

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Property Factor Enforcement Order (“PFEO”): **Property Factors (Scotland) Act 2011 Section 19(1) and (3)**

Chamber Ref: HOHP/LM/16/0146

5 Hillpark Grove, Edinburgh EH4 7AP
(“The Property”)

The Parties:-

Aylmer Edwin Millen, 5 Hillpark Grove, Edinburgh EH4 7AP
(“the Applicant”)

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD
(“the Factor”)

Tribunal Members:

David Bartos (Legal Member & Chairperson)
Colin Campbell (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal’s Decision of 31 January 2017 as corrected by Notice of Review dated 3 May 2017.

Decision

The Tribunal has decided to make a PFEO in terms of its Notice of Proposal dated 31 January 2017 with the exception of parts (2) and (3).

The decision of the Tribunal is unanimous

Reasons for Decision

1. In the Tribunal’s decision of 31 January 2017 it proposed to make a PFEO as follows:
 - (1) The Respondents shall, within two weeks of the notification to them of the order pay to the Applicant the sum of two hundred pounds sterling (£ 200.00);
 - (2) The Respondents shall within two weeks of the notification of this Order (1) provide a copy of Section 2 of the Code of Conduct for Property Factors to all of their employees whose employment requires or might involve contact with homeowners, drawing their express attention to section 2.1 thereof; and (2) lodge with the Tribunal a declaration on their notepaper from all of their directors and signed by them in the following terms:

"Declaration"

We confirm that each employee of Charles White Limited whose employment requires or might involve contact with homeowners has been supplied with a copy of Section 2 of the Code of Conduct for Property Factors and that their attention has been drawn expressly to section 2.1 of the Code."

- (3) The Respondents shall within two weeks of the notification of this Order lodge with the Tribunal a declaration on their notepaper from all of their directors and team leaders and signed by them in the following terms:

"Declaration"

We declare that we are aware that following the making of a complaint by a homeowner the letter containing our final decision on a complaint shall provide details on how the homeowner may apply to the Housing and Property Chamber of the First-tier tribunal for Scotland if he or she remains dissatisfied with the decision."

The Tribunal indicated that prior to making a property factor enforcement order, it would provide the parties with a period of fourteen days within which to make representations on its decision and the Notice of Proposal.

2. By e-mail dated 21 February 2017 the Applicant made detailed representations and sought a review of the Tribunal's decision of 31 January 2017 together with a hearing. A hearing on those representations took place on 20 April 2017. At the review hearing the Applicant indicated that he had not understood the hearing to cover representations in connection with the Notice of Proposal under the 2011 Act. Given the lack of clarity between the review procedure under the Tribunals (Scotland) Act 2014 and that under section 19(3) of the 2011 Act the Tribunal confined itself to review under the 2014 Act. The outcome of that procedure was notified to parties by Notice of Review dated 3 May 2017. The decision of 31 January 2017 was left unchanged apart from minor corrections in the narrative of the reasoning.
3. Thereafter the Applicant made written representations to the Tribunal in an e-mail dated 5 July and a separate document dated 4 August both 2017. These representations sought to challenge the outcome of the review of 3 May 2017.
4. In the light of rule 24 of schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, the Tribunal invited the parties to allow it to decide whether to make a PFEO without a hearing. The Applicant wished a hearing which was fixed.
5. In his letter to parties dated 2 August 2017 the Tribunal's case-work officer reminded parties that the purpose of the hearing would be to allow parties to comment on each other's representations and on why in the light of the decision of 31 January 2017 a PFEO should or should not be granted in terms of the Notice of Proposal or other terms. The Applicant did not lodge any written representation on that issue.

6. In the meantime by e-mail dated 21 February 2017 the Respondents' Miss Karen Jenkins indicated that action had been taken to implement what she saw as the "PFEO". This was that the Respondents had:
 - (1) credited the Applicant with £ 200 on his factoring account with them;
 - (2) circulated an e-mail to members of staff to comply with the first element of part (2) of the Notice of Proposal; and
 - (3) lodged declarations with the Tribunal in terms of parts (2) and (3) of the proposed PFEO.

The e-mail circular dated 21 February 2017 (with its attachment of Section 2 of the Code of Conduct) and the declarations from the directors (with their attachment of a statement of credit) were lodged with the Tribunal. Upon the hearing being fixed, Miss Jenkins indicated that she had no further written submission to make.

7. A hearing on the issue of whether the Tribunal should make a PFEO in terms of the Notice of Proposal was fixed for Friday 25 August 2017 at 10.30 a.m. at George House, 126 George Street, Edinburgh. The date, time and venue was intimated to parties by letter from the Tribunal's casework officer dated 1 August 2017.
8. At the hearing the Applicant appeared. Miss Jenkins appeared for the Respondents. The Tribunal explained to parties and the Applicant in particular that it was not open for the Tribunal to conduct a review of the review. The review process had been concluded and the only issues were those under section 19(3) of the 2011 Act, namely (1) whether the Tribunal remained satisfied that the Respondents had failed to comply with their duty under section 14 to comply with the Code of Conduct for Property Factors; and (2) if so whether the PFEO should be made in terms of the Notice of Proposal or in other terms.
9. The Applicant accepted that he had received a credit of £ 200 to his account but submitted that this should not be accepted as payment within 14 days as provided for in part (1) of the proposal. Miss Jenkins for the Respondents accepted that there had not been payment and indicated that there was no difficulty with part (1) of the Notice of Proposal being put into the PFEO. The Tribunal accepted the Applicant's submission. The giving of a credit which can extend well into the future does not amount to payment.
10. Turning to part (2) of the Notice of Proposal, the Applicant submitted that it still required to be contained in a PFEO. This was because the Respondents' e-mail of 21 February 2017 to "Charles White" was inadequate to demonstrate that all intended recipients, namely Respondents' employees whose employment required or might involve contact with homeowners, had received it. In short he submitted that the e-mail under the PFEO should require to name the employees individually and require the production of proof of receipts from the employees. He accepted that the directors had made the declarations lodged with the Tribunal but he submitted that the declaration for part (2) of the Notice of Proposal was discretionary as to how provision of Section 2 to employees was to be achieved.

11. The e-mail lodged with the Tribunal reads:

"From: Karen Jenkins [e-mail address]
 Sent: 21 February 2017 13.47 hrs
 To: Charles White, Edinburgh
 Subject: Decision from recent HPC case – Code of Conduct
 Attachments: Section 2 Code of Conduct.pdf

Good afternoon all,

As a result of a recent case raised with the HPC, we have been instructed to provide a copy of section 2 of the Code of Conduct for Property Factors to all our employees whose employment requires or might involve contact with homeowners, drawing express attention to section 2.1 thereof.
 Can you kindly read through the attached.

2.1 : You must not provide information which is misleading or false."

The e-mail has attached to it section 2 of the Code of Conduct.

12. For the Respondents Miss Jenkins explained that the e-mail of 21 February to "Charles White, Edinburgh" had been sent to every employee of the Respondents in their Edinburgh office, who covered all of the Respondents' activities in Scotland. It was important that all employees should see it as it was possible that all employees might have dealings with homeowners, including for example the receptionist or a cashier working in the accounts department. She had not asked for acknowledgement of receipt but the Respondents could re-run the exercise if necessary.
13. In terms of section 19(1)(b) and section 20 of the 2011 Act the Tribunal has a discretion as to the terms of the PFEO. Where it is non-monetary it must require the factor to execute such action as the Tribunal considers necessary. But for the actions of the Respondents as spoken to by Miss Jenkins – which the Tribunal accepted – a PFEO in terms of part (2) of the Notice of Proposal would have been necessary. The essence of the Applicant's insistence on it was that there was inadequate proof that all relevant employees had been provided with Section 2 of the Code of Conduct.
14. However declaration of the directors in the terms proposed in part (2) was proposed precisely to provide such proof from those in charge of and having responsibility for the Respondents. Accordingly while the Respondents have – perhaps understandably – acted prematurely, the Tribunal cannot see that it is necessary to have a re-run of the notification process as sought by the Applicant. The e-mail as explained by Miss Jenkins, with its attachment and as verified by the directors' declaration has achieved the purpose sought in the Notice of Proposal, namely that the employees be made aware of Section 2 of the Code so that breaches similar to that which occurred in this case are not repeated.

15. With regard to part (3) of the Notice of Proposal, the Applicant accepted that the directors' declaration had been lodged with the Tribunal and did not insist on this being in the PFEO.
16. In conclusion the Tribunal exercised its discretion to make a PFEO in terms of part (1) of the Notice of Proposal only, finding parts (2) and (3) to be in the circumstances unnecessary for the reasons stated above.

Property Factor Enforcement Order

The First-tier Tribunal hereby makes the following PFEO:

The Respondents shall, within two weeks of the notification to them of this Order, pay to the Applicant the sum of two hundred pounds sterling (£ 200.00).

Under Section 24(1) of the Property Factors (Scotland) Act 2011, a person who, without reasonable excuse, fails to comply with a property factor enforcement order commits an offence.

Appeals

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 and Chairperson

___30 August 2017_____ Date