

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision and Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 19 of the Property Factors (Scotland) Act 2011

Reference number : FTS/HPC/PF/22/1501 and FTS/HPC/PF/22/1883

Re: 2473 Dumbarton Road, 1/1 Rothesay Court, Glasgow G14 ONT (“Property”)

The Parties:

Mark Welsh, 2473 Dumbarton Road, 1/1 Rothesay Court, Glasgow G14 ONT
 (“Homeowner”)

Indigo Square Property Ltd, 42 Holmlea Road, Battlefield, Glasgow G44 4AL
 (“Factor”)

Tribunal Members:

Joan Devine – Legal Member

Mary Lyden – Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("Tribunal") unanimously determined that the Factor has failed to comply with its factor duties in terms of section 17(5) of the Property Factors (Scotland) Act 2011. 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.

Introduction and Background

1. In this decision the Property Factors (Scotland) Act 2011 is referred to as the "2011 Act"; the Property Factors Code of Conduct for Property Factors effective prior to 16 August 2021 is referred to as the "2012 Code"; the Property Factors Code of Conduct for Property Factors effective from 16 August 2021 is referred to as the "2021 Code" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as the "Rules". The Homeowner's application consisted of a form C1 dated 18 May 2022 and a form C2 dated 9 June 2022.
2. In the Form C1 the Homeowner complained about breach of sections 1.1a, B(c), 5.2 and 5.6 of the 2012 Code. In the Form C2 the Homeowner complained about breach of sections 1.15, B(4), 5.3 and 5.8 of the 2021 Code. The complaint in the C1 and C2 also related to a failure to carry out Property Factor duties.

3. The Factor raised the plea of *res judicata*. By Decision dated 11 August 2022 the Tribunal determined to exclude from further procedure under case reference FTS/HPC/PF/1883 any complaint regarding alleged breach of section 1.1A(a) and B(c) of the 2012 Code.
4. The Tribunal issued a Direction dated 11 August 2022 seeking further specification of the complaint made by the Homeowner because in the Form C1 section 7 had not been completed. And in the Form C2 section 7 had been completed in so far as it stated "See form C1". The Tribunal took the view that the basis of the complaint made by the Homeowner and the remedy sought in both the Form C1 and Form C2 lacked specification. No response was received to the Direction.
5. A Case Management Discussion ("CMD") was fixed for 10 November 2022. The Factor attended. There was no appearance by the Homeowner. The Tribunal issued a Direction dated 10 November 2022 asking the Homeowner to state whether or not he wished to proceed with the Application. He responded in the affirmative. A CMD was fixed for 1 March 2023.

CMD on 1 March 2023

6. A CMD took place on 1 March 2023. The Homeowner was in attendance. There was no appearance by the Factor. Reference is made to the Note of the CMD at which the Homeowner said that he only wished to proceed with the Applications in so far as he alleged breach of property factor duties. He said that his complaint related to the period starting in March 2019. He said that the remedy he sought was to be removed from the block insurance policy for the development of which the Property forms part. This significantly narrowed the issues in dispute.

Procedure after 1 March 2023

7. Following the CMD on 1 March 2023 the Tribunal issued a Direction seeking submissions from the Parties regarding the insurance for the Property. The Homeowner lodged submissions by emails dated 8 March and 24 April 2023. The Factor lodged submissions by emails dated 6 March, 10 March, 3 April and 24 April 2023.

Property Factor Duties

8. Section 17(4) of the 2011 Act states that references in the Act to a failure to carry out property factor's duties include references to a failure to carry them out to a reasonable standard. Section 17(5) of the 2011 Act states that in the

Act, “property factor duties” means, in relation to a homeowner (a) duties in relation to the management of the common parts of land owned by the homeowner or (b) duties in relation to the management or maintenance of land adjoining or neighbouring residential property owned by the homeowner, and available for use by the homeowner.

Submission of the Homeowner

9. In his submission dated 8 March 2023 the Homeowner submitted that the burdens drawn up in 1987 are extinct as they had been disregarded between 1987 and 2018 by homeowners. He also submitted that as he does not have a mortgage he is not bound “in the eyes of the law” to have buildings insurance.
10. In his submission dated 24 April 2023 the Homeowner submitted that on a proper construction of the Deed of Conditions relating to the Property, homeowners could choose to have their property covered by a block insurance policy or they could make their own insurance arrangements.

Submission of the Factor

11. In their submission dated 6 March 2023 the Factor referred to paragraph ninth of the burdens section of the title to the Property and to the minute of the meeting of the owners that took place on 18 March 2019 at which the owners voted to appoint the Factor as property factor for the development of which the Property forms part “*with all authority as set out in the title deeds, including the management and maintenance of the development and the provision of a communal buildings insurance policy.*” They also referred to the decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under reference FTS/HPC/PF/20/0128 and submitted that the Homeowner had raised the question of insurance in that case and the Tribunal had found in favour of the Factor. The Factor reiterated this point in their submission dated 10 March 2023
12. In their submission dated 3 April 2023 the Factor submitted that on a proper construction of the Deed of Conditions relating to the Property, homeowners have the right to have a property factor put in place a common building insurance policy and the proprietors of the development must adhere to that majority decision. The Factor referred to the minutes of the meeting of the homeowner’s association on 18 March 2019 when the homeowners agreed to appoint the Factor who would have all authority set out in the title deeds including the provision of a communal buildings insurance policy.

13. In response to a question from the Tribunal the Factor said that the existing insurer had not been approached and asked whether it would be possible for the Homeowner to be excluded from the block policy on the basis that he was able to demonstrate he has adequate insurance in place.

Findings in Fact

1. The Property is a flat within a block of 6 at 2473 Dumbarton Road, Glasgow.
2. The Homeowner has been the proprietor of the Property since 1 March 2002.
3. The complaints raised in the Application related to the period March 2019 to June 2022.
4. The Factor has performed the role of property factor at the development of which the Property forms part since 18 March 2019.
5. The title to the Property is registered under title number GLA67773.
6. A Deed of Conditions registered on 9 November 1989 by Balfour Beatty Homes Ltd (“Deed of Conditions”) applies to the Property.
7. The Factor was appointed by a majority vote of the Owner’s Association in terms of clause EIGHTH of the Deed of Conditions.
8. In terms of clause NINTH (Three) of the Deed of Conditions the Owner’s Association has the power to effect a common insurance policy for any of the blocks of flatted dwellinghouses on the development or the common property.
9. At a meeting of the Owner’s Association held on 18 March 2019 the Owner’s Association appointed the Factor to act as property factor for the development of which the Property forms part with all authority as set out in the title deeds including the management and maintenance of the development and the provision of a communal buildings insurance policy.

Discussion and Reasons for the Decision

14. Whilst a number of issues were raised by the Homeowner in the Form C1 and C2, the issues were narrowed significantly as the applications progressed. At the CMD on 1 March 2023 the Homeowner’s position was that he withdrew his complaints regarding breach of both the 2012 and 2021 Code and only wished to proceed in respect of breach of property factor duties. Whilst he had raised concerns about the nature of the block insurance policy in the Form C1 and C2, at the CMD he said that he had arranged insurance for the Property with the Royal Bank of Scotland (“RBS”) since he bought the Property. At the

CMD the Homeowner said that he wanted to be removed from the block policy as it is more expensive than his RBS policy. He said that the block policy was almost double what he paid under his RBS policy. He said he cannot afford to pay both. The question was therefore focused on whether the Homeowner was obliged to insure his Property under the block policy.

15. In his written submissions the Homeowner submitted that the burdens drawn up in 1987 are extinct and further that as the Property is no longer subject to a standard security, he is not required to have buildings insurance. The Tribunal is of the view that neither of those arguments is correct.
16. In their written submissions the Factor raised a plea of res judicata by submitting that the question of the Homeowner requiring to take part in the block insurance policy had been determined by the Tribunal in an earlier decision in case reference FTS/HPC/PF/20/0128. The Tribunal reviewed the decision in that case and noted that it did not cover the question of insurance in any way. The Tribunal therefore rejects that argument.
17. Both Parties submitted that their position was supported by the terms of the title to the Property.
18. The Parties were in agreement that the Deed of Conditions registered on 9 November 1989 by Balfour Beatty Homes Ltd (“Deed of Conditions”) applies to the Property. The Tribunal considered the terms of the Deed of Conditions in detail.
19. The Development Common Property is defined in clause FIFTH of the Deed of Conditions which states that each feuar will have an equal interest therein.
20. Clause EIGHTH of the Deed of Conditions provides that the Owner’s Association has the right to appoint a factor who shall be responsible for instructing and supervising common repairs, the maintenance of any common property and any insurance effected in terms of clause NINTH.
21. In terms of clause NINTH (One)(b) of the Deed of Conditions three members (*of the Owners Association*) present or by proxy owning dwellinghouses shall form a quorum in respect of any decisions taken solely in relation to that block.
22. In terms of clause NINTH (Three) of the Deed of Conditions the Owner’s Association shall have power to effect a common insurance policy for any of the blocks of flatted dwellinghouses on the development or the common property and to make any regulations which they consider necessary with

regard to such insurance and to delegate to any factor appointed such powers as it considers expedient.

23. Clause NINTH of the Deed of Conditions is followed by a declaration which states that all costs and expenses incurred by the Owner's Association or by the factor.....shall be payable by all the feuars affected by the same, jointly and severally whether or not they consented to the same.
24. Clause EIGHTEENTH of the Deed of Conditions provides that each feuar of a dwellinghouse on the development shall be responsible either individually or through the Owner's Association as aforesaid for insuring his dwellinghouse and his interest in all common property effecting thereto against loss or damage by fire and such other risks as the Owner's Association shall from time to time determine for not less than the full reinstatement value thereof with a reputable insurance company and to regularly pay the premiums thereof exhibiting to the Owner's Association the receipts thereof if and when called upon to do so.
25. The Factor submitted that in terms of the Deed of Conditions, homeowners have the right to have a property factor put in place a common building insurance policy and the proprietors of the development must adhere to that majority decision. The Tribunal agrees with the first part of that submission. Homeowners are entitled to decide to put in place a common building insurance policy and that was the decision of the Owner's Association taken on 18 March 2019. The Tribunal does not agree with the second part of the Factor's submission. It would not be uncommon for a deed of conditions to specify that all homeowners are obliged to insure their property under the common or "block" insurance policy but that is not what is provided in the Deed of Conditions.
26. Clause EIGHTEENTH of the Deed of Conditions provides that homeowners are responsible for insuring their property. They can do so "*either individually or through the Owner's Association as aforesaid.*" The Tribunal considered the impact of the words "*as aforesaid*". The definition of "*aforesaid*" in the Collins Dictionary is "*previously mentioned*". The use of the words "*as aforesaid*" is therefore a reference to something previously mentioned in the Deed of Conditions. As regards the question of insurance, what has been previously mentioned is that the Owner's Association has the power to effect a common insurance policy. The Deed of Conditions does not state that in the event of the Owner's Association voting to put in place a common insurance policy, that is the only method by which a homeowner can insure their property. The issue is one of contractual interpretation since title deeds are a form of contract, albeit conferring real rights and not merely personal rights.

The primary means of interpreting a contract is to have regard to the words actually used and to give them their natural and ordinary meaning. The Tribunal is of the view that giving the words in clause EIGHTEENTH of the Deed of Conditions their natural and ordinary meaning results in homeowners having an option to insure their property either individually or by way of a common insurance policy put in place following a decision of the Owner's Association.

27. The Tribunal notes the wording of the declaration which follows clause NINTH which states that all costs and expenses incurred by the Owner's Association or by the factor.....shall be payable by all the feuars affected by the same, jointly and severally whether or not they consented to the same. If the Homeowner's property is not covered by the block insurance policy then the Homeowner will not be affected by the block policy. In those circumstances, he will not be obliged to pay a share of the premium for the block insurance policy.

Proposed Property Factor Enforcement Order

28. 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) (a) Notice.

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.

Joan Devine

Legal Member

Date : 25 May 2023