



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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017

Chamber Ref: FTS/HPC/PF/17/0367

Re: 4 The Park, Victoria House, Forres, IV36 3AH ("the Property")

The Parties:-

Mr Ricardo Petrocelli and Ms Elizabeth Bruce, The Park, Victoria House, Forres, IV36 3AH ("the Homeowner")

James Gibb Property Management Ltd., 1 Thistle Street, Aberdeen, AB10 1XZ ("the Factor")

Tribunal Members

Helen Forbes (Legal Member)
Angus Anderson (Ordinary Member)

Decision

The Tribunal determined that the Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Section 5.7 of the Property Factor Code of Conduct ("the Code"). The decision is unanimous.

Background

1. By application received in the period between 28th September and 21st November 2017 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") for a determination that the Factor had failed to comply with Sections 5.6 and 5.7 of the Code, and that the Factor had failed in carrying out the Property Factor's duties.
2. Details of the alleged failures to comply were outlined in the Homeowner's application and associated documents comprising email correspondence between the parties, including a complaint from the Homeowner to the Factor

dated 30th October 2017; an insurance quote from Bridge Insurance Brokers Ltd. dated 3rd March, 2017; copy invoice issued by the Factor dated 28th May 2017; Title Sheet pertaining to the Property; Decision of the First-tier Tribunal (Housing and Property Chamber), case reference number FTS/HPC/PF/17/0006, dated 12th July 2017; and the Factor's Written Statement of Services. The alleged failures outlined by the Homeowner in the Application form were failures in answering the following questions in relation to the insurance renewed on May 28th 2017:

1. What were the insurance premiums and cover for each of the insurance quotations?
2. Advise if a price/quality selection matrix was used and if so what were the weightings and quality criteria?
3. What was the brokers commission to be paid for each of the quotations?

The Homeowner also alleged a failure of the Factor in their duty of care to provide the Homeowner with a competitive block building insurance policy.

3. By Minute of Decision dated 24th November 2017 a Convenor of the Housing and Property Chamber referred the Application to a Tribunal.
4. On 19th December 2017, the Factor's representative, Ms Morgan Cooper, Operations Director, informed the Tribunal by email that the Factor would not be able to attend the Hearing set down for 22nd January 2018. The following written representation was lodged:

'We are unsure as to why this case has been accepted. We appealed the previous case decision as we felt the FTS had failed to provide a resolution but our appeal was rejected therefore we cannot add anything further than previously provided. The insurance arrangements are on a two year deal therefore nothing has changed as the insurance renewed under the same terms with only an increase in IPT affecting the premium. I am sorry that we cannot add anything further, if the panel has any questions they wish to ask us in advance of the hearing we would be happy to provide a further written response.'

5. On 29th December 2017, the Homeowner lodged written representations and informed the Tribunal that they would attend the Hearing set down for 22nd January 2018. The written representations included further correspondence between the parties, and copies of two Directions and a letter issued by the First-tier Tribunal (Housing and Property Chamber) in the case reference number FTS/HPC/PF/17/0006.

Hearing

6. A hearing took place at 11.00 on 22nd January 2018 at Forres House Community Centre, High Street, Forres. The Homeowner, Ms Elizabeth Bruce was present. The Factor was represented by Ms Morgan Cooper, Operations Manager. Ms Cooper said she was in the area on family business and was able to attend the hearing after all.

Evidence and Representations

Breach of Section 5.6

7. Section 5.6 states: '*On request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes.*'

Submission by the Homeowner

8. The Homeowner said she had been asking the Factor for information for some time and no information had been provided. She did not draw the Tribunal's attention to any particular request as to how and why the Factor had appointed the insurance provider.

The Homeowner laid out the timetable of relevant events, which was included in the application and written representations, as follows:

28/05/17: The Factor renewed the insurance with the same insurer and at the same premium as the previous year. The insurance policy from the previous year had been the subject of complaints in the case FTS/HPC/PF/17/0006, which involved the same parties.

12/07/17: A decision was issued in case FTS/HPC/PF/17/0006. The Factor was found to be in breach of sections 5.6 and 5.7 of the Code, and in breach of the Property Factor's duties by failing to provide competitive insurance.

26/07/17: The Factor requested a review of the aforementioned decision.

22/08/17: The Tribunal refused the request for a review of the decision.

06/09/17: The Homeowner received an email with the Factor's quarterly invoice informing the Homeowner of the new insurance policy.

The Homeowner said she was informed of the new policy 101 days after the policy was renewed. The Factor's failure to inform homeowners of important information was a frequent occurrence. This had been a factor in case FTS/HPC/PF/17/0006, when the Factor failed to provide the Homeowner and the Tribunal with the information requested. The Homeowner said she could not understand how the Factor could blatantly and knowingly continue to proceed unlawfully. She said this is aggravating and a waste of time and tax payers' money. It is also unethical. The Factor is charging outrageous

commission and the current insurance premium is 60 or 70% higher than other insurers. The Homeowner has obtained a quote from Bridge Insurance Brokers Ltd. with a significantly lower premium; a copy of the quote was lodged with the application. The Factor ignores the complaints of the homeowners. The Homeowner wishes the Tribunal to know that she and her co-owner are up to date with payments, and have paid all invoices, albeit under protest.

The Legal Member asked the Homeowner if she had specifically requested information from the Factor to show how and why they appointed the insurance provider, as there did not appear to be such a specific request within the application or written representations. The Homeowner referred to an email dated 30th December 2017 which was on her laptop, and she asked if the Tribunal wished to see it. The Tribunal decided against seeing the email as it post-dated the application, and it had not been lodged with the Tribunal or circulated to the Factor.

The Homeowner said the Property was valued last week and the rebuild value is £245,000. This includes VAT and a share of the communal areas.

The Homeowner explained that a residents' committee was formed in 2016 but it only lasted for a few weeks. The Chair that initiated the formation of the committee was angry with the Factor. An insurance broker met with the group and said they should be paying £1 per £1000 of value per year as an insurance premium. At that time, all but one elderly couple and a lady who has since died, were unhappy with the situation. The committee disbanded after a few weeks. The Chair, who was in business as an accountant in the area, changed her mind and said she was happy with the Factor. No one else was interested in taking on the position of chair. There was a general lack of interest, and most of the homeowners were elderly.

Breach of Section 5.7

9. Section 5.7 states: '*If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request. If a paper or electronic copy is requested, you may make a reasonable charge for providing this, subject to notifying the homeowner of this charge in advance.*'

Submission by the Homeowner

10. The Homeowner said she had nothing to add in regard to the alleged breach of this section, having covered everything in her earlier submission and the written representations, other than that the insurance policy was renewed on 28th May 2017 but she did not find out until September 2017.

Response on behalf of the Factor

11. Ms Cooper said she was satisfied that all information requested by the previous Tribunal had been supplied. In February 2017, the homeowners had been notified by newsletter that there would be a 2% increase in insurance premium for the following year. The previous Tribunal's decision was not circulated until 12th July 2017. The renewal for the current year was already in place by that time. The Factor could not change the insurance mid-term. The Factor was not directed by the previous Tribunal to make any changes to the insurance arrangements for the following year or to re-tender mid-term. As for the Bridge insurance quote lodged by the Homeowner, it was 10 months old and out of date, and the re-build value for the property was incorrect.

The homeowners voted for a block policy on 1st July 2016. The Homeowner is aware that they can have individual insurance policies if a majority of the owners so decide.

Ms Cooper said that the insurance broker takes 30% commission and the Factor's commission comes from that. There is no additional premium taken. It has been proven that the insurance premium is fair. This issue is making management of the development difficult, and this includes the costs involved in coming to hearings.

The Ordinary Member asked for clarification in relation to the assertion that the re-build value included in the Bridge quote lodged by the Homeowner was incorrect. Ms Cooper said that the wrong re-building cost had been used and therefore the quote was not comparable. There was also a dispute over whether VAT should be added. It was not a like for like quotation, and no regard had been taken of the claims history of the development.

Ms Cooper said there is a monthly meeting with homeowners. There is no evidence of unhappiness with the Factor. In regard to the broker's advice on the cost of insurance, as given to the residents' committee, the figures quoted are an average without taking the claims history into account. The homeowners have not asked for details of the claims history. That might be helpful to them in the future.

Breach of Property Factor's Duties

Submission by Homeowner

12. The Homeowner said that the Factor is not being transparent. Certain questions have been put by the Homeowner to the Factor and they have not been answered. The Homeowner considered the Bridge insurance quote lodged to be like for like. The Homeowner had nothing further to add to the written representations and what had already been said.

Response on behalf of the Factor

13. Ms Cooper said a review of the previous Tribunal's decision had been requested as the Factor did not feel that the Tribunal had addressed matters fully. The Homeowner has all the information, but doesn't seem to understand that the agreement of all homeowners would be required for the situation to change.

The Legal Member referred to two emails to the Homeowner from the Factor's Catherine Flanagan dated 1st November 2017, in response to the Homeowner's complaint of 30th October 2017. In those emails, Ms Flanagan stated that the complaint was the same complaint as was exhausted last year, the Factor's position could not be amended, and the complaint was rejected and would not be responded to. The Legal Member asked why this matter was not dealt with in terms of the Factor's complaints policy and the Code. Ms Cooper said it was exactly the same as the previous complaint and there was nothing further that could be added. The Legal Member pointed out that this complaint referred to a different year and that the questions asked by the Homeowner had not been asked by her or her co-owner last year, but by the Tribunal. Ms Cooper said that the information requested by the Homeowner was given at previous hearings, with the exclusion of information thought to be sensitive. The homeowners have information specific to their development. They are aware that the commission taken is 28.5%.

In response to questions from the Ordinary Member as to when the homeowners were informed that the insurance was to be a two year deal, Ms Cooper said that a newsletter had been sent out, probably around November 2016. It was also on the Factor's website and the on-line portal. The homeowners do not always read their newsletters. This came to light at an EGM, and, clearly, this particular Homeowner did not have the information, so must not have read the newsletter.

Further submission by the Homeowner

14. The Homeowner said that the questions should have been answered and that it should not be up to the homeowners to have to look for information that could be provided on request. She did not know it was a two year deal for insurance and there was no contract in place between the homeowners and the Factors for a two year deal. When asked by the Legal Member if the Homeowner had read the newsletter referred to, in or around November 2016, the Homeowner said she hadn't seen it, as she was busy looking after her elderly mother.

The Homeowner said that a large number of homeowners were being ripped off in relation to the insurance policy, and if this was to continue, she would have to continue fighting. The Factor has free reign to do what they want, and the Homeowner is looking for some consideration from the Factor.

Further response on behalf of the Factor

15. Ms Cooper said further information could be provided at the stage of the next renewal of the insurance. The Homeowner is asking for information that affects the whole group of properties managed by the Factor. The Factor will not share information relating to group commissions. They were not required to disclose that by the previous Tribunal. The information sought by the Homeowner has no relevance to their particular development.

Asked by the Legal Member for more information as to the implications of changing policy mid-term, Ms Cooper said this was not a viable proposition and it would lead to the Factor resigning.

Responding to questions from the Ordinary Member as to the allocation of global premiums, Ms Cooper said each development is allocated its own rate taking the claims history for the development into account. There has only been one large insurance claim for the development since the Factor took over in 2015. The insurance premium has come down since the Factor took over. **The Ordinary Member mentioned that rates between £1.70 to £1.50 per £1000 insured had been quoted for this development and asked for the range of rates over the entire portfolio. Ms Cooper replied that rates for individual developments varied between £0.83 and £2.80 per £1000 over the whole portfolio property, based on insurer's criteria and claims history of the individual development.**

Findings in Fact

16.

- i. The Homeowner is the heritable proprietor of the property at 4 The Park, Victoria House, Forres, IV36 3AH
- ii. The Factor provides factoring services in respect of the development at The Park, Victoria House, Forres, IV36 3AH
- iii. The Factor has been a registered Property Factor since 23rd November 2012, with registration number PF000103.
- iv. The Factor negotiated a two year insurance policy for the development with brokers, Marsh, to cover a period from May 2016 to May 2018. The insurance provider was Allianz.
- v. On 28th May 2017, the insurance continued for the second year with Allianz, at the same premium as the previous year, with a slight increase due to an increase in insurance premium tax.

- vi. The Homeowner lodged an application with the First-tier Tribunal for Scotland (Housing and Property Chamber) in 2017 under case reference number FTS/HPC/PF/17/0006, complaining of certain breaches of the Code and the Property Factor's duties. The application was determined on 12th July 2017, with the Factor found to be in breach of Sections 1. 2.5, 5.6 and 5.7 of the Code, and in breach of the Property Factor's duties by failing to provide competitive insurance.
- vii. On 6th September 2017, an invoice was issued to the Homeowner by the Factor in respect of insurance premiums.
- viii. The Homeowner made a complaint to the Factor on 30th October 2017 requesting information which falls within the remit of Section 5.7 of the Code.
- ix. On 1st November 2017, a representative of the Factor informed the Homeowner that the complaint would not be considered and was closed.
- x. The Factor derives commission of 28.5% in respect of the insurance for the development.

Discussion and Reasons for Decision

- 17. The Tribunal took account of all the documentation provided by parties, their written submissions, and the evidence and oral submissions on behalf of the Factor.

Breach of Section 5.6

- 18. The Tribunal did not find that the Factor had breached this section of the Code. The section of the Code specifically requires that the information to show how and why an insurance provider has been appointed must be requested. In this case, there was no record of the Homeowner having made any such specific request. Instead the application was largely based on the previous Tribunal's questions. This Tribunal did not have the benefit of being involved in the previous case. This application involved the second year of insurance and the Tribunal had to assess this case on the new application. A separate request for information specific to the second year had not been made. Consequently, there was no breach of the section.

Breach of Section 5.7

- 19. The Tribunal found that this section had been breached. Although the Homeowner did not specifically request sight of documentation, the Homeowner, as part of their complaint dated 30th October 2017, asked for information relating to the alternative quotes obtained at time the insurance

company was appointed and details of the selection process, which are, in essence, questions relating to the tendering or selection process. As such, documentation in this regard ought to have been made available to the Homeowner, following their request. The Factor chose to arrange the insurance on a global, whole portfolio basis for their own reasons, claiming that this makes it difficult to provide the requested information and, indeed, stating that they refuse to do so as the information is sensitive and not relevant to these homeowners. The Factor refused to consider the complaint made by the Homeowner and provided no information or documentation in response. The Tribunal does not accept that the Factor's method of procurement and resulting objections should be a barrier to the provision of the information under the Code. Accordingly, the Tribunal finds that the Factor has breached section 5.7 of the Code.

Breach of Property Factor's duties

20. The Tribunal did not find that the Factor had breached their duties by failing to provide a competitive block building insurance policy for the current year.

The Tribunal had regard to the findings of the previous Tribunal, case reference number FTS/HPC/PF/17/0006, as the decision had been lodged by the Homeowner as part of the application; however, this was a separate case and the Tribunal was required to decide the case before it on its own facts and circumstances.

Although the previous Tribunal found that the Factor had breached their duties by not providing a competitive block building insurance policy at the outset, that decision was based on the circumstances and facts before that particular Tribunal, at a much earlier stage in the two year period of the insurance. This Tribunal is concerned with the continuation into the second year of the insurance, from May 2017, at which time the judgement of the previous Tribunal had not been issued, and the actions of the Factor once the previous Tribunal's decision was known.

The Tribunal took account of the submission made by Ms Cooper that changing insurance provider mid-term would have had significant implications for the development. The Tribunal considered that matters had moved on considerably since the last decision was made, and that, within the next few months, the second year of the insurance policy will be at an end. The Tribunal accepted that it might not have been prudent or in the best interests of the homeowners for the Factor to have changed insurers mid-term, after receiving the decision of the previous Tribunal. Based on the submissions of the Homeowner and the responses of the Factor, on balance, the Tribunal finds that the Factor did not breach their duties by allowing the insurance to continue for the second year.

Further consideration and observations

21. The Tribunal considered that the presentation of the case by the Homeowner, though well-organised on the face of it, was somewhat unfortunate, in that there was an over-reliance on the facts, circumstances, documentation and submissions from the previous case, including copying directly the questions asked of the Factor by the previous Tribunal in their second Notice of Direction but without the benefit of their context. Those questions were asked by the previous Tribunal in response to the facts and circumstances of that particular case, and it would have served the Homeowner and this Tribunal better if the Homeowner had presented a new case relevant to the recent circumstances, including submitting appropriately worded direct questions to the Factor in relation to the second year term of the insurance. In relation to the Homeowner's third question relating to commission, the Tribunal felt that this could be a legitimate request under Section 5.3 of the code, but this category was not selected by the Homeowner in the application nor referred to in correspondence with the Factor prior to the hearing.

The Tribunal was concerned by the Factor's refusal to consider the complaint made by the Homeowner dated 30th October 2017, thus failing to follow their own complaints policy; however, that was not a matter of complaint by the Homeowner to the Tribunal, therefore, no finding was made in that regard.

The Tribunal was not fully persuaded by Ms Cooper's comments regarding her perceived deficiencies of the Bridge quotation. While accepting that Bridge would not have had access to the claims history of the particular development, there is a considerable difference in the premium quoted. Although it may have been out of date at the time of the hearing, it was not out of date at the commencement of the second year of the policy. The Factor would do well to adopt a more open, transparent procedure in tendering and appointing the next insurance provider.

Proposed Property Factor Enforcement Order (PFEO)

22. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO.
23. In considering the terms of the PFEO, the Tribunal took into account the stress and frustration caused to the Homeowner by the failure of the Factor to observe the terms of the Code in respect of section 5.7. Section 19 of the Act requires the Tribunal to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations. The Tribunal proposes to make the following PFEO:

'James Gibb Residential Factors are directed to:

1. pay to the Homeowner £500 as compensation from their own funds and at no cost to the development homeowners. The said sum is to be paid within 28 days of the communication to them of the Property Factor Enforcement Order.
2. in relation to the selection of the insurance provider in May, 2016 (this being the information used as the basis of the renewal of the insurance in May, 2017), to provide the Homeowner with details of the insurance premiums and cover of each of the alternative quotes obtained and advise if a price/quality selection matrix was used, and, if so, what the weightings and quality criteria were. Commercially sensitive information which cannot be divulged may be anonymised by substituting names with A, B, C, etc. The said information is to be provided within 28 days of the communication to them of the Property Factor Enforcement Order'.

Right of Appeal

24. 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.

Legal Member and Chairperson

22nd January 2018

