

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Notice of Variation and Revocation:

Property Factors (Scotland) Act 2011 Section 21(1)

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”), represented by Mrs C. Mullen, T.C. Young, solicitors, 7 West George Street, Glasgow G2 1BA

Tribunal Members:-

**David Bartos (Legal Member and Chairperson)
Sara Hesp (Ordinary Member)**

Decision

The Tribunal has decided first, to vary the Property Factor Enforcement Order in respect of the Property dated 9 October 2017 as varied by the decision of the Tribunal dated 4 December 2017 and that by in part (2) of said Order :

- (a) for “one month of the notification of this Order” substituting “two weeks of the notification of this Order as varied”;
- (b) between “which” and “were or were due to be issued” inserting “(a)”;
- (c) after the words “1 June 2017” inserting:
“(b) were or were due to be issued in the three month periods after 30 June 2017, 30 September 2017, and 31 December 2017 respectively, all”
- (d) between “quarterly” and “management fee for the core services” inserting “flat rate”;

(e) between “management fee” and “for the core services” inserting: “(however it may be named, for example such as a “service charge”);

And then, to revoke the whole of the Order (as twice varied).

The decision of the Tribunal is unanimous

Reasons

1. By letter dated 16 October 2017 from the Tribunal the Property Factor Enforcement Order (“PFEO”) dated 9 October 2017 was sent to the parties. It is referred to for its terms. It had three parts. Part (1) required the Factor to move certain planters. Part (2) required the Factor to issue to the Homeowner quarterly invoices to include the quarterly management fee for core services provided by the factor in arrears. Part (3) required the Factor to lodge documentation showing compliance with Part (2). There was no appeal against the PFEO. By amended decision dated 4 December 2017, the Tribunal varied part (1) of the PFEO to allow the Factor further time for compliance with that element. In the same decision dated 4 December 2017 the Tribunal found that the Factor had failed to comply with parts (2) and (3) of the PFEO. There was no appeal against that decision dated 4 December 2017. It is referred to for its terms.

Part (1) – Planters

2. Part (1) of the PFEO required the Factor to move three planters in order to protect a common area from the passage of heavy vehicles. As found in the decision of 4 December 2017, the Factor had moved the first of these. The Tribunal adopts its findings of fact in that decision in relation to the moving of the first planter.
3. With regard to the remaining two planters by e-mail to the Tribunal dated 15 December 2017 the Homeowner confirmed that these had been moved after the decision of 4 December and that part (1) of the PFEO had been complied with. The Tribunal accepted this confirmation and found there to be compliance with part (1) of the PFEO as amended.

Parts (2) and (3) – Invoices

4. The position with regard to compliance with parts (2) and (3) of the PFEO as amended was unsatisfactory. There had been a failure to comply with these parts of the PFEO. Indeed no attempt had been made by the Factor to comply with these parts by the deadline in the PFEO. Following the notification of the decision of 4 December 2017, the Factor made an attempt to comply with these parts. By letter dated 11 December 2017 to the Homeowner the Factor enclosed two quarterly invoices both dated 11 December 2017. These were :
 - No. 120773 for a “Homefact Management Fee” for 1 January to 31 March 2017 for £ 29.36 said to be payable “immediately”
 - No. 120774 for a “Homefact Management Fee” for 1 April to 30 June 2017 for £ 30.28 said to be payable “immediately”.The letter enclosing them stated that “no action is required as the management fees for the above periods have already been paid.” Copies of these invoices, but not the letter enclosing them were lodged by the Factor with the Tribunal on 19 December 2017. The Factor submitted that there had been compliance with the whole of the PFEO.
5. However in his letter to the Tribunal dated 15 December 2017 and enclosing the invoices and the letter, the Homeowner submitted that there had not been compliance with the PFEO. He gave two reasons. Firstly the two invoices left untouched an earlier invoice No. 116967 dated 30 March 2017 which covered the same services and covered a 15 month period from 1 January 2017 to 31 March 2018 (“the 15 month invoice”). Secondly the two quarterly invoices did not cover a “service charge” which had also been charged in the 15 month invoice. That was a fee for core services which should have been covered in the quarterly invoices.
6. The Tribunal recalled its decision of 15 August 2017 where it had found the Factor to be in breach of its factor’s duty to issue invoices to a reasonable standard by not issuing them quarterly in arrears for at least the standard service charge (paras.32 to 34). That decision was based on the Factor’s

acceptance that this was their practice, which had been made at the hearing which preceded that decision, in their Stage 2 response to the Homeowner's original complaint, and in their Mr Monaghan's e-mail to the Homeowner dated 9 December 2016. It appeared to the Tribunal that the aim of part (2) of the PFEO, namely to ensure that the Homeowner was indeed being issued with quarterly invoices for core services was being thwarted through the issue and continuance in force of an invoice requiring immediate payment for core services over a 15 month period, 12 months of which had still to run. Through the 15 month invoice it appeared at first glance that the Factor was obtaining free credit from the Homeowner. In addition that invoice was inconsistent with the Factor's submission at the original hearing as to the quarterly frequency of the invoicing.

7. In the light of this the Tribunal considered that it might be reasonable to vary the PFEO so that the breach of factor's duty could be properly dealt with. Accordingly the Tribunal issued a Direction dated 16 January 2018 which notified parties of a proposed variation of part (2) of the PFEO to take account of the issue of the 15 month invoice. The Direction was sent to parties on 24 January 2018. Parties were given two weeks to make written representations on the proposed variation. By e-mail dated 24 January 2018 the Homeowner advised that despite the terms of the 15 month invoice he had paid it in quarterly instalments with the final instalment being due in March 2018. By e-mail dated 5 February 2018 the Factor's solicitor Mr Walker requested an extension of the two week period to four weeks, to assist with investigations. He gave no reasons as to why a two week period had been inadequate to allow the Factor to ascertain what invoices had been issued and paid. He gave no indication of what investigations had been or required to be carried out. In these circumstances the Tribunal was not persuaded that it was in the interests of justice to have further delay and the request was refused.

Hearing

8. The direction indicated the possibility of a hearing in connection with the proposed variation and a hearing to consider it was fixed to take place at

Gamble Halls, 44 Shore Road, Gourock on 12 April 2018 at 10.00 a.m. The date and times of the hearing were intimated to the Homeowner and the Factor by e-mails from the Tribunal office dated 16 February 2018. Unfortunately these e-mails suggested that the hearing was to deal with the question of whether the Factor had failed to comply with the PFEO and did not mention the possible variation. In the event at the hearing both parties were prepared to deal with the possible variation.

9. The hearing took place on the date, time and venue fixed. The Homeowner attended the hearing. The Factor was represented by Claire Mullen of T.C. Young & Co., solicitors. The treasurer of the Rankin Court Tenants and Residents Association, John Robertson, and Wendy McDougall, the Factor's Finance Officer and Tricia McLaughlin, the Factor's Factoring Services Supervisor were also present.

Late Documents for the Factor

10. At the outset of the hearing the Tribunal observed that the productions (documents) for the Factor for use at the hearing had been lodged at the Tribunal's office on 6 April 2018. They were therefore late in terms of rule 22(1) of schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules"). Mrs Mullen, for the Factor submitted that the Tribunal should exercise its discretion to allow the documents to be admitted late. She was unable to explain why the lateness had occurred. Instead she founded on rule 3 of the Rules which provides that when exercising any power under the Rules or interpreting any rule, the Tribunal should give effect to the overriding objective in rule 2 of the Rules. That included seeking informality and flexibility of proceedings. She submitted that the documents produced were intended to highlight compliance by the Factor with both the existing PFEO (as varied) and the variation proposed by the Tribunal. Some documents had been sent to the Homeowner on 29 March. There was no prejudice to him in them being allowed in late. The Homeowner opposed the submission. He accepted that he had received from T.C. Young documents on 6 April 2018 and a copy of the productions received from the Tribunal on 10 April 2018. He said that

he had not had the chance to go over them. He had sought to give an initial response in his e-mails to the Tribunal of 9 and 10 April. He submitted that it would be unfair to allow the Factor a further extension. The Factor had failed to comply timeously with the PFEO, had been given a further extension and had not complied with the rule without reasonable excuse.

11. The Tribunal raised with Mrs Mullen whether she was in effect asking the Tribunal to use its duty under rule 3 to apply the overriding objective in interpretation, in order to interpret the word "must" in rule 22(2) as "may". Mrs Mullen confirmed that she was not making such a submission. In the Tribunal's view she was correct not to do so. "Must" has a peremptory flavour. The apparent purpose of rule 22(2) is to limit the discretion of the Tribunal in rule 22(1). To allow late admission of documents without a reasonable excuse would fly in the face of rule 22(2). Rule 22(2) required the Tribunal to be satisfied that there was a reasonable excuse for the late lodging before it could exercise its discretion to allow late lodging. In this case no excuse at all, let alone a reasonable one, had been given. In those circumstances the Tribunal's discretion under rule 22(1) to take account of the overriding objective and the alleged lack of prejudice did not arise and the request was rejected.

Variation

12. Very fairly, Mrs Mullen submitted that the Factor had no opposition to the variation proposed by the Tribunal in its direction with the exception of part (f). The reason for the exclusion of part (f) was that there had in fact been no payment of the whole sum under the 15 month invoice upon its issue. Rather the Homeowner had made payments of the sum in the 15 month invoice as follows:

06/04/2017 - £ 174.80
17/07/2017 - £ 175.47
13/10/2017 - £ 200.00
03/01/2018 - £ 170.00
22/03/2018 - £ 169.23

This meant that there had been no period of interest free credit which part (f) was intended to compensate. In his submission, the Homeowner accepted that he had made these payments on the date stated. He too, had no objection to the variation proposed by the Tribunal.

13. The Tribunal accepted that the 15 month invoice had been issued and paid as submitted jointly by the Factor and Homeowner. There was therefore no free credit obtained by the Factor, despite the request for it from the Homeowner. The issue of the 15 month invoice was not something that had been produced to the Tribunal at the original hearing in August 2017. Furthermore the two invoices issued by the Factor in December 2017 appeared to cover only a “Homecraft Management Fee” and not “service charge” when both of these were core services provided by the Factor and both were described as a “management fee” or “flat rate management fee” in the Written Statement of Services (page 9). In these circumstances it was reasonable to vary the PFEO in terms set out in the Direction but without part (f). The Tribunal did so.

Compliance and Revocation

14. For the Factor, Mrs Mullen submitted that the Tribunal should issue a certificate of compliance. She submitted that the PFEO as varied by the proposed variation had been complied with by the Factor. In support of this she submitted that the Factor had issued credit notes to the value of the 15 month invoice. These had been issued by no later than 29 March 2018 being the date of the most recent one. In addition the Factor had issued to the Homeowner quarterly invoices for the whole period from 1 January 2017 to 31 March 2018 which covered both the “Homecraft Management Fee” and the “Service Charge”.
15. The Homeowner confirmed that he had now received credit notes numbered 129075, 128936, 120776 and 120775 from the Factor and that these totalled the sum charged in the 15 month invoice and the periods of services covered in the 15 month invoice. He also confirmed that he had now been issued with quarterly invoices for both the “Homecraft Management Fee”

and the “Service Charge” for the period from 1 January 2017 to 31 March 2018. These had been paid. However he still opposed a certificate of completion on the basis that there had not been compliance with the time limit for issue in either the originally worded part (2) or the varied wording of part (2) of the PFEO.

16. In the light of the above, the Tribunal was satisfied that the Factor had complied with the aim of the PFEO (as twice varied). Part (1) had been complied with. With regard to parts (2) and (3) (as twice varied), it was true that the Factor had not acted timeously and technically speaking there was still future action to be taken under with part (2) of the PFEO as now varied; and part (3) involving the lodging of the documents with the Tribunal. However these were unnecessary formalities. The 15 month invoice had been cancelled through the credit notes and replaced by the quarterly invoices issued and paid for all core services however described. The breach of factor’s duty had been cured. In the circumstances the Tribunal decided that any action technically required by the PFEO was unnecessary. Accordingly it made the second decision stated above.

Future Invoicing

17. At the hearing the Homeowner informed the Tribunal that as far as he was aware he was the only owner in Rankin Court who had been issued with quarterly invoices. He also informed the Tribunal that the Factor had issued him with a 12 month invoice covering the Factor’s “management fee” and “service charge”. He told the Tribunal that he had been informed that despite its appearance it was not to be treated as an invoice and showed the Tribunal a letter which he had received to that effect.
18. For the Factor, Mrs Mullen submitted that the Factor had undertaken a consultation exercise in December 2016 with all of the homeowners to whom they provide services whether or not from Rankin Court. Apparently 255 responses had been received from a total of 1900 consultations. Of these 53% agreed to an alteration of billing from a quarterly period to an annual period. While the Factor accepted that if the title of a property

required quarterly billing an owner was entitled to have quarterly billing, nevertheless the Factor had determined to introduce annual billing leaving a homeowner to make a request for quarterly billing. In the case of the Homeowner in the present case, as he had requested quarterly billing and been found entitled to it by the Tribunal, he had been informed to disregard the annual invoice as an invoice and to see it instead as intimation of the fixed charges for the year 2018/19 without being a demand for payment. Mrs Mullen (who was accompanied by officials of the Factor) did not suggest that anyone in Rankin Court other than the Homeowner had been given quarterly invoices.

19. Strictly speaking the issue of billing for the year 2018/19 is not something for the present case. However the Tribunal was concerned by these submissions. In the *first place* the reasoning behind its decision on quarterly billing applied to all homeowners in Rankin Court and not merely to the Homeowner. It was difficult to see why the Factor should not have been consistent with all such homeowners. *Secondly*, if any homeowner is entitled to quarterly billing, one would expect a responsible factor to provide quarterly invoices and not wait until a complaint and possible application to a tribunal before acting. *Thirdly*, the contract of the Factor is with the homeowners of Rankin Court. They are the community who has the right to appoint and dismiss the Factor. Therefore the terms of the contract and the services under it are something to be decided by that community with the Factor and not by the Factor's 1900 customers as a whole. *Fourthly*, given clarity of communications is something that should be uppermost in a factor's communications with homeowners, to issue an invoice to a homeowner and then state, separately, that the invoice is not to be treated as an invoice is bizarre. An invoice without a time limit for payment is on the face of it a request for immediate payment. If the intention is to issue an annual invoice but with quarter payments on quarterly dates, one would expect this to be indicated clearly on the invoice itself. *Fifthly*, the mention in invoices of separate service charge and management fee are at odds with the description of a sole management fee used in the Factor's Written Statement of Services. Without alteration of the Written Statement of

Services this is might to lead to confusion. While these are merely observations made in passing by the Tribunal and do not affect the decisions above, if they are taken into account, future cases such as the current one with the consequent cost to the Tribunal service and stress to the homeowner might be avoided.

Appeals

- 20. A homeowner or property factor 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.**

_(sgd) David Bartos _____ Legal Member
and Chairperson

_24 April 2018_____ Date