



Decision: Property Factors (Scotland) Act 2011: Section 19(1) (a)

Chamber Ref: FTS/HPC/PF/19/3291

127 Main Street, Bellshill, ML4 3DZ("The Property")

The Parties:-

**Miss Susan Mynehan, 127 Main Street, Bellshill, ML4 3DZ
("the Homeowner")**

**W.M.Cumming, Turner and Watt, Property Managers,40 Carlton Place, Glasgow,
G5 9TS
("the Property Factor")**

Tribunal Members:

**Martin J. McAllister, Solicitor, (Legal Member)
Robert Buchan, Chartered Surveyor, (Ordinary Member)
(the "tribunal")**

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"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules" and the First- tier Tribunal for Scotland (Housing and Property Chamber) is referred to as "the Tribunal." References to "Production" means the Productions lodged by the Respondents.

Decision

It was determined that the property factor had not complied with Section 2.5 of the Code and that a proposed Property Factor Enforcement Order be issued.

Background

The application dated 13th October 2019 and received by the Tribunal on 14th October 2019 was made by the Homeowner.

The application contended that the Property Factor had not complied with the property factor's duties and that it had not complied with sections 2.5, 5.4 and 6.9 of the Code.

The application arose from work done to replace a damaged bath and subsequent remedial work which was required as a result of damage caused when the bath was replaced.

On 7th January 2020 a legal member of the Tribunal, acting under delegated powers, referred the application to the tribunal for determination.

On 21st February 2020, solicitors acting on behalf of the Property Factor submitted written representations and lodged an inventory of productions, and a witness list.

Hearing

A Hearing was held on 28th February 2020 in Glasgow Tribunals Centre at 10 a.m. The Homeowner was present and gave evidence. She was supported by her partner, Mr Kenneth Brown.

Ms Angela Coyle, administrative assistant and Mr Neil Watt, repairs manager, both employees of the Property Factor were present and gave evidence. The Property Factor was represented by Mr Michael Ritchie, solicitor.

Preliminary Matters

Since the application was dated October 2019 and the papers before the tribunal disclosed that the Homeowner had received a cash payment from insurers in lieu of work being funded by the insurers, an enquiry was made of the Homeowner as to the current position with the bathroom which is the subject matter of the application. The Homeowner said that her partner had re-sealed the bath and a decorator had carried out some work. The Homeowner said that she had not had time to do the other work. Mr Ritchie said that a cash payment had been made to the Homeowner by the insurers who had also paid the contractor who had replaced the bath.

Matters of Agreement

Parties helpfully set out matters on which they were agreed.

Damage was caused to the Homeowner's bath and she made an enquiry of the Property Factors with regard to an insurance claim being submitted. An insurance claim was submitted. The Homeowner had difficulty in getting a contractor to provide an estimate for the replacement of the bath and asked Ms Coyle if she could recommend anyone and J.C. Plumbing was suggested. A quotation was obtained from J.C. Plumbing and this was submitted to the insurers by the Property Factor. The repair was authorised by the insurers and the Property Factor instructed J.C. Plumbing which replaced the bath. In the course of the work being done, tiling was damaged. J.C. Plumbing's quotation dated 16th December 2018 included the following: "Not quoting for broken tiles." The insurers confirmed that they would entertain a claim for the remedial works. J.C. Plumbing was unable to do tiling work and the Homeowner asked the Property Factor to suggest a contractor for the remedial works. Abbey Services (Scotland) Ltd was recommended and provided a quotation. The insurers authorised the works. The Homeowner wanted wall boards installed in place of tiling and was prepared to pay an additional sum for this.

The remedial works were not done and the Homeowner received a payment of £2,879 from the insurers on 11th December 2019 in settlement of her claim in respect of them.

Homeowners' Position

Miss Mynehan's application stated that the bath was replaced by Mr Cricket of J.C. Plumbing and that he had made a mess of sealing the bath and tiles were marked where the shower door had been. The application states that the Property Factor sent out Mr Derek Ross from Abbey Services who said that he would do the job in May 2019 and that it would take a week. The application states that no work was done in May and the Homeowner told the Property Factor that the seal around the bath was lifting. It states that Mr Ross said that the work would start on 6th August 2019. The application refers to issues with regard to the specification of the wall boards to be installed. The application states that the Homeowner's use of the bath was restricted and that she wanted her bathroom reinstated by reputable tradesmen and that, as a gesture of goodwill, the Property Factor should pay the amount the insurance company will not pay to reinstate the bathroom.

In evidence the Homeowner said that her partner had re-sealed the bath. She said that some decoration work had been done. She confirmed that she had received a payment of £2,879 from the insurers in December 2019 but that she has had a lot on and has not had the remedial repairs done. The Homeowner stated that she had not been well served by the Property Factor and the matter had gone on for too long. Miss Mynehan stated that, until she had seen the log lodged by the Property Factor (Production 3.20), she had not been aware of what had been going on with the Property Factor contacting Abbey Services. She said that she had not been kept informed and that there was a time lapse where nothing seemed to happen and matters dragged on. She said that she had difficulty getting information from Abbey Services with regard to what the quoted specification for the wet wall boards was. She said that she wanted to upgrade to a particular specification and meet the additional cost. She said that she knew the wall boards she wanted and had told Mr Ross of Abbey Services what these were and had even told him the shop where they could be found. Miss Mynehan said that she had not been told what Abbey Services' specification was despite repeatedly asking for it.

Property Factor's Position

The Property Factor's position was set out in the written representations and can be summarised as follows:

They were asked to recommend a contractor for the replacement of the bath and they nominated J.C. Plumbing and then instructed a quotation from them on behalf of the Homeowner. This was submitted to the insurers, the repairs were authorised and J.C. Plumbing carried out the work. In the course of the work, tiling was damaged and the Property Factor recommended Abbey Services to the Homeowner in respect of the remedial works. A quotation was provided and, when it was submitted to the insurers, they requested a breakdown of costs and, as a result of this, indicated that they would only pay part of the costs. The Homeowner then indicated that, rather than re-tiling, she wanted to consider the installation of wet boards. A further quotation dated 19th February 2019 was obtained from Abbey Services which was submitted to insurers who advised that they would only pay part of the overall cost of the repairs. The

Property Factor advised the Homeowner of the position and, on 1st March 2019, Abbey Services were instructed to proceed with the works. The representations state that the Applicant and the Respondent were left to liaise with each other regarding the carrying out of the works and payment. *(This makes no sense in the context of the representations and it is assumed to be a typographical error and that it was the Homeowner and contractor who were left to liaise with each other. Unfortunately, this was not brought to the attention of Mr Ritchie during the Hearing to allow him to clarify the position).*

The representations state that between March and July 2019 the Homeowner was in touch with the Property Factor to advise that Abbey Services were delaying and that, on each occasion, the Property Factor would contact Abbey Services. The representations allude to a period where there was correspondence regarding the cost to be paid by the Homeowner in relation to the wall boards and that it was the understanding of the Property Factor that discussions on that matter were on going.

The representations state that, in November 2019, the insurers offered to settle the claim by making a cash payment of £2,879.60 because the matter had been going on for so long and that this was accepted by the Homeowner.

The representations refer to the alleged specific breaches of the Code and it is convenient to refer to them when the particular sections of the Code are being dealt with.

To underline the Property Factor's position, Mr Ritchie referred the tribunal to various productions:

Production 3.26 is an email exchange between the Property Factor and the insurers dated 17th December 2018 and relates to the quotation from J.C. Plumbing to replace the bath.

Production 3.28 is an email to the insurers from the Property Factor and relates to the quotation from Abbey Services for the remedial works.

Production 3.32 relates to the breakdown of costs required by the insurers.

Production 3.37 is an email from the insurers detailing what they are prepared to contribute towards repairs.

Production 3.45 is an email from the Property Factor to the Homeowner dated 26th February 2019 confirming the sum the insurers would be prepared to contribute and the consequent contribution due from the Homeowner and Production 3.46 is an email from the Property Factor to Abbey Services dated 1st March 2019 confirming that the insurers have given authorisation to proceed with the estimate dated 19th February 2019 for £2,995 plus V.A.T.

Ms Coyle said that, on various occasions, the Homeowner had contacted her with regard to difficulties in getting the work started and that, on each occasion, she had contacted Abbey Services.

The tribunal was referred to Production 3.47 which was an email dated 18th July 2019 from Abbey Services to the Homeowner which was copied to Ms Coyle. It stated

"We will be commencing works on the 06/08/19, can you please call me to arrange keys for access and to discuss wallboards?"

Ms Coyle said that, at that time, she thought there were ongoing issues with regard to the wall boards which had not been resolved. The tribunal was referred to Productions 3.48 to 3.58 which were emails dated between 7th and 30th August 2019 between the Homeowner and the Property Factor and between the Property Factor and Abbey Services. Production 3.58 was an email from the Homeowner to the Property Factor seeking a copy of its complaints procedure. The earlier emails consist of emails

between the Homeowner and the Property Factor in relation to the specification of the wall boards with the Homeowner asking the Property Factor to clarify matters with Abbey Services.

Mr Watt said that, as far as he was concerned, his company was acting as an intermediary between the Homeowner and the contractor. He said that, in cases such as this, where there were no common repairs, he considered that the Property Factor should assist. He pointed out that homeowners were paying management fees. Both Mr Watt and Ms Coyle said that they thought that the Homeowner and Abbey Services were resolving issues but Mr Watt said that his company was always happy to assist where it could.

The Alleged Failures of the Property Factor

The homeowner's position is that the property factor did not comply with the property factor's duties and various sections of the code:

Section 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 times should be confirmed in the written statement (Section 1 refers).

The written representations of the Respondents state that the obligation is to reply to enquiries and complaints within prompt timescales, that the Respondents in their written statement of services undertake to deal with enquiries as quickly as possible and that the Respondents' insurance file which is lodged demonstrates that enquiries from the Applicant to her insurance claim have been dealt with expeditiously (Production 3.20).

The Homeowner referred the tribunal to a copy of a letter which she had sent to the Property Factor on 22nd September 2019. She said that she received no response despite the Property Factor's written statement of services stating that she should have received a response within ten working days. Mr Ritchie said that his clients acknowledge that, because of oversight, this letter was not responded to but that all previous communications from the Homeowner had been.

The Homeowner said that she never received a breakdown with regard to the Abbey Services quotation. Ms Coyle referred to Productions 3.49- 3.54. These were emails between Ms Coyle and the Homeowner setting out the various costs and she said that full information had been provided.

Miss Mynehan said that she never received any confirmation from Abbey Services with regard to the specification of the wall boards which they had quoted for.

Section 5.4

If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so.

The written representations of the Respondents state that the obligation in terms of the Code is to have a procedure in place for submitting claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with properly and correctly. The representations state that such procedures are in place and refer to the original intimation of the insurance claim in December 2018, the correspondence with the insurers in the period from December 2018 to March 2019 relating to the changes in the specifications and costings and the correspondence in November and December 2019 in relation to a cash settlement from the insurers.

Miss Mynehan accepted that the Property Factor had a procedure in place for submitting insurance claims on behalf of homeowners. She said that her concern was that she was not kept informed on what was happening with the remedial works.

Section 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

The written representations of the Respondents state that the obligation in terms of the Code is to sue a contractor or supplier to remedy defects in any inadequate work or service provided and that the Respondents only have authority to instruct and carry out repairs and maintenance to the common parts of the property. The representations refer to the Property Factor's written statement of services and the paragraph headed "Repairs and Maintenance" (Production No. 3.20).

Miss Mynehan said that the Property Factor did not pursue J.C. Plumbing for the faulty work which had been done on 8th January 2019. She acknowledged that the quotation from J.C. Plumbing referred to it not including damage to tiles (Production 3.24). Mr Watt and Ms Coyle said that Mr Cricket of J.C. Plumbing is a plumber and does not do tiling. Miss Mynehan said that, if this was the case, perhaps Abbey Services should have been instructed to do the original works because they could have dealt with the issue of damaged tiles. Mr Watt said that the J.C. Plumbing quotation showed that damage to tiles was contemplated and that it was a possible consequence of removal of a bath. He said that there was no defect with the installation of the bath by J.C. Plumbing and Miss Mynehan agreed this although she said that there was an issue with the sealant. He said that, as soon as his company

was advised about the damage to the tiles, another contractor was arranged to look at what required to be done. Mr Watt said that neither the original work or the remedial works constituted common repairs.

Property Factor's Duties

The Homeowner said that the Property Factor had allowed matters to drag on for over a year which was too long.

Submissions

The Homeowner said that the service level of the Property Factor was appalling and she stressed that she was greatly inconvenienced. She spoke of having to take showers at the local sports centre. She said that there were long periods where she did not know what was going on. Miss Mynehan said that she has not yet done anything to progress the remedial works in the bathroom because she has been busy.

Mr Ritchie asked the tribunal to have regard to his written submissions and made the following points:

In relation to the alleged breach of paragraph 2.5 of the Code, he said that his clients acknowledge that the Homeowner's letter of 22nd September 2019 was not responded to.

He said that the documents lodged on behalf of the Homeowner demonstrate good and prompt responses to all other queries and enquiries raised by the Homeowner.

In relation to the alleged breach of paragraph 5.4 of the Code, Mr Ritchie said that a procedure was in place for submission of insurance claims. He said that the evidence supported that a claim had been submitted by the Property Factor on behalf of the Homeowner. He said that the original claim had been promptly attended to and that J.C. Plumbing had been instructed to carry out the work. He said that the evidence showed that the Property Factor had promptly dealt with the second claim and had provided the quotation from Abbey Services, had received authority to proceed and had thereafter promptly dealt with the cash settlement on behalf of the Homeowner.

In relation to the alleged breach of paragraph 6.9 of the Code, Mr Ritchie said that there was no evidence before the tribunal to suggest that there was anything wrong with the original installation of the bath. He said that it was accepted that there was damage caused to tiling but that there were no inadequate works by the contractor. He said that damage to tiling was foreseen in the quotation from J.C. Plumbing.

Mr Ritchie said that the Homeowner's application did not specify in what way she considered the Property Factor to have failed to carry out the property factor's duties other than refer to breaches of paragraphs 2.5, 5.4 and 6.9 of the Code.

The tribunal makes the following findings in fact:

1. The Homeowner is the owner of 127 Main Street, Bellshill, ML4 3DZ which is a ground floor flat ("the Property").
2. The Property Factor performs the role of property factor of the Development of which the Property forms part.
3. There is a common insurance policy which is managed by the Property Factor.
4. The Property Factor submitted a claim form to the insurers on behalf of the Homeowner. The claim was in respect of damage caused to the bath in the Property.
5. The insurers authorised works to replace the bath.
6. The bath was replaced by J.C. Plumbing and, in the course of the work, damage was caused to tiling.
7. The insurers entertained a claim for remedial works and the Property Factor obtained a quotation from Abbey Services.
8. Abbey Services did not carry out the works because the Homeowner wanted to depart from the works detailed in the quotation and have an upgraded specification and she would pay for the difference in cost.
9. No agreement was reached on the specification of the works and the Homeowner accepted a cash settlement from the insurers in December 2019.
10. The Homeowner wrote a detailed letter of complaint to the Property Factor which is dated 22nd September 2019 and to which the Property Factor did not respond.
11. The Property Factor's written statement of services oblige the Property Factor to intimate insurance claims covered under the common insurance policy.

Findings in Fact and Law

1. Paragraph 2.5 of the Code states:

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 times should be confirmed in the written statement (Section 1 refers).

The Property Factor did not comply with this section of the Code because it did not respond to the letter of complaint sent by the Homeowner on 22nd September 2019.

2. Paragraph 5.4 of the Code states:

If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so.

The Property Factor did have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are being dealt with promptly and correctly.

3. Paragraph 6.9 of the Code states:

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.

There were no defects in the work carried out by the contractor who replaced the bath and therefore the Property Factor was not obliged to do anything in this regard.

4. In terms of Section 17(5) of the 2011 Act the Property Factor is obliged to carry out the property factor's duties. In the particular facts and circumstances of this application the Property Factor has complied with the property factor's duties.

Reasons for the Decision

The tribunal considered the oral and written evidence in relation to the application.

It considered that the facts are, by and large, a matter of agreement. Where the parties diverge is in relation to what the obligations of the Property Factor were in relation to the particular set of facts and circumstances regarding the bathroom works. There were no matters of credibility to assess.

The tribunal considered in turn each of the relevant paragraphs of the Code.

Paragraph 2.5

The Property Factor acknowledged that it had not responded to the Homeowner's letter of 22nd September 2019. This letter was sent as a precursor to the application to the Tribunal but it did set out the particular complaints of the Homeowner with reference to the Code.

The Homeowner referred to not being provided with information with regard to the specification of the wall boards. The tribunal considered that the Property Factor's position which was that it considered that such matters were being dealt with between the Homeowner and the Property Factor was a reasonable one and Production 3.20 and the emails before the tribunal evidenced that, whenever the Homeowner had raised any matter with regard to not having progress from Abbey Services, the Property Factor had chased the matter with this contractor.

Paragraph 5.4

The Homeowner did not dispute that there was a system in place for submitting insurance claims and did not dispute that the claim had been properly intimated. This insurance claim obviously had two heads- the original claim for the defective bath and the subsequent claim in respect of remedial works. Production 3.20 shows that the claims were intimated timeously and that the Property Factor had communicated with the Homeowner in respect of the claim and its progress. The tribunal accepted that there had been delay after the Abbey Services quotation had been received and the works authorised by the insurers but it did not accept that this was due to the Property Factor. It did not doubt that the Homeowner was frustrated because matters were not progressing but the issue was in relation to specification of wall boards and it would have been for the contractor and the Homeowner to resolve this.

Paragraph 6.9

The tribunal considered that quotation of J.C. Plumbing dated 16th December 2019 to be significant:

"Supply and fit new p shower bath, screen and bath panel; alter and renew supplies and waste to fit; remove/refit wash hand basin; not quoting for broken tiles."

It seemed to be a matter of agreement that, in removal of a bath in circumstances where there is tiling, there is a possibility that tiling will be damaged. This was certainly anticipated in the quotation and the insurers accepted this to be a possibility because it entertained the second head of the claim. The tribunal heard no evidence that the work in relation to the replacement of the bath was defective other than in relation to the sealant. It accepted that this had not been effective but it was clear that another contractor was to be instructed and the bath removed and re- fitted. The tribunal did not find that the work of J.C. Plumbing was defective and that therefore there was no requirement for the Property Factor to do anything in this regard.

Property factor's duties

The application contained no specification of why it was considered that the Property Factor had not complied with the duties other than to refer to the specific breaches of the Code. The Homeowner led no evidence in relation to the property factor's duties and the tribunal dealt with the specific sections of the Code which she did refer to. The tribunal found no breach of property factor's duties.

Disposal and Proposed Property Factor Enforcement Order

The Property Factor had not responded to the letter of complaint dated 22nd September 2019. It was clear that the Homeowner had been extremely concerned

about the situation she found herself in and the level of frustration would not have been improved at the failure of the Property Factor to respond. In the whole context of the matter it was at the minor end of the scale and the tribunal considered that a property factor enforcement order requiring payment of compensation of £100 to the Homeowner would be a suitable disposal of the matter.

Proposed Property Factor Enforcement Order

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.

Note

The tribunal considered that the main reason for this matter reaching an application to the Tribunal was because parties were unclear as to their respective roles and responsibilities. It was significant that Miss Mynehan accepted that the reason she asked the Property Factor to recommend a plumber and to deal with the matter was because she could not find a tradesperson and she accepted that, if she had found her own, she would have been dealing with that contractor direct. It is arguable that the Property Factor should have had no role other than asking for the quotation, submitting the claim and thereafter dealing with settlement. It chose to provide a service in excess of its core service and is to be commended for doing so. Mr Watt was clear in stating that his company likes to help and that, after all, homeowners are paying management fees. It seemed to the tribunal that the Homeowner expected more than was provided to her but that what was being provided was perhaps more than she would have been entitled to from the Property Factor. The Homeowner would have been clear on the position if, when the issue of the wall board specification arose, the Property Factor had clearly stated what role, if any, it would have in respect of that issue. Whilst it is appreciated that hindsight is always informative, it is the case that, if the Property Factor had clearly set out its role, the Homeowner would have known what was expected of her to progress matters. For example, the Property Factor may have advised that, because the Homeowner could not find her own contractor, it would recommend a plumber to provide an estimate and thereafter submit to the insurers but that the Homeowner would be required to organise the work and thereafter deal with the contractor.

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.

Martin J. McAllister, Legal Member, 5th March 2020