

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/21/3150

Re: Property at 486 St Vincent Street, Flat 3/1 Glasgow G3 8XU ("the Property")

Parties:

**Mrs Munira Begum, 486 St Vincent Street, Flat 3/1,
Glasgow G3 8XU ("the Applicant")**

**Glasgow West Enterprises Limited, 5 Royal Crescent Glasgow G3 7SL ("the
Respondents")**

Tribunal Member:

Graham Harding (Legal Member) and Sara Hesp (Ordinary Member)

DECISION

The Factor has not failed to carry out its property factor's duties.

The Factor has not failed to comply with its duties under section 14(5) of the 2011 Act.

The decision is unanimous

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".

Background

1. By application dated 14 December 2021 the Applicant's representative Mr Akhter Khan complained to the Tribunal that the Respondents were in breach of Sections 2.1, 2.2, 3.3, 5.5 and 6.9 of the Code and had failed to carry out

its property factor's duties. Details of the Applicant's complaint were set out in a comprehensive document accompanying the application together with extensive Appendices consisting of correspondence between the parties, reports, photographs and other documents. The Applicant's complaint was primarily concerned with the water damage to the Applicant's property and repairs to the roof of the property.

2. Following the submission of the application the Applicant's representative sent a Property Factor Code of Conduct letter and a Property Factor Duties Letter both dated 31 January 2022 to the Respondents. The Respondents acknowledged receipt of the correspondence by letter dated 11 February 2022.
3. By Notice of Acceptance dated 10 March 2022 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion ("CMD") was assigned.
4. Following discussion at the CMD on 28 June 2022 an in-person hearing was assigned to consider the Applicant's complaints in respect of Sections 2.1, 2.2 and 3 of the Code as well as those relating to carrying out property factor's duties.
5. The Applicant's representative submitted additional written representations by emails dated 6 May, 10, 19 and 24 August and 27 September 2022 and 16 January 2023.
6. The Respondents' representatives, T C Young, Solicitors, Glasgow, submitted written representations and documents dated 15 and 22 June, 10 August, 7 and 23 September 2022.

Hearing

7. A hearing was held at Glasgow Tribunals Centre on 23 January 2023. The Applicant did not attend but was represented by Mr Akhter Khan. The Respondents were represented by its Technical Director Mr Daniel Wedge and Ms Claire Mullen of T C Young, Solicitors. The Applicant had one witness, Mr Alastair Orr of Hallidays (formerly Shepherds) Surveyors.
8. By way of preliminary matters, the Tribunal first noted that in recent correspondence Mr Khan had submitted documents relating to an ongoing issue with the entrance door to the close at the property. The Tribunal explained that as this was a new matter that had not been included in the Applicant's original application it could not deal with the complaint at the hearing. This was understood by Mr Khan.
9. Ms Mullen submitted that although the Applicant had been directed to provide the Tribunal with specification as regards the sections of the Consumer Rights Act 2015, the Freedom of Information Act 2000 and the Public Contract Regulations 2015 that it was alleged the Respondents had broken no further specification had been forthcoming. There was therefore no prior notification

of the basis of the Applicant's complaint and no substance to it and the Tribunal should not allow arguments on these matters. Mr Khan explained that he was a lay person and did not have the benefit of legal representation. He explained that the cost of repairing the roof had been estimated at between £35000 and £45000. He said at no time had he been prewarned it could cost more than £80000. This was more than the Applicant could afford and she was being penalised. The whole point of having a factor was that they should communicate. The Tribunal considered that it had been clearly explained to Mr Khan at the CMD that if he was alleging that the Respondents were in breach of these statutes and regulations it was essential that he specify exactly how and why the breaches had occurred with reference to the particular sections of the Acts and Regulations concerned in order that the Respondents had fair notice of the complaints being made. As he had failed to provide any relevant details the Tribunal agreed with Ms Mullen that this part of the Applicant's complaint should not be upheld.

10. Ms Mullen went on to say that in the Applicant's revised application of 10 August 2022, Mr Khan sought to introduce an additional complaint of a breach of Section 6.4 of the Code however no intimation of any alleged breach in terms of Section 17(3) of the 2011 Act had been intimated to the Respondents and therefore the Tribunal had no jurisdiction to consider the complaint. Mr Khan explained that this section had been about his concerns about the entrance door and as that complaint had already been excluded, he accepted the Respondents' position.

Summary of submissions

11. The Tribunal heard evidence from Mr Alastair Orr, Chartered Surveyor. Mr Orr said that he had been instructed to carry out a survey of the property by Mr Khan on 16 July 2015. Mr Orr referred to his report dated 24 July 2015 (Applicant's Appendix 7). In response to questions from Mr Khan he confirmed that render and felt finishes to the chimneyheads and front wallhead were life expired and required replacement. He said he had recommended replacing with lead rather than felt as it would last longer. He confirmed the main defects were identified at paragraph 5.01 of the report. He said that the estimated budget for the repairs at that time had been £17850 plus VAT but with the passage of time costs would have increased. He confirmed he had not returned to the property since July 2015. He also confirmed that there had been water ingress into the Applicant's property.
12. Ms Mullen asked Mr Orr to compare two copies of his report that had been lodged namely the one at Appendix 4.18 and Appendix 7. Mr Orr confirmed that there had been a revision of the report that had been prompted by the addition of photographs supplied by Mr Khan and some discussion with Mr Khan. Mr Orr said he could not remember if he had been supplied with any invoices but had been verbally told about redecoration of the property and details of what works contractors had carried out to the roof. Mr Orr confirmed

he had not been provided with a copy of the report by P&D Scotland Ltd. Mr Orr said that clients did not always provide him with written information or invoices but sometimes would if of value.

13. In response to a query from the Tribunal Mr Orr confirmed that the figure provided for budgeting purposes had been based on replacing the felt with lead. He went on to say that the main difference between using lead was that it could last up to a hundred years whereas felt would be guaranteed for 20 - 25 years although it could last longer. He said lead cost much more than felt. He said he was unable without checking to state the current difference in cost. He thought the useful life of the building was indefinite as long as it was properly maintained.

Section 2.1 of the Code

14. Mr Khan referred the Tribunal to Applicant's Appendix 12.2 and the email from Ms Mullen to Mr Khan dated 3 March 2016 at point 6 confirming that the Respondents agreed to consult with owners regarding works to the roof during 2016 on the basis of the Shepherd report.
15. Mr Khan referred the Tribunal to Appendix 14.1 a letter from the Respondents to the Applicant dated 16 May 2016 advising of a meeting to be held on 22 June 2016 to consider options for remedial repairs to the roof. Mr Khan said that the Shepherds report had recommended the use of lead to replace the existing felt on the roof. Mr Khan referred the Tribunal to the mandate sent out by the Respondents to owners to confirm whether they could attend the meeting on 22 June 2016.
16. Mr Khan said that at the meeting it was suggested by the Respondents that felt would be cheaper and would do the same job. He said that at his insistence quotes should be obtained for both felt and lead. He went on to say that he thought it had been agreed that there would be a further meeting but instead the Respondents issued a letter to owners with a mandate (Applicant's Appendix 14.7). Mr Khan went on to say that the Applicant did not agree to the proposal as the process was flawed. He said that six owners had been in favour of proceeding with felt and there had been one dissenting owner himself on behalf of the Applicant. He explained that as the owner of the top flat the Applicant would suffer the most. The other owners apart from the Respondents were absentee landlords who perhaps cared less about the condition of the property.
17. Mr Khan explained that he had in March 2017 obtained a quote from West End roofing Ltd who had offered to repair the roof for £37560.00 in lead (Appendix 15.1) and also another quote from RJ Roofing & Slating Ltd for £8350 plus scaffold costs (Appendix 67) although he was less confident about the latter. He accepted that these companies had not gone through the Respondent's procurement tests. Mr Khan went on to say that his concerns were overruled and the Respondent's preferred contractors were to proceed at higher cost using felt. He said that he then managed to persuade another

owner to Mr Gilchrist to change their mind about approving the works going ahead.

18. Mr Khan referred the Tribunal to Appendix 18.1 and explained he had written to the Respondent's Chairperson, Yushin Toda by letter dated 11 March 2017 and following on from that the project had been scrapped. He said a week later he had been invited to a meeting with Mr Wedge to address his complaint. Mr Khan went on to refer the Tribunal to the Respondent's letter of 5 November 2017 (appendix 56.1) and particularly the paragraph at the bottom of page 2 where he said it was accepted that the Respondents said there had been an apparent disregard for the Shepherd report. and that Mr Wedge had gone on to apologise for failing to meet his expectations.
19. Mr Khan said that it took eight months to complete his complaint and then a further year to carry out another project and during that time the Applicant's flat was damaged further. He queried why the process could not have been conducted more quickly. In response to a query from the Tribunal, Mr Khan confirmed that the Respondent had written to owners as required in terms of the letter of 5 November 2017 but it had still taken another year to complete the proposals.
20. Mr Khan went on to explain that some owners had to contribute a greater share of the cost than others and that he did not have the names of all of the owners in order to communicate with them. He explained that one owner was obliged to pay 27% of the cost and that property was currently for sale by auction and had been for some time.
21. Mr Khan said that the Respondents had told his mother's insurers that he had prevented the project going ahead but had not explained the reasons for that.
22. Mr Khan referred the Tribunal to the Respondents' letter of 5 September 2018 (appendix 19.3) and to the expected cost of the repairs being in the region of £35000 to £45000. He also referred the Tribunal to the charge that would be incurred of £800.00 if the project did not proceed with the Applicant's share amounting to £73.12. Finally, Mr Khan referred the Tribunal to the correspondence he had with various individuals in connection with his concerns regarding the Respondents (Appendices 35-45)
23. For the Respondents Ms Mullen referred the Tribunal to her written representations which she adopted in full. She denied that the information supplied to the Applicant or Mr Khan had been false or misleading. She said that the Respondents had done what they had agreed to do. She said they had consulted on the basis of the Shepherd report which had said that ideally the roof should be replaced in lead but as Mr Orr had said lead was not the only option as felt was also an option as it would last for 20 – 25 years and possibly longer.
24. Ms Mullen referred the Tribunal to Appendix 14.7 in the Applicant's First Inventory. She accepted that no minutes had been kept of the meeting of 9 November 2016. She explained that there were two issues for owners to

consider when making a decision about the roof repair one was the lifespan of the material used and the other was the cost. She said that both options involved significant cost to owners and the Respondents could have faced criticism if they had only opted to put forward the more expensive lead option. She said that the Applicant was not the only homeowner and that normally cost was something that interested owners.

25. Ms Mullen went on to say that some owners resented paying because of the costs involved and there may have been a group of owners unwilling to give support when costs were high.
26. Ms Mullen went on to say that the estimate in the letter to owners dated 5 September 2018 (Appendix 19.2) was provided as a guide based on a previous tender exercise and was reasonable. She said the Respondents could not have known that the cost of the work would have risen by as much as it had.
27. Ms Mullen said that with regards to the information provided to QuestGate the Respondents had advised the insurers that the works did not proceed as one of the prior consenting owners withdrew his vote. This had been as a result of the intervention by Mr Khan. There had then been a lack of support for providing the funding to proceed with the project and there had also been a threat from Mr Khan of legal action should the project go ahead. Ms Mullen referred the Tribunal to the terms of QuestGate's letter to Mr Khan dated 16 October 2018 (Appendix 41).
28. Ms Mullen went on to differentiate between there being a quorate rate versus majority support. She said whilst the project may have had achieved the necessary quorate rate to proceed, in the absence of majority support and agreement to fund the works they could not proceed. She said that the insurers would have taken the view that Mr Khan had contributed to his own misfortune.
29. Mr Khan referred the Tribunal to the report prepared by P & D Scotland Ltd instructed by the Respondents (Respondents Production 29). He said he had reservations about the independence of the report as it had been prepared by one of the Respondent's own contractors. He said that there had been repeated patch repairs to the roof year on year which had not fixed the problem and that had not met the quality of service one would expect. He submitted that although the Respondents had provided a report with glossy pictures the report spoke of not finding any water ingress which was incorrect. He said the needs of the owners were not being met and the service provided was not good enough as water was still getting in.
30. For the Respondent Ms Mullen said that the duty of the Respondent had been to instruct works to be carried out when instructed to do so by the owners. It was not disputed that some repairs had been carried out. Some of that had been as a result of storm damage. Each incident would result in contractors being instructed. She said that Mr Khan was critical of the repairs that had been done and wished to rely on the Shepherd report however that was not a

report on previous repairs and more on the condition of the roof on the date of inspection. She submitted that there was no evidence that the Respondents were in breach of a condition of its Written Statement of Services.

31. Mr Khan submitted that all three rooms in the property had been affected by water ingress and that the routine repairs had not solved the problem.
32. Ms Mullen pointed out that the R&D report did not give the roof a clean bill of health and did refer to substantial work being needed.

Section 2.2 of the Code

33. Mr Khan indicated he was no longer insisting on arguing this part of his complaint.

Section 3 of the Code

34. When asked what he was looking for Mr Khan said that if there had been a failure on the part of the Respondents they should own up. He said he had submitted 71 pieces of evidence to support his case. He said he wanted damages for the damage caused to the Applicant's property and that the Respondents should be found liable. He said matters had dragged on unnecessarily. The damage to the Applicant's property amounted to £8690.00 and the damage to furnishings amounted to £2500.00. In addition, he said he was looking for an apology.
35. For the Respondents Ms Mullen said that homeowners had been given an opportunity to attend a meeting to discuss the proposed works. In addition to the Respondents only one owner and Mr Khan had attended. No-one else wanted to attend and the Respondents saw no purpose in having any more meetings. Ms Mullen referred the Tribunal to the test for professional negligence established in the case of *Hunter v Hanley* 1955 SC 200 at page 206 line 18 and submitted that in the present case the Respondents had followed the usual practice of a property factor. She said that Mr Khan had provided the Respondents with his surveyor's report and a tender exercise was undertaken as was usual practice. She said there was a quorate mandate to proceed based on fact but it was not unconditional as it needed owners to provide the funds. She said that there was no evidence that the Respondents had fallen below the standards expected of them in the absence of a commitment from owners to pay for the remedial works particularly with the threat of legal action pending. She said that no damages would be due if there was no breach of the Respondent's obligations.
36. Ms Mullen referred the Tribunal to the Applicant's Appendix 50.1 in which all the damage related to the living room and not the bedroom. She also referred to appendix 51.1 which again referred to the living room and not the bedroom. Ms Mullen said her principal submission was that the Respondents were not liable for the damage caused to the Applicant's property but in any event the sums claimed were excessive. The situation had been exacerbated by the actions of Mr Khan. In 2019 owners had voted to proceed with a

refurbishment project but for his intervention the works would have gone ahead.

37. Mr Khan said that the Applicant was a co-owner and the Respondents had to work in collaboration. He said he was being blamed but queried why he would want to create this mess. He went on to say that by aborting the original project it took a further two years to progress during which time more damage was caused. Mr Khan referred the Tribunal to the timeline of events

The Tribunal make the following findings in fact:

31. The Homeowner is the owner of Flat 3/1 466 St Vincent Street, Glasgow G3 8XU ("the Property")

32. The Property is a flat within the block of ten properties forming 484-488 St Vincent Street Glasgow (hereinafter "the Development").

33. The Factor performed the role of the property factor of the Development.

34. By July 2015 render and felt finishes applied to the chimneyheads and front wallhead respectively were life expired and required replacement. Pointing to chimneyhead flashings was defective and required to be replaced. Further repairs were also required to ridge tiles in addition to maintenance type works at the development.

35. A report by Shepherd Building Consultancy dated 24 July 2015 detailed the work required and recommended as ideal that existing felt coverings be replaced with lead as that would last significantly longer.

36. Following a meeting of owners held on 22 June 2016 owners were mandated with the option of proceeding with repairs to the roof using either felt or lead.

37. Six owners responded in favour of felt.

38. Mr Khan on behalf of the Applicant was in favour of lead.

39. Mr Khan persuaded one owner in favour of using felt, Mr Gilchrist to change his vote.

40. As there was no longer a majority in favour of using felt and Mr Khan was threatening the Respondents with legal action if they proceeded the repairs did not go ahead.

41. A further proposed project was commenced in 2018 and tenders obtained and presented to owners at a meeting on 15 May 2019.

42. At that meeting owners voted against proceeding with the repairs.

43. Between 2016 and 2019 the estimated cost for the repairs had risen from £35505.64 for felt and £43319.60 for lead to £90090.82 for lead.

Reasons for Decision

Section 2.1 of the Code

44. The Tribunal has been presented with very substantial documents and written representations in addition to the oral submissions. It was apparent that the Applicant's property had suffered from water ingress and that from at least 2015 repairs were required to the roof at the development. Mr Khan on behalf of the Applicant was adamant that the correct material to be used to replace the felt coverings on the roof should be lead rather than felt. The Tribunal is satisfied that lead would have a longer lifespan than felt but would also be more expensive.
45. The Tribunal does not consider that the Respondents can be faulted by giving owners the option of replacing the felt coverings with the same material or with the more expensive but longer lasting lead. In so doing they were correctly setting out the choices open to the owners with a view to accepting the majority decision.
46. It is significant that Mr Orr in his evidence did not dispute that replacing the felt coverings with felt would be suitable merely that lead would last much longer.
47. Therefore, having considered matters very carefully the Tribunal does not consider that the information sent to the Applicant in this regard was in any way false or misleading.
48. The Deed of Conditions governing the development provide that a majority of owners present at a quorate meeting and voting can order to be executed any common repairs. Given there are ten owners in the development a majority requires six owners to give their approval. Following the change of heart by Mr Gilchrist after intervention on the part of Mr Khan there was no longer a majority in favour of proceeding with the 2016 repairs. Had Mr Gilchrist not been influenced to change his mind then the Tribunal considers it likely that subject to funds being ingathered from the remaining owners the repairs would have proceeded and the further water ingress experienced by the Applicant in 2018 would not have occurred.
49. The Tribunal does not consider that the Respondents provided false information to QuestGates. It is satisfied that the information supplied accurately reflected the reasons the repairs did not go ahead. Although replacing the felt covering with lead was the recommended option in the Shepherd report it was not essential and but for the intervention of Mr Khan a majority of owners had been in favour of replacing the existing felt coverings

with the same material. Therefore, in many ways it appeared to the Tribunal by his intransigence Mr Khan was responsible for the subsequent damage to the Applicant's property and the failure of the insurers to meet her claim.

50. It did seem that there was a significant delay following the abandonment of the original project in dealing with Mr Khan's complaint initiated in March 2017 and not formally completed until Mr Wedge's letter to him dated 5 November 2017. However thereafter the Respondents proceeded to put forward a further tender exercise for carrying out the repairs only using lead rather than felt.
51. That project subsequently did not proceed as none of the private owners of the properties were prepared to go ahead and the Tribunal was satisfied from the oral and documentary evidence that this was as a result of the very substantial increase in the cost of the project. Although the actual cost was substantially higher than had been estimated by the Respondents in their letter of 5 September 2018 the Tribunal was unable to conclude from the evidence before it that the Respondents knew or reasonably ought to have known that the estimate was unrealistic.
52. The Tribunal was not satisfied that the Respondents were in breach of Section 2.1 of the Code.

Section 3 of the Code

53. The Tribunal was satisfied that in terms of its Written Statement of Services (section 5.4) the Respondents were entitled to levy an additional charge to owners for the consultation and procurement of the tender documents. It was also satisfied that proper notice of the charge had been intimated to the applicant in its letter of 5 September 2018.
54. The Tribunal did not have any other evidence presented to it to substantiate any other breach of Section 3 of the Code and was satisfied that the Respondents were not in breach of this section of the Code. As a result, the Tribunal did not require to consider further the Applicant's claim for damages.

Property Factor's Duties

55. Although the Applicant had sought to argue that the Respondents had failed to carry out its property Factor's duties the majority of the Applicant's complaint in this regard was struck out as the Tribunal did not have jurisdiction due to prior notification not having been given to the Respondents in terms of Section 17(3) of the 2011 Act.
56. Mr Khan had submitted that the Respondents had failed to ensure over a number of years that contractors had carried out repairs to the roof of the property to a reasonable standard with the result that there had been water ingress to the Applicant's property. However, although the Shepherd report did make reference to render having been applied to an inadequate thickness resulting in premature failure and water ingress there was insufficient evidence before the Tribunal to suggest that the Respondents had failed in its

property factor's duties in terms of its monitoring of its contractors performance.

57. In conclusion the Tribunal is satisfied that the Respondents are not in breach of the Code nor have they failed to carry out their property factor's duties. It is apparent to the Tribunal that there is a long history of dissatisfaction on the part of Mr Khan with the manner in which the Respondents have managed the Applicant's property and unfortunately that may have led to him adopting a position over insisting on replacing existing felt roof covering with lead that ultimately resulted in unnecessary damage to the Applicant's property.

Appeals

A homeowner or property factor 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.

Graham Harding Legal Member and Chair

10 February 2023 Date