



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) concerning application at the request of the Property Factor to review a decision made by it dated 31st March 2022, which application was made in terms of Rule 39 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended

Chamber Ref: FTS/HPC/LM/21/2188

Re: Property at 17 Silverholm Drive, Cleghorn, Lanark ML11 7SY (“the Property”)

Parties:

Mr Derek Tollan, 17 Silverholm Drive, Cleghorn, Lanark ML11 7SY (“the Homeowner”)

Newton Property Management Limited, 87 Port Dundas Road, Glasgow G4 0HF (“the Property Factor”)

Tribunal Members:

Neil Kinnear (Legal Member) and Andrew Taylor (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application for review should be allowed in respect that the Tribunal proposed awarding compensation payable by the Property Factor to the Homeowner in the sum of £862.29 in respect of the Property Factor’s failure to comply with sections 2.1 and 2.4 of the Code of Conduct for Property Factors and recalled its order of 31st March 2022 regarding expenses.

Background

By application dated 8th September 2021 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to carry out its property factor duties in terms of section 17(1)(a) of the 2011 Act and had failed to ensure

compliance with Sections 2.1, 2.4, 2.5 and 3.4 of the Code as required by Section 14(5) of the 2011 Act in terms of section 17(1)(b) of the 2011 Act.

On 16th September 2021 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a Hearing.

Thereafter, the Tribunal held two Hearings on 16th November 2021 and 17th February 2022 by conference call. The Tribunal issued its decision, proposed Property Factor Enforcement Order and order for expenses on 31st March 2022, and Property Factor Enforcement Order on 19th May 2022.

The Property Factor sought review of those upon two bases. The first was that the order awarding expenses against the Property Factor and in favour of the Homeowner to cover the expense to the Homeowner of preparing for the further continued Hearing on 17th February 2022 should be restricted to preparation undertaken after 1st January 2022. The Factor argued that having advised the Tribunal at the Hearing of 18th November 2021 that it was undertaking further investigations with third parties which it anticipated it would conclude by the end of December 2021, its failure to communicate the results of those investigations only commenced from 1st January 2022.

The second was that the Tribunal held that the parties were agreed that in the event that the Tribunal concluded that the Property Factor was in breach of its obligations, then the sum of £787.29 represented the sum which the Homeowner had paid which he should have not. The correct sum was not £787.29, but was £287.29.

A review Hearing was held at 10.00 am on 5th July 2022 by conference call. The Homeowner did not participated, and was not represented. The Property Factor's Mr MacDonald and Mr Miller participated, and the Property Factor was not represented.

Unfortunately, after investigation by the Tribunal, it appears that neither the Homeowner nor his representative had been intimated with notice of the review Hearing by administrative oversight.

This application was heard together with application FTS/HPC/PF/21/1283, and the Tribunal made a decision, proposed Property Factor Enforcement Order and order for expenses in identical terms in that application. The Property Factor also sought review of those on the same bases as in this application.

The Tribunal noted that the Property Factor explained that it had not received the decision in this application unlike that in application FTS/HPC/PF/21/1283. As a result, it had enquired with the Tribunal about when the decision might be available, and was sent a further copy which it received on 18th May 2022. The Property Factor then replied by e-mail that same day seeking review of the decision.

As a result of a discussion between the parties and the Tribunal in application FTS/HPC/PF/21/1283, it became clear that both Tribunal members had misunderstood the parties' respective positions. The Tribunal had understood that the parties were agreed that the sum of £787.29 represented the sum which the

Homeowner had paid which he should have not, and that in the event that the Tribunal concluded that the Property Factor was in breach of its obligations (as it did), that this sum should be repaid to the Homeowner by the Property Factor and that no other payment by way of compensation was sought.

Both parties in application FTS/HPC/PF/21/1283 confirmed that the correct position was that they were agreed that the sum of £287.29 represented the sum which the Homeowner had paid which he should have not. The Homeowner sought that sum together with compensation of £500.00 in respect of distress and inconvenience producing a total figure of £787.29. However, the Property Factor did not accept that compensation should be awarded, and accepted only that the sum of £287.29 should be repaid by it to the Homeowner in respect of the sum which the Homeowner had paid which he should not have. It appeared likely that the position was the same with respect to this application.

Having focused the issue, the Tribunal concluded that it ought to order the parties to provide written submissions on that point and set a continued review Hearing to hear the parties' arguments regarding whether or not compensation for distress and inconvenience should be awarded by the Tribunal to the Homeowner, and if it should be, the amount of any such compensation.

Further, the Tribunal concluded that it ought to order the parties to provide written submissions on whether the Tribunal's award of expenses should be restricted to cover only preparation undertaken after 1st January 2022, and to hear the parties' arguments on that point also at the continued review Hearing.

The Tribunal made a similar order for written submissions in application FTS/HPC/PF/21/1283, and set a continued review Hearing to be heard along with that in this application, as the arguments and background circumstances were the same in both.

The continued Review Hearing

A continued review Hearing was held at 10.00 am on 7th November 2022 by conference call. The Homeowner participated, and was represented by Mr Malcolm Campbell. The Property Factor's Mr MacDonald and Mr Miller participated, and the Property Factor was not represented.

The Parties again confirmed that the correct position was that they were agreed that the sum of £287.29 represented the sum which the Homeowner had paid which he should have not. However, the Homeowner sought a monetary award in respect of distress and inconvenience suffered by him with regard to the circumstances of this case, the history of which is set out in the Tribunal's original decision. The Homeowner had originally sought £500.00 in this regard, but now considered that the sum of £1,000.00 was appropriate upon the basis of the conduct of the Property Factor in drawing out the proceedings further by seeking review of the Tribunal's decision and not reimbursing the overpayment made by the Homeowner.

Mr MacDonald accepted that a monetary award in respect of distress and inconvenience suffered by the Homeowner was appropriate, but argued that this should be limited to £250.00. Mr MacDonald noted that Mr Campbell has separately previously brought an application in respect of his own property to the Tribunal in respect of the same grounds of complaint as here, and the Tribunal had made an award of £250.00 in respect of his distress and inconvenience.

Mr Campbell notes that the award made to him for distress and inconvenience was made by the Tribunal in 2021. Since that time, the Property Factor had further delayed in resolving the Homeowner's complaint. In those circumstances a higher award was appropriate.

Mr MacDonald submitted that the order awarding expenses against the Property Factor and in favour of the Homeowner to cover the expense to the Homeowner of preparing for the further continued Hearing on 17th February 2022 should be restricted to the sum of £225.00, which the Property Factor was willing to concede. After some consideration, the Homeowner confirmed that he prepared to accept that offer to expedite matters on a pragmatic basis.

Reasons for Decision

The Property Factor applied to the Tribunal for review of its decision of 31st March 2022, and set out why the Property Factor considered a review of the decision was necessary.

Rule 39(1) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides that the Tribunal may at the request of a party review a decision made by it where it is necessary in the interests of justice to do so.

The application did comply with the criteria set out in Rule 39(2) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended and section 43(2)(b) of the *Tribunals (Scotland) Act 2014*.

The Tribunal considered that the Property Factor's reasons for review had merit with respect to the award of compensation of £787.29. It was clear that the Tribunal has misunderstood the parties' positions about compensation, perhaps as a result of the conflation of a concession by the Property Factor concerning the overpayment of £287.29 with the sum sought by the Homeowner of £787.29 which included both that figure and a further £500.00 sought in respect of distress and inconvenience he had suffered.

In any event, both parties accepted that the correct figure in respect of the overpayment by the Homeowner was £287.29 and not £787.29. They differed upon the level of any monetary award in respect of distress and inconvenience.

After careful consideration, the Tribunal determined that £350.00 was an appropriate monetary award in respect of distress and inconvenience caused to the Homeowner

by the Property Factor's breaches. The Tribunal considered that there was some force in Mr Campbell's submission that the Homeowner had suffered more distress and inconvenience compared to himself as a result of the further delay in resolving the Homeowner's complaint compared to his own. However, the Tribunal felt that the sum of £1,000.00 sought was excessive in the circumstances.

With respect to the question of the Tribunal's award of expenses, the Tribunal was content to make an award of expenses of £225.00 to be paid to the Homeowner by the Property Factor as part of the compensation award in those circumstances.

That being so, the Tribunal considered that it should review the figure of compensation award in its decision of 31st March 2022 from the figure of £787.29 to the figure of £637.29 and recall its order of 31st March 2022 regarding expenses.

Decision

For the foregoing reasons, the Tribunal determined that the application for review should be allowed in respect that the Tribunal proposed awarding compensation payable by the Property Factor to the Homeowner in the sum of £862.29 in respect of the Property Factor's failure to comply with sections 2.1 and 2.4 of the Code of Conduct for Property Factors and recalled its order of 31st March 2022 regarding expenses.

07 November 2022

Legal Member

Date