

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/22/1225 and FTS/HPC/PF/22/1784

**5/15 Drummond Street, Drummond House, Edinburgh EH8 9TT
("the Property")**

The Parties:-

**Red Box Property Limited, having a place of business at 19/19 Salamander
Place, Edinburgh EH6 7JJ
("the Homeowner")**

**James Gibb Residential Factors, having a place of business at 4 Atholl Place
Edinburgh EH3 8HT
("the Factor")**

Tribunal Members:

Graham Harding (Legal Member)

Elizabeth Dickson (Ordinary Member)

DECISION

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 2.4 and 2.5 of the 2012 Code and section 7.1 of the 2021 Code.

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 2012 Code" and "the 2021 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. The Homeowner complained to the Tribunal by applications dated 28 April 2022 and 7 June 2022 that the Factor had failed to comply with the 2012 and 2021 Codes and had failed to comply with the Property Factor's duties.
2. By Notice of Acceptance dated 21 June 2022 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion ("CMD") was assigned.
3. Prior to the CMD the Factor submitted detailed written submissions.
4. A CMD took place by teleconference on 26 August 2022. The Homeowner was represented by Mr Graeme Morris. The Factor did not take part. The Tribunal continued the applications to a hearing. The issues for the Tribunal to determine were incorrectly stated to be:-
 - i) Did the Factor exceed its authority when appointing security patrols? Should it have obtained 100% approval from owners as the patrols were an improvement not a repair or maintenance and did it fail to do so?
 - ii) Is the Factor entitled to seek to recover co-owner debts and the cost of pursuing same from the co-owners?
 - iii) Did the Factor respond to complaints and communications within its timescales?Item ii) should not have been included as an issue as the Homeowner's application in respect of this matter had been refused at the CMD.
5. A hearing was held by video link on 20 March 2023. The Homeowner was again represented by Mr Morris. The Factor was represented by Mr Roger Bodden. Following an adjournment and as a result of the Tribunal's private discussions being overheard by the parties the Tribunal decided to recuse itself and a fresh hearing was assigned before a differently constituted Tribunal.
6. By email dated 25 May 2023 the Homeowner submitted further written representations to the Tribunal.
7. By email dated 5 June 2023 the Factor submitted further written representations to the Tribunal.

Hearing

8. A hearing was held by video link on 7 June 2023. The Homeowner was again represented by Mr Morris and the Factor by Mr Bodden.
9. By way of a preliminary matter the Tribunal ascertained from Mr Morris that he had no objection to the Factor's submissions of 5 June being received although late. Mr Morris confirmed he had no objection.
10. The Tribunal queried with Mr Morris if he accepted that as far as any alleged breaches of Section 1.a D of the 2012 Code and 1.5 A of the 2021 Code were

concerned the Factor's Written Statement of Service ("WSS") did have the required information. Mr Morris confirmed that the WSS had the information but that the Factor did not handle it appropriately. The Tribunal pointed out that this might result in the Factor being in breach of another section of the Codes but not Section 1.

11. With regards to a breach of Section 2.4 of the 2012 Code Mr Morris referred the Tribunal to his written submissions and asserted that security patrols were an improvement and would therefore have required 100% of owners to have agreed to them.
12. For the Factor Mr Bodden queried that it was an improvement particularly when homeowners were feeling upset as a result of repeated break-ins, threatening behaviour and drug abuse. He submitted it was reasonable that a Factor should seek a resolution and that it was not an improvement. He said it was a route to protect the building. He went on to say it was a cost that had been accepted by owners for three years. Nevertheless, he said the Factor had refunded the Homeowner all of the cost which had been one of the desired resolutions. Mr Bodden confirmed the security patrols had been both inside and outside the development and that signs advising of the additional security had been installed. He confirmed that owners had not been consulted but that none other than the Homeowner had raised concerns. He did not accept that the Factor required all the owners to agree to the additional security and that a majority would suffice and referred the Tribunal to the terms of the Factor's written representations and the title provisions and Rule 1 of Schedule 1 of the Tenements (Scotland) Act 2004.
13. In response to queries from the Tribunal Mr Morris confirmed there was no CCTV at the Development and that this would also require 100% approval of owners. Mr Bodden advised the Tribunal that the development was a converted school with two entry doors at the front and two at the side and with access to a lower-level car park. He said that the security patrols had looked out for homeless people using the development as somewhere to stay. Mr Bodden confirmed that the Factor had delegated authority to spend up to £20 per property without requiring owners' approval. He went on to say that the patrols had been stopped as the security situation had improved. Mr Morris submitted that the patrols had stopped because of his complaint and application to the Tribunal.
14. Mr Morris went on to say that the application to the Tribunal had arisen as a result of the Factor not answering his complaint and that what was needed now was a long-term solution. He said that the member of staff at the Factor that he had complained to had left the firm and that a subsequent employee had not dealt with the matter properly and had "got his back up". He suggested that although matters may have been temporarily sorted there would still be problems with the Factor in the future particularly if there was no consultation and no vote taken. Mr Morris referred the Tribunal to other developments that he was aware of in which the Factor had said 100% of owners had to agree before something could be implemented. He also said that he did not think security at the development had been a massive issue

and that in an emergency the first port of call should be the police and not a security patrol.

15. For the Factor Mr Bodden agreed that longer term solutions were required and said he wanted to work with Mr Morris and take up some of his proposals made at an owners' meeting such as the creation of a sinking fund and the installation of CCTV. Mr Bodden confirmed that the Homeowner had been fully reimbursed for the cost of the security patrols and additional compensation had also been paid amounting in total to £600.00.
16. Mr Morris confirmed he had received an apology and £600.00. He went on to say that the only reason that he was at a hearing was because after the CMD he had raised a couple of questions with the Factor and had received no response for a month. Furthermore following the Owners Association AGM on 28 March he had expected some documentation very shortly thereafter but some ten weeks later there had been nothing produced. Mr Morris said that he therefore doubted that the Factor had improved. For the Factor Mr Bodden said he could assure the Tribunal progress had been made and one letter had been sent. He explained that the Factor was not where it wanted to be with the development due to the lack of participation by other owners. He said that Mr Morris had been forthright in his approach to the Factor but that he wanted to work with him going forward.
17. Mr Morris said that the only reason he had not withdrawn the application was because he did not see the Factor improving. He accepted the current property manager was being more pro-active. For the Factor Mr Bodden said that the relationship with owners had been difficult and there was a degree of apathy amongst some that made it difficult to obtain funding for some projects such as a recent redecoration proposal. He indicated that the Factor might have to consider its position going forward. Mr Morris suggested that how the Factor handle projects was a factor and that after eighteen months to two years people were drained and had lost their appetite to continue. He accepted some owners ignored requests to agree to projects.
18. With regards to debt collection costs the Tribunal noted that this issue did not form part of the applications before it but had been considered by the previously constituted Tribunal under Reference FTS/HPC/PF/22/2003 and had been refused. The Tribunal therefore could not hear any submissions in this regard notwithstanding the terms of the previous CMD note.
19. In conclusion Mr Morris said that all he wanted was the service from the Factor that he paid for and that required better communication from it. He was not confident that he would not be back with a further complaint. He thought it important that the Tribunal made a finding against the Factor so that if another complaint was made in the future a Tribunal might see a pattern emerging.
20. For the Factor Mr Bodden had nothing further to add beyond what had been said in the written representations and earlier submissions.

The Tribunal make the following findings in fact and law:

21. The Homeowner is the owner of 5/15 Drummond Street, Drummond House, Edinburgh EH8 9TT ("the Property")
22. The Property is a flat within the Drummond House Development, Drummond Street, Edinburgh (hereinafter "the Development").
23. The Factor performed the role of the property factor of the Development.
24. The Factor's Written statement of Services complies with section D of both the 2011 and 2021 Codes.
25. The Factor instructed the employment of security patrols at the Development in response to concerns regarding break-ins, drug abuse, the use of the development by homeless persons and the assault and intimidation of owners.
26. The Factor did not seek owners approval to incur the cost of additional security at the development.
27. The Factor did not adhere to its own timescales when responding to the Homeowner.
28. The Factor has acknowledged certain failings in this regard and paid compensation to the Homeowner.
29. The Factor has refunded all of the additional security charges to the Homeowner.

Reasons for Decision

30. The Homeowner accepted that the Factor's Written Statement of Service contained all the necessary information required to comply with Section D of both codes. The Tribunal was satisfied that there was no breach of this section of the Codes.
31. Although the Factor has a procedure for consulting with owners it was admitted that there was no formal consultation and no vote taken in respect of the employment of security patrols. The Factor sought to rely upon the terms of Clauses 3.6.4 and 3.6.7 of the Deed of Conditions by Tamar Limited Registered 25 October 2004 as amended by Supplementary Deed of Conditions Registered 5 August 2005. Clause 3.6.4 allows the owners at a meeting to make any regulations considered necessary with regards to the preservation, cleaning, use or enjoyment of the common parts. Clause 3.6.7 provides that the Factor unless previously restricted from so doing can exercise all the rights and powers that a majority of owners could exercise at a meeting other than the appointment of a Factor and its remuneration. The

Tribunal noted that the delegated authority for incurring expenditure was limited to £20.00 per property. The monthly cost of the additional security was generally well below this figure however the contract ran over a three-year period and therefore the total cost to owners would be significantly more than £20.00. The Tribunal does not consider that “regulations” in Clause 3.6.4 would extend to include instructing a firm of security guards to conduct patrols at the development. However, in the fourth paragraph of Clause 3.6.7 there is provision for any proprietor who considers it desirable that any maintenance is carried out to the flat common parts or wishes to **raise any other matter** and it is refused by a majority of owners can then apply to the Factor who has power to decide and whose decision is final. The Tribunal does not consider however that the Factor has power to refer itself to itself to authorise the instruction of security patrols. That then leaves the Tribunal to determine whether in terms of the first paragraph of Clause 3.6.7 the Factor can determine to instruct the security patrols. If the total cost had been not more than £20.00. per owner then the Tribunal would have been satisfied that the Factor would have had authority but given the total cost of the contract over the period it was in place was in excess of £300.00 the Tribunal considers that the Factor exceeded its authority and ought to have consulted with owners and obtained their approval. As the service has ended and the Factor has refunded the homeowner all of the costs the issue as to whether or not it would require all owners to agree to the service because it is an improvement becomes academic although it does seem that the term “any other matter” in Clause 4.6.7 may be broad enough to allow for a simple majority vote. If that is the case then the provisions of the Tenements (Scotland) Act 2004 would not apply. In any event given the Factor’s failure to consult with owners before instructing the security patrols the Tribunal is satisfied that it is in breach of Section 2.4 of the 2011 Code.

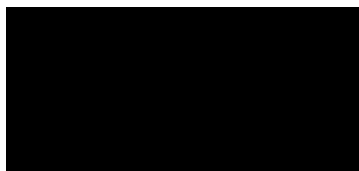
32. The Tribunal was satisfied from the written representations and the oral submissions on behalf of both parties that the timescales for responding to complaints and enquiries was not met and accordingly finds that the Factor was in breach of Section 2.5 of the 2011 Code. The Tribunal did however take into account that the Factor acknowledged its failings in this regard and apologised to the Homeowner and made a goodwill payment to it.
33. The Homeowner complained that the factor was in breach of Sections 2.4 and 2.5 of the 2021 Code however no evidence was led in respect of these sections which relate to information or documents being made available on request and providing an owner with contact details. Accordingly, the Tribunal does not find that the Factor is in breach of these sections of the 2021 Code.
34. With regards to Section 6.1 of the 2011 Code the Tribunal did not consider that the issues complained about by the Homeowner fell into the category of matters requiring repair, maintenance or attention to be notified by owners and therefore the Factor was not in breach of this section of the 2011 Code.
35. With regards to Section 6.1 of the 2021 Code again relates solely to repairs to owners’ property and is not relevant to the Homeowner’s complaint. The Tribunal finds that the Factor is not in breach of this section of the Code.

36. With regards to Section 7.1 of both Codes the Tribunal was satisfied that the Factor had an appropriate complaints procedure in place however there was a delay in properly following the procedure for which as previously indicated the Factor has apologised and paid compensation. Nevertheless, it is appropriate that the Tribunal finds the Factor to be in breach of Section 7.1 of the 2021 Code.
37. Taking everything into consideration including the apology made to the Homeowner by the Factor and the charges that have been reimbursed together with the goodwill payment made the Tribunal considers that finding the Factor to be in breach of Sections 2.4 and 2.5 of the 2011 code and 7.1 of the 2021 Code is sufficient sanction and that no purpose would be served by imposing a Property Factor Enforcement Order. The Tribunal would however wish to make it clear to the Factor that it is very important going forward that it improves its communication with owners if it is to continue to manage the development.

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



13 June 2023 Date