



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

hohp Ref: HOHP/PF/13/0054

Re: Property at 4 Croft Field, Jedward Terrace, Denholm, TD9 8BQ
(collectively "the Property")

The Parties:-

Mr K.D. Naylor, 4 Croft Field, Jedward Terrace, Denholm TD9 8QB ("the Homeowner")

Greenhome Property Management, McCafferty House, 99 Firhill Road, Glasgow, G20 7BE ("the Factors")

Decision by a Committee of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and the Homeowner Housing Panel (Application and Decisions) Regulations 2012 ("the 2012 Regulations")

Committee Members:

Maurice O'Carroll (Chairman); Sara Hesp (Surveyor Member); John Blackwood (Housing Member)

Decision of the Committee

The Committee finds that it has jurisdiction to hear all of the outstanding complaints made by the Homeowner for the reasons stated below.

The decision is unanimous.

Background

1. By application dated 4 April 2013, the applicant applied to the Homeowner Housing Panel ("HOHP") under s 17 of the 2011 Act alleging a failure on the part of the Factors to carry out their duties under s 17(1) of the Act and a failure to ensure compliance with the Code of Conduct as required by s 14(5) of the Act.
2. The application was referred to a homeowner housing committee on 24 June 2013 and a hearing was set down to take place at Thistle House, 91 Haymarket Terrace, Edinburgh on 30 August 2013. By letter dated 8 July 2013, the Factors intimated an intended challenge to the jurisdiction of the committee to hear the application. As a

result of that challenge, a First Direction was issued by the committee on 26 July 2013. In terms of the Direction, the committee indicated that it would hear the challenges to the committee's jurisdiction, before proceeding to hear the substantive issues forming the subject-matter of the application, if appropriate.

3. By letter dated 7 August 2103, the Factors indicated that an essential witness, Mr Scott, was unavailable to give evidence due to a prior commitment at Stirling Sheriff Court on that date. They also observed that the Homeowner had submitted 8 submissions amounting to 48 pages further to his application. They also requested that the hearing be convened in Glasgow.
4. Accordingly, the committee issued a Second Direction at its own instance dated 13 August 2013 which indicated that the hearing set down for 30 August 2013 would proceed on that date in Edinburgh in order to hear the challenges to its jurisdiction only, with no evidence being led. It also required the homeowner to provide a summary of all of his outstanding issues of complaint within a single document by reference to correspondence submitted to the Factors and the HOHP within 14 days of the Direction. The homeowner complied with the terms of the Second Direction by an email with attachment dated 21 August 2013.
5. At the hearing on 30 August 2013 the applicant appeared in person and was unrepresented. For the Factors, Mrs Julie Mitchell, their Managing Director, appeared, accompanied by Liz Anne McHugh, their business support manager and their solicitor, Wendy Quinn. The Factors helpfully provided a bound set of documents to the committee containing relevant correspondence and other materials which they wished to rely upon, while reserving the right to provide other documents if necessary. They undertook to provide the homeowner with a copy of that set of documents the following day, since he was not also furnished with one at the hearing itself.

Discussion of the heads of challenge

6. The Factors' letter of 8 July 2013 challenged the jurisdiction of the committee to hear the application on the following bases:
 - (i) The President's alleged failure to comply with s 18 of the Act and its associated regulations;
 - (ii) The Homeowner's failure to comply with the preliminary requirements of s 17(3) of the Act and its associated regulations; and
 - (iii) Issues complained of having occurred prior to the commencement date of the Act by reference to Regulation 28 of the 2012 Regulations.
7. The Factors provided no detailed submissions regarding the first head of challenge noted above, it merely being mentioned towards the end of the hearing by Mrs Quinn, apparently for the sake of completeness. The committee noted that the decision of

the president to refer the application to the committee in terms of s 18 of the Act was not a matter properly before it. On the face of it, the referral was validly made and had not been appealed in terms of the relevant timescale under s 22 of the Act. It therefore formed no part in the committee's deliberations.

8. The committee heard full submissions in relation to the second head of challenge under s 17(3), namely a failure on the part of the homeowner to notify to the factors in writing as to why it is he considered that they had failed in their duties or had failed to comply with the Code of Conduct prior to lodging an application with the HOHP. The committee was addressed by Mrs Mitchell who pointed out that the Factors had received a letter dated 13 May 2013 from the Homeowner which listed all of his grievances at that time, stating that if they were not resolved then he would require to apply to the HOHP. She then pointed out that the application to the Homeowner Housing Panel preceded that letter by a matter of some weeks, being 4 April 2013. Therefore, she submitted, s 17(3) had not been complied with.
9. In response, the homeowner, stated that he had indeed lodged his application with the HOHP at the date stated. However, at that time he was advised by HOHP that they would not proceed with his application until he had notified the factors of their alleged failures in duty. It was that advice which prompted his letter of 13 May 2013 which summarised his previous complaints and updated with more recent ones arising *inter alia* from the Factor's letter to him dated 27 June 2012. The letter in terms states that it is being sent prior to seeking resolution with the HOHP and gives 14 days for a reply. The Homeowner in fact allowed 28 days for a reply to be made by the Factors but none was forthcoming. His application to the HOHP was accordingly activated after that time. As noted above, the referral to committee in terms of s 18 did not occur until 24 June 2013.
10. The Committee notes that a letter dated 16 April 2013 was sent to the Homeowner setting out in layman's terms the requirements of s 17(3) of the Act and stating that prior notification was "an essential requirement" of the Act. The final sentence of that letter reads "You should follow the s 17(3) procedure in respect of the complaints arising from the failures to or failures with the Code arising from the relevant dates" [being 1 October 2012 and 1 November 2012 as noted below]. A reminder was sent on 30 April 2013. A further reminder was sent on 14 May 2013 requiring evidence of notification and any responses thereto. That letter appears to have crossed with the Homeowner's letter of 13 May 2013 addressed to the Factors and sent in near identical terms to the HOHP. The Committee is satisfied that the letter of 13 May 2013 addressed to the Factors was in order to comply with the requirements of s 17(3) of the Act, as advised by the HOHP and did in fact comply with that section. It is satisfied that the notification letter allowed a reasonable time for the Factors to address the concerns raised by the Homeowner in that letter prior to the application being referred to the Committee. Accordingly, the Committee finds that it is not debarred from hearing the application in terms of s 17(3) of the Act.

11. The third head of challenge relates to the time of the issues complained of, rather than the procedure prior to the application being made. In particular, the point of focus is whether the failures are alleged to have occurred prior to the entry into force of the Act on 1 October 2012, or if so, whether the alleged failures were ongoing after that date and therefore could be taken into account by the Committee in terms of Regulation 28(2) of the 2012 Regulations. In relation to the Code of Conduct, the date of registration of the Factors which was 1 November 2012 which means that failures to comply with the Code may only be considered if they are alleged to have occurred after that date.
12. At the hearing, the Committee was at pains to stress that in deciding upon this particular issue of jurisdiction, it was not concerned with the merits or otherwise of the complaints contained in the application, rather, whether it was entitled to consider them at all. To this end, the issues of complaint required to be taken at their highest, and at face value, regardless of whether they may eventually be found to be lacking in merit after any hearing on the evidence.
13. Despite the extensive correspondence already produced by the Homeowner (some of it as a result of attempts by the HOHP to clarify the issues contained within the application), it appeared to the Committee that the outstanding issues of complaint could be condensed into the following five categories:
 - (i) Failure on the part of the Factors to communicate effectively with the Homeowner
 - (ii) Communal gardening issues
 - (iii) Television issues
 - (iv) Financial management and accountability; and
 - (v) Alleged failure to comply with various parts of the Code of ConductThese are considered in turn below in relation to the issue of timing only.
14. The starting point for the Homeowner was the "demands for money" which were sent to his property in December 2011. He recounted various other letters which he sent to the Factors on 25 May 2012, 16 June 2012, 9 July 2012, 18 August 2012 and 8 September 2012, culminating with him receiving a court summons from the Factors in December 2012 which he settled in January 2013. Correspondence continued after that with further letters being sent by the Homeowner to the Factors in March 2013 and on 13 May 2013 to which he received no replies. For the Factors, Mrs Mitchell stated that all of the Homeowner's queries were answered in the letter sent to him on 27 June 2012. Prior to that, Mrs McHugh for the Factors had visited the site on 17 June (a Sunday) in order to hear the concerns of any of the homeowners in relation to the management of the development. A letter dated 7 July 2012 had been sent out to all homeowners informing them of a change of contractors.
15. For his part, the Homeowner contended that the letter of 27 June 2012 was the sole item of correspondence he actually received from the Factors and that it did not answer all of his concerns. As a result, he had sent a further letter dated 9 July 2013 which set out the issues which he considered to be still outstanding and not

addressed by that letter, to which he received no reply. It was accepted by Mrs Mitchell that if the Homeowner's concerns were valid after that date and subsisted until after 1 October 2012 without resolution, the Committee would have jurisdiction to hear the application. The Committee consider that concession to have been correctly made. Whatever the merits of the response to the Homeowner's letter of complaint dated 27 June 2012, it is clear that the Homeowner was still making allegations of failure on the part of the Factors after that date through to 1 October 2012 and up to the date of the hearing. The merits of those ongoing allegations and whether they are valid or not cannot be assessed at the stage of a preliminary hearing. The Committee therefore considers that there are issues which require to be considered by way of evidence. It therefore has jurisdiction to hear the application under this particular factual heading.

16. In relation to the gardening issues, the Factors indicated that not only was there a letter to all homeowners in the development relating to the change of contractor (who had been unsatisfactory), they also wrote a detailed letter to the Homeowner on 27 July 2012 which answered all of his concerns. The Homeowner claimed not to have received either of these letters which might also be a matter of evidence at a subsequent hearing. In any event, it is clear that the Homeowner still has complaints regarding gardening maintenance which form part of his application. Those complaints have again subsisted beyond the relevant date to the date of the hearing on 30 August 2013. Accordingly, the Committee considered that it has jurisdiction to consider the application under this particular factual heading.
17. In relation to the television issues, Mrs Mitchell on behalf of the Factors stated that the Homeowner had written to them stating that the communal aerials were an eyesore, that he wanted to see them removed and moreover did not expect to pay for the communal service in relation to them. On the face of it, that assertion did not appear to be borne out by other items of correspondence, in particular a letter dated 9 July 2012 which made reference to works in relation to the communal aerials being carried out "by yourselves" which the Committee understood to be a reference to the Factors in furtherance of their duties as such. The television issue was also flagged up by the Homeowner in the letter dated 13 May 2013 referred to above. Accordingly, in keeping with the above reasoning, the Committee considered that it has jurisdiction to consider the application under this particular factual heading.
18. A similar consideration applies in relation to the Homeowner's allegation of inadequate financial reporting and accountability. He appears to consider that the Factors ought to produce annual budgets, with them being sent to homeowners prior to them being set and an independent audit to vouch for monies spent at each year end. Those requirements might go further than the Factors' actual duties in terms of the Act but that is a matter for consideration after the hearing of evidence. For the Factors, the Committee was directed to two pages headed "Annual Statement of Account" dated 29 October 2012, the first of which formed the basis of the court action mentioned above. The Committee had doubts as to whether those statements were sufficiently detailed to provide an adequate level of accountability, however, it

was not required to make a determination on that issue at the preliminary hearing. It suffices to note at this stage that the statement post-dates 1 October 2012 and that there is scope for arguing that it is insufficient to comply with the Factors' duties under the Act. Again, that is an issue which requires to be determined after evidence. Accordingly, the Committee considered that it has jurisdiction to consider the application under this particular factual heading.

19. Finally, in relation to alleged failures to comply with the Code of Conduct, it was conceded by Mrs Quinn on behalf of the Factors that if the Committee considered that it had jurisdiction in relation to s 17 duties, it would also have jurisdiction in relation to alleged failures under s 14(5) (given that the subject-matter of complaint was essentially the same for each). The Committee took that concession to carry the proviso that it would have such jurisdiction, so long as the failures were alleged to have occurred after 1 November 2012. The alleged failures to comply with the Code were contained in the Homeowner's letter of complaint dated 13 May 2013 and repeated in the summary provided further to the Second Direction under cover of an email dated 21 August 2013. Standing the above discussion, the Committee therefore finds that it has jurisdiction to hear the parts of the application alleging failures to comply with the parts of the Code of Conduct contained within those two items of correspondence.

Decision

20. Having considered the submissions of the parties at the preliminary hearing held on 30 August 2013, the Committee finds that it has jurisdiction to hear all of the outstanding complaints contained within the Homeowner's summary of complaint dated 21 August 2013 in the light of the prior correspondence referred to above. The HOHP will proceed to fix a further hearing on the evidence based upon the five headings of factual issues outlined above at paragraph 13 of this decision.

Appeals

21. The parties' attention is drawn to the terms of s 22 of the 2011 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 a Homeowner Housing Committee; (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made..."

Maurice O'Carroll

Signed,
Chairperson

Date..... 12 September 2013