

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier tribunal for Scotland (Housing and Property Chamber)
("the tribunal")

Decision: Property Factors (Scotland) Act 2011 ("the 2011 Act"), Section 23(1)

Chamber Ref: FTS/HPC/PF/17/0223

3A Jerviston Court, Motherwell, ML1 4BS
("The Property")

The Parties:-

Mr William Tweedie, 2 Kilnwell Quadrant, Motherwell, ML1 3JN
("the Applicant")

Apex Property Factor Limited, 46 Eastside, Kirkintilloch, East Dunbartonshire,
G66 1QH
("the Respondent")

Tribunal Members:
Susanne L M Tanner QC (Legal Member)
John Blackwood (Ordinary Member)

DECISION

1. The tribunal decided that the Property Factor has failed to comply with a Property Factor Enforcement Order ("PFEO") made by the tribunal on 5 March 2018.
2. The tribunal will serve notice of the failure on the Scottish Ministers.
3. The tribunal's administration will report the Property Factor to Police Scotland for investigation of a potential criminal offence in terms of Section 24 of the 2011 Act.
4. The decision of the tribunal is unanimous.

STATEMENT OF REASONS

Property Factor Enforcement Order ("PFEO")

5. The tribunal made a PFEO on 5 March 2018 in terms of Section 19(3) of the 2011 Act, requiring the Property Factor to execute specified actions and make

specified payments to the Homeowner, within the period of 30 days of intimation of the PFEO, as follows:

- a. Register with Registers of Scotland a Discharge of the Notice of Potential Liability for Costs in terms of Section 12 of the Tenements (Scotland) Act 2004 by Apex Property Factor Limited dated 16 December 2016 and registered 19 December 2016 relative to the Property (Title number LAN33107); and provide documentary evidence to the tribunal of its removal from the Title Sheet of the Property by the Keeper of the Register.
 - b. Pay to the Applicant the sum of £678.70 in respect of the cost of professional legal services and outlays relating to the abortive sale of the homeowner's property as detailed in invoice number 2017122 from Freelands Solicitors Estate Agents dated 12 January 2017; and provide documentary evidence of said payment.
 - c. Pay to the Applicant the sum of £663.60 in respect of the cost of professional legal services and outlays provided to the Applicant homeowner for all work in connection with the dispute with the Respondent Property Factor (as detailed in invoice number 20171171 from Freelands Solicitors Estate Agents dated 16 November 2017); and provide documentary evidence of said payment.
 - d. Pay to the Applicant homeowner the sum of £250 in respect of the time, distress, worry and inconvenience occasioned by the Factor's failure to carry out its property factor's duties and to ensure compliance with its duties under the Code; and provide documentary evidence of said payment.
6. The PFEO and decision of the tribunal of the same date were intimated to the parties on 8 March 2018. The period for the actions to be executed and payments to be made was by 9 April 2018.

Applications for Permission to Appeal to the Upper Tribunal

7. On 16 April 2018, the Property Factor sought permission from the tribunal to appeal to the Upper Tribunal the tribunal's decision of 5 March 2018 to make a PFEO. The application was made out of time and no cause was shown for an extension of the 30 day time period.
8. On 14 May 2018, the tribunal refused the Property Factor permission to appeal to the Upper Tribunal, for the reasons outlined in the decision of the same date. The decision was intimated to the parties on 15 May 2018.
9. On 24 May 2018, the Property Factor sought permission from the Upper Tribunal to appeal to the Upper Tribunal the tribunal's decision of 14 May 2018.

10. On 5 June 2018, the Upper Tribunal intimated its decision to refuse leave to appeal the tribunal's decision of 14 May 2018, for the reasons stated in the Upper Tribunal's Decision.

Representations from parties

11. The tribunal's administration contacted parties after 9 April and provided pro forma letters for completion by parties, relative to compliance or otherwise with the terms of the PFEO; and invited parties to submit any requests to vary or revoke the PFEO.
12. On 17 April 2018 the Homeowner returned a completed pro-forma letter to the tribunal's administration stating that the actions required in the PFEO had not been completed by the Property Factor. He stated that he had not received any notification from the Property Factor that it had lifted the NOPL or received any monies awarded by the tribunal. The Homeowner stated that he did not want the tribunal to consider a variation or revocation of the PFEO.
13. The Homeowner's submission was intimated to the Property Factor.
14. There has been no response from the Property Factor to the Homeowner's submission.
15. The Property Factor did not return a completed pro forma to the tribunal in relation to compliance or otherwise with the PFEO.
16. The Property Factor has failed to provide the tribunal with documentary evidence of the removal of the Notice of Potential Liability ("NOPL") from the Title Sheet of the Property by the Keeper of the Register, as required by order (a) in the PFEO.
17. The Property Factor has failed to provide to the tribunal documentary evidence of payments to the Homeowner of £678.70, £663.60 and £250.00 as required by orders (b), (c) and (d) in the PFEO.
18. The Homeowner sent an enquiry to the tribunal on 3 July 2018 asking for an update on his case as he understood that there an application for permission to appeal had been made by the Property Factor to the upper tribunal but he had heard nothing further.

Decision in terms of Section 23 of the 2011 Act

19. The tribunal is satisfied that the 30 day period within which the PFEO of 5 March 2018 required actions to be executed and payments to be made to the Homeowner has ended, as required by Section 23(3)(a) of the 2011 Act. The PFEO and decision were intimated to parties on 8 March 2018 and the 30 day period ended by Monday 9 April 2018.

20. As the Property Factor's Application to the tribunal for Permission to Appeal was made out of time, and was refused, as noted above, and the application to the Upper Tribunal seeking permission to appeal was refused, no part of the period for compliance with the PFEO was suspended.
21. The tribunal considered the terms of Section 23(3)(b) of the 2011 Act. The tribunal is not satisfied that the Property Factor is unable to comply with the order because of a lack of necessary rights despite having taken reasonable steps for the purposes of acquiring those rights, nor that any action required by the order is likely to endanger any person, in terms of Section 23(3)(b) of the 2011 Act, no submissions or evidence having been submitted by the Property Factor to that effect.
22. As the tribunal is satisfied that the requirements of Section 23(3) of the 2011 Act are met, it is open to the tribunal to decide that the Property Factor has failed to comply with the PFEO in terms of Section 23(1) of the 2011 Act.
23. In the absence of submissions or the stipulated documentary evidence from the Property Factor that it has complied with any of the actions or made payments as specified in the PFEO, and taking into account the Homeowner's said submissions that the Property Factor has failed to comply with the PFEO, the tribunal finds that the Property Factor has failed to comply with the PFEO, in terms of Section 23(1) of the 2011 Act.
24. The tribunal must serve notice of the failure to comply on the Scottish Ministers, in accordance with Section 23(2) of the 2011 Act.
25. The tribunal will report the Property Factor to Police Scotland for investigation as to a potential criminal offence in terms of Section 24 of the 2011 Act.

Appeals

- 26. 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.**

S Tanner

Susanne L M Tanner QC
Legal Member

22 August 2018