

Housing and Property Chamber

First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: Property Factors (Scotland) Act 2011, section 19(1)(a).

Case Reference Number: FTS/HPC/PF/17/0309

The Property:

Flat 2/1, 8 Whitehill Street, Glasgow, G31 2LJ

The Parties:-

Kevin Brown, Flat 3/2, 6 Bowmont Gardens, Glasgow G12 9LR

(“the Homeowner”)

and

Apex Property Factor, 46 Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH

(“the Factors”)

Tribunal Members:

Adrian Stalker (Chairman) and Robert Buchan (Ordinary Member)

Decision:

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”), having made such enquiries as it saw fit for the purposes of determining whether the Factors had complied with the Code of Conduct for Property Factors (“the Code”), and with their duties as property factors, determined that the Factors had failed to comply with the Code, and their duties. It proposes to make a property factor enforcement order, in the following terms:

In terms of section 20(1) of the Property Factors (Scotland) Act 2011, the Factors are required, within 8 weeks, to take the following steps and produce

confirmation that they have done so for consideration by, and to the satisfaction of, the Tribunal:-

1. To issue to the Homeowners at 8 Whitehill Street, Glasgow, on whose behalf they currently manage that property, an accurate and comprehensive Statement of Services, in writing, which complies with section 1 of the Code of Conduct for Property Factors, making reference where necessary to the relevant provisions within the Title Deeds for the Property which describe the Property Factor's responsibilities and duties, and setting out, in particular:

- a) The Factors' authority to Act;
- b) The services provided by the Factors;
- c) Their financial and charging arrangements;
- d) Their communication arrangements, including their in-house complaints procedure;
- e) A declaration of interests, if applicable;
- f) A statement of how to end the arrangement;

all in accordance with the detailed terms of section 1 of the Code.

2. To provide a copy of this decision to the other Homeowners at 8 Whitehill Street on whose behalf they currently manage that property, with a covering letter which contains the following statement:

"Reference is made to the attached decision of the First-tier tribunal for Scotland (Housing and Property Chamber) in respect of a complaint made by Kevin Brown, owner of Flat 2/1, 8 Whitehill Street, Glasgow. Your attention is drawn, in particular, to paragraphs 53 to 67, which concern the arrangements for insurance of 8 Whitehill Street.

The insurance previously arranged on your behalf by Apex Property Factor has not been arranged in accordance with the Title Deeds for 8 Whitehill Street, Glasgow, and does not cover the whole building of which your flat forms part. It covers only your flat and other flats in the building. There is no common insurance policy over the whole building comprising 2 and 8 Whitehill Street, Glasgow, in accordance with the Title Deeds. You may wish to consider the implications of this with the other Homeowners in the building and/or take advice as to how the insurance of the building should be arranged. Apart from the fact that it is a condition of the Title, a common insurance policy over a block in multiple ownership is normally preferred, because: (a) it ensures that the block is properly insured; (b) all of the owners are contributing to it; and (c) it is easier to ensure that the level of cover, including public liability is adequate. However, should you decide to proceed with an individual policy, it may be possible for you to arrange cheaper insurance of your own flat yourself, rather than doing so through the Factors. You should consider seeking advice from insurers, or brokers, as to the effect of taking out an individual policy (as

opposed to a common policy covering the whole building), in the event that the building is damaged.”

3. To provide the Homeowner with written confirmation of:

- a) any commission, administration fee, rebate or other payment or benefit the Factors have received from the company currently providing insurance cover and any financial or other interest that the Factors have with the insurance provider.**
- b) Any other charge made by the Factors for providing the insurance.**
- c) How and why the Factors appointed the current insurance provider, including any cases where the Factors decided not to obtain multiple quotes.**

4. Prepare a schedule of proposed staff training to ensure that all of the Factors' staff have detailed knowledge of the terms of the Code of Conduct and are fully aware of the Factors' obligations: -

- a) to comply with the Code of Conduct;**
- b) to comply with their duties as Property Factors particularly those duties in relation to arranging insurance;**
- c) to ensure adequate customer relations and to communicate effectively;**

including details of the provider of the training and timescales for the provision of delivery of the training.

5. To make a payment of £500 to the Homeowner, within two weeks of the date of this decision, by way of a personal payment and not by way of a credit to the Homeowner's account. Evidence of such payment should be provided to the Tribunal.

Background

1. By an application to the First-tier tribunal for Scotland (Housing and Property Chamber) (“the Chamber”) received on 7 August 2017, the Homeowner sought a determination of whether the Factors had failed: (a) under section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”), to comply with the Code; and (b) to perform the property factor duties, as defined in section 17(5) of the Act, in respect of their factoring of the property. On 7 November 2017, a Convener having delegated powers under section 18A of the Act made a decision, under section 18(1)(a), to refer the application to a First-tier tribunal.
2. The Homeowner’s application comprised a completed application form, together with: documents (headed “Sheet 1 and Sheet 2”) which further described his complaint against the Factors; and copies of his correspondence with the Factors, including emails.
3. The complaints made in the application are fairly straightforward. The Homeowner purchased the property in 2016, taking entry on 1 April. Since then, he has received requests for payment from the Factors, including payment of a sum said to be his share of the insurance premium for the insurance of the

tenement of which the property forms part. The Homeowner complains that he has sought information from the Factors, which has never been provided to him, being:

- The Factors' Statement of Services
- Details of the insurance arranged by the Factors including, in particular, an explanation of how the Homeowner's share is calculated.
- The Factors' Complaints Procedure

The application contends that these failures constitute a breach of section 1.1, 2.5, 5.2, 5.3, 5.6, 7.1 and 7.2 of the Code. The application also states the Homeowner's belief that the Factors have failed to carry out their Property Factor duties, given the information contained within "Sheet 1 and Sheet 2", attached to his application.

4. These complaints had already been set out in an email from the Homeowner to the Factors dated 22 June 2017, which the Factors acknowledged in their email of 6 July. That email stated: "A detailed response is being prepared and will follow in due course". However, no response was ever received by the Homeowner. The complaints were reiterated in a letter from the Homeowner to the Factors dated 4 September, which included detailed reference to the parts of the Code said to have been breached. Again, no response was ever received from the Factors to that letter.
5. By letters dated 21 November 2017, the Chamber notified the parties that a hearing would take place in relation to the application on 9 January 2018. They were further advised that any written representations on the application must be returned to the Chamber by 12 December 2017. The Homeowner responded on 5 December, indicating that he intended to be at the hearing, but would not be making any written representations. Mr Neil Cowan, of the Factors, emailed a letter to the Chamber on 12 December indicating their intention to attend the hearing, and to make written representations. The letter stated: "Our written representations will follow shortly." However, no written representations were submitted to the Chamber in advance of the hearing.
6. Accordingly, neither the Homeowner nor the Tribunal was aware of the Factors' position in relation to the Homeowner's complaints, as at the commencement of the hearing. That was notwithstanding the fact that in the email of 6 July, more than 6 months before the hearing, the Factors had assured the Homeowner that he would receive a detailed response to those complaints.

Hearing

7. A hearing took place in respect of the application on 9 January 2018, at Wellington House, 134-136 Wellington Street, Glasgow. The Homeowner, Mr Brown, was present. Mr Neil Cowan, who is designated in the Factors' correspondence as their "Legal Manager", represented them.

Preliminary issues

8. The Tribunal sought an explanation from Mr Cowan as to why the Factors had failed to provide written representations, as promised in their letter of 12 December. Mr Cowan indicated that the Factors had attempted to send documents by email to the Chamber on the morning of 8 January. However, they discovered, around 7:30pm on that day, that there had been a problem with transmission of the email. It was sent again. He said that the failure to send any documentation to the Chamber before 8 January was due to an administrative oversight. It had “slipped through the net” of the “admin department”. Given that the letter of 12 December bore to be from Mr Cowan himself, the Tribunal did not find this to be a satisfactory explanation.
9. The documentation which Mr Cowan sought to put before the Tribunal was, in fact, a series of productions. No written representations in response to the application were offered. The productions were ten letters said to have been sent by the Factors to the Homeowner, and a certificate of insurance. The most recent letter was dated 8 January 2018. Mr Cowan maintained that this material answered all of the complaints made by the Homeowner.
10. For his part, Mr Brown stated that due to personal circumstances, he was anxious to progress the case. After a short deliberation, the Tribunal proposed that it would allow the productions to be received. It would then consider each of them in turn, inviting Mr Brown to confirm whether he had received the document, and to say whether it answered his queries. Mr Brown would be permitted an adjournment, if he needed to take time to consider the terms of any document. That course of action was agreeable to both parties.
11. The Factors’ productions were numbered 1-11. Numbers 1-10 bear to be letters from the Factors to the Homeowner. The first letter is dated 8 April 2016. The last letter (production number 10) is dated 8 January 2018, the day before the Tribunal hearing. Mr Brown stated that he not yet received that letter. That was accepted by Mr Cowan, given the date of the letter.
12. Some of the letters make reference to attachments. None of the attachments were produced by Mr Cowan, apart from the insurance certificate (production 11) to which reference is made in the letter of 8 January 2018 (production 10). The letters which are productions 1 to 9 are now considered, in turn. The letter of 8 January, and the insurance certificate, are discussed separately, at paragraphs 53 to 67 of this decision.

Factors’ Production 1, letter to Homeowner dated 8 April 2016

13. Mr Brown denied ever having received this letter. He maintained that his first letter from the Factors was dated 31 March 2016. A copy of that letter is included in the papers attached to his application. The two letters are similar: both begin “We understand that you are the new owner of 8 Whitehill Street, Flat 2/1, Glasgow. Apex Property Factor Ltd, factor this building”. Both bear to enclose an invoice for “a refundable float of £100.00” and in respect of the premium for buildings insurance. The difference between the letters is that the letter of 8 April, produced by the Factors, contains an additional paragraph which explains that

Common Buildings Insurance is a requirement of the Title Deeds, and that the insurance will not be effective until the payment is received.

14. Having examined the copy letter of 31 March, Mr Cowan accepted that it had been sent to Mr Brown. He then advised the Tribunal that he did not now think that the letter of 8 April, which he had produced, had ever been sent to Mr Brown. He said that the letter of 8 April had been generated by the Factors' computer system. There was some glitch in the way that the letter had been saved in the system. He accepted that this letter (Factors' production 1) should be disregarded.

15. The implications of this concession are discussed at paragraph 45 below.

Factors' Production 2, letter to Homeowner dated 11 April 2016

16. This bears to be a short letter enclosing the Factors' Statement of Services, "along with a copy of our letter dated 30th July 2012 stating our core services which we undertake at Whitehill Street including a note of our charges". Mr Brown maintained that he had never seen this letter, the Statement of Services, or the letter of 30th July 2012. Mr Cowan did not produce copies of either of the documents said to be attached to this letter.

17. Mr Cowan was asked about the content of the letter of 30th July 2012. He maintained that this was around the time at which Apex Property Factor Ltd had taken over the factoring of the building. They had been given to understand that the previous Factors had a particular arrangement with the Homeowners, in terms of which a very limited service was provided. The Factors were simply to arrange the buildings insurance, and address "major maintenance". No other service was to be provided. That was explained to the Homeowners in the letter of 30th July 2012.

18. Mr Cowan was asked why the Tribunal should accept that this letter was sent to Mr Brown, given Mr Cowan's concession in relation to the letter of 8 April. At this point Mr Cowan sought to refer to a log kept by the Factors, which he had brought to the hearing, which apparently listed dates and addressees, in respect of letters sent to Homeowners. He said that this showed that a letter had gone out to Mr Brown on 12 April 2016. However, on further questioning, he accepted that a generic letter had gone out to all of the homeowners in the building on that date. Therefore, it did not seem to the Tribunal that the log, as described by Mr Cowan, could assist in clarifying whether the letter of 11 April, which was particular to Mr Brown, went out on that date.

19. For the reasons explained in paragraphs 42 to 48 below, the Tribunal preferred Mr Brown's evidence, and found that this letter, and the attachments, were never sent to him.

Factors' Production 3, letter to Homeowner dated 16 January 2017

20. Mr Brown accepted that he had received this letter. It bears to be from Saira Ali, of the Factors' "Legal Department". It begins by referring to an email from Mr

Brown dated 21 December 2016. Part of the letter concerns a float payment which was said to be due by Mr Brown. Another part seeks to address Mr Brown's "concern in relation to insurance". It goes on to state:

We confirm that Apex had changed Insurance Broker to ensure that the we are getting the best service available; and not to get a sign up fee for the company. Please also find attached your Insurance Certificate and Policy Documents.

21. The Tribunal noted that the letter appeared to use the term "Statement of Services" in two different senses. Firstly, the letter stated that payment of the float "is a requirement as stated in our Statement of Services" Several paragraphs on, the letter said: "We enclose...your updated Statement of Services with an outstanding balance of £110.34". Mr Cowan accepted the latter sentence should read "Statement of Account".

Factors' Productions 4 and 5, letter to Homeowner dated 21 April and 5 May 2017

22. Mr Brown accepted that he had received both of these letters. The first is a letter which begins "Dear Sirs/Madam, and continues: "It has come to our attention that you are not insured under our Block Insurance Policy Cover 2017-18." The letter goes on to explain a Homeowner's duty to have his property insured under section 18 of the Tenements (Scotland) Act 2004, and under the Title Deeds. It then suggests that addressee contact the Factors' office if he wishes to be covered by their Block Insurance policy. It appears to be a standard letter.

23. The letter of 5 May acknowledges payment by Mr Brown of the annual insurance premium and encloses a copy of the Insurance Certificate.

Factors' Productions 6 and 7, letter to Homeowner dated 19 May and 12 June 2017

24. Mr Brown accepted that he received both of these letters. The letter of 19 May entirely concerns an outstanding debt said to be due by him, of £50. As Mr Cowan accepted, it appears to have no bearing on any of the issues raised in this application.

25. The letter of 12 June is similar to the letter of 16 January (production 3). It is from Ms Ali. Mr Cowan again accepted that this letter did not provide any of the information sought by Mr Brown, in terms of his complaint to the Tribunal.

26. As with the letter of 16 January 2017, the letter of 12 June refers the requirement to pay a float in accordance with the Statement of Services. It also refers to "your updated Statement of Services with an outstanding balance of...", and thus appears to confuse a Statement of Services with a Statement of Account. Mr Cowan advised the Tribunal that Ms Ali had only been employed by the Factors for a short time, and that she may not appreciate the difference between a Statement of Services and a Statement of Account.

27. The Tribunal noted that several of the Factor's letters or emails produced by parties bore to be from Neil Cowan, "Legal Department" or "Legal Manager". Mr

Cowan was asked about his qualifications. He has a paralegal qualification in debt recovery. He has had no training in relation to the 2011 Act or the Code of Conduct. He said that he had read the Code of Conduct.

Factors' Production 8, letter to Homeowner dated 7 July 2017

28. Mr Brown maintained that he had never seen this letter before. The letter begins by referring to his email of 22 June 2017 (see paragraph 4, above). The letter states: "In relation to the matter being passed to the Homeowner Housing Panel, we would like to remind you, according to our 'Statement of Services' there is a procedure in place for escalating complaints, which is as follows". There then follows a statement of a three point complaints procedure. Each of these points ends with the statement: "A response will be given within 21 working days of receipt of the complaint". The letter also refers Mr Brown to section 7 of the Code of Conduct.
29. It was pointed out to Mr Cowan that having received complaints from Mr Brown, in particular the email of 22 June 2017, the Factors had not given "a response within 21 working days". In fact, the Factors had given no response at all. This was accepted by Mr Cowan.
30. Mr Cowan was asked whether the postal log (see paragraph 17, above) could assist in clarifying whether this letter was sent to Mr Brown. He indicated that this particular log did not cover the period in question.
31. Again, for the reasons explained in paragraphs 42 to 48 below, the Tribunal preferred Mr Brown's evidence, and found that this letter was never sent to him.

Factors' Production 9, letter to Homeowner dated 19 September 2017

32. Mr Brown maintained that he had never received this letter. He had never seen it before. The letter begins by referring to his letter of 4 September 2017 (see paragraph 4, above), and then to the Factors' own letter of 7 July 2017 (production 8). It then asserts that, because Mr Brown has not followed the Complaints procedure, his complaint to the Tribunal "would not be valid". It goes on to state, "We address your points mentioned in your letter of 4 September 2017 as follows". Thereafter, a series of paragraphs set out the Factors' particular response to each of Mr Brown's complaints.
33. Mr Cowan was asked whether the postal log (see paragraph 17, above) could assist in clarifying whether this letter was sent to Mr Brown. He indicated that this particular log did not cover the period in question.
34. Again, for the reasons explained in paragraphs 42 to 48 below, the Tribunal preferred Mr Brown's evidence, and found that this letter was never sent to him.

Statement of Services dated 20 November 2017

- 35.Towards the end of the hearing, Mr Cowan referred to a copy Statement of Services which, he maintained, had been sent to Mr Brown. This was accepted as an additional production by the Tribunal, with copies being made by the clerk, and provided to the Tribunal members, and given to Mr Brown.
- 36.This document is headed "Property Factoring Statement of Services – Apex Property Factor Limited – Property: 8 Whitehill Street, Glasgow G31 2LJ – Date of Issue: 20 November 2017." It runs to four pages. It includes a "Complaints Handling Procedure" which sets out the three points narrated in the letter of 7 July 2017 (production 8). Mr Brown maintained that he had never seen this document, in advance of the Tribunal hearing.
- 37.Mr Cowan seemed, initially, to assert that this Statement of Services had been sent to Mr Brown as an attachment to the letter of 11 April (production 2). He also maintained that it had been sent to Mr Brown on 17 December 2017. He encountered several problems in maintaining this position.
- 38.Firstly, it was pointed out to Mr Cowan that the heading for the document expressly states that it was issued on 20 November 2017, not on either of dates suggested by him.
- 39.Secondly, the letter of 11 April 2016 makes specific reference to an earlier letter of 30 July 2012 which, according to Mr Cowan, describes the very limited service offered by the Factors in relation to 8 Whitehill Street. By contrast, the first two headings of the Statement of Services of 20 November 2017 are "Core Services Provided" and "Services and Works in Addition to Core Services". These parts of the Statement of Services describe a much more comprehensive set of services than the minimum service described by Mr Cowan, including: "Carrying out quarterly property inspections of the common areas...instructing regular gardening [and] cleaning works...arranging and instructing cyclical maintenance...". Accordingly, had the Statement of Services produced by Mr Cowan been sent out with the letter of 11 April 2016, there would have been a glaring contradiction between that Statement of Services, and the letters of 11 April 2016 and 30 July 2012.
- 40.In these circumstances, Mr Cowan was constrained to accept that the Statement of Services was "wrong", and did not give an accurate description of the core services actually provided by the Factors. He advised the Tribunal that a new statement would be prepared by the Factors, which accurately represented the service they provided for Homeowners at 8 Whitehill Street.
- 41.Thirdly, Mr Cowan was unable to produce any letter of 17 December 2017 to which the Statement of Services was attached. He informed the tribunal it had been sent out with a "With Compliments" slip. Again, his postal log did not cover that date.

Factors' productions 1-9; statement of services of 20 November: finding in fact and conclusion

42. Of the nine letters that are Factors' productions 1-9, the Homeowner accepted that he had received numbers 3 to 7, and it was accepted by the Factors that number 1 was never sent.
43. The Tribunal finds in fact that productions 2, 8 and 9 were also never sent by the Factors. It follows from this conclusion that the statement of services was not sent to Mr Brown on 11 April 2016, as an attachment to the letter of that date (production 2). The Tribunal also finds that it was not sent to him, on 17 December 2017. It makes those findings for the following reasons.
44. Firstly, the Tribunal formed the impression that Mr Brown was honest and straightforward in his account of his dealings with the Factors, and that he was anxious to resolve any dispute with them as soon as possible. It had the impression he was careful in retaining the correspondence he had received from them. The Tribunal could see no reason why he would continue to maintain that he had never received information, if he had actually received it. Therefore, the Tribunal concluded that he had never received productions 2, 8 and 9, or the statement of services. That, in turn, supports the conclusion that they were never sent to him.
45. Secondly, the Tribunal considers that Mr Cowan's credibility was undermined by his concession that the Factors did not send the letter of 8 April (production 1). The Tribunal observes that the Homeowner's fundamental complaint, which gave rise to this dispute, was that the Factors had failed to provide him with information about the buildings Insurance. At the outset of the hearing, Mr Cowan sought to put productions before the Tribunal which, he said, showed that the Homeowner's queries had been answered by the Factors. That being so, it is significant that the very first letter produced by the Factors gives more information about the insurance than the letter which was actually sent by the Factors to Mr Brown (being the letter of 31 March). Mr Cowan offered no explanation as to why the Factors' computer system would save a version of a letter that contained more information than the version that was actually sent. Against that background, the Tribunal was sceptical of Mr Cowan's assertions that other letters were sent, where that was in doubt.
46. Thirdly, the manner in which the productions were presented to the Tribunal does not inspire confidence. They were not produced until the day of the hearing. No adequate explanation was given for this failure. With the exception of the letter of 8 January 2018, none of the attachments to the letters were produced.
47. Fourthly, Mr Cowan came to the Tribunal with a postal log which, he said, demonstrated that the letter of 11 April 2016 had been sent to Mr Brown. However, for the reasons explained at paragraph 18 above, the Tribunal did not accept that argument. In the Tribunal's view, it is significant that Mr Cowan did not seek to produce, or rely upon, any postal log in respect of the letters of 7 July and 19 September 2017 (productions 8 and 9), or in respect of the statement of services being sent on 17 December 2017. It follows from Mr Cowan's position in relation to the letter of 11 April 2016 that the Factors keep a postal log, and that he was aware he could seek to rely upon it, in tending to show that letters were

sent. The failure to produce the log in respect of the disputed letters supports the conclusion that they were never sent.

48. Finally, if the letters of 7 July and 19 September 2017 (productions 8 and 9) were sent to Mr Brown, the Tribunal is at a loss to understand why the Factors did not lodge written representations referring to those letters, in advance of the hearing. The letter of 19 September 2017 bears to be an answer to all of Mr Brown's complaints. It asserts that if Mr Brown has not followed the complaints procedure, his application to the Tribunal is invalid. If that was, in truth, the Factors' position, as at September 2017, then the Tribunal cannot understand why they waited till the hearing on 9 January 2018 to state that position.

Conclusion in respect of Homeowner's complaints: parts 1, 2 and 7 of the Code

49. Against the background of the findings made in the last section, the Tribunal had little difficulty in concluding that the Homeowner's complaints in respect of parts 1, 2 and 7 of the Code were established.

50. In particular, the Tribunal finds that the complaint under part 1 of the Code is established. No written statement of services has ever been sent to Mr Brown by the Factors. Even the statement of services which Mr Cowan sought to produce at the hearing was fundamentally inadequate, as it failed to accurately describe the Factors' core service.

51. The Tribunal finds that the complaint under section 2.5 is established. In particular, the Factors have never responded to Mr Brown's enquiry as to how his share of the insurance premium is calculated. They never responded to his email of 22 June 2017, despite indicating, in their own email of 6 July, that they would provide a detailed response.

52. The Tribunal finds that the complaint under part 7 is established. The Tribunal concluded that the Factors did not have a complaints procedure that operated in respect of the Homeowner's complaint. It follows from the Tribunal's finding in fact (paragraph 43 above) that Mr Brown was never informed of any such procedure. Insofar as the letter of 7 July 2017 (production 8), and the statement of services of 20 November 2017 suggest that there is such a procedure, the Factors clearly failed to follow it, as Mr Cowan accepted. That failure was not merely technical, or related to a single stage of the procedure. It was fundamental. The Factors simply did not respond to the complaint of 22 June 2017 at all, despite having said that they would do so.

Conclusion in respect of Homeowner's complaints: part 5 of the Code, and property factors' duties

53. The position in respect of the Homeowner's complaint under sections 5.2, 5.3 and 5.6, and as regards property factors duties, is more complex.

54. Section 5.2 states that the Factors "must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is

calculated". The Tribunal had no difficulty in concluding that no such information had ever been given to Mr Brown.

55. The same conclusion would have been reached, even if the letter of 19 September 2017 (production 9) had been sent to Mr Brown, as it does not show how his share of the premium is calculated. Instead, it simply states: "We confirm that the allocation of the annual premium is based on the terms of the Title Deeds". However, having asked Mr Cowan about the splitting of the premium between the owners of properties at 8 Whitehill Street, the Tribunal formed the view that he did not know what, if anything, was said in the Title Deeds that was relevant to the division of insurance premiums.

56. Production number 11 is a Certificate of Insurance which is headed with names of the insurers Giant, Lloyd's of London, and the Brokers, d2 Corporate Solutions Ltd. It describes the "Property Insured" as "8 Flat 2/1, Whitehill Street, Glasgow..." Mr Cowan confirmed that the Factors had a block insurance policy arranged through the brokers which covers all of the properties and developments they factor. The cost of that insurance is split between all of the owners of those properties. The split is calculated by the insurers. Consequently, the amount that the factors demand from Mr Brown has nothing to do with the Title Deeds for 8 Whitehill Street.

57. The Title Sheet for the Property was obtained by the Chamber in preparation for the hearing. The relevant burden (being entry number 4 in the burdens section) is a disposition, in 1954, by the Trustees of Janet Stevenson and Others to Herman Good, of "(I) 6 Houses entering by 2 Whitehill Street, Glasgow and (II) 6 Houses entering by 8 Whitehill Street, Glasgow (under exceptions)." Clause (Fifth) of that burden binds the donee and his successors "to concur with other proprietors of the said tenement in insuring the said tenement...by Common Policy or Policies in the joint names of the respective proprietors..." It goes on to say that:

"...the entitled proprietors or the Factor or the proprietor or other person disbursing the insurance premiums...shall be entitled to recover their respective shares from each of the proprietors of the shops and dwellinghouses in the said tenement in the same proportions as payable by our said donee and his successors for repairs, et-cetera as detailed in said Schedule."

58. The Schedule lists the 6 houses entering by 2 Whitehill Street, and 4 houses entering by 8 Whitehill Street. Various fractions are given for each of these 10 houses (3 x 2/45ths, 3 x 1/18th, 3 x 1/12th and 1 x 1/10th). The proportion for the Homeowner's flat would appear to be 1/12th.

59. By the Tribunal's calculation, the fractions add up to 13/20ths, or 65%. Presumably the remaining 35% is payable by other proprietors in the tenement which forms 2 and 8 Whitehill Street, including the shop premises on the ground floor. Therefore, it appears that, in terms of the Title Deeds, Mr Brown is bound to join together with the other proprietors in that tenement to insure it, and his share of the premium is 1/12th.

60. However, Mr Cowan indicated that the Factors do not manage the properties at 2 Whitehill Street. Therefore, it seems likely that there are no arrangements for the insurance of the entire tenement comprising 2 and 8 Whitehill Street, in the manner envisaged by the 1954 disposition. If that is indeed the case, the Factors' right to arrange insurance, and recover the cost of that insurance from the Homeowners at number 8, is called into question: the entitlement to recover the Homeowners' share, under the 1954 disposition, does not apply.
61. It would also follow that the Factors are not arranging insurance for the building of which the Homeowner's flat is part. Instead, they are arranging individual insurance policies for the Homeowner's flat, and for other flats. That is why the insurance certificate produced by the Factors (production 11) gives the "Property Insured" as Flat 2/1, rather than 8 Whitehill Street.
62. The existing arrangement is sufficient to comply with the Homeowner's obligation under section 18 of the Tenements (Scotland) Act 2004, which provides:
- 18 Obligation of owner to insure**
- (1) It shall be the duty of each owner to effect and keep in force a contract of insurance against the prescribed risks *for the reinstatement value of that owner's flat* and any part of the tenement building attaching to that flat as a pertinent.
- (2) The duty imposed by subsection (1) above may be satisfied, in whole or in part, by way of a common policy of insurance arranged for the entire tenement building...
63. However, the Factors are not arranging a policy of insurance for 8 Whitehill Street and asking the Homeowner to pay his share. They are, in effect, arranging insurance for his flat. In doing so, they are not acting in their capacity as Factors of 8 Whitehill Street. They are not carrying out their duties, as property factors. The standard letter of 21 April 2017 (production 4) is misleading, in suggesting (at paragraph 3) that the Factors' "Block Insurance" is being arranged under the Title Deeds, and that it covers "both your own property and...areas such as...roof, stairs, halls, landings."
64. The Tribunal considers it likely that these conclusions apply not only to Mr Brown, but also to the other Homeowners at 8 Whitehill Street, from whom the Factors will have been demanding payment of their "share" of the insurance premium.
65. The Tribunal gave some thought as to how this issue ought to be addressed. In its view, the Factors ought to provide a copy of this decision to the other Homeowners in the building, along with a statement confirming certain of the Tribunal's findings. The Tribunal proposes to make an Order to that effect.
66. Apart from section 5.2, the Homeowner also complained that the Factors had failed to comply with sections 5.3 and 5.6 of the Code:

5.3 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.

...

5.6 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.

67. As regards 5.3, the Factors' production 3, being the letter to the Homeowner dated 16 January 2017, does inform the Homeowner that the Factors had changed Insurance Broker to ensure that they were getting the best service, not to secure a "sign up fee". In the view of the Tribunal, that does not provide sufficient information to cover all of the points in section 5.3. None of other letters sent by the Factor to the Homeowner address this issue. None of the letters give the Homeowner the information described in section 5.6. Accordingly, the Tribunal proposes to make an Order requiring the relevant information to be given.

Disposal under section 19, appeal, etc

68. The Tribunal proposes to make an Order requiring the Factors to issue a Written Statement of Services which complies with Part 1 of the Code of Conduct.

69. For the reasons stated at paragraphs 53 to 67 of this decision, the Tribunal proposes to make an order requiring the Factors to provide a copy of this decision to the other Homeowners in the building, along with a statement confirming certain of the Tribunal's findings. It also proposes to order the Factors to provide information to Mr Brown which complies with sections 5.3 and 5.6 of the Code.

70. In the Tribunal's view, the evidence in this case points to Apex Property Factor having little or no understanding of its obligations under the Code, or of its duties as property factors arising from Deeds of Conditions and other title deeds, particularly as regards insurance. Mr Cowan, who has described himself as their "Legal Manager", has had no training in relation to the Code. As indicated at paragraph 26 above, Ms Ali's letters to the Homeowner appear to be confused as to the meaning of the term "Statement of Services". The Factors have entirely failed to comply with obligations that may be regarded as among the most basic and fundamental under the Code: to provide a Statement of Services, and to respond to complaints. The Tribunal also formed the view that the Factors had applied no thought to the insurance arrangements for the property, or the legal basis on which they were asking Homeowners to pay contributions of a particular amount, to that insurance.

71. Accordingly, the Tribunal proposes to make an Order requiring the Factors to ensure that their staff undergo training to ensure that they have a detailed knowledge of the Code, are able to comply with their duties as property factors, particularly those duties in relation to arranging insurance, and are able to ensure adequate customer relations and to communicate effectively.

72. The Tribunal also decided to order the Factors to pay the sum of £500 to the Homeowner in respect of the breaches of the Code, which the Tribunal considered to be serious, and fundamental.

73. The Tribunal's decision was unanimous.

74. The Tribunal has accordingly issued a separate Proposed Property Factor Enforcement Order, to which reference is made.

75. 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.

76. Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Adrian Stalker

Signed

Date 12 February 2018

Chairman