

# Housing and Property Chamber First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref:FTS/HPC/PF/19/0719

6 Cedarwood Court, Cardross, Dunbartonshire, G82 5BT ('the Property')

**The Parties:**

Michael Nicholson C/O Artaigh, Rowmore, G84 0EH ('The Homeowner')

Lomond Property Factors Limited, The Gowk, Gartocharn, Dunbartonshire, G83 8ND ('the Factor')

**Tribunal members:**

Jacqui Taylor (Chairperson) and Colin Campbell (Ordinary Member).

## Decision of the Tribunal

The Tribunal determines that the Factor has failed to comply with section 2.5 of the Code of Conduct.

The decision is unanimous.

## Background

1. The Factor's date of registration as a property factor is 7th December 2012.
2. By application dated 5th June 2019 the Homeowner applied to the First-tier Tribunal (Housing and Property Chamber) for a determination that the Factor had failed to comply with the following sections of the Property Factor Code of Conduct ('The Code') and also failing to carry out the Property Factor's duties.

- Section 1: Written Statement of Services.

Section 1.1aA

- Section 2: Communication and Consultation.

Sections 2.1, 2.2 and 2.5

- Section 6: Carrying out Repairs and Maintenance

Sections 6.1 and 6.2

3. The application had been notified to the Factor.

4. By Minute of Decision by Maurice O'Carroll, Convener of the First-tier Tribunal (Housing and Property Chamber), dated 22nd July 2019, he intimated that he had decided to refer the application (which application paperwork comprises documents received in the period 7th March 2019 to 9th July 2019) to a Tribunal.

5. An oral hearing took place in respect of the application on 28th October 2019 at the Glasgow Tribunals Centre, Room 110, 20 York Street, Glasgow, G2 8GT.

The Homeowner appeared on his own behalf. The Factor was represented by Iain McInnes and Cath McInnes, both directors of Lomond Property Factors Limited.

At the beginning of the hearing the parties confirmed and agreed the following facts, which were accepted by the Tribunal:-

- The Homeowner is heritable proprietor of the Property 6, Cedarwood Court, Cardross, Dunbartonshire along with his parents Eric Nicholson and Lynn Nicholson.
- The Property is one of six flats in a block and it was built approximately 40 years ago.
- Lomond Property Factors Limited are property factors of the Property. They took over factoring of the block on 1<sup>st</sup> July 2015.

The Homeowner had provided a summary of the matters in dispute as part of his application, in the following terms:

'I notified LPF of a leaking communal roof in May 2018 of which LPF had plenty of time to organise a roofer to inspect the kitchen ceiling and actual roof space for the ingress of water prior to the roofer replacing the soffits and fascias. It was nearly a month before these parts of the roof were to be replaced. An estimate could be given by the roofer and this could be passed to the homeowners for a majority vote to have both the replacement soffits, fascias and leadwork done at the same time.

This is the common sense approach. This common sense approach has been demonstrated prior to this leaking roof. Namely shown via an email dated 3<sup>rd</sup> July 2015, whereby flat 3 notified LPF of a similar problem. Photographs were taken on 2<sup>nd</sup> July 2015. An email sent out on 3<sup>rd</sup> July 2015 with the note that 'I am eager to carry out the work while the weather is favourable (hopefully). When all shares are deposited, I can instruct works.'

A following email was sent out on 13<sup>th</sup> July 2015 to mention that 'Scaffolding will be erected on Monday 27<sup>th</sup> July 2015 and roofing contractor will commence work later that week'. Therefore, a majority vote was obtained. I was aware that a vote was needed and indeed, was able to vote in this situation.

This demonstrates that a precedence has been set and this can be applied to my notice in May 2018 when I notified LPF of a similar leaking communal roof. Of which LPF did not send around any surveyor or contractor to view this water ingress.

2018 was an ideal year to fix roofs as it was very hot weather prior to rain fall circa October 2018.'

The Homeowner confirmed that his parents are aware that he has made the application.

## **The parties' representations and the Tribunal's decisions:**

### **The Code Complaints.**

The Homeowner had sent the Factor letters dated advising the Factor that they considered that they had failed to comply with various sections of the Code of Conduct.

### **Section1: Written Statement of Services.**

#### **The Homeowner's complaint.**

The Homeowner accepted that the Factor's written statement of services complies with the requirements of section 1.1aA of the Code of Conduct.

#### **The Tribunal's Decision.**

The Tribunal determine that there has been no breach of Section 1 of the Code.

## **Section 2: Communication and Consultation.**

### **2.1: 'The Factor must not provide information which is misleading or false.'**

#### **The Homeowner's complaint.**

(1) The Homeowner explained that he considered the email from the Factor of 23<sup>rd</sup> July 2018 to be misleading. The email states:

'As requested by Mary Paterson, we have sourced what we believe to be the new address for McKenzie Roofing and have written to request that they contact us in respect of a previous roof repair.'

He explained that he considers this email to be misleading as it is for a majority of the homeowners to instruct the Factor to contact McKenzie Roofing and not just one owner.

(2) The Homeowner explained that he considered the email from the Factor of 25<sup>th</sup> July 2018 to be misleading. The email states:

'...It is not possible to carry out this repair without fully scaffolded access to the roof. This work has been proposed, however clients have requested that we try to contact the previous contractor to claim on the guarantee....'

He explained that this email was misleading as it states that clients have requested that the Factor contact the previous roofing contractor whereas the email of 23<sup>rd</sup> July

2018 states that Mary Paterson had requested the Factor to contact the previous roofing contractor.

(3) The Homeowner explained that he considered it to be misleading and intimidating to not include him in the voting procedures and the decisions that are made in terms of the title deeds.

(4) The Homeowner explained that he considered it to be misleading and intimidating to not pursue a report from the roofing contractor.

(5) The Homeowner explained that he considered it to be misleading and intimidating by the Factor displaying a correspondence address and companies house detailing a different registered address.

### **The Factor's representations.**

(1) Cath McInnes explained that they had contacted McKenzie Roofing at the request of one of the owners, Mary Paterson, as McKenzie Roofing had carried out previous work to the roof and had issued a ten year guarantee. She did not consider the email of 23<sup>rd</sup> July 2018 to be misleading

(2) Cath McInnes explained that she did not consider the email of 25<sup>th</sup> July 2018 to be misleading. Section 6.9 of the Code of Conduct requires that the Factor pursue a contractor to remedy any defects in any inadequate work or service provided. This is what they were doing by contacting McKenzie Roofing.

(3) The Factor provided evidence that the Homeowner had been invited to vote on proposals to renew soffits and appoint new garden maintenance contractors.

(4) The Factor explained that the roofing contractor had discovered no evidence of a roof fault which had definitively explained the cause of the damp patch to the client's kitchen ceiling. Access to the lead flashings required scaffolding and the authority of a majority of the owners and the consent of all. As there was no active water ingress and therefore no immediate need to examine the lead flashings the owners felt it was unnecessary to incur this expense unless there was an active leak, The lead flashings have not been inspected and no report has been produced. Access to carry out further internal and loft inspections could not be agreed with the Homeowner. The cause of the damp patch to the ceiling has not yet been found. A written report from ECO Solutions Contracts Limited dated 12<sup>th</sup> August 2019 has been provided.

(5) The Factor's registered address and correspondence address is cited on all email and written communications. Both the registered and communication addresses are publicly available. There is no intention to mislead.

### **The Tribunal's Decision.**

(1) and (2) The Tribunal determine that the emails of 23<sup>rd</sup> and 25<sup>th</sup> July 2018 did not contain information which was significantly misleading or false. The reference to 'clients' as opposed to 'a client' in the said email of 25<sup>th</sup> July 2018 was not a material error.

(3) The Tribunal determine that matter of whether or not the Factor included the Homeowner in decisions is not a breach of section 2.1 of the Code of Conduct as it does not involve the Factor in providing information which is misleading or false.

(4) The Tribunal determine that matter of not pursuing a report from the roofing contractor is not a breach of section 2.1 of the Code of Conduct as it does not involve the Factor in providing information which is misleading or false.

(5) The Tribunal determine that the Factor has not provided information which is misleading or false by displaying both a correspondence address and a different registered address. The Tribunal understand that many companies provide both a registered address and a correspondence address.

**2.2: You must not communicate with homeowners in a way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action.)**

### **The Homeowner's complaint.**

Mr Nicholson explained that he considered that the Factor had been intimidating by not including him in the consultation about whether to contact the previous roofing contractor. He wasn't invited to contribute to the decision as to whether or not to contact the previous contractor.

### **The Factor's representations.**

The Factor had included Mr Nicholson in the various decisions that had to be made by the homeowners. This is evidenced by their email to the Homeowner and the other owners dated 1<sup>st</sup> May 2019 regarding selection of the gardening contractor.

The Factor has made all possible effort to reassure the Homeowner of their commitment to the maintenance and repair of the building. Despite no evidence of active ingress at the time of report or since, efforts have been made to provide the Homeowner with an explanation for the stain on his ceiling.

### **The Tribunal's Decision.**

The Tribunal determine that the Factor was required to contact the previous roofing contractor under Code of Conduct section 6.9 regardless of the wishes of the homeowners. The Tribunal also determine that it was not abusive or intimidating for the Factor not to obtain the consent of the Homeowner to contacting the previous roofing contractor before progressing his complaint further.

**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 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.**

**The Homeowner's complaint.**

The Factor's Written Statement of Services does not include response times as required by section 2.5 of the Code of Conduct.

**The Factor's representations.**

Cath McInnes accepted that their Written Statement of Services does not include response times for general enquiries. She explained that their Written Statement of Services is being reviewed. They will also have to alter their registered address as their accountant is moving offices and they intend to make all the required changes at the one time. They will send the amended Written Statement to the homeowners with the next quarterly invoices which will be sent out in December 2019.

**The Tribunal's Decision.**

The Tribunal determine that as the Factor's Written Statement of Services does not include response times to general enquiries the Factor has failed to comply with section 2.5 of the Code of Conduct.

**Section 6.1: 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.**

**The Homeowner's complaint.**

The Homeowner's written representations explained that his complaint was that the Factor had delayed in inspecting the leak in the roof. However at the hearing he

acknowledged that on reflection the Factor did have in place the required procedures to notify them of required repairs.

### **The Tribunal's Decision.**

The Tribunal determine that there has been no breach of Section 6.1 of the Code.

**Section 6.2: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.**

### **The Homeowner's complaint.**

The Homeowner's written representations advised that he considered the leaking communal roof to be an emergency. However at the hearing he acknowledged that on reflection the Factor did have in place the required procedures to deal with emergencies and for giving contractors access to properties in order to carry out emergency repairs.

### **The Tribunal's Decision.**

The Tribunal determine that there has been no breach of Section 6.1 of the Code.

## **Alleged Breach of Property Factor Duties.**

### **The Homeowners' representations.**

Mr Nicholson advised that he considered that the Factor had breached the following property factor duties:

- Failure to treat the repair of the damp patch on his kitchen ceiling as an emergency.
- Delaying the repair of the damp patch on his kitchen ceiling by trying to contact the previous contractor.
- Failure to repair the damp patch on his kitchen ceiling to avoid the leak causing more extensive damage.

He explained that he was disappointed at the fact that the Factor has never sent surveyor or specialist contractor to survey the roof or the attic.

He has provided the Tribunal with a report from his property managers at the end of the last lease in March 2018 and that report make no reference to a damp staining to

the kitchen ceiling. He had initially advised the Factor that there is a damp stain to the kitchen ceiling in March 2018. In May 2018 he had sent an email to the Factor notifying them of the damp stain.

He advised that the access to the attic above his property is from within his property. He has never gone into the attic to ascertain if there is any evidence of recent water ingress. He has not carried out a head and shoulders inspection of the attic space. He does not reside in the Property and is unable to confirm if there dripping sounds from leaks to the roof. He advised that his Tenant has not complained to him about the damp staining to the kitchen ceiling or about any water ingress to the attic.

He explained that the staining of the kitchen ceiling is grey in colour and in his opinion it could be mouldy.

He acknowledged that Iain McInnes viewed the ceiling of the kitchen in June 2018 and found the damp patch to be a historic damp stain.

He acknowledged that the Factor had tried to arrange an inspection of the attic by their roofing contractor but the contractor had not arrived at the Property at the times he had advised that he would be available to give access and consequently the roofing contractor has not carried out an internal inspection of the attic.

He advised that he had not spoken to his Tenant in advance of the hearing to ascertain if the damp staining had deteriorated.

### **The Factor's representations.**

Cath McInnes explained that as no water ingress had been reported they did not deem the matter of the damp staining to the kitchen ceiling to be an emergency. They agreed to have their roofing contractors investigate when they were on site attending to soffit and fascia works. The letter from Andy Rae of ECO Solutions Contracts Limited dated 12<sup>th</sup> August 2019 advised:

'I renewed the soffits and fascias in May 2018. I also cleared the gutters and downpipes and carried out a few minor slate repairs to the mansard. I could not fully access the pitched roof level but from I could see nothing was faulty in the slating. If rain water had penetrated the roof recently it would have come from the lead flashings but I could not see anything obviously wrong.'

Thereafter Iain McInnes had inspected the kitchen ceiling in June 2018 and had not found any evidence of water ingress.



Iain McInnes advised that he has been employed as a building consultant since 1990 and he is very experienced in these matters. In his experience the damp issue is historic and there is no evidence that the matter is ongoing.

They do not believe that they have breached the Property Factors duties referred to by the Homeowner. The damp staining was historic. There was no evidence of water ingress. The situation was not worsening and they kept the Homeowner advised of the Factor's position.

### **The Tribunal's Decision.**

#### **(1) Failure to treat the repair of the damp patch on his kitchen ceiling as an emergency.**

The Tribunal determine that the Factor has not failed in their Property Factor duties by failing to treat the repair of the damp patch on the kitchen ceiling as an emergency.

The Homeowner did not provide the Factor with any evidence that there was ongoing water ingress in the attic and or the roof.

The Factors had inspected the damp patch on the kitchen ceiling in June 2018 and Iain McInnes using his knowledge and experience had deemed the matter to be historic.

The damp staining of the kitchen ceiling is not in itself a defect to common property of the flats in the block of which the Property forms part and accordingly does not fall within the remit of Property Factors duties.

#### **(2) Delaying the repair of the damp patch on his kitchen ceiling by trying to contact the previous contractor.**

The Tribunal determine that the Factor has not breached their property factor duties by trying to contact the previous roofing contractor for two reasons.

Firstly, The Code of Conduct defines an emergency repair as 'a repair where urgent work is required to prevent damage, or in the interests of health and safety, and where there is not time to use the normal channels of consultation and decision-making'. The Homeowner had not demonstrated that the damp stain is ongoing or if the matter is urgent or a health and safety concern.

Secondly, the Factor is under a duty to pursue contractors to remedy defects in inadequate work provided in terms of section 6.9 of the Code of Conduct.

**(3) Failure to repair the damp patch on his kitchen ceiling to avoid the leak causing more extensive damage.**

The Tribunal determine that the Factor has not breached their property factor duties by failing to repair the damp patch on the kitchen ceiling. The Factor had had the roof inspected externally by a roofing contractor. They had also inspected the ceiling of the kitchen internally. They had found no evidence of ongoing water ingress. Also the Homeowner has not provided evidence that the issue of water ingress is ongoing. The access to the attic is within his Property. He has not looked inside the attic himself. The Tribunal consider that it would be reasonable for the Homeowner to carry out a head and shoulders inspection of the attic to determine if there was any evidence of water ingress and whether or not it is ongoing and if it stems from a defect in the common roof.

The Factor had made five appointments for a roofer to gain access to the Property but the roofer had been unable to obtain access due to timing difficulties of both the Homeowner and the roofing contractor.

Furthermore, the current Tenant of the Property has not complained to the Homeowner that the Property is affected by water ingress or that the historic damp staining is worsening.

Also, as previously stated, the damp staining of the kitchen ceiling is not in itself a defect to common property of the flats in the block of which the Property forms part and accordingly does not fall within the remit of Property Factors duties.

**Decision and Property Factor Enforcement Order.**

In all of the circumstances narrated above, the Tribunal finds that the Factor has failed in its duty under section 17(1)(b) of the 2011 Act, to comply with Section 2.5 of the Code of Conduct as their Written Statement of Services does not detail their response times to general enquiries.

The Tribunal therefore determined to issue a Property Factor Enforcement Order.

Section 19 of the 2011 Act requires the Tribunal to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations to the Tribunal.

The Tribunal proposes to make the following Order:

'The Factor is directed to:-

- (i) Amend their Written Statement of Services to include their response times to general enquiries as required by section 2.5 of the Code of Conduct.
- (ii) Provide the Homeowner and the Tribunal with a copy of the amended Written Statement of Services by 16<sup>th</sup> December 2019.'

### **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.**

Signed ...

Date: 4<sup>th</sup> November 2019

Chairperson

