

# **Housing and Property Chamber**

## **First-tier Tribunal for Scotland**

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**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**

**by**

**Andrew and Catherine MacPhail, Flat 2/1, 1 Wallace Street, Dumbarton G82 1HH**  
**("the Applicants")**

**Apex Property Factor Ltd, 46 Eastside, Kirkintilloch, East Dunbartonshire G66 1QH**  
**("the Respondent")**

**Chamber Ref: FTS/HPC/PF/17/0232**

**Re: Flat 2/1, 1 Wallace Street, Dumbarton G82 1HH**  
**("the Property")**

### **Tribunal Members:**

John McHugh (Chairman) and Andrew McFarlane (Ordinary (Surveyor) Member).

### **DECISION**

**The Respondent has failed to carry out its property factor's duties.**

**The Respondent has failed to comply with its duties under section 14 of the 2011 Act.**

The decision is unanimous.

**We make the following findings in fact:**

- 1 The Applicants are the owners and occupiers of a flat at Flat 2/1, 1 Wallace Street, Dumbarton G82 1HH ("the Property").
- 2 The Property is located within a block ("the Block") consisting of three shop units at ground level and two upper storeys each consisting of two flats.
- 3 The Property is one of the two top floor flats.
- 4 The Respondent is the factor of the Block.
- 5 The Respondent was appointed as factor by the owners in 2015 with a view to the Respondent dealing with repairs to common areas of the Block and, in particular, the render finish to the gable wall.
- 6 On 21 June 2016 the Respondent issued to the Applicants a pro forma invoice in the sum of £1036.31 in respect of their share of intended rendering repairs.
- 7 On 20 October 2016 the Applicants paid the Respondent's pro forma invoice.
- 8 The Respondents have retained and refused to return that sum to the Applicants.
- 9 In June 2016 the Applicants reported water ingress to their bedroom. A contractor inspecting the problem damaged the ceiling of the bedroom of the Property.
- 10 The contractor failed to carry out adequate repairs to put the ceiling back into reasonable condition.
- 11 The property factor's duties which apply to the Respondent arise from the Respondent's Written Statement of Services. The duties arose with effect from 1 October 2012.
- 12 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor (1 November 2012).
- 13 The Applicants have, by their correspondence, including that of 14 August 2017, notified the Respondent of the reasons as to why they consider the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.
- 14 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

**Hearing**

A hearing took place at Wellington House, Glasgow on 20 December 2017.

The Applicants were both present at the hearing.

The Respondent was represented at the hearing by its Office Manager, Neil Cowan.

Neither party called additional witnesses.

## **Introduction**

In this decision we refer to the Property Factors (Scotland) Act 2011 as “the 2011 Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as “the Code”; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the 2017 Regulations”.

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.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included the Respondent’s undated Statement of Services which we refer to as the “Written Statement of Services”.

## **REASONS FOR DECISION**

### **The Legal Basis of the Complaints**

#### **Property Factor's Duties**

The Applicant complains of failure to carry out the property factor's duties.

The Written Statement of Services is relied upon in the Application as a source of the property factor's duties.

#### **The Code**

The Applicant complains of failure to comply with Sections 2.5 and 6.9 of the Code.

The elements of the Code relied upon in the application provide:

#### **" ...SECTION 2: COMMUNICATION AND CONSULTATION...**

...2.5 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 (Section 1 refers)...

#### **...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE**

*6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor..."*

## **The Matters in Dispute**

The factual matters complained of relate to:

- (1) Damage to the Applicants' bedroom ceiling and a failure to carry out roof repairs; and (2) the Respondent's failure to commence common works and its retention of sums advanced by the Applicants in respect of those works.

We deal with these issues below.

### **(1) Damage to the Applicants' bedroom ceiling**

In June 2016, the Applicants reported water ingress from their bedroom ceiling. The Respondent sent a contractor to investigate. During the course of that investigation the contractor dropped a bucket of materials through the ceiling, damaging the ceiling. The contractor effected a rough repair using plasterboard finished with an undercoat of plaster but never returned to finish the job. The plaster finish left was rough and undecorated.

The source of the water ingress has never been remedied and so water damage continues to be caused to the ceiling.

Mr Cowan advises that the Respondent had believed that the ceiling had been repaired to the satisfaction of the Applicants as it had received no complaints to the contrary. The Applicants observe, understandably, that finishing the ceiling was to their minds a less important issue than fixing the cause of the leak and at that stage to finish the ceiling would not have been sensible as it would only have been damaged quickly again by the ongoing water ingress.

We observe that the Applicants had made their dissatisfaction with the ceiling repair clear in their formal notification letter. This pre-dates the application and the version we have is date stamped 18 July 2017 although we suspect that it dates from 16 June 2017.

The Applicants were aware at the same time of the lack of progress with the other major repair, being the render repair (see below) as well as the roof repair and were complaining in respect of same.

The Respondent took no action to deal with the complaint regarding the ceiling. It took no action to have the responsible contractor address the matter.

The parties agree that the roof repairs remain outstanding. Mr Cowan advises that a quotation of £1500 (for temporary repairs) and £3300 (for permanent repairs) had been obtained and orally provided to the owners in August 2017 but the Applicants had thought that too expensive and

alternative quotes were to have been sought. Mr Cowan says these were the total figures whereas the Applicant advises that that figure was quoted as the Applicants' share. Mr Cowan advises that it was agreed to seek alternative quotes although that exercise was only begun in November 2017 because of the absence of an employee of the Respondent.

The Applicants report that the problem has worsened and that there is now water ingress at their living room ceiling. The Applicants had attempted to make a claim via the block insurance policy. They were originally advised by the Respondent's staff that insurers had rejected the claim and had been unable to obtain any information from the insurers about the matter, but Mr Cowan confirmed at the hearing that no claim had ever been submitted to the insurers.

Mr Cowan advises that access has been sought in the past week but that the Applicants have refused this. It is accepted however that access can be taken to the loft area from the common stair so this seems of little relevance and does not explain the previous delay in dealing with the matter.

We find the Respondent to be in breach of Section 6.9 of the Code in respect of its failure to attempt to have the contractors complete the bedroom ceiling repairs. We also find the same inaction to be a breach of property factor's duties as it is a breach of the obligation contained in the eighth paragraph of its Written Statement of Services under the heading "Core Services Provided" to investigate complaints of unsatisfactory work.

We find the Respondent to be in breach of Code Section 2.5 in respect of its failure to respond to the Applicant's communications requesting progress with the repairs to the roof and to the ceiling.

In respect of the same subject matter, we find the Respondent to be in breach of its property factor's duties including those in the first paragraph of its Written Statement of Services under the heading "Core Services Provided" to arrange common repairs.

**(2) Failure to commence common works and retention of sums advanced by the Applicants in respect of those works.**

The Respondent wrote to all proprietors within the block in June 2016 to indicate that repairs were required to the render at the gable end. The Respondent had obtained a quotation from a contractor for the repairs and requested that each owner should put it in funds before it commenced the repairs. A pro forma invoice dated 21 June 2016 in the sum of £1036.31 was issued by the Respondent to the Applicants in respect of their share. The Applicants, in response to the Respondent's request, sent a payment to the

Respondent of £1036.31 on 20 October 2016. The works have not yet been carried out and there is no scheduled date for their commencement.

The Applicants have contacted the Respondent many times since October 2016 and requested return of their payment. This has not been forthcoming.

The Applicants advise that they have received a number of explanations for the failure to return their money including that the only person who could write cheques was ill.

Mr Cowan accepts that the Respondent held onto the Applicant's money despite requests for its return. He accepts that the Applicant was advised that the person who wrote cheques was ill. He advises that they hoped that the works would be completed. It is still the case that no other owners have contributed. He agrees that the Applicants' money will now be returned voluntarily.

He advised that the original quote for approximately £6000 had since been revised to £54,000 and that there is still no agreement among owners.

Mr Cowan confirms that the Respondent was appointed as factor two years ago specifically to deal with the repair issues and, in particular, the loose render on the gable. He regarded that as a serious health and safety matter. He accepts that the Respondent has never carried out any repair of any kind. The Respondent does not carry out any maintenance or cleaning. Mr Cowan could produce no evidence that quarterly inspections were ever carried out. The Applicants advise that they have never had sight of any reports and dispute that the inspections ever occurred.

Mr Cowan sees the role of the factor as being only to deal with repairs which have been agreed and funded by the owners. However, the Respondent seems to have allowed matters to drift. Although it states that it has approached the non-paying owners, it has failed to take any meaningful steps to progress matters such as by calling a meeting of owners, advising of their options under the titles/Tenements(Scotland) Act. It has failed to keep the owners informed. Mr Cowan advises that contact has been made with the local authority in recent months and there has been an attempt (so far unsuccessful) to persuade them that a Dangerous Building Notice should be issued. He admitted that he could provide no record of this.

Mr Cowan accepts that the Respondent had failed ever to send any substantive response to the Applicants' repeated formal complaints.

We find there to have been a breach of Code Section 2.5 in respect of the failure to respond to the Applicant's complaints and to advance the repairs.

We find there to have been a breach of property factor's duties in respect of the obligations both to arrange common repairs under the first two paragraphs



of heading "Core Services Provided" and to carry out quarterly inspections and to follow the "Complaint Handling Procedure" under the Written Statement of Services.

### **Observations**

We found the Applicants to be entirely credible and reliable in their evidence. Mr Cowan did not have the level of familiarity with the detail of the matter which the Applicants did and he was unable to offer evidence which would contradict what was said by the Applicants. Mr Cowan had little to say which could defend the actions of the Respondent.

It is regrettable that a misunderstanding arose over the cost of roof repairs. This could have been avoided if the information had been either provided or confirmed in writing.

The Respondent's repeated failings in this matter are very significant and concerning.

### **PROPERTY FACTOR ENFORCEMENT ORDER**

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

We have a wide discretion as to the terms of the PFEO we may make. In this case we consider it appropriate to order the Respondent to return the Applicants' money to them and to make a payment to the Applicant of £500 which reflects the Applicants having been without their money for over a year without justification and without payment of interest, the failure of the Respondent to deal at all with their complaints, forcing the Applicants to repeatedly have to instigate contact both with the Respondent and with the insurers. It also reflects that the Applicants have been caused significant distress and inconvenience both by the failure to deal with the roof repairs and the repairs to their ceiling, resulting in them suffering leaks to their property over a long period. They have also been distressed at the lack of progress with the rendering repairs including their very real concern that loose and falling render will injure a passer-by and that they may be held responsible for that happening.

## **APPEALS**

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.

**JOHN M MCHUGH**

**CHAIRMAN**

**DATE: 30 December 2017**