



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

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/20/2159

**Kingsmeadows, Peebles EH45 9HR
("the Property")**

The Parties:-

**Mr Michael Marshall and Dr Catriona Mackay, The Lodge House,
Kingsmeadows, Peebles EH45 9HR
("the Homeowner")**

**James Gibb Residential Factors, 4 Atholl Place, Edinburgh EH3 8HT
("the Factor")**

Tribunal Members:

**Graham Harding (Legal Member)
Elaine Munroe (Ordinary Member)**

DECISION

The Factor has failed to carry out its property factor's duties.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 1.1bA, B, C, D, E and F, 2.1, 2.4, 3.3 and 7.1 of the Code

The decision is unanimous.

Introduction

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

Background

1. The Homeowner submitted an application to the Tribunal dated 17 December 2020. He claimed that the Factor was in breach of Sections 1.1bA, B, C, D, E and F, 2.1, 2.4, 3.3 and 7.1 of the Code and had also failed to carry out its property factors duties.

2. The Homeowner provided the Tribunal with substantial documentation to support his application.
3. By Notice of Acceptance dated 2 February 2021 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned to take place on 6 April 2021.
4. At the request of the Factor the hearing was postponed and a new hearing assigned for 5 May 2021.
5. The Factor submitted written representations by letter dated 29 March 2021.
6. The Homeowner submitted written representations by email on 12 and 24 March and 20 April 2021.

Hearing

7. A Hearing was held by teleconference on 5 May 2021. Mr Marshal and Dr Mackay attended personally. The Factor was represented by Ms Jeni Bole and Mr Nick Mayall.
8. The Tribunal confirmed with Mr Marshall that it had received the index attached to his most recent submissions and that the first item was his response to the Factor's written representations.
9. The Tribunal thanked both parties for their very comprehensive written representations and indicated that as a result there may be less need to hear much oral evidence.
10. The Tribunal queried with Mr Marshall if there had been any conveyance of the garden ground to the owners of Kingsmeadows House and the Homeowner by Granton Homes. Mr Marshall confirmed that there had not been any such conveyance. He explained that the owners of the flats at Kingsmeadows House held the garden ground within their development in common with the exception of the garden ground belonging to Flat 2 which was owned outright by the owners of Flat 2. The rest of the garden grounds outwith the Kingsmeadows House was, Mr Marshall said, still owned by Granton Homes.
11. The Tribunal then asked Ms Bole if she accepted that the garden ground not contained within the title of the owners of Kingsmeadows House was owned by a third party. Ms Bole submitted that the larger area of garden ground was common property in terms of the over-arching Deed of Conditions that affected the Homeowner's property and the twelve flats at Kingsmeadows House. She said it imposed burdens on the thirteen owners to maintain the garden ground and other common parts and was therefore common property.

12. The Tribunal queried if the Factor had sought legal advice in respect of this matter and Ms Bole confirmed it had not.
13. The Tribunal referred the parties to the Deed of Conditions by Granton Homes Limited registered on 29 January 2016. The Tribunal pointed out that the Deed had set up a Land Management Scheme under the Title Conditions (Scotland) Act 2003. The Tribunal explained these schemes were quite rare in practice. It set up an Owners Association under a Development Management Scheme and the Association was deemed to be a body corporate that could own property in its own name. However as far as the Tribunal was aware and as had been confirmed by Mr Marshall no transfer of ownership of any of the scheme property referred to in the Deed of Conditions had been transferred to the Owners Association by Granton Homes. The Tribunal therefore queried if Ms Bole and Mr Mayall accepted that the Homeowner was correct to make an application claiming that the Factor was in breach of its obligations in terms of Section 1.1b of the Code as the ground was not owned by the owners of Kingsmeadow House and the Homeowner but by a third party namely Granton Homes. Mr Mayall said that given the Tribunal's interpretation of the Deed of Conditions he accepted this was the case.
14. The Tribunal went on to suggest to Ms Bole that given that the Kingsmeadows Owners Association was a corporate body it was an entirely separate legal entity from the owners of Kingsmeadows House and queried therefore if it should not have an entirely separate Written Statement of Services. Again, Ms Bole and Mr Mayall accepted that this appeared to be correct.
15. The Tribunal confirmed with Mr Mayall that the Factor had been appointed by Granton Homes as the Scheme Manager with effect from May 2016. The Tribunal pointed out that the terms of the Development Management Scheme were statutory and not subject to amendment by the manager or the Owners Association except by a Deed of Variation and required to be followed to the letter of the law.
16. Mr Marshall advised the Tribunal that he had sought legal advice in connection with his concerns over the issues raised with the Factor. He said this had cost him £4069.20 although he had not submitted any invoice to the Tribunal. He said that by failing to provide a separate written Statement of Services for Kingsmeadows Owners Association the Factor was in breach of Section 1.1b of the Code. Breaches of sections 2.1 and 2.4 of the Code were bound up in the same way as the Development Management Scheme had not been followed. He went on to say that there had been a breach of Section 3.3 of the Code as the Owners Association finances had been mixed up with the Kingsmeadows House finances. With regards to the breach of Section 7.1 he said that over a lengthy period he had tried to engage with the Factor in an attempt to resolve the issues and had first queried matters two years ago. He said that he had then tried to escalate the complaint in March last year and there had been a video meeting with Ms Bole and Ms Kirkwood that had been followed up with a couple of emails but on 11 October 2020 he had been advised that there was no record of him having made a complaint. Mr

Marshall said he had pointed out that was not the case and had then started the complaints process again but it had not been resolved.

17. For the Factor Ms Bole and Mr Mayall advised they had nothing further to add in respect of the alleged breaches of Sections 1.1b, 2.1, 2.4 and 3.3 of the Code. With regards to Section 7.1 Ms Bole pointed out that by the time the complaint had been made in October 2020 the Homeowner had already started his application to the Tribunal and the Factor had decided it would be more appropriate to let matters be determined by the Tribunal. Ms Bole agreed that the previous complaint in March 2020 had not been treated as a formal complaint
18. Mr Marshall referred the Tribunal to his application and that he also complained that he believed the Factor was in breach of its property factor's duties. He explained that the title deeds provided that no trees in the grounds were to be chopped down but that Granton Homes in their planning permission were intending removing several trees. He said that in terms of the Development Management Scheme the manager was required to manage the development for the benefit of the members. The Factor was therefore required to write to Granton Homes to enforce the terms of the title deeds. Mr Marshall went on to say that the Property Factor Register had not been maintained as it did not reflect the position with regards to the involvement of Kingsmeadows Owners Association.

The Tribunal make the following findings in fact:

19. The Homeowner is the owner of The Lodge House, Kingsmeadows, Peebles ("the Property")
20. The Property is a house which along with the twelve flats of Kingsmeadows House, Peebles is subject to the provisions of a Deed of Conditions by Granton Homes Limited registered on 29 January 2016 in respect of ground at Kingsmeadows, Peebles (hereinafter "the Development").
21. The Factor performed the role of manager of the Development in terms of a Development Management Scheme constituted under The Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009.
22. The Factor is also the Factor of Kingsmeadows House, Peebles a development that consists of twelve flatted properties and is distinct from the Development.
23. The Development ground is owned by Granton Homes Limited.
24. The Homeowner and the owners of the twelve flats in Kingsmeadows House are by virtue of their ownership members of Kingsmeadows Owners Association.

25. Kingsmeadows Owners Association is a body corporate in terms of the Development Management Scheme constituted by the Deed of Conditions registered on 29 January 2016.
26. The Kingsmeadows Owners Association is a different legal entity from the owners of Kingsmeadows House.
27. The Homeowner had no right, title or interest to attend meetings or be otherwise involved in the Factor's dealings with the owners of Kingsmeadows House.
28. The Factor ought to have produced a Written Statement of Services for the Homeowner as a member of Kingsmeadows Owners Association but did not do so.
29. The Factor issued a single Written Statement of Services that combined its services provided to the owners of Kingsmeadows House together with Kingsmeadows Owners Association despite the Factor of Kingsmeadows House and manager of Kingsmeadows Owners Association being different roles and having different functions.
30. The duties of the manager are set out in Rule 8 of the Development Management Scheme ("the Scheme").
31. The calling of General Meetings of the Owners Association is set out in Rule 9 of the Scheme.
32. No meetings of Kingsmeadows Owners Association have taken place.
33. The Factor has failed to produce an annual budget for approval by the Owners Association.
34. Issues with regards to the management of the Scheme have mistakenly been combined with meetings of the owners of Kingsmeadows House
35. The current quorum for any meeting of the Owners Association is 7 members.
36. The scheme made provision for each owner to pay an initial deposit of £150.00.
37. As long as Granton Homes Limited owns any part of the Development the final decision on any matter affecting the Development will remain with Granton.
38. Planning permission in principle has been granted to Granton Homes Limited for further residential development within the Development.
39. The Development has not been updated on the Property Factor Register by the Factor.

40. Following a complaint being made by the Homeowner there was a meeting held between the Factor and the Homeowner on 9 March 2020 that did not resolve the complaint.
41. The Factor did not consider the complaint to be a formal complaint in terms of its complaints' procedure.
42. A formal complaint was made by the Homeowner on 18 November 2020.
43. The Factor did not respond to the complaint.

Reasons for Decision

44. It was apparent to the Tribunal that the Factor was operating under the misapprehension that because the owners of Kingsmeadows House and the Homeowner were liable for the maintenance of the garden ground and some other parts of the Development that it was common property when in reality it was owned by a third party, Granton Homes Limited. The Factor was further confused because it did not appreciate the legal difference between acting as factor for the individual owners of the twelve owners of Kingsmeadows House and acting as the manager under a Development Management Scheme for the Kingsmeadows Owners Association which is a body corporate that can own property in its own name and is therefore a distinct legal entity from the owners of Kingsmeadows House.
45. The Tribunal was therefore satisfied that the Factor was carrying out two entirely separate roles for two separate sets of clients at two separate developments. It therefore follows that the Factor was obliged to provide two separate Written Statements of Service each applicable to the particular development. The Factor failed to do so and the Tribunal was satisfied that the Factor was therefore in breach of all its obligations in terms of Section 1.1b of the Code.
46. The Tribunal did not conclude that the Factor set out to deliberately provide the Homeowner with false or misleading information. However, by confusing their authority to act and believing that a single Written Statement of Services that was applicable to both the owners of Kingsmeadows House and the Homeowner was appropriate the Factor was unintentionally providing the Homeowner with false and misleading information and therefore was in breach of Section 2.1 of the Code.
47. Rule 18 of the Development Management Scheme makes provision for the manager to prepare an annual budget for the approval of the Owners Association. It was accepted this had never happened. It was the Factor's position as detailed in an email from Angela Kirkwood to Mr Marshall dated 10 October 2020 that the terms of the Factor's appointment were as set out in the Written Statement of Services and the provision of financial accounts was not part of the Factor's core service but could be provided if a majority of homeowners were in favour. Ms Kirkwood went on to advise that the service would be outsourced and details of the cost would be provided. This position

adopted by the Factor fails to acknowledge the burden placed on the Factor by the terms of Rule 18. The Manager's duties under Rule 18 are not optional. They are mandatory unless and until they are amended by a Deed of Variation registered in the Land Register. It was not suggested to the Tribunal that any such deed existed. It follows therefore that any written Statement of Services should comply with the requirements of Rule 18. It also follows that the Factor must provide a draft budget each year and present it at a meeting of the Owners Association for approval. It was accepted by the parties that this had not happened and it follows that the Factor is in breach of Section 3.3 of the Code.

48. The Homeowner raised concerns regarding the confusion of Kingsmeadows House with Kingsmeadows Owners Association back in August 2019 and there were a number of email exchanges regarding the issue over a period of some seven months culminating in an email from the Homeowner to complaints@jamesgibb.co.uk dated 9 March 2020. That complaint was met with the parties meeting on Zoom on 5 May 2020 to attempt to resolve matters. Following the meeting there were further email exchanges between the parties ending with the Homeowner sending an email on 20 July 2020 advising that the dispute remained unresolved. No further progress was made on the complaint and in an email dated 20 September 2020 Ms Kirkwood advised the homeowner that the account was no longer in dispute and all charges remained valid and due for payment. This prompted the homeowner to initiate a fresh complaint in an email dated 7 October 2020. This complaint was not progressed by the Factor due to the Homeowner making an application to the Tribunal.
49. The Tribunal was somewhat at a loss to understand why the Factor considered that the Homeowner's complaint had been dealt with given the terms of the email of 20 July 2020. Although the Factor has very detailed complaints procedures it is clear that on this occasion it did not follow them. Furthermore, the Tribunal does not consider that an application to the First-tier Tribunal should prevent the Factor from dealing with a complaint as that might well in some cases avoid the need for a hearing or the imposition of a PFOE. The Tribunal having considered the history of the Homeowner's complaint and the documents submitted was satisfied that the Factor was in breach of Section 7.1 of the Code.
50. The Factor was operating under the misapprehension that the Development land was common property and not land owned by a third party. It had updated the Property Factor Register to show the Lodge House as a property factored by it. It did not show the Development Land as being under its management. The Tribunal was satisfied that this was an error. As indicated above the Factor has held meetings at which issues relating to Kingsmeadows House have been discussed but the Homeowner attended. Although perhaps not altogether pertinent to this application the Tribunal did not consider this to be good practice Importantly however there was a need for separate meetings of Kingsmeadows Owners Association to be held to discuss matters relevant to the Development and these did not happen at

least in proper form. The Tribunal was satisfied that with regard to these issues the Factor had failed to carry out its property factor's duties

51. The Homeowner suggested that the Factor was failing in its duties by not telling Granton Homes that it must not cut down any trees on the Development. This raises a number of interesting points. The first is that Rule 26.11 states that "No trees or shrubs will be cut down, lopped or removed from any part of the Development unless on the authority and under the instruction of the Manager." Secondly the Tribunal was of the view that it would be likely that a decision to remove a tree would normally lie with a majority decision of a meeting of the Owners Association. Thirdly it appears to the Tribunal that there is something of an anomaly in Rule 11 of the Scheme. Decisions of the Association are taken at quorate meetings by majority vote. Granton Homes has a right to attend meetings and has a vote for each unit whether completed or not for which there is planning permission. Granton homes no longer owns any units. At present there is outline planning permission but not full permission and therefore that calls into question whether at this point in time there is planning permission for any more units on the Development leaving Granton Homes potentially without any right to attend a meeting of the Association and vote. Matters are further complicated however by the terms of Rule 11.5 which gives Granton Homes an over-riding vote allowing it to have the final decision on any matter affecting the Development as long as it owns any part of the Development. It therefore appears to the Tribunal that notwithstanding a decision of the majority of owners Granton Homes could over-ride their wishes and advise the Factor for example to go ahead and cut down some trees. Therefore, whilst acknowledging that it was the Factor's duty in terms of Rule 8 to manage the Development for the benefit of the members there may be constraints placed on it by virtue of the powers reserved by Granton Homes and the Tribunal did not find that in this regard it had been shown at this stage the Factor had failed in its duties.
52. Although the Factor had not set out to deliberately or wilfully breach the Code or fail to carry out its property factor's duties it had over a prolonged period failed to comprehend a fundamental error in the way in which it was interpreting the title deeds burdening the Development. The Factors are a large company with a great deal of experience in factoring both land and residential properties. The Tribunal would expect them to be able to have recognised that they were dealing with two disparate sets of clients requiring different Written Statements of Services. Furthermore, when the obvious problems were pointed out to them in 2019 by the Homeowner matters could have been resolved relatively easily instead of which it would seem the Homeowner incurred legal expenses in excess of £4000.00. The Factor chose not to seek any substantive legal advice that might have clarified the issue. The Homeowner has incurred charges for the garden maintenance and other outgoings over their period of ownership without there being in place an appropriate Written Statement of Services. On the other hand, they have benefited from the Development being maintained in good order. It therefore would not be appropriate to make an order that involved the Factor repaying all the fees and charges made since the Factor assumed management of the

Development. Nonetheless the Homeowner has been subjected to numerous breaches of the Code and a failure of the Factor to carry out its property factor's duties over a long period of time. A problem that could have been resolved quite easily if the Factor had taken legal advice has cost the Homeowner a great deal of time and money. The Tribunal therefore considers it appropriate that in addition to making a Property Factor Enforcement order to deal with the issuing of a Written Statement of Services and compliance with the Development Management Scheme that a financial payment is also appropriate and that a sum of £2500.00 should be paid by the Factor to the Homeowner.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

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.

Graham Harding Legal Member and Chair

16 May 2021 Date