

Housing and Property Chamber

First-tier Tribunal for Scotland



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

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 (Procedure) Regulations 2016
Chamber Ref: HOHP/PF/17/0137

Flat 4, 50, Cecil Street, Glasgow, G12 8RJ ("The property")

The Parties:-

Mrs. Patricia Grant residing at Albannach, 30 Linden Park Road, Milnathort, KY13 9XX ("the homeowner") and

James Gibb Residential Factors, having a place of business at 65, Greendyke Street, Glasgow G1 5PX ("The factor")

Tribunal Members

Karen Moore (Legal Member)

Colin Campbell (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") determined that (i) the factor had not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct ("the Code") and (ii) had failed to comply with the property factor duties in terms of Section 17(5) of the Act.

Background

1. By application paperwork comprising documents received by the First-tier Tribunal for Scotland (Housing and Property Chamber) between 10 April 2017 and 11 July 2017 ("the Application") the homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the factor had failed to comply with Section 1 at 1.1a, Section 2 at 2.1 and Sections 6.2 and 6.9 of the Property Factor Code of Conduct ("the Code") and had failed to comply with the property factor duties in terms of Section 17(5) of the Act.

2. The Application comprised the following documents-
 - i) Application form dated 10 April 2017;
 - ii) Two letters from the homeowner to the factor dated 1 July 2017;
 - iii) Copy correspondence (email and letter) between the homeowner and the factor;
and
 - iv) The factor's Written Statement of Services.
3. Subsequent to lodging the Application, the homeowner submitted a video showing water ingress to the property.

Hearing

4. A hearing took place at 10.30 on 18 October 2017 at Wellington House, 134-136 Wellington Street, Glasgow G2 2XL. The homeowner was present. The factor was represented by Ms Deborah Rummens, one of its Directors, and by Mr Chris Vallance, one of its employees.
5. The tribunal first established that there was no dispute between the parties that that there had been substantial and repeated water ingress to the property caused by a valley gutter which was prone to blockages and that the matters in dispute between the parties were the way in which the factor dealt with gutter cleaning and the way in which the factor dealt with the homeowner's complaints. The tribunal also established with the homeowner that reference to paragraph 4.1 where it appears at Section 7 of her application form dated 10 April 2017 is reference to paragraph 4.1 of the factor's Written Statement of Services and not reference to paragraph 4.1 of the Code.
6. The tribunal then heard evidence from the parties in respect of the matters raised in the Application.
7. In respect of the gutter cleaning complaint, the homeowner explained to the tribunal that there had been ongoing problems with water ingress caused by the valley gutter at the property and that she had been assured by the factor's employees that gutter cleaning would be carried out annually. The homeowner referred to the tribunal to an email dated 19 July 2016 and a letter dated 31 January 2017 from the factor to her confirming this. The homeowner advised the tribunal that the gutter cleaning had not been carried out as promised and so the assurances given on behalf of the factor breached Section 2.1 of the Code. The homeowner stated that she knew that the gutter cleaning had not been carried out as access for the work can only be gained through the skylight within the property and the homeowner knew that no contractor had gained access through

the property. The homeowner further explained that on 13 December 2016, she had contacted Brenda Adamson, an employee of the factor, by phone to ask that the gutters be cleaned but that the work was not carried out and that this had caused significant water ingress to the property on 31 December 2016. In respect of that specific water ingress issue, the homeowner advised the tribunal that the factor did not have an out of hours emergency service in place as narrated in its Written Statement of Services at paragraph 4.3.1 and that it was by luck that, when telephoning the factor, she had got through to Robb Reinstatement, the factor's contractors. The homeowner asserted that this failure to have an out of hours emergency service breached Section 6.2 of the Code. The homeowner advised the tribunal that her complaint in respect of a breach of Section 6.9 of the Code related to a matter not notified to the factor and so withdrew this part of her complaint.

8. In response to the gutter cleaning complaint, Ms. Rummens advised the tribunal that there was no agreement with the homeowner and her co-proprietors to carry out works beyond the terms of the title deeds for the block of which the property forms part and that the monetary extent of the factors' authority is £350.00. Ms. Rummens explained, therefore, that the scope of the services provided by the factor was limited to reactive responses to common repair work and did not include preventative or regular maintenance work. Ms. Rummens referred the tribunal to paragraph 4.1 of the factor's Written Statement of Services which states:- *"Roof inspections, gutter cleaning etc will be provided, where applicable, on an as required basis"*. Ms. Rummens produced at the Hearing a Development Schedule dated December 2016 which relates to the property and which states:- *"To be read in conjunction with your factor's Written Statement of Services"* and *"Section 05(WSS 4.1 – Routine Maintenance – Cleaning Schedule) See Appendix II of this document."* Ms. Rummens accepted when questioned by the tribunal that "Appendix II" was amiss from the Development Schedule and that the homeowner had not been given a copy of the Development Schedule. Ms. Rummens' position was that the onus was on the homeowner to seek these documents out from the factor's website and the onus was on the homeowner to be aware of the terms of the title deeds in respect of factoring and common repairs. Ms. Rummens advised the tribunal further that the factor's employees who had assured by the homeowner employees that gutter cleaning would be carried out annually should not have done so as this was not within the scope of the factor's services and that they had no authority to make this commitment, albeit that the letter of 27 February 2017 had been written by one of the factor's Directors. Notwithstanding this response by Ms. Rummens, she did accept that, as this service had been offered on behalf of the factor, it should be honoured. With regard to the roof inspections, Ms. Rummens advised the tribunal that these are carried out twice yearly and are a visual inspection from street level and so the valley gutter is not inspected. With regard to the out of hours emergency service, Ms Rummens explained that the reason the homeowner got through by

telephone to Robb Reinstatement, was that the out of hours automated process as mentioned in the Written Statement of Services was in place.

9. In respect of complaint handling, the homeowner referred the tribunal to paragraph 4.5.1 of the factor's Written Statement of Services which states: - *"James Gibb residential factors will arrange for the works to be instructed within seven days of the request, if for any reason, instruction cannot be made within this time period, the homeowner ...will be notified"*. The homeowner advised the tribunal that following her telephone call to Brenda Adamson on 13 December 2016, requesting that the gutters be cleaned, the work was not carried out and she was not notified by the factor. The homeowner explained that she complained of this to the factor by email on 2 January 2017, and, by letter from the factor dated 31 January 2017 was advised that roofing contractors, AGM Roofing, had been instructed on 13 December 2016 *"to attend to gutter cleaning to the front and rear"*. The factor's letter noted that AGM Roofing had contacted the homeowner by phone to arrange access and had left a voicemail message to which the homeowner had not replied. The homeowner advised the tribunal that she had not received the voicemail message and so asked the factor to investigate further, escalating her complaint through the factor's complaint process. The homeowner's position is that the factor did not press AGM Roofing for evidence of the voicemail message and preferred AGM Roofing's statement to that of the homeowner. The homeowner referred the tribunal to paragraph 7.7 of the factor's Written Statement of Services which states: - *"..the complaints process is thorough and fair"* and submitted to the tribunal that the handling of her complaint did not meet these standards.
10. In response to the complaint handling complaint, Ms. Rummens advised the tribunal that the factor frequently used AGM Roofing and had no reason to doubt their word. Ms. Rummens further advised the tribunal that, in her opinion, she would have expected the homeowner to report back to the factor that work had not been carried out.
11. In respect of the effect which the water ingress and the factor's actions have had on her, the homeowner explained that there have been several insurance claims to repair and redecorate internal damage, all of which have incurred premium excess costs, that she had her husband have had to travel from their home some 45 miles from the property (which is occupied by her student daughters in term time) to deal with the water ingress emergencies and that all of this inconvenience and stress could be avoided by the factor arranging, as promised, routine cleaning of the valley gutter. The remedy which the homeowner sought was to be put back in the position as though none of these issues had occurred.
12. In response, Ms. Rummens advised the tribunal that the responsibility for the property lies with the homeowner who, although she resides some distance from

the property, does not employ a letting agent and so does not minimise the inconvenience caused by the water ingress. Ms. Rummens stressed to the tribunal that the scope of the factor's service is limited to reactive repairs and does not include preventative measures but that this scope could be extended if all of the co-owners in the block of which the property forms part agree. Ms. Rummens accepted that although her letter of 27 February 2017 to the homeowner undertook to contact all of the co-owners with a view to arranging a meeting to discuss preventative maintenance plan, a meeting had not yet been arranged.

Findings of the tribunal

13. The tribunal took into account the Application, the productions lodged by the factor at the Hearing and the submissions made at the Hearing. The tribunal did not take account of the video evidence as it post-dated the matters complained of in the Application. In any event, there was no dispute between the parties in respect of the water ingress and the damage to the property.
14. The tribunal found that the homeowner gave evidence in a straightforward and truthful manner and had no difficulty in believing her account of the events and the inconvenience and stress which she had suffered. The tribunal found that Ms. Rummens equally gave evidence in a truthful manner but that she sought to impose on the homeowner, unfairly in the opinion of the tribunal, responsibility for duties and obligations which fall to the factor. The tribunal did not accept Ms. Rummens' position that it was the responsibility of the homeowner to establish the scope of the factor's services as this is a clear duty of the factor in terms of the Act and the Code. The tribunal considered that it was most unfair and unreasonable for Ms. Rummens to imply that the homeowner should have been aware that the factor's employees had no authority to commit to annual gutter cleaning. The tribunal saw no relevance in the fact that the homeowner does not occupy the property or that she does not employ a letting agent. These facts have no bearing on the factor's statutory duties and do not diminish the standard of care which a professional factor should have to its homeowners.
15. With regard to the specific complaints, the tribunal considered Section 2.1 of the Code which states: -*"You must not provide information which is misleading or false."*
The homeowner stated that this related to the email dated 19 July 2016 and a letter dated 31 January 2017 from the factor to her confirming that annual gutter cleaning would be carried out and which was not carried out as promised. The tribunal found that, albeit there might have been no authority for a commitment to this level of service, there was nothing to suggest that the writers of this correspondence had acted in bad faith. In the tribunal's view the fact that the annual gutter cleaning had not been carried out resulted from poor management

in that the cleaning had not been scheduled rather than there being no intention to have it done and so the tribunal found that there had been no breach of Section 2.1 of the Code.

16. With regard to Section 6.2 of the Code which states:- *“If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs”*, the tribunal accepted the factor’s position that an automated procedure is in place and that the factor has a contact number for the homeowner and so the tribunal found that there had been no breach of Section 6.2 of the Code.
17. With regard to the property factor duties in terms of Section 17 of the Act, which at Section 17(5) states :- *“property factor's duties” means, in relation to a homeowner (a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner.”*, and at Section 17 (4) states:- *“References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.”*, the tribunal had regard to the way in which the factor conducted itself in complying with its Written Statement of Services.
18. The tribunal noted that paragraph 4.1 of the factor’s Written Statement of Services states:- *“Roof inspections, gutter cleaning etc will be provided, where applicable, on an as required basis”* and took the view that the only sensible and meaningful construction of the words *“where applicable”* in this sentence is that if there is a roof and if there are gutters, the roof will be inspected and the gutters will be cleaned. The tribunal noted that nowhere in the Written Statement of Services is there anything to suggest that the extent of the roof inspections and gutter cleaning is qualified. The Development Schedule produced by Ms. Rummens at the Hearing is not referred at paragraph 4.1 in relation to roof inspections and gutter cleaning. In any event, the Development Schedule does not limit the scope of these services. The tribunal’s view is that the factor’s position that the scope of these services is limited to reactive repairs is not supported by its Written Statement of Services. Further, the tribunal’s view is that the factor’s position that the onus is on the homeowner to seek out the Written Statement of Services and Development Schedule from the factor’s website is wholly untenable. Accordingly, the tribunal found that the factor had failed to carry out its property factor's duties to a reasonable standard.

19. The tribunal noted that 4.5.1 of the factor's Written Statement of Services states:
- "*James Gibb residential factors will arrange for the works to be instructed within seven days of the request, if for any reason, instruction cannot be made within this time period, the homeowner ...will be notified*". The tribunal accepted that the factor instructed AGM Roofing on the day of the homeowner's telephone call to Brenda Adamson on 13 December 2016. However, the instruction given to AGM Roofing was not for the matter reported by the homeowner, namely cleaning of the valley gutter, but was for "*gutter cleaning to the front and rear*". By Ms Rummens' own admission the factor did not follow up the lack of the proper instruction with the homeowner and so the tribunal find that the factor failed to carry out its property factor's duties to a reasonable standard.
20. The homeowner referred the tribunal to paragraph 7.7 of the factor's Written Statement of Services which states: -"*..the complaints process is thorough and fair*" and submitted to the tribunal that the handling of her complaint did not meet these standards. With regard to the investigation of the homeowner's complaint into the instruction to AGM roofing, the tribunal found that Ms. Rummens' investigation with AGM Roofing in respect of the voicemail message was cursory and fell short of the "*thorough and fair*" standard set paragraph 7.7 of the factor's Written Statement of Services. The tribunal considered that it was unacceptable for a Director dealing with a stage 5 complaint to accept without question that no telephone records existed. Further, as the instruction to AGM Roofing was "*to attend to gutter cleaning to the front and rear*", which task did not need access to the property, it would have been reasonable to expect to Ms. Rummens to query with the contractor why access was necessary. The tribunal agree with the homeowner that her complaint was not properly investigated as Ms. Rummens placed insufficient weight on the homeowner's denial of receiving the voicemail message and focussed instead on the fact that the homeowner does not live in the property. Accordingly, the tribunal find that the factor failed to carry out its property factor's duties to a reasonable standard.

Decision of the tribunal

21. Accordingly, for the reasons and findings set out in full in the foregoing paragraphs, the tribunal determine that the factor has not failed in its Section 14 in respect of compliance with the Code but has failed to carry out its property factor duties in terms of Section 17 of the Act.
22. The tribunal, having determined that the factor has failed to carry out its property factor duties in terms of Section 17 of the Act, then considered whether to make a property factor enforcement order in terms of Section 19 of the Act. The tribunal had regard to the homeowner's submission that she had been caused inconvenience and stress by the factor's failure to comply with its duties and considered that, in all the circumstances, the effect of the factor's failure had had

a detrimental effect on the homeowner and, accordingly, the tribunal proposed to make a property factor enforcement order which will follow separately to conform with Section 19 (2) of the Act which states:- *“In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so (a)give notice of the proposal to the property factor, and (b)allow the parties an opportunity to make representations to it.”*

23. The decision is unanimous.

Appeal

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

Karen Moore

Chairperson

9 November 2017