

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 (Rules of Procedure) Amendment Regulations 2017

Chamber Ref: FTS/HPC/PF/18/1366

Re: Flat 3/1, 242 Wilton Street, Glasgow, G20 6BJ ("the Property")

The Parties:-

Mrs Helen York, 22A Kings Road, Longniddry, East Lothian, EH32 0NN ("the Homeowner")

James Gibb, 65 Greendyke Street, Glasgow, G1 5PX ("the Factor")

Tribunal Members

Ms Helen Forbes (Legal Member)

Mrs Elizabeth Dickson (Ordinary Member)

Decision

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 Section 2.1 of the Property Factor Code of Conduct ("the Code").

The decision is unanimous.

Background

1. By application received in the period from 8th to 15th June 2018 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") for a determination that the Factor had failed to comply with Section 2.1 of the Code.
2. Details of the alleged failures were outlined in the Homeowner's application and associated documents including correspondence to and from the Factor, the Factor's document 'Selling your Home', a copy of an Initial Writ raised against

the Homeowner and her husband, a letter from Allied Scotland, and correspondence between the parties in respect of complaints made by the Homeowner. The failures outlined by the Homeowner related to the provision of false or misleading information by the Factor to the Homeowner's solicitor in relation to common repairs prior to the Homeowner's sale of the Property:

3. By Minute of Decision dated 14th June 2018 a Convenor of the Housing and Property Chamber referred the Application to a Tribunal.
4. On 26th June 2018, Notice of Referral and Hearing was sent to the Parties. A hearing was set down for 16th August 2018.

Hearing

5. A hearing took place at 10.00 on 16th August 2018 at Glasgow Tribunals Centre, 20 York Street, Glasgow, G2 8GT. The Homeowner was present. The Factor's David Smith, Operations Manager, and Debbie Rummens, Operations Director, were present.

Evidence and Representations

Failure to comply with Section 2.1 of the Code

6. Section 2.1 states: *You must not provide information which is misleading or false:*

The Homeowner's evidence

The Homeowner said that she and her husband had been living in the United States of America when they considered either renting out or selling the Property. They decided to test the market in respect of selling the Property. A home report was instructed and it showed no problems with the roof, which was categorised under category 1.

A potential buyer noticed that the roof space had not been examined, so the Homeowner instructed Allied Scotland, the firm that had completed the home report, to examine the roof space. Allied Scotland reported back by letter dated 11th December 2015, stating that damp penetration was affecting the fabric around the southwest most chimney stack at the front roof slope of the Property and the front and rear parts of the building at the west most mutual gable. There was also evidence of fungus suggesting dry rot at the chimney-head at the northwest side of the rear wall, affecting the timbers and brickwork. Plastic sheeting had been laid on top of the insulation and the ceiling joists.

The Homeowner passed the report to the Factor's Brenda Adamson by email on 15th December 2016, asking that the Factor take action to investigate and remedy the faults identified. The prospective purchaser did not proceed to purchase the Property. The Homeowner said she waited to hear further from Ms Adamson.

In February 2016, the Homeowner and her husband accepted another offer on the Property. At that time, the Homeowner called Ms Adamson, who said that bad weather was delaying matters in relation to the roof. The Homeowner informed her solicitor. He said there would be a retention from the purchase price in respect of the repairs, and that he would write to the Factor in this regard. The Homeowner decided that, if the repairs were to be major, they would rent out the property. The Factor responded to the solicitor's letter on 23rd February 2018, stating 'our records do not show any extraordinary repairs anticipated under our instruction', and mentioned a retention of £350 pending a final account. The Homeowner presumed the £350 was in relation to the repairs for the problems identified by the surveyor. Missives were concluded for the sale of the Property in March 2016.

Two years later, in March 2018, the Homeowner and her husband received an Initial Writ in a court action for breach of contract raised by the purchasers of the Property, claiming £17,685.65 damages plus the expenses of the action. The Writ referred to quotations for roof repairs that pre-dated the date of conclusion of missives, therefore, it was clear that Ms Adamson knew that the repairs were in the pipeline when she responded to the Homeowner's solicitor.

The Homeowner said she had received contradictory information from the Factor in relation to the quotes received. She discovered that a quote was provided on 9th October 2015 for £660 plus VAT, which is over the delegated limit of authority. She presumed that made it an extraordinary repair. She would expect to have been informed of this matter, and felt she had been left in the dark by the Factor. The Factor told her there was no response from a company called React Roofing. The Factor subsequently said they could not find the response. When she made a complaint to the Factor, the responses received from David Smith and Debbie Rummens were inconsistent.

The Homeowner said she understood that the purchasers were very angry. She and her husband are now in a difficult position. The action has been sisted for negotiation.

The Homeowner said she finds it difficult to believe that a new roof is now needed. It seems that the building has not been properly maintained. She said she was surprised that a repair had been carried out that involved putting plastic sheeting over the joists. She said she was unaware when that had been done.

Commenting on the wording used by Ms Adamson in response to the solicitor's letter, the Homeowner said the solicitor's questions were not answered. Ms Rummens had told her that nothing had been agreed with the homeowners, so there was nothing to tell the solicitor. The Homeowner said that, if anything had been agreed, she would have known about it, and would not have had to ask the Factor for the information.

Responding to questions from the Legal Member as to the fact that the Homeowner knew there was likely to be work necessary, given the report from Allied Scotland, the Homeowner said she assumed the retention of £350 was to cover that work.

The Homeowner said that her family was living in the Property during the marketing period and prior to the sale. There was no water ingress to their Property.

The Homeowner said she understood it was difficult to get quotes in the winter, but the Factor could have informed her solicitor that they were awaiting quotes and were not in a position to answer his questions at that time. She pointed out that she was reliant on the Factor for information, due to the Property being a flat. This would not be the case with a house; in that situation, she would have had all the relevant information herself.

In response to questions from the Ordinary Member, the Homeowner said there had been regular small repairs to the roof at intervals from February 2014. She highlighted a repair in October 2015 described as an inspection report of the attic space. It had been difficult to get information from the Factor and she was still unclear as to what quotes were received and when. She felt the Factor had not taken the matter seriously. She had asked Ms Adamson to keep her informed, and this had not happened. The Factor knew that more quotes had been instructed. They could have chased that up. They could have sent an interim response to the solicitor. The solicitor had pointed out the expected date of conclusion of missives. The Homeowner said she thought a major repair was anything over the delegated level of authority.

It was her position that, had her solicitor, and the purchasers been provided with all the information at the time of sale, they would, arguably, not have proceeded with the sale. The Homeowner and her husband were now, effectively, being called dishonest by the purchasers.

Evidence on behalf of the Factor,

Ms Rummens said that the matter referred to by the Homeowner and described as an inspection report of the attic space in October 2015 was in relation to a Legionella inspection of a cold water tank within the roof space, and was not connected to any common repairs.

Mr Smith said the letter from the Homeowner's solicitor dated 18th February 2016 was a standard sale information letter. The solicitor's letter did not specifically ask about the roof. It was received in advance of the JLG Slating quote, which was received on 26th February 2016, and the Glasgow Roofing and Building Company quote, which was received on 23rd February 2016. The Factor had the quote from JLG Slating for £660. Responding to questions from the Ordinary Member,

Mr Smith confirmed that the Factor also had the report from Allied Scotland. He clarified that the roof was not being replaced, but was being overhauled. The majority of work to be carried out was in respect of a defect in the gable, whereby the top two courses were not adequately attached to the gable. The water ingress reported by Allied Scotland was in a different area of the roof and not related to the defect in the gable. Responding to questions from the Ordinary Member, he said the plastic covering the insulation and joists, reported by Allied Scotland, was done by a resident, and not by contractors appointed by the Factor.

Ms Rummens said that the needs of one owner in a sale are different from the needs of the co-owners. A home report had been carried out in this case, and the subsequent examination of the roof space was carried out by the same surveyor that prepared the home report. As far as the Factors were concerned, this was all third hand information. The Factor had the report of water ingress and the quote of £660 plus VAT. Anything else took time to gather together. The Homeowner chose to sell the property. It is difficult for the Factor to get contractors out in the winter. Even if they had managed to get a contractor, it is likely that a tarpaulin would have been used until the weather improved. Ms Adamson attempted to get the alternative quotes. Allied Scotland had only alluded to the matter and did not cost it. It took the Factor two years to get all the necessary information together for the current repair work. This is an entirely different exercise from the one in progress at the time of the Homeowner's sale.

Ms Rummens said that the Factor cannot carry out any works costing over £350 plus VAT without majority agreement. At this time, they had one quote of £660 plus VAT. In anticipation of the work that was to be carried out in that regard, they had requested a retention of £350 by the solicitor, which included the Homeowner's share of this work.

Ms Rummens said that the Factor could only answer the questions asked by the solicitor. The Legal Member referred Ms Rummens to the Factor's document 'Selling your Home', which had been lodged by the Homeowner. In section 1, it states that the Factor has a duty to liaise with the seller's solicitor, and lists matters of which they are usually asked to make the seller aware. One of those matters is 'any identified forthcoming major works that require funding by the seller or buyer.' Ms Rummens said that the only work they were aware of had been costed at £660 plus VAT. That did not constitute a major repair. Responding to questions, Ms Rummens said that a major repair would probably be anything around £500 per owner, which would be a repair of around £4000 for the whole block.

The Legal Member questioned why, if the Factor's policy was to answer the exact questions asked by the solicitor, Ms Adamson had failed to do that. Ms Rummens said it looked like Ms Adamson had used a standard letter that had been in place prior to the Factor taking over from a previous factor. Although Ms Rummens said she would have expected

Ms Adamson to answer the questions properly, the response did not make any difference to the outcome. She said that the Factor would expect the solicitor to come back to them if further information was required.

Responding to questions from the Ordinary Member as to the quotes that were outstanding in February 2016, Mr Smith said a quote had been requested from GRBS on 11th February 2016. Ms Rummens said that, due to the vast difference in the quotes received, the company had been asked to requote. This was received on 26th February 2016. Normally the Factor would proceed on two quotes, but in this case, they asked for a third quote.

Mr Smith said that the major project that was now planned had taken two years to reach this stage. In July 2016, it was suggested to the homeowners that a full condition survey should be carried out. The first tender was received in March 2017. The contractors are on site now and the programme is expected to take 18 weeks. He said that the timeline was important as the purchasers were alluding to the Homeowner knowing about this work, and felt they had been mis-sold. The Homeowner was not aware of the works. There was no indication at the time of sale that there would be a spend of this level. The sum of £13,600 was added to the first tender in May 2017. A further stone survey of all three elevations was completed in October 2017, adding a further sum of approximately £50,000. The homeowners had decided to have all the identified work carried out. Some works were required as a condition of grant from Glasgow City Council and or planning requirements as this was a conservation area.

Mr Smith said that, at the time of the sale, it was thought that £660 would cover the problems. There was not a massive amount of water coming in, which probably explains why Ms Adamson answered in the way that she did.

Ms Rummens said that the Factor had received a letter from the purchasers' solicitor prior to the court action being raised, and they had explained the situation to them in detail, including telling them that the Homeowner had no further knowledge at the time of sale.

Parties confirmed that the assertion in the Initial Writ to the effect that a common scheme was in place at the time of sale, was incorrect.

Findings in Fact

7.

- i. The Homeowner was the joint heritable proprietor of the Property, which is a tenement flat in a block of eight flats, until on or around 30th March 2016, when the Property was sold.
- ii. The Factor has been a registered property factor since 23rd November 2012, with registration number PF000103. The Factor's duty under section 14(5) of the Act to comply with the Code arises from that date.
- iii. A routine roof inspection was carried out on 9th October 2015 by JLG Slating and Property Maintenance Ltd. A quote of £660 plus VAT was provided to the Factor to address communal works required to the roof.
- iv. By letter dated 11th December 2015, the Homeowner's estate agent was informed by Allied Scotland, Chartered Surveyors, who had carried out a survey of the roof space, that damp penetration was affecting the fabric around the southwest most chimney stack at the front roof slope of the Property, and the front and rear parts of the building at the west most mutual gable. There was evidence of fungus suggesting dry rot at the chimney-head at the northwest side of the rear wall, affecting the timbers and brickwork. There was plastic sheeting placed over the insulation and ceiling joists. Water was lying on the top of the plastic sheeting.
- v. On 15th December 2015, the Homeowner passed the Allied Scotland letter to the Factor, asking that the Factor take action to investigate and remedy the faults identified. The Homeowner also informed the Factor's Brenda Adamson that the prospective purchaser had decided against proceeding with the purchase.
- vi. On 16th December 2015, the Factor's Brenda Adamson acknowledged receipt of the Allied Scotland letter, stating that she had forwarded it to the Factor's maintenance department to arrange a contractor to attend to investigate the issues and report back with costs and recommendations.
- vii. During the week beginning 1st February 2016, the Homeowner called Brenda Adamson and was informed that due to recent bad weather the contractors had more urgent repair jobs taking priority.
- viii. On 18th February 2016, the Homeowner's solicitor wrote to the Factor informing them of a proposed sale with an entry date of 30th March 2016. The solicitor asked for "confirmation that there are no common or mutual repairs either in hand, outstanding or under contemplation".
- ix. By letter dated 23rd February 2016, the Factor's Brenda Adamson responded to the Homeowner's solicitor and stated 'Our records do not show any extraordinary repairs anticipated under our instruction'.
- x. The Factor received a quotation from Glasgow Roofing and Building Company ('GRBC') on 26th February 2016 dated 18th February 2016 for repairs to the roof and timbers, and to demolish the chimney of the block

236/242 Wilton Street, Glasgow. The quote was for £7,728. The Homeowner was not made aware of this quote.

- xi. The Factor received a quotation from JLG Slating and Property Management dated 26th February 2016, quoting the sum of £22,500 for works to the roof and chimney at 242 Wilton Street, Glasgow. The Homeowner was not made aware of this quote.
- xii. Missives for the sale of the Property were concluded on 15th March 2016. In the missives, the Homeowner warranted as seller that *'he has not received written notification of, approved, entered into or authorised any scheme of common repairs or improvement affecting the building'*. It was a condition of the missives that *'there are no major repairs or improvements proposed, instructed, authorised or completed but not yet paid in respect of the Property.'*
- xiii. The purchasers took entry to the Property on 30th March 2016.
- xiv. On 20th March 2018, the Homeowner received an Initial Writ in a court action for breach of contract raised by the purchasers of the flat, claiming £17,685.65 damages plus the expenses of the action. It was claimed that the Homeowner was in breach of the missives as the Homeowner had received notice of a common scheme of repairs before the missives were concluded, and the Homeowner had failed to make the purchasers aware of the defects in the roof and chimney.
- xv. On 27th March 2018, the Homeowner raised a complaint with the Factor stating that the Factor had not complied with section 2.1 of the Code. The Homeowner asked for an explanation as to how the minor repairs brought to the attention of the Factor had now escalated to the extent that complete re-roofing of the tenement was required. The Homeowner asked for evidence of what work was done to mitigate the damage caused by the issues highlighted in the roof report of 15th December 2015. The complaint was acknowledged by the Factor's Catherine Flanagan on 28th March 2018.
- xvi. On 9th April 2018, the Factor's David Smith responded to the complaint, detailing investigations made following a report of ingress of water by an owner on 29th January 2016, which eventually led to a Full Condition Survey being carried out in January 2017. The survey identified major works, which were eventually costed at £244,781.76 with the assistance of a local authority grant for half of that sum. Mr Smith stated that the repairs were only identified during completion of the survey and that, at the time of the response to the Homeowner's solicitor, 'no communal works had been costed, proposed or agreed with the co-owners.' The information provided at the time of sale was not false or misleading and the complaint was not upheld.
- xvii. On 11th April 2018, the Homeowner asked for the complaint to be taken to the next stage, described as 'Stage 5'. Within the complaint, the Homeowner requested further information in relation to the situation at

the time of sale of the Property, and the proposed major works. The complaint was acknowledged by the Factor's Debbie Rummens on 13th April 2018.

- xviii. On 17th May 2018, Debbie Rummens responded to the complaint. The complaint was not upheld.

Determination and Reasons for Decision

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

Failure to comply with Section 2.1 of the Code

9. The Tribunal found that the Factor failed to comply with this section of the Code. The solicitor for the Homeowner had specifically asked for "confirmation that there are no common or mutual repairs either in hand, outstanding or under contemplation". The evidence on behalf of the Factor was that the specific questions asked by the solicitor should always be answered. That did not happen in this case. The response given was 'Our records do not show any extraordinary repairs anticipated under our instruction'. The Factor was aware, upon receipt of the solicitor's letter dated 18th February 2016 that there were common or mutual repairs 'under contemplation' that would exceed the delegated level of authority. A quote had been received by the Factor following a routine roof inspection carried out on 9th October 2015 by JLG Slating and Property Maintenance Ltd, to address communal works required to the roof. In addition, the Factor had been provided with a copy of the letter dated 11th December 2015 by Allied Scotland, indicating concerns and defects within the roof space, and had passed this to their maintenance department for investigation, costs and recommendations. Furthermore, the Factor had requested quotes from other contractors in respect of common or mutual repairs. It is impossible to see how the Factor's records would not have shown this information. The Factor ought to have provided this information to the solicitor. In responding to the solicitor's letter as they did, the Factor provided false and misleading information, thereby breaching the Code.
10. The Tribunal took into account the Homeowner's assertion that the purchasers may not have purchased had the Homeowner's solicitor been given the correct information by the Factor. However, the Tribunal was not persuaded that the Factor's failure to comply with the Code was directly responsible for the situation in which the Homeowner now finds herself. The Factor is not connected to or responsible for the legal action raised by the purchasers. The Tribunal accepted the evidence that the Factor had provided accurate information to the solicitors of the purchasers, including information as to the knowledge of the Homeowner at the time of the sale.

Proposed Property Factor Enforcement Order (PFEO)

11. 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.
12. 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 section 2.1 of the Code.
13. 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. The Tribunal proposes to make the following PFEO:
14. The Tribunal proposes to make a PFEO as follows: 'The Property Factor is required to pay to the Homeowner within 21 days of intimation to them of the PFEO the sum of £1000 from their own funds and at no cost to the development homeowners, in order to compensate the Homeowner for the distress, frustration and inconvenience caused as a result of the Factor's failure to comply with the Property Factors Code of Conduct.'

Right of Appeal

15. 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.

Helen Forbes

Legal Member and Chairperson

25th September 2018