

# Housing and Property Chamber First-tier Tribunal for Scotland



**Decision: Property Factors (Scotland) Act 2011: Section 19(1) (a)**

**Chamber Ref: FTS/HPC/PF/19/0235**

**Flat 3/3, 103 Cambridge Street, Glasgow, G3 6RU ("The Property")**

**The Parties:-**

**Mr Allan Welsh, Flat 3/3, 103 Cambridge Street, Glasgow, G3 6RU  
("the Homeowner")**

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

**Tribunal Members:**

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

**Andrew McFarlane, Chartered Surveyor, (Ordinary Member)  
(the "tribunal")**

## **Decision**

**It was determined that The Property Factor be given notice that the tribunal propose that it make a property factor enforcement order in the following terms:**

- 1. The Property Factor is required to follow its own debt recovery procedure as intimated to homeowners and set out in the document SUP/033 which has been lodged with the tribunal.**
- 2. The Property Factor is to pay the sum of £4,476 to the Homeowner.**

**Parties are to be given an opportunity to make representations on the proposed property factor enforcement order.**

## **Introduction**

**In this Note the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules" and the First-tier Tribunal**

for Scotland (Housing and Property Chamber) is referred to as "the Tribunal" and James Gibb Property Management Ltd is referred to as James Gibb.

## **Background**

The application made by the Homeowner was received by the Tribunal on 24<sup>TH</sup> January 2019.

The application contended that the property factor had not complied with the property factor's duties and that it had not complied with sections 2.1, 2.5, 4.1, 4.5, 4.6, 4.7, 6.4 and 7.1 of the Code.

On 4<sup>th</sup> February 2019 a legal member of the Tribunal, acting under delegated powers, referred the application to the tribunal for determination.

A Hearing was held on 1<sup>st</sup> April 2019 when the tribunal determined that it had not enough information to determine the application. The Hearing was adjourned and Directions were issued under Rule 16 of the Rules. This Decision should be read in conjunction with the Decision dated 4<sup>th</sup> April 2019. A further Hearing was held on 2<sup>nd</sup> July 2019 when evidence was heard but the application was not determined and consideration was adjourned. Following upon the Hearing in July, Directions were issued under Rule 16 of the Rules. The final Hearing was held on 8<sup>th</sup> October 2019.

A Decision was issued after the Hearing on 2<sup>nd</sup> July 2019 but the tribunal consider it appropriate that this Decision should incorporate that earlier Decision since it is easier for parties to refer to one document rather than two and since evidence was heard over two days.

## **Hearing on 2<sup>nd</sup> July 2019**

A Hearing was held in the Glasgow Tribunals Centre. Mr Allan Welsh was present. Ms Debbie Rummens, Ms Val Black and Mr John McKenzie of James Gibb were present.

## **Preliminary Matters**

The representatives of James Gibb were asked if a copy of the Decision dated 4<sup>th</sup> April 2019 had been sent to Pub Enterprises Ltd ("Pub Enterprises"), the proprietors of commercial property on the ground floor of the tenement. No one from James Gibb was able to give a definitive answer and there was an adjournment to allow them to check the file and, if necessary, to telephone their office.

On the hearing reconvening, Ms Rummens asked for it to be noted that she did not like the attitude of the Legal Member and that she had been "thrown out of the room." She was assured that this was not the case and that the adjournment had been necessary to allow Ms Rummens an opportunity to check matters and consult with colleagues. She reported that the Decision had not been sent and that an abstract had been sent. The tribunal was referred to a letter which James Gibb had sent to Pub

Enterprises. It was noted by the tribunal that this letter did not contain any information contained within the Note which was part of the Decision. This Note set out the tribunal's views that the major part of James Gibb's problems in dealing with the management of the tenement is due to the failure of the proprietor of the public house, which formed part of the ground floor of the tenement, to pay what was due in terms of its title obligations. The members of the tribunal expressed the view that it had hoped that the Property Factor may have thought it useful to pass a copy of the Decision of 4<sup>th</sup> April 2019 to Pub Enterprises.

The representatives of James Gibb were asked if there had been any progress in recovering the sums due from Pub Enterprises. Mr McKenzie said that he had been in touch with Mr Paul Burns of Pub Enterprises and that he had also spoken to the solicitors acting for them. He said that he hoped to have a meeting with Mr Burns. Mr McKenzie said that he would rather that the matter be dealt with by agreeing some kind of payment plan rather than court action which could have uncertainties and potential costs for homeowners. He said that a Statutory Demand had already been served. Ms Rummens expressed the view that Pub Enterprises "just did not want to pay."

Mr Welsh said that the Property Factor required to have an income recovery plan in place and that this "had gone right off track."

## **Directions**

The tribunal noted the response to the Directions it had issued.

The Property Factors had lodged statements for the properties owned by Pub Enterprises. It also lodged copies of correspondence relating to its contacts with Pub Enterprises in relation to the debt owed by it.

The Homeowner had lodged copies of correspondence with his solicitor and James Gibb in relation to enquiries and information sought from James Gibb around the time of the abortive sale of his flat.

The Homeowner had lodged information with regard to his costs relating to the abortive sale of his flat but no invoices.

## **Alleged breaches of the Code**

### **Section 2.1**

*You must not provide information which is misleading or false*

Mr Welsh said that James Gibb had given a contract for pest control to a company called RCS. He said that there had been a historic problem with vermin which was understandable given the location of the tenement and the type of commercial properties in the area. He said that the service from RCS had tapered off and had deteriorated. He said that the contract allowed for a certain number of inspections and call outs from RCS and that the proprietors of the tenement felt that this was not being

complied with. He said that residential owners of the tenement had a meeting with Alan Henderson and David Smith of James Gibb in August 2017 and that the owners at the meeting had said that they wanted the contract with RCS to be terminated and the appropriate notice to be given.

Mr Welsh said that he had been told by James Gibb that this would be done but that it was subsequently discovered that the notice had not been given. He referred the tribunal to the letter from James Gibb dated 22<sup>nd</sup> February 2018 in which it was confirmed that notice of termination had not been given.

Ms Rummens said that James Gibb had not cancelled the existing pest control contract because they did not want to do it until a replacement contractor had been identified. No alternative supplier of the service had been identified and she said that the contract with RCS remained in place. Ms Rummens said that inspections of the tenement by James Gibb show that there is not a current issue with vermin and that this demonstrated that the contractor is being effective.

Mr Welsh said that there had not been an inspection carried out by RCS in 2017 and 2018 and he said that he understood that the problem that RCS had is that it did not have adequate geographical cover to deal properly with contracts in Glasgow.

The representatives of James Gibb could give no definitive information on the contract with RCS and the Ordinary Member noted that the factoring statements for Pub Enterprises Ltd would seem to indicate that there had been no entries for RCS since May 2017. Subsequent to the Hearing the Homeowner emailed the Tribunal and indicated that he had made enquiries of RCS and had been advised that the contract had been terminated.

Mr Welsh said that there had also been issues in getting information from James Gibb in connection with replacement of a door. He said that the Property Factor's communications referred to a door being replaced whereas it was the door frame. He said that he had experienced difficulties in getting "a straight answer" from James Gibb.

Ms Rummens said that damage to the front door of the tenement had been caused by vandalism. She said that the insurers had agreed to replace on a like for like basis but that the co-owners had wanted a different door installed which had necessitated a new door frame being fitted. Ms Rummens said that the matter had dragged on partly as a consequence of determining what the liability of the commercial owners was.

## **Section 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.*

Mr Welsh said that it was difficult to get hold of the property manager. He said that he had submitted a letter of complaint dated 15<sup>th</sup> November 2018 and that, in terms of the Property Manager's procedures, he should have got a response to it by Friday 14<sup>th</sup> December 2018. He said that he did not get the response by that date and did not receive an update from the Property Factor to state that the response was on its way. He said that he got a note from the Post Office on 15<sup>th</sup> December 2018 stating that a

recorded delivery letter was awaiting him and that he had collected it the next day. Mr Welsh acknowledged that he had told the Property Manager not to communicate with him by email.

Ms Rummens said that the letter of James Gibb had required to be detailed and that it had been sent out on time. She mentioned that there might have been an issue with the Christmas mail. Mr Welsh produced the recorded delivery envelope which showed that the letter had been franked on 12<sup>th</sup> December.

Mr Welsh said that he had frequently made contact with James Gibb by telephone and had left messages which had not been responded to and which the Property Factor, on occasions, said had not been left. Ms Rummens said that she does not have copies of phone records

#### **Section 4.1**

*You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.*

Mr Welsh accepted that James Gibb had a written procedure but said that the issue is that he does not consider that it is clearly, consistently and reasonably applied.

The tribunal was referred to Appendix 3 of the submission lodged with the Application where Mr Welsh had stated that James Gibb had not pursued the debtors. He referred the tribunal to James Gibb's document SOP/033 which he had lodged with the Application and to Section 5.11 thereof which gave a timeline for the Company's credit control procedure. This showed that legal action would be instigated on day 63 and that the debt would be redistributed on day 110.

Mr Welsh said that the time taken was considerably past 110 days. He said that the debt had been running since 2008 although he accepted that James Gibb had only been responsible since they had assumed responsibility for managing the tenement. Mr Welsh said that he did not consider that debt recovery should take the time that it had in this case and he said that for the debt to go on for so long that £8,000 had required to have been written off was indicative of the Property Factor's failure to follow its own debt recovery guidelines.

Ms Rummens confirmed that any debt written off was at a cost to James Gibb.

Mr Welsh said that he became aware of the debt position in 2018.

He said that the owners of the residential properties in the tenement had a meeting with David Smith of James Gibb in August 2017 and that at that meeting David Smith had expressed surprise that six owners had complained at a lack of communication from the Property Factor.

Mr Welsh said that he was told that he and other owners could not be advised of the identity of the debtor because of data privacy issues. He said that James Gibb should have pursued the debt more vigorously and that, when he was first made aware of the existence of the debt, it had been indicated to him that it was to do with insurance

alone but when the statements are examined it is not only the share of insurance premia unpaid by Pub Enterprises but also other items relating to management of the tenement.

Ms Rummens said that the Property Factor had some difficulties because there was not an owners' committee and that James Gibb had been contacted at different times by two or three owners. She said that her company's debt recovery team had entered into negotiations with Pub Enterprises who had been paying on a sporadic basis. She said that, notwithstanding the debt problems, James Gibb had continued to insure the tenement and arrange for cleaning and other services and maintenance. She said that at each quarter the sums due by each owner were fixed according to their obligations in terms of the title. She said that a Notice of Potential Liability had been placed on the title of the property owned by Pub Enterprises.

Mrs Rummens said that when her company had acquired Grant and Wilson it had paid full value for any sums of debt where Notices of Potential Liability had been registered. She accepted that between 2015 and 2018 the core debt owed by Pub Enterprises had not been eaten into and that payments had stopped in 2018.

Mr McKenzie said that Pub Enterprises had instructed a solicitor in the matter and that, when he had been first employed by James Gibb, he had met with Mr Burns of Pub Enterprises to try and identify what issues there might be with regard to non-payment of the debt and, in particular, what issues related to insurance and to other matters. Mr McKenzie explained that he understood that the issue with insurance was because Pub Enterprises had another insurance policy which he thought they were tied to as a result of a requirement of brewers. Mr McKenzie said that, as far as he knew, Pub Enterprises operated the public house. It was pointed out to him that, at the previous Hearing, Mr Elliott of James Gibb had stated that the pub is operated by tenants on a lease from Pub Enterprises. Mr McKenzie was unable to confirm what the true position is.

When asked how he thought things should progress, Mr McKenzie said that he would "rather manage the debt" and that he might serve a seven day notice and thereafter seek authority to go to court.

Mr Welsh said that he needed the matter resolved and clarity so that there would be no issues to affect a future sale of his property.

There was a short adjournment and when the Hearing reconvened Ms Rummens said that she had considered matters and that the Written Statement of Services contained provisions which would allow James Gibb to raise court action without specific authority from owners. She said that they would instruct their debt recovery agents to proceed as quickly as possible to get the matter into court.

The members of the Tribunal considered that there was still a considerable amount of evidence to deal with before it could determine the application. It was aware that what Mr Welsh wanted was for the debt issues with Pub Enterprises to be resolved which would ultimately allow him to sell his flat. Since the solution for Mr Welsh involved a third party- Pub Enterprises - it was difficult to see what orders the Tribunal might make which could bring him the desired resolution. The members of the tribunal considered

that the best approach would be to continue to determine the application until after James Gibb had made progress with debt recovery from Pub Enterprises and consideration of the matter was adjourned to a date and time to be intimated to parties. A possible timeframe for the continued Hearing was discussed and for various reasons it was decided that this would be some date after 26<sup>th</sup> September 2019.

There was some discussion with regard to the ownership of the relevant commercial premises and it was noted that, although all had been referring to Pub Enterprises, there are two entities which own the commercial properties- Pub Enterprises Ltd and Paul Gerald Burns, Brian Fox and Alfa Trustees Ltd as trustees of The Pub Enterprises Small Self - Administered Scheme.

Ms Rummens said that she would ensure that James Gibb kept the Tribunal apprised of progress with the court action.

### **Directions**

Whilst the tribunal noted that James Gibb had indicated that it would provide it with reports on progress of the court action, it determined that it would be appropriate to issue a Direction in this regard so that parties were clear what was expected. The tribunal considered it appropriate that the Property Factor provide a detailed report to the Tribunal at the end of each calendar month.

The tribunal also considered it appropriate for information to be provided in relation to the pest control contract for the tenement of which the Property forms part.

The tribunal also noted that, although part of the Homeowner's application related to a claim for costs involved in his abortive sale and for the cost of legal advice which he and other owners had required to obtain, he had not produced any evidence of this and the tribunal considered it appropriate that it should issue a Direction requiring him to do so.

### **Hearing on 8<sup>th</sup> October 2019**

Mr Allan Welsh was present and gave evidence.

Mr John McKenzie, Mr Nick Mayell and Ms Lesley Anderson from James Gibb were present and Messrs McKenzie and Mayell gave evidence.

### **Preliminary Matters**

Reference was made to the Directions which had been issued after the last Hearing. Mr Welsh had lodged details of the costs which he considered that he had had to assume because of failings of James Gibb.

In terms of the Direction James Gibb had been required to submit regular reports to the Tribunal indicating the steps that they were taking in relation to debt recovery. This had been done.

In terms of the Direction, James Gibb had been obliged to provide information on the pest control contractor for the tenement and, if the RCS contract had been cancelled, details of when this had been done. Nothing had been lodged and neither Mr Mayell nor Mr McKenzie could provide an explanation as to why the Direction had not been complied with. They said that any information relating to this would be in their office and they could provide no information at the Hearing.

Mr McKenzie said that some progress had been made in relation to progressing the issue with Pub Enterprises. Mr Mayell said that the problem was that it appears that Pub Enterprises was potentially double insured because it was required to have certain insurance as a result of leasing arrangements with Brewers. He also said that Pub Enterprises operated the public house. He said that homeowners in the tenement had been written to with a proposal that the commercial premises on the ground floor be removed from the common policy. He referred to the letter from James Gibb to homeowners dated 14<sup>th</sup> September 2019 which had been lodged with the Tribunal and which contained a proposal that Pub Enterprises would be excluded from the common insurance policy at no additional cost to the other proprietors of the tenement. Mr Mayell said that a number of owners had objected to this and he said that he thought this was for a number of reasons and that some owners were uncomfortable with the proposal.

Mr McKenzie said that a meeting had been held with Pub Enterprises and its legal representative and that it was proposed that there be some kind of write off of some of the debt. Mr Mayell said that the letter of 16<sup>th</sup> September 2019 to homeowners followed that meeting. He said that James Gibb had suggested writing off £2,000 of the debt and accepting responsibility for it. He said that he hoped that this would be an incentive for Pub Enterprises to start paying. He confirmed that no payment had been made. He said that an issue had been raised by Pub Enterprise's lawyers with regard to the liability in respect of 109 Cambridge Street which is part of the commercial premises. He said that James Gibb had sought advice from BTO solicitors but that this had not yet been provided. Mr McKenzie said that this issue about the title had not been raised prior to July 2019.

Mr Mayell said that the insurance proposal was not unusual and that he knew of situations where such arrangements were in place. He said that advice had been taken from insurance brokers but that this fact had not been included in the letter sent to homeowners. He agreed that the said letter did not address how the arrears would be dealt with. Mr Mayell confirmed that the debt due by the owners of the commercial premises on the ground floor was not solely in respect of insurance but he said that the vast bulk of the debt is in respect of insurance. Mr Mayell acknowledged that Pub Enterprises had not paid for seven years.

Mr McKenzie said that there was no dispute over the title position of 99/101 Cambridge Street and he agreed that court action could have been raised in respect of that part of the tenement.

Mr Welsh said that he felt that no real progress had been made since the previous Hearing. He said that he did not consider that James Gibb had been complying with its own debt recover process and he expressed frustration at what he described as "arguing over title deeds."



The tribunal then considered the application and recommenced dealing with the alleged breaches of the Code.

#### **Section 4.5**

*You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.*

Mr Welsh said that he did not think that James Gibb did this. He said that the first he and fellow homeowners knew about the large debt was when they were informed about it in a letter from James Gibb dated 15<sup>th</sup> January 2018. This letter stated that, should James Gibb not be able to engage the defaulter in a payment plan, it may consider terminating the management contract.

Mr Welsh said that the fact that the debt had been allowed to rise to the level that it is at evidences the fact that James Gibb has not complied with this section of the Code. Mr McKenzie said that when the debt of Pub Enterprises was referred to Adamsons, the debt collection agents, it was for them to deal with the matter and that James Gibb's debt collection process was effectively suspended. We were referred to a timeline in a document which had been provided by Adamsons and which had been lodged by James Gibb. This detailed instructions given by James Gibb, the various actions taken by Adamsons and interactions between the two parties. Mr McKenzie said that, even though the matter had been referred to Adamsons, he had tried to negotiate a settlement with Pub Enterprises.

#### **Section 4.6**

*You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).*

Mr Welsh said that the first he knew of the substantial debt issue was in January 2018. He referred to the letter which had been lodged with the Tribunal and which was dated 15<sup>th</sup> January 2018 and which detailed a level of debt of £16, 141.49. He said that he had lived in the Property for over twenty years during which period no major works had been done and that he therefore found it difficult to understand how the debt could have been at that level. He said that the letter referred to the debt having been discovered after a review. Mr Welsh said he was surprised given that James Gibb had been factoring the property since March 2015. He said that the letter stated that the Property Factor would have to review its continuing management of the building and made reference to the debt being split amongst co-owners. Mr Welsh said that this was a huge shock to him and that, prior to that time, he did not know the provisions of the Tenement (Scotland) Act the provisions of which would allow distribution of the debt.

Mr Mayell said that the method of corresponding with homeowners has been reviewed and changed. He said that the homeowners should have been notified about the debt issue prior to the letter referred to. Mr Mayell accepted that James Gibb had known about the commercial owner debt in 2015. He said that the debt had been passed to Adamsons, a debt collection company.

The Property Factor referred to the document which had been provided by Adamsons and which appeared to be a print from its system. It showed two records which appeared to reflect the position that there are two properties with the same owner. One of the records shows that on 23 June 2017 the debt recovery company had been instructed by James Gibb to lodge a Notice of Potential Liability over 109 Cambridge Street and the debt at that time is shown as £6,287.33. The Adamsons document shows a number of interactions between James Gibb and it both before and after January 2018.

#### **Section 4.7**

*You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.*

Mr Mayell said that homeowners had not been charged and that therefore James Gibb could therefore not be in breach of this section of the Code.

Mr Welsh said that the whole issue dominates his life and he is worried not only about being liable for the debt of fellow owners but also the fact that he cannot sell his house because any purchaser, when advised about the debt situation and the possible future issues, would not proceed with a purchase. He said that James Gibb has done nothing to reduce the level of debt. He said that, if Pub Enterprises were taken to court, at least a decision would be made as to its liability and that there would be some resolution. He said that, if the owners lost the case, then they would know what the position is. Mr Welsh said that he considered that he was in the worst possible position- he had been put on notice that he may have to pay this substantial debt but there is no certainty. Mr Welsh said that he felt he was being "held hostage" in a property which he could not sell and where there were now arguments going on about liabilities created by title deeds.

Mr Mayell took issue with what Mr Welsh had said. He stressed that the debt had not been redistributed and that his company had not been in breach of this section of the Code. He also said that he did not necessarily agree that, because of the debt issue, a prospective purchaser would be dissuaded from buying the Property.

#### **Section 6.4**

*If the core service agreed with homeowners included periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.*

Mr Welsh referred to the matter raised earlier concerning the pest control contract with a company called RCS. He said that, as part of the contract which owners had with the company, there were to be eight inspections of communal areas per year and also one private inspection which he described as an inspection of the individual properties in the tenement. He said that each year James Gibb had to be chased to ensure that the work was done. He said that he discovered that RCS could not adequately service the contract because of its lack of personnel in the Glasgow area and could not respond quickly enough. He said that no inspection had been carried out in 2017 and that, in February 2018, Iona Stubbs of James Gibb informed him that the contract with RCS had been cancelled. He said that he did not know what the actual position was and he said that, when he tried to get to the bottom of what was actually happening, he felt that he was "going round in circles." He said that Debbie Rummens of James Gibb had told him that the contract had not been cancelled and that, when he called RCS (which had changed its name to Enviro) he was told that they could find no information of a contract for the building in which the Property is situated. Mr Welsh said that the owners were invoiced for RCS in November 2017 but the last private inspection had been carried out in 2016. He said that there may have been an inspection or inspections of the common areas in 2017 but that he simply did not know.

Mr Mayell said that he could provide no evidence in connection with the pest control contract.

### **Section 7.1**

*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.*

Mr Welsh referred to the response to his complaint and which he received in December 2018. He accepted that James Gibb had a clear written complaints procedure but considered that it had not followed it. After some discussion he conceded that the response which he had received in December 2018 had been sent out timeously but that, because of the Christmas mail, there had been a delay of a few days in it being delivered.

Mr Welsh stated that he did not consider that the Property Factor had complied with the property factor's duties and that this was evidenced by the fact that the debt had been allowed to grow to its level and that James Gibb had failed to do what was necessary to recover the debt. Mr Mayell did not accept this.

Mr McKenzie said that there had been a payment plan in place for Pub Enterprises but that these had stopped after some payments had been made.

Mr Welsh said that he was not keen on the proposal contained in James Gibb's letter of 14<sup>th</sup> September 2019 relating to the proposal that the commercial properties would be withdrawn from the common insurance policy. He said that he and his fellow proprietors had entered into a block insurance policy in 2007 to ensure that there was cover for all the properties in the tenement. He said he was not attracted to

changing that arrangement. He said that the letter also did not address the historic debt issue. He said that he also feared unintended consequences in an owner's obligation in respect of its title being amended. He spoke about potential issue if there was a claim.

Mr Mayell said that James Gibb had taken advice from insurance brokers before the letter was sent to proprietors. He said that this fact had not been communicated to proprietors. He stressed that the change would not increase the individual cost to proprietors.

### **Costs incurred by Mr Welsh**

In response to the Direction, Mr Welsh had lodged documents in relation to costs which he considered he had incurred as a result of the failings of the Property Factor. Mr Mayell stated that he did not consider that James Gibb had breached any sections of the Code or failed in the property factor's duties. He said that he did not intend to take issue with any of the costs which Mr Welsh had submitted but that his overarching position was that, since there had been no breach or failure by James Gibb, no sums were due.

Mr Welsh said that he had sold his flat with a proposed entry date of 18<sup>th</sup> September 2018. He said that the purchaser had withdrawn because of the issue with the outstanding debt and as a result of this he had sustained direct costs. Mr Welsh referred to James Gibb's letter of 20<sup>th</sup> August 2018 and which had been sent to his solicitor. It contained the following statement: "There is a possibility of debt distribution at this property." Mr Welsh had detailed costs directly arising from the loss of the sale. These were:

1. Fee to Messrs Jones Whyte, solicitors £1,022.
2. Home Report fee £420.
3. Estate agency fee £450.
4. Royal Mail redirection fee £33.99.
5. Van Hire £50.30

Mr Welsh said that the cost for the van was incurred because, even though he did not actually move, he had to move furniture in the weekend prior to the expected date of entry.

Mr Welsh also submitted a number of other costs which he said that he had incurred as a result of the fact that his sale transaction had fallen through. These included ongoing costs which he said he incurs on a monthly basis such as utilities, insurance, property factor's fees, TV licence and broadband fees. He explained that his aim is to buy a property with his partner and that the costs he has detailed are those which, should he be able to move, he would not have. He conceded that, if he did move, he would have monthly ongoing costs but he said that they would not be as high and that there is currently an element of duplication. Mr Welsh also produced documentation relating to costs for service of a boiler, parking permit, costs of taking legal advice on liability under his title and the debt of co- owners and the quarterly invoiced rendered by James Gibb.

## **Submissions**

Mr Welsh said that all he wants to do is advertise his flat, sell it and buy a property with his partner. He said that the difficulties he is experiencing is because an owner is not paying what it is due and James Gibb has not done which it should have done as property factor of the tenement. He described his situation as like "being in a cell." He invited the Tribunal to find that the Property Factor had not complied with the Code and had not complied with the property factor's duties. He said that he needs to be able to sell his property and not end up in the situation that he was in at the failed sale.

Mr Mayell said that he was not unsympathetic to the position of Mr Welsh but that the Tribunal had to make its decision as to whether or not James Gibb has breached the Code and had failed to comply with the property factor's duties. He referred to Section 4.7 of the Code and said that no decision had been taken to charging homeowners in respect of the debt. He said that it was not a simple matter of just going to court to pursue the debt. He said that he understood that any action would be defended and that, if it were lost, the homeowners in the tenement would have to bear that liability. He said that James Gibb's primary focus is to remove the debt for all homeowners and to resolve the issue with Pub Enterprises. He said that he thought that Mr Welsh had made a number of valid observations but that the tribunal had to restrict its deliberations to whether or not James Gibb has breached the Code and/or failed to comply with the property factor's duties.

## **Findings in Fact**

1. The Property Factor is property manager of the tenement within which the Property is situated.
2. The Homeowner is proprietor of the Property.
3. The Property Factor has managed the Property and others in the tenement since March 2015.
4. The Property Factor has failed to progress recovery of a debt due by proprietors in the tenement and, in failing to do so, has not complied with its own debt recovery process.
5. The Property Factor has failed to provide accurate information to the homeowner in relation to a contract relating to pest control.
6. The Property Factor did not advise the Homeowner and other proprietors in the tenement of debt recovery problems until January 2018 and had been aware of the problems since March 2015.
7. The Property Factor has failed to comply with Sections 2.1, 4.1 and 4.6 of the Code.

## **Reasons**

The Tribunal arrived at the Findings in Fact after consideration of the evidence before it and as set out in the Discussion.

## **Discussion**

The alleged breaches of the Code were addressed:

### **Section 2.1**

*You must not provide information which is misleading or false.*

The Homeowner's position was that, in relation to the pest control contract, he was provided with false or misleading information. The issue for determination was whether or not Mr Welsh had been misled in relation to the contract or had been provided with information which was false. We were somewhat hampered in dealing with this matter because, despite a Direction being made, the Property Factor had not produced information which would have been of assistance. Mr Welsh's position was that, at a meeting with David Smith of James Gibb in August 2017, he had been told that the contract with RCS would be terminated and that appropriate notice would be given and that it was subsequently discovered that no such notice had been given. In evidence Ms Rummens said that James Gibb had not cancelled the contract because they did not want to do so until another contractor was in place. The letter from James Gibb dated 22<sup>nd</sup> February 2018 stated that the contract had not been terminated Ms Rummens said that the contract remained in place and that the fact that the contractor is effective is evidenced by the fact that there is not a current issue with vermin. The continued existence of the contract was not borne out by the invoices rendered by James Gibb which do not show a current payment to RCS. Mr Welsh was firm in his position that he had checked with RCS (Enviro) and that there is not a contract in place.

We believed Mr Welsh. We did not consider Ms Rummens to be untruthful in this matter but we formed the view that incorrect information had been provided to the Homeowner and that the whole position with the pest control contract was muddled. James Gibb had been given an opportunity to provide clarity to the Tribunal but had chosen not to comply with the terms of the Direction dated 17<sup>th</sup> July 2019.

The question for the tribunal was whether or not, in the particular facts and circumstances of the case, provision of incorrect information amounted to James Gibb providing information which was misleading or false. We consider this to be a high barrier to overcome. We consider, that on balance, there has been a breach of this section of the Code but that it is at the lower level of such breaches.

### **Section 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.*

Mr Welsh referred to the letter of complaint dated 15<sup>th</sup> November 2018 and to the fact that he did not get a response until 15<sup>th</sup> December. Mr Welsh had the envelope from the response and it was clear that it had been dispatched timeously. Although Mr Welsh said that he had telephoned the Property Factor on a number of occasions and left messages which had not been responded to there was no specific information before us with regard to this aspect.

The tribunal did not accept there to be a breach of this section of the Code.

#### **Section 4.1**

*You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that the procedure sets out how you will deal with disputed debts.*

Mr Welsh's position was straightforward and that was that, although there was a clear written procedure for debt recovery, James Gibb had not clearly, consistently and reasonably applied it.

It was a matter of agreement that James Gibb had assumed responsibility for factoring the tenement in March 2015 and it was a matter of admission by Mr Mayell that it had known at that time that there had been an issue with the debt which had been accrued by Pub Enterprises. Mr McKenzie's position was that collection of the debt had been passed to Adamsons and that, from that point, it was the agents who were responsible. The Adamsons document shows that the debt recovery company was instructed on 23 June 2017 and no one from James Gibb offered any real detail of what, if anything, had been done to take recovery action prior to that. The evidence of the Property Factor was not clear with regard to payments from Pub Enterprises. Mr McKenzie said that a payment plan was in place, some moneys were paid and that Pub Enterprises then defaulted on the agreement. Ms Rummens said Pub Enterprises didn't want to pay anything and Mr Mayell said that nothing had been paid for seven years.

On any view we accepted that Mr Welsh's point that the time taken for recovery was considerably in excess of the 110 days allowed for in the debt recovery procedure of James Gibb. The Document SUP/033 which had been lodged set out the debt recovery procedure and time scales. Mr McKenzie's position that he and his team had little further input after passing to Adamsons is not supported by the Adamsons Document which shows a number of occasions where employees of James Gibb (including Mr McKenzie) had instructed the debt collection company to put a stop on the process or to take other steps. We did not accept James Gibb's position that any difficulty caused to Pub Enterprises by having to pay for two insurance policies was relevant. James Gibb do not appear to have a clear position on this and had given evidence that the owners of the commercial property operated the public house but also stated that there was a lease in place. This was also stated in its letter to

homeowners on 14<sup>th</sup> September 2019. We did not consider the exact position to be relevant but it did demonstrate that it seemed that James Gibb have not been able to get a clear picture on what the actual position is. The issue had been ongoing for some time. The Adamson document had an entry on 8<sup>th</sup> September 2017 which stated "extend hold two months to allow insurance dispute to be settled." It was also noted that it was accepted by James Gibb that not all the debt owed by the commercial owner was in respect of a share of an insurance premium and that any issue with the commercial owner not having liability in terms of its title was not raised prior to July 2019. It was also accepted by Mr McKenzie that any issue with regard to the title was only in respect of part of the commercial property.

We found that the Property Factor had a clear written procedure for debt recovery. There is little point in having such a procedure if a property factor does not apply it in such a way that is effective. The evidence from James Gibb was that the difficulties were because of double insurance but it was clear that the Property Factor did have concerns that it might be for other reasons. Ms Rummens had stated that she thought Pub Enterprises "just did not want to pay."

We considered that the Property Factor could and should have done more to deal with the debt owed by the commercial owners and should have better applied its own debt recovery procedure and was therefore in breach of this section of the Code.

#### **Section 4.5**

*You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.*

Mr McKenzie said that the process of debt recovery was wholly outwith his control from May 2017, when the matter had been passed to Adamsons, to December 2018. This appears to be at odds with Adamsons' document which shows interactions between James Gibb and Adamsons during this period. On 16<sup>th</sup> August 2017 there is an entry involving an instruction from Mr McKenzie to place the recovery process on hold. Notwithstanding this we considered that we did not have specific evidence of a failing on the part of James Gibb in relation to send reminders to Pub Enterprises. It may have been the case that reminders were sent but, if so, they were certainly not acted upon.

The tribunal found no breach of this section of the Code.

#### **Section 4.6**

*You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).*

There were two facts which were not in dispute. The first is that James Gibb knew about the debt recovery problem with Pub Enterprises since March 2015 and the second is that the Homeowner was not advised of this problem until January 2018.



The Tribunal was clear in determining that the other homeowners should have been advised of the debt recovery problem shortly after March 2015 and definitely when the matter was passed to Adamsons in June 2017 when The Property Factor must have accepted that there was a clear debt recovery problem. James Gibb's argument that there were data protection issues was not acceptable. Had they seriously thought there to be such issues it is not clear from the evidence what had changed to allow them to write to homeowners in January 2018. It was clear to us that there would have been implications for homeowners arising from debt recovery problems of the commercial property and James Gibb's letters of 15<sup>th</sup> January 2018 to homeowners and 20<sup>th</sup> August to Mr Welsh's solicitor was evidence of this.

The tribunal found that there was a breach of this section of the Code.

#### **Section 4.7**

*You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.*

The non- commercial homeowners in the tenement had not had costs redistributed to them so the Tribunal had no difficulty in finding that there was no breach of this section of the Code.

#### **Section 6.4**

*If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.*

Mr Welsh's position that the issue of the CSR contract should be considered under this section of the Code. We were not persuaded that this was the case and it was not demonstrated that this contract formed part of the core service agreed with homeowners and was part of a programme of periodic property inspections.

The Tribunal finds that there is not breach of this section of the Code.

#### **Section 7.1**

*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.*

Mr Welsh had conceded that this was not a matter which we required to consider. He accepted that there was a written complaints resolution procedure.

## **Property Factor's Duties**

In terms of the 2011 Act these are defined as "duties in relation to the management or maintenance of land."

The tribunal considered that any deficiencies of the Property Factor in relation to management of the Property was dealt with under the alleged breaches of the Code and that, in the particular circumstances of the case, the Property Factor complied with the Property Factor's duties in terms of Section 17 (1) (a) of the Act although it had breached the Code.

## **Disposal.**

The tribunal found that the Property Factor had breached sections of the Code. It determined that it was appropriate to make a property factor enforcement order, give notice to the Property Factor of its intention to do so and allow parties to make representations on the matter. The tribunal considered that the Property Factor had failed to deal properly with the debt owed by commercial proprietors and had not followed its own procedures. It was therefore considered appropriate that part of the property factor enforcement order would relate to the Property Factor being required to follow its own debt recovery process in the future.

There was no challenge by the Property Factor with regard to the Homeowner having lost the sale of the Property as a result of the existence of the large debt and the Tribunal found that there were direct costs incurred by the Homeowner which it would be reasonable to compensate him for. These consist of costs for a Home Report, estate agency fee, solicitor's fee, mail redirection fee and van hire. These total £1976.29.

The tribunal had no doubt that the Homeowner has been upset at the situation he finds himself in and it was under no doubt of Mr Mayell's sincerity when he indicated that he was not unsympathetic.

It is difficult to quantify compensation in monetary terms. The tribunal accepted that the Homeowner would have ongoing monthly costs which he otherwise would not have had if the Property had been sold but considered that the figures provided by Mr Welsh could not tell the whole story because he would have had some of these costs if he had moved to another property and there therefore may be some duplication. The Tribunal considered that the Property Factor should compensate the Homeowner for the distress, inconvenience and upset he has suffered and considered £2,500 to be an appropriate sum to mark this and also to include an element of additional ongoing costs he would have incurred as a result of being unable to sell the Property. It therefore found it appropriate to make an order for the Property Factor to pay the sum of £4,476 to the Homeowner by way of compensation.

## **Note**

The members of the tribunal found this to be an unfortunate case where the particular situation the homeowner finds himself in cannot be wholly resolved by an

application under the Act. The issue up until July 2019 was that the commercial proprietor refused to pay what was due by way of its share of the common insurance premium. It was only this year that an issue was raised about a potential problem with interpretation of the title. It is disappointing that the Property Factor allowed matters to go on for so long. Notwithstanding this, the members of the tribunal considered that the suggestion made to exclude the commercial properties from the common insurance policy is perhaps worthy of exploration but that is a matter for all the homeowners. The proposal had been rejected by some owners, including the Homeowner, but perhaps if the Property Factor had held a meeting and disclosed the advice of the insurance brokers it might have had more success. It was also surprising that the letter to homeowners which contained the proposal made no reference to the historic debt and that James Gibb did not address that aspect at the Hearing. It seems to the members of the tribunal that it may be that the issue of liability and interpretation of the title can only be resolved by the Court or alternatively parties exploring any arbitration provisions contained within the relevant titles of the properties in the tenement.

## **Appeals**

**A homeowner or property factor 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.**

Martin J. McAllister, Legal Member  
of the First-tier Tribunal for Scotland

24<sup>th</sup> October 2019