

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/24/1161

Re: Flat 3/3 34 Thornwood Avenue, Glasgow G11 7QY ("the Property")

Parties:

**Mr John Sherry and Mrs Katharine Sherry, 136 Danes Drive, Glasgow G14 9BH
("the Homeowners")**

**James Gibb Residential Factors, Red Tree Magenta, 3rd Floor, 270 Glasgow
Road, Glasgow G73 1UZ ("the Factor")**

Tribunal Member:

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

DECISION

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

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections OSP6, OSP11, and 2.7 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. In March 2024 the Applicants 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 written statements outlining their complaint together with copies of correspondence between the applicants and the Factor and an Inventory of Productions. Following correspondence between the tribunal administration and the Applicants, the Applicants submitted an amended application to the Tribunal dated 11 March 2024. The Applicants submitted that the Factor was in breach of Sections OSP 6, OSP 11, 2.7, 6.4 and 7.2 of the 2021 Code.
2. By Notice of Acceptance dated 4 April 2024 a legal member of the Tribunal with delegated powers accepted the First Applicant’s applications and a Case Management Discussion (“CMD”) was assigned.
3. By email dated 21 June 2024 the Factor submitted written representations to the Tribunal.
4. A CMD was held by teleconference on 8 August 2024. The Applicants attended in person and the Factor was represented by Mr Alasdair Wallace and Ms Leanne Holt.
5. Mr Sherry submitted that as homeowners and tenants at the building in which the property was located had been made homeless following the evacuation of the building in November 2022 after it was declared to be unsafe the Factor had a duty to have done better to plan and act in a more professional manner in ensuring that the building was made safe and works completed within a reasonable timescale. Mr Sherry referred the Tribunal to his written representations and the details contained in Section 7 of the application. He complained of the delay from the date of the building being evacuated to the temporary works being completed in February 2023 and it then taking a further year to complete the repairs. Mr Sherry submitted that there had been a lack of supervision on the part of the Factor. He said that there had been no programme of works and that there had been delays of several months and that the Factor had not used the skills expected in monitoring the repairs. For the Factor Mr Wallace said that the timeline for completion of the repairs had been delayed by third parties and that was outwith the control of the Factor. In particular Mr Wallace said that delay had been caused by the surveyor at Grossart Associates who had been appointed to manage the project. Mr Wallace went on to say that the Factor had tried to keep homeowners up to date with developments but accepted that communication had not been perfect but that the Factor had not expected the repairs would have taken as long as they did. Mr Wallace also said that the time it took to ingather funds from homeowners did contribute to the delay. In response Mr Sherry submitted that the Factor had been

reactive rather than proactive. Mr Wallace went on to explain that the Factor did not employ in-house surveyors and had contracted the management of the project to an external company, Grossart Associates. They had been responsible for preparing and obtaining tenders and had advised the Factor when they would be available. Mr Wallace said the Factor's role was to push the Surveyor to get on with the work and that is what they had done. In response Mr Sherry submitted that the Factor had claimed a management fee for the project and it was therefore their duty to properly manage it. Mr Sherry said that there was extra work involved for which the Factor was entitled to charge a fee but that they were not managing the project that was being done by Grossarts. Ms Holt advised the Tribunal that at the commencement of the project, Mr Kenny Campbell had been very forthcoming and involved but then much less so as the project progressed that put a strain on the relationship between the Factor and Grossart Associates. Ms Holt said that the Factor was continually chasing Grossarts for progress to be made both by email and in telephone calls. She said there would be a record of emails but probably not of telephone calls. Mr Wallace accepted there had been a delay in responding to the Homeowners' Stage 1 complaint and that the Stage 2 response was one day late and this had been acknowledged in the Factor's written representations. He disputed that the Factor was in breach of Sections 6.4 and 7.2 of the Code and referred the Tribunal to the Factor's written representations and to the Inventory of Productions and the communications added to the client portal detailed on pages 100 to 106. Mr Wallace confirmed that the Factor had offered to reimburse the Homeowners with part of the project administration fee amounting to £150.00. For the Homeowners, Mr Sherry submitted that as the property had been empty for over a year the Factor should not be charging their quarterly fees either. He also submitted that the Tribunal should make a financial award to take account of the 50 emails and 35 telephone calls made to the Factor involving some 100 hours dealing with the issues raised. Mr Sherry confirmed that the property had been fully insured under a landlord's insurance policy. He explained he had asked the Factor to make an ex-gratia payment to his tenant who had only just moved into the property when he had to be moved out and had to abandon his belongings in the property until he could access them again once the property had been made safe but this had been refused and he was aware that the Tribunal could only make a financial award in respect of his own claim.

6. The Tribunal acknowledged that there were issues that required further clarification and in particular with regards to the alleged breach of Section 6.4 whether the Factor could have done more to keep the Homeowners informed. To that end the Tribunal considered it would assist it if the Factor provided copies of all emails and other correspondence together with any notes of telephone calls between the Factor and Grossart associates between November 2022 and the completion of the repairs. The Tribunal determined to adjourn the application to a further CMD to allow the Factor to lodge the required documents.

7. In light of the concessions made by the Factor the Tribunal adjourned the CMD to a hearing.
8. On 13 August 2024 the Tribunal issued Directions to the Factor.
9. By email dated 10 September 2024 the Factor submitted written representations in response to the Tribunal's directions.

The Hearing

10. A hearing was held by teleconference on 12 December 2024. The Applicants attended in person. The Factor was represented by Mr Alasdair Wallace.
11. Mr Sherry submitted that the Factor was placing the blame for delays on the surveyors, Grossarts, but just because there had been a lot of emails produced by the Factor that in the Applicants' view did not provide any sense of urgency or the setting of deadlines. Mr Sherry went on to say that although Ms Holt had found Grossart's Rhonda Morgan to have been helpful it should be noted that she was their Finance Director and therefore perhaps not the most appropriate person to be communicating with.
12. With regards to Section OSP6 of the Code Mr Sherry submitted that the Factor had failed to use reasonable care when dealing with the issues at the development. Mr Sherry said that it had taken until May 2023 to issue tender drawings. He submitted that Grossarts should have been involved at a much earlier stage in November 2022 when the building had become unsafe and had been evacuated. He said that a survey could have been undertaken at that time and that there had been unnecessary delay.
13. For the Factor, Mr Wallace submitted that the documents submitted to the Tribunal demonstrated that they had been chasing Grossarts for progress to be made. Mr Wallace went on to say that initially G. O. McNair, Chartered Engineers had been involved and Grossarts had not been asked at that time. Mr Wallace explained to the Tribunal that the Factor was not a surveyor and could not comment on the time it had taken to prepare the drawings. Mr Sherry said he found that comment to be astonishing.
14. Mr Sherry went on to say that the temporary work was required to make the building safe and in its letter of 24 November 2022 Building control had outlined the extent of the works required. Mr Sherry went on to say that the make safe work was completed by the middle of February 2023 but the repairs to the building were not completed until mid-February 2024 and he did not consider that amounted to using reasonable skill and in a timely manner.
15. In response Mr Wallace referred the Tribunal to the Factor's initial written submissions which provided a summary of the timeline involved. Mr Wallace went on to say that funding requests to homeowners add time to the overall

job and that there were issues with Grossarts that added to the time it took to complete the repairs.

16. Mr Sherry submitted that the Factor ought to have requested funding in November 2022 rather than only asking at that time for funds for the emergency repairs. He also said that the request for payment of Grossarts' fees had been made on 6 March 2023 and all payments had been received by 21 April 2023 and that more than enough had been ingathered before that date to instruct the initial design and this had been suggested to the Factor's Claire Budgeon but she had not approached Grossarts. Mr Sherry went on to say that a further funding request had been made on 2 October 2023 and the funds had been ingathered by 1 November 2023 but the work did not start until February 2024. For the Factor Mr Wallace said that he had not said that the delays in completing the repairs had been caused by delays in obtaining funds.
17. With regards to communication, Mr Sherry said that at the time the building was evacuated the Factor sent 5 messages and between January and June 2023 the Factor communicated on a further 5 occasions. He said that the bulk of the messages were after 6 June 2023 when the Applicants met with the Factor following their complaints.
18. With regards to OSP11, Mr Sherry said that the Factor had failed to respond to the Applicants' stage 1 complaint and had been a day late in responding to their stage 2 complaint and he believed they would not have replied to that if he had not phoned them.
19. With regards to Section 2.7 of the Code, Mr Sherry submitted that the Factor ought to improve their timescales for responding to enquiries and complaints.
20. In response Mr Wallace accepted that the person allocated to deal with the issues had not responded timeously but did not accept that the Factor would not have responded to the Stage 2 complaint. He also said that the complaint would normally have been dealt with by a more senior member of staff. He also said that he and MS Holt had met with the Applicants in June 2023 to try to resolve matters and he did think that the Factor had communicated extensively.
21. With regards to Section 6.4 of the Code Mr Wallace went on to say that the Factor had tried to escalate the issues with Grossarts and had put them under pressure. Mr Sherry referred the Tribunal to the emails from the Factor to Grossarts and submitted that there was no sense of urgency in them. It was submitted that initially the Factor tried to coax Grossarts to improve but later the emails did get tougher. Mr Sherry referred the Tribunal to his written representations and that due to delays in issuing tender documents these had been delayed until after the Glasgow trades holidays.

22. For the Factor Mr Wallace submitted that there were no sanctions or actions that they could have taken other than to have taken Grossarts off the job but he submitted that they had liaised with Grossarts to push the job along.
23. Mr Sherry queried if the Factor had ever sat down with Grossarts and set timescales. He submitted the Factor had always been reactive and that everything had been done in a linear fashion when the work should have been properly planned in November 2022. Mr Sherry submitted that the work could have been completed within 12 months and building control had suggested 6 months and instead it had taken 19 months to complete.
24. Mr Wallace said that he did not know if it would have been possible to appoint the surveyors sooner but that it may have been possible to have done this before the building was made safe but he did not know. Mr Wallace repeated that the Factor had communicated a lot and had liaised a lot in order to have the repairs completed.
25. In conclusion Mr Sherry said that he hoped for an improvement from the Factor in its timescale for responding to enquiries and dealing with issues. He said the repairs to the building had taken an inordinate amount of time. He considered a compensatory award of £1075.00 together with reimbursement of the Factor's management fees for the period the property was unoccupied was appropriate.
26. For the Factor, Mr Wallace said that the management fee charged was for core services but that the Factor had offered to reimburse the additional fee charged in respect of the repairs to the building.

Findings in Fact

27. The Applicants are the owners of the property which is a flat in the building at 34 Thornwood Avenue, Glasgow ("the building").
28. The Factor is the factor for the building.
29. In August 2022 the Factor obtained a report from G. O. McNair, Structural Engineers, Glasgow, following a General Structural Inspection of the building on 22 July 2022.
30. The report recommended repairs to the front elevation of the building and on 3 November 2022 the Factor advised the Applicants that costs were being obtained for the repairs.
31. On 4 November 2022 following discussions with Glasgow City Council Building Control the building was deemed unsafe and all residents were required to take up alternative accommodation immediately.
32. On 7 December 2022 Mr Donoghue from Glasgow City Council Building Control issued guidance for construction professionals entering the building.

33. The water supply to the building was turned off by the Factor after it was discovered this had not been done by Glasgow City Council and after this had been reported to the Factor by the Applicants.
34. Temporary repairs to the building commenced on 16 January 2023 and were completed on 6 February 2023.
35. Grossart Associates submitted their quote for preparing specification of works in respect of repairs to the building to the Factor on 23 February 2023.
36. Grossarts had been involved at an earlier stage in January 2023 preparing drawings for CBL Construction Ltd, the contractors who carried out the temporary repairs.
37. By email dated 28 March 2023 the Applicants made a Stage 1 complaint to the Factor.
38. The Factor failed to respond to the Applicant's Stage 2 complaint.
39. By email dated 14 May 2023 the Applicants made a Stage 2 complaint to the Factor.
40. The Factor provided a response to the Applicants Stage 2 complaint on 2 June 2023.
41. Between 6 March 2023 and 21 April 2023, the Factor ingathered funds from homeowners to meet Grossarts' fees.
42. Although the Factor had understood that Grossarts had been instructed to proceed to prepare the documents, Grossarts in an email dated 11 April that they had not yet received the go ahead for the job.
43. On 11 April 2023 the Factor issued a job order to Grossarts.
44. On 11 April the Factor provided an update to owners on the James Gibb portal.
45. On 17 April 2023 Grossarts provided the Factor with an estimated timescale for completing the specification of works and obtaining responses from contractors and that this would be about six weeks from the date of the inspection arranged for 1 May 2023.
46. Grossarts carried out their inspection of the property on 1 May 2023.
47. On 31 May 2023 the Factor contacted Grossarts for an update.

48. By 6 June 2023 the Factor had received the drawings prepared by Grossarts and sent these to Glasgow City Council building control for comment.
49. On 7 June Mr Donoghue from Building Control requested an on-site meeting with the Factor and Grossarts and this was arranged for 14 June 2023.
50. On 9 June 2023 owners were advised of the further on-site meeting taking place.
51. On 15 June 2023 Grossarts advised the Factor that following the meeting with building control amendments to the drawings and tender documents were required and these would be issued as soon as possible with the hope that contractors could return the tender documents by 23 June 2023.
52. On 16 June the Factor provided an update to homeowners on the client portal.
53. Grossarts advised the Factor by email dated 26 June 2023 that they had completed the amended drawings and tender documents and issued these to the contractors at the end of the previous week.
54. The Factor sent a copy of the drawings to Building Control by email dated 26 June 2023.
55. Grossarts by email dated 26 June advised the Factor that as Mr Campbell was on holiday until 10 July 2023 it might take until 17 July to finalise tenders with contractors.
56. The Factor provided a further update to homeowners on 27 June 2023.
57. By email dated 21 July 2023 the Factor requested an update from Grossarts.
58. The Factor provided an update to homeowners on the client portal on 25 July 2023 advising of a delay in obtaining the tenders from contractors due to closures for the trades holiday.
59. On 9 August 2023 the Factor provided a further update to homeowners advising that they awaited further information from Grossarts.
60. On 14 August 2023 Grossarts advised the Factor that two tenders had been returned and that the third contractor had not yet visited the site.
61. On 15 August 2023 the Factor queried with Grossarts the lead in times of the two contractors who had returned the tenders.
62. On 16 and 18 August 2023 the Factor provided an update to owners on the client portal.

63. By emails dated 23 and 29 August the Factor pushed Grossarts for a response and explained that the owners were frustrated at the delay.
64. On 30 August 2023 the Factor provided a further update to owners advising they still had not heard back from Grossarts regarding lead times or the third tender.
65. On 31 August 2023 Grossarts provided the Factor with the third tender and a lead in time for that contractor of for week from the date of instruction at a total cost of £109681.46.
66. On 31 August and 1 September 2023, the Factor provided updates to owners on the client portal.
67. On 12 September 2023 the Factor issued ballots to owners to choose their preferred contractor
68. On 22 September the Factor confirmed on the client portal that a majority of owners had chosen JCJ Group to undertake the repairs to the building.
69. On 29 September the Factor issued a further update to owners advising a funding request would be issued on 2 October 2023.
70. On 11 October 2023 the Factor advised owners that 2 out of 12 owners had paid their share of the repairs and that some owners' insurers had requested a Bill of Quantities before providing funds and that this had been requested from Grossarts.
71. By email dated 11 October 2023 the Factor asked Grossarts to provide a Bill of Quantities for the JCJ Group tender.
72. On 25 October 2023 the Factor sent a reminder email to Grossarts.
73. On 25 October 2023 the Factor advised the owners that the Bill of Quantities was available on the client portal.
74. On 30 October 2023 the Factor advised Grossarts that one owner's payment was outstanding and again requested a response as regards the lead time for commencing the works.
75. On 1 November 2023 the Factor advised Grossarts that if there were both common and private works, they would need a breakdown of these to apportion to owners.
76. On 1 November 2023 Grossarts advised the Factor that JCJ Group had said that because of a combination of its current workload and holidays the start date for the contract would be the week commencing 15 January 2024.

77. On 2 November 2023 the Factor confirmed to Grossarts that they were in funds and instructed Grossarts to proceed.
78. On 17 November 2023 the Factor provided an update to owners on the client portal.
79. On 15 December 2023 the Factor provided a further update to owners advising Grossarts were having a pre-start meeting with the contractors on 11 January 2024.
80. Following a pre-start meeting between Grossarts and JCJ Group on site on 11 January 2024 the Factor was advised that the contractor would not commence the works until mid-February 2024.
81. On 16 January 2024 the Factor provided a further update to owners advising that they were waiting on an update from Grossarts regarding the pre-start meeting.
82. By email dated 16 January 2024 Grossarts advised that the contractors would not be starting the works until mid-February 2024.
83. By email dated 16 January 2024 the Factor expressed concern at the start date being pushed back to mid-February.
84. On 19 January 2024 the Factor advised the owners of the delay in the commencement of the repairs on the client portal.
85. On 15 February 2024 Grossarts confirmed that repairs had commenced.
86. Grossarts provided the Factor with an update on 22 February 2024.
87. The Factor provided owners with an update on the client portal on 22 February 2024.
88. The Factor provided a further update to owners on 6 March 2024.
89. The repairs were completed in May 2024.

Reasons for Decision

90. The Factor acknowledged that they did not respond to the Applicants' Stage 1 complaint and that they were a day late in responding to the Applicants' Stage 2 complaint and they did offer the Applicants a goodwill gesture of a payment of the Applicants share of the project fee of £145.12. Some delay in responding to the Applicants enquiries could be attributed to one of the Factor's employees going on long term sick leave on 27 March 2023 and his replacement being on holiday until the beginning of April 2023. However on the whole the Factor did quite regularly update owners including the

Applicants as to progress or lack of progress by way of updates on the client portal. Nevertheless, given the failure to meet its own timescales in its written statement of services the Tribunal was satisfied that the Factor was in breach of Sections OSP 11 and 2.7 of the Code.

91. The Factor was aware of structural issues with the building prior to the problems that arose in November 2022 and were in the process of obtaining costs for carrying out repairs to the building when Glasgow City Council determined the building was unsafe and had to be evacuated. The Applicants have complained that had the Factor exercised due skill at that time they would have instructed Grossart Associates in November 2022 to commence work on the preparation of drawings and tenders for the repairs to the building and not just arrange for works to be carried out to make the building safe. Mr Wallace in his evidence said that he did not know if that could have been done or not but correspondence from Grossarts confirmed that they had in fact been involved with the contractors CBL Construction Ltd at that time and the Tribunal is therefore satisfied that Grossarts could have been instructed in advance of the building being made safe and therefore there was an unnecessary delay in instructing them to prepare the drawings and tender documents.
92. The Factor had to rely on the actions of several third parties throughout each stage of the repairs to the building. This meant that there was potential for delay at every stage that was outwith the control of the Factor. The Factor required to ingather funds from owners before instructing Grossart Associates and JCJ Group. That took for a total of about 11 weeks. Before passing the plans Glasgow City Council Building Control wished to have a site visit and thereafter sought some amendments to the plans. This added a further three weeks to the project. JCJ Group were issued with the tender documents on 23 June and submitted their quote on 31 August 2023. The other contractors had submitted their tenders by 18 August 2023. The Applicants complained that the tender documents were sent out just prior to the Glasgow trade holiday and that resulted in further delay but although that could have been avoided if Grossarts had been instructed at an earlier stage once the process had commenced in March 2023 the date for sending out the tenders was largely outwith the Factor's control.
93. It was not clear from the documents submitted or from the oral evidence at the hearing what the lead in times were for the two unsuccessful contractors but the Factor had been told by Grossarts at the beginning of September 2023 that JCJ Group lead in time was 4 weeks and owners may have based their decision to appoint them as their preferred contractor after taking that into account. Instead it transpired that the contractor was unable to start work until mid-February 2024. However the Tribunal does not consider that the Factor can be held responsible for this delay.
94. There were difficulties experienced by the Factor in obtaining updates from Grossart Associates but other than dispensing with their services and instructing another firm to replace them it would be difficult for the Factor to do much more than they did. It was apparent from the email

correspondence submitted by the Factor that they corresponded regularly with Grossarts and requested updates and made it clear that owners were frustrated and unhappy at the lack of progress. The Tribunal did not consider that it would necessarily have produced a better outcome for other Applicants to have dismissed Grossarts and employed another firm and the Tribunal has concluded that the Factor did exercise reasonable skill in its dealings with Grossarts.

95. Taking everything into account the only failure with regards to Section OSP6. of the Code and its property factors duties that the Tribunal was satisfied could be upheld was in respect of the timing of the involvement of Grossart Associates. It ought to have been apparent to the Factor that the full-scale repairs of the building were required and not just the make-safe works and therefore they ought to have instructed Grossarts at a much earlier stage than they did. Had they done so the tender documents could have been sent to contractors probably some eight weeks earlier than they were. It is certainly possible that if this had happened the works might have been completed within one year although the Tribunal is unable to conclude this for certain. Nevertheless, the Tribunal is satisfied that by delaying instructing Grossarts until after the make-safe works were completed the Factor was in breach of Section OSP6 of the Code and failed to adhere to its Written Statement of Services Section 4 and therefore failed to carry out its property factors duties.

96. The Tribunal has taken account of the Applicants claim for a financial award and the goodwill gesture made on behalf of the Factor and considers that a financial award of £500.00 is in all the circumstances appropriate.

Proposed Property Factor Enforcement Order

97. 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.

10 January 2025 Date