



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) in terms of section 19 (1) of the Property Factors (Scotland) Act 2011 (“the Act”) issued under the First-tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2016 (“the regulations”)

Chamber Ref: FTS/HPC/PF/19/0249

Property at Flat 2/2, 90 Manor Crescent, Gourock, PA19 1UP (“the property”)

The Parties: -

Mr James Turley, c/o Flynn, Flat 2/2, 90 Manor Crescent, Gourock, PA19 1UP (“the homeowner”)

Morrison Walker Property Management Ltd., 23 Patrick Street, Greenock, PA19 1UP (“the property factor”)

Tribunal Members: -

Simone Sweeney (Legal Member) Kingsley Bruce (Surveyor Member)

Decision of the Tribunal Chamber

The First-tier Tribunal (Housing and Property Chamber) (“the tribunal”) unanimously determined that the property factor has complied with the Property Factor’s duties in terms of section 17 of the Act.

Background

1. Reference is made to previous procedure. Following a hearing on 11th October 2019 at which the property factor sought to lodge information, the tribunal issued directions dated 30th October and 28th November 2019. Reference is made to the content of those directions.

2. By email of 5th November 2019 the property factor responded to the direction of 30th October 2019 producing various pieces of evidence. The evidence was shared with the homeowner.
3. By email of 29th November 2019 the homeowner responded confirming he had no opposition to the property factor's evidence being received by the tribunal.
4. Further communications were received from each party on 12th and 14th December 2019.

Evidence from parties received by email and at hearing on 11th October 2019

5. The homeowner was absent at the hearing. The property factor was represented by property manager/director, Florence Gallacher and property inspector, Derek Robinson. Both confirmed that they were familiar with the homeowner's complaint and the application before the tribunal to determine whether there had been a breach of the property factor's duties as set out at section 17 (5) of the Act. The chair invited responses of the property factor to each part of the homeowner's application.
6. The chair referred to the formal complaint letter dated 4th February 2019 which the homeowner had attached to his application. The letter provided,

"...in June 2018-I was ...disappointed to see that water ingress was causing damage to the ceiling and walls in the main lounge of the property...On two previous occasions...water ingress of this type had caused similar damage. On each of these two occasions I alerted Morrison Walker to the problem- and on each occasion a number of site visits were conducted (mostly from ground level).

On both occasions Morrison Walker reported that the problem had been resolved. I then arranged for the internal damage to be repaired, only for the ceiling and walls to suffer from the same type of spoilage as before. It was clear that the root cause of the problem was never established. I reported the ingress problem for a third time in August 2018..."

7. In response to the homeowner's complaint of reports of water ingress having been reported and not addressed effectively, Ms Gallacher submitted that the property factor had received three reports of water ingress at the property from the homeowner. These reports were from 13th October 2014, 9th January 2015 and 22nd August 2018.
8. In response to the report dated 13th October 2014, the property factor had instructed a contractor to inspect the property which was carried out on 1st November 2014. The contractor identified that water was coming from above the oriel window area. A section of lead was fitted to the area around the window to catch the water coming from the gutter. The property factor received no further contact from the homeowner following the repair.
9. A second report of water ingress and storm damage was received from the homeowner on 9th January 2015. Again the property factor instructed their contractors to inspect. There had been strong winds and heavy rain around this time and it was identified that tiles had become dislodged from the roof. Due to the bad weather continuing, temporary repairs, only, could be completed between February and March. Permanent repairs were completed in May 2015. The area in need of repair was the same area which had required repair in 2014. However, the two separate issues of water ingress were not connected. Internal damage to the homeowner's property had occurred as a result of the storm damage and an insurance claim was made.
10. Ms Gallacher explained that the property factor was in regular contact with the homeowner throughout this period due to the homeowner's failure to meet factoring payments. Court action had been taken twice (2016 and 2018). The court had granted decrees on each occasion. Notwithstanding the level of communication between the parties during this time, Ms Gallacher submitted that there was no mention from the homeowner of water ingress until his email of 22nd August 2018. The property factor's representatives would have expected the homeowner to have referred to issues with repairs or water ingress on-going during the course of any communications arising in the court actions.
11. On receipt of the homeowner's email of 22nd August 2018 which raised a third report of water ingress at the property, the property factor's contractor attended the property on 5th September. Property inspector, Derek Robinson

was in attendance. The contractor identified blockages in the guttering and at the downpipe. These repairs affected common property and rested with the property factor to address. However, it was noted that this was not the source of water penetration into the homeowner's property. Water was identified to be coming through the left window of the flat above the homeowner's property. (Photographs of the scene were submitted by the property factor by email of 5th November 2019). Mr Robinson submitted that the photographs show evidence of gaps around the window. The gaps had developed because the mastic sealant around the window had deteriorated. It was through these gaps in the mastic sealant that the rain was penetrating into the flat above the property. From there, the water was making its way into the homeowner's property, below. The property factor took the view that the window was in need of repair but the window was not common property and therefore the responsibility of the owner of the particular flat. For this reason Mr Robinson saw no requirement for a project plan to be created by the property factor as it was not the responsibility of the property factor to take any action.

12. The surveyor member of the tribunal enquired on which basis had the property factor reached the view that the repair to the window rested with the owner of the flat and was not common property. Mr Robinson submitted that the mastic around the window is always the responsibility of an individual owner. He referred to the title of the property and to the Tenements handbook which confirms the position.
13. Both the title information and the relevant section of the Tenement's handbook were lodged by the property factor under cover of email dated 5th November 2019. Set out at page 9 of the burdens section of the title information was the meaning of "*common parts*." Windows of individual properties were not included within the definition.
14. At page 9 of the Tenement's handbook provided by the property factor was a list of "*individual repairs*" within a tenement building which included, "*Flat windows, including roof windows and dormers which light the flat.*"
15. Mr Robinson submitted that the particular window was facing in a Westerly direction and it is not uncommon for water to penetrate these windows.
16. The chair enquired of the property factor whether the homeowner had been advised that the source of the water into his property was the window in the

property above. Moreover the chair enquired whether the homeowner had been advised that the window was not common property and any repairs would not be facilitated by the property factor.

17. The tribunal was directed to a series of emails (lodged on 5th November 2019) between 22nd August 2018 and 3rd January 2019. An email dated 26th October 2018 from Mr Robinson was the first intimation to the homeowner that the repair rested with another owner. The email read,

“I have the quote from Quinton Tannock and have found out that the problem is with the mastic that seals the top floor window above your flat. Mastic that seals the window to the wall is the responsibility of the flat owner therefore I have sent the quote along with photographs showing the problem also the gable photograph and have highlighted what the problem is that they require to repair. The flat is rented out therefore the above has been sent to the agent of the landlord.”

18. Reference was made by Mr Robinson to a reply email from the homeowner dated 30th October 2018 in which the homeowner stated,

“Thank you for the progress report...As I understand things, it is the responsibility of the owner above to repair the problem which is causing the ingress of water into my property. Can you advise if Morisson (sic) Walker will be overseeing this repair to a successful conclusion?”

19. The property factor responded to the query by email dated, 1st November 2019 in the following terms,

“That is correct it is the flat above window that is causing the problem as reported by the contractor to us. We have advised the agent for the owner to have the problems fixed....We do not deal with this as far as forcing the repair as we do not have the power to do this...if they (the letting agent) do not sort the problem you require to contact the council environmental health officers and I can give you the details if required.”

20. The property factor's representatives submitted that they were satisfied that they had explained to the homeowner that the source of the water into his property was from the flat above, that the property factor was not responsible for the repair and this rested with the owner of the flat above. The property factor's representatives were satisfied from the homeowner's email communications with Mr Robinson that the homeowner understood the position.
21. Mr Robinson submitted that the repairs which fell within common property (pipes and guttering) were completed by the property factor's contractors on 5th September. The repairs to the window of the flat above the homeowner's property were not completed until 5th March 2019.
22. The property factor's representatives confirmed that there was no system of routine cyclical maintenance in place to clear gutters as the owners had opted out of this system. Periodic inspections of the building are carried out every 12 to 18 months by the property factor. The property factor has authority to carry out works up to the value of £400 before consent is required from homeowners.
23. In response to the allegation by the homeowner that, "*that the root cause of the problem was never established*" the property factor denied this. The property factor's representatives were satisfied that the property factor had acted promptly upon all reports of water received by them. Their contractors had attended on each occasion and undertaken full investigations. The contractor had reported back to the property factor the source of water on all three occasions. The source of the water was different each time. The property factor disputed any suggestion that the water was coming from the same source on each occasion. With the exception of the third report the property factor had arranged for repairs and these were completed effectively. The property factor had not been involved in the repairs required in August 2019 because the location of the repair did not fall under common property and required to be completed by the owner of the particular flat.
24. The next part of the homeowner's formal letter of complaint of 4th January 2019 referred to communications by the property factor. The letter read,

“I asked for a Project Plan to be produced (to help finally ensure an effective repair and within a reasonable timescale). This request was denied on the grounds that such a simple repair did not require a Project Plan. It is now January 2019, and this simple repair remains an unfixed simple repair. There have been no progress reports forthcoming – rather I have received curt replies to my enquiries. I have now to believe that the problem is to do with the windows in the Apartment above – and as such is not the responsibility of Morrison Walker...As a paying customer, I feel I have been left ‘high and dry’ by Morrison Walker on three separate occasions. I quote from the ‘WRITTEN STATEMENT OF CONDITIONS/SERVICES’ the following: ‘MWPML shall instruct firms which, from their experience, they believe to be reliable and capable of completing the repairs satisfactorily and at a reasonable cost. And Again: ‘we strive to provide a Factoring service which meets your reasonable expectations.’ I would appreciate your comments on how Morrison Walker have performed against these two contractual promises given that the repairs remain unrepaired and my reasonable expectations have certainly not been met. It would be appropriate for Morrison Walker to:

- a) Resolve the water ingress problem in a timely and professional manner*
- b) Organise the repair of the internal ceiling and walls*
- c) Pay £1,000GBP compensation for this lengthy period of inadequate service.”*

25. Mr Robinson accepted as correct that the homeowner had asked the property factor to produce a project plan and that this was refused. He referred to his earlier evidence that there was no requirement for such a plan as the property factor had no involvement in repairing the window of the neighbouring flat. Accordingly progress reports of the window repairs could not have been provided by the property factor but reference was made to various emails (lodged under cover of 5th November 2019) which pointed to the homeowner being made aware of what progress was being made as far as the property factor was aware. An example was an email exchange between the

homeowner and the property factor in November 2019. By email of 27th November 2019 the homeowner enquired, *“This is dragging on and on – can I have an update please.”* Mr Robinson responded by email of 27th November 2019 in the following terms,

“I understand why you asked for a project plan however as I have already said it is the responsibility of the flat owner to carry out the work as it is the mastic that appears to be the problem. I spoke with the agent for the flat at the end of last week and they have instructed a builder to do the work and check the other window on that gable to ensure that it is okay if not they will deal with it to (sic).”

26. By way of further example was an email exchange between the two in January 2019. By email of 2nd January 2019 the homeowner wrote,

“This is really dragging on far too long- it is now at an unacceptable stage. Please advise when this work will be complete –or I will be taking the necessary steps to have the Morrison Walker contract cancelled.”

27. Mr Robinson replied on 3rd January 2019 in the following terms,

“I have advised you that the problem is not out (sic) responsibility as the flat windows are the problem. We have advised you on both emails 1/11/18 & 27/11/18 that we do not deal with the repairs we have advised the agent of the landlord of the situation and they are dealing with the problem albeit not quickly enough. If you check the owner above your flat on Landlord Registration Scotland you will find that the agent is Castle Estates Ltd, Union Street, Greenock and you can call them regarding the issue...Please refrain from threatening the contract we have for something that we have dealt with and is not within something we can force a timescale on.”

28. Further, the property factor, having identified water ingress coming from the neighbouring flat in September 2018 had made this known to the relevant letting agent (Castle Estates) timeously. The property factor had produced copy of an email from 25th October 2018 to Castle Estates. The email read,
- “...We have had a contractor investigate the problem which we initially thought was the lead at the top of the oriel window. It appears that the problem is defective mastic around the window of your owners flat and also the fact that the window has dropped on the inside and the sill is leaning backwards.”*
29. The property factor’s representatives denied any allegation that the property factor had failed to meet the commitments set out in the written statement of services. The property factor was satisfied that they had acted upon the reports timeously and professionally.
30. The property factor had used the same contractor (Quintin Tannock and Co. Ltd.) for a long time and had no concerns with their service. No issues had been raised by the homeowner about the standard of the contractor’s work following repairs in 2014 or 2015. The property factor’s representatives did not think there was anything further they could have done to assist the homeowner with the issue which arose in August 2018 and rejected any suggestion that they should pay the homeowner £1,000. Mr Robinson indicated that all repairs to the window of the neighbouring flat were now completed as far as he understood.

Additional evidence following directions of 30th October and 29th November 2019

31. By email of 5th November 2019 the property factor responded to the direction of 30th October 2019 producing various pieces of evidence. The evidence was shared with the homeowner.
32. By email of 29th November 2019 the homeowner responded confirming he had no opposition to the property factor’s evidence being received by the tribunal. The homeowner made the following submission,

“The documentation provided by the property factor by email of 5th November 2019 included 5 photographs relating to the cause of the water ingress problem. 4 of these photographs were taken from the roof – and would give the Homeowner some confidence that a thorough and professional survey had taken place which would lead to a satisfactory repair and conclusion. No such photographs were made available from the survey which was associated with the original water ingress problem –supporting the Homeowner’s assertion that a thorough and professional survey had NOT taken place which then led to an unsatisfactory repair being executed with subsequent ‘mirror image’ water ingress damage to lounge walls and ceiling.”

33. The homeowner’s submission was shared with the property factor. By letter of 12th December 2019 the property factor responded in the following terms,

“There was no unsatisfactory repair carried out at the property causing water damage to the lounge. It was identified that the problem was coming from Mastic around the windows in the flat above...The water ingress problem was only reported to us on 22nd August 2018. On further checking our records can trace no evidence of previous reports of water ingress or unsatisfactory works being carried out.”

34. In response the homeowner submitted in the following terms on 14th December 2019,

“...it seems rather convenient that their records do not show that I reported a water ingress problem several years ago. I am not sure of the exact date but it was certainly sometime before 2013. This original water ingress report led to an (unsatisfactory) survey being carried out and an (unsatisfactory) external repair being completed. Internal repairs were concluded on damaged walls and ceiling by a contractor hired by Morison Walker-however given given (sic) that original repair was flawed the water ingress returned and a second, similar report was made in 2018.”

Findings in fact

35. That the property is a second floor flat in a modern tenement building of four floors.
36. That the property factor manages the property.
37. That the property factor received reports of water ingress into the property on 13th October 2014, 9th January 2015 and 22nd August 2018.
38. That the property factor instructed the same contractor (Quintin Tannock) and co. Ltd. to inspect the property after each report.
39. That, in October 2014, the source of the water was identified to be located at the top of the oriel window of the property.
40. That contractors, Quintin Tannock fitted a new section of lead to the area above the window to address the issue of water ingress.
41. That the water ingress into the property in January 2015 was storm damage which had caused tiles on the roof of the building to become dislodged.
42. That the property factor instructed temporary repairs to the roof and permanent repairs were completed in May 2015.
43. That, contractors, Quintin Tannock, carried out these repairs to the roof area in 2015.
44. That the issues of water ingress in 2014, 2015 and 2019 are unconnected.
45. That the property factor's representative attended the property with contractors, Quintin Tannock, on 5th September 2018.
46. That water ingress into the property on 22nd August 2018 came from defective mastic at the window of the neighbouring flat, above.
47. That the window of the neighbouring flat is not common property.
48. That the property factor is not responsible for repairs to individual properties.
49. That, by email of 25th October 2018, the property factor intimated the issue with the defective mastic to the letting agent of the neighbouring flat.
50. That, by email of 26th October 2018, the property factor intimated to the homeowner that responsibility for repairs to the window rested with another owner.

51. That the property factor instructed its contractors, Quintin Tannock, timeously upon receipt of the homeowner's reports of water ingress.
52. That, contractors, Quintin Tannock, carried out inspections and necessary repairs timeously and effectively.
53. That the homeowner made no complaint about the standard of work or service of contractors, Quintin Tannock, following works in 2014 or 2015.

Reasons for decision

54. Notwithstanding the submission of the homeowner in his email of 14th December 2019 that he reported a problem with water ingress "*sometime before 2013*" the evidence before the tribunal is that the property factor received three reports of water ingress from the homeowner. These reports were 2014, 2015 and August 2018. The evidence before the tribunal was that a contractor had been sent out to investigate each of the reports. A different explanation for the water ingress was received from the contractor each time. Repairs were completed promptly in 2014 and 2015 and no evidence was before the tribunal to suggest that there was any issue with the quality of the repairs.
55. The issue reported in August 2018 was identified to be an internal repair which was the responsibility of a neighbouring owner. This was shared with the homeowner and accepted. The property factor communicated to the homeowner any information they acquired about developments with the repair. It is not clear what else the property factor could have been reasonably expected to do in the circumstances. The tribunal finds no evidence that the property factor has failed in the duties required by section 17(5) of the Act.
56. Accordingly, the tribunal will not issue a Property Factor Enforcement Order ("PFEO") in this matter in terms of section 19 (1) (b) of the Act.

Appeals

57. 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 within 30 days of the date the decision was sent to them.

Simone Sweeney, Legal chairing member, 14th January 2020