

Housing and Property Chamber
First-tier Tribunal for Scotland



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

by

Ronan Brolly, 16/7 Murano Place, Leith, Edinburgh EH7 5HG (“the Applicant”)

James Gibb Residential Factors, 4 Atholl Place, Edinburgh EH3 8HT (“the Respondent”)

Re: 16/7 Murano Place, Leith, Edinburgh EH7 5HG (“the Property”)

Chamber Ref: FTS/HPC/PF/1856

Tribunal Members:

John McHugh (Chairman) and Sara Hesp (Ordinary (Surveyor) Member).

DECISION

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

The Respondent has not failed to comply with its property factor's duties.

The decision is unanimous.

We make the following findings in fact:

- 1 The Applicant is the owner and occupier of a flat at 16/7 Murano Place, Leith, Edinburgh EH7 5HG ("the Property").
- 2 The Property is located within a larger block of flats and common areas ("the Development").
- 3 The Respondent has acted as the factor of the Development from around March 2015, having taken over the business of the previous factor.
- 4 The Development was constructed around 19 years ago.
- 5 The Applicant reported roof leaks to the Respondent in June 2015.
- 6 The Respondent instructed contractors to carry out repairs.
- 7 Roof leaks recurred on various occasions from 2015 to date.
- 8 The Applicant reported the further leaks to the Respondent.
- 9 The Respondent instructed contractors Forsyth Roofing and then TECX Roofing to address the leaks observed in 2015-2016.
- 10 The Respondent instructed The Garland Company UK Ltd to produce a report on the roof's condition. They reported on 1 February 2017.
- 11 The Respondent instructed Advance Roofing Edinburgh Ltd to carry out further works to the roof.
- 12 Leaks continued and the Respondent then instructed Ronald G Graham Roofing & Building Ltd to carry out further roof works.
- 13 The Respondent instructed F3 Building Surveyors to report on the condition of the roof. They reported on 11 December 2018. Their report recommended that further works should be carried out.
- 14 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor (23 November 2012).
- 15 The Applicant has, by his correspondence, including that of 13 August 2018, notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its obligations to comply with its property factor's duties and its duties under section 14 of the 2011 Act.
- 16 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at George House on 31 October 2019.

The Applicant was present at the hearing and assisted by his father, John Brolly, who is a Chartered Building Surveyor.

The Respondent was represented at the hearing by its Angela Kirkwood and Jeni Bole as well as by David Bonnar, a Chartered Building Surveyor of F3 Surveyors.

Neither party called additional witnesses.

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 23 November 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 January 2018 which we refer to as the “Written Statement of Services”. They also included an extract of a Deed of Conditions from the Applicant’s Land Certificate we refer to as “the Deed of Conditions”.

Written representations were made to the Tribunal after the date of the hearing. The Tribunal has not given consideration to these on the basis that the Tribunal considers that parties have had adequate opportunity to make representations at and before the hearing and that there is no good basis for allowing further submissions to be received.

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 sources of the duties relied upon are not specified in the Application.

The Code

The Applicant complains of failure to comply with Sections 6.1; 6.4 and 6.9 of the Code.

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

"

...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE...

...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...

...6.4 If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works...

...6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor..."

The Matters in Dispute

The factual matters complained of all relate to the presence of leaks in the roof of the Development which have caused water ingress into the Property.

History

The Development is a modern block of flats. The Property is a top floor flat within the Development. The Applicant bought the Property in 2012.

The Applicant first observed water ingress into his flat in July 2015.

He reported this to the Respondent. The Respondent arranged for a series of repairs using roofing contractors, Forsyth Roofing and TECX Roofing.

By the winter of 2016/17, the Property was still experiencing water ingress. The Respondent decided to instruct an independent survey. A survey was carried out and a report by Gilles Drummond of The Garland Company UK Ltd dated 1 February 2017 was produced. This report identified works required to remedy the issue.

The Respondent invited tenders for the works identified. The job was awarded to Advance Roofing Edinburgh Ltd ("Advance"). Advance undertook works. Advance then reported to the Respondent that it had carried out the works required and issued its invoice, which was paid within a few weeks by the Respondent.

By June 2017 it was apparent that roof leaks remained an issue and Garland, accompanied by the Applicant's father, carried out a further inspection.

Advance refused to accept responsibility for the ongoing issues and a new contractor, Ronald G Graham Roofing & Building Ltd ("Ronald Graham") was instructed to carry out the roof works in December 2017. Ronald Graham carried out further works and was paid by the Respondent.

The Applicant experienced further water ingress.

The Respondent instructed a survey to be carried out by F3 Building Surveyors ("F3"). That cost the owners approximately £2700. The survey was carried out by Mr Bonnar and his report was dated 11 December 2018. The report found that water ingress was occurring. It concluded that the works by Advance and Ronald Graham had not been carried out satisfactorily. F3 recommended that the roof be stripped, new felt and battens/counterbattens provided and that new lead valleys and water gates should be provided and the relevant areas retiled.

The current situation is that the Respondent has sought a vote of owners in favour of instructing the works recommended by F3 but have not yet been able to secure a majority in favour. They now intend to call an owners' meeting and are hopeful of obtaining a quorum in favour of carrying out the works. The Applicant is now

experiencing only limited water ingress but the matter remains one of concern to him.

The Applicant complains of the following specific matters:

Code Section 6.1

The Applicant complains that the Respondent has failed to deal with his complaints regarding water ingress. In particular, he complains that when he reported the matter in July 2015 the Respondent's employee failed to deal with the complaint. He received an email dated 14 July 2015 when the Respondent's employee accepted that she had failed to advance the matter by reason of oversight. At the hearing, the Respondent's representatives accepted that this was the case.

The Applicant further complained about a failure to keep him informed of the progress in dealing with repairs. He had had to ask for an update on 6 August 2015. The Respondent answered his enquiry on 7 August 2015 by confirming that the leak had been attended to by TECX Roofing. Further repairs took place in December 2015/January 2016. The Applicant complained of further water ingress on 16 June 2016 and had been advised on 17 June that the contractor would attend. The Applicant had asked for a progress report again on 23 June and received a response from the Respondent the following day to the effect that the contractor had been asked to contact the Applicant directly. This did not happen and the Applicant made contact again on 4 July but only received a response on 12 July.

The Respondent's general response is that it cannot keep every owner updated every time they make a complaint regarding a repair. The Respondent's approach is that the owner makes a complaint; the Respondent instructs a suitable contractor; the Respondent receives a report/invoice from the contractor and the Respondent assumes the matter has been satisfactorily addressed. In particular, the Respondent considers that such an approach is justified for minor repairs by its Written Statement of Services as it does not, as part of its services listed there, undertake to keep owners informed with progress reports relating to repairs.

We consider that the Applicant could reasonably have expected to receive updates on the progress of repairs which were obviously of particular importance to him at the relevant times. The delays in response by the Respondent in December 2015 and July 2016 which are identified above amount to a breach of Code Section 6.1.

Code Section 6.4

The Applicant complains that the Respondent does not have programme of works. In discussion at the hearing the Respondent's representatives explained their system

for dealing with maintenance of the Development. As well as a reactive approach of responding to reports from owners, the Respondent carries out a monthly inspection. This is performed by its Property Manager. It includes consideration of the roof although only on the basis of visual inspection from the ground. There is a contract with a third party, North Facades, whereby they carry out an annual roof inspection using a cherry picker. They identify issues and clear out the gutters. There is no specific maintenance plan for the roof; the Respondent would only have such a plan for older roofs where a need for increased maintenance is identified. In discussions with the Respondent's representatives at the hearing it was also identified that the Respondent has an internal system to highlight the need to carry out safety related inspections.

We do not consider that the Respondent's system for dealing with maintenance amounts to a "programme of works" as required by Code section 6.4. Accordingly, we find there to have been a breach of this section.

Code Section 6.9

The Applicant complains of the Respondent's failure to pursue the contractors whose works failed to resolve the roof leaks. The Applicant's particular focus at the hearing was upon Advance who he considers may have caused damage to the roof during their works.

When challenged by the Respondent, Advance had offered to repay half of the bill without admission of liability but subject to a condition which was unacceptable. When the Respondent had challenged Ronald Graham, it had ultimately refused to accept any liability and would not carry out remedial works.

The Applicant accepted at the hearing that the Respondent's Angela Kirkwood had, since her involvement began in 2018, made extensive efforts to pursue the contractors and had no complaint regarding her actions. He was less convinced by the Respondent's earlier efforts to have the contractors return to site

We consider that the Respondent's duty to pursue contractors in respect of defective works under Code section 6.9 is properly interpreted to be a duty to take reasonable efforts as opposed to a duty to take "every effort" as the Applicant's father contended. We consider that the actions of the Respondent were reasonable. We do not conclude that simply because the Respondent's efforts failed to achieve a meaningful benefit for the owners, those efforts can be classed as being insufficient to fulfil the duty created by section 6.9.

There was also a complaint regarding the failure to obtain collateral warranties. That duty exists "where appropriate" and we do not consider that obtaining collateral warranties was appropriate in this case, nor do we see collateral warranties as being relevant to the current situation. The contractors instructed have provided direct

warranties for their work which the Respondent as the agent of the owners could enforce. The issue is simply that the contractors deny any liability and the Respondent would need to prove a liability on the part of the contractors before any benefit would be obtained from such warranties.

We find there to have been no breach of Code section 6.9.

Property Factor's duties

Although we have available to us both the Deed of Conditions and the Written Statement of Services, there is no complaint of a breach of an obligation created by a specific term of either. Rather, there is the general complaint that the Respondent has in its performance of its duties as factor concerning the roof repairs been in breach of its general duty to carry out its property factor's duties to a reasonable standard as per section 17(4) of the 2011 Act.

There is a degree of overlap between factual matters complained of in relation to specific sections of the Code which we have dealt with above and more general matters not falling within the Code which we will deal with here. Where matters have been considered by reference to the Code above, it should be taken that we do not consider those same matters to amount to breaches of property factor's duties.

The Applicant complains regarding the Respondent's failure to make claims to the insurers of the allegedly negligent contractors. We do not consider there to be any merit in this complaint. The contractors themselves rejected any complaints regarding their works and there seems to be no basis to conclude that any complaint made to the contractors' insurers would have had a different outcome. This is not a case where the claim was admitted or the contractors' liability obvious but where the contractors were unable to pay and insurance might then have been relied upon; in this case liability is denied.

The Applicant further complains as to the absence of warranties. This complaint appears to us to fall within the same category as the complaint regarding the contractors' insurance and to be without merit for the same reason.

The Applicant also complains about the failure to obtain funds from the building insurers. A claim had been intimated to the insurers by the Respondent on the basis that the ingress was the result of storm damage. The insurers denied liability on the basis that they had no record of storms at the relevant time and that the water ingress was more likely the result of poor maintenance. The Respondent considers that if there has been poor maintenance then that should be the Respondent's responsibility. However, we cannot identify any specific maintenance failing by the Respondent.

The Applicant complains that the contractors failed to perform their instructions properly and that the Respondent did not force them to return to site or hold a retention to encourage their return. As regards the retention, we agree with the representations made on behalf of the Respondent at the hearing that a retention was unlikely to have been appropriate in the relatively small contracts involved here and that any retention, even if the contractors had agreed it, would have been unlikely to have been sufficient to encourage the return of an unwilling contractor.

The Respondent gave evidence that the contractors which it employed had been trusted contractors whose abilities and financial soundness had been assessed prior to being allowed onto the Respondent's approved panel. The contractors had subsequently been removed from the Respondent's panel as a result of their conduct in this case.

We are sympathetic with the Applicant's position since it will obviously have been unpleasant and difficult to have been experiencing water ingress to his flat on occasions occurring over a period of several years. However, we cannot automatically deduce from the apparent long lasting nature of the problems that there has been a failure by the Respondent in its property factor's duties. In particular, the Respondent's general approach has been to advance resolution of the matter albeit its efforts have been unsuccessful. In addition, it appears to us as less than certain that the water ingress experienced over the years has always been the result of one and the same issue ie there may have been one or more causes of the ingress over the years.

We do not consider that the Respondent has failed in any of its property factor's duties.

Observations

The Respondent appears reasonably optimistic of obtaining the agreement of a majority of owners to the carrying out of further roof repairs. In the event this cannot be achieved parties are reminded that further assistance might be available from the local authority or from the application of the terms of the Tenements (Scotland) Act 2004.

The Applicant observed at the hearing that he had asked the Respondent for information regarding any prior issues or repairs affecting the roof but had not been provided with it. The Respondent agreed to provide the requested information to the Applicant.

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.

We have a wide discretion as to the terms of the PFEO we may make. In this case we consider it appropriate to order the Respondent to introduce a programme of works in respect of the maintenance of the Development and to pay to the Applicant a sum to reflect the Respondent's failings.

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.

JOHN M MCHUGH

CHAIRMAN

DATE: 11 November 2019