

Housing and Property Chamber

First-tier Tribunal for Scotland



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

AMENDED 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 Reference: FTS/HPC/PF/21/1833

Property address: Flat 2/2, 71 Belville Street, Greenock, PA15 4SU (“the Property”)

The Parties

Mrs Fiona Harris, PO Box 21167, Nicosia, Cyprus (“the Homeowner”)

River Clyde Homes, Clyde View, 22 Pottery Street, Greenock, PA15 2UZ (“the Property Factor”)

Tribunal Members

Ms H Forbes (Legal Member)

Mr A Taylor (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has failed to carry out their property factor duties in terms of section 17 of the Act.

The decision is unanimous.

Background

1. By application received in the period between 30th July and 22nd September 2021, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with paragraphs 6.2 and 6.4 of the Code. The Homeowner also alleged a failure to carry out property factor’s duties. Details of the alleged failures were outlined in the Homeowner’s application and associated documents.

2. Formal notification of the failures was made upon the Property Factor by the Homeowner on 31st August 2021.
3. By decision dated 30th September 2021, 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. Both parties lodged written representations and productions.

Hearing

5. A hearing was held by teleconference on 23rd November 2021. The Homeowner was in attendance for part of the hearing, and was represented by Mr David Harris. The Property Factor was represented by Mr Richard Orr.

Preliminary Matters

6. The Tribunal raised the issue of the Homeowner's allegations that the Property Factor had failed to carry out their property factor duties by failing to comply with the Tenements (Scotland) Act 2004 and the Housing (Scotland) Act 2006. The Tribunal pointed out that these were not applicable in a property factor case under the Act and would not be considered.

The Homeowner's position

7. Mr Harris referred to the Homeowner's statement of facts previously submitted. He explained that the Homeowner bought the ex-local authority Property in June 2018, letting it out in August 2018. The tenant reported water ingress in early November 2018. The tenant in the adjacent property, which belongs to the Property Factor, also suffered water ingress and had to be moved out of the property. This was notified to the Homeowner by the Property Factor by email in November 2018. The Homeowner asked the Property Factor to carry out emergency repairs to the roof, but they refused to do so. The Property Factor provided a report (Homeowner's productions pp 77-103) from a roofing consultant following an inspection in October 2018, recommending that the roof be replaced at a cost exceeding £46,000. The report showed that a test hole had been made in the roof felt on 22nd October 2018. It was Mr Harris's position that this was before the water ingress was reported.
8. The Homeowner arranged to have temporary repairs carried out at a cost of £2800, which included the sum of £1200 for scaffolding. The Homeowner asked the Property Factor to pursue the owners for their share of the cost. An invoice was issued by the Homeowner (p13) dated 15th July 2019 to the Property Factor as owner, seeking ¼ share of the cost of the work. The Property Factor raised issues in relation to the format of the invoice, requesting copies of quotations and the contractor invoices. Responding to questions from the Tribunal as to the Property Factor's responsibility in relation to these repairs, as Property Factor rather than owner, Mr Harris referred to the Property Factor's Written Statement of Services ("WSS")

(pp49-64). On page 51, it is stated that the Property Factor will be responsible for instructing and paying, in the first instance, for repairs, planned and cyclical maintenance, investment works and agreed property improvements. It was his position that the Property Factor ought to have had the work carried out and ought to have had a cyclical maintenance plan.

9. Mr Harris referred to a statement in the WSS on page 50 to the effect that the Title Deeds for a property would set out the conditions covering the management, maintenance, insurance, repair and improvement of the shared or common parts of a building. He referred to the burdens section of the title deed for the Property (p50), in particular burden 13, which stated that the Council, for as long as they were proprietors of any of the remaining properties in the block shall be entitled to act as common factors or to nominate and appoint factors, and that the factors shall be entitled to require all reasonable maintenance and repairs to be carried out. It was Mr Harris's position that the Property Factor was responsible for having the repairs carried out, in terms of the WSS and the Title Deeds.
10. In May or June 2020, there was further water ingress to the Property. The Homeowner instructed a roofing contractor and further works were carried out, mostly to the area above the property owned by the Property Factor. The work cost £3500 and this was paid by the Homeowner. The tenant vacated the Property in July 2020. The Property has not been re-let since, and the Homeowner has not recovered the cost of any of the work carried out.
11. Mr Harris said that the Property Factor does arrange and carry out works, collecting the cost from homeowners when they choose to do so. He referred to pages 106 to 109, which comprised correspondence and an invoice from the Property Factor regarding a structural survey of the block following the discovery of a large structural crack. It was Mr Harris's position that this constituted cyclical maintenance. The Property Factor had instructed a report, billed homeowners for it, then withdrawn the invoice because homeowners complained that they had not instructed the work.
12. Mr Harris said he cannot go after the other owners of the block for the costs of the roof work. He does not know the identity of all the owners, as two properties have now been sold, and the Property Factor will not provide this information.

Paragraph 6.2

13. *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.*
14. Mr Harris submitted that the Property Factor had failed to comply with this section of the Code by failing to deal with the emergency repair. He had emailed the Property Factor on 15th November 2018 (p68) and told them local

contractors had been contacted to effect repairs if the Property Factor was not prepared to act. It was his position that the Property Factor refused to act on both occasions to have the roof repaired, in the first instance as an emergency, and in the second instance, as an emergency or as part of their duty to perform cyclical repairs and maintenance. The Property Factor also failed to provide alternative access to the roof due to the access ladder having been blocked, resulting in the Homeowner having to pay for scaffolding.

Paragraph 6.4

15. *If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.*
16. It was Mr Harris's position that the WSS showed that core services to homeowners included planned and cyclical maintenance and these services had not been provided.
17. Responding to questions from the Tribunal Mr Harris said he believed the roof to be watertight currently. He said the Property was bought with a clear home report. Four months later, there was water ingress, and they were told that a roofer had made a hole in the roof. They did not know if that hole had led to the water ingress.

The Property Factor's position

Paragraph 6.2

18. Mr Orr said the Homeowner's letting agent, Connect, had contacted the Property Factor to report water ingress in late September/early October 2018. It was dealt with as an emergency. A contractor attended and reported that repairs could not be carried out and a roof replacement was required. This was not a surprise as other similar properties in the area had required to have the flat roofs replaced with pitched roofs after a certain length of time. There was no charge to homeowners for the roof report. The Property Factor sought a report on the condition of the roof with independent surveyors, which confirmed that the roof required to be replaced at a cost of £46,568.17. Responding to questions from the Tribunal as to whether the quote had been formally put to the homeowners, Mr Orr said a follow-up quote was put to them with a ballot in October 2020. The cost of that quote was £29,000. Only two homeowners responded to the ballot, voting against it.
19. It was Mr Orr's position that the core test on the roof was not the cause of the water ingress. He believed the core test had been repaired. The tests on the roof took place because of water ingress. Responding to questions from the Tribunal as to whether the property owned by the Property Factor was watertight, Mr Orr said it was not. The Property Factor had forgone around £15000 in rental income. Asked about the long term intentions for the property, Mr Orr said it is in the Property Factor's interests as owner to

resolve the issues, including the crack in the building, but sale of the property is a possibility if no agreement can be reached.

Paragraph 6.4

20. Mr Orr explained that inspections of the block of flats were not included in the factoring service provided. There is no programme of works or cyclical maintenance. Repairs are arranged if required and requested. It is a reactive service. The WSS is a generic document. The services provided to this block of flats are as outlined on page 51 (page 3 of the WSS). The 'other services' referred to on the following page are services that can be provided on agreement but are not provided in this case. Mr Orr explained that the Property Factor is a non-profit organisation. The management fees cover staffing and other costs. The Property is in a deprived area. Works are often turned down after balloting due to inability of homeowners to pay. Responding to questions from the Tribunal as to whether the Property Factor would pay their share as owner for the roof works carried out, Mr Orr said they could not do that without the contractor's invoice, which they have never seen. ***Mr Orr said the Property Factor did not believe, on the basis of independent advice, that the second repair carried out by the Homeowner would stop the water ingress. It would not be reasonable to contribute to the cost when they had been advised in advance that the repair would not work.***

Failure to carry out property factor duties

The Homeowner's position

21. The Homeowner had submitted that the alleged failure to carry out property factor duties was in relation to the fact that the Property Factor was required by burden 13 in the Title Deeds "to require all reasonable maintenance and repairs to be carried out and any such requisition shall be binding on all proprietors of the said dwelling houses." The Homeowner submitted that the Property Factor has failed to require any maintenance and repairs to be carried out and has failed to require proprietors to bear their share of repairs to the roof. Their own roof analysis report shows that the roof has never been maintained or repaired.

22. Mr Harris said the terms of the agency between the Homeowner and the Property Factor were contained in the WSS, where there is a reference to the burdens in the Title Deeds. The Property Factor acts under the terms of the WSS and is bound by those terms. The Property Factor cannot say it is only an agent when it is clear that they carry out works.

The Factor's position

23. Mr Orr referred to his written representations, explaining that burden 13 is a Manager Burden and provides authority to the Property Factor to manage or factor the block. It relates to the appointment of the Factors and provides for payment to the Factors for factoring fees and expenses for factoring work and in implementation of factors duties. This provision states that the factors are

entitled to instruct reasonable maintenance and repairs at the block and any request for maintenance and repair works will be binding on all the proprietors in the block. The Manager Burden entitles the Council's successors to act as Factors. The Manager Burden was first registered in 1985, and there was a 30-year limit which expired on 20th October 2015. Thereafter, the Property Factor was acting as an agent only, and not as a principal, and any instruction of works on behalf of the Homeowner would require the prior approval of the Homeowner. The Property Factor does not have the right to effect repairs on behalf of the Homeowner without obtaining her consent.

24. Mr Orr said a new version of the WSS had now been developed to take account of forthcoming changes to the Code. Homeowners were now informed whether or not they had an agent or principal relationship with the Property Factor.

Cross-examination of Mr Orr

25. Mr Harris asked some questions in cross-examination. In regard to the letter mentioned by Mr Orr regarding agent/principal relationships, Mr Harris said it was dated 19th November 2021. Mr Orr confirmed it had been sent to all homeowners and had been sent to the address held on record for the Homeowner.
26. Mr Harris said the Homeowner had not received the letter and ballot sent out in October 2020. Mr Orr said it would be irregular if it had not been sent to the Homeowner. Mr Orr said time had been allowed to see whether the water ingress in the Property Factor's property had ceased after the second repair. He said no meeting had been called, as this had not been requested, in line with the WSS. Asked why it had not been called when it was 'required' as stated in the WSS, Mr Orr said it could not be called during a pandemic. Responding to questions from the Tribunal as to why the Homeowner had not been chased up for a response to the ballot, Mr Orr said two owners had voted against it, so that may be the reason it was not chased up, as the works could not have gone ahead.
27. Mr Harris put it to Mr Orr that the first correspondence from the Homeowner had been in November 2018. Mr Orr said that may be correct but it was not his understanding. There had been a lot of discussion with the letting agent before then. The Property Factor became aware of the water ingress through the letting agent.

Further documents

28. The Tribunal requested sight of the letter and ballot sent to the homeowners in October 2020, and this was provided.
29. The letter dated 19th November 2021, regarding the agent/principal relationship was also provided to the Tribunal.

30. Mr Harris said the letter and ballot dated 22nd October 2020 had been sent to the Property address. There was no one living in the Property by that time. ***Mr Orr said he was not sure when the correspondence address had been updated on the system, and he would not know this without investigation.***

Determination and Reasons for Decision

Failure to comply with paragraph 6.2 of the Code

31. The Tribunal did not find that the Property Factor had failed to comply with this paragraph of the Code. The Property Factor has procedures in place for dealing with emergency and for giving contractors access to properties to carry out emergency repairs. The Property Factor reacted to a report of water ingress to the Property in or around October 2018 by arranging a contractor to attend, thus fulfilling their duty in terms of this paragraph of the Code.

Failure to comply with paragraph 6.4 of the Code

32. The Tribunal did not find that the Property Factor had failed to comply with this paragraph of the Code. The core service arranged with the Homeowner does not include periodic property inspections or a planned programme of cyclical maintenance, so no programme of works is required.

Failure to carry out property factor duties

33. The Tribunal found that the Property Factor has failed in carrying out its property factor duties. In terms of the WSS, the Property Factor has certain duties in respect of the Property, including advising owners of all repairs expected to be in excess of £250 prior to instructing works and as soon as possible for emergency or urgent work. River Clyde Homes commissioned a report and obtained a quote for roof works in October 2018. The report was circulated by River Clyde Homes to homeowners. A competitive quote was not procured and circulated to homeowners with a ballot until October 2020. Furthermore, the letter and ballot was not provided to the Homeowner at her correspondence address, depriving her of the opportunity to respond to the ballot. It may be the case that, had the cheaper quote and ballot been provided to homeowners at an earlier stage, they may have agreed to carry out the work. Instead, there was an inordinate delay, for which there appeared to be no compelling reason.

34. The Tribunal did not find that the Property Factor was bound in terms of the Title Deed burdens to require all reasonable maintenance and repairs to be carried out. The wording of the burden clause provides authority to a factor to carry out repairs. It does not compel them to do so. In any event, in terms of section 63 of the Title Conditions (Scotland) Act 2003, the burden has now expired.

35. The Tribunal did not find that the Property Factor, as Factor, should be compelled to pay anything towards the repairs carried out by the Homeowner,

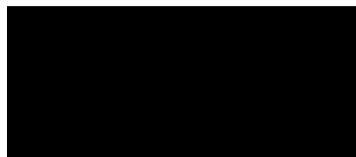
or ensure that other homeowners did so. Whether or not the Property Factor, as owner, should be compelled to make payment of their share of the works is not a matter for the Tribunal. There are legislative provisions in place to cover such eventualities in relation to tenement properties.

Proposed Property Factor Enforcement Order (PFEO)

36. Having determined that the Property 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.
37. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Property Factor's failure to carry out their property factor duties
38. 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.
39. 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

40. **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

21st January 2022