



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

**AMENDED STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 (“the Act”) and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended**

**Chamber Reference: FTS/HPC/PF/24/3676**

**Property address: Flat 5, 30 Eyre Crescent, Edinburgh, EH3 5EU (“the Property”)**

**The Parties**

**Mr Aylmer Millen, 5 Hillpark Grove, Edinburgh, EH4 7AP (“the Homeowner”)**

**James Gibb Ltd., 23 Alva Street, Edinburgh, EH3 8HT (“the Property Factor”)**

**Tribunal Members**

**Ms H Forbes (Legal Member) and Ms S Brydon (Ordinary Member)**

**Decision**

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has failed to carry out its property factor duties. The Tribunal determined that the Property Factor had not failed to comply with the 2021 Property Factor Code of Conduct (“the Code”).

The decision is unanimous.

**Background**

1. By application received on 13<sup>th</sup> August 2024, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with paragraphs OSP1, OSP3, OSP4, OSP5, OSP6, 1.1, 6.1 and 7.1 of the 2021 Property Factor Code of Conduct (“the 2021 Code”) and whether the Property Factor had failed in carrying out their property factor duties.
2. The Property Factor representative lodged written representations and productions on 20<sup>th</sup> February 2025.
3. By email dated 25<sup>th</sup> February 2025, the Homeowner provided further submissions.

4. A Case Management Discussion ("CMD") took place by telephone conference on 4<sup>th</sup> March 2025. The Homeowner was in attendance. The Property Factor was not in attendance having previously notified the Tribunal of their non-attendance. The Tribunal asked the Homeowner to amend their application to show which particular paragraph of section 7 of the Code he is alleging has not been complied with.
5. By email dated 24<sup>th</sup> March 2025, the Homeowner submitted an application to amend his application, by (i) amending paragraph 2.2 of the Written Statement of Services ("WSS") to paragraph 2.1, (ii) amending the reference to paragraph 6.1 of the WSS to paragraph 6.1 of the Code; and (iii) clarifying the reference to section 7 of the Code as paragraph 7.1.
6. By email dated 10<sup>th</sup> April 2025, the Property Factor confirmed there was no objection to the Homeowner's amendments.
7. A hearing set down for 1<sup>st</sup> September 2025 was adjourned at the request of the Homeowner.
8. By email dated 2<sup>nd</sup> October 2025, the Homeowner raised an issue regarding a conflict of interest in respect of the Property Factor representative who had compiled the written representations.
9. By email dated 2<sup>nd</sup> October 2025, the Property Factor responded in respect of the alleged conflict of interest.
10. By email dated 3<sup>rd</sup> October 2025, the Homeowner made further representations in respect of the alleged conflict of interest.

### **The Hearing**

11. A hearing took place by telephone conference on 7<sup>th</sup> October 2025. The Homeowner was in attendance. There was no attendance on behalf of the Property Factor, as notified in advance.
12. The Tribunal considered the terms of Rule 29. The Tribunal determined that the requirements of Rule 24(1) had been satisfied in respect of the Respondent. The Tribunal considered it was appropriate to proceed with the application in the absence of the Respondent upon the representations of the Homeowner and all the material before it, including the Respondent's representations.
13. The Homeowner confirmed his concerns regarding a conflict of interest in that the employee of the Property Factor who had drafted the written representations submitted to the Tribunal is married to another employee of the Property Factor, and the latter employee had been the instigator of the opt-out voting procedure of which the Homeowner complained. The Homeowner said the representations were tainted as a result of the

relationship between the staff members and the Tribunal should have regard to this when considering the representations.

### OSP1

*You must conduct your business in a way that complies with all relevant legislation*

14. The Homeowner said the Property Factor had departed from the Deed of Conditions and this was in breach of the Act and the Deed of Conditions. It was the position of the Homeowner that, even if the Property Factor wished to resort to opt-out voting, they would have to revert to the terms of the Tenements (Scotland) Act 2004. The Homeowner said there had been reference to using opt-out voting in relation to an insurance valuation prior to the issue complained of, but the Property Factor had not used this method at that time. Homeowners received a letter from the Property Factor dated 2<sup>nd</sup> April 2024 (Case file p128). In the second part of the letter, there was reference to water ingress repairs. It was stated in the letter 'It is our intention to instruct this work on owners behalf (with each share being £100.17 Inc. VAT) unless we receive majority objection by 10<sup>th</sup> April 2024.' The Homeowner said this method of voting is not a gauge of positive approval. It is a gauge of homeowner apathy. The Homeowner said he was concerned that responses were required within eight days.
15. The Homeowner referred to clauses Fourteenth and Fifteenth of the Deed of Conditions (CF81) which, in his submission, required positive approval for such matters. The Homeowner said the Deed of Conditions does not recognise deemed consent. Responding to questions from the Tribunal as to how the Property Factor previously dealt with inertia on the part of homeowners, the Homeowner said they would remonstrate and encourage homeowners to attend meetings, where they would spell out the significance of the issue. This has worked in the past. The Homeowner said there had been frequent meetings of homeowners instigated by the Property Factor previously. The Homeowner submitted that opt-out voting was a cynical, unannounced move to pre-empt introduction of the Written Statement of Services ("WSS") version 16 (CF96 – paragraph 02) which introduced opt-out voting. This had not been included in WSS version 15 (CF40). The Property Factor had not provided homeowners with a summary of changes to the WSS. The Homeowner said wider legislation allowed consumers to resist change, and they should be protected from arbitrary changes which impose charges.

### OSP3

*You must provide information in a clear and easily accessible way.*

16. The Homeowner said the change of the voting system by the Property Factor was a radical and unannounced departure from the previous position. This was a failure to provide information in a clear and easily accessible way,

deeming no response to equal consent. No summary of WSS v16 was provided. The Property Factor had argued that there was no requirement to provide a summary of changes as the WSS was a new document. The document just appeared on the document portal. The Homeowner said the Property Factor claimed they required to use this method of voting for expediency, but the water ingress was first reported in November 2023 and a contractor attended on 3<sup>rd</sup> July 2024. The water ingress was still ongoing in November 2024 and the homeowners are not convinced it has been resolved. Asked by the Tribunal whether the letter of 2<sup>nd</sup> April 2024 was not in clear and accessible terms, the Homeowner said it was not, as it was a bogus claim that this was a matter of expediency.

#### **OSP4**

*You must not provide information that is deliberately or negligently misleading or false*

17. The Homeowner said the letter of 2<sup>nd</sup> April 2024 was false and misleading. The Property Factor had misled homeowners by claiming expediency for the reasons mentioned previously. The Homeowner said the Property Factor had never been onsite. They had correlated the gutter problem rather than directly investigated the actual path of the water ingress. The Property Factor only obtained one quote. The Homeowner said the Property Factor should have arranged a meeting so the homeowners could have interrogated the real intention behind the move

#### **OSP5**

*You must apply your policies consistently and reasonably*

18. The Homeowner said the Property Factor introduced a wholly unannounced, unconventional policy without homeowner consent and outwith custom and practice under the excuse of expediency. There was little or no regard to the terms of the WSS v15, the Deed of Conditions or custom and practice.
19. The Homeowner said the 8-day turnaround for the water ingress works mentioned in the letter of 2<sup>nd</sup> April 2024 was a departure from accepted custom and practice. It was usual to give 14 days' notice. The Deed of Conditions mentions 14 days' notice to be given of any meeting.

#### **OSP6**

*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*

20. The Homeowner said the water ingress was believed to be ongoing in November 2024.

21. The Homeowner said the development schedule sets out a limit for expenditure of £20 plus VAT, which has been in operation for several years. In paragraph Fourteenth of the Deed of Conditions (CF81) it is stated that the Property Factor requires to report matters requiring major works up to £5000 to proprietors and such work shall only be undertaken if authorised by a majority thereof, counting one vote for each flat. The Property Factor has claimed the level of £5000 is relevant for the works carried out in respect of water ingress, but there is a discretionary level set out in the development schedule which has been agreed by the homeowners.
22. The Homeowner said the Property Factor had arranged repairs in a piecemeal fashion. They had speculated as to the cause of the water ingress, believing it to be due to gutters. The Property Factor had concluded that works carried out on 12<sup>th</sup> December 2023 had resolved the issue, without investigating or checking that was the case. The Homeowner said he understood, through discussion with other homeowners, that the water ingress is still ongoing. The Homeowner referred to Hardies' report which stated the ingress may be due to missing mortar, movement and open joints.

#### **Paragraph 1.1**

*A property factor must provide each homeowner with a comprehensible WSS setting out, in a simple, structured way, the terms 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 to the First-tier Tribunal for a determination, the First-tier 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 this Code.*

23. The Homeowner said the Property Factor had departed from the WSS v15 by using opt-out voting. This method of voting is not mentioned in that WSS.

#### **Paragraph 6.1**

*This section of the Code covers the use of both in-house staff and external contractors by property factors. While it is homeowners' responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard.*

24. The Homeowner said the repairs were not carried out promptly or to a good standard. Instigation of the repairs was based on correlation rather than causation. The Property Factor had failed to carry out works properly and had not visited the site with or without a contractor to seek to ascertain the path of the water ingress. Asked how he knew there had been no visits, the Homeowner said he had been told that by other homeowners.

## Paragraph 7.1

*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: WSS that the property factor must provide homeowners with a copy of its complaints handling procedure on request.*

*The procedure must include:*

- The series of steps through which a complaint must pass and maximum timescales for the progression of the complaint through these steps. Good practice is to have a 2 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 when the process has concluded.*
- How the property factor will manage complaints from homeowners against contractors or other 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.*

25. The Homeowner said the Property Factor failed to observe and apply their policy consistently and reasonably in nominating a complaint handler. They changed the complaint handler from the person originally intimated to the Homeowner without informing him. The replacement complaint handler was at the same level within the organisation as the author of the letter of 2<sup>nd</sup> April. The stage 1 complaint was signed off by the Executive Director, who then nominated themselves to carry out the stage 2 complaint investigation. The Homeowner said the Executive Director would already have been predisposed against him due to their involvement with the stage 1 complaint. This was a failure to observe objectivity and reasonableness. The response of the Property Factor at both stages was dismissive and lacking in substantive argument.
26. Referred to the policy (PF45) by the Tribunal, the Homeowner said although the policy does not state that different members of staff will carry out different stages of the complaint, there is an implication that a complaint handler will have some seniority. The complaint handler at stage 1 was of the same level of seniority as the person who instigated the opt-out voting procedure, therefore, a colleague was commenting on the work of another colleague, both being on the same level. This was not reasonable. These were colleagues that would be meeting on a daily basis.

## Property Factor Duties

27. The Tribunal noted that some of the property factor duty failures in the Homeowner's application had already been covered by the Code.

28. The Homeowner submitted the Executive Director must have known the WSS v16 was in draft form, and when challenged about this, he said other staff were dealing with it and he was not aware of it. The Homeowner said he felt his complaint was prejudiced by this matter, but stated there was no absolute evidence of this.
29. The Homeowner said there was a breach of section 7 of the WSS, which stated that all investigations would be fair, unbiased and professionally conducted.
30. The Homeowner had referred to a breach of WSS section 2.1 in his written representations, stating that management of the communal property had to be in accordance with the Deed of Conditions. The Homeowner had referred in his written representations to the Property Factor abandoning the delegated financial threshold authority from the Development Schedule. This is set at £20 plus VAT per property.

### **Findings in Fact and Law**

31.
  - (i) The Homeowner is the heritable proprietor of the Property.
  - (ii) A Deed of Conditions was registered in respect of the development of which the Property forms part on 13<sup>th</sup> December 1990
  - (iii) The Property Factor provides factoring services to the development of which the Property forms part.
  - (iv) Works were carried out to the common gutters to address water ingress to Flat 3/17 in November 2023.
  - (v) Gutters and downpipes were cleaned in December 2023.
  - (vi) The owner of Flat 3/17 notified the Property Factor of further water ingress in February 2024.
  - (vii) In April 2024 the Property Factor introduced an opt-out voting procedure in respect of further works to address water ingress. The Property Factor imposed an 8-day deadline for a majority objection.
  - (viii) On 5<sup>th</sup> April 2024, the Homeowner lodged a formal complaint.
  - (ix) On 17<sup>th</sup> April 2024, works were carried out to address water ingress.
  - (x) The Property Factor issued a stage 1 complaint response on 21<sup>st</sup> May 2024.
  - (xi) The Homeowner made a stage 2 complaint on 30<sup>th</sup> May 2024.

- (xii) The Property Factor issued a stage 2 response on 11<sup>th</sup> July 2024.
- (xiii) The Property Factor's Development Schedule for the Development introduces a different level of delegated authority to that in the Deed of Conditions.
- (xiv) The Property Factor has failed to carry out its property factor duties.

### **Decision and reasons**

32. In reaching its decision, the Tribunal had regard to the representations from both parties and the oral evidence from the Homeowner. The Tribunal did not consider that the written representations were tainted due to the relationship between the instigator of the opt out voting policy and the author of the representations. There may have been a conflict of interest if the author of the representations had been the designated complaint handler, but that was not the case. The author of the representations was representing the Property Factor's position in respect of the application.

### **OSP1**

33. The Tribunal did not find there had been a failure to comply with this paragraph. The Tribunal does not consider this requirement includes complying with the Deed of Conditions. It was not clear to which section of the Tenements (Scotland) Act 2004 the Homeowner was referring, or how this legislation might apply in this case.

### **OSP3**

34. The Tribunal did not find there had been a failure to comply with this paragraph. The Property Factor's actions in introducing an opt-out voting system and claiming expediency as the reason for it, whether or not this was a proper course of action, did not seem to fall within this paragraph of the Code. The letter of 2<sup>nd</sup> April 2024 was clear in its terms.

### **OSP4**

35. The Tribunal did not find there had been a failure to comply with this paragraph. The letter of 2<sup>nd</sup> April 2024 does not mention expediency. The Tribunal could not identify any deliberately or negligently misleading or false information in this letter.

### **OSP5**

36. The Tribunal did not find there had been a failure to comply with this paragraph. While the Tribunal considered it unfortunate that the Property Factor saw fit to introduce a new system of voting with a tight turnaround period for response, without any consultation with homeowners, it did not

consider this was a failure to apply policies consistently and reasonably, as the voting procedure was not set out in the WSS. The fact that there appears to have been a departure from the provisions of the Deed of Conditions is covered further below under property factor duties.

## **OSP6**

37. The Tribunal did not find there had been a failure to comply with this paragraph. The Property Factor arranged repairs as and when they were notified, which is their responsibility. The Property Factor is entitled to rely on contractors to determine the cause of a particular issue. It was not clear what further investigation the Homeowner thought the Property Factor ought to have carried out.

### **Paragraph 1.1**

38. The Tribunal did not find there had been a failure to comply with this paragraph. The WSS does not set out a method of voting, therefore, the Property Factor did not depart from it.

### **Paragraph 6.1**

39. The Tribunal did not find there had been a failure to comply with this paragraph for the reasons set out under OSP6 above.

### **Paragraph 7.1**

40. The Tribunal did not find there had been a failure to comply with this paragraph. The Property Factor has a written complaints handling procedure which has been applied consistently and reasonably. The fact that the complaint handler who investigated the complaint was not the same person initially notified to the Homeowner did not affect the process, and there is nothing in the complaints process to state that the identity of the complaint handler cannot change. The Tribunal did not consider that the person investigating the stage 1 complaint should be at a different level of seniority to the person responsible for the matter being complained of.
41. The Tribunal was not persuaded that it was inappropriate for the member of staff signing off the stage 1 complaint to carry out the stage 2 complaint investigation. There was no evidence that the stage 2 handler was predisposed against the Homeowner due to their involvement with the stage 1 complaint.

## **Property Factor Duties**

42. The Tribunal found there was a failure to carry out the property factor duties by the Property Factor's apparent failure to take account of the provisions of the Deed of Conditions when drawing up the Development Schedule, thus introducing considerable confusion for homeowners. The written

representations from the Property Factor suggest they may only have recently become aware of the provisions of the Deed of Conditions and the fact that it differs considerably from the Development Schedule in respect of the delegated authority provision. This is a serious matter which requires attention. Homeowners must be informed of the correct position in respect of delegated authority, if the Property Factor now intends to rely on the provisions of the Deed of Conditions. The Tribunal notes that clause FIFTEENTH seems not only to cover the replacement of the Factor, as suggested by the Property Factor in their representations. It goes on to discuss the procedure at any relevant meeting, stating that proprietors can call meetings and order common mutual operations, maintenance and repairs by a majority of those present. Proprietors can also make any regulations necessary in this regard, and delegate full power to the Factor to take charge of all matters pertaining to maintenance etc. It was not clear to the Tribunal whether any such meeting had taken place at the appointment of the Property Factor, and whether there was any agreement over the provisions of the Development Schedule. If the Property Factor is now saying majority agreement was not required for the works, it is not clear why they issued the ultimatum in the letter of 2<sup>nd</sup> April 2024. It is not clear why the Development Schedule imposes an authority to act limit of £20 plus VAT if this is not supported by the Deed of Conditions. These matters require to be clarified to homeowners.

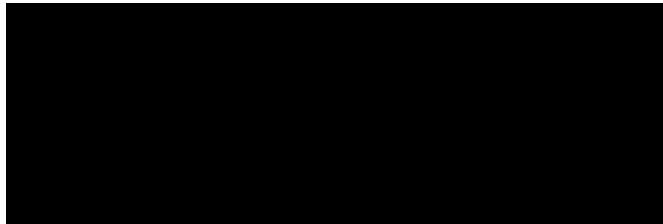
43. The Tribunal did not find that section 7 of the WSS had been breached for the reasons set out under the decision on Code paragraph 7.1 above. The Tribunal did not consider that the Executive Director's findings were prejudiced by the fact that the voting procedure was to be changed in the next version of the WSS.
44. The Tribunal observed that the Homeowner could have argued that there was a failure to comply with paragraph 1.2 of the Code as the Property Factor did not provide the requisite summary of changes when introducing WSS v16. However, the Homeowner did not include this paragraph in his application or his notification to the Property Factor, so no findings were made in this regard.

### **Proposed Property Factor Enforcement Order (PFEO)**

45. Having determined that the Property Factor has failed to carry out their property factor duties, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.
79. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.
80. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

## **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 original decision was sent to them.**



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Legal Member

Date

1<sup>st</sup> December 2025