

Housing and Property Chamber

First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factor (Scotland) Act 2011 ("the Act")

Reference number: FTS/HPC/PF/20/1382

Re: Property at Flat 0/1, 159, Wellshot Road, Tollcross, Glasgow, G32 7AH ("the Property")

The Parties:

Dr. Neil Edmonds residing at 29, Biggar Road, Symington, Biggar, South Lanarkshire ML12 6FT for Joistwheels Limited ("the Applicant")

Hacking and Paterson Management Services Limited having a place of business at 3, Newton Terrace, Glasgow, G3 7PL ("the Respondent")

Tribunal Members

Karen Moore (Chairperson)

Andrew Taylor (Surveyor Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent (i) had failed to comply with Section 14 of the Act in respect of compliance with Section 2.5 of the Property Respondent Code of Conduct ("the Code") and (ii) had not failed to comply with Section 14 of the Act in respect of compliance with Sections 1, 5.2 and 5.3 of the Code. The Tribunal determined not to make property factor enforcement order.

Background

1. By an application comprising application form with supporting correspondence and documentation received on 15 June 2020 ("the Application"), the Applicant applied to

the tribunal in terms of Section 17(1) of the Act for a determination that the Respondent had failed to comply with the Property Factor Code of Conduct ("the Code") as required by section 14(5) of the Act and, in particular, had failed to comply with Section 1(Written Statement of Services) at the opening statement, Section 2 (Communication and Consultation) at 2.5 and Section 5 (Insurance) at Sections 5.2 and 5.3.

2. A Hearing by telephone conference was fixed for 29 September 2020 at 10.00.

3. The Tribunal issued the following Direction:

"The Applicant is directed to submit a copy of the title sheet for the Property which shows the title burdens or title conditions relating to the appointment and duties of a property factor or property manager;

The Applicant is directed to submit evidence from Companies House or such similar organisation showing Dr. Neil Edmonds to be a principal of and entitled to act on behalf of Joistwheels Limited;

If the Respondent intends to rely on the cases cited in its Written Submissions, the Respondent is directed to submit a copy of these cases, namely HOHP/PF/13/0232, HOHP/PF/16/0174, HPC/PF/17/0466 in terms of Rule 22 of the Rules and to provide a Note on the relevance of these cases and

Both Parties are directed to submit a list of witnesses, if any, to be called to give evidence.

The said documentation should be lodged in hard copy or by email attachment with the Chamber and copied to the other Party no later than close of business on 24 September 2020."

4. Prior to the Hearing, the Respondent lodged written representations with the Tribunal which were copied to the Applicant.

Hearing.

5. The Hearing which had been fixed for 29 September 2020 at 10.00 was adjourned as neither the Tribunal nor the Respondent had received the Applicant's full responses to the Direction and the Respondent had received notification of the Direction too late to comply with it. An adjourned Hearing was fixed for 5 November 2020.
6. The adjourned Hearing took place on 5 November 2020 by telephone conference. The Applicant was present and not represented. The Respondent was represented by Mr. David Doran, its Managing Director.
7. In response to the Direction, the Applicant had lodged a copy of the Company File for Joistwheels Limited showing him to be a principal of Joistwheels Limited and so entitled to act on its behalf.
8. In response to the Direction, the Respondent had lodged copies of cases HOHP/PF/13/0232, HOHP/PF/16/0174, HPC/PF/17/0466 and a Note on the relevance of these cases.

9. The Respondent also lodged copy letter dated 1 September 2020 from it to the Applicant accepting a breach of Section 2 (Communication and Consultation) at paragraph 2.5 and offering a goodwill payment of £200.00 together with a copy invoice showing credit of same.
10. At the beginning of the Hearing it was noted that the Applicant had not submitted a copy of the title sheet for the Property in compliance with the Direction. The Applicant advised that he had posted the relevant title deed and the Tribunal did not dispute this. The purpose of this element of the Direction was to evidence the Respondent's powers in respect of the matter before the Tribunal. Neither Party disputed that the Respondent is the property factor for the Property nor that the Respondent is entitled to arrange buildings insurance. Accordingly, the Tribunal and the Parties agreed to proceed in the absence of the copy title sheet.
11. The Tribunal dealt with each of the Applicant's Heads of Complaint in turn.
12. As the Respondent's written representations accept a breach of paragraph 2.5 of Section 2 (Communication and Consultation) of the Code, the Tribunal dealt with this Head of Complaint first. The Applicant advised the Tribunal that the Respondent's offer was acceptable but that his complaints had been handled poorly and should have been resolved by the Respondent earlier and in full.
13. The Tribunal then dealt with the Applicant's Head of Complaint that the Respondent is in breach that part of the opening statement of Section 1 (Written Statement of Services) of the Code which states: "*You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner.*" The Applicant explained to the Tribunal that his complaints all arise from the Respondent's lack of transparency in setting out its insurance invoices and charging commission. The Applicant referred the Tribunal to the Respondent's Written Statement of Services (WSOS) which he had lodged as part of the Application and submitted that it was couched in "small print". He referred the Tribunal to paragraph 6.3 of the WSOS and submitted that that it was not sufficient for the Respondent to show its commission as a percentage. He submitted that the exact monetary amount should be shown. The Applicant submitted that the owners in the block of which the Property forms part would not know the amount of commission which the Respondent received.
14. In response, Mr. Doran submitted that there was no evidence from any of the other owners and the Applicant's comments were speculative in this respect. Mr. Doran submitted that the WSOS complied fully with the Code and had been reviewed and amended in response to tribunal decisions as a whole to ensure compliance.
15. With regard to the insurance process, Mr. Doran submitted that, in accordance with standard industry practice, the Respondent was not paid commission by the homeowners but by the insurers via the broker and that the WSOS is transparent in

disclosing the level of commission. Mr. Doran referred to the cases lodged on behalf of the Respondent in support of this point.

16. The Applicant did not accept that the WSOS and invoices were sufficiently clear in this respect.
17. The Tribunal then dealt with the Applicant's next Head of Complaint that the Respondent is in breach of Section 5 (Insurance) of the Code at Section 5.2 which states: "*You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this.*" The Applicant submitted that invoices issued by the Respondent were not compliant with this part of the Code as they did not show a full picture of the premium and its apportionment.
18. The Tribunal referred the Applicant to the various invoices and letters from the Respondent to him which he had lodged with the Application and, in particular, to the annual letters from the Respondent each of which included a copy summary of cover by the insurers and so set out the information required by Section 5.2 of the Code. The Tribunal noted that the insurance premiums shown on the invoices corresponded with the premium as set out in insurance summaries. The Applicant maintained that these letters and the invoices did not show the true position as they did not reveal the commission levels or amounts and maintained that the commission costs were borne by the homeowners.
19. The Applicant referred the Tribunal to an email exchange between him and the Respondent in December 2019 and, in particular, to an email from him to the Respondents dated 11 December 2019 in which he set out a table which he had populated in part with figures relating to the insurance costs. He had asked the Respondent to complete the remainder of the table, which they had done. He agreed that he had calculated his figures taking his base figure as the annual premium for the block and assuming that this figure of £5,901.75 included both the Respondent's and the broker's commissions. Accordingly, the Applicant calculated the annual premium for the block to be £3,688.58 and not £5,901.75 as charged by the Respondent.
20. In response, Mr. Doran submitted that the Applicant had fundamentally misunderstood the way in which the insurance was arranged, costed and invoiced. Mr. Doran submitted again that the commissions were not paid by the homeowners but by the insurers and that the Applicant had been invoiced for his share of the premium. He submitted that the Applicant's position was speculative and not supported by hard facts.
21. In response to questions from the Tribunal, the Applicant advised the Tribunal that, in his view, both the principle of receiving commission for arranging insurance and the amount received were not acceptable to him and that the Respondent operated

“sharp practices” and not “decent business practices”. He submitted that the sum received was excessive in proportion to the amount of work carried out by the Respondents in arranging the insurance cover.

22. Mr. Doran strongly refuted the Applicant’s allegations and submitted that the Respondent acted entirely in accordance with accepted standard industry practice.
23. The Tribunal then dealt with the Applicant’s final Head of Complaint that the Respondent is in breach of Section 5 (Insurance) of the Code at Section 5.3 which states: *“You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance.”*
24. The Applicant advised the Tribunal that this, again, related to the way in which the Respondent set out its paperwork which did not show the monetary amount of the commission it received. He stated that the Respondent could easily resolve the matter by producing the premium invoices from the insurers as he did not accept that the premiums shown on the summary of cover were the amounts paid.
25. Mr. Doran reiterated that the Respondent’s approach is in line with standard industry practice and is compliant with the Code. Mr. Doran referred the Tribunal to the various cases which the Respondent had lodged which supported the Respondent’s position.
26. The Parties then summed up their cases.
27. The Applicant summed up his position that the Respondent has not been clear and open about the commission received and that, because of these hidden costs, the insurance premium should be lower than that invoiced. He stated that if the Respondent apologised and removed the insurance charges, he would withdraw the Application.
28. Mr. Doran summed up by referring the Tribunal to his written submissions and the cases lodged. He took strong exception to the tone and content of the Applicant’s remarks throughout the proceedings which were slurs on the Respondent’s business practices and which were not substantiated in any way.

Findings of the Tribunal

29. The Tribunal took into account the Application, all of the productions lodged by the Applicant and the Respondent and the submissions made by the Applicant and on behalf of the Respondent at the Hearing, whether or not referred to in full in this Decision.

30. The Applicant is the heritable proprietor of the Property and the Respondent is the property factor. The Respondent arranges buildings insurance for the block of which the Property forms part as part of its property factor function.
31. The Tribunal found that the WSOS is in plain English, is set out in clear type face and uses language which is clear and easy to understand. The Tribunal found from the screen prints of the Respondent's website which were lodged with it that the Respondent provides clear and helpful supplementary information on its handling of insurance in an easy to follow step-by-step manner.
32. The Tribunal found that the Respondent, by its letter of 1 September 2020 referred to in paragraph 9 of this Decision accepts a breach of Section 2.5 of the Code.
33. The Tribunal found from the various invoices and letters referred to in paragraph 18 of this Decision that the annual premium invoiced to the Applicant corresponded to that shown on summary of cover provided by the insurers.
34. The Tribunal found that the invoices and letters referred to in paragraph 18 of this Decision were issued by the Respondent in accordance with Section 5.2 of the Code. and contained all of the information required by that section of the Code.
35. The Tribunal accepted Mr. Doran's evidence that the Respondent's commission and that of the broker were met by the insurers and not by the Applicant and other homeowners.
36. The Tribunal found that the Applicant was mistaken in his assumption and understanding that the Respondent's commission and that of the broker were in addition to the annual premium levied by the Respondent.
37. The Tribunal found that the figures relating to the insurance costs set out by the Applicant in his email of 11 December 2019 to the Respondents were not accurate as they had been calculated by the Applicant on the wrong assumption that what he perceived as the annual premium excluded commission amounts.
38. The Tribunal found that the WSOS at paragraph 6.3 sets out the Respondent's commission at 25% of the premium. Additionally, how the commission works is adequately described in the Insurance FAQ Section of the H & P Client Portal under the Question "Does H&PMS get a commission or fee from a common insurance policy?"

Decision and Reasons for the Decision

Section 1 of the Code

39. With regard to the Applicant's Head of Complaint in respect of part of Section 1 (Written Statement of Services), the Tribunal had regard to the relevant wording in the Code which states: "*You must provide each homeowner with a written statement*

setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner.” Having found that the Respondent’s WSOS is in plain English, in clear type face and uses language which is clear and easy to understand, the Tribunal does not agree with the Applicant the WSOS lacks transparency and having found that the WSOS disclose the commission received by the Respondent, the Tribunal does not agree with the Applicant that the WSOS does not set out the terms and conditions in this regard. Accordingly, the Tribunal determined that the Respondent is not in breach of this part of the Code.

Section 2.5 of the Code

40. Having found that the Respondent, by its letter of 1 September 2020 referred to in paragraph 9 of this Decision accepts a breach of Section 2.5 of the Code, the Tribunal determined that the Respondent is in breach of this part of the Code.

Section 5.2 of the Code

41. With regard to the Applicant’s Head of Complaint in respect of Section 5.2 (Insurance), the Tribunal had regard to the relevant wording in the Code which states: “*You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover,*”. The Tribunal did not agree with the Applicant that this part of Code obliged the Respondent to provide information on commission received by it. The Tribunal was of the view that this part of the Code relates to information on the insurance policy and not to information on the arrangement of the policy. The Applicant submitted that invoices issued by the Respondent were not compliant with this part of the Code as they did not show a full picture of the premium and its apportionment. In any event, having found that the invoices and letters referred to in paragraph 18 of this Decision were issued by the Respondent in accordance with Section 5.2 of the Code. and contained all of the information required by that section of the Code, the Tribunal determined that the Respondent is not in breach of this part of the Code.

Section 5.3 of the Code

42. With regard to the Applicant’s Head of Complaint in respect of Section 5.3 (Insurance), the Tribunal had regard to the relevant wording in the Code which states: “*You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover*”. The Tribunal considered the cases lodged on behalf of the Respondent, and whilst these are not binding precedents on the Tribunal, the Tribunal agreed with the findings of previous tribunals that it is not necessary for a property factor to specify the monetary amount of commission in its written statement of services. As the commission is related to the insurance premium, the monetary amount will differ each time a policy is arranged, and, as the statutory requirement is to issue one written statement of services and not an annual written statement of services, it is not logical that the commission can be disclosed as anything other than a formula. Accordingly, the Tribunal determined that the Respondent is not in breach of this part of the Code.

Property Factor Enforcement Order.

43. Having determined that the Respondent is in breach of Section 2.5 of the Code, the Tribunal then considered Section 19(1) of the Act which states: "*The First-tier Tribunal must, in relation to a homeowner's application referred to it under section 18(1)(a), decide (a)whether the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and (b)if so, whether to make a property factor enforcement order.*"
44. The Tribunal noted that the Respondent had issued a letter to the Applicant accepting a breach of Section 2.5 of the Code, had apologised and had made a goodwill payment of £200.00. The Tribunal, therefore, considered that this breach had been dealt with by the Respondent and determined not to make a property factor enforcement order.

Appeal

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

Karen Moore

Chairperson 23 November 2020