

Housing and Property Chamber First-tier Tribunal for Scotland



First-tier Tribunal (Housing & Property Chamber) (“the Tribunal”)

Property Factors (Scotland) Act 2011 (“the Act”)

Decision under Section 19(1)(a) of the Act

Chamber Ref: FTS/HPC/PF/18/2966

The Property:

3/1, 96 Shuna Crescent, Glasgow G20 9QS

The Parties: –

Ms Nicola Watt, residing at the property. (“the homeowner”)

and

Queens Cross Factoring, 45, Firhill Road, Glasgow G20 7BE (“the factors”)

Tribunal Members:

David Preston (Legal Member) and Carol Jones, Surveyor (Ordinary Member) (“the tribunal”)

Decision

The tribunal, having made such enquiries as it saw fit for the purpose of determining whether the factors had complied with the Code of Conduct for Property Factors (“the code”) as defined in the Act determined that the factors were in breach of Section 2.1 and 5.4 of the Code.

The tribunal determined to impose a Property Factor Enforcement Order.

Background:

1. By application dated 30 October 2018 the homeowner applied to the First-tier Tribunal for Scotland (Housing & Property Chamber) (“the Tribunal”) alleging a

failure on the part of the factors to comply with Sections 5.4, 5.5, 5.7, 6.6, 6.8 and 6.9 of the Code. On 9 December 2018 she added section 2.1.

2. On 14 January 2019 a legal member of the Tribunal with delegated powers so to do referred the application to this tribunal for determination.
3. A hearing was scheduled to take place at Glasgow Tribunals Centre on 7 March 2019. Present at the hearing were: the homeowner and Mr Matt Stewart on behalf of the factors, represented by Ms Claire Mullen, Solicitor.
4. At the start of the hearing the convener outlined the procedure which it was proposed should be followed.
5. During the hearing the homeowner referred to and produced an email from the insurers dated 20 February 2019 with a breakdown of the work carried out to the shower room and details of the actual cost incurred. Ms Mullen objected to the late lodging of it and questioned its relevance to the issues before the tribunal. She said that it had no bearing on the question of communication between the factors and the homeowner.
6. The tribunal decided to allow the late lodging of the production. The email correspondence which had been lodged in time included emails between the homeowner, the factors and the insurers dated 12 and 13 February 2019 which referred to the homeowners attempts to recover this information from the insurers, which required the consent of the factors, which was sent to the insurers on 13 February. They therefore had been given notice of the homeowner's attempts to recover the information which had come to hand only recently. It is noted that the email was copied to Lindsay Murphy and the factors had therefore been made aware of the details

Summary of Evidence:

7. The tribunal had before it the application as amended together with the supporting documents submitted by the homeowner and the representations and productions lodged by her in response to the Direction of the tribunal dated 4 February 2019. It also had the representations from the factors submitted by Ms Mullen on 11 February 2019 and the First Inventory of Productions lodged by her. In addition, oral evidence was provided by the homeowner and Mr Stewart and submissions and representations were made by Ms Mullen.
8. The homeowner summarised her complaints against the factors. She explained that she had been alerted to a leak of water to the flat below her which was reported to the factors. Ballantyne & Dunn, Contractors ("B&D") were instructed to attend to the leak, which they did. There was some discussion about the actual dates on which B&D attended and on which work was carried out. Nonetheless, the homeowner had made arrangements for her mother to let B&D into the property to attend to the leak. They dismantled the shower and removed the shower screen, wet wall on the shower wall and plasterboard beneath to trace and mend the leak. They then left the property, saying that they would return the following day. They said they would have to order the wet wall before they could re-instate the shower. The homeowner was told not to use the shower.
9. The homeowner complained that the shower room was left in a considerable mess with debris lying in the shower. There was a pile of rubbish left at the door to the

flat and the shower screen had been removed from the en-suite and left in the bedroom, blocking access to a chest of drawers. The homeowner and her boyfriend had to move that into the en-suite which prevented access to the WC and wash hand basin. When they left, B&D said that they would come back the next day to finish the work and clear the rubbish. The homeowner was then told that they were not returning to finish the work at that point as they had to get authorisation from the insurers. The homeowner then spoke to the factors about the rubbish removal, which she felt was the responsibility of B&D. In the end it was the factors' handymen who removed the rubbish although the cleaners had to sweep up the debris the following week. She was also not impressed that B&D had stuffed rubbish into the exposed cavity wall. She complained that she was given conflicting information by B&D. One of them told her they would be back and the other said they wouldn't, which was why she felt she had to refer it to the factors.

10. The homeowner said that by this time she had lost any faith in B&D and told the factors that she didn't want them back in her property. She then obtained an alternative quote for the work from J&M Modica in the sum of £1280 to re-instate the shower room and sent it to the factors on 11 June. She was not told of the details of the B&D quote until 18 June, despite having asked for that information when she sent in the Modica quote on 11 June. The email of 18 June from the factors also advised that the insurers preferred the B&D quote due to the cost. While that email did not specifically refer to 'betterment' it states that the B&D quote 'is both cost effective and quoted on a like for like basis'. Michelle Russell, Property Assistant with the factors, had been unable to access the B&D quote as her colleague Lindsay Murphy, who had been handling the matter had been on leave on Friday 8 June but had called in sick on 11 June and her email couldn't be accessed.
11. The homeowner complained that in her view it had been the factors and not the insurers who had dismissed the Modica quote and favoured the B&D one. She asserted that the factors accused her of looking for Modica to do more work than was necessary to reinstate the room on a like for like basis. The factors refuted this and stated that they were of the view that the B&D quote specified what work was necessary to reinstate the room. B&D had carried out the track and trace work and the factors therefore considered that they were best placed to determine what was required. They also referred to the email from Ross Ballantyne of B&D dated 18 June 2018 which confirmed that he had only priced for reinstating one section of Gyproc and wet wall that they removed as he didn't think there was any need to do more. He said it was very obvious where the leak was coming from so removing the shower tray etc he didn't find to be necessary.
12. The factors stressed that it had never been their intention to accuse the homeowner of seeking betterment to her property but were of the view that the significant difference between the Modica quote and that from B&D in whom they had confidence as a contractor could only be put down to unnecessary work having been included in the quote. They did not intend to suggest that any unnecessary work had been instructed or specified by the homeowner.
13. Following the email from the factors of 18 June the homeowner decided to handle the insurance claim by herself and contacted the insurers direct. They told her in their email of 25 June that the factors were adamant that the B&D quote would reinstate the room to the pre-leak state and that the Modica quote included additional works which would be considered betterment. The insurers thereafter arranged for a loss adjuster to attend and an alternative contractor (Prater) carried

out the work. The homeowner referred to the email from the insurers dated 20 February 2019 with details of the work which had actually been carried out to reinstate the room. For whatever reason this turned out to be significantly in excess of either the B&D or the Modica quotations.

14. In view of the late lodging of that information, after a short adjournment to allow the factors to consider it, Mr Stewart raised a number of points for the tribunal to consider which might explain the level of cost. He questioned the need for the WC and wash hand basin to be removed and re-fitted. He noted the charge for 'day work' and suggested that this might relate to the contractors travelling a distance. (The tribunal noted that this entry was noted as the hours required to remove and fit new wet walls board and trim.) He noted that there was only one section of plasterboard replaced. He questioned the entries about the timber wall structure being replaced and the extent of any redecoration required when it had only been wet wall that had been removed. He also said that he saw no need for the shower tray to have been removed which had resulted in damage and had to be replaced. In his view, the only necessary work to the tray was the re-sealing where the silicone had been removed to take out the wet wall which had been removed. He saw no reason to remove or replace the sealant which hadn't been affected. Mr Stewart also pointed out that a loss adjuster was appointed by the insurers and that this would result in an additional charge which could be around £500.
15. Mr Stewart confirmed that when they received the Modica quote they had spoken to B&D but they had not been able to contact Modica because they could not find any contact details. When they tried the telephone number, it was a dance school and they were unable to find any entry in Companies House for that name. He confirmed that they had not asked the homeowner how to make contact, or where she had found them.
16. The homeowner had also complained that she had been required to pay the insurance excess of £100. Mr Stewart explained that this claim was regarded as a 'private' claim on the block policy because it related entirely to the homeowner's property, notwithstanding that the damage had been caused entirely by a leak to the common supply. The repair of the leak had been a common repair but any remedial work inside the property was the responsibility of the homeowner. He said that was a term of the policy and was not something over which the factors had any influence.
17. The application sought compensation for inconvenience and expense which she had incurred, namely £25 per day to cover: the cost of fuel for additional hot water for baths rather than showers; phone calls and overall disruption; and for the need for her mother to travel from Crieff on a number of occasions to be at the property for the tradesmen.
18. In summary, Ms Mullen referred us to the written response lodged to the complaints relative to the Code. She submitted that any delays in having the work carried out were not the responsibility of the factors. They had responded in good time to all emails and had passed things on to the insurers without any delay. They had only been involved directly in the matter of the insurance claim between 7th and 18 June at which point the homeowner had taken that on herself. If the work detailed in the email of 18 June had proceeded the whole matter would have been resolved and there would have been no significant loss of use of the room. She stressed that the factors had not intended to suggest that the homeowner had been trying to obtain betterment.

19. The homeowner concluded by referring to the number of emails from the factors which opened with apologies for delays in getting back to her. She said that she had felt that she was being pressured into using B&D who were a contractor in whom she had no confidence and felt that the factors were pushing her to use their preferred contractor. She felt insulted at the suggestion that she was trying to get betterment, she was only looking for her en-suite to be reinstated to its previous condition. Because of her dealings with B&D, she believed that they would only do a patch up job and were not able to do a proper job on her property in which she took some pride.

Findings and Reasons:

20. We carefully considered the evidence presented by the parties at the hearing and had regard to the documents and correspondence lodged by the parties. The complaint related entirely to the matter of the damage to the homeowner's shower room and the subsequent handling of the insurance claim.

21. We have determined from the evidence and in particular the emails of 1, 7, 8 and 13 June that on 28 May 2018 the homeowner was advised by her downstairs neighbour about a leak which was reported to the factors. The homeowner's representations and the application say that B&D fixed the leak on 31 May, but that cannot be correct. The email of 1 June shows that B&D had attended the property on Tuesday 29 May and reported that the wet wall around the shower cubicle had to be taken off and the shower tray had to be removed to expose the waste pipe serving the property. At that point the insurers had been advised and they had authorised the track and trace work although at that point it was not clear as to whether the leak was a common or a private repair. B&D then appear to have made arrangements for access with the homeowner and according to the email from the factors of 7 June at 16:09, they had attended that day and fixed the leak in the common stack. They removed the wet wall and found the leak quite easily, according to their email of 18 June and therefore did not have to remove the shower tray, although the silicone seal on the tray had been removed to take out the wet wall. The email of 7 June indicates that B&D had provided a quote for the reinstatement work which had been passed to the insurers from whom authorisation was awaited. Someone from B&D said that they would return on 8 June, at least to clear the rubbish, but that did not happen. On 8 June at 15:03, having been chased by the homeowner, because B&D had not returned as understood by her, the factors apologised for not keeping her advised of progress, although there was nothing to report as there was still no authorisation from the insurers for the reinstatement work. The factors advised that they had told B&D not to clear the rubbish because of another urgent job and arranged for their own handymen to clear up the rubbish which they did, although some final clearing up had to be done by the cleaners the following week.

22. As a result of the facts that: B&D had not cleaned up after the work; and that they had left the shower screen in the bedroom preventing access to a chest of drawers in the bedroom, the homeowner was losing faith in B&D and obtained an alternative quote from J&M Modica who quoted £1280 for what they estimated would be required to make good the shower room. She passed that to the factors on 11 June who passed it to the insurers on 12 June. On 18 June the factors emailed the homeowner to advise that the insurers preferred the B&D quote due to the cost difference. They explained that the insurers would reinstate on a like for like basis and believed that the B&D quote provided that. That email also set out the work that B&D saw as necessary and told her that their quote had been for £450 + VAT

(£540). The homeowner, having lost faith in B&D on their performance and also considering that in her view their specification would only result in a patch up and not full reinstatement, decided to handle the insurance claim herself, with which the factors cooperated.

23. An email of 25 June from JLT, the insurers, confirmed that they preferred the B&D quote because of the significant price difference. They said that the factors had attempted to contact J&M Modica without success and had been unable to trace the company to seek further comment from them. The email said that the factors were adamant that the works quoted for by B&D would reinstate the room to the pre-leak state and that the J&M Modica quote had included additional work which 'would be considered as betterment' as opposed to reinstatement. In the circumstances the insurers involved Crawford, Loss Adjusters who inspected the work and appointed an alternative contractor to carry out the work which was completed on 21 August.

24. Section 2.1: You must not provide information which is misleading or false.

i. We consider that the factors provided false or misleading information to the insurers. They had obtained the quote from B&D and were provided with that of J&M Modica. They compared the quotes and spoke to B&D whose view was that they had specified the necessary work. The factors made some effort to contact J&M Modica, by phoning the telephone number which turned out to be a dance school and looking on the internet for a company search without success. There was nothing to suggest that J&M Modica was a limited company and, if not, it would not appear at Companies House. It would have been reasonable for the factors to go back to the homeowner and ask for more information about J&M Modica and find out how to contact them, in view of the discrepancy in prices. We also consider that it would be reasonable, where there is such a level of difference for a third quote to have been obtained. The factors do seem to have accepted whatever B&D told them and, on that basis alone, told the insurers that the B&D quote would cover the reinstatement. The factors, after all had not inspected the work and were relying entirely on their contractor. That judgement was made by the factors alone and passed to JLT. In the end of the day the work which was in fact carried out was as detailed in the schedule of work provided by the insurers with their email of 20 February at a cost of £1809. We accepted the points made by Mr Stewart in relation to this schedule but are satisfied that on any view, the cost of the work done was closer in scope to the J&M Modica quote than the B&D quote. Mr Stewart's assessment of the schedule was based entirely on what he had been told by B&D and was in effect in defence of their position. The factors may have had concerns about the status of J&M Modica as to who they were and what their experience was, but this was, as Mr Stewart pointed out, a private claim involving the reinstatement of the homeowner's property following on damage caused by a leak in a common stack. We wonder what locus the factors had in passing any judgement on which quote should be preferred. In this context the tribunal was concerned about the way the factors dealt with the insurance excess on this claim. Although the claim was a 'private' one insofar as it related to the homeowner's individual property, the damage giving rise to it had been caused by a common fault. Therefore, the homeowner should not have to bear the excess on her own. The terms of the insurance policy are irrelevant to this. What is at issue is the responsibility for paying the excess which ultimately must fall to the owners in the block and not to the individual. In the case of car insurance, while the innocent driver must pay the excess initially, they are entitled to recover it from the driver at fault. In the same way the homeowner is entitled to recover shares of the excess from the other proprietors, which essentially makes this a common charge on the

property which should be recovered by the factors from the other owners and accounted for to the homeowner.

- ii.* We consider that the homeowner was entitled to be dissatisfied with B&D as a result of the condition in which they had left the property, saying they would return the following day to complete the job and clear the rubbish which they failed to do. This was the fault of B&D and not the factors, although they did divert B&D to another job and arranged for their own handymen to clear the rubbish. If the homeowner had been misled about when B&D would return, that was the contractor, not the factors. In fact, the factors did respond in good time to the homeowner's complaint about the rubbish and their own people attended and cleared it up, even if some sweeping up had to be completed by the cleaners the following week. We find no fault in the actions of the factors in relation to these matters.
 - iii.* We accepted that the factors had responded to the homeowner in good time, although she is correct to say that a number of the emails from the factors did open with apologies for delays in getting back with reports on progress etc. However, the fact is that the factors did handle the correspondence appropriately and we find no fault in the actions in this regard.
25. Section 5.4: If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If the homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so.
- i.* The factors lodged a copy of their "Building Insurance Claim Process" which deals with claims being lodged by the factors on behalf of owners. The procedure refers to a "decision from the insurance company regarding the contractor". In this case there is a perception that the factors may have sought to influence the insurer's decision. As a private claim, apart from their position as the policyholder on behalf of the proprietors the factors should not have any locus in such matters. They could have sought clarification of the J&M Modica quote by enquiring of the homeowner as to contact with them.
 - ii.* As a consequence, the homeowner felt that she was being pressurised into using a contractor which appeared to be favoured by the factors and while we did not find that there was such a preference, the factors did open themselves to such a perception. There is also a perception that the factors were not acting entirely in the interests of the homeowner on whose behalf they should be seen to act.
 - iii.* The factors' process requires the owner to provide the factors with the necessary information such as quotes, photos etc on the basis of which the factors make the claim on behalf of the owner. It does not require the factors to obtain quotes or appoint contractors. This was a private claim and although it makes sense to allow an owner to consider a quote from the contractor who did the track and trace, which was a common expense, divided amongst the owners, we do not consider that the factors had any locus to make recommendations to the insurers regarding the quotes. We find that in this case the factors made a recommendation based on their assessment of the quotes, without having inspected the property themselves and relying entirely on what they were told by B&D. They do not seem to have

been pursuing the claim 'on behalf of' the homeowner but rather dealt with it as they might a common repair claim.

While the specific terms of this section of the Code have been applied insofar as a procedure does exist, we find that the process was not properly implemented in this case and we find there to have been a breach of the Code in this regard.

26. Section 5.5: You must keep homeowners informed of the progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves.
- i. We found no fault on the part of the factors in relation to their not attending to inspect the job, although if they had done they would have been in a more authoritative position to make a judgement on the necessary work.
 - ii. We found no fault on the part of the factors in regard to this section of the Code despite the emails which apologised for delays etc, although we did note that on one occasion, access to an absent staff member's email was not available which is a regrettable position.
27. Section 5.7: You must inform homeowners of the frequency with which property revaluations will be undertaken for the purposes of buildings insurance and adjust this frequency if instructed by the appropriate majority of homeowners in the group.

We were given no evidence to substantiate this complaint and found no fault.

28. Section 6.6: If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.

We were given no evidence to substantiate this complaint and found no fault.

29. Section 6.8: You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.

We were given no evidence to substantiate this complaint and found no fault.

30. Section 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.

We were given no evidence to substantiate this complaint and found no fault.

Property Factor Enforcement Order ("PFEO"):

31. Having determined that the Factors were in breach of the Code, the tribunal then considered the terms of a proposed PFEO and considered that the factors should pay to the homeowner the sum of £250 to the Applicant within a period of 30 days after service of Notice of PFEO.

32. The tribunal determined that the factors will refund will also refund the amount of the insurance excess to the homeowner and recover the relative shares thereof from the co-owners responsible.

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.

D Preston

Chairman

13 March 2019