

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/18/0336

**Argyll Block, Ardleighton Court, Dunblane FK15 0NE
("the Property")**

The Parties:-

**Mr John G. Connell, 17 Ardleighton Court, Dunblane FK15 0NE
("the Homeowner")**

**Hacking and Paterson Management Services, 1 Newton Terrace, Glasgow G3
7PL
("the Factor")**

Tribunal Members:

**Graham Harding (Legal Member)
Helen Barclay (Ordinary Member)**

DECISION

The Factor has not failed to carry out its property factor's duties.

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

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 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By application dated 7 February 2018 the Homeowner complained to the Tribunal that the Factor had failed in its property factor duties as a result of concerns he had regarding the maintenance of the lift at the property.
2. The Homeowner's complaint was in two parts, firstly the loss of the rolling maintenance contract and a failure to administer necessary maintenance in respect of the lift and secondly the disconnection of the emergency telephone line for a period in excess of 32 months.
3. Following initial correspondence between the Homeowner and the Tribunal the Homeowner intimated his complaint to the Factor by correspondence dated 27 February 2018.
4. The Factor responded to that correspondence by denying it had breached its duties in respect of its administration of the lift contract and in respect of the second part of the complaint accepted there had been failings on its part for which it had apologised and that checks were in place to ensure that the matter would be monitored in the future.
5. As a result of the Factor's representations on 4 April 2018 the Tribunal advised the Homeowner that it considered the matter had been resolved and rejected the application.
6. By letter dated 30 April the Homeowner requested a review of that decision. Although that request was out of time the Tribunal at its own instance decided to review its decision.
7. Following written submissions from the parties the Tribunal decided that whilst it had appeared that the Homeowner had accepted in correspondence that the first part of his complaint had been dealt with by the Factor that may not in fact have been the case. Furthermore, in respect of the second part of the complaint it appeared there might also be outstanding matters there also with regards to delays in responding to correspondence and a request for a document. The Tribunal therefore decided to allow the application to proceed in terms of a Minute of Decision dated 11 June 2018.
8. A hearing was fixed to take place on 22 August 2018 at STEP Stirling, Stirling Enterprise Park, John Player Building Stirling.
9. Prior to the hearing by correspondence dated 24 July 2018 the Factor requested that the Tribunal issue a Direction to the Homeowner to set out all outstanding complaints in a single, logical and coherent format. In light of correspondence received by the Tribunal from the Homeowner by way of a summary of complaint dated 18 July 2018 the Tribunal were of the view that the Homeowners complaints were sufficiently clear to allow the Hearing to proceed without the need for a Direction and refused the Factor's request.
10. By correspondence dated 15 August 2018 the Factor indicated that it felt it could not properly participate in the proceedings due to the lack of clarity in respect of the Homeowner's complaint and because it had not seen all the

correspondence between the Tribunal and the Homeowner referred to by the Homeowner in his representations.

Hearing

11. An oral hearing took place on 22 August 2018 at STEP Stirling. It was attended by the Homeowner and by Mr David Doran on behalf of the Factor.

Summary of submissions

12. For the Factor Mr Doran submitted that in terms of the legislative process the Tribunal could only deal with a complaint by the Homeowner that had been intimated to the Factor in a letter of complaint prior to the application being accepted by the Tribunal. The Homeowner could not introduce new complaints after the application had been lodged.

13. Mr Doran further submitted that as had been pointed out by the Convenor who had undertaken the review of the decision to refuse the Homeowner's application it was not clear whether the Homeowner was seeking to make a complaint that the Factor had breached a section of the Code or failed in its duties or both.

14. Mr Doran said that it was unclear as to what the Factor was supposed to be defending given that the principal issues with regards to the lift had all been resolved prior to the application to the Tribunal being made.

15. Mr Connell disputed that the Factor could be said to be on an unequal footing with regards to not having had sight of correspondence between himself and the Tribunal office. The correspondence referred to included a letter of guidance to applicants regarding procedures and acknowledgement of receipt of correspondence. Further correspondence between himself and the Tribunal office related to the letters of complaint sent to the Factor on 27 February (A1 and B1) and in respect of his application for a review of the decision to reject his application.

16. In response to a query from the Tribunal as to whether his complaint was restricted to an alleged failure on the part of the Factor to carry out its duties the Homeowner said that his application reflected the advice he had been given and if the application was incorrect he would be surprised that the Tribunal had not identified the correct procedure.

17. The Homeowner went on to say that when he purchased the property in 2015 he had no previous lift management experience. He explained that he had paid the Factor £356.00 in fees to manage the lift and expected a professional service in return.

18. For the Factor Mr Doran was of the view that whilst he could recognise that the Homeowner's complaint related to the lift he did not believe that the

Tribunal should adjudicate on matters which had already been dealt with. Mr Doran believed the Factor had tried to do everything it could to resolve the matter prior to the application being made to the Tribunal. It now appeared that the Homeowner was attempting to introduce a new issue around lack of communication but this could not in terms of the Rules be added into an existing complaint.

19. The Homeowner said that his complaint was in two parts. Firstly, with regards to the rolling contract that had continued until May 2017 he had not had an opportunity to comment on it. Secondly, he had previously been told by the Factor that they were not aware the emergency phone in the lift had been disconnected but through his efforts since raising the application he had become aware that the Factor had known the phone was disconnected and had taken no action to have it fixed.
20. Mr Doran said that the Homeowner had brought the lift issues to the Factor's attention. He accepted that on occasions the Factor makes mistakes and when that happens they are acknowledged and rectified. In the current case the Homeowner was provided with a copy contract for the lift maintenance and everything was back to where it should be with better procedures in place to ensure the issues would not arise again. It was not the Tribunal's role to clarify or confirm what had already been resolved.
21. Mr Doran went on to say that the Factor had asked to meet with the Homeowner to try to resolve any issues that he may have as the Factor was not clear what the Homeowner still wanted resolved. Mr Doran reiterated that he did not think it was an appropriate use of the Tribunal system to determine issues that had previously been dealt with.
22. For his part the Homeowner said that he was dealing with a professional firm of Factors and he was entitled to assume that they would take good responsible care for its clients' business. He pointed out that after the repair to the emergency phone had been carried out it had been again disconnected and had to be repaired again. He said the phone was working correctly at the moment as far as he was aware but he had to rely on the lift engineers Zurich and Schindler in this respect.
23. Mr Connell pointed out that it appeared that the Factor did not accept that the lift required to have an emergency telephone as in its letter of 31 May 2018 to the Tribunal the Factor had said that the legislation the Homeowner had referred to (The Lift Regulations 2016 – SI No 1093). In the Homeowner's submission this was clearly wrong and an important failing on the part of the Factor.
24. For the Factor Mr Doran said he did not have the legislation to hand but did not think it applied to the lift in question. In response to a question from the Tribunal Mr Doran accepted that irrespective of whether the legislation applied or not, if the lift was fitted with an emergency phone then it had to be in working order.

25. It was Mr Doran's position that the Factor had, prior to the application being accepted by the Tribunal, acknowledged it had made mistakes with regards to its management of the maintenance of the lift contract and the emergency telephone and it had apologised to the homeowner and sent him a cheque for £500.00 by way of an ex gratia payment. He explained that any delays in providing copy documentation which again had been provided to the Homeowner prior to the application being made had come about as a result of moving to a paperless office. Mr Doran said that the Homeowner had been given the reason for the delay and the Factor had offered to sit down with him to explain how procedures were now in place to ensure that going forward the Homeowner need have no concerns.
26. The Homeowner wished the Factor to provide him with a written report to ensure that it safely retains any lift maintenance contract and any extension to it. For the Factor Mr Doran was happy to give an undertaking to make such a report available to the Homeowner on a private area of the Factor's website and to meet with the Homeowner to discuss any issues he may have.

The Tribunal make the following findings in fact:

27. The Homeowner is the owner of 17 Ardleighton Court, Dunblane.
28. The Property is a flat within a block of six flats serviced by a lift (hereinafter "the Development").
29. The Factor performed the role of the property factor of the Development.
30. Between August 2017 and January 2018, the Homeowner entered into extensive correspondence with the Factor in respect of his complaints regarding its management of the maintenance and repair of the lift at the development (Homeowner's Appendix C).
31. The Homeowner's application was only in respect of an alleged failure of property factors duties and not any alleged breach of the Code.
32. Prior to the Homeowner making his application to the Tribunal the Factor acknowledged its service had fallen below the standard expected and that steps had been taken to remedy the situation (Letter from the Factor to the Homeowner dated 11 January 2018).
33. In addition to providing the homeowner with an apology the Factor sent the Homeowner a cheque in the sum of £500.00 by way of an ex gratia payment. The Homeowner had not cashed the cheque as at the date of the hearing.
34. The Factor had provided the Homeowner with the documents he had requested prior to the raising of the application.

35. Irrespective of whether or not the lift had to comply with the Lift Regulations 2016, as an emergency telephone was installed in the lift there was a requirement that it be maintained in working order.
36. The lift emergency telephone was disconnected for a period of about 32 months. This defect ought to have been noticed by the Factor. Once it was brought to the attention of the Factor by the Homeowner the emergency telephone was repaired prior to the Homeowner making his application to the Tribunal.
37. The Factor acknowledged its failings in the service provided to the Homeowner and made changes to its procedures to ensure any recurrence in the future prior to any application to the Tribunal being made by the Homeowner.
38. The Factor has offered to meet with the Homeowner to discuss any other issues he may have and to maintain good relations with the Homeowner.

Reasons for Decision

39. The Tribunal had no difficulty in understanding why the Homeowner had been concerned that the Factor had failed to properly manage the maintenance of the lift and the emergency telephone in particular. It is clearly very important that the Homeowner and other users of the lift can be assured that it is being properly maintained and that in the event of an emergency help will quickly be available.
40. As far as the Tribunal is concerned it does not matter whether the lift is or is not subject to the Lift Regulations 2016. There is no doubt that if the lift is fitted with an emergency telephone it must be in working order.
41. It is clearly unacceptable that the emergency telephone was not working for a period of 32 months and had the Factor not responded to the Homeowner's concerns in this regard there is little doubt that the Tribunal would have made an adverse finding. However, the fact remains that the Factor has acknowledged its failings and offered an apology to the Homeowner. It has made changes to its procedures to ensure that similar issues do not arise in the future.
42. Although as part of his submission for the review the Applicant suggested that there were outstanding issues in respect of his complaint set out in A/1 it seemed to the Tribunal that in fact these had been addressed by the Factor in its response to the Homeowner in advance of the application being made to the Tribunal.
43. As far as the Tribunal could ascertain all documentation requested by the Homeowner from the Factor had been supplied by it prior to the application being made.

44. The Homeowner at the Tribunal requested that the Factor provide him with a report to ensure that the Factor will safely retain any contacts relating to maintenance of the lift and any extensions of such contracts and the Factor has undertaken to ensure that these will be available on a private area of the Factor's website. If the Factor failed to meet that undertaking that might be grounds for the Homeowner to raise a fresh application to the Tribunal.
45. Mr Doran had made it clear that the Factor wished to work with the Homeowner in the future and Mr Doran was happy to meet with the Homeowner to discuss any concerns he may have. This seemed to the Tribunal to be a positive step in ensuring good client relations.
46. Taking everything into account the Tribunal, whilst understanding the Homeowner's concerns, were of the view that although there had been past failings on the part of the Factor these had been acknowledged by it and it had offered an apology and indeed an ex gratia payment as well as amending its procedures all in advance of the application being accepted by the Tribunal. That being the case it did not appear to the Tribunal that it would be appropriate to make a finding that the Factor had failed to properly carry out its property factor's duties or to make a Property Factor Enforcement Order.
47. The decision of the Tribunal was unanimous.

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

27 AUGUST 2018
Date