

Housing and Property Chamber First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in terms of Section 23 of the Property Factors (Scotland) Act 2011

Property:- 16 Eastside, Flat 1/2, Kirkintilloch, Glasgow G66 1PY ("the Property")

The Parties:-

Mr. Brendan Campbell and Mrs. Margaret Campbell, 98, Loch Road, Kirkintilloch, Glasgow G66 3EA ("the Homeowner")

Apex Property Factor Ltd., having a place of business at 46, Eastside, Kirkintilloch, Glasgow G66 1QH ("the Factor") hereinafter together referred to as "the parties"

Chamber Ref: HOHP/PF/15/0110

Committee Members

Karen Moore (Chairperson)

David Godfrey (Surveyor Member)

This Decision should be read in conjunction with:-

Decision dated 1 May 2016 and Property Factor Enforcement Order dated 20 June 2016

Background

1. By an application dated 12 July 2015 and subsequent dates and lodged by Mr. Brendan Campbell on behalf of the Homeowner in terms of Section 17(1) of the Property Factors (Scotland) Act 2011 ("the Act"), the Homeowner applied to the Homeowner Housing Panel (now the First-tier Tribunal for Scotland Housing and Property Chamber) (firstly) for a determination of whether the Factor had failed to comply with the Property Factor Code of Conduct ("the Code") as required by section 14(5) of the Act and, in particular, had failed to comply with section 4 (Debt Recovery) at 4.6 and 4.7, Section 6 (carrying out repairs and maintenance) at 6.9 and Section 7 (Complaints resolution) at 7.1 and (secondly) for a determination of whether the Factor had failed to comply with the property factor's duties in terms of Section 17 of the Act.
2. A Hearing was fixed for 24 February 2016 and later adjourned to 31 March 2016. Following the Hearing, the Homeowner Housing Committee ("now the Tribunal") determined that the Factor had failed to comply with their property factor duties in

terms of Section 14(5) of the Act and had failed to comply with sections 4.6, 4.7 and 7.1 of the Code.

3. Thereafter, the Homeowner Housing Committee ("now the Tribunal"), having allowed representations in terms of Section 19(2) of the Act, imposed a Property Factor Enforcement Order (PFEO) as follows:-

"No later than 15 July 2016 the Factor must:

Make payment to the Homeowner of the sum of £250 in recognition of the time spent, distress and inconvenience that the Factor's breaches of the Code have caused to the Homeowner;

Cancel the final invoice of 27 February 2015 and provide notification of that to the Homeowner;

Issue a replacement final invoice to the Homeowner showing a final sum due to them being the reimbursement of their float of £50 under deduction of the sum of £22.80 being due in respect of all factoring services provided and outstanding as at 27 February 2015 and make further payment to the Homeowner of the balance of £27.20;

At its own expense, register a Discharge of the Notice of Potential Liability registered against the Homeowner's Property and

Provide to the Homeowner Housing Panel documentary evidence of compliance with the above Orders."

4. The Factor subsequently appealed the Decision of the Homeowner Housing Committee ("now the Tribunal") to the Sheriff but was unsuccessful in that appeal. Accordingly, the Decision and PFEO remain in force.
5. Following intimation by the Homeowner to the Tribunal that the Factor was unsuccessful in its appeal, the Tribunal made enquiries of the Homeowner and the Factor to determine if the PFEO had been complied with. The Homeowner advised the Tribunal that the PFEO had not been complied with. The Factor, by letter dated 28 July 2017, did not comment on its compliance with the PFEO but advised the Tribunal that it has raised judicial review proceedings.
6. The Factor, in its said letter dated 28 July 2017, requested that the tribunal "confirm any enforcement action will be suspended until we have had a response from the Court of Session". The Tribunal took this to be a request by the Factor that the PFEO should either be varied to a later date or the Tribunal should delay making a finding of failure to comply with the PFEO to a later date. The Tribunal considered this request with regard to its powers in terms of the Act. Section 21 of the Act, states :-

(1) Where the First-tier Tribunal has made a property factor enforcement order it may, at any time (a) vary the order in such manner as it considers reasonable, or (b) where it considers that the action required by the order is no longer necessary, revoke it.

(2) Where subsection (3) applies, the First-tier Tribunal must vary the property factor enforcement order (a) so as to extend, or further extend, the period within which any action required by the order must be executed, and (b) in such other manner as it thinks fit.

(3) This subsection applies where (a) the First-tier Tribunal considers, on the submission of the property factor or otherwise, that any action required by a property factor enforcement order has not been, or will not be, executed during the period within which the order requires the work to be executed, and (b) the First-tier Tribunal (i) considers that satisfactory progress has been made in executing the action required or (ii) has received a written undertaking from the property factor stating that the action required will be executed by a later date which the First-tier Tribunal considers satisfactory.

7. With regard to Section 21(1)(a) of the Act, the Factor, in its letter of 28 July 2017 does not set out any grounds by which the Tribunal can be persuaded to vary the PFEO. No judicial review proceedings have been served on the Tribunal either as a party to proceedings or as an interested party to proceedings affecting another party. Accordingly, the Tribunal is not of a mind to vary the PFEO by suspending it to a later date.
8. With regard to Section 21(1) (b) of the Act, the Factor, in its letter of 28 July 2017 does not refute the Homeowner's advice to the Tribunal that the PFOE has not been complied with and does not set out any grounds by which the Tribunal can be persuaded that the PFEO is no longer required. Accordingly, the Tribunal is not of a mind to revoke the PFEO.
9. With regard to Section 21(2) (b) of the Act, the Factor, in its letter of 28 July 2017 does not set out any grounds which satisfy the criteria set out in Section 21(3) of the Act. Accordingly, the Tribunal is not bound by Section 21(2) of the Act to vary the PFEO.
10. The Tribunal, having had regard to its powers in terms of Section 21 of the Act, then had regard to the terms of Section 23 (1) of the Act and Section 23 (3) of the Act. Section 23 (1) of the Act states:

"It is for the First-tier Tribunal to decide whether a property factor has failed to comply with a property factor enforcement order made by the First-tier Tribunal."

and Section 23(3) of the Act states:

"The First-tier Tribunal may not decide that a property factor has failed to comply with property factor enforcement order (a) unless the period within which the order requires any work to be executed has ended, or (b) if the First-tier Tribunal is satisfied, on the submission of the property factor or otherwise (i) that the property factor is unable to comply with the order because of a lack of necessary rights (of access or otherwise) despite having taken reasonable steps for the purposes of acquiring those rights, or (ii) that any action required by the order is likely to endanger any person."

11. The Tribunal, having no reason to dispute the Homeowner's advice to it that the PFEO has not been complied with and having no grounds before it to engage

Section 23(3) of the Act , determines, in terms of Section 23(1) of the Act that the Factor has failed to comply with the PFEO.

12. This decision is unanimous.

13. In terms of Section 23(2) the Tribunal must serve notice of this failure on the Scottish Ministers and accordingly, a copy of this Decision will be served on the Scottish Ministers.

Right of Appeal

In terms of section 46 of the Tribunals (Scotland) Act 2014, 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

Karen Moore

Karen Moore, Chairperson

Date 17 August 2017