Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber)
In an Application under section 17 of the Property Factors (Scotland) Act 2011
by

David Watson, 93 City Apartments, Chapel Street, Aberdeen AB10 1SS ("the Applicant")

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

Re: Property at 93 City Apartments, Chapel Street, Aberdeen AB10 1SS ("the Property")

Chamber Ref: FTS/HPC/PF/21/1287

Tribunal Members:

John McHugh (Legal Member) and Colin Hepburn (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 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner of 93 City Apartments, Chapel Street, Aberdeen AB10 1SS (hereinafter “the Property”).

2 The Property is located within a development of flats and associated common areas known as City Apartments (hereinafter "the Development").

3 The Applicant became the owner of the Property on 19 June 2012.

4 A Deed of Conditions governs the arrangements for the sharing of costs relating to common property within the Development among the proprietors of the properties within the Development.

5 The Respondent is the property factor responsible for the management of common areas within the Development.

6 The property factor’s duties which apply to the Respondent arise from the Written Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.

7 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from 23 November 2012.

8 In 20219 there were complaints from owners of water ingress from the roof of the Development.

9 The Respondent instructed Atholls Chartered Surveyors to produce a report in relation to the condition of the roof.

10 In July 2019 Atholls reported that roof replacement was advisable.

11 Meetings of owners of properties within the Development were held on 6 August, 17 September and 25 November 2019.

12 Atholls were instructed to obtain tenders for the roof replacement.

13 Atholls recommended the instruction of a contractor, Graeme Cheyne.

14 The Development has an electric car park gate.

15 The Respondent instructed a safety assessment of the car park gates to be carried out by a contractor, Beatties in early 2020.

16 It was identified that works were required to the gate and Beatties quoted for those works.

17 The Respondent recommend to the owners that Beatties should carry out the works.

18 The Respondent did not seek alternative tenders.

19 The Applicant has, by his correspondence, including by his emails of 16 September 2020 and 17 January 2021, notified the Respondent of the reasons why he considers the Respondent has failed to carry out its property factor’s duties and its obligations to comply with its duties under section 14 of the 2011 Act.

20 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at by telephone conference on 17 January 2022.
The Applicant was present at the hearing.

The Respondent was represented at the hearing by its Suzanne Cameron and David Reid.

No other witnesses were called by either party.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the 2017 Regulations".

The Respondent became a Registered Property Factor on 23 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included a Deed of Conditions by Scotia Homes Limited registered 9 September 2002, which we refer to as "the Deed of Conditions" and the Respondent's Written Statement of Services Issue 10 dated January 2020 which we refer to as "the Written Statement of Services".

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Written Statement of Services is relied upon in the Application as a source of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant complains of breaches of Sections: 1; 2.1; 6.3 and 6.9 of the Code.

The elements of the Code relied upon in the application provide:

"SECTION 1: WRITTEN STATEMENT OF SERVICES

You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code.

You must provide the written statement:

- *to any new homeowners within four weeks of agreeing to provide services to them;*
- *to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage;*
- *to existing homeowners within one year of initial registration as a property factor. However, you must supply the full written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies);*
- *to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement.*

1.1a For situations where the land is owned by the group of homeowners

The written statement should set out:

A. Authority to Act

a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;
b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

B. Services Provided

c. the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service);
d. the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified;

C. Financial and Charging Arrangements

e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;
f. what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;
g. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);
h. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);
i. any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);
j. how often you will bill homeowners and by what method they will receive their bills;
k. how you will collect payments, including timescales and methods (stating any

choices available).Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements

l. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your in-house complaints handling procedure (see Section 7: Complaints resolution);
m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;
n. your procedures and timescales for response when dealing with telephone enquiries;

E. Declaration of Interest

o. a declaration of any financial or other interests (for example, as a homeowner or lettings agent) in the land to be managed or maintained;

F. How to End the Arrangement

p. clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination…

…SECTION 2: COMMUNICATION AND CONSULTATION

2.1 You must not provide information which is misleading or false.…

…SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE…

… *6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff…*

…6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor….

The Matters in Dispute

The Applicant complains in relation to the following issues:

(1) Roof Repairs.

(2) Gate Repairs.

We deal with these issues below.

1 Roof Repairs

Background

Although the Applicant's complaints are made on an issue by issue approach and related to specific breaches of the Code, it should be understood that his overarching concern is that the Respondent may have engaged in a course of conduct to with a view to having the roof works supervised and carried out by its preferred suppliers, Atholls and Graeme W Cheyne.

The Applicant complains about the communications received from the Respondent regarding the condition of the roof and the need for its replacement.

The Respondent instructed Atholls Chartered Surveyors to carry out a survey of the roof. Atholls issued a report in July 2019 which recommended roof replacement.

There were three owners' meetings at which the roof repairs were discussed.

The first meeting took place on 6 August 2019.

The second meeting took place on 17 September 2019

The third meeting took place on 25 November 2019. Graeme Cheyne was present for part of this meeting.

After the third meeting, the Respondent instructed Atholls to obtain tenders for the works. Atholls completed that exercise and in September 2020 issued a report recommending that the contractor, Graeme W Cheyne should be appointed.

The Issues

A) The Applicant is sceptical about the need for roof replacement as he believes that no owners had complained of water ingress.

The Applicant had questioned the Respondent about why the roof inspection had been necessary. The Respondent advised the Applicant in its letter of 1 October 2020 that the request had been made by the Residents Committee. The Applicant had since found out that the Respondent had emailed Jeanette Forbes, the Chair of the Residents' Committee on 8 April 2019. In that email, it had been the Respondent who had advised Ms Forbes of issues with the roof and recommended that the roof survey be carried out by Atholls. In the circumstances, the Applicant considers that

the information provided to him by the Respondent was misleading as the instigator of the roof report had been the Respondent rather than the Residents Committee.

The Respondent has provided a copy of its correspondence with the Chairperson of the Residents Committee. While it may be true that the original suggestion to instruct Atholls to produce a report came from the Respondent, it is equally true that the request to do so came from the Residents Committee. We therefore do not identify a breach of Code Section 2.1 in this regard.

B) The Applicant complains that he was given false information regarding whether Atholls had been appointed as project manager for the roofing works. In its response dated 30 September to his complaint of 16 September 2020, the Respondent had stated that Atholls was so appointed. This information was offered as the reason for the instruction of Graeme W Cheyne (a contractor who the Applicant did not wish to use) to provide a quote. In response to his complaint of 17 January 2021, the Respondent had advised that Atholls had not been appointed as project manager. The Respondent has issued two directly contradictory statements and there is no explanation for that. In the circumstances, we find there to have been a breach of Code Section 2.1.

C) The Applicant complains that he was advised by the Respondent that there had been difficulty in obtaining estimates for the roof works as contractors had requested a bill of quantities. The background to this was that the owners had instructed that quotations should be sought but that those invited to quote should not be given sight of the cost estimate contained in the Atholls report as it might influence their approach to pricing. There had however been no issue with them seeing the rest of the Atholls report.

The Applicant notes that in response to his request to evidence the demand by contractors for bills of quantities, none has been forthcoming. He observes that the Atholls report minus the cost estimate should have been sufficient for contractors to price the job. The Respondent accepts that it can produce no requests by contractors for a bill of quantities but states that contractors found it difficult to quote from roof plans alone since the Respondent had given them neither a bill of quantities nor a copy of the Atholls report (the Respondent wrongly believing that the whole Atholls report, as opposed to only part of it, was to have been withheld from the contractors being invited to tender).

The Tribunal finds it credible that contractors would have found it difficult to tender without the benefit of the Atholls report and so accepts the evidence of the Respondent that contractors did ask for a bill of quantities and that there has been no breach of Code Section 2.1. The Tribunal, however, notes that the Respondent seems to have fallen into error in the process by considering that it could not have provided the Atholls report (with prices redacted) to contractors being invited to tender.

D) The Applicant complains that at the November 2019 meeting Mr Cheyne of Atholls and Graeme Cheyne were in attendance. The meeting was advised by those gentlemen that an estimate from City Roofing did not include the cost of scaffolding. This information was wrong. Graeme Cheyne also advised the meeting that City Roofing was "about to go bust".

Although both Kenny and Graeme Cheyne were apparently invited by the Respondent to the meeting by the Respondent, the Tribunal is of the view that any comments which they made, even if false or misleading, may not be attributed to the Respondent. Messrs Cheyne were not employees, agents or representatives of the Respondent and so the Respondent is not responsible for their words and there is therefore no breach of the Code.

E) The Respondent complains that in its communication dated 1 October 2019 the Respondent had advised him that a guarantee from the roofing supplier, Marley would only be available if a Project Manager was appointed via a Quantity Surveyor. The Applicant has obtained an email from Marley which contradicts the Respondent's advice.

The Respondent advises that a representative from Marley had provided this advice to the Respondent at a site meeting and that that was the reason this information was provided to the Applicant. In the circumstances, we do not identify any intention to mislead or any recklessness on the part of the Respondent as to the accuracy of the information which they had provided to the Applicant. We accept that the Respondent relied upon what it had been told by the Marley representative which seems reasonable. In the circumstances, we find there to have been no breach of Code Section 2.1.

F) The Applicant complains that the Respondent sought to apply £4126.09 from the building's sinking fund towards the cost of the roof repairs. By email of 4 December 2019, the Respondent had indicated that the Residents Committee had been asked to approve this and that it was appropriate to take instruction from the Committee.

Again, the Applicant complains that the origin of the suggestion was an email by the Respondent to the Committee Chair, Ms Forbes, and not a request by the Residents Committee and so the information provided was misleading. It is correct that the original suggestion appears to have come from the Respondent in its Susan Ryrie's email of 27 November 2019 to Ms Forbes. As previously, however, it appears to be true that the Residents Committee did agree to this course and so we do not consider there to have been a breach of Code Section 2.1.

G) The Applicant complains that the roof works quotation by Graeme Cheyne increased significantly (by approximately £33,000) and that the Respondent initially explained this by reference to general cost increases related to COVID but later confirmed that COVID was not a factor. In its complaint response of 1 October 2020 it was said: "*the original costs were estimated and with COVID there has been*

increases on materials due to supply and demand." In the Respondent's response to the Applicant's complaint dated 17 January 2021 it is said by the Respondent that its representatives had confirmed at a meeting that COVID was not responsible for the cost increase. The two statements appear contradictory and there is no explanation for that. The Applicant should have been entitled to expect an accurate response to his complaints. We find the making of the statement that COVID was a factor in the price increase to have been a breach of Code Section 2.1.

H) The Applicant complains that the Respondent has issued demands to owners for their share of the cost of the roof repairs but that doing so was misleading as no sums were due because the owners had not authorised the carrying out of those works. The Respondent had issued with its letter of 1 October 2020 what it described as an invoice for the Applicant's share of the works although it is clear from the document itself and the covering letter that it refers to "advance funding" and it is stated that the works cannot proceed without payment being received. The Respondent sent a further similar letter on 20 January 2021.

The Applicant notes that the Respondent has advised that it is in receipt of legal advice regarding owners' liability. He was concerned that owners in receipt of these letters might consider that they had a liability to pay the amounts requested when in fact the owners had not voted to complete the works. The Tribunal considers that there would be some potential for owners receiving the Respondent's letters to be confused. However, given the history of meetings in which owners had been involved, it should have been clear to them what the current status of agreement (or otherwise) among the body of owners was. The Respondent was entitled to rely upon the owners being aware of the position and so we do not consider that the communications requesting payment were false or misleading in terms of Code Section 2.1.

I) The Applicant also complains of a breach of Code section 6.3 in respect of the failure to put the Atholls roof report and the roof works out to tender. As regards the Atholls report, the Respondent has confirmed that there was a reason to choose that particular firm to produce a report on the condition of the roof. That reason was Atholls previous experience of working on the building.

As regards the roof works themselves, the Atholls report had estimated that these might cost around £165,500 and that a market test should be carried out with contractors to establish their prices. Tenders had been sought from three contractors. However, as noted above the full Atholls report including the section in which they gave an estimate for the works, was sent to the tenderers, leading to understandable concerns on the part of the owners present at the meeting of 17 September 2019. It was agreed that three new tenders would be sought with those invited to tender receiving the Atholls report minus the price estimate section.

At the 25 November 2019 meeting, it was noted that it had not been possible to obtain tenders and it was agreed that Atholls would be asked to carry out a tendering process and that all owners would be invoiced £6600 each being the expected likely share per property in order to allow the works to proceed quickly once a successful

tenderer had been identified. The result of the tender process was reported to owners by the Respondent's letter of 8 September 2020 which identified Graeme W Cheyne as the recommended contractor and requested payment from owners.

It therefore appears to the Tribunal that the Respondent has provided an adequate reason for not tendering for the appointment of a surveyor to prepare the original report. It also appears that a tender exercise was, in fact, carried out for the roof works and so there is no breach of Code Section 6.3.

J) The Applicant complains about the fact that no steps have been taken to pursue those who have worked on the roof previously in respect of their apparent poor workmanship contrary to Code Section 6.9. In particular, he highlights the advice from Atholls and Cheyne that previous repairs have been inadequate and so considers that the Respondent should have pursued previous contractors who have carried out repairs.

On the basis of the available material, the Tribunal cannot see that there is evidence of a particular failed repair by a particular contractor having been identified and which would provide an obvious basis upon which the Respondent could be expected to take action. It appears simply that general assertions of inadequacy had been made some considerable time after any such repairs had been carried out. In any event, the Respondent has observed that recent repairs were only temporary in nature. The Tribunal does not identify any breach of the Code in respect of the Respondent's failure to pursue any previous roofing contractors.

K) The Applicant also complains that the Respondent has refused to send an email to the previous building insurers or to the original developer, Scotia Homes. The Respondent advises that the Development was completed in 2007 and that if there are construction or design defects in the building, they do not fall within its remit and are a matter for the owners to pursue directly. The Respondent has produced the advice of its insurance brokers dated 27 January 2021 which indicates that they could see no basis for an insurance claim.

We accept the Respondent's position and do not find any breach of the Code in this respect.

2 Gate Repairs

The Respondent instructed a safety assessment of the car park gates to be carried out by a contractor, Beatties in early 2020.

The Applicant complains of a breach of Code Section 2.1 in that the communications from the Respondent were misleading because they implied that an inspection was required because of recently changed health and safety rules. The Respondent's letter of 26 June 2020 referred to "*current Health and Safety guidelines*" and the email of 3 December 2020 referred to "new" health and safety guidelines.

He complains that there were, in fact, no new regulations.

The Respondent has confirmed that the dangers of injury from gates had been highlighted by reports of an accident involving a child elsewhere. This had led to Mr Reid issuing advice to all of the Respondent's property managers that they should, as a priority, have inspections carried out of all powered gates present on properties which they managed. It is accepted by the Respondent that there was no new guidance or law.

In the circumstances, the Tribunal considers that the wording of the Respondent was careless in that it suggested there was a new specific health and safety position. In fact, it was the Respondent learning of the potential danger relating to powered gates which had caused the Respondent to adopt a new policy to have the Development's gates inspected as a priority. However, the Tribunal considers the point a minor one and does not consider the communications to be false or misleading. We find there not to have been a breach of Code Section 2.1 in this regard.

The Applicant also complains of a breach of Code Section 6.3 in respect of the failure to put the gate work out to tender. The Respondent accepts that no other tenders were sought. It explains that the initial risk assessment carried out by Beatties identified the works which were required. The Respondent received a quotation from Beatties to carry out the works which quotation it considered reasonable and so it invited the owners to agree to carry out the work on that basis. The Respondent thought that it was reasonable not to invite further tenders as it thought that there might be additional cost in any other contractor carrying out its own assessment.

The Respondent's letter to owners dated 26 June 2020 however advised that they had instructed Beatties because they had been unable to obtain quotations from alternative contractors because of lock down restrictions (we say more about this below).

We do not consider that the failure to invite other tenders was necessarily a breach of the Code. The obligation under 6.3 is for the Respondent to explain why it did not seek alternative tenders. It has offered explanations above which would appear to be capable of meeting the obligation under Section 6.3.

In addition, the Applicant identifies that the Respondent's Written Statement of Services contains an obligation to seek three tenders. In fact, we note that Clause 4.9.2 of the Statement contains an obligation "*to seek up to three quotations*" for

works beyond its delegated authority and so having only sought one is not a breach of this clause.

In a related complaint, the Applicant complains of a breach of Code Section 2.1 in respect that the Respondent had advised in its letter of 26 June 2020 that it had been unable to obtain quotations from alternative contractors because of lock down restrictions whereas in the complaint response the Respondent states that the works were carried out prior to the implementation of the lockdown. There is evidently a tension arising out of the fact that the Respondent has given different explanations for the failure to seek alternative quotations. The letter of 26 June 2020 by referring to the fact that the Respondent *"[has] not been able to obtain any further costs due to the lock down restrictions*" creates the clear impression that such other quotations had been sought – not that the Respondent had decided not to seek them for other reasons. The letter is therefore misleading and we find there to have been a breach of Code Section 2.1.

The Applicant further complains that the Respondent has failed in its duties to carry out regular maintenance of the car park gate. It was accepted by the Respondent that regular car park gate maintenance was something which had been overlooked in its original specification so that servicing had not been carried out. The Respondent's duty under its Written Statement of Services was to administer the maintenance and repair of the common parts of the Development and by excluding the car park gates from maintenance it has failed in its property factor's duties.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

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.

JOHN M MCHUGH

CHAIRMAN

DATE: 23 February 2022