

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/17/0308

8P Glenford Place, Ayr KA7 1LB ("The Property")

The Parties: -

Mr Eric Armstrong, 8P Glenford Place, Ayr, KA71LB ("the Applicant")

**James Gibb Property Management Ltd, 65 Greendyke Street, Glasgow, G1 5PX
("the Respondent")**

Tribunal Members:

Josephine Bonnar (Legal Member)

Andrew McFarlane (Ordinary Member)

DECISION

The Respondent 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 sections 5.2 and 7.2 of the Code of Conduct for Property Factors. The Respondent also failed to carry out its property factor duties in terms of Section 17(5) of the Property Factors (Scotland) Act 2011 by failing to insure the property in accordance with the title deeds for the property and charging the Applicant an incorrect share of the insurance premium.

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 Respondent became a Registered Property Factor on 23 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application received on 7 August 2017 the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Respondent had failed to comply with the Code of Conduct for property factors and failed to carry out its property factor duties. The Applicant stated that the Respondent had failed to comply with sections 5.1, 5.2 and 7.2 of the Code. The Applicant also stated that the Respondent had failed to carry out its property factor duties by failing to provide property insurance in terms of the title deeds, charging incorrect insurance premiums and failing to advise the Applicant on the procedure for applying to the homeowner housing panel at the end of the complaints process.
2. On 6 September 2017, a Convener on behalf of the President referred the matter to a Tribunal for a determination. A hearing was assigned to take place at Russell House, King Street, Ayr on 17 November 2017.
3. The Applicant submitted a request to postpone the hearing. The request was not opposed by the Respondent. The request was granted by the Tribunal and a new hearing assigned for 11 December 2017, at the same location.
4. In advance of the hearing the Applicant lodged a bundle of documents and written representations. The Respondent lodged written representations and documents and advised that it would not attend the hearing.

Hearing

5. The hearing took place before the Tribunal on 11 December 2017. The Applicant, Mr Eric Armstrong was present. He was accompanied by Mr Alan

Lush and Mr Ian McDowall, who confirmed that they were there as observers. There was no attendance by or on behalf of the Respondent.

6. Mr Armstrong gave evidence in relation to his application. He advised the Tribunal that he purchased the property in April 2016. The property is a flat in a development known as Carrick Quay. There are 31 properties in the block, 14 of which are located in the stairwell in which the property is located. He referred the Tribunal to the description of the property in the deed of conditions contained within the title deeds for the property. These state, in section A of the Land certificate, "subjects 8P Glenford Place, Ayr KA7 1LB within the land edged red on the title plan being the penthouse flat on the fourth floor of block 9 tinted blue on the said plan". The Tribunal drew the Applicant's attention to the description set out above which referred to block 9, when he had called his property block 8. He confirmed his property was, in his view, part of Block 8 and the Land Certificate description was incorrect. He further advised the Tribunal that his block contains 31 properties and that there are 4 blocks in the development. He referred the Tribunal to the plan for the development and confirmed that the property is a penthouse flat. Mr Armstrong advised the Tribunal that following his purchase of the property he became concerned about the insurance premiums, and how these had been calculated. He made some enquiries with the Respondent, but found their explanation to be unsatisfactory. It appeared to him that he was being charged a higher premium, linked to the sale value of his property, rather than an equal share of the re-instatement value for the block, as provided for in the title deeds. He proceeded to refer the Tribunal to the terms of the title deeds and in particular to the insurance section [Entry 2 of Burdens Detail : Part 4 MANAGER BURDENS] which states "4e The Proprietors of each flat shall be bound along with the other Proprietors of the remaining flats within the block to effect through the agency of the Property Manager with a reputable and well established company and keep in force.....a policy of insurance..." and " The Proprietors of the flats in the Block shall be liable inter se for the payment of annual premiums of the insurance policies" and "Each Proprietor shall be responsible for paying an equal share of the said premiums in respect of insuring the Block." Eventually he received a letter from the Respondent dated 28 July 2017. This letter had been lodged with the application and he referred the Tribunal to the terms of same. Paragraph 1 of the letter states that it is a response in terms of stage 5 of the Respondent's complaints procedure. Paragraphs 3 to 7 of the letter outline the history of the insurance arrangements. Essentially the explanation put forward is that the Respondent took over from the previous property factor, insuring the property in same way as they had done. They had increased the sum insured for the property when the house had changed hands in 2013, and the new owner's lender had requested a higher figure. The Respondent changed insurance company in May 2016, to get a better deal for the proprietors. In the letter the Respondent goes on to acknowledge that the recorded sales prices for the property seem to reflect individual reinstatement values for insurance purposes but that "the premium share does not reflect what is stated in the Deed of Conditions". The letter goes

on to state that the total sum insured for the block (being 7, 8 and 9 Glenford Place) is currently £6,881,367.90. 27 proprietors pay the same amount, 4 others (including the Applicant) pay more due to the higher sums insured. These properties are bigger and have a higher value. In paragraph 8 of the letter the Respondent states that "Now that you have brought this to our attention, we will apply the annual insurance premium in accordance with the Deed of Conditions, on an equal share basis". The letter states that the effect of this will be an increase for the 27 and a reduction for the 4. The letter concludes by stating that the Applicant will be entitled to a credit of £234.76 in his final invoice. The Applicant advised the Tribunal that this letter provided him with an explanation of the position, for the first time. In response to questions by the Tribunal the Applicant was unable to say when he first raised his concerns about the insurance premiums but thinks that it was some time in 2016, by telephone call. He indicated that he is annoyed at the length of time taken to provide the explanation, and to acknowledge the error. Furthermore, he does not find the explanation, in his view, to be a satisfactory one as the Respondents ought to have checked the position when they took over the contract, to make sure that the insurance arrangements were correct and complied with the title deeds.

7. The Applicant advised the Tribunal that he has a further concern regarding the insurance. He explained that the block in which the property is located is one of four. Two are on the seafront and two are not. He believes the development is insured in one policy, rather than each block separately. He believes that the title deeds require each block to be separately insured. He advised the Tribunal that the seafront blocks, in his view, present a higher risk from an insurance perspective, because of their location. This means that insurance premium should be higher for them and lower for the other 2 blocks. He advised the Tribunal that, as his property is in one of the seafront blocks, that could mean a higher premium than is currently due. However, his position is that the title deeds are there for a reason, and should be complied with. He has not investigated the implications of this concern and could not advise the Tribunal of the financial consequences, if any. In response to questions from the Tribunal he confirmed that he understands that the sum insured figure in the letter of 28 July 2017, is the figure for the block, not the development.
8. The Applicant concluded the evidence by advising that the Respondent is no longer the property factor for the development, a unanimous decision of proprietors at a meeting having decided to terminate the contract and appoint a new property factor. He also advised the Tribunal that the final invoice due from the Respondent and referred to in the letter of 28 July 2017, was due on 28 November 2017 and to date, has still not been received. The refund detailed in the letter has not been paid to him. He is unhappy with the delay. He further advised the Tribunal that (contrary to the statement in the Respondents written representations that he did not pay the last invoice), he does not owe any money. This was confirmed to him in October 2017, when he challenged the

statement. The final invoice should not contain any charges as they have not provided any services since the end of July 2017. He is therefore due both the refund and the return of his float, but has received neither. He is of the view that the Respondent is in breach of section 5.1 of the code, by failing to insure the property as per the title deeds. They have also breached section 5.2 by failing to provide him with information regarding the insurance, as required by that section. Finally, he is of the view that the letter of 28 July 2017, being the last stage in the complaints process, ought to have information on how to apply to the First-tier tribunal (formerly homeowner housing panel). It does not. He feels that the Respondent should be reprimanded by the Tribunal for their failures.

9. The Respondent did not attend the hearing but submitted written representations from Deborah Rummens, together with an inventory of documents. The written representations refer the Tribunal to the terms of letter of 28 July 2017, also lodged and referred to by the Applicant in his evidence. Ms Rummens states that, having explained how the situation with the insurance occurred, the Respondent has agreed to refund the overpayment and do the same with regards the other affected owners, in the final invoice due to be issued following period 28/11/17. She states that the Applicant has withheld payment of sums due in terms of his August 2017 invoice. She concludes by saying that she saw no benefit to her attending the hearing, that the Applicant has received an apology, that they have improved systems and re-trained staff, and that the Applicant has achieved his goal of having their contract terminated at 30 July 2017. The documents lodged include a copy email to the Applicant dated 27 October 2017 which confirms that he settled the balance due to Respondent in September 2017. Also produced are a number of emails relating to the complaint made by the Applicant including an email from the Respondent dated 10 April 2017 which provides a link to the Housing and Property Chamber website. The other documents comprise a series of emails relating to a variety of issues not before the Tribunal and to the termination of the factoring contract.

The tribunal make the following findings in fact:

10. The Applicant purchased the property in April 2016.
11. The property is a penthouse flat in a block of 31 properties.
12. The Applicant is liable for an equal share of the insurance premiums due for the block.
13. The Respondent was the Property Factor for the property until 30 July 2017 when the contract terminated.

14. Between April 2016 and 30 July 2017, the Applicant was charged an unequal share of the insurance premium for the block resulting in an overpayment of £234.76. He has not received a refund of this overpayment.

Reasons for Decision

15. In his application, the Applicant states that the Respondent has breached Sections 5.1, 5.2 and 7.2 of the Code. The Applicant also states that the failure to insure the property in terms of the title deeds, charging incorrect premiums and failure to advise the Applicant on the how to make an application to the First-tier tribunal also amounts to a failure to carry out its property factor duties.
16. **Section 5.1 “You must have, and maintain adequate professional indemnity insurance, unless you are a social sector property factor who can demonstrate equivalent protections through another route”.** Although this section of the code is referred to in the application, the documentation lodged, and evidence presented to the Tribunal related only to buildings insurance for the property and not professional indemnity insurance. The Tribunal therefore concludes that there has been no breach of this section of the Code established.
17. **Section 5.2. “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 Tribunal heard evidence from the Applicant that the Respondent failed to provide him with this information and that it was not until the letter of 28 July 2017 (stage 5 in the complaints procedure) that he was made aware of how his share of the premium had been calculated. The Respondent does not specifically address the issue of failing to provide information in its written representations. The Tribunal however found the Applicant to be credible and reliable and accepted his evidence that he was not made aware of the basis upon which his share had been calculated until that letter, and this finding is supported by the letter itself which provides a detailed history of the insurance arrangements. The Tribunal concluded therefore that the Respondent is in breach of this section of the Code.
18. **Section 7.2 “When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management, before the homeowner is notified in**

writing. The letter should also provide details of how the homeowner may apply to the homeowner housing panel". The Tribunal considered the evidence of the Applicant and the documents lodged by the Respondent. It appears to be undisputed that letter of the 28 July 2017 is the last stage of the complaints process. The letter itself makes no mention of the Applicant's entitlement to apply to the Tribunal. The Applicant has therefore established that the Respondent is in breach of this section of the Code. However, the Tribunal notes that in the email exchange between the parties, copies of which are produced by the Respondent, there are various references to the Tribunal by both parties, including a link to the Tribunal website. The Tribunal is therefore satisfied that, although a breach of the section has been established, that this breach did not cause any prejudice to the Applicant and accordingly determined that there should be no order in relation to same.

- 19. Failure to carry out property factor duties – failure to insure the property as per the title deeds, allocating the insurance premiums incorrectly, failing to advise the Applicant on how to apply to homeowner housing panel.** The Tribunal considered whether the Respondent's failure to advise the Applicant on how to apply to the homeowner housing panel (now the First-tier Tribunal: Housing and Property Chamber) amounted to a failure to carry out its property factor duties and concluded that it did not. The Tribunal notes that from the correspondence between the parties, the Applicant was aware of the availability of an application to the Tribunal. Furthermore, the Tribunal concludes that this duty relates to the way in which factoring services have been delivered, or not delivered, by the Property factor, and that although some breaches of the code will also amount to a breach of this duty, it does not do so in this case. However, the Tribunal is satisfied that the Respondent's insurance arrangements do amount to a failure to carry out its property factor duties. The Respondent does not dispute that the way in which the insurance premium was divided among proprietors does not comply with the title deeds. The Tribunal accepts the Applicant's argument that the Respondent ought to have checked the deeds, when making the insurance arrangements, rather than simply continuing with the arrangement put in place by the previous property factor. That said, the Tribunal notes that the arrangement appears to have resulted from error or oversight rather than a deliberate decision to depart from the provisions of the deeds. The Tribunal is not convinced that the complaint by the Applicant that the Respondent is also in breach of the title deeds by insuring the development rather than each block individually. Firstly, the Tribunal was not persuaded from the evidence led that this is in fact the case. The Respondent does not specifically address this particular issue in the written representations and the letter of 28 July 2017 details the sum insured for the block, not the development. In any event, even if the policy relates to the whole development, not just the block, this is not necessarily prohibited by the title deeds. The Tribunal notes that the deeds do require the block to be insured and the proprietors to pay an equal share. However, this obligation does not necessarily exclude the possibility that the insurance policy might relate to more

than one block, as long as the proprietors are only paying an equal share of the premium for their block. Furthermore, the claim that a single development policy is prejudging some proprietors due to differing levels of insurance risk, is only speculation on the part of the Applicant. He also accepted that, if his theory is correct, his premium could increase rather than decrease. The Tribunal therefore concluded that only the unequal division of the insurance premium was established by the Applicant as a failure to carry out property factor duties.

20. The Tribunal accordingly determined that the Respondent is in breach of Sections 5.2 and 7.2 of the Code, although no order is proposed in relation to the latter. The Tribunal also determined that the failure of the Respondent to apply the title conditions in relation to the division of the insurance premium and thereby charging the Applicant an incorrect amount for his share of the premium does amount to a breach of the duty owed in terms of Section 17(5) of the Act. The Tribunal notes that the Respondent acknowledged in the letter of 28 July 2017 that the Applicant is due a refund of £234.76 but that as at the date of the hearing, the Applicant had not received this refund. The Tribunal therefore determined that in addition to ordering the Respondent to pay the sum due, that it would be appropriate to order compensation to be paid to the Applicant in the sum of £100.

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.

Josephine Bonnar, Legal Member

8 January 2018