

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision: Sections 44(1) (b) and 44 (2) (c) of the Tribunals (Scotland) Act 2014.

Chamber Ref: HOHP/LM/16/0162

11 East Barns Street, Clydebank, G81 1DA ("The House")

The Parties:-

**Mrs Ann McCormack,
11 East Barns Street, Clydebank, G81 1DA
(" the homeowner")**

**West Dunbartonshire Council,
Council Offices,
Garshake Road,
Dumbarton,
G82 3PU
(" the property factor")**

Members of the Tribunal:

Martin J. McAllister, solicitor, legal member and Ahsan Khan, ordinary member.

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the tribunal") considered matters and, following upon representations received from the property factor and the homeowner, Determined to set aside its Decision dated 20th March 2017 and served on parties on 27th March 2017. The tribunal made its Determination in terms of Section 44 (b) of the Tribunals (Scotland) Act 2014 and ordered that the Notice of Referral of the application to the tribunal be intimated to parties to allow them to make representations and thereafter for the matter to be considered by the tribunal in terms of Section 19 of the Property Factors (Scotland) Act 2011.

Background

On 20th March 2017 the tribunal determined to propose to make a property factor enforcement order and this was served on parties on 27th March 2017. As a consequence of representations made by the property factor the tribunal considered matters and on 8th May 2007 determined that it was considering setting aside its

Decision of 20th March 2017 in terms of Sections 43(2) (a) of the Tribunals (Scotland) Act 2014.

Parties were given the opportunity to make representations and a Hearing was fixed for 13th June 2017. The homeowner indicated that she did not want to attend the Hearing and the property factor indicated that if the homeowner was intending to attend the Hearing to address what the property factor stated to be its preliminary pleas then it would attend but otherwise would not attend.

Prior to the Hearing the tribunal determined that it would not be considering the substantive matters of the application or any preliminary pleas until it had determined whether or not it was setting aside its Decision of 20th March. It therefore conducted the Hearing based on the written representations.

The tribunal considered the representations contained in the homeowner's letter and the letter from West Dunbartonshire Council both dated 23rd May 2017.

The property factor made a number of representations which can be summarised as follows:

1. It had not been made aware of the substance of the application of the homeowner.
2. The property factor denies or is not aware of the application and Hearing prior to service of the Notification of the Decision dated 20th March 2017 and makes reference to Section 190 of the Local Government (Scotland) Act 1973.
3. The property factor stated that any legal proceedings should have been served on the Proper Officer of the Council.
4. There is a fundamental issue of jurisdiction and the Housing and Property Chamber should not be engaged in any dispute between the homeowner and West Dunbartonshire Council.
5. The property factor raised issues of ownership of the trees the removal of which initiated the application of the homeowner.
6. The property factor stated that the homeowner had not provided specification of why she considered West Dunbartonshire Council had been acting as a property factor.

The homeowner made a number of representations which can be summarised as follows:

1. The concerns which she had were raised with West Dunbartonshire Council and she produced copies of letters received from the Council. The matter was dealt with by Louise Lyons, the Customer Relations Officer Communications, Culture & Communities from the office of the Council at Aurora House, 3 Aurora Avenue, Queens Quay, Clydebank, G81 1BF.
2. The homeowner produced a copy of a letter from Stewart MacCallum, a Planning Officer of the Council dated 24th August 2016 which indicated that the matter was being referred to the Housing Section of the Council.
3. The homeowner produced copies of proof of posting dated 28th September 2016 and 21st November 2016 confirming that letters had been sent to the postcode G81 1BF.
4. The homeowner produced a copy of a letter which she had sent to West Dunbartonshire Council dated 27th September which contained the following:

"In relation to the lack of courtesy I would like to inform W.D. Council that my intentions are to apply to the Homeowner Housing Panel."

5. The homeowner produced a copy of a pro forma intimation in terms of The Property Factors (Scotland) Act 2011 dated 21st November 2016 which is addressed to West Dunbartonshire Council, Aurora House, 3 Aurora Avenue, Clydebank, G81 1BF.
6. The homeowner stated that she considered the office of the Council at 3 Aurora Avenue, Clydebank to have "an appointed officer who is competent and able to deal with all matters, including forwarding matters to head office otherwise what is the point of the building and staff being there."

The Tribunal administration confirmed that the Notice of Referral had been sent to both parties and that, in the case of West Dunbartonshire Council, it had been sent to Aurora House, 3 Aurora Avenue, Clydebank, G81 1BF. The administration confirmed that it had not been sent by recorded delivery.

Deliberations and Reasons

The tribunal noted that West Dunbartonshire Council had intimated that it would have preliminary pleas on the application. The tribunal considered that it did not have to consider these at this juncture. What it had to determine is whether or not it would be just to set aside its decision of 20th March 2017. West Dunbartonshire Council's position is that the Decision should be set aside because the Notice of Referral had not been served on its Proper Officer.

The tribunal considered that there are a number of matters raised by the parties that it would be useful to comment on but that the critical matter it had to decide was whether or not the Notice of Referral had been served on West Dunbartonshire Council whose position was that it had no knowledge of the application before the tribunal until it had received notification of the proposed property factor enforcement order. The tribunal considered that there was sufficient doubt on the matter to lead it to set aside its Decision of 20th March 2017. In coming to its view the tribunal did not require to have regard to the representations of West Dunbartonshire Council on whether or not the Notice of Referral had been served on a Proper Officer. The Notice of Referral had not been sent by recorded delivery mail and that fact cast sufficient doubt on whether or not West Dunbartonshire Council had received the Notice of Referral.

Further Procedure

The tribunal determined that, the Decision of 20th March 2017 having been set aside, the matter should be set down for further procedure. The property factor has had the application intimated to it. The Notice of Referral will be intimated to parties who will have the opportunity to make representations and to raise any preliminary matters if appropriate.

Note

The tribunal considered it appropriate to consider certain of the representations made by parties although such representations did not impact on its reasons for setting aside its Decision of 20th March 2017.

The property factor's position was clear in that it stated that, since matters had not been intimated to its Proper Officer, further procedure was incompetent and it referred to Section 190 of the Local Government (Scotland) Act 1973.

The tribunal considered the statutory provision referred to.

Section 190 of the Local Government (Scotland) Act 1973 refers to legal proceedings being served on the proper officer of a local authority. It states inter alia "Any legal proceedings against a local authority shall be deemed to have been duly served on the authority if served on the proper officer of the authorityshall be addressed to the local authority or to the proper officer and sent by post to the offices of the local authority.". Section 235 (3) of the 1973 Act states " Any reference in this Act to a proper officer and any reference which by virtue of this Act is to be construed as such a reference shall, in relation to any purpose and any local authority or other body or any area, be construed as a reference to an officer appointed for that purpose by that body or for that area, as the case may be."

The Tribunal administration had sent documentation addressed to the customer relations officer at the offices of West Dunbartonshire Council at Aurora House, 3 Aurora Avenue, Queens Quay Clydebank. This was the officer and the address that the homeowner had received correspondence from. The homeowner had communicated with that office and the Customer Relations Officer Communication, Culture & Communities. The tribunal considered that, had it been required to make a Decision on whether or not service of documents had been properly made on this Council Officer, it would have found documents to have been properly served. Ms Lyons had clearly been appointed by the Council to deal with matters such as those raised by the homeowner in terms of Section 253 (3) of the Local Government (Scotland) Act 1973.

The tribunal also considered that the requirements of Section 17 of the Property Factors (Scotland) Act 2011 had been complied with in as much as the homeowner had intimated to West Dunbartonshire Council that she intended to raise the matter with the then existing homeowner housing panel. She had also sent a pro forma intimation to the property factor setting out what she considered to be failures in its property factor duties.

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding

the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

M McAllister

Martin J. McAllister, Legal member
27TH June 2017