



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 2016

Chamber Ref: HOHP/PF/16/0055

The Parties:-

Mr Lawrence McMillan, residing at Flat 1/2 132 Falside Road, Paisley, PA2 6JT ("the homeowner")

And

Ross & Liddell Ltd having a place of business at 5 Glasgow Road, Paisley, PA1 3QS ("the property factor")

The Property:-

Subjects at Flat 1/2 132 Falside Road, Paisley, PA2 6JT

Tribunal Members

Mr James Bauld (Legal Member)

Ms Carol Jones (Ordinary Member)

Decision

The tribunal determined that the property factor had not failed to comply with any duties arising from the Property Factors Code of Conduct ("the Code") nor had they failed to comply with the property factor duties incumbent upon them in terms of the Act and accordingly determined to dismiss the application.

Background

1. By application initially made on 16th May 2016 the homeowner applied to the then Homeowner Housing Panel alleging that the property factor had failed to carry out the property factor's duties in terms of the Act and had breached the Code. After sundry correspondence between the homeowner and the then Homeowner Housing Panel, a final application was lodged with the panel on 30th November 2016.
2. On 1st December 2016, the jurisdiction of the Homeowner Housing Panel was transferred to the First-tier Tribunal for Scotland (Housing and Property Chamber) in terms of various regulations and legislation.
3. On 5th December 2016, an in-house convenor of the First-tier Tribunal for Scotland determined that the application made by the homeowner which comprised documents received in the period from 16th May 2016 to 1st December 2016 should be referred to the tribunal for a determination to be made in respect of the homeowner's application.

4. The matter was then referred to the tribunal and a hearing was set to take place on 16th February 2017. That hearing was postponed at the request of the property factor and a fresh hearing set for 16th March 2017.

Hearing

5. The hearing took place before the tribunal at 10 am on 16th March 2017 at Wellington House in Glasgow. The homeowner was present at the hearing and was assisted by Kevin Montgomery a CAB representative from Renfrewshire CAB. The homeowner was also accompanied by Mr Maurice Rodger, an architect who had prepared various reports on behalf of the homeowner.
6. The property factor was in attendance and represented by a director, Mr Brian Fulton who was formally represented by Michael Ritchie, solicitor, Hardy McPhail Solicitors, Glasgow.
7. The tribunal indicated to the parties and their witnesses and representatives that the tribunal would deal with the matter in accordance with the relevant regulations and would seek to deal with the matters in accordance with the overriding directive which is to deal with the proceedings justly. The tribunal emphasised that the matter would be dealt with as informally and flexibly as possible.
8. The tribunal also reminded parties of the import of regulation 33 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 which indicated that a tribunal is not entitled to take into account whether there was a failure before 1st October 2012 in respect of any allegation that a property factor had failed to carry out the property factors' duties. It had been noted by the tribunal that some of the allegations contained in the application by the homeowner related to the works which had been done before that date.
9. The tribunal was then addressed by Mr McMillan. He indicated that he was the owner of the flat at Flat 1/2, 132 Falside Road, Paisley. He accepted that the property factors were the properly appointed property factors for the building. He described the flat as forming part of a block of flats which had two closes, each close having six flats. The roof of the block was a flat roof. Mr McMillan indicated that from the outside his flat would be on the left hand side of the building as you look. His flat was situated on the first floor. The block was three storeys high.
10. The homeowner then described how in January 2012 there had been significant storm damage to the flat roof of the building. Some of the roofing felt had been blown away and estimates had been obtained for repairs. The buildings insurance was covering some of these repairs and the total repairs costs were estimated in the region of £30,000. The homeowner indicated the block of flats had been built around 1970.
11. The homeowner indicated that the costs which had been mentioned for the replacement to the part of the roof which had been storm damaged was simply being covered by the insurers. He was aware that when these works were being carried out the property factor had written to the various owners and had asked them whether at that stage they wished to have additional works carried out to the roof to carry out a full replacement of the roof or to carry out works beyond those which were being covered by the insurance. It seemed to be accepted that the various owners had voted only to carry out the works which had been covered by the insurers. The homeowner claimed that he had been suffering water ingress into his flat prior to the storm damage. He described his flat as having a bay window. The bay window was not only in his flat but in the flats above and below and the bay windows projected from the building. The Homeowner accepted that after the storm damage he was given a payment for approximately £1,800 to repair water ingress damage to his own flat.

This involved the redecoration of two rooms. He believed that this payment had been made because his property and other properties had suffered water ingress damage owing to the storm which had removed the roof covering. The works to his own flat comprised complete redecoration and re-plastering of the living room and the bedroom and he said this was completed by July 2012.

12. The homeowner then indicated that he reported water ingress in his flat in an email sent to the factor on 25 October 2013. The water ingress was at the bay window. He could not be sure of exactly when he noticed the water ingress but indicated that there was a progressive build up from some point after the redecoration works were completed in October 2013.
13. It was the homeowner's position that the water ingress to his property was being caused by a failure to carry out proper roof repairs after the storm damage earlier in the year. It was his position that the roof repairs had not been completed properly. He put forward to the tribunal a view that there was excessive ponding on the flat roof and on the roof parapet. His position was that the roof parapet had not been sealed properly and the new felt had not been torched on in the correct manner causing vapour to accumulate and the felt to bulge at the parapet. He said this resulted in water pouring over the parapet causing extra wear and tear to the aluminium trim and seal underneath. He indicated that it was then soaking a concrete render panel above the window of the upper floor flat and was somehow transferring through that concrete render and manifesting itself in the interior walls of his own flat. The homeowner also referred to the Alumasc Roofing Systems "Derbigum Project Specification" for the works dated 23 January 2012 and pointed out this this was not followed in every detail, specifically a new GRP edge trim was not installed during the works.
14. The homeowner had arranged for an architect's report to be prepared by Mr Maurice Rodger. Mr Rodger attended the tribunal. Mr Rodger's report, dated 10 March 2017, had been lodged in advance. A schedule of 9 photographs was attached as appendix 1. Two sketch details were attached as appendix 2. In Mr Rodger's opinion the source of the water penetration to the homeowner's flat was the roof. However Mr Rodger's opinion was that the water ingress was not being caused by water ponding at the roof edge and pouring over the roof but by water dropping vertically from the inner corner of the bay window roof penetrating the roof and finding its way down the interior cavity of the walls and then manifesting itself within Mr McMillan's flat.
15. During the course of the tribunal it was noted that the property factor had been in extensive correspondence with the homeowner. This correspondence dated back to the time of the storm damage. It was also noted that in or around 2014 the property factor had written not just to the homeowner but to all owners in the flats indicating that they wished to carry out investigations as to the cause of the water ingress into the homeowner's flat. Reference was made to a letter of 16th April 2014 addressed to the homeowner from the property factor. In that letter the property factor proposed that they would carry out investigations around the homeowner's bay window which would involve the erection of a tower scaffold to check the render at the bay window. The proposed works would involve a disruptive investigation involving opening up of cement panels between the windows, investigation of the dry cast on the main wall of the building, the opening up of the sealants between the cement panels in the dry cast, the opening up of sealants around the window frames and a closer inspection of the roof edge detail. The property factor's position was that they required to carry out investigative works to try to eliminate one possible source of water ingress. The property factors believed that the water ingress within Mr McMillan's flat was being caused by some fault in the cement rendering or panels outside his own window. They did not accept that the water ingress was being caused by any defect in the roof and certainly did not accept that any water ingress was being caused by any defect which had not been ascertained at the time of the roofing repairs following upon the storm damage in 2012. It was accepted that the roof repairs after the storm damage had not been completed until the summer of 2012 owing to a variety of difficulties.
16. The tribunal was directed to various documents which had been produced by both parties. The property factor had produced a variety of reports which they had obtained from Gerry

Gilroy who was employed by Ross & Liddell as a consultant building surveyor. There was a report from a Philip Thomson, a building surveyor from Ross & Liddell dated 5th November 2015. The homeowner produced the report previously mentioned from Mr Rodger. In addition other photographs and plans were exhibited to the tribunal at various stages during the hearing.

17. It was apparent that the parties were not in agreement as to the cause of the water ingress.
18. The representative for the property factor pointed out that in page 2 of Mr Rodger's report he indicated that "Mr McMillan's problem could be investigated and repaired economically from a small scaffold tower gaining valuable knowledge at modest cost and could result in substantial savings on the proposed remedial works." The property factor's representative indicated they had been proposing this since 2014. Their position was that they could not carry out these works and incur these costs without the consent of all the owners within the block. They had sought the consent but had not obtained it. Two of the owners had objected including the homeowner himself. The tribunal were then addressed by Mr Ritchie on behalf of the property factors. He indicated they had prepared a written representation and made reference to that. He also referred to the productions which had been lodged. Essentially, the property factor's position was there was no evidence which suggested that the roofing works in 2012 had been done inadequately. He made specific reference to production number 23 of his inventory which was a letter to Mr McMillan dated 3rd October 2016 from the property factor. In that letter the property factor clearly set out their position regarding the complaint by the homeowner. The letter again indicated the recommendation which the property factor had made to carry out the investigative checks to the external render. Mr Ritchie also referred to the response to Mr Rodger's report by Gerry Gilroy, consultant building surveyor for Ross and Liddell Ltd dated 13th March 2017. This response states that the overspill of rainwater from the roof in certain weather conditions is due to deficiencies in the existing roof structure, specifically a "lack of fall" causes ponding and when this ponding is sufficient it overspills. Mr Gilroy also says this is probably assisted by the wind. The solicitor concluded by suggesting that the property factor had not failed in any of their duties nor had they breached any of the relevant paragraphs of the Code Conduct.

Discussion and Decision

19. The tribunal had listened carefully to both the homeowner, Mr Rodger the architect, and the property factors and the property factors' solicitor. Parties were questioned by the tribunal members as the hearing progressed. The parties and their representatives and witnesses commented on each other's evidence and also asked questions.
20. It appeared to the tribunal that it was beyond dispute that there was water ingress within Mr McMillan's flat. The question which required to be determined by the tribunal was whether the tribunal could identify the cause of that water ingress and, if so, link the cause of that water ingress to a failure by the property factors in respect of either the general property factor's duties under section 17 (1) of the Act or a failure by the property factor to comply with the requirements of the Code. The homeowner had alleged that the property factor had breached sections 2.1, 2.5 and 6.9 of the Code.
21. It was clear from the evidence that there were at least three possible methods by which water was becoming manifest within the homeowner's flat. The first possibility was suggested by the property factors. Their position was that the water ingress was being caused by some flaw in the external render at the first floor window of Mr McMillan's flat possibly exacerbated by the design of the existing roof structure. They had proposed in April 2014 to carry out works to investigate and ascertain whether that was the cause. They had provided costs for that to the various homeowners but had not gained any support and accordingly had not been able to do so. They had regularly offered to carry out those investigatory works and were still willing to do so, on the basis that the owners met the relevant costs in accordance with the provisions of the titles to the flats..

22. The second possible cause of water ingress was suggested by the homeowner himself. He suggested the water ingress was being caused by water ponding at the parapet edge of the flat roof and overflowing from there behind the aluminium trim and soaking the concrete rendered panels above the window of the flat above his. This ponding on the parapet is shown in photograph 8 attached to Mr Rodger's report. The homeowner was then suggesting that this concrete render was so saturated that it was then causing further water ingress to travel through the building and manifest itself in the interior wall of his own flat.
23. The third possible method of water ingress was suggested by the architect who had been brought to the tribunal by the homeowner. Mr Rodger in his report and in his evidence to the tribunal indicated his belief that there must be a hole within the flat roofing felt and that water was penetrating from that and dripping down the internal cavity of the building and then manifesting itself at Mr McMillan's window.
24. Accordingly the tribunal were faced with three possible explanations for water ingress. Each of these explanations are conflicting. Each is entirely plausible. The tribunal were left in the impossible situation of having to decide which of these methods of water ingress was causing the problem. It was also suggested during the hearing by the tribunal that it was possible that the water ingress could have been caused by some other method outwit the contemplation of the parties.
25. The tribunal took the view that the burden of proof in these matters lies on the party raising the application. The tribunal accepted that the standard of proof would be on the balance of probabilities. The tribunal's position was that each of the three were entirely possible but the tribunal could not make any decision on which of the three was the most probable and accordingly the tribunal were unable to determine the cause of the water ingress. The tribunal noted that if the homeowner and his co-proprietors had agreed to the proposal made by the property factors then either the property factor's suggestion would have been proven to be the case or that could have been eliminated. However, it was impossible for the tribunal to eliminate that possibility. If that possibility was correct then the homeowner's application would simply have to fall. His whole application was based on the water ingress being caused through a fault in the roof of the property. He did not accept any possibility that the water ingress could simply be manifesting itself because of the fault in the exterior panels or cement render. The homeowner also disagreed with his own witness' view on the likely cause of the water ingress.
26. Accordingly the tribunal were unable to determine the source of the water ingress. As the burden of proof in these matters lies on the party raising the application, the tribunal were unable to make any determination in respect of the homeowner's position that the property factors were breaching the Property Factors Code of Conduct or had failed in their duties. The tribunal took the view that the property factors had been in lengthy and extensive correspondence with the homeowner. In the absence of any conclusive evidence that the water ingress was being caused by a fault in the roof, the tribunal could not determine that any of that correspondence was misleading or false and would thus be a breach of section 2.1. The tribunal were unable to find any breach of paragraph 2.5 of the Code in respect that the property factors always responded to enquiries and complaints and had done so within prompt timescales. Finally, the homeowner was alleging that the property factors were breaching section 6.9 of the Code by failing to pursue contractors or suppliers to remedy the defects in any inadequate work. The tribunal were unable to determine whether there had been any inadequate work and in any event the property factors had indicated that they had at various times since 2012 allowed the contractor to carry out certain remedial works to the property. The tribunal did not require to come to a determination with regard to whether the works which had been carried out in 2012 fell foul of the provisions of regulation 33. The tribunal did not require to determine whether there was a continuing breach of any property factor duty which would have allowed them to take into account circumstances occurring before 1st October 2012.

27. Accordingly the tribunal were unable to come to a determination with regard of the cause of the water ingress and the tribunal required to dismiss the homeowner's application.
28. The tribunal would respectfully suggest to the parties that they should try to proceed to carry out appropriate investigations to ascertain the source of the water ingress. The tribunal would respectfully suggest that the first method should be the method suggested by the property factor. If that is done and it transpires that the water ingress is not being caused by any flaw in the cement panels or render then it would be assumed that further investigations would require to be made in relation to the roofing felt.
29. In all the circumstances the tribunal determined that they had no option but to dismiss the application.
30. The tribunal would wish to thank the homeowner and the property factor for the presentation of their respective cases and for the assistance which they provided to the tribunal. The tribunal accepted that all parties were addressing the tribunal in an honest and open manner. In particular, the tribunal were grateful for the production of documents which were in order, numbered, paginated and indexed.

Review of tribunal's decision

31. 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.

James Bauld Chairperson

Date

31 March 2017

Witness CLAIRE MULLEN
SOLICITOR
7 WEST GEORGE ST
GLASGOW
G2 1BA