



Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

HOHP reference: HOHP/PF/13/0273

Re: Flat 0/1, 2H Viewmount Drive, Glasgow G20 0LW ('the property')

The Parties:

Mr Charles McGraw, Flat 0/1, 2H Viewmount Drive, Glasgow G20 0LW ('the homeowner')

Maryhill Housing Association Ltd, 45 Garrioch Road, Glasgow G20 8RG ('the factor')

Decision by a committee of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

Committee members:

Sarah O'Neill (Chairperson)

Kingsley Bruce (Surveyor member)

Decision of the committee

The committee determines that the factor has not failed to comply with its duties under section 14 of the Property Factors (Scotland) Act 2011 in respect of sections 6.1 and 6.9 of the code of conduct for property factors. The committee also determines that the factor has not failed to comply with its duties as a property factor as defined in section 17 (5) of the Act.

The committee's decision is unanimous.

Background

1. By application dated 16 September 2013, the homeowner applied to the Homeowner Housing Panel ('the panel') to determine whether the factor had failed to comply with its duties under the Property Factors (Scotland) Act 2011. In his application, the homeowner alleged that the factor had failed to comply with sections 6.1 and 6.9 (carrying out repairs and maintenance) of the code of conduct for property factors ('the code of conduct'). The homeowner also alleged that the factor had failed to comply with the property factor's duties as defined in section 17(5) of the Act.

2. By letter dated 19 December 2013, the President of the panel sent a notice of referral to both parties, intimating her decision to refer the application to a panel committee for determination. Written representations were requested from the parties by 13 January 2014. A request was received from the factor for an extension of two weeks to this deadline, due to the closure of its offices over the Christmas period, which was granted by the committee. Detailed written representations dated 23 January 2014, together with a total of 24 indexed documents, were received by the committee from the factor. No written representations were received from the homeowner before the deadline.

3. A direction was issued by the committee on 19 February 2014. This gave notice to the parties, that, although the homeowner's original application form did not specifically refer to section 1 of the code of conduct, his application and the written representations received from the factor raised issues which were relevant to a potential failure to comply with section 1 of the code of conduct for property factors regarding the provision of a written statement of services (WSS), and that the committee intended to consider this issue. The direction also required the homeowner to provide to the committee within 21 days further details, including any written evidence, of the reasons why he believed the factor had failed to a) comply with sections 6.1 and 6.9 of the code of conduct, and b) carry out the property factor's duties, including which duties he believed the factor had failed to carry out.

4. A letter dated 26 February 2014 was received from the factor acknowledging receipt of the direction, and expressing concern that the committee intended to consider the issue of the provision of a written statement of services, given that this had not been the subject of a formal complaint dealt with in accordance with its complaint handling process. No response was received from the homeowner by the required deadline, and a reminder was sent to him on 21 March 2014, requesting a response by 27 March 2014. No response was received from him in response to the reminder.

Hearing

5. A hearing took place before the committee at the panel's offices, Europa Building, 450 Argyle Street, Glasgow on 2 April 2014. The homeowner did not appear and was not represented. The factor was represented by Donna Birrell, Director of Development and Regeneration and Margaret Reid, Property Investment Manager, who gave evidence on its behalf. The factor's legal adviser, Alison Brynes of TC Young Solicitors, was also present.

Preliminary issues

6. The committee considered whether the hearing should go ahead in the absence of the homeowner. The committee was satisfied that, in terms of regulation 23 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 ('the regulations'), the requirements of regulation 17 (1) regarding the giving of notice of a hearing had been complied with. The committee therefore decided it would proceed to make a decision on the basis of the oral representations made by the factor at the hearing and the written representations submitted by both parties.

7. The committee considered, in light of the representations made by the factor, whether it should consider the potential failure to comply with section 1 of the code of conduct for property factors in relation to the provision of a WSS at the hearing, as indicated in its direction. The committee decided that it would not consider this issue at the hearing, as the homeowner did not appear to have made a formal complaint to the factor regarding this matter.

8. The factor brought to the hearing a file of further correspondence which had not previously been submitted to the committee, requesting that this be considered by the committee in reaching its decision. The committee did not take a view at this stage as to whether it would consider this evidence. Following the hearing, the committee decided that it was unable to consider this evidence, as it had not been submitted at least 7 days before the hearing, as required by regulation 12 of the regulations. The homeowner had not seen the documents, and had not therefore had fair notice that these documents would be relied upon by the factor. In the homeowner's absence, the committee concluded that it would not be fair in all the circumstances to allow this evidence to be considered.

Findings in fact

9. The committee finds the following facts to be established:

- The homeowner is the owner of Flat 0/1, 2H Viewmount Drive, Glasgow G20 0LW.
- The property is located within a new build and refurbishment development of a former primary school, which was developed by Maryhill Housing Association (MHA). This development included nine flats at 2H Viewmount Drive, which were developed and sold under the Scottish Government's New Supply Shared Equity (NSSE) arrangements. The development was completed on 30 November 2011, and the homeowner became the owner of the property on 5 December 2011.
- MHA is the property factor responsible for the management of the communal areas of the flats at 2H Viewmount Drive, as set out in the Deed of Conditions relating to the development dated 22 November 2011.
- MHA is therefore both developer and property factor in relation to the flats within the development.

- MHA was registered as a property factor on 28 December 2012, and its duties under the code of conduct arose from that date.
- A 12 month 'Defects Liability Period' ('DLP') ran in relation to the development from 1 December 2011, the date on which the development was formally handed over by the building contractor to MHA until 1 December 2012. During that 12 month period, the building contractor was contractually liable for the rectification of any defects which occurred within the development.
- A final Certificate of Completion of Making Good Defects in relation to the development was issued by the architect overseeing the project on 7 October 2013.

The complaints made by the homeowner

10. The homeowner made three complaints, as follows:

Complaint 1 - the factor has failed to comply with its duties under section 6.1 of the code of conduct, which states:

You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress this work, including timescales for completion, unless you have agreed with a group of homeowners a cost threshold below which job-specific progress reports are not required.

Complaint 2 - the factor has failed to comply with its duties section under 6.9 of the code of conduct, which states:

You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

Complaint 3 - the factor has failed to comply with its duties under section 17(5) of the Act.

11. The homeowner's application did not provide much detail about the reasons for his complaints. He stated that he had 'encountered a lot of issues that have been covered by the Defects Liability Period' and that 'there has been no management of repairs being carried out, no updates on the process of repairs or any form of communication on the timescale of repairs being carried out.' He also stated that there were several repairs that he had to insist on being redone because the standard of repair was not acceptable, and that on more than one occasion he had to ask independent experts to verify his concerns in order to have substandard repairs redone. He did not specify the nature of the repairs referred to.

12. The homeowner also complained that the factor had appointed a cleaning contractor without going through a formal tender process. He further complained that the builders had been working in the common areas of the development almost

weekly since he moved in, causing dust and using the common electrical points. He stated that he felt the factor should have insisted on the builders paying for the ongoing cleaning and electrical costs.

13. The homeowner requested in his application that the panel should require the factor to refund all of the factoring costs he had paid, including common cleaning and electrical costs.

14. The homeowner's application stated that he had the necessary documentation to back up his complaint, should the committee require it. The committee considered that it would be helpful to have more detailed information about the nature of his complaints. It therefore issued a direction requiring the homeowner to provide to the committee further details, as described in paragraph 3 of this decision. No response was received from the homeowner either to the direction itself or to a reminder later sent to him.

The representations made by the factor

15. The factor had submitted detailed written evidence, including a variety of supporting documents. At the hearing, Ms Birrell and Ms Reid stated that it was difficult to ascertain from the homeowner's application what repairs he was referring to, and in what respects he was alleging that the factor had failed to comply with its duties. Ms Brynes argued that the homeowner's application did not set out his reasons for considering that the property factor has failed to carry out its duties and/or to comply with the section 14 duty, as required under section 17(2) of the Act. Ms Birrell stated that there was a large volume of correspondence between the factor and the homeowner, and that the documentation the factor had sent to the panel was based on its 'guesstimate' as to the issues his application related to.

16. The main thrust of the factor's written and oral representations was that there is an important distinction between MHA's role as a developer and its role as factor in relation to the flats within the development. It made a clear distinction between defects, the rectification of which was the responsibility of the contractor for the development, and common repairs, which are dealt with through MHA's factoring service, and charged to homeowners in accordance with their title deeds. Ms Birrell advised that she had been involved in prolonged correspondence with the homeowner about 'snagging' issues, and that she believed that the 'repairs' referred to by the homeowner were in fact defects associated with the development which arose during the DLP. She stated that this view was confirmed both through her discussions with the homeowner and the correspondence with him relating to the complaints. She stated that the factor had tried to deal with the issues raised and had responded to the homeowner in detail.

17. The homeowner had raised four formal complaints through MHA's complaints handling process between February 2012 and September 2013. The first complaint related to a variety of reported 'snagging' defects, some of which were communal,

and some which were internal issues relating to the homeowner's own flat. The second complaint from the homeowner was about the issue of 'quality control', but he had not provided any further detail about this.

18. The homeowner's third complaint related to a number of defects, some of which were communal and some internal to his own flat. This complaint had been escalated to stage 2 of the complaints procedure at the request of the homeowner, who later confirmed by email on 27 August 2013 that he was satisfied with MHA's response to the stage 2 complaint, aside from one internal issue which was later resolved. His fourth complaint was made in September 2013, when he raised dissatisfaction with defects reported during the DLP and requested a refund of his factoring costs. The factor wrote to him on 10 September 2013; explaining the distinction between defects and common reactive repairs, and asking him to clarify his specific concerns. No response was received from the homeowner.

19. Ms Birrell stated at the hearing that all homeowners at 2H Viewmount Drive were kept informed of the progress of work carried out throughout the DLP by various means including telephone calls, letters and individual and group emails as appropriate. Several examples of such communications had been included with the documentation submitted by the factor to the committee. MHA wrote to all 9 flat owners on 7 May 2013 to advise them that the clerk of works and architect had completed their final inspection of the property and that all defects had now been completed. The Certificate of Completion of Making Good Defects was granted on 7 October, and homeowners were notified of this on 11 October 2013. Ms Reid advised at the hearing that where defects had not been dealt with, MHA felt that there was a satisfactory reason for this - for example, that the issue was not material or the costs were prohibitive. The clerk of works, the architect and the development consultant had all confirmed that all outstanding issues had been dealt with, and that the development was completed to their satisfaction.

20. One of the other flat owners wrote to Ms Birrell by email on 3 October 2013, advising that the owners at 2H Viewmount Drive had formed a housing co-operative, of which the homeowner was the Chairperson. This email advised that there were still a number of outstanding defects in communal areas, and asked for a meeting with MHA. Ms Birrell wrote to the homeowner on 24 October, asking him to confirm which defects he believed were still outstanding. She met with him on 28 October, and again asked him to provide a list of outstanding defects. She wrote to him and all of the other flat owners on 28 October, again asking him to confirm this, but no response has been received. MHA does not know, therefore, which defects he believes remain outstanding.

21. With regard to the homeowner's allegation that some repairs had not been carried out properly, Ms Birrell suggested that this could relate to the door closer on the pigeon gate in the rear courtyard area, which the homeowner had made repeated complaints about and had remained dissatisfied, despite its having been

replaced. MHA had investigated this issue in some depth, and had sent a representative from the manufacturer to the property, who had confirmed that it had been installed correctly.

22. Ms Birrell stated at the hearing that, while private factors might not generally be involved in snagging issues, MHA was keen to resolve any issue arising for owners, and that the factoring and development teams worked closely together in order to provide the best service to homeowners. She said that MHA had worked hard to explain the distinction between the developer and factor roles to homeowners, and that only the homeowner had continued to raise snagging issues as common repairs issues. She pointed out that the 'Home User's Guide' given to all homeowners when they move in clearly explained the different routes for reporting these issues. There had also been a meeting with homeowners on 23 January 2012 to explain in detail the procedures for reporting snagging, defects and repairs, the minutes of which had been sent to all homeowners.

23. Ms Brynes pointed out that MHA had also worked to resolve other issues which had arisen for homeowners which were unrelated to snagging, and had done its best to help them in ways which most factors would not. For example, there had been a problem with pigeons within the common courtyard, which had arisen after the development was completed. MHA had installed pigeon gates in the courtyard at no cost to owners, even though this was not part of the original specification for the development.

24. Ms Birrell confirmed that any issue arising after 7 May 2013, when homeowners were advised that the DLP had come to an end, would be dealt with as a common repairs issue, rather than a 'snagging' issue, unless it was a latent defect. She advised that some common repairs issues had in fact arisen during the DLP, such as vandalism to floodlights, and that these had been dealt with as common repairs.

25. With regard to the allegation that MHA had appointed a cleaning contractor without carrying out a formal tendering process, Ms Reid advised that the homeowner had not raised concerns about this issue with MHA prior to his application. The factor had nevertheless submitted to the committee a copy of a report dated May 2011 on tenders received for cleaning across all of the properties factored by MHA. This showed that four tenders had been received, and the lowest of these accepted. The factor's written representations stated that it does not have separate tendering processes for separate developments, but that the service provided had previously been tendered in accordance with appropriate procurement regulations and practice.

26. Regarding the use of common electricity by contractors while rectifying defects, the factor advised in its written representations that it believed that this was reasonable and practical. Ms Birrell stated at the hearing that MHA had investigated this matter, and had spoken to the architect and clerk of works, who advised that the

use of electricity had been kept to a minimum by the main contractors and sub-contractors during the DLP. The factor had produced figures which suggested that the common electricity charges for the year January- December 2013 were likely to be very similar to those for the year of the DLP, from December 2011-December 2012, which were around £108 per owner.

Reasons for the committee's decision

27. In the absence of detailed information from the homeowner regarding the nature of the repairs to which his complaints relate, the committee determines, on the basis of the evidence available to it, that on the balance of probabilities, complaints 1 and 2 concern 'defects' or 'snagging' issues, rather than common repairs. In particular, the homeowner's application itself made reference to the DLP. These issues do not therefore fall within the responsibilities of MHA in its role as property factor for the development. The committee can only consider issues which relate to the duties of a property factor in terms of section 17 of the Act.

28. The committee considers, however, that even if the complaints did relate to common repairs issues falling within MHA's factoring service, the factor has submitted considerable evidence to demonstrate that it has taken the homeowner's complaints seriously, investigated these fully in line with its formal complaints process, and taken action to rectify the matters complained about. As regards section 6.1 of the code of conduct, the evidence before the committee demonstrates that the factor has clear procedures in place regarding the notification of repairs by owners, as set out in section 11 of the WSS provided to the homeowner. The factor also provided considerable evidence that it had kept the homeowner informed through various means as to the progress of the work being carried out to remedy the defects that had been notified. Regarding section 6.9 of the code of conduct, it was also clear from the evidence submitted by the factor that MHA had pursued the outstanding defects with the building contractor until it was satisfied that all defects had been remedied so far as possible.

29. The committee observes, however, that, while MHA had clearly made considerable efforts to explain to homeowners the distinction between defects which were the responsibility of the contractor and common repairs issues for which the factor has responsibility, this is not a straightforward division given its dual role as developer and factor. This distinction could potentially cause confusion for both homeowners and MHA itself. While MHA's efforts to do as much as possible to resolve issues for homeowners were admirable and carried out with the best of intentions, it had gone beyond the usual role of a factor in some instances in attempting to resolve homeowner's concerns. This may have inadvertently created greater confusion between its two roles.

30. Regarding complaint 3, the committee determines that there was no evidence before it to support any conclusion that the factor had failed to comply with its duties

as a property factor as defined in section 17 (5) of the Act. While it was unclear from the homeowner's application why he considered the factor had failed to comply with its duties, the committee concluded that this may have related to his complaints regarding the alleged appointment of a cleaning contractor without going through a formal tender process, and the cleaning and common electrical costs arising from ongoing building works in relation to defects. The evidence submitted by MHA showed that the cleaning contract had been awarded following a formal tendering process, and there was no evidence that the homeowner had previously requested this information and had his request refused. The committee was also satisfied on the basis of the evidence submitted by the factor that the common electrical costs for the period concerned were not excessively high in comparison with the comparable period for the following year.

Right of appeal

The parties' attention is drawn to the terms of section 22 of the Act regarding their right to appeal, and the time limit for doing so. It provides:

- (1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or homeowner housing committee.
- (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made.

More information regarding appeals can be found in the information guide produced by the homeowner housing panel. This can be found on the panel's website at:

<http://hohp.scotland.gov.uk/prhp/2649.325.346.html>

Sarah O'Neill
Chairperson Signature :

Date.....13/5/18.....