

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)**

The First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the 2017 Regulations")

Chamber Ref: FTS/HPC/PF/20/1427

The Property: Flat 1/2, 12 Blackhall Street, Paisley, Renfrewshire, PA1 1TF ("the Property")

The Parties:-

Mr Thomas Stewart, Flat 1/2, 12 Blackhall Street, Paisley, Renfrewshire, PA1 1TF ("the Applicant") and

Ross & Liddell Ltd, 60 St Enoch Square, Glasgow G1 4AW ("the Respondent")

Tribunal Members:

**Mr G. McWilliams (Legal Member)
Mr M Links (Ordinary Member)**

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined to reject the Application in terms of Section 18(2)(a) of the Property Factors (Scotland) Act 2011 ("the 2011 Act")

Introduction

1. The Respondent is the registered Property Factor for the development within which the Property is situated and they have a duty to comply with the Property Factors Code of Conduct ("the Code"), under Section 14(5) of the 2011 Act, and to carry out their Property Factor's Duties in terms of Section 17(5) of the 2011 Act.

2. The Applicant submitted an Application to the Tribunal by lodging documents with the Tribunal between 29th June and 25th August 2020. In his Application the Applicant complained that the Respondent had breached Sections 5.3 and 5.6 of the Code and failed to comply with their Property Factor's Duties.

The Hearing

3. A Hearing proceeded remotely by telephone conference call at 10am on 5th January 2021. The Applicant attended. The Respondent was represented by their solicitor, Ms N McAtier of Anderson Strathern Solicitors, Glasgow. Ms J. Johnston, Mr S Davies, and Mr C Johnstone, Property Managers, attended for the Respondent, as did their Insurance Advisor, Mr G McGlone.
4. In their written submission, lodged in advance of the Hearing, and in an initial submission at the Hearing, the Respondent, through their Representative Ms McAtier, stated a preliminary point, namely that the Application should not proceed as the Applicant's specific complaints that the Respondent had acted in breach of Sections 5.3 and 5.6 of the Code, and had not discharged their Property Factor's Duties, had not been notified to the Respondent by the Applicant before the Application was lodged with the Tribunal. Ms McAtier submitted that the terms of Section 17(3) of the 2011 Act were not satisfied.
5. The Applicant stated that he had been the owner of the Property since 1994. He reiterated the terms of his email, sent to the Tribunal's Office on 3rd December 2020, and that he had been calling and emailing the Respondent, regarding his complaint, for many years. He re-stated the point, made in his Application, that he considered that he was paying an excessive sum for buildings insurance, through the common policy arranged and renewed each year by the Respondent.
6. The Applicant stated that he did not have expert knowledge of the relevant law in respect of the Code and Property Factor' Duties. He stated that he had not sought legal advice in connection with his complaint as he did not wish to incur legal fees for doing so.
7. In the circumstances, the Tribunal decided to hear evidence in respect of the preliminary matter, to reserve their decision on that point, and also hear the parties' evidence on the terms of the Application. The parties agreed to this course of action.
8. The Applicant stated that his complaint was only in respect of the rising cost of his annual building insurance premium. He said that when he first started questioning the cost of his building insurance he had called the Respondent. He stated that in recent years he had sent emails. He said that he had obtained a separate quote for buildings insurance, which was three times less than the annual amount, of £320.69, which he was now paying for the year 2020-21. The Applicant stated that the quote he had obtained was for an individual, not a common, policy and was based on a lesser re-instatement value. He submitted that his buildings insurance should be based on the Council Tax

Band A market value of the Property rather than re-instatement value. The Applicant stated that a friend was paying a much lesser annual buildings insurance premium to a Housing Association property factor. He stated that he would like to pay his own insurance, rather than through a common policy.

9. The Applicant acknowledged that the title deeds for the building, within which the Property is situated, provided that a common buildings insurance policy should be arranged. He stated that he would like to join with the proprietors of the other flats in the building and have the Respondent removed from their role as factor. He said that he had asked the Respondent for the other proprietors' details but they had not given them to him for data protection reasons. In this regard the Tribunal observed that it was open to the Applicant to check the Land Register.
10. In respect of the breaches of the Code complained of in the Application, the Applicant said that the Respondent's commission had not been made clear. He confirmed again, however, that his complaint was regarding the excessive amount of his annual premium.
11. In relation to the issue of breach of Property Factor's duties, the Applicant stated that he had ticked this box in the Application form for completion, and that he was not clear as to the position regarding such duties.
12. Mr McGlone, the Respondent's Insurance Advisor, stated that he had dealt with the Applicant's complaint regarding the level of the insurance premium, and the requirement for a common buildings insurance policy, in his emailed letter to the Applicant dated 21st May 2020, which had been lodged with the Tribunal by Ms McAtier, with copies of other communications between the parties, in advance of the Hearing. Mr McGlone stated that the e-mail of 21st May 2020, and the Respondent's annual Insurance Newsletter, provided details of how the common buildings insurance provider, Zurich, was appointed, the relevant tendering process for appointment,, and also in respect of the 22.5% commission paid to Ross & Liddell. The Insurance Newsletter of 2020 had also been lodged in the Respondent's papers by their representative. Mr McGlone stated that the Applicant is able to access the Insurance Newsletter on the Respondent's Online Portal but that, in any event, a further copy of the Newsletter for 2020 was sent with the e-mail of 21st May 2020.
13. Ms McAtier, for the Respondent, referred to, and relied on, her detailed written submission, and the documents she submitted in advance of the Hearing. She specifically re-iterated her submission that Mr McGlone's email to the Applicant provided a detailed explanation in satisfaction of the requirements of Sections 5.3 and 5.6 of the Code.

The Tribunal make the following Findings in Fact and Law:

14. The Applicant has been the owner of the Property since 1999.
15. The Respondent performs the role of Property Factor of the tenement block property within which the Property is situated.
16. The Applicant has made complaints to the Respondent, over several years, regarding the increasing cost of his annual buildings insurance premium, arranged by the Respondent in a common buildings insurance policy each year, and the requirement for him to be part of a common buildings policy with other proprietors of flats within the tenement block in which the Property is situated.
17. The Applicant did not notify the Respondent of his complaints in respect of Sections 5.3 and 5.6 of the Code, nor in relation to Property Factor's duties, being the complaints referred to in the Application, before lodging the Application with the Tribunal.
18. The Respondent provided the Applicant with common insurance policy details, including details regarding commission, in their Mr McGlone's e-mail sent to the Applicant dated 21st May 2020, which also confirms details of the appointment of Zurich, the insurance provider of the annual common buildings insurance policy for the tenement block in which the Property is situated.. The Respondent's Insurance Newsletter, which is available to homeowners on their Online Portal, also provides details of the commission paid to the Respondent in respect of the annual common buildings insurance policy and how and why Zurich was appointed. The Newsletter for 2020 was sent to the Applicant by the Respondent with their email dated 21st May 2020.
19. The Respondent has not breached Sections 5.3 and 5.6 of the Code, nor failed to carry out their Property Factors' duties, incumbent upon them in terms of Section 17 of the 2011 Act.
20. The Application, containing points which had not been previously notified to the Respondent, but which had already been dealt with in communications between the parties, is frivolous and falls to be rejected.

Reasons for Decision

21. Section 5.3 of the Code provides that a Property Factor must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit they receive from a company providing insurance cover and any financial or other interest that they have with the insurance provider. They must also disclose any other charge they make for providing the insurance.
23. Section 5.6 of the Code provides that on request a Property Factor must be able to show how and why they appointed the insurance provider, including any cases where they decided not to obtain multiple quotes.
24. Having considered all of the evidence, and in particular relied on the Applicant's oral evidence at the Hearing, the Tribunal found that the Applicant's complaints

to the Respondent, prior to the lodging of the Application, were in relation to the level of his annual buildings insurance premium, and the requirement for him to be part of a common buildings insurance policy, and not regarding the requirements of Sections 5.3 and 5.6 of the Code.

25. Accordingly the Tribunal found, on a balance of probabilities, that the Applicant made his Application to the Tribunal before notifying the Respondent of the specific complaints in that Application. Therefore the Tribunal determined that the Application did not comply with Section 17(3) of the 2011 Act.
26. Further, having considered all of the evidence, and in particular relied on the documentation lodged by the Respondent, the Tribunal found, on a balance of probabilities, that the Respondent had, in any event, dealt with the Applicant's specific complaints in the Application, notwithstanding that those complaints had not been notified to the Respondent before the Application was lodged. The Respondent discharged their obligations to the Applicant in terms of those Sections of the Code in their communications issued to him, in particular their Mr McGlone's e-mail sent to the Applicant on 21st May 2020, with the Respondent's annual Insurance Newsletter. The terms of the e-mail dated 21st May 2020, and the Insurance Newsletter, are clear regarding commission and how the insurance, through the insurance providers, Zurich, is arranged. The Applicant has owned the Property since 1999 and is also aware of the availability of the Insurance Newsletter, and other relevant documents, on the Respondent's Online Portal. The Tribunal accordingly determined that the Respondent was not in breach of Sections 5.3 and 5.6 of the Code.
27. Regarding Property Factor's duties, concerning the management of common parts of the land owned by the homeowners, the Applicant did not offer any evidence in support of that complaint and candidly acknowledged that he had ticked the box in relation to a complaint of breach of such duties without a known basis for doing so. The Tribunal therefore determined that the Respondent had not failed to carry out their Property Factors' duties, incumbent upon them in terms of Section 17 of the 2011 Act.
28. Accordingly the Application has not been made following compliance with the terms of Section 17.3 of the 2011 Act. The complaints in the Application are not complaints that the Applicant wishes to insist on, being the level of his insurance premium and, previously, the requirement for him to conjoin in a common buildings insurance policy. The alleged breaches of the Code and Property Factor's duties, in the Application, were not previously notified to the Respondent. Further, the complaints in the Application have been dealt with by the Respondent in previous communications between the parties.
29. Section 18(2)(a) of the 2011 Act provides that the Tribunal, acting under delegated powers from the Tribunal Chamber President, may reject an Application if it is vexatious or frivolous.
30. "Frivolous", in the context of legal proceedings, is defined by Lord Justice Bingham in *R v North West Suffolk (Mildenhall) Magistrates Court (1998)* Env L.R. 9. At page 16 he states: "What the expression means in this context is, in

my view, that the Court considers the Application to be futile, misconceived, hopeless or academic".

31. The Applicant is not expert in the law in respect of Property Factors obligations and duties, and is frustrated at the rising cost of his buildings insurance premium, and the fact that he cannot arrange an individual policy due to the terms of the title deeds for the Property. Nevertheless, the Tribunal found that the bringing of an Application in respect of specific matters not previously notified as complaints to the Respondent, and which matters were resolved in prior communications between the parties, was frivolous as it was misconceived and futile, with no prospect of success.. Therefore, having regard to the aforementioned test in *R v North West Suffolk (Mildenhall) Magistrates Court*, the Tribunal determined to reject the Application in terms of Section 18(2)(a) of the 2011 Act.

Observations

32. The Tribunal acknowledges that the Applicant is frustrated at the rising cost of his annual buildings insurance premium, arranged through the common buildings insurance policy for the tenement block in which his Property is situated. The Tribunal observes that it would be helpful if the Applicant can continue direct liaison with the Respondent's Mr McGlone, and his colleagues, so that the Applicant can be as clear as possible regarding his annual insurance premium. If there is ongoing communication between the parties it is to be hoped that they will be able to move forward and have positive dealings with each other in respect of insurance and other arrangements concerning the management of the tenement block in which the Property is situated.

33. A common building insurance policy is a current condition in the title deeds for the Property. If the Applicant were to seek to alter this condition and/or join with his co-proprietors, in the tenement block, in respect of the issue of buildings insurance, it is in his interests to obtain independent legal advice from a Law Centre, the Citizen's Advice Bureau, or a solicitor.

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 within 30 days of the date the decision was sent to them.

G McWilliams
Legal Member

25th January 2021