

Housing and Property Chamber
First-tier Tribunal for Scotland



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

Certificate of Compliance:

Property Factors (Scotland) Act 2011 Section 23

Case Reference Number: HOHP/PF/14/0076

Re : Property at 2/2 256 Crow Road, Glasgow G11 7LA (“the Property”)

The Parties:-

**Mr Colin Strain and Mrs Eleanor Strain, 2/2 256 Crow Road, Glasgow G11 7LA
 (“the Applicants”)**

**Ross & Liddell Limited, 60 St. Enoch Square, Glasgow G1 4AW (“the
 Respondents”)**

The Tribunal comprised:-

David Bartos - Chairperson
Colin Campbell - Ordinary Member

Decision

The Tribunal has decided to certify that the Property Factor Enforcement Order in respect of the Property dated 3 July 2015 as (1) modified by the interlocutor of the sheriff of Glasgow and Strathkelvin dated 18 January 2017 and (2) varied and revoked in part by the Tribunal on 25 May 2017, has been complied with.

The decision of the Tribunal is unanimous

Reasons

1. Following its decision of 25 May 2017 the only existing part of the Property Factor Enforcement Order ("PFEO") dated 3 July 2017 which remained unimplemented was part (3)(b) which provided as follows:

"The Respondents shall, by no later than 2 weeks from the notification of this Order . . . (b) issue to the Applicants an insurance certificate or certificates certifying that such insurance has been put into force and reflecting the terms of such insurance."

The insurance referred to in part (3)(b) was that mentioned in part (1) of the PFEO being an insurance policy for the tenement at 256 Crow Road, Glasgow G11 7LA in respect of among other matters loss or damage by fire, storm damage and property owners' third party liability. Further details are in part (1). Any right of appeal against part (3)(b) has been either refused or has expired.

2. By letter of 9 June 2017 the Respondents' solicitors Hardy Maphail forwarded to the Tribunal a copy of a letter from them to the Applicants also dated 9 June 2017 which bore to be sent by recorded delivery post and bore to enclose a "Certificate of Common Block Buildings Insurance". A copy of the certificate was included with the copy letter sent to the Tribunal.

3. The certificate enclosed with the letter of 9 June 2017 ("the First June 2017 Certificate"), differed in certain respects from the copy certificate enclosed with a letter from the Respondents' insurance brokers JLT Speciality Ltd dated 14 July 2015 which was referred to in paragraphs 10 to 14 of the Tribunal's decision of 25 May 2017 ("the July 2015 Certificate"). Thus the First June 2017 Certificate :

- (1) named an insurer, being Zurich Insurance plc;
- (2) in the first box had the heading "Policy Holder" rather than the "Policy Holder/Insured Property" stated in the July 2015 Certificate, albeit the narrative within that box remained the same;
- (3) had a separate box headed "Insured Property" with the Applicants' flat address entered as the narrative for that box rather than the "Individual Property Address" box stated in the July 2015 Certificate.

4. By e-mail of 22 June 2017 the Tribunal drew this third difference to the attention of the Respondents' solicitors. By e-mail of 28 June 2017 the Respondents' solicitors Hardy Maphail wrote to the Tribunal in the following terms:

"I refer to your e-mail of 22 June. This was received during my absence on holiday. I attach copy letters [sic] forwarded to the Applicant's [sic] today together with a copy of the certificate enclosed therewith."

The attachment comprised a copy of one letter from Hardy Macphail to the Applicants and a copy of a certificate dated 27 June 2017 ("the Second June 2017 Certificate"). The letter did not bear to have been sent recorded delivery but merely "FIRST CLASS". It was in the following terms:

"We refer to the above [2/2, 256 Crow Road, Glasgow G11 7LA] and enclose herewith copy letter being forwarded to you today by recorded delivery together with copy Certificate of Common Block Buildings Insurance".

The Second June 2017 Certificate differed from the First June 2017 Certificate in that the box headed "Insured Property" had been substituted with a box headed "Individual Property Address" in the same terms as the July 2015 Certificate and with the Applicants' flat being narrated in that box.

5. The Respondents' solicitors' correspondence of 9 June and 22 June with their enclosures was copied to the Applicants. By correspondence dated 14 July 2017 the Tribunal asked the parties to express their view on whether the Respondents had complied with part (3)(b) of the PFEO. By letter of 19 July 2017 the Respondents' solicitors submitted that there had been compliance and sought a response within 21 days. By letter of 18 July 2017 the Applicants submitted that there had not been compliance. They did not give any reasons why that was so and expressed the view that it was inappropriate to give further consideration to the matter as they were seeking permission to appeal the Tribunal's decision of 25 May 2017.
6. Permission to appeal was refused by both the Tribunal and, by early November 2017, by the Upper Tribunal. Following this by letter dated 7 November 2017 to both the Applicants and their solicitors Mitchells

Robertson, the Tribunal gave the Applicants a further opportunity to state their view on whether there had been compliance with part (3)(b) of the PFEO. By letter dated 16 November 2017 the Applicants' solicitors stated,

“As a matter of record the Applicants consider that there has to date not been compliance with part (3)(b) but in the foregoing circumstances do not wish to incur further time and cost debating this matter which was the subject of a compliance hearing on 18 May 2017 . . .”

The “foregoing circumstances” were the fact that the Tribunal has not served notice of their decision of 25 May 2017 that the Respondents had failed to comply with part (3)(b) on the Scottish Ministers.

7. Section 23(2) of the Property Factors (Scotland) Act 2011 does provide: “Where the First-tier Tribunal decides that a property factor has failed to comply with the property factor enforcement order, the First-tier Tribunal must serve notice of the failure on the Scottish Ministers.”.

The purpose of this provision appears to be to allow the Scottish Ministers to begin consideration as to whether to remove a factor from the register of property factors set up earlier in the 2011 Act. It would make no sense for the Scottish Ministers to begin consideration of removal when the decision of failure to comply can still be appealed. It follows that any suggestion that the notice must be given to the Scottish Ministers simultaneously with the issue of the decision to the parties before any appeal or appeal period is exhausted would be quite unreasonable and premature.

8. In the present case the Applicants sought to appeal the decision of 25 May 2017 and had permission to appeal been granted, there could have been a cross-appeal by the Respondents. Accordingly it would have been entirely premature for the Tribunal to have been put under the obligation to notify Scottish Ministers before the exhaustion of the appeal process.
9. A finding of non-compliance does not mean that the factor is left in non-compliance in perpetuity. That would be a nonsensical situation. It is possible for compliance to take place during the period for an appeal from a non-compliance decision. In that situation if the Tribunal is faced with a

submission by the factor that there has been compliance the Tribunal must decide it, provided that the material part of the decision under appeal has not been superseded by the outcome of the appeal. There is no reason for Tribunal to have to make a notification to the Scottish Ministers prior to deciding the factor's submission. Such notification can await the decision on the factor's submission. Any suggestion by the Applicants' solicitors to the contrary is ill-founded.

10. Has there been belated compliance with part (3)(b) of the PFEO as submitted by the Respondents ? The Applicants have not taken issue with either the Respondents' solicitors' e-mail of 28 June 2017 or any of its enclosures or anything said in those enclosures. The Applicants have indicated that they do not wish to debate this matter despite having been invited to do so. They have been given more than one opportunity to do so. Their position is no more than a bald assertion that there has not been belated compliance. In the circumstances the Tribunal took the view that having regard to its overriding objective, namely to deal with the proceedings justly (which includes the avoidance of delay, so far as compatible with a proper consideration of the issues), a further hearing to decide the issue of belated compliance was unnecessary.

11. There being no substantive issue taken with the material supplied by the Respondents' solicitors as narrated above, the Tribunal saw no reason to doubt that material. Therefore it found as a fact that –
 - (1) the Applicants received the Second June 2017 Certificate on or about 22 June 2017;
 - (2) the Second June 2017 Certificate certifies that insurance as set out in part (1) of the PFEO was in force for the tenement 256/258 Crow Road, Glasgow during the period from 15 May 2015 to 15 May 2016 and reflects the terms of such insurance.

12. In the light of the above, the Tribunal was satisfied that part (3)(b) of the PFEO had been complied with. Accordingly it made the decision stated above.

Appeals

13. 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.

Notice to Scottish Ministers

14. Given the Tribunal's finding of belated compliance with the PFEO, there is no purpose in notification to the Scottish Ministers of non-compliance without a simultaneous notification of belated compliance. Accordingly any notification will await the expiry of any period for appeal and completion of any appeal process.

D Bartos

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_ Legal Member and Chairperson

23 November 2017 _____ Date