

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/PF22/3996

Re: 62/4 West Bryson Road, Edinburgh EH11 1BA ("the Property")

Parties:

Mr Ian Gemmell, 62/4 West Bryson Road, Edinburgh EH11 1BA ("the Homeowner")

James Gibb Residential Factors, Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Factor")

Tribunal Member:

**Graham Harding (Legal Member)
Ahsan Khan (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 OSP2, OSP4, OSP6 and 6.4 of the Code and also failed to carry out its property factors 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 2021 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 email dated 28 October 2022 the Homeowner submitted an application complaining that the Factor had failed to comply with its duties under Section 14(5) of the 2011 Act and had failed to carry out its property factors duties. The Homeowner submitted an index along with a number of emails between the parties and a copy of the Factor's Written Statement of Services in support of the application. In particular the Homeowner complained that the Factor had (i) failed to perform their duties and maintain the communal areas of the development (ii) failed to carry out routine inspections over a period of at least 10 months (iii) failed to ensure the garden contractor employed by the Factor carried out work in the garden and car park properly over an eight month period resulting in residents being unable to park their cars properly in the car park (iv) were dishonest about making site visits and (v) treated the residents of the development as second class citizens as there was no residents association.
2. Following further correspondence between the Homeowner and the Tribunal administration by Notice of Acceptance dated 6 March 2023 a legal member of the Tribunal with delegated powers accepted the applications and a Case Management Discussion ("CMD") was assigned.
3. By letter dated 21 April 2023 the Factor submitted written representations to the Tribunal,
4. A CMD was held by teleconference on 18 May 2023. The Homeowner attended in person. The Factor did not attend nor were they represented. The Tribunal heard submissions from the Homeowner and considered the Factor's written representations and continued the application to a hearing. The Tribunal directed the Homeowner to submit in advance of the hearing an indexed and paginated Inventory of Productions.
5. By email dated 6 June 2023 the Factor advised the Tribunal that it intended to rely upon its written submissions of 21 April 2023 and did not intend attending the hearing.
6. By email dated 20 July 2023 the Homeowner submitted a paginated version of his written representations.
7. By email dated 25 July the Factor complained that the paginated submissions from the Homeowner did not amount to an indexed and paginated Inventory of Productions.
8. By email dated 29 August 2023 the Homeowner submitted further written representations to the Tribunal.

Hearing

9. A hearing was held by video conference on 2 November 2023. The Homeowner attended in person. The Factor did not attend nor were they represented.
10. By way of a preliminary matter the Tribunal noted that although the Homeowner had referred to submitting further photographs these did not in fact appear to have been submitted and the Homeowner accepted that this was the case. The Tribunal also referred the Homeowner to the issue raised by the Factor with regards to the Inventory of Productions. After some discussion the Tribunal accepted that there was an index with the original application and as the documents had been paginated it would be relatively easy for the Tribunal to be directed during the hearing to any specific document. The Tribunal then queried the relevance of the document submitted by the Homeowner on 29 August 2023 as it appeared to relate to a new matter not part of the Homeowner's application. The Homeowner submitted it simply confirmed his position that the Factor failed to treat him as an owner properly. However, the Tribunal did not consider it could take the correspondence submitted into account.
11. The Homeowner said that the Tribunal was important and that he thought by not attending the Factor was showing total contempt for him and the Tribunal but that he was not surprised. He said that the Factor knew that they had been caught in a lie and that the complaint about the Homeowner's productions was laughable and had nothing to do with the case.
12. The Homeowner referred the Tribunal to his written representations which he said set out his complaint against the Factor and then proceeded to clarify his position.

Section OSP2

13. The Homeowner stated that the Factor must be honest, open and transparent and fair in its dealings with homeowners. But he submitted the Factor had lied about making regular site visits. When asked how he would know if an employee of the Factor had attended at the Development, the Homeowner said that he could look out of his window and see that the site was in an appalling condition. He said other owners had reached the same conclusion. He went on to say that the crux had come when the Factor's Miss Bole had attended in August 2022 and had seen the state of the place and had taken pictures. He said that the car park had been completely covered in a carpet of leaves and moss. The Homeowner also said that the Factor had still not carried out regular visits after the complaint had been made.

OSP4

14. The Homeowner said that although he did not expect to receive a five-star service from a factor he did expect them to do an alright job and what was not acceptable was that a factor falsified records. The Homeowner said that he had made a Stage 1 complaint to the Factor over a lack of response in dealing with the clearing out of the communal bike store and issues with the state of the car park in May 2022. The Homeowner said he received a response to his complaint on 24 June 2022 refuting that the gardening contractor was failing in its duties and refusing to take responsibility for damage to his car. The Homeowner said he then made a Stage 2 complaint and the Factor's Executive Director, Mr Mayall in his response of 17 August 2022 confirmed the outcome of the Stage One complaint. The Homeowner then referred the Tribunal to the visit to the development by Miss Bole on 18 August 2021 during which he said she had been appalled at the condition of the car park and had admitted that there had been no site inspections in a long time. The Homeowner said that Miss Bole had told him that the gardener needed a "bit of a kicking". The Homeowner went on to explain that he thought that Miss Bole had been negligently misleading by providing false information in her response to his Stage One complaint by not visiting the site and taking the word of the gardener. He said that Mr Mayall had not only taken that approach in his original Stage Two complaint letter but was then fraudulently misleading by then issuing a second Stage Two letter on 31 August 2022 in which one paragraph had been amended to suggest that at recent inspections it appeared the gardener had fallen short of what had been expected and two months' gardening charges would be credited to his account. The Homeowner submitted that the Factor had falsified the Stage Two response. He said that when he tried to raise the issue in subsequent emails, he had been told the matter was closed and he referred the Tribunal to the emails on pages 37 and 38 of his submissions.

OSP6

15. The Homeowner said it had taken three years from when he first raised the clearing out of the bike store which had been full of junk for the Factor to do anything about it. He said he had been ignored by the Factor. He said that he had first contacted the Factor about the condition of the car park on 16 December 2021 and referred the Tribunal to his email on page 17 of his submissions. He said he went back to the Factor in March 2022 and again in May 2022 without any response. The Homeowner said that in terms of the Factor's Written Statement of Services ("WSS") they ought to have replied within one week. But he thought that even if they had responded within a couple of months there would not have been a problem.
16. The Homeowner said that the Factor's Mr Reid had offered to assist with arranging an AGM but had failed to do so and in the end he and some other owners had done this themselves. He said that when the Factor became aware of this, they then contacted owners but by that time the AGM had been

held. The Homeowner submitted that the Factor was in breach of OSP6 by not carrying out its services in a timely way.

Section 6.4

16 The Homeowner confirmed that his application had been amended at the application stage to include Section 6.4 and not 6.7 of the Code. He said that the Factor had not made routine inspections as had been obvious from the look of horror on Miss Bole's face when she attended on 18 August 2022. The Homeowner said that she had said that she had no idea that it was so bad and that no-one had been out that year. The Homeowner went on to say that it made no difference that Mr Mayal had said in his email that Miss Bole lived 200 metres away from the site as she had not been visiting it.

Property Factors Duties

17. The Homeowner submitted that the Factor had failed to provide its core services and referred the Tribunal to the WSS parts 3.1 and 3.2. He said the Factor ought to have ensured that the bike store, car park and garden were properly maintained but had failed to do so. He said the condition of the whole development was a disgrace and that routine maintenance was not being carried out to an adequate standard. The Homeowner went on to say that the Factor had taken the word of the gardener that the garden and car park were being properly maintained when that was not happening and was not being monitored.
18. The Homeowner said that there had been a failure to carry out property inspections in terms of part 4.8 of the WSS. This had been confirmed by Miss Bole on 18 August 2022. The Homeowner went on to say that because the Factor had not maintained the development to an acceptable standard the owners had voted to terminate their appointment and had replaced them. The Factor's services had been terminated with effect from 16 August 2023.
19. The Homeowner said that the Factor had been in breach of part 5.1 of the WSS in that it had failed to provide preventable maintenance by ensuring that proper pruning of trees and bushes was done and that leaves were cleared and removed and not just blown into a border to then be blown by the wind back over the car park.
20. The Homeowner said that the Factor had failed to comply with part 4.7.1 of the WSS as it had taken three years for the bike store to be cleared out and was never fully completed and over a year for the car park to be attended to.
21. The Homeowner said that the Factor was also in breach of part 4.9 of its WSS as it failed to instruct or manage contractors appropriately.
22. The Homeowner said that the Factor would bill aggressively and add late fees but did not do the work they were contracted to do. There were basic failures.

23. The Homeowner submitted that as the car park was small most neighbours reverse parked. He said that he had experienced two incidents where his car had been damaged in March and May 2022 by car doors opening on to his car. He explained that if the car park markings could not be seen parking became difficult and if one car was slightly out of its bay then every car was then out. The Homeowner said that he understood that generally cars were parked at the owner's own risk but that the Factor had a duty to maintain the car park and they had failed to do this. He said that it had cost £600 to repair the damage to his car and would like this to be reimbursed by the Factor.
24. The Homeowner went on to say that he had spent many hours having to deal with a non-responsive factor and had been ignored and put to a great deal of inconvenience. He said he would like some financial recompense for this. He also would like the Factor to be removed from the register as he did not think they were suitable to be factors.

Findings in Fact

25. The Homeowner is the owner of the flat at 62/4 West Bryson Road, Edinburgh.
26. Until 16 August 2023 when the contract was terminated the Factor was the factor at the flatted development there ("the development").
27. The Homeowner requested that the Factor attend to the removal of junk and old bicycles from the bike shed at the development in January 2020.
28. The Factor disregarded the Homeowner's request and did not respond to further requests until after a Stage One complaint in June 2022.
29. The bike shed was eventually cleared on the Factor's instruction in about October 2022.
30. The Homeowner complained to the Factor's Sebastian Walls in December 2021 about the faded space markings in the car park and that the garden contractor remove fallen leaves from the garden and car park.
31. The Factor did not respond to the Homeowner's request.
32. The Homeowner submitted a further request on 11 May 2022 and the Factor did not respond to that. As a result the Homeowner submitted a Stage One complaint.
33. In his complaint the Homeowner requested that the Factor meet the cost of repairs to his car which had been damaged in the car park.
34. The Factor responded to the Stage One complaint by letter dated 24 June 2022 and denied liability for damage to the Homeowner's car and did not find

fault with the work done by the garden contractor. The Factor offered to obtain a cost for renewing the space markings.

35. The Homeowner submitted a Stage Two complaint to the Factor on 30 June 2022.
36. The Factor responded to the Homeowner's Stage Two complaint by letter dated 17 August 2020.
37. The Homeowner met Miss Bole at the development on 18 August 2022.
38. The Homeowner believed Miss Bole to be shocked at the condition of the car park at that time.
39. The Factor issued a further amended Stage Two response on 31 August 2022.
40. The Factor did not carry out regular site inspections at the development prior to August 2022.
41. The Factor failed to ensure that the work undertaken by the garden contractor was being done to an acceptable standard prior to August 2022.
42. The Factor failed to attend to the clearing out of the bike store within a reasonable period of time.

Reasons for Decision

43. The Tribunal was disappointed that the Factor chose not to attend the hearing and simply to rely on its written representations. The purpose of a hearing is to test the evidence of the parties and to seek clarification particularly where facts are disputed. The purpose of a hearing is also to test the credibility and reliability of those persons giving evidence. In that regard the Tribunal found the Homeowner to be a credible and reliable witness and had no reason to doubt the truthfulness of his submissions.
44. The Factor did in its Stage One response to the Homeowner apologise for the failure to progress the clearing out of the bike store and failure to respond to correspondence. They also did thereafter take steps to have the bin store cleared out by October 2022. To that extent therefore the Factor acknowledged its shortcomings and took action.
45. However, the same cannot be said for the way in which the Factor dealt with the Homeowner's complaint about the condition of the car park. The response to the Stage One complaint was very much to the effect that the garden contractors were doing their job properly and there would inevitably be some windblown leaves on the car park during the Autumn and Winter months. The Tribunal was satisfied from the Homeowner's evidence that the Factor had not been regularly attending at the development and had not been monitoring the work being done by the garden contractors. The Tribunal

found no reason to doubt the Homeowner's description of his meeting with Miss Bole on 17 August 2022 and to some extent this is supported by the highly unusual second Stage Two response being issued on 31 August 2023. The Tribunal did not accept the submission made by the Factor in its written representations that quarterly inspections had been carried out.

46. The Tribunal would have liked an explanation from the Factor as to why it thought it was appropriate to issue two separate Stage Two responses to the Homeowner. It is important when dealing with a homeowner's complaint that a proper investigation is carried out before a response is issued as otherwise false or misleading information may be conveyed. The Tribunal does not consider it is at all satisfactory that the Homeowner was issued with two Stage Two responses with no explanation. The Tribunal was satisfied that the Factor had therefore not been honest, open and transparent and was either deliberately or negligently misleading and considers that the Factor was in breach of Sections OSP2 and OSP4.
47. The Factor acknowledged its failings in dealing with the clearing out of the bike store but did not to any material extent apologise for the failure to progress dealing with the repainting of the parking bays or the removal of leaves. The Tribunal was satisfied that the Factor's employees had not been carrying out regular site visits and were therefore not carrying out the services offered using reasonable care and skill and in a timely way. The Tribunal was also satisfied that the Factor failed to progress arranging an AGM for several months after offering to do this. The Factor was therefore in breach of OSP6.
48. Once the Factor agreed to obtain a cost for the repainting of the road markings in June 2022 the work was instructed in October 2022 and eventually completed in March 2023. The Factor did keep the Homeowner advised of progress and the reason for the work not being done in the winter. In the circumstances the Tribunal did not consider this amounted to a breach of Section 6.4 of the Code. The failure of the Factor to carry out regular inspections during at least the first part of 2022 would however amount to a breach of Section 6.4 of the Code.
49. The Tribunal was satisfied that the Factor had failed to carry out its property factor's duties. It was apparent that there had been infrequent site visits and that there had been inadequate supervision of the work undertaken by the garden contractors. The Factor had also failed to attend to requests such as clearing out the bike shed or the maintenance of the car park within a reasonable period of time.
50. The Tribunal accepted that the Homeowner had suffered a significant amount of inconvenience and frustration as a result of the way in which the Factor dealt with or rather failed to deal with the issues he had raised. However, the Tribunal was not persuaded that the Factor should be held liable for the damage to the Homeowner's car. The Tribunal considers that liability for the damage lies with the owner of the vehicle that caused the damage and that to

blame a third party for not properly supervising another third party is simply too remote in law.

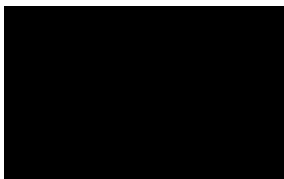
51. As the Factor is no longer the factor at the development the Tribunal considered that any Property Factor Enforcement Order ("PFEO") should be restricted to a financial award to the Homeowner and given the amount of delay and inconvenience he has incurred consider that an award of £500.00 is appropriate.

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

13 November 2023 Date