Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under Section 26 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules)' in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref:FTS/HPC/PF/21/1547

10 Benview Avenue, Port Glasgow, PA14 5SJ ('the Property')

The Parties:

James Stewart residing at 10 Benview Avenue, Port Glasgow, PA14 5SJ ('the Homeowner')

River Clyde Homes, Clyde View, 22 Pottery Street, Greenock, PA15 2UZ ('the Factor)

Committee members:

Jacqui Taylor (Chairperson) and Andrew Murray (Ordinary Member).

Decision of the Tribunal

The Tribunal determines that the Factor has not failed to comply with to comply with sections 2.1, 2.2 and 6.4 of the Code of Conduct and also has not failed to comply with the Property Factor duties specified in the application.

The decision is unanimous.

Background

1. The Homeowner purchased his property 10 Benview Avenue, Port Glasgow, PA14 5SJ on 15th December 1991. The Property is top floor flat in a block of six flats.

2. River Clyde Homes took over the factoring of the development in 2007.

3. River Clyde Homes were registered as a property factor on 12th December 2012.

4. By application dated 25th June 2021 the Homeowner applied to the Tribunal for a determination that the Factor had failed to comply with the Property Factor's

duties and the following sections of the Property Factor Code of Conduct ('The Code'):

- Section 2: Communications and Consultation.

  Sections 2.1 & 2.2

- Section 6: Carrying out Repairs and Maintenance.

  Sections 6.4

4. The application had been notified to the Factor by letters send by recorded delivery post on 24th June 2021.

5. By Notice of Acceptance by Martin McAllister, Convener of the Tribunal, dated 11th August 2021, he intimated that he had decided to refer the application (which application paperwork comprises documents received between 28th June 2021 and 21st July 2021) to a Tribunal.

6. An oral conference call hearing by conference call took place in respect of the application on 19th October 2021.

The Homeowner attended on his own behalf.

The Factor was represented by Richard Orr, senior project manager of River Clyde Homes.

6.1 Preliminary Matters

6.1.1The Homeowner had submitted written representations, including photographs the day before the hearing on 18th October 2021. The Homeowner clarified that his written representations were not seeking to amend the original application but were confirming that he wished to proceed with his application to the Tribunal. Mr Orr confirmed that he had received the written representations but had not had an opportunity to consider them. He had looked at the photographs. In the circumstances he had no objection to the photographs being accepted but he would object to the written representations being accepted.

The Tribunal acknowledged that the written representations had not been submitted to the Tribunal in terms of the Tribunal rules and determined that they could not accept the written representations which had been received on Monday 18th October 2021 but they would allow the photographs to be accepted.

6.1.2 As a matter of fact, accepted by the Tribunal, the parties acknowledged that the asbestos in the Property referred to in the application is situated in the soffits of the building 2-12 Benview Avenue, Port Glasgow and the soffits are a common part of that building.

6.1.3 The details of the application and the parties' written and oral representations are as follows:

Section 2: Communications and Consultation.

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

The Homeowner's First complaint:

The Factor's letter responding to the Homeowner's complaint dated 2nd April 2021 refers to the Factor acting as agent for the co- proprietors and he believes this reference to be misleading or false as it creates ambiguity and lack of transparency.

The Factor's response:

Describing the factor as an agent working on behalf of owners is a fair description of what a factor does i.e a factor makes decisions and takes actions on behalf of owners in a block. A definition of 'agent' in the dictionary is 'a person who acts on behalf of another person or group.' It was necessary to delineate owners' responsibilities in line with the title deeds and River Clyde Homes' responsibilities as factor.

The Tribunal's Decision:

The Tribunal determined that it is not misleading or false for the Factor to refer to themselves as agent of the homeowners. A factor is, as a matter of law, an agent of the homeowners they act for.

The Homeowner's Second complaint:

Part 3 Paragraph 3 of the Factor's letter dated 2nd April 2021 is misleading and false. That paragraph states:

'In 2013 we offered owners the opportunity to take part in asbestos removal and this was rejected. Since then and prior to your recent request, we have not received any requests for works of this nature or relating to the roof in the interim period.'

The Homeowner stated that this statement is misleading, false and a gross misrepresentation of the works proposed for the property 2-12 Benview Avenue. He also advised that he had phoned the Factors on several occasions asking for updates. He also explained that as part of the Scope of Works presented to the Homeowner in 2013 the Factor had endeavored to playdown the existence of asbestos in the Property when they stated ' there was a slight possibility of asbestos in common aspects of the building'. He submitted that this wording virtually denies the existence of asbestos in the Property and is false and misleading.

The Factor's response:

The correspondence in 2013 concerned the SHQS programme. In the cost summary dated 4th December 2013 they had referenced the possibility of asbestos content which they knew to be commonplace in buildings of this age and they advised homeowners that there would be a charge for its removal should that be necessary. Many years later following the rejection of the works they carried out reactive maintenance following inspection of the soffits on 27th August 2020 which confirmed the presence of asbestos. Had they received a majority approval for the SHQS works in 2013 they would have confirmed the presence of asbestos in the soffits and charged owners accordingly for the works to remove the content at that time. The only difference is that then this work would have been a part of a larger program of works, compared with the much lower scale works as is required now.

Mr Orr explained that the letter of 4th December 2013 was from Bernard Singleton, a factoring officer employed by the Factor. The letter was not intended to mislead or to dissuade homeowners to proceed with the proposed works. It simply indicated that there may be asbestos in the Property.

The Tribunal's Decision:

The Tribunal acknowledged that an asbestos survey had not been carried out to the Property when the letter from Bernard Singleton dated 4th December 2013 had been sent to the Homeowner and consequently the Factor was not in a position to state categorically if there was asbestos in the Property. The Tribunal determined that the statement 'there was a slight possibility of asbestos in common aspects of the building' was not a deliberate act by the Factor to provide information that was misleading or false.

The Homeowner's Third complaint:

The 2013 offer of works was correspondence that virtually denied the existence of asbestos in the Property rather than being an offer to remove asbestos and consequently it was false and misleading. As such he believes that the communication was a failure on the part of the Factor to abide by the legal requirement to inform factored owners of the presence and extent of asbestos in their property. He believes that the 2013 offer of works is false and misleading.

The Factor's response:

The Factor has no such legal requirement. Before purchasing a property owners are responsible for carrying out their own due diligence and satisfying themselves via external evidence such as surveys, home reports etc that the property they intend to purchase is in an acceptable condition including the existence (or not) of asbestos.

In their Written Statement of Services the Factors do not list advising owners of asbestos content as part of their core services.

The Tribunal's Decision:

The Tribunal find as a matter of fact that in 2013 an asbestos survey had not been carried out to the Property and consequently the Factor was unable to confirm or deny the existence of asbestos in the common parts of the Property. The Scope of works issued by the Factor with their letter dated 4th December 2013 explained that they had included a small provisional allowance for the slight possibility of common aspects of the building requiring the specialist removal of asbestos bearing materials and for replacement and treatment to rotted roof timbers and they stressed that the works may not be required and if they were not required no charge would be payable. They also explained that due to the age of the Property it was prudent to make allowance until close and detailed inspection was carried out.

The Tribunal determined that the statement that there was a slight possibility that common aspects of the building may require specialist removal of asbestos was not false or misleading.

The Homeowner's Fourth complaint:

The Factor, in their response to the Homeowner's claim, states that they have not had any correspondence from the Homeowner in the interim period from 2013 until now of any concerns they had regarding asbestos. This is incorrect as the Homeowner recalled phoning the Factor in 2018 and 2019 and asking what they were doing about the asbestos. He was advised that they had no plans. Another time he called the Factors and was advised that they had a policy of remove or contain asbestos.

The Factor's response:

The Factor's letter dated 2nd April 2021 did not state that they had not had any correspondence from the Homeowner from 2013 until now, what the letter stated was that 'Since then and prior to your recent request, we have not received any requests for works of this nature or relating to the roof in the interim period.' It is not the case that we have had a specific request for works to remove asbestos from the property, such as those proposed as part of the SHQS works in 2013.

In response to enquiries about the Property and on the subject of Asbestos we have advised that 'if left undisturbed, said content does not pose a risk to residents. We would not, as a matter of course, instruct works to remove asbestos content from the common parts where there was no requirement to do so as this would result in unnecessary costs for owners. This is standard practice with regards to asbestos management.'

The Tribunal's Decision:

The Tribunal accepted the evidence of the Homeowner that he had called the Factor in 2018 and 2019 and enquired about the asbestos works. However, the Tribunal determined that these phone calls did not amount to work requests and consequently the Tribunal found that the Factor's statement 'Since then and prior to your recent request, we have not received any requests for works of this nature or relating to the roof in the interim period.' was not false or misleading.

The Homeowner's Fifth complaint:

The Factor's statement that they were not able to classify the work required to the roof of the Property as an emergency and that the asbestos had been classified as 'very low risk' was false or misleading. He is able to view the soffits from the windows of his Property and was able to see the asbestos to be breaking down. He referred the Tribunal to photographs of the soffits that he had provided which showed that the exposed soffit with a very worn paint finish.

The Factor's response:

The classification of the asbestos content as 'very low risk' was the assessment of the Factor's qualified asbestos contractor. The asbestos report dated 27th August 2020 does not support the Homeowner's view that the asbestos content presents an emergency for residents that requires immediate action.

The Tribunal's Decision:

The Tribunal had been provided with a copy of the Asbestos report by Life Environmental Services in relation to their inspection dated 27th August 2020 which stated that the insulating board had been examined and the risk coding was Low. The Tribunal determined that the statement by the Factor that they were not able to classify the work required to the roof of the Property as an emergency and that the asbestos had been classified as 'very low risk' was not false or misleading as it corresponded with the terms of the said report dated 27th August 2020.

The Homeowner's Sixth complaint:

The Homeowner was concerned that in March 2021 the Factor's staff entered on top of the roof of the Property to carry out cleaning of guttering. He was concerned that heavy vibration caused by men working on the roof could have disturbed asbestos and caused asbestos to become airborne inside the Property via the attic space. This method of cleaning the gutters has caused him alarm for years and demonstrates that the Factor is not taking the Homeowners complaints seriously.

The Factor's response:

The Factor has an asbestos register. They also have an asbestos plan to remove the asbestos by the end of the year. Mr Orr explained that he does not consider it to be fair to suggest that the Factor does not take the Homeowner's complaint seriously.

The Tribunal's Decision:

The Tribunal found that this complaint does not fall within section 2.1 of the Code of Conduct.

2.2: 'You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that they may take legal action).

The Homeowner's complaint:

The Homeowner explained that his property has been affected by flooding from the roof on at least three occasions. He considered that the Factor's workmen intimidated him by coming to his Property on at least three occasions asking the Homeowner what he wants to be done in relation to the flooding.

The Factor's response:

Mr Orr explained that he did not consider this complaint to be part of the Homeowner's original application. He emphasized that River Clyde Homes provide a reactive repairs service as detailed in their Written Statement of Services. They do not attend to repairs within properties owned by individual owners. They would only attend to common repairs.

The Tribunal's Decision:

The Tribunal determined that the Homeowner's complaint did not form part of his original application and this complaint had not been notified to the Factor and consequently they were unable to consider the complaint that the Factor had breached section 2.2 of the Code of Conduct.

6.4:'If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.'

The Homeowner's complaint:

The Homeowner stated that proper cyclical work has not been carried out to the roof of the Property. The roof has only been repaired when it has been damaged and consequently the Factor has failed to comply with section 6.4 of the Code of

Conduct. He referred the Tribunal to the letter from Mr Singleton to the Homeowner dated 26th March 2014. The letter states:

'Participation SHQS Improvement Programme

You may recall I wrote to you in November 2013 seeking interest in participating in a capital works programme to comply with Scottish Quality Housing Standard. I have had a number of conversations with owners over recent months regarding our proposals and can report that to date there is insufficient support for our proposals as the project stands.

Following consultation with my colleagues in the Investment Team, River Clyde Homes have decided not to proceed with the programme of works until a majority of owners (including River Clyde Homes) vote in favour. The blocks will now be classed as being put back in abeyance and will be revisited at some point in the future.' He also referred the Tribunal to section 3.2 of the Factor's written statement of services which states:

'Homefact deals with Responsive, Cyclical and Investment repairs and maintenance on behalf of factored owners.'

The Factor's response:

Mr Orr explained that the Factor's service provision did not change after Mr Singleton's letter of 26th March 2014. The Factor's core services do not include periodic property inspections and/ or a planned programme of cyclical maintenance. Therefore section 6.4 of the Code of Conduct does not apply. The Factor provides a reactive repairs service to the homeowners. They do not provide any cyclical repairs such as gutter cleaning or stair cleaning. If the owners of Benview Avenue wish to change the service provision to include cyclical repairs they would have to instruct the Factor that this change was required and the Factor would provide the homeowners with a costing.

The Tribunal's Decision:

The Tribunal accepted Mr Orr's evidence that the core service agreed with the Homeowner does not include periodic property inspections or a planned programme of cyclical maintenance and accordingly the Tribunal determined that Section 6.4 of the Code of Conduct does not apply to the services provided by the Factor to the Homeowner.

Property Factor Duties

The Homeowner's complaint:

The duty on the Factor to manage asbestos is laid out in the Control of Asbestos Regulations 2012, the title deeds, the Factor's written statement of services, the tenement (Scotland) Act, the Health and Safety at work Act, the Property Factor

(Scotland) Act and all other relevant legislation. The Factor has failed to manage asbestos in the Homeowner's Property and failed to warn the Homeowner of asbestos in the Homeowner's Property potentially exposing the Homeowner to asbestos fibres by carrying out work on material they assume contains asbestos without warning the Homeowner or taking steps for the Homeowner's protection. The Factor has failed to implement and has breached their duty to maintain the Homeowner's Property.

The Homeowner also explained that in his opinion the failure of the Factor to carryout cyclical maintenance was a breach of the title deeds and the Tenement (Scotland) Act.

The Factor's response:

Mr Orr advised that the Factor has complied with the joint obligation the Factor has, along with the property owners, to comply with the provisions in the Control of Asbestos Regulations 2012. The Factor has had an Asbestos survey carried out, they have an Asbestos Plan and they are now proceeding to obtain the consent of the owners to instruct works to have the asbestos removed. He did not consider the Tenement (Scotland) Act to apply to the Property and as far as he was aware the Factor complied with the obligation on them in terms of the Health and Safety legislation.

The Tribunal's Decision:

The Control of Asbestos Regulations 2012 ('The Regulations') imposes a legal duty on the 'Duty Holder' to manage the risks from asbestos in non-domestic premises.

Regulation 4(1)(a) defines a Duty Holder as 'every person who has, by virtue of a contract or tenancy, an obligation of any extent in relation to the maintenance or repair of the property defined.

The Tribunal determined that as the Factor has a contract with the Homeowner in relation to the maintenance of the Property and as the Homeowner is the owner of the Property both the Factor and the Homeowner are Duty Holders in terms of The Regulations.

The legal duty under the regulations applies to commercial properties and the 'common parts' of multi-occupancy domestic premises. This obligation applies to the common parts of the property 2 - 12 Benview Avenue, Port Glasgow. The soffits are included within the common parts as the Land Certificate of the Property (title number REN68629) defines the common parts as including the roof and as a matter of fact the soffits are part of the roof.

'The duties contained within the regulations include:-

a. Taking reasonable steps to find materials likely to contain asbestos.

b. Assessing the risk of anyone being exposed to asbestos from these materials.

c. Making a written record of the location and condition of Asbestos Containing Materials (ACMs) and presumed ACMs, and keep it up to date (the management survey).

d. Repair or remove any material that contains or is presumed to contain asbestos, if necessary because of its location, condition or the likelihood of it being disturbed.

e. Prepare and put into effect an asbestos management plan (AMP) to manage exposure risk and ensure that:

f. information on the location and condition of ACMs is given to people who may disturb them during work activities

g. any material known or presumed to contain asbestos is kept in a good state of repair the condition of known and presumed ACMs can be monitored and

h. the AMP and the arrangements made to put it in place can be reviewed and monitored.

The Tribunal determine that the Factor is complying with these duties as the Factor obtained an Asbestos survey from Life Environmental Services dated 27th August 2020 which states that the soffits contain asbestos and categorised the risk as level Low; the survey recommended that remedial work should be carried out to repair and seal the soffits; the Factor had prepared an Asbestos Management Plan dated 29th January 2021 which identified the works required and the Factor had written to the owners of 2-12 Benview Avenue, Port Glasgow on 27th August 2021 advising that works need to be carried out to remove the asbestos containing soffits, they provided costings and sought approval to proceed.

Section 4 of the Health and Safety at Work Act 1974 places a duty on a party that controls a building to ensure that the premises (including asbestos) is safe and present no risks to health. The Tribunal determine that the said Asbestos survey from Life Environmental Services dated 27th August 2020 which states that the soffits contain asbestos and categorized the risk as level Low is evidence that this duty has been complied with.

The Tribunal determined that the Factor was not under a duty to repair in terms of the Tenement (Scotland) Act as the title deeds of the Property include provision for common repairs at clause 10 of Burden writ 4 being the Disposition by Inverclyde District Council registered 5th December 1991.

The Tribunal also determined that as the Homeowner did not specify particular breaches of the title deeds or the the Factor's written statement of services they were unable to make a determination on these alleged breaches.

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.

Signed ……..Date 20th October 2021

Chairperson