

Housing and Property Chamber

First-tier Tribunal for Scotland



**Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber)
In an Application under section 17 of the Property Factors (Scotland) Act 2011
by**

Mr Willian M Smith, 29 Rattray Grove, Edinburgh, EH10 5TL ("the Applicant")

Trinity Property Factors, 209/211 Bruntsfield Place, Edinburgh, EH10 4DH ("the Respondents")

Chamber Reference No: FTS/HPC/PF/20/1445

Re: Property at 29 Rattray Grove, Edinburgh, EH10 5TL ("the Property")

Tribunal Members:

Andrew Cowan (Chairman) and David Godfrey (Ordinary (Surveyor) Member).

Decision

The Respondent has failed to carry out its property factors duties.

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The Respondent has failed to comply with the Code of Conduct, Section – 6.9

The decision is unanimous.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as “the 2011 Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as “the Code”; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the 2017 Regulations”.

The Respondent is a Registered Property Factor and has a duty under section 14 (5) of the 2011 Act to comply with the Code.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents considered by the Tribunal included the titles for the Property which referred to, in the burdens section, a Deed of Condition by AWG Construction Services Limited recorded 25 June 2003, (as modified by two supplementary Deeds of Condition by Morrison Construction Services Limited recorded 22 November 2005). We shall refer to these documents as “the Deed of Conditions”. The Tribunal also had before it the Respondent’s written statement of services which they have named “Service Level Agreement”, marked as a version issued on 5 March 2018, and which we refer to as “the Respondent’s Service Level Agreement”.

Hearing

A hearing took place by telephone conference on 12 January 2021.

The Applicant was present at the hearing.

The Respondents were represented at the hearing by Nikki Dunlop, Property Manager and George McGuire, Director of Operations. No other witnesses were called by either party.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failures by the Respondent to carry out the Property Factor's duties. The Service Level Agreement and the Deed of Conditions are relied upon in the Application as a source of the Property Factor's duties.

The Code

The Applicant complains of failures by the Respondent to comply with the Code.

The Applicant complains of breaches in relation to a large number of sections of the Code. (The specific paragraphs of the Code upon which the Applicant relies in relation to each heading of his complaint are referred to in each section of the complaint as discussed below. The specific paragraphs of the Code are referred to for their terms.)

The Applicant's complaint

In his application, and subsequent amendments, the Applicant complained in relation to the following issues:

1. Issues in relation to works instructed by the Respondent to rectify damage caused by Pigeons
2. Issues in relation to work carried out by BT under the authority of the Respondent
3. Outstanding Requests for Assistance in Supplying Documentation
4. Concerns as to the selection of Contractors
5. Issues in relation to Fire Safety
6. Issues in relation to Property Insurance for Fire
7. Issues in relation to Switch Room Access at the property

Preliminary Matters

At the start of proceeding at the hearing, the Tribunal explained the process they intended to follow at the hearing. The Tribunal highlighted that they would wish to understand any agreed facts between the parties, together with those matters which were in dispute.

The Tribunal drew parties attention to section 17 (3) of the Act which stated that no Application to the Tribunal may be made unless

- (A) The homeowner has notified the Property Factor in writing as to why the homeowner considers that the Property Factor has failed to carry out the Property Factor's duties, or as the case may be, to comply with the section 14 duty and,
- (B) The Property Factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowners concerns.

In relation to each heading of the Applicant's complaints the Tribunal sought, as a preliminary matter, evidence from the Applicant as to how he had notified the Respondent of his complaint, and why he believed that the Respondent had refused to resolve, or unreasonably delayed in attempting to resolve, his complaint.

In the course of the discussion in relation to compliance with the section 17 requirements the Applicant withdrew from his application those parts of his complaint in relation to (using the same numbering as the above list of Applicant's complaints):-

- 3. Outstanding Requests for Assistance in Supplying documentation
- 4. Contractors
- 6. Property Insurance for Fire
- 7. Switch Room Access

There being no objection from the Property Factor, the Tribunal allowed the homeowner to withdraw these parts of his Application. It was noted that the homeowner indicated he may wish to lodge a new and separate Application in relation to these withdrawn matters (along with evidence which would satisfy the Tribunal that the homeowner had complied with the requirements of section 17 of the Act).

Complaints considered by the Tribunal

The Tribunal accordingly only considered the following three heads of the Applicant's complaint.

The three heads of complaint (together with the paragraphs of the Code, or the Factors Duties, which the Applicant considers the Respondent has failed to comply with) are:-

- 1. *Issues in relation to works instructed by the Respondent to rectify damage caused by Pigeons -*

Alleged code failures:

- 6.1 Failed to advise progress and timescales to complete
- 6.3 Failed to complete competitive tendering
- 6.7 Failed to advise any benefit for nominating a contractor
- 6.9 Failed to pursue the Contractor to remedy defects and incomplete works as specified in the quotation.

Duties - Failed to inspect the work prior to payment

2. Issues in relation to work carried out by BT under the authority of the Respondent

Alleged code failures:

6.1 Failed to inform the Proprietors of BT proposals.

Failed to obtain Proprietors consent to enter into a Wayleave Agreement.

Failed to inform the Proprietors of the BT proposals, for a period of 5 months and only after BT illegally entered and damaged the property.

Failed to obtain satisfactory undertakings from BT to make good damages, provide details of the work, programme of works and meet all costs and expenses.

Failed to immediately photographically record the damage and intimate a formal claim against BT, their subsidiaries, Contractors, employees and servants. The Applicant has not received a copy of the 10.12.19 photographic record, as advised to the Tribunal by the Factor.

Failed to immediately repair the damage.

6.6 Failed to professionally specify repair and redecoration of the damaged Duct Panels to preclude further damage on any subsequent removal and failed to obtain the Proprietors approval of same.

6.7 Failed to advise why BT were appointed and on what basis - commission, fee or other payment.

6.8 Failed to disclose why BT were appointed, without competition or Proprietors approval and any financial or other interests.

6.9 Failed to pursue BT to professionally remedy the defects or obtain a Collateral Warranty.

Duties - Failed to provide a competent solution to negligent damage of the Proprietors property and acted without competent professional advice where lacking and required.

3. Fire Safety

Alleged code failures:

6.1 Failed to proceed as notified. The Applicant advised the Factor of serious life-threatening circumstances and provided the Factor with independent competent Fire Safety advice. The Factor refused to act as requested.

6.3 Failed to obtain a competitive tender as requested by the Applicant.

6.4 Failed to act timeously in replacing essential fire safety equipment as advised by periodic inspection.

6.6 Failed to provide documentation to support non action as detailed at 6.1 and 6.3 above.

6.7, 6.8 and 6.9 The Applicant is unable to determine why the Factor failed to act and assumes some undisclosed financial reason.

Duties - Of all the Applicants concerns, the Factors response to this single issue of Fire Safety is inexcusable.

General Findings in Fact

We make the following findings and facts on general matters which were not contested by either party.

1. The Applicant is the owner of the dwelling house situated at and known as 29/4 Rattray Grove, Edinburgh being the subjects registered in the land registers Scotland under title number MID73486 (hereinafter referred to as "the property")
2. The property is located within a mixed development of dwelling houses and flats and flatted block and associated common areas known as Greenbank Village East (hereinafter after referred to as "the Development").
3. The property is situated in a block of flatted dwelling houses which share a common entrance and other common parts (hereinafter after referred to as "the common block").
4. A Deed of Conditions governs the arrangements for the sharing of costs relating to common property within the development along with arrangements of the appointment of a factor and definitions of common parts etc.
5. The Respondent is the Property Factor responsible for the management of common areas within the development.
6. The Property Factor's duties which apply to the Respondent arrive from the Service Level Agreement issued by the Respondent and the Deed of Conditions. The duties arose with effect from 1 October 2012.
7. The Respondent is under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

First Complaint

Issues in relation to works instructed by the Respondent to rectify damage caused by Pigeons

The Tribunal's findings in fact in relation to this specific matter.

1. By letter dated 10 December 2019 the Respondent sought consent from the Applicant, and other affected owners in the common block, to carry out necessary work to prevent birds roosting on the roof of the building and to clean all guano from the pipes situated on the exterior of the building.
2. By letter dated 18 December 2019 the Respondent confirmed that they had the necessary consent from the owners to proceed with the required work at the cost of £498 + VAT and that they intended to instruct these works to proceed (subject to a "Cherry picker" (elevated platform) being made available).
3. By letter dated 17 February 2020 the Respondent notified the Applicant, and other affected owners in the common block, that there had been a delay in carrying out the works due to

weather conditions and as the Contractor had been unable to secure a booking for a “Cherry picker”.

4. On the 3 March 2020 the Contractor attended on the site to carry out the necessary works.
5. By letter dated 4 March 2020 the Respondent confirmed that they had inspected the work carried out by the Contractor and they had noted that certain downpipes had not been correctly cleaned. They had instructed the Contractor to carry out further works to rectify this matter.
6. Following completion of rectification work the Respondent was satisfied that the Contractor had completed the work and paid the Contractor.

The Applicant's complaint

The Applicant complains that

- a. The Respondent failed to advise on progress and timescales to complete the work as required by section 6.1 of the Code.
- b. The Respondents failed to complete the competitive tendering in respect of the work as required by section 6.3 of the Code.
- c. The Respondents failed to pursue the contractor to remediate defects and incomplete work as specified in the Contractor's quotation, as required by section 6.9 of the Code.
- d. The Respondents have failed in their property Factor's duties in that they failed to inspect the work prior to payment.

The Tribunal's decision and reasons

7. It is evident to the Tribunal from the correspondence which has been exhibited that all of the homeowners in the common block were informed of progress of the works, and of any causes for delay in completing the works. The Tribunal do not consider that the Respondent failed to comply with section 6.1 of the Code.
8. The Respondent explained to the Tribunal that they had decided not to use a full tendering exercise in relation to this matter. They explained that the largest part of the cost of the work were in relation to the costs of hiring a “Cherry picker”. It was explained that this would have been a fixed cost and the Factor had taken the view that a competitive tendering exercise would not have generated an alternate proposal which would have been significantly different from that quotation already received. The Tribunal accepted that the actions of the Respondent in this respect were reasonable taking in to account the total costs involved and the fixed cost of the hiring of the Cherry picker. Paragraph 6.3 of the Code requires that a Factor must show how and why they appointed a Contractor (including cases where the Factor decided not to carry out a competitive tendering exercise). The Tribunal are satisfied in this case the Respondent has given a reasonable explanation as to why it was decided not to carry out a competitive tendering exercise. The Tribunal find there is no failure in relation to the compliance by the Respondent in relation to clause 6.3 of the Code.
9. The Applicant complained that the Respondent failed to pursue the Contractor to remediate defects and incomplete works as specified in the quotation. The Applicant maintained that the Respondents have breached clause 6.9 of the Code in this respect. The Tribunal noted that the Respondents did request that the Contractor return to the site to carry out some remedial works. The Tribunal noted that it is a matter of dispute between the parties as to the quality of the final work carried out by the Contractors and in particular whether the Contractor had properly cleaned all of the pipes on the external walls of the property. The Tribunal noted that the Respondent was satisfied that the works carried out by the Contractor were satisfactory and

complete. The Property Factor is appointed as the agent of the homeowner and the other owners in the common block. As agent, the Respondent was satisfied with the final work completed by the Contractor after the second visit. The Respondent does not accept that there continues to be any defect in the service provided by the Contractor. The Tribunal find there is no failure in relation to the compliance by the Respondent in relation to clause 6.9 of the Code. The Tribunal are satisfied that the Respondents pursued the Contractor to remediate defects and, as agents of the proprietor, the Respondents were content with the final quality of the works carried out by the Contractor.

10. The Tribunal does not consider there has been any breach of Code of Conduct by the Respondent or any breach of the Property Factor's duties by the Respondent in relation to these matters.

Second Complaint

Complaints in relation to Damage Caused by BT

The Tribunal's findings in fact in relation to this specific matter.

1. On 17 July 2019 the Respondent executed a Wayleave Agreement with BT Openreach (hereinafter referred to as "the Contractor") in relation to proposed works at the development.
2. The Wayleave Agreement was in respect of the installation of fibre optic upgrades to electrical communication apparatus within the development.
3. The Respondent did not have authority to execute the Wayleave Agreement, deriving either from the Deed of Conditions or the Service Level Agreement. In executing the Wayleave Agreement, without the authority of the Applicant and other occupiers of the development, the respondent failed to comply with the Property Factor's duties.
4. On 2 December 2019, the Contractor started the works to install the new fibre optic cabling etc. In the course of those works the Contractor had carried out certain works within the common areas of the block in which the Applicants property was situated. The Contractor removed various access panels located on each landing of the block and in doing so caused damage to the décor and to the access panels. The Contractor had attended on site to carry out works without prior notification to the Applicant or to the Respondent.
5. On or around 5 December 2019 the Respondent requested that the Contractor stop all work and make good any damage caused as a consequence of their works.
6. On 4 February 2020 the Respondent advised the Applicant that they were still waiting for the Contractor to provide a schedule in relation to the completion of the works and the rectification of the previous damage caused.
7. By letter dated 10 April 2020 the Respondent notified the Applicant (and other affected owners) that the Contractor had apologised for the lack of communication at the time they started the work. The Respondent confirmed that the Contractor had advised that they would make good damage caused within the common parts of the block once they had completed the necessary works.
8. By letter dated 18 May 2020 the Respondents advised the Applicant (and other affected owners) that the Respondent was, at the request of the Contractor, obtaining quotations in relation to the works required to rectify damage caused by the Contractor.

9. The Respondent's obtained four quotations in relation to work to be carried out to the common parts to rectify damage caused by the Contractor. The majority of owners within the block confirmed to the Respondent that they wished to appoint one of those contractors to carry out the rectification works.
10. On or around 11 August the Respondent's advised the Applicant (and other affected owners in the common block) that the Contractor had offered to make a payment of £1500 toward the rectification of damage. The Respondent further advised that this offer had been rejected and that the matter had been passed to the insurers of the common parts of the block to pursue matters on behalf of the owners.
11. Rectification works to the damage caused by the Contractor have not yet been completed.

Applicants Complaint

The Applicant complains that that the Respondent has failed to comply with sections 6.1, 6.6, 6.7. 6.8 and 6.9 of the Code in relation to this matter.

In general the Applicant complains that

- a) The Respondent failed to advise the Applicant of the Contractor's proposals and failed to obtain the Applicant's consent to enter in to the Wayleave Agreement.
- b) The Respondent failed to obtain satisfactory undertakings from the Contractor to make good damage caused at the property and delayed in pursuing the Contractor in this respect.
- c) The Respondent failed to record the damage by the Contractor.
- d) The Respondent failed to advise why the Contractor was appointed, and on what basis.
- e) The Respondent failed to pursue the Contractor to carry out repairs to property damaged by the Contractor during the works

The Applicant also complains that the Respondent has failed in their factoring duties in relation to this matter as they have "failed to provide a competent solution to negligent damage of the property and acted without competent professional advice."

The Tribunals Decision and Reason

1. It is accepted by the Respondent that a Wayleave Agreement was executed with the Contractor without the specific consent of the Applicant (or other affected homeowners at the development). No specific authority is given to the Respondent, either in terms of the general authorities provided within the Deed of Conditions or within the Respondent's Service Level Agreement. The Respondent has accordingly failed in their property factors duty by executing the Wayleave Agreement.
2. Paragraph 6.1 of the Code requires the Respondent to notify the Applicant of matters requiring repair or attention and requires the respondent to notify the Applicant and other homeowners of the progress of works including estimated timescales for completion.

The Contractors carried out work according to the terms of the Wayleave Agreement. The Contractors started works without first notifying the Respondent. The contract works caused damage to the common parts of the common block. The Tribunal are satisfied that the Respondent was not in a position to notify the Applicant of the progress of the initial work carried out by the Contractor, as they were not aware that the Contractor was starting work. The Respondent had sought to keep the Applicant updated and informed as to the progress of the works, and the proposed necessary works to rectify the damage caused by the Contractor. The Respondent has answered a number of emails from the Applicant on these matters. The tribunal are satisfied that the Respondents have in place procedures to allow homeowners to notify of matters requiring repair, maintenance and attention and that the Respondent has informed homeowners of the progress of work in relation to this matter. The Tribunal find there is no failure in relation to the compliance by the Respondent in relation to clause 6.1 of the Code.

3. The Applicant complains that the Respondent has failed to comply with paragraph 6.6 of the Code of Conduct. Specifically the Applicant states that he considers that the Respondents failed to "professionally specify the repairs and obtain the proprietors approval of same." Paragraph 6.6 of the Code relates to the requirement upon the Respondent to provide documentation relative to any tendering process. The Tribunal were satisfied that quotations were obtained by the Respondent in relation to required works to repair damage caused by the Contractor. These quotations were exhibited to all homeowners at the property. Further, the Tribunal were satisfied that the Respondents obtained the required consent of homeowners to proceed with necessary works to repair damage at the property. The Tribunal find there is no failure in relation to the compliance by the Respondent in relation to clause 6.6 of the Code.
4. The Applicant complains that the Respondent failed to comply with clause 6.7 of the Code. Clause 6.7 of the Code requires the Respondent to disclose to the Applicant any commission fee or other payment received from a Contractor. No evidence was led by the Applicant as why he considered any such commission or other benefit had been paid by to the Respondent from the Contractor in this matter and no specific complaint had been made by the Applicant to the Respondent on this point. The Tribunal find there is no failure in relation to the compliance by the Respondent in relation to clause 6.7 of the Code.
5. The Applicant complains that the Respondent failed to comply with clause 6.8 of the Code. The Applicant complains that the Respondent failed to disclose why the Contractor was appointed without competition or proprietors approvals. Clause 6.8 of the Code requires the Respondent to disclose any financial or other interests that they may have with any Contractor appointed. Clause 6.8 of the Code does not relate to any reasons as to why the Respondents appoint a particular Contractor. The Tribunal find there is no failure in relation to the compliance by the Respondent in relation to clause 6.8 of the Code.
6. The Applicant complains that the Respondent failed to comply with paragraph 6.9 of the Code. Paragraph 6.9 of the Code requires the Respondent to pursue a Contractor to remedy defects in any inadequate service or work provided. In this matter the Tribunal noted from evidence that the respondents have intimated a claim to the Contractor and required them to carry out works to rectify damage caused by the Contractor. The Contractor made an offer which was rejected by the Respondent. The Respondent thereafter chose to pursue a claim for recovery of costs through the common insurance policy for the property. The Tribunal finds that the Respondent did pursue the Contractor to rectify damage caused during the works, however, the Respondent failed to adequately pursue the Contractor to recover all costs in relation to the damage incurred. In particular the Respondent did not take forward any proactive steps (including alternative dispute resolution) to recover the full value of the damage caused from the Contractor, and chose instead to reject the contractor's initial offer of settlement and to intimate a claim to the insurers of the common block. No evidence was presented to the Tribunal which explained how the Respondent had authority to act in this manner or how they sought the owners instructions to proceed to reject the initial offer of

settlement from the Contractor. . The Tribunal find there is a failure in relation to the compliance by the Respondent in relation to clause 6.9 of the Code.

Third Complaint

Issues in relation to Fire Safety

The Tribunal's findings in fact in relation to this specific matter.

1. The Applicant obtained a fire safety report from two separate Contractors. Those reports made reference to certain works which the reports recommended be carried out to the property and to the common parts of the common block.
2. Copies of the reports and the quotations for necessary works were circulated by the Applicant to other owners of the flats in the common block.
3. The majority of the other owners in the common block did not agree to the instruction of the works recommended by the reports.
4. The Applicant sent copies of the relevant Fire Safety Reports to the Respondent on 15 June 2020.
5. The Respondent declined the Applicants request to instruct the works recommended in the reports obtained by the Applicant.
6. The Respondent did not have authority to proceed to instruct the works identified by the two reports obtained by the Applicant.

The Applicants complaint

The Applicant complains that

- a) The Respondent's failed to proceed "and notify" to instruct works required and identified by the two independent reports obtained by the Applicant. Section 6.1 of the Code.
- b) The Respondent's failed to obtain a competitive tender in relation to these works as required by section 6.3 of the Code.
- c) The Respondent's failed to act timeously in replacing essential fire safety equipment as required by section 6.4 of the Code
- d) The Respondent's failed to provide documentation to support their non-action as required by clause 6.6 of the Code.
- e) The Respondent's failed to comply with paragraphs 6.7, 6.8 and 6.9 of the Code.

- f) The Applicant also complains that the Respondent has failed to comply with the Property Factors duties in relation to this matter.

The Tribunals Decision and Reasons

1. The Applicant sought his own reports following his own concerns in relation to fire safety within the property. He obtained these reports and circulated them to other affected owners within the common block. The other owners within the common block rejected his request for the works identified in terms of the reports to be carried out within the property.
2. The Applicant intimated the two reports to the Respondent. The Respondent notified the Applicant that they did not have authority to proceed with any works as identified in the reports.
3. The Tribunal are satisfied that the Respondents have in place procedures to allow homeowners to notify of matter requiring maintenance, repair or attention. In this matter, the Respondent did not have the authority of homeowners to proceed with any works. The Tribunal find that there is no failure in relation to compliance with the Respondents in relation to clause 6.1 of the Code.
4. As the Respondent's did not have authority to proceed to instruct the works requested by the Applicant (and did not instruct any works) clause 6.3 of the Code is not relevant.
5. Clause 6.4 requires the Respondent to prepare a programme of works where it has been agreed that their services would include periodic property inspections etc. No evidence was led before the Tribunal to suggest that the Respondent had not complied with this part of the Code. The Tribunal find that there is no failure in relation to the compliance of the Respondent in relation to clause 6.4 of the Code.
6. Clause 6.6 of the Code requires the Respondent to make available documentation in relation to any tendering process. No tendering process was taken forward by the Respondent in relation to this matter as they did not have authority to proceed with any works. The Tribunal find that there is no failure in relation to the compliance of the Respondent in relation to clause 6.6 of the Code.
7. Clause 6.7 of the Code requires the Respondent to disclose any commission or fee paid by a Contractor, while 6.8 requires the Respondent to disclose any financial or other interests in relation to a Contractor which they have appointed. No Contractor was appointed in relation to this matter. The Tribunal find there is no failure in relation to the compliance of the Respondent in relation to clauses 6.7 and 6.8 of the Code.
8. Clause 6.9 of the Code, requires the Respondent to pursue a Contractor or supplier to remedy any defect in any inadequate work or service provided. No Contractor or supplier was appointed in relation to the matters raised in the reports obtained by the Applicant. Accordingly the Tribunal find there is no failure in relation to the compliance of the Respondent in relation to clauses 6.7 and 6.8 of the Code.
9. Property Factors duties. The Property Factor's duties are as specified in the conditions registered over this property. The Applicant claimed that the Property Factors duties extended to "thinking out of the box" and insisting that works identified in the reports which the Applicant had obtained should be carried out. The Property Factor's duties and authority arise from the Deed of Conditions. The Property Factor does not have authority to insist upon works being carried out at the property where the Respondent does not have the necessary consent of the proprietors within the common block. The Tribunal find there is no failure in relation to the

compliance from the Respondent in relation to the Property Factor's duties in relation to this matter.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a Property Factor Enforcement Order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

APPEALS

In terms of section 46 of the Tribunals (Scotland) Act 2014, 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 seek permission to appeal from First-tier Tribunal. The party must seek permission to appeal within 30 days of the date the decision was sent to them.

ANDREW COWAN

CHAIRMAN

DATE: 4 February 2021