

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Review Decision: First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, regulation 39

Property Factors (Scotland) Act 2011, Sections 20 and 23

Case Reference Number: FTS/HPC/PF/17/0381

The Property:

26 Jenning Gardens, Kilbirnie, North Ayrshire, KA25 7BF

The Parties:-

Marc Miller, 26 Jenning Gardens, Kilbirnie, North Ayrshire, KA25 7BF

("the Homeowner")

and

Cunninghame Housing Association Ltd

("the Factors")

Tribunal Members:

Adrian Stalker (Chairman)

Decision

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal"), on reviewing its decision of 14 September 2018 that "the Factors had failed to comply with the Property Factor Enforcement Order ('PFEO') issued on 8 June 2018, and that the Tribunal will serve notice of the failure on the Scottish Ministers, in terms of section 23(2) of the Property Factor (Scotland) Act 2011":

- a) determines that the Factors have still not complied with paragraphs 1 and 2 of the PFEO;
- b) decides to revoke paragraph 3 of the PFEO, under section 21(1)(b) of the 2011 Act;
- c) determines that the Factors have now complied with paragraph 4 of the PFEO.

Accordingly, the Tribunal amends the non-compliance decision of 14 September, so that it now reads:

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") determined that the Factors have failed to comply with the terms of paragraphs 1 and 2 of the Property Factor Enforcement Order ("PFEO") issued on 8 June 2018, and that the Tribunal will

serve notice of the failure on the Scottish Ministers, in terms of section 23(2) of the Property Factor (Scotland) Act 2011.

Reasons for Decision

Background

1. By a decision dated 7 April 2018, the Tribunal determined that the Factors had breached their duties in terms of section 17(1)(b) of the Property Factor (Scotland) Act 2011 ("the 2011 Act") in that they had failed to comply with the Code of Conduct for Property Factors as required by section 14(5) of the 2011 Act.
2. As required by section 19(2) of the Act, the Tribunal issued a Notice of a Proposed PFEO. It did so on the same date as the said decision and invited representations thereon within 14 days of the Notice being received by the parties. It then issued a final PFEO, in the same terms as the proposed PFEO, on 11 May 2018. The PFEO required the Factors, within 8 weeks, to carry out five distinct actions, and produce confirmation that they had done so for consideration by, and to the satisfaction of, the Tribunal.
3. After the final PFEO was issued to the parties in May, the Tribunal received no contact from the Factors, to confirm whether they had complied with the PFEO. By contrast, it received emails from the Homeowner, in particular an email of 8 August, in which he confirmed that the Factors had complied with paragraph 5 of the PFEO, but had not complied with paragraphs 1, 3 and 4. Paragraph 2 was not within the Homeowner's knowledge.
4. In terms of Section 23 of the 2011 Act, the Tribunal issued a non-compliance decision on 14 September 2018. On the basis of the information submitted by the Homeowner and in the absence of any further response from the Factors, the Tribunal was satisfied that the Factors have failed to comply with paragraphs 1, 3 and 4 of the PFEO. Given that failure, and in the absence of any assurance from the Factors to the contrary, the Tribunal also found that the Factors had not complied with paragraph 2 of the PFEO.
5. By a letter dated 27 September, the Factors' Director of Property Services, Mr Stephen Good, sought a review of that decision. In terms of rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, that request was intimated to the Homeowner. He submitted written representations in a letter dated 12 November, attached to his email of 15 November.
6. The Tribunal fixed a hearing in respect of the review request, on 10 December, 2018. The Homeowner was content to rely on his written representations alone, and did not attend the hearing. As was the case at the original Tribunal hearing on 6 March, the Factors were represented by Mr Good, who was accompanied by Mr Stuart Ross, a Factoring Officer employed by the Factors. Mr Ross assisted in the clarification of Factors' position, where necessary.

7. The Factors' letter of 27 September sets out the 5 paragraphs of the PFEO, and comments on each paragraph, stating "the actions taken and the information provided". At the end of the letter, Mr Good states: "I hope this matter can be deemed to have been resolved and the determination of the tribunal and the PFEO has been fully complied with."
8. Accordingly, the Tribunal understands that the Factors seek a review of the non-compliance decision of 14 September 2018, because they say that, contrary to that decision, they have complied with paragraphs 1-4 the PFEO.

Paragraph 1 of the PFEO

9. Paragraph 1 of the PFEO required the Factors:

1. To issue to the Homeowner an accurate and comprehensive Statement of Services, in writing, which complies with section 1.1b of the Code of Conduct for Property Factors, making reference where necessary to the relevant provisions within the Deed of Declaration of Conditions ("the Deed of Conditions"), registered on 30 September 2009, by the Factors, as owners of the development of which the property forms part, which Statement of Services describes the Property Factor's responsibilities and duties, and accurately sets out, in particular, any arrangements for funds for specific projects or cyclical maintenance in relation to the prospective costs for renewal or replacement of the CCTV system and Play Area, or any other part of the "Development Common Parts", confirming the amount, payment and repayment of charges (at change of ownership or termination of service), all in accordance with the detailed terms of section 1 of the Code.

10. In the letter of 27 September, Mr Good stated:

Attached is our written statement of services (appendix 1). I have also attached a letter to Mr Miller (appendix 2) which outlines the prospective costs for renewal or replacement of the CCIV system and play area.

11. Appendix 1 is the written statement of services which was produced to the Tribunal at the original hearing. No new statement has been prepared by the Factors. Accordingly, their current statement still erroneously refers to part 1.1a of the Code of Conduct, rather than part 1.1b. The significance of this distinction was explained at paragraphs 11 to 15 of the Tribunal's decision of 7 April.
12. Rather than revising the statement of services, and providing this to the Homeowner (which statement could then be provided to other homeowners in the development), the Factors chose simply to write to the Homeowner on 28 August (after the time for compliance with the PFEO had expired), giving information as to the cost of the maintenance and replacement of the play area and CCTV. In the Tribunal's view, that does not amount to compliance with the Code, or paragraph 1 of the PFEO. The Factors' written statement of services, provided to Mr Miller and the other homeowners in the development, is erroneous. It proceeds on a misunderstanding as

to which paragraphs of part 1 of the Code apply. That should have been corrected, given the terms of the Tribunal's order. That has not happened.

Paragraph 2 of the PFEO

13. Paragraph 2 of the PFEO required the Factors:

2. To arrange for an interest-bearing account or accounting structure to be put in place, for each group of homeowners paying charges in respect of the prospective costs for renewal or replacement of the CCTV system and Play Area, all in accordance with paragraph 3.6b of the Code.

14. The Tribunal's reason for imposing this requirement was set out at paragraphs 16-26, and 31 of the original decision.

15. As to this matter, Mr Good's letter of 27 September said:

The Association has in place within its management accounting system a separate account for the Jennings Gardens development. This in turn is broken down into the various service charges and replacement funds. All payments in respect of Jennings Gardens are recorded to this account and all expenditure is recorded against these separate headings to allow reconciliation and the operation of service equalisation. Appendix 2 shows the income recorded against each service area including the replacement funds for the CCIV system and play area.

16. Mr Good gave further information at the hearing as regards the accounting system. He said that there was a "cost centre" for the money collected in respect of play area and CCTV replacement. It was separately accounted for. It was possible to say, looking at the accounts, how much the Factors have collected.

17. Mr Good also argued that the requirement to open up a separate, interest bearing account, for the money collected in respect of play area and CCTV replacement would impose a pointless burden on the Factors. In the current financial climate, the interest would be minimal. It would be exceeded by the administrative costs in setting up and running a separate bank account.

18. He also argued that the adjective "interest-bearing", in paragraph 3.6b of the Code, applied only to the noun "account", and not to: "accounting structure". As the Factors had an "accounting structure", there was no obligation under that paragraph for it to be "interest-bearing".

19. The Tribunal observes that, as with paragraph 1 of the PFEO, the Factors have taken no action, since the proposed PFEO and the final PFEO were issued in April and May 2018, to address this paragraph of the PFEO. In respect of paragraph 2, Mr Good's position at the hearing was, in effect, that the arrangements that were in place at the time of the original hearing in March were compliant with the Code. Accordingly, his argument would clearly have been appropriate to a request to review the original decision, or could have been made, in an appeal against that decision. However, neither of those courses was taken by the Factors.

20. In any event, the Tribunal was not persuaded by the points made by Mr Good. Firstly, it is the Tribunal's view that paragraph 3.6b of the Code is correctly interpreted as requiring both an "account", and an "accounting structure" to be interest bearing. In the context of the paragraph 3.6b, it would make no sense to impose a requirement that an "account" had to be interest-bearing, but not an "accounting structure". Moreover, had the drafter of the paragraph intended the distinction suggested by Mr Good, one would expect the indefinite article to appear before "accounting structure" (i.e. "an interest-bearing account or [an] accounting structure").
21. Whilst the Tribunal had some sympathy with Mr Good's contentions regarding the efficacy of opening an interest-bearing account, it is a requirement of the Code. Where Factors have decided to maintain "a sinking or reserve fund", they must take in account, and comply with, the requirements of the Code, as regards the appropriate accounting arrangements, and giving information to the homeowners, in the statement of services. If those requirements are considered too onerous, then the Factors can decide against maintaining such a fund.
22. In the Tribunal's view the position adopted by the Factors at the original hearing, and at the hearing on the review application, amounts to insistence on operating a sinking fund without complying with the consequent obligations under the Code. The Factors have still not complied with paragraph 2 of the PFEO.

Paragraph 3 of the PFEO

23. Paragraph 3 of the PFEO required the Factors:

To make arrangements to ensure that the next factoring invoice issued to the Homeowner, and any further invoices in the future, set out the correct proportion, being one fiftieth, expressed as a percentage or fraction, of the management fees and charges for common works and services for which the Homeowner is responsible.

24. In the letter of 27 September, Mr Good stated:

As discussed at the tribunal the Association's software does not allow us to show a percentage breakdown on the invoice. Attached is an excerpt from the Deed of Conditions (Appendix 3) showing the proportion of charges liable as well as a written breakdown of total charges and the proportion charged to Mr Miller.

25. Attached to Mr Good's letter is a factoring invoice, issued to the Homeowner on 11 July 2018. As before, this erroneously shows the Homeowner's percentage share of various fixed charges as being "100". Again, this tends to indicate that the Factors have not, as yet, taken steps to address this part of the PFEO.
26. However, having heard from Mr Good, the Tribunal has decided, in respect of this part of the PFEO, to exercise its power to revoke part of the PFEO, under section 21(1)(b) of the 2011 Act: "(1) Where the First-tier Tribunal has made a property factor

enforcement order it may, at any time...(b) where it considers that the action required by the order is no longer necessary, revoke it”.

27. The Tribunal has decided to take this action for several reasons. Firstly, it considers that, in light of the history of this application, the Homeowner is now well aware that the figure of “100”, shown as his percentage share of the relevant charges, is a quirk of Factors’ software system, and that the Factors understand and accept that his share of those charges is 2%, not 100%.
28. Secondly, the Homeowner’s written submissions suggested that one way round this problem was for the Factors to provide “a suitable explanatory note until such times that the Association can invest in an appropriate alternative system.” During the course of the hearing, Mr Good confirmed that he would be prepared to implement that suggestion. Accordingly, he undertook on behalf of the Factors, to attach note to the invoices issued to Homeowners in the future, explaining why the invoice shows the wrong percentage share for fixed charges.
29. In these circumstances, the Tribunal considered that the action specified in paragraph 3 of the PFEO is no longer necessary, and decided to revoke that part of the order.

Paragraph 4 of the PFEO

30. This part of the PFEO required the Factors:

To provide to the Homeowner a detailed financial breakdown of the charges made in the Factors’ latest invoice rendered to him, and a description of the activities and works carried out which are charged for, all in accordance with paragraph 3.3 of the Code.

31. On this matter, Mr Good relied upon appendix 2 to his letter of 27 September relied being the aforementioned letter from the Factors to the Homeowner dated 28 August. In particular, he said:

Appendix 2 gives the breakdown of charges, a description of the works and activities undertaken charged for as well as a statement of income and proposed expenditure for replacement items.

32. For his part, the Homeowner stated, on this point:

...a detailed financial breakdown of the latest invoice has not been provided, contrary to the requirement of the first part of Paragraph 4 of the PFEO...

...at the Hearing, Mr Good stated that the contract documents, which were published via Public Contracts Scotland, regarding the maintenance of the common areas etc. would be made available. While I have not received this information, I continue to welcome this action as it would demonstrate the services that I can expect in return for the payment of the maintenance charges, fees etc. while succinctly meeting the terms of the second part of Paragraph 4 of the PFEO. I consider that the contract documents together

with the information supplied by the Association in their letter of the 27th of September has the potential to accord with the requirements of the second part of Paragraph 4 of the PFEO.

33. Here the Homeowner is referring to a “Ground Maintenance Schedule of Work Specification” attached to Mr Good’s letter, which sets out work to be done by the contractors in respect of the ground maintenance contract.

34. In the Tribunal’s view, the information provided by the Factors in the letters of 28 August and 27 September, and the documents attached thereto, provide sufficient information to the Homeowner to meet the requirements of paragraph 3.3 of the Code. It therefore finds that the Factors have established that they have complied with paragraph 4 of the PFEO.

Concluding remarks

35. The Tribunal accordingly refused the application for review in respect of paragraphs 1 and 2 of the PFEO. It revokes paragraph 3 of the PFEO. It accepts that the non-compliance decision should be amended on review, to reflect the fact that the Factors have now complied with paragraph 4 of the PFEO.

Adrian Stalker

Legal Member and Chair

9 January 2019