Housing and Property Chamber
First-tier Tribunal for Scotland

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

Property Factors (Scotland) Act 2011 ("the Act")

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

Chamber Ref: FTS/HPC/PF/18/0293

Flat 0/1, 65 Cherrybank Road, Merrylee, Glasgow, G43 2NL ("The Property")

The Parties:-

Mr Nathan Murdoch residing at Flat 0/1, 65 Cherrybank Road, Merrylee, Glasgow, G43 2NL and his representative Mrs Rebecca Murdoch also residing at Flat 0/1, 65 Cherrybank Road, Merrylee, Glasgow, G43 2NL ("the Applicant")

YourPlace Property Management Limited, a company incorporated under the Companies Acts (Company Number SC245072) and having its Registered Office at Wheatley house, 25 Cochrane Street, Glasgow, G1 1HL ("the Respondent")

Tribunal Members:

Mr E K Miller (Legal Member)
Mr D Godfrey (Ordinary Member)

Decision

The Tribunal, having made such enquiries as it saw fit for the purpose of determining whether the Respondent had complied with the Code and its property factor's duties as defined in the Act determined that the Respondents had breached Sections 2.1, 2.5, 6.1, 6.3 and 7.1 of the Code as well as breaching it's property factor's duties.

The Tribunal proposed to impose a PFEO requiring the Respondent to make payment to the Applicant of the sum of £1500.

The decision was unanimous.

Background

1. By an application dated 3rd February 2018 the Applicant had made an application to the First Tier Tribunal for Scotland (Housing & Property Chamber) ("the Tribunal") alleging a failure on the part of the Respondent to comply with their duties under the Property Factors duties as contained in the Property Factors (Scotland) Act 2011 ("the Act") and the Code.

2. The President of the Tribunal referred the application to the Tribunal for determination.

3. On 23 April 2018, a hearing took place before the Tribunal at the Glasgow Tribunals Centre, Room 2, 20 York Street, Glasgow. The Applicant and his wife were present and represented themselves. Mr Tom Cuthill and Ms Susan Mackie from the Respondents were present and they were represented by Mr David Adamson, solicitor of the Wheatley Group (the Respondent being part owned by the Wheatley Group)

Background

The Applicants had purchased the Property in 2016. The Respondents factored the larger tenement of flats of which the Property forms part ("the Block").

Since purchasing the Property, the Applicant and the Respondent had been at loggerheads over a number of issues. The Applicant had lodged a number of complaints with the Respondents over communal repair works which he alleged had either not been carried out or carried below an appropriate standard.

The Applicant's application to the Tribunal alleged breaches of 2.1, 2.4, 2.5, 6.1, 6.3, 6.4, 6.6, 7.1 and 7.2 of the Code as well breaches of property factor's duties as defined in the Act

The primary issue between the parties related to a significant repair/replacement that was required to the roof of the Block. It was anticipated that the Applicant's 1/6th share of these works would be around £4,667. Ewan – do you mean 1/6th of the £28,000 anticipated roof replacement cost?

The Applicant's complaint was that at the time of their purchase of the Property, the usual conveyancing enquiries had been made between the Applicant's solicitor and the then owner of the Property and her solicitor. As part of that process, a letter was obtained from the Respondents dated 21 March 2016 which stated that there were no communal repairs reported but not instructed. It also stated that there were no improvement/projects under consideration.

Upon investigation by the Applicant it transpired that various temporary roof repairs had been carried out to the roof of the Block in 2013/14. Tarpaulins had been placed in the attic void of the Block to catch incoming water. From the evidence before the Tribunal, it appeared that the tarpaulin was still present some five years later.

The Applicant's submission was that the letter of 21 March 2016 from the Respondent had been false and misleading as only a temporary repair had been carried out. The need for a proper repair had been highlighted to the Respondent back in 2013 but only a temporary repair had been carried out. The Applicants submission was that the letter of 21 March 2016 should have disclosed the ongoing issue. Had the Applicant been aware of these issues they would have raised them with the seller of the Property and had the opportunity to negotiate on the price they paid for the Property.

At the hearing, whilst the bulk of the submissions centred around the roof repair, a significant number of other issues were also raised. These issues were more minor in nature and for some of these the Respondents had already accepted that errors had been made. A number of the Applicant's complaints had been upheld by the Respondents in their complaints handling process.

Before setting out in more detail below the Tribunal's findings and reasons in relation to the primary issue of the roof repair, it is appropriate to set out, more briefly, these other issues and the findings of the Tribunal in this regard.

Complaints Resolution – 2.5, 7.1 and 7.2 of the Code

The Applicant had complained that the Respondent had breached their complaints resolution procedure in that they had failed to respond timeously to various complaints made by the Applicant.

Section 7.2 of the Code required the Respondent to confirm when the complaints procedure has been exhausted and at that stage to signpost the Applicant to the Tribunal if he was still dissatisfied. The Tribunal was satisfied that there had been no breach in this regard. The Respondent had a standard two stage complaints process in place that was clear. The responses to the Applicant made it clear when the process had been exhausted and had signposted the Applicant to the Tribunal.

In relation to 2.5 and 7.1 of the Code, this required the Respondent to have a clear complaints resolution process in place and to respond within timescales set out in its written statement for services. The Respondent had accepted both within its complaints process and also in its written submissions to the Tribunal that the Respondent had, on occasion, failed to adhere to the timescales for acknowledging and responding to complaints.

The Applicant, at the hearing, indicated that matters had improved recently in relation to his most recent complaints.

The Tribunal was satisfied that, overall, the Respondent had a robust and transparent complaints process. The complaints had been dealt with openly and their decisions explained. Whilst a couple of timescales had been missed these were not of any major significance.

Accordingly, whilst accepting there had been a breach, the Tribunal viewed this at the lowest end of the scale and did not consider that any further action was required in this regard.

Carrying out Repairs and Maintenance – 6.4 of the Code

It was accepted during the course of the Tribunal that the core service provided by the Respondent was a reactive service that dealt with repairs on an "as and when" basis rather than on a cyclical or planned basis. On that basis there had been no breach of the Code. An issue about maintenance of the back court of the Block is addressed below.

Carrying out Repairs and Maintenance – 6.3 and 6.6 of the Code

The Applicant complained that he had tried to obtain information regarding the basis of appointment of the contractors who carried out repair work on behalf of the Respondent. This was done by City Building (Glasgow) LLP ("City Building").

City Building was a joint venture between Wheatley Group (the parent company of the Respondent) and Glasgow City Council. The Wheatley Group had a 50% share of City Building.

Despite several requests, including during a meeting with Angela Lanigan of the Respondent, the Applicant alleged that no meaningful information had been provided as to the basis of appointment. The Respondent's position was that there had been no tendering exercise and so there was nothing to disclose.

The Tribunal was not satisfied during the course of the hearing that it had obtained sufficient information to allow it to make a determination in this regard. Accordingly, it issued a direction after the hearing asking for more information to be provided. The Respondent duly provided this on 8 July 2018.

The Respondent had initially tendered its repairs and maintenance works in 2009. Two parties had been appointed, one of whom did not take up the position. This left the work being carried out solely by City Building (Contracts) Limited (as opposed to City Buildings (Glasgow) LLP). In 2017 the Respondent, via Wheatley Group, had undergone a consultation exercise to ascertain the most appropriate way forward for the required repair and maintenance services to be delivered. Various professional advisors such as PwC, Savills and Shepherd and Wedderburn had advised on this. The upshot of the consultation was, for a variety of reasons, a recommendation for the Respondent to utilise the services of City Building going forward. There was no competitive tendering exercise.

The basis of the Respondent's submission in this regard was that there was nothing to disclose to the applicant in relation to Sections 6.3 and 6.6 as there had been no tendering process.

The Tribunal accepted this submission in relation to Section 6.6. This section clearly relates to where there has been a tendering process. If there has been no tendering process then there is nothing to disclose and, therefore, no breach,

However, the Tribunal could not agree with the submission in relation to 6.3. This required the Respondent to disclose, upon request, how and why a contractor was chosen. The Section specifically states that this includes where no competitive tendering exercise has taken place or in-house staff have been used.

The Tribunal was disappointed that the Respondent had failed to disclose the consultation process that had been undertaken before the appointment of City Building. Despite being asked by the Applicant verbally and throughout the complaints process they had failed to disclose how City Building was appointed and why. The section of the Code was very clear and it should not have taken a direction of the Tribunal to elicit the necessary information. It was all the more relevant to ensure there was transparency where no competitive tendering had taken place and there was a relationship between the respondent and the contractor. Homeowners were entitled to ascertain the reason for the appointment.

The Tribunal was now satisfied that the necessary information had been provided to the Applicant. The tribunal was disappointed at the apparent lack of transparency and willingness to share the reason for the appointment of City Building. However, the information had now been provided and so no further action was required.

Carrying out Repairs and Maintenance – 6.1 and Communication - 2.1 – general repairs

The Applicant had complaints regarding a number of the repairs carried out by the respondent at the Block. These were several in number and related to gutter and downpipe repairs, the erection of a replacement fence, roof repairs and back court

maintenance. These complaints contained elements of both Sections 2.1 and 6.1 as well as property factor's duties

The Respondent's accepted that there had been failings on their part in relation to some of aspects of the Applicant's complaints. Theses had been accepted in the complaints process where a number of complaints had been upheld and was also acknowledged by Mr Cuthill and Ms Mackie at the hearing and in the written submissions to the Tribunal.

Examples of issues faced by the Applicant (and accepted by the Respondent) were:-

- Downpipe repair – June 2016. The Applicant reported the required repair. Access was not obtained by the Respondents contractors and the repair was marked as closed. No effort appeared to have been made to gain access again by the contractors and the Applicant required to chase again in September 2016. This process was repeated and on the fourth time of asking the repair was dealt with properly.

- Fence repair/replacement – August 2017. Despite a works order being raised it was not progressed and the Applicant required to chase. Various reasons were given for subsequent delays - the contractors could not find the fence that needed replaced or the contractor stated they couldn't get past the security door – despite there being no security door at the Block.

- Gutter repair – the Applicant was billed for the gutter being cleaned by way of a saddle ladder. No saddle ladder was used. Incorrect information was given to the Applicant and considerable time spent by them resolving the matter and the billing.

- Back court maintenance – the Applicant complained about this being done to an appropriate standard and as frequently as it ought to have been. The Respondent submitted that this had been done. There was insufficient information for the Tribunal to make a determination in this regard.

As noted above, the Respondent accepted that there had been failings in this regard and there had been breaches of the Code and property factors duties as there had been poor service received by the Applicant over a prolonged period of time. It was apparent that the Applicant had spent a considerable amount of time and effort chasing for progress and highlighting billing and communication errors in this regard.

The Tribunal did not consider that there had been a breach by the Respondent of 2.1 in relation to this aspect of the Code on the highlighted repairs. There had undoubtedly been poor communication by the Respondent and their contractors. However, the Tribunal did not view it as having been deliberately false or misleading.

However, it did appear to the Tribunal that there appeared to be poor supervision of work by contractors, lack of correct reasons for work not being done and timescales for repairs being overshot considerably. Generally the tribunal was of the view that the Applicant had suffered from a poor standard of service in relation to these general repairs. Whilst the Respondent had cancelled some charges the Tribunal did not view this as going far enough. The Respondent had had to tolerate multiple failings and miscommunications across various repairs. The Applicant had spent a considerable amount of time chasing for these to be put right. The Respondent had

not met the terms of Section 6.1 of the Code or its general standard of service in terms of its property factor's duties.

The Tribunal was of the view that the Respondent should recognise this by way of a financial payment to the Respondent by way of recompense. The Tribunal was of the view that a sum of £300 would be appropriate,

Carrying out Repairs and Maintenance – 6.1 and Communication - 2.1 and property factor's duties – the roof

As highlighted above, the majority of submissions centred around the roof repair. The usual conveyancing enquiries had been made at the time of the Applicant's purchase of the Property. As stated above, the Respondent's standard letter indicated that there were no common repairs outstanding or works contemplated.

The Tribunal heard that an issue had been raised with the roof as far back as 17 April 2013. Job number WO1O1099866/1 from the Respondent's log showed that the pitched roof had been leaking and that a repair was requested by a resident as water ingress was occurring to the Block. A tarpaulin had been installed as a temporary measure.

On 5th December 2013 a further similar call was received by a resident and a further tarpaulin appeared to have been installed to catch water temporarily. On 14th January a further call was received and the tarpaulins were emptied of water, presumably on the basis they were overflowing by that point.

The tribunal questioned Mr Cuthill and Ms Mackie as to the terms of the letter issued on 21 March 2016 stating that there were no ongoing repairs. The placing of the tarpaulin did not appear to be a proper repair but simply a temporary fix to try and stop water penetration to the flat below. It appeared to the Tribunal that until such time as a proper and permanent repair had been carried out that the issue remained live.

After much questioning it appeared to be the case that the Respondent's computer system did not deal with such an issue in a particularly useful manner. The system viewed all matters as either open or closed. When the initial call was logged the matter became "open". When the tarpaulin had been installed the system was updated and, as some action had been taken, the system then changed the matter to being "closed". There was no method of recording on the system that the matter was "ongoing" or the like. This method of categorising appears to have continued each time the issue was logged and a further temporary fix carried out. Accordingly, when the letter of 21 March 2016 was issued the system did not show any open or ongoing repairs.

The Tribunal's initial view was that there was fault on the part of the Respondent here, caused by a system failure. There ought to have been a flag on the system that showed there was an ongoing issue with the roof. This ought to have been highlighted in the letter of 21 March 2016

The letter of 21 March 2016 was issued to the solicitor for the seller of the Property. However, such letters are commonly issued by factors to sellers on the basis that the information in them is to be relied upon by the purchasers of a property – in this case the Applicant. The Tribunal was of the initial view that the Applicant was entitled to have relied on that letter. If the Applicant had been aware of the issues they would have had the opportunity to consider whether they wished to proceed, they could

have made further investigations regarding the condition of the roof or they could have negotiated with the seller on the price to reflect the required repairs.

At the hearing the parties had both shown a willingness to acknowledge where there had been both failings and improvements. On that basis, the Tribunal indicated that whilst they were happy to reach a decision on the implications of the issues around the roof, they would not object if the parties wished to discuss directly to see if an agreement could be reached between them. Both parties were agreeable to this. The parties agreed to try and reach a landing between them within a fortnight, failing which the Tribunal would determine the matter.

On 4 May 2018, the Respondent indicated to the Applicant that they had no offer to make to the Applicant in respect of the issues surrounding the roof. The Respondent, having looked again at their system, was satisfied that the necessary repair works had been done and that a permanent repair had been carried out. On that basis the correct information had been given in the letter of 21 March 2016.

To support the Respondent's position they provided an expanded list of repair works that they submitted had been carried out. A list of works had been submitted by the Applicant in advance of the hearing. This had been provided to him after requesting it from the Respondent. This new list now contained a number of entries that supported the Respondents' position. An example of this was the original list contained an entry on 5th December that stated:-

"WO1258344/1 – Pitched Roof is leaking at the front of the property. Requested by a resident on 5th December 2013. Tarpaulin placed in the loft. Job was closed off as complete on 6th December 2013"

The amended entry now stated the following:-

"WO1258344/1 Pitched roof is leaking at the front of the property. Repair requested by a resident. Tarpaulin placed in the loft, notes on this work order confirm that the loft will be left open. Job was closed off as complete on 6th December 2013 – note states that an Emergency Follow Up has been sent to renew tiles at the chimney"

There also then appears a new entry immediately following the above WO1258344/1. This states:-

"WO1258344/2 – Pitched roof is leaking at the front of property. This is the follow up line from the repair above. Tilesl required at the front of chimney – possible storm damage. Tradesperson attended 16 December 2013, system notes state "no job as per both top floor owners" Job was signed off on 17th December 2013"

A further additional entry appear:-

"WO2358344/3 – Pitched roof is leaking at the front of the property. Follow up line to the two previous work orders. Notes on repair line advise that "Ludlow tiles poss missing" and was signed off 19/4/2014 noting that it was cancelled at the instruction of a member of staff"

The Tribunal considered the Respondent's submission. The Tribunal was more than a little uncomfortable at accepting this new evidence given that it had appeared post hearing. The Respondent had supposedly already provided the relevant information to the Applicant yet after being pressed on the issue of the roof by the Tribunal, new entries suddenly appeared. In the circumstances the Tribunal felt obliged to ask for

an explanation as to how this had occurred and to see screenshots from the Respondent's system. The Tribunal felt bound to test and weigh the credibility of this new evidence.

The information was duly provided by the respondent to the Tribunal. The Respondent submitted that the list of works requested in March 2018 by the Applicant from Angela Lanigan had only been to produce a brief background history of the repairs.

In response to this the Applicant highlighted an email from himself to Angela Lanigan of 5 March 2018 which stated "I still want to see a history of works by any Wheatley Group subsidiary". He stated "I just want to see job reports and invoices to see what's actually going on here". He went on to say "make sure the job reports and bills/invoices are present" and "I also want a detailed account breakdown for the Property"

The Tribunal did not find it a credible explanation, in light of the Applicant's email of 5 March 2018, that Angela Lanigan believed a brief history was required. The nature and tone of the request made it clear that the Applicant wanted a full explanation of the history of repairs and not a brief summary.

The screenshots provided by the Respondent did not help the Tribunal. Whilst they showed the existence of the two additional entries they did not provide any additional detail.

In any event, the Tribunal did not find the two follow up entries particularly helpful from the point of view of the Respondent. The WO1258344/2 entry states "no job as per both the top floor owners", which suggests the works may not have occurred.

The WO2358344/3 entry stated that tiles were "poss missing" and was signed off as being cancelled by a member of staff. The Respondent stated in their response to the Applicant on 4 May 2018 that "the work would only have been cancelled following a request from a customer or City Building Operative". The Tribunal did not regard this as showing in any way that further repair works had been done. The system seemed to be set up so that if works were done then details were inputted. The fact that it was referred to as "cancelled" suggested no works had been done.

The Tribunal also noted with interest the Respondents suggestion in the email to the Applicant of 4th May 2018 that photos now taken of the roof showed some tiles without moss and also some roofing compound, which suggested roof repairs had been carried out and not charged for.

The tribunal considered all the evidence before it in relation to the issue of the roof. The question before it was whether outstanding roof repairs should have been noted on the Respondent's system and therefore should have shown up in the letter to the seller's solicitor in March 2016.

On balance, the Tribunal was satisfied that the Respondent had breached the Code and it's general duties. The letter of 21 March 2016 was false and misleading and the Respondent had failed in its property factors duties by failing to record outstanding works properly and having appropriate procedures in place.

It was clear that temporary works had been carried out by the Respondent by installing tarpaulins in the roof space. The fact that those tarpaulins are apparently still in place some

four years later was suggestive to the Tribunal that matters had never been fully addressed with the roof.

Whilst there was some evidence that follow up works were considered, the Tribunal had concerns regarding the credibility of these additional entries. It was clear that all entries had been requested by the Applicant in March 2018 and not a brief history. It was convenient that these only came to light when it became apparent to the Respondent that the Tribunal members were unhappy in the hearing about the terms of the letter of 21 March 2016.

In any event, even if these additional entries were taken at face value they did little to assist the Respondent as neither proved work had been carried out and the repair had been properly closed off.

The suggestions from Ms Mackie of the Respondent that moss patterns on tiles and some roof compound indicated other works had been carried out but not charged for were scarcely credible. The Respondent cannot reasonably expect to be taken seriously if they cannot produce documentary evidence that works have taken place. If a factor has not charged for work then it is highly likely it is because the work has not been carried out.

Whilst the tarpaulins were dry on a 2018 inspection by the Respondent that did not prove the repair had been dealt with. The tarpaulin may be dry in summer but in winter it may be wet and still serving a temporary repair purpose.

The Tribunal was also concerned to note the apparent ease with which individual owners appeared to be able to cancel works. If work is required then regardless of an individual owner's view, it is incumbent on a factor to take the view of all owners. It should not take the easy way out and simply tick the job as closed and move on.

Overall, the Tribunal had significant concerns about how the Respondent had handled this matter. At best, the Respondent had a fault in how its system operated, categorised jobs and had exercised poor supervision and management of the works required.

In summary, the Tribunal was satisfied that, on balance:-

- only a temporary repair had been effected;
- that the fact the tarpaulins were still in place supported the view that a temporary repair was all that had been done;
- the new entries provided by the Respondent did not prove additional works had been carried out;
- that the Respondent's system should have still shown the repair as ongoing;
- that the letter of March 2016 ought to have disclosed the communal repair;
- that the Applicant was entitled to rely on the terms of that letter;
- the letter breached Section 2.1 of the Code;
- that generally 2.4 and 6.1 of the Code had been breached in relation to the lack of proper handling, consultation and completion of the required roof repairs;
- that the Respondent had failed to comply with their property factor's duties and to properly consult with homeowners in relation to the required roof repairs

The Tribunal, in light of this, required to consider what remedy, if any, was required in light of the above breaches.

The Applicant's principal grievance was that shortly after acquiring the Property he found out there was a significant roof repair/replacement being contemplated, of which his share would be approximately £4,667.

Had the Respondent acted appropriately and disclosed the ongoing roof issues in the letter of March 2016 then as highlighted above the Applicant would have had a chance to make further investigations and enquiries. He may have been able to negotiate a price reduction or be able to walk away from the purchase altogether. The most common course of action would have been to seek to reduce the price payable. The Tribunal was therefore satisfied that it would be appropriate for a financial order to be made against the Respondent to some extent.

However, there were a number of factors that mitigated the Respondent from having to meet the full cost of the share of the Applicant's bill for the forthcoming roof replacement:-

- it would have been apparent to the surveyor carrying out the Home Report of the property that the roof was generally of an age where replacement was likely in the short to medium term. This would have impacted on his valuation of the property in the view of the Tribunal.

- the Home Report highlighted that access had not been taken to the roof void and that a purchaser should check this. Had the Applicant done so then the problem would have been apparent. Accordingly the Applicant has to shoulder a significant degree of responsibility for the position he finds himself in.

- Whilst the temporary repair and the failure to address this properly may well have contributed to exacerbating the need for the roof to be replaced, nonetheless the roof was installed in 1955 and therefore nearing the natural end of its useful life, notwithstanding the failures of the Respondent.

Taking these factors in to account the Tribunal was of the view that whilst the Respondent should make a contribution to the Applicant's share of the roof replacement cost, the bulk would still fall to the Applicant. The Tribunal was satisfied that an additional £1,200 was an appropriate amount for the Respondent to pay to take account of their failures.

As a result of the foregoing and the breaches of Section 2.1, 2.5, 6.1, 6.3 and 7.1 as well as the breach of property factor's duties the Tribunal determined that a PFEO would be required in the circumstances

Property Factor Enforcement Order ("PFEO")

The Tribunal then considered the proposed terms of a PFEO.

The Tribunal proposes to make the following PFEO:-

"Within 30 days of service of the PFEO on the Respondent, the Respondent must make payment of the sum of £1,500 to the Applicant."

A copy of the proposed PFEO is contained in the accompanying notice under Section 19(2)(a) of the Act

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.

_ Legal Member and Chair

_ Date