

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier tribunal for Scotland (Housing and Property Chamber)

STATEMENT OF DECISION: Property Factors (Scotland) Act 2011, section 19(1)(a)

Case Reference Number: FTS/HPC/PF/17/0406

The Property:

43 William Street, Hamilton, ML3 9AW

The Parties:-

Michele Tammaro, 4 Cossack Avenue, Hamilton, ML3 9DG

(“the Homeowner”)

and

Speirs Gumley Property Management, 194 Bath Street, Glasgow, G2 4LE

(“the Factors”)

Tribunal Members:

Adrian Stalker (Chairman) and Susan Napier (Ordinary Member)

Decision:

The First-tier tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”), having made such enquiries as it saw fit for the purposes of determining whether the Factors had complied with the Code of Conduct for Property Factors (“the Code”), determined that the Factors had not failed to comply with the Code.

Background

1. By an application to the Housing and Property Chamber dated 26 October 2017, the Homeowner sought a determination of whether the Factors had failed, under section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”), to comply with the Code. On 1 December 2017, a Convener having delegated powers under section 18A of the Act made a decision, under section 18(1)(a), to refer the application to a First-tier tribunal.

2. 43 William Street, Hamilton is one of 12 flats in a block which was constructed in 1998. The Factors were appointed by the developers to act as property managers at the block. The Homeowner moved into number 43 in March 2015. He sold the property in December 2017.
3. The sequence of events that gave rise to this application began on 16 August 2017. On that day, the Factors received intimation from the owner occupier of 27 William Street, Mrs McGhee, that there was water staining at the ceiling of a cupboard in her flat. Number 27 is on the ground floor of the block. It is directly below number 35, which is directly below number 43.
4. On 16 August 2017, the Factors' Rachael Malarkey contacted the Homeowner by email. Ms Malarkey is Repairs Co-ordinator at Speirs Gumley. The email advised the Homeowner of "a possible leak coming from your property into the property directly below" and asked, "Can you please contact our office urgently so we can arrange to have a plumber attend to investigate this." The Homeowner was away on holiday. However, he received the email and spoke to Ms Malarkey that day, by telephone. He was advised that the Factors would arrange for one of their contractors to have a plumber attend the property.
5. On 18 August (a Friday), Mrs McGhee called the Factors to report that water was now dripping from the ceiling. The Factors duly arranged for a plumber from CCM (City Centre Maintenance Ltd) to attend the block that afternoon. The plumber was able to inspect number 27 and number 35. He ascertained that there was leaking toilet cistern at number 35. It was not originally expected that the Homeowner would have returned from holiday by then. However, as matters turned out, he came back to the property when the plumber from CCM was there. He was therefore able to allow access to number 43 to the plumber on that day. The plumber was unable to definitively establish the source of the water damage to Mrs McGhee's ceiling.
6. The plumber returned on 23 August. On that day, he was able to confirm, following further investigation, that there was a small leak to the waste pipe under the bath at number 43 ("the leaking pipe"). The Homeowner was informed that, as this pipe did not form part of the common parts of the block, he would have to pay for the repair himself. He instructed the repair, and it was carried out on that day. The Homeowner was subsequently invoiced by CCM in December 2017 in respect of the repair, for a total of sum of £252 (being £210 plus VAT).
7. The Homeowner made a complaint to the Factors, by email dated 30 August 2017. That email complained, in particular, that the Homeowner had been given misleading information by Ms Malarkey, to the effect that the repair to the leaking pipe would be treated as a "common" repair, rather than a "private" repair, (i.e.

the owners in common would pay for the repair, rather than the Homeowner alone). He also complained that the repair was subject to unreasonable delay, given the nature of the problem. Correspondence with the Factors ensued, in the course of which the Homeowner made further complaints. As those complaints were not resolved to his satisfaction, he then made an application to the Tribunal, contending that the Factors had failed to comply with certain parts of the Code, as set out below.

Hearing

8. A hearing took place in respect of the application on 31 January 2018, at Brandon Gate, Leechlea Road, Hamilton. The Homeowner, Mr Tammaro, was present. The Factors were represented by Tom McKie, one of their directors. Also present were Ms Malarkey and Ross Moffatt, one of the Factors' Senior Property Inspectors.
9. On 11 January 2018, the Factors lodged a bundle of productions containing 20 numbered documents. Most of the productions were copies of email correspondence between the parties. Of the documents already mentioned: production 1 is the Homeowner's email of 30 August, and production 15 is the CCM invoice sent to Mr Tammaro. At the hearing the Tribunal took the parties through parts of the correspondence and the various sections of the Code on which the Homeowner relied, taking their evidence and submissions on each of those sections.

Section 2.1 of the Code: Misleading Information

10. Section 2.1 of the Code states: "You must not provide information which is misleading or false".
11. Mr Tammaro gave evidence that he had spoken by telephone to Ms Malarkey on 16, 21 and 22 August. On each of those occasions, he said, he had asked her whether the repair of the leaking pipe would be treated as a common repair. She had confirmed, on each occasion, that it would be so treated. Therefore, he was aggrieved that, on 23 August, before the repair was carried out, he was advised that the pipe was not part of the "common parts" of the building, and that he would require to pay for the repair himself. That evidence was consistent with the terms of Mr Tammaro's email of 30 August. Mr Tammaro went on to say that he was very concerned to make sure of his potential exposure to costs for the repair: he was due to be married, and saving for the wedding. That was why he had sought confirmation of the position from Ms Malarkey.
12. The Factors' position is set out in the first page of Mr McKie's email to Mr Tammaro of 19 September (production 4), in particular under the heading:

“Common/Private Responsibility”. There it is said that, on each of the occasions she had spoken to Mr Tammaro, Ms Malarkey had advised him that the cost of calling out the plumber and locating the source of the leak would be common, but the cost of the repair may be private, if source of the leak was private, rather than common, property. When these discussions took place Ms Malarkey was not aware of the source of the water damage at number 27, and would not have been in a position to say whether all necessary repair works would be to the common parts.

13. Ms Malarkey then gave evidence herself as to the content of these discussions. She has worked as a Repairs Co-ordinator at Speirs Gumley since April 2016. Through her training and experience, she is aware of the distinction between “common” and “private” repairs. She is also aware that the Factors treat the investigation and identification of the source of leaks as a common cost, as distinct from the cost of the repair itself, which might be “private” or “common”. She is used to applying these distinctions in practice, as it is common for homeowners to ask who would pay for the cost of repairs.
14. Ms Malarkey agreed that she had spoken to Mr Tammaro on 16, 21 and 22 August. It was her clear evidence that he did not ask who would pay for the repairs until the discussion on 22 August. She then advised him that this would depend on the nature of the repairs, and whether they were to common parts. She accepted that she may have advised him that the cost of calling out the plumber and identifying the source of the leak were treated by the Factors as common costs, as distinct from the repair itself. She could not definitely recall.
15. The Tribunal accepted Ms Malarkey’s evidence. At the time when the discussions took place, she was not aware of the source of the leak, or whether it would require a repair to common parts, or to property owned by Mr Tammaro alone. Given her position, the Tribunal considered it inherently unlikely that she would have assured Mr Tammaro that the repair in question would be a common charge. She was aware of the distinction between “common” and “private” repairs. She had no reason to mislead Mr Tammaro. That being so, on Mr Tammaro’s account of events, her behaviour would be inexplicable.
16. The Tribunal considered that Mr Tammaro may have misunderstood the position, on having been advised that the cost of calling out the plumber and identifying the source of the leak was to be common. Or, there may have been an element of wishful thinking on his part, in taking from his discussions with Ms Malarkey that the repairs would be treated as common.
17. For that reason, the Tribunal concluded that Mr Tammaro had not been given misleading or false information. It therefore did not uphold the complaint under section 2.1 of the Code.

18. The Tribunal also noted that, during the course of evidence, Mr Tammaro was constrained to accept that the repair to the leaking pipe under his bath was necessary, lest the leak become worse. He also had to accept that this repair was not to the “common parts” as defined in clause (third) of the Deed of Conditions (production 20). Therefore, he was clearly liable to pay for the repair, which was necessary. That was the case, irrespective of any understanding he might have had, to the contrary.
19. The Tribunal also noted that Ms Malarkey’s evidence gave a somewhat different account from that stated in the Mr McKie’s email of 19 September (production 4), which had Ms Malarkey advising Mr Tammaro of the correct position regarding repair costs, in all three of their conversations. On her evidence, the issue was only raised in the last conversation. The Tribunal prefers Ms Malarkey’s account, given her direct involvement in the conversations.
20. It seems to the Tribunal that the position adopted by the Factors as regards costs is appropriate, in cases where the source of leak has to be identified: i.e. the cost of calling out the plumber and identifying the source is common, but the repair cost may be private or common. The Tribunal invites the Factors to consider whether it would desirable to adopt a policy of clearly explaining this to the Homeowner, at the point of first contact, when a leak is reported. In this case, that would have entailed the costs position being explained to Mr Tammaro during his first conversation with Ms Malarkey on 16 August, rather than waiting until the matter was raised during their last conversation.

Code of Conduct: sections 1.1a (B.c.), and 6.1 - delay in carrying out the repair

21. The Factors’ Statement of Services (production 19) states, under the heading, “Repairs”:

We expect urgent repairs to be attended to within 8 hours of notification. We expect routine jobbing repairs to be attended to within 48 hours of notification...There may be circumstances outwith our control when these timescales cannot be achieved i.e. severe weather, access restrictions, trade holidays, etc.

22. Mr Tammaro complained that the delay of 5 days between the plumber’s inspection on 18 August, and the repair being carried out on 23 August, was unacceptable. This point is developed, in particular, in his email to the Factors of 10 October 2017 (production 6). There he characterises the repair as “an emergency repair”. At the hearing, he argued that it was an urgent repair which required attendance within 8 hours, as indicated in the Factors’ Statement of Services. He also complained that, contrary to section 6.1 of the Code, he had

not been kept informed of the progress of work, including estimated timescales for completion. He had had to phone Ms Malarkey on 21 and 22 August to ascertain when the plumber was going to come again.

23. Mr McKie disagreed. He maintained that the repair was not urgent. The Factors had arranged for a plumber to attend, on the day that Mrs McGhee had advised that there was a leak. There was no suggestion that there was any danger to occupants.
24. Mr Tammaro accepted that there was no additional damage caused, or deterioration in the situation, between 18 and 23 August. He also indicated that he would not have been in a position to allow access on 22 August. Leaving out that date, the repair was, in effect, carried out two working days after 18 August.
25. Mr McKie also maintained that the arrangement for the plumber to return on 23 August was one that the plumber made directly with Mr Tammaro. Accordingly, Mr Tammaro was aware, from 18 August, of the date on which the plumber would return.
26. The Tribunal accepts Mr McKie's view that the repair in this case was not of the "urgent" type, that might require to be addressed within 8 hours. There was no suggestion of imminent danger to residents, or significant damage to the property. There was no indication that any of the residents in 27, 35 or 43 objected to the repair being left till the week beginning 21 August. In the Tribunal's view, the repair was effected within a reasonable period of time, in the circumstances. The Factors arranged for attendance by a plumber on the same day that Mrs McGhee reported that the patch of water damage in her cupboard had begun to drip. An arrangement was made for the plumber to return within a few working days. That seemed appropriate to the Tribunal, in the circumstances.
27. The Tribunal also considered that, for the purposes of section 6.1 of the Code, Mr Tammaro had sufficient information about the progress of the work, and the timescales for completion, even on his own account of events. He knew on 18 August that the plumber was shortly going to return to identify the source of the leak and carry out the necessary repair. It was simply a matter of identifying when, in the following week, that was going to happen. Any uncertainty as to the exact time and date of the plumber's return did not, in the view of the Tribunal, amount to a breach of section 6.1 of the Code.
28. Accordingly, the Tribunal did not uphold this complaint.

Code of Conduct: section 2.5, failure to follow Complaints Procedure

29. Section 2.5 of the Code states:

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 as fully as possible, and keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (section 1 refers).

30. The Homeowner's complaint was made by email on 30 August 2017 (production 1). He received an email response from the Factors' Ian Friel on 31 August (production 2), indicating that he would be contacted by Mr Friel's colleague Janine Wright, in relation to the complaint. Ms Wright then emailed the Homeowner, also on 31 August (production 3), confirming that the complaint had been passed to Tom McKie for investigation,

...and a response will be received in accordance with our Complaints Procedure, which is that we will reply within 7 working days confirming a timescale for resolution. We will investigate your complaint and endeavour, where we can, to resolve it within 28 days and if we cannot we will keep you updated.

This statement was in accordance with the Complaints Procedure set out in the Statement of Services.

31. The next contact was Mr McKie's email to the Homeowner of 19 September (production 4). This gives a full and detailed response to the points made in Mr Tammaro's complaint, 20 days after it was made. Mr Tammaro responded by email on 10 October (production 6), to which Mr Friel responded on 13 October (production 7). That last email stated that the Factors' complaints procedure was completed, and that any further complaint must be made to the Tribunal.

32. Mr Tammaro complained that the Factors had failed to comply with their own procedure, in that they had failed to provide him with a timescale for resolution of the complaint, within 7 working days (i.e. by 8 September). Mr McKie conceded that this had not been done. Mr Tammaro accepted that he had not made enquiry of the Factors, between 8 September and 19 September, as to whether he would be receiving the timescale. He did not suggest that he had suffered any particular prejudice or loss, as a result of not having received the timescale. At one point in his evidence, he complained that the overall completion of the procedure had taken from 30 August to 13 October. It was pointed out to him that this was, in part, due to his having taken three weeks to respond to Mr McKie's email of 19 September.

33. In the Tribunal's view, Mr Tammaro's complaint was answered reasonably promptly, and in a way that provided him with a full and detailed response to the

various points made in his emails. On that basis, it did not uphold the Homeowner's complaint under this heading.

34. Whilst section 2.5 of the Code requires the Factor to confirm response times in its Statement of Services, it does not provide that a failure to comply with stated response times is, in itself, a breach of the Code. Certainly, a failure to comply with those response times may be indicative of a failure under section 2.5, but it does not necessarily demonstrate such a failure.

Code of Conduct section 6.9: Inadequate Service

35. Part 6 of the Code is concerned with the manner in which the Factors carry out their repair and maintenance duties, under their contractual arrangements with Homeowners. Section 6.9 states:

You must pursue the contractor...to remedy the defects in any inadequate work or service provided...

36. Mr Tammaro's complaint under this section founded upon the section of the Statement of Services under the heading "Approved Contractors/Suppliers", which states:

We work with an Approved List of Contractors/Suppliers. These independent companies must maintain a high level of service to comply with our criteria and to remain on our Approved List. As we cannot check all repairs, we rely on feedback from our clients to monitor their performance. Our criteria includes an assessment of competence, a requirement to provide documents such as public liability and, where applicable, Health & Safety statements. Our criteria also states that contractors should ensure adequate supervision during the works and that a final inspection of the work carried out is undertaken by a suitably qualified person.

37. Mr Tammaro complained that the repair carried out by the plumber from CCM was not supervised by any other person; nor was there a final inspection of the work by a suitably qualified person. He raised this issue in his email of 10 October (production 6). Mr Friel responded on 13 October (production 7).

38. Notably, Mr Tammaro did not suggest that there was anything wrong with the work carried out by the plumber from CCM.

39. It was not at all clear that this complaint was specified in the Homeowner's application to the Tribunal, or in his subsequent letter to the Factors dated 10 November 2017. In that letter, the complaint under section 6.9 of the Code

simply states “Not instructing contractor to remedy non-compliance with Written Statement on work and service provided”.

40. In any event, the Tribunal considered that the complaint was misconceived. Mr Tammaro’s email of 10 October states: “Only 1 individual attended the work, thus would consider this to be another breach.” It is clear that “the work” to which he refers is the repair to the waste pipe under the bath at his flat: earlier he says: “I consented to the work being carried out at my property...” Therefore, “the work” in question was not to the common parts, and was, in effect, instructed by Mr Tammaro, rather than by the Factors. Had Mr Tammaro considered that the work was in need of a “final inspection...by a suitably qualified person”, he would have to have instructed that inspection himself. It could not have been done by the Factors. Therefore, section 6.9 of the Code did not apply; nor did the quoted passage from the Factors’ statement of services. Even if had applied, the Tribunal doubted whether the point raised by Mr Tammaro amounted to a complaint of an “inadequate service” for the purposes of section 6.9, given that there was no complaint that the repair was defective.

41. Accordingly, the Tribunal did not uphold the Homeowner’s complaint under this heading.

42. It appears to the Tribunal that, in stating: “...contractors should ensure adequate supervision during the works and that a final inspection of the work carried out is undertaken by a suitably qualified person...” the Factors may be making a rod for their own back. To insist on supervision of the work, and a final inspection, may not be appropriate in all cases, particularly in the case of minor repairs. That may have the effect of unnecessarily increasing the cost of repairs.

Code of Conduct: section 6.8

43. Reference was made to this section of the Code in the Homeowner’s application. However, Mr Tammaro indicated that he did not wish to pursue the complaint, and accordingly it was not upheld by the Tribunal

Disposal under section 19 of the Act, appeal, etc

44. For the reasons stated, the Tribunal reached the conclusion that it could not find, in this case, that the Factors had failed to comply with the Code, or their duties as property factors.

45. The Tribunal’s decision was unanimous.

46. **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.

47. Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

A Stalker

Signed

Date 12 February 2018

Chairman