

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Statement of Decision by the First-tier Tribunal for Scotland (Housing and Property Chamber) in an application under Section 19 of the Property Factors (Scotland) Act 201

Chamber Ref: FTS/HPC/PF/21/1613

The Parties:-

Mr Dales Pearce, Flat 97-1 Donaldson Drive, Edinburgh, EH12 5FA (“the Applicant”)

Redpath Bruce Property Management Ltd, Crown House, 152 West Regent Street, Glasgow, G2 2RQ (“the Respondent”)

The Tribunal comprised:-

Mrs Ruth O’Hare - Legal Member
Mr Kingsley Bruce - Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (‘the Tribunal’), having made such enquiries as it saw fit for the purposes of determining whether the property factor has complied with the code of conduct as required by Section 14 of the 2011 Act, determined that the property factor has not breached the code of conduct for property factors and has not failed to carry out its duties in terms of s.17 of the Property Factors (Scotland) Act 2011.

Background

- 1 By application dated 2 July 2021 the Applicant sought an order against the Respondent due to an alleged failure to comply with the Property Factors Code of Practice. In particular the Applicant stated that the Respondent had failed to comply with section 2.1 of the Code which states “*you must not provide information which is misleading or false*”.
- 2 In support of the application the Applicant provided the following documents:-
 - (i) Notification to Respondent of breach of Code dated 11 January 2021 and response;
 - (ii) Copy Reservation Agreement for the property at Flat 97, 1 Donaldson Drive, Edinburgh dated 9 October 2019 signed by the Applicant and by Donna Martin on behalf of City and Country;

- (iii) Copy Property Management Introduction from the Respondent together with schedule of costs dated 18 January 2018;
- (iv) Sample factoring invoice confirming the Applicant's share of 0.83% of the development wide costs;
- (v) Copy invoices from the Respondent to the Applicant dated 6 July 2020 and 4 December 2020.
- (vi) Copy insurance schedule for the development for 2020/2021;
- (vii) Excerpt from Deed of Conditions regarding buildings insurance;
- (viii) Copy Building Reinstatement Cost Assessment for insurance purposes by Malcolm Hollis dated 3 December 2015;
- (ix) Copy Assessment of Reinstatement Costs for Insurance Purposes dated December 2019;
- (x) Copy Development budget for 2018/2019 by the Respondent; and
- (xi) Copy email correspondence between the Applicant and Respondent.

- 3 In summary the Applicant's position was that the Respondent provided false and misleading information in relation to his share of the buildings insurance, which was based on an incorrect reinstatement value for the development in which his property is located. The Respondent should have been aware that the value was out of date. They had provided that information to the developer and should have known that it would be used by prospective buyers to assess the likely ongoing costs associated with the property. The reinstatement value had since been reviewed through a further assessment by CBRE and had increased from £75 million to approximately £126 million. As a result, the Applicant's share of the buildings insurance costs had increased from £728 per annum to £1,735,62. The Applicant sought an order for payment from the Respondent in the sum of £15,000 to reflect the increase in costs over a projected twenty year occupation of the property. The Respondent had substantially misrepresented the cost of ownership of the property.
- 4 By Notice of Acceptance of Application the Legal Member of the First-tier Tribunal determined that there were no grounds upon which to reject the application. Accordingly a hearing was assigned for 18 October 2021.
- 5 The Tribunal subsequently received written representations from Mr Stuart McMillan on behalf of the Respondent. In summary, the Respondent's position was that the schedule of costs upon which the Applicant had calculated his share of the buildings insurance was provided to the Applicant by the developer, City and Country, at the time of signing the reservation agreement. The schedule had been provided by the Respondent to the developer in January 2018, almost two years before the Applicant's purchase date, and was prepared based on information provided by City and Country to the Respondent at the time. As the development neared completion, a further professional insurance reinstatement valuation was prepared and resulted in the revised reinstatement value. The Respondent had originally been provided with a reinstatement valuation of £50 million by City and Country for preparing the schedule, but following discussions it was agreed that £75 million was a more

realistic figure. There had been further developments since January 2018 that had resulted in a different insurance position, namely the developer's decision to use their own insurance broker, an amendment to the Deed of Conditions to allow buildings insurance to be procured for the building as a whole, and not just communal areas, and a further assessment by CBRE, which had affected the reinstatement value. In short, the Respondent had not provided any false and misleading information, the information in question had been provided by the developer City and Country and the Respondent was therefore not in breach of the Code of Conduct.

The Hearing

- 6 The Hearing took place by teleconference on 18 October 2021. The Applicant was personally present. The Respondent was represented by Mr Stuart McMillan. The Tribunal heard submissions from both parties in relation to their written representations and subsequently determined to issue the decision in writing.

Relevant Legislation

- 7 The relevant legislative provisions are the following sections of the Property Factors (Scotland) Act 2011:-

“17 Application to the First-tier Tribunal

(1) A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed—

(a) to carry out the property factor's duties,

(b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the “section 14 duty”).

(2) An application under subsection (1) must set out the homeowner's reasons for considering that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty.

(3) No such application may be made unless—

(a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and

(b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(5) In this Act, "property factor's 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—

(i) adjoining or neighbouring residential property owned by the homeowner, and

(ii) available for use by the homeowner.

19 Determination by the First-tier Tribunal

(1) The First-tier Tribunal must, in relation to a homeowner's application referred to it under section 18(1)(a), decide—

(a) whether the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and

(b) if so, whether to make a property factor enforcement order.

(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to it .

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order.

(4) Subject to section 22, no matter adjudicated on by the First-tier Tribunal may be adjudicated on by another court or tribunal."

8 The Applicant seeks to rely upon section 2.1 of the Code of Conduct which states that "*you must not provide information which is misleading or false*".

9 For the avoidance of doubt this application predates the revised version of the Code of Conduct which came into force on 16th August 2021.

Findings in Fact

The Tribunal found the following facts to be established:-

- 10 The Applicant reserved the property at Flat 97 Donaldson Drive, the Playfair Building, Edinburgh, by Reservation Agreement between the Applicant and City and Country dated 9 October 2019.
- 11 At the time of signing the Reservation Agreement, the Applicant was provided by City and Country with a document titled "Property Management Introduction", on the Respondent's headed notepaper. The document included a schedule of factoring costs for the development.
- 12 The schedule of costs was dated 18 January 2018.
- 13 The schedule of costs confirmed in respect of the Buildings Insurance (marked "DV") a reinstatement value of £75,000,000 for the Playfair Building development.
- 14 The Applicant's share of the buildings insurance based on a reinstatement value of £75,000,000 amounted to £728 per annum.
- 15 The reinstatement value of £75,000,000 was information provided by City and Country to the Respondent. The Respondent was instructed by City and Country in January 2018 to prepare the schedule based on said information.
- 16 In December 2019 the Respondent instructed CBRE to prepare an assessment of reinstatement costs for insurance purposes.
- 17 The said assessment confirmed a reinstatement cost of £105,849,000 for the Playfair Building development. Inclusive of Value Added Tax, the total reinstatement costs for insurance purposes amounts to £127,018,000.
- 18 The Applicant's share of the building insurance based on a reinstatement value of £75,000,000 amounts to £1,735.62.

Reasons for Decision

- 19 The Tribunal carefully considered the evidence from both parties in its determination of the matter, both in terms of their written representations and verbal submissions at the Hearing. Both the Applicant and Mr McMillan were credible in their account of events and the matter in dispute appeared to be whether the Respondent had provided false or misleading information, in breach of Section 2.1 of the Property Factors Code of Conduct.

- 20 Whilst the Tribunal accepted that the Respondent should have been aware that the document headed Property Management Introduction and schedule of costs provided would be passed on to prospective owners, ultimately the Tribunal concluded that the information was in fact provided to the Applicant by City and Country, and the onus would therefore have been on City and Country to ensure any information provided to prospective buyers was accurate and up to date. The Tribunal had cognisance of the fact that the schedule had been prepared by the Respondent in January 2018, and had subsequently been provided to the Applicant by City and Country in October 2019. The Tribunal did not therefore accept that the Respondent had knowingly provided false or misleading information to the Applicant. It was clear that the Respondent had been acting on instruction from City and Country, as its client, at the time the correspondence was prepared in January 2018.
- 21 On that basis the Tribunal was of the view that the appropriate right of redress in this case was against City and Country as the developer who had provided the information to the Applicant. It was noted from correspondence submitted to the Tribunal between the Applicant and Mr McMillan that he was pursuing action against the developer, and he had confirmed this at the hearing, albeit he advised he was unable to disclose any information regarding those proceedings due to restrictions on confidentiality.
- 22 The Tribunal therefore determined there had been no breach of the Code of Conduct on the Respondent's part and therefore it did not require to make a property factor enforcement order. The Tribunal would however recommend that the Respondent may wish to consider taking greater care when preparing information that may be passed on to new owners, to ensure full transparency regarding the nature and amount of any factoring costs they may be taking on. It was noted that the introductory information prepared by the Respondent did not clarify the position regarding the buildings insurance, in that it initially related to the communal parts only. In order to ensure prospective purchasers are fully aware of the financial implications of a new property it would be helpful to highlight such information in any introductory package provided at the time of reservation.
- 23 The Tribunal therefore determined that the Respondent was not in breach of the Code of Conduct and determined to make no order. The decision of the Tribunal was unanimous.

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 to appeal within 30 days of the date the decision was sent to them.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Signed



Ruth O'Hare
Legal Member

6 December 2021