



Decision

of

the Housing and Property Chamber of the First-tier Tribunal for Scotland

(Hereinafter referred to as "the Tribunal")

Under Section 44(1)(a) and (c) of the Tribunals (Scotland) Act 2014 and Rules 39(5) and 18(1)(b) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure contained in the schedule to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017

Chamber Ref: FTS/HPC/PF/17/0353

Property at 18 Broom Drive, Clydebank G81 3HY ("the Property")

The Parties:-

Myra Martin, 43 Kirk Crescent, Old Kilpatrick, G60 5NJ ("the Applicant")

West Dunbartonshire Council, Regeneration, Environment & Growth, Council Offices, Garshake Road, Dumbarton G82 3PU ("the Respondents")

Tribunal Members:-

David Bartos - Chairperson, Legal member
Ann MacDonald - Ordinary member

NOTICE TO THE PARTIES

The Tribunal having considered the Respondents' application for review and their response to the Tribunal's provisional views on said application, has decided:

- (1) to correct the address of the Property as set out in the proposed property factor enforcement order dated 5 January 2018; and
- (2) otherwise to take no action in relation to its decision of 5 January 2018.

Note on Respondents' grounds of review (taking account of Respondents' response):

- a. With regard to paragraph (1) of the grounds, the clerical error is accepted and an amended proposed order accompanies this decision on review;
- b. With regard to paragraph (2), the Tribunal would have no difficulty with the offset of the damages of £ 750 against the any sum due by the Applicant under the invoice of 27 January 2017 after allowance of the credit note of £ 1076.32. However this is something which arises once any appeal process against the decision of 5 January 2018 has been completed;
- c. With regard to paragraph (3) damages (compensation) are awarded to put the innocent party back into the position it would have been in had there been no breach. Had there been no breach (and repairs rather than replacement carried out), the Tribunal found it likely that the figure of £ 1180.39 would have been charged by the Respondents (by June 2015) and payable by the Applicant for the repairs (para.80). This figure was determined by the Respondents themselves in their notice of repair in October 2015. It is not double charging. Its deduction reduces damages due to the Applicant. It prevents her betterment.
- d. With regard to paragraph 81 of the decision, paragraphs 72 and 73 make it clear that a reasonable action by the Respondents would have been to issue the October repairs notice in June 2015 with the repair works completed by mid July 2015;
- e. With regard to paragraph (4), essentially the Respondents are saying that had the repairs notice of October been issued in June as the Tribunal found that it should have been, there was no prospect of the roof replacement not being carried (i.e. it was 100% certain that the roof would have been replaced rather than repaired anyway).
- f. The breach was in not issuing the October repairs notice in June and not carrying out the repairs under the time limit (as stated in the October notice). There was no evidence before the Tribunal that the October repairs notice was a mistake, should not have been issued, and that there was no breach in not carrying out the repairs in it. The evidence before the Tribunal was that the October repairs notice was genuine, and scaffolding was put up in pursuance of it. This indicated a genuine prospect that repairs would have been carried out, which if carried out would at the very least have put off roof replacement until after the Applicant and her husband had disposed of the Property.

- g. Had the breach been avoided the Applicant would have had a chance of avoiding complete replacement of the roof taking place when it did before their re-sale. Estimating loss of chance is inherently imprecise and a 40% chance of repairs being effected without a replacement of the roof is not unreasonable.
- h. With regard to paragraph (5), the Respondents submit that the onus is on the homeowner to prove with evidence that it was more likely than not that the Craft Supervisor would not have had the matter referred to him and if so would not have recommended roof replacement before their re-sale. In other words the Respondents submit that it is an "all or nothing" situation : if the homeowner proves that it was more likely than not that no replacement would have occurred, then she is due as damages the whole of the roof payment; if she does not so prove, she has not proved a loss caused by the breach and no damages are due.
- i. The Tribunal's understanding of the legal position is that where, had there not been a breach, a decision might or might not have been made by a third party (e.g. the craft supervisor in this case), which would have decided the outcome of the breach, what is lost is a chance that (1) the craft supervisor would not have been referred to the matter at all and (2) if so would not have decided that the roof required replacement immediately.
- j. The Tribunal understands that it is not an "all or nothing" situation but that what it has to do is to carry out the difficult and imprecise task of estimating, on the evidence before it, of the likelihood of the chance of the roof replacement being avoided. Paragraphs 137 to 140 of the case *McCrinkle Group Ltd v. Maclay Murray & Spens* [2013] CSOH 72, appear to be relevant. The Tribunal decided that this chance was real (on the basis of repairs having been suggested in the first instance and the erection of the scaffolding), and estimated it at 40%. Hence it found the Applicant entitled to damages in the form of a credit note against the roof replacement invoice issued by the Respondents representing 40% of (their share of the costs involved in the roof replacement less their share of the repair costs that would have been due absent the breach). In their response the Respondents have not addressed *McCrinkle* despite having had it referred to them by the Tribunal.

Signed ..

2 April 2018

David Bartos, Chairperson