



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

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

**Chamber Ref:** Reference number: FTS/HPC/LM/22/2880

**Property:** 17 Corn Mill Road, Lenzie, Kirkintilloch, Glasgow, G66 3TL (“The property”)

**Parties:**

Dr Gordon Jahn, residing at 17 Corn Mill Road, Lenzie, Kirkintilloch, Glasgow, G66 3TL (“the Applicant”)

and

Residential Management Group Scotland Ltd, a company incorporated under the companies Acts and having their registered office at Unit 6, 95 Morrison Street, Glasgow, G5 8BE (“the Respondent”)

**Tribunal Members:**

**Paul Doyle (Legal Member)**

**Helen Barclay (Ordinary Member)**

**Unanimous Decision of the Tribunal**

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the respondent has failed to comply with the code of conduct as required by Section 14 of the Property Factors (Scotland) Act 2011, determined that the respondent has not breached the code of conduct for property factors nor have they failed to carry out the Property Factors Duties.

**Background**

1. By application dated 15 August 2022, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of his complaint that the respondent has breached the code of conduct imposed by Section 14 of the 2011 Act and breached the Property Factor’s duties.

2 The applicant says that the respondent failed to comply with Sections 2, 4, 8, 11, & 12 of the Overarching Standards of Practice, and failed to comply with sections 1.2, 1.19, and 1.21 of the code of conduct for property factors effective from 16 August

2021. In addition, the application says that the respondent has failed to carry out the Property Factor's duties.

3. By interlocutor dated 23 September 2022, the application was referred to this tribunal. On 7 November 2022 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 submitted written representations on 27 November 2022.

5. A Case Management Discussion took place before the Tribunal by telephone conference at 10.00am on 21 December 2022 at which it was established that the dispute to be resolved between the parties is

(a) Has the respondent failed to comply with Sections 2, 4, 8, 11, & 12 of the Overarching Standards of Practice?

(b) Has the respondent failed to comply with sections 1.2, 1.19, and 1.21 of the code of conduct for property factors effective from 16 August 2021

(c) Has the respondent has failed to carry out the Property Factor's duties?

6. On 13 January 2023 the respondent lodged a written response to the application. On 16 January 2023 the applicant lodged a supplementary written submission with additional documentary evidence. On 1 February 2023 the respondent lodged an inventory of productions.

7. A further Case Management Discussion took place on at 10am on 2 February 2023. The applicant was present and unrepresented. The respondent was represented by Mr A Kane, solicitor.

8. 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**

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

(a) The applicant is the proprietor of the property, part of a large development, collectively known as Woodilee Village, by Persimmon Homes Ltd, Cala Management Ltd, Miller Group Ltd and Redrow Homes Ltd.

(b) The respondents, in the course of their business, manage the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of “property factor” set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 (“the Act”).

(c) The respondents were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor. The date of current Registration of the property factors is 5 April 2018.

(d) The homeowner has notified the respondents in writing that he considers that the respondents have failed to carry out their duties arising under section 14 of the Act.

(e) One of the applicant’s neighbours made an application to the First-tier Tribunal for Scotland (Housing and Property Chamber), dated 21 June 2022, under Section 17(1) of the Act in almost identical terms (Chamber Ref: FTS/HPC/LM/22/1998). That application was determined by the First tier Tribunal for Scotland in a decision dated 14 October 2022.

(f) When the applicant lodged his application on 15 August 2022, he asked for the application to be conjoined with Chamber Ref: FTS/HPC/LM/22/1998 because the facts and circumstances in each application were so similar. Both the applicant in Chamber Ref: FTS/HPC/LM/22/1998 and the applicant in this case are office bearers in Woodilee Residents’ Association (WRA)

(g) The applicant became the joint heritable proprietor of the property, 17 Cornmill Road, Kirkintilloch, Glasgow G66 3TL (a property falling within the Development) on 18 August 2017. The Respondent has been property factor to that development since 2018 and was appointed in line with the Deed of Servitudes and of Conditions, registered 12 May 2011, by Persimmon Homes Limited, Cala Management Limited, Miller Group Limited, and Redrow Homes Limited.

(h) On 28 January 2022, WRA (of which the applicant is secretary) sent an email to the Respondent purporting to terminate the respondent’s appointment as Property Factor, but did not send details of (i) the voting process, (ii) the votes, and (iii) notice of the meeting being given to the other owners.

(i) On 18 February 2022, the respondent’s agents wrote to WRA refusing to accept termination of their appointment and suggesting that the requirements for termination set out in the Deed of Conditions had not been correctly followed.

(j) On 21 February 2022, WRA responded to the respondent's solicitors agents. Saying that the proxy voting form "...*may not have directly reached proprietors directly*". In their letter, WRA acknowledged that only 27 people attended their meeting. There are 857 owners within the Development. 20% of 857 is 171.

(K) On 25 March 2022, the respondent's solicitors wrote to WRA saying that the respondent is not satisfied the purported termination conforms to the requirements of title deeds. The respondent's solicitors told WRA that, without evidence of a properly convened meeting and valid decision, a fresh meeting and new decision would be required.

(l) On 6 April 2022 the respondent's solicitors again wrote to WRA declaring that the purported termination is not accepted.

(m) The Code of Conduct for Property Factors relevant to the application is the version effective from 16 August 2021.

(n) The Deed of Conditions relevant to the development for the purposes of the present application is Deed of Servitudes and Conditions by Persimmon Homes Limited, Cala Management Limited, Miller Group Limited and Redrow Homes Limited registered in the Land Register on 12 May 2011.

(o) The respondent issued a written statement of services to all proprietors in the development. An online version of that written statement of services is regularly updated.

(p) The respondent carries out monthly inspections of the common parts of the development, and carries out regular repairs and maintenance. The respondent's last maintenance visit was on 20 December 2022.

## **THE CODE OF CONDUCT FOR PROPERTY FACTORS**

### **Overarching Standards of Practice**

10. The applicant says that the respondent failed to comply with Sections 2, 4, 8, 11, & 12 of the Overarching Standards of Practice (OSP).

11. OSP2 & OSP4 say

You must be honest, open, transparent and fair in your dealings with homeowners

and

You must not provide information that is deliberately or negligently misleading or false

12. OSP11 says

You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.

13. OSP8 & OSP12 say

You must ensure all staff and any sub-contracting agents are aware of relevant provisions in the Code and your legal requirements in connection with your maintenance of land or in your business with homeowners in connection with the management of common property

and

You must not communicate with homeowners in any way that is abusive, intimidating or threatening.

The Code of Conduct

14. The applicant says that the respondent failed to comply with sections 1.2, 1.19, and 1.21 of the code of conduct for property factors effective from 16 August 2021

15. Section 1.2 of the Code says

1.2 A property factor must take all reasonable steps to ensure that a copy of the WSS is provided to homeowners:

16. Section 1.19 and 1.21 of the Code say

1.5 The WSS must make specific reference to any relevant legislation and must set out the following...

**G. How to End the Arrangement**

(19) clear information on when and how a homeowner should inform the property factor of an impending change in ownership of their property (including details of any reasonable period of notice which is required by the property factor to comply with its duties under this Code. This information should also state any charges for early termination/administration costs;...

(21) a clear statement confirming the property factor's procedure for how it will co-operate with another property factor to assist with a smooth transition process in circumstances where another property factor is due to or has taken over the management of property and land owned by homeowners; including the information that the property factor may share with the new, formally appointed, property factor (subject to data protection legislation) and

any other implications for homeowners. This could include any requirement for the provision of a letter of authority, or similar, from the majority of homeowners to confirm their instructions on the information they wish to be shared.

## **Reasons for decision**

17. After the case management discussion on 21 December 2022, a case management discussion note was issued to the parties. Paragraph 17 of the case management discussion note says

Parties attention is drawn to the Housing & Property Chamber decision in a similar case, which can be found on the Tribunal's website under reference FTS/HPC/LM/22/1998. That decision is not binding on this tribunal but might be persuasive.

18. The application in case reference FTS/HPC/LM/22/1998 is almost identical to this application. The similarity was recognised by the applicant when he asked for this application to be conjoined with FTS/HPC/LM/22/1998. The only difference between the two applications is that in this application the applicant says that the respondent has breached OSP 11 and section 1.2 of the code of conduct.

19. The tribunal decision in FTS/HPC/LM/22/1998 was issued on 14 October 2022, two months after this application was lodged. The tribunal decision in FTS/HPC/LM/22/1998 considered OSP 2, 4, 8, & 12 and sections 1.19 and 1.21 of the code of conduct, and whether the respondent had failed to carry out the Property Factors duties on the same facts and circumstances as are plead in this case.

20. In submissions dated 16 January 2023, the applicant declares that this application is not identical to FTS/HPC/LM/22/1998, but later in the same submissions says

the homeowner recognised that FTS/HPC/LM/22/1998 was ongoing and to ensure the process was not considered vexatious advised the tribunal on 27<sup>th</sup> August 2022 that any applicable findings from FTS/HPC/LM/22/1998 that resolved issues in this complaint would be respected.

21. In the decision in FTS/HPC/LM/22/1998, our confrere carefully rehearsed the applicant's position and the applicant's submissions. He rehearses the respondent's submissions before making findings of fact leading to the following conclusions in law.

63. The Tribunal cannot consider applications made by a Residents' Association or by one homeowner on behalf of himself and a number of other residents. It can only consider whether, in relation to the individual homeowner who makes the application, the property factors have failed to comply with the Code of Conduct or have failed to carry out the property factor's duties. Accordingly, the request by the homeowner for compensation for his time was not considered by the Tribunal, as he stated in terms that the time had been spent by him as Chair of WRA, which is a voluntary position.

64. The Tribunal's view was that it was not within its powers to determine whether the EGM had been competently convened or whether the decision to terminate the property factors' appointment was valid. There was a clear dispute between the Parties as to the legal interpretation of the Deed of Servitudes and Conditions affecting the development and this was rightly a matter for a court to determine, if the Parties could not reach agreement.
65. OSP2 states "You must be honest, open, transparent and fair in your dealings with homeowners and OSP4 states "You must not provide information that is deliberately or negligently misleading or false." The Tribunal did not accept that the addition of the word "every" in the property factors' agents' letter of 18 February 2022 was deliberately or negligently misleading or false. It merely emphasised the property factors' interpretation of the provisions of the title deeds. The property factors and their agents were clear and consistent in their stated view that they were not satisfied that the EGM and the vote taken at it were valid and, that, having considered the documentation provided to them by the WRA Committee, they remained dissatisfied with the process. They were rightly concerned that they might be open to complaints from other residents that they had failed in their duties had they not sought to be satisfied as to the validity of the process.
66. The homeowner alleged that the property factors had been dishonest in providing their agents with an "invalid" Written Statement of Services, namely the 2022 version. The homeowner's view was that the only valid version at the time of his legal challenge was the 2017 one. The Tribunal decided that this was a matter between the property factors and their agents and any alleged dishonesty on the part of the property factors was not directed at the homeowner. The Tribunal did not, in any event, accept that the property factors' reliance in correspondence on the 2022 version of the Written Statement of Services had been in any way detrimental to the homeowner's position. The property factors were entitled to make such enquiries as they thought reasonable to enable them to form a view as to the validity of the process undertaken by the WRA in seeking to terminate their appointment.
67. For the reasons set out in the two immediately preceding paragraphs, the Tribunal did not uphold the homeowner's complaints under OSP2 and OSP4 of the Code of Conduct.
68. OSP8 states "You must ensure all staff and any sub-contracting agents are aware of relevant provisions in the Code and your legal requirements in connection with your maintenance of land or in your business with homeowners in connection with the management of common property."
69. The Tribunal did not uphold the homeowner's complaint under OSP8. Solicitors are not subcontractors of their clients. They are agents for a disclosed principal and are not covered by the provisions of OSP8 of the Code of Conduct.
70. OSP12 states "You must not communicate with homeowners in any way that is abusive, intimidating or threatening." Appendix 1 of the Code of Conduct is a Glossary of terms and is stated to be relevant to the interpretation of the Code of Conduct. Under the heading "Abusive or intimidating" it states "For a property factor (or a third party acting on their behalf) to communicate to a homeowner in a manner where it is reasonable for the homeowner to form a view that this manner is offensive or insulting and/or for a property factor or a third party acting on their behalf to cause the homeowner fear and alarm including threats of physical and/or non-physical violence against the homeowner." The view of the Tribunal was that the property factors and their agents had been measured and temperate in their communications

with the homeowner and at no point had they been abusive. They had consistently stated what they were looking for in order to assess the validity of the process by which WRA had sought to terminate the property factors' appointment, and a warning that legal action might follow, and the possible consequences thereof with regard to legal redress and expenses was not intimidating or threatening. The Tribunal accepted that it would have caused a degree of anxiety to the homeowner but did not accept that it could have caused "fear and alarm" under any normal and reasonable interpretation of that phrase. Accordingly, the Tribunal did not uphold the homeowner's complaint under OSP12.

71. Section 1.19 (more correctly Section 1.5(19)) of the Code of Conduct requires that the Written Statement of Services should provide "clear information on when and how a homeowner should inform the property factor of an impending change in ownership of their property (including details of any reasonable period of notice which is required by the property factor to comply with its duties under this Code. This information should also state any charges for early termination administration costs." The Tribunal rejected the homeowner's complaint under this Section, as it relates to the procedure to be followed on the sale of a property, not to the procedure for appointing or terminating the appointment of property factors.

72. Section 1.21 (more correctly Section 1.5(21)) of the Code of Conduct requires the Written Statement to include "a clear statement confirming the property factor's procedure for how it will co-operate with another property factor to assist with a smooth transition process in circumstances where another property factor is due to or has taken over the management of property and land owned by homeowners; including the information that the property factor may share with the new, formally appointed, property factor (subject to data protection legislation) and any other implications for homeowners. This could include any requirement for the provision of a letter of authority, or similar, from the majority of homeowners to confirm their instructions on the information they wish to be shared." The version of the Written Statement of Services to which the homeowner was referring in his complaint was the 2017 one, the requirements for which were set out in the earlier version of the Code of Conduct, effective from 1 October 2012, which did not contain a provision equivalent to Section 1.21 which was introduced by the Code of Conduct effective from 16 August 2021. Accordingly, the Tribunal could not uphold the homeowner's complaint under Section 1.21 of the Code of Conduct.

73. The homeowner did not lead any evidence specifically in relation to any failure by the property factors to carry out the property factor's duties.

22. Those findings must be our starting point. We look to see what has changed since 14 October 2022. The applicant says that there was a question he asked the respondent during the complaints process which remains unanswered. Despite the volumes of documentary evidence placed before us, we cannot find the question that remains unanswered.

23. In reality, this application proceeds on the same facts and circumstances as FTS/HPC/LM/22/1998. It is an attempt to relitigate something that has already been determined by the tribunal.

24. The only difference between this application and FTS/HPC/LM/22/1998 is that this application alleges a breach OSP11 and a breach of section 1.2 of the code of conduct.



25. The applicant says that OSP11 is breached because he requested the procedure for transferring information to a replacement factor on 16 March 2022 and has not received a response to his query.

26. The respondent produces a sequence of correspondence passing between the respondent and WRA. The applicant does not produce his letter of 16 March 2022. The documentary evidence which is placed before us indicates that the respondent still does not accept WRA's purported termination of their appointment and actively pursued correspondence with WRA. Because the letter of 16 March 2022 is not reproduced, we do not know if the letter was from the applicant or from WRA, and the respondent has not had fair notice of the case the applicant wants them to answer.

27. As the correspondence between the respondent and WRA was a dispute about whether or not their contract was terminated, it would have been premature to provide the applicant with details of the procedure for transferring information and undertakings to a replacement property factor. The fundamental issue of whether there is to be a replacement property factor must be addressed before the mechanics of transfer can properly be discussed.

28. The applicant says there is a breach of section 1.2 of the code of conduct. The respondent says that the written statement of services is constantly updated on the RMG living portal. The applicant says that the respondent is lying and that the only written statement of services on the RMG living portal he has access to is dated 2017. The applicant produces screenshots of the RMG living portal. In those screenshots, a link to a statement of services dated 29 December 2017 can be seen.

29. The problem for the applicant is that he has not opened the link to the written statement of services for the tribunal. We do not know what lies beyond the link to the written statement of services. On the one hand the applicant says that the written statement of services has not been updated for five years. On the other, the respondent says that the latest update was last year.

30. Because the only evidence that is placed before us is a series of Internet links rather than the document itself, we cannot make the finding of fact that the applicant wants us to make. There is insufficient evidence placed before us of a breach of section 1.2 of the code of conduct for property factors.

31. In his written submission dated 16. January 2023, the applicant takes a complicated argument that the respondent is not the property factor, referring to the respondent's letter heading displaying a conflict between the declared registered company number for the respondent and the registered company number attributed to the respondent in the property factors register. That is not a matter which formed part of the application. It is not a matter which was intimated to the respondent before the application was submitted. Section 17(3) of the 2011 Act tells us that we cannot consider a complaint that the respondent is not the property factor as part of this application.

32. The applicant says that the Property Factor breaches the property factors' duties. Section 17(1), (4) and (5) of the Property Factors (Scotland) Act 2011 say

(1) A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed—

(a) to carry out the property factor's duties,

(b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the “section 14 duty”).

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(5) In this Act, “property factor's duties” means, in relation to a homeowner—

(a) duties in relation to the management of the common parts of land owned by the homeowner, or

(b) duties in relation to the management or maintenance of land—

(i) adjoining or neighbouring residential property owned by the homeowner, and

(ii) available for use by the homeowner.

33. The applicant says that the respondent has failed to carry out the property factors duties in relation to ground maintenance. The applicant says that the dispute over whether or not the respondent's appointment has been validly terminated has interrupted services in the larger development.

34. The problem is the paucity of evidence. The applicant does not lead any meaningful evidence of a failure to carry out ground maintenance work. This application proceeds almost entirely on the dispute about the validity of WRA's purported termination of the respondent's appointment. It has already been determined by the tribunal that that is a matter which falls within the jurisdiction of the Sheriff Court.

35. There is no reliable evidence of a breach of the property factors duties.

## **Decision**

36. The Property Factor has not breached the 2021 Code of Conduct. There has been no breach of the property factors duties.

37. A Property Factor Enforcement Order is not necessary.

## **Right of Appeal**

**38. 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

2 February 2023

Legal Member