

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision

of

the Housing and Property Chamber of the First-tier Tribunal for Scotland

(Hereinafter referred to as “the Tribunal”)

Under Section 21(2) and 23 (1) of the Property Factors (Scotland) Act 2011

Chamber Reference Number: FTS/HPC/PF/17/0142

Re:- Property at 21 Rankin Court, Greenock, PA16 9AZ (“the Property”)

The Parties:-

Thomas Kane, 21 Rankin Court, Greenock, PA16 9AZ (“the Homeowner”)

River Clyde Homes (a company limited by guarantee), Roxburgh House, 102-112 Roxburgh Street, Greenock, Inverclyde PA15 4JT (“the Factor”)

Tribunal Members:-

David Bartos (Legal Member and Chairperson)

Sara Hesp (Ordinary Member)

NOTICE TO THE PARTIES

The Tribunal :

- (1) varies the Property Factor Enforcement Order reference FTS/HPC/PF/17/0142 in respect of the Property dated 9 October 2017 by for the words “within one month of the notification to them of this Order” substituting the words “by no later than 15 January 2018”

(2) decides that the Respondents have failed to comply with parts (2) and (3) of the said Order;

(3) decides that the said Order (as varied) remains to be complied with.

Reasons

1. On or about 16 October 2017 the parties were issued with a Property Factor Enforcement Order (“PFEO”) in relation to the Property. There has been no appeal against the PFEO.

2. By letter dated 31 October 2017 from the Tribunal the Factor was notified of the opportunity of applying for a certificate of compliance with or a revocation of, the PFEO. By letter and form dated 20 November 2017 the Factor applied to the Tribunal for a certificate of compliance. This was founded on documentation supplied by the Factor to the Tribunal by e-mail dated 6 October 2017.

3. By form dated 20 November 2017 addressed to the Tribunal, and by his letters dated 13 October and 22 October 2017 the Homeowner contended that the Factor had failed to comply with the PFEO.

Extension of Time

4. A decision on whether there has been compliance with a property factor enforcement order is made under section 23 of the 2011 Act. Before it is made the Tribunal must apply its mind to the provisions of section 21(2) to (4) of the 2011 Act. These provide:

“(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.

(4) References in this Act to a property factor enforcement order or to action required by such an order are, where the order has been varied under this section, to be treated as references to the order as so varied or, as the case may be, to action required by the order as so varied.”

The purpose of these provisions is to avoid the making of unnecessary decisions of failure to comply under section 23 where there is every reason to believe that compliance will be achieved. That being the case whether there has been “satisfactory progress” must be assessed at the time that the Tribunal makes its decision.

Part (1)

5. With regard to part (1) of the PFEO, the Factor submitted :

- an e-mail of 19 September 2017 from Graham McDowall to Russell Smith, the Factor’s Environmental and Caretaking Manager asking him to confirm whether, following on from the proposed PFEO, the existing planter had been moved
- a response from Mr Smith to Mr McDowall also of 19 September 2017 which stated:

“I can confirm that the planter was moved this afternoon. I was on site with the team when it was done.”.

In addition the Homeowner with his letter of 13 October 2017 enclosed a photograph showing the repositioning of one planter.

6. In the light of this evidence, the Tribunal had no difficulty in accepting that the Factor moved one planter on or about 19 September 2017 to the position shown in the photograph of 13 October 2017.

7. However part (1) of the PFEO provided that while one planter was to be moved to protect a certain utility cover, two other planters were to be moved in order to “maintain adequate protection for the [pedestrian area adjacent to the right or south elevation] from the passage of vehicles”. It is apparent from the Factor’s submission that only one planter has been moved. There has therefore been non-compliance with part (1) of the PFEO.

8. With regard to the first planter, part (1) of the PFEO provided that it be moved “to provide adequate protection from the passage of vehicles for the utility cover situated adjacent to the right or south elevation of the tower block Rankin Court, Greenock (and now or at one time marked with a single red cone)”.

9. The Homeowner, in his annotations on the photograph of 13 October 2017 submitted that the cover had still been left exposed to vehicles despite the move of the planter. The Factor submitted that it was happy to visit the site again and re-position the planters but suggested that this is done jointly with “TARA” (the Tenants’ and Residents’ Association ?), and ideally the Homeowner.

10. The Homeowner’s photograph of 13 October 2017 could be compared with the fifth (un-numbered) photograph produced by the Homeowner with his application for the hearing on 9 August 2017 showing a single red cone. The photograph of October 2017 indicated that the planter had been moved between the utility cover and the elevation of the building. This still left a substantial part of

the utility cover exposed to a lorry passing over it and damaging it. In these circumstances the Tribunal found that there had been non-compliance with part (1) in relation to the first planter also.

11. Had satisfactory progress been made towards compliance with part (1) of the PFEO ? There had been movement of one of the planters. The Factor acknowledged that it was still willing to visit the site and re-position all 3 planters in co-operation with homeowners' representatives and preferably with the Homeowners. That seems sensible. In these circumstances the Tribunal found that satisfactory progress had been made in respect of part (1) of the PFEO.

Part (2)

12. The Tribunal noted that part (2) of the PFEO required the Factor to provide to the Homeowner the quarterly invoices that were due to be issued on 1 March 2017 and 1 June 2017 with said invoices to include the quarterly management fee for the core services provided by the Factor ending in the 3 month period before the date that the invoice was due to be issued. This was to be done within 1 month of the notification of the PFEO.

13. The Factor did not submit that any such invoices had been provided. Rather in an e-mail to the Tribunal dated 6 October 2017 the Factor's Mr McDowall wrote:

"I have attached the consultation documents that were circulated to the circa 1900 River Clyde Homes factored owners. . . I do not have anything else that I personally can provide you on this matter. . ."

This e-mail was supported by a questionnaire document which appeared to have been issued to all of the Factor's customers and not just the ones at 21 Rankin Court. The Factor's position appeared to be that because of this consultation it was entitled to disregard parts (2) and (3) of the PFEO.

14. The Homeowner submitted that for the year 2017 he had received from the Factor only invoices dated 14/01/2017 and 22/02/2017, and eventually that dated 30/03/2017. He had only found out about yearly payments after receiving these bills. He produced to the Tribunal the bill dated 30/03/2017 with “management fee” for 1. 1. 2017 to 31. 3. 2017 (15 months) and also an “annual service charge” for 1. 1. 2017 to 31. 3. 2017 (15 months). There had therefore been non-compliance with part (2) of the PFEO.

15. The Tribunal noted that there had been no apparent attempt by the Factor to comply with parts (2) or (3) of the PFEO. These elements of the PFEO had been imposed for the reasons set out in paragraphs 32 and 33 of the Tribunal’s decision which had been issued on or about 21 August 2017. The Tribunal’s reasoning that quarterly bills were a reasonable standard for implementation of the Factor’s duty to bill homeowners was based both on the Factor’s e-mail to the Applicant on 9 December 2016 and the Factor’s stage 2 resolution letter dated 17 January 2017 to which its Mr McDowall adhered at the hearing.

16. In these circumstances the Tribunal found it inexplicable why no attempt had been made by the Factor to issue the invoices as ordered. It was clear on any view that no progress at all had been made towards compliance with parts (2) and (3) of the PFEO. In these circumstances there was no scope for an extension of time. Instead the Tribunal found that there had been a failure to comply with those parts of the PFEO.

14. The Tribunal also found the Factor’s approach to seeking a change from quarterly billing to be based on a fundamental misconception. The Factor’s contract appears to lie with the community of homeowners in the tower block 21 Rankin Court. The contract is expressed at least in part in the written statement of services issued to those homeowners (and not others). The Tribunal failed to see how any customer who was not a homeowner in that block could determine what the service provided by the Factor to homeowners in that block should be. So far

as decision-making between the homeowners at 21 Rankin Court is concerned, and any possible alteration of the written statement of services in response to the Tribunal's decision, the Tribunal reserved its views on such matters which did not arise in this case.

Conclusion

15. In these circumstances the Tribunal was not persuaded to grant a certificate of compliance of the PFEO. With regard to part (1) of the PFEO the Tribunal decided to allow the Factor a further period of time with which to comply. It might be helpful to both parties and save further time and dispute if they could co-operate in deciding the exact location to which the three planters are to be moved.

52. The decision of the Tribunal set out above was unanimous. Notice of the decision will be served on the Scottish Ministers. The Factor is reminded that a person who without reasonable excuse fails to comply with a property factor enforcement order commits a criminal offence.

Right of Appeal

The parties may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission. All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016.

Signed ..

.. 4 December 2017

David Bartos, Chairperson