

Upper Tribunal for Scotland



2023UT29
Ref: UTS/AP/22/0022

DECISION OF
LORD DUTHIE
APPEAL AGAINST DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND
IN THE CASE OF

Mr Federico Garcia Lopez de la Torre, 103 Linksfield Court, Aberdeen, AB24 1GU

Appellant

- and -

Aberdeen City Council, Marischal College Property Factor, Business Hub 6, First Floor
South, Aberdeen, AB10 1AB

Respondent

FTS Case reference: FTS/HPC/PF/21/2375

8 September 2023

Decision

1. This is an appeal against a decision of the First-tier Tribunal (Housing and Property Chamber) (the “FTS”) dated 29 August 2022. By decision dated 6 April 2023 I granted permission to appeal in respect of Complaints 8 and 16 and Duties complaints (b), (e) and (f) only. *Quoad ultra* I refused permission to appeal. Parties were agreed that I should determine the merits of the appeal on the basis of written submissions and without a further hearing. Parties duly lodged written submissions. Having considered these and for the reasons set out below, I allow the appeals in respect of those specific complaints.

Complaint 8

2. This complaint relates to the statement, in the Council's letter of 22 September 2021 in response to the Appellant's complaint, that the Council *"received a report that a roof leak had been experienced in a property in Linksfield Court initially on 5 May 2021."* The Appellant says that this is misleading and false because he reported water ingress on numerous occasions from 2016 onwards. The Appellant asserts a breach of OSP 4 of the Code. The FTS rejected this complaint on the basis that *"although leaks and/or water ingress were reported prior to May 2021, the provision of the information about the reports in September 2021, was not "deliberately or negligently" misleading or false because the Property Factor was relying on the records when drafting the response"*: FTS Decision, paragraph 86.
3. The FTS found the Appellant to be *"both credible and reliable"*. It follows (a) that the FTS quite properly accepted his evidence that he reported water ingress on numerous occasions since 2016; and (b) the Council's submission that the FTS *"should be cognisant of the fact the Appellant was unable to evidence his calls of complaint sufficiently at First Tier Tribunal or at all"* is not here relevant.
4. On Mr Stoddart's own evidence, the complaints hotline is part of the PFS provided by the Council (FTS Decision, paragraph 44). The Council is the property factor. The Council's submission that the Appellant *"knowingly contacted the wrong department within the Respondent who are not tied to the Property Factor Service or covered by the legislation under which this action 2 has been raised"* is accordingly misconceived.
5. Before the FTS, Mr Stoddart could not explain why the Council had no records corresponding to calls demonstrably made by the Appellant between 2016 and 2021. The statement in the letter of 22 September 2021 *"we received a report that a roof leak had been experienced in a property in Linksfield Road **initially on 5 May 2021**"* (emphasis added) is patently misleading and false. The FTS erred in regarding the Council's reliance upon its own inaccurate/incomplete records as being a mitigatory factor. The Council is the property factor. Precisely where in the organisation the failure to maintain records occurred is here of no relevance. The Council is not entitled to rely upon its own failure to maintain proper records to excuse the giving of misleading and false information.
6. I set aside the decision of the FTS in respect of this complaint. This complaint is upheld.

Complaint 16

7. The complaint concerns an alleged breach of Section 6.9 of the Code in respect that the Appellant claims the Council failed to pursue contractors and suppliers to remedy defects of inadequate works replacing the roof of the building that caused extensive damage in the kitchen, bathroom and living room.
8. The FTS held that (at paragraph 99) that for a breach of this section to have occurred, it would have to be shown (a) that works replacing the roof in 2015/2016 were defective; (b) that the Council knew of the existence of potential defects; and (c) that the Council failed to take steps to pursue the contractor and have the defects remedied. The FTS accepted that the Appellant *“telephoned and reported water ingress on a few occasions which were not recorded or actioned by Council staff”*. However, the FTS did not uphold this complaint, for two reasons. First, it was not satisfied that the Appellant had established a direct link between the water ingress and the new roof. Second, it was not satisfied that the Council was aware the roof might be defective.
9. In my opinion, the FTS erred. It was not necessary for the Appellant to demonstrate to any particular standard a causal link between the roofing works and the water ingress to trigger the Council’s obligation to contact contractors: in circumstances where the roof had recently been replaced and there was apparently water ingress, it was sufficient that the Appellant simply raise the issue with the Council, which he did. Having accepted that the Appellant raised the issue with the Council, it is not open to the Council to feign ignorance of such potential defects. I set aside the decision of the FTS in respect of this complaint. This complaint is upheld.

Duties complaints (b), (e) and (f)

10. Duties complaint (b) relates to installing locks in drying rooms which do not have unique keys, thereby allowing access to unauthorised third parties. I agree with the Appellant that this is a failure to carry out factoring duties to a reasonable standard, even assuming this was the result of human error. Duties complaint (e) relates to failing to communicate effectively between departments of the Council. Duties complaint (f) relates to failing to address/provide an appropriate response to various complaints

which were made. The Council, quite properly, concedes that a higher standard of communication is required. I agree with the Appellant that these complaints are further failures to carry out property factor duties to a reasonable standard. I therefore set aside the decision of the FTS and find that these complaints are upheld.

Disposal

11. I remit the matter back to the FTS. I direct the FTS to determine what, if any, remedy should be granted in light of my decision. That will involve consideration of whether and, if so, how and to what extent the Property Factor Enforcement Order dated 29 August 2022 requires to be altered. I do not consider that a differently constituted FTS is required: to the contrary, having heard the evidence and made no adverse finding regarding the Appellant's credibility or reliability, the existing panel is well placed to determine these outstanding matters. Determination of questions of causation and quantification remain live.

"C E DUTHIE KC"

Member