

Housing and Property Chamber

First-tier Tribunal for Scotland



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 Ref: FTS/HPC/PF/22/0644

Property: Flat 13, 173 Lower Granton Road, Edinburgh EH5 1GL ("the Property")

The Parties:-

Mr Paul Gillam, Flat 13, 173 Lower Granton Road, Edinburgh EH5 1GL ("the homeowner")

Lowther Homes Limited, registered in Scotland SC402836 and having their registered office at Wheatley House, 25 Cochrane Street, Glasgow G1 1HL ("the property factors")

Tribunal Members:

George Clark (Legal Member/Chairman) and Carol Jones (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 OSP6 and their duties in terms of Sections 6.4 and 6.6 of the Code of Conduct for Property Factors, effective from 16 August 2021 ("the Code of Conduct") made under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") and have failed to comply with 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 5 March 2022, the homeowner sought a Property Factor Enforcement Order under Sections 17 and 20 of the

Property Factors (Scotland) Act 2011 (“the 2011 Act”) in respect of a failure by the property factors to comply with OSP6 and Sections 1, 6.1, 6.4, 6.6 of the Code of Conduct for Property Factors effective from 16 August 2021 (“the Code of Conduct”) and to carry out the Property Factors’ duties.

2. The homeowner stated that, at 10.15am on 29 November 2021, he reported, as an emergency repair, storm damage to the building of which the Property forms part. He stressed the urgency. He telephoned again at 15.10 and was told that his initial report had not been flagged as an emergency. By the time the property factors telephoned the homeowner again, they said that there was no point in coming out as it would be dark soon. The property factors attended the following day, but their contractors, TEAM, were unable to get on the roof through the hatch, as the ladder brought by their workman was not long enough. The homeowner was told by the property factors that TEAM would be back the following morning with a 33m cherry picker to ensure all was safe and to measure what was required. By this time a section of flashing had fallen off the roof. TEAM did not return the following morning. On 3 December, when TEAM workers arrived, they said they had been instructed to patch a portion of cladding and knew nothing about the roof. They had a 20m cherry picker which was not tall enough to reach the roof to make it safe and weatherproof. The homeowner telephoned the property factors who told him that the managing director of TEAM had said they would have a 33m cherry picker. The property factors telephoned the homeowner a short time afterwards to say that TEAM had told them that they had made a visual inspection of the roof and it was safe and weatherproof. The homeowner said that this could not possibly be true, as their hoist was not tall enough to enable them to inspect the roof from above. He did not receive a satisfactory response to his comments, despite sending “chasing” emails to the property factors.
3. On 17 December 2021, the property factors told the homeowner that the flashing had been made, but that it could not be painted until January. TEAM were going to be coming with a 33m cherry picker to inspect and make safe the roof. The homeowner emailed the property factors to say that this appeared to be an admission that they had not inspected and made it safe when they said they had, on 3 December. On 20 December, the homeowner reported that his neighbour had noticed water damage to the wall in the stairway below the site of the roof damage. TEAM were out the following day with a 33m cherry picker but told the homeowner they were there to inspect the damage and could not make a repair, as the flashing was not ready. They said that they had never inspected the roof to see if it was safe and weatherproof, in direct contradiction to what the property factors had told the homeowner by email on 3 December. The homeowner then telephoned the property factors and left a voicemail saying that the roof had to be made safe and weatherproof before Christmas. TEAM were unable to return to the Property on 22 December and the property factors instructed SWAT, who carried out temporary repairs, without requiring a cherry picker or ladders, on 23 December.
4. The homeowner provided the Tribunal with copies of the property factors’ Written Statement of Services, emails between the Parties between 29 November 2021 and 5 February 2022 (including the property factors’ response to the

homeowner's Stage 1 complaint) and a copy of the property factors' Stage 2 complaint response of 17 February 2022. The property factors upheld the complaint at Stage 1 and credited the common repairs account with the sum of £50. The homeowner did not accept this proposed remedy and, at Stage 2, the property factors accepted that there had been delays and that the homeowner had experienced poor service. They offered an additional £50 as a goodwill gesture.

5. The emails provided by the homeowner included a course of correspondence in which he stated that he had no faith in TEAM's ability to carry out a competent permanent repair to the roof. He asked the property factors to take the now-fabricated flashing from them and to have another, competent contractor, complete the job. In their Stage 1 response, the property factors said that they were unable to change the contractor for this particular job, as the flashing had already been fabricated, but that they would in future use B&D Roofing, approved contractors who are part of the Dunedin Canmore Framework, for repairs to the Property.
6. The homeowner also raised in the email exchanges with the property factors the issue that they had failed to comply with their service standards for completing an emergency repair, specifically that they had failed to attend the Property within four hours or ensure that a temporary repair was carried out within 24 hours.
7. On 29 March 2022, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the property factors were invited to make written representations by 19 April 2022. The property factors did not make any written representations to the Tribunal. The Applicant provided the Tribunal with a signed statement by Carol Cheam, confirming that she had been told by one of the TEAM workers when they called at the Property on 21 December 2021 that they were only there to put a temporary patch on the cladding lower down the wall and that they could not make a temporary repair to the roof until they had the newly-fabricated flashing ready.

Case Management Discussion

8. A Case Management Discussion was held on the morning of 30 May 2022. The homeowner was present. The property factors were not present or represented. The Legal Member of the Tribunal outlined the purpose of the Case Management Discussion, which was to clarify the issues if required, to identify areas of factual dispute and to determine whether to adjourn the case to a full evidential Hearing and what further information/documentation was required by the Tribunal in advance of such Hearing.
9. The homeowner told the Tribunal that there are 14 flats in the block of which the Property forms part. The permanent repair has still not been carried out. The property factors had told him a few weeks ago that TEAM would not now be doing the work and that SWAT had been instructed instead. They had also offered the homeowner £500 on condition that he withdrew his application to

the Tribunal. The homeowner told the Tribunal that it was not about money, so far as he was concerned. He just wanted the job to be done properly and for the property factors to show that they care about him and the other homeowners.

10. Under OSP6, one of the Overarching Standards of Practice, the homeowner contended that the property factors had not carried out their service in a timely way and that their staff did not have appropriate training, in that the call handler failed to log his initial call as an emergency and Mark Scoular, with whom the homeowner dealt throughout had failed to fulfil his promise of 30 November 2021 that TEAM would be back the following day with a 33m cherry picker.
11. The homeowner told the Tribunal that the property factors had failed to comply with their Written Statement of Services in that they had failed to respond within four hours of his notifying them that an emergency repair was required and had failed to deal with the temporary repair within 24 hours.
12. The property factors had failed to comply with the statement in Section 6.1 of the Code of Conduct that a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard. Their failures had resulted in further damage, namely water penetration into the common stair.
13. The property factors had failed to comply with Section 6.4 of the Code of Conduct as they had failed to arrange inspections and repairs in an appropriate timescale or provided information to the homeowner likely costs or progress.
14. Under Section 6.6 of the Code of Conduct, the property factors had failed to consider the need to balance the cost of repairs with other factors such as likely quality and longevity. They had been unable to show that TEAM had given the homeowners best value. Further, the homeowner understood that this was the first time the property factors had used TEAM. He still did not know the likely cost of the permanent repair and, when SWAT had carried out the temporary repair, they had told him that they had not been asked to give a quote in advance.
15. The homeowner's complaint in respect of failure to carry out the property factor's duties was that they had failed to comply with their Written Statement of Services.

Findings in Fact

- (i) The homeowner is the proprietor of the property.
- (ii) The property factors, in the course of their business, manage the common parts of the development of which the Property forms part. 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 24 January 2019.
- (v) The homeowner has notified the property factors in writing as to why he 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 5 March 2022, 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) The homeowner reported storm damage requiring an emergency repair on 29 November 2021.
- (ix) The property factors first attended the Property, following the homeowner's report, on 30 November 2021.
- (x) The necessary temporary repair was carried out on 23 December 2021.
- (xi) As at the date of the application, the permanent repair had not been carried out.

Reasons for Decision

- 16. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal regarded it as regrettable that the property factors had failed to submit written representations and had failed to appear or be represented at the Case Management Discussion, but the Tribunal was satisfied that it had before it all the information and documentation it required to decide the application without a Hearing.
- 17. OSP6 states that property factors must carry out the services they provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective. The homeowner had stated that the call handler to whom he spoke on 29 November 2021 to report the damage had failed to record the report as an emergency, but the Tribunal did not consider this one-off instance as establishing a shortcoming in the training of staff. The view of the Tribunal was, however, that the property factors had fallen short of the requirement to use reasonable care and skill and to carry out the services to the homeowner in a timely way. They did not seem to have taken control of the matter as the homeowner was entitled to expect. They did not appear to have challenged the assertion by TEAM on 3 December that they had made a visual inspection of the

roof and it was safe and weatherproof, when the homeowner told them that this could not be possible, as the cherry picker they had brought was not tall enough to enable any roof inspection to be made. Had the property factors acted promptly on this issue, they might have made an earlier decision to ask another contractor to carry out the work. The property factors also did not appear to have obtained from SWAT any estimate for carrying out the temporary repairs. In their Stage 1 response, the property factors said that they had agreed that future work on the roof would be carried out by another company, an approved contractor, part of the Dunedin Canmore Framework. They did not at any time provide the same quality assurance in relation to TEAM.

18. Having considered all the evidence before it, the Tribunal upheld the homeowner's complaint under OSP6.

19. The Tribunal did not uphold the homeowner's complaint under Section 1 of the Code of Conduct ("Written Statement of Services"). Section 1 covers the contents of the Written Statement of Services, and Service Standards are covered in the later Sections of the Code of Conduct. The homeowner's complaint referred to a failure to comply with the Written Statement of Services rather than to its contents and would be dealt with under the later headings of complaint.

20. Section 6.1 of the Code of Conduct states - "While it is homeowners' responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard". The view of the Tribunal was that Section 6.1 did not impose any specific duties on the property factor and was more of a heading, so the Tribunal did not uphold the homeowner's complaint under Section 6.1 of the Code of Conduct.

21. Section 6.4 of the Code of Conduct provides that "Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required". The view of the Tribunal was that the property factors had clearly failed to comply with this obligation and **the Tribunal upheld the homeowner's complaint under Section 6.4 of the Code of Conduct**. There was no indication that the anticipated cost of the work was below any agreed threshold. The homeowner was not provided with an estimate from TEAM for carrying out either the temporary or permanent repairs, and the homeowner told the Tribunal that SWAT had advised him when they carried out the temporary repair on 23 December 2021 that they had not been asked to provide a quote.

22. The relevant part of Section 6.6 of the Code of Conduct states that "The cost of the repair or maintenance must be balanced with other factors such as likely quality and longevity and the property factor must be able to demonstrate how and why they appointed contractors, including cases where they have decided not to carry out a competitive tendering exercise or use in-house staff. This information must be made available if requested by a homeowner". The Tribunal

upheld the homeowner's complaint under Section 6.6 of the Code of Conduct. It must have been clear to the property factors that, given the alleged performance failures by TEAM, turning up on 3 December with a 20m cherry picker when, according to the property factors, they had said it would be a 33m one, apparently telling the property factors that they had inspected the roof and it was safe and weatherproof when they could not have seen it from a 20m cherry picker, and arriving on 21 December without, apparently, instructions to carry out a temporary repair to the roof as well as the cladding, that the homeowner had no faith in the ability of that company to carry out the repairs to an acceptable standard. The response of the property factors seems to have been that, as TEAM had fabricated the replacement flashing, it was no longer possible to take the work away from them. Faced with serious questions such as those posed by the homeowner, the property factors should at least have explored the financial consequences of instructing alternative roofing contractors and explained to the homeowners the options open to them. They should also have sought to reassure the homeowners as to why they had appointed TEAM in the first place. The Tribunal noted that in their Stage 2 response, the property factors did not address this, but, recognising the homeowner's concerns about TEAM, they did set out the reasons for appointing B&D Roofing to carry out future works, namely that they were approved contractors on the Dunedin Canmore Framework.

23. The Tribunal also upheld the homeowner's complaint that the property factors had failed to carry out the property factor's duties. Under the heading "Your Repairs Service" on page 6 of their Written Statement of Services, the property factors state how they will deal with emergency repairs. They say they will attend within four hours of the repair being reported and make safe within 24 hours. They define an emergency repair as "an issue which causes immediate risk to health or is likely to cause serious damage to the property or makes the property less secure". The homeowner stated in the application that he had stressed the urgency when he called at 10.15 on the morning of 29 November to report an emergency repair, but the property factors had not responded until after 4pm and had then said there was no point in coming out day as it would soon be dark. They had not ensured that emergency repairs were carried out within 24 hours. Indeed, the temporary repair work was not done until 23 December, more than three weeks after the damage was reported by the homeowner. By that time, further damage had been caused by water ingress. It was no excuse that the call handler had not flagged the report as an emergency. There was a clear danger that material might fall from the roof, potentially causing harm to those below. The property factors did not attend the property until the afternoon of the following day. Furthermore, under the same heading on page 5 of their Written Statement of Services the property factors state that the consent levels for repair costs will be detailed in the Title Deeds or a Factoring Agreement but the homeowner said there is no mention of consent levels in the Deeds and no development specific agreement was provided by the property factor. These represented clear failures to comply with the property factors duties as set out in their Written Statement of Services.

24. Having decided that the property factors had failed to comply with OSP6 and Sections 6.4 and 6.6 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 ("PFEQ"). The Tribunal's view was that, although there was no evidence of actual loss, the property factors' failings had caused considerable inconvenience and distress to the homeowner who had told the Tribunal that he had worked hard to buy the Property and wanted it to be maintained in the same standard as it was when he purchased it. In light of the property factors' failings and the fact that the Tribunal intended to order the property factors to pay compensation to the homeowner, The Tribunal determined that it would be necessary to make a PFEQ. The Tribunal considered that an award of compensation to the homeowner of the sum of £500 by way of compensation would be appropriate in all the circumstances.

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.



**George Clark
Legal Member/Chair
9 June 2022**