



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

**Decision Property Factors (Scotland) Act 2011: Section 19, The First-tier
Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations
2017: Rule 18**

**17 Lugar Street, Coatbridge, Lanarkshire, ML5 3JS
(The Property)**

Case Reference FTS/HPC/PF/20/0202

Mrs Kathryn Miller, 11 Street Farm Close, Harthill, Sheffield, S26 7UH (“The Applicant”)

Mr James Miller, 11 Street Farm Close, Harthill, Sheffield, S26 7UH (“the Applicant’s Representative”)

Speirs Gumley Property Management, Red Tree Magenta, 270 Glasgow Road, Rutherglen, G73 1UZ (“The Respondents”)

Tribunal Members: Martin J. McAllister (Legal Member) and Mike Links (Ordinary Member).

1. Background

This is an application by the Homeowner regarding alleged failures of the Property Factor to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors and the property factor’s duties. The application is dated 20th January 2020 and was accepted for determination on 7th February 2020 and subsequently passed to members of the Tribunal. A Hearing was fixed for 7th April 2020 and had to be postponed because of the public health crisis. The Chamber President adjourned that Hearing on an administrative basis. Prior to another Hearing being fixed, the members of the Tribunal to whom the case had been assigned, considered matters and identified the case as being one which could be determined under Rule 18 of the Rules. On 12th August, the Tribunal issued a Direction under Rule 16 of the Rules requiring parties to submit written representations.

2. It is useful to set out the terms of Rule 18:

Power to determine the proceedings without a hearing

18. (1) Subject to paragraph (2), the First-tier Tribunal—

(a) may make a decision without a hearing if the First-tier Tribunal considers that—

(i) having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and

(ii) to do so will not be contrary to the interests of the parties; and

(b) must make a decision without a hearing where the decision relates to—

(i) correcting; or

(ii) reviewing on a point of law,

a decision made by the First-tier Tribunal.

(2) Before making a decision under paragraph (1), the First-tier Tribunal must consider any written representations submitted by the parties.

The Tribunal considered that the subject matter of the application is focused and that it is able to make a decision without a hearing because, whilst parties may not be in agreement about some aspects of the issues, the essential facts are not disputed by them.

3. 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"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Regulations," the First-tier Tribunal for Scotland (Housing and Property Chamber) is referred to as "the Tribunal," Speirs Gumley Property Management are referred to as Speirs Gumley and the development in which the Property is situated is referred to as "the development."

4. Written Representations

The Applicant had provided a considerable amount of information in the application. She made written representations prior to the date of the Hearing arranged for 7th April 2020 and further representations in response to the Direction dated 12th August 2020. In response to the application, the Respondents had submitted written representations dated 27th February 2020 and 13th March 2020. They had also submitted written representations in response to the Direction dated 12th August 2020.

5. Preliminary Matters considered by the Tribunal

(One) In its representations of 27th February 2020, the Property Factor had submitted that the matter should not have been referred for determination because “the owner has, by their own admission, refused to comply with our complaints procedure despite being fully aware of the process. For clarity we have not issued a final response to the homeowner as per our complaints procedure.” The Tribunal considered the representations submitted by both parties together with various copy documents. It was clear that the Property Factor was prepared to engage with its complaints process but that the Homeowner was not. The terms of the Applicant’s email to Mr Bryan McManus of the Respondents dated 13th October 2020 are significant:

“Please see attached formal complaint letter. This accepts your own declaration 2 months ago that you had no intention to enter into any protracted correspondence. We know anyway from previous experience you represent the end stage of your internal complaints procedure. Therefore we will not engage with such rolling correspondence on this particular issue..... This is now the subject of an application to First-tier Tribunal for a determination under the Code of Conduct for property factors.” The response of Mr McManus was contained within an email dated 15th October 2020 which stated “Firstly let me clarify that my reference to not entering into protracted correspondence related specifically to insurance matters. I have copied below the paragraph in my email to you of 5 August for ease of reference.

‘I have noted your comments however my email of 22 July clarified the position in relation to insurance and I have no further information to provide. I do not intend to enter into further protracted correspondence as insurance related matters have been dealt with, at length, previously. The policy renewal is 31 October and I would reiterate that the cover in place is a fully comprehensive block of flats policy and is held with a reputable insurer.’

The Tribunal had to consider whether or not it should determine the application or if it is premature because the Property Factor’s complaint process has not been pursued to conclusion. It appears that this process has not been exhausted. This was accepted by the Applicant. In the email dated 13th October 2019 she rejects the possibility of using this process on the basis of an earlier statement by Mr McManus regarding protracted correspondence. It appeared to the Tribunal that the Property Factor was correct in stating that the application was premature and that its reference to protracted correspondence was to the discrete matter of insurance. In their email to the Property Factor on 23rd December 2019, the Applicant indicated that she would be prepared to consider any proposals by the Property Factor “ahead of any Tribunal Hearing.”

The Tribunal considered that the contents of these emails was indicative of the Applicant’s reluctance to properly engage with the complaints process. It did not seem to the Tribunal that it was appropriate to engage in the complaints process in parallel with an application before the Tribunal. The Tribunal considered that referring the matter back for the complaints process to be followed or indeed rejecting the application would lead to further delay in resolving the issue which had been considerably protracted as a result of the Covid-19 pandemic. The Tribunal considered that the pragmatic approach was to determine the application albeit that the Applicant’s lack of proper engagement with the Property Factor’s complaints process would be considered by the Tribunal in connection with possible failure to comply with Section 7 of the Code.

(Two) Mrs Kathryn Miller submitted a letter to the Tribunal along with the most recent written representations of the Applicant. She queried why the members of the Tribunal assigned to determine the application were dealing with it without a Hearing. She specifically raised why other members of the Tribunal namely Mr O'Carroll and Mrs Devaney "did not see it that way." The Tribunal considered it appropriate to clarify matters for the Applicants.

Mr O'Carroll, with delegated powers of the Chamber President, had not remitted the matter to a Hearing but had decided that the application could be accepted for determination and did not consider that there were grounds for its rejection.

Mrs Devaney, the Chamber President, had adjourned the Hearing which had been fixed and this had been done because of the Covid-19 situation. She had adjourned many Hearings and Case Management Discussions because of the inability of the Tribunal to deal with them during lockdown. She had not considered the particular merits of this case. It is a matter for the members of the Tribunal dealing with an application to decide how best to determine it. In this case, members decided that Rule 18 could be employed because the Tribunal was able to make sufficient findings to determine the case and that to do so was not contrary to the interests of the parties.

6. The Application

The Application states that the Respondents had breached sections of the Code and had failed to carry out the property factor's duties.

7. The sections of the Code which the Applicant considers were breached were as follows:

2.1 You must not provide information which is misleading or false.

2.5 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.

6.1 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.

6.4 If the core service agreed with homeowners included periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.

7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written

statement, which you will follow. This procedure must include how you will handle complaints against contractors.

7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the First-tier Tribunal for Scotland.

The application states that the Homeowner considers that the Property Factor has failed in its property factor's duties in relation to non -adherence with its written statement of services.

8. Issues giving rise to the Application

The Applicant had reported a fault with a common door and had asked the Respondents to attend to it. The Applicant considered that the Respondents delayed in doing so, gave information which was incorrect and did not properly follow its complaints process.

9. Matters agreed between the parties.

The written representations of both parties reflect that there was an issue with the common front door which was eventually repaired. The Property Factor obtained a quotation from a contractor to repair it. The Applicant instructed that the repair not go ahead because proprietors in the Development were going to obtain alternative quotations. The work was delayed to allow this and, when the proprietors were unable to get quotations, the Property Factor obtained a quotation for the repair at a lower cost than the original quotation. The repair was effected and the rear common door was repaired at the same time.

10. The Repairs

The Applicant stated that, on 5th June 2019, they had reported that repairs were required to the common front door and that this was not actioned until 29th July 2019 and that, when a quotation dated 21st August 2019 was received from a contractor, it was not dealt with until 16th September 2019. The Tribunal had sight of an email from the Applicant to the Property Factor dated 26 July which was enquiring about the report which she had made with regard to the door dated 5th June. The Tribunal had sight of an email in response dated 29th July which was from Sean Larkins, an employee of the Property Factor and which stated " I have chased the contractors we have asked for quotes for the door, as soon as I have these I will issue a letter to the owners to update them further." The Property Factor had lodged a copy of a work order dated 29th July 2019 which was addressed to IJM Joiners and Contractors and

which invited them to provide a cost for repairs to the door. On 18th November 2019, the Property Factor emailed Mr Miller in the following terms: I have discussed the door issue with Sean and, having reviewed matters, I feel that the proposed works could have progressed quicker than they did. Sean was involved in various matters and it appears that this specific issue was not addressed in detail at handover. Sean did not progress matters by liaising with the contractor as well as meeting owners on site. There also appears to have been a delay in the contractor providing a cost for works and this is a matter that has been addressed..... I would like to apologise for the delays in the door repairs being progressed.”

The Property Factor had lodged an email from Sean Larkins to Mr Miller dated 26th June 2019 which acknowledged receipt of pictures relating to the door. A timeline document lodged by the Property Factor shows that Mr Larkins issued a Job order request with regard to the door to IJM Joinery on 29th July 2020. A quotation dated 21st August 2019 was sent to the Property Factor and a letter was issued to homeowners on 16th September 2019 relating to this quotation.

11. Communications

It was clear from representations made by both parties that there had been difficulties in communications between the parties. The Applicant and at least one other homeowner in the development did not get an email from the Respondents with regard to the quotation for the repair. Matters then halted because the Applicant and other proprietors were seeking quotations of their own. In Mr McManus's email dated 18th November he stated that it had been intended to progress the works until the Property Factor had been informed that proprietors “were looking to source alternative costs.” The Property Factor was subsequently asked to arrange for the repair and found another contractor to carry out the repair at a lower cost and, in addition, the rear common door was repaired. This work was done in February 2020.

12. The Complaints Process

The Property Factor's written statement of services sets out its complaints procedure.

It states that it will reply within seven working days confirming a timescale for resolution of a complaint and that the Property Factor will investigate the complaint and endeavour to resolve it within twenty eight days.

The procedure states that if a homeowner is dissatisfied with the response, he/she has the right to escalate the complaint to the Head of Residential Management.

The Applicant states that a formal complaint was made on 13th October and that an initial response was received on 15th October. The terms of the letter accompanying the letter of complaint were referred to earlier but it is appropriate to restate here:

“We know anyway from previous experience you represent the end stage of your internal complaints procedure.

Therefore we will not engage with such rolling correspondence on this particular issue. Certainly not 4 months on from raising our concerns with those to whom you have delegated responsibility.

This is now the subject of an application to First-tier Tribunal for a determination under the Code of Conduct for property factors.”

The letter of complaint states inter alia

“We too do not intend to enter into further protracted correspondence. That is plainly futile and unproductive. Instead we will apply to First-tier Tribunal for Scotland, to seek a determination on this situation, under the obligations demanded by the Code of Conduct.”

On 18th November 2019, Mr Bryan McManus of Speirs Gumley emailed the Applicants and the contents of that have been referred to previously. In that email, Mr McManus accepted that the repair to the door could have been progressed quicker than it had been.

On 21st November 2019 the Applicant emailed the Property Factor and referred to various matters. The email asked Speirs Gumley to reflect on its performance against its published service standards.

Mr McManus responded in an email dated 26th November 2019 and referred to matters concerning the door and specifically in relation to options for replacement or repair. In the Property Factor’s letter of 27th February 2020, Mr McManus stated that the Homeowner did not respond to the proposals contained within the letter.

In the Property Factor’s representations of 27th February 2020, Mr McManus states that he has not issued a final response to the complaint because the Applicant refused to comply with the Property Factor’s complaints procedure.

On 10th December 2019, the Homeowner sent a further email to Speirs Gumley together with a letter of complaint. This letter of complaint stated that the Applicant’s submission to the First-tier Tribunal had been suspended and that the Applicant had then asked for further consideration of the complaint and had then sent a summary of the issues and asked for a response as the Property Factor’s final response. The letter of complaint states that the Property Factor’s answer of 26th November

"disappoints and dissatisfies. So we will now move to formal application to First Tribunal."

Mr McManus responded by email on 13th December which stated " As you are aware in order to refer a complaint to the FTT you must first of all have followed our complaints procedure which you have failed to do and appear to have made assumptions that responses to your recent emails constituted a "final decision. While I have addressed points raised by you my last response offered to obtain further quotes for consideration by the owners however you have failed to respond to this."

The Applicant responded by email on 23rd December 2019 stating that shehad asked the Property Factor on 13th October to review the full proposals and the email also stated " of course if you have more to say, by way of proposals, we remain open to anything new or materially difference from what you have conveyed to this point, ahead of any Tribunal Hearing."

13. Findings in Fact

- 1. The Respondent is the property factor for the development.**
- 2. The Applicant reported to the Respondent that a common door needed repair.**
- 3. The Applicant delayed in getting a quotation for the repair and consequently the door took longer to be repaired than was reasonable.**
- 4. The Respondent provided misleading information to the Applicant in relation to instructions to a contractor to provide an estimate for the repair to the door.**
- 5. The Respondent has a written complaints resolution procedure which the Applicant did not exhaust.**
- 6. The Respondent responded to enquiries and complaints within prompt timescales.**

14. Determination and Reasons

2.1 You must not provide information which is misleading or false.

The Tribunal accepted that the issue with the door had been reported to the Property Factor on 5th June 2019 and that a work order had been raised on 29th July 2019 which was the same date that Mr Miller had contacted the Property Factor to enquire about progress. Mr Larkin of Speirs Gumley had emailed the Applicant on that date and indicated that he had “chased the contractors we have asked for quotes for the door as soon as I have these I will issue a letter to the owners to update them further.” This matter was not addressed by the Property Factor in its representations. The Tribunal determined on the balance of probabilities that there had effectively been inaction by the Property Factor between the matter being reported on 5th June 2019 and the job order being raised on 29th July and that the statement by Mr Larkin that he was chasing contractors was not accurate. The Tribunal had to consider whether the provision of inaccurate information amounted to provision of false or misleading information. This is a high threshold which requires to be reached. The Tribunal considered that it had been in this case. Mr Larkins had advised that he was “chasing” the contractors. One can only chase something which had been previously instructed. The response by Mr Larkins was by email and it was reasonable that it would have been made after he had made enquiries. If he had been mistaken in his initial response, he had the opportunity to clarify matters. The fact that the request for work dated 29th July 2019 made no reference to earlier contact reinforces the Tribunal’s view on the matter. Although the Tribunal considered that the threshold for breach of the Code had been reached, it was considered to be at the lower end of the scale.

The Tribunal found that the Property Factor had provided misleading information.

2.5 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.

The Tribunal considered that the Property Factor did respond to enquiries and complaints promptly.

6.1 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 Property Factor had a procedure in place to allow homeowners to notify them of matters requiring repair, maintenance or attention.

The Property Factor accepted that the matter of the door repair could have been dealt with quicker than it was. The apology of Mr McManus demonstrated that the Property Factor had followed its process.

The Tribunal determined that there was insufficient progress in obtaining the quotation and therefore dealing with the repair and that the Property Factor had not complied with this section of the Code.

The Tribunal did not consider that the delay in sending the original quotation to the homeowners was significant. It was dated 21st August 2019 and had been sent to homeowners on 16th September 2019.

6.4 If the core service agreed with homeowners included periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.

No evidence was provided by the Applicant to substantiate that the Property Factor required to prepare a programme of works. The fact that a repair required to be effected to the door did not, in itself, demonstrate that the Property Factor had failed to put a programme of works in place. Such a programme would only be appropriate if work needed to be done following an inspection.

7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

There is a clear written complaints resolution procedure and the Property Factor had followed it. The Homeowner had chosen not to.

There is no breach of this section of the Code.

7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.

As previously stated, the Tribunal found that the Applicant had not engaged properly with the complaints process and that the in- house complaints process had not reached the point of being exhausted. The Tribunal did not agree with the Applicant's position that she could either disregard the process or alternatively invite the Property Factor to deal with the complaint whilst, at the same time, she had made an application to the Tribunal. It found that there was therefore no breach of the Code in this regard.

15. Property Factor's Duties

The Tribunal considered whether or not the Respondent had failed to carry out the property factor's duties. It considered that any matters raised by the Applicant which

may be considered relevant to the property factor's duties had been dealt with in relation to the alleged breach of the Code.

16. Disposal

There had been breach of the Code and the Tribunal proposes that it should make a property factor enforcement order. The Tribunal considered that the failure to progress the repair to the door, whilst breach of the Code, was minor and that provision of misleading information, whilst serious in itself, was at the lower end of the scale. The Tribunal considered that a property factor enforcement order requiring payment of £100 was appropriate.

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.

Martin J. McAllister, Legal Member
of the First-tier Tribunal for Scotland
25th September 2020