

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/22/4237

Re: 23/3 Breadalbane Street, Edinburgh EH6 5JW ("the Property")

Parties:

Mr Harry Williams, 23/3 Breadalbane Street, Edinburgh EH6 5JW ("the Applicant")

Lowther Homes, Wheatley House, 25 Cochrane Street, Glasgow G1 1HL ("the Respondent")

Tribunal Member:

**Graham Harding (Legal Member)
Donald Wooley (Ordinary Member)**

DECISION

The Factor has not failed to carry out its property factor's duties.

The Factor has not failed to comply with its duties under section 14(5) of the 2011 Act.

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 2016 are referred to as "the Rules"

Background

1. By application dated 24 November 2022 the Applicant complained to the Tribunal that the Respondent was in breach of Sections OSP 1, 2.4, 2.5 and 6.1 of the Code and had failed to carry out its property factor's duties. The Applicant submitted copies of a Deed of Conditions affecting the property, correspondence between the parties, and a Fire risk Assessment of the building in which the property is located in support of the application.
2. By Notice of Acceptance dated 12 December 2022 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion ("CMD") was assigned.
3. By email dated 17 February 2023 the Applicant submitted further written representations to the Tribunal.
4. A CMD was held by teleconference on 9 March 2023. The Applicant attended in person supported by Miss Gordon. The Respondent was represented by Ms Aitken. The Tribunal noted the issues with regards to the fire risks at the development and the involvement of Persimmon Homes and determined to continue consideration of the application to a hearing. The Tribunal issued Directions to the Respondent to produce a written statement addressing the Applicant's complaints.
5. A hearing was held at George House Edinburgh on 13 June 2023. The Applicant attended in person. The Respondent was not in attendance. The applicant felt that little progress had been made since the CMD. Due to the non-attendance of the Respondent the Tribunal adjourned the hearing to a further hearing.
6. By email dated 25 April 2024 the Respondent submitted a response to the Tribunal's Direction.
7. By email dated 2 May 2024 the Applicant submitted further written representations and productions in response to the Respondent's submissions.
8. A hearing was held at George House, Edinburgh on 7 May 2024. The Applicant attended in person. The Respondent was represented by Ms Michelle Rush. Ms Rush was advised by the Tribunal that the response to the Directions had not addressed all of the issues nor had the Respondent submitted an Inventory of Productions. It was also noted that neither party had submitted a copy of the Respondent's Written Statement of Services ("WSS") and Ms Rush arranged for this to be made available to the Tribunal. The Tribunal heard evidence from both parties as regards the alleged breach of OSP 1. The Applicant submitted that the Respondent was not complying with the Health and Safety at Work Act 1974 and that it owed a duty of care to its employees at the development. For the Respondent Ms Rush disputed the Respondent had any employees at the development. The Applicant submitted that any sub-contractors such as cleaners were employees to whom the

Respondent owed a duty of care. The Applicant also referred the Tribunal to the Fire (Scotland) Act 2005 and the Fire Risk Assessment dated 21 February 2023 and submitted that the lack of maintenance at the development was the responsibility of the Respondent. This was disputed by Ms Rush who referred the Tribunal to the terms of the WSS and there then followed some discussion on the interpretation of Clause 7 of Burden 6 in the Applicant's title.

9. With regards to the alleged breach of Section 2.4 of the Code the Applicant submitted that although the Respondent did respond directly to requests for information the responses were contradictory. Ms Rush explained that Persimmon homes had accepted responsibility and a public meeting was to be held in the near future. There then followed some discussion as regards the standing and operation of the Owners Association and its Committee.
10. Ms Rush offered to meet with the Applicant at the Development and discuss his concerns and the Tribunal determined to adjourn the hearing to allow the meeting to take place.
11. By email dated 26 September 2024 the Respondent submitted further written representations to the Tribunal.
12. By email dated 2 October 2024 the Applicant advised the Tribunal he was unable to attend the adjourned hearing that day and submitted further written representations.

Hearing

13. A hearing was held at George House, Edinburgh on 2 October 2024. The Applicant did not attend due to ill health. The Respondent was represented by Ms Michelle Rush.
14. Ms Rush advised the Tribunal that the contract for the replacement of the cladding at the development had been signed the previous week and that it was anticipated that the remedial work would commence in about December 2024 or possibly January 2025. Ms Rush also advised the Tribunal that the work to repair the fire damage at the development was subject to an insurance claim but that Persimmon, as the contractors undertaking the cladding work, were also being asked to quote for the fire damage work also but that this was still ongoing.
15. Ms Rush went on to say that the Owners' Committee had been formally appointed and had authority to sign legal contracts at a meeting on 19 September 2024. Ms Rush said that weekly meetings were being held with the Committee and the Committee was providing information to owners by SharePoint and the Respondent was also providing information to owners and in addition information was being provided on Notice Boards at the Development. Ms Rush said that each stair had its own representative appointed and also had a WhatsApp group. She said that each week an Action Note was sent to owners by email.

16. Ms Rush said that following the previous hearing she had met with the Applicant at the Development. She said that she felt that the Applicant's issues had shifted from the issues in the original complaint to other remedial work and that she was endeavouring to engage with the applicant in this regard. In response to a query from the Tribunal as to the relevance of the recent issues raised by the Applicant and whether the Tribunal had jurisdiction within the current application to consider them, Ms Rush said that they were not really relevant to the issues before the Tribunal. She said that the Applicant felt that resolution of some matters had taken too long and Ms Rush accepted that there had been delays but that there had been reasons for that.
17. The Tribunal went on to consider the Applicant's submissions as regards a breach of Section 2.5 of the Code. It noted from Ms Rush that all of the required information in Section 2.5 was provided in the Respondent's Written Statement of Services.
18. With regards to the Applicant's complaint that the Respondent was in breach of Section 6.1 of the Code Ms Rush submitted that the Applicant's complaint was perhaps addressing something different to what that particular section of the Code was about. She said that back in 2022 a defect in the building had been identified and the Respondent had attempted to have the builder carry out remedial work. However, progress was only made once the Local Authority intervened and funding became available to meet the cost.
19. In response to further questions from the Tribunal Ms Rush indicated that the Respondent had kept in communication with the Owners' Committee but that it was possible that the Committee had not shared all relevant information with owners although she also said that the SharePoint facility had been set up by the Applicant when he had been a member of the Committee in 2021. Ms Rush explained that although the Respondent can view the items on SharePoint it cannot input items to it. Ms Rush said that since the previous hearing there had been three public meetings of owners. She said that the Waking Watch facility remained in place and that Curry and Brown were acting as monitoring surveyors. She also said that the contractor employed by the Respondent at the Development had carried out a site-specific Fire Risk Assessment.
20. The Tribunal noted that the Applicant had complained that the Respondent was in breach of its property factor's duties but had not specifically addressed this in his written submissions. The Tribunal also indicated that as the Applicant had been unable to attend the hearing due to ill health it would not be appropriate to make a final decision without giving him an opportunity to make further written submissions with the possibility of the Tribunal convening a further in-person hearing if appropriate. However, the Tribunal was able to determine that it did not have jurisdiction to consider the most recent issues raised by the Applicant in his emails of 23 September and 2 October as these all relate to matters that post-date the application being raised. The Tribunal would hope that the parties can resolve these most recent issues between themselves but if not the Applicant's remedy once any complaints process

had been exhausted would be to make a fresh application to the Housing and Property Chamber. The Tribunal then adjourned the hearing.

21. Following the hearing the Tribunal issued a Note on the Hearing and Directions to the parties dated 6 October 2024.
22. By email dated 6 November 2024 the Applicant advised the Tribunal he would respond to the Directions as soon as was practicable. No subsequent response was received
23. By email dated 19 November 2024 the Respondent submitted its response to the Directions.
24. By email dated 20 January 2025 the Tribunal allowed the parties a further 14 days for final submissions. No further response was received from either party.

Findings in Fact

25. The Applicant is the owner of Flat 23/3 Breadalbane Street, Edinburgh (“the property”).
26. The property is located within the Bond Building, Breadalbane Street, Edinburgh. (“the Development”)
27. The Respondent is the Factor for the Development and has been since 1 December 2020 succeeding another member of the Wheatley Group of Companies, Your Place Property Management Limited.
28. The Applicant has legitimate concerns with regards to fire safety at the development as a result of the type of cladding installed to the exterior of the building.
29. The Respondent has liaised with Edinburgh City Council, The Development’s Owners Association Committee, Persimmon homes and the Applicant to try and address the Applicant’s concerns.
30. Persimmon Homes have finally accepted liability for the issues at the Development and remedial work was due to commence in about December 2024.
31. Persimmon Homes arranged for 24 hours a day, 7 days a week “waking watchman” system to be put in place pending repairs being carried out.
32. The extent of the Respondent’s duties to the Applicant are as contained in its Written Statement of Services and the title deeds.

Reasons for Decision

33. The Tribunal was satisfied from the parties' written submissions and oral evidence that the Respondent has complied with all relevant legislation. The Tribunal was not persuaded that the Respondent had any employees at the development for whom they would be responsible under the Health and Safety at Work act 1974. Primarily any contractors' employees working at the development have responsibility for their staff's safety and it would be for them to undertake appropriate risk assessments. The Tribunal is satisfied that this responsibility does not extend to the Respondent. For similar reasons the Tribunal is not satisfied that the Fire (Scotland) Act 2005 applies to the Respondent. The Tribunal is therefore satisfied that the Respondent is not in breach of Section OSP1 of the Code.
34. The Tribunal was satisfied that the Respondent had responded to requests from the Applicant for information or documents and the Applicant had in his evidence at the hearing acknowledged this. The Applicant had been concerned at the time it had taken for the issues at the development to be addressed but as was explained by both Ms Aitken and Ms Rush these issues had been complicated and it had taken a considerable amount of time and the involvement of third parties such as Edinburgh City Council before Persimmon Homes finally accepted responsibility. In the circumstances the Tribunal was not satisfied that the Respondent was in breach of Section 2.4 of the Code.
35. The Applicant did not insist on his complaint as regards Section 2.5 of the Code.
36. The Applicant was clearly concerned about the time taken for the issues to be resolved and he was clearly worried about the risk to his property and himself during this period. The Tribunal can fully understand the Applicant's concerns in this regard but it has to make a decision on a breach of Section 6.1 of the Code on whether the Respondent has failed to seek to make prompt repairs. The Tribunal was not satisfied from the evidence that this was the case. There was a long-standing issue over liability for correcting the cladding and the Tribunal was satisfied that the Respondent worked closely with all the parties involved to try to resolve this. With regards to other issues raised by the Applicant the Tribunal was satisfied that the Respondent dealt with these in an appropriate manner and therefore it was not in breach of Section 6.1 of the Code.
37. The Applicant was asked to provide further evidence in respect of his complaint that the Respondent had failed to carry out its property factor's duties but no such evidence was provided. In the circumstances the Tribunal does not find that the Respondent failed to carry out its property factor's duties.
38. The Tribunal is therefore satisfied that the Respondent has complied with its duties under section 14(5) of the 2011 Act.

Appeals

A party 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

12 February 2025 Date