

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision and Statement of Reasons under Section 23 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 (Surveyor) Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("Tribunal") unanimously determined that the Property Factor Enforcement Order dated 21 September 2021 as revised and as remade by the Upper Tribunal by Decision dated 22 March 2023 ("PFEO") has not been complied with and determines in terms of Section 23(1) of the Property Factors (Scotland) Act 2011 that the Factor has failed to comply with the PFEO.

Background

1. On 21 September 2022 the Tribunal made a determination under sections 14 and 17(5) of the Property Factors (Scotland) Act 2011 ("Act") and issued a statement of decision and made a Property Factor Enforcement Order. Both the Homeowner and the Factor appealed the decision of the Tribunal. By decision dated 22 March 2023 the Upper Tribunal refused the appeal by the Factor. By decision dated 22 March 2023 the Upper Tribunal upheld the appeal by the Homeowner and remade the Property Factor Enforcement Order. The Property Factor Enforcement Order as remade is hereinafter referred to as the "PFEO". The PFEO is in the following terms :
 1. *By 8 September 2023 the Factor will provide to the Homeowner an insurance statement as specified in section 5.3 of the 2021 Code for the period November 2022 to November 2023.*

2. *By no later than 8 September 2023, the Factor will apportion the insurance costs for the Property as required by the Written Statement of Services that is in accordance with the Deed of Conditions registered on 22 December 2005.*
3. *By no later than 8 September 2023, the Factor will calculate, in accordance with the Deed of Conditions registered on 22 December 2005, the amount due by the Homeowner in respect of insurance costs for the development of which the Property forms part, for the periods November 2019 to November 2020; November 2020 to November 2021; November 2021 to November 2022 and November 2022 to November 2023. Thereafter any resultant overpayment will be refunded by the Factor to the Homeowner or any resultant underpayment will be invoiced to the Homeowner by the Factor."*
2. The Upper Tribunal remitted the matter back to the Tribunal. On 12 September 2023 a letter was sent to the Homeowner in terms of which he was asked to state whether or not the actions required in the PFEO had been completed. The Factor had previously intimated on 8 September 2023 that they had complied with the PFEO. The Homeowner responded on 15 September 2023 stating that the Factor had only partially complied with the PFEO. On 21st September the Factor commented on the Homeowners response.

Discussion

3. Section 23 of the 2011 Act provides as follows:

"23 – Effect or failure of comply with Property Factor Enforcement Order

- (1) *It is for the First-tier Tribunal to decide whether a Property Factor has failed to comply with a Property Factor Enforcement Order made by the First-tier Tribunal.*
- (2) *Where the First-tier Tribunal decides that a Property Factor has failed to comply with the Property Factor Enforcement Order, the First-tier Tribunal must serve notice of the failure on the Scottish Ministers.*
- (3) *The First-tier Tribunal may not decide that a Property Factor has failed to comply with a Property Factor Enforcement Order –*
 - (a) *unless the period within which the Order requires any work to be executed has ended, or*
 - (b) *if the First-tier Tribunal is satisfied on the submission of the Property Factor or otherwise –*
 - (i) *that the Property Factor is unable to comply with the Order because of a lack of necessary rights (of access or*

otherwise) despite having taken reasonable steps for the purposes of acquiring those rights, or

(ii) that any action requires by the Order is likely to endanger any person.

(4) Where the First-tier Tribunal is prevented by reason only of sub-section 3(b) from deciding that a Property Factor has failed to comply with a Property Factor Enforcement Order, the First-tier Tribunal must serve notice on the Scottish Ministers stating that it considers the Property Factor to be unable to comply with a Property Factor Enforcement Order.

4. The Factor produced an insurance certificate from Marsh dated 17 May 2023 for 75, 85, 87 and 95 Dunlop Street, Glasgow G1 4ET for the period 28 May 2023 to 27 May 2024 which included a premium apportionment appendix which showed the share of the insurance premium for the Property. The Factor also produced a copy of an email to the Homeowner dated 8 September 2023 attaching the insurance certificate and summarising the proportion of the insurance applicable to the Property and the difference between the previous flat rate utilised and the variable rate now applied bringing out a sum due by the Homeowner of £20.58.
5. The Homeowner submitted in his response dated 15 September 2023 that there had only been partial compliance with the PFEO firstly as the figures provided for the sum insured and the premium paid were provided for the building as a whole and not for the individual apartments within the building and secondly as the owners of the other 93 apartments in the building had not yet received the information set out in the PFEO.

Decision

6. Section 5.3 of the Code of Conduct for Property Factors (“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 provide 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.

7. The insurance certificate produced by the Factor contained a premium apportionment appendix which shows the amount of the insurance premium attributable to each apartment within the development. The sum insured is stated. The main elements of the insurance cover provided by the policy and excesses which apply are stated. The name of the company providing insurance cover is not stated. The period covered by the certificate is 28 May 2023 to 27 May 2024 and not the period referred to in the PFEO which is November 2022 to November 2023. **For these reasons, the information provided by the Factor indicates that they have failed to comply with part 1 of the PFEO.**
8. The insurance certificate produced by the Factor included a premium apportionment appendix which showed the share of the insurance premium for all of the apartments in the development including the Property. This evidenced that the Factor had apportioned the insurance costs for the Property as required by the Written Statement of Services that is, in accordance with the Deed of Conditions registered on 22 December 2005. **The information provided by the Factor indicates that they have complied with part 2 of the PFEO.**
9. The email produced by the Factor sent to the Homeowner on 8 September 2023 summarised the proportion of the insurance applicable to the Property and the difference between the previous flat rate utilised and the variable rate now applied. From this two figures are drawn out, firstly what the Homeowner paid and secondly what the Homeowner should have paid. This is for the period November 2019 to November 2023 as a single calculation. The PFEO requires four separate calculations. **For this reason, the information provided by the Factor indicates that they have failed to comply with part 3 of the PFEO.**
10. The Homeowner objected to the apportionment set out in the premium apportionment appendix being in the form of a percentage rather than a sum of money. Neither the PFEO or the Code have a requirement in the form the Homeowner states. This does not indicate a failure to comply with the PFEO. The Homeowner also noted that the other 93 apartments had not yet received the information set out in the PFEO. The PFEO only applied to the Homeowner

and his Property, both as defined at the top of the first page of this decision and the PFEO. On that basis there is no failure to comply with the PFEO.

11. The Tribunal considered that that the PFEO had not been complied with in full and having no grounds before it to engage Section 23(3) of the 2011 Act, determines in terms of Section 23(1) of the 2011 Act that the Factor has failed to comply with the PFEO. The decision is unanimous.
12. In terms of Section 23(2) of the 2011 Act the Tribunal must serve notice of the failure to comply with the PFEO on the Scottish Ministers and accordingly a copy of this decision will be served on the Scottish Ministers.

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.

Legal Member
Date : 4 October 2023