

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under Section 26 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules') in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref:HOHP/PF/20/0120

Flat 0/2, 23 Sutcliffe Road, Glasgow, G13 1BU ('the Property')

The Parties:

Maureen McCormack residing at Flat 0/2, 23 Sutcliffe Road, Glasgow, G13 1BU ('the Homeowner')

Glasgow Housing Association Limited, 25 Cochrane Street, Glasgow, G1 1HL ('the Factor')

Tribunal members:

Jacqui Taylor (Chairperson) and Andrew Taylor (Ordinary Member).

Decision of the Tribunal

The Tribunal determines that the Factor has failed to (i) comply with to comply with section 2.1 of the Code of Conduct and (ii) carry out Property Factor duties.

The decision is unanimous.

Background

1. The Homeowner purchased her property **Flat 0/2, 23 Sutcliffe Road, Glasgow, G13 1BU** on 2nd May 2014. The title of the Property is registered in the Land Register of Scotland under Title number GLA67786.
2. Glasgow Housing Association Limited are registered property factors.
3. By application dated 11th January 2020 the Homeowner applied to the Homeowner Housing Panel for a determination that the Factor had failed to comply with the following sections of the Property Factor Code of Conduct ('The Code') and also the following Property Factor's duties.

- Section 1: Written Statement of Services.

1.1 A by Title Deeds

- Section 2: Communications and Consultation.

Section: 2.1

- Section 3: Financial Obligations.

Section: Preamble

- Section 5: Insurance.

Section: 5.4

- Section 6: Carrying out Repairs and Maintenance.

Section 6.2

- Section 7: Complaints Resolution.

4. The application had been notified to the Factor.

5. By Minute of Decision by Maurice O'Carroll, Convener of the Homeowner Housing Panel, dated 7th February 2020, he intimated that he had decided to refer the application (which application paperwork comprises documents received between 14th January 2020 and 6th February 2020) to a Tribunal.

6. An oral conference call hearing took place in respect of the application on 13th October 2020.

The Homeowner attended on her own behalf.

The Factor was represented by David Adams, Solicitor and Michelle Rush, Business Improvement Lead, employed by Glasgow Housing Association.

Preliminary Matters:

The parties acknowledged that the dispute largely related to the repair of a mid floor located between flats 0/1 and 1/2, 23 Sutcliffe Road, Glasgow, G13 1BU. They agreed that there are six flats in the tenement 23 Sutcliffe Road, Glasgow. Mrs McCormack owns flat 0/2 which is located on the right hand side of the building. Flats 0/1 and 1/2 are located on the left hand side of the building and flat 1/2 is directly above flat 0/1.

The Tribunal had issued a Direction before the hearing in the following terms:

'Considering that the application considers the issue of whether or not joists between 0/1 and 1/2, 23 Sutcliffe Road, Glasgow are common property of the tenement 23 Sutcliffe Road, Glasgow the parties are directed to provide the Tribunal with case

law and statutory provisions as to whether or not the said joists are common property.

The Tribunal acknowledges that:

(First) that the Homeowner's title deeds are Land Certificate GLA67786 and clause 1 of the Deed of Conditions (Burden writ 2) at page D8 of the Title Sheet defines the common property of the Tenement;

(Second) Section 1 of the Tenements (Scotland) Act 2004 provides:

'except in so far as any different boundaries or pertinents are constituted by virtue of the title to the tenement, or any enactment, the boundaries and pertinents of sectors of a tenement shall be determined in accordance with sections 2 and 3 of this Act.

(Three) Section 2 of the Tenements (Scotland) Act 2004 provides:

Subject to subsections (3) to (7) below, the boundary between any two contiguous sectors is the median of the structure that separates them ...' and

(Four) The Explanatory notes on the Tenements (Scotland) Act 2004 at paragraph 9 states:

'Section 1 provides that where neither the title nor other legislation sets out the boundaries of a flat or another sector of a tenement or which parts of a tenement are pertinents of a sector then sections 2 and 3 will apply to determine the boundaries and pertinents of a sector of a tenement.'

The said documentation should be lodged with the Tribunal no later than close of business on 12th October 2020.'

Mrs McCormack provided the Tribunal with the following documents:

1. Tribunal Decision FTS/HPC/PF/19/0680.
2. An excerpt from the Scottish Law Commission report on the Law of the Tenement.
3. An excerpt from the provisional report to the Royal Institute of Chartered Surveyors on common repair provisions for multi owned property.

The Factor provided the following submissions:

'On behalf of the Factor it is submitted that the relevant statutory provisions as to whether or not the joists in question are common property are that which has already been identified by the Tribunal, namely:

Tenements (Scotland) Act 2004

Since each case would depend on the individual title provisions there is no case law to which the Factor would draw the Tribunal's attention as being able to shed any further light on the issue.

Per the Direction, the Tribunal is aware that the Homeowner's title deeds are Land Certificate GLA67786 and clause 1 of the Deed of Conditions defines the common property of the Tenement. For the avoidance of doubt the Burden writ referred to is the Deed of Declaration of Conditions, recorded G.R.S. (Glasgow) 27 Jul. 1989, by City of Glasgow District Council.

Section 1 of the Tenements (Scotland) Act 2004 provides: 'except in so far as any different boundaries or pertinents are constituted by virtue of the title to the tenement, or any enactment, the boundaries and pertinents of sectors of a tenement shall be determined in accordance with sections 2 and 3 of this Act.

Section 2 of the Tenements (Scotland) Act 2004 provides: "Subject to subsections (3) to (7) below, the boundary between any two contiguous sectors is the median of the structure that separates them ...'

It is submitted that any reported cases referring to Sections 1 and 2 or 3 of the Act are of no relevance to the particular facts of this case. The crucial issue is the interpretation of the particular Title in this case. As noted in the original Response submitted by the Factor, in line with the Section D, Burden 4, of the Title Deed (Production 3) for the property; "Common Parts of the said tenement meaning the whole parts of the tenement which are used by or serve more than one of the said dwellinghouses". As the joists between these properties are a common supporting part of the structure of the building, and could not be removed without affecting another property, these are deemed as common to all dwellinghouses. The Tenement Scotland Act (2004) and The Tenement Management Scheme are only relevant where there is no provision in the Title Deed.'

At the hearing the Tribunal invited the parties to make further submissions on whether or not the joist in question was a common part.

Mrs McCormack explained that in her view the joist is not a common part and she referred to the authorities she had provided.

The Tribunal acknowledged that she had only received the Factors response to the Direction at the start of the hearing and they asked if she wished an adjournment to allow her time to consider the submissions. She advised that this was not necessary.

Mr Adams referred the Tribunal to the authorities he had submitted. He explained that the titles clearly define the common parts as being 'the whole parts of the Property which are used by or serve more than one of the dwelling houses...' In his view the joist serves more than one property and therefore is a common part of the tenement. He acknowledged that the title deeds do not specifically refer to the joists and they do not specify the boundaries of the flats.

The Tribunal referred the parties to the Upper Tribunal decision UTS/AP/17/0009 which confirmed that the First-tier Tribunal has jurisdiction to determine ownership of heritable property, in particular whether some part of a development was part of the 'common parts'.

The Tribunal adjourned whilst they considered the parties submissions on whether the joist was a common part. They determined that as the titles are silent on the boundaries of the property section 1 of the Tenements (Scotland) Act 2004 applies and directs that the boundaries are determined in accordance with sections 2 and 3 of the Act. Section 2(1) provides that the boundary between any two contiguous sectors is the median of the structure that separates them.

They referred to the article by Professor Robert Rennie in the Journal of the Law Society of Scotland on 1st March 2004 'Last piece of the jigsaw', where he states 'Except where titles provide differently, sections 2 and 3 will determine the legal boundaries and pertinents of every part or sector of the tenement. 'Sector', means a flat, any close or lift or any other three dimensional space. Section 2 provides that the boundary between contiguous sectors is the middle line of the structure that separates them. The boundary between the first and second floor flats is the midline of the joists...'

The Tribunal determined that as the titles are silent on the boundaries of the individual flats within the tenement, the boundaries of the flats were the midpoints of the joists. The joists to the mid point formed part of each flat. Therefore the joists did not form part of the common parts of the tenement.

The Tribunal then considered the parties representations on the remainder of the Homeowner's application.

The details of the application and the parties' written and oral representations are as follows:

Section1: Written Statement of Services.

Mrs McCormack acknowledged that she had not notified this section of the application to the Factor and withdrew her Section 1 complaint.

Section 2: Communications and Consultation.

2.1: 'The Factor must not provide information which is misleading or false.'

The Homeowner's complaint:

The Factor made false and misleading communications regarding responsibility and costs for repairs to two privately owned flats. Consistently ignored burdens provisions in deeds. Initially they wrote to her in response to her formal complaint and advised that the joists are a common part of the tenement because the solum is common. She advised that this was clearly incorrect.

The Factor's response to the complaint:

Mr Adams explained that the Factor and Mrs McCormack had different opinions as to the effect of the title provisions. This was not misleading or false. The Factor did not attempt to mislead. Mrs Rush explained that when the Factor could not reach agreement Glasgow Housing association were willing to do the work at no charge. She clarified that due to Covid the works have not yet been completed. The Factor does not want to enter into arguments with the homeowners they want to have the work done. Mr Adams accepted that it was unfortunate that in early correspondence from the Factor to the Homeowner they had explained that the joist in question was a

common part due to the fact that the solum was common. He acknowledged that this was incorrect.

The Tribunal's Decision:

The Tribunal acknowledged that the parties had differing opinions as to the interpretation of the titles and whether or not the joist was a common part. They accepted that the titles position was complex and this differing opinion was not misleading or false.

However the Tribunal determined that the following statement made by the Factor in their stage one complaint response was false:

'Common parts means the whole parts of the property which are used by or service more than one of the said dwelling houses and include the following parts of the main building: the solum and foundations.

The joists are classed as parts of the solum of the building and it is the responsibility of all owners who have common property rights in these parts to share the costs of repairs.'

The Tribunal acknowledged that as a matter of law the joists do not form part of the solum.

Accordingly, the Tribunal determined that the Factor had breached Section 2.1 of the Code.

3: Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.'

The Homeowner's complaint: Improper payment request. Charges presented falsely as common repairs for structural damage caused by failure of duty to repair and maintain by GHA. Financial interest not declared in flats owned by GHA, another Wheatley Company.

The Factor's response:

Mr Adams advised that the Factor has not made any request for payment. The request for consent to the works that the Factor sent to the Homeowner was not a request for payment. The Factor believed that the joists were a common part and as such they were obliged to seek consent to the proposed works.

The Tribunal's Decision:

The Tribunal determined that as there had been no payment request issued by the Factor in relation to the repairs to the joists the Factor had not breached Section 3 of the Code.

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 Homeowner's complaint:

Proposing an insurance claim wrongly claiming as a common repair for which individual owners are responsible due to structural damage caused by failure to repair and maintain. Not liaising with insurers to check validity of claim.

The Factor's response:

The Factor had sent the Homeowner a letter dated 20th September 2019 headed 'Common Repair Consent Request'. Part of the letter stated 'We would advise you to contact your Buildings insurance provider to check if it is possible to make a claim against the block policy for these works.' The Factor's Written Statement of Services states that homeowners must submit their own insurance claims.

The Tribunal's Decision:

The Tribunal found that the Factor does not process insurance claims, their Written Statement of Services clarifies that homeowners must submit their own insurance claims. The Tribunal determined that the Factor had not breached section 5.4 of the Code by suggesting that the Homeowner check to see if an insurance claim was possible.

6.1: You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention.'

The Homeowner's complaint:

Failure to provide a repairs service to blocked and leaking gutters.

The Factor's response:

Mrs Rush confirmed that the Factor has a 24/7 phone line for homeowners to notify repairs and an online service. She referred the Tribunal to Page 5 of the Factor's Written Statement of Services which has the details.

The Tribunal's Decision:

The Tribunal found that the Factor has a procedure to allow homeowners to notify them of matters requiring repair etc. as set out at page 5 of their Written Statement

of Services. Accordingly the Tribunal determined that the Factor had not breached Section 6.1 of the Code.

7: Complaints Resolution:

The Homeowner's complaint: The Factor ignored evidence of false/misleading assertions in her complaint. They failed to disclose the cause of the dry rot infestation. They refused to provide health and safety information. They falsified Deed of Conditions.

Mrs McCormack withdrew her section 7 complaint.

Alleged Breach of Property Factor Duties:

The Homeowner's First complaint:

The Factor failed to provide repair service for blocked and leaking gutters, and to investigate resulting damage to structure of tenement building. Mrs McCormack advised that she first reported the repair required to the gutters on 5th December 2018. Despite telephoning and emailing the Factor about the repair the repair was not carried out until her MSP got involved. The repair was completed in May 2019. She had provided copies of the emails she had sent to the Factor.

The Factor's response:

Mrs Rush accepted that the Factors had delayed in having the repair completed. This was due to a procedural error as the repair had been linked to another repair. Once the administrative error had been corrected the repair was completed promptly but she accepted that there had been a six month delay in having the repair carried out.

The Tribunal's Decision:

The Tribunal noted that the Factors' Written Statement of Services includes the following statements:

As property factor we are here to help you. We have a delegated authority to complete routine repairs to the common parts of your property up to the consent levels set out in your title deeds or a factoring agreement we have with you and your neighbours. This delegated authority means we can respond to issues quickly, helping to minimize costs and further damage to your property...

You can report a repair at any time....

We will deal with repairs within the following timescales, weather permitting:

Emergency Repairs... within 24 hours

Common Repairs: within 30 days of being agreed.'

The Tribunal found that the Factor is under a duty to arrange repairs reported to them. There was no suggestion of the repair not having been carried out due to lack of owners consent. The failure to carry out the repair was due to an error in the Factor's reporting systems. The Factor failed in their duty to carry out the intimated repair within the timescales set out in their Written Statement of Services. Accordingly, the Tribunal determined that the Factor had failed to comply with the duty to carry out repairs timeously detailed in their Written Statement of Services.

The Homeowner's Second complaint:

Alleging that as a private property owner she is financially liable for the cost of repairs to other privately owned flats in the close due to the owners' failure in the duty to repair and maintain.

The Factor's response:

Mr Adams explained that the Factor wrote to Mrs McCormack asking for her consent to carry out the repairs to the joists as they believed the joists to be a common part of the tenement. As the Factor believed the joists to be common they were obliged to contact the other owners. The Factor does not know the cause of the rot found in the joists.

The Tribunal's Decision:

The Tribunal found that they are unable to determine if the rot was caused by a failure in a duty to repair and maintain as no evidence as to the cause of the rot had been produced.

The Homeowner's Third complaint:

The Factor had consistently refused to provide information regarding charges, damage due to dry rot and health and safety matters relating to dry rot infestation and structural damage. Mrs McCormack advised that she had specifically asked the Factor for the survey report on the rot and photographs of the fungus.

The Factor's response:

Mrs Rush advised that the Factor cannot share reports or photographs of tenant's homes due to data protection regulations.

The Tribunal's Decision:

The Tribunal have already determined that the joists are the property of the flats concerned and they not a common part of the tenement. Accordingly, the Tribunal determine that Mrs McCormack is not entitled to a report on the cause of the rot as this is a matter private to the particular owners of the flats involved and consequently the Factor has not breached any property Factor's duties in relation to this point.

The Homeowner's Fourth complaint:

The Factor consistently ignored the homeowner's evidence of mistaken/misleading/false title deed conditions and financial claims in their complaints process. Mrs McCormack advised that she withdrew this part of her application as it had already been covered under the considerations of the Code breaches.

Property Factor Enforcement Order.

In all of the circumstances narrated above, the Tribunal finds that the Factor has failed in its duty under section 17(1)(b) of the 2011 Act, to comply with Section 2.1 of the Code of Conduct and Property Factor duties.

The Tribunal therefore determined to issue a Property Factor Enforcement Order.

Section 19 of the 2011 Act requires the Tribunal to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations to the Tribunal.

The Tribunal proposes to make the following Order:

'Glasgow Housing Association Limited are directed:-

(First) To send a formal written apology to Mrs McCormack, the Homeowner, in respect of their failure (i) to comply with section 2.1 of the Code regarding falsely advising the homeowner that the joists were part of the solum and as a result the joists were common parts of the tenement and (ii) for their delay in having the communal gutters repaired.

(Second) To remit the sum of £300 to Mrs McCormack, the Homeowner, from their own funds and at no cost to the owners of 23 Sutcliffe Road, Glasgow. The said sums to be paid by 31st December 2020. Glasgow Housing Association Limited are directed to provide the Tribunal with evidence that the said sums have been paid within seven days of the payment being remitted to the Homeowner.'

Appeals

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.



Chairperson 13th October 2020