

Housing and Property Chamber
First-tier Tribunal for Scotland



**Decision on homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/18/0477

16 Netherkirkgate, Aberdeen AB10 1AU ("the property")

The Parties:-

Mr Emilio Ayllon, residing at Flat 12, 34 Home Street, Edinburgh EH3 9LZ ("the homeowner")

The Property Management Company (Aberdeen) Limited, incorporated under the Companies Act and having its registered office at PMC House, Little Square, Oldmeldrum, Aberdeenshire AB51 0AY, Company Number SC156893 ("the factors")

Tribunal Members:

David M Preston, (Legal Member) and David Godfrey (Ordinary Member) ("the tribunal")

DECISION

The tribunal, having made such enquiries as it sees fit for the purpose of determining whether the factor had complied with the Code of Conduct for Property Factors ("the Code") as required by section 14 of the Act, determined unanimously that the factors failed to comply: with sections 6.9; and 7.1 of the Code; and with their duties: to maintain and repair the building; check contractor performance; and act promptly in regard to requests for repairs in accordance with their Scope of Services.

Introduction

- 1. 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"**
- 2. The factors became a Registered Property Factor on 1 November 2012 and their duties under section 14(5) of the 2011 Act to comply with the Code arise from that date.**
- 3. By Minute of Decision dated 2 May 2018 a legal member of the Tribunal, having delegated powers to do so, referred the application to the tribunal. The Minute of**

Decision specified that the application comprised documents received in the period 6 March to 8 May 2018.

4. A Notice of Referral and Hearing dated 6 June 2018 was sent to the parties intimating a hearing to take place on 19 July 2018. On 21 June 2018 the factor requested a postponement of the hearing which was re-scheduled for 30 August 2018.

Hearing:

1. A hearing took place in The Credo Centre, John Street, Aberdeen AB25 1BT on 30 August 2018. Present at the hearing were: the homeowner; and Mr Richard Burnett, Operations Director and Ms Dionne Pearson, Property Manager, both representing the factors all of whom gave oral evidence.
2. In addition to the application and accompanying documents the homeowner lodged written representations dated 4 July (Document D1) and 20 August 2018. He also referred to video evidence which the Tribunal had been unable to accept in advance of the hearing. He did, however bring the videos to the hearing and sought to present them to the tribunal.
3. The factors submitted written representations and extracts of emails and documents with letter dated 25 June 2018 and further documents with letter dated 27 August 2018 which the factors sought to depend upon, although lodged late.

Preliminary Matters:

1. The homeowner confirmed that the application form had been wrongly dated as 13 February 2017 which was amended to read 2018.
2. The homeowner sought to have the tribunal consider the video evidence which he had brought. The factors said that they understood that the issue had been dealt with when they had enquired at an earlier stage. However the letter to the factors in response to their enquiry advised that "If, however, a party wishes to bring along their own laptop the tribunal may allow them to show video files. They will normally seek the other party's views regarding the showing of any video before commencement.". At the outset the tribunal indicated that it would reserve its position on the issue until later in the hearing to decide if it would like to see the videos.
3. The tribunal considered whether to accept the additional documents submitted by the factors on 27 August 2018. The tribunal had received these documents late in the afternoon on the day before the hearing. The homeowner advised that he had received the productions at the same time. The factors said they had sent copies by recorded delivery to the homeowner on 27 August 2018 but the homeowner advised that he had been out and had been left notification of the delivery. He had not had an opportunity to collect same from the post office. The factors had no excuse for the lateness of the productions. They said that they had been continually reviewing their evidence and had only decided to lodge same at that

stage. The tribunal rejected such reasoning. The factors had been notified of the application in the initial Notice of Referral and Hearing on 6 June 2018 although that hearing had been postponed by a further two months.

4. The tribunal sought clarification of the physical characteristics of the property. It was explained that the tenement comprised three floors, each with five flats, over commercial property on the ground floor. Although the homeowner's flat was flat 5 on the second floor, the lay out of the roof was such that parts of his flat formed the top floor, under the roof space and attendant gutters.

Summary of submissions

Failure to ensure work is carried out properly or to pursue contractors where work is not satisfactory (Code 6.9 and factors' duties):

1. The homeowner explained that he had been contacting the factors about water ingress to his kitchen since 2012 when it was drawn to his attention by his tenants who said that they had to catch the water in a bucket and that they had to open the top window to deflect the water to prevent water ingress to the flat. By email dated 18 October 2012 he reported the problem to the factors and suggested that a gutter was overflowing or incorrectly fitted due to the quantity of water. It was not until August 2013 that the homeowner was advised that work had been carried out by Sangster & Annand in an attempt to resolve the problem. The factors email dated 8 August 2013 explained that the initial contractor who had been instructed was unable to attend to the work and had not told the factors. The work was reallocated to an alternative contractor who had been similarly unable to attend due to other work commitments. Sangster & Annand had then been instructed and had eventually attended to the work.
2. The homeowner referred us to strings of emails between October 2012 and August 2013 (E-2-10) which show that he had been chasing the factors for progress. There was no evidence of any updates or reports from the factors except in response to the homeowner's emails.
3. Mr Burnett explained that the delays in having the work attended to resulted from the difficulties encountered with contractors as outlined in the email of 8 August 2013. He also referred to the particularly bad spell of weather over the winter of 2012/2013 which had resulted in long periods where roofing contractors had been unable to work anywhere in Aberdeen which in turn resulted in substantial backlogs of work of this type. He said that the factors had acted reasonably and fulfilled their obligations and that the problems had been out-with their control. He said that he saw no reason to report progress to the homeowner because they had responded to his requests for updates. He said that the factors were doing what they could to have the problem resolved and that the contractors had been difficult to tie down.
4. Mr Burnett maintained throughout that the ingress of water to the property was not related to a problem with the roof or the gutter but was entirely due to the

condition of the windows in the property which he said were rotten which caused the water to enter the flat.

5. On 27 December 2013 (E-2-10-3) the homeowner told the factor that water was still getting into the property and that the work carried out had not been effective to resolve the problem. The homeowner complained that he had not received any confirmation of action taken by the factors at that time. In March 2015 he again contacted the factors about the same issue as well as a further leak in the master bedroom which had caused internal damage to part of a ceiling above the window. He referred to further email exchanges from then until February 2016 (E-2-9-1 to E-2-9-10). During this time the homeowner was at the property and he took videos of the problem which he made available to the factors.
6. The homeowner requested repeatedly that the factors should arrange for an internal inspection of the property by the factors and the contractors but this had happened only on one occasion when Mr Burnett had attended with Ms Pearson. Ms Pearson maintained that she had subsequently visited the property but the homeowner denied this. The contractors did not visit, despite having made arrangements to do so but said that they could assess the problem externally from ground level and concluded that the windows were rotten which caused the problem.
7. The factors maintained that they had arranged for 30 repairs to the roof at the property and that they had difficulty in getting payment from the owners at the property. They said that the gutters were cleaned at least once a year as part of on-going maintenance. This is done by 'Skyvac' which can be carried out from ground level and does not involve the use of a cherry-picker.
8. The problem with water ingress to the kitchen of the flat persisted until August 2015 at which time it seems to have been resolved by work carried out by Proserv which was a different contractor from the one who had done the work previously. The homeowner reported that the problem which he had from water ingress had been resolved without replacing the windows.
9. During the intervening period the homeowner asked on a number of occasions for the factors and contractors to visit the property to witness the problems but no contractors did visit. Mr Burnett and Ms Paterson visited in 2017 but they maintained that the problem was due to the condition of the windows which was a matter pertaining to the homeowner's property for which they had no responsibility.
10. Mr Burnett emailed the homeowner on 25 July 2017 and said that Sangster & Annand who had carried out the gutter repairs in 2015 and 2016 had visited the property on 30 June 2017 and assessed from the ground that the problem was caused by the windows and not the gutter.
11. The homeowner reported that on 15 August 2017 he noticed that during heavy rain the problem was not evident and on enquiry of the factors was advised that the gutter had been cleared on 9 August 2017 by Proserv.

12. The homeowner referred to growth of vegetation which had persisted in the gutter and which did not appear to have been cleared despite the factors' assertions that the gutters were cleared at least once a year. The factors advised that the heavy growth was not related to the gutters but was in the stonework and they said that a significant quotation had been obtained for that work, separate from the gutter maintenance.

Failure to have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors. (Code 7.1)

13. The parties both referred to a previous decision of the tribunal as a result of which the factors' complaints procedure had been revised with the inclusion of the following paragraph:

“Should you have a Complaint involving or concerning a Contractor, it should be referred initially to the development Property Manager. The Complaint will be dealt with in accordance with the timescale and procedure set down at 1, 2 and 3 above.”

14. The homeowner complained that this paragraph had not been included in the factors' Complaints Procedure at the time of his problems with the factors in relation to the continuing water ingress over a period of almost 4 years which he maintained was due to inadequate maintenance and cleaning of the gutters.

15. The factors submitted that the revised Code had been approved by the tribunal as a result of which a Certificate of Compliance had been issued. In any event they maintained that the homeowner had not exhausted their Complaints Procedure.

Failure to provide details of how the homeowner may apply to the tribunal following the exhaustion of the Complaints Procedure without resolving the complaint.

16. The homeowner complained that the email from Mr Burnett dated 24 July 2017 had not provided the necessary information on how to apply to the tribunal. He had not been told that he was required to notify the factors of those sections of the Code which he believed they had breached. He took this email to be the factors' final position, notwithstanding the final sentence which read “I am happy to meet with you to discuss this matter further, if required”.

17. Mr Burnett maintained that this had not been the final letter as demonstrated by the last sentence. He maintained that the homeowner had not followed the factors' complaints procedure in any event.

Findings and Reasons:

Code 6.9 and Duties:

18. We were satisfied on the evidence presented that the factors had acted reasonably in response to the initial report from the homeowner about water ingress. We accepted that the weather conditions had prevented the roofing contractors from carrying out the work and that the factors had appointed a number of contractors although they had been let down. We were, however satisfied that the factors had failed to provide adequate reports on progress for the period from October 2012 to August 2013 and had only responded to chasing emails from the homeowner. This fell short of the service which a homeowner might reasonably expect from the factors.
19. We accepted that the homeowner had reported continuing issues with the same problem between November 2013 and January 2014. In particular the homeowner emailed the factors on 27 December 2013 and advised that water was still getting into the property. However the factors failed to take the matter up with the contractors to ascertain why the works carried out had not resolved the problem. We found that the factors had decided that because they were of the view that the windows were rotten and needed to be replaced, that was the cause of the problem and they appeared to close their minds to pursuing the contractors.
20. We accepted that the same problems continued to be experienced notwithstanding the work which had been done as well as the clearing of the gutters which should have caused the factors to take more steps to pursue the contractors, at least to assess the source of the water ingress as opposed to concluding that the problem was solely related to the condition of the windows.
21. After a short adjournment in the hearing during which we discussed the issue of the video evidence we decided to view the videos taken. There was evidence that the factors had seen the videos taken on 7 July 2015 at least and had visited the property around the time of the videos of 17 July 2017. The videos taken both inside and outside the flat showed a substantial quantity of water cascading from the roof on to the kitchen window and being forced into the flat. The videos had been taken during heavy rain and we had no doubt that the quantity of water cascading from the gutters and roof was excessive by any standards. This was clearly due to a fault with the guttering and the extent of water ingress to the property, and while it may have been contributed to by the condition of the windows, was unreasonable. The video taken on 17 July 2017 also showed significant water over-spilling the gutter and pouring down the front of the window to an extent which was excessive and caused ingress notwithstanding the condition of the windows.
22. The problems with water ingress continued up until August 2017 and in the event appear to have been resolved without the need to replace the windows as had been asserted by the factors.

23. At no time did the contractors make any effort to enter the flat to witness the problem and it was not clear whether they were shown the video of 7 July 2015. The factors should reasonably have been expected to take the matter up more robustly with the contractors when the problems complained of by the homeowner persisted.

24. We were satisfied that the factors failed to address the problem having viewed the videos as confirmed in the email from Ms Pearson to the homeowner dated 14 July 2015 and timed at 5.19 pm (E-2-9-3). We recognise the difficulties when an issue arises in particular weather conditions in arranging a visit to coincide but the homeowner did supply videos and there was no evidence of any effort by the factors to visit the property either with or without the contractors during adverse weather to enable them to verify the position.

Code 7.1:

25. We accepted that the factors' Complaints Procedure in force at the time of the homeowner's complaints did not include information about how they would handle complaints against contractors. The complaints procedure has been revised. However we do not agree that the revised procedure satisfies the terms of the Code in that it does not specify 'how you will handle complaints against contractors'. It merely states that a homeowner should refer the complaint to the factor. It does not explain what steps the factors will take to pursue the complaint against the contractor. It refers to timescales as set out for complaints against the factors, but does not explain what will happen if the contractors have different timescales for remedying complaints.

Code 7.2:

26. There was a misunderstanding about the completion of the complaints procedure in this case. The email from Mr Burnett of 24 July 2017 invited further representations and did not seek to conclude matters. However and in any event, the matter has been referred to the tribunal and has proceeded to a hearing.

27. The factors maintained that the homeowner had not used the complaints procedure. However the involvement of Mr Burnett, as managing director, in the emails clearly demonstrated that the matter had been dealt with by the factors as such.

28. For that reason there was no failure on the part of the factors to provide information on how to take the matter to the tribunal. In terms of Section 7 of the Code, the in-house complaints procedure requires to inform homeowners how they may make an application to the tribunal, which it does. In addition Section 7.2 requires that details of how the homeowner may apply to the tribunal in the letter confirming the final decision. No such final letter was sent in this case as Mr Burnett's letter of 24 July 2017 sought further communication on the matter.

Additional Observations:

29. The homeowner complained about the falsification of timesheets which were apparently signed by Ms Pearson for a visit which was said to have taken place when she was on holiday. We were satisfied with the explanation by the factors that Ms Pearson had overlooked signing the sheet on her visit and that the details had been added retrospectively by a colleague. We attached no significance to this issue.
30. The homeowner made certain comments about the terms of the report from Sangster & Annand but we were satisfied with the explanations given as to its provenance. It was, however unfortunate that the contractors did not visit the flat or comment on the videos.
31. The tribunal was satisfied that the issue relating to the front bedroom had been resolved.

Proposed Property Factor Enforcement Order

32. In terms of section 19(1) (b) of the Act, having determined that the factors have failed to carry out the property factors' duties and to comply with the section 14 duty, the tribunal must decide whether to make a Property Factor Enforcement Order (PFEO). Accordingly 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.
33. In coming to its decision the tribunal took account of the level of service which the homeowner had received during the period of his complaints, namely from the time he intimated the problem about water ingress which had been reported by his tenants until the problem was eventually resolved. The tribunal took the view that the factors failed to act upon the homeowner's reports about the lack of success with the work carried out by the contractors and failed to pursue the contractors adequately to ensure that the problem was resolved within a reasonable timescale. The factors had decided that they knew that the problem lay with the condition of windows in the property although ultimately when it was resolved in August 2017, it was evident that there had been an underlying problem with the gutters. The factors failed to identify the source of the water as coming from the defective guttering and they relied upon assurances from the contractors who carried out inspections from ground level without properly investigating and identifying the source.
34. The tribunal also considered that the factors' complaints procedure should provide more detail of what steps they will take when handling a homeowner's complaint which is directed against the actions or failures on the part of contractors.
35. For that reason the tribunal considers that the homeowner is entitled to a refund of the management fees charged by the factors throughout that period.

36. In addition the tribunal considers that the sum of £250 should be paid by way of reasonable compensation for the inconvenience caused to him as a result of the application process.
37. The tribunal was mindful of the fact that the homeowner asked in his application for compensation: for loss of income as a result of lower tenant satisfaction and higher tenant rotation; damage to property as a result of continuing professional negligence; and inconvenience and distress as a result of continuous professional negligence.
38. The tribunal is not a forum for assessing the issue of professional negligence. The function of the tribunal is restricted to an assessment of compliance with the Code and the factors duties. Any loss arising from professional negligence would be a matter of determination elsewhere.
39. The tribunal considers that a period of one month for compliance with the PFEO is a reasonable timescale.

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.

..... Chairman

17 September 2018