



Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 (“the Act”) and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/PF/21/0327

The Parties:

Mr Robert Millar, 1 MacMillan Drive, Gourock PA19 1SW (“the homeowner”)

and

River Clyde Homes Limited, incorporated in Scotland (SC329031) and having their Registered Office at Roxburgh House, 100-112 Roxburgh Street, Greenock PA15 4JT (“the property factors”)

Property: 4A Davidson Drive, Gourock PA19 1QD (“the Property”)

Tribunal Members – George Clark (Legal Member/Chairman) and Carol Jones (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) decided that the property factors have not failed to comply with their duties in terms of Section 2.5, 6.1 and 6.9 of the Code of Conduct for Property Factors (“the Code of Conduct”) made under Section 14 of the Property Factors (Scotland) Act 2011 (“the Act”). The Tribunal also determined that the property factors have not failed to carry out the Property Factor’s duties. Accordingly, the Tribunal does not propose to make a Property Factor Enforcement Order.

Background

1. By application, received by the Tribunal on 12 February 2021, the homeowner sought a Property Factor Enforcement Order (“PFEO”) against the property factors. His complaint was that they had failed to comply with their duties under Sections 2.5, 6.1 and 6.9 of the Code of Conduct and that they had failed to carry out the Property Factor’s duties.
2. The homeowner’s complaint related to work carried out in 2010 to install external cladding to the tenement of which the Property forms part. Shortly afterwards, the homeowner discovered that the rear wall in the bedroom of the Property was stained black. He contacted the property factors, who arranged for a survey, which took place on 29 October 2010. The report stated that condensation was the most likely cause, with the Property not being properly ventilated and washing drying on the radiators. The homeowner disputed this conclusion as there had not been a problem prior to the cladding being installed. The homeowner had been advised to install an extractor fan but had been told that if that work disrupted the cladding, it would affect its 15-year guarantee.
3. The homeowner had found out that the property factors had never applied to the local authority for a Completion Certificate for the cladding work. He had emailed Mr Richard Orr, Senior Project Manager, on 21 October 2020 to ask for a copy of the Completion Certificate. Mr Orr had called him back immediately and had said that the property factors would look at installing an airex brick to alleviate the condensation. The property factors had arranged for someone from their Factoring Team to investigate. He had said that he was sure it was dampness and not condensation and that he would send the homeowner a report, but the homeowner had heard nothing following that meeting. The homeowner had then raised a complaint with the property factors, as they had not dealt with the problem and had failed to comply with their own complaints procedure by not responding to his calls and basically ignoring him. He had arranged in October 2020 to meet with the Property Services Manager, Carine Strain, who was to telephone him when she was on her way, so that he could meet her at the Property. The homeowner had not received the call and when he eventually spoke to her, she informed him that she had sent a colleague in her place but had forgotten to tell him to call the homeowner.
4. When The Property Services Manager did eventually meet with the homeowner, she and a colleague had insisted that the problem was condensation, not dampness. She had also inspected the adjoining flat, where the tenant had also been experiencing dampness in the bedroom.
5. The final date for responding to the homeowner’s Stage 2 complaint was 15 January 2021. The homeowner had received the response by email at 20.51 that

evening, stating that his complaint had been partly upheld but that the work had been completed as per the architect's specification. The property factors would attempt to remedy the lack of a Completion Certificate. The Property was still damp, and the homeowner had no way of resolving the issue himself.

6. The application was accompanied by copies of the property factors' Written Statement of Services, a Report, following a site visit, from Ramboll Building and Design and the Stage Two complaint response from the property factors, dated 15 January 2021, together with the homeowner's response, dated 19 January 2021, expressing his dissatisfaction with the outcome.
7. The homeowner contended that the property factors had failed to comply with Section 2.5 of the Code of Conduct, in that they had not responded in a prompt timescale. The homeowner had had to continually contact them for a response, He was often ignored and on one occasion when a meeting was arranged, their representative did not turn up but sent in their place someone who had failed to telephone him in advance. He also alleged a failure to comply with Section 6.1 of the Code of Conduct, saying that he had been unhappy with the survey carried out in October 2010, but had followed the property factors' instructions and ensured the Property was properly ventilated. The problem had worsened, and he had used a dehumidifier. He had been advised to install an extractor fan but had then been told that he must not disturb the cladding, as it would prejudice the warranty. The property factors were taking no responsibility and the homeowner had discovered that they had never applied for a Completion Certificate for the cladding works. Under Section 6.9 of the Code of Conduct, the homeowner expressed his belief that the contractor had provided inadequate work and the property factors had failed to pursue them to remedy the defects. They had also failed to have the work inspected to obtain a Completion Certificate.
8. The application was accepted by the Tribunal on 14 April 2021.
9. The property factors submitted written representations, which were received by the Tribunal on 11 May 2021. They advised that they had entered into further conversation with the homeowner and hoped that a satisfactory conclusion could be achieved before the date scheduled for the Hearing.
10. In relation to Section 2.5 of the Code of Conduct, they stated that they endeavour to respond to all complaints as quickly as possible and that, whilst it had been sent on the evening of the last day prior to its due date, the Stage 2 response had been sent within the timescales set out in their Written Statement of Services. As to the meeting that was due to take place on 28 October 2020, it was unfortunate that Carine Strain could not attend at the arranged time, but their technical officer Colin Campbell had attended in her place. As the homeowner had not been there, he had

left a call-back card, The property factors did not believe they had failed to comply with Section 2.5 of the Code of Conduct.

11. With regard to the complaint under Section 6.1 of the Code of Conduct, the property factors confirmed that they have a 24-hours contact centre for customers wishing to report any repairs. Upon receiving the report that there was dampness, they had instructed the Ramboll survey. Its findings confirmed that the issue affecting the homeowner's property was condensation caused by inadequate ventilation and was not in connection with the then recently fitted external wall insulation ("EWI"). The homeowner had been notified at the time that it was not an issue with the common fabric of the building and, whilst they noted that he did not agree with this assessment, they did not believe they had failed to comply with Section 6.1 of the Code of Conduct.
12. The property factors also contended that they had not failed to comply with Section 6.9 of the Code of Conduct. Contractors had been instructed to install the EWI and had done so with no sign of defects. The property factors had not, therefore, required to ask them to remedy any defects. Independent investigation commissioned by them showed no indication that the EWI was the cause of the condensation and dampness. Instead, it had indicated that the most likely cause of the issues experienced within the Property were environmental issues, such as drying clothes on radiators, along with intermittent room temperatures. There was no substantial evidence suggesting that a common issue, or an issue arising from a defect in the EWI, existed.
13. The property factors acknowledged that the Certificate of Completion had not yet been provided. This was something they would pick up with the local authority, but there was no consequential loss to the homeowner at this stage.
14. A Hearing was scheduled for 14 June 2021 but was postponed at the request of the homeowner, to allow the property factors to undertake technical investigations at the Property. The property factors had agreed to the postponement.
15. The Parties subsequently provided the Tribunal with copies of emails passing between them on 6 and 9 July 2021 and a report by ODC Ltd (Preservation Division), Glasgow dated 30 June 2021. The report concluded that there was no rising damp problem within the walls of the Property. In the emails, the property factors pointed out to the homeowner that the test samples taken by ODC had provided a negative result for moisture within the structure and that the mould growth could normally be associated with atmospheric moisture condensing on a colder wall surface. The property factors suggested the installation of internal thermal lining plasterboard to the cooler wall in the bedroom and offered to supply and install it. They were presently investigating costs but anticipated that it would cost more than £1,000.

16. The homeowner did not accept the offer to supply and install the thermal lining, as there was no guarantee that it would work, the cost seemed excessive and there would be no comeback should the problem become worse over time. The property factors had also indicated that their offer was conditional on the homeowner withdrawing his complaint to the Tribunal and the homeowner regarded this as threatening. In an email of 9 July 2021, the property factors advised the Tribunal that the homeowner had turned down their offer to install the recommended solution at no cost to the homeowner, but that they would continue to engage with him in the hope of resolving the matter to everyone's satisfaction without the need for a Hearing. On the day prior to the Hearing, the homeowner told the Tribunal that he had turned down a revised offer from the property factors. He hoped the Hearing would produce a more legally binding outcome. The revised offer, contained in an email of 25 August 2021 had stated that if the homeowner was agreeable to the property factors arranging the works, they would continue to work to find a resolution to the problem if these works were unsuccessful.

Hearing

17. A Hearing was held by means of a telephone conference call on the morning of 27 August 2021. The homeowner was present. The property factors were represented by their Senior Project Manager, Mr Richard Orr.

18. The Tribunal Chair advised the Parties that they could assume that the Tribunal Members had read and were fully conversant with their written representations and that it would not, therefore, be necessary to lead the Tribunal through that evidence in detail again.

19. With regard to his complaint under Section 2.5 of the Code of Conduct, the Tribunal Members asked the homeowner why there appeared to be no evidence of discussion between the Parties from 2010 until 2020. Mr Millar said that the Property had not been occupied on a permanent basis. It had been lived in by family and friends. He had, however, been in contact with various people at River Clyde Homes, but nothing had happened until he had raised his application to the Tribunal and Mr Orr came on board. Mr Orr said that, in an attempt to find a resolution, the property factors had taken the view that they should instruct the ODC report, in case there was a non-visible defect in the cladding. The ODC report had, as they expected, ruled that out, concluding instead that moisture was settling on the coldest wall in the bedroom, namely the non-insulated internal party wall and that thermal insulation of that wall would "even up" the distribution of moisture.

20. The homeowner said that he was concerned that he would have no comeback if the proposed solution did not work. Mr Orr conceded that the property factors could

not categorically guarantee that it would work, but they were following the advice of technical experts.

21. In relation to Section 6.1 of the Code of Conduct, the homeowner said that, to his knowledge, the property factors had never asked the contractors to come back and check their work after the issue was raised by him. He felt there was something wrong with the cladding, as he had had no issues before it was fitted. Defects might have been picked up at an inspection by the local authority, but, as no Completion Certificate had been applied for, he had no way of telling. Mr Orr said that the property factors were currently engaging with the local authority to have the Completion Certificate issued. He added that initial notes on their system indicated that the property factors had asked the contractors to inspect the building when the problem was first raised and it had been when they responded to say they were not responsible that the property factors had instructed the report from Ramboll, who inspected the Property on 29 October 2010.
22. Regarding Section 6.9 of the Code of Conduct, the homeowner raised the question of whether the cavity wall insulation should have been removed before the cladding was fitted. Mr Orr said that his understanding was that it did not have to be removed and that he was not convinced there were any defects in the work. The homeowner could not understand why it was only his and the adjoining flat that appeared to have been affected, when the cladding had been applied to 4 or 5 other buildings as well.
23. The homeowner told the Tribunal that his complaint regarding failure to carry out the property factors' duties related to their failure to respond to his Stage 1 and Stage 2 complaints within the timescales set out in the Written Statement of Services. Mr Orr said that he had apologised for the fact that the Stage 2 response had only been sent on the evening of the final day. It had escalated automatically from Stage 1 to Stage 2, as they had been unable to carry out an adequate investigation within the very short timescale allowed in Stage 1 of the procedure.
24. The Parties then left the Hearing, and the Tribunal Members then considered all the evidence, written and oral, that had been presented to them.

Findings in Fact

- (i) The homeowner is the proprietor of the property 4A Davidson Drive, Gourrock, being the westmost ground floor flat of the block of which it forms part.
- (ii) The property factors, in the course of their business, manage the common parts of the tenement. The property factors, therefore, fall within the definition of

“property factor” set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 (“the Act”).

- (iii) The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- (iv) The date of Registration of the property factors was 12 December 2012.
- (v) The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- (vi) The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber, received on 12 February 2021, under Section 17(1) of the Act.
- (vii) The concerns set out in the application have not been addressed to the homeowner’s satisfaction.
- (viii) On 14 April 2021, the Housing and Property Chamber intimated to the Parties a decision by the President of the Chamber to refer the application to a Tribunal for determination.

Reasons for Decision

25. The Tribunal considered first the homeowner’s complaint under Section 2.5 of the Code of Conduct, the relevant part of which provides as follows:

“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.”

26. The Tribunal did not uphold the homeowner’s complaint under Section 2.5 of the Code of Conduct. There was evidence to indicate that the property factors had responded promptly when the matter was first raised with them. They had arranged for the Property to be inspected and had reported the findings back to the homeowner, with recommendations regarding the need for ventilation. The homeowner had told the Tribunal that he had not been satisfied with the report and had mentioned later discussions with a number of people at River Clyde Homes, but he had provided no evidence of the content of these discussions or when they had taken place. It was for the homeowner to make his case and the Tribunal could only determine the application on the basis of the evidence before it. There was clear evidence of a significant level of engagement in the past few months and the

Tribunal decided that the evidence presented to it did not establish that the property factors had failed to comply with Section 2.5 of the Code of Conduct.

27. The Tribunal then considered the complaint under Section 6.1 of the Code of Conduct, the relevant part of which states:

“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.”

28. The Tribunal did not uphold the complaint under Section 6.1 of the Code of Conduct. The homeowner had not disputed that there was such a procedure in place. He had said that he had been unhappy with the survey carried out in October 2010 but had followed the property factors’ instructions and ensured the Property was properly ventilated. The problem had worsened, and he had used a dehumidifier. He had been advised to install an extractor fan but had then been told that he must not disturb the cladding, as it would prejudice the warranty. The property factors had taken no responsibility and the homeowner had discovered that they had never applied for a Completion Certificate for the cladding works. The property factors for their part had stated that they had acted promptly when the matter was brought to their attention, had commissioned a report and had let the homeowner know its findings and recommended that he improve the ventilation. The view of the Tribunal was that there was no evidence that the property factors had failed to inform the homeowner of progress. This was a decision made on the balance of probabilities, as the homeowner had not provided details of any communication between October 2010 and June 2020.

29. The Tribunal then then considered the complaint under Section 6.9 of the Code of Conduct, the relevant part of which states:

“You must pursue the contractor...to remedy the defects in any inadequate work,,provided.”

30. The Tribunal did not uphold the complaint under Section 6.9 of the Code of Conduct. The complaint here referred to the work done in 2010. The homeowner based his contention of defective work on the fact that there had been no condensation issue in the bedroom of the Property before the cladding was installed and that the problem must, therefore, have arisen from a defect in that work. The Tribunal was of the view that to make such a causal link was speculative at best, given the fact that investigations in October 2010 and in June 2021 had given no indication that the problem was related to the cladding works. There were no abnormal moisture readings in the walls of the Property and the two reports agreed that the issue was most likely to be atmospheric moisture, namely condensation, and was not penetrating or rising damp. The external wall of the bedroom had, in effect, been

insulated, leaving the uninsulated party wall as the coldest wall in the bedroom. There was no evidence to indicate that any defects in the 2010 work had been identified, so the Tribunal was unable to find that the property factors had had a duty to pursue the contractor. The Tribunal noted that the property factors had not applied for a Completion Certificate for the works in 2010 but, as no defects had been identified, was not prepared to speculate on the possibility that a local authority inspection in connection with issuing a Completion Certificate might have identified any defect.

31. The homeowner had also complained that the property factors had failed to carry out the property factors duties. The homeowner's argument was that they had failed to comply with the procedures set out in the Complaints Resolution portion of the Written Statement of Services, in that they had missed the deadlines for responses at Stage 1 and Stage 2 of their procedure. Mr Orr had stated that the complaint had automatically escalated to Stage 2, as there was insufficient time to investigate it within the tight timescales in Stage 1. The Stage 2 response had been sent just within the timescale set out in the Written Statement of Services. The homeowner accepted that receipt of his complaint had been acknowledged promptly.
32. The Tribunal noted that the Written Statement of Services provides that Stage 1 involves frontline resolution of issues that are straightforward and potentially easily resolved and require little or no formal investigation. The deadline for responding to this level of complaint is 5 working days. The view of the Tribunal was that this was not a Stage 1 issue. The property factors were being asked to go back to records from 2010 and significant investigation would be necessary. Stage 2 applies to complaints requiring an investigation and the deadline for responding to them is 20 working days. The Tribunal was in no doubt that the homeowner's complaint was complex and required an investigation and was satisfied that, albeit late in the day, the property factors had responded within the deadline. Accordingly, the Tribunal did not uphold the complaint that the property factors had failed to carry out the property factor's duties.
33. Having decided that the property factors had not failed to comply with the requirements imposed on them by Sections 2.5, 6.1 and 6.9 of the Code of Conduct and had not failed to carry out the property factor's duties, the Tribunal determined not to make a Property Factor Enforcement Order.
34. The Tribunal noted that the Parties are at present in communication with one another and, at the Hearing, the homeowner indicated that he was content to allow the internal thermal insulation lining to be installed, if he had legal safeguards as to what would happen if it did not solve the problem. The Tribunal noted with satisfaction that the property factors had agreed that this work should be done at no expense to the homeowner and expressed the hope that the Parties could find a form of words which would provide the homeowner with sufficient comfort that if

the proposed work did not remedy the problem, the property factors would continue to work to find a resolution to the problem, as they had stated in their email of 26 August 2021. The Tribunal would also urge the property factors to do everything they can in relation to obtaining a Completion Certificate from the local authority.

35. The Tribunal's Decision was unanimous.

Right of Appeal

In terms of Section 46 of the Tribunal (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/Chairman:

27 August 2021

George Clark