

Housing and Property Chamber

First-tier Tribunal for Scotland



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

STATEMENT OF DECISION in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016

Chamber Ref: HOHP/PF/16/0100

The Parties:-

Miss Christine Wilson residing at 7/3 Waverley Park, Abbeyhill, Edinburgh, EH8 8EU ("the homeowner")

And

Charles White Ltd. Citypoint 65, Haymarket Terrace, Edinburgh, EH12 5HD ("the property factor")

The Property:-

Subjects at 7/3, Waverley Park (and surrounding development), Abbeyhill, Edinburgh, EH8 8EW

Tribunal Members

Mr James Bauld (Legal Member)

Ms Ann Macdonald (Ordinary Member)

Decision

The tribunal determined that the property factor had failed to comply with certain duties arising from the Property Factors Code of Conduct ("the Code") and accordingly determined to make a Property Factor Enforcement Order.

Background

1. By application dated 16th July 2016 the homeowner applied to the Homeowner Housing Panel for a determination that the property factor had failed to comply with the various sections of the Code. In particular the homeowner alleged that the property factor had breached section 1, section 2.1, section 2.4, section 3.2, section 4.7 and section 7.2 of the Code.
2. After sundry procedure the application was referred to the First-tier Tribunal and a hearing was set to take place on 2nd February 2017 within George House, Edinburgh.

Hearing

3. A hearing took place before the tribunal at 2nd February 2017 at George House. The homeowner was not present at the hearing and had previously indicated she simply wished her written representations to be taken into account. It was a matter of agreement that the property factors were no longer instructed to act as factors for this property. They had been removed by the owners of the development following upon an appropriately conducted process. The property factors were represented at the hearing by three members of staff David Hutton, Marianne Griffiths and Georgina Ramsay. The hearing proceeded in the absence of the homeowner and the tribunal members asked various questions of the representatives from the property factor and considered the written evidence submitted by the owner .
4. The tribunal decided to take each of the alleged breaches in turn and questioned the various staff members from the property factor.
5. With regard to the first allegation which was the failure to issue the written statement of services as required by section 1 of the Code, the staff members of the property factors admitted that this had been an oversight. They accepted that the written statement of services had not been issued until September 2015 and they accepted that this was two years late. They accepted that the written statement of services should have been issued no later than October 2013. They indicated that they had provided an apology to the homeowner in this regard. However they accepted this was a clear breach of the Code.
6. The next allegation of breaches of the Code related to allegations that the property factors had breached sections 2.1 and 2.4 of the Code. These sections relate to the duty of property factors not to provide information which is misleading or false (2.1) and to have procedures which would enable them to consult with groups of homeowners and seek written approval before providing works or services which will incur charges or fees in addition to those relating to the Code (2.4). The homeowner was clearly concerned that some of the correspondence received from the property factor had been misleading, in particular in relation to the concept of joint and several liability relating to charges. The homeowner was also complaining that the property factors had appeared to introduce by means of their written statement of services a charge of £40 to be levied upon the termination of the property factors' agreement between the homeowners and the factors. The homeowner's position was that such a charge was not allowed in terms of the deed of conditions and that the written statement of services could not introduce fresh charges without agreement.
7. The property factors' representatives were questioned with regard to these allegations and indicated they found it difficult to answer the allegations that they had provided information which was misleading or false owing to a lack of specification by the homeowner. They indicated that they believed that they had addressed the various queries which the homeowner had raised. They did not believe that they had deliberately provided any information which was false or misleading. They indicated that their vast majority of correspondence with the homeowner related to her queries regarding the practice of spreading unrecovered debt from one homeowner amongst the remaining homeowners. That was a separate claim relating to a breach of the Code in section 4.7.
8. It was noted by the tribunal that there were emails from the property factor to the homeowner which seemed to acknowledge that previous correspondence had at least been incorrect. As an example, an email from Georgina Ramsay dated 21st August 2015 to the homeowner indicated that "*following a further investigation I can confirm that the deed of conditions does not state that all owners are joint and severally (sic) liable for all common charges. Please accept my sincere apologies for this miscommunication.*" Accordingly it seemed that the property factors had admitted that some of the information which had been provided to the homeowner had been misleading although their position was it had not been done deliberately. On being questioned by the tribunal with regard to the introduction of the termination fee the property factors' representatives' position was that this was the fee which they always charged. Their position was that when the Code was introduced in 2012 it was not meant to be about renegotiating everything which existed before then. It was to ensure that property factors were transparent in their dealings with homeowners. Their position was that this was a charge which had always been in existence and when they had issued the

written statement of services all they were doing was setting out the charges which had always been there and making it absolutely transparent to the homeowners that these charges would be made. They did not accept that they required to consult the homeowners before issuing the written statement of services which contained that charge. Their position was that the written statement of services was simply setting out the charges and manners in which they would deal with homeowners which had existed at the time the Act came into force.

9. The tribunal then turned to the complaints which had been raised by the homeowner in respect of the alleged breaches of sections 3.2 of the Code and 4.7 of the Code. These complaints related to the return of monies at the end of the property factors' engagement and the requirement to pursue debt prior spreading unrecovered debt amongst owners. The discussion with the property factors indicated that they had taken floats from each owner of up to £225. They did not hold that in a separate account. The float was used to pay for bills between invoice periods. It was not a contingency fund and was not held separately. The "spread" debt was a debt of £5,686.05 which was owed by one owner. They had taken action against that owner and held two decrees totalling that sum. They had placed a notice of potential liability on that owner's property in July 2014. They had written to all the owners indicating that they were taking action against this debtor. They took advice from solicitors and sheriff officers and were advised that pursuing sequestration would not be effective in recovering money as the particular owner had negative equity in their property. The property factors' position was that they had taken all reasonable steps to recover the debt and only when it was clear that it was irrecoverable did they take the step of spreading that debt amongst the remaining owners. The property factors' position was that they had not breached section 4.7 of the Code nor had they breached section 3.2. In particular with regard to the final accounting they took account of the individual float in respect of each homeowner and gave credit for that float in the final accounts. With regard to the particular homeowner it is noted that the final account remitted to her shows a credit for the float of £225 and that the final account shows that the property factors are claiming a final amount from the homeowner which totals £236.07 of which £196.07 was the spread debt. It was noted that the homeowner has paid the entire account with the exception of the £40 final administration fee which is still disputed.
10. The last alleged breach of the Code was the alleged breach of section 7.2. Section 7.2 of the Code deals with a duty on the property factors to have a complaints resolution procedure and indicates that when the in-house complaints resolution procedure has been exhausted, the letter which confirms the final decision should also provide details of how the homeowner may apply to the Homeowner Housing Panel (now the tribunal).
11. It was accepted by the representatives of the property factors that their letter of 5th September 2016 was to be treated as their final response to the complaint by the homeowner. It was accepted by them that there are no specific details provided in that letter of the contact details of the Homeowner Housing Panel nor were such details contained within the written statement of services. Accordingly the property factors' representatives accepted that there was a technical breach of the relevant section of the Code in that they did not provide details of how the homeowner may apply to the Homeowner Housing Panel.
12. The tribunal questioned the property factors' representatives on the matters which the homeowner wished the tribunal to determine. In particular the homeowner had requested that the tribunal in determining matters should resolve matters by crediting her account for the "improperly invoiced fee" of £196.07 and the £40 handover fee. The homeowner also suggested that a credit should be made to all other proprietors of the development for the same figures and that a compensation payment of £100 should be made to each homeowner. The homeowner also wished a formal apology.
13. The response from the Property factors' representatives was that the figure of £196.07 was a proper charge on the homeowner. They had properly applied their debt recovery procedures and they had correctly spread the debt. With regard to the £40 fee they indicated that was their standard administrative fee for the handover which covered the additional work involved. Their position was it was a transparent charge which had been intimated to the homeowner in the written statement of services. They also took the view that the tribunal could not make

any orders in respect of any homeowner other than the applicant and accordingly the tribunal had no power to make any general award of payment to others. They indicated that a compensation order for £100 would be punitive. With regard to an apology they indicated that they had already apologised by means of emails and letters dated 17th May 2016 and 24th September 2015.

14. The tribunal then concluded the hearing and thanked the various members of the property factors' staff for attending and for their assistance to the tribunal.

Discussion and Decision

15. After the hearing was concluded the tribunal considered the evidence which had been led. The tribunal considered the papers which had been lodged by the homeowner, the papers which had been lodged by the property factors and the evidence which had been heard by the tribunal members.
16. The tribunal took the view that the property factors had admitted that they had breached section 1 of the Code. They admitted that the written statement of services had not been served in accordance with the provisions of the Act and the Code. Accordingly there was a clear breach of the Code in this respect.
17. With regard to the allegations of the breaches of sections 2.1 and 2.4 of the Code. The tribunal members took the view that some of the communications which had been sent by the property factors to the homeowner had been misleading. This had been admitted in terms of the emails set out in paragraph 11 of this judgment. The tribunal took the view that the charge contained in the Written Statement had never previously been intimated to the owners. There had been no consultation about it. It was not a charge set out in the relevant title deeds nor did the written statement of services advise they were operating by custom and practice. Accordingly the tribunal took the view that there were breaches of paragraphs 2.1 and 2.4 of the Code.
18. With regard to section 7 of the Code, the tribunal took the view that the property factors had again admitted a technical breach of the Code in that they had not provided the homeowner with details of how to apply to the relevant tribunal.
19. With regard to the allegations of breaches of section 3.2 and 4.7 of the Code, the tribunal took the view that the property factor had not breached the Code in respect of these matters. The tribunal took the view that the property factors had prepared final accounts and had included relevant floats within those accounts. They were entitled to do so. Section 3.2 of the Code requires factors to return funds due to homeowners at the point of settlement of a final bill on a change of property factor. The tribunal also took the view that the property factors had a robust debt recovery procedure and had taken all appropriate legal advice prior to spreading the debt amongst homeowners. They had provided clear details of that advice from their lawyer at a meeting which had been held with the owners association. Accordingly the tribunal took the view there were no breaches of sections 3.2 or 4.7 of the Code.
20. The tribunal having decided that there had been breaches of the Code required to determine whether or not a Property Factor enforcement Order should be made. The tribunal took the view that a Property Factor Enforcement Order should be made and the terms of that order are attached. The tribunal regarded the failure to provide the Written Statement of Service within the timescales set out in the legislation as a serious breach of the Code. The tribunal took the view that the charge of £40 for additional costs of closing accounts and correspondence with new factor was not eligible to be charged because it was not included in the title deeds and the written statement of services did not advise that the factor was operating by custom and practice. The tribunal also found that the communication from the factor was not deliberately misleading however it was not clear and did mislead the applicant. The terms of the Property Factor Enforcement Order are set out in a draft document. The parties are invited to make representations to the tribunal in respect of this proposed order in

terms of section 19(2) of the Property Factors (Scotland) Act 2011. Such representations should be remitted to the tribunal within 14 days of the date of intimation of this decision.

Review of tribunal's decision

21. In terms of section 46 of the Tribunals (Scotland) Act 2014, a party 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.

J Bauld

James Bauld, Chairperson

Date

30 March 2017

G Williams

*SENIOR COURT ADMINISTRATION
TWEED CLOTHES ST
CAWDOR G21 3LA*

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Notice of Proposal to make a property factor enforcement order

in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016

Chamber Ref: HOHP/PF/16/0100

The Parties:-

Miss Christine Wilson residing at 7/3 Waverley Park, Abbeyhill, Edinburgh, EH8 8EU ("the homeowner")

And

Charles White Ltd. Citypoint 65, Haymarket Terrace, Edinburgh, EH12 5HD ("the property factors")

The Property:-

Subjects at 7/3, Waverley Park (and surrounding development), Abbeyhill, Edinburgh, EH8 8EW

Tribunal Members

Mr James Bauld (Legal Member)

Ms Ann Macdonald (Ordinary Member)

This document should be read in conjunction with the tribunal's decision under section 19(1)(a) of the Act on the same date.

The tribunal proposes to make the following Property Factor Enforcement Order

"The Tribunal order that the property factor makes a payment to the homeowner of the sum of £100 within four weeks of the date of this decision."

Section 19 of the 2011 Act provides as follows:

"... (2) In any case where the tribunal proposes to make a property factor enforcement order, they 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 them.

(3) If the tribunal are satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the tribunal must make a property factor enforcement order..."

The intimation of the tribunal's Decision and this notice of proposal to make a PFEO to the parties should be taken as notice for the purposes of section 19 (2) (a) of the Act and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19 (2) (b) of the Act reach the First-tier Tribunal's office by no later than fourteen days after the date that the Decision and this notice is intimated to them. If no representations are received within that timescale, then the tribunal is likely to proceed to make a property factor enforcement order ("PFEO") without seeking further representations from the parties

Failure to comply with a Property Factor Enforcement Order may have serious consequences and may constitute an offence.

J Bauld

 James Bauld, chairperson

30 March 2017

C McQuarrie

7 West George Street, Glasgow, G2 1BA

 SOLICITOR

Witness