

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision and Statement of Reasons under Section 19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/18/1414

4/10 Gillsland Road, Edinburgh EH10 5BW ("the Property")

The Parties:-

Jennifer Cowper, 4/10 Gillsland Road, Edinburgh EH10 5BW ("the Property")
("the Homeowner")

Bield Housing and Care, 79 Hopetoun Street, Edinburgh EH7 4QF("the Factor")

Tribunal Members :

Joan Devine – Chairing and Legal Member
Elaine Munroe – Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Factor has not failed to comply with the Code of Conduct for Property Factors as required by section 14 of the Property Factors (Scotland) Act 2011. The Tribunal unanimously determined that the Factor has not failed to comply with its factor duties in terms of section 17(5) of the Property Factors (Scotland) Act 2011. In all the circumstances the Tribunal does not propose to make a Property Factor Enforcement Order.

The Tribunal make the following findings in fact:

1. The Homeowner is the owner of 4/10 Gillsland Road, Edinburgh EH10 5BW ("the Property") having acquired the Property from a third party in July 2008.
2. The Property is a flat within a development of 56 flats at Gillsland Road, Edinburgh EH10 5BW. ("the Development").
3. The Factor has performed the role of the property factor of the Development since 1983.
4. The Factor sent to the Homeowner a copy of its Written Statement of Services ("WSS").
5. The WSS sets out the complaints handling procedures that the Factor will follow.

6. 11 floods took place at the Property between 13 January 2009 and 11 June 2016 due to water ingress from the flat above.
7. The Factor operates an emergency response service for residents of the Development which is available 24 hours / day.

Introduction

1. In this decision the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the 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"
2. The Factor is a Registered Property Factor obliged to comply with the duty under section 14(5) of the Act to comply with the Code.
3. Following on from the Homeowner's application to the Tribunal which comprised documents received on 15 June 2018 ("the Application"), the Convener, with delegated powers under section 18A of the Act, referred the Application to the Tribunal on 27 June 2018. The Tribunal had available to it, and gave consideration to, the Application, further documentation provide by the Homeowner on 20 July and 6 August 2018, Inventory of Productions lodged by the Factor and the oral submissions made by both parties at the hearing.

Hearing

4. A hearing took place at George House, 126 George Street, Edinburgh EH2 4HH on 3 September 2018. The Applicant attended on her own behalf. She was accompanied by her daughter, Nicola McFadden. The Factor was represented by David MacInnes, and Shona Rintoul, both owner services managers.

Basis of the Application

5. The Homeowner complained of non-compliance with section 7 of the Code. The Homeowner also considered that the Factor had failed to comply with the property factor's duties.

Summary of Submissions

6. The Homeowner told the Tribunal that she had owned the Property since July 2008. She had purchased the Property from a third party. It was not new built at that time. There were fifty-six flats in the Development.
7. David MacInnes told the Tribunal the Development had been built by Barret and that it had been taken over by the Factor in 1983. They have been the property factor since then. He explained that the Development consists of 1 building containing flats plus a large villa which contains the office and the

guest room. He told the Tribunal that all of the properties in the Development are owned. The owners can sub-let to third parties although none of the properties are currently let. David MacInnes explained that there are no supported residents in the Development in that none of their support services are provided by the Factor. All owners arrange for their own support services. David MacInnes explained that there is a scheme manager on site at the Development who works from 9.00 until 12.30 each day. The property manager's role is to deal primarily with repairs. The current property manager is Sarah Lewis. Schedule 5 to the WSS which was produced as the third item in the inventory for the Factor contained the job description for the scheme manager.

8. Shona Rintoul told the Tribunal that she deals with the management of the site managers. She also deal with sales. She explained that the only criteria for purchasers of properties at the Development is that they must be over 60.
9. The Homeowner took the Tribunal through the note which she had produced as part of the documents supporting her application which provided the dates on which the various floods had occurred at the Property. There had been 11 floods between 13/1/2009 and 11/6/2016.
10. The Homeowner explained that the owner of the flat above her in January 2009 was Jean Potter. Generally when a flood occurred the Homeowner would go up to Mrs Potter's flat to ask her to stop the flow of water. The Homeowner would also "pull the cord" which alerted the Factor's 24 hour emergency service. After the first flood the Factor arranged for an electrician to come out and assess the Property.
11. Mr MacInnes explained that the Factor provides an emergency response for repairs and for medical matters. In a situation such as this where a flood had occurred, the Factor would arrange for an electrician to check the flat. The cost would be met by the buildings insurance or the residents collectively. Items such as carpets do not fall within the buildings insurance. The cost for replacing them would be met by contents insurance of the adjoining proprietor who had caused the flood. The Homeowner explained that Mrs Potter did not have contents insurance. She paid for the replacement of the Homeowner's carpets following the first flood.
12. The Homeowner told the Tribunal that when the second flood occurred she again went to Mrs Potter's door and had the water stopped. She called the Factor's emergency service. However it was Christmas Eve. The electrician did attend shortly after the second flood on Christmas Eve 2009. He checked the safety aspects. Following that flood there was contact between the Factor and Mrs Potter's family. The idea was to fit self-closing taps. That would have to be funded by Mrs Potter.
13. The Homeowner told the Tribunal that a third flood occurred on 23rd October 2010. After this the Homeowner wrote to the Factor by letter dated 31 October 2010, a copy of which was produced to the Tribunal. In the letter she specifically asked for self-closing taps to be fitted. There was a further flood

on 24th January 2011. Mrs Potter would not allow the plumber to fit the self-closing taps.

14. Mr MacInnes told the Tribunal that the self-closing taps were fitted on the 4th February 2011. Discussion took place between the Factor and Mrs Potter's family. Mr MacInnes explained that he did not have a note of the flood taking place on 23rd October 2010.
15. The Homeowner told the Tribunal that the next flood occurred on 9th November 2014. The Homeowner explained that this was a really bad flood. The Homeowner returned to the Property having been out all day. Her daughter, Nicola McFadden was with her. The Homeowner was unable to obtain access to Mrs Potter's flat. Her daughter became concerned and telephoned the police. As the police were arriving Mrs Potter opened her door. She was in a state of undress. Nicola McFadden told the Tribunal that she was concerned about Mrs Potter's mental health. At the time of this flood the Homeowner again contacted Factor's emergency services. The electrician attended that evening.
16. The Homeowner confirmed that when she contacted the emergency service provided by the Factor they did respond. The Homeowner told the Tribunal that the difficulty was not with the Factor's response but with getting access to Mrs Potter's flat. The Homeowner's concern was preventing the damage being caused in the first place.
17. Mr MacInnes explained that he met with the Homeowner on the morning after the flood on 9th November 2014. He returned to the Property on 17th November 2014 once it had chance to dry out. At that point the Factor arranged for the plumber who fitted the self-closing taps to come back out. Nicola McFadden explained that it was apparent at that point that Mrs Potter had removed the self-closing taps as she didn't like them.
18. The Tribunal asked Mr MacInnes what report was provided by the plumber. Mr MacInnes said that he did not receive a report from the plumber as the cost of the call out was paid by Mrs Potter.
19. The Homeowner told the Tribunal that there was a further flood on 20th February 2015. New self-closing taps were fitted March 2015. The Homeowner spoke to Mrs Potter at that time and it was clear that Mrs Potter did not like the self-closing taps. Nicola McFadden told the Tribunal Also that at that time she contacted Edinburgh City Council social care as she was concerned about the level of care. She contacted them in 2015 and again in April 2016.
20. The Tribunal asked Mr MacInnes if the Factor was concerned about Mrs Potter. Mr MacInnes said that the Factor was concerned about persistent flooding. They were in touch with Mrs Potter's family to manage the situation. At this point a weekly arrangement was set up to check the taps. The local scheme manager would go to Mrs Potter's house once per week to check that the taps were working. This worked for a period. Then there were changes in staff. A neighbour agreed to help. Also the Development had no manager for

a period of six months. Mr MacInnes explained that the Factor contacted Mrs Potter's family after each incident.

21. The Homeowner told the Tribunal that there was a further flood on 11th June 2015 which indicated to her that the self-closing taps were not working. There was yet another flood on 19th May 2015. The Homeowner understood that this flood was caused by plumbers carrying out work at the Development.
22. Mr MacInnes said that his notes indicate that the scheme manager was carrying out weekly checks at the time of the flood on 23rd January 2016. His recollection was that the weekly visits came to an end around March 2016. He explained that the local scheme manager has their own diary that contains the daily log of what they have done. They also keep a log of repairs for each property.
23. Mr MacInnes explained that after the flood on 23rd January 2016 the plumber tested the system. There were no plugs in the sinks. However, Mrs Potter would block up the plug with a flannel. Also the plumber identified a difficulty with the water pressure which meant that the tap was not always turning off properly. Pumps were fitted in the bathroom and the kitchen of Mrs Potter's flat to ensure that the water pressure was adequate to allow the self-closing taps to operate.
24. Nicola McFadden said that she thought that the taps were not working properly and she asked the Factor to get another plumber to look at the taps. Nicola McFadden emailed the Factor between May and June 2016 raising concerns.
25. Mr MacInnes told the Tribunal the pumps were fitted after the 10th flood on 16th April 2016 and new taps were fitted after the 11th flood on 11th June 2016. The Homeowner told the Tribunal that there was nobody in Mrs Potter's flat from February 2017.
26. The Homeowner said that her solicitor had written to the Factor and asked for weekly checks. The Homeowner was concerned in April 2016 that the scheme manager had been off for three weeks and weekly checks were not being carried out. Miss Rintoul told the Tribunal that when the scheme manager was off, she carried out the weekly checks. They indicated that the taps in Mrs Potter's flat were working the way that they should.
27. The second issue that the Homeowner wished the Tribunal to address was the anti-social behaviour at the Development.
28. The Homeowner told the Tribunal that in December 2017 she realised that the atmosphere in her flat had changed. She went to the scheme manager to raise concerns. She thought that perhaps the new occupier of the flat above her was a chain smoker. The scheme manager suggested that she try lighting a candle. The Homeowner had already tried that and it made no difference. She bought an air purifier. This did not work either. The Homeowner became concerned about the smell and went to stay with her son over New Year in January 2018. The homeowner described the smell as "chemical". She did not

know the source of the smell. Her son suggested that the police should be contacted. Two police officers attended the Property. The Homeowner said that she then started to feel unwell. She said that she felt too ill to stay in the Property. The Homeowner was then admitted to hospital and was diagnosed with pneumonia. The homeowner told the Tribunal that the police attended the flat above hers. The Homeowner did not know whether anything was identified during the course of that visit. After her release from hospital the Homeowner stayed with her son and then on returning to her flat would stay in the guest accommodation provided by the Factor. She did not wish to try to recover from pneumonia in a compromised atmosphere. The Homeowner explained that the chemical smell from the flat above is worse at night.

29. Mr MacInnes told the Tribunal that the site manager asked the family of the gentleman who owns the flat upstairs, Mr Kirkwood, if he smoked. They said that he had not smoked since 1970. The site manager then involved the environmental health department. Two people attended the site. They were unable to detect anything. This was in March 2018.
30. The Homeowner explained that the problem is that there is nobody there when she detects the smell. The Homeowner went to her counsellor who contacted the Police who gave her a contact within Police Scotland. The Police Officer was contacted but did not attend the Property until two or three days thereafter. The Homeowner explained that she had called out the Police on January 1st and 3rd, on February 28th, on March 4th, 20th and 27th and on 16th April of 2018. The Homeowner was not aware of the Police reaching any conclusion regarding the smell. The Homeowner said that her neighbour had also experienced discomfort due to the smell.
31. The Homeowner told the Tribunal that the air purifier is on daily. She can manage during the day with the windows open but is unable to manage overnight. She has taken the decision to leave the Property at night and to stay in the guest accommodation provided or to stay with her son. The smell is not continuous.
32. Mr MacInnes told the Tribunal that Mr Kirkwood is an owner occupier. He had been approached about smoking. An owner is however permitted to smoke in their own home. Matters escalated when reports were received from the Homeowner of a metallic smell. The Factor arranged for a plumber to attend and seal up any connecting pipes. The Factor contacted Environmental Health. They were unable to identify the source of the smell. The Factor contacted the police who reported to the Factor that they were unable to identify the cause of the smell. The Factor met with the family of Mr Kirkwood. The site manager spent time in his flat. Mr MacInnes explained that Mr Kirkwood has support coming into his flat and they have not identified the source of the problem. Mr MacInnes was not aware of support workers being adversely affected by the smell.
33. The Tribunal asked Mr MacInnes if he had an anti-social behaviour policy. He said that the Factor does not have such a policy for owner occupiers. He was asked what the Factor would do when receiving complaints of this nature. He said that the Factor would do what they had done in this case. They would

contact the appropriate agencies. Mr MacInnes was asked if he would involve the Council. He said that the Factor has used the Council mediation service in the past.

34. The Homeowner explained that she is very much aware of the problem. The problem is that those investigating have not attended at the time when she notices the problem. In addition, Mr Kirkwood is deaf. His family are therefore consulted before access is taken to his property. The Homeowner told the Tribunal that Mr Kirkwood is also extremely aggressive and uses foul language.
35. Nicola McFadden queried whether there were any residual difficulties following upon the flooding. Mr MacInnes said that it may be helpful to remove an area of plaster in the bedroom of the Property and test it. Mr MacInnes told the Tribunal that he would be content to arrange for that testing to be carried out.
36. The Tribunal asked the Homeowner what it was that the Factor could have done that they have not done to date. The Homeowner said that they were not attending the flat above her at the right time of day. She said that the Factor should carry out more investigations.
37. The Tribunal asked Mr MacInnes whether the Factor held residents' meetings at the Development. He said that there is an AGM in November each year for the Development. Miss Rintoul said that she attends the Development once per month. Notice of the date on which she is attending is given to residents and they are invited to come along and raise any concerns with her. She said that she is not hearing any complaints about this issue. She said that some of owners had complained about a specific visitor to Mr Kirkwood's flat. Action was taken in that regard and that person had not visited for some months. Mr MacInnes said that the Factor's role is to be supportive but they cannot restrict who visits an owner occupier.

The Code

The Homeowner complained of non-compliance with section 7 of the Code. It provides as follows :

38. **Section 7: Complaints Resolution**

Section 17 of the Act allows homeowners to make an application to the homeowner housing panel for a determination of whether their property factor has failed to carry out their factoring duties, or failed to comply with the Code.

To take a complaint to the homeowner housing panel, homeowners must first notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties, or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them.

It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in house complaints procedure and how they make an application to the homeowner housing panel.

- 7.1 *You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.*
- 7.2 *When your in house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.*
- 7.3 *Unless explicitly provided for in the property titles or contractual documentation, you must not charge for handling complaints.*
- 7.4 *You must retain (in either electronic or paper form) all correspondence relating to a homeowner's complaint for three years as this information may be required by the homeowner housing panel.*
- 7.5 *You must comply with any request from the homeowner housing panel to provide information relating to an application from a homeowner.*

Remedy Sought

39. In the Application the Homeowner said that she sought payment of compensation to finance her every day needs which had been depleted due to her having to pay for use of the guest room made available by the Factor and pay for taxis to travel to stay with her son. At the hearing she said that the factor is not attending the Property at the right time to properly assess the smell emanating from the flat above the Property.

Tribunal Findings and Reasons for Decision

40. The Homeowner complained of non-compliance with Section 7 of the Code. The Factor had produced a copy of their WSS in their inventory of productions. This set out a complaints resolution procedure.
41. The Homeowner had been subjected to 11 floods in the Property which had been caused by water ingress from the flat above. Each time there was a flood the Homeowner alerted the 24 hour response service provided by the Factor. The response service had reacted quickly and an electrician had attended the Property to ensure the Property was safe. The Factor had worked with the proprietor of the flat above the Property and her family to put in place a system to prevent flooding. This consisted of the installation of self-closing taps and laterally pumps to ensure the water pressure to the flat above the Property was adequate to ensure the self-closing taps operated properly. The Factor carried out weekly checks to ensure that the self-closing taps were

operating. The Homeowner told the Tribunal that the difficulties which she experienced did not relate to the Factors' response to the flooding incidents but to gaining access to the flat above to stop the flow of water and to the implementation of preventative measures to stop further damage being caused.

42. As regards the anti-social behaviour in the flat above the Property and the smell emanating from the flat above the Property the Tribunal heard evidence that the Factor had attended the flat above the Property, had liaised with the family of the owner of the flat above the Property, had been in touch with the Police and the Environmental Health Services. However, none of the agencies contacted had identified a source for the smell complained of by the Homeowner. The Factor had received complaints from residents at the development about a particular visitor attending the flat above the Property. Steps had been taken and the individual concerned no longer visited the Development.
43. Having considered all of the information placed before it including the written and oral submission regarding breach of factor's duties, the Tribunal determined that the issues complained of did not constitute a breach of the Code or a breach of duty. The Tribunal noted and welcomed the suggestion from Mr MacInnes that the Factor would take a sample of the material in the ceiling of the Homeowner's bedroom and have testing carried out by a qualified individual then report back to the Homeowner on the findings in an effort to determine whether the smell complained of was due to water damage in the area between the Property and the flat above.

Proposed Property Factor Enforcement Order

44. The Tribunal does not propose to make a property factor enforcement order.

Appeals

45. In terms of section 46 of the Tribunals (Scotland) Act 2014 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.

J Devine

Signed

Joan Devine, Legal Member and Chair

17 September 2018
Date