

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/23/2592

Re: Property at 3-2 193 Kent Road, Glasgow, G3 7HD ("the Property")

Parties:

Miss Eileen Clarke, 3-2 193 Kent Road, Glasgow, G3 7HD ("the Applicant")

Glasgow West Enterprises Limited, 5 Royal Crescent, Glasgow, G3 7SL ("the Respondent")

Tribunal Members:

Graham Harding (Legal Member), Andrew McFarlane (Ordinary(Surveyor) Member)

DECISION

The Respondent has failed to carry out its property factor's duties.

The Respondent has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with OSP 6 and Sections 2.7 and 6.4 of the 2021 Code.

The decision is unanimous.

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the 2011 Code" and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors July 2021 as "the 2021 Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

Background

1. By correspondence dated 1 August 2023 the Applicant submitted an application complaining that the Factor had failed to carry out its property factors duties and was in breach of Sections of the 2021 Code. The Applicant submitted a written statement outlining her complaint together with a copy of the Respondent's Written Statement of Services, correspondence and emails with the Respondents and a timeline of events, The Applicant submitted that the documents demonstrated a failure on the part of the Factor to carry out its property factors duties to a reasonable standard and were also breaches of the Code.
2. By Notice of Acceptance dated 9 October 2023 a legal member of the Tribunal with delegated powers accepted the First Applicant's applications and a Case Management Discussion ("CMD") was assigned.
3. A CMD was held by teleconference on 14 February 2024. The Applicant attended in person and the Respondent was represented by Ms Claire Mullen of T C Young, Solicitors, Glasgow and also in attendance were Mr William Hunter and Ms Jennifer Barrow from the Respondent.
4. The Tribunal upheld a preliminary point made by Ms Mullen with regards to jurisdiction in respect of the alleged breach of Section OSP9 of the Code.
5. The Tribunal noted that the Respondent had accepted it was in breach of Sections 2.7 and 6.4 of the Code but disputed it was in breach of OSP 6 or that it had failed in its Property Factor's duty to instruct an insurance claim. The Respondent did however accept it had failed in its Property Factor's duties to respond timeously to the Applicant's enquiries and had offered an apology. As the repairs to the roof were still to be completed and it appeared the insurers had refused to uphold the Respondent's claim and the Applicant's insurance claim was still ongoing the Tribunal adjourned the CMD to a further CMD. The Tribunal considered that before it could make a final determination it would be appropriate to continue the application to a further CMD to allow for the Applicant's internal repairs to be considered and for further information to be provided with regards to any water ingress to the stairwell, any medical evidence, and any further losses that the Applicant may seek to recover.

The Case Management Discussion

6. A CMD was held by teleconference on 4 July 2024. The Applicant attended in person and Ms Mullen represented the Respondent along with Mr William Hunter, the Respondent's Repairs and Factoring Manager.

7. The Tribunal noted that following an inspection and report prepared by Rainbow Restorations it had been determined that the Applicant's internal repairs could go ahead and that the costs of these would be met under her insurance. The Tribunal also noted that the report had also suggested that the communal close had been affected as a result of water ingress with damp staining and wet plaster on the top floor and also two floors down. However, this was disputed by the Respondent and Mr Hunter said that the close and stairwell had been inspected by himself and his repairs team and they were satisfied that all that was required would be to use stain block and scrape off loose and flaking paint at the next round of redecoration. Mr Hunter said there was no sign of dampness or mould and the staining was superficial. But that the Respondent would continue to monitor this. Miss Clarke queried if this was the appropriate course of action and Mr Hunter explained that there was some flaking paint on one wall. It would require scaffolding to paint it and it would then look out of place with the rest of the close and would therefore be better to be carried out as part of a general redecoration. The Tribunal noted that the communal close had not been decorated for about 20 years. Miss Clarke said that it was nevertheless in good condition. The Tribunal also noted that it would require the majority of owners in the block to agree to the common areas being redecorated.
8. The Tribunal noted that the Applicant had in her recent Inventory of Productions referred to damage to the windows at the rear of the property which she considered had been caused by the lack of a gutter over a long period. She referred the Tribunal to the difference between the windows at the front of the property and those at the back. The Applicant explained that the damage had only recently been pointed out to her by her window cleaner and therefore had not formed part of her application. For the Respondent Ms Mullen submitted that the Respondent had been denied the opportunity of fair notice and the Tribunal should not consider this aspect of the Applicant's claim. The Tribunal allowed Ms Mullen and Mr Hunter to further consider the position during a short adjournment. Following the adjournment Ms Mullen explained that her position remained the same but that Mr Hunter would engage with the Applicant to try to resolve the issues with the windows outwith the Tribunal proceedings.
9. The Applicant referred the Tribunal to the letter she had obtained from her doctor which confirmed that she had an appointment with her GP on 25 May 2023 and was prescribed migraine medication and online cognitive behaviour therapy to manage her anxiety. For the Respondent Ms Mullen noted that the appointment had been made 16 months after the gutter had been removed and during the period when the Applicant had raised a complaint with the Respondent. Ms Mullen also submitted that the emails contained in the Applicant's Appendix 5 were not indicative of the Applicant suffering from anxiety and stress. The Applicant disputed that this was the case.
10. The Tribunal noted the terms of the detailed record of time spent by the Applicant composing emails and on phone calls to the Respondent as well as obtaining advice and preparing her application to the Tribunal and preparing for and attendance at the CMDs. The Tribunal explained that some of these

entries would be considered to be the normal part of tribunal proceedings and could be considered to be what was known as expenses. The Tribunal explained that expenses were only awarded in cases where a party had occasioned unnecessary expense which was not the case here. For the Respondent, Ms Mullen queried whether the time spent was in fact accurate and referred the Tribunal to the Applicant's Appendix 5 and the number of emails and phone calls recorded. In response the Applicant said that not all contact had been recorded and she may have been kept on hold at times. Mr Hunter advised the Tribunal that the Respondent had a direct line and if the line was busy calls were sent to voicemail.

11. With regards to the alleged failure of the Respondent to carry out its Property Factor's duties in respect of instructing an insurance claim following the removal of the gutter in January 2022 Ms Mullen explained that the Respondent had in February 2022 instructed its brokers to intimate a claim to its brokers but had been advised the claim was not recoverable and therefore the Respondent was not in breach. Furthermore, following the Applicant's complaint, a further claim was submitted and although at the previous CMD the Tribunal had been advised that the claim had been refused the Respondent had been told the previous week that the insurers had reconsidered and the claim was now going to be met.
12. The Tribunal ascertained from the parties their views on whether or not the Tribunal had sufficient information before it to make a decision or whether the application should be determined at a hearing. Both the Applicant and Ms Mullen were content that the Tribunal make a determination on the information it had before it without the need for a hearing.

Findings in Fact

13. The Applicant is the owner of 3-2 193 Kent Road Glasgow.
14. The Respondent is the Factor of the block of flats in which the property is located.
15. Following a storm in January 2022 the Respondent arranged for a section of loose gutter to be removed from the rear of the block as it constituted a safety hazard.
16. In February 2022 the Respondent instructed its insurance broker to intimate an insurance claim in respect of the storm damage but was advised the claim was not recoverable.
17. In October 2022 the Applicant's property was affected by water ingress as a result of the gutter being removed.
18. The Respondent failed to contact other homeowners or source contractors to repair the gutter between January 2022 and Spring 2023.

19. A quorate meeting of homeowners was held in September 2023 following inquorate meetings in April and May 2023.
20. There was a lack of awareness in the Respondent's repairs team of means open to it to source contractors through Public Contracts Scotland and Scotland Excel Procurement Database that led to a delay in procuring additional quotes for repairs to the gutter.
21. The Respondent instructed its insurance broker following the Applicant's complaint to submit another claim to its insurers in May 2023.
22. The insurers finally agreed to meet the claim in June 2024.
23. The Applicant's internal repairs to the property will be met by her insurers.
24. The communal close and stairwell has suffered some internal staining and water damage due to the gutter being removed.
25. So far as can be currently ascertained the damage is superficial and would be treated during a planned redecoration programme agreed by homeowners but will be monitored for any change by the Respondent.
26. The Applicant suffered from anxiety, migraine headaches and inconvenience as a result of the failure of the Respondent to timeously deal with her queries and effect the repairs.

Reasons for Decision

27. The Respondent accepted that it was in breach of Sections 2.7 of the Code and that this had been acknowledged in the Stage two complaint response and an apology offered and by the allocation of property services officers to specific areas and taking other steps to avoid a recurrence of a breach in the future.
28. The Respondent accepted it was in breach of Section 6.4 of the Code and that alternative options for sourcing contractors should have been explored.
29. The Tribunal was satisfied that the Respondent had sufficient notice of the Applicant's reasons for claiming there had been a breach of OSP 6 and that it was quite clear from reading Mr Hunter's response to the applicant's Stage 2 complaint that the repairs team were in need of training to allow them to have the information they needed to be effective. If they had been aware of the means of obtaining another quote through say Public Contracts Scotland then the Applicant may not have experienced the difficulties and delays that she did.
30. The Tribunal accepted that the Respondent instructed its insurance broker to intimate a claim to its insurers in February 2022 and that the brokers advised

that the claim was not recoverable. It was also accepted that ultimately and no doubt due to the Applicant's complaint the insurers eventually accepted the claim. The Tribunal therefore did not find that the Respondent was in breach of its duty in this regard.

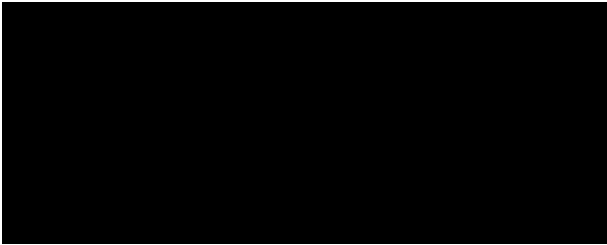
31. The Respondent accepted it was in breach of its property factor's duties as regards its failure to respond timeously to the Applicant's enquiries and offers its apologies.
32. The Applicant submitted that the Tribunal should order the Respondent to refund its management fee from January 2022 onwards for failing to provide proper service. The Applicant provided the Tribunal with a copy of the Respondent's invoice of 11 July 2022. The Tribunal was of the view that although the Respondent had failed in respect of its communications with the Applicant and in the way it dealt with the gutter repair it had dealt with other issues in respect of the management of the block such as the common electricity supply, close cleaning and waste management and therefore it would not be appropriate to refund the whole management fee but that a refund of 25% of the management fee for the period from 1 January 2022 to 30 June 2023 would be appropriate. The Applicant also sought an order that the factor cover the cost of an independent survey of the property but in light of the report from Rainbow Restorations and the Respondent's own assessment of the property the Tribunal does consider this to be necessary. The Tribunal would also hope that going forward there will be better communication between the Applicant and the Respondent and that any remaining issues such as the condition of the Applicant's windows can be resolved without further involvement of the Tribunal.
33. The Tribunal can fully understand why the Applicant would be anxious and worried about the lack of communication over a long period from the Respondent particularly when this resulted in water ingress to her property with the possibility that the damage was going to be more severe than was ultimately the case. The Tribunal was satisfied that this had an adverse effect on the Applicant's health and that the Applicant has been put to a considerable amount of inconvenience as a result of the Respondent's breaches of the Code and failure to carry out its property factor's duties. The Tribunal therefore considers that a financial award is appropriate in the circumstances. Although the Applicant undoubtedly has spent a substantial amount of time preparing her application for the Tribunal and may have had to take time off work to attend hearings the Tribunal did not consider that it would be appropriate to make any award of expenses against the Respondent and much of the Applicant's time spent did fall into the category of expenses. Nevertheless, the Tribunal was in no doubt that the stress, inconvenience and anxiety suffered by the Applicant as a result of the Respondent's failings impacted her health in the short term and justified a financial award of £800.00.

Proposed Property Factor Enforcement Order

34. The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

Appeals

A homeowner or property factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.



Graham Harding Legal Member and Chair

13 July 2024 Date