

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

Statement of reasons for decision in terms of the First-tier Tribunal for Scotland, Housing and Property Chamber ("the Tribunal") (Rules of Procedure) Amendment Regulations 2017 ("the 2017 Regulations")

Chamber Ref: FTS/HPC/PF/20/0046

Re.: 5/2, 72 Lancefield Quay, Glasgow G3 8JF ("the property")

The Parties:-

Mr William Shirriffs, 5/2, 72 Lancefield Quay, Glasgow G3 8JF (**"the homeowner"**)

MXM Property Solutions Ltd., Baltic Chambers, Suite 544 -545, 50 Wellington Street, Glasgow, G2 6HJ (**"the property factor"**)

The Tribunal members: Simone Sweeney (legal chairing member) and Elaine Munroe (ordinary housing member)

Decision of the Tribunal Chamber

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") unanimously determined that the property factor has failed to comply with section 2.5 of the Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the Act.

The Tribunal determines that the property factor has not failed to comply with section 7.1 of the Code.

Background/Procedure

1. By application dated 11th January 2020, the homeowner applied to the Tribunal for a determination on whether the property factor had breached sections 2.5 and 7.1 of

the Code. There was no allegation of any failure on the part of the property factor to comply with the Property Factor's duties.

2. A Notice of acceptance of the application was issued on 13th January 2020 by the Tribunal under Rule 9 of the Rules of Procedure. The application was referred to a hearing before a Tribunal on 13th March 2020 at the Glasgow Tribunals Centre.
3. Following sundry procedure set out within direction dated 26th February 2020 to which reference is made, the property factor produced written representations on 3rd March 2020 together with confirmation that the property factor did not intend to attend a hearing.
4. On 13th March 2020 the homeowner was in attendance at the hearing. There was no appearance, by or on behalf of, the property factor.

Evidence of the homeowner

Section 2.5 of the Code

5. Section 2.5 of the Code requires that the property factor,
"must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement."
6. In respect of section 2.5 of the Code, the homeowner took the Tribunal through the chronology of his complaint to illustrate why he claimed there to have been a breach.
7. The homeowner had sent an email to the property factor on 13th November 2019 on behalf of the owners' association, the River Heights Committee. The email read,
"On behalf of the River Heights Committee, I'd like to request a copy of the Buildings Insurance Claims History for the past 5 years."
8. A reply email was received from the property factor later on the same date. It read, insofar as is relevant,

"...we cannot provide the last five years at present, but details from 2011 to 2017 are attached...We will request the figures for 2018 and 2019 from the Broker."

9. The homeowner submitted that the information provided within the attachment was not an accurate or up to date account of claims history for the period 2011 to 2017. He submitted that it was a slide show and referred the Tribunal to a screenshot which he had lodged in support of his application. It was the homeowner's position that this did not answer his enquiry.
10. The homeowner sought clarification of timescales in another email to the property factor on 14th November 2019. In this email the homeowner asked,

"Are you able to give a rough idea of when the claims history for 2018 and 2019 will be available?"

11. The response from the property factor was,

"Can you please confirm what this information is required for."
12. An explanation was provided to the property factor by the homeowner in his email of 15th November 2019. The email provided, insofar as is relevant,

"The Committee is trying to better understand our claims history in respect of whether it is improving, staying the same or getting worse....as well as whether there are any common circumstances of loss..."
13. Having received no response from the property factor, the homeowner sent an email to the property factor on 21st November. He enclosed the email of 15th November 2019 to that communication. Within the email of 21st November, the homeowner enquired,

"Are you please able to advise when our 2018 and the 2019 to date claims history can be obtained from the Broker?"
14. The homeowner's evidence was that he received no response to the email of 21st November 2019. In fact he has received no contact from the property factor since the email which he received on 14th November 2019. The homeowner insisted that the property factor has never been produced the information which he had requested on 13th November 2019. No explanation had been offered to him from the property factor as to why the information was not produced.
15. The homeowner explained that the reason for the committee requesting the information was part of an on-going procurement exercise in late 2019. The committee

was intending to end its relationship with the property factor and procure new property management services from an alternative factor. The homeowner was of the opinion that information about the number of claims which had been made between 2014 and 2019 was important to share with any future factor. The homeowner insisted that the property factor was made aware of the procurement exercise.

Section 7.1 of the Code

- 16.** Section 7.1 of the Code provides that the property factor,

“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.”

- 17.** In respect of the second part of his complaint, the homeowner alleged that the property factor had breached section 7.1 of the code. The homeowner accepted that he was in possession of a copy of the written statement of services from the property factor. The homeowner accepted that a copy of the written statement of services had been provided to the Tribunal by the property factor. The homeowner accepted that section 4 of the written statement concerned “*Communication Arrangements*” and specifically, section 4.1.8 concerned, “*Complaints*.*”* The homeowner accepted that the written statement of services contained a complaints resolution procedure.
- 18.** The homeowner submitted that whilst he accepted that the property factor may have a written complaints resolution procedure, he did not accept that it had been followed by the property factor.
- 19.** The homeowner submitted that the timescales within the complaints procedure provided that the property factor would acknowledge an owner’s enquiry within 10 days for a stage one complaint and within 14 days for a stage two complaint (It was confirmed later that the timescale for a stage two complaint set out in the complaints procedure was in fact 10 days, also.) It was his position that the property factor had failed to meet these timescales.

- 20.** Having received no response from the property factor to his email of 21st November 2019, the homeowner sent a formal letter of complaint to the property factor on 26th November 2019. The letter bore the heading, "*Stage One Complaint.*"
- 21.** The letter provided a history of the email exchanges between the parties and the homeowner's request for the buildings insurance claims history for the preceding 5 years and began,
- "I would like to register a Stage Once complaint to you regarding the lack of a response to a request for information ... as well as an overall lack of information sharing."*
- 22.** The homeowner's letter of 26th November 2019 was included with the papers lodged by the property factor on 4th March 2020. Notwithstanding the commitment in the written statement of services to respond to a stage one complaint within 10 days, there was no response to the homeowner by the property factor to the letter of 26th November 2019.
- 23.** On 13th December 2019, the homeowner sent another letter to the property factor. This letter bore the heading, "*Stage Two Complaint.*" The letter was addressed to the Managing Director, MXM Property Solutions, Dalsetter Business Centre, Unit 3, 42 Dalsetter Avenue, Glasgow, G15 8TE.
- 24.** Within the letter of 13th December 2019 the homeowner wrote,
- "I had lodged a Stage One complaint to MXM Customer Services, which was received and signed for by L Moore on 27 November 2019.... 10 working days from 27 November 2019 is 12 December 2019 and I have not received any acknowledgement or response to this Stage One complaint, therefore I am lodging this Stage Two Complaint."*
- 25.** It was the evidence of the homeowner that he received no response to his letter of 13th December 2019. In his submission the property factor had failed to meet its own timescales of responding to a stage two complaint within the time frame set out within the complaints procedure. In light of there being no response, the homeowner brought an application before the Tribunal.

Evidence of the property factor

Section 2.5 of the Code

26. The Tribunal chair referred to the written representations produced by the property factor on 3rd March 2020. The homeowner confirmed that he was familiar with the document and had a copy before him. In respect of a breach of section 2.5 of the Code, this was refused by the property factor. The property factor accepted that an email had been received from the homeowner on 13th November 2019. The property factor accepted that the homeowner requested a history of building insurance claims for the preceding 5 year period. The property factor submitted that,

"We provided the homeowner with a reply on the same day, explaining that we could not provide the last 5 years at present, but provided the details from 2011 to 2017. We also advised that with the excess now increased to £5,000.00 for EOW escape of water claims then this had made an impact on the number of claims for 2018 to 2019 and there had been no claims out with the one for the homeowner. (Subsequently excluding the information already provided for 2011 to 2017, there has only been 3 claims and one of these involved this homeowner and one other was accepted as a common claim for storm damage and the other was not accepted as this was below the excess value.)"

27. The property factor accepted the homeowner's position that further information had been requested,

"We then advised the owners that we would request this information for 2018 and 2019 from the Insurance Broker."

28. Further the property factor submitted that,

"We also provided the homeowner with the cost proposal provided by Leaksafe which had been approved by all insurance companies, which then would reduce homeowners excess from £5,000.00 to £1,000.00"

29. The property factor confirmed all that was submitted by the homeowner regarding the content of the email exchange on 14th November 2019.

30. The property factor confirmed the homeowner's evidence that the property factor had replied to the homeowner's email on 14th November,

"We then replied the same day requesting what this information was required for."

31. The property factor accepted that the homeowner had responded to the query on 15th November 2019. The property factor submitted,

“..we received an explanation from the homeowner suggesting that this was to get a better understanding of the claims history and if this was improving.”

32. It was explained that because the homeowner had already been provided with a background to the number of claims arising from escapes of water, the property factor did not see the homeowner's reasoning in requesting the information. The written submissions of the property factor provided,

“Given that we had already stated to this homeowner that there had been no further EOW claims, then it did not make any sense why this was being requested.”

33. The property factor provided further explanation for its response to the homeowner's request,

“The previous week, we had been informed that some of the owner's group (which included this homeowner) had been carrying out a tendering exercise for the Property Factoring at River Heights which did not include and (sic) invitation for MXM...”

34. And, by way of further explanation for the response taken to the homeowner's request for information,

“With the GDPR regulations coming into force on 23 May 2018, then any type of data about homeowners (which would include claims history), meant that the process had been delayed before the Insurance Broker could provide any further information on this matter and we were still waiting for confirmation on what could be provided for the homeowner.”

35. Within the written submission, the property factor accepted that the homeowner submitted a formal complaint in relation to the property factor's failure to provide information. The property factor disputed that there was any requirement to provide the information, however,

“...it is accepted that the information for any common building's claims should be made available and this has been previously issued, this is not disputed, but in terms of the general claims history for the building under the Property Factors (Scotland) Act 2011, Code of Conduct for Property Factors, Section 5 Insurance, 5.2 to 5.7, there is no requirement to provide claims history information, although MXM meet all other

requirements within this section of the Code and this is not disputed by the homeowner.”

36. Finally the property factor relied on the terms of the Deed of Conditions to explain the reasoning in not providing the information requested,

“There is also no requirement listed within the Deed of Conditions for the building (please refer to document 1C) page 13 Section 12 Insurance.”

37. No document 1C was produced within the papers submitted by the property factor. No specification of what the relevant section provided was given by the property factor.

38. Finally the property factor indicated an intention to provide the homeowner with the information which he had requested,

“In relation to the claim’s history and Data Protection, we have now received feedback/advice from the Chartered Insurance Broker for River Heights, Hamilton Robertson, which shows what can now be provided for homeowners is very different to what was being requested.

We are therefore in the process of drafting a document which will be issued to all owners this month on the level of EOW – escape of water leaks in the building and all building claims for the period from 2018 to 2019 and all previous claims issued in the revised format as stated in the information provided by the Insurance Broker Advice. This will also ensure all information is made available for the new Factor at River Heights who we understand is to commence on site in May 2020.”

39. By way of evidence to support this position the property factor produced a copy of an email received from insurance brokers, Hamilton Robertson, dated 3rd March 2020. The insurance brokers provided the property factor with a copy of an email from Thistle compliance specialists. The email from the compliance specialists provided,

“...the issue with regard to giving claims experience to all owners in a block of flats comes under data protection regulations. Whilst no names are shown, the addresses are and therefore other owners within the block would be able to relate the information to a particular person (sic). In order to avoid this problem, we suggest that a claims experience sheet is created for all owners separately, but in each case information

relating to other owners is redacted (blocked out) so that each owner only received information pertaining to them and is unable to see other owners details."

Section 7.1 of the Code

40. The property factor denied that there had been any breach of section 7.1 of the Code.
41. Attached to the written submissions, the property factor had produced a copy of the complaints procedure. Section 5 provided,

"Prior to raising a complaint, we would suggest that you consider by far the most effective way of resolving a problem is to provide the contractor or representative concerned from MXM the opportunity to discuss and resolve your dissatisfaction informally. Before you make a formal written complaint, please ensure you have taken the opportunity to do this."

42. It was submitted by the property factor that the homeowner had failed to discuss the issue,

"Given that this homeowner did not make any attempt to ring the office or make us aware of this and decided just to issue this complaint, if this owner had come back us (sic) again before commencing the stage one process we would have made the homeowner aware of the Data protection issues around issuing claims history for insurance claims and this was delaying this information being made available."

43. The property factor provided further explanation in response to the allegations made by the homeowner,

"We also considered the further issue around this being for a tender exercise and not for what had been stated, we also considered our previous experiences with this homeowner and felt that whatever we said or did would not be accepted by this homeowner and did not see any merit in carrying out this process given their approach and purpose, we would also refer you to the minutes of a meeting which were issued by the owners group for River Heights...which clearly shows this homeowners intentions (sic) is to use the Housing and Property Chamber..."

Response of the homeowner to the property factor's submissions

44. The homeowner explained that he had been unaware of the existence of a GDPR issue which prevented the property factor providing the homeowner with the requested

information. He only became aware of this when he received a copy of the property factor's written submissions in March 2020. The homeowner submitted that he was well aware of the significance of GDPR. Had this been explained to him in November 2019, the homeowner would have understood. However he was of the opinion that GDPR would have provided, "*a reason, not an excuse*" to withhold the information he had requested from the property factor. The homeowner believed that the information could have been produced in a redacted format and GDPR compliant. Moreover the homeowner believed that should the property factors that GDPR prohibited the information being produced, a simple explanation to that effect would have managed the homeowner's expectations and have avoided letters of complaint and an application to the Tribunal.

45. In response to the property factor's submission that the fact that the information was requested in relation to a tendering exercise, the homeowner did not feel that this justified the failure on the property factor to communicate with him. He submitted that the property factor could not "*pick and choose*" with whom to communicate and fail to respond to an owner because there was another matter on-going. The homeowner did not consider it to be a "*good idea*" to ignore complaints.
46. In relation to the property factor's interpretation of section 5 of the Code as relieving the property factor's requirement to provide claims history, the homeowner submitted that, even, if this is correct, then why could this position not have been conveyed to him in November 2019.
47. Similarly, in response to the property factor's submission that there was no requirement to provide the claims history because of the terms of the Deed of Conditions, the homeowner questioned why the property factor could not have conveyed this position to him in November 2019.
48. The homeowner wished to highlight to the Tribunal the date of the emails from the compliance specialists and the insurance broker to the property factor. By his own admission he had no evidence to support the position but suggested that the factor had only contacted the insurance brokers for the requested information on 3rd March 2020 notwithstanding the undertaking given in the email of 13th November 2019.

Findings in Fact

49. That the property factor managed the property in November 2019 and will continue to manage the property until May 2020.
50. That on 13th November 2019 the homeowner requested from the property factor a copy of the buildings insurance claims history for the preceding 5 year period.
51. That on 13th November 2019 the property factor provided the homeowner with an undertaking to recover information from its insurance broker.
52. That the homeowner requested a timescale from the property factor on 14th November 2019.
53. That no timescale was provided by the property factor.
54. That the property factor sought an explanation from the homeowner for requesting the information on 14th November 2019.
55. That the homeowner responded to the email with an explanation for requesting the information.
56. That a tendering exercise was on-going in November 2019 to appoint new factors to manage the property.
57. That the homeowner contacted the property factor by email on 21st November 2019 requesting the information.
58. That copies of the emails from the homeowner from 13th, 14th, 15th and 21st November 2019 were produced to the Tribunal by the property factor.
59. That the property factor did not respond to the email of 21st November 2019.
60. That the homeowner sent a formal letter of complaint to the property factor on 26th November 2019.
61. That within the letter of 26th November 2019 the homeowner made a further request for the claims history.
62. That the property factor produced a copy of the letter of 26th November 2019 to the Tribunal.
63. That the property factor did not reply to the homeowner's letter of 26th November 2019.
64. That the homeowner sent a stage two complaint letter to the property factor on 13th December 2019.
65. That the property factor did not reply to the letter of 13th December 2019.

66. That the homeowner has never received a copy of the buildings insurance claims history for the preceding 5 year period.
67. That the written statement of services provides the timescales within which the property factor will respond to communications from owners.
68. That the written statement of services provides that stage one complaints will be acknowledged within 10 working days.
69. That the written statement of services provides that stage two complaints will be acknowledged within 10 working days.
70. That the property factor did not respond to the stage one complaint within 10 days.
71. That the property factor did not respond to the stage two complaint within 10 days.
72. That the property factor did not meet the terms of its written statement of services.
73. That the property factor has a written complaints procedure.
74. That the procedure suggests that any issue be discussed informally in the first instance.
75. That the written statement of services, at page 28, provides that the property factor will confirm to an anticipated response time if a query cannot be answered, fully.
76. That the property factor did not confirm an anticipated response time to answer the homeowner's query, fully.
77. That the property factor failed to follow its own complaints procedure.

Reasons for decision

Reasons for failure to comply with section 2.5 of the Code

78. It is a matter of agreement between the parties that on 13th November 2019 the homeowner requested information from the property factor of the buildings insurance claims history. It is agreed that much of this information was within the hands of insurance brokers. It is a matter of agreement between the parties that on 13th November 2019 the property factor provided the homeowner with an undertaking to request the information from the insurance brokers. It is a matter of agreement that the homeowner sought a timescale from the property factor on 15th November and that, having received no reply to this email from the property factor a further email was sent to the property factor on 21st November 2019. The property factor does not

dispute that no reply was issued to the homeowner's formal letters of complaint of 26th November and 13th December 2019. It is a matter of agreement that the request remains outstanding.

79. The property factor provided various responses to the application for a failure to provide the information. These included GDPR, the terms of section 5 of the Code and the Deed of Conditions and the fact that there was a tendering exercise on-going to appoint a new factor.
80. The relevant section of the Deed of Conditions was not before the Tribunal. The Tribunal does not intend to comment on section 5 of the Code and its effect, if any. The requirement on the property factor under section 2.5 of the Code is to respond to enquiries and complaints within prompt timescales. These responses may provide explanations for the property factor's failure to provide the information. However there is no valid explanation before the Tribunal why these matters were not shared with the homeowner in November 2019.
81. The property factor submitted that GDPR prohibited the information sought being provided. Moreover guidance was awaited from the insurance brokers on how this could be overcome. No evidence was produced from the property factor that any request had been made of the insurance brokers following the undertaking on 13th November 2019. The only evidence before the Tribunal was an email to the property factor from the insurance broker dated 3rd March 2020.

Reasons for failure to comply with section 7.1 of the Code

82. The property factor has produced a written complaints procedure which provides that homeowners should "*discuss*" issues prior to making a formal written complaint. The property factor was aware of the homeowner's information request in November 2019. The property factor chose not to provide the information. The property factor chose not to reply to the homeowner's emails chasing the information. This failure to communicate became as much part of the homeowner's formal complaint on 26th November 2019 as the failure to provide the information. It was open to the property factor to share with the homeowner the various reasons which are provided to explain the failure to respond to the homeowner's request. The property factor chose to simply

ignore all communications from the homeowner. It was not for the homeowner to call the property factor to enquire why there was no response to his emails. It was entirely proper that the homeowner would keep all communications in writing in the circumstances. Discussion requires participation from both parties. It was open to the property factor to contact the homeowner by telephone to discuss the issue if that was the process in terms of the complaints procedure. There is no evidence that the property factor attempted to discuss the issue with the homeowner. There is no evidence that the property factor would have engaged in discussions with the homeowner given that they failed to engage in any written communications.

83. The complaints procedure produced by the property factor provides timescales for responses to complaints. Page 5 of the complaints procedure provides that for stage one of the complaints process, the property factor,

"will acknowledge receipt of your complaint within ten working days by either sending a full reply or advising that additional time is required with a set date for our response."

The property factor fully accepts that the homeowner's stage one complaint letter of 26th November 2019 was received. There is no evidence that the property factor sent a full reply or advised additional time was required for a full response to the letter of 26th November 2019.

84. At page 6 of the complaints procedure is the timescale for a stage two complaint. Again this provides a timescale of 10 days,

"We will acknowledge receipt of your complaint within ten working days, by either sending a full reply or advising that additional time is required and providing a date for this."

The property factor does not dispute that the homeowner sent a stage two complaint on 13th December 2019. There is no evidence that the property factor sent a full reply or advised additional time was required to the letter of 13th December 2019.

85. Finally, section 4 of the written statement of services sets out the property factor's commitment to communication with owners. Specifically section 4.1.2 provides,

"If we are unable to fully answer your query within this timescale, you will receive an acknowledgement from us, which will confirm an anticipated response time, or if we cannot assist any further enquiry we will tell you."

86. The property factor has failed to provide any explanation why the homeowner was not made aware of the reasons for being unable to provide the requested information, now relied upon by the property factor.
87. The Tribunal accepts that the property factor has a clear written complaints resolution procedure as required by section 7.1 of the Code. However the Tribunal finds no evidence available to show that the property factor followed its own procedure. Accordingly the Tribunal determines that the property factor has failed to comply with section 7.1 of the Code.

Decision

88. The Tribunal determines that the property factor has failed to comply with sections 2.5 and 7.1 of the Code for the reasons provided. The Tribunal proposes a Property Factor Enforcement Order (“PFEO”) to accompany this decision.
89. The property factor is ordered to provide to the homeowner, in writing, a deadline by which the information requested by the homeowner will be available.
90. The property factor is ordered to provide to the Tribunal a copy of that written communication to the homeowner.
91. The property factor is ordered to provide the requested information to the homeowner by the deadline.
92. The property factor is ordered to provide to the Tribunal confirmation that the information has been provided to the homeowner by the deadline.
93. The property factor is ordered to pay to the homeowner the sum of £100 compensation in recognition of the time and inconvenience incurred by the homeowner in bringing this application as a result of the property factor’s inaction.

Appeals

94. 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 within 30 days of the date the decision was sent to them.

Simone Sweeney, legal chair, 17th April 2020, Glasgow