



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

HOHP Ref: HOHP/PF/14/0081

Re: Taylor Wimpey Development, Prestongate, Prestonpans, East Lothian

The Parties

Harry Kerr, residing at 18 Caledonian Crescent, Prestonpans, East Lothian, EH32 9GF ("the applicant")

and

Charles White Limited, a company incorporated under the Companies Acts and having a place of business at Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD ("the respondent")

DECISION BY THE COMMITTEE OF THE HOME OWNERS HOUSING PANEL IN AN APPLICATION UNDER S17 OF THE PROPERTY FACTORS (SCOTLAND) ACT 2011

DECISION OF THE COMMITTEE

The Committee, having made such enquiries as it saw fit for the purposes of determining whether the Respondent has

- (a) Complied with the property factor's duties created by Section 17 of the Property Factors (Scotland) Act 2011 ("The 2011 Act") &
 - (b) Complied with the Code of Conduct, as required by Section 14 of the 2011 Act
- Determined that the Respondent has not breached the Code of Conduct for Property Factors, nor has the respondent failed to carry out the property factor's duties.

Committee Members

Paul Doyle	(Chairperson)
Sally Wainwright	(Housing Member)

Background

- 1 By application dated 6 April 2014, the applicants applied to the Homeowner Housing Panel for a determination as to whether the respondent has failed to comply with the

code of conduct imposed by Section 14 of the 2011 Act and separately failed to comply with the property factor's duties.

- 2 The application stated that the applicant considered that the respondent failed to comply with the property factors' duties and also failed to comply with Section 2.2.2, Section 3.3.3(d) and (m), Section 2.2.5, Section 4.4.8 and Section 7.7.2 of the Code of Conduct.
- 3 By minute dated 24 September 2014, the president of the Home Owner Housing Panel intimated a decision to refer the application to a Home Owner Housing Committee. The Home Owner Housing Panel served notice of referral on the parties, directing the parties to make any further written representations.
- 4 By e-mail and written response dated 10 and 16 November 2014, the applicant expanded on his application. (e-mails were also received from the respondent on 26 July, 1, 2 & 20 August, & 22 September all 2014). The respondent submitted a response to the referral dated 16 October 2014.
- 5 Neither party has requested an oral hearing. The Committee was satisfied that this case can be justly determined on the available documentary evidence.

Findings in Fact

6 (a) The applicant purchased the property at 18 Caledonian Crescent, Prestonpans on 30 September 2011. The property forms part of a development of dwelling-houses and flats, completed by Taylor Wimpey Developments Ltd in or about 2011/2012. The management of the communal areas has been handled by the respondents, who are property factors, since the completion of the development in or about 2011/2012. One of the property factor's duties is to arrange the care and maintenance of the common parts under the instructions of the management committee of a residents' association. The applicant is a member of that residents' association.

(b) Adjacent to the applicant's property, there is a pathway and an area of ground, the title for which still rests with Taylor Wimpey Developments Ltd. Neither the applicant nor the respondent are responsible for maintenance of that area.

(c) When the applicant moved into the property, the respondents contacted him and provided him with a written statement of services. That written statement of services was updated in April 2013. The respondent provided the applicant with a copy of the written statement of services. A copy of the respondent's written statement of services dated April 2013 has been placed before the Committee.

(d) The respondent invoices the applicant (and others) quarterly for factoring charges. The applicant has refused to pay the invoices sent to him since 1 January 2012. The respondent wrote to the applicant on 30 May 2013, reminding the applicant that his account was overdue, referring to previous reminders and telling the applicant that the respondent intended to

"...proceed to either;

- 1 raise a summary court action for the debt
- 2 place a notice of potential liability on your title as per the "Tenement (Scotland) Act 2004" or "Title Conditions Act 2013"

If you wish to avoid this action then please arrange to pay the balance in full".

(e) Before the respondent wrote to the applicant threatening court action to recover the sums due, there had been significant e-mail correspondence between the applicant and the respondent. The applicant told the respondent that he was withholding charges because the respondent was responsible for the landscaping of common areas and the applicant was not satisfied that landscaping works had been carried out properly, nor that he had been invoiced properly. The respondent told the applicant that the area of ground which had not been properly landscaped still belonged to the developers and was the developers' responsibility. The respondent offered to meet the applicant to discuss matters. The applicant rejected the respondent's offer.

(f) In response to the applicant's complaints, the respondent contacted Taylor Wimpey Developments Ltd, asking them to re-plant the area owned by them - which was blighted with dead trees. The respondent instructed their own gardeners to carry out some weeding of the area even though they were not responsible for the area. The respondent, on 5 August 2013, wrote to the applicant, reassuring the applicant that he was not charged for the area about which he was complaining.

(g) Between 1 July 2012 and 30 June 2013, the applicant did not pay the respondent's charges. By 30 June 2013, he had amassed arrears of £168.60. By 1 June 2013, agreement had been reached for the respondent to accept responsibility for the area of ground complained of by the applicant and new contractors were engaged to start landscaping of the area on 1 June 2013. Between 1 June 2013 and September 2013, the applicant and the respondent discussed the arrears on the applicant's account. By September 2013, the respondent offered to refund, as a gesture of goodwill, £73.20 to the applicant which would leave an outstanding balance of £47.98 due to the respondent. The applicant rejected that offer. In January 2014, the respondent repeated the same offer to the applicant by e-mail dated 15 January 2014. The applicant told the respondent that he had been in touch with the Home Owner Housing Panel and set out the sections of the code of conduct which he believed the respondent had breached.

(h) Each of the respondent's invoices sent to the applicant provide a breakdown of charges and notes about method of payment. The unpaid invoices were followed up by reminders which contain the following, "*We note that this balance is still outstanding. Failure to pay may result in a "notice of intended action" being issued and this will incur an administration charge.*"

(i) The statement of services delivered by the respondent to the applicant contains a chapter headed "*Financial and Charging Arrangements*" which provides details of the services for which charges would be levied and the method of collecting those charges. That same chapter contains a detailed "*debt recovery procedure*". The same statement of services contains a chapter headed "*Communication Arrangements*" and provides details of methods of communication and timescales which the respondent will aim to meet in responding to an enquiry from one of the members of the residents' association, such as the applicant. Under the chapter headed "*Communication Arrangements*" in the statement of services, the respondent set out their complaints procedure and specifically state, "*in the event that you remain dissatisfied, having followed our internal complaints procedure, you can make an application to the Home Owner Housing Panel...*"

Reasons for Decision

7. (a) The application was submitted on 6 April 2014. At section 7 of the application form, the applicant was asked for details of his complaint and focused on Sections 2:2.2, 2:2.5, 3:3.3(d) and (m), 4:4.8 and 7:7.2 of the code of conduct.

(b) At section 7(b) of the application form, the applicant complains that the respondent had failed to carry out the property factor's duties.

(c) The property factor's duties defined in Section 17(5) of the Act as follows:-

"(5) In this Act, "property factor's duties" means, in relation to a homeowner—

(a) duties in relation to the management of the common parts of land owned by the homeowner, or

(b) duties in relation to the management or maintenance of land—

(i) adjoining or neighbouring residential property owned by the homeowner, and

(ii) available for use by the homeowner."

(d) The applicant's complaint of failure to carry out the property factor's duties is that the respondent invoiced the applicant for maintenance work which had not been carried out. The applicant states "*I along with other residents can prove through recorded entries of when the maintenance team visited and what duties were undertaken, they differ significantly to that of the factor..."*

(e) In his response to the notice of referral to the Committee, the applicant stated that he would send "*two witness statements...*". No witness statements have been submitted by the applicant. No "*...recorded entries of when the maintenance team visited and what duties were undertaken...*" are produced.

(f) Although the applicant offers to prove there is a difference between the work for which has been invoiced and the work that was actually carried out, the applicant produces no such evidence. In the sequence of e-mails providing additional information, the applicant does not provide any specification of his allegation of false accounting by the respondent.

(g) The respondent's measured response is that the applicant has been properly charged for work which has been carried out but the (neglected) area of ground about which the appellant complains is an area over which the respondent do not have factoring duties and in connection with which the respondent has limited influence.

(h) When the Committee takes a holistic view of each strand of evidence, the Committee comes to the conclusion that the applicant does not establish that the respondent has demanded payment for work which has not been carried out. The weight of reliable evidence before the Committee indicates that the respondent has invoiced the applicant correctly for work which has been carried out for the management and maintenance of land for which the property factors have accepted responsibility.

(i) The Committee therefore finds that the respondent has not failed to carry out the property factor's duties.

(j) The real focus in this case is on the code of conduct. The applicant complains that the respondent has breached the section of the code of conduct relating to communications and consultation, and refers specifically to Section 2:2.2 which states, "*You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).*"

(k) The applicant's complaint is that "*the continual threat of court action and latterly phone calls from a debt collection agency has caused considerable stress and anxiety...*". What is beyond dispute is that the applicant has refused to pay the respondent's invoices since 2012. The documentary evidence placed before the Committee indicates that the respondent rendered invoices timeously, then sent reminders and final demands, and gave a reasonable indication that there was the prospect of legal action.

(l) The Committee has read the written communications that the respondent has had with the applicant and cannot find that any part of those communications is abusive, intimidating or threatening. What the respondent has done is complain that invoices are outstanding and given the applicant fair notice that, in order to recover the outstanding invoices, they will have recourse to the law. Section 2:2.2 enables the respondent to give a reasonable indication that legal action is in prospect. That is exactly what the respondent has done. The Committee considers all of the communications between the parties (which have been disclosed to the Committee) and cannot find any trace of abuse, intimidation or threat from the respondent to the applicant. The respondent has not breached Section 2:2.2 of the code of conduct.

(m) The applicant's focus shifts to Section 6 of the code of conduct, "*carrying out repairs and maintenance*", but it is there that the applicant reverts to reference to the requirements of a written statement (D(m)) and Section 3:3.3 of the code of conduct).

(n) The applicant does not complain that a written statement of services has not been provided. The Committee has a copy of the written statement of services which the respondent provided to the applicant. Section 1 D(m) imposes an obligation on the respondent to provide, in the written statement of services, details of procedures and timescales for response when dealing with telephone enquiries. The written statement of services contains procedures and timescales for such responses. The Committee draws the conclusion that the applicant has, in fact, alighted on the wrong part of the code of conduct. Section 3:3.3 relates to financial obligations. The applicant does not complain that the respondent has failed in financial obligations. In reality, the applicant is complaining that the respondent has not provided a detailed breakdown of charges for the repairs and maintenance carried out.

(o) The applicant focuses on the wrong part of the code of conduct. When the Committee considers the application in its entirety, the Committee draws the conclusion that the applicant's complaint is that the respondent has not provided a breakdown of charges for landscaping and the applicant's focus is on an area of land which the respondent is not obliged to carry out works on.

(p) The reliable evidence placed before the Committee indicates that the respondent accurately narrates work carried out in each invoice and, in their annual report, provides an accurate summary of the works carried out. There is no obligation on the respondent to provide a day-to-day breakdown or the equivalent of timesheets for works carried out. It is apparent to the Committee from the documentary evidence produced that there is nothing wrong with the applicant's invoice procedures. Section 3:3.3 and Section 1 D(m) are not engaged in this complaint.

(q) The applicant's focus shifts to complaints resolution - which is covered in Section 7 of the code of conduct, but once again, in the application, the applicant spreads his net too wide and refers to Section 2:2.5 and Section 4:4.4 under the heading of complaints resolution.

(r) Section 2:2.5 relates to timely response to enquiries and complaints. The written statement of services placed before the Committee sets out response times. The documents produced to the Committee indicate that there has been considerable correspondence between the applicant and the respondent. The respondent expresses disappointment that certain timescales set out in the written statement of services were not met, and explains that a member of staff who had failed to meet those timescales no longer works for them. The respondent has offered the applicant a refund of all late payment charges and a credit of six months' management fee "*...as an apology for the delay in dealing with his original complaint which related to areas of the development we did not manage at that time*". The applicant has not accepted that offer.

(s) The Committee considers matters at the date of hearing. At the date of hearing, the respondent has acknowledged that there was an historic failure to meet response times and has offered recompense for that delay. The respondent explains that steps have been taken to ensure that delay does not occur in the future. We consider the extent of the delay and consider it to be *de minimis*. The respondent has carefully considered and now adheres to the terms of Section 2:2.5 of the code of conduct.

(t) Section 4:4.8 of the code of conduct provides "*you must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention*".

(u) The weight of evidence placed before us indicates that the respondent has threatened to take court action after at least three quarterly invoices were not paid by the applicant and that the respondent made offers to enter into correspondence with the applicant and offered recompense for a delay in dealing with the applicant's complaint. Both parties are agreed that the applicant has rejected the offer made by the respondent and has refused to meet the respondent to discuss his complaint and seek a resolution of the difference between the parties. At the date of application, the applicant conceded that he has not paid invoices for three quarters of the year. At the date of hearing, those invoices remain unpaid. Reasonable intimation that a court action may be raised to recover the sums due has been given to the applicant. The Committee can only come to the conclusion that reasonable steps have been taken to resolve the dispute between the parties. The weight of evidence indicates that fair notice has been given of an intention to raise proceedings for payment of unpaid invoices. The respondent has not breached Section 4:4.8 of the code of conduct.

(v) The applicant's focus turns to Section 7:7.2 of the code of conduct. Section 7 deals with complaints resolution. Section 7:7.2 requires the respondent to write to the applicant, confirming that in-house complaint procedures have been exhausted and to provide the applicant with details of how to apply to the Home Owner Housing Panel.

(w) In support of his application, the applicant produced a number of the e-mails passing between the parties of this case. In the e-mails sent by the applicant dated 15 January 2014

to the respondent, he made reference to Section 7:7.2 of the code of conduct and refers to a communication on 5 August (2013) stating "*on 5 August, senior manager Sarah not only failed to understand the content of the complaint but also failed to notify myself that an application can be made to the Housing Panel*". The final paragraph of that e-mail contains a statement that the applicant has already been in contact with the "*Housing Panel*".

(x) Amongst the many documents produced by the applicant, there is a letter dated 5 August 2013 from the respondent. The applicant also produces an e-mail dated 24 December 2012 from the applicant to the respondent and in that e-mail, the applicant himself quotes from the respondent's written statement of services and sets out the respondent's internal complaints procedure, including the section which states "*in the event you remain dissatisfied having followed our internal complaints procedure, you can make an application to the Home Owner Housing Panel...*"

(y) The weight of reliable evidence indicates that the applicant repeats the respondent's own words to confirm his understanding that he has the right to apply to the Home Owner Housing Panel. In his correspondence with the respondent after the letter that he complains of (5 August 2013) the applicant repeatedly states that he is copying the Home Owner Housing Panel into the correspondence he is having with the respondent. The Committee draws the conclusion that the letter of 5 August 2013 is not the final letter from the respondent stating that the in house complaints procedure has been exhausted. Despite the fact that the in house complaints procedure appears not to have been exhausted, the respondent has made the applicant aware of the existence of the Home Owner Housing Panel and the applicant's right to apply to the Home Owner Housing Panel.

(z) The weight of reliable evidence indicates that the respondent has not breached any part of Section 7 of the code of conduct.

Decision

8 The committee therefore finds that the respondent has not breached the Code of Conduct for property factors. The committee refuses the application. No property factor enforcement order will be made in response to this application.

Appeals

9 The parties' attention is drawn to the terms of section 22 of the Property Factors (Scotland) 2011 Act regarding their right to appeal and the time limit 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 day on which the decision appealed against is made..."

Paul Doyle

Signed

Date 23/12/2014

Chairperson