

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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**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:FTS/HPC/PF/23/2076**

**Flat 5, and communal roof above flats 3 and 6, Cedarwood Court, Main Road, Cardross, G82 5BT ('the Property')**

**Michael Nicholson residing at Flat 5, Cedarwood Court, Main Road, Cardross, G82 5BT ('the Homeowner and Applicant')**

**Lomond Property Factors ('the Factor and Respondent')**

**Tribunal members:**

**Jacqui Taylor (Chairperson) and Helen Barclay (Ordinary Member).**

### **Decision of the Tribunal**

The Tribunal determines that the Factor has failed to comply with OSP6 and sections 6.4 of the 2021 Code of Conduct.

The decision is unanimous.

### **Background**

1. The Homeowner is heritable proprietor of the property **Flat 5, Cedarwood Court, Main Road, Cardross, G82 5BT** ('the Property'). He purchased the Property in 2021. He is also the landlord of Flat 6 which is owned by his parents.
2. Lomond Property Factors were factors of the Property. They were registered as a property factor on 7<sup>th</sup> December 2012 and their current registration was renewed on 21<sup>st</sup> June 2016. They were Factors of the Property from 2015 to 31<sup>st</sup> March 2023.
3. The Homeowner submitted a C2 application to the Tribunal dated 20<sup>th</sup> June 2023.

The Homeowner applied to the Tribunal for a determination that the Property Factor had failed to comply with the Property Factor's duties and specified sections of the Property Factor Code of Conduct 2021.

4. By Notice of Acceptance by Martin McAllister, Convener of the Tribunal, dated 12<sup>th</sup> October 2023 he intimated that he had decided to refer the application (which application paperwork comprised documents received between 23<sup>rd</sup> June 2023 and 26<sup>th</sup> September 2023) to a Tribunal.

## **5. Case Management Discussion.**

An oral conference call Case Management Discussion (CMD) took place in respect of the application on 5<sup>th</sup> February 2024 at 10am.

The Homeowner attended on his own behalf.

The Factor was represented by Mrs Cath McInnes, a Director of Lomond Property Factors.

The Homeowner attended the Glasgow Tribunal Centre expecting the CMD to be held in person. One of the clerks in the Glasgow Tribunal Centre arranged for him to use one of the Tribunal rooms and a telephone so that he could participate in the CMD. The parties were advised that the CMD would have to be completed by 11.15 as another hearing was scheduled to take place in the room the Homeowner was using. The CMD was delayed in starting but both parties confirmed that they were happy to proceed. At the end of the CMD both parties confirmed that they had been given sufficient time to present their case.

Both parties had lodged written representations and productions with the Tribunal. The Homeowner had lodged the original application and supporting documents and further written representations which were dated 17<sup>th</sup> January 2024. The Factor's written representations were dated 27<sup>th</sup> December 2023.

Both parties confirmed that they had received copies of the application and the other party's written representations.

### **5.1 The detail of the Homeowner's application and the parties' representations in relation to the detailed complaints are as follows:**

**OSP5 of the 2021 Code of Conduct Application C2 (complaint after 16<sup>th</sup> August 2021): You must apply your policies consistently and reasonably.**

#### **The Homeowner's complaint.**

The Factor had revised their complaint's process in 2022 with the result that their complaint's process takes too long. The Factor's 2019 Written Statement of Services includes a complaints process that takes 14 days. This was changed in their 2022 Written Statement of Services with the result that their complaints process now involves three stages and takes 70-91 days prior to arriving at the Tribunal.

In addition, the Factor has been inconsistent in how they have arranged repairs. When the soffits were replaced the Factor obtained an estimate from the contractor and arranged for the homeowners to approve the estimate. The Factor asked the homeowners to pay their share of the cost in advance and the Factor then arranged for the contractor to carry out the repair. The value of this job was £3,200.

This program of events did not happen with the missing roof slates. Both these situations are not consistent or reasonable.

The Factor's 2019 Written Statement of Services at sub para 2.3 details the Factor's repairs procedures. It states that the Factor will only instruct works without owner consultation where those works are emergency, immediately required or minor jobbing works and provided those works do not exceed the value of the "emergency fund held". The value of the emergency fund is £900.

The Factor has not provided any estimates of costs to replace missing roof tiles, there have been no inspections carried out by a roofer and no further communication from the Factor (in over a year) regarding the roof. The repair was not carried out. The email from the Factor to the Homeowner dated 10<sup>th</sup> November 2021 clearly acknowledged that the Homeowner had advised the Factor of the slipped slate and confirmed that the repair had been instructed.

### **The Factor's response.**

Applying a different process to a majority approved repair scheme and to a report of a slipped slate does not represent an inconsistent or unreasonable application of policy. The previous process of instruction of soffit/fascia repairs was a different circumstance. A substantive defect had been identified in that instance and reported to co-owners several times. Proposals to remedy were presented. The Factor attended the owners meeting resulting in majority acceptance of tender and approval of works. Works were deferred for 6 months to the Spring of 2018 allow owners to budget for these repairs. The Applicant later lodged a complaint that the share of the cost of these works was presented without notice.

The report of a slipped slate not causing active ingress or showing evidence of ingress, does not constitute a defect requiring a tender exercise and costed proposal to co-owners.

In addition, they do not consider that improving/changing their complaint handling process and incorporating the amended process in their revised written statement of service represents an inconsistent or unreasonable application of policy.

### **The Tribunal's Decision.**

The Tribunal do not accept the Homeowner's claim that the Factor is acting inconsistently and unreasonably by changing their complaints procedure. The Factor is entitled to review and update their complaints procedure provided that it complies with the Code of Conduct.

The Tribunal do not accept the Homeowner's claim the Factor is acting inconsistently and unreasonably by not following the same process for the repair of the slipped slate as the soffit/ fascia replacements. The soffit/fascia replacements were upgrading works that required the prior approval of the homeowners unlike the slate repair which was an ongoing repair that did not require the prior approval of the homeowners.

The Tribunal determine that the Factor has not breached OSP 5.

**OSP6 of the 2021 Code of Conduct Application C2 (complaint after 16<sup>th</sup> August 2021): You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective.**

#### **The Homeowner's complaint.**

The slipped slate was notified to the Factor in November 2021 but the repair had not been carried out by March 2023 when Lomond stopped factoring the Property. He considers it to be unreasonable to wait until an additional repair is required to the roof before completing the repair to the slates. The slipped slate could be letting water into the Property and causing damage to the structure of the building. Mr Nicholson confirmed that he had inspected the roof space as far as possible and he could not categorically say there is no dampness. Whilst there was no specific evidence of water ingress any water may travel down the waterproof membrane that is under the roof tiles and direct water to other parts of the building.

#### **The Factor's response.**

Mrs McInnes explained that if there had been water ingress there would be staining in the roof space. They no longer use the contractor they had instructed as he was proving to be unreliable. Mr Nicholson did not follow up his report that the slate had slipped and therefore they assumed that the matter was not urgent. After the original contractor did not carry out the repair they approached five other contractors to do minor jobbing work but could not get anyone to do the job. They had delayed having the work completed as they were wanting to combine the repair to the slates with other work to reduce the over all cost. She confirmed that none of the other owners had reported the slipped slate.

#### **The Tribunal's Decision**

The Homeowner advised the Factor of the slipped slate by email dated 9<sup>th</sup> November 2021. The Factor did not arrange for the required repair to be carried out. The repair was outstanding when the Factor stopped acting as Factor for the Property in March 2023. The Tribunal acknowledges that the Factor wanted to mitigate the cost of the repair to the owners but notwithstanding this fact the repair had not been completed during the period of sixteen months after being instructed.

The Tribunal determine that the Factor has breached OSP 6 of the Code of Conduct by not carrying out the slate repair in a timely way.

**Section 6.1 of the 2021 Code of Conduct Application C2 (complaint after 16<sup>th</sup> August 2021):**

**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 to prevent further damage or deterioration by seeking to make prompt repairs to a good standard.**

**The Homeowner's complaint:**

Despite the Homeowner's email dated 9 November 2021, notifying the Factor that a roof tile is missing and needs to be replaced he did not receive a substantive response until 22 February 2023 when he received an email from the Factor which states: "Following your email intimating complaint. Can you advise if tarpaulin is laid in attic as a preventative measure or because there was water ingress. Is the attic currently experiencing ingress and do you wish us to arrange for remediation?"

The question of whether or not there was water ingress is immaterial as roofing tiles are integral to keeping the wood underneath of the slates dry. Consequently, the slate repair should have been a priority.

**The Factor's response:**

Notice of the slipped slate did not include report of active ingress or evidence of ingress and therefore it did not require immediate repair attention. The contractor was instructed to attend to make ground level visual assessment but later confirmed he did not attend. This contractor is no longer on the Factor's approved list.

Without note of active ingress or report of evidence of ingress and with no further communications on the matter from Applicant, they noted the slipped slate for attention when the contractor next attended. The report of a slipped slate causing no immediate issue and not the subject of continued owner concern, would generally be carried forward to the next opportunity for access, such as gutter clearing or other roof repair. Roof includes mansards that can make access difficult. They required to be cautious of incurring inspection expenditure. Owners in the building previously cancelled two plans to instruct accessed roof inspection on the grounds that active ingress was not evidenced. They later requested clarification that the slipped slate was not causing ingress to the attic but received no response from Applicant. As they received no further communication from the Applicant they reasonably assumed that the slipped slate continued to cause no immediate issue. They ceased to Factor the building in March 2023 and note Applicant makes no reference to ingress

attributable to a slipped slate. They assume that the slipped slate has not and is not currently causing issue. They note that slipped slate remains unattended. This implies that Applicant does not consider the slipped slate as presenting potential to cause damage or to be a repair priority.

### **The Tribunal's Decision:**

The Homeowner has not provided the Tribunal with any evidence that the delay in repairing the slipped slate caused damage or deterioration to the Property. Consequently, the Tribunal determine that the Factor has not breached section 6.1 of the Code of Conduct.

### **Section 6.4 of the 2021 Code of Conduct Application C2 (complaint after 16<sup>th</sup> August 2021):**

**Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required. Where work is cancelled, homeowners should be made aware in a reasonable timescale and information given on next steps and what will happen to any money collected to fund the work.**

### **The Homeowner's complaint:**

There has been no information regarding any progress of work, estimated timescales for completion whatsoever.

### **The Factor's response:**

Report of a slipped slate would usually generate inspection to verify and identify location prior to issue of instruction to remedy, if required. Notice of a slipped slate did not include report of active ingress or evidence of ingress and did not require immediate repair attention and was minor. The Factor instructed the contractor to attend to make ground level visual assessment but the contractor later confirmed that he did not attend. They advised the owner that with post covid backlog they could not offer the date of attendance. This contractor is no longer on their approved list.

The report of a slipped slate causing no immediate issue and not the subject of continued owner concern, would generally be carried forward to the next opportunity for access, such as gutter clearing or other roof repair. They would anticipate follow-up communication if a non-immediate issue continued to be of concern to a homeowner or if the condition worsened.

Confirmation of whether the slipped slate was potentially a problem could not be assessed externally. Assessment of whether the slipped slate was causing ingress

to attic, could only be achieved through a ceiling hatch in the Applicants flat. It was reasonable to assume that owner had carried out a head and shoulders inspection of his attic space to ascertain that slipped slate was not causing issue. They received no communication from Applicant regarding the slipped slate from the report on 19<sup>th</sup> November 2021 to 21<sup>st</sup> February 2023 when they received the Applicant's complaint (15 months). There was no further communication from Applicant on the slipped slate but emails were received from Applicant on other matters.

The emails received are as follows:

Email dated 22.03.22 in connection with garden maintenance contractors and that the Applicant was unhappy about having received no update on the proposed whirligig renewal.

Email dated 10.07.22 by the Applicant who considered inconsistent approach by Factor as applicant asked to vote on proposal for whirligig renewal but not given prior notice of a repair to interior and exterior light. (advised minor jobbing within delegated)

Email dated 05.12.22 vote to terminate Factor appointment and request to source new garden maintenance contractor (acknowledged and advised contractors generally approached Jan/Feb for forthcoming season).

Email dated 09.12.22 request that Factor approach all owners and invite vote on his proposal to terminate Factor appointment. (co-owners approached).

Email dated 31.02.23 NOTICE OF TERMINATION ISSUED

21.02.23 complaint re failure to respond to report of slipped slate. (acknowledged 22.03.23 – 2nd email 22.03.23 requesting further information re current status of roof).

31.03.23 FACTORING APPOINTMENT TERMINATED.

Email dated 01.08.23 being 2 letters of complaint indicating application to FTT.

In addition to responding to the above, the Factor communicated with Applicant in connection with invoicing, insurance details, copy docs and termination handover to Mr Nicholson during same period. This suggests that Applicant did not consider the slipped slate a pressing matter.

The Applicant has raised 14 separate email threads indicating dissatisfaction since commencement of Factoring appointment. One resulted in this application to FTT and one to an FTT June 2019. It is assumed that the other notes of dissatisfaction were satisfied as they received no reply. If a clarification or explanation does not receive response, it generally indicates the Homeowner is satisfied or no longer concerned about an issue. They requested further information in connection with the 22<sup>nd</sup> March 2023 complaint but received no response.

### **The Tribunal's Decision:**

As already determined under OSP 6, the Homeowner advised the Factor of the slipped slate by email dated 9<sup>th</sup> November 2021. The Factor's Written Statement of Services states that the Factor aims to instruct repairs at the earliest possible date but timescales can be impacted by contractor availability and availability of access if works are at height but the Factor will update homeowners if works are delayed (paragraph 6.4 of the 2022 Written Statement of Services).

The Factor did not arrange for the required repair to be carried out. The repair was outstanding when the Factor stopped acting as Factor for the Property in March 2023.

The Tribunal acknowledges that the Factor wanted to mitigate the cost of the repair to the owners but notwithstanding this fact the repair had not been completed during the period of sixteen months after being instructed and no updates were provided to the Homeowner.

The Tribunal determine that the Factor has breached section 6.4 of the Code of Conduct by not carrying out the service of repairs in a timely way and by not keeping the homeowner informed of the progress of this work, including estimated timescales for completion.

### **Section 7.1 of the 2021 Code of Conduct Application C2 (complaint after 16<sup>th</sup> August 2021):**

**A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of section 1 of the Code: WSS that the property factor must provide homeowners with a copy of its complaints handling procedure on request.**

**The procedure must include:**

- **The series of steps through which a complaint must pass and maximum timescales for the progression of the complaint through these steps. Good practice is to have a 2 stage complaints process.**
- **The complaints process must, at some point, require the homeowner to make their complaint in writing.**
- **Information on how a homeowner can make an application to the First-tier Tribunal if their complaint remains unresolved when the process has concluded.**
- **How the property factor will manage complaints from homeowners against contractors or other third parties used by the property factor to deliver services on their behalf.**
- **Where the property factor provides access to alternative dispute resolution services, information on this.**

### **The Homeowner's complaint:**

The Factor's Written Statement of Services dated 24 August 2022 states that there are more than 2 stages to a complaint. The total journey time from start of a complaint to ending up at the Tribunal is either 70 or 91 days. This is excessive as



the Factor's 2019 Written Statement of Services detailed a 2 stage event complaints procedure.

**The Factor's response:**

The requirements of the Code in respect of complaint handling are addressed in current Written Statement of Services. The Code of Conduct suggests a 2 stage process as good practice. This is a suggestion, not a requirement.

They have elected to employ a three stage process with a maximum timescale of 49 days for Factor responses (not including time applicant requires to form their replies). This is different from their 2019 Written Statement of Services which did not declare a maximum timescale for the first stage. The current Written Statement of Services represents an improvement in opportunity for communication generating resolution. The process includes an initial stage in which they look to confirm and summarise the alleged breaches of Code to allow them to respond in full and to clarify the issues that are of concern.

They asked the Applicant to confirm their summary of his complaints on 7<sup>th</sup> August 2023. They received no response from the Applicant. They have not had the opportunity to attempt to reach resolution of Applicants complaint

**The Tribunal's Decision:**

Section 7.1 of the Code of Conduct states that it is good practice is to have a 2 stage complaints process. There is no obligation on the Factor to have a 2 stage complaints process. The Factor's 3 stage complaints process does not breach section 7.1 of the Code of Conduct.

**Property Factor Duties**

The Homeowner confirmed that the breaches of Property Factor duties notified to the Factor are the breaches of OSP5 and OSP 6 and he has nothing further to add in relation to breaches of Property Factor duties.

**10. Findings in Fact.**

10.1 The Homeowner owns Flat 5, Cedarwood Court, Main Road, Cardross, G82 5BT.

10.2 The Factor factored Cedarwood Court from 2014 to 31<sup>st</sup> March 2023.

10.3 The Homeowner reported the slipped slate to the Factor on 9<sup>th</sup> November 2021.

10.4 The Factor instructed a contractor to attend at the Property on 10<sup>th</sup> November 2021.

10.5 The contractor did not carry out the repair to the slipped slate.

10.6 The Homeowner did not chase up the repair to the slipped slate between 9<sup>th</sup> November 2021 and 21<sup>st</sup> February 2023.

10.7 The Factor intended to arrange the repair to the slipped slate along with other roof works to mitigate expense for the homeowners.

10.8 The homeowners of Cedarwood Court are cost conscious.

10.9 There is no evidence of water ingress to the Property as result of the slipped slate.

10.10 None of the other owners of Cedarwood Court reported the slipped slate or chased up the repair.

10.11 The Factor had not arranged the repair of the slipped slate by 31<sup>st</sup> March 2023.

10.12 The slipped slate had not been repaired as at 19<sup>th</sup> December 2023.

### **11. 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 OSP 6 and section 6.4 of the 2021 Code of Conduct.

The Tribunal then considered whether to issue a Property Factor Enforcement Order.

The Tribunal had found that there was no evidence that the delay in carrying out the repair to the slipped roof tile had caused damage or deterioration to the Property.

The evidence indicates that the Homeowner did not consider the repair to the slipped slate to be an urgent matter. The Homeowner did not chase up the repair between November 2021 and 21<sup>st</sup> February 2023. The Factor had provided a photograph of the Property dated 19<sup>th</sup> December 2023 which shows that the slipped slate has still not been repaired.

The Factor stopped acting as factor of the Property on 31<sup>st</sup> March 2023.

The Tribunal accepted the evidence of Mrs McInnes to the effect that the owners of Cedarwood Court are particularly cost conscious and to ensure the repair of the slipped slate was achieved as economically as possible they intended to have the repair carried out along with other repairs to the roof. As the slipped slate was not causing damage to the Property the Tribunal considered this to be a reasonable approach especially as none of the other owners had reported or chased the repair.

Consequently, the Tribunal determined that it was not appropriate to make a Property Factor Enforcement Order.

## 12. 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.

Signed .....Date 6<sup>th</sup> February 2024

Chairperson