

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/17/0366

**37 Lethington Tower, 28 Lethington Avenue, Glasgow G41 3HY
("the Property")**

The Parties:-

**Mrs Sonia Mahboob residing at Flat 1/2 69 Leslie Street Glasgow G41 2JX
(represented by Mr Akeel Mahboob residing at Flat 1/2 69 Leslie Street,
Glasgow G41 2JX ("the Applicant"))**

**Speirs Gumley Property Management, 194 Bath Street, Glasgow G2 4LE ("the
Respondent")**

Tribunal Members:

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

DECISION

The Respondent has not failed to carry out its property factor's duties.

The Respondent has not failed to comply with its duties under section 14(5) of the 2011 Act and has complied with Sections 6.6 and 6.9 of the Code.

The decision is unanimous.

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".

The Respondent became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By application dated 26/09/17 the Applicant complained to the Tribunal that the Respondent had breached Sections 6.6 and 6.9 of the Code and had also failed in carrying out its Property Factor's duties. The Applicant's complaints were in respect of issues with the lift in the block in which the property was located. The Applicant complained that the lift had not been working for about two years and that it took too long for the Respondent to decide to change the lift and thereafter too long to have the work carried out. During this latter period the Applicant had sold the property and had requested a refund of the money she had paid towards the cost of the upgraded lift but this had been refused.
2. Following further documentation being lodged by the Applicant between 26 September 2017 and 7 March 2018 a Convenor with delegated powers referred the application to a Tribunal on 22 March 2018.
3. The Respondent lodged written representations with the Tribunal by email dated 02 May 2018.
4. The Tribunal issued a Direction to the Applicant dated 8 May 2018 requiring the Applicant to provide the Tribunal and the Respondent with a copy of the missives of sale of the property prior to the hearing assigned to take place on 23 May 2018. The Applicant partially complied with this Direction and provided an incomplete copy of the missives.

Hearing and Summary of Submissions

5. A hearing took place at Glasgow Tribunals Centre, 20 York Street Glasgow on 23 May 2018. It was attended on behalf of the Respondent by Joanne Knox, Client Relations Manager and Grant Malcolmson, Senior Property Inspector. The Applicant was not present nor was she represented.
6. Mr Malcolmson explained to the Tribunal that the lift in question had been 40 years old and during that time there had been minor upgrades made to it. Over the past four years that he had been involved there had been an increasing number of calls coming from owners reporting that the lift was out of service. It had not been permanently out of service over a two-year period. It was subject to a maintenance contract with Clyde Valley Lifts Ltd.
7. Mr Malcolmson said that the faults reported were that the lift would go to the wrong floor or that the doors were sticking. He said that the lift might be out of service about twice per month and never for an extended period. Reference was made to the Repair Orders in the Respondent's Productions (25.1 – 25.15).
8. Mr Malcolmson said that as the number of call outs increased he wrote to all the owners in the block on 14 July 2016 (Production 1) with quotes for a major

upgrade of the lift. The alternative would have been to take the lift out of service completely.

9. According to Mr Malcolmson the Respondent did by September 2016 obtain a majority of owners in favour of upgrading the lift and there then followed an extended period of time attempting to ingather the necessary funds from each owner in the block. He said progress in this regard was slow requiring constant reminders and updates until eventually there were only four owners' contributions outstanding.
10. Mr Malcolmson said that the Respondent then applied to Glasgow City Council for funding under the missing share scheme. He said that the timescale for this was fairly quick involving correspondence over the period from 30 March 2017 to 20 April 2017. Thereafter Glasgow City Council required the Respondent to write to the four owners on 15 June 2017 and the Respondent was in a position to instruct the contractors to proceed with the upgrade to the lift on 11 July 2017.
11. Ms Knox advised the Tribunal that the Applicant had complained about not receiving a refund of the amount paid towards the upgrading of the lift on 6 August 2017 as she had sold the property and the works had not been completed. She said that the complaint had been escalated through the Respondent's complaints procedures first by Cheryl Dearie, then by Ian Friel and ultimately on 1 December 2017 by another director Tom McKie. The Respondent had concluded that in the absence of a letter of authority from the Applicant's solicitor confirming that the Applicant was not liable for the cost of the work instructed no refund would be possible and then only on receipt of funds from the purchaser of the property.
12. Mr Malcolmson confirmed that following the completion of the works the owners were written to on 22 November 2017. Various owners had commented on how happy they were with the improvements to the lift. There had been no communication with the new owners of the property with regards to the lift.
13. In response to a question from the Tribunal as to what information had been provided to the Applicant in compliance with Section 6.6 of the Code Mr Malcolmson said that copies of the quotes had been provided.
14. Mr Malcolmson advised that the Respondent had no concerns with the quality of work done by Clyde Valley Lifts Ltd in repairing the lift but that it had become increasingly more difficult for them to source replacement parts. There had been no complaints from any owners about the service provided by Clyde Valley Lifts.
15. The Tribunal queried whether the Respondent had procedures in place for providing refunds in terms of Section 3.4 of the Code. The Tribunal was advised that the funds were held in trust until the work was completed. There were no written procedures in relation to the proposed works but information

would have been put in correspondence to the seller's solicitor as there would have been a sales letter.

16. The Tribunal adjourned briefly to allow the Respondent to produce a copy of the letter sent to the Applicant's solicitor upon being advised that the property was being sold. On reconvening the Tribunal noted that the sales letter did not mention the pending upgrading of the lift but indicated there were no major works in process. The Tribunal queried what would constitute major works given that the total cost of the lift upgrade was in the region of £50000.00. Mr Malcolmson said there was no specific definition of what constituted major works.
17. According to Mr Malcolmson there was no record of Mr Mahboob reporting any faults in respect of the lift to the Respondent.
18. Mr Malcolmson said the decision to proceed with the works had been taken on 20 September 2016. In all the circumstances he did not think the time taken for the works to be completed was excessive given the difficulty in obtaining payment from all the owners and further delays that the contractors experienced in obtaining parts during the European summer holiday period. He further explained that owners had been kept advised as to progress.
19. After the hearing on 23 May but prior to making its decision the Tribunal was of the view that in order to properly satisfy the interests of justice and in fairness to both parties it was necessary to obtain from the Applicant a copy of a full set of missives of the sale of the property and accordingly issued a second Direction to the Applicant dated 29 May 2018 requiring the Applicant to provide a full copy of the missives within four weeks and fixed a continued hearing to take place on 13 August 2018.
20. By correspondence dated 5 June 2018 the Respondent's solicitors BTO, Solicitors, Glasgow requested the Tribunal review its decision to issue a Second Direction and fix a further hearing. The Tribunal refused this request on the ground that in terms of Rule 16 the Tribunal could on its own initiative give directions to a party where it appeared necessary to obtain information in the opinion of the Tribunal for the determination of the application.
21. The Homeowners representative Mr Akeel Mahboob provided a copy of the missives in advance of the continued hearing which took place on 13 August 2018. The continued hearing was attended by Mr Mahboob on behalf of the Applicant and by Mr Ian Friel, Managing Director, Ms Joanne Knox, Client Relations Manager and Mr Grant Malcolmson, Senior Property Inspector on behalf of the Respondent.
22. At the commencement of the continued hearing the Tribunal noted that the missives for the sale of the property clearly showed that the Applicant was responsible for meeting the cost of the repairs to the lift serving the property.
23. Mr Mahboob explained that he was the brother of the Applicant and had lived in the property prior to it being sold. His sister had not lived there. She lived in

England. He said that he had made the payment to the Respondent for the cost of the upgrade to the lift.

24. Mr Mahboob explained he had been unable to attend the original hearing on behalf of his sister as he had to travel all over the UK for work and was not available that day.
25. Mr Mahboob said that in his view the Respondent had mishandled the way in which they had dealt with the lift issues. They had not communicated properly with owners. They had mismanaged the service agreement with the lift contractors. The lift could not be used for two years.
26. According to Mr Mahboob because of the lift not working, his mother who was disabled was unable to visit him at the property. Mr Mahboob said that the lift did not stop at the correct floor. If you were on floor 2 you had to go to floor 1 or 3 to call the lift. You could never call the lift from the ground floor.
27. Mr Mahboob said that he had requested from the Respondent a copy of the contract for the upgrade of the lift and also for details of the internal view of the refurbished lift but had never been provided with these. He said he had decided not to pay for the upgrade but when he received emails telling him he would be charged with penalties for late payment he decided to pay his sisters share.
28. For the Respondent Mr Friel said that whilst there was no evidence from the Applicant that the lift was not working for two years the Respondent had produced documentation (productions 25-1 to 25-15 and 26) that showed that the lift was working.
29. Mr Friel said that Mr Mahboob was making a case that the Applicant should not be charged for a maintenance contract for the lift if the lift was not in operation but there was only one set of circumstances in which the maintenance contract could be cancelled and that was if the lift was decommissioned. That had not happened. It was accepted that the lift had intermittent faults but the Respondent was discharging its duties to the owners by raising job orders instructing contractors to carry out repairs.
30. Mr Friel was of the view that the issue before the Tribunal was that the Applicant wanted her money back that she had paid for the upgrade to the lift but that this was not for the Respondent to determine. This was a matter between the purchaser and the seller's solicitors.
31. Mr Friel said that the Applicant's complaint was about payment not about service. However, when it came to communications between the Respondent and the Applicant Mr Friel said he had been pleased about the level of communication that had taken place and referred the Tribunal to Productions 3-9 and 14 -18 as confirmation in this regard.
32. Mr Friel said that the Applicant had paid her share of the cost of the lift installation whilst the Respondent was trying to get the project off the ground.

It did take time to establish a majority in favour and then ingather the funds. He could recognise the frustration of not getting the benefit of paying for the improvement if the property was sold but noted that a purchaser would see it as being important that the property had a working lift.

33. Mr Friel said that he was struggling to see why the matter was before the Tribunal. He said he had given the Applicant and Mr Mahboob the opportunity to speak to their solicitor to provide written authority to release the funds but this had not been forthcoming. Either Mr Mahboob's research into the matter had not been good or he had known he was not entitled to the funds as the seller was responsible. Either way the Respondent had given him the opportunity to sort the matter out with his sister's solicitor.
34. Mr Mahboob said that there was no issue with regards to liability. He did not expect the purchaser to pay for the cost of the upgrade to the lift. He believed the Respondent should be held accountable for their mismanagement of the lift not working for two years and the time it took for the upgrade to be completed.
35. Mr Mahboob said that if he had received an apology from the Respondent over his disabled mother being unable to visit that might have been sufficient.
36. The tribunal referred Mr Mahboob to the repair orders provided by the Respondent from which it appeared that the Respondent was dealing with reported faults timeously. Mr Mahboob maintained that the lift still had not been working properly for about two years.
37. Mr Malcolmson said that whilst there were intermittent faults with the lift the Respondent had given the owners the option of how to proceed and once a majority of owners had agreed to the upgrade the Respondent had pursued them to ingather funds and had obtained funding for the balance from Glasgow City Council. He had various telephone conversations with Mr Mahboob and any time Mr Mahboob had contacted the respondent he had received a response.
38. Mr Friel confirmed that following Mr Mahboob's formal complaint he had become involved in accordance with the Respondent's complaint procedures. He had confirmed in a final resolution letter that the Respondent would require written confirmation from the Applicant's solicitor that the purchaser was responsible for the cost of the repairs to the lift before funds could be released.
39. With regards to an apology Mr Friel said that he was not sure what he would be apologising for as he did not believe his business was culpable. The lift had been 40 years old, the Respondent dealt with reported faults as they occurred. They advised the owners to carry out major repairs and these went ahead once a majority had agreed and funding was in place.
40. Mr Friel said he was comfortable with the processes that were in place with regards to works instructed but not carried out when a property was sold.

Even if these were not mentioned in the sales letter provided to the seller's letter it was common for the solicitors to speak to the Respondent by telephone.

The Tribunal make the following findings in fact:

41. The Applicant was the owner of the property until it was sold on 15 August 2017.
42. The Property is a flat within the Lethington Tower, Lethington Avenue, Glasgow (hereinafter "the Development").
43. The Respondent performed the role of the property factor of the Development.
44. The lift serving the development was about 40 years old and was subject to regular intermittent faults throughout 2016 and most of 2017. There was a service contract in place with Clyde Valley Lifts Ltd.
45. The Respondent responded timeously to faults reported to them and instructed Clyde Valley Lifts Limited to carry out repairs by issuing repair orders.
46. Due to the age of the lift it was becoming more difficult by 2016 for the lift engineers to access spare parts and the lift needed a major upgrade.
47. In July 2016 the Respondent recommended that the owners agree to a major upgrade of the lift and obtained mandates from a majority of owners by 20 September 2016.
48. Between September 2016 and March 2017 the Respondent endeavoured to ingather the funds required from the owners to proceed to instruct the contractors to go ahead with the upgrade to the lift.
49. By March 2017 four owners had still not paid their share and the Respondent applied to Glasgow City Council for funding for the missing shares. This application was granted and contractors were instructed to proceed in July 2017.
50. The Applicant concluded missives for the sale of her property on 28 July 2017. In terms of the missives she was responsible for her share of the cost of the repair to the lift at the property.
51. The Applicant's brother Mr Akeel Mahboob requested a refund of his sister's share of the cost of the lift upgrade from the Respondent on 6 August 2017 as she had sold the property. When this was refused he requested that his complaint be escalated through the Respondent's complaints procedure.

52. The Respondent dealt with the complaint appropriately. The Respondent advised Mr Mahboob that a refund would only be given on receipt of a letter from the Applicant's solicitor confirming the position and on the purchaser placing the Respondent in funds for their share of the cost of the lift upgrade.
53. The Respondent regularly communicated with the Applicant advising of the progress in respect of the lift upgrade and the reason for any delay.
54. The letter produced by the Respondent and sent to the Applicant's solicitor on being advised of the sale of the property made no mention of the lift upgrade as work instructed but not yet completed and indicated that there were no major works in process.

Reasons for Decision

Section 6.6 of the Code

55. The Respondent provided in their productions a copy of an email to Mr Mahboob dated 27 January 2017 attached to which was a revised estimate from Caledonian Lift Services for the cost of the upgrade to the lift. In the email Mr Malcolmson indicated that if Mr Mahboob wished to discuss matters further Mr Mahboob should not hesitate to contact him. The Tribunal heard no further evidence to suggest that Mr Mahboob requested further information from the Respondent in this regard. The Tribunal was therefore satisfied that the Respondent had discharged its duties in terms of this section of the Code.

Section 6.9 of the Code

56. There was no evidence before the Tribunal to suggest that the lift engineers Clyde Valley Lifts Limited had provided inadequate work or service. The information provided by the Respondent suggested that the lift was coming to the end of its working life and that parts were becoming difficult to obtain. Faults were being reported on a regular basis and the lift engineers called out to carry out repairs which were then attended to promptly. The Tribunal did not accept Mr Mahboob's assertion that the lift had been out of service for two years nor that the Applicant had been paying for a service contract for the lift but not being provided with that service. The Tribunal therefore was satisfied that the Respondent had not breached this section of the Code.

Property Factors Duties

57. The Tribunal noted that there did not appear to be written procedures provided to owners dealing with payments made in advance in cases where there was a sale of the property prior to works being carried out. In the current case an explanation was provided to Mr Mahboob by the Respondent prior to the property sale being completed and therefore the lack of written procedures did not impact upon the Applicant particularly as the repairs to the lift were clearly dealt with in the missives for the sale of the property. The

Tribunal did however think that the Sellers letter sent by the Respondent to the Applicant's solicitor might have been clearer in its terms as an expenditure of some £50000.00 at the Development might well be considered to be major. Whilst the Tribunal was of the view that the Respondent did not fail to carry out its duties in this regard the Respondent may wish to consider these points in the future.

58. The Tribunal accepted that, as is often the case in common repair situations, it took the Respondent some months from proposing that the owners agree to a major upgrade of the lift to obtaining a majority in favour. The Tribunal also accepted that it then took several months for the Respondent to persuade the owners to pay their share of the cost of the upgrade and indeed that it eventually became necessary for the Respondent to apply to Glasgow City Council for funding for the four missing shares. The Tribunal was of the view that the Respondent acted diligently throughout this period. In all the circumstances the Tribunal whilst understanding the Applicant's frustration at the delay did not find that the Respondent had breached its duties in this regard.

Appeals

A homeowner or property factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Legal Member and Chair

18 August 2018 Date