AGM. The property factors had managed the volume of communications from the homeowner via their Group Managing Director, to ensure the homeowner's complaints had been addressed, but the outcome might not have been what the homeowner had wished. They provided copies of emails which they said indicated that the complaint items were being dealt with.
14. The approach of the homeowner had reached the point of breaching their unreasonable behaviour policy and, as a result, they had had to minimise their employee engagement with the homeowner. In their view, the complaints of the homeowner had at times been vexatious and frivolous.

The Hearing

15. A Hearing took place by way of a telephone conference call on the morning of 8 February 2021. The homeowner was present. The property factors were represented by Mr David Reid, Ms Jeni Bole and Ms Angela Kirkwood.

Summary of Oral Evidence

16. The Chairman told the Parties that they could assume that the Tribunal members had read and were completely familiar with all the written submissions and the documents which accompanied them. The Tribunal then heard evidence on each application in turn.

FTS/HPC/PF/20/2316

17. The homeowner told the Tribunal that, over the course of 8 years, the property factors had never provided the service for which the owners at the Development had contracted. Consequently, he had had to send multiple emails and had escalated them to people further up the hierarchy of the property factors. None of his complaints had, however, been resolved. The external painting was still not completed. He had tried to use the complaints system, which states that within 5 working days, every complaint should have reference number, but the property factors had failed to allow him to use the complaints system. At the first stage they would ignore him, then they would offer him "a bunch of lies", then they would attack him personally. If the complaints process had been followed, matters would have been dealt with in a documented, calm, rational way.
18. Mr Reid responded that everything raised by the homeowner since February 2020, when Mr Reid took over the management of his complaints had been

addressed. They had decided as a company, because of various allegations and slanderous remarks made by the homeowner, to take the management of his complaints away from their complaints team, on order to protect the health and wellbeing of the individuals involved. Mr Reid had openly said that sometimes, previous issues had not been addressed, but the company had apologised at the 2019 AGM and had offered a reduced fee. He acknowledged that there had been a further problem in relation to the amount of the reduced fee, but this had been corrected. He admitted that administrative errors had been made but took complete exception to any suggestion that they had been lying. The property factors were now at the stage that they had admitted when they had got things wrong but when they tried to address the issues, they would receive a huge number of emails from the homeowner, which was very hard to manage.

19. The Tribunal referred the homeowner to an email of 18 June 2020 to Mr Reid, in which he had said "I am taking a zero-tolerance approach to Gibbs...I will leap on any and every failing and prosecute it to the n'th degree" and asked the homeowner how he thought that such an approach helped the property factors to resolve his complaints. The homeowner responded that, as Chair of the Owners' Association Committee, he had a responsibility to ensure that the owners' money was being spent responsibly. The Tribunal then asked the homeowner why the owners had not taken the decision to sack the property factors if they thought the service was so poor. He replied that he had believed there were enough votes to change the factors at the 2019 AGM, but the offer of reduced fees had led to a surge of votes from owners who were landlords and not owner-occupiers. The reduction in fees had, he contended, not been to compensate for poor service in the past but an attempt to keep the business.

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20. This complaint was under Section 2.1 of the Code of Practice, which states that property factors must not provide information that is misleading or false. The homeowner asked leave of the Tribunal to withdraw this application, as he had important evidence to support his complaint that he had not previously submitted to the Tribunal. The Tribunal refused his request and determined to hear evidence, as it was not prepared to permit a party to lodge new productions during a Hearing when the sole motive was to try and improve that party's case. The homeowner had to prove his case and he had had many weeks within which to lodge any productions on which he intended to rely at the Hearing. The letter to the Parties intimating the date of the Hearing had stated that "written representations on the whole application **must** be returned to this office by **8 January 2021**". It would be unfair to the property factors if, suddenly realising that there might be further documentation that would help his case and that the Tribunal would not accept such late lodging of documents, the homeowner could simply withdraw the application and start again. The Tribunal then heard evidence in this case.

21. The homeowner's complaint related to an email sent to him by the property factors, which indicated that gutters had been cleared. Attached to the email was a series of photographs purporting to show the cleared gutters, but the photographs were of an entirely different property. The homeowner's view was that this might amount to fraud, but he confirmed that he had not reported it to Police Scotland.
22. The property factors were unable at the Hearing to confirm whether the photographs were of another property but responded that there had been no attempt whatever on their part to provide information that was misleading or false.

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23. The Tribunal having determined that the Form C in this application had not referred to a breach of Section 6 of the Code of Conduct, the complaint was limited to a possible failure of the property factors to comply with the property factor's duties.
24. The homeowner referred the Tribunal to the property factors' Written Statement of Services ("WSS"). There was a discussion as to which version of the WSS should be considered. The homeowner had provided with his application a copy of Version 09 dated May 2019, but, as the matter related to events which preceded that, his view was that the 2014 Version should be used. He had not, however, provided the Tribunal with a copy of that version. After being permitted a little time to peruse both documents, however, the homeowner confirmed that the Sections to which he was referring were the same in both documents, so he was content to proceed on the basis of the 2019 WSS.
25. The homeowner said that there were three aspects to his complaint in this case. One element was the failure of the property factors to prepare a schedule of works, but this was not considered by the Tribunal as it related to Section 6.4 of the Code of Conduct. The second element was the failure of the property factors to follow the requirements of the Deed of Conditions insofar as it set out requirements for regular external painting. The third aspect was that the painters had simply painted over rotted woodwork, when the property factors were supposed to ensure that all wood substrate was pre-prepared for painting. The specification stated that repairs to substrates which were to be painted must be undertaken by the owners' contractor in advance of the expected paint start date.
26. Mr Reid responded that it is the owners who are the duty holders under a Deed of Conditions. It is their obligation to carry out the external decoration. AkzoNobel had been utilised to prepare a specification for the external painting, and the role of the property factors was to act as the agents of the owners. They were not responsible for carrying out the work and, as they are not experts in the specialist trades involved, they would not project manage the work themselves, but would generally advise owners to appoint a suitable person if a project manager was required. They had relied on the AkzoNobel specification and Thistle Decorators, who carried out the painting, had been

told to report any defective wood that they found and to stop working on it. They had relied on the contractor to identify any works required and they had not been contacted by the contractors to highlight any issues.

27. The homeowner responded that the fact that the property factors subcontracted to other companies to carry out work did not relieve them of their fiduciary duty to the owners by whom they were charged to maintain the building.
28. The oral evidence being concluded, the Parties then made their closing remarks. The homeowner stated again that he felt he had not provided the evidence he felt he should have. He had observed ten previous Tribunal hearings, and, in some cases, the Tribunal had admitted new documentary evidence on the day. That was why he had sought to withdraw two of the applications at the Hearing and would have wished to withdraw also the application under FTS/HPC/PF/20/2315.
29. Mr Reid, for the property factors asked that it be placed on record that these cases appeared to be intended to cause as much disruption to the property factors as possible. They had taken up a lot of time and resources and they would not be at all happy if the homeowner was permitted to withdraw the applications when his stated intention was to re-submit them.
30. The Parties confirmed that there were no further matters that they wished to put before the Tribunal. They then left the Hearing conference call, and the Tribunal members considered all the evidence, written and oral, which had been provided by the Parties.

Findings of Fact

31. The Tribunal makes the following findings of fact:

- The homeowner is the owner of the Property within a Development known as The Stables, Gilmerton Road, Edinburgh. The Development comprises 36 flatted properties over five blocks at 482, 484, 486, 488 and 490 Gilmerton Road.
- The property factors, in the course of their business, manage the common parts of the Development. 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 he considers that the property factors have failed to carry out their duties arising under section 14 of the Act and have failed to carry out the property factor's duties.

- The homeowner made four applications, all dated 24 September 2020, to the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") under Section 17(1) of the Act.
- The concerns set out in the applications have not been addressed to the homeowner's satisfaction.
- On 18 December 2020, 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 Decision

FTS/HPC/PF/20/2316

The Tribunal did not uphold the homeowner's complaint under Section 7 of the Code of Conduct.

32. Section 7 relates to Complaints Resolution and requires property factors to have a clear written complaints resolution procedure which sets out a series of steps which they will follow. The WSS in this case has a clear complaints resolution procedure of up to 5 stages, the last of which is escalation to the local director, whose response is final and exhausts the complaints process. The property factors had decided in February 2020 that all the homeowner's complaints should, in effect, be immediately escalated to the last stage of the process by being managed directly by the Group Managing Director. Their reason for taking this step was that their staff were being overwhelmed by the volume of emails and complaints from the homeowner and the fact that they were being sent to so many people within the organisation.
33. The view of the Tribunal was that the property factors' actions were justified. It was completely unreasonable to expect the complaints team of an organisation to deal with the enormous number of emails that the homeowner was sending. By his own admission, he had sent between 750 and 2,000 emails to the property factors. He had also made it clear in these emails that he was engaged in a personal vendetta against the property factors. On 18 June 2020, he had described them as "*Bunch of girls in-fighting with each other I expect*". That email had been copied by the homeowner to 5 people within James Gibb. In another email sent some 21 minutes later to Mr Reid he had said "*I am taking a zero-tolerance approach to Gibbs...I will leap on any and every failing and prosecute it to the n'th degree. That is how angry I am. Like I said, if I have to die in a ditch to get even with Gibbs-so be it. Whatever it takes. You can only lie, cheat, abuse and steal from people for so long before righteous anger arises and they set out to get you whatever the cost*". On 28 August 2020, he had described the property factors as an "*out-of-control, incompetent and corrupt organisation*" and, in an email of 4 November 2020, he had accused the property factors of defrauding him and their staff of

lying. He also constantly reminded the property factors about the number of applications he had made or was about to make to the Tribunal. All of these emails had been sent to or copied by the homeowner to staff members of the property factors and made the task of dealing with them almost impossible. The property factors indicated in their written representations that the homeowner's conduct might be seen to amount to harassment. Following this last email, Mr Reid had advised the homeowner that the property factors were no longer prepared to communicate with him by email.

34. The Tribunal saw no evidence whatsoever that would excuse the content or tone of the emails referred to above and decided that the property factors were justified in deciding that, given the sheer volume and the intimidatory and abusive content of emails being sent by the homeowner, they required to protect their staff by arranging that their Group Managing Director would manage all the homeowner's complaints directly. Accordingly, the Tribunal did not uphold the homeowner's complaint under Section 7 of the Code of Conduct.

FTS/HPC/PF/20/2411

The Tribunal did not uphold the homeowner's complaint under Section 2.1 of the Code of Conduct.

35. Section 2.1 states that property factors must not provide information that is misleading or false.
36. The homeowner's complaint was that the property factors had sent him an email on 11 May 2015, which had appended to it a document with 4 photographs which purported to be of the Development, but which were of an entirely different property. The property factor said they had been taken by Burns and Watson.
37. The Tribunal was of the view that it was possible that the photographs of the gutters were of a different property but noted that the gutters shown in the photographs were clear. The email was dated 14 months later, and it referred to the condition of the gutters "this past week". In the email the property factors said that the gutters were last cleared a year or so ago and the Tribunal decided that it could not conclude that the photographs, which were on a sheet headed "Forsyth Roofing" and bore to have been taken on 24 March 2014 were the photographs to which the property factors were referring in their email. It was possible that they had attached the wrong set of photographs, taken when the gutters were clear in 2014, as the ones to which they referred in their email were, they stated, taken by Burns and Watson, and it did not appear, from the tone of the email, that the gutters were clear at that time. It was also possible that the email had included, or had been intended to include, two sets of photographs, one from Forsyth Roofing showing clear gutters in 2014 and the other from 2015, taken by Burns and Watson, showing the position a year or so later.

38. As the Tribunal was unable to determine that the photographs in the sheet headed "Forsyth Roofing" were the ones referred to in the email, it could not make a finding that the information had been misleading or false. Accordingly, the Tribunal did not uphold the homeowner's complaint under Section 2.1 of the Code of Conduct. Even if they were the photographs referred to, however, the property factors had, in good faith, forwarded what they believed to be photographs of part of the Development and had made it clear in the email that they had been provided by a third party, so the Tribunal did not uphold the complaint.
39. The Tribunal found no evidence to support the contention of the homeowner that the property factors had engaged in a campaign to undermine his position as Chair of The Owners' Association Committee.

FTS/HPC/PF/20/2315

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to carry out the property factor's duties as defined in Section 17 of the Act.

40. Property factors act as agents for the owners who appoint them. They are not responsible for ensuring that homeowners comply with the conditions imposed by a Deed of Conditions. These obligations lie with the owners themselves. The Deed of Conditions relative to the present Development contains provisions regarding the frequency with which exterior painting should be carried out. It states that this obligation lies on each feuar (owner). Homeowners can, by decisions arrived at in accordance with their title deeds, appoint property factors and can instruct them to arrange for works to be carried out on their behalf, but the property factors do not then somehow assume liability for compliance with the Deed of Conditions.
41. Unless they claim to have such expertise, property factors cannot be regarded as experts on building construction and maintenance. They are, therefore, entitled, in exactly the same way as individual home owners, to rely on the skill and judgement of professionals and contractors that they employ on behalf of the owners. Property factors cannot be held liable for the failings of third parties who fail to carry out work properly, provided they have taken all reasonable steps to satisfy themselves that the professional or contractor is suitably qualified for the work that is being instructed.
42. In the present case, the property factors had instructed AkzoNobel to prepare a specification for the external painting. Thistle Decorators, Edinburgh, had been awarded the contract and the painting was carried out. It became apparent that remedial works were required, as they had painted over rotted woodwork which should have been fixed before painting. Thistle Decorators had agreed to carry out the remedial work at no cost to the homeowners, apart from the joinery work which would have been necessary anyway and the property factors had offered to meet the cost of hiring access equipment to enable the remedial work to be carried out.

43. The homeowner's complaint was that the property factors were supposed to ensure that all wood substrate was pre-prepared for painting. The specification stated that repairs to substrates which were to be painted must be undertaken by the owners' contractor in advance of the expected paint start date. In their written representations, the Property factors had included their email of 29 August 2018, in which they had told the homeowner that they had relied on the contractor to identify any works required and that they had not been contacted during the works to highlight any issues. This email was in response to questions from the homeowner, who quoted from the Scope of Work for the job that "The client will arrange for a joiner to carry out all joinery work identified in advance, but any further repair work identified by the painting contractor during painting should be reported to the property manager to arrange for joinery work".
44. The Tribunal held that the property factors were entitled to rely on the contractor to identify any works required and accepted from the email evidence of 29 August 2018, which the homeowner had not challenged at any time, that they had not been contacted by the contractors to highlight any issues. Accordingly, they had not failed to carry out the property factor's duties and the homeowner's complaint was not upheld.
45. Having decided not to uphold any part of the homeowner's complaint, the Tribunal does not propose making a Property Factors Enforcement Order.

Right of Appeal

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.

.....George Clark (Legal Member/Chair)

8 February 2021

