

Housing and Property Chamber

First-tier Tribunal for Scotland



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/24/2985 and FTS/HPC/24/3612

Property: 39/30 Pilrig Heights, Edinburgh EH6 5FD (“the Property”)

The Parties:-

Mr Oscar Mesalles-Naranjo, C/ Narcis Monturiol 204, 3R 2A, Vilasar de Mar 08340, Spain (“the homeowner”)

James Gibb Residential Factors, a trading name of James Gibb Property Management Limited, incorporated in Scotland (SC299465) and having their registered office at 3rd Floor, Red Tree Magenta, 270 Glasgow Road, Rutherglen, Glasgow G73 1UZ (“the property factors”)

Tribunal Members: George Clark (Legal Member/Chairman) and Elizabeth Williams (Ordinary Member)

Decision

The First-tier Tribunal for Scotland Housing and Property Chamber determined that the property factors have failed to comply with Section 7.3 of the Property Factors Code of Conduct effective from 16 August 2021. The Tribunal proposes making a Property Factor Enforcement Order

Background

1. By application, dated 2 July 2024, the homeowner sought a Property Factor Enforcement Order against the property factors under the Property Factors (Scotland) Act 2011 (“the Act”). He alleged a failure to comply with Section 7.3 of the Property Factors Code of Conduct effective from 16 August 2021 (“the Code of Conduct”). This application was allocated the Tribunal reference FTS/HOC/PF/24/2985. In a separate application dated 7 August 2024, he alleged failures to comply with Sections 1.2 and 1.5E of the Code of Conduct.

The second application was allocated the Tribunal reference FTS/HPC/PF/24/3612.

2. The homeowner's complaint in relation to the first application was that the property factors obtained legal advice in relation to the allocation of common electricity costs across the development of which the Property forms part, without seeking the prior approval of the owners. They misrepresented the situation in their billing as one where the legal advice was obtained "as per owner request". A number of owners, including the homeowner, had complained about the manner in which the property factors were allocating the electricity costs, and the homeowner's view was that it was in response to these complaints that the property factors had obtained advice from their own solicitors. Section 7.3 of the Code of Conduct states that a property factor must not charge homeowners for handling complaints.
3. The complaint in the second application was that the property factors had issued a new Written Statement of Services ("WSS") without providing a summary of changes, as required by Section 1.2 of the Code of Conduct. Further, the new WSS did not comply with the requirement of Section 1.5.E that a WSS must include a declaration of any financial or other interests which the property factor has in the common parts of the property and land to be managed or maintained, for example as a homeowner. If no interest is declared, then this must be clearly stated. The response of the property factors to his complaint had been that the Code of Conduct provision does not apply when the WSS is being completely replaced, not merely revised.
4. On 1 October 2024, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the property factors were invited to make written representations by 22 October 2024. The property factors did not make any written representations to the Tribunal.

Case Management Discussion

5. A Case Management Discussion was held by means of a telephone conference call on the morning of 30 January 2025. The homeowner was present. The property factors were not present or represented.
6. The Tribunal advised the homeowner that, as he is resident in Spain, he was not permitted to give any evidence in the absence of the Foreign and Commonwealth Office obtaining consent from the Spanish Government permitting him to do so. The homeowner accepted the position and gave no evidence to the Tribunal. As a result, there was no discussion on the merits of the applications. The homeowner left the conference call, and the Tribunal Members considered all the evidence before them.

Findings of Fact

- i. The homeowner is the proprietor of the Property, which is a sixth-floor flat, part of a development of 378 flats in several blocks, known as The Ironworks, on the north side of Edinburgh.
- ii. The property factors, in the course of their business, manage the common parts of 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”).
- 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 property factors were registered on The Scottish Property Factor Register on 23 November 2012. Their present registration is dated 17 May 2019.
- v. The homeowner has notified the property factors in writing as to why he considers that the property factors have breached the Code of Conduct under the Act.
- vi. The homeowner made applications to the First-tier Tribunal for Scotland Housing and Property Chamber on 2 July and 7 August 2024, under Section 17(1) of the Act.

Reasons for Decision

7. 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 all the information and documentation it required to enable it to decide the application without a Hearing. The Tribunal noted that the property factors had not provided any written representations and that they had chosen not to be present or represented at the Case Management Discussion, but the Tribunal had before it their emailed final responses to the homeowner’s complaints.
8. The Tribunal considered first the application under FTS/HPC/PF/24/2985.
9. **Section 7.3 of the Code of Conduct** states that “A property factor must not charge homeowners for handling complaints unless this is specifically provided for in the property titles”.
10. The homeowner provided the Tribunal with a copy of the property factors’ bill for the period to 27 May 2024. It included two invoices from BTO solicitors, for £570 and £600, exclusive of VAT. The narrative beside each charge referred to “Legal view on utility apportionment as per owner request.” One of them appeared under the heading “Legal”. The other one was included amongst a number of items

under “Sales/Purchases”. The homeowner also provided a copy of an “EGM Factors Report” issued in advance of an owners’ meeting to be held on 22 April 2024. This report stated that some owners had raised concerns that the property factors had acted outwith the titles in apportioning the electricity costs and that the property factors had sought legal advice, a copy of which was incorporated in the report. The report did not state that the owners had requested or had agreed to legal advice being obtained.

11. The view of the Tribunal was that this advice had been sought following complaints from owners, including the homeowner, and that it was, therefore, related to these complaints. There was no evidence that the property factors had suggested to the homeowner or other owners that legal advice be sought, and the Tribunal decided that the property factors had obtained advice for their own purposes following complaints and had then passed on the cost to the owners. Accordingly, the Tribunal **upheld the homeowner’s complaint under Section 7.3 of the Code of Conduct.**

12. The Tribunal then considered the application under FTS/HPC/PF/24/3612.

13. Section 1.2 of the Code of Conduct states that a property factor must take all reasonable steps to ensure that a copy of the WSS is provided to homeowners ...at the earliest opportunity (in a period not exceeding 3 months) where substantial change is required to the terms of the WSS. Any changes must be clearly indicated on the revised WSS issued or separately noted in a “summary of changes” document attached to the revised version.” The response of the property factors to the homeowner’s complaint had been that the Section does not cover the situation where a property factor issues a completely new WSS, rather than a revised one. The Tribunal agreed that, on a strict interpretation of the wording, the Section 1.2 requirement for a summary of changes applied to revisions to a WSS, not its complete replacement, so the Tribunal **did not uphold the complaint under Section 1.2 of the Code of Conduct.** The view of the Tribunal is, however, that this is a *lacuna* in the Code of Conduct and that, where property factors decide to replace their WSS in its entirety, they should at least draw the attention of homeowners to any changes from the previous version which may have an impact on them, such as changes to the level of service, financial and billing arrangements or complaints procedure.

14. Section 1.5.E of the Code of Conduct provides that the WSS must include “a declaration of any financial or other interests which the property factor has in the common parts of property and land to be managed or maintained, for example as a homeowner...If no interest is declared, then this must be clearly stated”. The

Tribunal **did not uphold the complaint under Section 1.5.E**. The relevant WSS is Issue 16, dated July 2024 and, under the Heading “Authority to Act” it states “O2. James Gibb Property Management Ltd has no ownership interest in any of the properties it manages”.

15. Having decided that the property factors had failed to comply with Section 7.3 of the Code of Conduct, the Tribunal then considered whether or not to make a Property Factor Enforcement Order. The Tribunal noted that the cost to each individual owner of the legal advice was very small (£3.10 plus VAT), but the Tribunal’s view was that the property factors had committed a serious error in seeking that advice without at least advising owners of their intention to do so and that they had then misrepresented the position in their bill by stating that it had been obtained at the request of owners. It appeared to the Tribunal from the evidence before it that the property factors had acted on their own account and the Tribunal decided that the property factors should have borne the cost themselves and that the legal fees plus VAT should be refunded to owners by means of a credit to their individual factoring accounts. The Tribunal proposes to make a Property Factor Enforcement Order in terms of the Section 19(2)(a) Notice attached to this Decision.

16. The Tribunal’s Decision was unanimous.

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

30 January 2025
Date