

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 ("the Act")

Chamber Ref: FTS/HPC/PF/21/1377

Re: 0/1,140, Lochleven Road, Glasgow, G42 9SQ ("The Property")

The Parties:-

Mr Sam Webb residing at 0/1,140, Lochleven Road, Glasgow, G42 9SQ ("the Homeowner") and

W.M. Cumming, Turner and Watt having a place of business at 40, Carlton Place, Glasgow, G5 9TS ("the Factor")

Tribunal Members

Karen Moore (Legal Member) and Mary Lyden (Ordinary Member)

Decision

The Tribunal determined that the Factor had failed to comply with the Property Duties and proposed a Property Factor Enforcement Order ("PFEQ")

Background

1. By application received between 8 June 2021 and 25 July 2021 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Factor had failed to comply with the Property Factor's Duties ("the Duties"). The Application comprised the following documents: application form dated 1 June 2021; copy email correspondence from the Homeowner's co-owner to the Factor; a copy quote dated 12 October 2018, copy buildings policy and a copy of the Factor's Written Statement of Service ("the WSoS").
2. In response to the Application, the Factor lodged written representations, a copy of the WSoS and a copy of a letter dated 4 August 2021 from the Factor to the Homeowner. The Factor advised that it did not intend to attend the Hearing and that it "would take on board any decision" made.

3. The Homeowner lodged further copy correspondence received from the Factor and advised that his co-owner, Ms. Christine Turnbull, would represent him at the Hearing.

Hearing

4. A Hearing took place at 10.00 on 8 October 2021 by telephone conference. The Homeowner was present and represented by Ms. Turnbull. The Factor did not take part.

5. From the Application, the Tribunal noted that the Homeowner's complaint arises from a letter dated 1 October 2020 which the Factor sent to the solicitor acting for the former owner of the Property as part of the conveyancing process selling the Property to the Homeowner. The letter in question was the Factor's response to the selling solicitor's request for information on common repairs and charges attributable to the Property. In that letter, the Factor states "*We can confirm that there are no common building defects, maintenance issues or pending matters to which we are aware of*". On taking ownership of the Property, the Homeowner became aware that there was an ongoing repair issue, being the infestation of dry rot.

6. Ms. Turnbull confirmed that this was the core of the complaint and expanded on the facts of the matter. She explained that the Property was the Homeowner's and her first property purchase and that they moved in to the Property on 9 October 2020. On 10 December 2020, they received a phone call from the Factor's office advising that a contractor required access to the Property in respect of rot works for other flats in the Block of which the Property forms part. It was explained that rot works were required three metres either side of the affected properties and that three quotes would be obtained. In that call, the Homeowner and she were advised that the Property was affected by dry rot.

7. In response to questions from the Tribunal, Ms. Turnbull advised that she and the Homeowner had viewed the Property twice in July 2020 before submitting an offer at a closing date. On neither occasion were they advised of the dry rot infestation. She advised that the Home Report did not mention the rot and that the seller did not disclose it on the seller's questionnaire. Ms. Turnbull advised the Tribunal that she reviewed the Home Report in detail with her lawyer and was certain that there was no mention of dry rot. There had been mention of dampness work for which there was a guarantee, but nothing with regard to rot.

8. Ms. Turnbull advised the Tribunal that she made numerous calls over the next several months to the Factor to ask for an explanation without success. Calls were not returned, emails were not answered and she was given misleading or incorrect information. She was advised that the Property was not affected by the rot or that the Factor was not aware of the rot history in the greater building. Ms. Turnbull advised the Tribunal that it was her neighbours who told her that the Factor was holding funds from a previous owner to pay for the rot works and it was neighbours who provided the 2018 quote for rot works which was lodged as part of the Application. Despite calls and emails to the Factor, the Factor did not disclose this information. She explained that she was advised by the Factor's staff that only Mr. Robert Watt was dealing with the matter. However, Mr. Robert Watt was evasive,

stating that it was his administrative staff who had issued the letter of 1 October 2020 in error and that he was not able to check the Factor's records fully. Ms. Turnbull stated that Mr. Watt failed to return calls or reply to emails. She advised that ,during a call to Ms. Turnbull on 4 August 2021, Mr. Watt stated that Bromac had been instructed but that the Property was not affected by dry rot. However, on checking with Bromac, this proved to be incorrect and work was required to the Property and to the common parts of the block of which the Property forms part. Ms. Turnbull advised the Tribunal that the Homeowner and she then submitted a formal complaint to the Factor which was ignored and so the Homeowner lodged the Application.

9. Ms. Turnbull advised that both the common works and the works to the Property were carried out in September 2021 at a final cost of £1,987.50 from which the sum of £534.30 held by the Factor was deducted. She estimated that the cost of making good the décor is around £200.00.

10. With regard to the effect of the matter on the Homeowner and herself, Ms. Turnbull advised that the Property had been freshly decorated when they moved in and that the rot works were intrusive. She explained that she had been meticulous in looking at the Home Report and had the Homeowner and she been aware of the rot, they might not have made an offer on the Property or would have sought to have a reduction on the price offered. She considered that the Factor had been dishonest in its dealings with the Homeowner and herself since the matter had come to light and that the Factor's ineptitude and incompetence had caused them months of additional stress, worry and frustration. Ms. Turnbull explained that the Homeowner and she were aware of the serious nature of dry rot and the effect which it has on buildings and so were extremely concerned about the structure of the tenement block and the Property.

Tribunal's assessment of evidence

11. The Tribunal had regard to the Application, the Factor's written representations, the correspondence lodged by the Homeowner and the oral submissions at the Hearing. The Tribunal considered that Ms. Turnbull's submissions at the Hearing were truthful and measured and that she did not seek to over-emphasise the complaint or exaggerate the effect of it on the Homeowner.

Tribunal's Findings in Fact

12. From the Application, the Factor's written representations, the correspondence lodged by the Homeowner and the oral submissions at the Hearing, the Tribunal held the following findings in fact either proved or evidenced by the Parties, whether set out in full in this Decision or not: -

- i) Mr. Sam Webb and Ms. Christine Turnbull are the owners of the Property and the Factor is the property manager and so Mr. Webb is entitled to lodge the Application;
- ii) The Property is a flat within a tenemental block of flats ("the Block");
- iii) There had been an issue with dry rot in the Block since at least October 2018;

- iv) The Factor managed the dry rot investigations from that time and had instructed contractors on behalf of the owners in the Block;
- v) The dry rot affected the common parts of the Block and the Property;
- vi) An outgoing owner of the Property paid the Factor £534.30 in respect of the share of the dry rot works attributable to the Property;
- vii) The Property was marketed for sale in or around July 2020;
- viii) The Home Report for that sale did not disclose the dry rot infestation in the Property or the Block;
- ix) The Homeowner and Ms. Turnbull successfully offered for the Property;
- x) The selling solicitor made the usual enquiry of the Factor in respect of common works and common charges for the purpose of apportioning liability;
- xi) The Factor responded to that enquiry by letter dated 1 October 2021 and did not disclose the history of the dry rot in the Block and the Property and did not disclose that it held £534.30 in respect of the share of the dry rot works attributable to the Property, all of which was within its knowledge;
- xii) In that letter of 1 October 2021, the Factor made an incorrect statement being "*We can confirm that there are no common building defects, maintenance issues or pending matters to which we are aware of*";
- xiii) Two months after taking ownership of the Property, the Factor made the Homeowner aware of the dry rot issue at the Block and the Property;
- xiv) The Homeowner and Ms. Turnbull made numerous attempts by both phone and email to engage with Factor in respect of the dry rot and to obtain an explanation for the erroneous content of the Factor's letter of 1 October 2020, but the Factor was evasive and failed to respond promptly or in detail.;
- xv) The Factor wrote to the Homeowner on 21 April 2021 and confirmed that it held £543.30 to account for the works;
- xvi) The Factor wrote to the Homeowner on 4 August 2021 with a brief history of the dry rot at the Block and advising that "estimates for the property repairs had been cancelled". The Factor did not explain what this phrase meant;
- xvii) The Factor arranged for Bromac to carry out dry rot remedial works at the Block and the Property and the Homeowner paid his share of these works being £1,978.50 less sum of £534.30;
- xviii) Décor works amounting to around £200.00 are required following the completion of the dry rot works;
- xix) Had the Homeowner been aware of the dry rot before completing his and Ms. Turnbull's purchase of the Property, he would have negotiated a reduction in the price with the seller of the Property and
- xx) The Homeowner and Ms. Turnbull suffered considerable distress, stress and worry as result of the matter.

Decision of the Tribunal and reasons for the Decision

13. Having made the Findings in Fact as set out above, the Tribunal had regard to the complaint of the Factor's failure to comply with the Duties. The Tribunal took the view that a property factor is an agent of the homeowners and so has a general duty of care to the homeowners. The Tribunal took the view that a reasonable property factor exercising an ordinary standard of care would have in place measures to ensure that accurate information is provided in correspondence and would have in place measures to ensure that correspondence and enquiries from homeowners are dealt with promptly. Accordingly, although the Homeowner could have made an application and complaint under the Property Factor Code of Conduct, the Tribunal found that the Homeowner's complaint was equally competent as a complaint in respect of performance of Duties.

14. The Tribunal had regard to the Factor's letter of 1 October 2021. The Tribunal is aware from its own professional expertise that the purpose of this letter was to provide information to conveyancing solicitors in respect of liabilities and potential liabilities attributable to a property. It would be relied upon by those solicitors and their clients in contractual negotiations and the completion of a property contract. In this case, the Homeowner, unbeknownst to him at that time, was already at a disadvantage in those negotiations as a result of the previous owner failing to disclose the rot infestation. Had the Factor provided correct information in its letter of 1 October 2021, the Homeowner would have been able to take view on whether to proceed with the purchase of the Property or to negotiate compensation or a price reduction with this seller. On the contrary, the Factor's letter did not just provide false information but went so far as to provide a false assurance "*that there are no common building defects, maintenance issues or pending matters*". The consequence for the Homeowner was that he and his co-owner did not have the opportunity to resile from the purchase of the Property or to seek recompense from the seller.

15. The second part of the Homeowner's complaint is the Factor's attitude and response to his request for an explanation. Given the serious nature of the Factor's error in issuing the letter of 1 October 2021, in the Tribunal's view, a reasonable property manager in this situation would have apologised and offered to reimburse the homeowner's unforeseen costs, in full or in part.

16. The Tribunal had regard to the Factor's written submission of 31 August 2021, which enclosed its letter to the Homeowner of 4 August 2021. In both of these letters, the Factor does not acknowledge that incorrect information was provided in its letter of 1 October 2021. Whilst, the Factor apologise for delays in general, it does not acknowledge or apologise for the delays and lack of correspondence with the Homeowner, in particular. In the Tribunal's opinion, the Factor has simply ignored the core issue and attempted to excuse its error by stating that "*previous estimates had been cancelled*" without explaining what this means. In any event, even if "*previous estimates had been cancelled*", the information was clearly available as it was referred to in the letter of 4 August 2021. In this case, the Tribunal agrees with the Homeowner that the Factor has taken an evasive approach and has not been prepared to accept either its failings or the consequences of its failings.

17. The Tribunal notes that in its written submission of 31 August 2021, the Factor states that it "will take onboard any decision that the Housing Panel make" and takes from this that the Factor now accepts its failings.

18. Accordingly, the Tribunal had no difficulty in determining that the Factor had failed to comply with the Duties.

19. The decision is unanimous.

Property Factor Enforcement Order ("PFEO")

20. The Tribunal having so determined, then considered whether to make a PFEO in terms of Section 19 of the Act and took the view that the extent of the Factor's failings was so significant and had such serious financial consequences for the Homeowner that a PFEO is appropriate. The Tribunal took into account the facts that the Homeowner was denied the opportunity to pass the cost of the rot works, in full or in part, onto the former owner of the Property and found himself with a substantial common repair account and an account for work to the Property. In addition, the Factor exacerbated the situation by failing to be open and transparent with the Homeowner and, in doing so, caused him unnecessary stress and worry.

21. Accordingly, the Tribunal proposed to make a PFEO which will follow separately to conform with Section 19 (2) of the Act which states:- *"In any case where the First-tier Tribunal proposes to make a property Respondents enforcement order, it must before doing so (a)give notice of the proposal to the property Respondents, and (b)allow the parties an opportunity to make representations to it."*

Appeal

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.

Karen Moore

Chairperson

15 October 2021