

Housing and Property Chamber First-tier Tribunal for Scotland



**Decision of the of the First-tier Tribunal for Scotland Housing and Property
Chamber
In an Application under section 17 of the Property Factors (Scotland) Act 2011**

by

Charles McDonald, 111 Whitehaugh Park, Peebles EH45 9DB (“the Applicant”)

**Greenbelt Group Limited, McCafferty House, 99 Firhill Road, Glasgow G20 7BE
 (“the Respondent”)**

Chamber Ref: HOHP/PF/16/0135

Tribunal Members:

John McHugh (Chairman) and Robert Buchan (Ordinary (Surveyor) Member).

DECISION

The Tribunal decides to issue a Property Factor Enforcement Order. Certain amendments will be made to the content of the Proposed PFEO.

The decision is unanimous.

REASONS FOR DECISION

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act" and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code".

In our decision of 2 March 2018 we found that the Respondent had breached its property factor's duties and its duties arising under the Code. We provided the parties with a copy of a proposed Property Factor Enforcement Order ("PFEO") for their comment. The proposed PFEO provided as follows:

"Within 90 days of the date of the communication to the Respondent of this property factor enforcement order, the Respondent must:

- 1 Credit to the Applicant's factoring account the sum of £200.*
- 2 Credit to the Applicant's factoring account any charges which have been imposed in respect of late payment or the pursuit of late payment.*
- 3 Take steps to invite the views of homeowners of the Development in relation to the future management of the woodland areas.*
- 4 Confirm in writing to the office of the Tribunal that steps 1, 2 and 3 above have been carried out.*
- 5 Provide to the Applicant and the office of the Tribunal a report confirming that the Development is currently in a state consistent with it currently being managed "in accordance with good residential land management practice." such report to be written by an independent expert in the maintenance and management of residential estates. The report should explain the author's expertise, confirm that the author is not associated with the Respondent and that the author has been given sight by the Respondent of the Tribunal's Decision, the Deed of Conditions, the Written Statement of Services and any other documents which the author has requested for the purpose of producing his report."*

The Respondent made representations dated 16 March 2018 concerning the terms of the proposed PFEO. The Applicant made representations dated 18 and 21 March 2018.

The Respondent has made the following representations regarding the terms of the proposed PFEO (adopting its paragraph numbering):

1 The £200 credit is not proportionate with the findings and that regard should be had to certain goodwill measures taken by the Respondent and which have benefited the Applicant.

The Tribunal has a wide discretion in this matter and considers that the sum of £200 is appropriate in the circumstances of this case. The Tribunal was aware at the time of making the proposed PFEO that certain goodwill measures were being undertaken by the Respondent and factored these into its decision. The Tribunal is not prepared to alter this paragraph of the Proposed PFEO.

2 The Respondent advises that a credit of a total of charges of £213.50 has been made. The Applicant confirmed his receipt of their cheque by his email of 21 March 2018. The Tribunal therefore finds it unnecessary to make any order in this respect and will remove paragraph 2 from the final PFEO.

3 The Respondent considers that because no complaint proceeded under Code Section 2.4, no order concerning consultation is appropriate. We regard that submission as misguided. There is no requirement that the terms of a PFEO should be confined by the Sections of the Code referred to by an Applicant. The Tribunal is not prevented from making an order which it considers relevant to the resolution of matters contained within an application simply because the remedy specified may have an overlapping subject matter with a Section of the Code. The Tribunal is given a wide discretion in the terms of its PFEO by virtue of section 20 of the 2011 Act.

The Respondent further considers that the making of an Order in the terms of this paragraph is no longer required because it has written to homeowners and carried out certain works to the woodland. It has received, so far, only one response from a homeowner to its communications. Further, because it has an agreed cost limit beneath which consultation is required, it observes that it may not require to consult in respect of such works.

We do not consider that the points raised by the Respondent would justify no order being made. We have not been advised as to what the terms of the response from the single resident was nor what further communication or action that may involve.

In the circumstances, we consider that it is appropriate that an order as per paragraph 3 of the Proposed PFEO should be made but in order that the Respondent may, when being judged on its compliance with the PFEO, be able to refer to the factors which it has mentioned (such as its authority to undertake certain works without specific authorisation) we shall include the word "reasonable" as a new second word in paragraph 3 of the PFEO.

5 The Respondent considers that the remit of the independent expert is too wide given it would cover matters outwith the matters where a breach of the Code or property factor's duties have been identified and that certain issues such as grass maintenance and playground fencing repairs should be excluded. We consider that it would be impractical to try to identify to an expert certain matters which he/she should ignore. His/her task would be to confirm that the Development is being maintained in accordance with the Respondent's obligation ie "*in accordance with good residential land management practice.*" and we do not see how an expert could opine on that matter without being able to consider all matters which he/she considers relevant to that question.

The Respondent estimates the cost of obtaining a report at £5000 plus VAT which sum it considers disproportionate to the matters concerned. We disagree. We consider the report as important to give confidence that the matters of complaint have been dealt with appropriately. We refer to our comments regarding paragraph 3 of the Proposed PFEO. The Respondent further observes that the Tribunal may carry out its own inspection. While this is so, it is a matter of discretion and we consider that the inspection by the independent expert is the appropriate route.

The Respondent seeks guidance on when an expert is "associated" with the Respondent. The Respondent has the benefit of legal advisers who can no doubt advise it upon the duties of expert witnesses to courts and tribunals. No doubt the Respondent will, with the benefit of such advice, instruct an expert whose independence would be beyond question.

The Respondent advises that production of the report could not be obtained within 90 days and requests 120 instead. We are prepared to modify the PFEO accordingly.

In the circumstances, issuing the PFEO in the same terms as the Proposed PFEO but with the amendments we have highlighted would appear to be required in terms of section 19(3) of the 2011 Act and we hereby do so.

For the avoidance of doubt the PFEO is in the following terms:

“Within 120 days of the date of the communication to the Respondent of this property factor enforcement order, the Respondent must:

- 1 Credit to the Applicant's factoring account the sum of £200.
- 2 Take reasonable steps to invite the views of homeowners of the Development in relation to the future management of the woodland areas.
- 3 Confirm in writing to the office of the Tribunal that steps 1 and 2 above have been carried out.
- 4 Provide to the Applicant and the office of the Tribunal a report confirming that the Development is currently in a state consistent with it currently being managed "in accordance with good residential land management practice." such report to be written by an independent expert in the maintenance and management of residential estates. The report should explain the author's expertise, confirm that the author is not associated with the Respondent and that the author has been given sight by the Respondent of the Tribunal's Decision, the Deed of Conditions, the Written Statement of Services and any other documents which the author has requested for the purpose of producing his report."

APPEALS

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.

J McHugh

JOHN M MCHUGH

CHAIRMAN

DATE: 10 April 2018