

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")

Chamber Ref: FTS/HPC/PF/18/2565

Property: Dempster Court, 3 Dempster, Greenock, PA15 4QE ("the Property")

The Parties:-

Ms.Irene Farmer, residing at Dempster Court, 3 Dempster Street, Greenock, PA15 4QE ("the Homeowner") represented by Mr John Miller, residing at Flat 2E, Dempster Court, 3 Dempster Street, Greenock, PA15 4QE ("the Homeowner's Representative")

Speirs Gumley Property Management, having a place of business at 194, Bath Street Glasgow, G2 4LE ("the Factor")

hereinafter together referred to as "the Parties"

Tribunal Members

Karen Moore (Chairperson)

Mike Links (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") determined that as the Homeowner had not complied with the mandatory requirements of Section 17 (3) (a) of the Act it has no jurisdiction to consider the Application and so the tribunal dismisses the Application in terms of Rule 27 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules") .

Background

1. By an application comprising application form with supporting correspondence and documentation received in the period from 3 October 2018 to 8 February 2019 ("the Application") , the Homeowner's Representative applied on the Homeowner's behalf to the tribunal in terms of Section 17(1) of the Act (firstly) for a determination that the Factor had failed to comply with the Property Factor Code of Conduct ("the Code") as required by section 14(5) of the Act and, in particular, had failed to comply with Section 6 and Section 7 and (secondly) for a determination that the Factor had failed to comply with the property factor's duties in terms of Section 17(5) of the Act.
2. On 22 February 2019, a Convener of the Chamber, with delegated powers under Section 18A of the Act, having considered the application in terms of Section 18(3) of the Act and having intimated to all parties by Notice of Referral, a decision under

Section 18 (1) of the Act to refer the Application to a tribunal, and, fixed a Hearing for 24 April 2019 at the Gamble Halls, 44, Shore Street, Gourock, PA19 1RG.

Written Representation on behalf of Factor

3. By letter dated 14 March 2019, Mr. David Young of BTO Solicitors, Glasgow ("the BTO Letter"), wrote to the tribunal requesting that the Application be dismissed citing the following grounds: -
 - i) The Homeowner had not complied with Section 17 (3) of the Act;
 - ii) The Application, although in the name of the Homeowner, is truly in respect of a complaint by the Homeowner's Representative, which complaint had been dealt with by the Chamber under reference FTS/HPC/17/0391 and so the Application falls in terms of Section 18(2)(c) of the Act;
 - iii) Further, the Application, although in the name of the Homeowner, is truly in respect of a complaint by the Homeowner's Representative, which complaint has been dealt with by the Chamber under reference FTS/HPC/17/0391 and so the Application falls in terms of Section 18(2)(c) of the Act, the true purpose of the Application is to avoid application of Section 18(2)(c) of the Act and so is an abuse of process and vexatious in terms of Rule 8(1)(e) of the Rules;
 - iv) As the substantive matter of the complaint is a matter which occurred before the Code and Act came into force and as no complaint was made by the Homeowner to the Factor, the tribunal has no jurisdiction and
 - v) The order sought by the Homeowner has prescribed in terms of Section 6 of the Prescription and Limitation (Scotland) Act 1973.

The letter also sought expenses.

4. The tribunal considered the terms of the BTO Letter with regard to the Rules and, in particular, Rule 39 which deals with review of a decision and took the view that the letter did not fit squarely within that Rule and so was not a request to review the decision of the Convenor dated 22 February 2019. The tribunal then considered the request under Rule 27 of the Rules and took the view that, in terms of the overriding objective as set out in Rule 2 of the Rules, the proper course of action for the tribunal to take was to deal with the BTO Letter as a preliminary plea at the Hearing thus allowing the lay parties an opportunity to understand fully the legal arguments. Further, the tribunal could not be certain from the Application whether or not the Homeowner had complied with Section 17 (3) (a) of the Act and, in the event that the Homeowner had so complied, if the Application fell in terms of Section 18 of the Act and Rule 8 of the Rules. Accordingly, the tribunal considered that the BTO Letter should be addressed at the Hearing.

Hearing

5. A Hearing took place on 24 April 2019 which at the said Gamble Halls. The Homeowner was present and represented by the Homeowner's Representative. The Factor was not present having intimated to the tribunal by email that it intended to rely upon the BTO Letter.

Preliminary matter

6. The tribunal explained to the Homeowner and the Homeowner's Representative the arguments put forward in the BTO Letter and, in particular, the mandatory requirements of Section 17 (3) (a) of the Act which states that no application may be made to the tribunal unless the homeowner has notified the property factor in writing as to why the homeowner thinks the property factor has failed to carry out its duties or has failed to comply with Section 14 of the Act and the property factor has refused or unreasonably delayed in attempting to resolve the homeowner's concern.

7. The tribunal asked the Homeowner if she had notified the Factor in writing in terms of Section 17 (3) (a) of the Act before making the Application. The Homeowner said that she had not but that she had telephone the Factor on numerous occasions, although she could not be specific in this regard.
8. The tribunal asked the Homeowner when she had appointed Mr. Miller as her representative and when she had advised the Factor of this. The homeowner replied that Mr. Miller began to represent the Homeowner about six months previously and that she had not advised the Factor of this.
9. The tribunal asked the Homeowner's Representative if he had notified the Factor that he represented the Homeowner and if he had notified the Factor writing in terms of Section 17 (3) (a) of the Act before lodging the Application. He said he had not.
10. The tribunal then explained to the Homeowner and the Homeowner's Representative that as compliance with the requirements of Section 17 (3) (a) of the Act is absolute, the tribunal has no jurisdiction and so must dismiss the Application in terms of Rule 27 of the Rules.

Factor's Claim for Expenses

11. Notwithstanding the foregoing and in light of the Factor's claim for expenses, the tribunal took the Homeowner and the Homeowner's Representative through the other points raised in the BTO Letter. Although, the Homeowner's Representative agreed that the background papers lodged as part of the Application referred to his complaint which he agreed had been dealt with under reference FTS/HPC/17/0391, he maintained strongly that the Application was that of the Homeowner and flatly denied that it was for any other purpose. The tribunal advised the Homeowner and the Homeowner's Representative that it was not, on the face of it, persuaded that they had overcome the other arguments put forward in the BTO Letter and so, even if the tribunal had jurisdiction, it was unlikely that the Application would have been successful.
12. The tribunal had regard to the Factor's claim for expenses in terms of Rule 40 which states that the tribunal may award expense only where a party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense. The tribunal took the view that the actions of the Homeowner and the Homeowner's Representative as lay persons were misconceived and were not deliberately unreasonable and so declined to award expenses to the Factor.

Appeal

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.

K Moore

Karen Moore Chairperson 7 May 2019.