



Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

Ref: HOHP/PF/14/0203

Re: 23 Scotsraig Apartments, Boat Road, Newport-on-Tay, Fife, DD6 8EU ("the Property")

Parties: Mr William Docherty residing at 23 Scotsraig Apartments, Boat Road, Newport-on-Tay, Fife, DD6 8EU ("the Homeowner")

Sheltered Housing Management Ltd, a Company incorporated under the Companies Acts and having their Registered Office at 13 Ward Road, Dundee ("the Factor")

Decision by a Committee of the Homeowner Housing Panel in an application under section 21 of the Property Factors (Scotland) Act 2011 ('the Act')

Committee members:

Mr E K Miller (Chairperson and Legal Member); Ms Sara Hesp (Surveyor Member); and Ms Carolyn Hirst (Housing Member).

Decision

1. The Committee determined that the Factor is no longer subject to the requirements of the Act and that the obligation on the Factor to produce accounts in terms of the PFEO has ceased.
2. The Committee resolved to leave in place the Property Factor Enforcement Order as previously varied and not to revoke it, as a matter of public record of the Factor's actions.
3. The decision is unanimous.

Background

4. By a decision dated 2 October 2015, the Committee determined that the Factor had breached its duties in terms of Section 17(1)(b) of the Act in that it had failed to comply with sections 3.1 and 3.3 of the Code of Conduct for Property Factors ("the Code") as required by Section 14(5) of the Act.

5. As required by the Act, the Committee issued a PFEO after providing the parties with an opportunity to provide comment on a draft PFEO. The Committee issued a PFEO on 2 October 2015.
6. The PFEO required the Factor to produce termination accounts following the termination of the Factor's appointment on 30 April 2014 compliant with the terms of Section 3.1 of the Code. The PFEO also required annual accounts to be produced by the Factor following their registration as Factor on 13 March 2013 in terms of Section 3.1 of the Code. The PFEO gave the option, should the Factor so elect, to consolidate the annual and termination accounts into one consolidated account. The Factor elected to take up this option.
7. On 30 December 2015 the Factor provided the Homeowner with the statement of account for the relevant consolidated period. The Homeowner was still dissatisfied and the matter came before the Committee again to determine whether compliance with the PFEO had occurred. On 22 March 2016 the Committee issued a further decision determining that the accounts produced by the Factor were not in sufficient detail and compliant with the Code. The Committee extended the period for the Factor to produce compliant accounts for a period of one month.
8. Subsequent to the issue of the variation of the PFEO, the Factor's representatives (BBM Solicitors) advised the Committee on 14 April 2016 that their client was no longer a property factor and had been removed from the Property Factor Register with effect from 14 March 2016. They provided confirmation from the Property Factor Registration Team at the Scottish Government that the Factor had been removed with effect from 15 March 2016.

Reasons

9. The Factor's solicitor highlighted Section 2 of the Act and that their client did not view themselves as a "property factor" any longer. It was their client's position that they were no longer under the jurisdiction of the Committee in relation to the matters set out in the PFEO. They requested that the PFEO be varied to note this and to confirm that no further action was required.

In response to the Factor's solicitor's letter, the Homeowner responded that it was unjust and unfair that the Factor was seeking to escape from the obligations contained within the PFEO. He highlighted that there was nothing in the Act that stated that once deregistered a property factor can walk away from their responsibilities relating to a period when they were registered.

10. The Committee considered the matter and concluded, somewhat reluctantly, that the obligations under the PFEO were no longer enforceable by the Committee against the Factor. Section 2(1) of the Act provides that a property factor is "a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes". This was the section of the Act that the Factor's solicitor sought to rely on. The Factor was no longer registered as a

factor and had been removed from the Register of Property Factors. This has been done in compliance with Section 4(7)(a) by the Scottish Ministers. On that basis there was an argument that the Factor could no longer be said to be a property factor within the terms of the Act. If this premise is accepted then the whole basis of enforcement against the Factor under the Act became untenable. All references within the Act to the referral to the Committee process and the subsequent PFEO and variation all relate to actions being carried out against a "property factor". The Factor was no longer carrying out any factoring business, was no longer registered and, it could be argued, was no longer a property factor.

11. In any event, even were the position set out in Clause 10 above to be incorrect, the Committee was of the view it no longer had jurisdiction in this particular case in light of the terms of Section 14 of the Act. Section 14(5) specifies that a "registered property factor must ensure compliance with the code of conduct" (emphasis added). In contrast to the bulk of the Act where reference is simply made to a "property factor" the obligation to comply with the Code only rests with a "registered property factor". The Factor, in light of its deregistration, was clearly no longer a registered property factor.
12. The Committee considered the point raised by the Homeowner that there was nothing in the Act that stated a factor could "walk away" from their responsibilities after being deregistered. However, conversely, the Committee could find no section of the Act that indicated there was continuing jurisdiction for the Committee once a factor had been removed from the Register. The specific use of the word "registered" in Section 14 of the Act could not be ignored by the Committee. The Factor was not a registered property factor and therefore no longer subject to the obligations contained within the Code. If the Code does not bind the Factor then, by logical extension, the PFEO, which only contains a direction regarding compliance with the Code, cannot remain enforceable.
13. The Homeowner had also highlighted in his submission that the Committee had previously decided that the Factor had a continuing liability after his termination as factor for the development the Homeowner resided in. On that basis the Homeowner submitted it would be illogical for the Committee to allow the Factor to now become free of the obligation in the PFEO. The Committee, however, was of the view that there was a distinction between the two situations that had arisen. Notwithstanding the resignation by the Factor for that development, the Factor had remained registered at that point and to trade in other developments. On that basis the Factor remained a registered property factor and subject to the strictures of the Code. As highlighted in the previous decision of the Committee, the Code envisaged situations where there remain ongoing obligations by Factors to Homeowners after resignation. However, the deregistration effectively took the Factor out of the ambit of the Code of Conduct. The PFEO only covered matters relating to the Code of Conduct and, therefore, the Committee no longer had jurisdiction.
14. The Committee was aware that this decision would be frustrating for the Homeowner. The Homeowner was being denied information to which they

would ordinarily have been entitled had the Factor remained registered. Notwithstanding the deregistration, the Committee would encourage the Factor to provide the information. As highlighted by the Homeowner there appeared to be no reason why the Factor could not provide this information other than a determination to operate in their own particular fashion. While the Committee did not feel able to take matters any further forward the Committee did take some comfort that the Factor had deregistered and was no longer operating within the profession. The attitude of the Factor in this case had been somewhat high-handed and it appeared to the Committee that the Factor had not fully grasped the implications of the Act and the Code of Conduct. The Act and the Code set out standards for the factoring profession and, in particular, the need to act in a clear and transparent fashion. The Factor appeared unwilling to adapt their business practices to meet the requirements of the Code and so had exited the profession. To that extent, the Code had, in this particular case, served its purpose

15. The Committee considered what should occur with the PFEO as it currently stood. In terms of paragraphs 21(1) of the Act the Committee which made a PFEO may, at any time (a) vary the order in such manner as they consider reasonable, or (b) where they consider that the action required by the Order is no longer necessary, revoke it. It appeared to the Committee that it had discretion as to what it wished to do with the PFEO as it stood. The Committee did not consider that it was appropriate to revoke the PFEO. Compliance had not been achieved and while, for the reasons set out above, the Factor could no longer be compelled to provide the information, nonetheless the Factor could have done so. A failure to comply with a PFEO was a relevant consideration in the event that the Factor ever sought to reregister as a factor again. If this eventuality were to occur it would be better that there remained a public record of the fact that the Factor had not provided the information requested. Accordingly, whilst the Committee accepted there was no continuing obligation on the Factor to provide the amended accounts, the PFEO would still be left in place.

Appeals

The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides

"(1) An appeal on a point of law only may be made by summary application to the Sheriff against a decision of the president of the Homeowner Housing Panel or a Homeowner Housing Committee. (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made ... "

Chairperson Signature

Date 1/7/16