

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/21/0188

**19 Wilderhaugh Court, Galashiels, TD1 1QL
("the Property")**

The Parties:-

**Mr John Mitchell and Mrs Doreen Mitchell, 10 Wilderhaugh Court, Galashiels
TD1 1QL
("the Homeowners")**

**James Gibb Property Management Ltd, Bellahouston Business Centre, 423
Paisley Road West, Glasgow G51 1PZ
("the Factor")**

Tribunal Members:

**Graham Harding (Legal Member)
Mike Scott (Ordinary Member)**

DECISION

The Factor has failed to carry out its property factor's duties.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 2.5 and 6.1 of the Code

The decision is unanimous.

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

Background

1. By application dated 26 January 2021 the Homeowners complained to the Housing and Property Chamber that the Factor was in breach of Sections 2.5, 6.1, 6.2, 6.9, 7.1 and 7.2 of the Code. The Homeowners also complained that the Factor had failed to carry out its property factor's duties.
2. The Homeowners stated that for two years the roof above the bedroom at the property had been plagued by leaks and despite promises of action by the Factor the roof was still leaking. The Homeowners stated that communication by the Factor had been woeful. In support of their application the Homeowners provided the Tribunal administration with copies of email exchanges between them and the Factor, a copy of the Factor's Written Statement of Services, intimation of the complaint to the Factor and a copy of the title deeds to the property.
3. By Notice of Acceptance dated 9 April 2021 a legal member of the Tribunal with delegated powers accepted the application and assigned a hearing.
4. A hearing assigned for 9 June 2021 was postponed at the request of the Factor.
5. By correspondence dated 4 June 2021 the Factor submitted written representations to the Tribunal.

Hearing

6. A hearing was held by teleconference on 30 June 2021. The Homeowners attended in person. The Factor was represented by Mr David Reid, Group Managing Director and Lorraine Stead, Director.
7. The Tribunal had noted from the Factor's written representations that reference had been made to court proceedings having been raised in November 2020 and sought clarification from the parties as to the nature and outcome of these proceedings. Mr Reid explained that an action had been raised by the Homeowners' tenant against the Factor. They had initially obtained a decree but this had subsequently been recalled and the Tribunal was told that the action had then been dismissed.
8. The Tribunal was advised by Mr Mitchell that the problem with the leaks from the roof had been ongoing until about six or eight weeks previously. They had been told that they would subsequently be advised that the problem had been resolved but Mr Mitchell said he had still heard nothing from the Factor.
9. For the Factor Mr Reid said that the repairs to the roof had been completed in February and that the contractors had returned in March to carry out a damp check. Mr Reid said he would have to check his emails but had thought the Homeowners had been advised that the repairs were completed. He went on to say that the contractors had interacted with the tenant at the property and that might have been why the Homeowners had not been contacted. Mr

Mitchell pointed out that previously he had been told that the Factor would not deal directly with a tenant. Mr Reid explained that the Factor would not take instructions from a tenant. He had however understood that the contractor had advised the tenant that the work had been completed satisfactorily. Mr Reid went on to say that he apologised if the Homeowners were not subsequently informed.

10. Mr Mitchell advised the Tribunal that he had been in regular contact with the tenant and it appeared that there had been no further leaks although sometime after the contractors had attended a couple of spots had appeared on the ceiling but he did not know if that was a new leak or not. Mr Reid queried if that information had been passed on to the Factor and Mr Mitchell confirmed it had not. Mr Reid said he was not aware of any further water ingress at the property.
11. Mr Mitchell advised the Tribunal that internal repairs to the property had not yet been started. Mr Reid confirmed that these were the subject of an insurance claim that was being dealt with by Watson & Gordon. He said there was a backlog due to the Covid-19 pandemic.

Section 2.5 of the Code

12. The Tribunal referred Mr Reid to the Factor's written submissions and suggested that it appeared that it was accepted by the Factor that there had been a breach of this section of the Code. Mr Reid said that it was accepted that there had been a failure and that had the complaint been escalated to senior leaders the Factor would have made an offer to the Homeowners as a goodwill gesture.
13. Mr Mitchell disputed that the Factor could lay the blame at just one individual who was no longer employed by the company. Mr Reid went on to say that the issue had been dealt with by John Dobie then Fraser Dunbar then Greg Sigley took over as manager for the majority of 2019. He accepted that Mr Sigley had been a bit slow in interacting with other owners in the building in order to progress matters. Mr Reid went on to explain that thereafter between March and June 2020 Ms Stead had become involved because of concerns that rather than continuing with reactive repairs there may have been a larger problem. As a result, a decision was made to instruct a report from F3 building Surveyors before instructing further repairs.
14. In response to a query from the Tribunal as to whether the leak would have initially been treated as an emergency Mr Reid spoke of there being a concern that the owners could be throwing money at the problem without getting to the root cause. There was also an issue as regards submitting an insurance claim that could be repudiated by the insurers. There was a history with the builder of the development, Stanley Brash and the lack of any guarantees or the willingness on his part to correct defects.
15. For the Homeowners Mr Mitchell said that he did not recall his home report mentioning any defects in the roof when he and his wife purchased the

property and thought it was wrong to blame the developer. He said he was unaware if the Factor had treated the issue as an emergency but was aware that Ms Stead knew about the problem.

16. Mr Reid explained that there was a crossover where expenditure was outwith the Factor's authorised limit and public safety and that owners then had to be consulted and the expenditure approved.

Section 6.1 of the Code

17. The Tribunal queried with Mr Mitchell in what way he felt that the Factor was in breach of this section of the Code. Mr Mitchell said that the Factor had failed to have the work carried out timeously and had been slow to communicate any developments or timescales.
18. For the Factor Mr Reid said that the initial repair work had not resolved the issue in June 2019. The Homeowners may not have been advised of the cost involved at that time but that would not be unusual if the work was done under an insurance claim. Mr Reid confirmed that the level of authorised expenditure was £1000.00 or £10.00 per owner whichever was the higher. Mr Reid went on to say that after it had become apparent that the initial work carried out by K2 had not been successful it had been discussed internally and there was general consensus that it made sense to carry out a full survey of the building. He felt the Factor was damned if they did and damned if they didn't but the best practice was to obtain an independent report. The repair in June 2019 had been to the slated part of the roof. The further repairs identified were to the flat roof membrane and the gutters. He said the Factor had been concerned that to proceed without an independent report might have resulted in putting good money after bad.
19. Mr Mitchell pointed out that throughout all the time that passed from November 2019 onwards there was still an emergency at the property. He also queried if there was a connection between K2 and the company instructed to carry out the eventual repair, Cleland roofing. Mr Reid advised the Tribunal that George Cleland had left K2 in 2020 to set up his own company.
20. The Ordinary member of the Tribunal queried if other homeowners in the building had complained about the roof and why the issue had been escalated from what had been an emergency repair. Mr Reid said that a number of homeowners had been questioning the cost of the repair and the Factor had been under pressure that they were throwing good money after bad.

Section 6.2 of the Code

21. Mr Mitchell said that whilst he hoped that the Factor did have arrangements in place for dealing with emergencies, he was not certain that they operated in practice when there was a problem with a roof.

22. Mr Reid explained that the Factor was one of only two companies who operated a dedicated service 24 hours a day 365 days a year dealing with homeowners' emergencies. However, there were scenarios that the Factor was unable to deal with as there could be external factors that they had to allow for. He explained these could be the Deed of Conditions as well as the Property Factors (Scotland) Act 2011. Therefore what seemed like a straightforward matter could be more complicated.
23. The Ordinary member of the Tribunal queried if an internal inspection of the property would have been carried out following the issue being raised. Mr Reid confirmed that there would have been an internal inspection and the Homeowners would have been contacted as regards access.

Section 6.9 of the Code

24. Mr Reid submitted that there was a history of poor design of the building with reoccurring problems with the roof. The initial repair although required was insufficient to remedy the problem and it was difficult to identify the issue hence the need to instruct a surveyor especially following concerns raised as regards costs by other owners.
25. In response to a query from the Tribunal Mr Reid confirmed that the quote in March 2020 for £4790.00 +VAT was in respect of the area later identified by the surveyors as being necessary and ultimately carried out by Cleland roofing at a cost of £4100.00 + VAT and completed in February 2021.

Section 7.1 of the Code

26. Mr Reid submitted that the Homeowners had never made a formal complaint and therefore the Factor's complaints process had never been instigated. Had the Homeowners made a formal complaint it would have been investigated and determined. There had been a number of email communications that had passed between the Homeowners and members of staff dealing with the issues raised. Ms Stead had not been originally involved but had agreed a resolution. There had been the start of a formal process in late 2020 but there had been no response from the Homeowners.
27. Mr Mitchell disputed that there had ever been a resolution of the Homeowners' complaint. Senior management were aware of the issues from July 2019 and did not address the issues.

Section 7.2 of the Code

28. Mr Reid submitted that had the Homeowners made a formal complaint or responded to his correspondence of 31 March 2021 then in a final letter the Factor would have advised the Homeowners of their right to make an application to the Housing and Property Chamber.

Property Factor's Duties

29. Mr Mitchell submitted that it had taken the Factor a long time to have the repairs to the roof carried out with the work not being done effectively and this being relayed to them numerous times.
30. Mr Reid submitted that the Factor had acted as requested but accepted that communication with the Homeowners could have been better.
31. Mr Mitchell explained that the Homeowners tenant had refused to pay rent of £390.00 for a period of three months. He said he and his wife had been subjected to significant worry and stress as a result of the way in which the Factor had failed to deal with the issues over a two-year period and that they were seeking an apology and recompense. He also thought that the Factor should engage in further staff training.
32. Mr Reid advised the Tribunal that training had taken place for one individual. He also said that the company had undergone a re-structuring exercise in February 2020 that meant that there was now an emergency response team in place from 5.00pm to 9.00am at head office to improve communications with owners. He went on to say that there had also been re-structuring at regional offices so that all now worked as mini teams so that instead of one development manager three separate people had ownership and must give an owner an acknowledgment of any communication so that owners communications were not overlooked.
33. Mr Reid went on to say that he would again apologise to the Homeowners for the poor communication. He pointed out that there was a huge problem at the development with the build quality and apathy amongst owners with a high number of absentee landlords that proved very problematic whilst the Factor in terms of legislation remains accountable. Mr Reid also pointed out that as a result of the Covid-19 pandemic there had been issues with tradesmen between March and July 2020.

The Tribunal make the following findings in fact:

34. The Homeowners are the owners of the property.
35. The Property is a flat within the block at 13 -20 Wilderhaugh Court, Galashiels (hereinafter "the Development").
36. The Factor performed the role of the property factor of the Development.
37. In about the beginning of March 2019 the Homeowners reported water ingress to the then Factor, Life Property Management Limited ("LPM").
38. The Homeowners complained to LPM about lack of progress on 16 April 2019 and received a response on 17 April 2019.

39. A repair was carried out to the roof of the development in June 2019.
40. The Factor acquired LPM in August 2019.
41. A further leak was identified by the Homeowners in November 2019 and reported to the Factor on 27 November 2019.
42. No action was taken by the Factor until Mrs Mitchell contacted them again on 3 January 2020.
43. A further repair was attempted on 11 January 2020.
44. A further leak was reported at the beginning of March 2020.
45. K2 contractors quoted for repairing the flat roof and gutters at the development in January 2020 at a cost of £4790.20 + VAT.
46. The K2 quote was not sent to the development owners until 1 July 2020.
47. The Homeowners agreed to the quote and were looking for updates. Not all owners agreed to the cost.
48. Without consulting with the Homeowners or other owners the Factor decided in August 2020 to instruct F3 surveyors to provide an independent report in respect of the building.
49. The building was surveyed by F3 on 15 September 2020 and they provided a written report on 20 November 2020 proposing repairs at a total cost of £33000.00 which included additional work not related to the water ingress.
50. A quote from Cleland Roofing for roof repairs at a cost of £4100 + VAT was accepted by the Factor on 30 November 2020.
51. The roof repairs were completed in February 2021.
52. The internal repairs at the property have not yet been carried out.
53. The Factor did not communicate with the Homeowners to confirm that the roof repairs had been completed.
54. There was a failure on the part of the Factor respond to the Homeowners' enquiries promptly.
55. There was a lack of communication on the part of the Factor with the Homeowners in respect of keeping them informed of the progress of the roof repairs or the reasons for any delay.
56. The Factor has procedures in place for dealing with emergencies.

57. The Factor arranged for K2 to return to the development in January 2020 to carry out a further repair to the roof.
58. The Homeowners did not proceed with a formal complaint through the Factor's complaints procedure before making an application to the Tribunal but had been in communication with and had complained to the Factor including the senior management over a lengthy period without any resolution.
59. As a result of there being water ingress at the property the Homeowners' tenant refused to pay rent over a three-month period.
60. The Homeowners experienced worry and stress as a result of the delay in the roof repairs being completed and the lack of communication from the Factor.

Reasons for Decision

Section 2.5 of the Code

61. It was accepted by the Factor that a previous employee had failed to meet the timelines for response that was expected. The Tribunal was however satisfied that the failures went beyond the actions of a single employee. The Factor failed to maintain adequate responses to the Homeowners enquiries and complaints over a prolonged period and this involved a number of the Factor's employees and management. It appeared from the Factor's own timeline submitted with the written representations that there were long gaps with little or no communication with the Homeowners and this was supported by the written and oral evidence of the Homeowners. The Tribunal was therefore satisfied that the Factor was in breach of this section of the Code.

Section 6.1 of the Code

62. Although the Factor has procedures in place to allow homeowners to notify them of matters requiring repair, it was apparent to the Tribunal the Factor fell short of what was expected of them when it came to keeping the Homeowners informed of progress of the work and timescales for completion. An initial delay of some four months for what was clearly an emergency repair with very little information being provided to the Homeowners was clearly unacceptable. There were further incidences of little information being passed on to the Homeowners over subsequent months with long delays between the quote from K2 being obtained in March 2020 and issued to owners in July 2020. Although some account can be taken of the Covid-19 pandemic around this time for the Factor being unable to instruct tradesmen to effect a repair that does not really explain why the quote could not have been communicated to owners.
63. The Tribunal had some difficulty in seeing the advantage of instructing surveyors in July 2020 to obtain a more wide-ranging report in respect of the development at a time when there was an obvious issue with water ingress to the property from the roof that had apparently been identified by K2 in March 2020. The Tribunal acknowledged there was a history of poor workmanship

and that some owners were concerned that they could be putting good money after bad but nevertheless the continued delay along with poor communication with the Homeowners was in the Tribunals view unacceptable particularly when water ingress could be considered to be an emergency repair. Taking account of the written and oral submissions of both parties the Tribunal was satisfied that the Factor was in breach of this section of the Code.

Section 6.9 of the Code

64. It appeared to the Tribunal that the Factor on being made aware that the initial repair undertaken by K2 had not resolved the issue had taken appropriate steps to have the contractors return to the property to inspect the roof and to undertake remedial work. Although it subsequently transpired those further repairs were necessary to another part of the roof the Tribunal was satisfied that the Factor had taken appropriate action in response to being made aware of the further water ingress. The Tribunal was therefore satisfied that the Factor was not in breach of this section of the Code.

Section 7.1 of the Code

65. The Factor does have a clear written complaints resolution procedure. It was accepted by the Homeowners that they did not avail themselves of the Factor's formal complaints procedure. In the circumstances although the Tribunal can fully understand why the Homeowners were frustrated at the way in which the Factor had dealt with their complaints it cannot be said that the Factors are in breach of this section of the Code.

Section 7.2 of the Code

66. As the Homeowners did not participate in the Factor's formal complaints resolution procedure, they did not arrive at the final stage at which they ought to have been advised that if still not satisfied with the outcome they could make an application to the housing and Property Chamber. However, the Tribunal found that it had no reason to doubt the evidence of Mr Reid who said that had the procedure reached that stage the Homeowners would have been so advised. Therefore, the Tribunal were satisfied that the Factor was not in breach of this section of the Code.

Failure to carry out its property factor's duties

67. The Homeowners were subjected to their property being affected by water ingress over a period of two years. Whilst the Tribunal acknowledge that ultimately the cost of common repairs has to be met by the development owners and that can sometimes lead to delays there are occasions when the Factor must ensure that action is taken with appropriate diligence to minimise inconvenience and worry to owners. That cannot be said to have happened here. It was apparent from the written and oral submissions that the water ingress at the property was not given the degree of urgency that it merited on more than one occasion and that the communication with the Homeowners was poor. Even allowing for the difficulties the Factor may have experienced

as a result of the Covid-19 pandemic there was unnecessary delay and poor management of the issues involved that contributed to the understandable frustration and worry and stress said to have been experienced by the Homeowners. The Tribunal was therefore satisfied that in this regard the Factor had failed to carry out its property factor's duties.

68. However, it did appear to the Tribunal that the Factor had acknowledged at least some changes to their procedures had been necessary and had undergone a re-structuring exercise that should improve outcomes for owners in the future and the Tribunal took this into account in considering what might be appropriate measures to include in a Property Factor Enforcement Order.
69. The Tribunal consider that in all the circumstances the Homeowners should be recompensed for the worry, inconvenience and stress that they have suffered over the past two years. The Tribunal did not consider that any loss of rent was necessarily a factor it should take into account in arriving at an appropriate award. The tribunal did acknowledge that the Factor would have been prepared to make an undisclosed gesture of goodwill had the homeowners availed themselves of the formal complaints procedure. Taking everything into account the tribunal considered that an award of £1200.00 was appropriate.
70. The property factor has failed in their duties and breached the Code. The failure in duties and the breach of the code of conduct forms part of a pattern of behaviour which merits a Property Factor Enforcement Order ("PFEO"). The purpose of the PFEO is not to enrich the Homeowners. The purpose of the PFEO is to punish the property factor; to mark society's displeasure; to protect society and to ensure the enforcement of the Property Factors (Scotland) Act 2011 and the Code in the future.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

Appeals

A homeowner or property factor 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.

Graham Harding

Legal Member and Chair

7 July 2021

Date