



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

HOHP reference: HOHP/PF/13/0041

Re: Property at 2 Milton, 41(b) Station Road, Carluke, ML8 5AD ("the Property")

The Parties:-

JAMES BRYDEN, residing at 2 Milton, 41(b) Station Road, Carluke, ML8 5AD ("the Homeowner")

And

Newton Property Management, Property Factors, 87 Port Dundas Road, Glasgow, G4 0HF ("The Factor")

Decision by the Committee of the Homeowner Housing Panel in an application under Section 17 of the Property Factors (Scotland) Act 2011

Having considered the Application from the Homeowner, and having considered the written representations of both parties (together with the supporting documents), and having heard parties at the hearing, the Homeowner Housing Committee have determined that the Property Factor has not failed to carry out the Property Factors duties.

Committee Members

Andrew Cowan (Chair Person)
Alexander Carmichael (Surveyor Member)
Helen Barclay (Housing Member)

Background

1. The Factor's date of registration as a Property Factor is 1 November 2012.
2. By an application dated 7 February 2013, the Homeowner applied to the Homeowner Housing Panel ("the Panel") to determine whether the Factor had failed to carry out the

Property Factors Duties and/or to ensure compliance with the Property Factor Code of Conduct in terms of the Property Factors (Scotland) Act 2011 ("the Act"). The application by the Homeowner alleged the following failings on the part of the Factor:-

- (a) that the Factor had breached the Code of Conduct ("the Code") for Property Factors. In his application the Homeowner made reference to 16 different sections of the Code with which, he alleged, the Factor had failed to comply;
 - (b) that the Factor had failed in their duty to deal with issues which arose following the failure of an external sewage pump which served the block of flats in which the Property is situated;
 - (c) that the Factor had failed in their duty to properly manage issues in relation to a leak in the roof of the block in which the Property is situated; and
 - (d) that the Factor had failed in their duty to adequately and fully resolve issues which had arisen in relation to the electric gates to the development in which the Property is situated and which the Homeowner maintained are not fully operational or fit for purpose.
3. Following the submission of the Homeowner's Application the Panel entered into further correspondence with the Homeowner, the purpose of which was to clarify further details in relation to the nature and extent of the Homeowner's Application. All of the correspondence between the Panel and the Homeowner was copied to the Factor.
 4. By letter dated 7 May 2013, the President of the Panel intimated her decision to refer the application to a Homeowner Housing Committee.
 5. Following referral of the Application by the President of the Panel to the Homeowner Housing Committee ("the Committee"), the Factor, by letter dated 17 May 2013, lodged written submissions in respect of each of the separate complaints the Homeowner had raised in his application and as referred to in paragraphs 2 (b), (c) and (d) above.

Hearing

6. A hearing on the issues took place at the office of the Panel, Europa Building, 450 Argyle Street, Glasgow on 4 July 2013 before the Committee. The Homeowner represented himself. He gave evidence and called no witnesses. The Factor was represented by Mr Derek McDonald and Mr Scott Cochrane. Both representatives gave evidence on behalf of the Factor. No other witnesses were called.

First Preliminary issue re jurisdiction

7. At the start of the hearing the Committee were required to consider whether they had jurisdiction to consider certain parts of the application lodged by the Homeowner.

Complaints under the Code

In his application form the Homeowner had completed that part of the form which related to an alleged failure by the Factor to comply with the Code. The Homeowner had indicated 16 Sections of the Code with which he considered the Factor had failed to comply. In response to a letter from the Panel, the Homeowner had, by letter dated 8 March 2013, given some further specification of his complaints under the various sections of the Code.

At the hearing the Committee made reference to Section 17(3) of the Act which states that no application can be made to the Homeowner Housing Panel unless:-

"The Homeowner has notified the Property Factor in writing as to why the Homeowner considers 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 Section 14 duty referred to in Section 17 (3) relates to the duty upon a Property Factor to ensure compliance with the Code.

Following discussion with the Homeowner, it was accepted by the Homeowner that he had never specifically put in writing to the Factor any complaints with specific reference to the Code. The Homeowner accepted that he had not notified the Factor in writing as to why he considered the Factor had failed to comply with each of the various Sections of the Code to which he had referred in his application.

The Homeowner confirmed he wished to pursue the application in relation to the three specific matters he had raised where he alleged the Factor had failed to carry out his duties, and as identified in this decision at paragraphs 2 (b), (c) and (d).

Having heard parties on this issue, the Committee determined that they did not have jurisdiction to consider that part of the Homeowner's application which related to an alleged failure of the Factor to comply with the Code.

In particular, the Committee noted that the Homeowner was not in a position to confirm that he had notified the Property Factor in writing as to any specific failure in this respect, all as required by Section 17(3) of the Act.

Having reached their determination in this respect, the Committee intimated this decision to both parties and confirmed that they could not hear any evidence from either party in relation to a failure to comply with the Code.

Second preliminary issue re jurisdiction

8. The Homeowner has complained that the Factor has failed in his duties in relation to issues which arose following the failure of an external sewage pump which served the block of flats in which the Property is located.

In support of his submission, the Homeowner had lodged a series of correspondence between the Homeowner and the Factor, the majority of which was dated between December 2011 and August 2012.

It was evident from that correspondence that, following a failure in the pump in December 2011, the Factor had ultimately instructed the necessary works and the pump had been repaired by the end of February 2012.

In the course of organising these repairs the Factor had obtained an Engineer's report as to the cause of the original break down of the pump and had further obtained the authority of the majority of the owners in the block to install a remote early warning system which would alert Engineers in the event there was a further problem with the system in the future. The affected owners were each charged a *pro indiviso* share of the necessary costs of the work. The works were subsequently completed and the Homeowner was charged his share of the costs of the necessary works which amounted to £40.93. The Homeowner subsequently paid for that work.

The Homeowner's complaint appeared to centre around the fact that he had discovered that the Factor had not ensured that the pumps had previously been maintained in accordance with a service schedule for which there was a contract, and for which the Homeowners had paid a fee.

In considering this complaint, the Committee had regard to Regulation 28 of The Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 ("the Regulations").

In particular the Committee noted that Regulation 28 provides

- "(1) Subject to paragraph (2), no application may be made for the determination of whether there was a failure before 1 October 2012 to carry out the property factors duties.

- (2) The President and any Committee may take into account any circumstances occurring before 1 October 2012 in determining whether there has been a continuing failure to act."

The Committee noted that the Homeowner's complaint related to an issue which arose before the 1 October 2012.

The Homeowner maintained that there was a continuing failure of the Factor after 1 October 2012 as the Factor had failed to accept that the original failure of the pumps was attributable to the fact that engineers had failed to carry out regular inspections of the pump, as they were contracted to do.

Regulation 28(1) ensures that the 2011 Act does not have retrospective effect while Regulation 28(2) allows certain circumstances occurring before it came into force to be taken into account in determining whether there has been a continuing failure to act after the Act came into force and became applicable to actions of a particular Property Factor.

Having heard parties submissions on this matter, the Committee determined they had no jurisdiction to deal with the Homeowner's complaint in relation to this particular part of his application as his concerns about

- (a) the Factor's failure to ensure that a proper servicing schedule was maintained in relation to the pump, and
- (b) whether or not the Homeowner should have been charged for any work carried out to the pumps,

arose from circumstances arising in the periods prior to 1 October 2012.

There is nothing in correspondence after that date, or any action or inaction on behalf of the Factor after that date, which supported the Homeowner's views that there had been a failure by the Factor to carry out his duties.

In all the circumstances, the Committee determined that they do not have jurisdiction to consider this part of the applicant's complaint further as the complaint related to matters of an alleged failure by the Factor which occurred before the 1 October 2012 to carry out the Factor's duties and in accordance with Regulations 28(1), the Committee has no jurisdiction to consider such matters.

The Homeowner's complaint regarding the alleged failures of the Factor in relation to a necessary roof repair.

9. The Homeowner has complained that the Factor has failed in his duties in relation to the management and co-ordination of necessary repairs in respect of a leak in the roof of the block in which the Property is situated.

More specifically, the Homeowner has complained that, *inter alia*, the Factor sought to obtain quotes for carrying out necessary repairs to the roof without proper consultation with the Homeowner.

The Homeowner further maintained that he was entitled to insist that he could instruct the work to be carried out.

The Homeowner further maintained that he was entitled to insist that the Factor instruct a local contractor to carry out the work.

The Committee heard evidence from both the Homeowner and the Factor in relation to this issue. The Committee were able to also consider the various letters and emails which had passed between the Factor and the Homeowner on this issue.

Findings in Fact

- (a) Around 8 October 2012, the Factor received a complaint from another owner in the block that there was a leak into his property. Having received that complaint, the Factor obtained a quote to carry out certain works to the roof and intimated their intention to proceed with that work to the other affected owners within the block.
- (b) The Homeowner responded to the Factor and indicated that he had spoken with the majority of the other owners within the block and that he would now instruct his own contractor to carry out repairs. At the same time, however, he indicated that any costs incurred by him in instructing such a contractor would require to be reclaimed from each of the owners by the Factor.
- (c) The Homeowner was entitled to proceed to instruct the necessary works to the roof.
- (c) The Factor confirmed to the Homeowner that he could appoint his own local contractor to undertake the work but, the Factor would require specific authority from a majority of the owners if they were required to recover their share of any costs incurred by the Homeowner
- (d) The Homeowner then obtained a mandate signed by a majority of owners within the block. That mandate confirmed that the Homeowners wished a local contractor to carry out the work. It did not authorise the Homeowner to instruct works on the other Owners' behalf nor did it authorise the Factor to recover a

share of such costs in the event such works directly instructed by the Homeowner.

- (e) On receipt of the various mandates from the majority of owners within the block, the Factor sought to obtain further quotations from local contractors.
- (f) In correspondence from the Homeowner, he suggested that:-
 - (i) the Factor had deliberately delayed matters by insisting upon obtaining the necessary consents from the owners within the block;
 - (ii) the Factor had unreasonably refused to organise access to the property affected by the leak;
 - (iii) the Factor had failed to select local contractors, as the contractors selected by the Factor was not based within the immediate locality of the property.
- (h) On receipt of the Homeowners' request for a local contractor to carry out the works, they had approached a company known as JM Services. That company hadn't initially responded to the request for a quotation to carry out the work. JM Services ultimately carried out the necessary work to repair the leak in the roof at no charge to the Homeowners.

Decision

Having heard parties in relation to the issues, the Committee are not satisfied that there has been a failure on the part of the Factor to carry out the Property Factors duties.

The Factor correctly requested the consent of Owners to carry out work to the roof.

The Homeowner objected to the Factor's quotation, as he was entitled to do.

There was a delay in ultimately arranging for a contractor to carry out the works but this was, in part, caused by the Homeowner's confused instructions to the Factor. The Homeowner had sought to insist that he would instruct the works, whilst at the same time requiring the Factor to recover the share of costs of such works from each of the affected Homeowners.

It is the Committee's view that the Homeowner cannot simply select those parts of the Factor's services which he wishes to use in any particular event. The Homeowner can either require the Factor to organise the necessary works and to recover the costs from the Owners, or to carry out such works himself. In the event he instructs the work himself, it would be for the Homeowner to recover the share of costs from the other

Owners affected. The Committee are satisfied that the Factor took reasonable steps to explain their position to the Homeowner and to address his concerns. The Factor cannot provide access for the Homeowner to other owner's private property. The Committee noted that the Factor attempted to obtain local quotations from local contractors as per the instructions from the Homeowner. Ultimately the Committee noted the work was finally done at no cost to any of the Homeowners within the block.

The Committee are satisfied that the Factor complied with their duties in relation to this matter.

The Homeowner's complaint regarding the alleged failures of the Factor in relation to the electric gates.

10. The Homeowner has complained that the Factor has failed in his duties to adequately and fully resolve issues which have risen in relation to the electric gates to the development in which the property is situated. The Homeowner maintains that these gates are not fully operational or fit for purpose.

The Committee were able to consider an extensive series of correspondence between the Homeowner and the Factor in connection with this issue. The correspondence dates back as far as June 2008. Notwithstanding this, the Committee noted that the issues complained of by the Homeowner continued after the 1 October 2012. The Homeowner maintains that there was a continuing failure of the Factor after the 1 October 2012 in relation to their duties in this respect. The Committee were satisfied that there was a continuing issue after the 1 October 2012 and, in the circumstances, they did have jurisdiction to consider this part of the Homeowner's complaint. In doing so, the Committee had regard to Regulation 28 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 and in particular paragraph 2 of Regulation 28 which confirmed the Committee could take into account any circumstances occurring before 1 October 2012 in determining whether there had been a continuing failure to act after that date.

During the course of the hearing, the Factor lodged with the Committee (with the consent of the Homeowner) a chronological history of all correspondence and actions which had taken place through the Factor from the period 17 January 2011 to date.

Findings in fact

- (a) Until at least May 2013 there had been a continuing problem with the operation of the electric gates at the entrance to the development in which the property is situated.

- (b) The operation of the gates has been, at best erratic and for a long period they were left open as they did not operate at all.
- (c) On each occasion that a fault was reported in relation to the gates, the Factor had instructed contractors to investigate and where possible repair the gates.
- (d) During the course of those investigations the contractors had attempted a number of different technical solutions to resolve the position.
- (e) A number of these solutions failed to fully address the issues which had risen with the gates and, in November 2012, the Factor had provided the Homeowners with details of a contractor's report and suggested actions required to rectify the gate along with the associated costs.
- (f) The Factor thereafter subsequently obtained a second opinion from a second contractor, who reported that the mechanical gates were in a good condition and were suitable and were fit for purpose. They did however recommend replacement of the existing electric operational system. The Factor thereafter presented that report to the owners seeking their instructions as to which of the two proposals for works to the gate they wished to accept.
- (g) The Factor ultimately received 11 mandates from owners who wished to proceed with the proposal produced by the WSS Group. The Factor required a minimum of 13 mandates in order to proceed with the work. Accordingly, on 12 May 2013, the Factor again wrote to the owners and confirmed that on the basis they already had 11 mandates to instruct WSS Group to carry out works, unless objections were received within 14 days from the remaining owners who had yet to formally return a mandate, they would assume they had consent to proceed with the WSS Group quote.
- (h) Thereafter the Factor instructed WSS to carry out necessary works to the gates. It is the Factor's position (although that is not accepted by the Homeowner) that this work has now been completed and that the gates are operational. They have a guarantee/warranty in respect of the works carried out by WSS.

Decision

The Committee noted that the Factor accepted that there had been extensive periods when the gates did not operate. The Factor's position was that they had taken all reasonable steps to address the issues. The Factor highlighted that:-

- (a) they required the consent of the majority of the owners in the development to carry out any work which was required to the gates;

- (b) they required to rely upon advice of consultants and contractors in relation to the identification of faults with the electric gate system together with the proposed technical solutions to address those faults; and
- (c) work had recently been carried out to the gates and the gates were now again operational.
- (d) The Factor had obtained a warranty/guarantee in relation to the recent rectification works, which they were confident would assist in addressing any future issues which would arise in relation to the gates.

The critical factor for the Committee in relation to this issue is whether they consider there is sufficient evidence to establish that the Factor has failed to carry out his Property Factors duties in relation to this particular issue.

Although the Committee have considerable sympathy with the position of the Homeowner in this respect, it is the Committee's view that there is a sufficiency of evidence that the Factor has attempted to resolve this issue in a reasonable manner.

Although the operation of the gates has, at best, been intermittent over a long period, the Factor has in the view of the Committee, taken reasonable steps to identify and repair the gates on each occasion that a fault has been reported. In doing so, the Factor must rely upon the advice of contractors and consultants as to a reasonable method of resolving the issues which have arisen. In addition, the Factor requires to consult with the Homeowners and obtain their consent to carry out any necessary works. Each of these steps takes time and urgent or immediate solutions are not easily reached in these circumstances. The Factor has complied with these requirements throughout the process. It is recognised that at different stages of this issue, the contractors have attempted to resolve the issue and such attempts have failed. The Committee are of the view, however, that that is not through the fault of the Factor.

In all the circumstances, the Committee are not satisfied that there is a sufficiency of evidence to establish that the Factor has (either before 1 October 2012 or thereafter) continually failed in their duties on relation to this matter. In terms of Section 17(4) of the Act, the Committee are satisfied that in relation to this issue the Factor has carried out their duties to a reasonable standard.

Decision in relation to Homeowners Application

11. Having considered the Application from the Homeowner, and having considered the written representations (and supporting documents), and having heard parties at the hearing, the Homeowner Housing Committee have determined that the Property Factor has not failed to carry out the Property Factors duties as averred by the Homeowner and, accordingly, do not require to consider making a Property Factor Enforcement Order in relation to this particular application.

Appeal

12. 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 may only be made by summary application to the sheriff against a decision of the president of the Homeowner Housing Panel or a 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."

Signed ...

Andrew Cowan, Chairperson

..... Date..... 22/7/13