

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**

Chamber Ref: FTS/HPC/PF/19/4090

Property : Flat 3/1, 43 St Andrews Square, Glasgow G1 5PP (“Property”)

Parties:

Corrine Sinclair, Eastr, Stromness, Orkney KW16 3HS (“Homeowner”)

**Speirs Gumley Property Management, Red Tree Magenta, 270 Glasgow Road,
Rutherglen, Glasgow G73 1UZ (“Factor”)**

Tribunal Members:

Joan Devine – Legal Member

Elizabeth Dickson – Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“Tribunal”) unanimously determined that the Factor has complied with the Code of Conduct for Property Factors as required by section 14 of the Property Factors (Scotland) Act 2011. The Tribunal does not propose to make a Property Factor Enforcement Order.

Introduction and Background

1. 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 (Procedure) Regulations 2017 are referred to as the “Rules”.
2. By application dated 20 December 2019 the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to carry out its property factor duties in terms of section 17(1) of the 2011 Act and had failed to comply with various sections of the Code as required by section 14(5) of the 2011 Act. The Application was originally part of a group of applications. By Decision dated 1 June 2021 (“2021 Decision”) the Tribunal determined that there had been no failure to comply with the property factor duties or with the Code. The Homeowner appealed. By Decision dated 21 March 2022 (“Appeal Decision”) the appeal was granted in relation to (1) the reasons provided by the Tribunal regarding sections 5.2, 5.5, 5.6 and 5.7 of the Code; and (2) the

absence of reasons for rejecting the Homeowner's complaint under section 5.3 of the Code. The Upper Tribunal considered that it did not have available sufficient findings in fact to reach a substantive decision on the two issues before it and therefore set aside the Decision of 1 June 2021 regarding sections 5.2, 5.3, 5.5, 5.6 and 5.7 of the Code and ordered a new hearing takes place before a differently constituted Tribunal. Whether there had been a breach of Property Factor duties was dealt with in the June 2021 Decision and was not the subject of the Appeal Decision.

3. A Hearing was fixed before a differently constituted Tribunal for 20 June 2022. By email dated 24 May 2022 the Homeowner stated that she did not wish to attend the Hearing and did not wish to make any further submission in addition to what had already been lodged. By email dated 10 June 2022 the Factor indicated that they were content to proceed by way of written representations at that stage in the process. The Tribunal discharged the Hearing fixed for 20 June 2022 and issued a Direction dated 13 June 2022 seeking further documentation and written representations from the Parties. On 16 August 2022 the Homeowner lodged a further representation. On 16 and 17 August 2022 the Factor lodged further representations. The Tribunal took the view that they had sufficient information before them to proceed to make a determination. This was communicated to the Parties and they were asked whether they were content to proceed on that basis and without a Hearing. By email dated 5 September 2022 the Homeowner stated she was content to proceed in that way. By email dated 12 September 2022 the Factor stated they were content to proceed in that way.

The Code

4. Following the Appeal Decision, the Application proceeded in respect of sections 5.2, 5.3, 5.5, 5.6 and 5.7 of the Code.
5. Section 5 of the Code applies where the agreement between a homeowner and property factor includes arranging any type of insurance.
6. Section 5.2 of the Code provides that the property factor must provide each homeowner with clear information showing the basis on which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses that apply, the name of the company providing the insurance cover and the terms of the policy. It also provides that the terms of the policy may be provided in the form of a summary of cover but full details must be available for inspection on request.

7. Section 5.3 of the Code provides *inter alia* that the property factor must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit the property factor receives from the company providing insurance.
8. Section 5.5 of the Code provides that the property factor must keep homeowners informed of progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves.
9. Section 5.6 of the Code provides that, on request, the property factor must be able to show how and why they appointed the insurance provider, including any cases where the property factor decided not to obtain multiple quotes.
10. Section 5.7 of the Code provides *inter alia*, that, if applicable, documentation relating to any tendering or selection process should be available for inspection.

Documents

11. In support of the Application the Homeowner lodged a detailed report dated December 2019 ("2019 Report"). Appendix iii to the 2019 Report is titled "*evidence to support insurance*". In response to the Direction dated 13 June 2022 the Homeowner lodged a document headed "*Application for Appeal to the Upper Tribunal*" and a document which was stated to be a representation "*submitted further to the First-tier Tribunal's letter of 5 May 2022.*"
12. In response to the Direction dated 13 June 2022 the Factor lodged a written representation along with productions numbered 1, 1a, 1b, 2, 2a, 3, 4, 5 and 6.

Findings in Fact

1. The Homeowner was the proprietor of the Property during the period 31 July 2009 to 2 December 2019.
2. The complaints raised in the Application related to the period November 2017 to March 2019.
3. The Factor performed the role of property factor at the development of which the Property forms part in the period November 2017 to March 2019.
4. The Deed of Conditions registered on 1 December 1995 applies to the Property.

5. In terms of the Deed of Conditions registered on 1 December 1995, the Factor was to arrange insurance cover for the development of which the Property forms part.
6. The Factor provided to the Homeowner the information set out in section 5.2 of the Code.
7. The Factor provided to the Homeowner the information set out in section 5.3 of the Code.
8. The Homeowner did not have a “*claim*” for the purposes of section 5.5 of the Code.
9. The Factor was able to show how and why they appointed the insurance provider as required by section 5.6 of the Code.
10. Documentation relating to any tendering or selection process [for an insurance provider] was available as required by section 5.7 of the Code.

Findings in Fact and Law

1. The Homeowner had the requisite title to bring this Application in terms of the 2011 Act.

Preliminary Issue

13. In their submission dated 17 August 2022 the Factor said that they had not had the benefit of legal advice during the earlier proceedings. They said that they now had legal advice and wished the Tribunal to consider a preliminary issue. They submitted that the Homeowner had sold the Property prior to the date of raising the Application and therefore was not a “*homeowner*” in terms of the 2011 Act and therefore did not have the requisite title to bring the Application. In her written representation the Homeowner said that she had been a “*homeowner*” for the duration of her dealings with the Factor.
14. The Tribunal considered the decision of Sheriff Deutsch in the Upper Tribunal in the case of *Shields and Blackley v Housing and Property Chamber* issued in June 2017. In that case the Housing and Property Chamber had rejected two applications as the homeowner had sold the property at the time the application was made. The homeowner appealed. The Upper Tribunal allowed the appeal and held that section 17 of the 2011 Act must be construed purposively in such a way as to give effect to the objectives and policy that underlies the 2011 Act. The Upper Tribunal found that a literal interpretation of section 17 produced an absurdity. The UT held that section 17 should be interpreted as requiring only that the person making the

application was a homeowner at the time of the failure which is the subject of the complaint.

15. In this Application the papers indicate that the Homeowner acquired title to the Property on 31 July 2009 and left the Property on 2 December 2019. On the basis of the decision in *Shields and Blackley v Housing and Property Chamber* the Tribunal determined that the Homeowner has the requisite title to bring an application regarding alleged failures on the part of the Factor in the period 31 July 2009 to 2 December 2019.

Reasons for Decision

16. As regards the complaint under **section 5.2** of the Code in her written representation the Homeowner said the information set out in section 5.2 was “refused *countless times for a back period*”. At section 1 the 2019 Report she said: “*we requested this countless times and to date still do not have the backdated information*”.
17. In their representation the Factor said that they had complied with section 5.2 of the Code. The Factor said that the Homeowner had failed to specify what it is that has not been supplied. They go on to refer to an email from Sandra Ralston of the Factor’s office to the Homeowner dated 30 November 2017 which disclosed the insurer; terms; sum insured and premium paid. They said that the Code is focused on what is within the control of the property factor which is the basis of allocation of the block premium amongst homeowners, not how the insurer arrived at the block premium. The Factor said that it would be wrong to interpret section 5.2 as requiring the Factor to provide information as to how the insurer arrived at a premium as that calls for information in the hands of the insurer and not the Factor. The Factor submitted that the clear intent behind section 5.2 is to require the Factor to justify allocation of the premium because the Factor is responsible for allocation.
18. The Tribunal noted that at section 3 of the 2019 Report nothing is said about what specific information listed in section 5.2 it is that the Factor failed to provide to the Homeowner. The narration at section 3 of the 2019 Report relates to lack of information regarding the way the premium was calculated rather than about failure to provide the information listed in section 5.2. At page 8 of the 2019 Report the Homeowner says “*To prove that our risk rating had been erroneous for such a long time we requested the Annual Building Insurance Reports for the years 2011, 2012...2016*”. She goes on to say “*Despite numerous emailsSpeirs would not provide these documents*”. It would therefore appear that the information which the Homeowner complains

was not supplied was the historic annual building insurance reports which are not part of the information set out in section 5.2.

19. The Tribunal noted that the basis on which a homeowner's share of the insurance premium is calculated is set out at page D9 of the Deed of Conditions registered on 1 December 1995. The remainder of the information to be provided in terms of section 5.2 of the Code was contained in the email from Sandra Ralston dated 30 November 2017 which is production 1a for the Factor. The Tribunal therefore determined that there had been no breach of section 5.2 of the Code.
20. As regards the complaint under **section 5.3** of the Code, in her written representation the Homeowner said: "*it is accepted the charge was notified within the Written Statement of Services that there would be one it was only when a claim was made that the amount was ascertained*". The Homeowner made reference to the concept of agency and for the need for an agent to act with reasonable skill and care.
21. In their representation the Factor said that they have complied with section 5.3 of the Code. They made reference to the insurance certificate provided to the Homeowner which shows the percentage of commission they received. This was production 1b.
22. The Tribunal considered that the concept of agency and the need for an agent to act with reasonable skill and care was not relevant to the question of compliance with section 5.3 of the Code which required the disclosure of specified information. The Tribunal determined that the insurance certificate (production 1b) evidenced compliance with section 5.3 of the Code. The Tribunal therefore determined that there had been no breach of section 5.3 of the Code.
23. As regards the complaint under **section 5.5** of the Code, in her written representation the Homeowner said: "*It was not unreasonable to ask about claims on the block insurance that ultimately directly affected the Applicant.*" At section 1 of the 2019 Report the Homeowner refers to "*countless enquiries regarding outstanding claims on our insurance*". Section 3 of the 2019 Report does not refer to a claim by the Homeowner where the Factor failed to keep her informed of progress.
24. In their representation the Factor said that they have complied with section 5.4 of the Code. The Factor said that the Homeowner did not have an insurance claim at the time of making the application. They refer to pages 38-40 of appendix iii in the 2019 Report which is a claims review from insurance

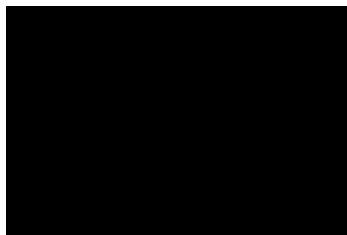
brokers, Deacon. They also produced copy emails where inquiries are being made about an open liability claim.

25. The Tribunal noted that section 5.5 of the Code refers to the need for homeowners to be kept advised of the progress of *“their claim”*. The Homeowner has not provided any evidence of a failure on the part of the Factor to keep her advised of the progress of a claim made by her. In the absence of a claim being made by her, there can be no breach of section 5.5 of the Code. The Tribunal therefore determined that there had been no breach of section 5.5 of the Code.
26. As regards the complaint under **section 5.6** of the Code, in her written representation the Homeowner said: *“The factor stayed with the same broker for a number of years and only when challenged and by admission (see Mr Friel’s email of 10 April 2018) was the cost challenged. The factor was not acting in the Homeowner’s best interests.”* In the 2019 Report the Homeowner stated that she has never been given a breakdown of quotes and insurance was only reviewed when Robert Hogg (another owner) obtained an independent quote.
27. In their representation the Factor said that they have complied with section 5.6 of the Code. In their representation the Factor said that they relied on a broker. They referred to their productions 3, 4 and 5 which, they submitted, explained the position.
28. The Tribunal noted that Productions 4 and 5 contained information regarding how and why the Factor appointed the insurance provider and the role of the broker. The Tribunal noted that the Written statement of Services said that the Factor is an agent and not a broker and therefore does not have direct access to the wider insurance market. The WSS went on to state that the Factor may appoint a broker. This explains the importance of the broker in identifying an insurance provider. The Tribunal determined that productions 4 and 5 evidenced compliance with section 5.6 of the Code. The Tribunal therefore determined that there had been no breach of section 5.6 of the Code.
29. As regards the complaint under **section 5.7** of the Code, in her written representation the Homeowner said: *“Again looking to the fact documentation was refused when requested as per insurance section of the report.”* At section 1 of the 2019 Report the Homeowner said that requests for insurance documentation were denied.
30. In their representation the Factor said that they have complied with section 5.7 of the Code. The Factor said prior to making this Application the

Homeowner had not asked for details of how the insurance was tendered. They referred to production 6 which was a report from the insurance broker, Deacon, which had been copied to the Homeowner. The Tribunal determined that production 6 for the Factor evidenced compliance with section 5.7 of the Code. The Tribunal therefore determined that there had been no breach of section 5.7 of the Code.

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.



Legal Member: Jacqui Taylor

Date : 3 October 2022