

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision and Statement of Reasons under Section 19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/18/1569

Re : 17 Lugar Street, Coatbridge, Lanarkshire ML5 3JS ("Property")

The Parties:-

Mrs Kathryn Miller, 11 Street Farm Close, Harthill, Sheffield S26 7UH ("Homeowner")

Speirs Gumley Property Management, 194 Bath Street, Glasgow G2 4LE ("Factor")

Tribunal Members:

Joan Devine – Chairing and Legal Member
David Hughes Hallett – Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Factor has complied with the Code of Conduct for Property Factors as required by section 14 of the 2011 Act. In all the circumstances the Tribunal does not propose to make a Property Factor Enforcement Order ("PFEO").

Introduction

1. 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"
2. Following on from the Homeowner's application to the Tribunal which comprised documents received in the period 28 June to 3 August 2018 ("the Application"), the Convener, with delegated powers under section 96 of the Housing (Scotland) Act 2014, referred the Application to the Tribunal on 27 September 2018. The Tribunal had available to it, and gave consideration to, the Application, Productions provided by the Homeowner, Inventory of

Productions provided by the Factor and the oral submissions made by both parties at the hearing.

Hearing

3. A hearing took place at the Glasgow Tribunals Centre on 4 December 2018. The Homeowner attended and was accompanied by her husband, James Millar who acted as her representative. The Factor was represented by Brian McManus and Joanne Knox.
4. The Tribunal noted that at section 7 of the Application, the Homeowner had said that the Application was proceeding under section 1, 2 and 7 of the Code. The Tribunal sought clarification of the issue which the Homeowner wished to raise under section 1. The Homeowner clarified that she did not have any issue about what is contained in the Written Statement of Services. It was clarified that the Homeowner's Application proceeded in respect of section 2.5 and section 7.2 of the Code.

Findings in Fact

1. The Property is a flat within a block of six at 17 Lugar Street, Coatbridge, Lanarkshire.
2. The Factor performs the role of the property factor of the block.
3. In May 2017, the windowsill of the flat below the Property collapsed.
4. Insurance for the building is held with Zurich. A claim was made for the cost of the repairs in terms of the insurance policy for the building. The claim was rejected.
5. The claim made to the insurers was rejected on or about 16 June 2017.
6. The Factor told the Homeowner about the rejection of the claim on 22 August 2017.
7. The Homeowner has appealed to the relevant Ombudsman, seeking to have the rejection of the claim overturned. That matter has not yet been resolved.

Summary of Submissions

1. Mr Miller made submissions on behalf of the Homeowner throughout the hearing. He told the Tribunal that the Homeowner had acquired the Property in December 2012. Mr Miller told the Tribunal that there were 60 flats in the development and that the Property was situated within a block of 6 flats. The

collapse of the windowsill that led to the insurance claim which featured throughout the Application had taken place in May 2017. He told the Tribunal that the windowsill which collapsed was in the flat below the Property. Mr Miller told the Tribunal that he and the Homeowner are not permanently resident in the Property. They use it as a holiday home.

2. There were two particular communications which caused concern for the Homeowner. Firstly, the email issued by Mr Miller to the Factor dated 26 October 2017 and, secondly, the email issued by Mr Miller to the Factor dated 26 March 2018.
3. Mr Miller told the Tribunal that in August 2017 the Homeowner and other proprietors within the Block were asked to pay for the repair to the collapsed windowsill. It was then queried why the cost was not covered by insurance. On 22 August 2017, the Factor told Mr Miller that the claim had been rejected based on a report from a loss adjuster called Cunningham Lindsey, which said that the sill was not fitted properly at the time of construction.
4. Mr Miller said that the date of rejection of the claim was 16 June 2017. He was not, however, advised until 22 August 2017.
5. As regards the email of 26 October 2017, it attached a summary of the course of events to that point. Mr Miller said that the main concern at that point was that the Homeowner wanted the Factor to contact the insurance broker, Deacon, to obtain "a plain English "yes" or "no" answer" to two questions. The first question was whether or not there was insurance cover in place for the future in respect of events similar to the windowsill collapse which had occurred in May 2017. The second question related to the failed insurance claim itself. The Homeowner wanted the Factor to appeal that decision.
6. The Homeowner said that he and other homeowners at the block had asked the Factor to go to the broker and ask them to contact the insurer, Zurich, and invite them in to confirm whether there was cover in place for similar future events. Mr Miller said that it was his position that the Homeowner still did not have an answer to that question in a format that was acceptable.
7. Mr Miller said that proprietors within the Block raised questions as to why the problem with the windowsills had not been picked up in any of the routine inspections carried out by the Factor. He said that the Factor carried out four inspections each year. In addition, the Homeowner had obtained a home report when acquiring the Property from DM Hall. This had not identified any problem with the building. Mr Miller told the Tribunal that Zurich had insured the building for 12 years.

8. Mr Miller said that one of the grounds for concern about communication with the Factor, was the number of members of staff at the Factor who dealt with communications. Mr Miller referred to his email of 26 October 2017 and the narrative under the heading "Presentation". This set out the number of people at the Factor who had been involved.
9. Mr Miller said that in response to his email of 26 October 2017, a meeting was convened for 20 November 2017 at the offices of the Factor. Mr Miller and another proprietor, Mr Murphy, attended as representatives for the block. Mr Miller referred the Tribunal to the document which he had lodged headed "Questions for SP" which set out the points he wished to raise at the meeting. He said that his central focus was the unanswered email of 26 October 2017.
10. Mr Miller said that his concern was that the Factor had given a copy of his email of 26 October 2017 to the insurer, Zurich. It was inappropriate for the Factor to have done that as the email summarised the tactics to be adopted by the homeowners within the block to challenge the decision by the insurer to reject the claim.
11. Mr Miller told the Tribunal that the outcome of the meeting of 20 November 2017 was that he produced a list of agreed action points. A copy was produced. He emailed this to the Factor on 21 November 2017. The Factor responded by return, accepting some of the action points and not others.
12. Mr Miller told the Tribunal that a neighbour, Mr Murphy, asked the Factor on 22 August 2017 whether there had been a wider assessment of the building.
13. Mr Miller then referred to the letter from the Factor dated 26 September 2017 which was the first document in the Factor's productions. He said that this letter contained the first proposal to have a contractor, Affiniti, assess the whole building. The letter set out the cost provided by two structural engineers. Mr Miller noted that this letter referred to a previous similar incident where a sill had collapsed. Reference was made to paragraph 2 on page 2 of the letter.
14. Mr Miller told the Tribunal that he had asked for a claims history and it was only now that this previous sill collapse in 2016 had been "slipped in". Mr Miller questioned what had been the diagnosis in 2016 for the sill collapse. His concern was that the Factor had had information since 2016 which they had not acted upon to see how widespread the issue was.
15. The Tribunal asked Mr Miller to clarify his concerns by reference to the Code. Mr Miller said that his concern related to the delay between June and August 2017. The insurance claim had been rejected in June, but homeowners were

not told until August. He was also concerned that on 5 September 2017 proprietors were told that a wider assessment of the building had not been carried out. It was only on 26 September 2017 that prices were proposed for a full inspection.

16. Mr Miller said that the proprietors had appealed the rejection of the insurance claim. He referred to a letter from the Factor dated 2 October 2017 which advised of the rejection of the appeal. It referred to a rejection by the loss adjuster, Cunningham Lindsey, on 27 September 2017. Mr Miller said that he thought that the loss adjuster had rejected the appeal because the Factor had told the broker about the previous incident.
17. Mr Miller told the Tribunal that in response to the letter from the Factor of 26 September 2017, the Homeowner agreed to instruct Affiniti to assess the building. In response to the rejection of the appeal, intimated by the Factor on 2 October 2017, Mr Miller had responded to the Factor on 3 October saying that he wanted a permanent fix. As regards the ongoing appeal against the rejection of the claim, Mr Miller had decided to take the matter to the appropriate ombudsman. He understood that that was a matter for him to pursue and not the Factor. His concern in October 2017 was, however, that the Factor had compromised the insurance claim.
18. Mr Miller told the Tribunal that he had a concern around information provided by the Factor to the insurer, Zurich. He thought that the Factor had handed over the Affiniti quote and that they had also told the insurer about the previous collapse of a windowsill.
19. On behalf of the Factor, Mr McManus told the Tribunal that he regarded the meeting on 20 November 2017 as being productive. There had been a lot of communication between the parties. However, the crux of the dispute seemed to be that Mr Miller did not agree with the insurer's rejection of the claim or with the conclusion reached by the engineers.
20. Mr McManus referred to the Code and said that he was not aware of a failure on the part of the Factor to respond or to deal with a complaint.
21. Mr McManus said that the rejection of the insurance claim was still a matter that was with the ombudsman. He said that the Factor felt that they had acted in good faith. They had provided information to the ombudsman when requested. The ombudsman's position at this stage was that nothing further was required.
22. The Tribunal asked Mr McManus about response times. He said that the Factor had responded to Mr Miller by return or quickly thereafter.

23. The Tribunal asked about the complaints process implemented by the Factor. Mr McManus said that he did not regard the letter of 26 March 2018 as being a complaint. Once it was clarified that this was a formal complaint, the Factor requested further information to determine whether or not there had been a breach of the Code. He said that as far as the Factor could tell, the Homeowner's complaint related to rejection of the insurance claim and the content of the engineer's report. Mr McManus said that he was not aware of specific breaches of the Code.
24. The Tribunal asked Mr McManus why the issue with the windowsills had not been picked up. Mr McManus said that it was not an obvious defect. The Tribunal queried why the insurer had not covered the claim. Mr McManus said that he did not know what had caused the sill to collapse, nor did the insurers.
25. Mr McManus referred to document 18 in the Factor's productions which he regarded as being the formal complaint. Document 19 was the acknowledgement of the complaint which requested further time to respond. Document 20 was the full response from the Factor.
26. The Tribunal asked Mr McManus about the failure to advise the Homeowner of the rejection of the insurance claim in June 2017. Mr McManus said that he did not have information in that regard with him.
27. Mr McManus confirmed that the Factor is the property factor for the whole development and that Zurich are the insurer for the whole development. He said that the incident in 2016 of the sill collapsing was on a ground floor in another block. He did not know whether a claim was submitted to the insurer in respect of the previous incident.
28. The Tribunal asked Mr McManus to comment on Mr Miller's complaint regarding the sharing of information.
29. Mr McManus said that proprietors had asked the Factor to liaise with insurers and his view was that insurers should be provided with all relevant information. He did, however, think that one report from Affiniti had been withheld. He was asked about the allegation that the Factor had told the insurer about the previous incident. Again, Mr McManus said that he felt it was appropriate for the insurer to be given all relevant information.
30. As regards insurance cover going forward, Mr McManus thought that the appropriate cover was in place. He referred to document 8 in the Factor's productions.

31. As regards the complaint made by Mr Miller on behalf of the Homeowner, Mr McManus viewed the current complaint as relating to the structural engineer's report from McCulloch. He referred to document 6. In his view, Mr Miller was not happy with the report. He thought that it was Mr Miller's view that the engineer's report would assist with the claim to the ombudsman.
32. As regards the email from Mr Miller of 26 March 2018, Mr McManus said that the response to that had been a meeting on 9 April 2018. Mr McManus said that production 14 onwards contained the documents which showed that the Factor was dealing with the complaint.
33. Mr McManus said that he felt that the reference to the Tribunal occurred before the Factor's complaints process had been completed.
34. Mr Miller told the Tribunal that the claims history provided to him did not include the incident from 2016 which suggested there had been no insurance claim made in respect of that incident.
35. Mr Miller said that he was concerned that there was still no evidence of what had caused the sill to collapse. Mr Miller said that he understood that the Factor was not responsible for the rejection of the insurance claim. However, the Factor as agent for the proprietors should not supply ammunition to the insurer to allow them to reject the claim.
36. He said that his concern about the Factor was firstly that they had not acted upon information which they had held since 2016 regarding the previous incident and they were not carrying out a full assessment of the development after the May 2017 incident.
37. Mr Miller said that the meeting on 9 April 2018 did not resolve the concerns raised in his email of 26 March 2018. In his view, there had been no substantive response to the 26 March email until 30 July 2018. Mrs Miller confirmed that she had received the letter of 30 July.
38. The Homeowner and Mr Miller clarified that the email of 3 August 2018, timed at 14.46, from Mr Miller to the Tribunal set out the Homeowner's response to the Factor's letter of 30 July 2018. Mr Miller said that the Homeowner had been promised a response to the 26 March complaint on 18 May, 6 June and 12 June, but none was provided until 30 July 2018.
39. Mr McManus said that the letter of 26 March 2018 did not make clear that it was a complaint. On his reading of it, it seemed to be a complaint about the engineer and the content of their report, rather than a complaint about the conduct of the Factor.

40. Mr Miller referred the Tribunal to his email of 13 June 2018 which narrated when responses were provided by the Factor. Mr Miller said that, in his view, his emails of 26 October 2017 and 26 March 2018 remained unanswered. Mr Miller said that there had been unreasonable delay in responding to and resolving a complaint.
41. Mr Miller said that he did not engage in the Factor's complaints process as matters were becoming protracted. Mr McManus had agreed on 20 November 2017 to be the main point of contact and he had not continued to be such a contact.
42. Mr McManus said that he thought that the complaint under section 7.2 of the Code was not competent as Mr Miller had said that he did not intend to engage in the complaints process. He said that the Factor did not consider that the letter of 26 March was a complaint. Once it was made clear that it was a complaint, the matter was passed to Joanne Knox who is the client relations manager at the Factor.
43. Joanne Knox told the Tribunal that she acknowledged the letter of 20 June on 22 June and said she would respond fully within 28 days unless more time was required. She said that she wrote to Mr Miller on 23 July seeking more time. The full response was issued on 30 July 2018. She said that in addition she had left a voicemail for Mr Miller on 15 June 2018, to which he did not respond. She had emailed him on 15 June and on 19 June she had again tried to call him and spoken with the Homeowner.
44. Mr Miller said that the Factor should conduct their business by reference to all relevant legislation. They should not have handed over documents at key stages that prejudiced the appeal against the rejection of the insurance claim. Mr Miller said that the Factor did not have regard for health and safety issues. They did have information in 2016 that they could have acted upon to ensure safety.
45. Mr McManus said that the Factor had been completely open and had not sought to cover anything up.

Remedy Sought

46. The Tribunal asked Mr Miller what remedy was sought. He said that he wanted compensation. He said that he wanted compensation in respect of the wrongful commissioning of the engineer's report. He thought that the Factor should pay that cost which was £540 inclusive of VAT. Joanne Knox clarified that the cost of £540 was the cost met by all six proprietors.

47. Mr Miller said that he also felt that the insurance claim had been prejudiced and if the further appeal to the ombudsman did not succeed then he felt that the Factor should pay for the cost of the reinstatement of the sill which was £236. He said that he also felt that the proprietors had not received the service that they deserved and they should receive a refund of the management fees that had been paid.
48. Mr McManus said that the engineer's report was instructed at the request of the owners. The owners had agreed to the cost. In those circumstances there had not been wrongful commissioning of the report.
49. Mr Miller said that the engineer should not have been asked to comment on the cracks in the structure but they should have been instructed to look at what was the underlying cause for the sill collapsing.

The Code

50. Section 2.5 of the Code states:

"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 referred)."

51. Section 7.2 of the Code states:

"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."

Tribunal Findings and Reasons for Decision

52. The Tribunal determined that there had been no breach of the Code.
53. The Homeowner's basis for complaint under Section 2.5 of the Code was fundamentally the delay between the insurance claim being rejected and the Factor telling the Homeowner about the rejection. The delay was from 16 June to 22 August 2017. The Tribunal determined that this delay was not unreasonable in all of the circumstances. Further the Tribunal took the view that this issue could not properly be construed as falling under Section 2.5 as

it was not a response to an enquiry. The Homeowner was also concerned about information being provided by the Factor to the insurer of the Property. The Tribunal determined that this complaint did not fall under Section 2.5. In general terms the Tribunal observed that the Factor communicated with the Homeowner within reasonable timescales and fully responded to issues raised. It was apparent that the Homeowner was dissatisfied with the way in which the Factor had handled elements of the insurance claim but that was not indicative of a breach of the Code.

54. The Homeowner's basis for complaint under section 7.2 of the Code was essentially the lack of a satisfactory response to the email from Mr Miller to the Factor of 26 March 2018. The email expressed concern about a number of matters and in particular the inspection of the building and the report received from Affiniti. It was not immediately apparent from the email and attachments that it was a formal complaint that would fall under Section 7.2 of the Code. The main points made in the email related to the engineer's report recently received rather than concern being expressed about the conduct of the Factor. There was produced to the Tribunal copies of a number of emails between the Parties in the period after 26 March 2018. In particular there were communications from the Factor dated 11, 13, 17 and 30 April, 11 and 24 May, 6, 12, 15 and 22 June and 23 and 30 July 2018. In the final communication of 30 July 2018 further information was sought by the Factor from the Homeowner and explained how the complaint could be escalated to the next stage. The Tribunal determined that there had been no breach of Section 7.2 of the Code.

Appeals

55. **In terms of section 46 of the Tribunals (Scotland) Act 2014 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.**

Ms Joan Devine

Signed
Joan Devine, Legal Member

Date

13 December 2018