

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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

**Decision on homeowner's application: Property Factors (Scotland) Act 2011  
Section 19(1)(a)**

**Chamber Ref: FTS/HPC/LM/24/2852**

**Dr Michael Marshall, The Lodge House, Kingsmeadows, Peebles, EH45 9HR  
("the Applicant")**

**James Gibb Residential Factors, Red Tree Magenta 3<sup>rd</sup> Floor, 270 Glasgow Road,  
Rutherglen ("the Respondent")**

**Tribunal Members:**

**Josephine Bonnar (Legal Member) and Sandra Brydon (Ordinary Member)**

### **DECISION**

**The Tribunal determined that the Respondent has failed to carry out its property factor duties to a reasonable standard**

**The decision of the Tribunal is unanimous.**

### **Background**

1. The Applicant lodged an application in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. The application states that the Respondent has failed to carry out its property factor duties.
2. The parties were notified that a CMD would take place by telephone conference call on 13 November 2024. Prior to the CMD both parties lodged submissions and documents. Following the CMD, the Tribunal issued a note and a direction. Both parties lodged further submissions. The Legal Member of the Tribunal became aware of a conflict of interest and recused himself from further consideration of the case. The parties were notified that the case would be heard by a differently constituted Tribunal.
3. The parties were notified that a further CMD would take place on 10 March 2025 at 2pm by telephone conference call. The Applicant participated. The Respondent did not participate and was not represented. Following the CMD

the Applicant lodged a further brief submission which was circulated to the Respondent. The Respondent lodged a brief response.

## The CMD

4. The Legal Member noted that one of the Applicant's complaints is that the Respondent is supposed to carry out regular inspections in terms of the WSS and Development Management Scheme ("DMS") but has failed to inspect the entrance road and boundary wall. The Respondent lodged an inspection report dated August 2024 with their response to the application and stated that inspections are carried out. However, they only involve a visual inspection and the whole boundary wall had not been inspected until February 2024. Dr Marshall told the Tribunal that he had never been issued with an inspection report before and referred to the minutes of meetings where concerns were raised about the wall and road. He said that it is also not clear whether the August 24 report relates to Kingsmeadow House ("KH") or his development, since there is no reference to the wall or road.
5. Dr Marshall told the Tribunal that a KH meeting took place in November 2024. Technically it was not quorate, and no financial information was available. He said that the Factor continues to mix up KH, which has 12 properties and Kingsmeadow Owners Association (KOA), which has 13, comprising the other 12 properties and his property.
6. In relation to the complaint about a failure to arrange regular maintenance, the Tribunal noted that the Respondent states in their submission that a quote had been obtained from a stonemason which would be issued to the AGM in November 2024. Dr Marshall said that no work has been carried out. He referred to an email sent to the Tribunal on 4 November 2024, which included a copy of his invitation to the AGM and the quote for £10,500. However, no work has yet been carried out. Furthermore, there has been no ongoing maintenance and as a result, the wall is falling into the road, and a section requires to be re-built. The Tribunal noted that the Respondent states that an owner arranged to tarmac the road on behalf of the owners. Dr Marshall confirmed that this is the case. The owner did so because the road was in disrepair. It had been reported but the Respondent had not dealt with it. It was also raised at three AGMs. He referred the Tribunal to the minutes of the AGMs.
7. The Tribunal noted that one of the complaints is that the Respondent is required to provide accounts for the KOA each year and does not do so. The Respondent states that they are not qualified to do this and would have to instruct an accountant and charge for this service if the owners want annual accounts. Dr Marshall confirmed that the Respondent would be entitled to invoice the homeowners for this service, but they are required to provide it. He also said that there is no evidence of a separate bank account and that his own calculations establish that there should be surplus funds, which is denied by the Respondent. The Tribunal noted that the DMS requires the development funds to be held in the name of KOA and to be deposited in a bank account. It

does not state that the bank account requires to be in the name of KOA. Dr Marshall conceded that it could be interpreted in that way. He referred to his production D91 and said that this issue was tabled at the first AGM in 2021, covering 2016 to 2021. There appears to be a loss of over £2000 which was discussed but never reconciled as no accounts have been provided by the respondent following the AGM. The Respondent has not provided a profit and loss statement, balance sheet or cashflow. He told the Tribunal that the amounts shown in statements don't match the invoices. If the sums in 13 invoices are added together there should be a positive of £42000 and not a minus of £2000.

8. The Tribunal noted that the last complaint is that the Respondent has failed to comply with a PFEO issued in 2021. However, this case was closed in October 2021, following the issue of a certificate of compliance in relation to the PFEO. The Tribunal is of the view that this complaint cannot be considered in the context of a new application, as the order related to a previous application and the tribunal had been satisfied that the Respondent had complied. Dr Marshall said that this was disappointing but that he understood the reasoning. He said that the problem with the WSS is still a live issue, and that the Respondent continues to confuse the two developments.
9. The Tribunal noted that the title deeds provide for the termination of the factoring contract. Dr Marshall said that their initial 5 year term ended at the 1<sup>st</sup> AGM. They were re-appointed. The homeowners think that the Respondents owe them money and that the issue will be easier to resolve if they are still in post.
10. Dr Marshall concluded by saying that there are issues in relation to the finances and lack of accounts as well as failures to inspect and maintain the boundary wall. Substantial, costly repairs are required as a result.

## **Findings in Fact**

11. The Respondent has failed to carry out regular inspections at the development.
12. The Respondent has failed to carry out required maintenance of the boundary wall and entrance road at the development.
13. The Respondent has failed to prepare annual accounts for the KOA.
14. The Respondent has failed to provide evidence that KOA's funds are held in the name of KOA and failed to provide financial information regarding the existence or absence of surplus funds.

## Reasons for Decision

### Inspections

15. In their response, the Respondent stated that “regular property inspections are carried out”. The only evidence provided is an inspection report dated 7 August 2024. They go on to say that the whole boundary wall was not inspected until February 2024. No other information was provided.
16. Dr Marshall told the Tribunal that he has never received an inspection report prior to August 2024. He also said that the poor condition of the boundary wall has been discussed at every meeting since the first one in 2021.
17. Section 4.7 of the first WSS states “Routine inspections will be made by the development manager, at a frequency detailed in Section 06 of your development schedule.” The Development schedule (also submitted by the Respondent). states that there will be 4 inspections per year. The more recent WSS issued in 2024 contains different wording, however it still refers to inspections or visits. The DMS states at Rule 8(b) that the property factor will carry out inspections from “time to time”.
18. The Tribunal is satisfied that the Respondent has failed to comply with the WSS and the DMS in relation to inspections. They did not provide dates and times of any inspections other than August 2024. They stated that an inspection was undertaken in February 2024, although no details or evidence was provided. They admit that they did not inspect the whole boundary wall until February 2024, but do not explain why they failed to do so. The Tribunal is satisfied that they have failed to provide a service specified in their WSS and required in terms of the title deeds. Therefore, they have failed to carry out their property factor duties in relation to routine inspections.

### Failure to carry out routine maintenance to the boundary wall and entrance road

19. The Respondent does not directly address this complaint in their response. In relation to the entrance road, they state that one of the owners “took it on himself to organise tarmac repairs to the entrance drive.....James Gibb were not involved.”. They do not explain why they did not arrange repairs, if these were required. Furthermore, they do not deny that repairs were needed or that they were unaware of the condition of the road. Dr Marshall said that the owner in question arranged the work because the road had fallen into disrepair. Based on the available information and evidence, the Tribunal is satisfied that the Respondent’s failure to arrange road repairs is a failure to carry out their property factor duties.
20. The Respondent states that a quote was obtained from a stonemason in February 2024, and this was to be presented to the homeowners at the AGM scheduled for November 2024. Dr Marshall said that it was issued, and he had sent a copy to the Tribunal, although the Tribunal has no record of receiving it. He also said that no work has been carried out. In his written submission, Dr Marshall referred to an email from the Respondent dated 27 March 2024, when

they say, "I don't think the wall is likely to fall down imminently although repairs will be major in that I expect a section of wall will need to be dismantled and rebuilt." He told the Tribunal that the work now required is more substantial and more expensive than would have been the case if the Respondent had been fulfilling their obligations.

21. It is not clear why the Respondent failed to inspect the wall until 2024, or why the stonemason quote obtained in February 2024 was only issued to the homeowners in November 2024. Given the passage of time the cost of the work may have increased. Dr Marshall mentioned that the meeting might not have been quorate. In any event, based on the available evidence the Tribunal is satisfied that the Respondent failed to carry out their duties in relation to the boundary wall.

**Failure to keep property financial records and prepare the accounts of KOA each year.**

22. The Respondent does not deny that they have failed to prepare accounts. They point out that they are not qualified to do this and would have to instruct an accountant to prepare the accounts and pass on the costs to the homeowners. Dr Marshall acknowledged that this would be required, and that the management fee would not cover the cost. However, the DMS (at Rule 8(e)) specifically states that annual accounts will be prepared by the manager. As the property factor must act in accordance with the title deeds, they are obliged to provide this service. At the very least, they should have consulted with the homeowners in relation to the matter. However, as it is a requirement of the DMS, it is arguable that they could only dispense with this service if all the owners were agreed. There is no evidence that they have ever consulted with the homeowners in relation to this matter. They have simply chosen to ignore the requirement.
23. Related to the failure to prepare annual accounts is the complaint that the Respondents have failed to keep proper financial records. Dr Marshall says that the paperwork suggests that there should be surplus funds. The Respondents do not specifically deny this allegation. They state, "In terms of any perceived surplus of funds, we simply do not follow the applicant's point on this as we currently invoice quarterly in arrears based on actual expenditure. This being the case, it would be unusual for any surplus to build up". This is a somewhat vague response to what should be an easy question to answer. The Tribunal members are not accountants, and it does not appear that there is enough information to establish that there are (or should be) surplus funds. However, there appear to be discrepancies. The Respondent has been asked to explain these discrepancies and has failed to do so.
24. The Tribunal is satisfied that the failure to arrange annual accounts, and to provide the Applicant with full details of income and outgoings to address his concerns about possible discrepancies, is a failure to carry out their duties to a reasonable standard.

## **Association funds to be held in the name of the association and deposited in a bank account**

25. Rule 21.1 of the DMS stipulates “Any Association funds must be: (a) held in the name of the Association; and (b) subject to rule 21.2, deposited in a bank or building society account.”. Rule 21.2 relates to funds which are likely to be held for some time and require the sums to be placed in an interest-bearing account or invested.
26. Dr Marshall told the Tribunal that the Respondent has not provided evidence that the KOA funds are held in their name or placed in an account in the name of the KOA. The Respondents state that the KOA funds are properly accounted for and are held in their client account, in accordance with the Code, which requires a property factor to keep clients finds separate from their own funds.
27. The Tribunal is not persuaded that Rule 21 requires the bank account to be in the name of KOA. However, for the same reasons as outlined in the previous section of this decision, the Tribunal is satisfied that the Respondent should have provided evidence that KOAs funds are held in their name in the Respondent’s records, when asked to do so. The Tribunal is satisfied that this is a failure to carry out their duties to a reasonable standard.

## **Failure to comply with a previous PFEO which required the Respondent to issue a WSS to all homeowners.**

28. This is essentially admitted by the Respondent although they state that the WSS in question was superseded by a new version which was issued to all.
29. The Tribunal notes that, on 15 September 2021, a certificate of compliance with the previous PFEO was issued by the Tribunal, following submissions by both parties. There was no appeal or request for review and the case is now closed. The Tribunal is not persuaded that property factor duties include the terms of previous PFEOs granted by the Tribunal. In his note submitted following the hearing, Dr Marshall refers to his application and states “I attempted to explain that it is the failure to manage the KOA by providing the services mentioned in the written statement of services for the KOA that was the problem I sought to fix”. The Tribunal is not clear how this relates to the complaint. It is clear from the paperwork that the complaint is about compliance with the previous order. That is not a matter that the Tribunal is entitled to consider in relation to this application.

## **Proposed Property Factor Enforcement Order**

30. The Tribunal considered the Applicant’s requests, as outlined in the application. Having regard to the available information and evidence, the Tribunal is satisfied that it would be appropriate to compensate the Applicant for his time

and inconvenience and also to order the Respondent to fulfil their obligations in terms of the WSS, DMS and the legislation. The Tribunal therefore proposes to make a Property Factor Enforcement Order (“PFEO”). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice

## **Appeals**

**A homeowner or property factor 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.**

Josephine Bonnar, Legal Member and Chair

23 April 2025