

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 (“the Act”) and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber Ref: FTS/HPC/PF/22/0306

Property: 31/2 Fettes Row, Edinburgh EH3 6RH (“the Property”)

The Parties:-

Mrs Sandra Walker, Kittestrips, Etrickbridge, Selkirk TD7 5JJ (“the homeowner”)

Charles White Limited, registered in Scotland SC212674 and having their registered office at Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD (“the property factors”)

Tribunal Members:

George Clark (Legal Member/Chairman) and Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) decided that the property factors have failed to comply with their duties under Section 5.2 of the Code of Conduct for Property Factors, effective from 1 October 2012, made under Section 14 of the Property Factors (Scotland) Act 2011. The Tribunal proposes to make a Property Factor Enforcement Order as set out in the accompanying Notice under Section 19(2)(a) of the Act.

Background

1. By application, received by the Tribunal on 31 January 2022, the homeowner sought a Property Factor Enforcement Order under Sections 17 and 20 of the

Property Factors (Scotland) Act 2011 (“the 2011 Act”) in respect of a failure by the property factors to comply with Section 5 of the Code of Conduct for Property Factors (“the Code of Conduct”). The homeowner stated that the complaint related to the buildings insurance for 30 and 31 Fettes Row. In 2021, one of the proprietors had obtained a Home Report for the purpose of selling their property and it appeared that there was a difference in the rebuilding costs figures. After obtaining a copy of the 2018 Revaluation Report, it transpired that there was a large difference in the floor area of the individual flats. The Chair of the Residents’ Association contacted the property factors regarding this on 12 April 2021 and the property factors agreed to a further valuation which was carried out by Graham & Sibbald, chartered surveyors, on 13 May 2021. Their report confirmed that the wrong measurement of the individual properties within the tenement had been used and that the total measurement of each block was reduced from 1026 Square metres to 716 square metres, a reduction of some 30%.

2. It took until 19 July 2021 for the property factors to issue the renewal papers for the insurance where it was disclosed that the reinstatement value was reduced by 32% and the insurance premium by 34%, the premium for each flat being reduced by £153.24.
3. It was clear to the homeowner that, since purchasing the Property in 2010, she had been paying a higher premium of approximately 30% each year in respect of the Property due to the error in the valuation figures, an error caused by the information given by the property factors to the surveyors. She understood that the property factors contend that at each renewal, when they issue the Policy Schedule, they state “If you consider the reinstatement value of your property and your share of the common areas to be incorrect you will need to contact an RICS qualified Building Surveyor to provide you with an appropriate valuation.” The homeowner considered that she had met this obligation by having the property factors and the building surveyors they instruct to do exactly that. No copies of the surveyors’ valuation were provided to the owners.
4. The homeowner understood that the property factors were now seeking to apportion the cause of the error onto the surveyors instructed by them. It was up to the property factors to look into reimbursement from the surveyors. The owners had no contractual relationship with the surveyors and were not in a position to seek recompense from them.
5. The homeowner considered that the property factors had failed to carry out their duties in terms of Section 5.2 of the Code of Conduct for Property Factors. She provided details of the insurance premiums she had paid since 2011 and was seeking reimbursement from the property factors of approximately 30% of all premiums paid.
6. The application was accompanied by copies of the property factors’ Written Statement of Services, a Building Reinstatement Cost Guidance Report by DM Hall LLP, dated February 2014, and Reinstatement Cost Assessment Reports by Graham & Sibbald, dated 17 December 2018 and 13 May 2021.

The homeowner also provided a copy of her email to the property factors of 10 December 2021, being a First Stage complaint. Its wording was, in effect, identical to the wording contained in the application, so need not be repeated here. In their reply of 23 December, the property factors confirmed that the information previously provided to the Building Surveyors came from the information available to them at the time. This included the previous reinstatement valuation survey if available, deed plan and any drawings held on file, with any other salient information they held. They stated, however, that it was the responsibility of the surveyor to ensure the information is correct and carry out spot checks to confirm its accuracy. The property factors did not hold information on the size of each individual privet property beyond what they provided to the building surveyors, unless specifically advised by owners. They did not accept liability for formal assessment for reinstatement value as it was outwith their experience and expertise, so did not accept liability on the previous policy premiums. They provided the information they held in good faith to the surveyors.

7. On 25 February 2022, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the property factors were invited to make written representations by 18 March 2022. The property factors did not make any written representations to the Tribunal.
8. The present application was conjoined with the application made under Chamber Reference PF/22/0281 and the following details of the Case Management Discussion and subsequent Hearing are, therefore, to be read together in relation to both applications.

Case Management Discussion

9. A Case Management Discussion was held on the morning of 23 May 2022. The homeowner was present, as was the homeowner in application PF/22/0281. The property factors were represented by Ms Tanya Murray of Lyons Davidson Solicitors, Edinburgh. The legal Member of the Tribunal outlined the purpose of the Case Management Discussion, which was to clarify the issues if required, to identify areas of factual dispute and to determine whether to adjourn the case to a full evidential Hearing and what further information/documentation was required by the Tribunal in advance of such Hearing.
10. The homeowner in application PF/22/0281 told the Tribunal that one thing she had not seen was the documents which the property factors had given to the surveyors in advance if revaluations. The letter which she had received when owners were contacted in 2013 referred to the last assessment having been carried out in 2007.
11. Ms Murray told the Tribunal that she intended to move for a full Hearing, to give the property factors the opportunity to prove that they had given the surveyors all the documents that they held and that they had not provided any erroneous information. It was clear to the Tribunal that it was important to try to ascertain precisely where the error which resulted in the floor area of the

flats and blocks being overstated had arisen. This would involve requiring the property factors to produce evidence of all the information and documentation sent to the firms of surveyors with the revaluation instructions to produce the reports of 2014 and 2018. There was also an indication that a valuation had been carried out in 2007. Accordingly, a full evidential Hearing would be required and the Tribunal would issue such Directions as it thought fit in relation to the production of documents in advance of the Hearing.

12. Consideration of the application was adjourned to a full evidential Hearing.
13. The Tribunal issued Directions to the Parties on 6 June 2022. The property factors were required to provide copies of their letters of instruction to surveyors in connection with the Reinstatement Valuations of 30 and 31 Fettes Row Edinburgh in 2007, 2013 and 2018, together with full details of all documents provided by them to the surveyors in connection with said Reinstatement Valuations and any information and documentation relative to Reinstatement Valuations and floor area calculations that was passed over to them when they took over the factoring of the Property in 2003. The homeowner in application PF/22/0281 was required to provide a copy of the portion of the Home Report in respect of the Property, obtained by her in 2021, which states the floor area of the Property.
14. The property factors did not comply with the Tribunal's Direction.
15. The homeowner in application PF/22/0281 provided the Tribunal with a copy of a Home Report over the Property dated 12 October 2020. It stated the gross internal floor area of the Property to be 65 square metres.

The Hearing

16. A Hearing took place on the morning of 30 August 2022. The homeowner was represented by her husband, Mr Douglas Walker. The homeowner in application PF/22/0281 was also present. The property factors were not present or represented.
17. The homeowner in application PF/22/0281 told the Tribunal that she had no further information to provide to the Tribunal, but she expressed her disappointment that the property factors had failed to comply with the Tribunal's Direction, had failed to make any written representations and had failed to appear or be represented at the Hearing. This, she said, was typical of the property factors and exemplified her disappointment and frustration with the manner in which they had handled this matter.
18. Mr Walker advised the Tribunal that the complaint had been set out pretty fully in the application. He added that, whilst it would have been helpful for residents to know how the error occurred, they had no contractual relationship with the surveyors, so their complaint must rest with the property factors. He also expressed his disappointment that the property factors had not made any written representations and were not present or represented at the Hearing.

Findings in Fact

1. The homeowner is the proprietor of the property, which comprises a lower ground floor flat within one of two five-storey terraced blocks erected circa 1983, each block comprising 10 flats.
2. The property factors, in the course of their business, manage the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of “property factor” set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 (“the Act”).
3. The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
4. The date of Registration of the property factors was 7 December 2012 and the date of their current registration is 18 April 2016.
5. The homeowner has notified the property factors in writing as to why she considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
6. The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber, dated 29 January 2022, under Section 17(1) of the Act.
7. The concerns set out in the application have not been addressed to the homeowner’s satisfaction.
8. In terms of the Deed of Conditions regulating the development of which the Property forms part, each owner is responsible for a 1/20th share of the block insurance premium.

Reasons for Decision

19. The homeowner’s application was made under Section 5.2 of the Property Factors Code of Conduct effective from 1 October 2012 made under Section 14 of the Property Factors (Scotland) Act 2011. Section 5.2 states:
“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.”
20. The Tribunal noted that the basis of the application was that successive insurance revaluations of the Property had been made by chartered surveyors based on erroneous information as to the gross internal floor area of the Property. This information, provided by the property factors, had resulted in insurance premiums over a number of years being based incorrectly on a larger floor area than was the case. It appeared that the homeowner in

application PF/22/0281 had discovered the error when, in October 2020, she obtained for her own purposes a Home Report which stated that the gross internal floor area was 65 square metres. In April 2021, she asked the property factors to provide her with a copy of the Revaluation Report carried out in 2018 and, when she received that Report, she noticed that it stated the floor area of her Property to be 97 square metres. The Report stated that all measurements had been provided by the client, the property factors, as part of the project brief and that the chartered surveyors had not undertaken any detailed measurement exercise or gained access into privately owned properties.

21. The homeowner also provided the Tribunal with the previous Revaluation Report of 2014, which also stated that the figures were calculated “using the area and other information provided to Charles White who in turn provided it to us.” The chartered surveyors stated that they had assumed that information provided was correct and that their inspection had been “of a superficial, non-detailed nature.”
22. The property factors confirmed, in an email to the homeowner in application PF/22/0281 of 15 November 2021, being their response to her Second Stage Complaint, that at the time the surveys were instructed by them, salient information was provided to the surveyors by the property factors. Initially “this included plans, drawings, apportionment details, Deed extracts, details we held on property areas and copies of previous reports if available.” Their response to the homeowner in the present application, contained in an email of 23 December 2021 had been in very similar terms, although it did not specifically state that the salient information provided by them included floor areas.
23. The Tribunal was disappointed to note that the property factors had failed to comply with the Direction of 6 June 2022, to provide copies of their letters of instruction to surveyors in connection with the Reinstatement Valuations of 30 and 31 Fettes Row Edinburgh in 2007, 2013 and 2018, together with full details of all documents provided by them to the surveyors in connection with said Reinstatement Valuations and any information and documentation relative to Reinstatement Valuations and floor area calculations that was passed over to them when they took over the factoring of the Property in 2003. This failure was particularly regrettable, as their solicitor had specifically asked for a full evidential Hearing, to give the property factors the opportunity to prove that they had given the surveyors all the documents that they held and that they had not provided any erroneous information.
24. The Tribunal decided, on the balance of probabilities, that the erroneous information with regard to property floor areas had been provided by the property factors to the chartered surveyors as part of the Revaluation process in 2014 and in 2018, and possibly also in earlier revaluation exercises. As the property factors had failed to comply with the Tribunal’s clear Direction, had made no written representations and were not present or represented at the Hearing, they had offered no evidence which would enable the Tribunal to ascertain precisely where the error which resulted in the floor area of the flats

and blocks being overstated had arisen, but, prior to the homeowner's complaint,

25. they had not told the homeowner that they had provided floor areas to the chartered surveyors. The Tribunal accordingly determined that the property factors had failed to provide each homeowner with clear information showing the basis upon which their share of the insurance premium was calculated and that they had failed to comply with Section 5.2 of the Code of Conduct.
26. The Tribunal recognised that, when it became clear that a significant over-statement of the floor area of the Property and the other flats in the development of which it forms part might have been provided, the property factors had arranged for the chartered surveyors who were carrying out the 2021 Revaluation Report to visit two properties to check the measurements and, having found out that the information previously provided had been incorrect, had taken steps to seek an appropriate adjustment of the block insurance premiums. The Tribunal also recognised that the property factors are not surveyors, so would not necessarily have identified that the floor areas were over-stated, but, as they had not told the homeowners that they had provided the area measurements, the homeowners, relying on the professional skill of the chartered surveyors and having no such professional skills themselves, had no reason to doubt the information stated in the various Revaluation Reports. Had the homeowners been aware that the floor area measurements had been provided by the property factors and not by qualified surveyors, they might have had occasion to double-check the figures themselves, but they had not been provided with that information.
27. As the internal floor areas are significant in the calculation of Reinstatement Values, the consequence of these measurements has been that, probably for many years, the homeowners have had to pay higher block insurance premiums than would otherwise have been the case. There has, therefore, been actual loss. The view of the homeowner was that she should be compensated to the extent of 30% of the premiums she had paid since purchasing the Property in 2010. The Tribunal could not speculate as to whether an over-statement of approximately 50% in the floor areas resulted in a one-third increase in the premiums, as a number of other factors will be taken into account in the calculation of the premium, but was of the view that the loss to the homeowner since the failure of the property factors to let the homeowner know that they had provided the (incorrect) information, will have been significant. In her written representations, the homeowner had confirmed that, when the correct measurements were provided to the insurers, the premium for 2021 had been reduced by £153.25 per property. Insurance premium rates have risen sharply over the last few years, and the Tribunal was not prepared simply to extrapolate from the 2021 figure and apply the same proportion of loss to previous years back to 2014, but, having taken into account all the evidence before it, the Tribunal decided that the loss would not have been less than £500 and that it would be reasonable to require the property factors to pay that sum to the homeowner in respect of actual loss.
28. As the Tribunal was satisfied that the actions of the property factors following

the homeowner pointing out the discrepancy to them had been reasonable in all the circumstances, the Tribunal made no award in respect of distress and inconvenience.



George Clark
Legal Member/Chair

08 September 2022