

# Housing and Property Chamber

## First-tier Tribunal for Scotland



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

**STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended**

**Chamber Ref: FTS/HPC/PF/20/0209**

**Flat 3, Downie Drive, Larkhall, ML9 2LJ ("the Property")**

**The Parties:-**

**Mr Henry Semple, 11 John Place, Heidelberg, Ontario, Canada ("the Homeowner")**

**Miller Property Management, Suite 2.2, Waverley House, Caird Park, Hamilton, ML3 0QA ("the Factor")**

**Tribunal Members**

Ms Helen Forbes (Legal Member)

Mrs Elizabeth Dickson (Ordinary Member)

**Decision**

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") determined that the Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with sections 2.5, 6.1 and 7.2 of the Property Factor Code of Conduct ("the Code") as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the Act").

The decision is unanimous.

**Background**

1. By application received in the period between 23<sup>rd</sup> January and 2<sup>nd</sup> March 2020, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with sections 2.3, 2.5, 5.4, 6.1, 6.2 and 7.2 of the Code. Details of the alleged failures were outlined in the Homeowner's application and associated documents including correspondence to and from

the Factor, a timeline, and the Factor's Written Statement of Services. The matter concerned damage to the soffits and fascia of the Property, which damage was not repaired for 12 months.

2. The Homeowner intimated his concerns to the Factor by letter dated 4<sup>th</sup> February 2020.
3. By decision dated 30<sup>th</sup> March 2020, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.
4. By Direction dated 22<sup>nd</sup> September 2020, the Tribunal ordered parties to provide copies of correspondence between themselves, and correspondence between the Factor and the contractor. Both parties lodged copy correspondence as required.

### **Hearing**

5. A hearing was held by teleconference on 22<sup>nd</sup> October 2020. The Homeowner was not present and was represented by Mrs Carol Crombie. The Factor was represented by Mr Harry Miller.

### **Preliminary Matters**

6. There was some discussion about the fact that, for reasons unknown, the Factor's response to the Direction was only circulated to the Tribunal and the Homeowner the day before the hearing, despite having been submitted by the Factor before the deadline imposed in the Direction. Mrs Crombie confirmed that she had had an opportunity to read the correspondence and she was content to proceed with the hearing.

### **Section 2.3 of the Code**

7. Mrs Crombie confirmed that the Homeowner was no longer alleging a breach of this section of the Code.

### **Section 2.5 of the Code**

8. The Code states: *You 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.*

### **Evidence on behalf of the Homeowner**

9. Mrs Crombie said the Factor's communication had been very poor. There had been no proactive communication and the Homeowner had to continually chase the Factor. The Factor had responded to emails as soon as they were contacted; however, there had been no response to a letter sent to the Factor

on 14<sup>th</sup> October 2019. There had been a delay in responding to a letter dated 4<sup>th</sup> February 2020, with a response received on 17<sup>th</sup> March 2020.

### **Response on behalf of the Factor**

10. Mr Miller said the Factor had tried their hardest to respond to all homeowners. Mr Miller was in hospital for quite a while. He believed his staff had provided the Tribunal with all the correspondence. The Factor had answered as quickly as they could.

### **Section 5.4 of the Code**

11. The Code states: *If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so.*

### **Evidence on behalf of the Homeowner**

12. Mrs Crombie said there was no evidence that any procedure was put in place to submit an insurance claim. The Homeowner was told the damage was not covered by insurance. The Homeowner asked for evidence to show that a claim had been rejected but nothing was forthcoming. The Homeowner was not advised if he was required to submit a claim. The damage was caused during a severe storm. It was not only due to wear and tear.

### **Response on behalf of the Factor**

13. Mr Miller said this was a maintenance issue due to wear and tear, notwithstanding that there was also a storm. It is an old building and the fabric had deteriorated. It was never going to be considered by insurers, as they would not accept a claim in this situation. He stated that an insurance claim can only follow an incident. The Factor has procedures in place for submitting insurance claims. They deal with this on a daily basis. Responding to questions from the Tribunal as to whether homeowners had been notified that this was not an insurance matter, Mr Miller said it had been explained to all homeowners, although he was unable to clarify how they were told. If it had been an insurance matter, they would not have sought estimates for the work, as the insurer would have taken over the procedure.
14. Mrs Crombie responded to the Factor's statement and stated that there was an incident, as there had been a storm.

### **Section 6.1 of the Code**

15. Section 6.1 states: *You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated*

*timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.*

### **Evidence on behalf of the Homeowner**

16. Mrs Crombie said there was no communication from the Factor. The Homeowner was not informed of the progress of work throughout the period of 12 months. He had to continually push for updates. It was clear from the Factor's productions that they only communicated with the builder after contact from the Homeowner. There was nothing to suggest the Factor was proactive. The Factor did not email homeowners with an update on how the repairs were going. The timescales were always vague.

### **Response on behalf of the Factor**

17. Mr Miller said the Factor made telephone calls approximately twice weekly to the builder to find out what was going on. They only sent out emails every so often when they could not get an answer by telephone. The builder was also the owner of the majority of the properties in the block. The Factor was powerless when the majority of owners were not giving them any information. Furthermore, one of the owners could not pay, so there was a missing share which delayed matters. He believed the Factor was proactive and carried out all the necessary work in accordance with requirements. The Factor cannot give people an update on ongoing work which has not started.

### **Section 6.2 of the Code**

18. Section 6.2 states: *If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs wherever possible.*

### **Evidence on behalf of the Homeowner**

19. Mrs Crombie said there was no out of hours procedure. The Factor's Written Statement states that emergency repairs will be attended to within 8 hours of notification. The storm damage was reported by email to the Factor the morning after the damage occurred and the Homeowner checked two days later. Someone had attended but said they did not know where the damage was. The emergency arrangements during office hours were not adequate. Mrs Crombie said she would class this as an urgent repair. Even if it was not an emergency, a temporary repair should have been carried out.

### **Response on behalf of the Factor**

20. Mr Miller said there was deterioration in part of the soffit that had allowed water coming from the gutter to cause damage. It was not an emergency situation. There was no damage to the roof and no damage to the fabric of the

building. The damage was not causing any problems. The contractor checked the situation and determined it was not an emergency. The Factor cannot use owners' money to pay for work if the majority of owners do not want the work carried out, and, in this case, the majority of owners did not want a temporary repair.

## **Section 7.2 of the Code**

21. Section 7.2 states: *When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.*

### **Evidence on behalf of the Homeowner**

22. Mrs Crombie said the Homeowner was left in the dark about the Factor's complaints procedure. In the letter of 14<sup>th</sup> October 2019, the Homeowner asked in the final paragraph for confirmation that this was the final response. There was no response and no information given of the next step in the complaints process.

### **Response on behalf of the Factor**

23. Mr Miller said he thought the Factor had done everything correctly. Their letter of 7<sup>th</sup> October 2019 clarified their response. This was a complaint against the builder rather than the Factor. There were difficult circumstances which combined to delay matters. Responding to questions from the Tribunal, Mr Miller said he believed the Factor had complied with the Code. When asked if there had been a final letter sent, Mr Miller said he could not answer that.

### **Summary on behalf of the Homeowner**

24. Mrs Crombie said the crux of the complaint is the lack of communication. The time delays were unfortunate and it was accepted that some things were outwith the Factor's control. The Homeowner was happy with the builder. He would have appreciated if a temporary repair had been carried out to make the repair watertight. It was badly handled by the Factor and homeowners were not kept informed. It is clear from the Factor's documentation that another homeowner was also making enquiries.

### **Summary on behalf of the Factor**

25. Mr Miller said the delays were caused by one owner not being able to pay. He said the Homeowner was also in constant touch with the builder directly and that he had told the Factor on numerous occasions that he had already contacted the builders and they had not provided him with any information. The Factor could not get any information. The Homeowner was fully aware that the builder was not providing information. The Factor has spent hours on this matter at no cost and it was sad to be taken to the Tribunal for a matter

where they have gone above and beyond in trying to get the matter resolved.

### **Response on behalf of the Homeowner**

26. Mrs Crombie said it was untrue that the Homeowner made numerous calls to the builder. He once visited the builder's yard and emailed on one occasion. There was a phone call from the builder two weeks ago.

### **Findings in Fact**

- 27.
- i. The Homeowner is the proprietor of the Property which is one of five properties in a block of flats.
  - ii. The Factor registered as a Property Factor on 1<sup>st</sup> November 2012 under registration number PF000314.
  - iii. The Factor acts as agent for the homeowners in relation to the block of flats.
  - iv. Following a storm on or around 19<sup>th</sup> September 2018, damage was noted to the soffits and fascia in the block of flats. The soffits and fascia were already in a state of disrepair due to wear and tear. The damage was reported by a representative of the Homeowner to the Factor on 24<sup>th</sup> September 2018.
  - v. Estimates to repair the damage were sought by the Factor.
  - vi. On 11<sup>th</sup> October 2018, the parties corresponded about the damage and the estimates. The Factor wrote that copy estimates would be sent out to all the homeowners. The Homeowner asked to be kept updated.
  - vii. On 21<sup>st</sup> January 2019, the Homeowner contacted the Factor as no update or quotes had been received.
  - viii. Quotes were provided to the Homeowner by the Factor on 22<sup>nd</sup> and 29<sup>th</sup> January 2019.
  - ix. It was agreed that Scott Builders would carry out the necessary work and homeowners were invoiced on 26<sup>th</sup> February 2019.
  - x. There was a delay in getting all the funding for the work in place. The funding was all in place by the end of April 2019.
  - xi. The Homeowner received no correspondence or updates from the Factor during May, June and July 2019.
  - xii. In early August 2019, a homeowner requested an update from the Factor.

- xiii. The Factor contacted the builder on 5<sup>th</sup> August 2019 requesting an update.
- xiv. The Homeowner contacted the Factor on 9<sup>th</sup> August 2019 requesting an update.
- xv. The builder responded to the Factor on 9<sup>th</sup> August 2019, stating that the work would be carried out the following week, weather permitting. This information was passed to the Homeowner.
- xvi. On 22<sup>nd</sup> August 2019, the Homeowner contacted the Factor and asked that the work be escalated.
- xvii. The Factor contacted the builder on 22<sup>nd</sup> August 2019 for an update and was informed on 23<sup>rd</sup> August that work would commence in early September 2019. The email was passed to the Homeowner on 23<sup>rd</sup> August 2019.
- xviii. On 6<sup>th</sup> and 10<sup>th</sup> September 2019, the Homeowner contacted the Factor for an update. The Factor contacted the builder on 9<sup>th</sup> September 2019 requesting an update.
- xix. On 23<sup>rd</sup> September 2019, the Homeowner complained to the Factor about the delays and lack of communication.
- xx. On 24<sup>th</sup> September 2019, the builder confirmed work would commence the following day. The Factor passed the information to the Homeowner on 24<sup>th</sup> September 2019 by email.
- xxi. The work was carried out and completed by late September 2019.
- xxii. By letter dated 3<sup>rd</sup> October 2019, the Homeowner lodged a formal complaint with the Factor.
- xxiii. By letter dated 7<sup>th</sup> October 2019, the Factor responded to the Homeowner's complaint, stating that the Factor had carried out its duties properly.
- xxiv. By letter dated 14<sup>th</sup> October 2019, the Homeowner requested further information from the Factor and asked if, in line with the Factor's complaints policy, the Factor could confirm, after clarification of the information requested, that it was the Factor's final response.
- xxv. The Factor did not respond to the letter of 14<sup>th</sup> October 2019.
- xxvi. By letter dated 4<sup>th</sup> February 2020, the Homeowner reiterated his complaint, informing the Factor of the alleged breaches of the Code.
- xxvii. The Factor responded to the Homeowner's letter on 17<sup>th</sup> March 2020.

## **Determination and Reasons for Decision**

28. The Tribunal took account of all the documentation provided by parties and their written and oral submissions.

### **Failure to comply with Section 2.5 of the Code**

29. The Tribunal found that the Factor had failed to comply with this section of the Code, by failing to respond to letters of 14<sup>th</sup> October 2019 and 4<sup>th</sup> February 2020 within prompt timescales. The Tribunal noted that, otherwise, the Factor had responded timeously to all emails sent by the Homeowner.

### **Failure to comply with Section 5.4 of the Code**

30. The Tribunal did not find that the Factor had failed to comply with this section of the Code. The Tribunal accepted that the Factor has a procedure in place for submitting insurance claims, and that this repair fell outwith the buildings insurance.

### **Failure to comply with Section 6.1 of the Code**

31. The Tribunal found that the Factor had failed to comply with this section of the Code by failing to inform the Homeowner of the progress of the work, including estimated timescales for completion. The Tribunal noted that, although the Factor contacted the builder on occasion for updates, this was always done proactively following concerns from the Homeowner and one other homeowner. The Factor failed to provide any update to the Homeowner from 11<sup>th</sup> October 2018 to 21<sup>st</sup> January 2019, and late April 2019 to early August 2019. The Tribunal did not accept the Factor's submission that he could not update homeowners when work had not started.

### **Failure to comply with Section 6.2 of the Code**

32. The Tribunal did not find that the Factor had failed to comply with this section of the Code. The Tribunal accepted that the repair was not an emergency repair.

### **Failure to comply with Section 7.2 of the Code**

33. The Tribunal found that the Factor failed to comply with this section of the Code as no final decision was notified to the Homeowner with the required information.

## **Observations**

34. The Tribunal appreciated that the Factor was not responsible for the delays in this case, however, by any standard, the time taken to effect a standard repair

was unacceptable. It was incumbent upon the Factor to attempt to progress matters and keep owners updated, even when there is little or no progress. In terms of the Written Statement of Services, the Factor is obliged to organise and administer maintenance and repair. Following the appointment of the contractor, there does not appear to have been much in the way of organisation or administration carried out by the Factor. If, indeed, the Factor made twice-weekly calls to the contractor, they ought to have updated the homeowners on the reasons for the delay.

### **Proposed Property Factor Enforcement Order (PFEO)**

35. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.
36. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Factor's failure to comply with the Code.
37. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.
38. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

### **Right of Appeal**

39. In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Legal Member and Chairperson

22<sup>nd</sup> October 2020