

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Ref: FTS/HPC/PF/20/0851

161/163 Allison Street, Glasgow, G42 8RY (“the Property”)

The Parties:-

Mr Mohammed Yasin, 163 Allison Street, Glasgow, G42 8RY (“the Homeowner”)

Hacking and Paterson Management Services, 1 Newton Terrace, Glasgow, G3 7PL (“the Factor”)

Tribunal Members

Ms Helen Forbes (Legal Member)

Mr David Godfrey (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Factor has failed to comply with the Section 14 duty in terms of the Property Factors (Scotland) Act 2011 (“the Act”) in respect of compliance with paragraphs 6.1, 6.4 and 6.9 of the Property Factor Code of Conduct (“the Code”) as required by section 14(5) of the Act. The Factor has also failed in carrying out its property factor duties in terms of section 17 of the Act.

The decision is unanimous.

Background

1. By application received in the period between 9th March and 19th September 2020, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with section 6 of the Code, and whether the Factor had failed in carrying out its property factor duties.

2. Details of the alleged failures were outlined in the Homeowner's application and associated documents, which included the Factors written statement of services ("WSS"), correspondence between the parties, and photographs. The complaint concerns a leakage of water through a burst pipe in the basement of the building which was first reported to the Factor in February 2019, and has not yet been satisfactorily repaired. The Homeowner complained that the Factor had charged for the repair.
3. The Homeowner intimated his concerns formally to the Factor on 12th September 2020. There had been a significant amount of correspondence from the Homeowner complaining about the matter since February 2019.
4. By decision dated 8th October 2020, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a tribunal for a hearing.
5. Hearing notification letters were sent out to parties on 21st October 2020 notifying parties of a hearing scheduled for 2nd December 2020.
6. By email dated 11th November 2020, the Homeowner provided written representations, including email and letter correspondence and photographs
7. By email dated 23rd November 2020, the Factor indicated that they would attend the hearing. The Factor did not lodge written representations.
8. A hearing took place by telephone conference on 2nd December 2020. The Tribunal members were Helen Forbes and Mike Links. The Homeowner was not in attendance at 10 am, but he later joined the telephone conference. Mr Colin Devon was in attendance on behalf of the Factor. Mr Devon had two challenges to the application. Firstly, it was his position that the Homeowner had not notified the Factor as to why it was considered that the Factor had failed to carry out its property factor duties, as the email purporting to notify the Factor was sent to the wrong email address. Secondly, the Homeowner had failed to clarify which paragraph of section 6 of the Code had not been complied with. Matters had not proceeded through the Factor's complaints procedure as they normally would, prior to an application being made to the Tribunal.
9. Mr Devon said that the basement is not a common basement and that contractors had refused to work in it due to the presence of rat droppings. The Factor had a great deal of paperwork regarding this matter, which it would wish to lodge. The case was adjourned to a further hearing to allow the Homeowner to notify the Factor in the correct manner, and to allow the Factor to make written representations in response.
10. A Direction was issued to parties in the following terms:
 1. **The Homeowner** is required to:

- (i) Notify the Factor within 10 days of the date of issue of this Direction of the reasons that he considers the Factor has failed to carry out its property factor duties;
- (ii) Notify the Factor within 7 days of the date of issue of this Direction of the exact paragraph within section 6 of the Code of Conduct for Property Factors (“the Code”) that he alleges has not been complied with;
- (iii) At the same time as notifying the Factor as mentioned at (i) and (ii) above, provide copies of the notification letter/email, the notification notice and evidence of service to the First-tier Tribunal for Scotland (Housing and Property Chamber), Glasgow Tribunals Centre, 20 York Street, Glasgow, G2 8GT or by email to HPCAdmin@scotcourtribunals.gov.uk;
- (iv) Inform the Housing and Property Chamber by email to HPCAdmin@scotcourtribunals.gov.uk in advance of the next hearing of the details of any representative that will be representing him;
- (v) Clarify with the Housing and Property Chamber by email to HPCAdmin@scotcourtribunals.gov.uk, the following:
 - (1) Is the affected basement common property owned by more than one homeowner?
 - (2) When was Andrew Hodge, Loss Adjustor, involved in this matter? The emails submitted to the Tribunal state it was 2009. Is this correct or is it an error in the emails?

2. **The Factor** is required to lodge a written response to the Homeowner’s application **not later than 14 days** before the date of the next hearing.

Any submitted documentation **must have each page numbered and listed in an inventory**. Any documentation that does not follow this order will not be accepted.

11. On 9th December 2020, the Homeowner notified the Factor of a failure to comply with paragraphs 6.1, 6.2, 6.3, 6.4, 6.5, 6.7, 6.8, and 6.9 of the Code, and a failure to carry out property factor duties.

12. By email dated 15th December 2020, the Homeowner notified the Housing and Property Chamber that he had provided the notifications to the Factor, providing copies of the notifications, and stating that the basement is common property for the residents of the tenement building.

13. On or around 19th January 2021, the Homeowner lodged written representations in response to the Direction and further productions including photographs.

14. By letter dated 3rd February 2021, the Factor lodged written representations and productions.

15. By letter dated 5th February 2021, the Homeowner lodged further written representations.

The Hearing

16. A hearing was held on 17th February 2021 by telephone conference. The Homeowner was in attendance. The Factor was represented by Mr Colin Devon, Director.

Findings in Fact

17.

- i. The Homeowner is the owner of the Property, which is shop premises forming part of a tenement building comprising numbers 157 to 163 Allison Street, Glasgow (“the tenement building”).
- ii. The Factor registered as a Property Factor on 1st November 2012 under registration number PF000288, and provided factoring services to the tenement building.
- iii. By telephone calls on 12th, 14th, 15th and 18th February 2019, the Homeowner reported a concern to the Factor regarding a flood in the basement of the Property from a common pipe running through the common basement of the tenement building.
- iv. By email dated 19th February 2019, the Homeowner complained to the Factor that there was water ingress to his basement, coming from a common pipe in the common basement, stating that the matter was urgent.
- v. On 21st February 2019, a plumber (“SE”) visited the Property to inspect the basement at the request of the Factor and carried out further works.
- vi. On 28th February 2019, SE repaired the open rodding holes on the pipe in the common basement.
- vii. By email dated 18th March 2019, the Homeowner reported further leakage of water. He stated that he had received no update on the work carried out and no response to his email of 19th February 2019.
- viii. By email dated 25th March 2019, the Factor confirmed to the homeowner that SE had attended, attaching a copy of the contractor’s invoice. The Factor requested further information or photographs, stating that the works completed by SE would suggest the problem was rectified.

- ix. By letter dated 28th March 2019, the Homeowner's solicitor informed the Factor that the work carried out was defective, providing a photograph showing the leaking pipe. The solicitor stated that the Homeowner did not feel the invoice should be paid until permanent repairs were carried out.
- x. By email dated 2nd April 2019, the Factor passed the Homeowner's concerns to SE.
- xi. On 3rd April 2019, the Factor instructed SE to attend the Property as an urgent matter. SE attended the property and carried out further works.
- xii. On 4th April 2019, Scottish Water were contacted, and attended to inspect the problem.
- xiii. On 5th April 2019, Scottish Water reported to the Factor that all drains were jetted in the public realm.
- xiv. By letter dated 6th April 2020, the Factor wrote to homeowners stating that the leak was due to blockages within the pipes, caused by flushing unsuitable materials.
- xv. By email dated 6th April 2019, the Homeowner requested a copy of the plumber's report from the Factor, stating that the matter should be resolved on a permanent basis, rather than by undertaking temporary repairs.
- xvi. By email dated 12th April 2019, the Factor informed the Homeowner that he should contact Scottish Water regarding his concerns.
- xvii. By email dated 22nd April 2019, the Homeowner informed the Factor that Scottish Water would not deal with the issue as it was within the property boundary, and that the problem was continuing.
- xviii. By email dated 23rd April 2019, the Homeowner's solicitor contacted the Factor to inform him that the blockage in the pipe continued and the basement of his shop continued to be flooded. The solicitor asked if another contractor could be instructed.
- xix. On 29th April 2019, the Factor instructed SE to attend and repair the broken pipe as an urgent matter.
- xx. By email dated 8th May 2019, the Homeowner informed the Factor that SE had not attended.
- xxi. On 9th May 2019, SE attended at the Property.
- xxii. On 16th May 2019, the Factor instructed SE to attend as an emergency to fully repair the hole in the pipe in the basement.

- xxiii. On 22nd May 2019, the Homeowner informed the Factor that the leak continued, asking for a permanent solution.
- xxiv. On 24th May 2019, the Factor instructed another plumber (“JHH”) to attend to the problem.
- xxv. By email dated 29th May 2019, the Factor informed the Homeowner that replacement of defective pipework had been instructed.
- xxvi. On 30th May 2019, JHH carried out works to replace defective pipework.
- xxvii. On 11th December 2019, the Factor instructed JHH to attend the Property as an emergency due to heavy flooding into the basement. JHH reported no issues.
- xxviii. By email to the Factor dated 20th December 2019, the Homeowner reported further heavy water ingress
- xxix. By email to the Factor dated 24th December 2019, the Homeowner reported the continuing issue of water ingress.
- xxx. By email to the Factor dated 29th December 2019, the Homeowner reported the continuing issue of water ingress.
- xxxi. On 31st December 2019, JHH attended and rodded the drains, recommending further works.
- xxxii. On 8th January 2020, the Factor instructed JHH to carry out CCTV investigations.
- xxxiii. On 22nd January 2020, JHH attended to carry out CCTV investigations, reporting that, due to rodent droppings in the basement, the CCTV operator refused to carry out the works.
- xxxiv. By letter dated 1st October 2020, the Factor wrote to the Homeowner stating that their ongoing involvement as property factor had become untenable due to excess levels of communal debt, and notifying him of the withdrawal of their services from 12th November 2020.
- xxxv. By email dated 9th November 2020, the Factor informed the Homeowner that they were unable to instruct any contractors due to excess levels of communal debt.

General representations by parties

The Homeowner

18. The Homeowner reiterated his complaints, as set out in the application and written representations, that there had been flooding into his basement for a

period of 2 years. He notified the Factor on 12th February 2019 of the issue, and on several occasions thereafter. The problem has not yet been fixed. The pipe is a common pipe that runs through the common basement, with water spilling into the Property's basement. The Homeowner said he had always made clear exactly where the problems were occurring. He referred to the photographs that he had lodged, which clearly showed the damaged pipe. The works carried out were of a temporary nature and were not sufficient. The Homeowner had complained in his written submissions that the Factor had lodged evidence relating to other plumbing issues, which were not relevant.

19. Responding to questions from the Tribunal as to what was going on during the period between late May and mid-December 2019, where there appears to have been a gap in communication and action, the Homeowner said he was busy with work but believed he had sent a few emails to the Factor during that time. The water had continued to leak into the basement. He had tried using a dehumidifier but it had not helped.
20. The Homeowner said he had made a formal complaint to the Factor towards the end of 2019 and received no response. He had asked the Factor for their complaints procedure and had been told there was no complaints procedure. That was why he had employed a solicitor. He felt there had been a miscommunication by the Factor.
21. The Homeowner said he had been told by the Factor to contact the local authority concerning the rat droppings, which were actually in the common basement, and not in his basement. He did not believe that any work had been carried out by the Factor regarding the rat droppings.
22. The Homeowner said he had always paid his bills and he felt the Factor should have to address this issue, notwithstanding that the Factor had resigned. No CCTV work had been carried out, and all repairs were temporary patch repairs.

The Factor

23. On behalf of the Factor, Mr Devon said that the Factor resigned on 12th November 2020. He believed they had done all they could with this problematic property. They had liaised closely with the local authority concerning this and other properties in the area. There was a high level of debt, but they agreed to try to maintain the property. Up to 85% of invoices were not being recovered. They continued to try and assist homeowners despite the debt. The homeowner was paying in full, and they had tried to support him.
24. Responding to questions from the Tribunal regarding the period from May to December 2019, Mr Devon said the Factor heard nothing from the Homeowner for 8 months and thought the works had been carried out and any blockages cleared.

25. Regarding the issue of the rat droppings, Mr Devon said the contractor had told the Factor that he had asked the Homeowner to clear his basement. It was unclear exactly where the problems were. Mr Devon accepted that the pipes were common, but there was little in the way of useful engagement by the Homeowner as to where the issue was. The Homeowner's tone was not helpful. Contractors referred to carrying out work in the jeweller's basement, and the Homeowner sometimes referred to his basement.
26. Mr Devon was not aware of any formal complaint received from the Homeowner. Normally, before cases go to the Tribunal, they will have proceeded through the complaints procedure, which is available on the company website. He accepted that the Homeowner had been complaining about the issue, but there was no record of a formal complaint.
27. Responding to questions from the Tribunal regarding the additional information lodged by the Factor that seemed to refer to other plumbing issues, Mr Devon said the other issues were relevant, and that this issue only came to light when SE attended to one of the other issues and was asked by the Homeowner to look at the problem in the basement on 11th February 2019.
28. Responding to questions from the Tribunal regarding the delay between the Homeowner notifying the Factor on 18th March 2019 of further water ingress and the instruction to SE on 3rd April 2019, Mr Devon agreed that the response by the Factor was not ideal. The Factor had felt further information was required, but he accepted the contractor could have been asked to attend sooner.
29. Mr Devon conceded that the terms of the email sent to the Homeowner on 12th April 2019, informing him that he should contact Scottish Water, were not correct. Scottish Water had already stated that they would not be attending. It was not a straightforward matter, and contractors and Scottish Water had been involved.

The Code of Conduct – Submissions and Decision

30. In addition to their written submissions, the parties made further submissions on each section of the Code. During discussions, the Homeowner withdrew paragraph 6.5, accepting that the Factor does ensure that all contractors have public liability insurance. The Homeowner also withdrew paragraphs 6.7 and 6.8, on hearing that the Factor does not receive any commission, fee or other payment or benefit from, or have any financial or other interests with, any contractors appointed.

Paragraph 6.1

31. *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 Homeowner

32. The Homeowner said no timescale had been given by the Factor for the work that was to be carried out by contractors. The Factor's communication was not good. The Factor had not taken the emergency nature of the situation into account.

The Factor

33. Mr Devon said the Factor has procedures in place and referred the Tribunal to paragraph 5.4 of the WSS. He stated that the timeline submitted by the Factor showed that the Homeowner had been updated in relation to two different contractors. Responding to questions from the Tribunal regarding the cost threshold, Mr Devon said no such threshold had been set, so the Factor was required to consult with homeowners before any work was carried out. There was not a high level of communication with homeowners in the tenement building.

Decision

34. The Tribunal found that there had been a failure to comply with this paragraph of the Code, in respect of progress reports and timescales for completion. There was no agreed cost threshold below which job-specific progress reports were not required. The Factor was, therefore, required to provide progress reports for all work carried out. The Factor did not provide progress reports to the Homeowner in respect of the work carried out on every occasion, nor did they provide estimated timescales for completion. The Tribunal noted that the Homeowner stated in his email dated 18th March 2019 that no update had been given to him since his email of 19th February 2019 and the contractor's subsequent attendance. The Tribunal noted that the Factor's Fraser Hamilton then emailed Angela Tarbert on 21st March 2019, to ask her to provide an update, which was provided on 25th March 2019. Again, on 20th December 2019, the Homeowner states in an email to the Factor that he had to telephone the Factor's office that day to receive an update following JHH's visit on 12th December 2019. The Code requires proactive updates from the Factor following work carried out by contractors.

Paragraph 6.2

35. If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs, wherever possible.

The Homeowner

36. The Homeowner said he had never been given an emergency number to call and he believed this paragraph had not been complied with.

The Factor

37. Mr Devon said there are emergency numbers for contractors on the Factor's web page, and these have always been available.

Decision

38. The Tribunal did not find a failure to comply with this paragraph as the Factor has the necessary procedures in place. The situation in relation to emergencies was considered further under property factor duties.

Paragraph 6.3

39. 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.

The Homeowner

40. The Homeowner said this paragraph had not been complied with because he had asked for another contractor to be appointed and this had not been done. His solicitor had reiterated this point in his email of 21st April 2019. It was 24th May before a different contractor was sent out.

The Factor

41. Mr Devon said no request had been made, as required by the paragraph. Contractors are deployed on behalf of all homeowners and could not be changed at the request of one homeowner. The contractor was changed quickly when this was required.

Decision

42. The Tribunal did not find a failure to comply with this paragraph of the Code. No request had been made of the Factor to show how and why contractors had been appointed, as required by the Code.

Paragraph 6.4

43. 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

44. The Homeowner said he did not believe periodic inspections were carried out, and there was no cyclical maintenance. He raised the issue of whether or not the Factor had ever checked the basement. It was his position that the Factor ought to have checked the basement, knowing there was an issue with water ingress.

The Factor

45. Mr Devon said it was clear there had been periodic visits. The Factor does not carry out inspections as they are not qualified to do so. They provide an administrative role, reporting any problems that are observed. There were security issues around the Tenement Building and staff had asked not to attend alone. Responding to questions from the Tribunal as to the purpose of their visits, set out in the WSS as periodic attendance at the Property, Mr Devon said it was to have a look. They would take a common-sense approach and instruct contractors where required.

46. Responding to questions from the Tribunal, Mr Devon initially said there was no programme of works, as the homeowners had never asked for this. He then said there was a programme of works in relation to gutter cleaning but instruction would be taken from the homeowners on a programme of works.

47. Mr Devon said the Factor notices issues and rectifies them when they go out. A huge amount of work was done to try and support homeowners in this tenement building. It had been shown that the Factor had noticed issues and was acting on them.

Decision

48. The Tribunal found there had been a failure to comply with this paragraph of the Code in that the Factor had not prepared a programme of works. The Tribunal was not persuaded by the evidence on behalf of the Factor that a programme of works, as required by the Code, is in place.

Paragraph 6.9

49. 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 Homeowner

50. The Homeowner reiterated his previous submissions in this regard, alleging that the Factor has not complied with this paragraph. The pipe is still leaking. The work carried out was inadequate. While the Homeowner accepted that the Factor acts in an advisory role, he would expect them to deal with the matter in a timely way.

The Factor

51. Mr Devon said the Factor always accepted that the pipe was a common pipe. There is a complex timeline and the Factor's staff are not experts. That is why they appoint an expert and act on their advice. They have done so throughout the process.

Decision

52. The Tribunal found that the Factor had failed to comply with this paragraph of the Code by failing to pursue the contractor in respect of the inadequate work provided, despite the Homeowner informing the Factor repeatedly of his concerns. In particular, the Tribunal noted that the Homeowner informed the Factor on 19th March 2019 that the problem continued despite works purportedly carried out. It was not until the Homeowner's solicitor contacted the Factor, providing a photograph, that the Factor pursued the contractor, who was not instructed to attend until 3rd April 2019. It was entirely unclear why the Factor did not take the Homeowner's concerns about the standard of the work and the ongoing problem seriously enough to pursue the contractor as soon as they were notified by the Homeowner.

Failure to carry out property factor duties

53. The Homeowner's complaint in terms of this section was as follows:

I first notified you regarding an issue with water leaking into the basement to my property by phone on 12th February 2019. You initially declined any responsibility regarding the issue and said the water must be coming from above. After pressurising you to look into the issue you then sent one male and one female to look at the issue. They took a photo of the burst pipe and said they will report this to the factor. I then called a few days later as you did not get back to me. You then stated that the water was coming from the third floor and stated that no one had notified you or sent any picture to you. He said he will find out and get back to me, he did not. I then had to write an email to him on the 19th. You did not even reply to this email. I then had to get a letter from my solicitor, he then replied to my solicitor now stating that the issue was to do with Scottish Water. My solicitor wrote to the factor on the 24th February 2019 that after Scottish Water had investigated the issue it was to do with the common pipe in the basement. He did not reply to me or my solicitor until over a month later after he had hired Stuart Eadie to fix the damage. The shabby patchwork had fallen apart after a day. The Factor has been negligent as has been trying to avoid responsibility whenever he can find the chance. The issue has been persisting for over a year now and nothing has been done. On the 9th November 2020 you have now ultimately refused to provide me service.

The Homeowner

54. The Homeowner reiterated his previous submissions and his written submissions, having covered the points made in this complaint.

The Factor

55. Mr Devon reiterated his previous submissions and his written submissions. He added that the Factor had tried to carry out its duties. There had been 38 exchanges in this case. There was no communication between May and December 2019 from the Homeowner. There were four or five days at the end of March 2019 when the Factor could have dealt with matters faster.

Decision

56. The Tribunal found that the Factor had failed in carrying out its property factor duties by:

- (i) failing to progress the repair as an emergency, despite the Homeowner repeatedly informing the Factor of the problem;
- (ii) failing to respond timeously to the Homeowner's communications;
- (iii) failing to attend the property and ascertain for themselves exactly where the problem was, given the obvious and significant confusion over a long period; and
- (iv) failing to progress matters to a conclusion at the time that rat droppings were discovered in the common basement, and not in the Homeowner's basement.

57. The Tribunal noted that the Factor's WSS provides at 3.2 that the Factor will arrange and administer maintenance of common property, investigate complaints of inadequate work or service and pursue them to remedy these, meet homeowners where necessary, attend the property periodically, and advise on maintenance and repair where it may be considered necessary. This was a situation that required significantly more input from the Factor, working with the Homeowner, to ensure a satisfactory solution. It was disingenuous of Mr Devon to say there was little in the way of useful engagement from the Homeowner as to where the issue was. A visit to the Property would have been the best way for the Factor to ascertain the position. While the Tribunal accepted that the Factor's role is administrative, and that they are not surveyors, they have a duty to attend and advise where necessary, and they failed in carrying out that duty.

Proposed Property Factor Enforcement Order (PFEO)

58. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.

59. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the

Factor's failure to comply with the Code and in carrying out its property factor duties.

60. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.

61. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Right of Appeal

62. 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 and Chairperson

22nd February 2021