

Housing and Property Chamber

First-tier Tribunal for Scotland



Statement of Decision under Rule 38(3) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (contained in Schedule 1 of the Chamber Procedure Regulations 2017 (SSI No 328)) ("the Procedure Rules") in relation to a request for permission to appeal under section 46(3) (a) of the Tribunals (Scotland) Act 2014

In connection with

Chamber File Reference number: FTS/HPC/PF/19/0680

Re: Property at 553 Mossspark Drive, Mossspark, Glasgow G52 1QP

The Parties:

- **Mr John Garrett, 553 Mossspark Drive, Mossspark, Glasgow G52 1QP ("the Homeowner")**
- **Your Place Property Management Limited, Wheatley House, 25 Cochrane Street, Glasgow G1 1HL ("the Factor")**

Tribunal members: Graham Harding (chairing legal member); Andrew Taylor (ordinary member)

1. DECISION

The Tribunal refuses to give permission to appeal in terms of Rule 38 of the Procedure Rules. The decision of the Tribunal was unanimous.

2. BACKGROUND

- i. The Homeowner has sought permission to appeal the Tribunal's decision dated 19 March 2020 to issue a Certificate of Compliance in respect of the Property Factor Enforcement Order dated on 30 October 2019.
- ii. The email does not set out numbered grounds of appeal but identifies perceived criticisms of the facts and in some cases the law as recorded in the decision and in the reasons given by the Tribunal for its decision. The Tribunal has therefore had some difficulty in identifying what if any points of law the

Homeowner is seeking to appeal to the Upper Tribunal. In order to be as fair as possible to the Homeowner the Tribunal has categorised the Homeowner's application according to the headings used by the Homeowner and tried to summarise the Homeowners complaints and responded to them below.

- iii. When the Tribunal made its decision to issue a Certificate of Compliance on 19 March it was only aware that the Upper Tribunal had on 15 January 2020 refused the Homeowner's application for permission to appeal. It was not aware of any subsequent application by the Homeowner for further permission to appeal. It was subsequently advised by the Homeowner that a further appeal to the Upper Tribunal was pending and therefore the Tribunal by interim decision dated 19 May 2020 continued consideration of the Homeowners application for permission to appeal to await the decision of the Upper Tribunal.
- iv. The Homeowner had in fact sought a reconsideration of the Upper Tribunal's decision of 15 January 2020 under Rule 3(7) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016. The Upper Tribunal issued its decision in respect of that matter in its decision dated 24 June 2020. The Upper Tribunal refused to grant permission to appeal and dismissed the application.
- v. It is therefore appropriate for the Tribunal to now consider the Homeowners application for permission to appeal its decision to issue a Certificate of Compliance.

3. GROUNDS OF APPEAL AND REASONS FOR DECISION

The grounds of appeal founded upon by the Homeowner are as follows: -

i. Failed to consider representations

The Homeowner makes reference to issues regarding the address of the block in which the property is situated and the owner of number 557. The Homeowner criticised the Tribunal for issuing the PFEO on 30 October when it was aware that an application for permission to appeal had been made to the Upper Tribunal. The Homeowner then goes on to make reference to emails he sent to the Tribunal on 11and 14 February 2020 which were in the following terms:-

"The PFEO required the Factor to convene a meeting between all proprietors to progress common repairs. The meeting was held on 18 September 2019. On 17 October 2019, the Homeowner had cause to complain. He did not receive the minutes of meeting and he did not receive the tender specification contractors were required to price against. Type and colour of roof tiles, how many coats of paint etc. - Technical, materials and workmanship spec. The information requested remains outstanding to this day. On the pretext that the minutes were sent on 11

October 2019 as claimed by Susan Mackie why did Susan Mackie not respond to the Homeowner's email of 17 October 2019 in which he clearly stated that he had not received the minutes at that time. The Factor has not complied with the letter and spirit of the PFEO and seems quite happy for the Homeowner to do all the chasing around after wasting so much time of the Homeowner. The Factor is not performing. This is just ONE aspect of the Factor not complying with the PFEO. If you require a more comprehensive account of failure to perform at no cost I will request more time beyond Thursday of this week. I am a busy man".

and

"The actions required by the PFEO have not been completed. The Homeowner received last night an email of denial from Susan Mackie of YPPM Ltd for which she sought consideration. Reasons as follows:

- The Factor unreasonably expects payment up to £25,000 for exterior painting and new roof works without disclosing any specification.
- The Factor has failed to issue the minutes of meeting on time thereby creating a potential delay to the project (20 weeks late).
- The Factor has failed to issue a works specification for the works he proposes.
- The Complaint raised (ref: 2871760) by the Homeowner has not been properly investigated at any time.
- The Factor has been obstructive and evasive in his dealings with the Homeowner by refusing to answer the question put to him.
- The Factor consumes a lot of management time. The Homeowner has kindly provided the FtT with supporting information, which is attached for your perusal.

These are just some of the aspects for which the factor requires significant improvement in performance and behaviour to avoid wasting people's time."

The Homeowner goes on to state that the Factor had on 28 February 2020 resigned from acting as Factor as its business operations were not cost effective.

At paragraph 16 the Homeowner makes reference to his application before the Upper Tribunal and at paragraph 17 refers to the Tribunal in its decision of 19 March stating that the Homeowner had no further appeal with the Upper Tribunal pending.

The Homeowner then in paragraphs 20 to 28 sets out his arguments with regards to what he perceives as the failings of the Factor in tendering its resignation and the Tribunal in overlooking or withholding important evidence. He goes on to say that by convening a meeting it is irrelevant if the outcome was not satisfactory. He also takes issue with the sum awarded to him by the Tribunal.

The Homeowner also goes on to say that for a decision to be lawful the decision maker must not have exercised his discretion on the basis of irrelevant factors and must take account of all relevant factors.

The Homeowner suggests that the Tribunal refused to consider a variation or revocation of the PFEO in reaching its decision to issue a Certificate of Compliance. He goes on to say that failing to consider representations on the part of the Homeowner on the pretext of irrelevant factors was a lack of diligence on the part of the Tribunal resulting in the need for the Homeowner to make an application for permission to appeal.

The PFEO dated 30 October 2019 took account of the representations made by the Homeowner following the issuing of the proposed PFEO and corrected the clerical errors in the address of the block and the address of the owner at number 557 Mossspark Drive.

The Tribunal issued the PFEO on 30 October 2019 and received an email from the Homeowner on 5 November 2019 reconfirming his intention to make an application to the Upper Tribunal for permission to appeal.

In taking the decision to issue a Certificate of Compliance the Tribunal fully considered the representations made by both parties. It concluded that the issues raised by the Homeowner in his email of 11 February 2020 did not address whether or not the Factor had complied with the terms of the PFEO but rather raised fresh complaints against the Factor arising from the owners' meeting that had been the requirement of the PFEO. The Homeowner's email of 14 February 2020 detailed further alleged failings on the part of the Factor but again these were not part of the PFEO.

The Homeowner makes reference to the Factor resigning from office on 28 February 2020 with effect from 31 March 2020 as a breach of contract but fails to explain why this raises a point of law or where the Tribunal can be said to have erred.

The Homeowner goes on to suggest that the decision of the Factor, in conjunction with the First-tier Tribunal, to resign and to remove building insurance cover makes it clear that there appears to be a real possibility of bias to a fair minded and impartial observer. The Tribunal is at a loss to understand this assertion. There is no factual basis to the First-tier Tribunal having any involvement either in the Factor's resignation or in the insurance of the building.

In paragraph 23 the Homeowner suggests that the Tribunal erred in accepting confirmation by the Factor that it was aware of the current address of the owner of number 557 Mossspark Drive but the Homeowner has never asserted that this information was incorrect. The terms of the PFEO in this regard were that :-

"The Factor must confirm to the Tribunal and to the Homeowner in writing that it is aware that the owner of 557 Mossspark Drive, Mossspark, Glasgow does not reside there and that it knows the owner's home address and corresponds with him or her at their home address."

In correspondence the Factor confirmed that:-

"We can confirm that we are aware that the owner of 557 Mossspark Drive does not reside there and we correspond with them at their requested mailing address. In terms of the consent letters issued we can advise our process is to issue consent letters to the property address as well as any mailing address we have recorded on our system."

It was reasonable for the Tribunal to conclude that the Factor had complied with this part of the PFEO.

The PFEO required the Factor to convene a meeting of owners to discuss the remedial works that are required that are common to the property. The PFEO is quite explicit in its terms. It is accepted the meeting took place and discussed the remedial works required. Any issues raised at the meeting and the representations made by the Homeowner in his written representations of 11 and 14 February 2020

are irrelevant in determining whether or not the terms of this part of the PFEO have been met.

The Homeowner takes issue with the award of compensation made by the Tribunal in the PFEO but this was the subject of the original decision and PFEO for which permission to appeal has been refused both by the Tribunal and the Upper Tribunal. It is not the subject of further appeal at this stage of the proceedings. The issue before the Tribunal in whether to grant a Certificate of Compliance was whether or not the Factor had issued a cheque in payment to the Homeowner and it was satisfied this was the case.

The Homeowner does not make it entirely clear which irrelevant factors he considers the Tribunal have taken into account or indeed which relevant factors the Tribunal has failed to take into account in exercising its discretion in reaching its decision however the Tribunal wishes to make it clear that it fully considered the written representations made by the Homeowner in determining that it was appropriate to issue a Certificate of Compliance.

For the reasons given above the Tribunal finds that this ground of appeal raises no arguable point of law.

Leave to appeal is refused

ii. Serving repair notices to wrong address

The thrust of the Homeowners submissions in paragraphs 29-46 is that the Tribunal should not have accepted the written assurance of the Factor that it was aware that the owner of 557 Mossspark Avenue did not reside there and that it had a postal address for that owner. The Homeowner suggested that the Factor had incorrectly provided an address in the past and that this was evidence that the Tribunal should have taken into account. The Homeowner goes on to suggest that by accepting the Factor's position it exhibited bias.

The original decision of the Tribunal highlighted the problem with the address of the owner of 557 Mossspark Avenue and the PFEO made it clear that it was for the Factor to confirm that it was aware that it knew that the owner of 557 did not reside there and that it had a contact address for him. In its written representation to both the Homeowner and the Tribunal the Factor confirmed this was indeed the case. The Tribunal had no reason to doubt that the information provided by the Factor was incorrect nor did the Homeowner at any time offer any contrary evidence to suggest that it was incorrect following the decision and PFEO.

The Tribunal is therefore satisfied that it took all relevant factors into account and did not take any irrelevant factors into account in reaching its decision therefore any point of law raised is not arguable.

Leave to appeal is refused.

iii. Purpose of convening a meeting between proprietors

In paragraphs 47-58 the Homeowner argues that it was not sufficient for the Factor to convene a meeting of proprietors and goes on to state that the purpose of the meeting as set out in the PFEO was “to discuss remedial works that are required at the property.” The Homeowner goes on at paragraph 51 to express his understanding of what that would mean and that this went beyond having a meeting and included having explanations for each proposal, being given time for consultation and taking account of each owner’s response before a decision was made.

At paragraph 53 the Homeowner goes on to criticise the Tribunal for failing to consider inter-textual documents such as Deeds of Conditions, the Law of Agency, the Offer of Services and the track record of the Factor.

At paragraph 55 the Homeowner criticises the loose terms of the PFEO and claims that these are examples of bias that breach the reasonable expectations of the Homeowner.

At paragraph 56 the Homeowner makes reference to the Consumer Protection Act 2015 which he says gives Homeowners basic rights when they enter into contracts to supply a service and argues that the Tribunal failed to consider aspects of these rights with regards to time, cost and quality standards when placing objectives on the Factor by means of a PFEO.

At paragraph 57 the Homeowner states that there is a requirement for a written term of a decision/PFEO to be transparent and intelligible.

The purpose of convening a meeting of owners was to discuss the remedial works that were required to the common property in the block and nothing more. The terms of the PFEO in that regard were transparent, clear and intelligible. The Tribunal did not make provision in the PFEO for anything beyond a single meeting of owners and the Factor therefore any additional issues identified by the Homeowner above are beyond the terms of the PFEO and are not relevant. Similarly, in considering whether to grant a Certificate of Compliance the Tribunal would at that stage not be considering other documents such as the Deed of Conditions or the Written Statement of Services unless they were deemed to have a direct bearing on the terms of the PFEO which they did not. The law of Agency and the track record of the Factor were not considerations for the Tribunal unless they formed a specific part of the PFEO. The Tribunal is not aware of the Consumer Protection Act 2015. It anticipates the Homeowner may have intended to refer to the Consumer Rights Act 2015. The Homeowner failed to explain in what way the Act had any bearing on the specific terms of the PFEO and the Tribunal’s decision to issue a Certificate of Compliance. The Tribunal was satisfied that the Factor had complied with the specific terms of the PFEO. That did not indicate bias on the part of the Tribunal.

The ground of appeal raises no point of law. Leave to appeal is refused.

iv. Setting the correct level of compensation

The Homeowner sets out at paragraphs 59-76 his reasons for seeking a variation of the PFEO which were included in correspondence dated 12,13,19 and 26 February 2020. The Homeowner in said correspondence was concerned at the lack of progress on remedial works; the alleged failure of the Factor under the law of agency; further complaints not raised in the original application; a dispute regarding the minutes of the owners' meeting and further complaints regarding the Factor's handling of proposed remedial works. The Homeowner was also critical of the sum awarded by the Tribunal in its decision which he considered to be paltry and did not compensate him for neglect and nuisance or delay inconvenience and expense suffered by him over a number of years.

In the main the concerns raised by the Homeowner related to further issues arising from the ongoing discussions relating to future repairs as well as to his previous complaints which had already been decided by the Tribunal.

The Tribunal in issuing its decision stated it had taken account of the written representations of the Homeowner and had concluded that it would not be appropriate to vary the PFEO for the reasons given. The Homeowner was raising issues that which had either already been adjudicated on by the Tribunal or the issues raised were in effect new issues arising from the owners' meeting and were not addressing the specific terms of the PFEO. Although the Homeowner made reference in his correspondence to awaiting the outcome of an appeal to the Upper Tribunal the Tribunal was advised by its administration that the Homeowner's application for permission to appeal had been refused by the Upper Tribunal and no appeal was pending.

The ground of appeal raises no point of law. Leave to appeal is refused.

v. **Making a mistake about the meaning of the legislation**

In paragraphs 77-90 the Homeowner complains firstly that the Tribunal corrected a clerical error. This is assumed to be the correction of the block numbers and the address of the owner of 557 Mossspark Drive referred to in the PFEO. The Homeowner suggests that the errors in the addresses rendered the whole process unlawful. The Homeowner goes on to complain about the wording used to describe the Factor's failures to comply with its duties under Section 17 of the 2011 Act. The Homeowner then complains about the Tribunal's requirement to make written representations within 14 days of receipt of the proposed PFEO when such a time limit is not prescribed in Section 19(2) of the 2011 Act. In Paragraph 90 the Homeowner asserts that the disclosure of material facts and reasons do not stand up to scrutiny thus raising legitimate questions about fairness and due process.

As is clear from the wording of the PFEO issued on 30 October 2019 the Tribunal had taken account of the representations made by the Homeowner regarding the address of the block and the owner of 557 Mossspark Drive when issuing the final version of the PFEO.

The Homeowner had in his previous application for permission to appeal raised the issue of the Tribunal's wording in respect of the Factor's failures in respect of its duties. The Tribunal's decision was in standard terms and in the recent decision of the Upper Tribunal of 24 June this was confirmed to be unobjectionable.

Whilst Section 19(2) does not specify a time limit for allowing parties to make representations in regards to a proposed PFEO it cannot issue the PFEO until it has given parties an opportunity to make representations. It is therefore necessary for the Tribunal to set a reasonable period for any such representations. Furthermore, Rule 16A of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may regulate its own procedure.

The Tribunal in reaching its decision to issue a Certificate of Compliance considered the written representations of the parties insofar as they related to the issues to be considered namely whether or not the Factor had complied with the requirements placed upon it by the PFEO. In reaching its decision the Tribunal could not consider issues unrelated to the strict interpretation of the terms of the PFEO. The issues raised by the Homeowner have no bearing on the Tribunal's decision in this regard and are irrelevant. The Homeowner has failed to present any arguable case or that the Tribunal has erred in law.

The ground of appeal raises no point of law. Leave to appeal is refused.

APPEAL PROVISIONS

4. A party aggrieved by the decision of the tribunal may seek permission to appeal to the Upper Tribunal for Scotland on a point of law only. That party must seek permission to appeal within 30 days of the date the decision was sent to them. The request for permission to appeal must be in writing and you may wish to consult the Scottish Courts and Tribunals Service website which includes an application form with information on the details required.

A decision of the First-tier Tribunal relating to a permission to appeal request cannot be appealed or reviewed.

Chairing Legal Member of the Tribunal
Dated: 2 July 2020

