

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision and Statement of Reasons on homeowner's application:
Property Factors (Scotland) Act 2011, Section 19(1)(a)

Chamber Ref: **FDS/HPC/PF/23/2851 and**
FDS/PF/23/2852

Property Address: **Flat 2/6, The Pirns, King Street,**
Galashiels, TD1 1PX

The Parties **Mr Duncan McGill, 10**
Dingleton Drive, Melrose,
TD6 9JL ("the homeowner")

James Gibb Residential
Factors, Bellahouston
Business Centre, 423 Paisley
Road West, Glasgow, G51 1PZ
("the property factor")

Tribunal Members:

Mr Mark Thorley (Legal Member)
Mr Donald Wooley (Ordinary Member)

Decision:

The factor failed to comply with (First Application) (C1) dated 17 August 2023 sections 2.5,4.1,4.4,4.6 and 6.4 of the 2012 Code of Conduct and (Second Application) (C2) Overarching Standard of Practice 6 and sections 2.1.2.7,6.2,6.12 and 7.1 of the 2021 Code of Conduct and has failed to carried out the factor's duties in terms of the Written Statement of services sections

TO BE CONFIRMED

1. The tribunal's decision was unanimous.

Background:

2. The applicant applied by application form C1 dated 17 August 2023. The applicant set out that the property factor was in breach of sections 2.4, 2.5, 4.1, 4.2, 4.4, 4.5, 4.6, 4.7, 6.1, 6.4, 6.9, 7.1,. The principal issue for the homeowner was that of a failure to maintain the building in a good and weatherproof state of repairs. For the avoidance of doubt sections 4.1 – 4.7 mistakenly relate to the numbering within the respondent's written statement of services rather than the relevant section of the 1st October 2012 Code of Conduct.
3. The second application, on form C2, was dated 17 August 2023. In terms of this application, the homeowner complained of breaches by the property factor of OSP 1, 2, 4, 5, 6, 8 and 9, Written Statement of Services 1.1, A(1), A(2), A(3), B(4) and D(13), communications and consultations sections 2.1 and 2.7, carrying out repairs 6.1 and 6.12 and complaints resolution 7.1. The homeowner's complaint regarding the property factor's duties was a failure to progress and communicate regarding the proposed schedule of repairs and the failure to acknowledge failures in duties.
4. On 6 December 2023, both applications were accepted for determination.

Subsequent Procedure

5. A case management hearing was held on 26 March 2024. The homeowner attended. The property factor did not. The case management hearing was then continued.
6. There was a further case management discussion on 28 June 2024 Reference is made to the terms of the note produced from that case management discussion.
7. A hearing was conducted in the case on 13 December 2024
8. At the further case management discussion, on 28 June 2024 the following was noted:
9. Written Statement of Services – 4.1, The Property Factor was to come back providing a notice making reference to the portal that had been provided to the homeowner.

10. communications and consultations. 2.4 withdrawn, 2.5 conceded,

Carrying out repairs and maintenance - 6.1 conceded, 6.4 to be continued, 6.9 to be continued,

Complaints Resolution - 7.1 to be continued.

In terms of the Overarching Standard of Practice heads 1 and 5 were withdrawn and heads 2, 4, 6 and 8 continued

Communications and Consultation -2.1 continued, 2.7 conceded

Carrying out repairs and maintenance – 6.1 to be continued, 6.12 to be continued.

Property Factor Complaints Handling Procedure- 7.1 to be continued

A hearing was then assigned.

Findings in fact

11. The Tribunal made the following findings in fact:

- a) The property factors are James Gibb Residential Factors.
- b) The homeowner is Mr Duncan McGill.
- c) The property is situated at Flat 2/6, The Pirns, King Street, Galashiels, TD1 1PX.
- d) In response to the complaint details under Section 1 of the 2012 Code of Conduct "Written Statement of Services", it was acknowledged by the Tribunal that the application made reference to the itemised sections of the Written Statement of Services rather than the relevant sections of the Code of Conduct. During the earlier case management discussions it was agreed that, in relation to the sections as described in the Written Statement of Services, the following had been agreed; Sections 4.1 and 4.7 conceded and Sections 4.2, 4.5, 4.6, were withdrawn.

In response to the complaints under Section 2 of the 2012 Code of Conduct, "Communication and Consultation", 2.4 was withdrawn and 2.5 was conceded

In response to complaints under Section 6 of the 2012 Code of Conduct, "Carrying out repairs and maintenance", 6.1 was withdrawn.

In response to complaints under Section 7 of the 2012 Code of Conduct "Complaints resolution", 7.1 was withdrawn

12. The outstanding sections related to Section 4.4 as described in the Written Statement of Services and sections 6.4 and 6.9 of the 2012 Code of Conduct..

13. A building survey report was undertaken by F3 Building Surveyors, dated 25 April 2022. There was a recommendation for work to be undertaken in the immediate/short term, medium term and long term. There was no follow up to that report. The work was not undertaken.

14. In terms of paragraphs 6.4 no repairs and maintenance had been undertaken.

15. Section 7.1 was withdrawn.

16. In the C2 Application, no information has been provided regarding the portal in which the apparent Written Statement of Services was issued. Accordingly, under heads A1, A2, A3, B4 and D13, there has been a breach of the code.

17. There was a lack of communication by the property factors and accordingly section 2.1 was made out and section 2.7 had already been conceded

18. Sections 6.1 and 6.12 also made out in terms of the non-carrying out of works.

19. Section 7.1 had been withdrawn

20. The property factor was appointed as factor to this development in 2015.

21. In March 2018, the property factor advised they would instruct a survey to the building regarding rot on the wood and beams following upon a major leak to the top floor. That survey was not carried out until 2022. The homeowners have raised concerns since at least July 2018.

22. In September 2018, the homeowner had written to the property factor raising concerns about signs of water ingress along the length of the top floor corridor. No investigative action was undertaken.

23. Following upon the issue of the building sub-frame reported May 2022 an online meeting was held to discuss a proposed schedule of repairs in August 2022.

24. The homeowner issued a formal letter of complaint on 22 August 2022.

This was acknowledged on 9 September 2022 by the property factor.

25. On 22 December, the property factor responded to the complaint providing the homeowner with 10 working days to confirm whether the complaint had been satisfactorily addressed.
26. On 30 December 2022, the homeowner indicated that he was not satisfied with the outcome of the complaint. On 10 February 2023 the property factor responded and indicated that they had exhausted their complaints procedure.
27. James Gibb was dismissed as factor with effect from 19 October 2024

Hearing

The home owner gave evidence along with a Mr Middlemiss a co-owner at the development

28. Prior to the hearing the homeowner had supplied an extensive inventory of documentation, received by the Tribunal on 26 November 2024. The property factor had submitted a written representation. The homeowner attended at the hearing. It was noted at an earlier Case Management Discussion that there had been a variety of concessions and indeed withdrawals of various heads of complaint.

Sections 4.1, 4.7 as described in the Written Statement of Services and 2.5 of the code of conduct were conceded.

Sections 4.2, 4.5, 4.6 of the Written Statement of Services and 7.4, 7.5, 2.4, 6.9 and 7.1 were withdrawn.

This left Sections 4.4 and 6.4 to be determined.

Written Statement of Services

29. ***You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangements in place between you and the homeowner. If a homeowner applies to the Homeowner Housing Panel for a determination in terms of Section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of the code.***
30. The homeowner referred to the Written Statement of Services provided by the property factor issued 15 March 2023 statement 4.4 and the heading "Major projects". The home owner had no other Written Statement of Service and nothing else had been provided on the property factor's portal.
31. Clause 4.4 of the Written Statement of Services from March 2023 -

provides the mechanism upon which a major project would take place.

32. The position of the homeowner was that it took a significant period of time, namely from 2018 when works were identified until 2022 to undertake a building survey. That building survey, having then been undertaken, works were not done in accordance with it. That appeared to be entirely conceded.
33. The homeowner produced documentation showing that on 16 September 2018, he had emailed the property factor. He had identified a series of issues with the building which included:
 - a) Communal stairway walls and ceilings
 - b) The under-stair cupboard in the entrance vestibule
 - c) Ceiling beams across the second floor corridor
 - d) Signs of water ingress on the wall of the floor under the second floor hallway
 - e) Outbuildings to the rear of the flats.
34. The homeowner had followed this up by providing photographs of the issues. There had been no survey instructed by the property factor until the survey that was undertaken on 17 March 2022. That in itself identified certain priority work which was described as being immediately short term, thereafter medium term work and long term work. No work appeared to be undertaken to this.
35. This in itself was a breach of the 2011 code. The property factor failed to undertake work in accordance with its Written Statement of Service.
- 36.2.5 Communication arrangement – You must respond to enquiries and complaints received by letter or email within a prompt timescale. Overall your aim should be to deal with enquiries as fully and as quickly as possible and to keep owners informed if you require additional time to respond. Your response time should be confirmed in the written statement.
37. The homeowner is referring to the Written Statement of Services. It was fundamentally clear that in terms of the March 2023 Written Statement of Services that a complaint had been lodged and acknowledged within 10 working days of receipt. Investigation process should be completed within 25 working days.
38. The initial complaint was made on 22 August 2022 and was acknowledged outwith the time period expected. In addition to that, the period of time within which the complaint should have been responded to, i.e. 25 working days, was not complied with.
39. Thereafter the response to the homeowner was given on 22 December 2022 (at Christmas time) allowing for a 10 working days response.
40. This head of the Code of Conduct 2011 is breached.

C2 complaint

41. The C2 complaint obviously deals with the property factors' code.

Form C2 complaint – overarching standards

42. Overarching standards

43. OSP 1 – You must conduct your business in a way that complies with all relevant legislation.

44. OSP 2 – You need to be honest, open transparent and fair in your dealing with homeowners.

45. OSP 4 – You must not provide information that is deliberately or negligently misleading or false.

46. OSP 5 – You must apply your policies consistently and reasonably.

47. OSP 6 – You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective.

48. OSP 8 – You must ensure all staff and any sub-contracting agents are aware of relevant provisions in the Code and your legal requirements in connection with your maintenance of land or in your business with homeowners in connection with the management of common property.

49. OSP 9 – You must maintain appropriate records of your dealings with homeowners. This is particularly important if you have to demonstrate how you have met the Code's requirements.

Of these the tribunal had to determine OSP 2,4,6 and 8

OSP 2 was difficult to establish and was not upheld as it referred to honesty, openness and transparency. How the property factor had undertaken work (or the lack of it) did not mean that they were not honest, open or transparent

OSP 4 was equally difficult to establish was not upheld as no evidence was supplied that demonstrated that the property factor had provided information that was deliberately or negligently misleading or false.

OSP 6 was upheld on the basis that there was nothing timely that took place in relation to the repairs to the property.

OSP 8 was not upheld as it referred to the knowledge of the Code by staff and sub agents and no evidence had been led of the lack of it

Written Statement of Services 1.1

50. A property factor must provide each homeowner with a comprehensive WSS setting out, in a simple, structured way, the forms and service delivery standards of the arrangement in place between them and the homeowner. If a homeowner makes an application under Section 17 of the 2011 Act firstly to the Tribunal for determination, the Tribunal will expect the property factor to be able to demonstrate how their actions compare with their WSS as part of their compliance with the requirements of the Code. Nothing was provided from the portal.

51. The tribunal finds that this section of the code has been breached.

Communications and Consultations 2.1

52. Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowner's responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations.

53. It is acknowledged that the 2021 Code came into effect in August 2021. Much of the information provided in the C1 application remains valid in this application. From August 2021 there was a lack of communication with the homeowner regarding the repairs to be undertaken to the property. The survey was not undertaken until 25 April 2022. Following upon this there was to be a conference call with homeowners. This only took place on 10 August 2022. The minute of that meeting took 3 months.

54. The tribunal finds that this section of the code has been breached.

Section 2.7

55. A property factor should respond to complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall the property factor should aim to deal with enquiries and complaints as quickly and as fully as possible and to keep homeowners informed if they are not able to respond within the agreed timescale. There appears to be an accepted breach here by the property factor. As was narrated, the complaint was not responded to and acknowledged within a period of 10 days and the investigation was not undertaken and concluded within 28 working days.

6 – Carrying out repairs and maintenance

56. Section 6.1 of the Code covers the use of both in-house staff and external

contractors by property factors. While it is a homeowner's responsibility, and good practice, to keep the property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make proper repairs to a good standard.

57. The work in this property was identified in March 2018. The survey was not issued until April 2022. Even taking into account the pandemic years, that is a period of 4 years. The onus was on the property factor to ensure that the work was done.
58. Clause 6.1 is an aspirational statement. It does not lend itself to the duty of the factor. There is no breach accordingly.
59. Clause 6.1.2 - If requested by homeowners, a property factor must continue to liaise with Third Parties, i.e. contractors, within the limits of their "authority to act" (see Section 1.5A or 1.6A) in order to remedy the defects of any inadequate work or service that they have organised on behalf of the homeowners. If appropriate to the works concerned, the property factor must advise the property owners, if a collateral warranty is available from any Third Party or contractor, which can be instructed by the property factor on behalf of the homeowners if they agree to this. A copy of the warranty must be made available if requested by a homeowner.

In this case, photographs have been provided to the homeowner to show that there had been defective work undertaken. The property factor agreed to have matters sorted out. No visit was undertaken by the property factor. On the basis of the photographs provided, there appears to be a "defect". Accordingly there is a breach of this section.

Complaints resolution 7.1

60. Property factor complaints handling procedure – A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of Section 1 of the Code, Written Statement of Service, that the property factor must provide homeowners with a copy of its complaint handling procedure on request.
61. The procedure must include the series of steps through which a complaint must pass and the maximum timescales for progression of the complaints through these steps. Good practice is to have a two stage complaints process. The complaints process must, at some point, require the homeowner to make their complaint in writing. Information on how a homeowner can make an application to the First-tier Tribunal if their complaint remains unresolved and the process is concluded. How the property factor will manage complaints from homeowners against contractors or Third Parties used by the property factor to deliver services on their behalf. Where the property factor provides access to alternative

dispute resolution services, information on this.

62. It is true in this case that there have been breaches of Section 7.1. This is accepted by the property factor.

63. Remedy is sought by the homeowner.

64. The homeowner advised that the cost for the repairs to the property have risen significantly. If the work had been undertaken at an earlier stage then costs would have been significantly less. Essentially, the homeowner is looking for payment in respect of these issues.

A proposed property factor enforcement order.

65. In terms of an appropriate remedy, there does appear to have been a significant delay in the work undertaken together with various other breaches. However, of course, this is not an action in which the Tribunal can award sums in relation to alleged "losses" arising from an increase in the cost of the works and no vouching has been provided to the Tribunal in support of the increased costs arising from the delay in completing the repairs

66. However, in the same situation, the homeowner has done significant work in relation to this case. There should be a property factor enforcement order as set out in the attached PFEO.

67. There should be an award for stress related inconvenience totalling £1200 (One Thousand Two Hundred Pounds)

68.

Right of appeal

A landlord or tenant or third party applicant aggrieved by the decision of the tribunal may apply 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 in 30 days from the date the decision was sent to them. Where such an appeal is made, the effect of the decision will be treated as having effect from the date of which the appeal is abandoned or so determined.

Signed:



**Date:02
April 2025**

**Chairman:
Mark
Thorley**