Housing and Property Chamber
First-tier Tribunal for Scotland

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

In an Application under section 17 of the Property Factors (Scotland) Act 2011

by

Christopher Purnell, 7/12 Colonsay Way, Edinburgh EH5 1FB ("the Applicant")

James Gibb Residential Factors, 65 Greendyke Street, Glasgow G1 5PX ("the Respondent")

Re: Property at 7/12 Colonsay Way, Edinburgh EH5 1FB ("the Property")

Tribunal Reference: FTS/HPC/23/3446

Tribunal Members:

John McHugh (Chairman) and Elizabeth Dickson (Ordinary (Housing) Member).

DECISION

The Respondent has not failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner of 7/12 Colonsay Way, Edinburgh EH5 1FB (hereinafter “the Property”).
2 The Property is a top floor flat located within a residential block consisting of privately owned flats and common areas (hereinafter "the Block").
3 The Respondent is the property factor responsible for the management of common areas within the Block.
4 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from 23 November 2012. From 16 August 2021, it was under a duty to comply with the updated 2021 Code.
5 The Block contains common stairs and a lift.
6 The Respondent has a lift maintenance contract with Orona.
7 Orona are the company which manufactured and installed the lift originally.
8 The maintenance contract includes periodic maintenance and repairs. It includes attendance on an emergency basis.
9 The lift is also subject to periodic inspection on behalf of the insurers of the Block.
10 The Applicant is a wheelchair user. His only way of moving between his flat and the outside world is by using the lift.
11 The lift had been out of service for a period in May 2023. The Applicant had been dissatisfied with the Respondent’s response at that time.
12 On 7 September 2023 the lift stopped working and the Applicant reported this to Orona.
13 On 8 September 2023 the Applicant reported the issue to the Respondent.
14 On 8 September 2023 the Respondent also reported the issue to Orona who attended on the same day.
15 On 8 September 2023 the Respondent issued a communication confirming that the lift was broken and that a part was required which would take several days to arrive.
16 On 10 September 2023 the Applicant made a formal complaint to the Respondent. He enlisted the support of his elected representatives.
17 A considerable number of communications are exchanged between the parties over the following days.
18 On 13 September 2023 the Respondent reported that the part has been delayed.
19 On 14 September 2023 the Respondent advised that it has approached alternative contractors and found one who can supply a suitable part.
20 On 15 September 2023 the repair is carried out. The lift works only intermittently over the next two days until the lift stops working again. The part fitted is found to be unsuitable.
21 On 17 September 2023 the Applicant intimates an intention to apply to the Tribunal.
22 On 18 September 2023 the Respondent acknowledges the complaint and indicates that it will respond substantively in the week commencing 25 September 2023.
23 On 19 September 2023 Orona have the awaited part and complete the lift repair.
24 On 27 September 2023 the Respondent issued its final response to the complaint.
25 The Applicant has, by his correspondence, including his letter of 17 September 2023 informed the Respondent of the reasons why he considers the Respondent has failed to carry out its duties under section 14 of the 2011 Act.
26 The Respondent has not unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A Case Management Conference took place by telephone conference on 16 January 2024.

It was agreed by the parties that the matter would proceed to determination by the Tribunal without the need for a further hearing.

The Applicant represented himself and the Respondent was represented by Nic Mayall, its Executive Director of Operational Delivery & Performance.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as revised with effect from 16 August 2021 as "the Code" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the 2017 Regulations".

The Respondent became a Registered Property Factor on 23 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant does not complain of failure to carry out property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant originally complained of breaches of Sections: 2.1; 2.2; 6.9 and 7.2 of the Code although on discussion at the hearing he recognised that Code Section 2.2 was not relevant and so did not insist upon that.

The elements of the Code relied upon provide:

"Section 2: Communication and Consultation

2.1 Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations…

…Section 6: Carrying out Repairs and Maintenance

6.1 This section of the Code covers the use of both in-house staff and external contractors by property factors. While it is homeowners' responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard…

6.9 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) must be made available if requested by a homeowner…

…Section 7: Complaints Resolution

Property Factor Complaints Handling Procedure…

… 7.2 When a property factor's in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed in writing…"

The Matters in Dispute

The Applicant complains in relation to the following issue:

The Respondent's handling of the repair of a lift including the speed and manner of its response and how it communicated with owners during this time.

Background

The Block consists of privately owned flats served by common areas including stairs and a lift.

The Applicant is the owner of a top floor flat within the Block.

The Respondent is the property factor responsible for the management of common areas within the Block including maintenance of the lift.

There is no, or at least no substantial, disagreement between the parties as to the history of events which are briefly summarised as follows:

7 September 2023 – the lift broke down and the Applicant reported this direct to Orona.

8 September 2023 – the Applicant reports the issue to the Respondent at around 0800. At around 1500 the Respondent emailed the Applicant to advise that the lift had broken down and that a part was required to repair it which would likely take until 13 September.

10 September 2023 – the Applicant formally complains to the Respondent. He also asks his MP and MSP to help.

11 September 2023 – the parties exchange emails. The Applicant complains. The Respondent responds and repeats the situation communicated in its email of 8 September. The Applicant indicates a wish to escalate his complaint to Stage 2 of the Respondent's Complaints Procedure.

12 September 2023 – the Respondent emails the Applicant to indicate that it considers that its approach has been appropriate. The parties exchange further correspondence in which the Applicant confirms that he remains dissatisfied, in particular with the emergency procedures.

13 September 2023 – the Respondent communicates to the Applicant that the required lift part is delayed but is on order from Spain.

14 September 2023 – the Respondent communicates to all owners that the part remains awaited. The Respondent sends a further email to the Applicant to advise him that it has approached alternative contractors and that one has a part which will be fitted the following day. The Applicant complains that the Respondent's claim to have communicated everyday is inaccurate.

15 September 2023 – the parties exchange emails in which it is confirmed that the part will be fitted later in the day. The Respondent suggests a meeting with the Applicant. The parties exchange further emails on the topic. The lift is repaired by the alternative contractor.

16 September 2023 – the Applicant advises the Respondent that the lift has failed again.

17 September 2023 – the parties exchange correspondence; the lift starts working again briefly but fails again. The Applicant asks the Respondent to explain. The Applicant intimates his intention to apply to the Tribunal.

18 September 2023 – the Respondent acknowledges and advises it will respond substantively to the complaint in the week commencing 25 September.

19 September 2023 – the lift is repaired by Orona and the Respondent emails the Applicant to advise him of this.

By way of background, in May 2023, the lift had been out of service for a period and the Applicant had complained to the Respondent regarding its response. He had been dissatisfied by the Respondent's response on that occasion.

Complaint

The Applicant has always been at pains to point out that his complaint is not that the lift is broken. He understands and accepts that lifts may go out of service from time to time. Rather, his complaint is that the lift being out of service has a severe and disproportionate effect upon him compared with most other residents. He feels that the Respondent's response to his complaint failed to recognise this.

The Applicant complains that Mr Mayall was "borderline abusive" in his responses and sought to mischaracterise his complaint as being that the lift had broken rather than that the response was unacceptable.

Mr Mayall maintains, and we accept, that there is nothing in the Respondent's communications that could be considered as borderline abusive. The communications are written in professional and polite language. It is true that some of the focus of Mr Mayall's responses was around the fact that breakdowns of machinery such as lifts was inevitable but we do not take that as a deliberate attempt to avoid answering the substantial issue ie the need to fix the lift quickly.

There were regular communications between the Respondent and the Applicant during the period from when the lift was reported broken and when it was repaired. There were also general communications to owners in the Block via the Respondent's portal. It is undoubtedly the case that the Applicant's persistence led to increased frequency of communications from the Respondent over what would probably otherwise have been the situation.

The evidence is that the matter was quickly addressed after the Applicant's initial report with Orona having attended promptly and the Respondent reporting that the lift would be inoperable until a part was received on 13 September. By 14 September, when the delay in delivery of the part became known, the Respondent made reasonable efforts to identify an alternative contractor with a suitable part. An alternative contractor attempted a repair but that did not last any significant time. Mr Mayall understands that that repair failed because the lift was designed only to accept an original Orona part. As soon as the part became available, Orona attended and repaired the lift. The parties remained in communication regularly throughout that period.

We identify no breach of Code Section 2.1 nor of Code Section 6.1. Section 6.9, which is concerned with tendering, appears to be of no direct relevance to the current application.

The Applicant complains that Mr Mayall failed to direct him to the Respondent's complaints policy.

Mr Mayall is a senior member of the Respondent's staff and dealt with the complaint from the outset which he explained was because he had been on duty on the weekend when the complaint arose and because he had dealt with the Applicant's previous complaint.

Mr Mayall accepts that he did not formally direct the Applicant to the Complaints Procedure. This was because he knew that the Applicant was already familiar with the Procedure from his May complaint. It is also evident from the content of the Applicant's emails that he was familiar with the process – he refers to a Stage 2 complaint in his email of 11 September 2023.

Mr Mayall set out his written response to the complaint in his email of 27 September 2023. Mr Mayall indicated that in circumstances where the Applicant had already (in his email of 17 September) intimated his intention to proceed to the Tribunal, he saw no benefit to anyone in directing the Applicant to follow any further procedure but resolved that he would just issue his final decision.

We do not find there to have been a breach of Code Section 7.2.

The Applicant has also complained that he was incorrectly informed in a letter of 29 June 2023 by the Respondent that the Equality Act 2010 did not apply to residential properties. That letter was in response to his complaint relating to the May lift breakdown. The letter read:

" I would indicate that to the best of my knowledge the Equalities Act (2010) does not apply to residential properties.

I can advise that James Gibb, as the appointed Factor for the Residential Properties at the Fusion Development, arrange for the ongoing management and maintenance of the common parts of the development. We are only able to manage the development as constructed. Any alterations you feel which are required would need the agreement of the co-proprietors."

The first sentence standing alone would not appear to be accurate but, read with the following sentences, it appears that the Respondent was attempting to convey that the Act would not be of practical application in the current situation. That is because it is not the provider to the Applicant of services relating to its property, rather that it is carrying out services in relation to the property of the Applicant himself and of the other owners and has limited discretion as to how it may carry those services out. We therefore do not consider there to have been a breach of Code Section 2.1.

In summary, we do not find the Respondent to have breached any aspect of the Code.

Although we find there to have been no breach of the Code, the Tribunal has a great deal of sympathy for the position in which the Applicant finds himself. He is entirely reliant upon a working lift. Without that, he cannot reliably plan or carry out his everyday activities. He has the additional fear that when away from his flat he may be unable to get back into it if the lift should fail during his absence. To preserve access without any meaningful gaps, the Applicant requires a service involving a different level of response to that which the Respondent offers. In this case, the Respondent appears to have taken reasonable steps to address the matter promptly. It has maintained a contract with an apparently suitable supplier and it has made efforts to source an alternative supplier when the part was delayed.

The Applicant suggests other ways in which the Respondent might address the situation including the provision of an “evac chair” and available staff to assist with access when the lift is out of order. Mr Mayall advised that he was not aware of any similar arrangement in the many other properties which are factored by the Respondent other than in one retirement property where a stairlift had been installed to assist a resident. The Tribunal is similarly not aware of measures of the kind suggested by the Applicant being adopted in other properties.

The Respondent is the agent of the owners of properties in the Block including the Applicant. It is possible that the owners as a whole could be asked to agree to make enhanced arrangements for alternative access when the lift is out of service but that (and the related cost) is not something which the Respondent is entitled to impose upon the owners.

Breaches of the Code

We do not find the Respondent to have breached any aspect of the Code.

PROPERTY FACTOR ENFORCEMENT ORDER

As we have found no breach, no property factor enforcement order will be made.

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.

JOHN M MCHUGH

CHAIRMAN

DATE: 29 January 2024