



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) in an application under section 17 of the Property Factors (Scotland) Act 2011 (“the Act”)

Property Factor Enforcement Order (PFO) under Property Factors (Scotland) Act 2011 Section 19 (3)

Chamber Ref: FTS/HPC/PF/21/2238

Re: Property at 6 Old Dalmore Drive, Auchendinny, EH26 0NG (“the Property”)

Parties:

Dr Sarah Morton, residing at 6 Old Dalmore Drive, Auchendinny, EH26 0NG (“the Applicant”)

Charles White Limited, Citypoint, 65 Haymarket, Edinburgh EH12 5HD (“the Respondent”)

Tribunal Members:

Jim Bauld (Legal Member)

Andrew McFarlane (Ordinary Member)

Background

1. Reference is made to the notes issued by the tribunal after the Case Management Discussion (CMD) of 28 January 2022 and the subsequent hearings of 19 August 2022 and 7 October 2022.
2. A hearing was set to take place on 27 January 2023 but that required to be postponed .

3. A further hearing was set to take place on 17 March 2023. That hearing was arranged to take place via the Webex video conferencing platform.

The hearing

4. The tribunal convened on 17 March 2023
5. The applicant was personally present and the respondents were represented at the hearing by Mr David Hutton, their managing director.
6. The tribunal reminded the parties of the overriding objective of the tribunal to deal with the proceedings justly.
7. The tribunal commenced by noting that the report which it requested be produced in its note from the hearing of 28 January 2022, had not been obtained.
8. The applicant indicated that she had approached two different professionals and had been advised that preparing such a report retrospectively would be very difficult. She had not proceeded to instruct the report.
9. It remained the applicant's position that she had reported a repair to the property factors on 22 February 2021, and that they had failed to respond in an appropriate and professional manner. They had ignored emails from her when she indicated that it was getting worse. She indicated that the initial response from the respondent's staff member was that the matter was not a common repair, but was an individual responsibility of the applicant as a homeowner.
10. Mr Hutton for the respondent indicated that in his view the report required by the tribunal had not been produced and that there was therefore no evidence upon which the tribunal could proceed to make the decision sought by the applicant and that the application should be dismissed.
11. He referred to the timeline of events which he had produced, which showed that the respondent had received the initial report on 22 February 2021 and had eventually instructed repairs on 1 April 2021. That was a period of approximately 5 weeks. Later in the hearing he also indicated that the tribunal should take into account the context of the restrictions which were in place at the time, namely the various measures dealing with the Covid pandemic. At that point it was difficult to obtain access to certain developments and even occasionally difficult to obtain contractors.
12. He indicated that on first inspection, there was a very minor stain showing on the hatch, which was assumed to be condensation. He indicated that it would not be standard practice to open every wall behind what appears to be a minor condensation stain. Normal practice would be to monitor the situation over a period of time by taking readings from appropriate damp monitors.

13. The applicant indicated that she had continued to report the problem to the property and indeed had actually removed the hatch herself to inspect the interior.
14. There was some discussion between the tribunal members and the parties with regard to what might have been contained in the report which the tribunal had requested. The surveyor member the tribunal indicated his agreement that it would not be easy to compile such a report, but that such a report could have been prepared even if the answer was not providing certainty or a clear-cut answer.
15. The tribunal indicated to the parties that the standard of proof in the tribunal process was the balance of probabilities.
16. There was further discussion between the tribunal members and the parties with regard to the options open to the tribunal.
17. In the absence of the report sought, parties were agreed that the tribunal members would still be in a position to make a decision based on the evidence which had been presented to them. It was explained to the parties that such a decision might involve the tribunal members in conjecture and speculation. However, in many instances that is the manner in which a tribunal or a court requires to make a decision. The tribunal requires to consider the evidence before it, and to make a decision based on the balance of probabilities. Decisions are not always made based on absolute certainty.
18. The legal member suggested that it may well be intuitive to assume that when a leak is reported and nothing is done for five weeks, then the situation must be progressively worsening and that an earlier intervention would have led to a lesser repair.
19. The legal member also then suggested that, counterintuitively, it may well be the case that there was no such progressive worsening of the situation. Even if a report had been obtained by the applicant, it was unlikely to have answered that question with any degree of certainty.
20. The tribunal members were again referred to the various emails and copy documents which had been provided by both parties and the tribunal were invited by the parties to proceed to make a decision.
21. The legal member explained the parties that such a decision would be prepared and would be issued to the parties and thanked the parties for the attendance at the hearing and for the assistance they had provided to the tribunal.
22. The tribunal notes that both the applicant and the respondent's representative presented their cases in a polite and respectful manner and that they had greatly assisted the tribunal. There was very little in the way of factual dispute between them it was the implications of these facts where they differed.

Findings in fact

23. There was very little dispute between the parties of what had happened between the applicant's report of the problem on 22 February 2021 and the instruction of works in early April 2021
24. Accordingly the following is more a narration of what is agreed between the parties rather than formal findings of fact
25. There is no dispute that the applicant is the owner of the property and that the respondents are the properly appointed property factor for the property.
26. The series of events which led to this application being made commenced on 22 February 2021. On that date the applicant noticed damp staining to a wall and nearby carpeted area in the common access area at the entrance door to her flat. She reported this issue to the property factor. In the area where staining was noted there was a timber hatch or cover to a void behind. This was described by both parties as a "cupboard". It appears however to have been a duct or riser to accommodate pipes and similar items.
27. Between 22 February and 8 April, the applicant had been in regular contact with the property factor by email indicating her concerns. She had always believed that this was a common repair.
28. Initially the property factor understood that the cause of the leak was a matter which related only to the applicant's own flat. They did not acknowledge that it was a problem with a common pipe.
29. The Applicant reported the leak by email of 22 February 2021 at 3:42 pm.
30. The respondent sent an email to the applicant dated 23 February at 8:38 am, indicating that the leak appears to be from a private cupboard and suggested the applicant to contact a plumber.
31. The applicant sent a further email to the respondent and 24 February 2021 at 2.34 pm, asking the respondent to confirm whether the cupboard was the applicant's.
32. The respondent replied on 25 February 2021 at 2:04 pm, indicating they did not hold every owner's title deeds on file, and again repeating that any issues within the private cupboards relative to the private flat were all the relevant owners' responsibility.
33. By email dated 7 March 2021, the applicant emailed the respondent indicating the issue was becoming worse on a daily basis and indicating that, because the wall was outside the boundary of her property, it was not for her to resolve. She expressed extreme concerns that mould was creeping towards the walls and indicated she would contact the Environmental Health department at the

Local Authority. She asked the Factor to give advice to all flat owners about the private cupboards and to highlight their responsibilities associated with maintenance.

34. By email dated 11 March 2021, the respondent confirmed that several other owners had been in contact about the cupboards and that they would send an email to all owners.
35. On 15 March 2021 the property factor issued a letter to all the owners within the block indicating that they had been contacted by several other owners regarding what they described as "some of the private cupboards located in the communal areas". They asked flat owners to check their cupboards.
36. Again the indication in this letter is that any damage from these cupboards to the communal areas would be the relevant owners' individual responsibility to rectify.
37. By letter dated 29 March 2021 the property factor acknowledged the worsening condition of the communal areas next to the cupboards and indicated they had called out a plumber to attend the site and to provide a report on the source, location and cause of the leak. They confirmed that the Council Environmental Health Department had indicated they did not believe this to be condensation and that the walls were noted to be wet.
38. By letter dated 8 April 2021, the property factor acknowledged that the problem was a common problem involving corroded common pipes and that they were now taking steps to carry out appropriate works. They accepted that the ground floor area was most affected owing to the nature of gravity. The letter of 8 April indicated a likely cost to each owner and also indicated that an insurance claim had been initiated to cover reinstatement of the ground floor area. At that stage they apologised for the delay in resolving the matter and for any upset caused.

Discussion and decision

39. The matter to be determined by the tribunal is whether the respondents failed in the duties under the Code of Conduct for Property Factors.
40. It is clear from the evidence provided to the tribunal that a report was made to the property factor on 22nd February by the applicant. She was concerned with regard to what she believed to be damp staining.
41. It is clear from the correspondence that has been produced to the tribunal that the property factor initially took the view that this was not a common repair and made no attempt to investigate the situation.
42. After further complaints from the applicant, an inspection took place on 29 March 2021. On that date it was accepted that the issue was a common repair

and thereafter the respondents took responsibility, for the matter, lodged the appropriate insurance claim and arranged for the appropriate repair works.

43. Even in the absence of any expert report, and supported by photographs lodged by the applicant, the tribunal is driven to the conclusion that the manifestations of dampness became progressively more extensive in the period from 22 February 2021 to 29 March 2021.
44. The factor's initial response that it was an individual repair was incorrect. At the very least there should have been an inspection arranged prior to 29 March 2021 and probably such an inspection should have been arranged by 15 March 2021 when the factors accept that a number of owners were making a similar complaint.
45. The tribunal was unable, in the absence of an expert report, to determine that the delay in carrying out the inspection, and then instructing the works has led to any significantly different outcome for the applicant. It is likely that the works which eventually required to be undertaken would have been required even if an earlier inspection had taken place. Accordingly, it is likely that the applicant would have required to be decanted and to suffer the disruption that she did. The tribunal assumes that the relevant costs involved in the decant and associated remedial works were covered by insurance.
46. The tribunal is therefore driven to the conclusion that the property factor has failed in the duties under the Code of Conduct for Property Factors.
47. The tribunal now needs to consider if the property factor has breached particular provisions of the Code of Conduct for Property Factors.
48. The tribunal also noted in its note after the CMD of 28 January 2022 that in the letter which the applicant had sent to the property factor dated 17 November 2021 she made reference to specific sections of the Code of Conduct.
49. In that letter the sections which she quotes are taken from the updated and revised version of the Code of Conduct as amended which only came into force on 12 August 2021. Given that her initial complaints relate to acting of the factor in the period from February 2021 to April 2021 the appropriate version of the Code of Conduct which would apply would be the initial version which was in force from 2012 not the amended version.
50. The relevant headings of the sections in the two versions of the Code are the same.
51. The applicant referred to breaches of
 - Section 2, "Communication and Consultation",
 - Section 5 "Insurance" and
 - Section 6 "Carrying Out Repairs and Maintenance"

52. There is a breach of section 2.5 in respect of a failure to respond to enquiries and complaints within prompt timescales. The initial email of 22 February and the subsequent emails from the applicant raised an issue which should have been more fully and more speedily investigated by the factor. It is noted that the property factor did respond, in many cases, very quickly but unfortunately such responses were based on incorrect information relating to the extent of the common parts.
53. There is a breach of section 6.1 in respect of the failure to deal with a notification by a homeowner of a matter requiring repair, maintenance or attention. The factor having received a report of a matter requiring repair failed to identify that the repair was a common repair and thus failed to progress the work and to keep owners informed of the progress of the work.
54. There is no breach of section 5. Once it became clear that the works were covered by insurance, all appropriate steps appear to have been taken by the respondent to progress the claim.

The proposed PFEO

55. If the tribunal finds that there is a breach of the code, the tribunal's responsibility is to decide whether to make a property factor enforcement order (PFEO) in terms of section 19 of the 2011 Act. When a tribunal proposes to make such an order it must give notice of the proposal to the property factor and also allow parties the opportunity to make representations on the proposed PFEO
56. At present the proposed PFEO would be in these terms

The tribunal proposes to make a PFEO in respect of the application and proposes an order for payment would be made against the property factor in favour of the applicant in the sum of £500.

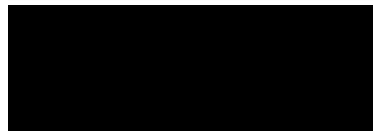
57. In proposing to make such an order the tribunal refers once again to its note after the CMD on 28 January 2022. In that note it explained that a number of the remedies sought by the applicant were not within its jurisdiction. Having determined that the property factor should have acted at an earlier stage than it did, the tribunal recognises that the applicant was involved in additional effort to continue communication with the property factor and involve the local council.

Further representations required

58. Parties are asked to make representations as allowed by section 19 of the 2011 Act and upon receipt of same the tribunal will decide on the final terms of the PFEO. Representations should be lodged with the tribunal within 21 days of the date upon which this decision is intimated to the parties.

Right of Appeal

In terms of Section 46 of the Tribunal (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.



23 March 2023

Legal Member

Date