

# Housing and Property Chamber

## First-tier Tribunal for Scotland



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

Decision: Property Factors (Scotland) Act 2011:Section 19 (3)

Applicants, Properties and Tribunal reference numbers:

<b>Agnes McIlvride</b>	<b>Flat 7H Glenford Place, Ayr, Ayrshire, Scotland, KA7 1LB</b>	<b>FTS/HPC/PF/18/3296</b>
<b>Myra Hessett</b>	<b>4D Glenford Place, Ayr, KA7 1LB</b>	<b><u>FTS/HPC/PF/18/3309</u></b>
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<b>Anne McBride</b>		
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<b>Marina McLean</b>		<b><u>FTS/HPC/PF/18/3343</u></b>
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<b>Alma Kinnaird</b>		
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<b>Anne-Marie Conway</b>		
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<b>Gordon Phillips</b>		
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<b>Craig McVicar</b>		
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<b>Isabelle Grogg</b>		
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<b>Wellwood Grierson</b>		
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<b>Andrew McDowall</b>		
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<b>John Miller</b>		
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<b>Gordon Anderson</b>		
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<b>Aileen Scott</b>		

<b>Gordon Lancaster &amp; Magdalena Lancaster</b>	<b>9F Gleniford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3357</b>
<b>Margaret Rodie</b>	<b>9A Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3358</b>
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<b>Malcolm Foster</b>	<b>8 Wexford Way, Ayr, KA7 1LA</b>	<b>FTS/HPC/PF/18/3363</b>
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<b>Angela Lafferty</b>	<b>3C Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3366</b>
<b>Sandra Ratcliffe</b>	<b>3B Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3367</b>
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	<b>1G GlenfordPlace,Ayr, KA7 1LB</b>	
<b>Rae Clark</b>		<b>FTS/HPC/PF/18/3370</b>
<b>Elaine Flannigan &amp; Ronnie Bradley</b>	<b>1A Glenford Place, Ayr, KA7 1LB</b>  <b>1C Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3371</b>
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<b>Eric Armstrong</b>	<b>Flat 8P, Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3314</b>

<b>Andrew McLean</b>	<b>Flat 7F, GlenfordPlace, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3299</b>
<b>John Wotherspoon</b>	<b>Flat 4C, Glenford Place, Ayr, KA7 1LB</b>	<b>FTS/HPC/PF/18/3311</b>

(the “Homeowners”)

**James Gibb Property Management Ltd  
65 Greendyke Street, Glasgow, G1 5PX  
 (“the Property Factor”)**

**Tribunal Members:**

**Martin J. McAllister (Legal Member)**

**Andrew McFarlane (Ordinary Member)**

## **Decision**

**It was determined that the Property Factor had not complied with the Code of Conduct for Property Factors and that a Property Factor Enforcement Order be made.**

## **Introduction**

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act" and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code."

## **Background**

The tribunal considered an application by the homeowners submitted in terms of Section 17 of the Property Factors (Scotland) Act 2011 (The 2011 Act). There were a number of Hearings and procedural diets relating to the application. The tribunal issued a proposed property factor enforcement order on 6th January 2020. Following upon representations made by the Property Factor, set aside its proposed order on 28th January 2020. Following a procedural Hearing where both parties had the opportunity to make representations, the tribunal issued a replacement proposed property factor enforcement order on 3<sup>rd</sup> October 2020. It issued a new proposed property factor enforcement order on that date and this was served on parties on 6<sup>th</sup> October 2020.

In terms of Section 19(2) (b) of the 2011 Act, parties were given the opportunity to make representations on the proposed property factor enforcement order.

## **Representations:**

On 19<sup>th</sup> October 2020, solicitors acting for the Property Factor submitted an email to the First-tier tribunal for Scotland requesting that it consider its representations before making a property factor enforcement order.

The representations are as follows:

- 1. The factors from the outset admitted the breach.*
- 2. The claimant's claim was primarily for financial loss. The evidence led demonstrated no such loss.*
- 3. The tribunal awarded a sum for worry, stress and inconvenience which was not sought and upon which no evidence was led.*
- 4. It was put to the tribunal that any order under s 19 (of the Act) should therefore be zero.*

*The proposed PFEO, it is respectfully submitted is ultra vires of the powers of the Tribunal. The Tribunal's purpose is to determine disputes between two parties. The order proposed goes beyond that purpose and is ultra vires of the powers of the Tribunal in that it is acting as enforcer, across an estate of properties where no dispute has arisen.*

*The role of the tribunal it is respectfully submitted is as arbiter and not enforcer, the undertaking as proposed would leave the respondents open to potential prosecution, regardless of circumstances.*

*Given the foregoing, the Tribunal is invited to review its proposed PFEO.*

## **Consideration of Representations**

1. It is acknowledged by the tribunal that the Property Factor from the outset admitted the "breach."
2. The tribunal had originally issued a proposed property factor enforcement order requiring that compensation be paid to the Homeowners and, after representations, had set this aside.
3. Section 19 (3) of the 2011 Act is clear in its provisions:

*If the tribunal is 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 tribunal must make a property factor enforcement order.*

4. The Property Factor's solicitor does not seek to argue that no property factor enforcement order should be made but rather that it should be "zero."
5. The representations state that, if the tribunal were to make a property factor enforcement order in the terms proposed, it would be "acting as an enforcer" and it would be acting ultra vires of its powers because it would affect "an estate of properties where no dispute has arisen."
6. The tribunal considered that it is required to make a property factor enforcement order and it has no choice in the matter given the statutory provisions contained within the 2011 Act.
7. The tribunal had regard to the circumstances giving rise to the submission of the Homeowners' application. These involved concerns about significant safety issues.
8. The tribunal considered that, in determining the terms of a property factor enforcement order, it has complete discretion once the threshold set out in Section 19(3) has been crossed.
9. The tribunal considered that, in view of the nature of the breach of the Code and the failure to comply with the property factor's duties, its proposed property factor enforcement order was reasonable and furthermore that it was a reasonable exercise of its discretion that the Property Factor be asked to provide an undertaking in the terms set out in the proposed property factor enforcement order. The tribunal did not consider that such an undertaking would leave the Property Factor open to potential prosecution. The undertaking sought is reflecting what a competent and professional property factor should be doing. Further it is what the Property Factors undertook to do in their Written Statement of Services issued to the Homeowners.
10. The tribunal considered it appropriate to amend the proposed property factor enforcement order to reflect that the property factor requires to follow its statutory obligations and undertakings within its written statements of services.
11. The tribunal did not consider that it was acting as an "enforcer" in requiring the undertaking from the Property Factor but rather in contributing to ensuring that property factors comply with the Code and the property factor's duties particularly in relation to activities where safety could be compromised.

12. The tribunal did not consider that it would be appropriate to issue a property factor enforcement order as “zero” and was unsure what the purpose of such an order might be.

13. The tribunal determined to make a property factor enforcement order in the following terms:

**James Gibb Property Management Ltd will provide an undertaking to the Tribunal that it will comply with the Code of Conduct for Property Factors and the property factor’s duties in accordance with obligations contained in its written statements of services and in accordance with its statutory obligations and, in particular, will ensure that appropriate inspections and maintenance of common safety systems are carried out in developments which they manage. Such an undertaking will be provided within twenty one days of service of the property factor enforcement order.**

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.

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

Martin. J. McAllister,  
Legal Member  
3<sup>rd</sup> November 2020