

Housing and Property Chamber
First-tier Tribunal for Scotland



The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) Property Factors (Scotland) Act 2011 (“the Act”)

Notice of a direction in terms of rule 16 of the First-tier Tribunal for Scotland (Housing and Property Chamber) (Rules of Procedure) Regulations 2017 (“the regulations”)

Chamber Ref: FTS/HPC/PF/20/1983//2109/2156/2213

Re.: Flat 34, Morningside View, 14 Maxwell Street, Edinburgh, EH10 5HU (“the property”)

The Parties: -

Mr James Whyte, Mrs Pamela Ager, Mrs Susan Freshwater and Mr George Millar
(“the homeowners”)

First Port Property Services Scotland, Troon House, 3rd Floor, 199 St Vincent Street,
Glasgow, G2 5QD **(“the property factor”)**

Tribunal Members: - Simone Sweeney (Legal Member) Elizabeth Dickson (Ordinary Housing Member)

The Tribunal directs:-

1. That applications under Tribunal references, FTS/HPC/PF/20/2109, FTS/HPC/PF/20/2156 and FTS/HPC/PF/20/2213 are dismissed and will not be determined by the Tribunal.

2. That the hearing of 8th January 2021 will be for parties to address the Tribunal and lead evidence in respect of the application of Mr James Whyte under reference, FTS/HPC/PF/20/1983, only.
3. The Tribunal will determine the application of Mr James Whyte under reference, FTS/HPC/PF/20/1983, thereafter.

Background

4. Reference is made to applications to the Tribunal dated 14th September 2020, from Mr James Whyte (provided with Tribunal reference FTS/HPC/PF/20/1983) from Mr George Millar, dated 5th October 2020 (provided with reference FTS/HPC/PF/20/2109) from Mrs Pamela Ager, undated but understood to be lodged with the Tribunal's administration in or around October 2020 (provided with reference FTS/HPC/PF/20/2156) and from Mrs Susan Freshwater, dated 7th October 2020 (provided with reference FTS/HPC/PF/20/2213).
5. Each of the applications brought complaints against the property factor alleging failures to comply with the section 14 duty and breaches of the Property Factor's duties provided at section 17 of the Act.
6. All of the applications related to separate flatted properties all based at, 14 Maxwell Street, Edinburgh, EH10 5HU.
7. Each of the applications brought by Ms Pamela Ager, Mrs Susan Freshwater and Mr George Millar were completed with identical information, narrated identical complaints and all identified Mr James Whyte as their representative.
8. Attached to the applications provided to the Tribunal were copy letters and emails between the Tribunal's administration and Mr James Whyte. Also, Mr Whyte had produced copy letters and communications between himself and

the property factor in respect of his complaint together with supporting documentation enclosed within an Inventory of Productions.

9. Before the Tribunal there were no copy communications between the other applicants (Mrs Ager, Mrs Freshwater and Mr Millar) and the property factor, nor any supporting documentation in respect of their respective applications (HPC/ FTS/PF/20/2109; 2156 and; 2213).
10. By email of 27th October 2020, Mr Whyte wrote to the Tribunal's administration with an enquiry about the applications of Mrs Ager, Mrs Freshwater and Mr Millar. The email (insofar as is relevant) read,

"Mr Millar hopes to join his application to my own but some confusion appears to have arisen over the mechanism to do this. As Mr Millar is one of three other Morningside View residents who wish to join my application, it is important that we clarify that mechanism quickly, as the questions which you ask below are equally relevant to the other applications... The information suggested as missing from Mr Millar's application is all contained within the documents sent within my application. This includes the original notification letter(s) sent to the Factor advising them that I believe they are in breach of the Code as well as their general duties as agent, the Factor's response and my follow up response."

11. Notices of acceptance for the applications brought by Mrs Ager, Mrs Freshwater and Mr Millar (under references FTS/HPC/PF/20/2156; FTS/HPC/PF/20/2213 and; FTS/HPC/PF/20/2109, respectively) were issued on 10th November 2020 by a legal member of the Tribunal with delegated powers of the Chamber President. Reference is made to the terms of the relevant notices.
12. A Notice of acceptance for the application of Mr James Whyte (reference FTS/HPC/PF/20/1983) was issued on 12th November 2020 by a legal member

of the Tribunal with delegated powers of the Chamber President. Reference is made to the terms of the relevant notice.

Request by property factor for dismissal of applications FTS/HPC/PF/20/2156;2213 and 2109

13. By letter dated 7th December 2020 the property factor's representative, Mr Bodden, wrote to the Tribunal requesting that the applications brought by Mrs Ager, Mrs Freshwater and Mr Millar be dismissed. The basis of the motion was that the property factor had received no notice of these complaints, as required by section 17(3) of the Act, prior to applications being made to the Tribunal.

14. Insofar as is relevant, the letter read,

"We accept that the primary applicant in this case, Mr James Whyte (Case Reference FTS/HPC/PF/20/1983) has provided suitable notification in terms of Section 17(3) of the 2011 Act. However the three Homeowners have not. Although Mr Whyte has stated to the First-tier Tribunal that he represents other proprietors for the purpose of bringing applications on their behalf to the Tribunal, his omission to mention them in his notification to the Property Factor in addition to the failure of the other three applicants to notify the Property Factor directly of their application to the First-tier Tribunal has removed the Property Factor's ability to resolve their complaint."

15. The Tribunal sought Mr James Whyte's response to the terms of property factor's request. Also, the Tribunal requested evidence of any formal letters of complaint which had been intimated to the property factor by or on behalf of applicants, Mrs Ager, Mrs Freshwater and Mr Millar prior to them lodging their respective applications.

16. By email of 16th December 2020 Mr Whyte responded to the Tribunal's request. Insofar as is relevant, the email provided,

"I am disappointed by the Property Factor's application and by Mr Bodden's arguments. He makes an entirely procedural point with no underlying merit or purpose. It makes no sense to suggest that the other applicants might receive a different response from the Property Factor on exactly the same issues or that their applications should be heard separately."

17. There was no evidence produced by Mr Whyte on behalf of the other applicants to show that intimation of their respective complaints had been made to the property factor prior to them lodging applications with the Tribunal.

Section 17 (3) of the Act

18. Section 17(3) of the Act provides,

*(3)No such application may be made unless—
(a)the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and
(b)the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.*

19. For an application to be determined by a Tribunal, section 17 (3) requires a homeowner to have provided written notification to the property factor why the homeowner considers the property factor to have failed to carry out the property factor's duties or failed to comply with the section 14 duty.

Reasons for direction

20. There is no evidence before the Tribunal that, prior to them lodging applications with the Tribunal, homeowners, Mrs Ager, Mrs Freshwater and

Mr Millar provided written notification to the property factor why they consider the property factor to have failed to carry out the property factor's duties or failed to comply with the section 14 duty.

21. In the absence of same, the Tribunal determines that the applications brought by Mrs Ager, Mrs Freshwater and Mr Millar have not satisfied the requirements of section 17(3).
22. Accordingly the Tribunal dismisses the applications against the property factor under references FTS/HPC/PF/20/2156; FTS/HPC/PF/20/2213 and; FTS/HPC/PF/20/2109.
23. The Tribunal is satisfied that Mr Whyte intimated his complaint to the property factor effectively prior to his application being lodged with the Tribunal. This is admitted by the property factor. Therefore the Tribunal will hear evidence and submissions from parties on 8th January 2020 in respect of the application of Mr James Whyte (reference FTS/HPC/PF/20/1983) only.
24. Regulation 2 provides-

The overriding objective

"2. —(1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.

(2) Dealing with the proceedings justly includes —

(a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;

(b) seeking informality and flexibility in proceedings;

(c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take;

(d) using the special expertise of the panel and the committees effectively; and

(e) avoiding delay, so far as compatible with the proper consideration of the issues."

25. The Tribunal is of the view that, for the overriding objective of the regulations to be met (ie. to ensure that parties are on an equal footing procedurally and are able to participate fully in the proceedings) as set out at regulation 3 of the Regulations, only the application which has satisfied the requirements of section 17 of the Act should proceed against the property factor.

Legal chairing member, 4th January 2021