

Housing and Property Chamber

First-tier Tribunal for Scotland



**Decision and Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Section 19 of the Property Factors
(Scotland) Act 2011**

Chamber Ref: FTS/HPC/PF/22/1597

Re : Flat 3/2, 87 Dunlop Street, Glasgow G1 4ET ("Property")

The Parties: -

John Blair, Flat 3/2, 87 Dunlop Street, Glasgow G1 4ET ("Homeowner")

**James Gibb Residential Factors, 65 Greendyke Street, Glasgow G1 5PX
("Factor")**

Tribunal Members:

Joan Devine – Legal Member

Andrew McFarlane – Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("Tribunal") unanimously determined that the Factor has failed to comply with the Code of Conduct for Property Factors as required by section 14 of the Property Factors (Scotland) Act 2011 and has failed to comply with its factor duties in terms of section 17(5) of the 2011 Act. 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.

Introduction and Background

1. In this decision the Property Factors (Scotland) Act 2011 is referred to as the "2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors effective from 16 August 2021 is referred to as the "20221 Code" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as the "Rules".

2. The Homeowner's application to the Tribunal comprised documents received between 27 May and 9 June 2022. An undated Form C2 was lodged on 27 May 2022. A Case Management Discussion ("CMD") was fixed for 25 August 2022. In the Form C2 the Homeowner complained about breach of section 5.3 of the 2021 Code as well as a failure to carry out Property Factor duties.

3. A CMD took place on 25 August 2022 at which The Parties agreed that the Deed of Conditions registered on 22 December 2005 ("Deed of Conditions") applied to the Property. Reference is made to the note of the CMD and to the oral submission narrated therein. In summary, the Homeowner's complaint was firstly that he had not received an annual statement as required by section 5.3 of the 2021 Code and secondly that the Factor had not apportioned the insurance premium in accordance with the Deed of Conditions.
4. Following the CMD the Tribunal issued a Direction dated 25 August 2022 directing the Parties to lodge any further written representation and documents in respect of the Application by 5 September 2022. The Factor lodged a written representation dated 2 September 2022 with supporting documents. The Homeowner lodged a written representation dated 5 September 2022 with a copy of an email from the Factor to the Homeowner dated 15 February 2022. The Tribunal took the view that they had sufficient information before them to proceed to make a determination. This was communicated to the Parties, and they were asked whether they were content to proceed on that basis and without a Hearing. By email dated 6 September 2022 the Homeowner stated he was content to proceed in that way. By email dated 9 September 2022 the Factor stated they were content to proceed in that way.

The 2021 Code, Section 5.3

5. Section 5.3 of the 2021 Code states :

If the agreement with homeowners includes arranging any type of building insurance or contents insurance, the following standards will apply :

5.3 A property factor must provide an annual insurance statement to each homeowner (or within 3 months following a change in insurance provider) with clear information demonstrating :

- the basis upon which their share of the insurance premium is calculated
- the sum insured
- the premium paid
- the main elements of insurance cover provided by the policy and any excesses which apply

- the name of the company providing insurance cover; and
- any other terms of the policy.

This information may be supplied in the form of a summary of cover, but full details must be available if requested by a homeowner.

Documents

6. In support of the Application the Homeowner lodged an excerpt from the Deed of Conditions, a timeline of his complaint, a copy of the development schedule for the development of which the Property forms part (“Metropole”), a copy of the title sheet for the Property, a copy of the Factor’s Written Statement of Services (“WSS”) and copy emails between the Homeowner and the Factor.
7. The Factor lodged a written representation dated 26 July 2022 with supporting documents. The representation was paginated number 1 – 88 and included 5 appendices. They also lodged a written representation dated 2 September 2022 with supporting documents numbered 89 – 117.
8. The Parties did not raise an objection in respect of any of the documents lodged.

Findings in Fact

1. The Homeowner is a homeowner in terms of the 2011 Act and the 2021 Code.
2. The Factor are property factors in terms of the 2011 Act and the 2021 Code.
3. The Development of which the Property forms part consists of 94 apartments and 4 commercial units.
4. The basis on which the Homeowner’s share of the insurance premium was calculated is shown on quarterly invoices, sent directly to the Homeowner.
5. The terms of the insurance policy are set out in the policy document. A copy of this is available on the Factor’s website.
6. Other insurance information is shown on the Certificate of Insurance which is also available on the Factor’s website.
7. The Certificate of Insurance does not disclose the basis upon which the Homeowner’s share of the insurance premium is calculated.

8. A Deed of Conditions, registered 22 December 2005, regulates the appointment of the Factor. It further requires them to effect insurances and specifies the manner in which premia are to be apportioned.
9. The Factor has arranged insurance of the building as required by the Deed of Conditions since November 2020.
10. The Factor confirms to the Homeowner in its Written Statement of Services “WSS” that it will apportion insurance costs in accordance with the Deed of Conditions.
11. Insurance costs have not been apportioned in accordance with the Deed of Conditions but in respect of apartments each homeowner has been charged a 1/94th share.

Reasons for Decision

9. Section 5.3 of the 2021 Code provides that a property factor must provide an annual insurance statement to each homeowner with clear information demonstrating prescribed information. The prescribed information is detailed in 6 bullet points. Bullet points 2 to 6 are set out in the insurance certificate which is available on the Factor's website. Bullet point 1 is the basis upon which the homeowner's share of the insurance premium is calculated. This information is provided to the Homeowner on invoices provided to him by the Factor. There is a provision that the full terms of insurance policies do not need to be set out in the statement and can appear in another document. The Factor interprets this as meaning their approach complies. It does not as the core information set out in the six bullet points have to be in a single document. If the Factor's approach had been intended, the word “*document*” would need to have been in the plural. It is appreciated that compliance with section 5.3 of the 2021 Code will require a change to the Factor's business operation. This however is not a consideration for this Tribunal.
10. The Factor clearly sets out in their WSS, provided to the Homeowner, that they will apportion insurance costs on the basis set out in the Deed of Conditions. They admit they are not doing this in their written representation dated 26 July 2022. In their defence they cite a lack of instructions from the Metropole Owners Committee. In addition, they claim to have insufficient information to implement the terms of the Deed of Conditions. The Deed of Conditions gives the Factor the responsibility to arrange insurances and apportion the costs. Their decisions on apportionment are final and binding except in the case of manifest error. They need no instructions from any proprietor or any group of proprietors. The arrangement set up in the Deed of

Conditions recognises the inherent conflict of interest individual proprietors or groups of proprietors have in such a matter.

11. The Homeowner pointed out that although the report to which the Factors have access to, prepared by Bluestone dated 29th April 2019, states an overall figure which is not the sum currently used, figures for individual apartments are provided and with a little calculation the apportionments can be derived.
12. The Tribunal determined that The Factor has failed to comply with section 5.3 of the 2021 Code as an annual insurance statement has not been provided to the Homeowner. The Tribunal further determined that the Factor has failed to carry out the Property Factor's duties as they have not apportioned the insurance costs in the manner set out in the Written Statement of Services.

Proposed Property Factor Enforcement Order

13. 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) (a) Notice

Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014 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.

Joan Devine

Legal Member

Date : 21 September 2022