

Housing and Property Chamber First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) in relation to the application by the Homeowner to review their decision their decision under section 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

Chamber Ref:FTS/HPC/PF/18/1952; FTS/HPC/PF/18/2008; FTS/HPC/PF/18/2009; FTS/HPC/PF/18/2010 and FTS/HPC/PF/18/2011

6 Circus Drive, Glasgow, G31 2JH ('the Property')

The Parties:

David Niven, residing at Flat 2/1, 6 Circus Drive, Glasgow, G31 2JH; Rhona McColm, residing at Flat 1/1, 6 Circus Drive, Glasgow, G31 2JH; Steve Hollingsworth, residing at Flat 1/2, 6 Circus Drive, Glasgow, G31 2JH; Gil Shaw, residing at Flat 0/2, 6 Circus Drive, Glasgow, G31 2JH and Marie Taylor, residing at Flat 2/2, 6 Circus Drive, Glasgow, G31 2JH ('The Homeowners')

Ross and Liddell, 60 St Enoch Square, Glasgow, G1 4AW ('the Factor')

Tribunal members:

Jacqui Taylor (Chairperson) and Andrew Taylor (Ordinary Member).

The Tribunal received an email from the Homeowner dated 25th January 2019 which requested the Tribunal to review their Decision dated 7th January 2019. The Tribunal refuses the application and determined that the application to review their Decision is without merit.

Background

- 1. The Tribunal issued a Decision dated 7th January 2019 which found that the Factor had failed to comply with sections 2.1; 2.5 and 6.1 of the Code of Conduct and advised that they proposed to make a Property Factor Enforcement Order.**
- 2. The Tribunal issued a Notice of Proposal under section 19(2)(a) of the Property Factors (Scotland) Act 2011 of the proposed Property Factor Enforcement Order and directed the parties to ensure that any written representations which they wished to make under section 19(2)(b) of the Act reached the Housing and Property Chamber's office no later than 14 days after the date the Decision and Notice are intimated to them.**

3. In response to the said Decision and Notice the Homeowner sent the Tribunal the following documents:

- A letter dated 25th January 2019 from David Niven to the Tribunal requesting the Tribunal to Review their Decision.
- A copy of a letter from Ross & Liddell to David Niven dated 14th December 2018.
- A copy of the letters from Ross & Liddell to J C J (Demolition & Construction) Ltd dated 3rd and 12th December 2018.
- A copy of a letter from Ross and Liddell to the co-proprietors of 6 Circus Drive dated 13th December 2018.
- A copy of an email from David Niven to Brian Fulton, Gerry Gilroy and Fiona Church- Michael of Ross and Liddell dated 3rd January 2019.
- A copy of the screen grab from Ross and Liddell's online portal.

Decision of the Tribunal in response to the Homeowner's application to Review its Decision.

4. Section 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 sets out the requirements of an application for review. The application must be in writing; it must be copied to all the other parties; it must be made within 14 days of the date the written reasons were sent to the parties and it must set out why a review of the decision is necessary.

The Tribunal acknowledged that the application for review had been received timeously.

The Tribunal have considered the terms of the said letter from David Niven dated 25th January 2019, their response is as follows, using the same numbering as is detailed in the said letter:

1. The Tribunal confirm that they had considered the terms of the letter from David Niven dated 2nd August 2018 and the supplementary evidence referred to.

2. Final Bullet Point on page 3.

The statement 'It was agreed with the contractor that they would commence works on 31st July 2017. It was anticipated the works would last 12 weeks.' was agreed with the parties at the start of the hearing as background factual information.

3. Final Bullet Point of the Background Information section, at the top of page 4.

The statement 'The building works are not yet complete. No certificate of practical completion has yet been issued.' was agreed with the parties at the start of the hearing as background factual information.

4. Regarding the Preliminary Matters at Third Bullet Point.

The Tribunal acknowledge that the Homeowners' complaints were not solely in relation to workmanship issues. Preliminary Matters third bullet point details part of the Factor's written representations.

5. Preliminary Matter Determination 1.

The Tribunal's determination in relation to the building contract not being certified as complete means that the contractor is still liable under the contract and has not been discharged from liability under the contract. This is distinct from practical completion.

6. Preliminary matter determination 2.

As stated in the Tribunal's Decision, the Property Factor's duties are defined in section 17(5) of the Property Factors (Scotland) Act 2011 as being, *inter alia*, 'duties in relation to the management of the common parts of land owned by the homeowner.' Consequently the Tribunal can only make determinations regarding property factors duties in relation to common parts of the Property. This is a matter of statute.

7. Homeowners notification letter complaint numbers 1-12.

As stated in the Tribunal's Decision section 1 of the Code of Conduct provides that the Factor must provide the Homeowner with a Written Statement of Services and specifies the matters to be included within the Written Statement. The Homeowners complaints regarding Section 1 of the Code are in relation to the alleged failure by the Factor to carry out matters which have to be detailed in the written statement of services as opposed to providing a written statement which complies with Section 1 of the Code. The Tribunal are unable to consider these matters further.

8. Homeowners notification letter complaint numbers 13-20.

As stated in the Tribunal's Decision, the Preamble of Section 2 of the Code of Conduct states in general terms that good communication is desirable. It does not contain a specific duty to be followed. The details of the good communication required is set out in the detailed paragraphs of section 2. The Homeowner states that it is incumbent upon the First-tier Tribunal to confirm if there has been a breach in another part of the code of conduct i.e. if a homeowner incorrectly references a specific point in the code.

The Homeowners lodged extensive written representations and productions. The obligation is on the Homeowners to make their cases and to give the Factor prior notification of their cases. The Tribunal is an impartial and independent Tribunal and it is not their role to make the Homeowners' cases. Accordingly the Tribunal are unable to consider these matters further.

9. Homeowner's notification letter of complaint number 21.

The Tribunal's decision in relation to complaint number 21 is in the following terms:

'The Tribunal determine that the fact the said letter from Brendan McCaughey, building surveyor for the Factor, dated 29th July 2016 states that professional services being offered were to organise and oversee the proposed building repair works at the above property..... as highlighted

within the building survey report' but the Scope of Works referred to in the said Tender Report do not specifically refer to the said survey report to be misleading as it has not been clearly stated that tender report does not include the said repairs that were detailed in the survey report namely the closing of the gap above the close door; the repair to the defective FAI's and the removal of the mature tree in the neighbouring backcourt.'

The Tribunal consider this to be a clear determination.

The Tribunal determination found that the Factor had provided information which is misleading in breach of section 2.1 of the Code of Conduct, albeit they acknowledged that the contract variations were not misleading or false.

10. Homeowners' notification letter of complaint number 22.

The Tribunal had considered the terms of part 1.G.VI.a of the complaint cover letter dated 2nd February 2018.

The Tribunal upheld the Homeowners complaint number 22.

11. Homeowner's notification letter of complaint number 23.

The Tribunal had considered the terms of part 1.G.V1.b I of the complaint letter dated 2nd February 2018. The additional comments made cannot now be considered as they were not made at the hearing.

12. Homeowner's notification letter of complaint number 25.

The Tribunal had considered the terms of part 1.G.Vi.b ii of the complaint letter dated 2nd February 2018.

13. Homeowner's notification letter of complaint number 26.

It is noted that no review of the Tribunal decision in relation to this complaint is required. The Tribunal are unable to consider events between the parties that occurred after the hearing.

14. Homeowner's notification letter of complaint number 27-48.

As stated in the Tribunal's decision the building contract is still on-going and no final accounts have been prepared. The defects period has still to pass. Consequently the Tribunal determined that there had been no breach of section 3 of the Code as the final accounts have still to be prepared. The Tribunal do not consider that Homeowners' further representations in the application for review relation to this point to be material.

15. Homeowner's notification letter of complaint number 50.

Section 6.8 of the Code of Conduct requires the Factor to disclose to homeowners in writing any commission, fee or other payment or benefit they receive from a contractor appointed by them. This section of the Code does not relate to conflict of interest.

16. Homeowner's notification letter of complaint number 51.

As stated in the Tribunal's decision the situation is an on-going fluid situation and the Tribunal accepted that there is evidence that the Factor is pursuing the contractor.

17. Breach of Factor Duties. 18. Part A and Part B and 19. Part G

The Homeowners have not provided any legal basis to justify their request for the Tribunal to review their Preliminary Determinations or their decisions in relation to paragraphs A, B and G of the written representations by David Niven dated 2nd August 2018.

Consequently the Tribunal refuses the Homeowners' application for review as they consider it to be without merit.

5. The decision of the Tribunal was unanimous.

J Taylor

Signed

Chairperson Date: 6th March 2019

