

Housing and Property Chamber First-tier Tribunal for Scotland



Decision and Statement of Reasons under Section 19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/17/0116

Flat 1-3, 27 McLennan Street, Mount Florida, Glasgow G42 9DH ("the Property")

The Parties:-

Mr Ryan Holmes, 19 Allanshaw Street, Hamilton M13 6NL ("Homeowner")

Edzell Property Services LLP t/a Edzell Property, 1008 Pollokshaws Road, Glasgow ("Factor")

Tribunal Members:

Joan Devine – Chairing and Legal Member

Andrew Taylor – Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Factor has complied with the Code of Conduct for Property Factors as required by section 14 of the 2011 Act. The Tribunal unanimously determined that the Factor has failed to comply with its factor duties in terms of section 17(5) of the 2011 Act. In all the circumstances 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) Notice.

The Tribunal make the following findings in fact:

1. The Property is a flat within a block of 12 at 27 McLennan Street, Mount Florida, Glasgow ("the Tenement").
2. The Factor performed the role of the property factor of the Tenement until April 2014.
3. The Factor obtained quotes from four contractors to carry out repairs to the roof of the Tenement between January and August 2012.
4. The homeowners in the Tenement decided by majority to approve the quote provided by Loch Orchy Projects Limited ("Loch Orchy").
5. Loch Orchy were appointed to carry out the works required to the roof of the Tenement.
6. CRGP were appointed to oversee the works being carried out by Loch Orchy.
7. The works were carried out by Loch Orchy between the end of June and 1 August 2013.

8. The Factor sold its factoring business and ceased to the factor for the Tenement in April 2014.
9. Loch Orchy went into liquidation on 24 September 2015 and was dissolved on 11 October 2016.
10. Wiseman Associates Limited prepared a report in respect of the roof of the Tenement dated 10 October 2016 ("the Wiseman Report").

Introduction

1. 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"
2. The Factor became a Registered Property Factor on 19 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.
3. Following on from the Homeowner's application to the Tribunal which comprised documents received in the period 24 March to 9 April 2017 ("the Application"), the Convener, with delegated powers under section 96 of the Housing (Scotland) Act 2014, referred the Application to the Tribunal on 13 April 2017. The Tribunal had available to it, and gave consideration to, the Application, written submission and Inventory of Productions provided by the Homeowner, written representations submitted by the Factor, Inventory of Productions provided by the Factor and the oral submissions made by both parties at the hearing.

Hearing

4. A hearing took place at Wellington House, 134-136 Wellington Street, Glasgow G2 2XL on 17 November 2017. The Applicant attended on his own behalf. The Factor was represented by David Nelson, Solicitor, Timothy Lovat of the Factor and Alastair Macdonald, former property manager with the Factor .

Basis of the Application

5. The Homeowner complained of non-compliance with sections 6.3, 6.8 and 6.9 of the Code. The Homeowner also considered that the Factor had failed to comply with the property factor's duties.

Summary of Submissions

Preliminary Issues

6. In response to questions from the Tribunal Mr Lovat explained: that the works to the roof of the Tenement ("the Works") were carried out in July 2013; the Factor sold their factoring business to Redpath Bruce in April 2014; the Factor did not receive payment of a fee in respect of the Works; and that the Factor had been unable to recover any documentation regarding approval of the Works following completion.
7. Mr Nelson said that he objected to the Homeowner amending his application and leading any evidence in respect of breach of paragraph 2.5 of the Code. The Tribunal said that they would hear the Homeowner's evidence regarding paragraph 2.5 under reservation of questions of competency and relevance.

The Code

8. Section 6: Carrying Out Repairs and Maintenance

"This section of the Code covers the use of both in-house staff and external contractors.

6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.

....

6.8 You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.

6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor."

Paragraph 6.3

9. The Homeowner said that he had raised concerns about Loch Orchy. Background checks carried out by him showed that they were barely solvent. The Homeowner said that he had requested copies of due diligence carried out in respect of Loch Orchy. The Homeowner explained that four quotes had been provided. The checks which he had carried out caused him to query the ability of Loch Orchy to deliver. The Homeowner said that Mr Macdonald had told him that Loch Orchy had carried out work in Paisley. The Homeowner said that he raised concerns in his email to the Factor dated 23 October 2012. He followed this up in November 2012 and February 2013. He referred to an email received by him from Mr Macdonald dated 5 February 2013. In this email, Mr Macdonald said that Mr Lovat from the property factor knew Loch Orchy. The Homeowner explained, however, that the majority of owners consented to the appointment of Loch Orchy.

10. The Homeowner explained to the Tribunal that Birchgrove Properties Limited owned four flats within the Tenement. Edzell also owned four. Mr Lovat said that Edzell did not own four flats, but were letting agents for four flats within the Tenement. Mr Lovat confirmed that the Factor were letting agent for eight out of twelve flats in the Tenement.
11. Mr Macdonald explained that he had worked for the Factor between December 2010 and April 2014. He was a Property Manager. At that time, he had no property related qualifications. He was now a Chartered Building Surveyor and a member of the RICS. At the time of the Works being carried out, he was working on his post-graduate degree. His job involved instructing and coordinating contractors to carry out various works.
12. The Tribunal asked the Factor about the tender exercise. Mr Macdonald explained that Thomas McMaster had expressed concern regarding water ingress. Their view was that it was not cost effective to carry on repairing the roof. Rather, the roof needed to be replaced. Mr Macdonald explained that the Factor asked them for a quote. They then sought two further quotes.
13. The Tribunal asked Mr Macdonald what was the basis for the quote and whether a specification had been produced. Mr Macdonald explained that there was no specification produced. The contractors were simply asked to go and look at the Tenement to assess what required to be done. Mr Macdonald said that all of the contractors who had provided quotes were on the Factor's approved list. He said that a contractor would be placed on the approved list if they had the appropriate public liability insurance.
14. Mr Lovat told the Tribunal that there was more to it than just insurance. Loch Orchy had been recommended to the Factor. Approved contractors completed a form. Mr Lovat said that they had completed a roof at Townhead Terrace. Mr Lovat told the Tribunal that Loch Orchy had been employed by the Factor on six occasions to carry out various works over a period of four years.
15. Mr Nelson submitted to the Tribunal that there was evidence of tenders being obtained and circulated to homeowners. Issues raised were dealt with. For example, CRGP were appointed. He referred to the email chain produced as Item 13 in the Factor's Inventory of Productions. He said that the Factor did provide an example of other work carried out by Loch Orchy. Mr Lovat said that he understood that the Director of Loch Orchy had a doctorate in a property related subject such as structural engineering. Mr Macdonald explained that only the Townhead Terrace example of work carried out by Loch Orchy was put forward. Other work carried out by them for the Factor was possibly not relevant. Mr Macdonald did not recall information being requested by the Homeowner regarding the financial background of Loch Orchy.
16. As regards the tendering process, Mr Macdonald explained that the Factor must ensure they are comparing like with like. If there is a large difference in

cost, that should be considered. He said that he was satisfied that all of the quotes received were "*like for like*". Mr Macdonald explained that the letter produced as Item 11 in the Factor's Inventory of Productions was the letter that was first sent to homeowners dated 3 July 2012. He said that a letter dated 11 October 2012 addressed to the Homeowner (which appears at page 8 of the documents produced by the Homeowner) with his written submission was the letter which enclosed the summary of quotes with additional works added. This letter enclosed a mandate for homeowners to sign.

17. Mr Nelson asked Mr Macdonald if it was a request from the Homeowner that motivated the Factor to instruct CRGP? Mr Macdonald said that it was.
18. The Homeowner said that he felt under pressure to agree to the appointment of Loch Orchy as the majority of homeowners had consented to their appointment. There was a need to get on and carry out the works to deal with the water ingress. Mr Lovat explained that although the Factor manages eight properties within the Tenement, they had no voting rights. He explained that Birchgrove owned four properties, Mr Levitus owned two, and Ori Lovat owned two.
19. Mr Nelson noted that a tendering exercise had been carried out. Four tenders were circulated to homeowners. The lowest priced tender was recommended. During the process, queries were raised and some investigation was carried out. Ultimately, Loch Orchy were appointed. Mr Macdonald said that the Factor complied with the decision of the majority of homeowners. He explained that the Factor appoints the contractor on behalf of homeowners. Due to the size of the Works, CRGP were appointed to oversee the Works.

Paragraph 6.8

20. As regards breach of paragraph 6.8 of the Code, the Homeowner explained that the Factor managed the properties owned by Birchgrove. John Beresford is a Director of Birchgrove. He has a working relationship with Loch Orchy. The Homeowner said that he understood that Loch Orchy refurbished the flats owned by Birchgrove. He explained that the Factor managed the properties where homeowners have previously instructed Loch Orchy.
21. Mr Nelson asked if the Factor stood to gain from the appointment of Loch Orchy? Mr Lovat said that they did not. He asked Mr Lovat if the Factor ever had any financial interest in Loch Orchy? Mr Lovat said that they did not. Mr Macdonald said that the Factor had a working relationship with all of the contractors who submitted quotes.

Paragraph 6.9

22. As regards breach of paragraph 6.9 of the Code, the Homeowner agreed with the Tribunal that his concerns regarding the Works broke down into three categories, being (a) the chimneys were patched and not properly re-

rendered; (b) the gutters were changed from aluminium to UPVC; and (c) the lead work was not carried out properly.

23. The Tribunal asked the Homeowner when the water ingress first manifested itself? The Homeowner said that this was around October 2015. At that point, Wiseman Associates Ltd ("Wiseman") were asked by the new factors, Redpath Bruce, to produce their report. He said that the Wiseman Report contained photographs which showed that the chimneys had not been re-rendered, but rather a patch repair had been carried out. The Homeowner referred to photographs numbered 16, 17, 18 and 20. The Homeowner said that he understood that Wisemans took the photographs around the time of production of their report.
24. Mr Nelson drew the Tribunal's attention to Items 36 and 37 in the Factor's Inventory of Productions, which were photographs taken at the time of the works being finalised in August 2013. He explained that these had been recovered from CRGP files. He said that the photographs were in a folder on CRGP's system dated 1 August 2013.
25. The Homeowner explained that photographs annexed to the Wiseman Report numbered 19, 20, 24, 25, 26, 27, 28, 29, 30 and 36 also showed that the chimneys had not been fully re-rendered, as did photographs numbered 40, 43, 49 and 50.
26. The Homeowner referred to an email from Mr Macdonald to Lorraine Martin of CRGP dated 22 July 2013. He noted that the final bullet point in the email referred to further work being required to the chimneys. The Homeowner said that he did not know anything about "*sign-off*" of the Works taking place. However, if the work carried out to the chimneys had been flagged as a defect by CRGP, that should have been followed up.
27. Mr Nelson referred to the email forming Item 27 in the Factor's Inventory of Productions. Mr Macdonald said he did not recall sending that email. Mr Macdonald said that he did not think that the chimneys were to have a full re-render. Rather, areas which were damaged were to be hacked off and re-rendered.
28. The Homeowner drew attention to Item 25 in the Factor's Inventory of Productions, which was an email from Mr Macdonald to the Homeowner dated 8 July 2013, and which refers to the chimneys being rendered using coloured mortar. The Homeowner said that this email also referred to the chimneys being re-rendered, not partially re-rendered.
29. Mr Nelson said that the emails referred to showed that the issue was picked up and passed on by the Factor to Loch Orchy.
30. The Tribunal asked Mr Macdonald what happened after the emails referred to? Mr Macdonald said that he could not remember. He said it was a matter for CRPG to deal with any defects.

31. Mr Nelson referred Mr Macdonald to Item 36 of the Factor's Inventory of Productions, which was photographs taken of the roof on 1 August 2013. He asked Mr Macdonald if he recalled the final inspection taking place? He said that he did. Mr Nelson asked Mr Macdonald if the photographs reflected the final state of the roof? Mr Macdonald said that they did. Mr Macdonald said that at no time was any question raised regarding defects in the chimneys. In his view, aesthetically they did not look very good. However, if there were any concerns he would have expected CRGP to raise them. Mr Macdonald said that he did not recall any defects being identified by CRGP.
32. In response to questions from the Tribunal, Mr Macdonald said that he did not recall any documentation being received from CRGP regarding completion of the Works, and that no interim payments were made prior to completion of the Works.
33. Mr Nelson asked Mr Macdonald if CRGP ever raised concerns regarding the Works? Mr Macdonald said that they did not. There were snagging issues, but nothing in the way of defects. He said that no issues were raised during the final inspection. Mr Nelson asked Mr Macdonald to explain his impression of CRGP, and Lorraine Martin in particular. Mr Macdonald said that she was very competent and professional. He had no concerns regarding the way in which CRGP handled the job. Mr Nelson asked Mr Macdonald, if CRGP had raised concerns, would he have paid Loch Orchy? Mr Macdonald said that he would not have paid them in those circumstances. Mr Nelson asked Mr Macdonald how reliant he was on what CRGP told him about the quality of the works? Mr Macdonald said that he was fully reliant.
34. The Homeowner asked about the basis of the appointment of CRGP? Mr Macdonald said that Item 8 in the Factor's Inventory of Productions was a summary of CRGP's quote. He referred to Item 25 in the Factor's Inventory of Productions. Mr Macdonald said that this showed that CRGP were doing their job. He said that at the time he had no concerns about communications with CRGP or Loch Orchy.
35. The Homeowner then went on to explain his concerns regarding the gutters. The material to be used was changed from aluminium to UPVC. The Homeowner said that he thought that UPVC was a poor choice of specification, and it ultimately led to water ingress.
36. Mr Nelson referred to Item 26 in the Factor's Inventory of Productions and to the copy email produced in the Homeowner's Second Inventory of Productions at page 27, which was an email from Lorraine Martin of CRGP to Mr Macdonald dated 11 July 2013. Mr Nelson drew attention to the final bullet point in the email, which explained why UPVC was to be used instead of aluminium.
37. Mr Nelson asked the Homeowner if, having seen the emails referred to, he maintained his position that the Factor should have pursued the contractor in respect of the change in material for the gutters in the very least as a cost

saving which should have been passed on to the Homeowners. The Homeowner said that the change in material caused problems at a later date.

38. The Homeowner then moved on to express his concerns regarding the lead work. He referred to the Wiseman Report and said that paragraphs 3.1.1(3), (4), (5) and (13) supported his position that the lead installations had not been properly carried out. Further, paragraphs 3.1.2(1), (2), (4), (5), (14), (19) and (21) also supported his position. The Homeowner referred to the quote provided by Loch Orchy and what it said regarding lead work. The Homeowner said that the Wiseman Report shows that Loch Orchy did not do what was described in the quote particularly with regards to the works being carried out in accordance with the Lead Sheet Association recommendations.
39. As regards the photographs annexed to the Wiseman Report, the Homeowner said that a number of photographs showed that the lead installation had not been carried out properly. He referred to photographs numbered 4-9, 20, 21, 24-27, 34-36, 40-44, 48, 61 and 62. The Homeowner said that he was not aware of concerns being raised at the time. However, in his view it should have been flagged as a defect by CRGP.
40. Mr Nelson submitted that the Wiseman Report did not say anything about defective work by Loch Orchy. No evidence had been provided that placed any blame on the Factor. Mr Nelson asked the Homeowner if he accepted that there was no independent professional criticism of the Factor or Loch Orchy? The Homeowner said that he had not instructed anyone to review the work done by Loch Orchy.
41. Mr Nelson referred to the photographs produced as Items 36 and 37 in the Factor's Inventory of Productions. He asked the Homeowner if anything in the photographs showed failing in the lead work? The Homeowner said that photograph no. 2 showed poor lead work in the flashings. Mr Nelson asked the Homeowner if he would expect the Factor to identify this as a defect? He asked if CRGP flagged any issues regarding the lead work? Mr Macdonald said that CRGP did not raise any issues other than issues in the course of the contract, such as ensuring the clipping was attached to the lead work. Mr Macdonald said that he had no reason to suspect that there might be an issue with the lead work. He said that if there had been defects, he would not have paid Loch Orchy.
42. As regards collateral warranties, Mr Macdonald explained that the contract was direct between the homeowners and CRGP and between the homeowners and Loch Orchy. In those circumstances, there was no scope for a collateral warranty.
43. **Section 2: Communication and Consultation**

Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:

2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response time should be confirmed in the written statement (Section 1 refers).

44. The Tribunal asked the Homeowner to explain the issues which caused him concern in terms of paragraph 2.5 of the Code. The Homeowner told the Tribunal that his concerns related to communications in 2017. The Homeowner accepted that by that point the Factor was no longer the factor for the Tenement. In light of that, the Homeowner said that he was content to withdraw his complaint under this paragraph.

Failure To Carry Out Property Factor's Duties

45. As regards failure to carry out duties, the Homeowner said that his concern around breach of duties was that the Factor had failed in its duties under the same headings as the Code complaints, surrounding the tendering exercise and subsequent roof and rot works. Mr Nelson said that he was content for the Factor to be judged by reference to the evidence led in respect to breach of the Code.

Remedy Sought

46. The Tribunal asked the Homeowner what he wished to see happen as a result of his application.
47. The Homeowner said that he would like to be paid the costs that will now be incurred in carrying out rendering, guttering and lead work. The Homeowner referred to estimated costs for carrying out that work. He referred to the documents produced with his written submission and the estimated costs for carrying out works. He said that his proportion of liability for the estimated costs was 9.3%. He therefore sought to be reimbursed 9.3% of the works associated with the chimneys, lead work and gutters.
48. Mr Nelson objected to quantification on this basis, as this was not what was specified in the Application. The Homeowner said that he was content to seek payment of the costs incurred of £5,165.41 in 2013 as set out in the Application.
49. Mr Nelson said that no meaningful evidence had been led to establish a link between the sum claimed by the Homeowner and anything which the Factor had failed to do.

Tribunal Findings and Reasons for Decision

50. The Tribunal found that there had been no breach of the Code in terms of paragraph 6.3. The tendering exercise carried out had been unusual. There had been no specification provided to contractors. The quotes were provided

by contractors on 12 January, 18 April, 20 June and 24 August 2012. The time gap between the tenders was unusual. In the absence of a specification, it would be difficult for the Factor to determine whether all contractors were tendering on the same basis. The Tribunal noted, however, that the Factor did provide the homeowners with a copy of the tenders and proceeded to appoint the contractor agreed upon by the majority. The Tribunal noted that the Homeowner had raised queries regarding the appointment of Loch Orchy, and it was unfortunate that these were not replied to in full. However, ultimately the Homeowner had signed the mandate agreeing to appoint Loch Orchy. The Factor had demonstrated how and why they appointed Loch Orchy.

51. As regards paragraph 6.8 of the Code, the Tribunal found that there had been no breach. There had been no evidence presented to the Tribunal which showed that the Factor had any financial or other interest in Loch Orchy.
52. As regards paragraph 6.9 of the Code, the Tribunal found that there had been no breach. No evidence had been presented to the Tribunal to show that the Factor was aware of defects during a time period within which they could have acted upon that information. It was noted that the defects in the Works were not evident until the production of the Wiseman Report in October 2016. The Factor had, however, ceased to be factor for the Tenement in April 2014. Loch Orchy had gone into Liquidation on 24 September 2015. The Tribunal were, however, of the view that it was unfortunate that the Factor was unable to respond to the direction seeking documentation regarding the sign-off of the Works by CRGP. The Tribunal were surprised that there were no such documents apparently in existence. As regards collateral warranties, the Tribunal determined that it would not have been appropriate for a collateral warranty to have been considered in the circumstances of this case. However, it was unfortunate that full documentation was not available regarding the appointment of CRGP which could be made available to the Homeowner.
53. As regards breach of paragraph 2.5 of the Code, the Tribunal noted that the Homeowner had withdrawn his complaint under this heading.
54. As regards breach of the Factor's duties, having considered all of the information placed before it, the Tribunal determined that there had been a breach of the Factor's duty to the Homeowner. In electing to commission and manage the Works the Factor had a duty to safeguard the interest of homeowners. In a number of areas the Tribunal considered that the Factor had failed to adopt best practice. The Factor had failed to properly carry out the tender exercise. There had been no specification of the Works which would have ensured contractors tendered on a "like for like" basis. Tenders were sought and returned on a haphazard basis rather than have tenders sought and returned within a co-ordinated period. Doing so would have demonstrated fairness and open competition. The Factor had failed to fully address the Homeowner's concerns regarding the contractor's viability, track record and expertise. The Factor had failed to address the question regarding the disparity in the amounts tendered by each contractor. There was

ambiguity in Loch Orchy's quotation regarding the extent of works to be carried out to chimneys. Once the contractor was selected, there had been a failure to adopt a formal building contract which contained a defects liability period and allowed for retentions. The account given to the Tribunal of the final inspection and sign-off of the Works was unconvincing. Further, the Works appear to have failed within a short period of time. A further major project is now required which will involve the Homeowner in further considerable expense. The Tribunal determined that the Factor should pay compensation of £750 to the Homeowner in respect of the breach of duty.

Proposed Property Factor Enforcement Order

55. 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

56. **In terms of section 46 of the Tribunals (Scotland) Act 2014 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.**

Signed

Joan Devine, Legal Member and Chair

27 November 2017

Date