

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)
(“the Tribunal”)

Statement of Decision:

Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, as amended (“the Procedure Rules”);
Property Factors (Scotland) Act 2011 (“the 2011 Act”)
Tribunals (Scotland) Act 2014, section 43 (“the 2014 Act”)

Chamber Ref: FTS/HPC/LM/18/3392

Hillpark Grove Development, Edinburgh, EH4 7AP
(“the Property”)

The Parties: -

Mr Aylmer Millen, residing at 5 Hillpark Grove, Edinburgh, EH4 7AP
(“the Homeowner”)

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD
(“the Factor”)

Tribunal Chamber Members

Maurice O’Carroll (Legal Member)
Kingsley Bruce (Ordinary Member)

Decision of the Chamber

The Tribunal in the exercise of its jurisdiction in terms of rule 39(3) considers that the application is wholly without merit for the reasons stated below.

Background

1. A hearing on the above application was held on 27 March 2019. By decision dated 17 April 2019, the First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) unanimously determined that the Factor failed to comply with sections 2.5, 6.4, 6.9 and 7.2 of the Code of Conduct for Property Factors (“the Code”) as required by section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”). It further found that the Factor had failed to carry out the property factor duties as required by section 17(1)(a) of the Act as detailed in

that decision. The Tribunal therefore upheld nearly all of the points of complaint raised by the Homeowner. It therefore also issued a proposed Property Factor Enforcement Notice of even date with the decision.

2. By email dated 3 May 2019, the Homeowner requested a review of that decision.

Ground for review

3. The Homeowner set out his response to the Tribunal's decision by referring to various numbered "items" of the decision. This has been taken by the Tribunal to be a reference to paragraph numbers of its decision. These are dealt with in turn below, using that presumed reference.

The relevant legislation

4. Applications for review may be made in terms of the above noted legislation by either party. The terms of Rule 39 of the Rules of Procedure provide in relevant part as follows:

"39.— Review of a decision

(1) The First-tier Tribunal may either at its own instance or at the request of a party review any decision made by it...where it is necessary in the interests of justice to do so.

(2) An application for review under section 43(2)(b) of the 2014 Act must—

(a) be made in writing and copied to all other parties;

(b) be made within 14 days of the date on which the decision is made or within 14 days of the date that the written reasons (if any) were sent to the parties; and

(c) set out why a review of the decision is necessary.

(3) If the First-tier Tribunal considers that the application is wholly without merit, the First-tier Tribunal must refuse the application and inform the parties of the reasons for refusal."

5. The application for review was received on 3 May 2019. It was copied to the other party and it bears to set out why a review of the decision is necessary. It is therefore timeous and complies the requirements of rule 39(2).

The Tribunal decision

6. **Paragraph 11.** This ground of review is a re-statement of what the Homeowner stated in the course of the hearing before the Tribunal at the hearing. The Tribunal remains of the view that the Homeowner's understanding of the legal context of the contract between the parties is incorrect. In particular, there was no evidence of title being transferred by the developer, Mactaggart and Mickel, to the Factor. The correct legal position is that title in the Property was transferred to the respective proprietors of the development and the Factor acted as their agent. This is supported by both the Title Deeds and the Written Statement of Services which were produced in evidence. If this understanding on the part of the Tribunal is incorrect, then it may be corrected by the Upper Tribunal.

7. **Paragraph 22.** The duty to investigate was canvassed at the hearing and in the Tribunal's decision. The Homeowner refers to "accepted practice." There was no evidence led in relation to accepted practice. Accordingly, the Tribunal was not in a position to make a finding as to the extent to which any investigations by the Factor ought to have been made at the time property was handed over to individual proprietors by the developer as a matter of accepted practice.
8. **Paragraph 23.** Again, reference is made to "commonly accepted and applied best practice in the building industry." No evidence to this effect was led by the Homeowner. Therefore, the Tribunal could not make any findings in respect of it. The assertion of the detailed inspection requirements desiderated by the Homeowner were not supported by any evidence provided at the hearing and were therefore rejected. This ground of review simply seeks to revisit those findings in fact with which the Homeowner disagrees.
9. **Paragraph 24.** The Homeowner states that he did not anticipate any question from the Tribunal that might arise regarding the action the Factor might have taken in the event that it considered that the drainage system was inadequate after any inspection. The Tribunal noted that the Homeowner was unable to describe the legal mechanism which was in place to prevent the transfer of drainage infrastructure happening at any stage when Mactaggart and Mickel entered into purchase agreements to sell the respective parts of the development. It appears to the Tribunal that this was an obvious question which would inform the remedy sought by the Homeowner. Based on the evidence, there was in fact no answer to that question, short of seeking interdict in the Courts. This extreme measure was never at any point suggested by the Homeowner, but with which the Tribunal would not have agreed as constituting a duty in any event.
10. **Paragraph 25.** The Tribunal found on the evidence that the Factor acted as agent for the proprietors of the development and not as principal. This ground of review simply seeks to revisit that finding in fact with which the Homeowner disagrees.
11. **Paragraph 26.** The narrative in the application for review in relation to this paragraph does not accord with what is stated in paragraph 26 of the decision. The statement at paragraph 26 of the decision affirms what is stated above in relation to paragraph 25. The ground of review refers to drainage being fit for purpose and the delays in instigating maintenance by the Factor. These matters have already been addressed within the Tribunal's decision. In particular, at paragraph 29, the Tribunal found that the Factor had delayed inordinately, and in breach of its duties as factor, in dealing with the drainage issues at the development.
12. **Paragraph 27.** At paragraph 27 of its decision, the Tribunal noted that: "the Factor does, however, have a duty to react to maintenance issues as and when they arise and to deal with them in as prompt and effective a manner as would any affected homeowner. In carrying out their functions as property factor, the Factor required to exercise ordinary or reasonable skill and care."

As noted in the decision, this does not entail the detailed level of expert and intrusive inspection desiderated by the Homeowner. This ground of review simply seeks to revisit those findings in fact and law with which the Homeowner disagrees.

13. **Paragraph 39.** This paragraph refers to section 6.8 of the Code of Practice for Property Factors which requires Factors to disclose any financial or other interest they may have with contractors appointed. The Tribunal found as a matter of fact on the evidence led that there was none. This ground of review therefore has no basis.

Outcome

14. For the above reasons, the Tribunal finds that the application for review is wholly without merit and is therefore rejected. The decision of the Tribunal and its associated proposed Property Factor Enforcement Order both dated 17 April 2019 stand.
15. **It should be noted that in terms of section 43(4) of the Tribunals (Scotland) Act 2016, the exercise of the Tribunal's discretion whether a decision should be reviewed may not itself be reviewed or subject to appeal. The availability of an appeal otherwise remains unaffected.**

M O'Carroll

Signed

Date: 7 May 2019

**Maurice O'Carroll
Legal Member**