

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: HPC/PF/19/1621

Flat 8 112 Hillpark Grove, Edinburgh, EH4 7EF (" the property")

The Parties:

Michael Sturgeon, Flat 8 112 Hillpark Grove, Edinburgh, EH4 7EF ("the Homeowner")

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

Tribunal Members:

Josephine Bonnar (Legal Member)
Andrew Taylor (Ordinary Member)

DECISION

The Tribunal determined that the Property Factor has not failed to carry out its property factor duties in terms of section 17(1) of the Property Factor (Scotland) Act 2011 (" the Act") and has not failed to comply with Section 6.4 of the Property Factor Code of Conduct as required by Section 14(5) of the Act.

The decision of the Tribunal is unanimous

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 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"

The Factor became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application dated 29 May 2019 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with Section 6.4 of the Code. The Homeowner also sought a determination on whether the Property Factor had failed to carry out its property factor duties as required by Section 17(1) of the Act. Specifically, the Homeowner stated that the Property Factor had failed to arrange maintenance for the development's common drainage system, failed to carry out appropriate checks on the common drainage system at the point of handover from the developer and failed to pursue the developer for the cost of rectifying defects in the drainage system on behalf of the Homeowners within the development.
2. On 11 June 2019 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a hearing. By letters dated 19 June 2019 both parties were notified that the application had been referred to a Tribunal and that a hearing would take place on 16 August 2019 at 10am at George House, 126 George Street, Edinburgh.
3. The Tribunal issued a direction requiring the Homeowner to provide a copy of his title deeds to the property. In response he lodged certain documents. In advance of the hearing the Property Factor lodged written representations.
4. The hearing took place before the Tribunal on 16 August 2019 at 1Dam. The Homeowner attended. The Property Factor was represented by Karen Jenkins, an employee of the company. She was accompanied by Sarah Wilson. Also present were two observers, Carol Black and Neil Kinnear, the latter being a legal member of the Tribunal but attending only to observe. The Tribunal heard evidence from the Homeowner and Ms Jenkins.

The Hearing

5. As a preliminary matter the Tribunal noted that the Property Factor had referred in the written representations to a previous decision of the Tribunal in an application by another Homeowner in the development against the Property Factor and arising out of similar issues. The Tribunal noted that the Homeowner was aware of that decision. The Tribunal confirmed to parties that the present application would be determined by the Tribunal on its own merits and on the evidence presented to the Tribunal.
6. **Property Factor duties – Failure to arrange maintenance for common drainage system.** Mr Sturgeon advised the Tribunal that there has been a functioning drainage system in place at the development for about 15 years. The development comprises 156 properties, a mixture of houses and flats, and is located at the bottom of Corstorphine Hill. He advised that the property Factor has not carried out any routine maintenance to the system throughout that time. He also stated that it is his understanding that routine maintenance would involve flushing out the drains from time to time and added that the Property Factor has mentioned that this should be a couple of times a year.

7. Ms Jenkins advised the Tribunal that it is accepted that the maintenance of the common drainage system is part of the Property Factors duties in relation to the development. She advised that there are defects in the drainage system. A contractor started work about three weeks ago to rectify those defects and identify the cause. This followed on from a series of meetings of homeowners, a tendering process and the ingathering of funds from homeowners to enable the work to be instructed. Ms Jenkins stated that she took over the management of the development in March 2017. She came across a survey report on the drainage dated August 2016 and wasn't sure if it had been issued to homeowners, so she sent it out then. A meeting was also arranged at that time by her as the residents committee had stepped down. The issues with the drainage were discussed at the meeting and it was agreed that quotes would be obtained to have sections jet washed and a CCTV survey carried out to identify defects. The survey findings and associated costs were subsequently notified to the homeowners. At a meeting in October 2018 the homeowners agreed to the appointment of a contractor, Lanes Drains. The Property Factor then started to ingather funds from the homeowners and the work has now started. Once completed a decision can be made as to ongoing routine maintenance. Usually this involves jet washing every 3 years, but this development might initially require more frequent maintenance, maybe once or twice a year.
8. Mr Sturgeon advised that the works to the drainage system have cost the homeowners £71000 so far. However, he confirmed that his complaint is not about the remedial work but rather the Property Factors failure to carry out routine maintenance over the last 15 years. The current works are the first arranged by the Property Factor, although they have been the Factor for the development throughout that period. Ms Jenkins confirmed that she did not dispute this claim. By way of explanation, she advised the Tribunal that Scottish Water carried out some work in relation to the system in 2010 following flooding which had occurred. The developer then cleared out a section of the system in 2014. She advised that the development was not completed until 2016. As sections were completed, between 2004 and 2016, they were handed over to the homeowners and the Property Factor. However, the common drainage system remained the responsibility of the developer, MacTaggart and Mickel Ltd, until the final handover of the last part of the development in 2016. She advised that as the development progressed, the developer retained responsibility for certain other matters, such as public liability insurance. In her view, their actions in carrying out work to the drainage system in 2014, is evidence of their continued responsibility for the drainage. For this reason, the Property Factor did not take any action in relation to the drainage until 2016. By that date, it was clear that there were defects. At the various meetings of homeowners between 2017 and 2019, they confirmed that their priority was rectifying the defects. Only once the defects have been resolved will it be possible to identify what routine maintenance will be needed and how frequently it should take place. Mr Sturgeon advised the Tribunal that he disputes that claim that the drainage was the responsibility of the developer until 2016. He advised that the drainage has been in place for 15 years and, although he has no knowledge for when different parts of the development were handed over, he is of the

view that it has been the responsibility of the Property factor since its installation.

9. Property Factor duties – failure to carry out handover checks in relation to the common drainage system. Mr Sturgeon advised the Tribunal that he and the other homeowners were not notified by the Property Factor when completed sections of the development were being handed over. Had they been notified, they would have had the opportunity to raise concerns about matters like the drainage. He further advised that when the drainage system was being handed over, whenever that might have been, the Property Factor ought to have inspected it. Had they done so, defects would have been identified sooner and could have been raised with the developer. In response to questions by the Tribunal he conceded that neither the Deed of Conditions or the Written Statement of Services ("WSS") specifically state that the Property Factor has to do this, although he referred the Tribunal to page 2 of the WSS which states " As Managing Agents , CWL deal with the upkeep, maintenance and insurance of the common areas which are co-owned by all of the proprietors within your development". He advised that in his view they ought to have carried out some investigation. Ms Jenkins disputed the claim that the homeowners were not aware of the handover of the development. She advised that the final handover in 2016 was certainly mentioned in a newsletter issued to the homeowners. She disputes also the claim that the Property Factor ought to have inspected the drainage system at the time of the handover, saying that this is not required of them in terms of the title deeds or the WSS. Furthermore, there was no mechanism within the Deeds nor any other agreement to prevent the handover taking place once all properties had been sold.
10. Property Factor duties – failure to pursue the developer for the cost of the drainage repairs. Mr Sturgeon advised the Tribunal that the reports which have been obtained so far clearly show that there have been defects in the drainage system since it was installed. This knowledge has existed since March 2017. This being the case, the Property Factor ought to have pursued the developer for the cost of the work, rather than charging the homeowners. In response, Ms Jenkins advised the Tribunal that she has advised the developer of the drainage issues and asked for their proposals regarding the drainage. They have indicated that they dispute that they are liable. She further advised liability for the repair work has been discussed at many of the meetings held with the homeowners. In particular, a meeting held in October 2018 and one in May 2019. The instructions given to her by those attending the meeting in May 2019 was to instruct the repair work and investigations first. Legal action will be considered once the work and the investigations are complete. She does not currently have instructions from the homeowners to pursue the developer. Mr Sturgeon rejected this explanation. He confirmed that he was not in attendance at either of the 2 meetings specifically mentioned by Ms Jenkins although he has attended others. He is of the view that it is already clear that the developer is liable. He did not comment on the claim that the Property Factor has not been authorised or instructed initiate action against the developer.

11. **Section 6.4 of the Code. " If the core services agreed with homeowners includes periodic property inspections and/or planned programme of cyclical maintenance, then you must prepare a programme of works."** Mr Sturgeon advised the Tribunal that the Property Factor's WSS does provide for 6 weekly inspections but that no programme of works has ever been prepared in relation to the drainage system. Ms Jenkins confirmed that she carried out 6 weekly inspections. These involve her walking round the development to carry out a visual check and to make a note of matters which need attention. She confirmed that a record of the inspection is kept which is the programme of work to be carried out. This is not routinely issued to the homeowners. However, the inspections are only visual checks to identify damaged play park equipment, broken lights are other matters which can be identified from a visual inspection. The inspections do not involve checking the drains although she would make a note if she saw evidence of a blocked drain or ponding. She reiterated her previous remarks that no routine maintenance of the drainage has yet been carried out. This will commence once the repairs are complete and will involve jet washing every three years or perhaps more frequently, depending on the circumstances.

The Tribunal make the following findings in fact:

- a) The Homeowner is the owner of Flat 8, 112 Hillpark Grove, Edinburgh
- b) The Property is a flat within the Hillpark Grove development, Edinburgh which comprises 156 properties. The development was completed in 2016.
- c) The Property Factor has performed the role of the property factor of the Development since 2003
- d) Parts of the development have suffered drainage problems and flooding .
- e) Work to rectify defects in the drainage system and identify the cause of same commenced in July 2019, instructed by the Property Factor.
- f) The Property Factor has not arranged for routine maintenance of the drainage system.
- g) The Property Factor did not inspect the drainage system at the point of handover from the developer.
- h) The Property Factor has not been instructed to pursue the developer for the cost of the drainage remedial work.
- i) The Property Factor carries out routine inspections of the development, but these do not include inspections of the drainage system.

Reasons for decision

12. The Tribunal heard oral evidence from both parties. Although the Homeowner had lodged a number of documents with the application, these mainly related to the defects in the drainage system which was not in dispute. He also lodged a copy of the WSS and the deeds of conditions which relate to the development. Neither party lodged any minutes of residents' meetings. The Property factor lodged written representations which provided a summary of actions taken to arrange repair work to the common drainage system.

13. Property Factor duties – failure to arrange maintenance of the common drainage system. The Homeowner was quite clear that his complaint did not relate to the delay in arranging remedial work to the common drainage. Had it done so the Tribunal might have upheld the complaint. Even if the Property Factor's statement that responsibility for the drainage did not pass until August 2016 is accepted, the Tribunal is of the view that a delay of three years to arrange the repairs is unsatisfactory. However, it is the lack of routine maintenance, such as jet washing, which is complained of. The Tribunal first considered when the Property Factor became liable for the drainage system. If the Homeowner had established that responsibility for the drainage had been part of the Property Factor's duties since their appointment in 2003 his complaint might have been upheld, since it was not disputed by the Property Factor that they had taken no steps to maintain the drainage prior to 2016. However, although the Homeowner was adamant that the Property Factor was responsible for the drainage before 2016, he provided no evidence in support of this. On the other hand, the Property Factor was able to demonstrate that they had only initiated action in relation to the drainage system in 2016 and that the developer had, on at least one occasion, carried out work before then. The Tribunal is therefore not satisfied that the Property Factor was responsible for the maintenance and repair of the drainage system prior to 2016. Secondly, the Tribunal considered the evidence about the lack of routine maintenance between August 2016 and the lodging of the application. It is not disputed by the Property Factor that routine maintenance has not yet taken place, the explanation being the focus on rectifying the defects. However, the Homeowner did not establish in his evidence that essential routine maintenance has actually been needed during this period nor did he make any claim that the lack of routine maintenance has contributed to the current problems. In fact, his position is that the drainage system has been defective since installation. Neither party were able to state, with any degree of certainty, how often maintenance should be carried out or what it should involve. The Tribunal therefore concluded that the Homeowner has not established that there has been any failure to carry out property factor duties in relation to routine maintenance of the common drainage system.

14. Property Factor duties – Failure to carry out handover checks. The Tribunal noted that neither the deed of conditions for the development or the WSS require the Property Factor to inspect or investigate the condition of the common drainage system (or indeed any of the common parts of the development) when parts of the development are being handed over by the

developer. Furthermore, no information was forthcoming from the Homeowner as to what kind of checks or investigations would have been appropriate or what difference they would have made, since the handover of the development would have gone ahead anyway. Similarly, the Homeowner failed to demonstrate that the Property Factor, as part of its duties, ought to have notified owners as and when handover of sections of the development occurred. Ms Jenkins stated that some information regarding handover was provided in newsletters although she indicated that this might only have been the final handover in 2016. Again, the Tribunal was not satisfied that the Homeowner had established any failure on the part of the Property Factor to carry out its duties in terms of the Act with regard to this complaint.

15. Property Factor duties – failure to pursue the developer. The Tribunal notes from the evidence given by Ms Jenkins that action against the developer has not been ruled out. She said in her evidence that the homeowners have reserved judgement on this matter and referred to 2 separate meetings where the matter was discussed. Mr Sturgeon was not at these meetings and conceded that he could not dispute what was discussed. He did not claim that the Property Factor has been instructed to take action against the developer by the homeowners but has failed to do so. Both parties confirmed that minutes of homeowner meetings are generally issued after residents' meetings, although neither had lodged copies of any minutes or referred in their evidence to the content of same. The Tribunal was persuaded by the Property Factor's evidence that they require the authority of the homeowners before taking action on their behalf and do not currently have that authority. The Tribunal therefore determines that there has been no failure by the Property Factor in relation to this complaint.

16. Section 6.4 of the Code. The Homeowners' complaint again related to the drainage system and the lack of a programme of works for this, rather than a failure to have a programme of works at all. Ms Jenkins gave evidence that a 6 weekly visual inspection of the development is carried out by her and that the report she prepares following the inspection is the programme of works. She conceded that this is not shared with the homeowners. She also conceded that there is no programme of works for the drainage system, since the 6 weekly inspections do not include an inspection of that system. The Tribunal notes that Section 6.4 requires the Property Factor to prepare a programme of works where there are "periodic property inspections and/or a planned programme of cyclical maintenance". It does not require the Property Factor to provide a copy of the programme to homeowners. The Homeowner did not dispute the Property Factor's evidence that the drainage is not currently included in the 6 weekly inspections and both parties are in agreement that there is currently no planned programme of cyclical maintenance for the drainage system. The Tribunal is therefore not persuaded that the Property Factor has been under an obligation to prepare a programme of works for the drainage system. The Tribunal therefore determines that the Homeowner has not established a breach of this section of the Code by the Property Factor.

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.

Josephine Bonnar

Legal Member and Chair

27 August 2019