

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 (“the Act”) and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber Ref: FTS/HPC/PF/22/0281

Property: 30/2 Fettes Row, Edinburgh EH3 6RH (“the Property”)

The Parties:-

Mrs Christina Davies, 19 West Mains Road, Edinburgh EH9 3BG (“the homeowner”)

Charles White Limited, registered in Scotland SC212674 and having their registered office at Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD (“the property factors”)

Tribunal Members:

George Clark (Legal Member/Chairman) and Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) decided that the property factors have failed to comply with their duties under Section 5.2 of the Code of Conduct for Property Factors, effective from 1 October 2012, made under Section 14 of the Property Factors (Scotland) Act 2011. The Tribunal proposes to make a Property Factor Enforcement Order as set out in the accompanying Notice under Section 19(2)(a) of the Act.

Background

1. By application, dated 29 January 2022, the homeowner sought a Property Factor Enforcement Order under Sections 17 and 20 of the Property Factors

(Scotland) Act 2011 (“the 2011 Act”) in respect of a failure by the property factors to comply with Section 5 of the Code of Conduct for Property Factors (“the Code of Conduct”). The homeowner stated that the complaint related to the buildings insurance for 30 and 31 Fettes Row. In 2021, it had transpired that property owners had been paying a higher rate of insurance due to incorrect information held by the property factors. The factors worked on behalf of owners to commission RICS qualified surveyors to carry out Reinstatement Valuation Assessments. In doing so, they shared information with the surveyors which resulted in higher valuations and consequently higher insurance premiums. In raising a complaint with the property factors, the homeowner had requested that in future, along with the periodic pre-renewal letters they issue to individual owners information, which includes the declared value of single properties, they should also share the information they hold on property areas and explain to owners what information they hold on the development which factor into reinstatement valuation calculations and explain where this information came from. Ideally, they should make these documents visible to owners for verification. The homeowner’s view was that the property factors should provide financial compensation to owners, and this should go beyond pro-rata refunds for 2021-2022.

2. The homeowner stated that at the first and second stage of the complaints procedure, the property factors had rejected the request for compensation and had referred to their pre-insurance letters to owners in which they had said that if owners considered the reinstatement value for their property to be incorrect they would need to contact an RICS qualified building surveyor to provide them with an appropriate valuation, but the property factors did not reveal to owners that they held additional data which would feed into the valuation calculations, nor did they make owners aware that they were providing the surveyors with information relating to the development. The valuation reports were not made readily available to owners, limiting the ability to verify the information which then led to the valuation of the properties. Owners believed that they had met their duty by employing the property factors to oversee the appointment of RICS qualified surveyors to produce an accurate reinstatement valuation. At the pre-valuation stage, owners are told that no specific direct access to their properties is required. The property factors failed to disclose that they hold data which contributes to creating a square-metre calculation of their properties which will contribute to the calculation of the reinstatement valuation.
3. In April 2021, the homeowner had asked the property factors for a copy of the 2018 reinstatement report. From this, she had seen that the square metre calculations recorded for the private areas of the development were 30-49% larger than they actually are. She had spoken to a surveyor at Graham & Sibbald to explain that the data provided by the property factors was incorrect. Two days before the renewal date, the property factors had arranged for the surveyor to visit two properties within the development to verify measurements of the floor areas. The insurance was, however, set up on 1 May, using the incorrect floor areas, resulting in inflated premiums. On 27 May, the property factors had advised the homeowner that the measurements relating to her property had been incorrect and on 20 June they sent her

details of the proposed adjustments to the buildings insurance. The homeowner had replied on the same day, asking the property factors if they could negotiate any discount as the owners were long-standing customers of the insurance company. On 19 July 2021, the property factors issued formal documentation and communications relating to the adjusted insurance.

4. The homeowner said that it was unclear how long the property factors had been providing erroneous information to building surveyors in connection with the calculation of reinstatement valuations. As they had provided no evidence, she had to assume that it had been happening since they took over as factors in October 2003. They had also gained financially through receiving commission on unnecessarily high valuations. The length of time they had taken to obtain the adjustment to premiums was unacceptable. They had not been fully transparent about the data being submitted by them, so it was not acceptable to say that the fault lies with the owners for not bringing it to their attention. The owners would not have thought to question the assessment of expert surveyors.
5. The application was accompanied by copies of the property factors' Written Statement of Services and of a Building Reinstatement Cost Guidance Report by DM Hall LLP, dated February 2014, and Reinstatement Cost Assessment Reports by Graham & Sibbald, dated 17 December 2018 and 13 May 2021. The homeowner also provided copies of various emails between the Parties, including her formal complaint of 10 December 2021 and the property factors' response at the Second Stage complaint of 15 November 2021, in which they stated that the information provided to the Building Surveyors came from the information held on file, which would include plans, drawings, relevant Deed extracts, details they held on property areas and copies of previous reports if available. They apologised for anything on their part which had caused any delay to the process between the homeowner contacting them on 12 April and when the insurers recalculated the premium and applied a credit. They had used their best endeavours to have the development professionally assessed for reinstatement purposes and did not accept the homeowner's claim, which was for compensation of £100 per property for every year since 2003. There was no logic or basis to support a claim for this amount.
6. On 25 February 2022, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the property factors were invited to make written representations by 18 March 2022. The property factors did not make any written representations to the Tribunal.

Case Management Discussion

7. A Case Management Discussion was held on the morning of 23 May 2022. The homeowner was present. The property factors were represented by Ms Tanya Murray of Lyons Davidson Solicitors, Edinburgh. The Legal Member of the Tribunal outlined the purpose of the Case Management Discussion, which was to clarify the issues if required, to identify areas of factual dispute and to determine whether to adjourn the case to a full evidential Hearing and what

further information/documentation was required by the Tribunal in advance of such Hearing.

8. The homeowner told the Tribunal that one thing she had not seen was the documents which the property factors had given to the surveyors in advance of revaluations. The letter which she had received when owners were contacted in 2013 referred to the last assessment having been carried out in 2007.
9. Ms Murray told the Tribunal that she intended to move for a full Hearing, to give the property factors the opportunity to prove that they had given the surveyors all the documents that they held and that they had not provided any erroneous information. It was clear to the Tribunal that it was important to try to ascertain precisely where the error which resulted in the floor area of the flats and blocks being overstated had arisen. This would involve requiring the property factors to produce evidence of all the information and documentation sent to the firms of surveyors with the revaluation instructions to produce the reports of 2014 and 2018. There was also an indication that a valuation had been carried out in 2007. Accordingly, a full evidential Hearing would be required and the Tribunal would issue such Directions as it thought fit in relation to the production of documents in advance of the Hearing.
10. Consideration of the application was adjourned to a full evidential Hearing. This case has been conjoined with another application under Tribunal reference FTS/HPC/PF/22/0306 and the two applications would be heard together.
11. The Tribunal issued Directions to the Parties on 6 June 2022. The property factors were required to provide copies of their letters of instruction to surveyors in connection with the Reinstatement Valuations of 30 and 31 Fettes Row Edinburgh in 2007, 2013 and 2018, together with full details of all documents provided by them to the surveyors in connection with said Reinstatement Valuations and any information and documentation relative to Reinstatement Valuations and floor area calculations that was passed over to them when they took over the factoring of the Property in 2003. The homeowner was required to provide a copy of the portion of the Home Report in respect of the Property, obtained by her in 2021, which states the floor area of the Property.
12. The property factors did not comply with the Tribunal's Direction.
13. The homeowner provided the Tribunal with a copy of a Home Report over the Property dated 12 October 2020. It stated the gross internal floor area of the Property to be 65 square metres.

The Hearing

14. A Hearing took place on the morning of 30 August 2022. The homeowner was present. The property factors were not present or represented.
15. The homeowner told the Tribunal that she had no further information to

provide to the Tribunal, but she expressed her disappointment that the property factors had failed to comply with the Tribunal's Direction, had failed to make any written representations and had failed to appear or be represented at the Hearing. This, she said, was typical of the property factors and exemplified her disappointment and frustration with the manner in which they had handled this matter.

Findings in Fact

1. The homeowner is the proprietor of the property, which comprises a lower ground floor flat within one of two five-storey terraced blocks erected circa 1983, each block comprising 10 flats.
2. The property factors, in the course of their business, manage the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
3. The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
4. The date of Registration of the property factors was 7 December 2012 and the date of their current registration is 18 April 2016.
5. The homeowner has notified the property factors in writing as to why she considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
6. The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber, dated 29 January 2022, under Section 17(1) of the Act.
7. The concerns set out in the application have not been addressed to the homeowner's satisfaction.
8. In terms of the Deed of Conditions regulating the development of which the Property forms part, each owner is responsible for a 1/20th share of the block insurance premium.

Reasons for Decision

16. The homeowner's application was made under Section 5.2 of the Property Factors Code of Conduct effective from 1 October 2012 made under Section 14 of the Property Factors (Scotland) Act 2011. Section 5.2 states:
"You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy."

The Tribunal noted that the basis of the application was that successive insurance revaluations of the Property had been made by chartered surveyors based on erroneous information as to the gross internal floor area of the Property. This information, provided by the property factors, had resulted in insurance premiums over a number of years being based incorrectly on a larger floor area than was the case. It appeared that the homeowner had discovered the error when, in October 2020, she obtained for her own purposes a Home Report which stated that the gross internal floor area was 65 square metres. In April 2021, she asked the property factors to provide her with a copy of the Revaluation Report carried out in 2018 and, when she received that Report, she noticed that it stated the floor area of the Property to be 97 square metres. The Report stated that all measurements had been provided by the client, the property factors, as part of the project brief and that the chartered surveyors had not undertaken any detailed measurement exercise or gained access into privately owned properties.

The homeowner also provided the Tribunal with the previous Revaluation Report of 2014, which also stated that the figures were calculated “using the area and other information provided to Charles White who in turn provided it to us.” The chartered surveyors stated that they had assumed that information provided was correct and that their inspection had been “of a superficial, non-detailed nature.”

The property factors confirmed, in an email to the homeowner of 15 November 2021, being their response to the Second Stage Complaint of the homeowner, that at the time the surveys were instructed by them, salient information was provided to the surveyors by the property factors. Initially “this included plans, drawings, apportionment details, Deed extracts, details we held on property areas and copies of previous reports if available.”

The Tribunal was disappointed to note that the property factors had failed to comply with the Direction of 6 June 2022, to provide copies of their letters of instruction to surveyors in connection with the Reinstatement Valuations of 30 and 31 Fettes Row Edinburgh in 2007, 2013 and 2018, together with full details of all documents provided by them to the surveyors in connection with said Reinstatement Valuations and any information and documentation relative to Reinstatement Valuations and floor area calculations that was passed over to them when they took over the factoring of the Property in 2003. This failure was particularly regrettable, as their solicitor had specifically asked for a full evidential Hearing, to give the property factors the opportunity to prove that they had given the surveyors all the documents that they held and that they had not provided any erroneous information.

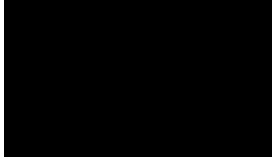
The Tribunal decided, on the balance of probabilities, that the erroneous information with regard to property floor areas had been provided by the property factors to the chartered surveyors as part of the Revaluation process in 2014 and in 2018, and possibly also in earlier revaluation exercises. As the property factors had failed to comply with the Tribunal’s clear Direction, had made no written representations and were not present or represented at the

Hearing, they had offered no evidence which would enable the Tribunal to ascertain precisely where the error which resulted in the floor area of the flats and blocks being overstated had arisen, but, prior to the homeowner's complaint, they had not told the homeowner that they had provided floor areas to the chartered surveyors. The Tribunal accordingly determined that the property factors had failed to provide each homeowner with clear information showing the basis upon which their share of the insurance premium was calculated and that they had failed to comply with Section 5.2 of the Code of Conduct.

The Tribunal recognised that, when it became clear that a significant over-statement of the floor area of the Property and the other flats in the development of which it forms part might have been provided, the property factors had arranged for the chartered surveyors who were carrying out the 2021 Revaluation Report to visit two properties to check the measurements and, having found out that the information previously provided had been incorrect, had taken steps to seek an appropriate adjustment of the block insurance premiums. The Tribunal also recognised that the property factors are not surveyors, so would not necessarily have identified that the floor areas were over-stated, but, as they had not told the homeowners that they had provided the area measurements, the homeowners, relying on the professional skill of the chartered surveyors and having no such professional skills themselves, had no reason to doubt the information stated in the various Revaluation Reports. Had the homeowners been aware that the floor area measurements had been provided by the property factors and not by qualified surveyors, they might have had occasion to double-check the figures themselves, but they had not been provided with that information.

As the internal floor areas are significant in the calculation of Reinstatement Values, the consequence of these measurements has been that, probably for many years, the homeowners have had to pay higher block insurance premiums than would otherwise have been the case. There has, therefore, been actual loss. The view of the homeowner was that she should be compensated to the extent of £100 per year from 2003, being approximately one-third of the premiums paid. The Tribunal could not speculate as to whether an over-statement of approximately 50% in the floor areas resulted in a one-third increase in the premiums, as a number of other factors will be taken into account in the calculation of the premium, but was of the view that the loss to the homeowner since the failure of the property factors to let the homeowner know that they had provided the (incorrect) information, will have been significant. In her written representations, the homeowner had confirmed that, when the correct measurements were provided to the insurers, the premium for 2021 had been reduced from £10,189.87 to £7,124.79, a reduction of £153.25 per property. Insurance premium rates have risen sharply over the last few years, and the Tribunal was not prepared simply to extrapolate from the 2021 figure and apply the same proportion of loss to previous years back to 2014, but, having taken into account all the evidence before it, the Tribunal decided that the loss would not have been less than £500 and that it would be reasonable to require the property factors to pay that sum to the homeowner in respect of actual loss.

As the Tribunal was satisfied that the actions of the property factors following the homeowner pointing out the discrepancy to them had been reasonable in all the circumstances, the Tribunal made no award in respect of distress and inconvenience.



George Clark
Legal Member/Chair
8 September 2022