

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/22/2960

Property at 251 Great Western Road, Glasgow ("the Property")

Parties:

Yoginder Malhotra, 251 Great Western Road, Glasgow ("the Homeowner")

Hacking and Paterson, 1 Newton Terrace, Glasgow ("the Property Factor")

Tribunal Members:

Josephine Bonnar (Legal Member)

Elizabeth Dickson (Ordinary Member)

DECISION

The Property Factor has not failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not fail to comply with Sections 1, 3.2, 3.3, 3.4 and 5.3 of the Code of Conduct for Property Factors.

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 2021 Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "The Regulations".

The Property Factor became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. The Homeowner lodged an application with the Tribunal in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. The application states that the Property Factor has failed to comply with Sections 1.3.2, 3.3, 3.4, 5.3, 5.8 and 7.1 of 2021 Property Factors Code of Conduct (“the Code”). Documents lodged in support of the application include a copy of the Property Factor’s written statement of services (“WSS”), an application for formal complaint resolution, correspondence with the Property Factor and a copy of the Homeowner’s title deeds.
2. On 22 September 2022, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. Parties were notified that a case management discussion (“CMD”) would take place on 14 December 2022 at 10am by telephone conference call. Both parties lodged written submissions and documents in advance of the CMD.
3. The CMD was postponed at the request of the Property Factor and took place on 21 February 2023 at 10am by telephone conference call. The Homeowner participated. The Property Factor was represented by Mr Martin Henderson.

Summary of discussion at CMD

4. The Tribunal noted that the application was submitted on Form C2 and relates to the 2021 Code of Conduct. Mr Malhotra confirmed that his complaints relate only to failures by the Property Factor to comply with this Code since 16 August 2021. Following discussion, Malhotra stated that he was not insisting on his complaints under Sections 5.5, 5.8 and 7.1 of the Code.
5. Mr Malhotra told the Tribunal that he purchased the property in 1988. It is a commercial unit on the ground floor of the building. He runs a mortgage broker business from the premises.
6. **Section 1 of the Code.** Mr Malhotra told the Tribunal that his complaint under section 1 relates to section 3.1 of the WSS. This section states that the Property Factor holds professional indemnity insurance and provides information about the policy. Mr Malhotra was unable to direct the Tribunal to the relevant part of Section 1 of the Code. The Tribunal noted that the Homeowner would require to clarify this prior to the hearing.
7. **Sections 3.2, 3.3 and 3.4 of the Code - Financial obligations.** Mr Malhotra told the Tribunal that clause 17 of the title deeds states that each proprietor must pay their share of common charges. The clause does not distinguish between insurance and repair charges. However, although the cost of insurance is based on re-building costs, the Property Factor allocates shares according to market value. Furthermore, the Homeowner’s share of the

insurance costs has remained fixed since he purchased the property, although market value fluctuates. It should therefore not dictate the share to be paid by each proprietor.

8. The Tribunal noted that the title deeds stipulate that the share payable by each proprietor is to be based on “gross annual value”. Mr Malhotra advised the Tribunal that he disputes that this term requires an allocation of shares based on market value. He referred to the survey report lodged with the application. This was obtained by the Property Factor and provides information about the re-building cost of the property for insurance purposes. Mr Malhotra stated that this should be the basis of the allocation of shares. However, even if the rateable/market value is correct, the shares should vary from year to year. In response to questions from the Tribunal Mr Malhotra said that he has not discussed the issue with the other proprietors or called a meeting. He stated that it was the Property Factor’s responsibility to do this.
9. Mr Henderson told the Tribunal that he has checked their records and the share of insurance premiums payable by each property has remained fixed for many years. He conceded that market values change and that the Property Factor has not altered the shares payable in response to changes in market value. However, they did write out to Homeowners this year to suggest that they change to the percentage of the re-instatement cost relevant to each property. There was no interest from the Homeowners in changing the current arrangement.
10. Mr Malhotra told the Tribunal that the Property Factor has failed to comply with Money Laundering Regulations. He stated that anyone collecting insurance premiums must comply with these and be registered with the FCA. In response to questions from the Tribunal, Mr Malhotra said that he could not refer to the specific regulations which are the basis of his complaint but that the position is well established.
11. Mr Henderson said that he was not prepared to comment until Mr Malhotra provided better specification and evidence in support of this allegation, given the serious nature of the claim which is being made.
12. In relation to section 3.4 of the Code, Mr Malhotra stated that he has made numerous requests for a full breakdown of charges, including insurance commission, and has not been provided with this. Mr Henderson said that the statements issued are fully compliant with this section of the Code. In addition, copies of contractors’ invoices are available on the Portal.
13. **Section 5 of the Code.** Mr Malhotra referred the Tribunal to the Insurance Summary of cover submitted with the application. This is headed “Residential Property Owners Policy”. Mr Malhotra said that this policy does not cover the commercial units on the ground floor, only the residential units. Mr Henderson denied that this is the case and confirmed that he could obtain information from the insurance company to demonstrate that the whole building is covered. Mr Malhotra told the Tribunal that he is an insurance broker and knows that the

policy would not pay out in relation to his property.

14. In relation to section 5.3 of the Code, Mr Malhotra said that none of the items listed in this section have ever been provided by the Property Factor. The insurance should be in the name of the owners. He has had to arrange his own insurance.

15. The Tribunal noted the following disputed issues; -

- (a) Does the Property Factor's calculation and allocation of shares in relation to common insurance comply with the Deed of Conditions?
- (b) Does the Property Factor require to comply with money laundering regulations and, if so, has it failed to do so?
- (c) Does the common insurance policy arranged by the property factor cover the Homeowner's property?
- (d) Having regard to Section 3.1 of the WSS, has the PF failed to comply with section 1 of the Code. If so, which part of Section 1 has been breached?
- (e) Has the Property Factor failed to comply with Sections 3.2, 3.3, 3.4 and 5.3 of the Code of Conduct?

16. The Tribunal determined that the application should proceed to an in person hearing and issued a direction for the production of documents. The parties were notified that the hearing would take place on 31 May 2023 at Glasgow Tribunal Centre. This hearing was postponed at the request of the Homeowner and parties were notified that the hearing would take place on 1 August 2023. The Property Factor complied with the direction and lodged submissions and documents on 17 March 2023. The Homeowner did not lodge any documents until 31 July 2023.

17. The Hearing took place on 1 August 2023. The Homeowner attended and the Property Factor was represented by Mr Henderson.

The Hearing

18. The Tribunal noted that the Homeowner's submissions had only been lodged the previous afternoon although he had been directed to submit these no later than 21 days before the hearing. Mr Henderson told the Tribunal that he had been involved in meetings all afternoon on the 31 July and had attended a dental appointment immediately before the hearing. As a result, he had not had the opportunity to consider the submission and objected to it being considered. Mr Malhotra advised the Tribunal that he had only returned to the UK three weeks before the hearing and had been abroad for several months caring for sick relatives. The Tribunal noted that both parties were keen to proceed with the hearing and determined that the submission would not be considered as it

had been submitted late and the Property Factor had not had the opportunity to consider it prior to the hearing.

- 19. Section 1 of the Code and section 3.1 of the WSS.** The Tribunal noted that Mr Malhotra had been unable to identify which part of section 1 of the Code applied to this complaint at the CMD. He was still unable to do so at the hearing. He stated that Section 3.1 of the WSS states that the Property Factor holds professional indemnity insurance. However, he has asked them to provide evidence of this on numerous occasions and they have failed to provide it. When asked, he said that he had not lodged copies of his requests which had been sent to various members of staff. Mr Henderson told the Tribunal that he was unaware of any requests being made and was happy to provide the information to the Homeowner.
- 20. Section 3.2 and 3.3 of the Code.** Mr Malhotra said that his complaint under this section relates to the Financial Conduct Authority and Money Laundering Regulations. He said that CASS 5.2 states that someone who holds money as an agent of an insurance company has to be registered. He is concerned that the Factor takes money from homeowners, and it is not clear where it goes. The money must be kept separate from the Factor's own funds. He stated that insurance is a regulated activity. If the Property Factor is collecting money on behalf of an insurance company, they must be regulated. The Property Factor is not registered, only the broker is authorised by the FCA.
- 21.** Mr Henderson told the Tribunal that it is usual for property factors to receive commission in relation to insurance. The broker receives commission from the insurance company and gives commission to the Factor for administering the insurance. He also stated that the Property Factor always use a broker and that they had taken advice on whether they required to register with the FCA and established that they did not require to do so.
- 22.** Mr Malhotra was asked whether he had contacted the FCA to discuss the Property Factor's status. He said that he had not but that he understands the requirements. The Factor used to be registered and must be registered if they are dealing with claims and handling money. He stated that Hacking and Paterson are the only property factor who operate in this way.
- 23. Section 3.4 and 5.3 of the Code.** Mr Malhotra advised the Tribunal that this complaint is linked to the previous one. He said that, where a company is registered with the FCA, as the Property Factor should be, they require to provide certain information regarding the insurance which is not included in the statements that he receives. This includes the premium payable, IPT (Insurance Premium Tax), the policy fee and the broker fee. The information provided by the Property Factor does not comply with the FCA requirement. He has made requests for the missing information to be provided however, has not lodged copies of these requests with the Tribunal. Mr Malhotra provided the Tribunal with further details of the information which must be provided, in terms of the FCA. He stated that he does not rely on the common insurance which is arranged and has his own.

- 24.** Mr Henderson told the Tribunal that the Property Factor is not registered with the FCA and does not require to provide the information referred to by Mr Malhotra.
- 25.** The Tribunal noted that Mr Malhotra disputes the way his share of the common insurance is calculated. Mr Henderson told the Tribunal that Hacking and Paterson have factored the property since 1988. Mr Malhotra confirmed that he has owned his property since 1988. He said that the apportionment is completely wrong. A three bedroom flat pays 3.59%. However, it has a market value of £330,000 and could attract a rent of £1800 per month. This information was obtained from Zoopla. The rebuilding cost of the flat is £131,000. Number 241, a commercial unit, pays 13.52%. It has a market value of £100,000 (based on a recent sale) and a rental value of £250 per week. The re-building cost is £490,000. Mr Malhotra told the Tribunal that the re-building costs for insurance are based on the cost of construction. They include things like the architects' fees which have nothing to do with the market value. His unit is located in a building which was constructed in 1898. At that time things were different. The Property Factor states that it is basing the insurance on market value but actually it is based on re-building costs. When asked whether he had called a meeting on the homeowners to discuss the issue he said that it is the Property Factor's job to do that. He also said that the letter from the Factor was wrong.
- 26.** Mr Henderson confirmed that the shares applied to each flat or unit has remained unchanged since at least 1988 and that he supposes that they could write out to the homeowners to discuss getting valuations. He added that, if Mr Malhotra does not want to pay for the common insurance policy there would have to be a scheme decision to withdraw from it. Mr Malhotra can call a meeting to vote on the matter and the Property Factor would accept the decision.
- 27.** Mr Malhotra told the Tribunal that, as insurance costs are based on the cost of re-building, the share payable should also be based on that. He said that he has been writing to them since 2012 and asked to speak to someone about it. He has not received replies. He also asked them if he could contact the insurance company, and this was refused. Mr Henderson said that the request was considered by the Board who had rejected it.
- 28.** In response to questions from Mr Malhotra, Mr Henderson said that he first started with the Property Factor in 1996 but left for a while and returned 2 years ago. He has not been to the property since he took up his current post in 2021 as it would be the property manager who would do that and deal with the homeowners. He has not considered a different apportionment for the insurance as the Property Factor is agent for all the homeowners and it would need to be a collective decision. He confirmed that Jennifer McKinnon is an employee of the Property Factor. He could not say where the insurance premiums collected are kept – that's not his job. The building has been insured with Allianz since May 2014. The Property Factor does not obtain insurance quotes, it is the broker who does that. The Property Factor has no financial interest in the broker. The broker obtains quotes every year. The Factor gets commission of 25%, the broker 1%.

The Tribunal make the following findings in fact:-

29. The Homeowner is the heritable proprietor of the property. He purchased it in 1988.
30. The Property Factor is the property factor for the development in which the property is located.
31. Clause 17 of the Deed of Conditions for the property requires the Homeowner to pay a share of the common repairs and insurance according to the proportion of the gross annual value that the property has in relation to the gross annual value of the tenement.
32. The Property Factor has not arranged for the gross annual value of the properties in the tenement to be assessed since 1988.
33. The Homeowner has not called a meeting of homeowners to discuss the common insurance arrangements.
34. The Property Factor has not called a meeting of proprietors to discuss the common insurance arrangements. They wrote to the homeowners to propose changing the basis upon which shares are calculated. They did not receive a majority in favour of this course of action.
35. The invoices and information issued by the Property Factor in relation to the common insurance provides all the information specified in sections 3.4 and 5.3 of the Code.
36. The Property Factor is not registered with the FCA. The insurance broker used by the Property Factor to arrange the common buildings insurance is registered with the FCA.
37. The Property Factor has not failed to respond to enquiries from the Homeowner.

Reasons for Decision

Section 1 of the Code.

38. Section 1 of the Code extends to 5 pages and has numerous sections and subsections. In the application, the Homeowner stated that he had not been provided with the WSS. However, at the CMD, he said that his complaint in relation to Section 1 was about paragraph 3.1 of the WSS which states that the Property Factor holds professional indemnity insurance.
39. In the note issued following the CMD, the Tribunal stated that Mr Malhotra would require to clarify which part of section 1 had been breached, prior to the

hearing. He did not do so. He also failed to address the issue in response to a direction issued by the Tribunal. At the hearing, Mr Malhotra stated that he could not identify the relevant part of section 1. He told the Tribunal that he had made numerous requests for evidence of the professional indemnity insurance, but it had not been provided. However, he had not submitted copies of his requests.

40. In the absence of proper specification of the complaint, the Tribunal is not able to determine whether clause 3.1 of the WSS is Code compliant or otherwise. In any event, the clause only states that the Property Factor holds professional indemnity insurance. It does not indicate that a copy of the policy or further information will be provided, if requested. Furthermore, the Homeowner did not provide evidence that he had made requests for information regarding the insurance. No breach of this section is established.

Section 3.2 – The overriding objectives of this section are to ensure property factors:

Protect homeowners funds

Provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor

Make a clear distinction between homeowners funds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property factors own funds and fee income.

Section 3.3 – All property factors should be aware of the threat of money laundering and must comply with all relevant legislation and guidance to minimise the risk that they and their business will be used to launder the proceeds of crime.

41. The central point of the complaint under these sections is the failure by the Property Factor to register with the FCA. The Homeowner referred to this failure and an alleged failure to comply with money laundering regulations interchangeably. However, although they may be linked in some circumstances, they are separate and distinct obligations. Many organisations are required to comply with regulations relating to money laundering. For example, solicitors must do so. However, unless they are also providing financial services, they do not require to register with the FCA.
42. At the CMD, Mr Malhotra was notified that he had to provide better specification of his complaint and evidence in support of it. Although he had six months in which to prepare for the hearing, his position was poorly argued and unsupported by evidence. His claim appears to be based on the fact that the Property Factor used to be registered and that they collect insurance premiums from the homeowners. Mr Henderson told the Tribunal that his firm had taken advice and, as they use a broker to arrange the insurance, they do not require to be registered.
43. The Tribunal's remit is to consider whether the Property Factor has complied with the Code of Conduct and the 2011 Act. Whether it requires to register with other organisations and/or comply with other legislation is largely outwith that

remit. The Homeowner did not provide a satisfactory explanation for his failure to contact the FCA and report what he considers to be unauthorised activities by the Property Factor, although this is what their website recommends. Had he done so, he might have been able to provide the Tribunal with better information and evidence to support his complaint. In the absence of this, the Tribunal is not satisfied that he has established that registration with the FCA is required. Even if he had, that would not necessarily lead to a conclusion that the Property Factor had failed to comply with either section 3.2 or 3.3. In relation to 3.2, he is entitled to ask the Property Factor for evidence of separate bank accounts. He did not establish that he had done so. In relation to 3.3, he failed to demonstrate that the Property Factor does not have procedures in place to address the threat of money laundering. No breach of either section is established.

Section 3.4 – A property factor must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise) a detailed financial statement showing a breakdown of charges made and a detailed description of activities the activities and works carried out which are charged for.

Section 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 made available if requested by the homeowner

44. Mr Malhotra told the Tribunal that the FCA requires companies to provide certain information in relation to insurance and that the Property Factor has not provided this to him. As indicated in paragraph 42, the Tribunal is not persuaded that the Homeowner has established that the Property Factor is obliged to be registered with the FCA or comply with their regulations. However, even if he had done so, these sections of the Code do not require the Property Factor to provide information which the FCA states must be provided to customers. The provisions are very clear as to what is required of a Property Factor in terms of compliance with the Code.

45. Mr Malhotra lodged a letter from the Property Factor dated 15 June 2021 and the summary of insurance cover which was attached to it. The letter and summary appear to provide the name of the insurance company, the policy number, the policy period, the sum insured, the excesses which apply, the events which are covered, the name of the broker and the Homeowner's share of the premium.

46. In response to the Tribunal's direction The Property Factor lodged a copy of the invoices issued to the Homeowner,. These appear to meet the requirements of Section 3.4 and the Homeowner did not refer to any specific issues in relation to the invoices when he gave his evidence.
47. The Tribunal heard evidence from Mr Malhotra regarding the calculation of his share of the insurance premium. This complaint appears to have been made under section 5.3 of the Code. The Tribunal found the evidence on this issue somewhat confusing, as his position appeared to have changed since the CMD. At the CMD the Tribunal was told that the calculation of shares based on market value was wrong and that it should be based on the re-instatement value. At the hearing, Mr Malhotra stated that although they claim to base their calculations on market value, the Property Factor is actually using the re-instatement value. The claim appears to be based on research he recently carried out on the sale prices of flats and commercial units in the building.
48. Mr Malhotra did not provide evidence to support his statements about the sale or rental value of the properties referred to in his evidence. However, it was clear from the Property Factor's evidence that they have taken no steps (at least since 1988) to check that they are correctly applying the relevant provisions of the title deeds. Clause 17 of the deed of conditions stipulates that the share of common repairs and insurance to be paid by each flat or unit is to be based on gross annual value. If valuations are not arranged on a regular basis, there is no way to establish whether the percentages which are being used are accurate. Mr Henderson suggested to the Tribunal that the homeowners would have to agree to valuations being carried out. However, this is not the case. The gross annual value of the properties will fluctuate and the only way to ensure accuracy is to have the valuations carried out . However, the Tribunal agrees with Mr Henderson's argument that the Property Factor cannot impose a new regime, based on re-instatement value, unless all homeowners agree, as this would not be in line with the deed of conditions. Even if all were in favour, future owners would have grounds to challenge the arrangement unless an appropriate application to be Lands Tribunal had been made and determined. The Property Factor wrote out to the homeowners and did not receive a positive response to this proposal. Mr Malhotra has the power to call a meeting of the homeowners if he wishes to discuss a new arrangement.
49. Although the Tribunal is of the view that the Property Factor should take the necessary steps to ensure the accuracy of the apportionment of shares in relation to insurance and repairs, this is not a breach of section 5.3 or any of the other sections of the Code referred to in the application. The documents lodged demonstrate that they have complied with section 5.3 and have provided the Homeowner with information about the basis upon which his share of the premium has been calculated. That information may be inaccurate but that cannot be established until a re-valuation of the whole tenement has been carried out.
50. The Tribunal is satisfied that the Homeowner has failed to establish that the Property Factor has failed to comply with sections 1, 3.2, 3.3, 3.4 and 5.3 of the 2021 Code.

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

14 August 2023