

Housing and Property Chamber First-tier Tribunal for Scotland



**Decision of the First-tier Tribunal Housing and Property Chamber
In an Application under section 17 of the Property Factors (Scotland) Act 2011
by**

Robin Lovat, 1008 Pollokshaws Road, Glasgow G41 2HG (“the Applicant”)

Macfie & Co Management Services Ltd, 5 Cathkinview Road, Glasgow G42 9EA (“the Respondent”)

Reference No: FTS/HPC/PF/18/1743

**Re: Property at 1/2, 73 Old Castle Road, Glasgow G44 5TG
 (“the Property”)**

Tribunal Members:

John McHugh (Chairman) and Robert Buchan (Ordinary (Surveyor) Member).

DECISION

The Respondent has failed to carry out its property factor’s duties.

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

- 1 The Applicant is the owner of 1/2, 73 Old Castle Road, Glasgow G44 5TG (hereinafter "the Property").
- 2 The Property is a flat located within a tenement block (hereinafter "the Block").
- 3 The Block consists of individual flats and common parts.
- 4 The Respondent is the property factor responsible for the management of the common parts.
- 5 The Property was at all material times let by the Applicant to tenants.
- 6 On or around 19 December 2017 a plumbing contractor under the instruction of the Respondent carried out investigations at the Property which involved taking up floor boards and removing the bath panel.
- 7 The Respondent refused to reinstate the floor boards and the bath panel.
- 8 The Applicant complained to the Respondent by email on 20 December 2017.
- 9 The Respondent did not respond to the complaint until, at the earliest, 23 July 2018.
- 10 The property factor's duties which apply to the Respondent arise from the Statement of Services.
- 11 The Respondent was, since its registration as a property factor on 7 December 2012, under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.
- 12 The Applicant has, by his correspondence, including by his letters of 2 and 6 August 2018, notified the Respondent of the reasons why he considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.
- 13 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at the Glasgow Tribunals Centre on 22 November 2018.

The Applicant was represented at the hearing by his brother, Timothy Lovat.

The Respondent was neither present nor represented at the hearing having indicated in advance that it did not intend to attend. No other witnesses were called by either party.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as “the 2011 Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as “the Code”; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the 2017 Regulations”.

The Respondent became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

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

The documents before us included the Respondent’s Written Statement of Services dated November 2017 which we refer to as “the Written Statement of Services”.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Written Statement of Services is relied upon in the Application as a source of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant complains of breaches of Sections 2.5, 6.1, 6.2, and 7.2 of the Code.

The elements of the Code relied upon in the application provide:

“...SECTION 2: COMMUNICATION AND CONSULTATION

...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 to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)...

...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE

This section of the Code covers the use of both in-house staff and external contractors.

6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.

6.2 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, wherever possible...

...SECTION 7: COMPLAINTS RESOLUTION

Section 17 of the Act allows homeowners to make an application to the homeowner housing panel for a determination of whether their property factor has failed to carry out their factoring duties, or failed to comply with the Code.

To take a complaint to the homeowner housing panel, homeowners must first notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties, or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them.

It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in-house complaints procedure and how they make an application to the homeowner housing panel...

...7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel."

The Matters in Dispute

The Applicant complains in relation to the Respondent's actions regarding a water leak in December 2017.

On or around 8 December 2017, the Applicant's managing agents were informed by the Respondent that there was a water leak believed to originate from the bathroom of the Property. Water was leaking into the common stair area. Investigations by the Applicant's agents led them to the view that the source of the leak was a common pipe. They reported this to the Respondent.

On 15 December 2017, the Respondent's plumbing contractor arrived without advance warning at the Property and requested access to investigate the source of the leak. The Applicant's tenant allowed him access. He reported that the source of the leak was the bath seal.

On 19 December 2017 the Respondent's plumber again called at the Property and was given access by the Applicant's tenant. The Respondent's plumber lifted floorboards and removed the side panel of the bath. He identified a leaking pipe within the Property's bathroom. He left the floorboards up and the bath panel off. The following day the Applicant's plumber repaired the leaking pipe.

The Applicant invited the Respondent to send back its plumber who had lifted the floorboards and removed the bath panel so that these could be reinstated. The Respondent refused to do this as it considered that the repair was private and not to a common part of the Block.

The reinstatement works were shortly thereafter carried out by SERCO who are employed under a contract with the Government to assist the tenants.

The Respondent expects to receive a bill from SERCO for these works.

The Applicant complained by email of 20 December 2017 to the Respondent about its having taken access to the Property without advance warning and to the Respondent's refusal to carry out the reinstatement works.

The Respondent has provided an email of 23 July 2018 in reply to a reminder email of 11 July 2018 by the Applicant's representative. The 11 July 2018 email complained of the Respondent's failure to respond to the original complaint email of 20 December 2017.

The Applicant's position (supported by an analysis by an IT consultant of the Applicant's managing agent's email system commissioned by the Applicant's agent) was that the email of 23 July 2018 had never been received.

The 23 July 2018 email states that its author, John Walker, Director of the Respondent was "*under the impression that the position had previously been made quite clear to your client*" although it provides no detail of how that is thought to have happened, nor does it make any explicit reference to there having been any response to the 20 December 2017 email.

There is no evidence of any response by the Respondent to the Applicant's email of 20 December 2018 until 23 July 2018 (at the earliest assuming the email was in fact ever sent; and the evidence suggests otherwise).

That being the case, the Respondent is in breach of its property factor's duties arising from the Written Statement of Services under the heading "Communication" where it is stated that the Respondent will endeavour to respond to emails within seven days. It is also in breach of its duties arising out of the "Complaints about our Service" section of the Written Statement of Services which sets out a process involving two 21 day complaint periods. The Complaints procedure seems not to have been followed at all.

Further, the same facts amount to breaches of Code Sections 2.5 and 7.2.

The Applicant complains in relation to the fact that the Respondent's plumbing contractor failed to announce his visit in advance or to liaise with the Applicant and his plumber. The Applicant complains that the Respondent should have reinstated the bathroom.

The Respondent's plumber does seem to have been attempting to be helpful in his actions and, in fact, by removing the floor boards and bath panel he managed to identify a repair required to the Applicant's private pipe. In this sense, his work was of value to the Applicant. If the plumber had, having discovered the leaking pipe, immediately replaced the floor and panel, they would only have required to have been taken up again at the Applicant's cost, so his actions in leaving the bathroom in the way which he did are understandable.

The Respondent refused reinstatement of the bathroom on the grounds that the items of work required were private and not chargeable to the Block proprietors as a whole as common repairs. This would seem to be an accurate statement of the position. However, of course, the Respondent might have taken that view earlier in the process and not have crossed the threshold of the Property at all but simply have left the Applicant to carry out all of his own investigations.

We would be reluctant to criticise the actions of the Respondent's contractor since he seems to have done some valuable work for the benefit of the Applicant (and all owners within the Block) by finding the source of the problem. It is obvious however that communication between the Respondent and the Applicant's representatives could have achieved a similar result without the inconvenience of the bathroom being left in a disrupted state in the way which it was.

However, the Respondent's conduct in respect of this aspect does not seem to us to amount to a breach of either the Code or of its property factor's duties.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order (“PFEO”). The terms of the proposed PFEO are set out in the attached document.

APPEALS

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

J McHugh

CHAIRMAN

DATE: 12 December 2018