

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/23/2945

Re: 3/10 Cables Wynd, Edinburgh EH6 6DU ("the Property")

Parties:

**Mrs Anna Royer, Avenue Eugene-Rambert 30, 1005 Lausanne, Switzerland
("the Applicant")**

James Gibb Residential Factors, 4 Atholl Place, Edinburgh EH3 8HT ("the Respondents")

Tribunal Member:

**Graham Harding (Legal Member)
Andrew McFarlane (Ordinary Member)**

DECISION

The Respondent has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections OSP2, 3, 6 and 11 and Sections 2.7, 6.1 and 6.4 of the 2021 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 2011 Code" and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors July 2021 as "the 2021 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 21 August 2023 the Applicant complained that the Respondents were in breach of Sections OSP2, OSP3, OSP6, OSP11, 1.5(B)(4), 2.7, 6.1 and 6.4 of the 2021 Code. The Applicant submitted written representations outlining her complaint together with copies of email correspondence and other documents in support of her complaint. She submitted that these failures demonstrated the Respondents’ breaches of the Code.
2. By Notice of Acceptance dated 19 September 2023 a legal member of the Tribunal with delegated powers accepted the First Applicant’s applications and a Case Management Discussion (“CMD”) was assigned.
3. By email dated 1 November 2023 the Respondents submitted preliminary written representations to the Tribunal.
4. By correspondence dated 16 November 2023 the Applicant submitted further written representations to the Tribunal
5. A CMD was held by teleconference on 13 March 2024. The Applicant attended in person and the Respondents were represented by Mr Nic Mayall.
6. The Tribunal noted that the repairs to the property had still not been carried out. Mr Mayall explained that good weather was needed but that water testing was being carried out at the moment. He went on to say that there were also questions regarding the membranes on the balconies and water leaks from the upstands and cladding. The Tribunal was advised by the Applicant that the water test was carried out on 1 March and according to a report on 9 March 2024 from the Respondent’s Steven Paterson, the test had proved inconclusive. The Tribunal was further advised that F3 Building Surveyors were quantifying the alternative proposals for the repairs. The Applicant submitted that in the summer of 2023 Mr Paterson had engaged with other owners at the development to add their properties to the works to be carried out rather than dealing with those in the original complaint. The Tribunal queried with Mr Mayall if this was because of a requirement in the title deeds and he indicated he thought this to be the case. He said that there was an inherent issue with the development with multiple leaks from a similar source. He said that it made sense when looking at a solution to find one that would fix all of the issues. He went on to say that a funding request had been sent to owners in February or March 2023 proposing a liquid membrane but that they were now looking at a different solution of an overcoat felt covering and replacing a flashing. Mr Mayall said that the

Respondent had still only ingathered 50% of the funds required from owners and did need the owners to pay to complete all the works. With regards to the Applicant's complaint that the Respondent was in breach of Section OSP2 of the Code the Applicant submitted that the Respondent had provided no explanation as to charges made and had not responded to complaints and enquiries within anything like the timeframes contained in the Written Statement of Services ("WSS"). The Applicant also said that initially the Respondent's property managed Fraser McIntosh had said that terraces did not fall within the Respondent's remit. The Applicant complained that although there had been recent positive developments it had taken two years from February 2022 to resolve the problems. She submitted there had been a lack of transparency on the part of the Respondent and when she had asked what was going on had not received answers. For the Respondent Mr Mayall said it was difficult to respond to each alleged breach as the complaints were unspecific and supported by documentation. It then became apparent that Mr Mayall had not had sight of the Applicant's response to the Respondent's written representations that she submitted to the Tribunal by email dated 16 November 2023. It was unclear if this was because it had not been sent to Mr Mayal by the Tribunal administration or because it had perhaps been sent to Mr Bodden prior to him leaving the Respondent and not forwarded to Mr Mayall. In any event it was clear that Mr Mayall was at a disadvantage as the Applicant's written representations did answer some of the points that had been made by Mr Bodden in his written representations of 1 November 2023. With regards to the remaining alleged breaches, it again appeared to the Tribunal that the Respondent would require further time to consider the terms of the Applicant's submissions and that it would also be helpful if the Applicant would provide further documentation and specific examples of her complaints. For the Respondent Mr Mayall submitted that the issues with the development were not simple to fix and required complex investigation. He said the Respondent had first asked owners for funding in February 2023 and much was still outstanding. The Applicant said that there had not been extensive communication between the Respondent and other homeowners and that most correspondence with the Respondent had been with herself. The Tribunal noted that the development appeared to have been built in the early 2000s. Given the circumstances and in particular the fact that Mr Mayal had not until the CMD seen the applicant's written representations of 16 November 2023 the Tribunal was satisfied that the interests of justice demanded that the Respondent be given time to consider these and respond in due course. The Tribunal also was of the view that if the Applicant had further evidence to submit in support of her application it was appropriate that this should be done as soon as possible to allow the Respondent time to consider it and answer if appropriate. Furthermore, as there were still works to be carried out to remedy the water ingress it was appropriate to continue the CMD to a further CMD in about three months' time at which point the Tribunal can determine such further procedure as may be necessary.

7. By emails dated 29 March and 30 July 2024 the Applicant submitted further written representations to the Tribunal.
8. By email dated 6 August 2024 the Respondents indicated they did not intend to attend the next CMD and were content to rely on their previous written representations.
9. A CMD was held by teleconference on 8 August 2024. The Applicant attended in person. The Respondents were not represented. The Tribunal noted that the Respondents had not submitted any further written representations following the CMD of 13 March 2024 or in response to the Applicant's submissions of 29 March and 30 July 2024 but had indicated in their email of 6 August 2024 that they intended to rely on their written representations of 1 November 2023. The Tribunal also noted that the repairs to the balconies were ongoing and the Applicant confirmed that the screed had been laid on 19 July 2024. The Applicant maintained that the Respondents were in breach of the various sections of the Code that were the subject of the complaint and as there was a dispute as to the facts the Tribunal continued the application to a hearing.
10. By email dated 2 December 2024 the Respondents advised the Tribunal that they would not be attending the hearing.

The Hearing

11. A Hearing was held at Glasgow Tribunals Centre on 10 December 2024. The Applicant attended in person. The Respondents were not represented.
12. By way of a preliminary matter the Tribunal noted that the Applicant had intimated a late witness list and that she intended to call a neighbour Mr Ian Cameron as a witness. After considering whether there was likely to be any prejudice to the Respondents in allowing Mr Cameron to give evidence the Tribunal allowed the Applicant to lead evidence from Mr Cameron. The Applicant also confirmed she was no longer insisting on her complaint that the Respondent was in breach of Section 1.5(B)(4) of the Code.
13. The Applicant said that the Respondents had failed to explain why it had taken so long to deal with the leak at her property. She said that the Respondents had never informed her why no progress was being made or why the same things were being done multiple times. The Applicant said that she had contacted the Respondents and offered to help but that this had been refused. The Applicant said that between June and October 2023 no work had been done because of poor weather and she found this difficult to accept. The Applicant also queried why contractors had decided to undertake a further water test on 9 March 2024 and then propose another solution. The Applicant said she had queried this with the Respondents but never received an explanation.
14. The Applicant went on to say that everything had taken so long but the Respondents had failed to explain why. She said that the scaffold had been

in place for six months at significant cost and she had asked why it had been erected when no work was being carried out but had not received an explanation.

15. The Applicant said that the work had been completed in September 2024 and the Applicant's insurers had proceeded to deal with the internal repairs to the property thereafter. The Applicant went on to say that the previous Sunday a further leak had appeared in the ceiling of her property and she was now questioning the quality of the work done and whether it had been done to a reasonable standard. The Applicant said that the Respondent had not replied to her query.
16. Mr Cameron confirmed that he lived at 3/13 Cables Wynd. He explained that he had become aware of water ponding underneath the decking on his balcony. He recalled that one day a young girl from the flat below knocked on his door and invited him down to look at a leak in her living room. He said he had found out it was coming from his balcony and he had reported it to the Respondents. Mr Cameron went on to say that the Respondents had a succession of property managers none of whom stayed in post for very long and there had been a never-ending sequence of emails asking for timescales for completion of the repairs but it had been very difficult to get an answer. Mr Cameron said that since Steve Paterson had been appointed, he was making an effort but previously there had been no response to queries.
17. Mr Cameron said that scaffolding had been erected in November 2023 and the decking at Flat 5 had been removed. He said that the work then took 8 months to progress with bad weather being used as an excuse. Mr Cameron went on to say that David Bonnar from F3 had figured out a different way of carrying out the repairs and had blamed the problem on a poor design which had led to ponding under the decking on the balconies. leading to water flowing over the membrane in heavy rain. Mr Cameron said initially contractors had put a screed down but within two months it was falling off and Cleland roofing had then put down felt over half of the screed. Mr Cameron said he had a joiner replace the decking he had been concerned that that it might need replaced again and had recommended covering the whole balcony with a new waterproof membrane.
18. Mr Cameron said he had been concerned that in 2022 the original contractors who came and took photographs of the balcony appeared very young and didn't know what they were doing. He said they had looked at the drain but that he had made sure the drain was clear. Mr Cameron said that the Respondents had blamed owners for failing to keep the drains clear but that owners could keep the drains clear but could not control water underneath the decking. Mr Cameron went on to say there had been long gaps in the involvement of F3 and Cleland roofing that were never explained by the Respondents. He said that the repairs should have been a top priority but that he had always felt the Respondents had other priorities and queried why it had taken 2.5 years to repair at significant cost.

19. The Applicant said that she thought that the Tribunal should tell the Respondents that they should not manage the development in the way they had as she had no control over her property. The Applicant said she had stopped paying the Respondents in November 2022 as a way of regaining control but the Respondents had managed to obtain payment direct from her bank. The Applicant said that she would like to sell her property to avoid paying high mortgage interest rates and by way of compensation would like the Tribunal to make the Respondents pay her mortgage payments from February 2022 to September 2024. The Applicant said that she did not have landlord's insurance that paid her lost rent while the property was unoccupied. The Applicant explained that although she had suspended paying the Respondent's management fees, they had contacted her bank direct and the bank had paid all the outstanding amount claimed by the Respondent. The Applicant referred the Tribunal to her written representations of 30 July 2024 and said that she wished the Tribunal to award her the sum of £325.81 of management charges and £140.00 of late payment charges and £16533.13 of financial compensation in respect of her mortgage payments since February 2022.

Findings in Fact

20. The Applicant is the owner of the property.
21. The property is located in a development of flatted properties at Cable Wynd, Edinburgh.
22. The Respondent is the factor of the Development.
23. The Applicant had experienced water ingress from the balcony above her property in 2021 and a repair had been undertaken by North Facades Ltd.
24. The Applicant experienced further water ingress from the balcony above her property on 7 February 2022 and reported the issue to the Respondent at that time.
25. The Respondent did not provide a substantive response to the Applicant until 23 February 2022.
26. The ceiling in the Applicant's property required to be removed.
27. The Applicant's tenant moved out of the property on 22 March 2022 due to the water ingress.
28. Between the end of February 2022 and the end of March 2022 the Applicant and the Respondent were in email communication regarding the issue of water ingress and Coronet Services attended at the property but no remedial works were carried out.
29. Coronet Services carried out a Trace and Locate Inspection at the development on 25 March 2022.

30. The Respondent's property manager, Fraser McIntosh advised the Applicant in June 2022 that the Respondent had not received the report from Coronet Services.
31. Between June and August 2022, the Applicant was in email correspondence with Coronet Services and Claims at Protector Insurance and Fraser McIntosh at the Respondent. No progress was made with regards to identifying the cause of the water ingress during this period and Mr McIntosh did not respond to emails until 19 August 2022.
32. On 19 August 2022 Mr McIntosh advised the Applicant that the balconies were not common property and therefore not within the Respondent's remit.
33. On 9 September 2022 the Respondent wrote to the Applicant advising it was their intention to approach a surveyor to investigate and report on the issue of water leaking from balconies into properties below.
34. On 5 October 2022 F3 Surveyors inspected the Applicant's property.
35. On 7 November 2022 David Bonar of F3 Surveyors advised the Applicant that their report would be sent to the Respondent the following day.
36. On 8 November 2022 the Applicant emailed Fraser McIntosh to ask if the Respondent had received the report from F3 Surveyors.
37. On 21 November 2022 the Applicant again emailed Fraser McIntosh asking for a reply to her email of 8 November 2022.
38. On 25 November 2022 Mr McIntosh advised the Applicant that the report had been sent to four contractors to provide tenders.
39. The Applicant emailed Mr McIntosh on 17 December 2022, 2 January, 4 January, 9 January, 10 January and 11 January 2023 and received a reply from Mr Steve Paterson, Senior Development Manager on 11 January 2023 advising tenders were back by 23 December 2022.
40. The Applicant sent further reminder emails to Mr McIntosh on 15, 16, 17 and 19 January 2023 and received a reply on 20 January 2023 and that the contractor would be instructed to proceed shortly.
41. On 14 February 2023 the Applicant initiated a stage 1 complaint to the Respondent.
42. On 15 February 2023 the Respondent acknowledged receipt of the complaint.
43. On 24 February the Applicant received an email from Mr Steve Paterson that did not address the Applicant's complaint.

44. On 3 March 2023 the Applicant advised the Respondent that she had not received a response to her Stage 1 complaint and was escalating it to a Stage 2 complaint.
45. On 14 March 2023 the Applicant sent further emails to Mr McIntosh and the Respondent requesting an update on the outstanding issues.
46. On 15 March 2023 Mr Paterson advised the Applicant that the contractor, Balmore Specialist Roofing had provided a cost of around £2000.00 for each balcony to be repaired and that a surveyor was needed to organise it.
47. Between March and April 2023, the Respondent began collecting funds from homeowners to meet the cost of the repairs to the balconies.
48. Although insufficient funds had been ingathered by the end of April 2023 the Respondent advised the applicant in an email dated 28 April 2023 that they had sufficient funds to start on the worst balconies including the one above the Applicant's flat and would confirm once they had a date from the contractor.
49. On 22 May 2023 the Applicant advised the Respondent that she had not received a response to her Stage 2 complaint and intended to make an application to the Housing and Property Chamber unless she received a response by 24 May 2023.
50. On 23 May 2023 the Respondent advised the Applicant that a stage 2 response had been sent by email on 6 April 2023.
51. By email dated 23 May 2023 the Applicant disputed receiving the Respondent's Stage 2 response and took issue with its contents.
52. On 23 May 2024 Mr Paterson advised the Applicant that he had been unable to obtain a commitment from Balmore Specialist Roofing as to when they would commence the repairs to the balconies.
53. On 4 August 2023 Mr Paterson emailed the Applicant to advise that Mr McIntosh had left the Respondent and that the issue with the leaking balconies had been held up by lack of progress with the chosen contractor and another contractor had been contacted.
54. Cleland Roofing were instructed to proceed with the repairs on 23 October 2023 and works were due to start with the erection of scaffold on 2 November 2023.
55. Following further investigations by F3 surveyors on 1 March 2024 a revised repair was instructed in April 2024 Due to issues with the existing screed discovered on 23 April 2024 repairs commenced on the balcony above the Applicant's property on 19 July 2024 and were finally completed in September 2024.

56. On 8 December 2024 the Applicant became aware of further water ingress at the property.

Reasons for Decision

57. The Tribunal was disappointed that despite the Respondent intimating what was said to be preliminary written representations and despite being given a further opportunity to submit a more detailed response particularly after the Applicant had submitted further written representations following the first CMD the Respondent chose not only to rely on its initial fairly skeletal submissions but also not to attend the second CMD or the hearing.

58. The Tribunal was satisfied from the evidence provided by the Applicant and Mr Cameron and from examination of the email correspondence submitted that the Respondent could have been more open and explained in better terms what was happening with regards to the issues surrounding water ingress from the balconies and what any difficulties there were that resulted in the long delay in addressing the problems. This was particularly apparent during the period from February 2022 to September 2022. There was a distinct lack of clarity in the limited responses the Applicant received with at one point the Respondent's position being that the balconies were not common property and therefore not within the Respondent's remit and then without any explanation being given this view being changed. The Respondent was slow to reply to the Applicant's legitimate concerns and failed to provide clear answers as to the reasons for the delay in receiving reports. For these reasons the Tribunal was satisfied that the Respondent was in breach of Sections OSP2 and OSP3 of the Code.

59. Any significant water ingress to a property must be considered a priority by a responsible factor. The Tribunal understands that there has been an issue with the design of the balconies and that finding a resolution to the problem may not be straightforward. However, it is apparent from the email exchanges between the Applicant and the Respondent and Coronet Services and Protector Insurance and the obvious lack of communication from the Respondent's then property manager Mr McIntosh that the initial investigations and reporting was sadly lacking. The Tribunal accepts that it is the owners' responsibility to fund the cost of repairs and acknowledges that the Respondent was prepared to underwrite the cost of some of the repairs pending payment by some of the owners however the Tribunal was satisfied that the delays in progressing the repairs over a period of some two and a half years was unacceptable particularly given that the Applicant's property had been rendered uninhabitable. The Tribunal was satisfied that the Respondent had failed to ensure that its staff had the training and information they needed to be effective and was therefore in breach of OSP6.

60. The Tribunal was satisfied from the Applicant's oral evidence and from a detailed examination of the email correspondence submitted by both parties that the Respondent failed to respond to the Applicant's enquiries within a reasonable timescale and indeed on some occasions failed to respond at all. The Tribunal noted that some delay in responding to the Applicant had occurred in late 2022 and early 2023 due to Mr McIntosh being absent from work for a period of four weeks. In these circumstances the Respondent ought to have had a system in place to ensure that enquiries to Mr McIntosh were redirected to another staff member. The Respondent did not respond at all to the Applicant's stage 1 complaint and although they sent a response to the Applicant's stage 2 complaint dated 6 April 2023 as an attachment to an email dated 23 May 2023 did not provide the Applicant with a copy of the original email sending the response on 6 April when the Applicant said it had not been received. The Tribunal was therefore satisfied that the Respondent was in breach of OSP11 and Section 2.7 of the Code.
61. The Respondent relied heavily on the contractors it instructed to carry out both initial investigations and to undertake the repairs. It is important that a factor employs reputable firms that can deliver its services to an acceptable standard within a reasonable period of time. This will require the factor to be proactive to ensure that its clients' needs are being met. It was apparent from the Applicant's evidence and an examination of the email correspondence that particularly in the early stages from February 2022 to November 2022 there was a lack of oversight on the part of the Respondent to ensure that progress was being made to effect prompt repairs. Although there was an improvement in 2023 and some delay could be attributed to the time taken to ingather funds from owners the Tribunal also concluded that further delays could have been avoided had the Respondent been more pro-active in its dealings with contractors particularly given the difficulty in obtaining a definite commencement date for the repairs from Balmore Specialist Roofing. Taking everything into account the Tribunal is satisfied that the Respondent is in breach of Section 6.1 of the Code.
62. As indicated above the Tribunal does not consider that a timescale of two and a half years for completing the repairs to the Applicant's property is appropriate. In January 2023 the Homeowner was advised that the contractor would be instructed to proceed shortly but repairs did not commence until July 2024. The Tribunal was satisfied from the Applicant's oral evidence and the written submissions that the Respondent was in breach of Section 6.4 of the Code.
63. The Respondent has participated minimally in these proceedings and sought to rely on what it described as their preliminary submissions. They did not respond to the subsequent written representations submitted by the Applicant. The Applicant has been unable to occupy or rent or sell her property over a lengthy period and has been put to considerable worry and inconvenience. The Tribunal was not satisfied that it would be appropriate to make a financial award to the Applicant that would reimburse her for the cost of her mortgage payments for the period from February 2022 to July

2024. The Applicant was renting the property and for whatever reason chose not to insure the property under a let property insurance policy. That was her choice. Had she done so the Tribunal was in little doubt that the insurers would have paid her lost rent for the period the property was unoccupied due to the water damage. The Tribunal is not satisfied that as a result of the Applicant's failure to properly insure the property the Respondent should be held responsible for the Applicant's mortgage costs. In any event there would be other factors to consider such as any increase in the value of the property over the time in question. The Tribunal is therefore not prepared to make any award in respect of this aspect of the Applicant's claim. The Tribunal does however consider that the Respondent's breaches of the Code demonstrate serious failures on their part. The Respondent failed to give the water ingress at the Applicant's property the priority it deserved. They failed to respond to enquiries and complaints timeously. They failed to adequately supervise contractors and obtain reports quickly and effectively and allowed matters to drift without providing the Applicant with adequate explanation. Repairs which although not straightforward taking some two and a half years to complete is excessive and demonstrates a lack of understanding and skill on the part of the Respondent. The Tribunal is therefore satisfied that the Applicant should be refunded the management fees charged by the Respondent for the period from February 2022 to November 2024 together with any late payment fees. The Tribunal is also satisfied that the Applicant has been put to a very considerable degree of worry and distress as well as being deprived of the effective use of her property from February 2022 until the latter part of 2024. The Tribunal considers that in light of this the Applicant is entitled to a financial award of a payment by the Respondent of £1500.00.

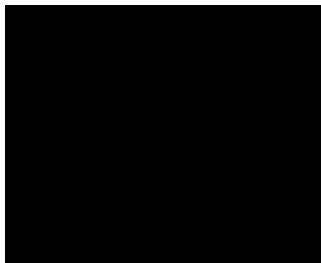
64. The Tribunal considered whether it should direct that the Respondent's staff should receive further training but as the staff concerned are no longer in the Respondent's employment the Tribunal determined that no further orders were necessary. That said the Tribunal would expect that the principals of the Property Factors controlling the organisation would enquire into the conduct of their business to establish if there are underlying systemic issues which need to be addressed.

Proposed Property Factor Enforcement Order

65. 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.



Legal Member and Chair

6 January 2025 Date