

# 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 in relation to an application made under Section 17(1) of the Property Factors (Scotland) Act 2011**

**Chamber Ref: FTS/HPC/PF/23/2788**

**Property: 98/12 Orchard Brae Avenue, Edinburgh EH4 2GB (“the Property”)**

#### **The Parties:-**

**Mr Doug Maughan, 52 Menteith View, Dunblane FK15 0PD (“the homeowner”)**

**Myreside Management Limited, registered in Scotland (SC213664) and having their Registered Office at 3 Dalkeith Road Mews, Edinburgh EH16 5GA (“the property factors”)**

#### **Tribunal Members:**

**George Clark (Legal Member/Chairman) and Sandra Brydon (Ordinary Member)**

#### **Decision**

The First-tier Tribunal for Scotland Housing and Property Chamber determined that the application could be decided without a Hearing and determined that the property factors have failed to comply with OSP11 of the Property Factors Code of Conduct effective from 16 August 2021 and have failed to carry out the Property Factor’s Duties. The Tribunal proposes to make a Property Factors Enforcement Order.

#### **Background**

1. By application, dated 16 August 2023, the homeowner sought a Property Factor Enforcement Order against the property factors under the Property Factors (Scotland) Act 2011. He alleged failures to comply with OSP4, OSP6 and OSP11 of the Property Factors Code of Conduct effective from 16 August 2021 (“the Code”) and a failure to carry out the property factor’s duties.
2. The homeowner’s complaint related to an issue which has been identified as a latent structural defect in the block of which the Property forms part. There are 14 flats in the block. In July 2022, painting contractors recommended by the property factors carried out redecoration to the hall ceiling in the Property. The homeowner was charged £398 for this work. The homeowner had challenged

the bill and, after a lengthy exchange with the property factors, they had agreed to refund the cost to the owners.

3. In March 2023, the homeowner discovered that the stain on the hall ceiling had reappeared in the same spot and paint was flaking off. He reported it to the property factors, who sent an insurance assessor to investigate on 28 April. Following this inspection, the property factors reported back to the homeowner that the previous paint job had been checked and completed satisfactorily and there was no recurrence of staining on the hall ceiling. The view of the homeowner is that these two statements were manifestly untrue and a failure to comply with OSP4 of the Code. He challenged them, and the property factors then agreed and told him that the cost of the redecoration would be refunded.
4. On 9 November 2022, the homeowner informed the property factors that there appeared to be a fault in the roof structure, causing the ceiling of the living room of the Property to crack. The property factors had instructed a roofing company to attend. They reported that the problem lay with the ceiling, not in the loft. After more emails and a complaint to the Tribunal, the property factors instructed a structural engineer, who confirmed that the likely cause of the crack was flexing of the wooden framework in the loft, which he identified as a latent structural weakness. That was in February 2023 and, as at the date of the application, the property factors had still not engaged a contractor to carry out the recommended work.
5. On 1 August 2023, the homeowner discovered that the property factors were on the point of instructing a contractor, PRS, to double sheet the living room ceiling. This had not been suggested by the structural engineer and there was no mention in their quote of any strengthening work to the loft framework.
6. The view of the homeowner is that the conduct of the property factors in relation to this matter constitutes a failure to comply with OSP6 of the Code.
7. In relation to his complaint under OSP11, the homeowner stated that the property factors do not respond to enquiries within reasonable timescales and frequently do not reply at all. He did not, however, provide with his application, documentary evidence, such as emails, in support of his contention, but he did say that he had never received a full response to the formal complaint that he lodged with the property factors on 9 January 2023.
8. On 12 January 2024, the property factors provided the Tribunal with their written representations.
9. In relation to the complaint under OSP4, they stated that as a gesture of goodwill they had credited back to co-proprietors the amount charged for the initial redecoration and had advised the homeowner that appropriate redecoration will be done once the timber repairs in the roof space have been completed, as this work will also involve redecoration of the living room ceiling.

10. With reference to the complaint under OSP6, the property factors stated that they are arranging repair of the defective roof timbers in the roof space, which have caused cracking to appear on the plasterboard ceiling of the living room of the Property. There have been issues in moving forward with this, from initial assessment, to instructing a structural survey, multiple contractors declining to provide quotations for the work and owners failing to agree by majority to decide a way forward. Some owners wanted further quotes to be obtained. The roof space is common property, so a majority must agree to the repair. The property factors have, in their view, done as much as they can to facilitate this.
11. Responding to the complaint under OSP11, the property factors said that there have been in excess of 200 emails between the Parties regarding the repairs and that the homeowner has been kept regularly and timeously updated. They did not, however, provide copies of any emails regarding the updating. They accepted that delays have occurred in responding to the homeowner's emails at times and had already apologised to him for that. They had not formally responded to his official complaint to date but have attempted to reach out by email with offers to meet in person or to speak on the phone to resolve his complaint.

### **First Case Management Discussion**

12. A Case Management Discussion was held on the morning of 21 February 2024. The homeowner was present. The property factors were not present or represented. They later contacted the Tribunal to apologise that an unforeseen circumstance had prevented their representative from attending.
13. The homeowner told the Tribunal that no progress whatever had been made since the date of his application. There was no agreement about the scope of repairs that should be attempted to address the latent structural defect in the block of which the Property forms part. The property factors were claiming that they were unable to obtain quotes other than from their preferred contractor, but the homeowner stated that a firm called Narro Associates had attended the Property and had told him that they would be sending their report and quotation to the property factors. The property factors had subsequently told owners that Narro Associates had not attended the Property, but the homeowner had contacted Narro Associates and they had confirmed that their report had been sent to the property factors on 26 June 2023 and had been acknowledged by them on the same day. The homeowner had not, however, provided the Tribunal with a copy of the communication in which the property factors said that Narro Associates had not attended the Property.
14. The homeowner also said that the work being suggested in the quote which the property factors had recommended to the owners was greater in scope than the recommendations of a report from structural engineers, on which requests for quotes should have been based, and the property factors had failed to respond to his request for clarification on this point. The structural engineers had suggested bolting a 6 metres length of timber to the existing roof trusses. The homeowner's view was that this could be achieved by

splicing the timber into smaller sections which could more easily be carried into the roof space. The quote being recommended for acceptance involved cutting a hole in the living room ceiling of the Property to allow timber to be passed up into the roof space, but there was already a hatch in the hallway of the communal stair and the homeowner could not understand why it could not be used instead. The property factors had obtained two quotes from their preferred contractor. One of them involved erecting scaffolding and cutting through the roof to pass the timber through and the other involved cutting the hole in the living room ceiling.

15. The Tribunal had not seen the structural engineers' report and would not hold itself out as qualified to interpret it, but was of the view that the property factors should be invited to explain whether, and if so why, they have departed from the report and why it is necessary to cut a hole in the living room ceiling of the Property when there is an existing access hatch on the ceiling of the landing outside. They should also be invited to explain why they have recommended installing a double ceiling in the living room, as the homeowner's view was that this would only hide the problem, not resolve it and that it would put an even greater weight on the roof trusses. The Tribunal had not seen copies of correspondence between the Parties relating to the homeowner having queried this with the property factors.
16. The homeowner told the Tribunal that he accepted that the property factors had offered to meet him in person, but they had stated that it would have to be in Edinburgh, and this would involve him in a round trip of 4 hours, so he had declined the offer.
17. The preliminary view of the Tribunal, in relation to OSP4 was that it appeared that, on 7 June 2023, the property factors relayed to the homeowner a report from insurance assessors that the previous paint work undertaken had been checked and completed satisfactorily and that there had been no recurrence of staining on the hall ceiling. The homeowner disputed this later that day, and on the following day the property factors agreed from photographs that there was further staining and advised the homeowner that they were waiving the decoration cost. The preliminary view of the Tribunal was that the property factors were entitled to rely on information provided by a third-party and that, having ascertained that this was incorrect, they took appropriate steps by waiving the cost. It did not appear that they had provided information that was deliberately or negligently false or misleading, but the Tribunal wished to afford the homeowner the opportunity to provide any further evidence he wished it to consider before reaching a final conclusion.
18. In relation to OSP6, the homeowner was of the opinion that the property factors had not exercised reasonable care and skill in their approach to the repairs required to address the latent structural defect in the block. The Tribunal could not arrive at a decision on this matter without having full details from the property factors of the process they had undertaken, including disclosing whether Narro Associates provided a report and quote and an explanation as to why the work they are asking the owners to undertake is greater in scope than that recommended by the structural engineers. The

Tribunal also required an explanation as to why the existing hatchway cannot be utilised rather than cutting a hole in the living room ceiling of the Property and as to why they are recommending the installation of double sheeting in the living room ceiling.

19. The Tribunal noted that the property factors accepted that they had failed to provide a formal response to the homeowner's complaint. The Tribunal's preliminary view was that this constituted a failure to comply with OSP11 of the Code.
20. The Tribunal decided to continue the case to a further Case Management Discussion issued the following Directions to the Parties.

"The property factors are required to provide copies of the structural engineer's report obtained by them in relation to the Property and to confirm whether the specification of work put out to tender or now proposed differs in any way from the works recommended in that report. They are also required to provide a full account of the process they undertook to appoint contractors, the number of estimates received and their reasons for recommending their preferred contractor to the homeowner.

The homeowner is required to provide copies of any emails or other documents on which he intends to rely in relation to his contention that the property factors told him that Narro Associates, had failed to attend the Property to provide a report and estimate of works required.

The said documentation should be lodged with the Chamber no later than close of business on 29 March 2024."

21. On 29 February 2024, the homeowner provided the Tribunal with a copy of a letter emailed by the property factors to all owners on 13 October 2023. It stated that they had approached three contractors whose names had been provided by the structural engineers. Two declined to quote, as they had no available resources, and the other did not respond. The property factors then listed six firms that they had approached, only one of which had attended and provided a quotation. The list included Narro Associates who, they said had arranged an appointment to look at the works but did not attend. The letter concluded that owners now had an important decision to make, either to accept one or other of the quotes from Property Revival Solutions, to follow one of the owners who had suggested new quotes be obtained, or to hold a meeting of owners to discuss the situation.
22. On 29 March 2024, the property factors provided written submissions to the Tribunal and copies of the report from McColl Associates of 17 February 2023, emails between them and Narro Associates of 15, 16, 23 and 26 June 2023 regarding a proposed inspection of the Property, and a report by Narro Associates dated 26 June 2023 following their inspection. They attached a fee quote, and further emails of 26 June 2023 between them and the property factors confirmed that their role would be consultancy and that they assumed the property factors would obtain competitive quotes for the actual work. The

property factors also provided the Tribunal with copies of two Estimates from Property Revival Solutions (“PRS”) dated 16 August 2023. Both estimates were for the work in the attic as per the McColl Associates Report and both included adding a second layer of plasterboard to the ceiling of the Property. One estimate assumed access would be taken via scaffolding through the roof and the other involved taking access by cutting out a section of the ceiling in the living room of the Property.

23. The property factors listed the contractors that they had approached after receiving the report from McColl Associates and repeated that PRS were the only ones to submit estimates. They stated that at no stage had they been at the point of instructing a contractor, nor did they recommend installing a double ceiling in the living room of the Property or a specific contractor and that at no stage had they recommended PRS as their preferred contractor. They had recommended that it would be beneficial for homeowners to have a meeting to discuss the matter further and they did provide homeowners with the options that were available to them, to allow them to make a decision on how they would like to proceed. This was sent to homeowners on 13 October 2023.
24. The property factors conceded that it had been established that Narro Associates did attend the Property and provide them with a quote to oversee and manage the project and they expressed regret that this error took place and had offered their apologies to the homeowner. They had taken internal action to ensure these errors are not repeated in the future.

### **Second Case Management Discussion**

25. A second Case Management Discussion was held by means of a telephone conference call on the morning of 30 May 2024. The Homeowner was present and the property factors were represented by Mr Leigh Collins, their Managing Director.
26. The Tribunal began by asking the Parties for an update on progress of the work. The homeowner told the Tribunal that no work had begun and that no estimate had been accepted, so no contractor had been appointed. Mr Collins stated that there had been a meeting on 27 February 2024 to try and agree how to move forward. The property factors had broadened their search and further estimates had been obtained, but they all appeared to be different in their approach, despite all having been provided with the McColl Associates report as the basis on which to estimate costs, so the decision was back with the owners. The property factors’ recommendation was to have a further meeting. PRS were not their “preferred” contractors, as the homeowner was implying in his application and his written submissions. They had never worked with them before. They were simply the only company that had come forward with estimated costs at the time.
27. The homeowner said that the property factors had balloted owners in regard to the four options contained in their letter of 13 October 2023. They had reported the result as being 5 in favour of the option to accept the PRS estimate, 2 to seek further estimates and 3 to hold a meeting. One owner had queried the

outcome of the poll and on 10 March 2024, the property factors had revised the results to show only 3 in favour of accepting the PRS quote and 5 in favour of seeking further estimates, with one supporting a further meeting. Asked to explain this. Mr Collins said that a few owners had indicated more than one preference, and he accepted that the property factors had misinterpreted some of the votes. He added that one of the owners had offered to take the lead on the project, so it was over to the owners to reach a decision.

28. The homeowner told the Tribunal that his expectation would be that, as the 4 quotes are so radically different, McColl Associates should be asked to review them and advise which would be most effective and most cost-effective. He could not understand why the matter had become so complicated and had dragged on for 18 months.
29. Mr Collins advised that the property factors had also looked at alternative approaches such as insurance claims and had explored whether the original developers would become involved in remedying the latent defect. The property factors have tried to give every opportunity to the owners to be involved in arriving at a decision.
30. The homeowner then summarised his position. In relation to OSP4, he referred to the fact that the property factors had told him that the painting in the hall ceiling of the building in 2022 had been satisfactorily carried out and had then had to change their opinion when faced with photographs showing ongoing staining. They had at one point indicated that the insurers had accepted a claim, but this had turned out not to be the case. They had said that Narro Associated had failed to attend the Property, which had been untrue, but had been restated by Mr Collins at the meeting on 27 February 2024. They had intimated a false outcome of the ballot and had been on the point of instructing the double sheeting of the living room ceiling of the Property. In relation to OSP6, the repairs to the hall ceiling had been requested in 2021, but were still not complete, the original work in 2022 having been unsuccessful. With regard to OSP11, he had been told that the property factors' response was ready but that they would prefer to meet with him to try and resolve the issues. He had told them just to send their response but they had failed to do so.
31. Mr Collins, in his closing remarks, stated that the property factors had not acted deliberately or negligently (OSP4). They had told the owners that the redecoration of the hall ceiling would be carried out at the same time as the works in the roof space and in the living room of the Property (OSP6). He had offered to meet the homeowner before sending the formal response to his complaint, but the homeowner had not responded.
32. The Parties then left the Case Management Discussion and the Tribunal Members considered all the evidence, written and oral, before them.

### **Reasons for Decision**

33. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a

Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it sufficient information and documentation to decide the application without a Hearing.

34. **OSP4 of the Code** states that property factors “must not provide information that is deliberately or negligently misleading or false.” The Tribunal did not uphold the homeowner’s complaints under OSP4.
35. The homeowner had stated that the property factors had told him that the painting in the hall ceiling of the building in 2022 had been satisfactorily carried out and had then had to change their opinion when faced with photographs showing ongoing staining. The Tribunal did not regard this as a deliberate or negligent failure. The property factors relied on information provided by a third party, namely the insurance assessors, and, when they were provided with evidence that the staining was still there, they stated on the following day that they would waive the cost.
36. The contention that the property factors at one point indicated that the insurers had accepted a claim, but this had turned out not to be the case was not included in the application, so was not considered further by the Tribunal.
37. The Tribunal noted that the property factors had incorrectly said that Narro Associates had failed to attend the Property, but they had apologised for the error and, in any event, the role of Narro Associates would have been to oversee and manage the project, not to carry out the actual work, so the situation that only one quote for the remedial work was obtained remained unaltered. The view of the Tribunal was that this error was careless but not deliberate or negligent.
38. The homeowner said that the property factors had intimated a false outcome of a ballot of homeowners held in October 2023. This could not be considered by the Tribunal, as it occurred after the date of the application, so was not included in the complaints on which the Tribunal could make a determination.
39. The homeowner stated in evidence that the property factors had been on the point of instructing the double sheeting of the living room ceiling of the Property. The Tribunal found no evidence to support that claim. The property factors had stated in evidence that at no stage had they been at the point of instructing contractors. The two estimates from PRS had both included double sheeting the ceiling.
40. **OSP6 of the Code** provides that property factors must carry out the services they 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 Tribunal did not uphold the homeowner’s complaint under OSP6.
41. The complaint was that the repairs to the hall ceiling had been requested in 2021, but were still not complete, the original work in 2022 having been unsuccessful. The property factors’ position was that the redecoration will be



done after the timber repair works in the roof space have been completed, as that work will involve redecoration of the homeowner's living room ceiling. The Tribunal regarded that as a reasonable position to take. The Tribunal accepted that, whilst at first glance, the work in the roof space appeared to have taken an inordinate length of time to arrange and indeed was not yet instructed let alone carried out, the property factors had had to contend with the well-recognised difficulties in obtaining quotes from building contractors post-pandemic and that the problem was particularly acute in Edinburgh. They had also had to seek the authority of the owners and, as yet, that had not been forthcoming.

42. **OSP11 of the Code** requires property factors to respond to enquiries and complaints within reasonable timescales and in line with their complaints handling procedure." The Tribunal upheld the homeowner's complaint under OSP11.
43. The property factors' WSS states that they will respond, or deal with complaints within seven working days. The property factors accepted that they had failed to provide a formal response to the homeowner's complaint.
44. The homeowner stated that he had been told that the property factors' response to his complaint was ready but that they would prefer to meet with him to try and resolve the issues. He had told them just to send their response but they had failed to do so. The view of the Tribunal was that the property factors should have issued their written response whenever it became clear that the homeowner did not wish to hold the meeting that they had suggested, or if he failed to respond to that suggestion.

### **Property Factor's Duties**

45. The Tribunal determined that the property factors had failed to carry out the Property Factor's Duties. He did not provide any evidence specific to this head of complaint, but the Tribunal decided that the failure of the property factors to comply with their Complaints Procedure also constituted a failure to carry out the Property Factor's Duties. The Tribunal did not find any further failure to do so. The property factors had relied on an assurance from the insurance assessors that the work in the hall ceiling had been satisfactorily carried out but had immediately acted to agree to waive the cost when the homeowner provided photographic evidence to the contrary. The property factors used reasonable endeavours to find contractors to quote for the remedial works within the roof space, and the difficulty in finding companies to take on what, for them, would not be a big contract, was not the fault of the property factors. They had been mistaken in stating that Narro Associates had failed to attend, but that did not affect the issue of obtaining quotes for the work, as Narro Associates would have been project managers only and not the contractors. The Tribunal did not find any evidence to support the homeowner's claim that PRS were the property factors' "preferred contractors". The property factors stated in evidence that they had never worked with the company before. The

situation was that they were the only company to have provided a quote for the work.

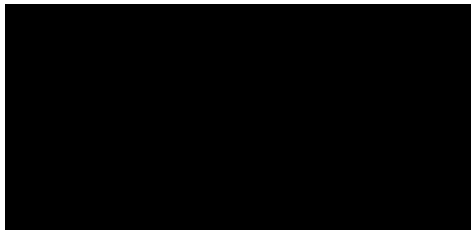
### **Property Factor Enforcement Order**

46. Having determined that the property factors had failed to comply with OSP11 of the Code and had failed to carry out the Property Factor's Duties, the Tribunal had to decide whether to make a Property Factor Enforcement Order.

47. The Tribunal was unable to find that the homeowner had suffered any actual loss as a result of the property factors' failures, but recognised that he was the owner most directly affected by the latent defect that had been discovered in the roof space and that he had had to take on himself the time-consuming process of bringing his complaints to the Tribunal. The Tribunal proposes, therefore, to make a Property Factor Enforcement Order in terms of the Section 19(2)(a) Notice attached to this Decision, for compensation for inconvenience and distress and that a reasonable, fair and proportionate sum to order the property factors to pay would be £150.

48. The Tribunal also recommends that the property factors review the terms of the "Complaints Procedure" in their WSS. It should clearly set out the timescale within which they will issue a written response to complaints.

49. The Tribunal's Decision was unanimous.



**Legal Member**

**30 May 2024**