

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/22/0883, FTS/HPC/PF/22/1440

Re: Flat 4, 7 Chapel Street, Peterhead, Aberdeenshire AB42 1TH ("the Property")

Parties: Mr Ian Taylor, 7 Chapelwell Drive, Balmedie, Aberdeen AB23 8HY ("the Applicant")

Atholls Ltd, 16 North Silver Street, Aberdeen AB10 1RL ("the Respondent")

Tribunal Member:

**Graham Harding (Legal Member)
Andrew Murray (Ordinary Member)**

DECISION

The Factor has not failed to carry out its property factor's duties.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with section 6.1 of the 2012 Code or with Section 2.7 of the 2021 Code.

The decision is unanimous.

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors 2011 is referred to as "the 2012 Code"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors 2021 is referred to as "the 2021 Code" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".

Background

1. By application dated 26 March 2022 the Applicant complained to the Tribunal that the Respondent had failed to comply with the 2012 Code and was in

breach of Sections 2.1, 2.7, 5.6, 5.7, 6.1 and 6.3 and had also failed to carry out its property factor's duties. More specifically the Applicant complained that the Respondent had failed to take appropriate action over the inappropriate storage of waste bins in a communal area. The Applicant also complained that the Respondent had failed to adequately deal with a common repair required following water ingress to the Applicant's property in August 2018. The Applicant also complained that the Respondent had failed to obtain the most competitive price for insurance of the building in which the Applicant's property forms part when the policy was renewed in May 2021. With regards to the failure to carry out its property factor's duties the Applicant submitted that the Respondent had failed to enforce the terms of the Deed of Conditions affecting the property with regards to the location of bins as the Deeds requires all bins to be kept in either a designated bin area or bin store.

2. By application dated 11 May 2022 the Applicant complained to the Tribunal that the Respondent had failed to comply with the 2021 Code and was in breach of Sections OSP1, OSP4, OSP11, 2.7, 6.4 and 6.6 and had failed to carry out its property factor's duties. More specifically the Applicant again complained about the Respondent failing to take action in respect of the storage of bins in a communal area. He also complained about the delay in the Respondent issuing Written Statement of Services following his purchase of the property. He submitted that there had been a failure on the part of the Respondents to properly communicate with him with regards to the outstanding repairs and a failure to adhere to the terms of the Deed of Conditions.
3. By email dated 6 July 2022 the Respondent submitted an Inventory of Productions.
4. By email dated 7 July 2022 the Applicant submitted further written representations to the Tribunal.
5. By email dated 29 July 2022 the Respondent submitted a List of Witnesses to the Tribunal.
6. A Case Management Discussion was held by teleconference on 5 August 2022. The Applicant attended in person. The Respondent was represented by Mrs Jackie Mair, Mr Alastair Walker and Mr Kenneth Cheyne. The Tribunal directed the Respondent to submit written representations in answer to the Applicant's complaints and continued the applications to a hearing.
7. By email dated 19 August 2022 the Respondent submitted written representations to the Tribunal.
8. By email dated 21 October 2022 the Applicant submitted further written representations to the Tribunal.

Hearing

9. A hearing was held by teleconference on 2 November 2022. The Applicant attended in person. The Respondent was again represented by Mrs Mair, Mr Walker and Mr Cheyne.

Bin Storage

10. The Applicant referred to his written submissions and submitted that the bins should not be kept in the stairwell. He explained that he had been unable to attend a meeting of owners when the issue had been discussed. For the Respondent Mrs Mair explained that the meeting had been given sight of the correspondence that the Applicant had obtained from the Scottish Government as well as from Aberdeenshire Council and the Scottish Fire Service. The block insurers had also been consulted. The matter had been put to a vote and the majority of owners were in favour of continuing to store the bins in the hallway rather than retain refuse in each flat with a weekly kerbside collection. In response to a query from the Tribunal as to how the terms of Clause 2.1(x) of the Deed of Conditions burdening the property affected such a decision, Mrs Mair said that she had sought advice from the Respondent's solicitor who had indicated that as there were no designated bin areas or bin stores the condition was unenforceable. Mr Taylor referred to the plans being changed from that originally envisaged which had included janitorial services for the removal of rubbish. It was also noted that Rockview Properties Limited currently owned two of the five flats and not three as suggested by Mr Taylor. Mr Taylor also submitted that although the fire service had commented there was a low risk of wilful fire raising at the property, fires can happen accidentally and therefore he still believed the storage of waste in the hallway constituted a fire risk. The Tribunal noted there was insufficient space for two bins for each flat and therefore bins had to be shared. Mr Cheyne queried if Mr Taylor's tenants had used the bins following the purchase of the property in 2017. Mr Taylor explained he had been unaware of the issue until he had been asked to contribute to the cost of replacing the carpet with vinyl in 2021. Mrs Mair confirmed the insurers had been provided with photographic evidence of the bins when asked to provide their view on the matter. She also pointed out that the Respondent was not the police, it could not force owners to move the bins from the stairwell.

Water Ingress September 2018

11. Mr Taylor submitted that by passing responsibility for repairs to the developers, Rockview Properties Limited the Respondent had abdicated its responsibility to properly monitor the repairs. He said that in correspondence he had seen in December 2021 the developers had variously described the work done as infinitesimal to removing skews and repointing and sealing. He went on to say that whatever works had been done had not prevented the leak re-occurring and his flat being damaged again.

12. Mr Cheyne confirmed that he had been asked to inspect the property following a quote having been obtained by Mr Taylor from Graeme W Cheyne (Builders) Limited. He said that he had agreed with the scope of the work proposed by the contractor. There was some discussion about the date on which Mr Cheyne's inspection had taken place and Mr Cheyne said it was after he had received the contractor's quote and in advance of the meeting of owners on 18 February 2022.
13. The Applicant took issue with Mr Cheyne over the scope of works prepared by him which he said was essentially Graeme Cheyne's quote with the pricing removed. Mr Cheyne defended his position submitting that this was the correct way to obtain a like for like quote from another contractor. Any delay in providing the scope of works had been due to holidays and pressure of business.
14. In response to a further question Mr Cheyne explained it was difficult to say if the building had been properly maintained. He said that deterioration to pointing and skews was usually gradual and buildings could last for many years without displaying any signs internally. The issues could have been present for some time and he thought there would have been deterioration over a period of time.
15. The Applicant pointed out that his contractor Mr Steve Buchan had stated that the water ingress that was evident in September 2018 was again evident in December 2021. Therefore if any work had been done it had been to no effect. He suggested that Mr Gardiner and Mr Bowie of Rockview Properties had suggested that the building was in better condition than it actually was. He submitted it was in fact in poor condition. Mr Cheyne submitted it had been repaired. The Applicant said that had the Respondent not passed responsibility to Rockview to carry out the repair under warranty it would have been able to monitor what was being done. Mr Taylor suggested that the waterproof paint used by his contractor in 2018 had held back the water for a period before the problem again became apparent. He said that it had been the Respondent's responsibility to have properly checked on the work being done. For the Respondent, Mrs Mair confirmed that the Respondent had accepted that it should have followed up with Rockview Properties to ensure that the Applicant was being kept up to date with what was happening. and could only apologise.
16. Mr Cheyne suggested that both temporary repairs and permanent repairs can fail. As there had been a gap of three years between the original repairs carried out by the developers and the further water ingress it could not be said that the original work had been the cause of the subsequent water ingress. The Applicant submitted that the original problem had not been addressed in 2018. Mr Cheyne suggested that it was not possible to say that the cause of the second water ingress was from the same source. The Applicant said that the problem emanated from the chimney stack and there was no sign that the pointing had been repaired. This had been confirmed by Mr Buchan who was a joiner/builder who undertook this type of work including damp-proofing.

Insurance

17. The Applicant explained that the block buildings insurance had increased in May 2021 by 60%. He said he queried this with the Respondent two months later. He was concerned that when the developers had wished to replace the carpet in the hallway at a cost of £200.00 the Respondent had put this to a vote of the owners but when the insurance had risen by £400.00 there had been no vote and no attempt to source a cheaper quote. He went on to say that the following year he had volunteered to obtain competitive quotes and had managed to obtain much cheaper insurance. For the Respondent Mrs Mair explained that the Respondent was not authorised to carry out insurance business and relied on its broker. It had accepted the information provided by the broker that insurance costs were rising. She said they had taken on board the points made by the Respondent for the following year. She also pointed out that the 2022 insurance was not on the same basis as the 2021 insurance as it did not provide for loss of rent and was therefore not as good.

Communication

18. The Applicant submitted that there had been a lack of communication on the part of the Respondent. He said that he had asked questions but had not received replies. He thought that the basis on which other owners were not accepting the title conditions was unsatisfactory. There were issues with the scope of works prepared by Mr Cheyne He did not feel that the Respondent was acting on his behalf.
19. Mrs Mair explained that the problem lay with the requirement firstly to persuade the majority of the flat owners to accept that substantial repairs were required and then that still only accounted for 38% of the building as the two retail units were responsible for the remaining 62%. Mr Cheyne referred to the Respondent being caught between a rock and a hard place.

Witnesses

20. The Tribunal heard from Mr Graham Bowie a Director of Rockview Properties Limited and a co-proprietor of two of the flats. He said that he was aware of the correspondence from the Scottish Government and Aberdeenshire Council and the Scottish Fire Service. His position was that the only suitable place to store the bins was in the stairwell. He said there was no alternative and that the building insurers and environmental health did not want refuse stored in individual flats.
21. With regards to water ingress Mr Bowie confirmed that the Respondent had passed details to the company in September 2018 and remedial work had been done under warranty. He went on to say that he had objected to carrying out further remedial work as it was not considered to be necessary. He went on to say that the contractor who had provided the quote in 2022 did not have

access to the rear of the building. For the Respondent Mr Cheyne said that he had had access to the rear and that he had agreed the work was necessary. Mr Bowie went on to say that he had tried to obtain other quotes but had been unable to find another contractor willing to quote due to their workload. He also said that as far as he could understand if there was any leak at Flat 4 it would be coming from the roof. Mr Bowie said that if the skews were open moisture would transfer into the joist ends. He said there was no damp in 2018 in the walls or roof. When asked what the best way to progress the water ingress issue Mr Bowie said that it had never been reported to him after February 2020 that there was a problem but that it would be necessary to convince the other owners that work needed done. Rockview Properties thought it was unnecessary.

22. In response to a query from the Applicant Mr Bowie maintained that the bins could only be located in the stairwell and that this was common throughout Aberdeen and Aberdeenshire in similar tenement properties. Mr Bowie went on to explain that only one flat within the building had required planning permission for change of use. He did not know the reason for this.
23. In reply to a further question from the Applicant regarding a second leak in December 2021 Mr Bowie indicated he had been unaware of this. He confirmed that in 2018 the contractor had accessed the roof to carry out repairs using a roof ladder. Scaffolding had not been necessary.
24. The Tribunal also heard evidence from Mr Alan Gardiner who is also a director of Rockview Properties Limited and a co-owner of two flats in the block and in addition is the proprietor A & J Investments which owns one of the retail units on the ground floor. Mr Gardiner confirmed he had seen the correspondence Scottish Government and Aberdeenshire Council and the Scottish Fire Service. His position was that the only suitable place to store the bins was in the stairwell. He said there was no alternative and that the building insurers and environmental health did not want refuse stored in individual flats. He explained that Aberdeenshire Council did not permit bins to be stored on the street.
25. With regards to the proposed remedial works, Mr Gardiner described these as aspirational. He said he owned over 70 properties and in nearly 90% of them it would be possible to carry out repairs as proposed but that they were not necessary. He went on to say that it had not been suggested that there was still a leak at the property. Therefore, the proposed works were aspirational. He went on to say before any work could be done a majority of owners would have to agree. It was pointed out to Mr Gardiner that the reason for Cheynes preparing a quote to carry out the work was because there had been a leak. Mr Gardiner then said that he had been made aware of it at that point. He went on to say that he had not been able to find another contractor to provide an alternative quote as no-one had been interested.
26. In response to a question from the Respondent Mr Gardiner said that he was aware of lots of flats where bins were stored inside in hallways. He went on to say that he was unable to comment on any changes made to the plans other

than to say it had originally been intended to have serviced accommodation but that had fallen through. He suggested if there was any issue that the Respondent take that up with the planning department.

Final Remarks

27. The Respondent asked the Tribunal to recognise that he had been let down by the Respondent. He suggested that the Respondent had acted more on Rockview Properties behalf than his own. He said that he was looking for recompense for the detriment to his health and wellbeing as a result of the failures on the part of the Respondent and for the inability to lease his property since December last year. He said he had asked in an email of 9 February 2022 if he should carry out a temporary repair to the property but had never received a reply.
28. For the Respondent Mr Cheyne re-iterated that it could not be said that the later leak was caused by a failure of the work carried out in 2018 but even if it was, repairs do fail and that was not the fault of the Respondent. Although the Respondent may have failed to reply to the Applicant's query it was ultimately down to the Applicant himself to decide whether to carry out repairs to his property.

The Tribunal make the following findings in fact:

29. The Applicant is the owner of the property.
30. The property is one of five flats flat within the tenement forming 7 Chapel Street, Peterhead.
31. The five flats share what is known as "the tenement common parts."
32. The ground floor of the tenement is occupied by two retail shops.
33. The shops and flats combined form what is known as "the block".
34. The owners of the five flats contribute jointly in equal shares 38% of the cost of maintaining the common parts of the block subject to certain exceptions for the owner of Flat1.
35. The owners of the five flats contribute equally towards the cost of maintaining the common parts of the tenement
36. The Factor performed the role of the property factor of the five flats but does not factor the retail units.
37. Although the Deed of Conditions by Rockview Properties Limited registered 23 January 2017 burdening the tenement at Clause 2.1(x) provides that "no garbage cans, ash buckets or any other refuse receptacles shall be left or

deposited other than in the bins store or bin areas provided for that purpose;" no such bin store or bin area was designated or provided.

38. The Applicant complained to the Respondent that bins should not be stored in the stairwell of the tenement and that to do so was in breach of the Deed of Conditions.
39. The Applicant corresponded with Aberdeenshire Council regarding the appropriateness or otherwise of keeping bins in the stairwell.
40. The Respondent obtained advice from the Scottish Fire Service and the building insurers.
41. The Respondent held a meeting of owners to discuss the bin issue and a majority of owners determined to continue to keep the bins in the stairwell.
42. The Respondent was notified in September 2018 of water ingress affecting the Applicant's flat. The Respondent arranged for the developers, Rockview Properties Limited to undertake repairs to remedy the water ingress under warranty.
43. The Respondent failed to ascertain from Rockview Properties Limited the nature and extent of the works carried out and they failed to keep the Applicant properly advised.
44. The Respondent relied upon the advice of its insurance broker when the block building insurance was due for renewal in June 2021.
45. The cheaper insurance obtained on renewal in 2022 was not on the same terms as in 2021.
46. The scope of works prepared by the Respondent following the quote provided by Graeme W Cheyne was inadequate as it did not provide measurements of the areas involved.
47. The Respondent held a meeting of flat owners and owners of the retail shops on 18 February 2022. The Applicant did not attend. The Respondent recommended that the work quoted for by Graeme W Cheyne was carried out. The majority of owners did not agree.
48. Rockview Properties Limited undertook to obtain its own quotes for repairs but failed to obtain any.
49. No progress has subsequently been made.
50. The Respondent failed to respond to an email from the Applicant dated 9 February 2022 querying if he should instruct temporary repairs to his flat.
51. The Applicant did not pursue this matter further with the Respondent.

52. The Applicant has not carried out any repairs to his flat. It remains in a similar condition to what it was in December 2021. He has not re-let it.

Reasons for Decision

Bin Storage

53. This issue raises a number of points for the Tribunal to consider. Firstly, does the title condition preclude bins being stored anywhere other than in a bin store or other area provided for that purpose? Whether it was at some point intended that there would be a bin store or area is unknown. It is quite clear that there is neither. That being the case the correct way to deal with interpreting the clause is to treat it as though it does not exist. This means that as far as the title is concerned there is no restriction on where the bins can be kept. However, the Scottish Government quite rightly pointed out that there is an onus on owners and occupiers to comply with Section 93 of the Civic Government (Scotland) Act 1982. Furthermore, Mr Fyvie from Aberdeenshire Council in his correspondence did not consider the current arrangement to be adequate. The Tribunal also noted from correspondence that the Council may be moving to a three-weekly cycle for refuse collection with additional refuse bins being provided. If that is the case then there is likely to be an even greater risk of rubbish piling up in the hallway. The Tribunal does not consider that the current arrangement is at all satisfactory. Having said that the Tribunal acknowledges that there may be a limit to the role that the Respondent can play in changing the situation. The Tribunal was frankly surprised but accepts that the insurers apparently consider weekly storage of refuse in individual flats is a higher risk than fortnightly storage in a communal area. It would nevertheless suggest that this matter is looked at again by the Respondent particularly if the Council is moving to a three-weekly cycle. The Tribunal would also encourage the Respondent to have further discussions with the flat owners to see if a majority might reconsider their position on having refuse stored in each flat with a weekly collection as this seems to the Tribunal to be a much better alternative to the current situation. The Tribunal does not consider it should make any order in respect of the bin storage but would strongly encourage the Respondent to be more proactive in persuading owners to move to a weekly collection.

Water Ingress 2018

54. The Tribunal found that the overseeing of the work carried out by Rockview Properties in 2018 was woefully inadequate. It appears the Respondent contacted the developers and then left everything to them and took no further interest whatsoever. In this regard they fell far short of what the Applicant might reasonably have expected of his factor. By not knowing accurately what work was done in 2018 it is impossible to say if any subsequent leak in 2021 was due to faulty workmanship or to an entirely new cause. The Respondent was in breach of Section 6.1 of the 2012 Code.

Insurance

55. The Respondent is not an insurance broker. They are not authorised to conduct insurance business. It is therefore entirely appropriate for the Respondent to rely upon the advice of a professional insurance broker as they did for the renewal of the block insurance in 2021. They cannot be faulted for that. Although the Applicant was able to obtain cheaper insurance the following year that was not on a like for like basis as the cover was not the same. The Tribunal does not consider there was any breach of Sections 5.6 or 5.7 of the 2012 Code.

Communication and Current Repairs

56. The Tribunal has considered carefully the documents submitted by both parties as well as the oral evidence. It has found that whilst much of the Applicant's concerns have been adequately addressed by the Respondent some issues have been attended to rather poorly. The Tribunal agrees that the scope of works produced by the Respondent which simply used the quote provided by Graeme Cheyne with the figures removed was inadequate. A contractor presented with this would not be able to provide a quote without having measurements provided. There was a failure on the part of the Respondent to reply to the Applicant's query in his email of 9 February 2022. Overall there appeared to the Tribunal to be a reluctance on the part of the Respondent to be pro-active in dealing with the current repairs issue although the Tribunal accepts that this might partly be due to the ongoing application before the Tribunal. The Tribunal also acknowledges that the Respondent has an uphill struggle in having repairs carried out given the split between the retail properties and the flats. There may be very little the Respondent can do even if it totally agrees with the Applicant that repairs to the chimney, gable and roof are essential if the retail shop owners will not agree. The Tribunal does not have jurisdiction in this regard. The Tribunal does however consider that there have been some failures on the part of the Respondent for the reasons given above and finds that there has been a breach of Section 2.7 of the 2021 Code.

Other Matters

57. The Tribunal considered whether the Respondent was in breach of OSP1. There is a requirement for the Respondent to conduct its business in a way that complies with all relevant legislation. The Tribunal did not consider this extended to an obligation that the Respondent was required to ensure that all the owners in the tenement complied with Section 93 of the Civic Government Scotland Act 1982 but rather that their obligations under the Act were pointed out to them. The Tribunal was satisfied that the Respondent had done this but as stated above the Tribunal would encourage the Respondent to do more in this regard.
58. The Tribunal was satisfied from the documents produced and the oral submissions that the Respondent had complied with OSP4.

59. The Tribunal was satisfied from the documents produced and the oral submissions that the Respondent had not breached any data protection legislation. Although some flat owners may have been aware of the Applicant's position that was not as a result of disclosures by the Respondent but from conclusions drawn by other flat owners themselves.
60. For the reasons given above the Tribunal does not consider that there have been any breaches of Sections 6.4 and 6.6 of the 2012 Code.
61. For the reasons given at paragraph 53 the Tribunal does not consider that the Respondent has erred in its interpretation of the title deeds and therefore does not consider that it has failed to carry out its property factor's duties.
62. Taking everything into account the Tribunal does accept that the Applicant has been let down by the Factor. The Factor failed to adequately deal with the supervision of the repairs in 2018. There has also been further poor communication in 2022. The Tribunal accepts that the Applicant has been put to considerable inconvenience and at times delay. Having said that the Applicant could himself have been more pro-active in seeking answers from the Respondent particularly when there was no reply to his email of 9 February. The Tribunal does not consider that the Respondent should be liable for the Applicant's loss of rental income from December last year. It does however consider that the Applicant is entitled to a financial award in the sum of £500.00 to reflect the foregoing issues.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

Appeals

An Applicant or Respondent 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.



Graham Harding Legal Member and Chair

10 December 2022 Date