



Statement of Decision in an application for Review under Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (contained in Schedule Part 1 of the Chamber Procedure Regulations 2017 (SSI No 328), as amended) ("the Procedure Rules")

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

Decision issued under s19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/20/2471

The Property: 15 Silverholm Drive, Jerviswood Park, Cleghorn, Lanark, ML11 7SY ("The Property")

The Parties:-

Malcom Campbell, residing at 15 Silverholm Drive, Jerviswood Park, Cleghorn, Lanark, ML11 7SY ("the applicant")

Newton Property Management Ltd, a company incorporated under the Companies Acts and having a place of business at 87 Port Dundas Road, Glasgow, G4 0HF ("The property factor")

Committee Members

Paul Doyle	Legal Member
David Godfrey	Ordinary Member

DECISION

The Tribunal grants the application for Review in terms of Rule 39 of the Procedure Rules.

BACKGROUND

1. By application dated 26 November 2020, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of his complaint that the property factor has breached the code of conduct imposed by Section 14 of the Property Factors (Scotland) Act 2011 and that the property factor has failed to comply with the property factor's duties.

2 The application stated that the applicant considered that the respondent failed to comply with Sections 2.1, 2.2, 2.4, 6.2 and 7.1 of the code of conduct for property factors and breached the property factor's duties.

3. On 24 March 2021 the tribunal determined that the property factor had breached the code of conduct for property factors and had failed to carry out its duties in terms of s.17 of the Property Factors (Scotland) Act 2011.

4. On 8 April the First-tier Tribunal for Scotland (Housing and Property Chamber) made the following property factor enforcement order (PFEO)

Within 28 days of the date of service on the respondent of this property factor enforcement order the respondent must pay the applicant £450.00 as reimbursement of the cost of maintenance incorrectly charged to the applicant between 2015 and 2020.

The Request for Review

5. By e-mail dated 14 April 2021, the applicant applied to the Tribunal for review of the decision under Rule 39 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) regulations 2017 ("the procedure rules").

6. By email dated 21 April 2021 the Property Factor said that the application for review is time-barred, but asked for either a direction or an amended order to set off the payment order contained in the Property Factor Enforcement Order dated 8 April 2021 ("the PFEO") against sums outstanding in the applicant's account with the property factor.

REASONS FOR DECISION

7. The Applicant asks for a review of the payment order contained within the PFEO. In his application for review, the applicant identifies various invoices raised by the Property Factor between 2015 and 2020 and says that instead of providing recompense for those invoices the PFEO prevents him from recovering money from the Property Factor. The applicant provides further detailed argument in his email dated 30 April 2021.

8. The PFEO was issued on 8 April 2021. The application for review was made on 14 April 2021. Rule 39(2) of the procedure rules says

(2) An application for review under Section 43 (2) (b) of the Tribunal's Act must

- (a) be made in writing and copied to the other parties
- (b) be made within 14 days of the date on which the decision is made or within 14 days of the date that the written reasons (if any) were sent to the parties and
- (c) set out why a review of the decision is necessary

9. The application for review was made within 14 days of the PFEO and so is not time-barred.

10. The Property Factor did not participate in the hearing on 23 March 2021 and rested solely on written submissions dated 01 March 2021. The request for a

direction to set off the payment order contained in the PFEO is a matter which has not previously been plead.

11. The tribunal heard evidence focusing on one invoice raised in August 2020. Both parties made submission based on that one invoice. The request to set the PFEO off against the applicant's account with the respondent is a request to apply the PFEO to a broader contract than the one before the tribunal. In any event, we intend to review the PFEO in a way which will render pleas to set off payment irrelevant.

12. In his application for review, the applicant concedes that the invoices now discussed were not before the tribunal. The applicant concedes that he has not previously quantified his claim. At paragraph 5 of the PFEO the tribunal said

The tribunal's decision is based on the evidence placed before the tribunal. It would be wrong for the tribunal to consider evidence tendered after the hearing has finished and after the tribunal has issued their decision. The applicant's request to allow further evidence to be received after the tribunal's decision was issued is refused.

13. It would be both unfair and an error of law to vary the PFEO to take account of quantification and evidence which postdates the evidential hearing. In his application the applicant asked for "a refund of all costs... paid to date". The problem for the applicant is that the evidence he offered focused on one invoice only, dated 12 August 2020. The tribunal can only, therefore, make an order in relation to that one invoice.

14. The final words of the PFEO are

as reimbursement of the cost of maintenance incorrectly charged to the applicant between 2015 and 2020.

15. The tribunal found that the evidence related to one invoice dated 12 August 2020 (Invoice number 1132550). The first sentence of finding in fact 6(l) in the decision dated 23 March 2020 is wrong. The second word of finding in fact 6(u) is inaccurate. (Instead of "September" it should be "August").

16. Taking account of the errors identified in the findings in fact in the decision dated 23 March 2020, it is in the interests of justice to review the PFEO.

17. In his email dated 14 April 2021 the applicant's concluding remark is

If the Tribunal is unable to consider the evidence quantifying the losses for the period outlined in the PFEO, then I would request that the PFEO is updated to either; remain silent of the quantification of the damages between 2015 and 2020, allowing these to be agreed between the Factor and I, or account for the period and charges for which the original complaint related; being the August 2020 invoice only.

18. The applicant asks for a payment order with an element of solatium. He seeks interest and an award for distress and inconvenience. These are not matters which were put before the tribunal in evidence. In any event, on the facts as the tribunal found them to be, the property factor's breach of the code of conduct comes as a result of misinterpretation of the title deeds, and not from any malicious act. At paragraph 23 of the decision dated 23 March 2020 the tribunal said

We emphasise that on the facts as we find them to be the respondent's failure is not a result of deliberate acts.

19. There are no grounds to make an award comparable to an award of damages for a delictual act.

20. The tribunal's findings in fact revolve around one disputed invoice raised by the Property Factor in August 2020. It is for the parties to resolve any dispute they still have about earlier invoices which were not placed before the tribunal, in the light of this tribunal's determination of the meaning of the burdens in the title deeds to the property. The PFEO is too broad in its terms. We therefore withdraw the PFEO issued on 8 April 2021.

21. The tribunal therefore intend to make the following property factor enforcement order (PFEO)

"Within 28 days of the date of service on the respondent of this property factor enforcement order the respondent must amend their invoice 1132550 dated 12/08/2020 by removing the two following charges

27/02/2020 – Pump waste disposal – 351.52

03/03/2020 – Sewage Block- 3 Tankers – 1,381.93"

22. Section 19 of the 2011 Act contains the following:

(2) In any case where the committee 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 committee 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 committee must make a property factor enforcement order.

(4) Subject to section 22, no matter adjudicated on by the homeowner housing committee may be adjudicated on by another court or tribunal.

23. The intimation of the tribunal's decision and this proposed PFEO to the parties should be taken as notice for the purposes of s. 19(2)(a) of the 2011 Act, and parties are hereby given notice that they should ensure that any written representations which they wish to make under s.19 (2)(b) of the 2011 Act reach the First-Tier Tribunal for Scotland (Housing and Property Chamber) office not later than 14 days after the date that the Decision and this proposed PFEO is intimated to them. If no representations are received within that 14 day period, then the tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Right of Appeal

24. In terms of Section 46 of the Tribunal (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.

25. 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.

Signed

4 May 2021

Legal Member