



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under Section 26 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules') in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref:FTS/HPC/PF/20/0955

Flat 1/1, 278 Stonelaw Road, Burnside, Glasgow, G73 3RP ('the Property')

The Parties:

Mr Anthony Donnelly residing at Flat 1/1, 278 Stonelaw Road, Burnside, Glasgow, G73 3RP ('the Homeowner')

James Gibb Residential Factors, 65 Greendyke Road, Glasgow, G1 5PX ('the Factor')

Committee members:

Jacqui Taylor (Chairperson) and Mike Links (Ordinary Member).

Decision of the Tribunal

The Tribunal determines that the Factor has not failed to comply with section 6.9 of the Code of Conduct and the Property Factor duties.

The decision is unanimous.

Background

1. The Homeowner purchased his property Flat on 14th November 2014. The Property is part of the tenement 272-278 Stonelaw Road, Burnside, Glasgow which comprises four flats on the first and second floors and two shops on the ground floor.

2. James Gibb were registered as a property factor on 23rd November 2012 and took over the factoring of the Property in 2014.

3. By application dated 18th March 2020 the Homeowner applied to the Tribunal for a determination that the Factor had failed to comply with the Property Factor's duties and the following sections of the Property Factor Code of Conduct ('The Code'):

- Section 6: Carrying out Repairs and Maintenance.

Section 6.9

4. The application had been notified to the Factor.
5. By Notice of Acceptance by Jacqui Taylor, Convener of the Tribunal, dated 21st July 2020, she intimated that she had decided to refer the application (which application paperwork comprises documents received between 18th March 2020 and 10th June 2020) to a Tribunal.
6. A hearing was originally scheduled for 30th September 2020 but was continued to 17th November 2020. At the hearing held on 17th November 2020 the Factor's representatives explained that written representations and productions had been hand delivered to the Tribunals Centre, 20 York Street, Glasgow. As the written representations and productions had not been provided to the Applicant or the Tribunal members the hearing was adjourned. An oral conference call hearing by conference call took place in respect of the application on 14th January 2021.

The Homeowner attended on his own behalf.

The Factor was represented by David Reid, Managing Director; Lorraine Steed, Operations Director and Annie Dunley, Senior Development Manager.

6.1 As a preliminary matter the parties confirmed and agreed the following facts, which were accepted by the Tribunal:-

- (i) In general terms the application relates to repairing dampness in the close of the tenement 272-278 Stonelaw Road, Burnside, Glasgow
- (ii) There was no evidence of dampness in the close in November 2016.
- (ii) Mr Donnelly first reported the damp problem to the Factor in January/ February 2017.
- (iii) A plumber employed by the Factor attended at the Property in March 2017 and reported that the dampness had not been caused by a burst pipe.
- (iv) The Factor obtained a report from Alliance Timber and Damp specialists dated 24th November 2017 which referred to excessively high moisture readings indicative of rising damp and they recommended the insertion of a new chemical damp proof course to the affected areas.
- (v) The burst pipe was repaired in January 2018.
- (vi) The Factor submitted an insurance claim for the repair in January 2018.
- (vii) McGregors, contractors employed by the Factor stripped and replaced the damp plaster in July 2018.
- (viii) On 23rd July 2018 Mr Donnelly reported to the Factor that the dampness had reappeared.
- (ix) The adjacent Pharmacy and former Royal Bank of Scotland building, which forms part of the tenement 272-278 Stonelaw Road, had a damp proof course installed and where the new DPC adjoined the close of the tenement the dampness has reduced.
- (x) A second insurance claim was submitted by the Factor in respect of the ongoing dampness but the insurance company have refused to meet the cost of installing a new damp proof course in the close.

(xi) The close has still not been finally repaired.

6.2 The details of the application and the parties' written and oral representations are as follows:

Alleged Breach of Property Factor Duties:

The Homeowner's complaint:

The Factor had failed to manage a successful repair to rising damp in the communal close. They did not act upon or adequately consider the Alliance Damp Specialist Report (24/11/2017) recommending insertion of a DPC before submitting an insurance claim and authorizing tests and repairs amounting to a botched job. Ignoring this report was a major factor.

The Alliance Report dated 24th November 2017, which had been instructed by the Factor, recommended a damp proof course which was not acted on. The Report was not submitted to the insurance company in support of the insurance claim. Mr Donnelly explained that had the Alliance Report been submitted to the insurance company in support of the first insurance claim the cost of the DPC would have been met by the insurance company.

Mr Donnelly had lodged in evidence a letter from Ian Hamilton dated 4th December 2020 which explains that he met with the plumber when the plumber inspected the Property and he had advised the plumber that there was a running water pipe noise 24/7 that was audible from the flats. He explained that the plumber had dismissed his speculation that there was a burst pipe. Once the pipe had been repaired in January/ February 2018 the running water noise stopped.

Mr Donnelly explained that the plumber had wrongly advised that there was not a burst pipe which resulted in the Factor instructing a number of tests which were not necessary and delayed matters and resulted in unnecessary expense. Had the burst pipe been properly identified in March 2017 the damage would have been significantly less. In August 2017 the dampness in the close was head high and it had spread laterally along the wall. It was only when the Factor's senior property manager, Anne Dunlay, became involved that the pipe was eventually repaired. This took place in January 2018. For a year the leak from the pipe had been running under pressure.

The Factor's Response:

Mr Reid explained that the Factor acts as agent for the Homeowners. The Factor's role is to assist in identifying the problem and finding a solution. In connection with the dampness problem in the Property, the Factor had submitted two insurance claims. The first was in respect of the burst pipe. The second was in respect of the dampness problem. In connection with the second claim the insurance company

authorized track and locate to identify the cause of the dampness but they had rejected the request for a new Damp Proof Course to be installed.

The Factor had provided a copy of an email from Michelle Taylor of Sedgwick International UK dated 6th February 2020 which states:

'As previously advised, insurers will not consider the costs to install a damp proof course, this is the responsibility of the owners.'

As a Factor they rely on the expertise of specialists they employ such as the loss adjuster employed by the insurance company, surveyors and contractors. In particular they relied on the assessment of the plumber who originally inspected the dampness in the close and who had reported that the dampness had not been caused by a burst pipe.

Mr Links acknowledged that the tenement was probably 120 years old. He suggested that there would probably be an original slate damp proof course due to the fact there had been no problems with dampness before the problem with the burst pipe in 2017. He was very surprised that the plumber had not identified the leak in the pipe. He referred to the fact that Mr Donnelly has provided a letter from Iain Hamilton of Flat 2, 278 Stonelaw Road which referred to a hissing noise at the time the burst pipe had been reported. He suggested that the hiss in the pipe is a reasonable signal that it needs to be investigated as an urgent matter.

Mr Reid emphasized that as property factors they are facility managers. They rely on specialists, which included the advice of the plumber. In connection with the installation of the new Damp Proof Course, he explained that it is not the Factor's decision to install the DPC. It is for the insurance company to decide if they will accept installation of the new DPC as part of the claim the Factor submitted. He is not certain if the Alliance report was sent to the insurance company. The insurance company appoint their own contractors to identify the cause of the damp. If the homeowners are not happy with the decision of the insurance company they are entitled to apply to the Ombudsman. The residents could also choose to instruct the Factor to install a new damp proof course and pay for the installation themselves.

The Tribunal's Decision:

The parties had provided the Tribunal with the Factor's Written Statement of Services. The Tribunal noted the following details:

Section 2.3: Our authority to act includes the management ofon-going repair works.

Section 2.4: For non- emergency repairs, the ultimate decision to authorize work will require the approval of a majority of owners.

The Tribunal make the following findings in fact:

1. The Factor employed a plumber to investigate the dampness who reported that there was no leak.
2. The Factor had included the cost of the DPC in the Insurance claim they had submitted on behalf of the owners but the Insurance company did not accept the cost of replacing the DPC. This is evidenced by email from Michelle Taylor of Sedgwick International UK dated 6th February 2020

The Tribunal acknowledge that it is a duty of the Factor to manage ongoing repairs to the tenement. The Factor had employed a plumber to investigate the leak and dampness that had appeared in the close of the tenement and they had relied on the expertise of the plumber. The Tribunal accept that the Factor is not a damp specialist and they are entitled to rely on the expertise of the plumber. Consequently they find the Factor is not responsible for the plumbers incorrect assessment of the cause of the dampness. The Tribunal recognize that the fact the plumber stated that the dampness had not been caused by a burst pipe resulted in the repair taking significantly longer to complete than usual. The Factor has not failed to comply with their property factor duties by relying on the advice of the plumber.

The Tribunal acknowledge that the Factor had asked the insurance company to install a damp proof course but the insurance company had refuted the claim. The Insurance company employed their own loss adjusters who assessed the cause of the dampness. The Tribunal find that the Factor is not responsible for the insurance company not agreeing to install the new damp proof course and the Factor has not breached any property factor duty by the fact that the insurance company refused to meet the cost of installing the new damp proof course.

6.9: You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

The Homeowner's complaint:

Mr Donnelly explained that he considers that the Factor has generally failed to adequately manage the repair of the common close. They failed to comply with recommendations in Alliance Damp Specialists Report (24/11/2017) when authorizing expensive tests and repairs including bridging of the existing damp proof course and use of absorbent plaster acting as a wick for damp.

He explained that the report by J Short of JDN Property Services addressed to Alasdair Macintyre dated 10th April 2019 refers to 'bad workmanship from a previous attempt to resolve a damp issue'. He referred the Tribunal to the email he sent to the Tribunal on 4th December 2020 from J Short, surveyor with JDN Property Services sent to Alastair Macintyre of Burnside Pharmacy which is in the following terms:

'Yes I can confirm the work within the common close is below standard for any reputable damp proofing contractor to have carried out. I would highly doubt any

guarantees which may be in place would be valid as a result due to the recognized industry specification not being followed. The final coat of plaster that has been used at low level is a thistle/British Gypsum multi finish plaster which if used in the way that it has been, it will create salts and draw moisture up from floor level. This process could be accelerated by regular cleaning of the close.

What should have been used is a washed building sand/ cement mix to a 3:1 ratio, sponge floated to a smooth finish. This would also contain waterproofing additives to prevent the moisture from the solid slab, drawing up the wall as it has been...’

He considers that the Factor should have pursued this.

The Factor’s response:

Mr Reid advised that the first definitive evidence the Factor received which stated that the replacement plasterwork in the close was defective was the email from John Short of JDM dated November 2020. The only other evidence was word of mouth. The Factor had not received the email from John Short at the time Mr Donnelly’s stage 5 complaint was being considered.

As far as he is aware the insurance claim is still open. He agreed to send the email from John Short to the insurance company. Even if the insurance claim has been closed he can ask for it to be reopened in light of this new evidence. He emphasized that his company is persisting in the insurance claim to resolve the issue to avoid extra costs to the homeowners. Mr Reid also agreed to take up the matter of the plasterwork with the original contractors.

The Tribunal’s Decision:

The Tribunal find that the Factor only became aware that the plasterwork was defective in November 2020. The Factor was not aware that the plaster work was defective at the time of Mr Donnelly’s application to the Tribunal. Consequently, the Tribunal determine that the Factor has not breached section 6.9 of the Code of Conduct.

7. The Tribunal’s Decision.

In all of the circumstances narrated above, the Tribunal finds that the Factor has not failed in its duty under section 17(1)(b) of the 2011 Act, to comply with Section 6.9 of the Code of Conduct and the Property Factor duties.

Appeals

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.

A handwritten signature in black ink, appearing to read "J. Taylor".

Date 20 January 2021

Chairperson