

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland Housing and Property Chamber in relation to an application made under Section 17(1) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/22/4273 and FTS/HPC/PF/23/0328

Property: 31 Abbey Mill, Stirling FK8 1QS (“the Property”)

The Parties:-

Ms Susan Crowe, 31 Abbey Mill, Stirling FK8 1QS (“the homeowner”)

Ross & Liddell Limited, registered in Scotland under the Companies’ Acts (SCO97770) and having their registered office at 60 St Enoch Square, Glasgow G1 4AW (“the property factors”)

Tribunal Members:

George Clark (Legal Member/Chairman) and David Godfrey (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (‘the Tribunal’) decided that the property factors had not failed to comply with Section 6.1 of the Property Factors Code of Conduct effective from 1 October 2012 or Section 6.1 of the Property factors Code of Conduct effective from 16 August 2021.

Background

1. By applications, the final versions of which were received by the Tribunal on 15 December 2022, the homeowner sought a Property Factor Enforcement Order against the property factors under the Property Factors (Scotland) Act 2011. She alleged failures to comply with Section 6.1 of the Property Factors Code of Conduct effective from 1 October 2012 (“the 2012 Code”) and Section 6.1 of the Property Factors Code of Conduct effective from 16 August 2021 (“the 2021 Code”). As the alleged breaches occurred both before and after 16 August 2021, it was necessary for two applications to be made.

2. The homeowner's complaint is that the property factors have failed to repair the communal roof for over 2 years, as a result of which the homeowner and her husband have had water ingress during that time. They initially reported the leak on 26 May 2020, soon after moving in, but found out during the complaints process that the leak had existed since January 2020. At first, the property factors' Property Manager managed to have a roofer attempt to fix the problem, but it did not work. From there, the property factors failed to arrange a roofer to address the problem and then attempted to arrange for a surveyor to look into the problem but, deciding that this would need to be instructed on a majority basis involving every homeowner in the building, this also fell through. They said that they would then need to move to "reactive repairs", of which there has only been one, in November 2021, despite frequent emails for further help. The homeowner sent a complaint in May 2022 about the lack of progress and received a response that suggested they have a water test done through a private insurance claim to determine the cause of the leak. The homeowner and her husband decided to do this, though the idea of a private insurance claim for a public part of the building made little sense to them. As they were desperate to make some progress they ended up paying £500 for the excess on the private insurance claim. The water test found that there were two holes in the roof and a problem with one of the windows which exacerbated the problem. The property factors' private insurance claim company found that the leak was "gradually operating" and they would therefore not cover it. They had said in correspondence that the property factors are responsible for the roof repairs but that the homeowner and her husband would probably have more luck paying for it themselves and seeking compensation from other homeowners in the building or the property factors. As the homeowner and her husband were becoming desperate, they decided to face the bill and hope to get the property factors to pay them back, but when, as part of the complaints procedure, they mentioned this plan, a Director of the property factors told them that not only did they not advise them to arrange a repairs, as "it would have a detrimental impact on owners and our company", but also that the property factors would not reimburse them for the work. To add further confusion, they had recently received conflicting accounts over the majority rule decision-making over the roof. Two Property Managers had said in emails that the property factors were still gathering quotes for the roof repairs, so that they could put it to a vote, but one of the Directors, seemed to disagree as, according to her, the vote had already taken place on 10 August 2022, despite the homeowner and her husband never having received a letter with which to vote. In recent weeks they had needed an emergency repair and the Property Manager was about to arrange for Northwest Roofing to attempt a patch repair. The roofers had said they would contact the homeowner and hopefully come back the following day to do the work, but they never returned.
3. After 2 years they are still dealing with this water ingress, with the property factors doing next to nothing to help for much of the time. The homeowner and her husband had sent and received many emails and have even gone through a complaints process, but it has all amounted to nothing as their property continues to be damaged. The homeowner and her husband believe that this is a repair which should not be decided on majority rule. There have

been repairs that have occurred without majority rule as they were considered necessary to the safety of the building, as this too should be. One owner had told them that as it does not concern them, they are not interested in paying. With the cost of living crisis as it is, this is understandable, which is why the property factors should not rely on majority rule to make this essential decision.

4. The homeowner and her husband have experienced property damage because of this negligence, as this too should be. This largely comes in the form of water damage to the ceilings of two rooms, as well as the hole from the water test. The latter will be covered by their own building insurance for their Property but there is little point in it being carried out if the damage will only continue. There has been water damage to a table, academic notes have been destroyed and black mould continues to coat the ceiling of one of the affected rooms.
5. The homeowner wanted the property factors to be ordered to complete the repairs recommended by North Facades following the water test within 21 days, as is stipulated in their Service Level Agreement (which, for the purposes of this Decision is called their Written Statement of Services ("WSS"), that being the wording used in the Code of Conduct).
6. The homeowner's view is that the property factors have failed to comply with Section 6.1 of the 2012 Code and Section 6.1 of the 2021 Code.
7. In her written complaint to the property factors, the homeowner said that their Property Manager failed to make the necessary repairs within the maximum response times stated in the WSS, namely 21 days for a roof repair, and the property factors had failed to keep the homeowner and her husband informed of the progress of the work or given timescales for the completion of the work. There was also an unacceptable use of majority rule among homeowners for a necessary repair of the building.
8. On 2 February 2023, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the property factors were invited to make written representations by 23 February 2023.
9. On 3 March 2023, Raeside+Chisholm Limited, solicitors, Glasgow submitted detailed written representations on behalf of the property factors. They submitted that the property factors have responded appropriately to the homeowner's notification about the ongoing repairs required to the roof and the leak at the dormer window point. These two matters were considered separately by the property factors.
10. On receipt of the homeowner's complaint on 7 June 2022, the property factors provided a response outlining that since the first report of water ingress. They had responded appropriately. The history was set out in their response of 30 June 2022 to the complaint. After the report from the homeowner on 26 May 2020, the property factors instructed Reid Roofing to revisit the Property and assess the matter. No further information on this visit was received and no

charge was incurred, indicating to the property factors that no further works were completed. The Property Manager instructed an alternative contractor to attempt repair of any defects and the property factors' records show that as at 9 July 2020, these works had been completed. The contractor did not send an invoice.

11. A further report of water ingress was received on 29 December 2020 and 28 January 2021. The Property Manager required estimates from a number of building surveyors to obtain a roof survey, with the agreement of the other owners in the Development, with a view to ensuring correct and complete repairs could be undertaken. Obtaining quotes was delayed by the impact of the COVID-19 pandemic, but once quotes were obtained, a proposal was issued to the other proprietors seeking consent and funding to appoint Allied Surveyors to complete the roof survey and identify the sources of ingress and thereafter the repairs. Reminders were sent on 27 May, 11 June and 1 July 2021, but only 6 of the 15 owners responded with consent to proceed. Given the lack of majority consent, required by the title deeds, the Property Manager cancelled the proposal on 28 July 2021 and had to revert to reactive repairs.
12. The property factors further sought to undertake a permanent roof repair, which also required the consent of the majority of owners. On 10 August 2022, their Property Manager wrote to owners regarding a more permanent repair by Northwest Roofing, confirming that two further quotes had been received, and set out proposals for the apportionment of the cost as per the title deeds. The letter also highlighted the failed roof survey as a result of a lack of majority support. Further reminder letters were issued on 2 September and 14 October 2022. These letters were not issued to the homeowner and her husband, as they had provided their agreement, though no funding. On 11 November 2022, a final reminder letter was sent to proprietors, and, on 28 December 2022, the property factors wrote to them cancelling the proposed roof repairs, as responses had only been received from 7 out of 15 owners and this did not represent a majority allowing the property factors to instruct the works.
13. The property factors would not be able to provide definitive timescales for repairs, as they are dependent on majority rule. The property factors are not in a position and are not bound to fund repairs which are not approved by the majority of proprietors. Works Orders were raised by the property factors on 30 January, 19 February, 26 May, 17 June 2020, 29 October 2021, 28 January, 16 August and 2 November 2022 and 3 February 2023. The homeowner was kept updated by the property factors as these works progressed.
14. The property factors directed the Tribunal to their WSS (June 2022), which sets out the position regarding repairs at Section 2. The roof repair was considered by the property factors to fall into the category of a "Major Repair" and the WSS states that the property factors will seek competitive quotes and may recommend appointment of surveyors, architects and structural engineers. It states that "All owners have an obligation to maintain their property and legislation/Title deeds, Deeds of Conditions, permit works to be

instructed on a majority basis, however, we will normally seek advance funding for the whole cost prior to instructing the repair work.” The property factors stated that they were bound by the WSS to consult all owners within the development before instructing the major repair, but they were unable to get the majority required and had, therefore, instructed reactive, temporary repairs to the roof whilst attempting to arrange for the full roof repair. The property factors had tried to remedy the repairs timeously, but were bound by the lack of majority support. In all of the circumstances, they considered that they adhered to the standards set out in Section 6 of the 2012 Code.

15. In relation to Section 6.1 of the 2021 Code of Conduct, which states that “While it is homeowners’ responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard”, the property factors said in their written representations that, at all times, they endeavoured to help to prevent further damage or deterioration by seeking to make prompt repairs where possible. Through no fault of the property factors, they were unable to get the support of all owners as would be required for major, common repairs of this kind.
16. On 9 March 2023, the property factors’ solicitors submitted a number of Productions in support of their written representations. These included copies of a letter of 7 May 2021 sent to the proprietors seeking agreement and funding for surveyors to undertake a roof survey, a reminder letter of 27 May 2021, stating that so far they only had approval from 5 out of 15 owners, a further request for responses dated 11 June 2021, a final request dated 1 July 2021 and a letter of 28 July 2021, stating that, as they had only received approval from 6 owners, with no objections from others, they did not have majority agreement and were, therefore cancelling the proposal.
17. The Productions also included copies of correspondence between the property factors and proprietors regarding proposed roof repair works. On 10 August 2022, the property factors sought approval for the repairs and gave details of the proposed work and costs. On 2 September 2022, they advised proprietors that they had received 13.33% of the necessary funding. In a further letter of 14 October 2022, they told proprietors that they had received funding from 26.67% of owners and again encouraged owners who had not provided clear instructions to do so by 28 October. They issued a final reminder on 11 November 2022, advising that only 7 out of 15 owners were in agreement, and on 28 December 2022 they informed proprietors that, as only 7 of 15 had responded, a majority had not been achieved and the work would not proceed.
18. The property factors solicitors also provided copies of their WSS, a repairs timeline spreadsheet and Invoices of 9 October 2020 and 4 December 2021 for roof repairs.

Case Management Discussion

19. A Case Management Discussion was held by means of a telephone conference call on the morning of 23 March 2023. The homeowner was present, along with her husband Mr Fergus Spence. The property factors were represented by Ms Paige Dickinson and Ms Jennifer Johnston and by Ms Caitlin Colville of Raeside+Chisholm, solicitors.
20. The homeowner agreed that the relevant portion of Section 6.1 of the 2012 Code was the requirement for property factors to inform homeowners of the progress of work, including estimated timescales for completion and that the relevant portion of Section 6.1 of the 2012 Code was the statement that a property factor can help prevent further damage or deterioration by seeking to make prompt repairs to a good standard.
21. The homeowner summarised her complaint. The Development comprises four blocks of flats, built in the early 1990s. There are 15 flats in her block, which is three storey and attic in height. The homeowner and her husband own a top flat, which is the only one which extends up to two rooms on the attic floor. There are two holes below the exterior cladding around the attic floor and it is in the two rooms there that there has been water ingress. When the property factors were unable to get a majority in favour of the necessary repairs, the homeowner and her husband had decided to cover the cost themselves and recover shares from the other owners, but the property factors said that they were not allowed to do it. They have a deteriorating flat and no reactive repairs are being done.
22. Ms Colville told the Tribunal that her understanding is that the matter is still ongoing and that the property factors are seeking to re-open the vote for repairs. Ms Dickinson added that it appeared that two of the proprietors who had not previously voted were now in favour of having the work carried out.
23. The property factors confirmed that they do not have an agreed level of delegated authority, but typically, if a repair is going to cost more than £500 shared amongst the owners in the block, they would not proceed without majority consent. They will instruct temporary repairs without consultation in an emergency situation. In the present case, the contractors had advised that it would be a major repair and some temporary repairs had been carried out in 2020 and 2021. They would not support the homeowner instructing works to the common parts of the building herself, as, if there were any defects in the work or issues with the contractors, they would not be able to assist the owners.

24. The homeowner told the Tribunal that she accepted that the property factors had assumed she and her husband were in favour of carrying out the work, as they were the people who had raised the issue, but she thought that they had not received two of the letters to which the property factors had referred in their written representations. The property factors accepted that two reminder letters might not have been sent to the homeowner, but a mail merge check indicated that the letters of 11 November and 28 December 2022 had been sent to her. Ms Colville pointed out that there had also been frequent emails to and from their previous Property Manager and the homeowner.
25. Having confirmed that they were satisfied that the issues they wished to raise had been covered, the Parties and their representative left the conference call and the Tribunal Members considered all the evidence, written and oral, that had been presented to them.

Reasons for Decision

26. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it sufficient information and documentation to enable it to decide the application without a Hearing and that it appeared that the Parties had provided all the information and documentation they wished the Tribunal to consider in arriving at its Decision.
27. Section 6.1 of the 2012 Code provides: *"You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required."*
28. Section 6.1 of the 2021 Code provides: *"This section of the Code covers the use of both in-house staff and external contractors by property factors. While it is homeowners' responsibility, and good practice, to keep their property well maintained, a property factor can help prevent further damage or deterioration by seeking to make prompt repairs to a good standard."*
29. The Tribunal noted that the property factors' position was that they had been unable to instruct the roof repairs because they had been unable to obtain support and funding from a majority of the 15 owners in the block of which the Property forms part. The Tribunal did not have sight of the title deeds of the Property or a Deed of Conditions for the Development, but the property factors advised that it appeared that the Deed of Conditions did not specify the position regarding votes on common repairs, in which case the Tenements (Scotland) Act 2004 would apply.

30. The Tribunal accepted that it was perfectly reasonable for the property factors to require at least majority consent before instructing what appeared to be major works to the roof of the block and to require upfront funding. It is not part of the function of property factors to fund repairs themselves, with no certainty of recovering the money from homeowners at a later date. Accordingly, the homeowner's request that the property factors be ordered to complete the works recommended by North Facades within 21 days was refused. Part 2 of the property factors' WSS states - *"All owners have an obligation to maintain their property and legislation/Title deeds, Deeds of Conditions, permit works to be instructed on a majority basis, however, we will normally seek advance funding for the whole cost prior to instructing the repair work."*
31. The role of the property factors was to obtain competitive quotes and put a recommendation to the homeowners and this was what the property factors did in the present case. In relation to the recommendation that a survey be carried out, they sent an initial request for approval and funding and then 3 reminders, before telling the homeowners that they were unable to instruct the work and, in relation to the roof repairs it was an initial letter and 4 reminders. In all the reminder letters and final notices, they told the homeowners in the block that they did not have a majority in favour and that the work could not proceed without the necessary consent and funding. The Tribunal accepted that there was nothing more that the property factors should have done in the circumstances and determined that they had done all they could to inform homeowners of progress. The Tribunal noted that it appeared that two of the reminder letters regarding the roof repair may not have been sent to the homeowner but did not consider that she had been prejudiced as a consequence. At the time, from 2 August to 18 October 2022, she and her husband were in regular email communication with the property factors' Property Manager about the roof repairs and, in an email of 18 October the homeowner asked him to take the email as her and her husband's consent for any further works.
32. It follows that, in the absence of the necessary authority to instruct the survey and/or the roof repairs, it would not have been possible for the property factors to provide the homeowner with estimated timescales for completion. Accordingly, the Tribunal did not uphold the homeowner's complaint under Section 6.1 of the 2012 Code of Conduct.
33. The Tribunal was of the view that, in obtaining competitive quotes for both the survey and the roof repairs, the property factors did all they reasonably could to help prevent further damage or deterioration by seeking to make prompt repairs to a good standard. They could not instruct the repairs without the consent of the majority within the block and they had gone to considerable lengths to try to obtain the necessary approval to enable the work to proceed. Accordingly, the Tribunal did not uphold the homeowner's complaint under Section 6.1 of the 2021 Code of Conduct.
34. The Tribunal fully understands the homeowner's frustration at the lack of progress in carrying out the roof repairs. She and her husband are the ones who have had to deal with water ingress and have had to take the lead in

discussions with the property factors. Ultimately, however, their wish to have a permanent repair carried out has been frustrated, not by the property factors, but by some of the other owners in the block. It does not appear that any of them have actually said “no” to the proposed repairs, but a majority have not said “yes”. The Tribunal notes, however, that there are optimistic signs that two more of the owners are willing to approve the works and it is to be hoped that this is indeed the case, that updated quotes can be obtained in the near future, and that the repairs can finally be completed.

35. The Tribunal’s Decision was unanimous.

Right of Appeal

In terms of Section 46 of the Tribunal (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 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.

George Clark
Legal Member/Chair
23 March 2023