Upper Tribunal for Scotland

DECISION ON AN APPLICATION TO APPEAL IN THE CASE OF

Dr David Shields, 11 Denbeath Court, Ferniegair, Hamilton, South Lanarkshire, ML3 7TR,

- and -

Alan Blackley, 40A Horncastle Road, Lincolnshire, LN10 6UZ

Appellants

- against -

Housing and Property Chamber, 4th Floor, 1 Atlantic Quay, 45 Robertson Street, Glasgow, G2 8JB, per

Respondent

Decision of the Upper Tribunal

The Upper Tribunal (Housing and Property Chamber) grants the appeal in each case, quashes the decision of the First-tier Tribunal to reject the applications and remits to the First-tier Tribunal to proceed as accords.

Note

[1] Each of these appeals is against a decision of the First-tier Tribunal to reject the application because, upon its interpretation of section 17 of the Property Factors (Scotland) Act 2011 ("the 2011 Act"), it was not validly made. The perceived invalidity arose out of the fact that when the applications were received by the Tribunal neither applicant was any longer the owner of the property managed by the factor. Being a current homeowner was understood by the Tribunal to be an essential condition of the right to bring an application.

[2] Section 17 of the 2011 Act must be construed purposively in such a way as to give effect to the objectives and policy that underlie the provision (Great Stuart Trustees v McDonald 2015 SC 379 at 386, paragraph [20]). Those objectives and policy are not to be found, as would ordinarily be the case, in any report of the Scottish Law Commission or explanatory memoranda officially issued in connection with the bill, because the 2011 Act had its genesis as a private members bill, which the government eventually came to support. Be that as it may the purpose of the legislation and of

section 17 in particular is readily discernible through consideration of the pre-act law and the terms of the 2011 Act itself.

[3] Before the 2011 Act was passed property factors in Scotland were not subject to regulation, they were not subject to any minimum standards of practice and disputes between property factors and homeowners could only be resolved by litigation conducted in the courts. In introducing such measures it is plain that the legislature saw the existing free-for-all as a mischief which required to be remedied. The preamble to the 2011 Act makes it plain that provision for the resolution of disputes between homeowners and property factors represents one of its main purposes.

[4] The reasoning of the First-tier Tribunal in each case emphasizes the opening clause of section 17 (1) – "A homeowner may apply". If a person is not a homeowner at the time of presenting the application then, it is argued, they have no right to do so. In taking this approach the First-tier Tribunal has adopted a very literal, non-purposive interpretation. When section 17 (1) is considered as a whole it becomes clear that the right to apply to the tribunal is for determination of past failures on the part of the property factor. Once that is recognized it does not greatly strain the language of the subsection to interpret it as requiring only that the person making the application was a homeowner at the time of the failure which is the subject of the complaint.

[5] Merely because a person is no longer a homeowner, it does not follow that a dispute arising out of a past failure by the factor, which took place while the person aggrieved did meet the terms of section 10 (5), has ceased to exist as a dispute. There is no logical or practical reason why the legislature should have granted to current homeowners a remedy for past breaches while denying the same remedy to persons who happen to have sold their property after the failure complained of occurred. That would be at odds with its policy of making provision for dispute resolution. Complaints about failures to comply with the property factor code of conduct would not be justiciable in the Sheriff Court. A literal interpretation produces an absurdity; something which in both cases the First-tier Tribunal itself recognized – "[the] Tribunal can therefore see that the scheme of the Act places a person in the position of the applicant in an impossible conundrum."

[6] It is not the case that the literal interpretation would produce an unworkable or impracticable result only in exceptional cases. Where the alleged breach of factor duties occurs or is discovered at a time when the homeowner has concluded missives to sell their property, compliance by the applicant with the section 17 (3) obligation – in the first instance to attempt to resolve matters directly with the factor – is likely to mean that the aggrieved person will have ceased to be a homeowner before it becomes clear that attempts to resolve the dispute have failed. The property factors code of conduct contains a further provision with the potential to generate a significant number of former homeowners with grievances arising from alleged breaches of duty occurring prior to any sale. Section 3.1 of the code gives the factor three months following a change of ownership to make available to the homeowner all financial information relating to their account. A purposive interpretation resolves both of these difficulties.

[7] I consider that properly construed section 17 (1) of the 2011 Act requires only that the applicant should have been a homeowner at the time of the alleged failure on the part of the property factor. I have accordingly quashed the decisions of the First-tier Tribunal to reject the applications and have remitted the two cases to it in order that the applications may proceed.

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