

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision on homeowner's application: Section 44 Tribunals (Scotland) Act 2014

Chamber Ref: HPC/PF/19/1621

Flat 8 112 Hillpark Grove, Edinburgh, EH4 7EF (" the property")

The Parties:

Michael Sturgeon, Flat 8 112 Hillpark Grove, Edinburgh, EH4 7EF ("the Homeowner")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD ("the Property Factor")

Tribunal Members:

**Josephine Bonnar (Legal Member)
Andrew Taylor (Ordinary Member)**

DECISION

The Tribunal determined that the Homeowner's application for a review is refused.

The decision of the Tribunal is unanimous

Introduction

In this decision 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"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 are referred to as "the Rules"

The Factor became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

This decision should be read in conjunction with the Tribunal's decision of 27 August 2019.

Background

1. By application dated 29 May 2019 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with Section 6.4 of the Code. The Homeowner also sought a determination on whether the Property Factor had failed to carry out its property factor duties as required by Section 17(1) of the Act. Specifically, the Homeowner stated that the Property Factor had failed to arrange maintenance for the development's common drainage system, failed to carry out appropriate checks on the common drainage system at the point of handover from the developer and failed to pursue the developer for the cost of rectifying defects in the drainage system on behalf of the Homeowners within the development.
2. On 11 June 2019 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a hearing. By letters dated 19 June 2019 both parties were notified that the application had been referred to a Tribunal and that a hearing would take place on 16 August 2019 at 10am at George House, 126 George Street, Edinburgh.
3. The Tribunal issued a direction requiring the Homeowner to provide a copy of his title deeds to the property. In response he lodged certain documents. In advance of the hearing the Property Factor lodged written representations.
4. The hearing took place before the Tribunal on 16 August 2019 at 10am. The Homeowner attended. The Property Factor was represented by Karen Jenkins, an employee of the company. She was accompanied by Sarah Wilson. The Tribunal heard evidence from the Homeowner and Ms Jenkins.
5. Following the hearing the Tribunal issued a decision to the parties. In terms of the decision the Tribunal determined that the Property Factor had not failed to carry out its property factor duties and had not failed to comply with the Code.
6. On 30 August 2019 the Homeowner made a request for a review of the decision of the Tribunal. On 13 September 2019 the Homeowner confirmed that the request had been copied to the Property factor, as required by Regulation 39(2)(a) of the Rules. On 27 September 2019 the Property Factor notified the Tribunal that they had no comments to make in relation to the request for a review as all matters had been addressed at the hearing. The Tribunal determined that the application could be considered without a hearing in terms of Regulation 18 of the Rules and proceeded to consider the request.

The Submissions

7. The Homeowners request for review is in four parts. They are as follows: -

- a. The Tribunal accepted the Factor's statement that the common drainage remained the responsibility of the developer until 2016. The deed of conditions define the common areas to include the drainage and "any other structures in or under the development". Common areas of the development have been managed by the Factor since at least 2004, therefore the maintenance of these areas, including the drainage, falls due upon the owners when these areas are handed over. Consequently, the Factor should have arranged maintenance as and when these areas were handed over.
 - b. The Tribunal accepted the Factors statement that they do not have an instruction to pursue the developer to rectify the drainage defects. The Factor has an obligation through their role as managing agents on behalf of owners to pursue the developer to rectify defective work. Moreover, the Property Factor Code of Conduct (section 6.9) states "you must pursue the contractor or supplier to remedy any defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor."
 - c. The Tribunal stated in their determination (paragraph 14) that there was no information forthcoming from the homeowner as to what kind of checks or investigations would have been appropriate at handover. My letter to the factor dated 27 March 2019, included in the case documents, noted that the factor could have inspected the inspection chambers for debris, could have asked for CCTV or documentary evidence of drain cleaning or flushing, could have asked the developer for details of the maintenance requirements, and should have asked for as-installed information, outlining the underground drainage systems, so that they could have identified the maintenance requirements.
 - d. It is noted in the decision (paragraph 13) that it was the homeowners position that the drainage system has been defective since installation and that I produced no evidence that the lack of maintenance had contributed to the defects. Both of these points are not true. At the hearing I stated that I did not consider the lack of maintenance contributed to all of the current defects and that some are clearly from the original installation. Furthermore, I submitted a report conducted by the NHBC (included in the case file) that concluded that the defects were due to "neglect and failure to carry out normal specific maintenance".
8. In their response to the request for a review the Property Factor advises that they have no additional comments to make beyond what was said during the hearing.

Reasons for decision

9. **First Review Point – Paragraph 7a above.** The Homeowner is correct when he says that the Tribunal accepted the evidence of the Property Factor that the developer retained responsibility for the drainage system until 2016. The Tribunal reached this conclusion based on the evidence presented to it. The

Tribunal was satisfied that such an arrangement is standard practice and the evidence about the developer flushing the system in 2014 reinforced this. No evidence was provided as to any arrangement for sectional completion or handover of identified sections of the drainage system. The Tribunal is also satisfied that nothing in the deed of conditions contradicts the Tribunal's conclusions. The Tribunal therefore refuses part 1 of the application for review.

10. **Second review point – Paragraph 7b above.** The Tribunal rejects the Homeowner's statement that the Property Factor "has an obligation" to pursue the developer. The Property Factor acts on behalf of the homeowners. It is the homeowners who are responsible for maintenance of the common areas, in terms of the deed of conditions. The Tribunal remains satisfied that the Property Factor cannot pursue the developer for the drainage defects without the authority of the homeowners, who will have to pay for any such action. The Tribunal is also satisfied, from the evidence presented at the hearing, that the Property Factor has already raised the issue with the developer, who has denied liability, and currently does not have an instruction from the homeowners to take the matter further. The homeowners have elected, as a group, to wait until the defects are rectified and then decide whether action is appropriate. With regard to Section 6.9 of the Code, the Tribunal notes that the Homeowner's application did not include a complaint under this section. Furthermore, it does not appear relevant as it concerns suppliers and contractors appointed by Property Factors. The Tribunal therefore refuses part 2 of the application for review.
11. **Third Review Point – Paragraph 7c above.** The Tribunal acknowledges the content of the letter referred to by the Homeowner in the request for review. However, this does not alter the decision of the Tribunal. The Tribunal reached its decision that the failure to carry out handover checks did not amount to a failure to carry out property factor duties on the grounds that neither the deed of condition nor the written statement of services require the Property Factor to engage in any handover procedure. Furthermore, no evidence was presented regarding the existence of any legal mechanism to prevent handover taking place when the development was complete, and the properties all sold. The Tribunal therefore refuses part 3 of the application for review.
12. **Fourth review point – Paragraph 7d above.** The Tribunal is firstly satisfied that when giving evidence at the hearing the Homeowner stated that the defects in the drainage system were wholly due to defective installation. The Tribunal acknowledges that the NHBC report does indeed attribute some of the problems to the lack of maintenance, although the Tribunal was not directed to this aspect of the report during the hearing. However, the Tribunal concluded that the lack of current routine maintenance arises from the delay in getting the defects rectified as it is not yet possible to establish what maintenance will be needed. The Tribunal is satisfied that the rectification of the defects has taken longer than it should. However, that was not the complaint before the Tribunal. The Tribunal concluded that the Property Factor took over the drainage in 2016 and since that date has been working

toward the rectification of the system, albeit slowly. The content of the NHBC work therefore does not affect the decision of the Tribunal. The Tribunal therefore refuses this part 4 of the application for review.

13. The Tribunal therefore determines that the application for review should be refused.

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.

Josephine Bonnar,
Legal Member

3 October 2019