

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 2017 ("the Rules").

Reference number: FTS/HPC/PF/21/3008 and 22/0409

Re: Property at Flat 10, 2, Barnie Terrace, Portobello, Edinburgh EH15 1BU ("the Property")

The Parties:

Mr. Mike Newsome residing at the Property ("the Homeowner")

Ross and Liddell Limited, 6, Clifton Terrace, Edinburgh, EH12 5DR ("the Property Factor") per their agents, Raeside Chisholm Solicitors Limited Tontine House 8 Gordon Street Glasgow G1 3PL ("the Property Factor's Agents")

Tribunal Members

Karen Moore (Chairperson) and Elaine Munroe (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Property Factor: -

- (i) 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 2011 ("the 2011 Code") at:
Section 1 at 1.1a D m and n; Section 6 at 6.9 and Section 7 at 7.1;
- (ii) 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 2021 ("the 2021 Code") at:
Section OSP at OSP1, OSP4, OSP6 and OSP12; Section1 at 1.5(B) 4 and 5(D)14; Section 2 at 2.7 at Section 6 at 6.7 and 6.12 and
- (iii) has not failed to comply with the Property Factor's Duties.

Background

1. By applications received between 6 December 2021 and 14 February 2022 ("the Applications") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber for a determination that the Factor had failed to comply with the Codes of Conduct for Property Factors and had failed to comply with the Property Factor Duties.
2. The Applications are as follows:
 - i) Application Form C1 and given Chamber reference FTS/HPC/PF/21/3008 which complained of breaches of the 2011 Code at Section 1 at 1.5 (B) 4 and Section 6 at 6.7 and
 - ii) Application Form C2 and given Chamber reference FTS/HPC/22/0409 which complained of breaches of the 2021 Code at Section OSP at OSP1, OSP4, OSP6 and OSP12; Section1 at 1 at 1.5 (B) 4 and 5(D)14, Section 2 at 2.7; Section 6 at 6.7 and 6.12 Section 7 at 7.1.
3. Both Applications complained of a failure to comply with the property factor duties. Both Applications comprised copy correspondence between the Homeowner and Property Factor including formal letters intimating the complaints. With regard to Application C1, FTS/HPC/PF/21/3008, the formal intimation letter noted the complaint under Section 1 as a complaint in terms of the 2011 Code at Section 1 at 1.1a D m and n.
4. On 16 February 2022, a legal member of the Chamber with delegated powers of the Chamber President accepted the Application and a Case Management Discussion (CMD) was fixed for 25 April 2022 at 10.00 by telephone conference call.
5. Prior to the CMD, the Property Factor's Agents submitted written representations together with copies of the Property Factor's Service Level Agreements being their written statements of services (WSS) and copy correspondence between the Parties. The written submissions contained a preliminary plea that the Applications were premature as the Property Factor's complaints process had not been exhausted before submission. The outcome of the CMD was that a Hearing was fixed.

Hearing

6. The Hearing took place on 22 June 2022 at 10.00 by telephone conference call. The Homeowner was present on the call and was unrepresented. The Property Factor was represented by Mr. Watson of the Property Factor's Agents. The Homeowner gave evidence on his own behalf. Mr, Neil Main of the Property Factor gave evidence on behalf of the Property Factor.
7. The Parties were in agreement that the Property is a new build flat in a development built by the developer, Barratt Homes ("Barratt"), and that the Property Factor was appointed by Barratt after a tender process carried out in 2020.

8. The Tribunal dealt with each Application in turn in respect of each head of complaint.

Homeowner's Position

Application Form C1 reference FTS/HPC/PF/21/3008

Section 1 at 1.1a D m and n states: "*For situations where the land (includes buildings) is owned by the group of homeowners, the written statement should set out: m. the timescales within which you will respond to enquiries and complaints and n. your procedures and timescales for response when dealing with telephone.*"

9. The Homeowner stated that this complaint related to the numerous times the Property Factor had not responded to him within reasonable timescales in line with WSS. He accepted that the WSS contained the relevant information but, in cross-examination, did not accept that the Property Factor adhered to this.

Section 6 Carrying out repairs at 6.9 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.*"

10. The Homeowner explained that this referred to the fact that the Property Factor had accepted the handover of the common stair relative to the Property in an inadequate condition, had not pursued Barratt to remedy the defective or inadequate work and had not obtained a collateral warranty from Barratt at the handover. In cross-examination, he did not accept that Barratt are not a contractor of the Property Factor and that a collateral warranty is not usual or appropriate for in a new build handover situation.

11. Mr. Watson for the Property Factor requested to be allowed to submit copy email correspondence between the Property Factor and Barratt. The Tribunal, with the consent of the Homeowner, allowed this to be lodged under reservation of admitting it to the proceedings. Having had regard to the content of the correspondence, the Tribunal allowed it to be lodged and admitted to the proceedings.

Section 7 Complaints at 7.1 states: "*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.*"

12. The Homeowner stated that this complaint again related to the numerous times the Property Factor had not responded to his complaints both in respect of the conduct of the previous property manager and in respect of the lack of progress with addressing the defective work. In cross-examination, he accepted that the WSS contained the relevant information but, did not accept that the Property Factor adhered to this. He did not accept that he had not complied fully with the Property Factor's complaints procedure and had not given the Property Factor a final

opportunity to deal with his complaint before applying to the Tribunal. He explained that he submitted emails to the generic complaints email box which he understood to be the email address for the complaints manager.

Application Form C2 reference FTS/HPC/22/0409

Section OSP 1 “OSP1: You must conduct your business in a way that complies with all relevant legislation. You must be honest, open, transparent and fair in your dealings with homeowners. OSP 4: You must not provide information that is deliberately or negligently misleading or false. OSP6: You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective. OSP12: You must not communicate with homeowners in any way that is abusive, intimidating or threatening.

13. The Homeowner stated that this complaint related to the overall way in which the Property Factor had conducted its business with him. The previous property manager had not treated his complaints seriously, had been unpleasant and threatening at a meeting on site and had said that work had been completed when it had not. The Property Factor had not employed skilled personnel to carry out that handover process with Barratt as they had not identified necessary snagging work. The Property Factor has been intimidating by pursuing the Homeowner for the cost of repairs relating to the defects at handover and had not explained that the cleaning of the light fittings by Mr. Main had been carried out at nil cost. In cross-examination, he did not accept that Mr. Main had acted in good faith to attempt to resolve matters with the Homeowner and did not accept that the Property Factor, in general, had attempted to resolve matters with the Homeowner

Section 1 WSS at 1.5(B) 4 states: “*the core services that the property factor will provide to homeowners. This must include the target times for taking action in response to requests from homeowners for both routine and emergency repairs and the frequency of property visits (if part of the core service)*” and Section 1 WSS at 1.5(D)(14) states; “*procedures and timescales for responding to enquiries and communications received from homeowners in writing and by telephone (including details of the property factor’s standard working hours)*”

14. The Homeowner’s complaint in this regard again related to the numerous times the Property Factor had not responded to him within reasonable timescales as set out in paragraphs 9 and 12 above. He did not accept that the Property Factor had adhered to its WSS.

Section 2 at 2.7 states: “*A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall, a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale*”

15. The Homeowner’s complaint in this regard again related to the Property Factor’s failure to responded to him within reasonable timescales as set out in paragraphs 12 above.

Section 6.7 states “*It is good practice for periodic property visits to be undertaken by suitable qualified / trained staff or contractors and/or a planned programme of cyclical maintenance to be created to ensure that a property is maintained appropriately. If this service is agreed with homeowners, a property factor must ensure that people with appropriate professional expertise are involved in the development of the programme of works.*”, and, Section 6.12 states “*If requested by homeowners, a property factor must continue to liaise with third parties i.e. contractors, within the limits of their ‘authority to act’ (see section 1.5A or 1.6A) in order to remedy the defects in any inadequate work or service that they have organised on behalf of homeowners. If appropriate to the works concerned, the property factor must advise the property owners if a collateral warranty is available from any third-party agent or contractor, which can be instructed by the property factor on behalf of homeowners if they agree to this. A copy of the warranty must be made available if requested by a homeowner.*”

16. The Homeowner’s key point here followed on from his complaint set out in paragraph 10 above. He submitted that the Property Factor staff who carried out the handover with Barratt could not have had the “*appropriate professional expertise*” as they failed to delay the handover until the snagging work was remedied. In cross-examination, he did not accept that the snagging work was part of the Homeowner’s contract with Barratt and was not the responsibility of the Property Factor to pursue. He advised the Tribunal that he had approached Barratt direct, and Barratt had referred him to the Property Factor. He accepted that the Property Factor’s role commenced after the handover but maintained that the common property should not have been accepted by the Property Factor in its condition at the time of the handover.

Property Factor Duties.

17. In respect of both Applications, the Homeowner explained that his complaint related to the way in which the Property Factor had conducted itself by taking handover of common property which was not in good order and passing the costs to remedy the defects onto the owners. He submitted that the Property Factor had failed in its duties by failing to obtain a collateral warranty from Barratt. In cross-examination, he did not accept that the contractual terms of the Property Factor’s appointment by Barratt, and so the handover, did not concern the owners as the owners were being asked to pay for the defects to be remedied.

Property Factor’s Position

18. Mr Main gave evidence on behalf of the Property Factor, dealing with the heads of complaint in turn. Firstly, he gave an overview of the Property Factor’s process in dealing with new build developments. He explained that, when notified that a development or stage in a development is complete, the Property Factor’s New Business Team (“the NBT”) walk round relevant areas with the developer and that they jointly pull together a snagging report for repairs and works and generally for the works to be done by the developer after handover and while the developer is on site although a timescale is not specified. Thereafter any works fall to the owners to instruct and pay for. In general snagging is items like door locks not working, light fittings not working and marks on doors and on walls caused by Barratt’s workmen.

19. With regard to the complaints process, Mr. Main explained that the process has now changed, but that the time the Homeowner raised his complaint when the previous property manager was in post, this was treated as a concern and the property manager had 10 days to acknowledge and a further then 21 days to provide a full response. If matters were not resolved, the complaint should have been escalated to the complaints manager and would then be dealt with as a formal complaint. Mr. Main explained that complaints now go directly to the complaints manager.
20. With reference to the Homeowner's complaint, although there had been correspondence from the Homeowner from July 2021, the Property Factor had not treated the correspondence as a formal complaint until the Homeowner's email of 31 August 2021. With reference to the WSS, Mr. Main explained that the complaint process was in two stages: an informal process as outlined in paragraph 19 above and then a formal process carried out by the complaints manager. In this case, the Homeowner had only carried out the first stage as he had not written directly to the complaints manager.
21. With regard to the Homeowner's email of 31 August 2021, Mr. Main advised that he acknowledged this on 2 September 2021 and advised that he would respond in full within 21 days. He had then discussed the matters with previous property manager and then complied his full response based on what he had been told. He accepted that the previous property manager had not been truthful and had told him that repairs had been carried out when this turned out not to be the case. Mr. Main advised the Tribunal that he had followed up with the NBT who had contacted Barratt. Mr. Main's full response to the Homeowner was set out in his email of 30 September 2021. At that time, Barratt had undertaken to carry out the paintwork and to clean the carpet. He advised that the paintwork had been carried out on 1 October 2021, but that Barratt had reversed its undertaking in respect of cleaning the carpet on the advice of its contractors who had taken the view that the condition of the carpet had been caused by owner wear and tear and not by Barratt's workmen.
22. Mr. Main advised the Tribunal that, at this point, the Homeowner's correspondence was being treated as an informal process and not a formal complaint as the Homeowner had not written directly to the complaints manager, as set out in the WSS and as noted in the correspondence from the Property Factor, including Mr. Main's letter of 30 September 2021.
23. In cross-examination, Mr. Main maintained that the Homeowner had not complied with the full complaints process and had not escalated his complaint to the complaints manager. He stated that he did not know what had happened to emails sent by the Homeowner to the complaints manager on 17 and 19 August 2021 and maintained that the first part of the complaints process began on 2 September 2021 with the acknowledgement of the email of 31 August 2021. Mr. Main accepted that he had apologised to the Homeowner on two occasions for late responses. Mr. Main accepted that, in this case, the Homeowner had raised concerns in July 2021 and had rejected Mr. Main's responses in emails of 11 November 2021 and 6 December 2021 but held to the view that these emails were not a full escalation to the complaints manager who had responded that an

appeal should be made to her in writing. He accepted that the Homeowner had sent the formal intimation letter to the complaints manager on 19 December 2021, at the same time as beginning the Tribunal proceedings. Mr. Main accepted that the previous property manager could have handled matters better.

24. In re-examination, Mr. Main stated that the earlier emails from the Homeowner had been treated as concerns not complaint as the property manager was entitled to have an opportunity to resolve matters before the concerns were treated as complaints.
25. With regard to the defects and snagging, Mr. Main agreed that the matters could have been handled better and that he had asked the previous property manager to clean the light fittings and attend to some of the other issues. Mr. Main explained that he attended the development in January 2022 and cleaned the light fittings and arranged for the other work to be carried out at the cost of the owners, including the Homeowner, the paint work, handrail and window repairs having been carried out by Barratt and the repair to the stair edges being damage post-handover. The only remaining items are paintwork to the MDF baton and to edges at the meter room by Barratt and the carpet cleaning which the owners have not yet instructed. The work which falls to Barratt is being chased up by the Property Factor. Mr. Main took the view that he had "gone above and beyond to address the Homeowner's complaints regarding the defect work.
26. In cross-examination, Mr. Main agreed that Barratt had stated that they would pay for the carpet cleaning but had reversed this decision because the dirtying had been caused after handover by the owners moving in and having their own contractors in the building. He stated that Barratt were not responsible for cleaning the light fitting as it was in working order but that he had cleaned it himself as a gesture of goodwill. Mr. Main maintained that the NBT follow a protocol at handovers and did not accept that the NBT were not able to carry out this task professionally. He explained that the contract for the build is between the owners and Barratt and not the Property Factor and Barratt, and that although the Property Factor can chase up snagging, the Property Factor cannot enforce this. Mr. Main did not accept that the Property Factor ought to have cleaned the light fittings before January 2020 and should have pursued Barratt further in respect of snagging.

Summing -up

27. Both Parties summed- up in line with the evidence led by them.

Findings in Fact.

28. The Tribunal had regard to the Applications in full, the written submissions and to the evidence at the Hearing, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.
29. The Tribunal found the following facts established:
 - i) The Parties are as set out in the Application;
 - ii) The Homeowner is a homeowner in terms of the Act;
 - iii) The Property Factor is a property factor in terms of the Act and is bound by Sections 14 and 17 of the Act, being the duty to comply with the statutory

- iv) codes of conduct and the duty to comply with the Property Factor's Duties;
- v) The Property Factor issued the Homeowner with the WSS which fully complies with both the 2011 Code and the 2021 Code;
- v) The Property Factor complied with the WSS, although at times, the Property Factor did not deal with correspondence from the Homeowner as promptly as it might have done;
- vi) The Property Factor gave the Homeowner inaccurate advice in respect of work carried out;
- vii) The Homeowner had a contract with Barratt for a new build flat in respect of which there is common property;
- viii) The Property Factor was appointed by Barratt following a tender process;
- ix) Barratt is not a contractor employed or engaged by the Property Factor;
- x) The Property Factor took handover of the common parts relative to the Property and agreed a schedule of snagging with Barratt;
- xi) The Property Factor pursued Barratt to carry out snagging works of which only minor paintwork remains outstanding;
- xii) Repair work to the stair edging arose after the handover and the Property Factor arranged the repairs at the cost of the owners;
- xiii) The carpet requires to be cleaned in respect of dirtying which has occurred since handover;
- xiv) Mr. Main of the Property Factor cleaned the light fittings as a gesture of goodwill to the Homeowner;
- xv) The Homeowner's complaints began in July 2021 with a complaint to the then property manager;
- xvi) At that time, the Property Factor had a two stage complaints process, the first stage being an informal process to the property manager and the second stage being a formal complaint to the complaints manager;
- xvii) The Homeowner continued with written complaints on 17, 19 and 31 August 2021;
- xviii) The Property Factor began its complaints process with the Homeowner's complaint of 31 August 2021, treating that complaint as the informal process to the property manager;
- xix) The Property Factor issued a response to that complaint on 30 September 2021;
- xx) The Homeowner continued to pursue his complaint with the Property Factor until 6 December 2021 when the Property Factor's complaints manager advised him to appeal directly to her in writing at the Property Factor's Glasgow office;
- xxi) The Property Factor's complaints manager uses a generic complaints email box;
- xxii) The Parties habitually corresponded by email;
- xxiii) There is no collateral warranty for the snagging works.

Issues for Tribunal

30. The issues for the Tribunal are: has the Property Factor breached those parts of the 2011 Code and the 2021 Code as complained of in the Applications and has the Property Factor failed to comply with the Property Factor's Duties.

31. Core to these issues is the way in which the Property Factor took handover of the common property from Barratt and how it carried out its processes and procedures as set out in the WSS.

Decision of the Tribunal with reasons.

32. Section 19 of the Act states: “*(1) The First-tier Tribunal must, in relation to a homeowner’s application referred to it ... decide (a)whether the property factor has failed to carry out the property factor’s duties or, as the case may be, to comply with the section 14 duty, and (b)if so, whether to make a property factor enforcement order.*” Having heard the Parties, the Tribunal proceeded to make a decision in terms of Section 19 (1)(a) of the Act.

33. The 2011 Code at Section 1 at 1.1a D m and n states that the Property Factor should have procedures and timescales for dealing with contact from homeowners. From the WSS and the evidence, the Tribunal is satisfied that the Property Factor complies with this part of the 2011 Code. The way in which the Property Factor complied with its procedures and timescales is dealt with under Property Factor Duties.

34. The 2011 Code at Section 6 at 6.9 states that the Property Factor must pursue contractors or supplier to remedy the defects in any inadequate work or service provided and if appropriate, you should obtain a collateral warranty from the contractor. The Tribunal agrees with the Property Factor that the developer in this case is not a contractor engaged by the Property Factor: the developer is a builder with whom the Homeowner entered into a contract for the build of the Property and its common parts and so the contractor’s obligation is to the Homeowner and not the Property Factor. The Tribunal took the view that the Property Factor is not the agent of the Homeowner in respect of his contract with Barratt and that it is for the Homeowner to pursue Barratt in terms of his contract with Barratt or in respect of any warranty such as a National Housing Builder’s certificate or similar. In any event, the Tribunal took the view that the Property Factor did pursue Barratt as far as it is able to do so and that the Property Factor is not entitled to a collateral warranty in these circumstances as there is no relevant contractual relationship between the Property Factor and Barratt.

35. The 2011 Code at Section 7 Complaints at 7.1 states that the Property Factor should have complaints procedures. From the WSS and the evidence, the Tribunal is satisfied that the Property Factor complies with this part of the 2011 Code. The way in which the Property Factor complied with its procedures and timescales is dealt with under Property Factor Duties.

36. The 2021 Code sets out overarching standards of practice for Property Factors. From the evidence before it the Tribunal is satisfied that the Property Factor complied with the standards complained of. The Tribunal notes that inaccurate information was provided in respect of work carried out but does not consider that this is so significant to be in breach of the Code. The inaccuracy was not deliberately false or misleading and was corrected with an explanation and an apology. The Tribunal accepts that the Property Factor staff have a protocol for dealing with new build handovers which is compliant with the Code. Accordingly, the Tribunal does not find the Property Factor to be in breach of this part of the Code.

37. The 2021 Code at Section 1.5(B) 4 and 1.5(D)(14) are broadly similar to the 2011 Code at 1.1a D m and n. From the WSS and the evidence, the Tribunal is satisfied that the Property Factor complies with this part of the 2021 Code. The way in which the Property Factor complied with its procedures and timescales is dealt with under Property Factor Duties.
38. The 2021 Code at Section 2 at 2.7 states that the Property Factor should respond to homeowners within the timescales confirmed in their WSS and should aim to deal with enquiries and complaints as quickly and as fully as possible, keeping homeowners informed if they are not able to respond within the agreed timescale. The Tribunal had regard to all of the evidence and took the view that any discrepancies in this regard were not significant and minor delays were addressed properly by the Property Factor. Accordingly, the Tribunal does not find the Property Factor to be in breach of this part of the Code.
39. The 2021 Code at Section 6.7 sets out standard for periodic property visits and planned programmes of cyclical maintenance. No evidence was led in respect of a breach or failure of this part of the Code. Section 6.12 of 2021 Code is broadly similar to Section 6.9 of the 2011 Code but makes specific reference to work instructed or organised by the property factor on behalf of the homeowners. No evidence was led in respect of a breach or failure of this part of the Code. Evidence was led in respect of work contracted between the Homeowner and Barratt and is dealt with in paragraph 34 above. Accordingly, the Tribunal does not find the Property Factor to be in breach of this part of the Code.
40. With regard to Property Factor Duties, the Tribunal took the view that the Property Factor had followed its processes and procedures correctly. The Tribunal was satisfied that the Property Factor carried out the handover correctly and had pursued and is pursuing Barratt as far as it is able to do so. The Tribunal found that there was no obligation on the Property Factor to obtain a collateral warranty from Barratt. With regard to the complaints procedure, the Tribunal took the view that the Property Factor had followed its procedures, had investigated the Homeowner's complaints and had provided him with a full response, albeit that the Homeowner was not happy with the response. The Tribunal noted the Property Factor's position that the Homeowner had not complied with the process. However, the Codes apply to the Property Factor not the Homeowner and the Property Factor could have taken the view that, by emailing the generic complaints mailbox which is accessed by the complaints manager, that the Homeowner had, in fact, complied, as a separate letter posted to the complaints manager and going over the same grounds would have been fruitless. Accordingly, the Tribunal does not find the Property Factor to have failed to carry out its Property Factor Duties.
41. 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

Signed

Karen Moore, Chairperson

28 June 2022