Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier tribunal for Scotland (Housing and Property Chamber)

Decision issued under s19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/21/2061

The Property: 30 Brighouse Park Cross, Cramond, Edinburgh, EH4 6GU ("The Property")

The Parties:-

Robert Finnie, residing at 30 Brighouse Park Cross, Cramond, Edinburgh, EH4 6GU
("the applicant")

James Gibb Property Management Ltd, a company incorporated under the Companies Acts and having their registered office at Bellahouston Business Centre, 423 Paisley Road West, Glasgow, G51 1PZ
("The property factor")

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the property factor has failed to comply with the code of conduct as required by Section 14 of the Property Factors (Scotland) Act 2011, determined that the property factor has breached the code of conduct for property factors.

Committee Members

Paul Doyle	Legal Member
David Godfrey	Ordinary Member

Background

1 By application dated 27 August 2021, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of his complaint that the property factor has breached the code of conduct imposed by Section 14 of the 2011 Act.

2 The application stated that the applicant considered that the property factor failed to comply with Sections 2.5 and 6.9 of the code of conduct for property factors.

3 By interlocutor dated 28 September 2021, the application was referred to this tribunal. The First-tier Tribunal for Scotland (Housing and Property Chamber) served notice of referral on both parties, directing the parties to make any further written representations.

4 The applicant lodged further written representations on 31 October 2021. The property factor lodged written representations on 11 November 2021.

5. A Case Management Discussion took place before the Tribunal by telephone conference at 10.00am on 29 November 2021. The Applicant was present and unrepresented. The property factor was represented by Mr Roger Bodden, who is an Operations Director of the property factor and Jeni Bole, Technical Manager (Legal).

6. Both parties agreed that they have provided adequate documentary evidence for this application to be determined without further enquiry. Neither party has anything of relevance to add to their written submissions. Mindful of regulations 2, 17, and 18 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, we proceed to determine this application on the documentary evidence placed before us.

Findings in Fact

7. The tribunal finds the following facts to be established:

(a) The applicant is the heritable proprietor of 30 Brighouse Park Cross, Cramond, Edinburgh EH4 6GU. The property factor was the property factor for the larger development of which the property forms part until 23 August 2021.

(b) On 21 June 2019, Independent Fire Services Ltd inspected the dry risers which forms part of the common property of the larger development of which the property forms part. They recommended that the dry riser mains should be fire stopped between each floor. The property factor instructed that work to be carried out, relying on the powers granted in the deed of conditions by AMA (Cramond) Ltd registered in the Land Register for Scotland on 8 May 2007.

(c) Clause 7.1.1 of the deed of conditions registered in the Land Register for Scotland on 8 May 2007 empowers the property factors to instruct common repairs which they deem necessary to implement their obligations.

(d) On 16 September 2019, contractors instructed by the property factor installed cavity barriers in each block in the larger development. On 28 February 2020, the homeowner was charged £86.39 plus VAT as his share of the cost of that common repair.

(e) On 16 March 2020, Lothian Fire Service (Scottish Fire and Rescue Service) inspected the dry riser. Lothian Fire Service told the homeowner that sealant was missing in the dry riser voids. The homeowner was told that without sealant in the dry riser voids, it is possible for smoke to travel from floor to floor within the larger building.

(f) On 22 March 2020, the homeowner emailed the property factor complaining that the charge made for the dry riser works exceeded £50 plus VAT and complaining that the property factor failed to ensure that the work to the dry risers in block 30 of the development had been completed correctly.

(g) The property factor did not reply to the homeowner's email of 22 March 2020. On 28 April 2020 the applicant emailed the property factor to further his complaint but did not receive a reply.

(h) On 8 May 2021 the applicant again emailed the respondent. The respondent acknowledged that email on 11 May 2021, but no substantive response was received.

(i) On 14 June 2020 the applicant emailed Alan Martin and two directors of the property factor to further his complaint. The email of 14 June 2020 was acknowledged, but no substantive reply was made by the property factor

(j) On 30 June 2021 the applicant again emailed the property factor to pursue his complaint, but no reply was received. On 7 July 2021, the applicant emailed the property factor to escalate his concerns to a formal complaint. The property factor did not respond

(k) On 12 August 2021 the applicant emailed the property factor's complaints department. On 16 August 2021 the property factor replied to say that the applicant's complaint had been passed to a regional director for review.

(l) On 23 August 2021 the property factor's tenure was brought to an end and a new property factor was appointed.

(m) On 8 September 2021 the property factor finally responded to the applicant's complaint. In that response the property factor asked for documentary evidence that remedial works are required to the dry risers and asked the applicant to obtain a report from Lothian Fire Service.

(n) On 17 September 2021, the homeowner responded asking the property factor to accept responsibility for the cost of investigation into the works already carried out to the dry risers and the cost of any remedial works required.

(o) On 29 October 2021 the property factor wrote to the applicant, saying that they do not believe that their own complaints procedure had been exhausted and asked the applicant to produce

> "… Substantial evidence that previous works carried out work unsafe, and a detailed summary of remedial action required…."

(p) On 6 October 2020, a fire risk assessment was carried out of the larger development by IQ Fire and Security on the property factor's instructions. IQ Fire and Security prepared a report dated 9 October 2020. That report says the dry riser system is serviced and maintained by Wm Brown & Co LtdThe report recommends a review of the fire risk assessment in October 2021.

Reasons for decision

8. (a) Arguably, the property factor raises a preliminary point. The property factor says that their own complaints procedure has not been exhausted, so that this tribunal does not have jurisdiction.

(b) Section 7 of the property factor's written statement of services deals with complaints. It is tempting to quote from section 7 of the property factor's written statement of services and set those quotations against the chronology in this case. For the sake of brevity, the applicant made his complaint on 22 March 2020. In that email he used the words "formal complaint". That is the first of the sequence of emails with the property factor did not reply to.

(c) By 7 July 2021, the applicant was addressing his emails to the property factor's complaints section. Those emails went unanswered until 22 August 2021.

(d) The applicant spent seventeen months trying to engage the property factor in the property factor's complaints procedure. It is the property factor who has not adhered to section 7 of their own written statement of services. If the property factor does not take the first step in the complaints procedure, then they cannot properly argue that the internal complaints procedure is not exhausted.

(e) The essence of the property factor's complaints procedure is that a written complaint will be addressed first by a senior manager and then by a director. On 8 September 2021 the applicant received a response from an operations manager employed by the property factor. The complaint was then considered by Mr Boddon himself. Mr Boddon is designed as an operations director. The property factor's complaints procedure is exhausted. This tribunal has jurisdiction.

9. (a) Section 2.5. of the code of conduct says

> 2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers).

(b) The property factor's written statement of services provided a time scale of five working days to respond to complaints. The applicant sent seven emails complaining to the property factor between 22 March 2020 and 12 August 2021. None of them was answered.

(c) In their written response dated 11 November 2021 the property factor candidly says

> we accept and apologise for the apparent lack of response to Mr Finney on this matter….

(d) The property factor quite correctly concedes that the emails between 22nd March 2020 and 12 August 2021 went unanswered. The property factor incorrectly says that the formal complaint was raised on 12 August 2021. The weight of reliable evidence tells us the words "*formal complaint*" were first used by the applicant on 22 March 2020. It seems it was only on 12 August 2021 that the property factor read those words.

(e) There is clearly a breach of section 2.5 of the code of conduct for property factors.

10. (a) In his application form, the applicant refers to section 6.0 of the code of conduct. It is clear that, from the very outset, the applicant was referring to section 6.9 of the code of conduct, which says

> You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

(b) Section 7.12 of the respondent's written statement of services, says

> any complaints received regarding contractors will be passed to the contractor to allow them to respond. We require homeowners making a complaint to provide us with evidence e.g. photographs, to allow us to demonstrate to contractors any shortfall in the service level agreed…

(c) The applicant raised a concern about sealants between floors in the dry riser. That was a straightforward and specific concern. When the property factor eventually addressed the applicant's complaint, they asked for documentary evidence and then a report from Lothian Fire Service.

(d) It would have been a simple matter for the property factor to contact the contractors to ask for their opinion on the existence of seals, or the need for

such seals. If the property factor had done that, they would have complied with the wording of their own written statement of services.

(e) The effect of asking the applicant for documentary evidence, and then for a report from Lothian Fire Service on a matter which is a common repair was to make a simple matter complicated. If the property factor had simply asked the question of the contractor there need not have been a dispute between the parties.

(f) Because the property factor did not ask the question of the contractor, the property factor has not adhered to their own written statement of services and has breached the terms of section 6.9 of the code of conduct.

11. (a) This dispute started because the applicant saw a charge which exceeded a pre-set £50 limit. The property factor is correct that the deed of conditions empowers the property factor to carry out emergency repairs. The need for works to the dry riser mains arose from inspection on 21 June 2019. The repairs were required to the fire safety equipment for the property. If those repairs were not carried out as a matter of urgency, the property factor would risk a claim for negligence.

(b) The property factor was correct to treat repairs to the fire safety equipment as urgent repairs necessary to implement their obligations and duties.

(c) The property factors actions were not only correct in 2019, they are supported by the deed of conditions.

12. On the facts as we find them to be the property factor has breached sections 2.5 and 6.9 of the code of conduct for property factors

13. The applicant does not suggest that the Property Factor has breached the property factor's duties

14. The applicant asks

> … For the factor to get the work completed successfully, that is put in the proper sealants where necessary, at no cost to the owners. Any compensation would be at the discretion of the tribunal.

15. It is a matter of agreement that the property factor no longer manages this property. A new property factor was appointed on 23 August 2021.

16. The applicant can achieve the first part of the remedy he seeks by asking the new property factors to contact the contractors for confirmation of the extent of the works that were carried out and for comments on the necessity of sealant between floors in the dry riser mains.

17. We consider whether this is a case where compensation is appropriate. The property factor concedes that correspondence was ignored for seventeen

months. It must have been frustrating for the applicant to feel that he was being ignored.

18. Ignoring the applicant for seventeen months and then treating his complaint dismissively has led to the breaches of the code of conduct. There is no longer a contractual relationship between the parties. We find that the property factor should be ordered to pay a nominal sum to the applicant for distress and inconvenience. On the facts as we find them to be, the correct measure of damages for distress and inconvenience is £250.

Decision

19. The tribunal therefore intend to make the following property factor enforcement order (PFEO)

> *"Within 28 days of the date of service on the property factor of this property factor enforcement order the property factor must pay the applicant £250.00 as solatium for the distress and inconvenience caused to the applicant."*

20. Section 19 of the 2011 Act contains the following:

> (2) In any case where the committee proposes to make a property factor enforcement order, they must before doing so—
>
> (a) give notice of the proposal to the property factor, and
>
> (b) allow the parties an opportunity to make representations to them.
>
> (3) If the committee are satisfied, after taking account of any representations made under subsection (2)(b), 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, the committee must make a property factor enforcement order.
>
> (4) Subject to section 22, no matter adjudicated on by the homeowner housing committee may be adjudicated on by another court or tribunal.

21. The intimation of the tribunal's decision and this proposed PFEO to the parties should be taken as notice for the purposes of s. 19(2)(a) of the 2011 Act, and parties are hereby given notice that they should ensure that any written representations which they wish to make under s.19 (2)(b) of the 2011 Act reach the First-Tier Tribunal for Scotland (Housing and Property Chamber) office not later than 14 days after the date that the Decision and this proposed PFEO is intimated to them. If no representations are received within that 14 day

period, then the tribunal is likely to proceed to make a property factor enforcement order without seeking further representations form the parties.

Right of Appeal

22. In terms of Section 46 of the Tribunal (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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Signed 29 November 2021

Legal Member