

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Case reference: FTS/HPC/PF/21/0079

Re:- Flat 3/2 Eastfield Road, Springburn G21 1NF

The Parties:-

**Mrs Hazel Gibson, Flat 3/2 Eastfield Road, Springburn G21 1NF
("the Applicant")**

and

**James Gibb Residential Property Factors, 65 Greendyke Street, Glasgow
G1 5PX
("the Respondent")**

Tribunal Members:

Richard Mill (legal member) and Mr Andrew Taylor (ordinary member)

Decision

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

Background

By application dated 12 December 2020, the applicant complained about the respondent breaching a number of sections of the Code and their property factor duties. The complaints under the Code, refer to sections 2.5, 5.4, 5.5, 5.6 and 6.1. The complaint in respect of the respondent's duties relates to their alleged failure to investigate and remedy the water ingress impacting upon the common stair of the property.

The application has been actively case managed by the Tribunal. No timeous response was received from the respondent and an initial Direction was issued dated

6 July 2021 seeking clarification of their position. This prompted an application to postpone by the property factor. This was granted and the initial scheduled hearing on 27 July 2021 was converted into a Case Management Discussion. The Tribunal noted the position of both parties at that hearing. A fresh hearing on the evidence was fixed to take place on 21 September 2021.

Documentation submitted into evidence

The written application was accompanied by the management documents issued by the respondent in respect of the property, together with extensive email correspondence between the parties.

The respondent lodged formal written submissions on 10 August 2021, accompanied by a number of appendices to support their position.

Hearing

The hearing took place by teleconference on 21 September 2021 at 10.00 am.

The applicant joined the teleconference hearing personally and represented her own interests. The respondent was represented by Alasdair Wallace, Operations Manager, and Lorraine Stead, Regional Director. An additional member of the Respondent's organisation, Kayleigh McLachlan, Development Manager, joined to observe the proceedings only.

The Tribunal utilised its inquisitorial function making inquiry into the applicant's complaint and the reaction of the respondent to it. Both parties were afforded the fair opportunity of giving relevant evidence and making submissions throughout. The tribunal ascertained the relevant chronology and then looked at each Code complaint in turn and then the duty complaints. Both parties were also afforded the opportunity of making concluding submissions.

The Tribunal reserved its decision.

The applicant's complaints

The applicant complains about water ingress which is affecting the common stairway on the ground level. The problem is intermittent, but has been ongoing since December 2018. The source of the difficulty is known to originate within one of the private properties in the block (Flat 1/2) but has not been remedied. The applicant believes that the respondent has delayed taking appropriate action to investigate and resolve the issue. She is concerned both about the aesthetic appearance and the damage caused to the fabric of the building. She is unhappy at the lack of communication from the respondent about the issue, the rectification of the problem, and the advancement of the corresponding insurance claim.

Findings in Fact

1. The applicant is the heritable proprietor of Flat 3/2 Eastfield Road, Springburn G21 1NF ("the property").

2. The property is on the top (third) floor of a four storey block comprising the ground floor with three additional floors. This is a modern block which is part of a small development built by Wimpey Homes in the early 1990s.
3. In terms of the Deed of Conditions for the development provision is made for the appointment of a property factor. The respondent is the appointed property factor for the development. The respondent is a registered property factor – No PF000103.
4. The respondent has issued a Written Statement of Services to the applicant and all other homeowners. The most recent version is dated January 2020. A Development Schedule has also been issued. This is dated November 2020. There are corresponding Gardening and Cleaning schedules which have also been issued.
5. There are a total of 235 residential units within the development which the respondent manages. The respondent has encountered difficulties with management of the development. There is currently £108,000 worth of debt owed to the respondent over the development. The annual factoring charge per residential unit is £117 plus VAT per annum.
6. One of the flats on the first floor of the applicant's block, Flat 1/2, was sold in late 2018. The new proprietors are known to have installed a new bathroom and kitchen. In December 2018 water damage was noted to be affecting the lower ground floor common stair area, including the service cupboard, which was noted to be coming from the ceiling area which is immediately below Flat 1/2.
7. The water ingress noted in the common stair was first reported to the respondent on 24 December 2018 by a resident other than the applicant. The respondent made attempts to call the occupants of Flat 1/2 without success. A formal Repair Order was raised by the respondent on 24 December 2018 in prompt response to the report of water ingress. The respondent instructed McGregor Property Maintenance Ltd to carry out investigations. That firm attended on two occasions over the following month and made investigations as to the cause of water ingress. No conclusion was reached.
8. On 18 March 2019 letters were issued to all homeowners in the block by the respondent advising to check plumbing for any leaks due to the water damage in the stairway. Intermittent reports of water escaping into the lower ground stairway continued.
9. In February 2020 the respondent, who had not received recent complaints about further water damage, was satisfied that there was no ongoing leak and instructed the contractor, McGregor Property Maintenance Ltd, to carry out reinstatement work. A buildings insurance claim was lodged with Allianz on 3 April 2020.

10. In October 2020 the respondent instructed a different contractor, J H Horne, to make investigations. That firm traced a water leak from the combination tank cylinder in Flat 1/2. Advice was given to the occupant. That problem was a private matter.
11. In October 2020 further reports of water ingress at the same area was reported to the respondent. Further attempts were made by the respondent to investigate. On 28 October 2020 the occupant of Flat 1/2 refused entry to the respondent's contractor McGregor Property Maintenance Ltd.
12. The water ingress problem has remained ongoing, but has been very intermittent. There are no problems for weeks or even months at a time. In April 2021 the respondent's contractor, MacGregor Property Maintenance Ltd, again made investigations after further reports were received. They were able to have direct access to Flat 1/2 at that time. The occupier provided evidence of six trace and access reports from private plumbers whom she had instructed who had failed to find any source of a leak. The investigations undertaken had included a dye test.
13. There has been a more general persistent difficulty with the lack of cooperation on the part of the owner and/or occupier of Flat 1/2. On 26 July 2021 the occupier was emailed by the respondent confirming that the buildings insurance claim is open and will cover the cost to conduct a further trace and locate exercise which, is likely now to be invasive, but the insurers will cover the reinstatement of any damage caused. It was also stipulated that in the absence of cooperation the respondent would refer the matter to Glasgow City Council to apply for an Enforcement Order.
14. The occupier of Flat 1/2 has now engaged further and the respondent instructed a fresh firm to carry out investigation work due to the failure on the part of earlier contractors to do so. Columbus Facilities Maintenance was instructed and gained access to Flat 1/2 on 7 September 2021. The leak has now been traced to the shower area in Flat 1/2. The extent and scope of the works has now been identified and this information has now been passed to Allianz Insurers to obtain approval to proceed with the necessary work which will include the removal of flooring and the shower unit.
15. The respondent has reacted to the reports of water ingress at the property made by the applicant and other homeowners. They have instructed contractors accordingly. They have failed to effectively communicate the steps which they have taken to make investigations and the difficulties which have been encountered to the applicant and other homeowners. The respondent also failed to timeously inform the applicant and other homeowners of the insurance claim made which remains open. The respondent's communication with the applicant has much improved since July 2021 which coincides with her application to the Tribunal.
16. It is unlikely that Glasgow City Council will be prepared to become involved and make any Enforcement Order. This is because the water ingress and

damage in the applicant's block is not affecting any living area and is affecting the common stair area only.

17. The respondent has a procedure in place to allow homeowners to notify them of matters requiring repair, maintenance and attention. They also have a procedure in place for submitting insurance claims on behalf of homeowners.
18. The respondent is open with homeowners about the basis upon which insurance cover is arranged on an annual basis. Communications are issued to all homeowners on an annual basis. Accessible in their online portal, the respondent makes available a Customer Guide entitled 'Communal Insurance Cover and Claims Process'.

Reasons for Decision

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

The Tribunal's decision is based upon the Tribunal's detailed findings in fact which were established on the basis of the extensive documentary and oral evidence.

The Tribunal has considered all documentary and oral evidence and made findings in fact in relation to the relevant live disputes between the parties as identified by the applicant at the hearing. It is not necessary to make findings in facts in relation to every element of the application. The failure to make more extensive findings in fact does not carry with it any assumption that the Tribunal has failed to consider the whole evidence or that the Tribunal's reasoning was based upon a consideration of only parts of the evidence.

The Tribunal firstly determined the applicant's Code complaints with reference to its primary findings.

- 2.5 "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)."

The applicant's complaint under this section of the Code is that her enquiries regarding the water ingress were not responded to timeously by the respondent. She was unaware of what was happening with regards to investigation of the water ingress and remedying the problem. She was unable to ascertain the position despite further attempts to do so by, for example telephoning the respondent's organisation. There was candid acceptance on behalf of the respondent that this section of the Code had indeed been breached. There had been a failure to communicate timeously and effectively with the applicant. The respondent submitted in mitigation that there had been a changeover in staff but further accepted that the lack of

information would have been frustrating for the applicant. In terms of the Written Statement of Services, the response time for a routine repair or notification is two working days.

- 5.4 “If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so.”

The applicant accepted in the hearing that the respondent does have a procedure in place for submitting insurance claims and for liaising with the relevant insurer. There are no issues regarding the applicant submitting an insurance claim on her own behalf. The complaint under this section of the code was not insisted upon.

- 5.5 “You must keep homeowners informed of the progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves.”

The applicant’s complaint is that she was not informed as to the making of the insurance claim timeously nor kept updated with regards to its progress. The applicant was not advised until around June 2020 of the insurance claim having been made and this was only upon repeated requests for information made by her. Full information has now been provided regarding the ongoing open claim. The applicant has acknowledged this information. She has understandably been frustrated by the lack of information and updates. Again, it was candidly accepted on behalf of the respondent that they have breached this section of the Code and failed to timeously inform the applicant of the progress of the relevant insurance claim.

- 5.6 “On request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes.”

Within the respondent’s submission and supporting documentation, the position in respect of the appointment of the insurance provider was made clear. The respondent employs the services of a broker and they, on the respondent’s behalf, tender the communal buildings insurance policy on an annual basis to ensure that the best deal is obtained for all homeowners with the best insured terms. The tender exercise is communicated to all homeowners. The applicant acknowledged this information in the oral hearing and did not insist upon her complaint under this section of the code.

- 6.1 “You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated

timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.”

The applicant accepted that the respondent does have in place procedures to allow homeowners to notify them of matters which require attention. The applicant’s complaints are again regarding the lack of communication and information from the respondent regarding the progress of the work, including estimated timescales. Once more, it was openly accepted on behalf of the respondent that this section of the Code had, indeed, been breached for the reasons which the applicant complains of.

The tribunal thereafter determined the applicant’s further complaints with reference to the assertion that the respondent has failed to comply with their property factor duties.

The applicant’s complaints regarding the respondent having failed to comply with their duties arises from the same complaints which she has regarding their breach of the Code. Her general view is that the respondent has failed to treat seriously the reports of water ingress in the common stair area of her block. She does not feel that active steps have been taken to investigate and remedy the problem. She feels that there has been a lack of importance attached to the complaint. She does not believe that sufficient individuals have attended to investigate, either from the respondent’s own organisation or by contractors acting on their behalf.

The respondent’s submission under the duty complaints was that all possible steps have, indeed, been taken by them since the matter was first reported to them. The matter has been taken seriously and all efforts made to remedy the water ingress. A Repair Order was raised as soon as the first report came in. The respondent’s representatives described the presenting water ingress as ‘unique’. The water leak has been very intermittent and, at times, it has appeared as if the leak has been fixed and matters resolved. More than one contractor has been employed by the respondent and there was a lack of clarity regarding the source of the leak. It seems that the trace of a leak to the combination water cylinder by the firm J H Horne in October 2019 was not, in fact, the singular source of the difficulty which is causing water ingress in the common stair area. This sadly led to further confusion. Significant problems have been encountered with regard to the cooperation and compliance of the occupant of Flat 1/2 in identifying the relevant issue. On the other hand, to be fair, the occupant has vouched to one of their earlier contractors that numerous plumbers have investigated the source of the problem and come to no conclusion. The originating source of the intermittent leak has been very difficult to identify.

It was submitted on behalf of the respondent that all efforts that could have been made have been made at appropriate times, notwithstanding the lack of communication and correspondence with the applicant and other home-owners. This has included the making of a relevant insurance claim which remains open.

The respondent further submitted that whilst more recently, a threat has been made to the occupant of Flat 1/2 that an Enforcement Order may be sought from Glasgow City Council, the reality is that this is most unlikely to be successful as the water damage in the applicant's block has only affected common areas and not any living space. Accordingly, any earlier such application would most likely be unsuccessful.

The Tribunal concluded, on balance, that the respondent has reacted reasonably and promptly to the reports of water ingress as they have arisen. Notwithstanding their failure to communicate adequately with the applicant, which is accepted, appropriate and proportionate measures have been taken. The problem is, regrettably, complicated and the source of the water has not been easy to detect and this is best demonstrated by the number of contractors who have visited the property and been unable to identify it.

In all of the circumstances, the Tribunal found that the respondent has complied with their property factor duties.

Conclusion

The respondent accepts the breach of sections 2.5, 5.5 and 6.1 of the Code. On the basis of the totality of the evidence and the Tribunal's primary findings in fact, these breaches are established. There is no doubt that the respondent has failed to adequately communicate with the applicant and provide her with assurances that action was being taken and, indeed, follow up with reports with the outcome of such investigations. It is understandable given the difficulty in ascertaining the source of the water leak that the matter has not been capable of resolution, but the applicant deserved the benefit of the necessary information being provided to her as to what was actually happening or not happening, and why.

The applicant ought to be financially recompensed for the respondent's breaches of the Code. In their oral submissions the respondent's representatives did not seek to argue otherwise. The Tribunal has noted that the annual management charge imposed upon the applicant is £117 plus VAT. This is a low management charge. The Tribunal concluded that it would be appropriate for the respondent to compensate the applicant to the extent of £450 which broadly equates to 3 years management charges plus VAT. The Tribunal is of the view that such sum is proportionate to the loss and harm suffered by the applicant given the anxiety which the respondent's failures have caused her.

The Tribunal otherwise found that there was no basis upon which to make any other Order against the respondent. The Tribunal noted that lessons have been learned by the respondent's failure in this particular case and that restructuring has taken place in the respondent's organisation since January 2021 which has include the installation of property assistants and the management of work under regional units. This is likely to minimise the risk of any such further breaches in the future. The Tribunal was otherwise satisfied that the respondent and all of their staff are well aware of their duties under the Code of Conduct and otherwise.

There is no Order which the Tribunal can appropriately make to ensure that all problems associated with the water leak are resolved.

Property Factor Enforcement Order (PFEO)

The Tribunal proposes to make a PFEO given the Tribunal's findings and having found that the respondent has breached sections 2.5, 5.5 and 6.1 of the Code.

The Tribunal therefore intends to make the following PFEO:

“Within 14 days of the date of service of this PFEO the respondent must issue an apology to the applicant and pay her the sum of £450 for breaching the Code”

The parties should note the Tribunal's proposal to make a PFEO and intimation of this decision complies with the requirement to give notice to the parties for the purposes of Section 19(2) of the Act. Any representations which the parties wish to make under Section 19(2)(b) of the Act (restricted to the terms of the PFEO) must reach the First-tier Tribunal for Scotland (Housing and Property Chamber) office no later than 14 days after the date of intimation of this decision to them.

Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Legal Member 

Date: 23 September 2021