

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/19/1435

**482-490 Gilmerton Road, Edinburgh EH17 7SA
("the Property")**

The Parties:-

**Mr Paul Brown, 488/3 Gilmerton Road, Edinburgh EH 17 7SA
("the Homeowner")**

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

Tribunal Members:

**Graham Harding (Legal Member)
Andrew Murray (Ordinary Member)**

DECISION

The Factor has not failed to comply with its duties under section 14(5) of the 2011 Act.

On this occasion the Tribunal does not have jurisdiction to determine whether or not the Factor has failed to carry out its property Factor's duties.

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"

The Factor became a Registered Property Factor on 23 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application dated 14 May 2019 the Homeowner complained to the Tribunal that the Factor was in breach of Section 6.9 of the Code and that the Factor had failed to carry out its property Factor's duties.
2. By Notice of Acceptance dated 19 June 2019 a legal member of the Tribunal accepted the application and a hearing was assigned.
3. Following intimation of the hearing the Factor submitted written representations to the Tribunal by email dated 9 August 2019. The Homeowner submitted further written representations by email dated 12 August 2019
4. A Hearing was held at George House, Edinburgh on 15 August 2019. It was attended by the Homeowner personally and by Ms Angela Kirkwood, Operations director, Ms Michelle Blake Operations Manager and Ms Jeni Bole, Legal Compliance Manager on behalf of the Factor.
5. With the agreement of the parties the hearing was adjourned to allow the remedial works to be completed and a further hearing assigned.
6. Further hearings were postponed at the request of the parties and as a result of the Covid-19 outbreak and a further hearing was eventually assigned to take place on 4 November 2020.
7. By email dated 27 August and 24 September 2020 the Homeowner submitted further written representations to the Tribunal.
8. By email dated 1 September 2020 the Factor submitted written representations to the Tribunal.

The Hearing of 15 August 2019

9. The Tribunal heard from both parties and it was not disputed that remedial works were required. It was noted by the Tribunal that there had been a recent offer by the Factor to meet the cost of providing access for the work to be done and it had previously been confirmed that the painters, Thistle Decorators, would carry out the painting at no cost to the Homeowners. The only cost to Homeowners would therefore be for the joinery work.
10. It was submitted on the part of the Homeowner that prior to the contractors carrying out repainting at the development some of the soffits should have been sanded down and areas where there had been delamination or rot should have been replaced. The Factor's representatives did not dispute that this was the case. The Homeowner submitted that prior to the work being instructed the area should have been inspected and during the course of the work being carried out there ought to have been clear communication of any issues identified.

11. For the Factor Ms Bole submitted that following a complaint by the Homeowner a rectification programme was being implemented. She said that no high-level inspection had been done prior to the original work commencing. The contractor had been instructed to report back if there were issues and they had failed to do so. As a result, they were now doing something to rectify the problem.
12. The Homeowner submitted that it should have been apparent that there had been delamination even without a high-level inspection. Ms Kirkwood did not agree.
13. The Homeowner explained that the owners had agreed to having the windows and doors at the development painted and everything had been done badly. The Homeowner said he had asked the Factor for a clear plan identifying the problem along with a clear indication of the cost. He submitted that following his complaint being upheld by the Factor he had for ten months been asking for proposals that he could take back to the owners committee. He explained the owners had already paid for the work to be done and he wanted a clear explanation and that the Factor should do everything possible to mitigate the owners' loss. He said that any remedial works required the owners' authorisation but instead the Factor had gone ahead and issued a bill to owners without any amelioration and that had resulted in him telling the owners one thing and the Factor another. Reference was made to an elevation plan (Production 10.1) marked with "x" or "/" with those areas marked "/" being sanded down and painted by the contractors at no cost to the owners. The Factor had also agreed to meet the cost of hiring access equipment in the sum of £660.00 with the owners meeting the remaining joinery costs. Ms Bole did not accept there had been undue delay and said that within 22 days the Factor had obtained six quotes from three different contractors. She said any delay in completing the works was due to the weather as it required to be carried out in spring or summer. The proposals were sent to the owners' committee in March and a request for funding in advance was subsequently made.
14. The Homeowner submitted that he was still waiting for the elevation plan and this had been the subject of a series of emails. Ms Bole submitted that matters had been dealt with in a professional manner. The Factor had liaised with the joiner, painter and AkzoNobel. She said that the Factor's property manager had significant experience and was very capable and the issue had been dealt with properly. For his part the Homeowner referred the Tribunal to The Stables Residents' committee AGM Minutes (Production 8.2) which made mention of the owners having to pay £30.00 for access equipment and labour to complete the external painting. Ms Kirkwood referred the Tribunal to a letter to the Homeowner dated 8 April 2019 (Production 8.1) and submitted the Minutes were not clear as it had been intended to consult with the owners in the first instance. For his part the Homeowner said that it had definitely not been agreed at the AGM that Watson and Gordon would complete the work. Ms Bole confirmed that there had been an error in the funding call sent to owners which had been

£8.00 per property too high. The proprietors had been notified and the Factor had received funds from over 50% for all but one block. The impediment at the moment had been an email indicating that the Homeowner was awaiting the outcome of the application before the Tribunal.

The Hearing on 4 November 2020

15. A hearing was held by teleconference on 4 November 2020. The Homeowner attended personally. The Factor was represented by Ms Jeni Bole, Ms Angela Kirkwood and Mr David Reid.
16. The Homeowner submitted that the Factor was dealing with the issue around the outstanding remedial works in a chaotic manner and was showing no desire to pursue the contractor for their failures. The remedial works had still not been completed.
17. Mr Reid referred the Tribunal to the Factor's latest submissions lodged on 2 November 2020 and it became apparent that the Tribunal had not received these. The Factor arranged to have the submissions emailed to the Tribunal during the course of the hearing.
18. The Homeowner submitted there were five issues outstanding namely for the Factor:-
 - (i) To consult and produce and agree a clear diagram showing which parts of the soffits were to be replaced.
 - (ii) To have a deadline for completion of the work.
 - (iii) To consult with and keep the owners informed.
 - (iv) To accept liability.
 - (v) To explain why the works were not completed on the previous occasion.
19. Mr Reid submitted that there was a clear diagram; the Homeowner had a problem with regards to the surveyor employed by the Factor. The Homeowner had to play an active part and the owners had to pay for some of the remedial works. He also said it would be open to the owners to employ their own surveyor if they were not satisfied with the report prepared by the Factor's surveyor. Mr Reid went on to say that matters had been complicated by the Covid-19 outbreak and trying to bring contractors back when they were not going to get paid for doing the work. He did accept that the development manager could have communicated better with the Homeowner. Mr Reid said that providing a deadline for completion of the work was a priority and despite a recent disagreement with the Homeowner he was keen to conclude matters. The problem was that the development was of an age where a decision had to be made to replace some of the timber. The Factor had agreed to meet some of the cost at no expense to owners but at some point it had to end.

20. The Homeowner confirmed that the Factor had made an effort to sort out the issue. He went on to say that there were major defects in the buildings and he had supplied details to the Factor and produced a number of diagrams. The Factor's surveyor had produced two different drawings and there had been no version control. Any remedial work would now have to wait until spring 2021.
21. Mr Reid confirmed that the Factor had produced a diagram showing what was proposed but if the Residents Association was not happy with that then it could get its own professional advice. The Homeowner spoke of walking round the development with the property manager and the surveyor and showing the large holes in the soffits and the delamination. Mr Reid suggested that these issues went beyond the original scope of the remedial work as the timber was failing. The Homeowner submitted the timber should not have been subject to further deterioration if it had been properly treated at the outset and it was not the Factor's intention to replace all the failing timber at no cost to the owners. Mr Reid said that the owners should agree to replace the timbers as the Factor was already way beyond replacing what had been the original issue and was not prepared to make it an endless project. The Homeowner reiterated that the original specification determined the scope of the contract and determined what was to be replaced. The owners had paid to have sections of the wood replaced and anything further was the Factor's responsibility.
22. Ms Bole explained to the Tribunal the steps the Factor had taken to remedy the initial defects and the subsequent appointment of F3 Surveyors when that had been insufficient. The Homeowner submitted that the surveyors report had not taken account of repairs to blocks 488-490 in their original report and that the soffits there needed replaced entirely. He said that there were photographs to show that the contractors had not followed the agreed specification. There were gaping holes and plywood swollen to 1.5 inches and completely rotten. He said he could not understand how anyone could paint it. For the Factor Mr Reid referred the Tribunal to the Factor's latest written submissions and in particular the offer to resolve all remaining issues set out in Appendix 6.
23. Having heard from both parties and acknowledging that discussions regarding settlement were ongoing the Tribunal determined that it would further adjourn the hearing to allow the parties time to reach a possible agreement on the completion of outstanding works or failing agreement for the parties to lodge, within one month, final written submissions setting out their arguments and further details of their case to allow the Tribunal to determine the application. In the event of an agreement being reached between the parties the Tribunal determined that the hearing would be adjourned until the Spring of 2021. In the event that no agreement is reached the Tribunal will issue its decision once it has received the further written submissions from the parties without the need for a further hearing.

The Tribunal make the following findings in fact:

24. The Homeowner is the owner of 488/3 Gilmerton Road, Edinburgh ("the Property")
25. The Property is a flat within The Stables 482-490 Gilmerton Road, Edinburgh (hereinafter "the Development").
26. The Factor performed the role of the property Factor of the Development.
27. The Factor prepared a Scope of Works for external painting at the Development in June 2017.
28. A specification for the works was prepared by AkzoNobel and dated 13 July 2017.
29. The Factor obtained quotes from three contractors.
30. The external painting works were undertaken by Thistle Decorators in May 2018.
31. Following completion of the works and a complaint by the Homeowner a report was obtained by the Factor from AkzoNobel.
32. The report stated that as a result of delay in maintenance of the fascias and soffits a number of sections had weathered and broken down and consideration should be given to replacing parts displaying heavy failure. The report also commented on the paintwork at the doors of the Development and made recommendations for repainting.
33. A complaint by the Homeowner to the Factor in 2018 was upheld by the Factor.
34. An agreement was reached with the Homeowner and the other Development owners and the Factor that another contractor Watson & Gordon would carry out the repair/replacement of sections of the fascia boards plus sanding down and painting.
35. The cost to the Development owners was restricted to £4280.00.
36. The Factor agreed to cover the cost of the hire of access equipment.
37. Remedial works were carried out at the Development in October 2019 by Watson & Gordon.
38. A subsequent report by F3 surveyors confirmed areas of paint was flaking off and areas where there was still rotten delaminated wood.

39. The Factor arranged that Thistle Decorators returned and repainted all the fascia boards at no charge to the owners in July 2020.
40. Further remedial works have been identified by F3 surveyors.
41. The Factor has offered to meet the cost of all outstanding issues at no cost to owners.

Reasons for Decision

Section 6.9 of the Code

42. The Tribunal carefully considered not only the parties' oral submissions on two occasions but also the not inconsiderable written representations. It was apparent that the Factor acknowledged the Homeowner's concerns regarding the standard of the external painting work carried out at the Development and from all the submissions it seemed that significant steps have been taken by the Factor to hold the original contractor to account at least cost to the Homeowner.
43. Had a proper survey of the fascia boards been instructed prior to the initial work being tendered then it is likely that it would have been apparent that possibly as a result of previously delayed maintenance rot would have been apparent and there would have been a recommendation to replace portions of the timber but at additional cost to the owners.
44. The Factor cannot be faulted for its initial attempts to instruct alternative contractors to carry out remedial works and have the original contractor meet the additional painting cost. At that time it was reasonable that the owners meet the cost of replacing the timber as this was a cost they would have had to meet had the work been carried out properly in the first instance. It was also appropriate that as a goodwill gesture the Factor meet the cost of the hire of the access equipment.
45. The Tribunal in reaching its decision has to consider the actions of the Factor prior to the application being submitted in determining whether there has been a breach of the Code. Any subsequent actions may impact on such measures the Tribunal consider appropriate if satisfied that there has been a breach of the Code but not in determining whether or not there has been such a breach.
46. It cannot be said that the Factor has "failed to pursue the contractor or supplier to remedy the defects in any inadequate work or service provided." It is quite apparent that the Factor has endeavoured to have the inadequate works remedied and at no cost to the Homeowner other than the initial additional cost of replacement timber. Furthermore, this is not a situation where it would be appropriate to obtain a collateral warranty from the contractor.

47. Although there may have been delays from the time the defects were identified to the initial attempts to have them remedied that in part was due to the work needing to be completed during the better weather and also because of the need for the Factor to obtain funds from the owners. Subsequent delays can in part be attributed to the Covid -19 outbreak and the difficulties the parties have had in reaching an agreement on a final resolution of the issues.

48. Having carefully considered all of the submissions and written representations the Tribunal was satisfied that the Factor was not in breach of this section of the Code.

Failure to Carry Out its Property Factor's Duties

49. The first point to note is that Section 17(3) of the 2011 Act states:

17 [F1Application to the First-tier Tribunal]

(1) A Homeowner may apply to the [F2First-tier Tribunal] for determination of whether a property Factor has failed—

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

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

(2) An application under subsection (1) must set out the Homeowner's reasons for considering that the property Factor has failed to carry out the property Factor's duties or, as the case maybe, to comply with the section 14 duty.

(3) No such application may be made unless—

(a) the Homeowner has notified the property Factor in writing as to why the Homeowner considers that the property Factor has failed to carry out the property Factor's duties or, as the case maybe, to comply with the section 14 duty, and

(b) the property Factor has refused to resolve, or unreasonably delayed in attempting to resolve, the Homeowner's concern.

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

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

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

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

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

(ii)available for use by the Homeowner.

In his application the Homeowner in respect of the Factor's alleged failure to carry out its property factor's duties states "Please see attached" but then does not to any extent specify in what way the Factor has failed to carry out its duties. Furthermore Section 17((3) of the 2011 Act requires the Homeowner to notify the Factor in writing as to why it has failed to carry out its property factor's duties or as the case may be to comply with the section 14 duty. The Homeowner did intimate in his correspondence of 22 May 2019 to the Factor that he believed the Factor was in breach of Section 6.9 of the Code but the Tribunal could not find in the written representations any such intimation of a failure to carry out its property factor's duties.

50. That then poses a jurisdictional problem for the Tribunal as Section 17(3) is mandatory in its terms. Although the point was not specifically raised by the Factor, the Tribunal noted that in its written representations submitted on 9 August 2019 the Factor only addressed the alleged breach of Section 6.9 of the Code and made no mention of property factor's duties. Taking everything into account namely: a) the lack of specific information from the Homeowner as regards the duties or legal responsibilities which he believed had not been carried out by the Factor; b) the failure to notify the Factor in writing of his reasons for considering why the Factor had failed to carry out its property factor's duties and c) the fact that neither party has chosen to make representations to the Tribunal with regards to any specific failure the Tribunal has determined that on this occasion it does not have jurisdiction to make a determination with regards to this part of the Homeowner's application.
51. The Tribunal has noted that the issues surrounding the Homeowner's complaint have been ongoing for a considerable length of time and had the Tribunal had jurisdiction to consider the Homeowner's application as regards the property factor's duties there may have been questions for the Factor to answer with regards to the time it has taken to resolve matters although the Tribunal would have had to have taken into account the effect that the Covid-19 outbreak may have had in addition to any constraints that the weather may have imposed. It is however in both parties' best interests that matters are finally resolved as soon as possible and the Tribunal would hope that any remaining differences can be agreed and the remedial works completed to everyone's satisfaction in early course.

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

10 January 20121 Date