

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/20/0627

48 Patriothall, Edinburgh EH3 5AY (“the House”)

The Parties:-

Miss Caroline Brown, 48 Patriothall, Edinburgh EH3 5AY (“the Homeowner”)

James Gibb Property Management Ltd., 4 Atholl Place, Edinburgh, EH3 8HF (“the Property Factor”)

Tribunal Members

Ms Helen Forbes (Legal Member)

Mr Colin Hepburn (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 in respect of compliance with paragraphs 2.5 and 6.1 of the Property Factor Code of Conduct (“the Code”) as required by section 14(5) of the Act.

The decision is unanimous.

Background

1. By application received in the period from 24th February and 3rd April 2020, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with sections 2.5, 6.1 and 7 of the Code.

2. Details of the alleged failures were outlined in the Homeowner's application and associated documents including correspondence to and from the Factor, photographs, and the Factor's Written Statement of Services. The complaint concerns a delay in roof repairs following complaints of water ingress from April and June 2018.
3. The Homeowner intimated her concerns to the Factor on 31st July 2018 and again by email dated 18th December 2019.
4. By decision dated 30th June 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 17th August notifying parties of a hearing scheduled for 29th September 2020.
6. By letter dated 27th August 2020 the Homeowner was asked to provide information believed to be missing from section 7 of the application form.
7. The Homeowner responded by email dated 1st September 2020, as follows:

With regard to Section 7 - I left 7B blank, mainly to avoid duplication. I could have added that James Gibb have failed in their duties, the two main areas being (with reference to their Statement of Services): - Services Provided & Maintenance and Response Arrangements - Failing to promptly carry out and complete necessary repairs to the building, including proper investigation of problems; and - Complaints - Failing to monitor my complaint (which they upheld) to completion; also as part of this; - Various Sections, including 6.1.1- Failing to provide updates and respond to email within their stated timescale. The documentation already supplied supports this

8. By email and letter dated 2nd September 2020, the Factor requested an extension to the time allowed for written representations and a postponement of the hearing due to insufficient time in which to prepare a response. The Factor also provided an update on works to the Property.
9. By letter dated 7th September 2020, the Factor was informed that the application for postponement had not been granted, and an extension to the time allowed for written representations was granted to 18th September 2020.
10. By email dated 7th September 2020, the Factor requested a further extension to the time allowed for written representations. An extension was granted to 24th September 2020.
11. By email and letter dated 24th September 2020, the Factor lodged written representations and productions, comprising correspondence between the parties, correspondence with homeowners, survey report, correspondence with contractors and tender report. The Factor reiterated their request for a postponement of the hearing.

12. The Factor's representations and productions of 24th September 2020 were not circulated to the Tribunal and the Homeowner until the morning of 29th September 2020, shortly before the hearing commenced.

The Hearing

13. The hearing was held on 29th September 2020 by telephone conference. The Homeowner was in attendance. The Factor was represented by Ms Jeni Bole, Technical Manager (Legal) and Ms Angela Kirkwood, Operations Director.

Preliminary Matters

Late circulation of documents

14. The Homeowner was asked if, in the interests of fairness, she would wish to request a postponement of the hearing, given the late circulation of documents lodged by the Factor on 24th September 2020. The Homeowner said she felt much of the information provided was historical and she did not wish to request a postponement.

Factor's Postponement Request

15. The Factor's representative, Ms Kirkwood, said the Factor wished a postponement for the following reasons:

- (i) The Factor's complaints procedure had not been exhausted. The Factor had not had a chance to resolve the Homeowner's complaint.
- (ii) All requests of the Factor had been met and the repairs are progressing and cannot be progressed any faster.
- (iii) The Factor wished to call an independent witness from F3 Building Surveyors Ltd. ("F3") to explain the delays, and the witness was not available for today's hearing. This was necessary as the Factor's representatives are not surveyors and the requirement to keep the Homeowner informed had been delegated by the Factor to F3. This had a direct bearing on the complaint that paragraph 6.1 of the Code had not been complied with. F3 had told the Factor that they were keeping the Homeowner informed and managing the situation. Responding to questions from the Tribunal as to why this was not mentioned in their submission and no witness list or information had been notified to the Tribunal in advance of the hearing, Ms Kirkwood said this was an omission.

16. In response, the Homeowner said she was informed by the Factor by email dated 27th July 2019 (included with her productions) that the complaints procedure had been exhausted. Any information from F3 to the Homeowner was always copied to the Factor. She was not aware of any formal delegation to F3 of the responsibility to keep her informed of progress.

Consideration of request

17. The Tribunal adjourned to consider the Factor's request for a postponement. The Tribunal refused the request for the following reasons:

- (i) There had been no witness list lodged as required by Rule 22 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended ("the Rules").
- (ii) The necessity for a witness was not mentioned in either of the two requests for postponement made by the Factor.
- (iii) It was not clear to the Tribunal why the evidence of the witness was crucial.
- (iv) The Factor had notified the Homeowner that the complaints procedure had been exhausted.
- (v) It would be open to the Tribunal at any time to ask for further information or to postpone the hearing should it be deemed necessary to hear from the witness.

Sections of the Code to be considered

18. The Tribunal pointed out that the Homeowner had not clarified which paragraph of section 7 she was alleging had not been complied with; however, it was clear that her complaint was in relation to the fact that, despite an upheld complaint, the situation was ongoing. There is not a relevant paragraph within the Code to cover this situation. In her email of 1st September 2020, she had stated that she could have added alleged breaches of Property Factor's duties; however, the Tribunal took the view that she had not added these matters, nor had the Factor been informed of them, so the hearing would be confined to consideration of paragraphs 2.5 and 6.1 of the Code.

19. The Tribunal adjourned for a short period to allow everyone to read the Factor's submission and productions.

Alleged breach of paragraph 2.5

20. The Code states: *You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.*

Evidence of the Homeowner

21. The Homeowner said the Factor had not responded promptly at all times. Although they submitted that they had quickly and fully resolved complaints, that was not the case. She had asked for her complaint to be accelerated and this had not been done. She had hoped to sort matters out between the parties, but the Factor had directed her to the Tribunal. She constantly had to email the Factor for progress reports. Although her complaint was upheld, the

Factor continued to delay matters and the roof had still not been repaired. Had the repairs been progressed sooner, the roof would not be in such a bad state now. In late 2019, F3 sealed the roof and it is now watertight. Prior to that, there was a slow seep which has caused a deterioration in the condition of the House. The room that is affected with damp can only be used for storage. It smells musty and the plasterwork has deteriorated. There is no point in repairing the internal damage until the roof has been repaired, and the insurer would expect her to wait until a final repair had been carried out before completing the internal work.

Evidence on behalf of the Factor

22. Ms Kirkwood said the Tribunal should only be considering the complaint that was upheld in 2018, and nothing that had occurred since then, as this would be outwith the scope of the Tribunal.
23. Ms Kirkwood said the Factor immediately notified contractors when the matter arose. Initially, it was thought the repair was successful, until they heard in August 2018 that there was further water ingress. There were problems with the contractor and another contractor was brought in. There were issues involving access, warranty and ownership that delayed matters. In November 2018, F3 became involved. It was then apparent that the cost was outwith the level of delegated authority. There was more ingress in November/December 2018.
24. From January to March 2019, the Factor tried to get a third quote for the repairs but they were unsuccessful. There was a delay with the contractor commencing work, and this was due to start in June 2019. A sub-roof was then discovered and tests undertaken. F3 were in touch with the Homeowner throughout the period from November 2018 to the present. There was contact by F3 to which the Factor was not party. In December 2019, a temporary repair was carried out successfully.
25. Ms Kirkwood said this was a complex repair and time was required for quotes, surveys, and consent. The Factor did not lose focus. The Factor did not always give updates as this had been delegated to F3.
26. Ms Kirkwood said that communication could have been better, and the Factor could have brought in a surveyor sooner; however, they have to justify bringing in an expert as this adds additional cost. Otherwise, they had responded to matters promptly and taken all the correct action.
27. Responding to questions from the Tribunal, Ms Kirkwood said they have now made an application to the Missing Share scheme as two out of five homeowners have not paid their share. They are awaiting an update from the local authority. Homeowners were notified on 24th April 2020 of the work and provided with consent to proceed. The Factor has been very active during lockdown in issuing a funding call and chasing up homeowners.

28. The representatives of the Factor said that at one point the Homeowner had asked not to be called by the Factor, preferring correspondence by email.

Response from Homeowner

29. The Homeowner said she agreed it was a complex repair but the delays were unreasonable. She had provided photographs of the slow seep to the Factor in July and November 2019. She had never been told to deal directly with F3. There was the odd call from F3 asking about access. She has asked F3 for updates and they have always said the repair is in hand. Ms Kirkwood told her she was taking a personal interest in the case and did not tell the Homeowner that the responsibility to update her was delegated to F3. There was no sense of urgency on behalf of the Factor. The Homeowner was pushing for progress but the Factor was not managing the situation.
30. The Homeowner said she had not asked not to be called by the Factor, other than on one day when she had difficult family circumstances to deal with, and she could not answer calls.

Section 6.1

31. The Code states: *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's Evidence

32. The Homeowner said she was given a verbal assurance from the person dealing with her complaint on behalf of the Factor on 25th February 2019 that she would receive a weekly update on progress. She received an email regarding this on 20th March 2019. On 23rd April 2019, the Homeowner emailed the Factor about lack of update, stating that she had heard nothing since 10th April 2019. She gave up for a while after that. On 27th November 2019, she requested an update and received no response. On 4th December 2019, she sent an email and received notices of intended work but no update. If they had told her not to contact them for a period of time because they were carrying out certain work, she would have accepted that.
33. Responding to questions from the Tribunal regarding the email from the Factor dated 27th July 2019, and what exactly she had been complaining about, the Homeowner said she was complaining about everything. The same issues were ongoing and matters were no further forward.

Evidence on behalf of the Factor

34. Ms Kirkwood said the Factor had conceded there was a delay in communication but not that they had not provided updates. Regular updates

were given. The Factor proceeded as quickly as they could. They could not determine when the various questions would be answered. They were not responsible for any delay. They provided an update to all owners on 25th February 2019, and again in April and May. They cannot call homeowners on a weekly basis if nothing is happening. Responding to questions from the Tribunal, Ms Kirkwood said she was not aware that an undertaking had been given to provide weekly updates. The Factor would give updates of the current position. It was not stated in their written statement of services that weekly updates would be provided.

35. Responding to questions from the Tribunal regarding the significant number of times within lodged emails that the Factor's representatives had apologised to the Homeowner for delays and lack of updates, Ms Kirkwood said they were sympathetic rather than apologetic. They had accepted their communication could have been better and conceded that paragraph 2.5 had been breached.

36. A detailed update went out to all homeowners on 25th February 2019.

Scope of Tribunal

37. The Tribunal invited the Factor to make further submissions on the matter of whether the Tribunal could take into account matters after the complaint was dealt with in August 2018. Ms Kirkwood said she understand that the Tribunal was limited as a point of law to only those matters that had been complained about.
38. The Homeowner said the Tribunal was a last resort. She had tried to progress the complaint but had been told it could not be taken further. This has had a significant impact on her life. The fact that it is now two and a half years since the issue first arose speaks for itself.

Further procedure

39. Following the hearing, the Tribunal issued a Direction in the following terms

The Homeowner is required to lodge the following documentation ... by 26th October 2020:

- (i) *Copies of all relevant correspondence to the Factor making the complaint which was given the reference CAR2018/048 and concluded in August 2018;*
- (ii) *Copies of all relevant correspondence concerning the complaint made prior to the email issued by the Factor dated 27th July 2019;*
- (iii) *Copies of the 'multiple emails where I request an update' referred to at the top of the last page of the Homeowner's timeline.*
- (iv) *A full copy of the email from Jeni Bole to the Homeowner dated 5th December 2019.*

All submitted documentation must have each page numbered and listed in an inventory.

The Factor is required to lodge the following documentation and information ... by 26th October 2020:

- (i) *Copies of any correspondence issued to the Homeowner between the dates of the letter issued on 30th May 2019 (production number 10) and the letter issued on 5th September 2019 (production number 11);*
- (ii) *A full explanation of all the factors that contributed to the delay referred to in production number 11;*
- (iii) *Any evidence that supports the delegation to F3 of the responsibility to update the Homeowner on an ongoing basis;*
- (iv) *Any evidence that supports regular updates being provided by F3 to the Homeowner.*

All submitted documentation must have each page numbered and listed in an inventory.

40. By letter dated 22nd and received on 26th October 2020, the Homeowner submitted documentation in response to the Direction.

41. By email dated 30th October 2020, the Factor submitted documentation in response to the Direction.

Findings in Fact

- 42.
- i. The Homeowner is the owner and occupier of the House, which is a flatted dwelling-house.
 - ii. The Factor registered as a Property Factor on 23rd November 2012 under registration number PF000103.
 - iii. The Factor acts as agent for the homeowners within the development of which the House forms part.
 - iv. On or around 11th April 2018, there was water ingress into the House.
 - v. On or around 20th June 2018, there was further water ingress into the House.
 - vi. On 22nd June 2018, a repair was carried out above the bathroom of the House. The area above the main bedroom remained unrepaired.

- vii. The Homeowner complained to the Factor about the lack of progress and her complaint was upheld by the Factor on 31st August 2018. The Factor conceded there had been an excessive delay in providing reports and attending, that another contractor should have been engaged and that timescales for responses had been repeatedly breached.
- viii. In November 2018, F3 Building Surveyors were instructed to undertake survey work.
- ix. On 19th December 2018, F3 provided a report to the Factor.
- x. The Homeowner continued to complain about delays and a lack of updates on progress with the work.
- xi. There were issues with warranty, access and ownership that caused delays.
- xii. On 25th February 2019, the Factor made a verbal promise to provide the Homeowner with a weekly update on progress. This was confirmed by email on 20th March 2019.
- xiii. The Factor failed to provide weekly updates to the Homeowner.
- xiv. On 2nd May 2019, the Factor wrote to homeowners stating that work would start on the roof later that month. Homeowners were requested to make payment of their share of the cost of the works.
- xv. On 30th May 2019, the Factor wrote to homeowners stating that work would start on the roof in the latter part of the week beginning 3rd June 2019.
- xvi. Poor weather in early June 2019 delayed the start of the work.
- xvii. The discovery of a sub-roof in June 2019 further delayed the start of the work.
- xviii. Two homeowners within the block of flats did not pay their share of costs and the Factor has had to access the Missing Share Scheme.
- xix. On 27th July 2019, the Factor confirmed that the Homeowner had exhausted their complaints procedure.
- xx. On 26th August 2019, in response to an email from the Homeowner, the Factor stated that work would commence mid-September 2019.
- xxi. On 5th September 2019, the Factor wrote to homeowners stating that work on the roof would commence on 23rd September 2019.

- xxii. In early to mid-November 2019, there was email correspondence between F3 and the Homeowner concerning access and visits to be made to the House by F3.
- xxiii. On 27th November 2019, the Homeowner requested an update from the Factor, and received no response. The Homeowner chased the Factor up on 4th December 2019.
- xxiv. On 4th December 2019, the Homeowner sent an email to the Factor and received notices of intended work, but no update.
- xxv. On 6th December 2019, the Factor offered the Homeowner £500 compensation.
- xxvi. In December 2019, a temporary repair was carried out successfully.
- xxvii. On 9th and 27th March 2020, F3 provided an update to the Homeowner regarding tenders having been issued.

Determination and Reasons for Decision

43. The Tribunal took account of all the documentation provided by parties and their written and oral submissions.

Scope of Tribunal's decision

- 44. The Tribunal did not find that there was merit in the argument made on behalf of the Factor that the Tribunal could only take into account matters up to August 2018. Section 17(3) of the Act provides that, before making an application to the Tribunal, the homeowner must notify the factor in writing of alleged failures, and the factor must have either refused to resolve or unreasonably delayed in attempting to resolve the homeowner's concerns. The Act does not provide that a homeowner can only make an application in relation to matters that have been through the factor's formal complaints system.
- 45. In this case, the Homeowner has continued to complain of delays and lack of updates in writing to the Factor after August 2018. The Factor, despite upholding the complaint in August 2018, has unreasonably delayed in addressing the Homeowner's concerns, and has continued to fail to comply with the Code.

Failure to comply with paragraph 2.5 of the Code

- 46. The Tribunal found that the Factor had failed to comply with this section of the Code, by failing to respond to enquiries and complaints within prompt timescales. Even during the process of making the complaint that was upheld in August 2018, the Homeowner had to prompt the Factor for responses. The Factor conceded this point in upholding the complaint, and during the hearing. Despite having upheld the complaint, the Factor failed to respond to the Homeowner's email of 27th November 2019.

Failure to comply with paragraph 6.1 of the Code

47. The Tribunal found that the Factor had failed to comply with this paragraph of the Code by failing to inform homeowners of the progress of the work. Again, this was upheld as part of the complaint finally dealt with in August 2018; however, the Factor continued thereafter to fail to provide the Homeowner with updates. Having informed homeowners that work would commence in June 2019, the Factor did not keep homeowners informed of the progress of the work, or lack thereof. The Tribunal noted that, in response to the Tribunal's Direction, the Factor stated that the contractor had notified them in July 2019 of personal circumstances that would impact staff levels. There was no evidence that this was notified to homeowners. On almost every occasion that any update was provided, it was prompted by a request from the Homeowner. Having undertaken to provide a weekly update, the Factor ought to have kept to that undertaking, whether or not it is required so to do by its written statement of services. The tone and content of emails from the Factor on several occasions is apologetic, tending to indicate an awareness that they were failing to provide updates, contrary to the claims made by the Factor's representative during the hearing that this was not the case.
48. The Tribunal was not persuaded that the Factor delegated responsibility for updating the Homeowner to F3. Even if it had done so, it was incumbent upon the Factor to check whether such updates were being provided. There was some correspondence between F3 and the Homeowner in November 2019 and March 2020 on matters of access and tenders. There was no evidence of regular updates provided by F3 prior to or after November 2019. The Tribunal did not take into account correspondence between F3 and the Homeowner after early April 2020, as this was outwith the timeframe of the application.

Observations

49. The Tribunal considered that the time taken to progress this repair is unacceptable. The Tribunal notes that the main repair has still not been completed. While the Tribunal accepts that some matters were outwith the control of the Factor, particularly in the early stages, it is incumbent upon the Factor to continue to pursue the contractor to complete the work.

Proposed Property Factor Enforcement Order (PFEO)

50. 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.
51. 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.
52. 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.

53. 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

54. 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

11th November 2020