

Housing and Property Chamber

First-tier Tribunal for Scotland



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/19/3399

**82/2 Harvesters Way, Wester Hailes, Edinburgh EH14 3JJ
("the Property")**

The Parties:-

**Miss Christian Marie Wood, 82/2 Harvesters Way, Wester Hailes, Edinburgh
EH14 3JJ
("the Homeowner")**

**Residential Management Group Limited, RMG House, Essex Road,
Hoddesdon, Hertfordshire EN11 0DR
("the Factor")**

Tribunal Members:

**Graham Harding (Legal Member)
Carol Jones (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 2.5, 6.1 and 7.2 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. By application dated 22 October 2019 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 2, 3, 5, 6 and 7 of the Code and was also failing to carry out its property factor's duties. The Homeowner

alleged that the Factor had charged for work that had not been done and that a charge had been made for work that should have been the subject of an insurance claim. The Homeowner also complained that the Factor had failed to respond to letters of complaint. The Homeowner further complained that there had been no consultation with owners prior to the appointment of the Factor.

2. The Homeowner subsequently confirmed by email dated 22 December 2019 that she believed the Factor was in breach of Section 2.1, 2.4 and 2.5 of the Code.
3. By Notice of Acceptance dated 16 March 2020 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.
4. A hearing was arranged to take place on 18 October 2020 by teleconference but was postponed at the request of the Homeowner. A further teleconference hearing was arranged to take place on 26 November 2020.
5. The Factor by email dated 12 November submitted written representations to the Tribunal.

Hearing

6. A hearing was held by teleconference on 26 November 2020. The Homeowner attended in Person. The Factor was represented by Ms Lisa Pieper and Mr Darren Gallagher.
7. The Tribunal raised two preliminary matters with the Homeowner. The first was in respect of the apportionment of costs between the Homeowner and Castle Rock Edinvar Housing Association for any repairs and maintenance of the property. The Homeowner confirmed that in terms of her agreement with the Housing Association that although she was a one quarter owner of the property, she was responsible for a 100% share of the cost of repairs and maintenance. The second preliminary point raised by the Tribunal was in respect of the procedure followed that led to the appointment of the Factor. The Homeowner explained that there had been no consultation with owners and that she had just received a letter from the Factor advising that they had been appointed as the new Factor to take over the management of the development. The Tribunal referred the Factor to its written submission in which it had said Rule 21.4 of the Deed of Conditions burdening the Development provided for the appointment of the Factor by Castle Rock Edinvar Housing Association ("the Association"). The Tribunal referred the parties to Rule 21.4 and the terms thereof which provided for the Association being entitled to appoint, terminate and appoint a new factor for a period of five years from the date of the sale of the first plot and continued until the plot proprietors acquired the right to appoint the Factor. The Tribunal queried when the first plot had been sold, how many of the plots on the development

were privately owned, how many were owned under shared ownership and how many were owned by the Association. Ms Pieper and Mr Gallagher said they did not have that information to hand but it could be obtained later. Ms Pieper said that the written submission had been prepared by the Factor's legal team and she did not know any more. The Tribunal referred the parties to Rule 21.1(a) and (e) which stated that at a meeting of plot proprietors the proprietors may decide to appoint or dismiss a Factor. Mr Gallagher pointed out that the previous factor would have been involved in dealing with the calling of a meeting of owners if one had taken place.

Summary of submissions

Section 2.1 of the Code

8. The Homeowner explained that there had been a problem with the cleaning of the bins store at her block. It serviced nine flats and there was a charge of £90.00 for cleaning applied by the Factor. The Homeowner submitted that the cleaning had not been done and had been carried out by herself. She referred the Tribunal to the photographs submitted with her application. The Homeowner went on to say that there had been a problem with rats as a result of the condition of the bin store. She said that neighbours had helped to clean up the bin store. She suggested that it was unnecessary to have outside contractors to do the work as the owners were having to do it themselves.
9. For the Factor Ms Pieper submitted that it was accepted that the bin stores did end up in a mess and that there was an issue with one clean and as a result the Factor had credited £90.00 back into the communal pot. Ms Pieper went on to say that the Factor had not provided any false or misleading information. She submitted the work at the bin store had been carried out but following the Homeowner's complaint the Factor had as a goodwill gesture refunded the charge. She further submitted that she was unable to obtain proof from the cleaning company.
10. For her part the Homeowner accepted the charge had been refunded but said that the Factor had never acknowledged that she had cleaned the bin store and it had taken them six months to reply. She remained of the view that there had been falsification of the bill sent by the Factor.

Section 2.4 of the Code

11. The Homeowner submitted that she had been asking for years how much needed to be spent by the Factor before they needed to seek approval from Homeowners. She said she had never been provided with an answer. She referred the Tribunal to a roof repair at a cost of £583.00 and submitted that this could have been claimed on insurance.
12. In response, Ms Pieper referred the Tribunal to the Factor's written representations which she said set out the Factor's position.

Section 2.5 of the Code

13. The Homeowner said that the Factor had not responded to complaints she had made first in February or March 2019 and further correspondence in July 2019. She said that she had then been advised in October 2019 that the file had been dealt with and closed but she had never received an answer. She said that initially the complaints had been by telephone then by letter in July and subsequently by email. The Homeowner said that following a telephone call in October 2019 she was advised in a subsequent call in November 2019 that the case would be opened again but she did not get a further call back.
14. Ms Pieper referred the Tribunal to the Factor's written representations and submitted that following the Homeowner's correspondence in June 2019 and further correspondence in July 2019 the complaint was dealt with by the then property manager but his replies were no longer accessible and the case was closed in October 2019. It was suggested that the property manager had corresponded with the Homeowner on 1 and 15 August 2019.
15. The Homeowner said she had no recollection of any correspondence but thought there may have been something received on 28 August but she had no substantive response to her complaints until February 2020.
16. For the Factor Ms Pieper acknowledged there had been a delay in dealing with the complaint due to a change of property manager and the Homeowner's initial written complaint of 29 July 2019 went unanswered. She submitted however that in the circumstances a period of three months to deal with the Homeowner's complaint on 1 December was reasonable.
17. The Homeowner explained that the issue had caused her a lot of stress and had affected her wellbeing. She explained that given her job as a nurse she was subject to burn out but that she was stubborn and not prepared to give up.

Section 3 of the Code

18. The Homeowner explained that she found the way in which the share of the costs incurred were calculated was confusing. She explained that for some charges she was liable for a 0.596 % share while for others it was 1.205% or 12.5 % or 8.334%. She felt that it was easy for the Factor to fiddle the figures.
19. For the Factor Ms Pieper submitted that the proportions would be shown in the Development schedule. She said that a new Schedule would have been sent to the Homeowner last year. The Homeowner said she had not received this. Ms Pieper referred the Tribunal to the review of charges that had been carried out on the Homeowner's account in September 2020 by the property manager that had resulted in the account being credited with £39.64. as a result of some charges being applied incorrectly to the incorrect block or common area. The property manager had also asked for the cleaners to check the bin stores on every stair cleaning visit.

20. For her part the Homeowner submitted that the errors on the account ought to have been addressed by the Factor's Operations Director Justin Herbert at the time of Stage 3 of her complaint in February 2020.

Section 5 of the Code

21. The Tribunal noted that the Homeowner had submitted with her written representations a copy of the Zurich Municipal policy provided to her by the Factor. It was accepted by the Homeowner that the property was insured and that she had been sent a copy of the policy as an attachment to Ms Pieper's email to her of 6 December 2019.

Section 6 of the Code

22. The Homeowner explained that she thought if the Factor instructed someone else to carry out work then it should be inspected to see it had been done properly.

23. Ms Pieper explained that the Factor would not routinely carry out inspections following work being done as they had contractors that they regularly used and could rely on. They would only go back if they received complaints.

24. The Homeowner advised the Tribunal that there had been an issue with courtyard lights remaining on all the time and now did not come on at all.

25. Ms Pieper explained that arrangements had been made for the work to be done but there had been issues around contractors' availability.

Section 7 of the code

26. It was accepted that the parties' earlier comments with regards to Section 2.5 of the Code had addressed this aspect of the Homeowner's complaint.

Property Factor's Duties

27. The Homeowner submitted that the Factor continually had given excuses for its failures and that had led to her having less faith in the system if they did not carry out their duties. The Homeowner said that she had asked the Factor to provide her with an estimate of how much she needed to pay each month and they had not provided an answer. She said she had set up her own figure of £50.00 per month. She considered the Factor was undertaking financial abuse and queried why a company should be paid for not doing their job. She said she was currently in arrears with her account and yet she was a responsible person. Some people had not paid a penny since they had moved in to the development.

28. For the Factor Ms Pieper said that she understood where the Homeowner was coming from and that the Factor would try to keep costs to a minimum. She explained that bills were issued quarterly in arrears and did go up and down as charges varied. She said it was necessary to keep an eye on the

balance and to have a payment plan. She acknowledged there was an issue with debt on the development.

Final Submissions

29. The Homeowner said that once the pandemic was over, she wanted to have a meeting of owners to take place and possibly to have a change of factors following discussions. She said she would also like her arrears to be waived and that it would be fair to ask for that.
30. For the Factor Mr Gallagher explained he had started work in the middle of January and had it not been for the Covid pandemic he would have arranged a meeting. He said he would be happy to meet with any resident and it was frustrating for him but he wanted to do his best and he did take pride in his work.
31. Following the hearing the Tribunal issued a direction requiring the Factor to provide as at the date of the decision to appoint the Factor was taken:
 1. Confirmation of the total number of properties in the development of which the Property forms part.
 2. The number of properties in the development wholly owned by Castle Rock Edinvar Housing Association ("the Association").
 3. The number of properties owned in co-ownership between the Association and individuals.
 4. The number of properties wholly owned by individuals.
 5. The date and place of any meeting held of owners to discuss the termination of the previous Factor's appointment and the appointment of a new Factor.
 6. If no such meeting took place a written explanation as to why such a meeting was not necessary.

32. By emails dated 11 and 16 March 2021 the Factor responded as follows:

"1. There are a total of 168 properties in the development of which the Property forms part.
2. Castle Rock Edinvar hold 78 properties.
3. RMG Scotland do not hold information on the number of co-ownership Homeowners.
4. From the above position on point 4, RMG Scotland are unable to say how many properties are wholly owned by individuals.
5. Colleagues in RMG Scotland have not been able locate details of a meeting in 2018.
6. Colleagues in RMG Scotland will provide further details on why such a meeting was not necessary."

And

"Further to my email of last week, the following information may be of help to the Tribunal with regard to points 5 and 6.

The Deed of Conditions, attached again for ease, was registered by Castle Rock Edinvar Housing Association Limited ("Castle Rock"). In Part 1, Interpretation, the "Association" is defined as Castle Rock. By way of Rule 24,

Castle Rock created a manager burden in favour of the Association, that is itself. At Rule 24.2, the Association or its nominees may make decisions in respect of the matters specified in Rule 21. Castle Rock appointed Places for People Scotland Ltd to undertake the role of manager and to carry out the factoring duties on its behalf. Places for People Scotland Ltd is a subsidiary of Castle Rock. In March 2018, Castle Rock transferred the factoring role to Residential Management Group Scotland Limited ("RMG Scotland"). Castle Rock therefore continue to hold the manager burden but have appointed RMG Scotland as its nominee. There was therefore no meeting of the plot proprietors."

The Tribunal make the following findings in fact and law:

33. The Homeowner is a one quarter owner of the property in co-ownership with Castle Rock Edinvar Housing Association Limited
34. The Property is a flat within the 168 properties comprising the development at Harvesters Way Wester Hailes, Edinburgh (hereinafter "the Development").
35. The Factor performed the role of the property factor of the Development.
36. The Factor was appointed by Castle Rock Edinvar Housing Association Limited ("the Association") without consultation with other Homeowners in 2018.
37. Rule 24.1 of the Deed of Conditions registered 8 May 2008 created a manager burden in favour of the Association that applied:-
 - (a) For the period of five years beginning with the date on which the deed was registered; or
 - (b) For the period during which the Association was proprietor of at least one plot or part of the Development

Whichever was the shorter

38. The manager burden in favour of the Association ended on 8 May 2013.
39. The Factor has been appointed without a meeting of plot proprietors being held in accordance with rules 18 and 21.1(a) of the Deed of Conditions.
40. Following a complaint from the Homeowner regarding the failure of contractors to clean the bin store at the property the Factor refunded the cleaning charge to the Homeowner's account.
41. The Deed of Conditions at Rule 21.3 provides that the Factor shall convene a meeting of proprietors where the anticipated expenditure for any item of work is in excess of £2500.00 exclusive of VAT per plot.

42. The Factor closed the Homeowner's complaint in October 2019 without proper communication with the Homeowner and after a substantial delay in responding to the Homeowner's initial complaints.
43. After the Homeowner further complained on 1 December 2019 it took until 28 February 2020 for the Factor to issue a final response to the complaint.
44. A review of the Homeowners account by the Factor resulted in identifying overcharges amounting to £39.64.
45. The property is insured by the Factor through a policy with Zurich Municipal.
46. A problem with the courtyard lighting has been resolved.
47. The Homeowner has been subjected to stress that has affected her wellbeing as a result of failures on the part of the Factor.

Reasons for Decision

48. The Tribunal was concerned that according to the Homeowner there had been no consultation prior to the appointment of the Factor in 2018. As it appeared that the Factor's representatives had scant information on this point at the hearing the Tribunal issued a Direction following the hearing requiring the Factor to provide further information. Unfortunately for reasons that were not disclosed it took the Factor some three months to comply with the Tribunal's request and even then, the information provided was not wholly complete. It did appear however of the 168 properties in the development 90 are in private ownership. An unknown number of that number will be in co-ownership.
49. The Factor relied on the terms of Rule 24.1 of the Deed of Conditions as being authority for the Association to appoint whoever it wished as Factor without either consulting with other owners or holding a meeting in terms of rule 18. In so doing the Tribunal is satisfied that the Association was acting *ultra vires* as Rule 24.1 is clearly time limited and the maximum period of time that the manager burden in favour of the Association applied was five years beginning on the date on which the Deed of Conditions was registered namely 8 May 2008. It therefore follows that the Factor was acting without the authority of the owners in that it had not been appointed in accordance with the provisions of Rules 18 and 21. Rule 21.4 of the Deed of Conditions provided for the Factor being appointed at any time after completion of any of the dwellinghouses within the Development and would continue for a period of five years following the sale of the first plot. The Factor was to remain in office until removed by the plot proprietors. Provision was made within the Rule for the Association to appoint a substitute Factor within the five-year period. The Tribunal was not provided with any evidence as to when the first plot was sold but understood it to have been significantly more than five years prior to the appointment of the current proprietors. The Tribunal is unable to say whether the Factor was or was not acting in good faith but given that the terms of Rule 24.1 are quite obvious it should have been apparent both to the Association

and the Factor that the manager burden provision had long expired and therefore prior to a new Factor being appointed there ought to have been a meeting of all owners arranged in terms of Rule 18.

50. It logically follows that if the Factor is acting without authority it has no right to charge the Homeowner any management fees and indeed raises a question as to whether it had any right to incur any expenditure at all on behalf of the Homeowner.
51. It appeared to the Tribunal that there was an ongoing issue with regards to the cleaning of the bin store. The Tribunal had no reason to doubt the evidence of the Homeowner that she and a neighbour were largely responsible for keeping the bin store clean. It did appear however that the Factor had taken some steps to try to remedy the situation. Although there may be some dispute as to whether or not the bin store was cleaned on the day the Factor said it had been the Tribunal was not persuaded that the Factor was in breach of Section 2.1 of the Code.
52. With regards to Section 2.4 of the Code the Tribunal was satisfied there was no breach in that the repair to the roof referred to by the Homeowner would not have been covered by insurance and the authorised expenditure limit is referred to in the Factor's Written Statement of Services and in the Deed of Conditions.
53. The Tribunal was concerned at the delay in providing a substantive response to the Homeowner's complaints some of which such as the crack in the wall referred to in the written submissions had still not been addressed by the time of the hearing. Overall, the Factor's communication with the Homeowner throughout 2019 had been unacceptable and the Tribunal was satisfied that there had been a breach of Section 2.5 of the Code. The Tribunal also thought that the Factor's complaints procedure was unnecessarily cumbersome and thought should be given to streamlining the process.
54. Although the Factor did not provide the Tribunal with a copy of the Development Schedule it had no reason to doubt that the Homeowner had been provided with a copy and that would have provided an explanation for the various percentage calculations attributable to the Homeowner's property. The Tribunal did have some concerns that there had been errors in the charges made on the Homeowner's account but given that these had been addressed by the Factor the Tribunal on balance determined that there had not been a breach of Section 3 of the Code.
55. As indicated above it did not appear that the Factor was in breach of Section 5 of the Code. The Tribunal was satisfied from the documentary evidence provided that there was insurance in place and was also satisfied that the repair referred to by the Homeowner would not have been the subject of an insurance claim.
56. The Tribunal was satisfied that there had been a failure on the part of the Factor to communicate with the Homeowner as regards the ongoing problem

with the courtyard lighting. It is a requirement that the Factor keep owners informed of progress of work and provide timescales for completion. Although the Covid pandemic no doubt made repairs more difficult that in the Tribunal's view made it even more important to maintain good lines of communication with the Homeowner. The Tribunal was therefore satisfied that there had been a breach of Section 6.1 of the Code.

57. The Homeowner's initial complaint was closed without the Homeowner being properly advised and a subsequent complaint raised by the Homeowner on 1 December 2019 was disposed of at Stage 4 of the Factor's complaints procedure by its Compliance Director Richard Price on 28 February 2020. The Factor's procedures provide for this stage to be reached potentially within 40 working days. As indicated above the Tribunal considered the Factor's complaints procedure to be unnecessarily cumbersome. Furthermore, the Stage 4 response of 28 February did not provide details of how the Homeowner could apply to the Housing and Property Chamber. The Tribunal was therefore satisfied that the Factor was in breach of Section 7.2 of the Code.
58. Given that the Factor was not appointed in accordance with the terms of the Deed of Conditions it follows that it was not complying with its property factor's duties.
59. Given the Factor's breaches of the Code and its failure to comply with its property factor's duties and the fact that its authority to act was improperly obtained and given that the Homeowner has been subjected to a substantial amount of stress the Tribunal considers it appropriate that the Factor makes a payment to the Homeowner in terms of Section 20(1)(b) of the 2011 Act in the sum of £500.00.

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

26 March 2021 Date

