

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland Housing and Property Chamber in relation to an application made under Section 17(1) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/23/3192 and FTS/HPC/PF/23/3193

Property: 11 Mannering Road, Glasgow G41 3TB (“the Property”)

The Parties:-

Mr Dan Whitehead, 11 Mannering Road, Glasgow G41 3TB (“the homeowner”)

Hacking & Paterson Management Services Limited, registered in Scotland (SCO73599) and having their Registered Office at 1 Newton Terrace, Charing Cross, Glasgow G3 7PL (“the property factors”)

Tribunal Members:

George Clark (Legal Member/Chairman) and Donald Wooley (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that it was able to decide the application without a Hearing and decided that the property factors had not failed to comply with Section 6.9 of the Property Factors Code of Conduct effective from 1 October 2012 or with Section 6.12 of the Property Factor’s Code of Conduct effective from 16 August 2021. The Tribunal decided that the property factors had failed to comply with the Property Factor’s Duties. The Tribunal proposes to make a Property Factor Enforcement Order.

Background

1. By applications, dated 11 September 2023, the homeowner sought a Property Factor Enforcement Order against the property factors under the Property Factors (Scotland) Act 2011. He alleged failures to comply with Section 6.9 of the Property Factors Code of Conduct effective from 1 October 2012 (“the 2012 Code”) and Section 6.12 of the Property Factors Code of Conduct effective from 16 August 2021 (“the 2021 Code”). As the alleged breaches

occurred both before and after 16 August 2021, it was necessary for two applications to be made. The homeowner also complained that there had been a failure to carry out the Property Factor's duties.

2. The homeowner's complaint related to work carried out on the roof of the Property between April 2021 and October 2022 by Northwest Roofing, and the property factors' management of that work during that period and immediately afterwards. The owners had had to pay £5,950 plus VAT and an additional £1,146 plus VAT to fix a problem with dry rot in the roof beams and external wall, plus under the floor between Flats 3/2 (the homeowner's flat) and 2/2 and in the party wall between Flats 3/2 and 3/3. This was after having paid £1,920 and £2,376 to a roofing contractor to fix a problem with the roof directly above where the rot was discovered. The homeowner contended that the dry rot stemmed from the fact that the property factors failed to carry out their duties as mandated in the Code of Conduct with respect to the management of the roofing contractor and the problem with the roof as a whole.
3. The homeowner stated that he had to move out of the Property on 13 August 2022 because the wall and ceiling above his bed became mouldy and the plaster began to fall away. This was after Northwest Roofing completed work on the roof in June 2022. It took them until October 2022 to stop the leak. At this point the homeowner lodged a claim with his insurers to fix the plaster and the dry rot was found behind it. The insurers eventually declined the claim in respect of the dry rot and there was a lengthy delay before the dry rot issue was fixed. The homeowner could not stay in the Property during this time and had been denied the opportunity to live there for 8 months. He had been left with a large bill for repairs for a problem he had repeatedly asked the property factors to put right. He had had months and months of phone calls and emails trying to resolve the matter and months and months of stress and anguish.
4. A solution satisfactory to the homeowner would be for the money paid to Northwest Roofing to be refunded. The owners had paid it to the property factors in good faith and they in turn had handed it over to a contractor who was not fit to carry out the job. The property factors had then consistently failed to manage that contractor properly. In addition to the refund, the owners should be compensated for the full cost of the dry rot works, which would not have been necessary, had the property factors fulfilled their duties set out in the Code of Conduct and managed them properly.
5. The homeowner provided with his applications a copy of the property factors' Written Statement of Services ("WSS") and of correspondence between the Parties in relation to his formal complaints.
6. On 6 November 2023, the property factors provided written representations to the Tribunal. In his complaint to them, the homeowner had made reference to a number of Sections in the 2012 and 2021 Codes that were not included in his applications. The Tribunal could only deal with matters that were within the applications, so did not consider further any complaints or responses under other Sections of the Codes.

7. The property factors contended that the application under the 2012 Code should not be considered by the Tribunal, as the matters complained about related to a period “over recent years”, but the Tribunal noted that the repairs which were the subject of the application began in April 2021, so it was relevant and necessary for the homeowner to make the two applications.
8. In relation to the complaint under Section 6.12 of the 2021 Code, the property factors confirmed that upon completion of a number of repairs to the Property by Northwest Roofing, they were notified by the homeowner on a number of occasions that water ingress issued remained. On each occasion, this was relayed to the contractors, who attended and carried out further work. It was evident from correspondence that the property factors had extensive communication with the contractors in relation to the complaints received. It was also evident from the repairs carried out, from the contractors’ description of works and estimates that various different areas of the roof and guttering were attended to, which was unfortunate and, in the view of the property factors, led to the continued water ingress over a protracted period. It was perfectly understandable that the homeowner raised complaints and queries and for him to believe that the work was substandard or that it did not address the evident issues.
9. After a period of repeated repairs, the property factors recommended the employment of a building surveyor to carry out a building survey upon which action could be taken which would hopefully address the evident issues. The property factors accepted that this action could have been taken at an earlier stage, but they did not receive instructions from the collective owners in this regard.
10. In addition to alleging breaches of the Code of Conduct, the homeowner had issued correspondence asking numerous questions specifically about the works completed. Following consultation with the contractors, the property factors’ Team Manager responded to the homeowner within the formal Complaints Procedure, addressing each of the questions and providing photographs produced by the contractors to accompany the responses. They offered to arrange a meeting with the homeowner and the contractors on the basis that they might have been able to further address the homeowner’s remaining issues, but the homeowner did not see this as an acceptable option and the Parties were unable to agree an amicable resolution. This resulted in the property factors’ final response of 23 May 2023, under their formal Complaints Procedure.
11. The property factors did not provide submissions in relation to Section 6.9 of the 2012 Code, as they contended that it was only the 2021 Code that applied, but the Tribunal noted from their response to the homeowner of 23 May 2023 that their view was that that, by corresponding with the appointed contractor in relation to the complaints received, they had complied with the requirements of Section 6.9 of the 2012 Code.

First Case Management Discussion

12. On 16 October 2023, the Tribunal advised the Parties of the date of a Case Management Discussion, which was held by means of a telephone conference call on the morning of 9 January 2024. The homeowner was present. The property factors were represented by Mr Alastair Leitch, their Associate Factoring Director.
13. The Ordinary Member of the Tribunal went through with the Parties a timeline from April 2021 to October 2022. He expressed concern that the photographs included in the property factors' final response of 23 May 2023 to the homeowner did not contain any descriptions which would help the Tribunal to identify precisely which areas of the roof were shown. The Parties were able to assist in this process, but the Tribunal noted that there were no photographs showing the work done in October 2022.
14. The homeowner told the Tribunal that, following the work in April 2021, he reported on 29 May that the problem was not fixed. The contractors reattended and assessed that it was a secondary leak, unrelated to the work they had already carried out. Due to the presence of nesting seagulls, the additional repair, namely gutter cleaning costing £360, could not be done until August. The homeowner reported a further leak in December 2021 and the contractors attended again and cleared the skew. The homeowner expressed the view at the time that this was not sufficient. More work was carried out in June 2022 to replace the lead in the skew. The homeowner reported on 25 July 2022 that it was leaking again and seemed a little worse than previously. Finally, in October 2022, the contractors came out again and reported to him that the problem lay with the gutter. As a result, the homeowner's insurers rejected his claim, as it was deemed to be due to a lack of building maintenance. The major work carried out in June 2022 did not solve the problem. The contractors came out again in early August, purportedly to do a full roof survey, but they did not spend much time on the roof, and the homeowner reported back to the property factors that he was not confident that they would fix the problem. He went on holiday and when he returned on 13 August, he found mould on the wall. He asked the property factors to confirm what work had been done. On 2 September, they responded that the contractors had carried out tile and slate repairs and had cleared the skew valley. The homeowner replied on 4 September that, as the lead in the skew had just been replaced, it was unlikely that skew cleaning would be sufficient. On 12 September, the property factors told him that they were going to carry out temporary repairs, to allow a full survey to be done later that week.
15. In early October 2022, the contractors came out with a cherry-picker and stripped back the roof and found it was a problem with the gutter, which they fixed. They suggested further gutter work be done to fix the problem long-term.
16. The homeowner told the Tribunal that, with reference to the property factors' suggestion of a detailed roof survey in May/June 2023, this was following his complaint and there had been no real context around why it was being offered.

17. Mr Leitch told the Tribunal that the property factors instruct contractors whenever water ingress is reported to them. Repairs in this case had been carried out, but, by default, the contractors had stabilised the incorrect part of the roof. With a number of jobs being carried out over an extended period, they had suggested a roof survey. They accepted that it would have been better if it had been instructed at the outset, as the misdiagnosis might have been avoided.
18. The homeowner stated that the contractors' Invoice when they went back after the work in April 2021 was unsuccessful had referred to a "secondary leak" several metres away, but, from the photographs, that was clearly incorrect. This should have been picked up by the property factors. The homeowner's complaint was that the property factors paid the first Invoice on 9 June 2021, when they knew that he had reported on 29 May that the roof was still leaking, and that the property factors had failed to pick up on the second repair which, although described as a secondary leak, was carried out in the same area as the original work. He told the Tribunal that plasterers had taken down plaster in his Property. This enabled them to see the roof beams and they found evidence of dry rot, which was dealt with by Alliance Preservation.
19. Mr Leitch said that the property factors have a process to check when Invoices come in that the owners are happy with the work that has been done. He accepted that it appeared this had not happened in the present case. He was very keen to interrogate the process of what he was specifically told and why Northwest Roofing's reference to a "secondary leak" was not questioned at the time.
20. The Tribunal told the Parties that it would be necessary for the Members to have sight of the timber specialists' report, specification and estimate and also the correspondence between the property factors and Northwest Roofing, including all Invoices and estimates. The Tribunal would also wish to see any photographs taken between June and October. Accordingly, it would be necessary to continue consideration of the applications to a later date and, in the meantime, for the Tribunal to issue Directions to the Parties.
21. By Direction dated 19 February 2024, the property factors were required to provide copies of the timber specialists' report, specification and estimate obtained by them and also the correspondence between the property factors and Northwest Roofing relating to the roof of the Property, including all Invoices and estimates, together with any photographs taken between June and October 2022.
22. On 15 March 2024, the property factors provided further documentation to the Tribunal in compliance with the Direction. It comprised copies of a Report and Quote from Alliance Timber & Damp Specialists dated 27 February, an Additional Report and Quote from them dated 5 April 2023, an email of 10 March 2023 from them to the property factors regarding an adjustment to the quotes, an Invoice from them dated, together with their Certificate of Guarantee, emails between the property factors and Northwest Roofing,

various Invoices from 13 November 2020 to 1 October 2023 and photographs dated 6 June 2022, provided by Northwest Roofing.

Second Case Management Discussion

23. A second Case Management Discussion was held by means of a telephone conference call on the morning of 25 April 2024. The homeowner was in attendance and the property factors were again represented by Mr Leitch.
24. The Tribunal began by summarising the position reached at the first Case Management Discussion and reviewing with the Parties the documentation received following the Tribunal's Direction of 13 February 2024, analysing the various Invoices relating to the roof repairs and dry rot work.
25. In relation to the work carried out in May 2021, the homeowner told the Tribunal that he had asked the property factors why the issue had not been picked up when the earlier work was done in April. He was told that the property factors had been advised by the contractors that it was in a different location, "several metres away", but the photographs showed that it was in the same area as that of the original repair. He told the Tribunal that he had complained to the property factors on 29 May 2021. The leak manifested itself again in December 2021, this time in the flat beneath him, so had penetrated through the Property to that flat. That had resulted in the additional work that was carried out in June 2022 and the homeowner accepted that between then and October 2022, the water ingress appeared to have been addressed satisfactorily. He did not have to pay for the work that was done during that period by Northwest Roofing, who attended the Property on several occasions.
26. By the time the work was completed in October 2022, the homeowner had an issue of mould on a wall in the Property and he had moved out temporarily. He had been promised a written report by the property factors but this had never been produced.
27. In October or November 2022, the homeowner was having the necessary replastering done in the Property. His contractors discovered dry rot. Alliance Timber & Damp Specialists Limited provided a report, specification and estimate on 27 February 2023. This resulted in remedial works. Originally these were to cost the homeowner £3,190 plus VAT, subsequently amended to £2550.00 plus VAT and a further 1/12th share of £1,740 plus VAT for the proportion that was communal. When the work started, Alliance found further dry rot, which took the total cost to £7,753.20 and increased the homeowner's share by £278 plus 1/12th of £590.
28. The Tribunal referred the Parties to the Invoice for £2,376 from Northwest Roofing of 16 June 2022. The property factors confirmed that they had paid this Invoice without checking with the homeowner whether he was satisfied that the work done had fixed the ingress of water to the Property.
29. The Tribunal told the homeowner that the fact that the roofing work had been done unsatisfactorily did not necessarily mean that the property factors bore

the responsibility. It would be for the Tribunal to consider the terms of the Written Statement of Services (“WSS”) and consider what the role of the property factors should have been in the process. The property factors told the Tribunal that they do not supervise work carried out by contractors. They have responsibility for employing contractors on their Approved Contractors Network, who are suitably qualified. Their relationship with contractors on their list is that, if a homeowner complains that work is not done satisfactorily, the contractors will fix it at no expense. The property factors accepted that Northwest Roofing had to go back to the Property on a number of occasions, but they had told the property factors that their initial work was carried out in certain areas of the roof, but it was later diagnosed as a problem with the gutters, which Northwest Roofing have fixed. On each occasion that it had been brought to their attention, they had instructed them to go out again. The property factors felt that they had fulfilled their obligations regarding the contractors they employed.

30. In closing remarks, the homeowner told the Tribunal that he could only go on what is stated in the WSS regarding investigating reports of inadequate service. After the work in May 2021, he had reported that the roof was still leaking. The property factors had then said that there was a second source of the leak, several metres away, but the photographs provided later showed that it was in the same general area, and the property factors should have picked up on this. Instead of liaising with the contractors to investigate his complaint about inadequate work, they simply paid the Invoice. There was no evidence of any investigation, when it was clear that the contractors were not doing a good job. The property factors had access to the photographs. The homeowner did not have access at that time.

31. Mr Leitch concluded by saying that he totally sympathised with the situation in which the homeowner had found himself. He accepted that the contractors probably did not identify the problem in the early stages. He added that the property factors now operate slightly differently in practice, in that, as they do not oversee the work of contractors, they will check by means of a telephone call to affected owners that work appears to have been completed satisfactorily before paying Invoices.

Findings of Fact

- i. The homeowner is the proprietor of the property, which is a top flat, entering off the common stair of a tenement, erected circa 1902.
- ii. The property factors, in the course of their business, manage the common parts of the tenement of which the Property forms part. The property factors, therefore, fall within the definition of “property factor” set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 (“the Act”).
- iii. The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.

- iv. The property factors first registered on 1 December 2012. Their present registration is dated 2 April 2019.
- v. The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- vi. The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber on 11 September 2023, under Section 17(1) of the Act.
- vii. Northwest Roofing completed works on the roof on 12 February 2021. Their Invoice for £930 (inclusive of VAT) was submitted the same day.
- viii. Northwest Roofing completed works on the roof on 16 April 2021. Their Invoice for £1,092 (inclusive of VAT) was submitted the following day.
- ix. Northwest Roofing completed further works on the roof on 5 May 2021. Their Invoice for £1,920 (inclusive of VAT) was submitted the following day and was paid on 9 June 2021. The property factors did not contact the homeowner before paying the Invoice.
- x. Northwest Roofing completed works to clear gutters and replace 8 roof tiles on 19 August 2021. Their Invoice for £360 (inclusive of VAT) was submitted the following day.
- xi. Northwest Roofing completed works to replace 25 roof tiles on 25 October 2021 and their invoice for £594 (inclusive of VAT) was submitted the following day.
- xii. Northwest Roofing submitted further invoices dated 6 December 2021 and 14 February 2022 in respect of clearing vegetation at the “valley and gutter” and the “annual gutter clean”.
- xiii. Northwest Roofing completed further works to the roof on 16 June 2022. Their Invoice for £2,376 (inclusive of VAT) was submitted the following day. The property factors did not contact the homeowner before paying the Invoice.
- xiv. On 26 July 2022, the property factors advised Northwest Roofing that the homeowner had contacted them to say that, despite the work carried out in June 2022, the roof was still leaking in exactly the same place. They said that they trusted the contractors would return to the Property and repair at no cost to the homeowners.
- xv. The homeowner moved out of the Property on 13 August 2022, due to issues with the plaster and with mould on the bedroom ceiling.
- xvi. An outbreak of dry rot was discovered when the homeowner had internal plaster reinstatement work carried out following successful completion of the roof works.

Reasons for Decision

32. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it sufficient information and documentation to decide the application without a Hearing. The Parties also agreed at the Second Case Management Discussion that they were content for the Tribunal to determine the applications without a full evidential Hearing.
33. Section 6.9 of the 2012 Code states that property factors “must pursue the contractor or supplier to remedy the defects in any inadequate work or service.”
34. Section 6.12 of the 2021 Code states “If requested by homeowners, a property factor must continue to liaise with third parties I.e. contractors, within the limits of their “authority to act” in order to remedy the defects in any inadequate works or service that they have organised on behalf of homeowners.”
35. The only material difference between the two Sections is that, under the 2012 Code, property factors must “pursue” contractors, whereas in the 2021 Code, their obligation is to “continue to liaise” with them. Noting this difference the Tribunal considered the complaints under the two Sections together.
- xvii. The Tribunal noted that the property factors had said in their written representations that upon completion of a number of repairs to the Property by Northwest Roofing, they were notified by the homeowner on a number of occasions that water ingress issued remained. On each occasion, this was relayed to the contractors, who attended and carried out further work. The Tribunal’s view was that it was evident from the number of re-visits by the contractors that the property factors had extensive communication with the contractors in relation to the complaints received. The Tribunal had also seen an email of 22 July 2022, advising Northwest Roofing that the homeowner had contacted them to say that, despite the work carried out in June 2022, the roof was still leaking in exactly the same place. The property factors said in that email that they trusted the contractors would return to the Property and repair at no cost to the homeowners.
36. The Tribunal accepted that the property factors did not have a duty, nor did they have the requisite technical knowledge, to oversee or sign off the work of Northwest Roofing. Their WSS does not state or imply that they will oversee works, but it does state that their core service includes investigating complaints of inadequate work from contractors and pursuing them to remedy these, which mirrors their obligations under the two Sections of the Codes. The Tribunal was satisfied that the property factors had both “pursued” and “liaised with” Northwest Roofing when the homeowner complained that work done had not remedied the problem.
37. The Tribunal considered various photographs of the roof, taken in April and August 2021 and in June 2022. The 2021 photographs did not indicate that any

exposure investigation or work had been carried out in the immediate area of the pitched dormer roof where dry rot was later discovered, and it was not obvious to the untrained eye that the June 2022 photographs showed rot in the battens or a hole in the sarking board of the pitched dormer roof, such as would alert the property factors to the possibility of a problem beneath. The Tribunal accepted that it was something that Northwest Roofing, who must have seen it, should have commented on, and that, had they done so, the dry rot problem might have been identified sooner, but the Tribunal was not persuaded that responsibility lay with the property factors. The Tribunal was, in any event, unable to hold that the dry rot issue was a direct consequence of the failure of the contractors to identify and repair the roof issues correctly. It was impossible for the Tribunal to say whether or not the dry rot problem pre-dated the roof work, and it appears that the evidence lay behind the plaster of the pitched dormer, so would not have been visible to someone inspecting the roof. It had only been discovered when the homeowner's contractor hacked off further sections of internal plaster as a preliminary to carrying out reinstatement of plaster affected by water penetration. It would be speculation on the part of the Tribunal to make a finding that the water penetration which had been dealt with in 2021 and 2022 had caused the dry rot outbreak. The Tribunal noted that the dry rot had, over time, spread behind the plaster and had affected the floor joists of the homeowner's property, impacting on the flat below which is in separate ownership.

38. The Tribunal decided that, having considered all the evidence before it, the homeowner had failed to establish that the property factors had failed to comply with Section 6.9 of the 2012 Code or Section 6.12 of the 2021 Code. Accordingly, his complaints under these Sections were not upheld.
39. The homeowner also contended that the property factors had failed to carry out the Property Factor's Duties. His principal complaint was that they had paid the Northwest Roofing invoices, particularly that of 6 May 2021 without having made any effort to check with him whether the work appeared to have stopped the water penetration.
40. The Tribunal noted the terms of the WSS, in which the core service is said to include "Checking contractor and service supplier invoices when rendered" The view of the Tribunal was that, where instructions to carry out works result from a homeowner raising an issue which affects his or her property directly, "checking" the contractor's invoice should include contacting the homeowner to ask whether the work appears to have been carried out satisfactorily. In the present case, the homeowner could not have been expected to go on the roof and inspect the work for himself, but he should at least have been asked whether the water penetration had stopped, even if payment of the invoice had to be delayed until the next fall of rain enabled the homeowner to confirm the position. In relation to the invoices in the present case of 6 May 2021 and 16 June 2022, the property factors paid them without any recourse to the homeowner and the view of the Tribunal was that, in that respect, the property factors had failed to carry out the Property Factor's Duties.

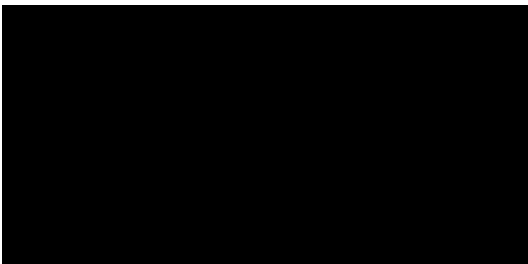
Property Factor Enforcement Order

41. The Tribunal was unable to find that the homeowner had suffered any actual loss as a result of the property factors' failure to check with him before paying the invoice. When he complained that the work had not resolved the problem, the property factors reported it to the contractors, who returned on a number of occasions. The fact that it took them so long to correctly identify and rectify the cause of the water penetration was not the fault of the property factors. The Tribunal recognised, however, that the homeowner felt badly let down by the failure of the property factors to check with him rather than being content simply to pay the invoices. As he had said in his evidence, the homeowner's expectation was that the property factors, to whom the authority was delegated, would have exercised the same level of prudence that he would have shown had he instructed the work himself, namely to pay the invoices only when he was content that the work appeared to have been successful. The Tribunal proposes, therefore, to make a Property Factor Enforcement Order in terms of the Section 19(2)(a) Notice attached to this Decision, for compensation for inconvenience and distress and that a reasonable and fair sum to order the property factors to pay would be £250.

42. The Tribunal's Decision was unanimous.

Right of Appeal

In terms of Section 46 of the Tribunal (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

25 April 2024