

# 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") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 ("the Rules").

Reference number: FTS/HPC/PF/19/0660

Re: 4, Fairyknowe Court, Bothwell, G71 8SZ ("the Property")

The Parties: Miss Karen Steel residing at 4, Fairyknowe Court, Bothwell, G71 8SZ ("the Applicant")

and

James Gibb Property Management Limited having a place of business at 65, Greendyke Street, Glasgow, G1 5PX ("the Respondents")

### Tribunal Members

Karen Moore (Legal Member)

Ahsan Khan (Ordinary Member)

### Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Factor has not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct ("the Code") but has failed to comply with the Section 17 duty in terms of the Act ("the property factors' duties")

### Background

1. By application received by the First-tier Tribunal for Scotland (Housing and Property Chamber) between 4 March 2019 and 3 May 2019 ("the Application") the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Respondents had failed to comply with the Code at Sections 2, 4, 5 and 6 and the property factors' duties.

2. The Application comprised Application form dated 28 February 2019, copy correspondence (emails and letters) between the Applicants and the Respondents and the Respondents' Written Statement of Services.
3. The Tribunal issued the following Direction on 30 June 2019:-

*"The Applicant is required to provide:*

1. A copy of the title deeds or a land register print of the Land Certificate for the Property relevant to the common ownership and factoring title conditions.

*The Respondent is required to provide:*

1. A copy of the Respondent's appointment as property factor to the development of which the Property forms part;
2. Details of owners' meetings, if any, arranged and held in respect of works to address water ingress at the Property and in respect of any common property relative to the Property and
3. Details of work tendered, if any, in respect of works to address water ingress at the Property and in respect of any common property relative to which the Property forms part.

*The said documentation should be lodged with the Chamber no later than close of business on 12 July 2019. Each party should present their documentation in a single bundle which should be clearly indexed with numbered pages."*

The Parties complied with the Direction.

#### Hearing

4. A hearing took place at 10.00 a.m. on Thursday 24 July at the Glasgow Tribunal Centre, 20 York Street, Glasgow, G2 8GT. The Applicant was present and accompanied by Mr. Charles Downs as a supporter in terms of Rule 11 of the Rules. The Respondents were represented by Mr. David Smith and Ms. Paula Murphy, two of its employees.
5. The Tribunal first explained the role of supporter to the Applicant and Mr. Downs. The Tribunal then explained its role in the proceedings and advised the Parties that it had had the benefit of reading all of the paperwork lodged with the Application and in response to the Direction and so was familiar with the substance of the complaints all of which emanated from the water ingress at the Property.
6. As the Respondents had cited a witness to speak to water ingress and that part of the Applicant's complaint which related to Section 6 of the Code, Repairs and Maintenance, the Tribunal decided to hear the witness first and to deal with that part of the complaint first.
7. The Tribunal clarified that the relevant paragraph of Section 6 of the Code, Repairs and Maintenance, was paragraph 6.9 and read out that paragraph which states: "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.”*

8. The Tribunal then heard from Mr. Easton of Ashton Building Systems Limited who advised the Tribunal that on 31 May 2016 he had been instructed by the Respondents to inspect and thereafter provide a quote for works to four upper floor balconies at the block of flats (“the Block”) of which the Property forms part to remedy water ingress at various points, one being water ingress into the Property. Mr. Easton stated that he provided a quote on 2 June 2016. By way of a narration of events and in answer to questions from the Tribunal, the Respondents and the Applicant, Mr. Easton explained that he heard nothing further until he was invited to return to the Block on 18 September 2017 with an employee of the Respondent to inspect the balconies and, in particular, the balcony immediately above the Property. He explained that he had not expected it to be a meeting with the owners but that some owners were there and things became heated. Mr. Easton had not carried out any works at this time and he advised the Tribunal that he had not been permitted to carry out a water test to that balcony by one of the persons present whom he identified as Mr. Downs. Mr. Easton advised the Tribunal that he had prepared a technical report on his findings with recommendations for works which he had forwarded to the Respondents. Mr. Easton identified his report as forming part of the Respondents’ Productions. Mr. Easton explained that he is an approved contractor for manufacturers, Sika, and that his work using their materials is guaranteed for 25 years. He explained further that he was then instructed by the Respondents to carry out the works as recommended in his report and that he did so. This work included work to the floor, rails and upstands of the balconies. He explained that he had carried out around 6 water tests, was satisfied that his work was watertight and issued a guarantee. Mr. Easton was firm in his evidence that the water tests which he or his employees carried out were appropriate and sufficient. Mr. Easton advised the Tribunal that, in his professional opinion, the work he reported on and carried out related to only one element of where water might ingress, that it is difficult to assess where water might be ingressing and that he advised the Respondents that further investigation should be carried out, and in particular, alerted them to potential problems with the roof which he had photographed. Mr. Easton was firm in his evidence that his remit had been to effect repairs to the balconies and not to effect all works to eliminate specific water ingress to the Property.

9. The Applicant then gave evidence by addressing the Tribunal on the Application and, by answering questions from the Tribunal and the Respondents.

10. She explained that since taking entry to the Property in 2006, there had been consistent problems with serious water ingress to the master bedroom of the Property, which bedroom is unusable, a fact which she illustrated with reference to the photographs in her Productions. She explained that she frequently contacted the Respondents to report water ingress, particularly after a weather event of strong wind and heavy rain and was aware that her co-owners made similar reports. She explained that in her opinion that throughout her ownership, the Respondents and their predecessor organization, Grant and Wilson, had not given the water ingress

the importance and seriousness it deserved as the Respondents were not quick to act, did not keep her informed of progress of repairs and she frequently had to issue reminders to the Respondents. In the Applicant's view, the Respondents should have been proactive in following up after repairs had been carried out and should have contacted her to find out if the water ingress persisted.

11. The Applicant was firm in her evidence that Mr. Easton had been or should have been instructed to repair the water ingress into the Property and did not accept that the water tests he or his company carried out were sufficient or appropriate.

12. With reference to her complaint in respect of Section 4 of the Code, Debt Recovery, the preamble of which states: "*Non-payment by some homeowners can sometimes affect provision of services to the others, or can result in the other homeowners being liable to meet the non-paying homeowner's debts (if they are jointly liable for the debts of others in the group). For this reason it is important that homeowners are aware of the implications of late payment and property factors have clear procedures to deal with this situation and take action as early as possible to prevent non-payment from developing into a problem. It is a requirement of Section 1 (Written statement of services) that you inform homeowners of any late payment charges and that you have a debt recovery procedure which is available on request*", the Applicant accepted that the Respondents had a debt recovery procedure in compliance with this part of the Code. She advised the Tribunal that her complaint related to the Respondents failing to ensure that her co-owners repaid to her their share of the common works promptly. With reference to the balcony works, the Applicant explained that she had paid the cost of this on behalf of some of her co-owners to allow the work to commence and had been advised by a former employee of the Respondents that this sum would be refunded to her in November 2017 regardless of whether her co-owners had paid or not and did not accept the Respondents' position that the refund would be made when her co-owners had paid. Both Parties advised the Tribunal that there had been a dispute with certain co-owners over liability for the works which led to delays in the work being carried out.

13. With reference to her complaint in respect of Section 5 of the Code, Insurance, which sets out the standards relating to common insurance arranged by a property factor, the Applicant advised the Tribunal that this part of her complaint related to the Respondents not pursuing a claim on the common policy for her and not explaining to her why a claim could not be made. The Applicant accepted that her co-owners had decided not to pursue a claim on the policy.

14. With reference to her complaint that the Respondents had failed to comply with the property factors' duties, the Applicant advised the Tribunal that this related to the response times for correspondence and repairs as set out in the Written Statement of Services. The Applicant advised the Tribunal that in her opinion, the Respondents' level of service in this regard fell short but was not able to refer the Tribunal to specific examples.

15. The Respondents then gave evidence by addressing the Tribunal on the complaints made in the Application and, by answering questions from the Tribunal and the Applicant and with reference to the Respondents' Productions and in

particular to copy correspondence which showed response times within those set out in the Respondents' Written Statement of Service. With reference to the Applicant having funded the balcony works, the Respondents were firm in their evidence that the Applicant was told that this would be invoiced in November 2017 and refunded when the co-owners had paid. Notwithstanding this, the Respondents advised the Tribunal that the Respondents had refunded the Applicant from their own funds in September 2018, ahead of the co-owners making payment in full.

16. With regard to the balcony repair carried out by Mr. Easton, the Respondents were firm in their evidence that Mr. Easton had been instructed to repair water ingress from the balconies as reported by the owners of the Block. The Respondents advised the Tribunal that numerous roof tiles were replaced following storm damage reports in 2018 and 2019.

17. In response to questions from the Tribunal the Respondents accepted that it would appear that the water ingress continued at the Property and accepted that the Respondents had not called to inspect the Property nor had they instructed a roofer or other survey report to establish the cause of the water ingress.

18. With regard to response times and communications, the Respondents were firm in their evidence that they had complied with the timescales and processes as set out in the Written Statement of Services and referred the Tribunal to their Productions which showed responses within those timescales and, on some occasions, by return.

19. With regard to the insurance claim, the Respondents advised the Tribunal that there had been a successful NHBC claim in the past, that NHBC refused to accept another claim and that, in any event, the NHBC cover had now expired. The Respondents advised the Tribunal that a claim for decoration repair could be made on the common buildings policy when the water ingress problem was resolved and undertook to contact the Applicant in that regard.

#### Issues for the Tribunal

20. The issues for the Tribunal were that the Respondents breached those parts of the Code as complained of by the Applicant and had the Respondents failed to comply with their general property factor duties.

#### Findings in Fact

21. The Tribunal took into account the Application, the productions lodged by the Parties and the submissions made at the Hearing. The Tribunal found that there is a factor/homeowner relationship between the Parties, that there is a serious and continuing water ingress problem at the Property which is likely to render the main bedroom in the property unusable and that the water ingress is most likely to emanate from a common part of the Block, being the roof or parts of the balconies which are common.

22. The Tribunal found Mr. Easton to be straightforward and truthful in his evidence and had no difficulty in accepting that he had carried out the work he was instructed to do and that he was satisfied that his work had not failed.

23. The Tribunal found the Applicant also to be straightforward and truthful but found that she failed to demonstrate to the Tribunal the failings of the Respondents in respect of the Code with reference to specific incidents. In particular, the Tribunal found that the Respondents had not breached Section 6 of the Code at paragraph 6.9 as the Respondents had arranged for Mr. Easton to return to the Property and test his work and had obtained a warranty from him. With regard to Section 4 of the Code, the Tribunal found that the Respondents had not breached this part of the Code as they had pursued and recovered the sums due to the Applicant. With regard to Section 5 of the Code, from the evidence before it, the Tribunal found that the Respondents had not breached the standards as set out in the Code.

24. The Tribunal found the Respondents to be less straightforward and considered that the Respondents could have been more open and forthcoming about their interface with the Applicant. Whilst the Tribunal accept that the Respondents acted strictly within the Code and complied with the time scales set out in their Written Statement of Service, the Tribunal considered that the Respondents could have been more circumspect in their handling of the whole matter. The Respondents could have given greater weight to the continuing water ingress and the length of time taken to effect repairs date all without resolution. The Tribunal had regard to the property factors' duties and had regard to the Respondents' role as agent for the Applicant in their role as her property factor. At common law, the duties of an agent are to act with ordinary care and to exercise the same prudence as they would in their own affairs. In this respect, the Tribunal agreed with the Applicant that the Respondents as her agent had failed in this common law duty by failing to appreciate the seriousness and extent of the water ingress, by failing to recognise that, as the problem had occurred for very many years, a full roof and building survey should have been instructed to determine the cause and they as factors and agents should have taken the lead and should have recommended this course of action to the Applicant and her co-owners.

#### Decision of the tribunal

25. Accordingly, for the reasons and findings set out in full in the foregoing paragraphs, the Tribunal determined that the Respondents have not failed in their Section 14 duty in respect of compliance with the Code but have failed in their general duties in terms of Section 17 of the Act.

26. The Tribunal having so determined, then considered whether to make a PFEO in terms of Section 19 of the Act. 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.*"

27. The decision is unanimous.

#### 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

12 August 2019

