



Notice of Proposal

of

the Housing and Property Chamber of the First-tier Tribunal for Scotland

(Hereinafter referred to as "the Tribunal")

Under Section 19 (2) (a) of the Property Factors (Scotland) Act 2011

Case Reference Number: FTS/HPC/PF/16/1016

Re : Property at Flat 1/2, 36 Mount Stuart Street, Shawlands, Glasgow G41 3LZ ("the Property")

The Parties:-

Mr Christopher MacVicar, 2/30 Westbourne Grove, Northcote, Victoria 3070, Australia ("the Applicant")

D & I Scott (a firm), 1 Carment Drive, Shawlands, Glasgow G41 3PP ("the Respondents")

Whereas in terms of its decision bearing the same date as this notice, the Tribunal decided that the Respondents have failed to carry out their duties as property factors in terms of section 17(1) and (5) of the Property Factors (Scotland) Act 2011; the Tribunal proposes to make a property factor enforcement order in the following terms:

The Respondents shall, within two weeks of the notification to them of the order pay to the Applicant the sum of five hundred pounds sterling (£ 500.00).

Both Applicant and Respondents are invited to make representations to the Tribunal on this Notice of Proposal and the decision accompanying it. The parties must make

such representations in writing to the Tribunal by no later than 14 days after the notification to them of this Notice.

D Bartos

Signed

2017

David Bartos, Chairperson

Housing and Property Chamber
First-tier Tribunal for Scotland



**Decision of the Housing and Property Chamber of the First-tier
Tribunal for Scotland**

(Hereinafter referred to as "the Tribunal")

Under the Property Factors (Scotland) Act 2011

Case Reference Number: FTS/HPC/PF/16/1016

Re : Property at Flat 1/2, 36 Mount Stuart Street, Shawlands, Glasgow G41 3LZ ("the Property")

The Parties:-

Mr Christopher MacVicar, 2/30 Westbourne Grove, Northcote, Victoria 3070, Australia ("the Applicant")

D & I Scott (a firm), 1 Carment Drive, Shawlands, Glasgow G41 3PP ("the Respondents")

The Tribunal comprised:-

David Bartos	- Chairperson
Elizabeth Dickson	- Ordinary member

Decision

1. The Respondents have failed to comply with their duty to the Applicant to :
 - (1) inspect the roof of the tenement of which the Property forms part;
 - (2) inspect the remainder of said tenement to a reasonable standard;
 - (3) notify the Applicant of repairs to the common parts of said tenement likely to exceed £ 100 per flat, to a reasonable standard.
2. The Applicant's complaint of a breach of a duty to him to recommend to a reasonable standard the acceptance of a tender for the carrying out of works to the common parts of said tenement is rejected.

Background:-

3. By application received on 6 December 2016, the Applicant applied to the Tribunal for a determination that the Respondents had failed to carry out their duties as property factors.
4. In particular he alleged that the Respondents had breached duties to the Applicant to :
 - (1) inspect the roof of the tenement of which the Property forms part, and in any event to inspect it to a reasonable standard;
 - (2) inspect the remainder of said tenement to a reasonable standard;
 - (3) notify the Applicant of repairs to the common parts of said tenement, to a reasonable standard;
 - (4) to recommend to a reasonable standard the acceptance of a tender for the carrying out of works to the common parts of said tenement.

Findings of Fact

5. Having considered all the evidence, the Committee found the following facts to be established:
 - (a) The Property is one of 8 flats in an early 20th century traditional red sandstone tenement building 36 Mount Stuart Street. The tenement is in the Shawlands area of Glasgow;
 - (b) The Applicant has been the owners of the Property since 1998. Since August 2016 it has been rented out;
 - (c) The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 in 2012. They were appointed factors for the tenement with effect from 10 July 2013. This followed a meeting with owners on 25 June 2013. They produced a Statement of Services ("the Written Statement"). This was issued to the Applicant.
 - (d) The Written Statement set out the Respondents' services to the owners of the tenement including the Applicant. These included under part B "Services Provided" the following:

"D & I Scott Property Management will provide quality Management Services as follows:

...(d) notify all owners of any large repairs required i.e. those repairs costing more than £ 100 per flat. We may also at our discretion advise owners of repairs costing less than £ 100 per flat. In these circumstances the co-owners will be given the opportunity to object to the repair and where the majority of owners object the repair will not

be instructed.

... (f) Carry out inspections of the property with the aim of visiting each property a minimum of once every 2 years. Any required repairs noted at the time of inspection may be instructed at our discretion. It is our policy to instruct the cleaning of the gutters and inspection of the roof area at all properties on an annual basis, except where the majority of owners have indicated that they do not require this service."

- (e) In August 2013 the condition of the tenement including its gutters was as shown in photographs 93 to 99 in the Wiseman report from April 2016. The defects in the stairwell noted in paragraph 3.5 of that report and the defects in the rear elevation noted at paragraph 3.6.5 of that report were present in August 2013.
- (f) On 28 August 2013 the Applicant sent an e-mail to the Respondents asking for their proposals for refurbishment of the communal areas of the tenement. He made express reference to broken stair windows, damaged tiles and shabby paintwork in the common stairwell and damaged external brickwork and a drainpipe. On 4 September 2013 the Respondents e-mailed their response without any proposals. By e-mail to the Respondents dated 3 September 2013 the Applicant asked them for an itemized list of repairs that they had identified in their inspection. He repeated his request by e-mail of 26 February 2014. In this e-mail he suggested that a full roof survey might be necessary.
- (g) By e-mail to all homeowners dated 28 February 2014 the Respondents stated that all work identified at the inspection in 2013 had been carried out and that the next inspection would take place in autumn or winter of 2014.
- (h) By e-mail of 18 March 2014 the Applicant complained to the Respondents questioning the aptitude of the person who had carried out the inspection and notifying the poor condition of stairwell window frames and plastering and also possible defects in the roof. In an e-mail of 3 April 2014 he re-stated his request for a list of all repairs essential and non-essential necessary to bring the common areas into good condition. He did not pursue his complaint at that time due to personal circumstances. He did not receive any inspection report or list of repairs as sought until the issue of the Wiseman report to him in mid 2016.
- (i) The Respondents' inspections of the tenement included visual inspections of the external walls, gutters, downpipes and the common close.
- (j) The Respondents employed a contractor to clean the gutters of the tenement. The gutter-cleaning contractor did not report the poor condition of the verge of the roof where it adjoined the neighbouring tenements nor the condition of the roof in and around the chimney.

- (k) The invoices produced by the Respondents to the Tribunal had been issued to homeowners. The work stated in them was done.
 - (l) In autumn 2015 Claire Stewart, the owner of flat 3/1 suffered water ingress into her living room and bedroom. The Respondents obtained tenders for remedial work from three contractors, one of whom was Hugh Scott, part of the Hunter Building Group. There were material differences in the work quoted for in the three tenders.
 - (m) The tenders were intimated to homeowners by letter of 20 January 2016 with a recommendation from the Respondents for acceptance of the quotation from Hugh Scott.
 - (n) By e-mail of 21 January 2016 the Applicant requested the Respondents to instruct a full roof survey.
 - (o) On 21 April 2016 Wiseman Associates Ltd's building surveyor carried out an inspection of the fabric of the tenement. Their findings are in their report dated 12 May 2016. The condition of the tenement was as set out in their report.
 - (p) In the light of the report, the Respondents instructed Wiseman Associates to prepare a schedule of work for which contractors would be invited to tender. Contractors were invited to tender for the work. Three contractors tendered for the work. In December 2016 Wiseman Associates prepared a Tender Analysis of the tenders. The Tender Analysis is incorporated into these findings. Based on the lowest priced tender document Wiseman Associates estimated the total cost of the works to be £ 157693 inclusive of VAT (and professional fees). Of this £ 28140 exclusive of VAT was attributable to work to the rear elevation and front elevation.
 - (q) By letter dated 8 November 2016 the Applicant complained to the Respondents about the matters forming the subject of this application. The Respondents replied with their letter to the Applicant dated 15 November 2016, rejecting the complaints and referring him to the Homeowner Housing Panel.
6. A Convener of the Tribunal, using his delegated powers under section 96 of the Housing (Scotland) Act 2014, decided under section 18(1) of the 2011 Act to refer the application to the Tribunal. That decision was intimated to the Applicant and to the Respondents on or about 19th January 2017.
 7. Following the referral of the application to them the Tribunal issued a direction dated 26th January 2017 to the parties requiring the production of certain documents together with written representations by the Applicant on certain matters. The Respondents intimated written submissions dated 30th January 2017 and 16th February 2017 to the Tribunal. The Applicant intimated a written submission on 14th February 2017 to the Tribunal.

8. The parties were informed that the hearing to take place on 22nd February 2017 at the Glasgow Tribunal Hearing Centre, 134 Wellington Street, Glasgow G2 2XL at 10.00 hrs. This was given by letter from the Tribunal's clerk.
9. The parties lodged various documents with the Tribunal in support of their application and opposition, respectively. Those lodged by the Applicant included those sought in the direction.

The Evidence

10. The evidence before the Tribunal consisted of:-

- The application form, including a 7 page letter of complaint and attached documents
- The Respondents' written statement;
- The Applicant's written submission
- Copy current Land Register of Scotland title sheet GLA21504 for the Property
- Copy Land Certificate for the Property under title GLA21504 from 1994
- Copy Wiseman Associates Ltd report for 36 Mount Stuart Street dated 12 May 2016
- Copy Wiseman Associates Ltd Re-roofing and Fabric Repairs Tender Analysis for 36 Mount Stuart Street dated December 2016
- The Applicant's productions lodged with his e-mail of 14 February 2017 timed at 9.27 hrs GMT
- The Applicant's production lodged with his email of 14 February 2017 timed at 9.36hrs GMT
- The Respondents' productions lodged with an inventory
- Copy e-mail from the Respondents to the Tribunal dated 16 February 2017 enclosing an e-mail of the same date from the Respondents to homeowners
- Copy buildings insurance policy for the Property
- The oral evidence of the Applicant

The Hearing

11. The hearing took place on the date, time and venue fixed. The Applicant attended the hearing. The Respondents did not attend and were not represented
12. The Applicant presented his own evidence. He narrated the history of his dealings with the Respondents. In so far as material it is referred to below. The Tribunal accepted the evidence of the Applicant as credible and reliable.

Failure to Carry out Inspections

13. The Applicant submitted that among the services which the Respondents required to provide under their Written Statement of Services were those in Part B under letter (f). Those services included the carrying out of inspections of "the property". In this context "property" meant the tenement. Read together the services under letter (f) imposed a duty on the Respondents to carry out an inspection of the tenement and since the tenement included the roof, they had a duty to carry out an inspection of the roof. The last sentence of (f) where the Respondents stated their policy to instruct the cleaning of gutters and "inspection of the roof area" put the matter beyond doubt. He also founded on provisions on two pages of the Respondents' website. The first of these headed "Service Definitions" stated, "Regular inspections by D & I Scott cover all building's [sic] common areas. . . ". The second of these headed "What we Do and Don't Do" stated "Regular Inspections We inspect all common areas including entranceways, stairs, roof and roof spaces".
14. That being the Respondents' obligation, he submitted that they had not carried out any real inspection of the roof area of the tenement until the inspection carried out by Wiseman Associates Ltd, chartered building surveyors on 21 April 2016. This failure had taken place despite his e-mailed requests in 2013 and 2014. They had therefore been in breach of their duty since becoming factors in July 2013.
15. The Applicant added that any inspections of the building that had been carried out had not been performed with sufficient rigour resulting in the disrepair in the problematic communal areas not having been identified.
16. The submission for the Respondents was that their duty was fulfilled by an annual inspection of the roof by the contractor whom they appointed to clean the gutters. They submitted that this contractor checked the roof for any "issues causing water ingress or likely to cause water ingress in the near future". There had been no breach of duty. The Applicant did not take issue with the statement that the Respondents' contractor had cleaned the gutters on an annual basis.
17. The Respondents submitted that the findings of their inspections had been notified to the Applicant in their letter to him of 15 November 2016 in part b) of that letter. The Applicant submitted that the letter of 15 November was in fact a response to his complaint and could not be described as a report of inspections.
18. In assessing the competing submissions the Tribunal took account of the Respondents' statement in a letter dated 15 November 2016 to the Applicant where they stated,
"Our property inspections are visual inspections of the exterior walls, gutters, downpipes and common close. We do not inspect the roof of the property.". This reflected a similar statement in the Respondents' e-mail to the Applicant dated 25 October 2016 timed at 11.27 hrs.
19. The Tribunal was persuaded by the Applicant's submission. The submission for the

Respondents did not take account of the Respondents' own Written Statement of Services which had been issued to the Applicant. In terms of Part B letter (f) of the Written Statement the Respondents had a duty to the Applicant to carry out an inspection of the tenement. As the roof is part of the tenement, absent any exclusion of the roof, an inspection of the tenement includes inspection of the roof. Not only did the first sentence under letter (f) not exclude the roof, but last sentence stated specifically that it was the Respondents' policy to instruct the inspection of the roof area at all properties on an annual basis except where the majority of owners indicated that such service was not required. Accordingly the Tribunal found that the Respondents owed a duty to the Applicant to inspect the roof of the tenement on an annual basis.

20. Was that duty breached ? The Applicant did not take issue with the Respondents' statement in their letter of 15 November which is quoted above. The Respondents did not provide any information about exactly what the contractor whom they employed to clean the gutters did in his checking of the roof for issues of water ingress either current or "in the near future". What is clear is that he did not report, and presumably did not observe the poor condition of the verge of the roof where it adjoined the neighbouring tenements nor the condition of the roof in and around the chimney. In the circumstances the Tribunal is unable to find that any checking by the Respondents' contractor extended beyond observation from the gutters.
21. Such observation was clearly inadequate to pick up defects in the roof which required attention but which might not be obvious existing or imminent leaks. At best it amounted to a partial but incomplete inspection of the roof. Accordingly the Tribunal found that the Respondents had failed to fulfill their unqualified duty to inspect the roof. They were in breach of their duty as property factors to the Applicant.
22. If the Tribunal had found that there had been inspections of the roof in terms of the Written Statement, it would have found nevertheless that the inspection lacked reasonable rigour for the reasons given in the preceding two paragraphs. In these circumstances the Respondents would have failed to carry out their duty to inspect to a reasonable standard. This would have been found to have been in breach of their duty as property factors in terms of section 17(4) of the 2011 Act.

Failure to Inspect Stairwell and Rear Elevation and to Notify Owners of Repairs

23. The Applicant submitted that the failure to inspect with reasonable rigour extended also to parts of the tenement other than the roof. In addition he alleged that the Respondents had failed to communicate to owners any proposal to remediate the degraded condition of the building. In particular he had on a number of occasions requested the Respondents to provide a report on their proposals to rectify problematic areas. He referred to his e-mails to the Respondents dated 2 July 2013, 28 August 2013, 3 September 2013, 26 February 2014, and 18 March 2014 in which he asked for a report on the full extent of work required. He had not received any response actually answering his request. He

denied that there had been a response in the last paragraph of the Respondents' Ann's e-mail of 28 February 2014. No inspection report had ever been received.

24. He told the Tribunal that the photographs 93 to 99 in the Wiseman report from April 2015 showed the condition of the tenement including its gutters although he could not be 100% certain about photos 92 to 94 in relation to the gutters. He said that the defects in the stairwell noted in paragraph 3.5 of that report and the defects in the rear elevation noted at paragraph 3.6.5 of that report were present in August 2013. He did not dispute that the invoices produced by the Respondents to the Tribunal had been issued or that the work in them had been done. However he submitted that such work had been inadequate to deal with a "degraded building".
 25. He submitted that from Wiseman Associates' tender analysis of December 2016 it was plain that works to a value of £ 157,693 inclusive of VAT were required. The works in the Wiseman report which had given rise to the tenders had not arisen over one or two months before the report. The Respondents should have known about the defects in the roof causing water ingress from the outset of their appointment. A roof inspection should have taken place. It was impossible to accept that in the three years since appointment the Respondents were unable to identify repairs costing more than £ 100 per flat.
 26. The Respondents' position was that there had been no failures on their part. Their inspections included visual inspections of the external walls, gutters, downpipes and the common close. They referred to e-mails to the Applicant dated 21 August and 3 September which were said to give details of their findings of their inspections and also to the said letter of 15 November 2016 and part b) of that letter. They referred also to the works carried out by them for which the Applicant had been invoiced. There were no other works of which homeowners required to be notified.
 27. The Tribunal noted the provisions of part B letter (d) of the Respondents' written statement which provides:
 "D & I Scott Property Management will provide quality Management Services as follows:
 . . . (d) notify all owners of any large repairs required i.e. those repairs costing more than £ 100 per flat;
 . . . (f) carry out inspections of the property . . ."
- It also noted that section 17(4) of the 2011 Act had the effect of requiring property factor's duties to be carried out to a reasonable standard.
28. The Tribunal accepts that the Respondents did carry out visual inspections of the external walls, gutters, downpipes and common close. It also accepts the evidence of the Applicant as to the defects that were present in August 2013. It is plain from the element of "Facade Repairs" in the Wiseman Analysis of Tenders, that the cost of repairs for the rear elevation defects was more than £ 100 per flat and that this would have been the case since August 2013 when the Respondents carried out their inspections.

29. No explanation was provided by the Respondents as to why the elements in the Wiseman report not relating to the roof could not have been detected during the annual inspections. In these circumstances the Tribunal found that the Respondents had not carried out their duty to inspect the tenement to a reasonable standard.
30. Furthermore a reasonable standard of inspection under letter (f) would have disclosed the stairwell and rear elevation defects shown in paragraphs 3.5 and 3.6.5 of the Wiseman report. On the basis of the cost of the rear "Facade Repairs" being greatly in excess of £ 800 the Tribunal also found that the Respondents knew or ought to have known that the cost of repairs of such defects would exceed such sum. A reasonable standard for notification required such work to be notified to owners under letter (d) of part B but this was not satisfied for over 2 years. There was thus a failure to carry out property factor's duties in these two respects.

Failure to Advise on Tender

31. Finally the Applicant complained that the Respondents had failed to show technical competency in recommending to owners acceptance of quotations from Hugh Scott dated 27 November 2015 and 11 January 2016 to carry out roof repairs. He submitted that in their e-mailed letter to him of 20 January 2016 the Respondents should have informed homeowners like him of material differences in the Hugh Scott quotations from the quotations of other contractors. The Respondents should not have recommended Hugh Scott without clarification from the other contractors to ensure their quotations were comparable with those of Hugh Scott.
32. The Respondents submitted that the quotations were not significantly different but that in any event they provided the owners with the quotations and the owners were free to choose whom they preferred, "providing a majority of owners are in agreement."
33. The Tribunal found that the services which the Respondents were under a duty to provide did not extend to advising on tenders for repair work. There was no mention of such a service in their Written Statement. That being the case there was no property factor's duty to advise on tenders and there could be no failure to carry it out to a reasonable standard. This complaint was rejected.

Property Factor Enforcement Order

34. In his application the Applicant sought:
- an apology
 - the sum of £ 500 as compensation for the increased costs of works caused by the breach of factors' duties
 - termination of the contract with the Respondents
 - an official warning over previous behaviour and in relation to future conduct

- a monetary fine.
35. At the hearing the Applicant indicated that his real focus was not an apology but to have the repairs carried out. The Tribunal explained to him that it did not have jurisdiction to terminate the contract which existed between the Respondents and all of the owners of the tenement and not merely himself. Equally it did not have the power to impose an official warning or monetary fine.
36. With regard to compensation, he submitted that had the works been identified in 2013 he would have been eligible for a grant as an owner-occupier whereas now with a tenant he would not be eligible. In addition he alleged the costs of the works had increased since 2013. As an electrician he estimated that 4% per annum was not an unreasonable increase in repairs costs over the past nearly 4 years. On his calculation this meant that £ 18500 of the current estimated costs of £ 157500 was due to increased costs since 2013 of which his share would be £ 2300. He did however indicate that he would be satisfied with £ 500 as originally claimed.
37. There was no response from the Respondents to the Applicant's supplementary submission on costs which had been copied to them. The Respondents did however indicate that at a meeting on 15 February 2017 a majority of the five owners present or represented had voted by 3 votes to 2 not to proceed with an application for grant funding for the work in the Wiseman tender analysis and not to instruct a structural report.
38. The Tribunal's award of compensation is designed to reflect the loss suffered by the Applicant as a result of the breaches of factors' duties that the Tribunal had found. The loss suffered by the Applicant was however not the increased cost of repairs since 2013 but at highest the loss of a chance (from that time) to avoid that increased cost. This is because on any view even if the Respondents had obtained the Wiseman report in 2013 and made the appropriate notifications of repairs and obtained the consequent tenders, there was no guarantee that the majority of owners would have agreed to the work going ahead. What was lost was the chance of obtaining their agreement to allow the works to be carried out.
39. It is impossible to estimate the chance of the work going ahead in 2013 with any accuracy. A broad approach is necessary. A nil chance would result in no loss. A 100% chance would result in a loss of £ 2300. In the circumstances the Tribunal took the view that the £ 500 which the Applicant was prepared to accept reflected adequately the chance that had been lost in 2013 as a result of the breaches of factor's duties.
40. The fact that the owners at present have decided not to go ahead is not material in the assessment of loss. This is because the chance was lost in 2013 and not now. That loss has not disappeared into a black hole merely because the current owners have decided not to go ahead. Indeed it might be possible for the Applicant to take the initiative to have the work carried out but his difficulty might lie in having to fund all of the work himself

with only a right of relief against the other owners. Another option is to contact Glasgow City Council who may consider enforcing essential repairs using their statutory powers.

41. Given the finding on compensation the Tribunal did not see merit in ordering the giving of an apology.

Court Proceedings

42. The parties are reminded that except in any appeal, no matter adjudicated on in this decision may be adjudicated on by a court or another tribunal.

Opportunity for Representations and Rights of Appeal

43. The Applicant and Respondents are invited to make representations to the First-tier Tribunal on this decision and the proposal. The parties must make such representations in writing to the Tribunal by no later than 14 days after the day of this decision

44. The opportunity to make representations is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.

45. Following the making of representations or the expiry of the period for making them, the First-tier Tribunal will be entitled to review this decision. If it remains satisfied after taking account of any representations that the Respondents have failed to comply with their duties, it must make a property factor enforcement order. Both parties will then have a right to seek permission to appeal on a point of law against the whole or any part of such final decision and enforcement order.

46. In the meantime and in any event, the parties may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission. All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016.

D Bartos

Signed

Date: 17 March 2017

David Bartos, Chairperson