



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/19/1338

Flat 7, 29 Brighouse Park Cross, Edinburgh EH4 6GW
("the Property")

The Parties:-

Dr John Howard, 5132 Aldenbrook Way, Glen Allen, VA23059, USA
("the Homeowner")

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

Tribunal Members:

Graham Harding (Legal Member)
Mike Links (Ordinary Member)

DECISION

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 23 April 2019 the Applicant complained to the Tribunal that the Factor had failed to carry out its duties by failing to test stairwell fire safety automatic smoke vents; failing to notify the Homeowner of issues and failing to complete repairs over a lengthy period. The Homeowner submitted copies of correspondence between himself and the Factor and subsequently submitted further written representations in support of his application.
2. By Notice of Acceptance dated 6 June 2019 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.
3. By email dated 4 July 2019 the Factor requested a postponement of the hearing assigned to take place on 8 August 2019. The Tribunal refused to postpone the hearing.
4. A hearing was held at George House Edinburgh on 8 August 2019 however due to some documents submitted by the Homeowner not having been received by the Factor the Tribunal determined to adjourn the hearing to allow time for the Factor to consider the documents.
5. Prior to the adjourned hearing the Homeowner submitted further documents and applications for Directions. The Applications for Directions were refused by the Tribunal.
6. The Factor also submitted further written submissions and productions in advance of the hearing

Hearing

7. A hearing was held at George House Edinburgh on 9 January 2020. The Homeowner attended personally. The Factor was represented by Angela Kirkwood, Operations Director, Jeni Bole, Legal Compliance Manager and Georgina Ramsay, Property Manager.
8. At the commencement of the hearing the Tribunal sought clarification on the issues before it. It had become apparent that two separate applications had been submitted by the Homeowner one dated 23 April 2019 and another dated 23 June 2019. The second application had not been processed by the Tribunal administration but had been included in the Homeowner's bundle of documents submitted in advance of the hearing assigned for 8 August 2019. The Tribunal Chairman explained to the Homeowner that as the second application had never been processed and had never been assigned a case reference number it could not be conjoined with his present application. It therefore would not be possible to consider any of the issues relating to that application at this hearing. The Tribunal apologised to the Homeowner for any inconvenience that might cause.

9. The Tribunal noted that the Homeowner had made two Transatlantic journeys already in connection with his application and explained it would be open to him to apply to have the second application processed and heard separately on another occasion or this hearing could again be adjourned until the two applications could be conjoined. After considering his position the Homeowner decided to proceed with the hearing restricted to the issues contained in his first application and would raise his concerns about the second application with the Tribunal administration.

Summary of Submissions

10. The Homeowner indicated that although it appeared that the repairs to the automatic smoke vents at the property had been carried out no certification was available. This was disputed by Ms Bole who suggested it was available and would be uploaded to the portal.
11. Ms Ramsay advised the Tribunal that there were two separate fire safety systems operating at the property one for the lobby and one for the stairwell. These were now being maintained under a single contract with Kilpatrick Blane. The automatic smoke venting system was now fully operational. Ms Ramsay went on to say that the Factor had also arranged for a separate independent consultant DKI Consultants, Leith to prepare a report on the system. Ms Ramsay advised the Tribunal that the Consultant had inspected the system on 8 January and the report was expected the following week. Ms Ramsay acknowledged that historically there had been an issue with the smoke venting system and that potentially it would have been possible for the homeowners to have taken action against the developers. Now that the work had been carried out the Factor anticipated that the report would show everything was absolutely fine but in the event of non-compliance the Factor would take it up with the contractor. Ms Kirkwood confirmed the DKI report would be uploaded to the portal once it was available. There had not been a verbal report provided.
12. Ms Bole referred the Tribunal to the spreadsheet submitted with the Factor's representations dated 23 December 2019. She confirmed the original commissioning of the fire safety system had been undertaken by the developers prior to the Factor taking over responsibility for the development in May 2014. The Homeowner queried what steps the Factor had taken at the point that it had assumed responsibility for the development to ascertain the system including the smoke vents was working properly.
13. Ms Bole referred to a timeline commencing in May 2014. In September 2016 the Factor was made aware of an issue with the smoke vents and arranged attendance at the development by Sequel. A report was obtained and the issues referred to the developers as it was considered a snagging issue. The developers responded by saying that as the system had been commissioned at the outset it must have been tampered with and denied responsibility. The Homeowner pointed out that there ought to have been tests carried out in November 2014 and May and November 2015. Ms Bole accepted that due to an oversight no tests had been done and apologised for this. She went on to

say that following the denial of liability by the developer discussions had continued with the committee and in December 2016 AMA attended and carried out a small repair. Following this at the request of the Factor, Sequel attended in January 2017 and subsequently the Factor notified the committee of the potential issue. A report from Sequel dated 27 March 2017 was immediately sent to the committee who instructed the Factor to chase the developer. Ms Bole went on to say that the committee instructed the Factor that they were not to carry out the necessary works at a cost to the homeowners.

14. Ms Bole explained that subsequently in May 2017 the Factor had contacted NHBC to ascertain if the cost of the repairs would be met under their 10-year guarantee but as the cost per property was below the threshold the repairs were not covered.
15. Ms Bole further explained that there was an AGM held on 15 May 2017 at which all owners were notified of the issues regarding the smoke vents and the steps being taken to resolve them.
16. The Tribunal was advised that in October 2017 there was a meeting between a director of the Factor and AMA where the Factor's concerns were expressed and AMA said they would deal with the problem. Ms Bole said that thereafter the Committee had been kept up to date.
17. Ms Ramsay said that in February 2019 she had met with the Committee to advise them that the Factor was getting nowhere with the developer and following on from that meeting a request for advance funding was sent to homeowners requesting payment. The authorised expenditure was only £20.00 per property. There were 24 properties. The anticipated cost of the repairs was about £1800.00. This worked out at between £55.00 and £90.00 per property. There were delays in gathering the requested sums from the owners but by May 2019 the Factor had received funds from about half the owners and the Factor decided to proceed with the work. Each owner contributed a £650.00 float in terms of the titles.
18. Ms Bole said that between October 2017 and February 2019 there had been two or three occasions when the developers had said they were prepared to do the work but had then stepped away from doing it.
19. In response to a query from the Tribunal Ms Kirkwood explained that when the development was first occupied there had been a core group of owners who had been very engaged initially with reporting snagging issues and garden maintenance work. There was not a formal Owners Committee but these owners met on a roughly quarterly basis. There was no provision in the titles for the formation of an Owners Committee. Ms Kirkwood confirmed that the Factor did not organise an annual meeting of homeowners.
20. For his part the Homeowner said he had not read the minutes of the AGM. He had received an email from the Factor dated 30 April 2019 (page 114-115 of the Homeowner's Inventory). The Homeowner submitted that the Factor had

plenty of time to send out notifications by letter but that had not happened with the smoke vents. The Homeowner was also concerned that every email sent from the Factor had at the bottom a disclaimer absolving the Factor from liability.

21. It was the Factors position that the meeting in May 2017 had been called by the owners and all owners had been invited to attend. There was provision for meetings of owners within the tile deeds.
22. The Homeowner went on to refer the Tribunal to the Factor's statutory responsibility in terms of the Fire Safety (Scotland) Regulations 2006 following the Fire Scotland Act 2005 and in particular Regulations 23 and 24. The Homeowner explained that in terms of the legislation which was introduced for the safety of firefighters the Factor was for the purposes of the legislation a person with control of the premises and had a statutory responsibility to ensure its fire safety. There was a requirement to maintain fire safety equipment in common areas. It was the Homeowner's submission that the Factor had breached its statutory obligations over a long period.
23. Ms Bole submitted that there had been an inspection in May 2016 and the smoke vent system had been checked. The fault had been reported at that time. An investigation was carried out and the Factor had met with the committee in September 2016. The Homeowner queried what had happened between May and September 2016. Ms Bole said that in her experience with other developments it was not uncommon for smoke vent systems to be set off.
24. There then followed a discussion on the origins of the Sequel report of September 2017. Another owner Dr Finnie had noticed something looked off with the window in the stairwell and that had been reported to the committee. That in turn had been referred by the Factor to AMA who had said the system had been tampered with and that led to Sequel being instructed to prepare a report. Ms Bole confirmed that Sequel had not charged for the report.
25. The Homeowner pointed out that there was still a statutory requirement for a biannual inspection and testing of the fire safety system at the development and that had not been done. Ms Bole referred the Tribunal to Section 4.1 of the Factor's Written Statement of Services.
26. The Homeowner confirmed he had not paid his share of the up-front cost of the repair to the smoke vent system and referred the Tribunal to Paragraph 1 on page 315 of his productions as well as page 114 and page 269. The Homeowner suggested these were important as there had been recipients of the emails who were not residents at the development and it also appeared that the Factor's employees had access to other employees' emails. However, Ms Ramsay explained this was not the case and the email of 30 July 2018 although sent by herself on Melanie Walker's email that had been because she had been working with Ms Walker doing a handover and had not yet had her own email address.

27. The Homeowner went on to say that his concern was that there were references to AGM's and agreement being reached but that was inconsistent with how the development was run. Ms Bole suggested that nonetheless the Factor and the owners involved had all been moving in the same direction to have the issue resolved.
28. The Homeowner moved on to express his concern that there may have been a lack of insurance cover for some four and a half years when the smoke vent system was not functional. There was a requirement to inform the insurance providers of any defect in the system and he queried if that had been made. He went on to say that if there had been a fire and the residents had to evacuate the building there would have been a risk to their safety. The whole issue had taken up a lot of his time and caused great anxiety. His two Trans-Atlantic trips to attend the hearings had cost about \$3000.00. The Tribunal should give some consideration to this. The Homeowner indicated he had not initiated the proceedings for financial reasons but for an acknowledgement that the smoke vents should have been repaired 18 months ago.
29. Ms Bole confirmed that the Factor had informed the insurers of the defects and they would still have paid out to re-instate the building. They would have investigated with regards to any negligence issues.
30. Ms Kirkwood also advised the Tribunal that following on from the issues identified at the development the Factor had carried out a complete review of its internal procedures and had prepared a centralised asset register of all equipment located at all developments under its control.

The Tribunal make the following findings in fact:

31. The Homeowner is the owner of Flat 7, 29 Brighouse Park Cross, Edinburgh ("the Property")
32. The Property is a flat within the Caer Amon Development (hereinafter "the Development").
33. The Factor performed the role of the property factor of the Development.
34. An Automatic Smoke Venting system was installed and commissioned by the developers of the development AMA.
35. The Factor assumed responsibility for the development with effect from May 2014.
36. The Automatic Smoke Venting system ought to have been inspected and tested by the Factor on a bi-annual basis.

37. No inspections or tests were carried out by the Factor between May 2014 and May 2016.
38. The development does not have a formally constituted Owners Committee.
39. A small group of owners have formed an informal committee with whom the Factor discuss ongoing issues.
40. The Factor was made aware of a problem with the Automatic Smoke Vents in September 2016 and raised it with the committee.
41. The Factor contacted the developer AMA and in December 2016 a small repair was carried out.
42. The Factor instructed Sequel to prepare a report that was available in January 2017.
43. The Factor notified owners of the issue with the Smoke vents in about May 2017.
44. The Factor met with AMA in October 2017 and had understood AMA would carry out repairs to the Smoke Vent system.
45. Between October 2017 and February 2019 no progress was made with the developers. During that time the Factor kept the committee informed.
46. Following a meeting with the committee in February 2019 it was decided to proceed with a request to homeowners to fund the necessary repairs to the smoke vent system.
47. After obtaining funding of about 50% from owners the Factor instructed contractors to undertake the necessary repairs to the smoke vent system in about August 2019.
48. The repairs to the smoke vent system was completed and certified by Kilpatrick Blane Services Limited.
49. The Factor is subject to the terms of Regulations 23 and 24 of the Fire Safety (Scotland) Regulations 2006.
50. The Factor informed the development insurers Allianz of the issues with the smoke vent system once they became aware of them.

Reasons for Decision

51. It was acknowledged by the Factor that there had been an oversight on its part during the period from May 2014 when it assumed responsibility for the development until the issue with the smoke vents was brought to its attention to inspect and test the system.

52. The Factor states in its Written Statement of services at section 4.1 that "Statutory inspections of lifts, emergency lighting, fire fighting equipment etc will be arranged where applicable by James Gibb in accordance with the individual requirements."
53. The Tribunal considered the terms of Regulations 23 and 24 of the Fire Safety (Scotland) Regulations 2006 and agreed with the Homeowner that in terms of the legislation the Factor along with the owners would be deemed to have a responsibility to ensure that the fire safety equipment was in working order.
54. It was therefore apparent that over the period from May 2014 to September 2016 the Factor was in breach of its property factors duties.
55. The next issue for the Tribunal to determine was the actions of the Factor once it had become aware of the problem with the smoke vents. In considering matters the Tribunal was concerned that the Factor chose to liaise principally with the owners committee rather than directly with the owners themselves. Whilst there was nothing to stop a group of owners forming an informal association it did not have any real authority in terms of the title deeds of the development. There therefore remained an onus on the Factor at all stages to keep owners directly informed of any issues that arose at the development and the steps that were being taken to resolve those issues. The Tribunal did not consider that the Factor could be said to be properly fulfilling its duties by simply keeping the committee informed of what it had been doing particularly during the period from December 2017 to February 2019.
56. Furthermore, the failure of the smoke vents to operate properly could in the event of a major fire have had catastrophic consequences for both occupants and the Fire and Rescue Service. It therefore seems to the Tribunal that having been made aware of the problem in September 2017 the Factor ought to have taken steps to have the smoke vent system fixed far sooner than it did. Section 2.4 of the Written Statement of services limits the non-emergency work that the Factor can carry out to the level of authorised expenditure per property. In this case it had been set at the low figure of £20.00 per property. However, Section 2.5 permits the Factor to authorise emergency repairs whatever the cost. Section 2.6 states that the decision to treat a repair as an emergency will be made on the conditions and hazards present. Given that each property carried a substantial float of £650.00 and given that there was a statutory duty in terms of the Fire Safety (Scotland) Regulations 2006 to maintain the fire safety equipment it is difficult to see how the Factor would not treat a failure in the smoke vent system as an emergency. Having given the developer an opportunity to carry out repairs within a very short period and them failing to do so the Tribunal considers it was the Factor's duty to instruct repairs, recover the funds from the owners and seek instructions on whether a majority wished to pursue the developer for recovery of the cost. It was simply not appropriate for the smoke vent system to be inoperative for a further period of almost two years. The Tribunal was therefore satisfied that

following the discovery of the problem with the smoke vent system the Factor continued to be in breach of its duties over the period to August 2019.

57. The Tribunal was satisfied that the repairs to the smoke vent system have been satisfactorily carried out. It was also satisfied that had there been a fire at the property the insurers would have met the cost of re-instatement. However, it is apparent that the Homeowner with a considerable amount of justification has been put to a great deal of trouble and inconvenience and no doubt not insubstantial anxiety as a result of the failures of the Factor to properly carry out its duties. Whilst the Homeowner indicated he had not brought the application in order to obtain compensation the Tribunal consider that it is appropriate to make a financial award in this case to reflect the failures on the part of the Factor. The Tribunal consider that any such award has to be proportionate and is unlikely to reflect the substantial cost incurred by the Applicant in travelling from the USA to attend the hearings. In the circumstances the Tribunal considers a financial award of £750.00 to be an appropriate sum to award the Homeowner.

58. As it seems the Factor has carried out a complete review of its internal procedures and prepared a centralised asset register of all equipment at all properties under its control the Tribunal is satisfied that no further orders are required at this time.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

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

19 February 2020 Date