

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011

Case references: FTS/HPC/PF/22/2431 and FTS/HPC/PF/22/3182

Re:- 15 Rosebery Court, Kirkcaldy, Fife KY1 1DG

The Parties:-

**Mr James Fair, 15 Rosebery Court, Kirkcaldy, Fife KY1 1DG
("the Applicant")**

and

**Bield Housing & Care, 7 Eagle Street, Glasgow G4 9XA
("the Respondent")**

Tribunal Members:

Richard Mill (legal member) and Elizabeth Dickson (ordinary member)

Decision

The Tribunal unanimously determined that the respondent has complied with the Code of Conduct for Property Factors ("the Code") and their property factor duties.

Introduction and background

By applications dated 14 July 2022 and 29 August 2022, the applicant complains about the respondent's acts and omissions.

The applicant lodged numerous documents in respect of both applications. Given the manner in which they were presented, it was not possible for the Tribunal to understand what the nature of the specific complaints in each application to be. The Tribunal was also concerned that no adequate clear notice had been given to the respondent.

The applicant had failed to adhere to the Practice Direction No. 3 issued by Lady Smith on 26 February 2018 which requires productions to be both indexed and paginated. In all of the circumstances, the Case Management Discussion (CMD) scheduled to take place on 22 November 2022 was discharged and the Tribunal issued a Direction requiring the applicant to produce one combined indexed and paginated document containing all of the headline complaints over both applications with a brief supporting statement in respect of each separate complaint.

On 5 December 2022 the applicant produced a further bundle of documents which was still not fully indexed and paginated; nor was there, as requested to be produced, one combined submission covering all complaints. The Tribunal determined however that the live issues raised by the applicant were sufficiently clear to allow matters to proceed.

There was then, regrettably, a lengthy delay due to the failure of the respondent to provide their written submissions timeously. A Direction of 3 November 2022 issued by the Tribunal, postponing the CMD fixed for 22 November 2022 and setting out the further requirements for both parties, made it clear that the respondent was afforded a period of 28 days to respond in full to the applicant's complaints once received. They failed to do so.

Ultimately, on 7 March 2023 the respondent lodged its response in relation to all issues raised by the applicant.

The Hearing

The hearing took place on 4 July 2023 at George House, Edinburgh.

The applicant was present and represented his own interests. The respondent was represented by David MacInnes, Head of Housing and Shona Rintoul, Head of Owner Services.

The Tribunal utilised its inquisitorial function, making inquiry into the applicant's complaints and the response of the respondent to each of them. Both parties were afforded the fair opportunity of making submissions throughout. Both parties were also afforded the opportunity of making concluding submissions.

The Tribunal reserved its decision.

Applicant's Complaints and Respondent's Response

Roof guttering and downpipes

The applicant complains that the side and rear roof gutters were in a state of disrepair and that there was grass and weeds visible from ground level. This caused debris to fall to ground level when rain was heavy.

The respondent states that the cleaning of gutters to the rear and side elevations had always proved difficult due to the height of the building and limited access in these areas. In terms of the agreement with the homeowners the maintenance of

these areas was therefore not included in the routine maintenance provision. Additionally, owners funds were limited to undertake these works. It was agreed in 2019, prior to the applicant purchasing his property that there would require to be a significant increase in the service charge to enable necessary maintenance works to be undertaken, including external painting and all gutter cleaning. Due to the Covid-19 pandemic and resulting restrictions, works to the gutters were therefore delayed but were cleaned in the Spring of 2021. No other complaints had been received.

Entrance doors/ fire exits

There are four such doors on the ground floor (the main entrance door, two to the rear garden and communal drying area and one other). All four doors were designed to be unlocked by owners using their flat door key which ought to be 'mastered' to open any of the four doors. Due to obsolete/faulty locking cylinders remaining in place, only the main door however could be opened by residents in the manner intended. Additionally, the applicant was concerned that the rear door to the drying area was being kept open habitually by residents who were using their own equipment so as to allow access on return to the building.

The respondent acknowledges the locks required to be changed and obtained suitable quotes for replacement locks. There were delays in these being fitted again due to Covid-19 restrictions and due to supply problems. No other complaints had been received.

Garden contract / boundary conifers

The area complained of is on the east boundary of the development. It is understood by the applicant that it was originally maintained at a level of 4 metres but had been allowed to grow to a height of 9 metres over a period of some 10 years.

The respondent asserts that there had been historical disputes amongst residents about what height to keep the hedge. Some residents favoured the privacy which the trees provided at a higher level. Representatives of the respondent met with the applicant in August 2021 when an agreement was reached regarding a height which these would be trimmed. This was then arranged and completed with the costs being met by the respondent rather than the owners. No other complaints had been received.

The respondent's failure to properly respond to complaints

On 1 October 2021 the applicant raised a complaint (number 3667) to be resolved by the respondent's complaint handling procedure. The applicant complains that the stage 2 process was not followed because a 'senior manager' within the respondent's company was not involved in the complaint response dated 4 February 2022.

The respondent states that the applicant's suggestion that the complaint was not signed off by a senior manager is incorrect. Any response in relation to a stage 2

complaint requires to be agreed with a senior manager. The fact that the response letter did not name the senior manager is therefore irrelevant. This explanation was provided to the applicant in an email on 7 March 2021 by a senior manager.

The alleged mismanagement of external painting contract

In terms of an agreed specification in February 2019 the external painting works was prepared for tender and the funding towards the painting contract and gutter cleaning was to be in place by early 2020. Due to the Covid-19 pandemic and restrictions, the painting contract could not commence as anticipated. Work ultimately did not commence until 29 August 2022. The scaffold was erected causing one of the exits to be unusable and the painting contractors on site misinformed owners not to leave their windows open for painting causing some to be painted shut.

The applicant raised a formal complaint (number 3976) regarding this issue. On 14 October 2022 he received a full response in which the respondent acknowledged that there could have been better communication with owners regarding the detail of the scope of the proposed works. The painting could only be done over the summer months. It was also acknowledged that some of the information provided directly by the painting contractors to owners was wrong and this did cause a number of owners disruption with windows which were not able to be opened. It was also acknowledged that the scaffolding firm had fitted a vertical pole behind the fire exit stopping the door from being used which was also inappropriate. Both these issues were resolved as soon as they were raised by the applicant and other owners.

Findings in Fact

1. The applicant and his wife are the heritable proprietors at 15 Rosebery Court, Kirkcaldy, Fife KY1 1DG ("the property"). They purchased the property on 8 November 2019 and took up residence of the property in late March 2020, just as the UK entered into the first Covid-19 lockdown.
2. Rosebery Court is a small residential development designed for the elderly which was built approximately 30 years ago. There are 28 units within the development. This is made up of one large block of 24 units, within which the applicant's property is situated, and a smaller connected annex of 4 units.
3. The respondent was the property factor for the development from the time it was built until 31 May 2023. The respondent is no longer the property factor for the development. The respondent resigned as property factor in November 2022, having reached a commercial decision as a company not to provide factoring services on any sites or developments in the future.
4. The respondent had a positive working relationship with the owners of the development prior to 2020. No complaints in respect of their services had been received and satisfaction surveys had returned favourable praise for their services.
5. Within the first few months of living in the property the applicant identified three issues of concern which he intimated to the respondent. These were:

roof guttering and downpipes, main fire exit/security doors and the boundary conifer trees. All of these issues were taken seriously by the respondent and ultimately resolved satisfactorily. No other owners complained about these issue to the respondent.

6. Prior to 2020, the respondent had agreed with owners in the development that the guttering and downpipes to the side and rear elevations were not maintained on an annual or routine basis. This was due to the height and limited access to those areas, and the resulting difficulty and costs involved in maintaining these areas. In the circumstances, only the front elevation was routinely maintained, the costs of which were included within the core service provided by the respondent.
7. The respondent was aware that over time the guttering and downpipes to the rear and side elevations of the main block required maintenance attention. This had been brought to the attention of the owners well before the applicant purchased his property. The owners agreed in 2019 to pay an additional service charge monthly so as to provide a fund for all external maintenance work to be undertaken, which included external painting and also the maintenance of the rear and side gutter and downpipes. Due to the Covid-19 pandemic these works were delayed and were not implemented in 2020 as first envisaged. In Spring 2021 the required maintenance to the guttering and downpipes at the rear and side elevations was undertaken and completed to the satisfaction of the applicant.
8. The main block has four doors on the ground level to exit the property. Habitually only the main entrance doors have been used by owners. There are two sets of rear doors, both of which access the rear garden/drying area. Only one of these sets of doors has habitually been used by owners. The other set of rear doors and the remaining set of doors (also at the front of the property) are not customarily used.
9. The rear exit doors used by owners had habitually been kept open by the use of a doorstopper for temporarily entering the rear garden area and returning, to avoid being locked outside. This door and the other two sets of external doors (ie all other than the main entrance door) did have a lock to allow opening from the outside of the property, however none of the owners for around the last 20 years have ever used the external locks in those three sets of doors to enter the property. No owner had complained about this before the applicant.
10. The respondent made enquiries into the use of the locks in the three sets of external doors (other than the main entrance door) and advice was taken firstly from a joiner and thereafter from a locksmith. Enquiries were made to identify whether or not a master key type of entry could be utilised as it is on the main entrance door, but the locks were found to be obsolete due to age. Ultimately appropriate replacement lock systems were identified and the locks were replaced in around November 2021.

11. The maintenance of the boundary conifer trees at the rear of the development is a matter which the respondent has sensitively approached over the years. In or about 2015 these were reduced and this caused many in the development significant upset due to the benefits which they saw of that boundary line being kept at higher level for security purposes. At the other side of the boundary there is a snooker hall and nightclub which has caused issues of nuisance over the years. The respondent had received no other complaints regarding the increased height of the boundary conifers prior to the applicant's complaints. Due to the nature of the boundary and the conifer trees this is not a 'hedge' which forms part of the standard garden maintenance contract.
12. After receipt of the applicant's complaints regarding the boundary conifers, consulting with other owners, and meeting with the applicant on site at the development, the conifers were reduced in height in late 2022. This work was undertaken free of charge to all homeowners.
13. External painting of the development commenced in August 2022. The origins for the provision for this work commenced in 2019 long before the applicant took up occupation of his property. The scaffold erected at the development for the purposes of the repainting had also been wrong. A scaffold pole was erected outside one of the external doors which prevented the door opening in the event of a fire. Once raised with the respondent this was quickly resolved. Contrary to the agreement reached at the pre-start meeting with contractors the painters on site had wrongly advised homeowners that they did not require to keep their windows open at the time of painting. This led to a number of windows being painted shut. One of the applicant's windows was affected (his kitchen window). After raising this issue the problems were quickly resolved.
14. The applicant has raised numerous complaints with the respondent. These have been treated in accordance with their own complaints handling procedure in terms of stage 1 complaints and stage 2 complaints. Senior management officials have been involved in all the applicant's complaints even though their names may not appear on the emails and other correspondence which the applicant has received
15. The respondent's development manager who is responsible for the tendering, implementation and checking the completion of external maintenance works was on site at the commencement of the painting contractors and maintained communications to ensure issues of difficulty were resolved. Information was pinned to the noticeboard regarding how he could be contacted by owners in the event of problems when contractors were on site.

Reasons for Decision

The Tribunal was satisfied that it had sufficient detailed evidence upon which to reach a fair determination of the application.

The Tribunal's decision is based upon the Tribunal's detailed findings in fact which were established on the basis of the documentary evidence together with clarifications in the oral evidence and submissions from the parties. The primary facts were not substantially the subject of dispute. Rather the interpretation of these facts was. Credibility was not a significantly material factor.

The Tribunal has considered all the evidence and submissions and made findings in fact in relation to the relevant live disputes between the parties. It is not necessary for the Tribunal to make findings in fact in relation to every element raised in the two conjoined applications. The failure to make more extensive findings in fact does not carry with it any assumption that the Tribunal has failed to consider the whole evidence or that the Tribunal's reasoning was based upon a consideration of only parts of the evidence.

The applicant complains about the failure of the respondent to carry out relevant maintenance work over a number of years prior to his purchase of the property. He however, as a homeowner, is only entitled to make complaints regarding the respondent's acts and omissions from the time that he purchased the property which was in March 2020.

It is also important to note that the maintenance issues which the applicant complains of were all well known, or ought to have been known, to him at the time that he agreed to purchase the property in November 2019. The applicant agreed that the condition of the property, and the core matters which he complains about, were no different at the time of his intended purchase in November 2019 to the condition of the property as at the time that he took up occupation in March 2020 and commenced his complaints.

The timing of the applicant taking up occupation of the property and making his complaints is also highly relevant. He took up occupation just as the Covid-19 pandemic hit the UK and strict lockdown restrictions were introduced. This had an obvious and devastating impact upon the provision of any services and caused delays to those which were capable of being provided once restrictions were lifted. These delays continued to have an impact throughout 2020 and 2021 and the facts established must be seen through the lens of the Covid-19 restrictions and the impact of these.

The applicant may not have been happy with the provision of service by the respondent but he has to appreciate that this level of service was clearly agreed and accepted by all other owners given the custom and practice operating and lack of any complaints from any other owner.

Though credibility was not a feature of the Tribunal identifying the facts after the applicant became an 'owner' for the purposes of the legislation the Tribunal records that it found Mr MacInnes and Ms Rintoul highly credible and reliable witnesses. The detail provided of the history of the development, the former agreement with homeowners regarding the provision of services, the lack of any earlier complaints and the good relations between the respondent and the other owners at the development was all found to be credible and an accurate reflection of the past history. Mr MacInnes has had 23 years of experience and knowledge of the

development and Ms Rintoul has had 15 years of experience and knowledge of the development. The applicant has no knowledge at all regarding the history of matters and did not challenge the evidence of Mr MacInnes or Ms Rintoul on these issues.

The Tribunal was generally impressed by the standard of service provided by the respondent at the development. It is clear that there had been, over a number of years, a full commitment to the development by the respondent company. They had established positive working relationships and the respondent's staff acted diligently and professionally. There had been areas of maintenance not attended to regularly, but these issues were not part of the core service, as adapted in terms of the agreement reached between the collective owners and the respondent over the years.

The applicant was clearly unaware of the specifics of the respondent's core services. It is clear to the Tribunal that the applicant has acted in good faith. He has pursued matters of concerns to him in a dogged way though regrettably has been unaware of the relevant history in the agreed contract and custom and practice at the development.

The Tribunal concluded that but for the Covid-19 restrictions in 2020, it is more than likely that the applicant's engagement with the respondent and his impression of their reaction to any concerns which he raised, would have been much more positive. The respondent could perhaps have been more proactive in providing the applicant all information as a new homeowner but the world was coming to a standstill in March 2020. The respondent must be afforded a degree of dispensation to the usual expectations accordingly. To that extent the timing of the applicant taking up occupation of his property was therefore unfortunate. It is also clear that his expectations of maintenance at the property were higher than those of the other owners and the issues which were important to him were not so important to others. They did not raise any concerns or indeed complaints regarding the respondent's acts or omissions.

The Tribunal found that the respondent's reaction to the applicant's complaints regarding the guttering and downpipes, fire exit doors and the boundary conifers, all to have been undertaken in a professional manner and that whilst there were delays in implementing resolutions such delays have to be seen in the context of the timing of such complaints at the time of Covid-19 restrictions. All issues were explored and ultimately remedied to the satisfaction of the applicant.

The Tribunal was satisfied that in accordance with the respondent's complaints handling procedure that senior management was involved in all formal complaints. Whilst this was not immediately obvious to the applicant from the terms of the written communications he received, he received direct assurances from senior management when he queried this. There was no good basis for doubting that this was the case given the otherwise professional nature of the respondent's approach.

In order to establish a breach of reasonable care and fulfilment of the respondent's duties, the applicant would require to establish that the respondent had failed or unreasonably delayed actioning maintenance works within the scope of the agreed core services. He has failed to do so. He would otherwise require to establish that

the respondent chose (even by omission) not to act in respect of any non-core maintenance or repair issue raised with them. He has failed to do so. He would otherwise have to establish that a property factor of ordinary competence acting with normal skill and care would have instructed works prior to when the respondent in fact did. He has failed to do so. He has failed to produce any independent expert opinion evidence supporting the allegations of professional failings on the part of the respondent.

The respondent has already apologised to the applicant to the extent that further detail as to the scope of the proposed external painting works could have been provided. The respondent has also clearly acknowledged that the painting contractors failed in terms of their advice regarding the windows not requiring to be opened at the time of painting and in respect of their scaffold works which impeded one of the fire doors. It is clear however that the respondent took those matters seriously when it was reported to them and that they were successfully resolved in a time appropriate manner.

The Tribunal finds that the respondent has acted competently at all times. The Tribunal finds that there were no failings on the part of the respondent in respect of any of the complaints which the applicant has raised. The Tribunal was therefore satisfied that the respondent has adequately discharged their property factor duties to the applicant (and other homeowners).

The applicant did not specifically address the Tribunal on any specific provisions of the Code of Conduct in his submissions though it was noted from the terms of both his applications that numerous sections of the Code had been put at issue. The Tribunal considered all sections of the Code (both the 2012 and 2021 version where appropriate) and was satisfied that there were no relevant breaches.

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.

Legal Member

Date: 7 July 2023