

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Decision on homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/18/0413

214 Prospecthill Circus, Glasgow, G42 0LF ("The Property")

The Parties: -

Mrs Linda Higgins, 214 Prospecthill Circus, Glasgow G42 0LF ("the Homeowner")

Your Place Property Management Limited, Wheatley House, 25 Cochrane Street, Glasgow, G1 1HL ("the Property Factor")

Tribunal Members:

Josephine Bonnar (Legal Member)

David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 5.3 of the Code of Conduct for Property Factors. It has also failed to carry out its property factors duties in terms of Section 17(5) of the Act in that it did not have proper procedures in place in relation to insurance claims for common repairs.

The decision is unanimous

Introduction

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "The Regulations"

The Property Factor became a Registered Property Factor on 6th September 2017 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application dated 24 February 2018 the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Property Factor had failed to comply with the Code of Conduct for Property Factors. The Homeowner stated that the Property Factor had failed to comply with sections 5.3 and 5.4 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties in terms of section 17(5) of the Act.
2. On 28th March 2018, a Convener on behalf of the President, referred the matter to a Tribunal for a determination. A hearing was assigned to take place at Glasgow Tribunals Centre, Room 109, 20 York Street, Glasgow on 25 May 2018.
3. On 20th April 2018 the Property Factor made a request for the hearing to be postponed as 25 May 2018 was the Friday of a holiday weekend and no one was available to attend. The Homeowner did not oppose the request and the hearing was re-arranged for 8 June 2018 at the same location.
4. The Homeowner lodged documents with her application. In advance of the hearing the Property Factor lodged a bundle of documents. On 18 May 2018 the Tribunal issued a direction requiring both parties to lodge further documents. On 24 May 2018 the Homeowner lodged a copy of her title deeds, in response to the direction. On 31 May 2018, the Property Factor lodged a bundle of copy common charges and repairs invoices relating to the Homeowner, in response to the direction.

The Hearing

5. The hearing took place before the Tribunal on 8 June 2018. Mrs Linda Higgins, the Homeowner, attended and gave evidence. The Property Factor was represented by Susan Mackie, Regional Business Manager, and Vicky Aitken, Business Improvement Lead. Both confirmed that they would give evidence on behalf of the Property Factor.
6. Mrs Higgins advised the Tribunal that her application had followed on from a dispute with the Property factor about a common repair. She explained that her property is a flat in a block of 6 new build properties. She moved in to the property at the end of 2016. In April 2017, a window in the stairwell was damaged because of vandalism. The window in question is a large floor to ceiling window. A glass canopy over the close door was also damaged. Another proprietor called the police and contacted the Property Factor. He was told to put in an insurance claim. By letter, the Property Factor told the other residents to put in insurance claims as well. Mrs Higgins advised that she has not made a claim and understands that some other proprietors have

also declined to do so because they believe it should be one claim by the Factor with one excess payable. Instead, the insurance company is charging an excess per claim of £100. Mrs Higgins further advised that the repair has been carried out. It was expensive because specialist glass was needed. She has received an invoice from the Property Factor for £500. She advised that the proprietors who made insurance claims have only been invoiced for the insurance excess. She advised that she doesn't know if the insurance company made the payments direct to the Property Factor or to the homeowners themselves.

7. **Section 5.3 of the Code – “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”** The Homeowner advised the Tribunal that she has sent emails to the Property Factor asking for details of the procedure for appointing insurance companies, together with details of the commission and other payments they receive. She advised that emails were sent on 24 April and 11 May 2018. She has not yet received this information from them.
8. Ms Mackie and Ms Aitken (“the representatives”) advised the Tribunal that the commission paid by the insurance company is 15% and is disclosed on all common charges statements and invoices. They advised that the commission is also covered in the written statement of services and the annual insurance statement. The Tribunal was further advised that the Property Factor also receives a profit share from the insurance company. This is not guaranteed and varies from year to year. This is detailed in the newsletter which was issued to proprietors by post and is also available on the website. The representatives referred to the bundle of documents lodged with the written representations and to the copy invoices lodged in response to the Tribunal’s direction. Firstly, they referred to the copy invoices which state “The legal stuff. ...Insurance Premiums include 12% insurance premium tax and Your Place’s commission of 15% for administration of the policy”. Thereafter the Tribunal was referred to the annual insurance statement for February 2018, which states that commission is £15.2%. Next, they referred to the written statements of services. Two of these were lodged with the bundle of documents, the original version and an updated version issued in March 2018. On page 18 of the first it states, “Your common charge billing includes details of the cost of your cover, as well as details of the administration fee we charge for providing this service”. Page 8-9 of the second version also includes this sentence but has, in addition, “ Your Place receives commission from our insurance provider which helps to cover the cost of administering the policy as well as debt recovery. We also have a profit sharing arrangement in place as part of our buildings insurance contract which supports the effective management of the contract and helps to keep premiums low”. The representatives conceded that the first version, which is the one which would have been issued to Mrs Higgins when she became a proprietor, does not disclose the details of the commission or the existence of a profit share arrangement. The Tribunal was advised that the profit share

arrangement did not exist when the document was drafted. They also conceded that the latest version mentions commission and profit share but with no detail. For the terms of the insurance commission, the proprietor must look at their invoices. For profit share information, which can vary substantially from year to year, the proprietor has to read the newsletter which is posted to all proprietors. A copy of a recent newsletter was referred to by the representatives. This contains information about last year's profit share and what it has been used to achieve. Lastly, the representatives explained that the Property Factor goes through a tendering process every three years to appoint insurers.

9. Mrs Higgins conceded that the 15% commission does appear to be stated on the invoices. She had not previously been aware that this was the case. She advised that she did not receive the newsletter and was unaware of its existence. She further confirmed that she expected the written statement of services to contain all the relevant information about commission and other payments.
- 10. Section 5.4 “If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so.”**
Mrs Higgins said that the window repair was the first common repair at the property which gave rise to an insurance claim. She had assumed that the reference in the written statement of services to “administration” of the insurance included the submission of claims. She conceded that there is no specific reference to claims in the written statement. She did not provide the Tribunal with evidence that the insurance excess would have been lower had there been one claim by the Property Factor instead of six separate claims. She stated that whatever the financial implications, she believes that the Property Factor ought to make insurance claims for common repairs as part of their service.
11. The representatives advised that the submission of claims has never been part of the service provided by the Property Factor. They advised that they only administer the insurance – the insured person is the homeowner. The reason for this is that they manage 30,000 properties and processing claims would be a significant amount of work and would result in higher insurance premiums, excesses and management fees. They further advised that the Property Factor is committed to providing value for money and these increases would not meet that aim. They referred to the copy insurance booklet which was lodged with the bundle of documents. This provides guidance for homeowners on how to make claims. This information is also on the website. They also referred to the written statements, neither of which state that the Property factor will submit claims. They referred the Tribunal to section 5.4 of the code which states that the requirement for a procedure in relation to claims is qualified by the words “If applicable”. Furthermore, although the example given for individual claims are “private or internal

"works", this list is not necessarily exhaustive. In response to questions from the Tribunal, the representatives advised that when homeowners claim they can elect to have the funds sent to the Property Factor direct, or to themselves. In the latter case, they would then be invoiced for their full share of the repair and would be expected to use the funds for that purpose. They conceded that there could be occasions when the proprietor would fail to pay the proceeds of the claim to the Property Factor or fail to claim. They also conceded that the written statement and insurance booklet could be clearer about the claims process. The Tribunal referred the representatives to the copy title deeds lodged by Mrs Higgins. Clause 10 relates to common insurance and states, "10.5 Any claim under the block insurance policy referred to in clause 10.4 shall be held in trust by the Manager in the sub-community maintenance account and shall be used and applied at the sight of the manager in or towards the reconstruction, re-building or repair of the block or the appropriate part thereof". The representatives conceded that the Property Factor would have difficulty complying with that section of the deeds, given the current procedures, but submitted that the deeds do not require the property manager to submit the claims.

12. In response, Mrs Higgins stated that it is not clear from the written statement and the insurance booklet that common repair claims are not made by the Property Factor and that she, and the other homeowners in the block, had not known that they had to make their own claims until they were told this by the Property factor, by letter, following the broken window being reported.
13. **Failure to carry out property factor duties – failure to deal with an insurance claim for a communal repair.** The Application states that the failure to submit an insurance claim on behalf of the homeowners also amounts to a failure to carry out property factor duties. Mrs Higgins stated that Property Factors generally provide this service as part of their management of the property and therefore should do so in this case. This was disputed by the representatives who advised that it has never been part of the services provided by the Property Factor in relation to any properties that they manage, and they have never had a complaint about this before. Furthermore, they are not required by the title deeds to submit claims

14. The Tribunal make the following findings in fact:

- (i) The Homeowner is the heritable proprietor of the property, a flat in a block of six properties.
- (ii) The Property Factor is the property factor for the block of flats in which the property is located.
- (iii) In April 2017 a window in the common stairwell and glass canopy over the close door were damaged by vandals.
- (iv) The block of flats has a block buildings insurance policy arranged by the Property Factor. The Property Factor does not submit claims to the Insurer

on behalf of the proprietors, for common repairs.

- (v) The Property Factor's written statements of services do not stipulate the procedure for making insurance claims or the amount of commission and other payments received by the Property factor from the Insurance provider.
- (vi) The common charges and repairs invoices issued to the Homeowner state that the Property Factor receives commission of 15% from the Insurance Company.
- (vii) The annual insurance statement dated February 2018 states that the Property factor receives commission of 15.2% from the Insurance company.
- (viii) The title deeds for the property stipulate that the property manager should hold the proceeds of insurance claims and apply them to repairs and reinstatement of the property.

Reasons for Decision

15. **Section 5.3.** The Tribunal considered the terms of the statements of services and the other documents provided by the Property Factor and the evidence of the Homeowner and the representatives from the Property Factor. The Tribunal notes that the Property Factor receives commission, currently 15%, from the Insurance Company, and has a profit share arrangement. The sums received in terms of this arrangement vary significantly from year to year with £345,000 being received last year, but only £60,000 this year. The statement of services issued to the Homeowner, when she became a proprietor, makes no mention of commission. The most recent version does refer to commission, but not the figure. Both refer the proprietor to the common charges bills. The Homeowner therefore had to wait until the first bill was received before the information about commission was disclosed. In fact, as there was no mention of the commission in the statement issued to the Homeowner, she did not know to look to the invoices for this information and assumed that any commission being paid was not disclosed. The profit share arrangement is not in the written statement and while the Tribunal notes the explanation that the statement probably pre-dates the existence of the arrangement, the Tribunal is of the view that the statement ought to have been updated more quickly or other notification of the arrangement issued to homeowners. The Tribunal is not persuaded that the newsletter rectified the failure to disclose the information. Mrs Higgins has no recollection of receiving this document. No evidence was provided that she had done so. The Tribunal found Mrs Higgins to be credible and reliable in her evidence and is satisfied that she has not previously had sight of the document. The annual insurance statement produced by the Property Factor is for the current year, although it

is accepted by the Tribunal that it is likely that a similar document was issued the previous February. The Tribunal concludes that the insurance commission is disclosed on the annual statement and in the invoices and as a result there is technically written disclosure of same. The Tribunal is however of the view that this information ought to be detailed in the written statement of services. The profit share is not fully disclosed in writing. The Tribunal therefore finds the Property Factor to be in breach of this section of the code.

16. **Section 5.4** The Tribunal notes that the Property Factor does not submit insurance claims as part of its service. The requirement to have a procedure for submitting claims is qualified by the words "If applicable", and it therefore appears to the Tribunal that the Property factor may be able to rely on this qualification to opt out of this requirement. The Tribunal considered whether the use of these words is only intended for situations where no common insurance is arranged by the Property Factor. In such cases, no procedure would be required. This interpretation is supported by the second part of this section of the code which relates to homeowner claims "for example for private or internal works", which suggests that individual proprietors would not be claiming in respect of common repairs. However, the Tribunal accepts the Property Factor's argument that the examples given are not identified as an exhaustive list and the words "If applicable" could equally be interpreted to mean that the procedure is required only when the Property factor submits claims as part of service it provides. Therefore, the Tribunal concludes that there is no breach of this section of the code established.
17. **Failure to carry out property factor duties.** The Tribunal considered the evidence and representations of both parties. The Tribunal is satisfied that the statements of services and insurance booklet do not notify homeowners that the Property Factor does not submit claims. The reference to administering the policy suggests that they do more than arrange the insurance and collect premiums. Furthermore, although the booklet tells people how to make a claim, it does not make it clear that all claims must be by the homeowner. The Tribunal accepted Mrs Higgins evidence that she believed that the Property factor did and should submit claims and that this belief was shared by other proprietors. It was only when an insured repair issue arose that the Property Factor told the homeowner and her neighbours that they would have to submit their own claim and pay an excess per property. The Tribunal also notes that the current arrangements for homeowners to claim conflict with the title deeds to the property, which stipulate that the Property Factor is responsible for the insurance claim funds. Currently, homeowners who elect for insurance funds to be paid to themselves are invoiced for their whole share of the common repair, and there is a risk that some homeowners will claim but not pay over the proceeds of that to the Property factor. Or, as with Mrs Higgins and the window repair, not claim at all. The Tribunal is of the view that the wording of the code of conduct suggests that it would be usual for insurance claims to be a core part of property factor duties. The Title deeds also suggest that property managers are expected to be involved in the process. However, neither document states specifically that property factors must submit claims. The Tribunal concludes that the Property factor has failed to carry out certain

property factor duties by failing to inform homeowners of the Property Factor's role in relation to insurance and advise them that they do not submit claims. In addition, the Property Factor does not have a system to ensure that all proceeds of insurance claims are paid to them and held in an account until needed, as required by the title deeds. From the evidence it appears unlikely that the Property Factor will change its position on the submission of claims, although the Tribunal is of the view that they should consider doing so. The Tribunal is also not satisfied that the homeowner has suffered any direct financial loss as a result of the requirement to submit an individual claim as it was not established in evidence that the excess would have been lower had one claim been submitted. The Tribunal concludes that the failure to notify the homeowner of the insurance claim arrangements and the failure to have a system set up for all insurance claim funds to be paid to themselves amounts to a failure to carry out property factor duties.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

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

Josephine Bonnar
20 June 2018