



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/21/1868

The Parties:

Ms Juliet Westwood, Flat 2/2, 171 Cumloden Drive, Glasgow G20 0JJ (“the homeowner”)

and

Maryhill Housing Association, 45 Garrioch Road, Glasgow G20 8RG (“the property factors”)

Tribunal Members – George Clark (Legal Member/Chairman) and Robert Buchan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) decided that the property factors have failed to comply with their duties in terms of Section 6.9 of the Property Factors Code of Conduct (“the Code of Conduct”) made under Section 14 of the Property Factors (Scotland) Act 2011 (“the Act”) and have failed to carry out the Property Factor’s duties. The Tribunal proposes to make a Property Factor Enforcement Order as set out in the accompanying Notice under Section 19(2)(a) of the Act.

Background

1. By application, received by the Tribunal on 9 August 2021, the homeowner sought a Property Factor Enforcement Order (“PFEO”) against the property factors. Her complaint was that they had failed to comply with their duties under Section 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 was that the gutters and fascias/soffits of the block of which her property forms part, had not been cleaned or repaired. This had caused an infestation of flies and a nest of wasps. A programme of other works had been identified but had not been carried out and there had been an unreasonable delay in addressing matters, some of which were extremely urgent. These failures posed a threat to the mental and physical well-being of the homeowner and her daughter. It was impossible to open the windows because of the infestation. There was a threat to the fabric of the building and the property factors' persistent delay was deleterious to the mental health of their customers. The homeowner wanted to ensure that the full programme of work, which it was agreed was required, is carried out as soon as possible and that maintenance is performed regularly thereafter, to prevent any recurrence of the issues currently being suffered.
3. The application was accompanied by copies of email correspondence between the Parties between September 2019 and July 2021 and of the homeowner's intimation of complaint on 19 July 2021 and the property factors' response of 27 July 2021. The correspondence related mainly, but not exclusively, to the issue of clearing the gutters of the block and the unreasonable delay in carrying out the work identified in a list of repairs and outstanding issues of maintenance, the homeowner stating that she had first raised the failure to clean and repair the gutters over four and a half years previously.
4. In their letter of 27 July 2021, the property factors listed the agreed items of maintenance that required to be carried out. They stated that they had had a number of delays due to COVID-19 lockdown restrictions, staff and contractor absences and health and safety concerns raised by the gutter cleaning contractor. These issues had been resolved, but the contractors had been unable to clean the gutters, as they had found a wasps' nest. The property factors had arranged for it to be removed and were waiting for confirmation as to when that could be carried out and, when it was done, the gutter cleaning would be completed. They were also currently arranging for the external paintwork and repairs to leaking gutters, joints and fascia and soffits to be carried out. The property factors accepted that they had delayed in carrying out this essential maintenance and appreciated how frustrating this had been for the homeowner and asked her to accept their apologies. The last year and a half had proved exceptionally difficult for them to arrange repair works, but they were now working through a high number of works that had been delayed due to lockdown restrictions and disruptions to staffing and contractors caused by self-isolation.
5. On 30 July 2021, the homeowner responded that the majority of the issues long pre-dated the pandemic and stated that, whilst the property factors were saying that they remained committed to resolving the full list of issues, her confidence in them had diminished and she would be proceeding with her application to the Tribunal.

6. On 23 September 2021, the homeowner provided the Tribunal with copies of further emails between the Parties and of the property factors' Written Statement of Services. She stated that, the previous week, the gutter cleaning contractors had been unable to do the work, as they had found serious issues with the anchor points on the building. She also commented on what she regarded as serious failures of the property factors in their communication with contractors, which brought their competence into question.
7. On 20 October 2021, the Tribunal advised the Parties of the date and time of a Hearing, and the Parties were invited to make any further written representations by 10 November 2021.
8. On 9 November 2021, the homeowner made further written representations. She said that the case had arisen because of the acknowledged failure of the property factors to maintain the property over a number of years. The lack of maintenance had led to a build-up of problems which had caused stress, frustration and worry and had damaged the quality of life for her daughter and her. The failure to clean and repair the gutters had led to infestations of wasps and flies. Black mould had formed at the area where there were leaks in the gutters. Because of the mould, she had replastered and painted all the rooms when she bought the property in 2017. When the mould came back, she had invested in new windows in 2019, thinking the windows might be the cause of the problem, but the mould had re-appeared yet again. The property factors had taken some steps to redress some of the smaller outstanding issues. The roofing company had attended to clean the gutters, but this had been done from ground level with a vacuum and had not removed solid chunks of vegetation. The wasps' nest had been dealt with, but her fear was that it might recur if the gutters were not properly maintained, and she still had a problem with flies around the windows.
9. On 17 November 2021, the property factors' solicitors submitted written representations on their behalf. In relation to the homeowner's complaint under Section 6.9 of the Code of Conduct and the complaint relating to property factor's duties, they said that in April 2020, the property factors' contractors, Lattos, attended the property to undertake gutter cleaning but were unable to gain access. In December 2020 they revisited to undertake the works but could not proceed due to an alleged unsafe anchor point. The anchor point contractors attended on 23 March 2021 to certify the anchor points as safe, but only two of the anchor points were inspected. On 20 May 2021, the anchor point contractors certified the safety of all five anchor points, but when Lattos went back in July 2021 to complete the gutter cleaning work, they were unable to proceed due to there being a wasps nest on the roof. There were challenges in removing the nest, as its location meant that a mobile platform was required. Lattos then returned on 10 September 2021 but were unable to complete the works due again to an alleged unsafe anchor point. The anchor point contractor disputed this but, nevertheless, the property factors

instructed Lattos to replace it and complete the gutter cleaning work, which they did in early October 2021.

10. The property factors acknowledged that the situation was unacceptable and apologised unreservedly. Progressing the remedial actions had proved difficult. The property factors had experienced staff absence and contractor difficulties during the ongoing pandemic, which had exacerbated matters. A programme of works had now been agreed with the homeowner and, in relation to the works required to gutters, fascias and soffits, the property factors' preferred contractor had indicated a potential starting date in January 2022, although the property factors had approached two other contractors with a view to exploring an earlier timescale. The property factors had offered to meet the cost of the repairs to the gutters, fascias and soffits. Additionally, they had agreed with the homeowner that they would meet the costs of reinstating the interior of her property by carrying out a fungicidal scrub, applying stain block to one bedroom and the bathroom, prior to repainting the ceilings in these two rooms.

The Hearing

11. A Hearing was held by means of a telephone conference call on the morning of 24 November 2021. The homeowner was present. The property factors were represented by Mr Ian Munro, Factoring Manager, and Ms Carol Bain, Head of Property, and by their solicitor, Mrs Claire Mullen of TC Young solicitors, Glasgow.
12. 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.
13. The property factors updated the Tribunal and the homeowner in relation to the start date for the works to the gutters, fascias and soffits. The scaffolding was to be erected on Saturday 27 November. The homeowner stated that she was very happy to hear that, but told the Tribunal that, whilst the property factors had prepared a Programme of Works, she had lost all faith in them and in their ability to follow through on the timetable in that Programme. She had been in contact with them since 2017, so the problems long pre-dated the pandemic. She had had to live in intolerable conditions, working from home but unable to open the windows in hot weather, because of the wasps and flies. She felt that the property factors had been unable to manage the process and asked why, for example, only two anchor points had been inspected originally. She felt that she was really powerless and was being fobbed off all the time. She was unable to upgrade her bathroom because of the mould. She had bought the property five years ago as a home for her daughter and

her. All she wanted was for the property to be in a nice condition and the problems that had arisen had been very distressing for her.

14. Mrs Mullen told the Tribunal that there was no doubt that there had been a failure to comply with Section 6.9 of the Code of Conduct and a breach of the property factor's duties in relation to the core services that they provided, but she contended that the property factors are using their best endeavours to ensure that the work in the Programme is carried out in the difficult current conditions. Questioned by the Tribunal as to whether they had offered any compensation to the homeowner, the property factors stated that there had been an attempt to settle the matter on a "without prejudice" basis, but this had not been accepted by the homeowner. The anticipated costs the property factors would incur in relation to the works to the gutters, fascias and soffits was £6,500. This did not include the work inside the homeowner's property that they would be paying for as well. They were meeting these costs due to the length of time it had taken them to organise the works.
15. 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 2/2, 171 Cumloden Drive, Glasgow, part of a modern tenement block built over three floors.
- (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 7 December 2012.
- (v) The homeowner has notified the property factors in writing as to why she 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 9 August 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 20 October 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

16. The Tribunal considered first the homeowner's complaint under Section 6.9 of the Code of Conduct, which provides as follows: *"You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided."*
17. The only allegation of inadequate work having been carried out by contractors was that only two of the five anchor points had been inspected on 23 March 2021 and that it was not until 20 May that a further inspection took place. The view of the Tribunal was that, as no explanation for the delay of two months between the two inspections, following up on the failure of the contractors to inspect all the anchor points first time around, had been given, the property factors had failed in their duty under Section 6.9 of the Code of Conduct. The Tribunal could not speculate as to whether, had the reinspection been carried out sooner, the repair works might not subsequently have been hampered by the discovery of the wasps' nest. The Tribunal noted that on 10 September 2021, Lattos had again contended that one of the anchor points was unsafe, but the Tribunal was satisfied that the property factors had responded promptly by instructing Lattos to remedy the problem themselves, when the anchor point contractors disagreed with this finding.
18. The homeowner had also complained that the property factors had failed to carry out the property factors duties. This was not disputed by the property factors, who acknowledged that there had been an unacceptable delay in having the repairs to the gutters, fascias and soffits carried out. Their Written Statement of Services includes, amongst the Core Services provided to homeowners, a reactive repairs and maintenance service for the common or shared areas and, whilst clearing of blocked gutters is regarded, in their Repairs and Maintenance Policy, as routine, the delay in carrying out the work in the present case is unacceptable. The homeowner said that she had reported the issue in 2017, but the Tribunal had no evidence of this. It was, however, clear that the matter had been ongoing for more than a year, as on 26 November 2020, the property factors emailed to the homeowner a maintenance programme which included cleaning of gutters and repairs to gutters, fascias and soffits. Additionally, the contractors had called to clean the gutters in April 2020 but, having been unable to gain access, they did not re-visit the property until December 2020. Accordingly, the Tribunal upheld the complaint that the property factors had failed to carry out the property factors duties.
19. Having decided that the property factors had failed to comply with Section 6.9 of the Code of Conduct and had failed to carry out the property factor's duties, the Tribunal

then considered whether to make a Property Factor Enforcement Order. The Tribunal accepted that the 2020 lockdown and other COVID-19 restrictions had significantly affected the operational capability of all businesses and that, in the present case, this would have impacted on the ability of the property factors to have work carried out by external contractors, who would themselves be experiencing issues of staff either being on furlough or self-isolating. That said, the delay in progressing the repairs in this case to a conclusion could not be attributed solely to the pandemic. It appeared to the Tribunal that the property factors had not established a grip on the situation and had not managed matters with the urgency that they ought to have done, knowing that the homeowner was in frequent contact with them as a result of the water penetration and consequential damage to her property. The Tribunal had heard the homeowner express the distress this had caused her as a single parent working from home. The Tribunal therefore proposes to make a Property Factor Enforcement Order as detailed in the accompanying Notice made under Section 19(2)(a) of the Act. The intention of the Order is to ensure the property factors comply with their stated wish to have the repair works carried out as soon as possible in line with the Programme of Works included in their written representations of 17 November 2021.

20. The Tribunal also considered whether an award of compensation should be made against the property factors. The Tribunal recognised that, accepting the length of time it had taken them to organise the works, the property factors had agreed to pay for the repairs to the gutters, fascias and soffits and for the necessary remedial work within the homeowner's property and that this would be a substantial cost to them, but the view of the Tribunal was that some modest element of compensation should be paid to the homeowner in respect of the stress and inconvenience she has suffered during the process and her distress at being unable to carry out upgrading work within her property because of the water penetration and mould.

21. 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.