

# Housing and Property Chamber First-tier Tribunal for Scotland

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**First-tier Tribunal for Scotland (Housing and Property Chamber)**

**Property Factors (Scotland) Act 2011 (“the Act”), Section 19**

**The First-tier Tribunal for Scotland, Housing and Property Chamber  
(Procedure) Regulations 2016 (“the 2016 Regulations”)**

**Chamber Ref: FTS/HPC/PF/16/1006**

**Flat 8/2, The Isokon Building, 100 Holm Street, Glasgow, G2 6SY  
(“The Property”)**

**The Parties:-**

**Mr Norman McPherson, 34 Lauder Crescent, Perth, PH1 1SU  
(“the Homeowner”)**

**Newton Property Management Ltd, 87 Port Dundas Road, Glasgow, G4 0HF  
(“the Factor”)**

**Tribunal Chamber Members**

Maurice O’Carroll (Legal Member)  
Elizabeth Dickson (Ordinary Member)

**Decision of the Chamber**

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) unanimously determined that the Factor has not failed to comply with section 2.1 of the Code of Conduct for Property Factors (“the Code”). Therefore, no further action on the part of the Factor is required.

**Background**

1. By application dated 24 November 2016, the Homeowner applied to the Homeowner Housing Panel for a determination on whether the Factor had failed to comply with section 2.1 of the Code as imposed by section 14(5) of the Act. The application raised no other issues, either in relation to any other parts of the Code or in relation to the Factor’s duties generally.
2. By operation of regulation 3 of the First-tier Tribunal for Scotland (Transfer of Functions of the Homeowner Housing Panel) Regulations 2016, the application was then considered by the Housing and Property Chamber of the First-tier Tribunal for Scotland (“the Tribunal”).

3. By decision dated 6 January 2017, a Convenor on behalf of the President of the Housing and Property Chamber decided to refer the application to the Tribunal for a hearing.
4. A hearing of the Tribunal was held on 10 March 2017 at Wellington House, Wellington Street, Glasgow. The Homeowner did not appear, preferring to rest on the written submissions he had sent to the Tribunal. The Factor was present and represented by Mr Derek MacDonald, co-director of the Factor and Mr Scott Cochrane, Associate Director, both of whom gave evidence. They also brought with them Mr Ian MacDonald Dip BS, MRICS, a Chartered Building Surveyor of Bluestone Chartered Building Surveyors who also gave evidence during the hearing. Mr Ian McDonald has over 30 years' experience as a Chartered Building Surveyor.
5. The Homeowner intimated his concerns regarding the alleged failures in duty on the part of the Factor by formal notification dated 8 December 2016, in compliance with the requirements of section 17(3) of the Act.
6. Prior to notification, detailed correspondence passed between the parties which were taken into consideration by the Tribunal. Neither party produced written submissions for the purposes of the Tribunal hearing itself.
7. In advance of the hearing, at the request of the Tribunal, the Factor provided a full copy of their Written Statement of Services, a complete copy of the Deed of Conditions applicable to the Property and quotations for the works at issue between the parties. The Tribunal is grateful to the Factor for its assistance.

### **Committee findings**

The Committee made the following findings in fact pursuant to Regulation 31(2)(b)(i) of Schedule 1 to the 2016 Regulations:

8. The Property is situated within a 13 storey building which was built in or around 2004. There are generally 3 residential flats per floor in the development which is known as the Isokon Building. However, the upper two storeys consist of penthouse flats (two per floor) and ground floor houses a commercial unit which extends to part of the ground floor and is occupied by the Roy Castle Foundation. In total there are 36 units, including the commercial unit.
9. A Deed of Conditions was granted in respect of the block in which the Property is situated by the developer Levensdale Limited. It was signed on 27 July 2004 and makes provision for the appointment of Factors, the definition of the common parts of the building and the apportionment of liability for the maintenance and repair thereof.
10. Section C (iii) of the Factor's Written Statement of Services states that the Factor will issue a quarterly account of the common charges to the Homeowner. The section then goes on to state that "the common charge account will detail the Homeowner's share of the specific repair as required by the Deed of Conditions." It is therefore clear that the document governing the common charge at issue is the Deed of Conditions. It was agreed by the

Factor at the hearing that the Tribunal's interpretation of the relevant parts of the Deed of Conditions is required to resolve the issue between the parties and that such interpretation will be determinative of the issue in question. In the course of correspondence, the homeowner referred to the Tenements (Scotland) Act 2004. However, the Tribunal considers that the relevant parts of the Deed of Conditions are clear and as such, the 2004 Act is of no application.

11. The dispute between the parties concerns liability for the cost of repair works carried out at properties known as Flat 3/2 and Flat 4/2 of the development. The Factor maintains that the works are communal and therefore the cost of them requires to be shared among all of the proprietors within the development. The Homeowner maintains that the works are the individual responsibility of the owners of Flats 3/2 and 4/2 in respect of the works carried out at their properties. In his view, the costs of the works should be borne by them alone.
12. In terms of location, the properties in question are the second flats on the second and third floors of the development. The Property owned by the Homeowner is the second flat on the seventh floor of the development. All of the flats are directly above one another on the south elevation of the development, although three floors separate the Property from the nearest flat at which works were carried out.
13. In terms of the Deed of Conditions, the common parts of the development are termed "Block Common Parts" and "Flat Common Parts." Works in respect of the former are split 37 ways (the commercial unit paying 2 shares) and works in respect of the latter are split 35 ways. It was agreed that the relevant common part at issue is the "Block Common Part". Both parties prayed in aid the terms of Clause (1)(a) in support of their respective positions.
14. Clause (1)(a) provides as follows:  
 "Block Common Parts in relation to the block means:-  
 the solum on which the block is erected, the external communal area to the rear, the foundations, roof, roof space, back, front, gable and other external walls and the main internal load bearing division walls and/or columns (but excluding the screeding, plaster work and finishes thereof) **and generally the whole structural frame of the building and all other parts of or fitting in the building which are related to the main structure thereof.**" (bold added)
15. The works in question are described in two quotations issued on separate dates by Hugh Scott Building Services. The first of these dated 18 December 2015 arose following water ingress into Flat 3/2. In order to prevent water ingress there, works were required at Flat 4/2 which involved the removal of the window cill and panel works, fitting a new damp proof course ("dpc") and then reinstatement. The cost of those works was £1,284 plus VAT. The Homeowner's 1/37<sup>th</sup> share of that which was included in a quarterly account statement came to £49.84 plus VAT.
16. The second works in question were vouched by a quotation dated 16 February 2016. Those works were at Flat 3/2 and consisted of the removal of internal linings to allow the installation of a cavity tray around the window of that

property and to reinstate the existing building paper to the external face of the external wall's inner leaf. The cost of those works was £1,884 plus VAT. The Homeowner's 1/37<sup>th</sup> share of that which was included in a later quarterly account statement came to £50.92 plus VAT. Both sets of works were required to remedy defects in the external wall cladding system which was allowing water ingress into the building fabric, affecting the inner leaf of the south elevation and the internal finishes.

17. Mr Ian MacDonald gave evidence regarding the construction of the Isokon building by reference to a photograph of the southern elevation. It is a timber framed building with aluminium and concrete cladding and curtain walling. The cill detail is used as part of the cladding. The windows are standard aluminium units which can be moved in and out without disturbing the cill detail, unlike a traditional timber construction. Indeed, when the works were undertaken to Flats 4/2, it was not necessary to remove the windows in order to access the cills which required to be remedied in order to prevent water ingress. In other words, the windows themselves are individual units, whereas everything apart from them are structural, including the cills and the dpc surrounds.
18. The cavity tray referred to above was introduced between the timber frame and the concrete cladding to collect water. A damp proof membrane was introduced around the windows of Flat 3/2 as part of that cavity tray in order to shed water away from where it was entering the building. The repair was therefore one which concerned the overall wall and cladding system at the southern elevation, rather than simply to individual properties. The dpc around the windows of the flats in question are integral to the dpc of the building as a whole in order to deal with water ingress which might affect the building. As he explained it, the dpc as now corrected allows the building to function as it should and to expel water from inside the building to the exterior.
19. Mr Ian MacDonald confirmed that the works were completed on 17 March 2016 and together had been successful in eliminating water ingress to the development. At the conclusion of his evidence, Mr MacDonald provided a summary of his oral evidence which was contained within a letter addressed to the Tribunal dated 10 March 2017.
20. The Tribunal accepted the evidence of Mr Ian MacDonald in full. In so doing, it was satisfied that the works which formed the basis of the dispute between the parties were in fact structural in nature. Since they were structural or at the very least "related to the main structure" of the building, they fell within the definition found at Clause (1)(a) of the Deed of Conditions highlighted above in bold. It follows that since the works are structural, they constitute "Block Common Parts", the repair and maintenance of which falls to the collective body of homeowners at the development. Since the works fall within the definition of Block Common Parts, the Homeowner is liable to pay a 1/37<sup>th</sup> share thereof in terms of the schedule to the Deed of Conditions which governs the matter.
21. The above view is fortified by reference to Clause SECOND (3) of the Deed of Conditions which details parts of the development which are individual to

homeowners within the development. The third sentence thereof makes specific reference to the “window frames and glass in the windows thereof.” As noted above, the windows within the development are removable as separate units and are distinct from the cills and outer walls. It follows that they are individual components in the properties in which they are located. They are therefore the sole responsibility of individual homeowners in question. This can be contrasted with the works actually carried out as described above.

22. The works in question were not in relation to the windows on their own, but rather in relation to the dpc and cills and the damp proofing of the building as a whole. The works specified in the quotations dated 18 December 2015 and 16 February 2016 were communal, not individual repairs.

#### Section 2.1 of the Code – False or misleading statements

23. Section 2.1 of the Code states the following: “You must not provide information which is misleading or false.” The Homeowner’s position was that since the works in question were not communal, it was incorrect or misleading to assert that they were so. This was done by charging the Homeowner and the other homeowners within the development for a share of the works carried out at Flats 3/2 and 4/2 and in the course of ensuing correspondence with the Homeowner.
24. Standing the evidence led and the Tribunal’s findings in relation to it, the Tribunal is of the view that the works in question were indeed communal. It follows that it was neither false nor misleading to contend that they were so in the charging arrangements of the Homeowner and the other occupants of the development or otherwise.

#### **Decision**

25. Therefore, the Tribunal finds that the Factor has not breached its duty to comply with the Code in relation to section 2.1. This was the sole issue requiring determination by the Tribunal. No further action on the part of the Factor is therefore required. The decision was unanimous.

#### **Appeals**

26. 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.

Maurice O’Carroll

Signed: M O’Carroll  
Chairman

Date 15 March 2017