

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/25/2434 & FTS/HPC/PF/25/3483

Re

10C Botanic Crescent, Glasgow, G20 8QQ

("the Property")

The Parties:-

Mr Fergal Brennan, 10C Botanic Crescent, Glasgow, G20 8QQ

("the applicant")

**Newton Property Management Ltd, Registered Office, 87 Port Dundas, Road,
Glasgow, G4 0HF**

("the respondent")

Tribunal Members:

Iain MacRae (Legal Member)

Sara Hesp (Ordinary Member)

Representation

Applicant: Self

Respondent: Catherine Flanagan

DECISION

1. The respondent has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 (**the 2011 Act**) in that it did not comply with Section 5.2 of the 2012 Property Factor Code of Conduct effective from 1 October 2012 and then 5.3 of the 2021 Property Factor Code of Conduct effective from 16 August 2021 by representing to the applicant that it was entitled to arrange buildings insurance for the applicant and that he was required to contribute to that insurance which included him insuring against a risk that he did not have.

2. The decision is unanimous

Introduction

3. In this decision

the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act";

the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and

the First-tier Tribunal for Scotland (Housing and Property Chamber) Rules of Procedure 2017 are referred to as "the Rules"

4. The Factor became the Registered Property Factor in respect of the dwelling on 18 April 2011. In terms of section 14(5) of the 2011 Act it was under a duty to comply with the property factor code of conduct from 1 October 2012.
5. This is an application for orders under Rule 43 of the Rules and section 17 "the 2011 Act". The Forms C1 and C2 alleged a breach of the factors duties relation to insurance.

Hearing

1. A case management discussion (**CMD**) took place by teleconference on 3 February 2026. The respondent had provided written representations and productions in advance of that.

Summary of submissions

2. The applicant's position was that the deed of condition did not entitle the respondent to arrange insurance for the property. He had queried this with the respondent when he purchased the property. He had received differing views

from the respondent. He has had his own insurance since he purchased the property. He had last contributed towards the block or communal insurance premiums in December 2019. There may be a limited obligation to contribute towards an insured risk for common parts of the mews but there was no obligation on his part to contribute towards any insured risk for the tenement.

3. For the respondent it was pointed out that when they were appointed there was a co-proprietors building insurance to be apportioned to new proprietors with the developers maintaining cover for the retained units. They had taken legal advice and based on that advice were entitled to take out a block insurance and the applicant was required to contribute towards it.

The Tribunal make the following findings in fact:

4. In about 2011 the properties at 10-13 Botanic Crescent, Glasgow were developed into flats with mews houses situated in the grounds to the rears (**'The Development'**);
5. Properties within the Development are subject to real burdens including those contained in Deed of Conditions by Persia Investments Limited, registered 24 May 2005;
6. The respondent has performed the role of the property factor of the Development since 18 April 2011;
7. The applicant became the heritable proprietor of 10C Botanic Crescent, Glasgow, G20 8QQ (**'the Property'**) on 12 April 2021;
8. The Property is one of the mews houses within The Development;
9. The owner of the flats in the development are obliged to maintain their own flats and the tenement common parts.
10. The owners of mews at the development are obliged to maintain their own mews;
11. The owners of the flats and mews are obliged to maintain the mews common parts;
12. The mews common parts specifically excludes the common parts of the tenement;

13. Five owners of the flats are entitled to convene a meeting of the flat owners at which they could make decisions regarding the maintenance and insurance of tenement common parts or insurance of the flats;
14. As the duly appointed factor the respondent is entitled to make any decision as regards the tenement as the flat owners could.
15. The mews owners may insure their properties if they so wish;
16. Five owners of the flats and mews are be entitled to convene a meeting of the flat and mews owners at which they could make decisions regarding the maintenance or insurance of the mews common parts.
17. As the duly appointed factor the respondent is entitled to make any decision as regards the mews common parts as the flat and mews owners could;
18. The respondent has arranged one common insurance policy for the Development of the flats, mews, tenement common parts and mews common parts
19. The flat owners have no power to compel the mews owners to contribute towards any insurance policy in respect of the flats or tenement common parts.
20. The applicant is not required to pay towards insurance the flats or tenement common parts.

Reasons for Decision

21. GROUSS Residential Investment Partnership LLP (the developer) were the owners of and developed 10 and 12 Botanic Crescent. The development consisted of 18 flats and 4 mews properties. It formed part of the larger development of 10-13 Botanic Crescent. The property is one of four Mews within the development. The developer appointed the respondent as the Common Managing Agents in terms of the Deed of Conditions, with effect from 18 April 2011.
22. The letter advising the respondent of their appointment stated that it was conditional on management fees only being charged to the new owners on sale and not the developer; co-proprietors insurance being apportioned to the new purchasers with the developers maintaining building insurance for the retained units; and adoption of common service will be for the communal stairs of 10

and 12 Botanic Crescent, external envelope of 10 and 12 Botanic Crescent, communal development gardens, controlled access gates and any shared common parts of the mews properties. That letter is a private matter between the developer and the respondent. It cannot create real rights or burdens over the Property, over and above of these contained in the title to the Property.

23. The title sheet for the property describes it as:-

“10C Botanic Crescent edged mauve on the Title Plan with the car parking space hatched blue on the said plan; Together with a one quarter pro indivisio share in and to the four communal parking spaces hatched brown on the said plan; Together also with a one quarter pro indivisio share in and to the mews common parts as defined in the Deed of Conditions aftermentioned; Together also with the rights and servitude rights specified in the Deed of Conditions in Entry 4 of the Burdens Section; Together with the subsisting rights to real burdens specified in the Schedule, below.”

24. The following parts are defined in the Deed of Conditions as follows:-

"the Tenement" is the townhouses known as 10, 11, 12 and 13 Botanic Crescent, Glasgow and being edged blue on the Plan

"Flat" Any one of the flatted dwellinghouses within the Tenement

"Mews" Any one of the mews dwellinghouses erected or to be erected to the rear of the Tenement tinted pink on the Plan.

"Mews Common Parts" Development, under exception of the Tenement, Mews, and the Parking Area not exclusively owned by the proprietors of the Mews or Flats, if any.

"Tenement Common Parts" The tenement, under exception of the Flats as owned by the proprietors, including by way of inclusion not exception,

without prejudice to the foregoing generality, the solum, foundations, outside and gable walls, the roof and roof void, but only where not part of the penthouse flat on the fourth floor of numbers 11 and 12 Botanic Crescent aforesaid; the common entrances to the Tenement, entrance doorways, passageways, stairways, landings and any door entry system; internal load bearing columns, beams and floors; supporting walls, the internal floors, walls and ceilings enclosing the said common entrance hall and passageways, stairways and landings; any common lighting and floor coverings; all service media, including drains and soil pipes, water supply pipes, rhones, conductors, electric mains, cables and wires, television aerials and gas supply pipes; and all doors and windows pertaining to the common entrance, passageways, stairways and landings; declaring that there are excluded the mutual walls and floors between the Flats where these are not load bearing and the windows and window frames relative to the said Flats.

25. The real burdens in the Deed of Conditions include:-

(First) Each of the Flats shall have a right of common property in the Tenement Common Parts.

(Second) Each of the Mews and Flats shall have right of common property in the Mews Common Parts

(Third) Each of the proprietors of the Flats shall be liable in all time coming, jointly with proprietors of the other Flats in shares relative to the proportion the floor area of each Flat bears to the total floor area of all the Flats for the cost of maintaining, repairing, cleaning and renewing the Tenement Common Parts; declaring that there is an obligation on the proprietors of each of the Flats to maintain in good condition in all time coming and keep tidy the Tenement Common Parts.

(Fourth) The proprietors of the Flats and the Mews shall be liable in all time coming for the cost of maintaining, repairing, cleaning and renewing the Mews Common Parts in shares relative to the proportion

the floor area each Flat or Mews bears to the total floor area of all Flats and Mews.

(Fifth) The proprietors of the Flats shall have a right of pedestrian access over the Mews Common Parts for the purposes of access to and egress from the Parking Area, Bin Stores and for all maintenance purposes and all other necessary purposes. The proprietors of the Flats shall have a vehicular right of access from the Parking Area to Botanic Crescent Lane.

26. There are therefore two distinct parts to the development, firstly the eighteen flats and secondly the four mews. The flats are within the tenement (i.e. the townhouses (known as 10, 11 12 and 13 Botanic Crescent) and the mews are erected to the rear of the tenement.
27. There are also two separate and distinct common parts within the development namely the Tenement Common Parts and then the Mews Common Parts. The Tenement Common Parts are everything within the tenement apart from the flats. The mews common parts are the development under exception of the tenement, mews and any parking area not owned exclusively by a flat or mews owner.
28. Only the owners of the flats have an obligation to maintain the Tenement Common Parts. Separately the owners of the flats and the mews each share an obligation to maintain the Mews Common Parts.
29. As regards upkeep and maintenance the deed of condition makes provision for two classes of meetings to be called. Where the matter relates to the Tenement Common Parts, the proprietors of any five flats can call a meeting of proprietors of all the flats to deal with matters. This could include a decision to insure against a risk affecting the flats or the Tenement Common Parts. The respondent, as factor has all the power of the owner of the flats so can arrange common insurance against risks affecting the flats and Tenement Common Parts. An owner of a mews has no right to be one of the five calling such a

meeting or to vote at such a meeting. Mews owners have no interest in the flats or Tenement Common Parts.

30. As regards the upkeep and maintenance or management of the Mews Common Parts (i.e. the common parts of the development other than the Tenement Common Parts) the proprietors of any five flats or mews can call a meeting of proprietors of all the flats and mews to deal with those matters. This could include making a decision to insure against a risk affecting the Mews Common Parts.
31. The result of there being two classes of owners means that only those proprietors who are liable for a share of the costs of the maintenance and upkeep of the Tenement Common Parts (or who may be affected by the management decisions such as a decision to take out common insurance) can call a meeting or attend at such meeting to make decisions.
32. Section 26 of the Tenements (Scotland) Act 2004 (**the 2024 Act**) defines a tenement as
 - (1) In this Act, “tenement” means a building or a part of a building which comprises two related flats which, or more than two such flats at least two of which—
 - (a) are, or are designed to be, in separate ownership; and
 - (b) are divided from each other horizontally,and, except where the context otherwise requires, includes the solum and any other land pertaining to that building or, as the case may be, part of the building; and the expression “tenement building” shall be construed accordingly.
 - (2) In determining whether flats comprised in a building or part of a building are related for the purposes of subsection (1), regard shall be had, among other things, to—
 - (a) the title to the tenement; and
 - (b) any tenement burdens,treating the building or part for that purpose as if it were a tenement.

33. The Property does not fall into the definition of a tenement. It is therefore not subject to the terms of the 2004 Act. There can be no Tenement Management Scheme in place in respect of it. The applicant has no obligation to maintain or contribute towards the maintenance of the Tenement Common Parts. He cannot call a meeting or attend and vote at a meeting relating to the common parts of the tenement. As he has no obligation for these areas he cannot be required to contribute towards the insurance of the common parts or the flats.
34. The respondent had provided a copy of the “block” (or common) buildings insurance to the solicitors dealing with the sale of the property by the previous owner to the applicants. Nothing turns on that as the issue is not whether the applicant was aware the respondent had arranged a common insurance policy, but whether the respondent is entitled to require the applicant to contribute towards such a policy which insures against risk for which he is not responsible. The fact that the respondent was under the mistaken belief that the applicant was required to contribute does not make him liable to contribute.
35. A letter to the applicant dated 4 February 2019 stated that the Deed of Condition requires that a block buildings policy is to be arranged. That is not correct. The Deed of Conditions make no such provision. As far as the flats and tenement common parts are concerned such a requirement would be a decision of the owners of the flats at a meeting of the owners of the flats or the factors appointed by the owners of the flats who could make any decision that the owners of the flats should be so insured.
36. The respondent sought and was given legal advice. The email for their solicitor is dated 6 June 2024. They were advised that they were entitled to effect common insurance (as they had been doing). The advice was correct in as far as it stated the respondent as factor was entitled to exercise any power that the owners might. However, the advice takes no account of fact that only the owners of the flats are entitled to call a meeting of the owners of the flats and are liable to maintain their flats and are jointly liable to maintain the Tenement Common Parts. The owners of the flats are entitled to take decisions relating to

the tenement and so could decide to take out common insurance to cover their liability as regards the tenement. The owner of the flats could not call on the owner of the mews to contribute towards such a policy insuring against a risk the flat owners alone had. The advice to the respondent refers to the management of the development (as a whole) whereas clause (seventeenth) relied on, in fact refers to the maintenance of the Tenement Common Parts and the Mews Common Parts which are different and have distinct procedures to call meeting of the 18 owners (of the flats) who have an interest in the Tenement Common Parts and the 22 Owners (of the 18 flats and 4 mews) who have an interest in the Mews Common Parts.

37. As the factor of the Mews Common Parts the respondent could arrange insurance for those parts alone, separate from the tenement block insurance and all 22 owners would be required to contribute to such a policy.
38. It follows the factor could decide to take out or maintain a common block insurance policy to cover the tenement but cannot require the owners of the mews to contribute to a policy which includes a risk (to the Tenement Common Parts) for which they have no interest in or liability for.
39. In their letter to the owners dated 8 October 2021 the respondent explains that when they tendered to become the factor they had included the placing of a block insurance policy as part of the tender. The letter correctly records that the deed of conditions does not require a block policy. However it suggests that a scheme decision was taken in terms of the 2004 Act. It goes on to note that one benefit of a block policy is that the owner are not require to exhibit to the other owners annual proof of sufficient insurance as required by the 2004 Act. It concludes that if the deeds do not require a common block policy a majority of the homeowner can agree to have such a policy and all owners are required to contribute to it. As the property is not part of a tenement any scheme decision does not apply to the proprietors of the mews.
40. There is no reason why an owner of a Mews property cannot avail themselves of the common policy if they so wish. Those who have done so and paid the

premiums have received the benefit being insured under that policy. The applicant has, however sought to make his own insurance arrangements since he has been the owner of the Property. Although he initially paid towards the insurance he ceased doing so. Having advised the respondent that he wished to effect his own insurance he should not have been invoiced for or been required to make any contribution towards that insurance.

Proposed Property Factor Enforcement Order

41. We considered whether we should make a property factor enforcement order ("PFEO"). The owners of the flats and mews were informed by letter of 8 October 2021 of the dispute regarding the insurance. It is appropriate that the owners of the flats and mews are informed that the applicant was correct to assert that he was entitled to effect his own insurance over his mews property as it does not form part of the tenement. The respondent ought to have known that the property was not part of the tenement. The applicant has been put to time and trouble in asserting that he was correct in that the respondent had failed to comply with the codes and that should be marked in some way.
42. 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.

Appeal

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.

Iain MacRae _____ Legal Member and Chair

17 April 2023