

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("The Rules")

Chamber Ref: FTS/HPC/PF/18/0149

Property:- 49 Greenrigg Road, South Carbrain, Cumbernauld G67 2QA ("the Property")

The Parties:- Mr. Joseph Mellon, having an address at 58, Westfield Road, Kilsyth G65 9AN ("the Homeowner") and Apex Property Factor Ltd., having a place of business at 46, Eastside, Kirkintilloch, Glasgow G66 1QH ("the Factor") hereinafter together referred to as "the parties"

Tribunal Members

Karen Moore (Chairperson)

Mike Links (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") determined that (i) the factor had failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Sections 2, 6 and 7 of the Property Factor Code of Conduct ("the Code") and (ii) had not failed to comply with the property factor duties in terms of Section 17(5) of the Act. Having so determined, the tribunal considered whether or not to make a Property Factor Enforcement Order in terms of Section 19 of the Act and determined not to make an Order.

Background

1. By an application comprising application form dated 29 December 2017, the Homeowner in terms of Section 17(1) of the Property Factors (Scotland) Act 2011 applied to the tribunal (firstly) for a determination that the Factor had failed to comply with the Property Factor Code of Conduct ("the Code") as required by section 14(5) of the Act and, in particular, had failed to comply with Part 1.1a, D and m of the Written Statement of Services, Section 6 Carrying Out Repairs and Maintenance at 6.1, and Section 7 (Complaints Resolution) at 7.1 and (secondly) for a determination that the Factor had failed to comply with the property factor's duties in terms of Section 17 of the Act. The Homeowner then submitted a further and amended application in terms of the said Section 17(1) which application comprised application form with supporting correspondence and documentation and was received by the tribunal in the period from 19 January 2018 to 25 April 2018. This amended

application is the one which the tribunal considered and is referred to herein as “the Application”. The Application sought (firstly) for a determination that the Factor had failed to comply with the Code as required by section 14(5) of the Act and, in particular, had failed to comply with Section 2 (Communication and Consultation) at 2.5, Section 6 Carrying Out Repairs and Maintenance at 6.1, and Section 7 (Complaints Resolution) at 7.1 and (secondly) for a determination that the Factor had failed to comply with the property factor’s duties in terms of Section 17 of the Act.

Hearing

2. A Hearing took place on 28 June 2018 at Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT. The Homeowner appeared on his own behalf. The Factor was represented Mrs Christine Davidson-Bakhshae, one of the Factor’s directors, and Mr Neil Cowan, office manager within the Factor’s organisation.
3. The tribunal asked the Homeowner to address it on the various matters complained of in the Application.
4. With reference to Sections 2.5, and 7.1 of the Code, the Homeowner referred to his email of 11 September 2017 which was not responded to by the Factor until November 2017, following two reminder emails by the Homeowner. Mr Cowan on behalf of the Factor agreed that the response time as set out in the WSoS had not been complied with.
5. The Homeowner submitted to the tribunal that the main issue of his complaint was that the Factor had failed to comply with Section 6.1 of the Code and with the property factor’s duties in terms of Section 17 of the Act all as set out in full in his email of 11 September 2017 to the Factor, being i) a lack of communication progress or otherwise on the repair to the common roof, ii) an explanation for the Factor’s forced entry into the Property and refund of the cost of a replacement door and iii) the Factor’s failure to communicate with him by email thus incurring late penalty charges.
6. With regard to i) a lack of communication progress or otherwise on the repair to the common roof, the parties agreed that the Homeowner and his tenant had reported water ingress to the Factor. The Homeowner was aware that an estimate for repair had been obtained but questioned the accuracy of this as he doubted that a roof inspection had been carried out and a roof report prepared. The Homeowner advised the tribunal that the Factor had not provide him with any update on the progress of the repair. Mr Cowan on behalf of the Factor explained to the tribunal that the building of which the Property forms part is, in general, in a poor state of repair and that the majority of the 37 co-owners are reluctant to pay for repairs. With regard to the roof, Mr Cowan explained that the Factor manages a number of similar properties which are in a similarly poor condition and so, rather incur the cost of roof inspection and roof report, which cost was unlikely to be recovered from the co-owners, the Factor arranged for a local roofing contractor with local knowledge and experience of similar properties to provide a desk top estimate of the cost of the repair. At the same time, the Factor tried to arrange grant funding from the local authority to assist with

the costs. The estimate of £1673.90 excluding VAT, which equated to around £52.00 per property, was intimated to the 37 co-owners, however, only 13 of that number responded favourably and so the factor had neither the mandate nor the funds to proceed with the repair, and so there was nothing to report to the Homeowner in respect of progress. Mr Cowan advised the tribunal that, although it was the Factor's opinion that the roof repair was not required as a result of insurable damage, the Homeowner had asked for and been given an insurance claim form. The Homeowner accepted that he had been given the form but had not realised that he had the form and so had not made a claim on the common policy.

7. With regard to ii) the Factor's forced entry into the Property and the cost of a replacement door, the parties agreed that the Homeowner had emailed and phoned the Factor from his overseas place of employment to report water ingress on 12 or 13 July 2017. The Homeowner's position was that no emergency or potential emergency had been reported. The Factor's position was that the report was that ingress was severe and had the potential to cause damage to neighbouring properties. Therefore, the Factor arranged for a contractor to attend immediately and as the Homeowner's tenant could not be contacted, arranged for the police to attend and for forced entry to be taken to the Property. The Homeowner's position was that this action was excessive.
8. With regard to iii) the Factor's failure to communicate with the Homeowner by email thus incurring him late penalty charges, the Homeowner fairly withdrew this part of his complaint as the issue has since been resolved, the penalty charges were minimal and the Factor had refunded half of these.

Findings of the tribunal

9. The tribunal took into account the Application, the productions lodged by the Homeowner and the Factor and the submissions made by the homeowner and on behalf of the factor at the Hearing. The tribunal found that all parties gave evidence in a straightforward and truthful manner and had no difficulty in believing their accounts of the events.
10. The Homeowner is the heritable proprietor of the Property which forms part of a block of flats, the roof of which is common to 37 proprietors. The Factor was appointed in August 2015 and its duties under the Act arose from that date.
11. There had been water ingress at the Property, which was reported to the Factor. The Factor although having obtained an estimate for the repair and potential grant funding to assist with costs was unable to instruct the repair because consent of the majority of proprietors could not be secured.

Decision and reasons in respect of Section 2.5, 6.1 and Section 7.1 of the Code

12. The tribunal dealt with these complaints together as they arose from the same point being the Factor's failure to meet its stated time limits for responding to

correspondence and, in particular, taking two months to respond to the Homeowner's email of 11 September 2017 which set out his main complaint. The tribunal noted that the Factor accepted this failing.

Decision and reasons in respect of property factor's duties

13. As the parties agreed that the Factor had forced entry to the Property causing damage to the front door, the question for the tribunal was had the Factor been overzealous in its approach and had it acted outwith its powers and so breached its duties. The tribunal had sympathy for both parties in this situation but considered that Factor had a duty not only to the Homeowner but had a duty to other proprietors in the block for the protection of their properties. Therefore, on balance, the tribunal considered that the Factor had acted appropriately. The tribunal accepted that the Factor had made considerable efforts to arrange a roof repair but was thwarted by the disinterest of the majority of co-owners, who, as owners, have the final say on the repairs to be carried out. Accordingly, the tribunal found that Factor had not failed to comply with the property factor's duties in terms of Section 17 of the Act.

Property Factor Enforcement Order

14. Having determined that the factor has failed to carry out its duty in terms of Section 14 of the Act, the tribunal then considered whether to make a property factor enforcement order in terms of Section 19 of the Act. The tribunal had regard to the full facts of the Application and all of the matters before it. The tribunal had regard to the fact that relations and communication between the parties appeared to have been much improved since the Application had been lodged. The tribunal took the view that, on the whole, the Factor had acted in the best interests of the Homeowner and that the Homeowner had not suffered any loss or prejudice by the Factor's breach of the Code. The tribunal had regard to the effect of a property factor enforcement order on the Factor and on its reputation and considered that the effect of a property factor enforcement order outweighed the extent of the breach.

15. Accordingly, the tribunal determined not to make a property factor enforcement order.

Appeal

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must 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.

K Moore

Karen Moore Chairperson 31 July 2018