

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Notice of Variation and Completion:

Property Factors (Scotland) Act 2011 Sections 21(2) and 23

Chamber Ref: HOHP/LM/16/0146

5 Hillpark Grove, Edinburgh EH4 7AP
("The Property")

The Parties:-

Aylmer Edwin Millen, 5 Hillpark Grove, Edinburgh EH4 7AP
("the Applicant")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD
("the Respondents")

Tribunal Members:

David Bartos (Legal Member & Chairperson)
Colin Campbell (Ordinary Member)

Decision

The Tribunal has decided (1) to vary the Property Factor Enforcement Order in respect of the Property dated 30 August 2017 by for the words "within two weeks" substituting "within three weeks"; and (2) to certify that the said Order has been complied with.

The decision of the Tribunal is unanimous

Reasons

1. By letter dated 5 September 2017 from the Tribunal the Property Factor Enforcement Order ("PFOE") dated 30 August 2017 was sent to the parties. The PFOE required the Respondents to make payment to the Applicant of

the sum of £ 200 within 14 days of its notification to the Respondents. There has been no appeal against the PFEO.

2. By e-mail to the Tribunal dated 23 September 2017 the Applicant stated that on 18 September 2017 he had received an "electronic letter" from the Respondents bearing that date enclosing a cheque for £ 200. He stated that he checked his account that day and that no payment had been made. He further stated that on 22 September he received an enveloped franked on 20 September and bearing to be sent by second class post. Within the envelope was a hard copy of that letter together with the cheque for £ 200 dated 11 September 2017. The Applicant supplied the Tribunal with copies of the letter, envelope and cheque. By e-mail to the Tribunal dated 28 September 2017 the Applicant noted that he had presented the cheque to his bank and that the funds had been cleared to his account on 26 September 2017.
3. The Tribunal sees no reason to doubt the Applicant's statements as to the facts narrated above and accepts them.
4. However in his e-mail of 23 Sepember the Applicant also submitted that there had been a failure to comply with the PFEO. A decision on whether there has been compliance with a property factor enforcement order is made under section 23 of the 2011 Act. Before it is made the Tribunal must apply its mind to the provisions of section 21(2) to (4) of the 2011 Act. These provide:
 - "(2) Where subsection (3) applies, the First-tier Tribunal must vary the property factor enforcement order—
 - (a) so as to extend, or further extend, the period within which any action required by the order must be executed, and
 - (b) in such other manner as it thinks fit.
 - (3) This subsection applies where—
 - (a) the First-tier Tribunal considers, on the submission of the property factor or otherwise, that any action required by a property factor enforcement order has not been, or will not be, executed during the period within which the order requires the work to be executed, and
 - (b) the First-tier Tribunal—
 - (i) considers that satisfactory progress has been made in executing the action required,

or

(ii) has received a written undertaking from the property factor stating that the action required will be executed by a later date which the First-tier Tribunal considers satisfactory.

(4) References in this Act to a property factor enforcement order or to action required by such an order are, where the order has been varied under this section, to be treated as references to the order as so varied or, as the case may be, to action required by the order as so varied."

The purpose of these provisions is to avoid the making of unnecessary decisions of failure to comply under section 23 when there is every reason to believe that compliance will be achieved. That being the case whether there has been "satisfactory progress" must be assessed at the time that the Tribunal makes its decision.

5. Given that the cheque was received by the Applicant outwith the two week period the Tribunal considered that the PFEO could not be executed within the timescale provided within it. However given that the cheque had been signed and the letter written and sent to the Applicant within that period, there had been progress in the process of making payment, which was satisfactory within the timescale. Even if one took a strict view and saw it as unsatisfactory that the cheque had not been sent by the end of the two weeks, given the subsequent receipt of the letter and cheque and its clearance, the Tribunal was of the clear view that satisfactory progress had been made in fulfilling the PFEO. This obliged the Tribunal to extend the time limit in the PFEO.
6. Receipt of a cheque can be seen as payment under a property factor enforcement order provided that subsequently the cheque transfers funds to the homeowner on presentation. That has occurred here. There has been no prejudice to the Applicant in the payment that has taken place. In these circumstances the Tribunal saw it as reasonable to extend the time limit in the PFEO from two to three weeks from notification to the Respondents.
7. In the light of the above, the Tribunal was satisfied that the PFEO had been complied with. Accordingly it made the decision stated above.

Appeals

- 8. 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.**

David Bartos

____ Legal Member and Chairperson

____ 11 October 2017 _____ Date