

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/19/0725

Re: Property at Flat 2/1 8 Mariscat Road, Glasgow, G41 4ND ("the Property")

Parties:

Mr Alan Cunningham, Flat 2/1 8 Mariscat Road, Glasgow, G42 4ND ("the Homeowner")

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

Tribunal Members:

Ms Josephine Bonnar (Legal Member);

Mr Mike Links (Ordinary Member)

DECISION

The Tribunal determined that it does not have jurisdiction to determine the complaint that the Property Factor has failed to carry out its property factor duties in terms of section 17(1) of the Property Factor (Scotland) Act 2011 ("the Act") and the complaint that the Property Factor has failed to comply with Section 6.3 of the Property Factor Code of Conduct as required by Section 14(5) of the Act.

The Tribunal determined that the Property Factor has not failed to comply with Section 6.6 of the Property Factor Code of Conduct as required by Section 14(5) of the Act.

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 1 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 lodged on 6 March 2019, the Homeowner applied to the Tribunal stating that the Property Factor had breached Sections 2.1, 2.4, 6.3 and 6.6 of the Property Factors Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). In particular, the Homeowner stated that the Property Factor entered into contracts without putting proper contractual terms in place, failed to advise homeowners on repairs, as stated in their Written Statement of Services, failed to obtain written consent from homeowners prior to instructing common works and failed to provide guarantees for the work which was carried out. Documents were lodged in support of the applications including correspondence with the Property Factor notifying them of their complaints. On 12 April 2019 a Convener on behalf of the President referred the matter to the Tribunal. A hearing was assigned for 14 June 2019 at 10am at Glasgow Tribunals Centre, 20 York Street, Glasgow.
2. In response to the application the Property Factor lodged written representations on 17 May and 6 June 2019. In response to a direction issued by the Tribunal the Property Factor also lodged a bundle of documents. The Homeowner also lodged a bundle of documents on 6 June 2019.
3. The application called before the Tribunal for a hearing on 14 June 2019. Five other related applications by other Homeowners under Chamber references FTC/HPC/PF/19/0679, 0718, 0721, 0722 and 0724 also called before the Tribunal on that date. Mr Devon attended on behalf of the Property Factor. The Homeowner attended, represented by Mr Hoare, one of the other Homeowners. Also present were Mr and Mrs Innes, Mrs Crusher and Mr Martin, homeowners in 3 of the other applications. The Tribunal noted that a number of preliminary issues had been raised by the Property Factor in their written submissions. The Tribunal proceeded to discuss these preliminary matters. Mr Hoare then requested an adjournment of the hearing to discuss the preliminary matters with the other homeowners, investigate and take advice. The Tribunal agreed to adjourn the hearing. Thereafter the Tribunal issued a Note of the matters discussed at the hearing and a direction requiring both parties to lodge written submissions in advance of the adjourned hearing addressing the preliminary matters identified in the Note.
4. The adjourned hearing was scheduled for 2 September 2019 at Glasgow Tribunal Centre, 20 York Street, Glasgow. In advance of the hearing both parties lodged written submissions in connection with the preliminary matters detailed in the hearing note. The application called before the Tribunal

together with the other 5 related applications. The Homeowner attended, represented again by Mr Hoare. Mr Devon again attended on behalf of the Property Factor. Mr and Mrs Innes and Mrs Crusher also attended.

The Hearing

Preliminary Matters

5. The Tribunal proceeded to discuss the preliminary matters with the parties. The first of these related to three of the other applications (0679, 0722 and 0724). The Property Factor had challenged these applications on the ground that the applicants were not homeowners in 2012/2013, being the period of time when the alleged breaches had occurred. In the written representations lodged by Mr Hoare, it is conceded that these applications cannot proceed, and he advised the Tribunal that he wished to withdraw all three. The Tribunal noted that the applications were withdrawn, and the hearing therefore proceeded in relation to the Homeowner's application and the applications under Chamber references 0718 (Mr Eric Martin) and 0721 (Mrs Crusher as attorney for her mother, Mrs Cousins). Mr Hoare confirmed that although his own application was withdrawn, he would continue to represent the other homeowners.
6. The second preliminary matter discussed was the claim by the Property Factor that all three applications had prescribed by virtue of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act). Both parties confirmed that they had nothing to add to the written representations which had been lodged in advance of the hearing. The Homeowner's written representations (prepared by Mellicks solicitors) focus on the legislation and, in particular, Schedule 1 of the 1973 Act, which lists the obligations which are extinguished after 5 years in terms of Section 6 of the 1973 Act. The list does not include applications to the First tier Tribunal for an order against a Property Factor for breach of the Code or failure to carry out property factor duties. Mr Devon's representations refer to two cases. Both cases, *David Kennedy v Royal Bank of Scotland* 2018 Hous. L.R and *Gordon's Trustees v Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287, concern the calculation of the date upon which the five year prescriptive period starts to run. Neither address the relevancy of the legislation to the applications before the Tribunal. The Tribunal advised parties that the written representations had been considered and, in the absence of further submissions, the Tribunal determined that the 1973 Act did not apply to the application before the Tribunal and that the Homeowner's entitlement to make the application had not prescribed.
7. The third preliminary matter discussed related to the complaint in terms of Section 2.4 of the Code. The Tribunal noted from the written representations that the Homeowner did not wish to proceed with this complaint and that the application should be amended to allow it to be removed. The Tribunal noted that the complaint under section 2.1 of the code was removed at the previous hearing. The Tribunal therefore noted that the application was to proceed only

in relation to alleged breaches of section 6.3 and 6.6 of the Code and the complaint as to property factor duties.

8. The Tribunal advised parties that, having considered the written representations, that the Tribunal required to hear evidence from the parties in relation to the two other preliminary matters which had been raised before it could determine them. The first of these is a claim by the Property Factor that the Tribunal does not have jurisdiction to consider the application because the complaints relate to events which occurred prior to date upon which the Act came into force or the date upon which the Property Factor required to comply with the Code. The second is a claim by the Property Factor that the application is made against the wrong Respondent, and that any failures are attributable to Hacking and Paterson, a separate company from the Property Factor, Hacking and Paterson Management Services (HPMS). The Tribunal advised that evidence on these two issues would be required before they could be determined.

The Evidence

9. From the application and the various documents and representations lodged with the Tribunal in advance of the first hearing, the Tribunal noted that the Homeowner's complaint relates to a common repair carried out at the property. A timber lintel was replaced with a three-part concrete lintel. After a few years, cracking appeared on both sides of an internal wall on the upper level of the property. A structural survey obtained in July 2018 identified the concrete lintel as the cause and indicated that it did not provide adequate support. The conclusion reached was that the work carried out to replace the lintel had been defective and resulted in structural problems at the property. The Homeowner lodged a complaint with the Property Factor. They were dissatisfied with the response and applied to the Tribunal.
10. Mr Hoare advised the Tribunal that the building in which the property is located was badly damaged during a storm on 2 January 2012. The Insurers were notified, and they instructed Lambert Contract Ltd ("Lambert") to carry out remedial work. Mr Hoare referred the Tribunal to copy mandates lodged with the application, dated February 2012 and signed by the various homeowners. He confirmed that the storm damage insurance work started in March 2012. At some point during the restoration work, Lambert identified a damaged lintel which required to be replaced. It was not part of the storm damage and was not covered by the insurance policy. He referred the Tribunal to the minutes of a meeting which took place in August 2012, attended by some homeowners, representatives from Lambert and George Watson of Hacking and Paterson. The minutes mention the additional work and state that the cost of same is to be divided among all the homeowners. Mr Cunningham advised the Tribunal that there were several meetings with the contractor while the insurance work was ongoing, as the work took several months. He did not attend the meeting in August 2012 but recalls receiving the minutes. He noted that the minutes state that Homeowners would be sent estimates for the cost of the work. He assumed these would be issued before the work was instructed. However, he received nothing further until a factoring

invoice in May 2013 which included a charge for the repair. He contacted the Property Factor to challenge the charge and initially withheld payment of the invoice. He did not get a response to his query. Eventually he paid the invoice as a result of threats that Sheriff Officers would be instructed. Mrs Crusher advised the Tribunal that although the minutes indicate that she was at the meeting on 27 August 2012 with her mother, she wasn't present. She didn't have power of attorney at that time and doesn't know what correspondence was sent out. Mr Cunningham also advised the Tribunal that he recalls George Watson of Hacking and Paterson being present at other meetings he attended. He was the only representative of Hacking and Paterson who attended. He assumed that Mr Watson was there on behalf of the Property Factor and believes the other Homeowners shared this belief.

11. Mr Hoare advised the Tribunal that the Homeowner is unable to specify exactly when the lintel was replaced. However, as the contractor did not invoice the Property Factor until April 2013, it would be reasonable to assume that the work was carried out in 2013 and not in September 2012. In response to questions from the Tribunal he acknowledged that his complaints relate to action or lack of action by the Property Factor, before the work would have commenced, while it was ongoing and when it concluded. He stated that he is of the view that both the Act and the Code were in force at the relevant time. He commented that it is highly unlikely that a business would carry out work and then wait several months to request payment for same. Logically, the work was carried out shortly before the April 2013 invoice, when both the Act and the Code were in force. He advised the Tribunal that Lambert have gone into administration so they cannot be pursued for the defective work. Mr Hoare also advised the Tribunal that he disputes the Property Factor's claim that they were not involved in the repair. He advised the Tribunal that the Property Factor issued invoices to the Homeowners for the repair, having received an invoice from Lambert. At the meeting in August 2012, George Watson was present. He is on the HPMS website as a consultant, under the heading "Our team". The instruction of common repairs is a property factor duty and George Watson is a representative of the Property Factor.
12. From the written representations lodged, the Tribunal noted that the Property Factor claims that there is no basis for the application, as the Property Factor was not involved in the instruction of the lintel repair. The only role played by the Property Factor was to invoice the Homeowner for his share of the cost of the repair, following receipt of the invoice from Lambert. The application is also challenged on the grounds that the Act did not come into force until 1 October 2012 and the Property Factor's obligation to comply with the Code did not commence until 1 November 2012. The Property Factor stated that the Homeowner is unable to demonstrate that the alleged breaches of the Code or failures to carry out duties occurred before those dates.
13. At the hearing Mr Devon advised the Tribunal that following an exhaustive search of their records he had only been able to locate the invoice from Lambert dated April 2013 and copies of invoices sent to the Homeowners in May 2012. No other records are held by the Property Factor in relation to the lintel replacement. He stated that this lack of documentation supports the

argument that they were not involved when the work was instructed and provided a purely administrative function in relation to the invoicing. He also advised the Tribunal that, in the absence of any evidence from the Homeowner as to when the work was instructed and carried out, the Tribunal could not conclude that it was after the Code and Act came into force. He confirmed that he does not know when the work was carried out. He referred the Tribunal to the minutes of the meeting from August 2012, which refer to George Watson of Hacking and Paterson being present, stating that Mr Watson is not, and never has been, a director of HPMS. No one from the Property Factor attended the meeting in August 2012 or any other site meetings. The contractors had been instructed by the Insurance company. The Property Factor took no part in the instruction of Lambert to replace the lintel and he assumes that the instructions came directly from the Homeowners themselves. He pointed out that the letters which sent the minutes of the meeting to homeowners were also from George Watson. The Tribunal noted that the minutes refer to George Watson of Hacking and Paterson and that there is no reference to HPMS in the minutes. On the other hand, page three of minutes makes reference to the lintel work stating "The costs for this work to be invoiced separately to Hacking and Paterson for inclusion in the next run of common charges" which suggests that the minute taker did not distinguish between the two organisations. Furthermore, the Homeowner had lodged a copy of a letter from Mr Watson, dated 5 December 2018 and addressed to Mr Devon. This letter states "instructions should be placed with HPMS to instruct a contractor to carry" out the lintel replacement. It goes on to state "In this respect, as instructed, we passed the owners instructions to HPMS". The letter goes on to confirm that Hacking and Paterson's records "relate strictly to the storm reinstatement works for which we were appointed". Notwithstanding the terms of this letter, Mr Devon advised the Tribunal that the Property Factor did not instruct the work and therefore could not be held to have failed in their duties or have breached the Code with regard to same.

The Tribunal make the following findings in fact:

- a) The Homeowner is the owner of Flat 2/1 8 Mariscat Road, Glasgow.
- b) The Property is a flat within a block of properties. The properties are factored by the Property Factor.
- c) In 2012 the block sustained storm damage. Remedial work was undertaken by Lambert Contracts Ltd on the instruction of the Buildings Insurance company for the properties. The work took several months to complete.
- d) While carrying out the storm damage repair work at the block Lambert Contracts Ltd replaced a damaged timber lintel with a three part concrete lintel. This work was not covered by the insurance policy.
- e) In April 2013 Lambert Contracts Ltd sent an invoice to the Property Factor for the replacement lintel. In May 2013 the Property Factor issued a common

charges invoice to the Homeowner which included a share of the cost of the replacement lintel.

- f) A structural survey of the block was undertaken in 2018 which concluded that the concrete lintel does not provide adequate support and has caused structural damage to the block.

Reasons for decision

14. The Tribunal has jurisdiction to determine applications by Homeowners which relate to alleged breaches of the Code by Property Factors which occur after the date upon which the Code applies to the Property Factor. In this case the relevant date is 1 November 2012. The Tribunal also has jurisdiction to determine applications by Homeowners which relate to alleged failure to carry out property factor duties in terms of Section 17 of the Act from 1 October 2012, being the date upon which the Act came into force.

15. Property factor Duties – entering into contracts with contractors without putting proper contractual terms in place and failure to obtain written consent from homeowners prior to instructing common works. It is not disputed by the Property Factor that they did not enter into a contract with Lambert or consult homeowners regarding the lintel work. From the evidence, it appears that Lambert carried out the lintel replacement at some point between August 2012 and April 2013. In August 2012 the minutes of a meeting attended by some homeowners confirm that Lambert would do the work, although there is also a reference to an estimate being issued to Homeowners to enable the work to be instructed. The Tribunal is satisfied from the Homeowner's evidence that no estimate was issued, and no further consultation took place. However, the Tribunal was provided with no evidence which establishes the date upon which the lintel work started or finished. On one hand the April 2013 invoice from Lambert suggests it was in 2013. On the other, the Tribunal notes that the work was discussed at a site meeting on 27 August 2012 and that the storm damage work started in March 2012. The Tribunal noted that much of the insurance work discussed at the August 2012 meeting appears to be re-decoration and snagging work. Furthermore, the minute confirms that "Gary Clark stated that it was his intention to hand back the site prior to the next programmed meeting and therefore no fortnightly formal site meeting will be required" This suggests that the work was nearing completion on 27 August 2012. It appears that no consultation with homeowners took place before Lambert replaced the Lintel. However, had there been consultation and proper instructions given to Lambert, this would presumably have occurred before the commencement of the work. The Tribunal therefore concludes that it is not satisfied that the alleged failures to carry out property factor duties occurred after 1 October 2012. As a result, the Tribunal concludes that it does not have jurisdiction to determine this part of the application.

16. Property Factor duties – failure to advise homeowners on repairs. The Tribunal notes that it is not disputed that the Property Factor did not provide

the Homeowners with information or updates on the lintel repair. However, for the reasons stated in paragraph 15, the Tribunal concludes that it does not have jurisdiction to determine this part of the application as the Homeowner has not established that this failure occurred after 1 October 2012, when the Act came into force.

- 17. Property Factor duties – Failure to provide guarantees for the work which were promised in writing.** The Tribunal notes that it is not disputed that the Property Factor did not provide the Homeowner with a guarantee for the work. For the reasons stated in paragraph 15, the Tribunal concludes that it does not have jurisdiction to determine this part of the application as the Homeowner has not established that the alleged failure occurred after 1 October 2012 when the Act came into force. In any event, the Tribunal notes that the obligation to provide guarantees for work carried out would rest with the Contractor carrying out the work and not the Property Factor, and therefore this part of the application would have been rejected, even if the Tribunal had jurisdiction to determine it.
- 18. Section 6.3 of the Code. “On request you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in house staff”** It is not disputed that the Property Factor did not provide information to the Homeowner about how they appointed Lambert. The explanation provided is that they did not make the appointment. For the reasons stated in paragraph 15 the Tribunal concludes that it does not have jurisdiction to determine this complaint as the Homeowner has not established that the alleged breach of the Code occurred prior to 1 November 2012, being the date from which the Property Factor has to comply with the Code.
- 19. Section 6.6 of the Code. “If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance”** It is not disputed that the Property Factor failed to provide this information, the explanation being that the Property Factor did not carry out any tendering process in relation to the lintel repair work. The Tribunal notes that this complaint appears to relate to a recent request by the Homeowners, although the documentation sought is from 2012 or 2013. The Tribunal therefore concludes that it has jurisdiction to consider the complaint. However, the Tribunal notes that the Property Factor relies on the words “If applicable” at the beginning of this section of the Code. The documentation has not been exhibited, because it does not exist. It does not exist, because no competitive tendering was carried out. The Tribunal therefore concludes that no breach of this section of the Code has been established.
- 20.** As the Tribunal determined that it does not have jurisdiction to determine the complaints under Section 17 of the Act and Section 6.3 of the Code and that on the basis of the evidence that no breach of Section 6.6 of the Code has

been established, the Tribunal does not require to address the other part of the Property Factor's defence, namely that the complaints ought to have been made against Hacking and Paterson and not the Property Factor. However, the Tribunal make the following observations. Firstly, a Homeowner can only apply to the Tribunal in relation to a Property Factor. Secondly, the Tribunal was not persuaded by the Property Factor's argument. It was not disputed that arranging common repairs is part of a property factors usual duties. It was clear to the Tribunal that the Homeowner thought that the Property Factor was involved in the instruction of the lintel repair and that consultation with homeowners, the provision of quotes and updates on the repair would be provided. It is not clear why that didn't happen and Mr Devon's statement that the Homeowners just arranged matters themselves is not supported by the evidence, particularly the minutes of the meeting in August 2012 and the letter from Mr Watson from December 2018. The Tribunal notes that the conduct of the Property Factor in relation to the lintel repair is far from satisfactory and concludes that they may not have taken any part in the instruction of the repair, but that they ought to have done so.

21. The Tribunal therefore determines that it does not have jurisdiction in relation to the complaint of failure to carry out property factor duties in terms of section 17 of the Act or the alleged breach of Section 6.3 of the Code. The Tribunal also determines that the Property Factor has not breached Section 6.6 of the Code.

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 and Chair
10 September 2019