

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/19/2423

Flats 2/10 North Werber Place, Edinburgh ("The Property")

The Parties:-

**Fraser Robinson, formerly residing at 2/10 North Werber Place, Edinburgh, and now residing at 12 Old Dalmore Path, Auchendinny, EH26 0NF
("the applicant")**

**James Gibb Property Management Ltd, a company incorporated under the Companies Acts and having a place of business 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 complied with the code of conduct as required by Section 14 of the 2011 Act, determined that the property factor has not breached Sections 1a, and section 2.5 of the code of conduct for property factors but has breached section 7.1 and 7.2 of the code of the conduct.

Committee Members

**Paul Doyle
Ahsan Khan**

**Legal Member
Ordinary Member**

Background

1 By application dated 30 July 2019, 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 & that the property factor has failed to comply with the property factor's duties.

2 The application stated that the applicant considered that the respondent failed to comply with Sections 1.1a, 2.5 and 7.1.2 of the code of conduct for property factors.

3 By interlocutor dated 05 September 2019, 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 On 01 October 2017, the property factor sent a detailed response to the application. The applicant sent written representations on the 24th September, and further representations dated 7 October 2019.

5. A hearing was held at Riverside House, Edinburgh on 4 November 2019. The applicant was neither present nor represented. The respondent was neither present nor represented. The casefile revealed that both parties were timeously notified of today's hearing, but have asked that the case be dealt with on the documentary evidence and their written submissions.

Findings in Fact

6 The tribunal finds the following facts to be established:

(a) The homeowner was the heritable proprietor of the flatted dwellinghouse at 2/10 North Werber Place, Edinburgh ("The property"). In 2019 the homeowner notified the property factor that he was selling the property.

(b) The Property Factor acted as factor for the property throughout the period of the homeowner's ownership of the property. The property factor provided the Homeowner with a written statement of services dated 1 December 2013 when he purchased the property. By the time the homeowner came to sell the property there had been a number of changes to the written statement of services.

(c) Section 5 of each version of the property factor's written statement of services deals with Financial and Charging Arrangements. The property factor's written statement of services dated 1 December 2013 makes no provision for an administrative charge on the sale or transfer of title to a property.

(d) Since December 2013 the property factor has made a number of changes to its written statement of services. The property factor maintains a website and provides a mobile phone app which proprietors can consult. The property factor's website includes a members' portal which the homeowner had access to throughout his period of ownership of the property. Between 10 December 2016 and 12 June 2019, the homeowner regularly consulted the portal provided by the property factor. The property factor's website and the portal provided was regularly and timeously updated with news affecting homeowners, including publication of changes to the property factor's written statement of services.

(e) In 2016 the property factor amended the written statement of services. The amendments made included a provision in Section 5 of the written statement of services for an administration charge of £25 plus VAT to be levied on the sale of a property in the development. The homeowner was not sent a hard

copy of the revised written statement of services, but the revised written statement of services was made available on the property factor's website and within the client portal consulted by the homeowner. The property factor publicised the changes to the written statement of services in their own quarterly newsletter which was circulated to all homeowners in the development of which the property forms part.

(f) By letter dated 03/06/2019 the property factor explained to the homeowner that they intended to charge an administrative fee of £25.00 plus VAT because he was selling the property. On 12/06/2019 the homeowner wrote to the property factor challenging the charge and saying that he could find no provision for it in the written statement of services.

(g) By email dated 19/06/2019 the property factor responded to the homeowner and provided him with an up to date copy of the written statement of services (containing the amendment made in 2016 which provides for an administrative charge on change of ownership). The same day, the homeowner emailed the property factor noting that there is a difference between the wording of the 2013 & 2016 written statement of services.

(h) On 25/06/2019 the property factor emailed the homeowner and attached a copy of the guidance published on its website entitled "Selling your Home". A hard copy of that guidance has been made available by the property factor since September 2016.

(i) On 26/06/2019 the homeowner emailed the respondent saying that he wanted to make a formal complaint because the written statement of services had changed, and he insists that he was never advised of the change. The property factor did not respond to the homeowner's email until 08/07/2019.

(j) On 08/07/2019 the property factor emailed the homeowner apologising for the delayed reply and explaining why the property factor believes there has been no breach of the code of conduct. Less than 6 hours later the homeowner emailed the property factor saying that he does not think his complaint has been resolved.

(k) On 18/07/2019 the property factor emailed the homeowner explaining why the property factor believes there is no merit in his complaint

Reasons for decision

7 (a) Section 1.1.a.e. of the code of conduct says

1.1a For situations where the land is owned by the group of homeowners

The written statement should set out:

C. Financial and Charging Arrangements

e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;

(b) Prior to May 2019, various versions of the property Factor's written statement of services provides at section 5.6 for an administrative charge of £25 on transfer of title. In the version of the written statement dated May 2019 that charge has been increased to £50. The homeowner complains that he has not been given an amended copy of the written statement of services each time a change has been made to the written statement of services. The homeowner owned the property for four years. Throughout this period the property factor provided all homeowners with a quarterly newsletter. This newsletter at times made reference to changes to the written statement of service. It also informed homeowners that the written statement was available on its website, with hard copies on request. The homeowner has consulted the members' portal where the amendments are publicised.

(c) There is no requirement on the property factor to circulate an amended statement of services each time a change is made. The property factor took adequate steps to ensure that every homeowner was properly advised of each amendment to the statement of services. The amendment introducing the £25 administrative charge on transfer of title was made three years ago. On the facts as we find them to be, the property factor made sure that that amendment was properly publicised. The code of conduct does not demand more of the property factor.

8. (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

(b) The Homeowner produces an exchange of emails between 12/06/2019 and 18/07/2019. The homeowner's email dated 26 June 2019 was not answered until 8 July 2019, which is a gap of eight business days. The homeowner's reply to this dated 8th July was not answered until the 18th July, (eight business days) and then only after a reminder email from the homeowner sent on 17th July. The property factor's written statement of services, says

James Gibb staff will acknowledge receipt of communication within five working days of receipt. Timescales for resolution of queries, relevant to the prevailing issues, will be advised that the homeowner, where possible on receipt acknowledgement.

(c) The homeowner's email of 26 June 2019 was not acknowledged until he sent a reminder on 8 July 2019. The day the reminder was sent the property factor sent a detailed email response not only acknowledging the homeowner's communication, but comprehensively (if succinctly) responding to it.

(d) The homeowner's email of 8th July was not acknowledged until he sent a reminder on 17th July 2019. The following day the property factor sent a detailed email response acknowledging the homeowner's communication and restating the previous reply.

(e) Insofar as there is any failure on the part of the property factor, it is the absence of acknowledgements of the homeowner's emails dated 26th June and 8th July 2019, which should have been sent within five days. The detailed responses provided by the property factor answered the homeowner's question contained in his emails. These responses were sent within a reasonable timescale and in accordance with the property factor's written statement of services.

(f) However, the acknowledgement emails are missing. The property factor's emails dated 8th July 2019 and 18th July deal with the homeowner's enquiry without delay, and begin with an apology for not responding sooner. The property factor's emails dated 8 July 2019 and 18th July 2019 purifies the delay. There was no delay in responding to the substance of the emails. There cannot, therefore, be a breach of the code of conduct.

9.(a) Section 7.1 of the code of conduct says

You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

(b) Section 7 of the property factor's statement of services sets out a clear five stage procedure for handling complaints. Separately, the property factor produces a guide for homeowners to the complaints process, which is published on their website and available to all homeowners.

(c) The property factor manifestly has a clear written complaints resolution procedure which sets out a series of steps within reasonable timescales linked to the written statement of services.

(d) The problem for the property factor is the phrase

...which you will follow

contained in section 7.1 of the code of conduct. The property factor did not follow the complaints procedure. Instead, the property factor summarily dismissed the "formal complaint" raised in the homeowner's emails of 26/06/2019 and 8/07/2019. The property factor appears to believe either that because the homeowner has not provided the specification asked for in their published guide he has not competently made a complaint which merits engaging the complaints procedure, or that because his complaint involves such a small amount of money the complaints procedure is unnecessary.

(e) The harsh truth is that the homeowner used unambiguous words to make a complaint, and the property factor did not then embark on the complaints procedure. That must be a breach of section 7.1 of the code of conduct. We consider the impact of that breach. The impact is that the homeowner has not been able to resolve a dispute over a charge of £25.00. The impact is negated by the fact that he has now been able to ventilate the dispute before this tribunal, and, at an early stage, the property factor indicated a willingness to make a goodwill payment to the homeowner of £25.00.

(f) The subject matter of dispute is quantified at £25.00. *De minimis non curat lex* is not a plea which can be competently taken in this jurisdiction but the effect of the breach of the code of conduct does not merit a Property Factor Enforcement Order because the Property Factor's failure is without impact.

10. (a) Section 7.2 of the code of Conduct says

When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.

(b) By email dated 26 June 2019 the homeowner said to the property factor

I have raised an issue with a colleague of yours regarding the levying of a fee for selling my property, but the lack of resolution means I now wish to raise it as a formal complaint.

It is that email which the property factor responded to on 8 July 2019. The property factor's response was that there is no merit in the homeowner's complaint and effectively the property factor set the complaint contained in the emails of 26/06/2019 and 8 July 2019 aside as misconceived.

(c) The property factor relies on their own guidance to the customer complaints process, which requires the homeowner to provide concise and factual details of the complaint, referring to the breaches of the code of conduct of the written statement of services. The property factor's written statement of services makes provision for complaints procedure in section 7 and sets out a five-stage process for complaints.

(d) Because we find that the property factor breached 7.1 of the code of conduct, by analogy we find that 7.2 of the code of conduct was breached because the property factor did not allow the complaints procedure to be followed. The summary dismissal of the homeowner's complaint did not provide details of this jurisdiction. There is no evidence that the summary dismissal of the Homeowner's complaint was confirmed with senior management

(e) On the facts as we find them to be, the property factor breached section 7.1 and 7.2 of the code of conduct. We consider the seriousness of the breach by considering the impact that the breach has had and the overall

facts and circumstances surrounding the breach. The fulcrum of this dispute is a £25.00 charge. The property factor would have done well to focus on its responsibility under the code of conduct. The focal point is that the property factor made a mistake when deciding that there was no need to follow the complaints procedure.

(f) The dispute is trivial, but the complaints procedure exists, and the code of conduct requires that it is followed. The value of this dispute is so low that the property factor's failings have no meaningful impact. The systems and procedures required are all available to this property factor's homeowners. The property factor should learn from this mistake. It must recognise all complaints notified to it and investigate them fully in line with its complaints policy, however, a Property Factor Enforcement Order is considered unnecessary.

Decision

11. Even though there has been a breach of sections 7.1 and 7.2 of the code of conduct for property factors there is no need for a Property Factor Enforcement Order because such an order would serve no meaningful purpose.

Appeals

12. 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 decision was sent to them

Signed

11 November 2019

Legal Member