

# 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/19/2839**

**Flat 5, 24 King Edward Street, Perth PH1 5UT  
("the Property")**

**The Parties:-**

**Mrs Ruth Dunsire, 30 Oakbank Road, Perth PH1 1HG  
("the Homeowner")**

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

**Tribunal Members:**

**Graham Harding (Legal Member)  
Robert Buchan (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 23 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 September 2019 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 6.2 and 6.9 of the Code and had failed to carry out its Property Factor's duties. Specifically, the

Homeowner complained that the Factor had failed to effectively carry out external repairs to surface water disposal arrangements especially repairs to the roof, gutters and downpipes.

2. By Notice of Acceptance a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned and intimation sent to the parties by post on 14 October 2019.
3. By letter dated 10 November 2019 the Factor submitted a written response to the application and requested a postponement of the hearing on the ground that the Homeowner had not notified the Factor of a formal complaint under the Factor's complaints procedures.
4. The Tribunal considered the Factor's postponement request and the Homeowners email objection to the request dated 18 November 2019 and refused the postponement request.
5. By email dated 21 November the Factor intimated its further objection to the hearing proceeding submitting there had been no delay on the part of the Factor in dealing with a communication from the Homeowner to the Factor's Managing Director. Further submissions were received from the Homeowner on 22 and 26 November 2019 and from the Factor on 25 and 26 November 2019. In light of the difference of opinion as to the factual position the Tribunal determined that it was appropriate to proceed with the hearing and consider the party's representations as a preliminary matter at that time.

### **Hearing**

6. A hearing was held at Inveralmond Business Centre, Auld Bond Road, Perth on 28 November 2019. The Homeowner attended personally supported by her husband Mr Ian Dunsire. The Factor was represented by Ms Jeni Bole, Legal Compliance Manager, Angela Kirkwood, Director and Robert Lynn, Property Manager.
7. By way of a preliminary matter the Tribunal heard from both parties regarding the issue of delay in responding to the Homeowner's complaint and whether the Homeowner was entitled to make an application to the Tribunal if she had not made a formal complaint in terms of the Factor's written complaints procedures.
8. The Homeowner referred the Tribunal to her letter of 2 August 2019 addressed to the Factor's Managing Director, Mr Nick Mayall. She said that she considered this to be a complaint. She said she sent a follow up email on 9 August and then as she had not had any reply sent a further letter and a copy of the original letter to Mr Mayall informing him she was applying to the Tribunal. She said she received a telephone call the following day from Ms Kirkwood and as a matter of courtesy had sent a copy of the correspondence she had sent to Mr Mayall including photographs to Ms Kirkwood.

9. For the Factor Ms Bole referred the Tribunal to its Written Statement of Services and Section 7 which dealt with complaints. She explained that at no time had the Homeowner made a formal complaint. Furthermore, there had been no delay in dealing with the issue once it had been brought to the Factor's attention.
10. The Tribunal considered that the terms of Section 17 (3) of the 2011 Act did not require a Homeowner to complete the Factor's formal complaints procedure before making an application to the Tribunal if there had been unreasonable delay in attempting to resolve the Homeowner's concern. In this case the Homeowner had raised her concerns with Mr Mayall on 2 August 2019 and by 26 August had received no response whatsoever. That in the Tribunal's view was an unreasonable delay that entitled the Homeowner to write to the Factor intimating her intention to make an application to the Tribunal. The Tribunal therefore decided to proceed with the hearing.
11. There then followed some discussion as to the extent of the jurisdiction of the Tribunal as the Homeowner was seeking to introduce issues that had arisen after the date of the application and which had not formed part of the application and which had only been intimated to the Factor on 26 November. After a short adjournment to consider how to deal with these issues the Tribunal determined that it would only consider the issues raised by the Homeowner in her application and up to 7 September 2019.

### **Summary of submissions**

12. The Homeowner opened her submissions with a statement explaining that her complaint emanated from a heavy ingress of water to the kitchen in her property from defective guttering and downpipes. The Homeowner submitted that over an extended period of time dating back to December 2017, whilst some repairs had been attempted by the Factor, they had been ineffective. There had been a delay between May 2018 when the Factor had intimated its intention to carry out maintenance of the gutters and downpipes until December 2018 when obtaining further funds from owners was discussed. The repairs remained outstanding until the Homeowner was told that the works would be carried out on 26 June 2019. The Homeowner went on to say that there was then a further delay and in July 2019 photographs were taken of water cascading down from the gutters on to the kitchen wall of her property. This led the Homeowner to approaching the Factor's Managing Director and ultimately making an application to the Tribunal. The Homeowner went on to say she had 47 emails with the Factor on the subject and her patience had expired. She acknowledged that the Factor was having difficulty in deciding ownership of the gutters and downpipes in question but had eventually cleared that matter up. However, despite further works being undertaken a problem remained.

## **Section 6.2 of the Code**

13. The Tribunal asked the Homeowner to explain why she thought the Factor was in breach of this section of the Code which dealt with having in place procedures for dealing with emergencies. The Homeowner said that in her view the wet wall in her kitchen was an emergency that required urgent attention.
14. For the Factor Ms Kirkwood referred the Tribunal to Section 4.3.1 of its written statement of services that details the procedures for dealing with emergencies. She accepted that whilst there was water ingress to the Homeowners flat she had not at any point tried to contact the Factor to instigate an emergency repair.

## **Section 6.9 of the Code**

15. The Tribunal asked the Homeowner to explain why she thought the Factor was in breach of this section of the Code. The Homeowner explained that after maintenance work had been carried out by contractors in July 2019 there were still divots seen in some gutters and the water was still overflowing from the gutters. She had reported this to the property manager Mr Lynn. She said Mr Lynn had told her that these gutters belonged to other proprietors but he was going to arrange for the contractors to return and pressure wash the downpipes.
16. For the Factor Mr Lynn confirmed that the contractors R L Reid had returned about two days later to carry out further works.
17. For her part the Homeowner said that had still not fixed the problem with the gutters.

## **Property Factors Duties**

18. The Homeowner submitted that either the Factor was not choosing competent tradesmen to carry out repairs or as it had taken almost two years for something to be done there was a lack on the part of the Factor to get things done. The Homeowner went on to say that the roof adjoining her property was more of a problem as it had not been known who owned it. Once she had put the property on the market for sale a number of problems with the property had been identified by a surveyor and that had resulted in an offer for the purchase of the property being withdrawn on 29 March 2019. The Homeowner referred the Tribunal to the email exchanges with the property manager and his colleague commencing on 18 June 2019 She suggested that the Factor did not seem to know who was responsible for maintaining the roof.
19. For the Factor it was explained that the owners of Café Biba, Methcroft Limited had been maintaining the roof. As a result, owners and surveyors had been liaising with them over addressing the issues with the roof. According to Ms Kirkwood it was only in the conversation with the Homeowner on 27 August that it had been suggested that the roof might be owned in common.

Ms Bole said that they then decided to look at all the adjoining proprietors' titles as it was not apparent from the block title of which the Homeowners property was part that the roof was common to the block. Having examined the adjoining titles the Factor was able to ascertain that the roof was indeed common to the block. Having established that was the case the Factor took immediate steps to carry out repairs to the roof.

20. For her part the Homeowner felt it had taken a very long time to establish ownership. The problem with water ingress was ongoing and she wanted her building watertight.
21. For the Factor Ms Bole said that up until 26 November the Factor had been unaware of any ongoing issues at the property.
22. The Homeowner submitted that she wanted a property that she was able to sell and the water ingress stopped properly. She explained that she had incurred cost for joinery work, installing a dehumidifier, insurance excess and the property had been devalued.
23. For the Factor Ms Kirkwood submitted that the Factor had been effective in maintaining the building. It was apparent from the communications between the Homeowner and the property manager that the roof had not been thought to be common but as soon as the Factor became aware of that being a possibility a full title search was carried out and a repair carried out within 4 days. There was a need to work together in the future to find a long-term solution to the issue.
24. The Tribunal queried why after the Factor had taken over the Factoring contract from Grant & Wilson it had taken the Homeowner's application to the Tribunal to trigger a detailed examination of the titles. Ms Bole said that the Factor previously had the Café Biba titles and the Homeowner's building titles and from those it did not appear that the roof pertained to the building. It was only when they obtained the adjoining titles it became apparent as they were then able to look back to the original pitched roof to see that the new roof fell into the Homeowner's building's title.
25. The Tribunal noted that if as it may have appeared from the photographs submitted by the Homeowner the gutters were of inadequate size the building may require wider gutters and downpipes. That would go beyond normal maintenance and would require competitive quotes and agreement amongst the building owners.

**The Tribunal make the following findings in fact:**

26. The Homeowner is the owner of Flat 5, 24 King Edward Street, Perth ("the Property")
27. The Property is a flat within the building 24 King Edward Street (hereinafter "the building").

28. The Factor performed the role of the property factor of the building
29. Gutter cleaning and repairs to downpipes at the building were proposed by the Factor in December 2017 at a cost to the homeowner of £68.70.
30. In May 2018 the Factor identified that further works were required and intimated to owners in the building that another contractor would be contacted as scaffolding was required.
31. By letter dated 20 December 2018 the Factor advised the Homeowner that a contractor had been chosen and additional funds of £54.86 were required.
32. The Homeowner paid the sums requested by the Factor promptly. The Factor was unable to instruct the contractor to carry out the works until the other owners in the building had placed the Factor in Funds.
33. The Factor instructed the gutter cleaning and downpipe repair in June 2019 once it was in funds.
34. The work was carried out in July 2019.
35. The Homeowner contacted the Factor's property Manager after the work had been carried out as there was still an issue with the gutters overflowing and causing water ingress to the Homeowners kitchen wall.
36. The property manager arranged for the contractors to return to carry out power washing of the gutters and downpipes at the beginning of August 2019.
37. The sloping roof of the stairwell adjoining the Homeowners property takes water from a gutter down the roof past the homeowner's kitchen window.
38. The design of the sloping roof has led to water ingress into the Homeowner's property.
39. The owners of adjoining property a restaurant called Café Biba had claimed responsibility for maintaining the sloping roof.
40. Prior to 27 August 2019 neither the Homeowner nor the Factor believed the sloping roof to be owned in common by the owners of the building.
41. Following a telephone call between the Homeowner and the Factor's Ms Kirkwood on 27 August 2019 the Factor instigated a search of adjoining properties titles and concluded that the sloping roof was owned in common by the owners of the building.
42. On determining that the roof was owned in common the Factor instructed repairs to the roof to protect the Homeowners property and these were carried out on 31 August 2019.

## **Reasons for Decision**

### **Section 6.2 of the Code**

43. It is necessary to differentiate between what constitutes an emergency repair and what might be considered to be general maintenance or improvement to a property or building. The Factor's Written Statement of Services at Section 4.3 clearly sets out the procedure to be followed in the event of an emergency. Although it was apparent from the submissions from the Homeowner that there had been damage caused to her property as a result of water ingress, it appeared to the Tribunal that this had occurred over a long period of time and in the circumstances it could not be said to constitute an emergency repair. Furthermore, when it became apparent that the sloping roof adjacent to the Homeowner's property was common the Factor made arrangements within a very short space of time to have a repair carried out. As was indicated at the commencement of the hearing the effectiveness of the repair and any ongoing issues with regards to ongoing water ingress are beyond the jurisdiction of the Tribunal in this application. The Tribunal is satisfied that the Factor was not in breach of this section of the Code.

### **Section 6.9 of the Code**

44. It appeared to the Tribunal that on being contacted by the Homeowner regarding her concerns that following the cleaning of the gutters there was still water overflowing and still plants growing in one of the gutters Mr Lynn took steps to have the contractors return to remedy the problem although there was some doubt as to the ownership of the gutter where plants were still growing. It therefore appeared to the Tribunal that the Factor had taken appropriate steps to have the contractor remedy the defects in any inadequate work or service provided. The Tribunal acknowledges that there may still be an issue with water ingress to the Homeowner's property but does not consider that is due to a failure on the part of the Factor to pursue the contractor in respect of the work carried out in July and the beginning of August 2019. The Homeowner was not satisfied with the work carried out to the roof on 31 August 2019 but did not raise that issue with the Factor in her application and did not intimate a problem to the Factor until shortly before the hearing. As a result, the Tribunal was not prepared to consider that issue as part of this application. It does seem to the Tribunal from the evidence produced by the parties that the roof may have an intrinsic design problem that affects the Homeowner's kitchen wall and that further investigation may be required to identify a resolution. However, from the information provided to the Tribunal relating to the works done prior to 31 August the Tribunal was satisfied that the Factor was not in breach of this section of the Code.

### **Property Factors Duties**

45. The Tribunal had a considerable amount of sympathy for the Homeowner's situation. Having decided to sell her property it was extremely unfortunate for

the offer to be withdrawn as a result of a significant issue related to the water ingress around the kitchen wall of the property. The Tribunal could also appreciate how frustrating it must have been for the Homeowner to have agreed to fund repairs to the gutters and a downpipe in December 2017 only to have to wait until July 2019 for the work to be done. However as is frequently the problem in factored properties works can only be instructed once the Factor has in-gathered the funds from the owners of the building unless there is a float or sinking fund in place to meet such expenditure. There were no such funds available and therefore the works could not commence until the Factors had obtained payment in advance from the owners. This took until June 2019. Matters were further complicated when it was discovered that the works involved were somewhat more extensive than had been initially thought and as a result scaffolding was going to be required and another contractor found all at additional cost the homeowners. Whilst the delay was undoubtedly unfortunate the Tribunal was unable to say on the evidence before it that it occurred as a result of a failure on the part of the Factor to carry out its duties.

46. It was not apparent to either the Homeowner or the Factor that the roof over the stairwell adjoining the property was common. It had in the past been maintained by the owners of Café Biba. Neither the building's titles nor those of Café Biba indicated that the roof was owned in common by the proprietors of the building. Whilst the Factor was aware of the Homeowner's concerns regarding water ingress from the roof, if the roof was not part of the building it was factoring it could not instruct repairs. It did appear from the correspondence submitted by the parties that attempts were being made by the Factor on the Homeowner's behalf to get Café Biba's owners who had previously maintained the roof to take some action. There may be a temptation with the benefit of hindsight to suggest that the Factor ought to have considered earlier that the roof might be common. However, given that Cafe Biba thought they were responsible for maintaining it as the Factor mentioned and it was not apparent from the building titles and it took an examination of neighbouring titles to track back to the boundaries of the properties in question prior to their redevelopment it cannot be said that the Factor was in breach of its duties in this regard.
47. Whilst the Tribunal has concluded that the Factor is not in breach of the Code nor that it has failed to carry out its Property Factor's Duties it is apparent that the Homeowner still has significant concerns about water ingress to her kitchen and these must be addressed by the Factor. There may well be works needed to the gutters and downpipes if they are unable to take the volumes of water experienced during heavy rainfall. It may be necessary to instruct an expert to look at the roof to ascertain what can be done to remedy the water ingress to the Homeowners property. That will undoubtedly incur costs that will require to be shared amongst the owners and such procedures can take time. It is therefore important that the parties work together to try to resolve the outstanding issues and to avoid the Homeowner feeling compelled to make a further application to the Tribunal.

## **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

11 December 2019 Date