

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(3)

Chamber Ref: HPC/LM/22/0360

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

The Parties:

Aylmer Millen, 5 Hillpark Brae, Edinburgh, EH4 7AP (“the Homeowner”)

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

Tribunal Members:

Josephine Bonnar (Legal Member)

John Blackwood (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal’s Decision of 20 June 2022

Decision

The Tribunal determined that it should make a PFEO in the terms originally proposed by it.

The decision of the Tribunal is unanimous.

Reasons for decision

In the Tribunal’s decision of 20 June 2022, it proposed to make a PFEO as follows:

- (1) The Tribunal order the Property Factor to provide the Homeowner with a response to his enquiry dated 3 January 2022 regarding the invoice issued in relation to the drainage work, within 28 days of intimation of the PFEO.

The Tribunal indicated that prior to making a PFEO, it would provide the parties with the opportunity to make representations under section (Scotland) Act 2011 (“the 2011

Act"). The Tribunal's decision was intimated to the parties. On 21 July 2022, the Property Factor notified the Tribunal that they had no objection to the proposed PFEO. They also submitted a copy of an email sent to Mr Millen, also dated 21 July 2022. This email provides a response to the Mr Millen's email of 3 January 2022 and includes an apology for the delayed response.

On 20 July 2022, Mr Millen sent an email to the Tribunal stating that he wished to "apply for a review under Section 19(2)(b) of the 2011 Act of the proposed property factor enforcement order (PFEO)". The Tribunal sought clarification of the request. Mr Millen was asked to confirm whether he was seeking a review of the decision in terms of Rule 39 of the Procedure Rules, or simply making representations regarding the terms of the proposed PFEO. In his response dated 7 August 2022, Mr Millen apologised for any confusion caused and confirmed that he was "making representations in terms of Section 19(2) of the 2011 regarding the decision of the Tribunal to propose a PFEO in the terms indicated". He did not comment on the correspondence submitted by the Property Factor.

Section 19 of the 2011 Act states-

- (1) The First-tier Tribunal must, in relation to a homeowner's application referred to it under section 18(1)(a), decide-
 - (a) Whether the property factor has failed to carry out the property factor duties or, as the case may be, to comply with the section 14 duty, and
 - (b) If so, whether to make a property factor enforcement order.
- (2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so –
 - (a) Give notice of the proposal to the property factor, and
 - (b) Allow the parties an opportunity to make representations to it."

The Tribunal considered Mr Millen's written representations. Although the email of 7 August 2022 indicates that Mr Millen's representations relate to proposed PFEO, the submissions do not specifically address the terms of the proposed order or indicate whether a PFEO should be issued in different terms or not issued at all. Instead, Mr Millen raises several issues regarding the written decision with statement of reasons and challenges the Tribunal's determination of the application. He concludes by stating that he had not been given the opportunity to question the Property Factor's evidence at the hearing, that the Tribunal had not applied the relevant law and that the Tribunal had taken the wrong approach, had not asked the right questions, had taken account of manifestly irrelevant considerations, and had arrived at a decision which no reasonable Tribunal could have properly reached. For these reasons, Mr Millen states that the Tribunal should re-visit the terms of the proposed PFEO.

The Tribunal is satisfied that the purpose of Section 19(2) of the 20122 Act is to allow parties to comment on the terms of the order which is being proposed. A Homeowner might take the view that the order does not properly compensate them for the failures which have occurred or penalise the Property Factor. A Property Factor might argue that it is too harsh. Parties might also suggest alternative terms or state that no order is appropriate. Mr Millen does not do this. He makes no comments about the terms of the order but argues that the decision itself is wrong. His submissions might be

relevant in an application for review or permission to appeal, but not in relation to section 19(2) representations.

Section 19(3) of the Act states, “If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the Property Factor has failed to carry out the property factor duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal **must make a property factor enforcement order**”.

The Tribunal is satisfied that the Property Factor failed to comply with its duties under section 14(5) of the Act in that it did not comply with OSP 11 of the 2021 Code of Conduct for Property Factors, when it failed to provide a response to an enquiry made on 3 January 2022 about an invoice issued in relation to drainage work. The Tribunal is also satisfied that the appropriate sanction should be a requirement that the Property Factor provide the information which was requested

The Tribunal determines that a PFEO should be issued in similar terms to the proposed PFEO.

Property Factor Enforcement Order

The First-tier Tribunal hereby makes the following PFEO:

- (1) The Tribunal order the Property Factor to provide the Homeowner with a response to his enquiry dated 3 January 2022 regarding the invoice issued in relation to the drainage work, within 28 days of intimation of the PFEO.

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 a 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.

Josephine Bonnar, Legal Member
28 August 2022