



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

Hohp ref: HOHP/PF/12/0013

Re: Property at 108/8 Great Junction Street, Edinburgh EH6 5LD ("the Property")

The Parties:-

Mr Graeme Brebner, residing at Sorrowlessfield Farm, Earlston, Berwickshire TD4 6AG ("The Applicant")

Annan Property, 229 Portobello High Street, Edinburgh EH11 2AN ("The Respondent")

**Decision by a Committee of the Homeowner Housing Panel
In an Application under Section 17 of the Property Factors (Scotland) Act 2011**

Committee Members:

Paul Doyle (Legal member)
Ann MacDonald (Housing member)

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

- (a) Failed to carry out the property factor's duties

(b) Because the Section 14 duty did not arise in this case until 2nd November 2012, the question of compliance with the code of conduct cannot be considered.

Background

1. By application dated 25/11/2012 the applicant applied to the Homeowner Housing Panel for a determination of whether the Respondent had failed to comply with the property factor's duties imposed by Section 17 of the 2011 Act, and failed to comply with the duties to comply with the code of conduct imposed by Section 14 of the 2011 Act.
2. The application by the applicant stated that the applicant considered that the respondent had failed to comply with sections 1, 2.5, 5.4, 5.5, 6.1 & 7 of the code of conduct, and had failed to comply with the property factor's duties because the respondent either refused or delayed to instruct repairs necessary to the common parts of the larger building of which the applicant's property forms part.
3. By letter dated 23/01/2013 the President of the Homeowner Housing Panel intimated a decision to refer the application a Homeowner Housing Committee. The Homeowner Housing Panel served Notice of Referral on the parties.
4. Following service of the Notice of Referral both parties made further written representations to the Committee.
5. A hearing was held at Thistle House, Haymarket Terrace, Edinburgh on 26th April 2013. All parties were timeously notified of the time, date and place of the hearing. The applicant was present (and unrepresented). The Respondent neither appeared nor were they represented. The applicant answered questions from Committee members. The Committee then reserved their determination.

Findings of fact

6. The Committee finds the following facts to be established:-
 - (a) The applicant is the joint heritable proprietor of the property known as and forming 108/8 Great Junction Street, Edinburgh, EH6 5LD, registered the Land Register of Scotland under title number MID1810. The property forms a second-floor flat in a four-storey block of flats.
 - (b) The respondent was the property factor responsible for repair and maintenance of the common parts of the larger property at 108 Great Junction Street, Edinburgh, until 20 December 2012. In the period to 20 December 2012, the respondent was responsible for instructing and supervising common repairs to the common parts of the larger building at 108 Great Junction Street Edinburgh.
 - (c) The respondent became a registered property factor on 2 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the code arises from that date.

(d) In or about July 2012 the applicant became aware that water was leaking into the property. The applicant reported the water ingress to the respondent, explaining that water was entering the property through the ceiling of the dining/sitting-room. Because of the location of the property it was necessary to investigate the source of the water leak.

(e) Between mid-July 2012 and 11 October 2012 there were two instances of significant water ingress through the ceiling into the open plan living area of the property. Investigations disclosed that the water was accumulating in a gully in the roof of the larger building at 108 Great Junction Street. A drain was blocked. Because the water accumulating in the gully could not drain away, it overflowed and entered the building through the ceiling of the applicant's property.

(f) Between mid-July 2012 and the end of October 2012 the respondent took no effective action to instruct the repair necessary to prevent further water ingress. On 11 October 2012 the applicant sent an e-mail to the respondent complaining about the lack of response to his earlier complaints. The applicant was told by the respondent that the contractor had been contacted and that the respondent was awaiting a response from the contractor.

(g) In October 2012, Edinburgh suffered a number of unusually heavy rain storms. After one of the rainstorms in October 2012 a significant amount of water leaked through the ceiling of the property causing damage to the fittings and fixtures therein. The applicant contacted the contractors identified by the respondent ("Rob Reinstatement Limited") to be told that the respondent had not previously contacted the contractors.

(h) The applicant instructed contractors to investigate the source of water ingress. On 6 November 2012 Rob Reinstatement Limited provided the applicant with a report and with an estimate for works. Rob Reinstatement Limited (correctly) identified that a blocked gutter required to be cleared. The applicant involved his own buildings insurers, & the work necessary to prevent further water ingress was carried out. The applicant's insurers repaired the water damage to the property.

(i) The applicant has to pay an excess of £350 in respect of any claim on his buildings insurance. On 20 December 2012 the applicant's buildings insurers sent the applicant a cheque in settlement of his claim in relation to the water damage to the property, but deducted the £350 excess from the sums paid to the applicant.

(j) The applicant complained to the respondent about the delay in carrying out remedial work. The applicant complained to the respondent that the respondent had not taken any effective steps to organise or instruct the remedial works, and that the applicant had had to take the necessary steps to arrange repairs to common parts into his own hands. The respondent did not resolve the applicant's complaint satisfactorily, and delayed unreasonably in attempting to address and resolve the applicant's concerns.

(k) On 25 November 2012 the applicant made his application to the Homeowner Housing Panel. On 12 February 2013 the respondent wrote to the Homeowner

Housing Panel confirming a willingness to pay £350 to the applicant "... As a gesture of our goodwill". At the date of hearing, no payment had been made by the respondent to the applicant.

(l) The property is not occupied by the applicant. Throughout 2012 the property was rented by the applicant to tenants, one of whom is the applicant's son. The applicant's tenants do not have contents insurance for the property, and did not have contents insurance for the property throughout 2012. Although the applicant had contents insurance for the property, he does not want to claim on his insurance.

(m) The repeated water ingress between July and November 2012 caused damage to some of the contents of the property. The damaged items included an expensive piece of furniture designed to house stereo equipment, together with a number of vinyl LP records and their covers. None of the moveable items damaged by water ingress between July and November 2012 belong to the applicant.

(n) On 26 October 2012 the applicant asked the respondent to produce a written statement of services. The applicant has not received a response to that request.

(o) Throughout October 2012 the applicant asked the respondent for details of complaints procedure. The applicant has not received a response to any of those requests.

Reasons for the decision

7. (a) The applicant complains that the respondent has failed in the duties imposed by both sections 14 and 17 of the 2011 Act. The applicant gave evidence in clear and credible terms, answering questions from committee members fluently & without hesitation. The oral evidence given by the applicant is entirely consistent with the documentary evidence placed before us. The Committee has no hesitation in accepting that the applicant is an entirely credible and reliable witness.

(b) The applicant gave a clear history of discovering water ingress in July 2012, and reporting the problem to the factor. We accept the applicant's evidence that the respondent either refused or delayed to take any action to investigate the source of water ingress and to carry out remedial works. The weight of evidence in this case indicates that the problem which caused water to pour into the applicant's property related to a blocked gutter which caused water to collect in a gully. The gully in which the water collected, and the gutter which was blocked, are common parts of the larger building at 108 Great Junction Street Edinburgh, which are the responsibility of the respondent both in terms of title conditions affecting the property and in terms of section 17(5) of the 2011 Act.

(c) Had the respondent acted immediately on the applicant's report of water ingress, then no complaint could competently have been made to the Homeowner Housing Panel. Because the applicant either delayed or refused to take any action, the Homeowner Housing Panel has jurisdiction - the neglected damage to the common parts endured until at least mid - October 2012. Regulation 28(1) of the Homeowner Housing Panel (Applications and Decisions)(Scotland) Regulations 2012 ("the 2012 regulations") provides "*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". Regulation 28(2) provides that the committee "...may take into account any circumstances occurring before 1 October 2012 in determining whether there has been a continuing failure to act".

(d) By mid-October 2012 there had been two occasions when water ingress was caused by the lack of maintenance and repairs to a common part of the larger property. The applicant establishes that the respondent failed to act on his repeated complaints of water ingress, so that the applicant had to take matters into his own hands. Once contractors were instructed the remedial work was promptly carried out.

(e) The only realistic conclusion open to the Committee (on the evidence presented) is that the respondent has failed to meet the property factors duties set out in section 17(5) of the 2011 Act. The Committee has clear and unchallenged evidence that it was the respondent's duty, as property factor, to deal with a defective common part of the larger building of which the applicant's property forms part. The Committee has clear and unchallenged evidence that the need for urgent remedial work to a blocked gutter was repeatedly reported to the respondent, and the respondent ignored those reports – delaying or refusing to take any of the necessary action which was the respondent's duty and responsibility.

(f) The applicant produces a letter from his insurance broker confirming that the financial loss that he incurred as a result of water damage to his property, caused by a defect in a common part of the larger building of which is properly formed part, is £350 (representing the excess on his buildings insurance policy). In his original application the applicant stated that he sought reimbursement of that sum. By letter dated 12 February 2013 the respondent declares a willingness to pay that sum to the applicant. The evidence before the Committee indicates that the respondent has not paid that sum to the applicant. The Committee is minded to make a property factor enforcement order ordaining the respondent to pay £350 to the applicant.

(g) In his written submissions, and in his oral evidence before the Committee, the applicant stated that £350 was not the limit of his loss. The applicant gave an unchallenged history of frustration caused by the respondent's failure to respond to his reports of damage & requests for progress. The applicant had to contact contractors himself in order to remedy an obvious problem. The applicant suffered inconvenience as a direct result of the respondent's failure to meet the property factors duties.

(h) The applicant provided evidence of the damage to moveable items belonging to his tenants, for which no insurance claim has been made. The Committee find that no award can be made to the applicant in relation to the damaged moveable contents of the property for two reasons:

(i) The damage to the moveable contents of the property is not a loss incurred by the applicant. It is a loss incurred by the applicant's tenants, who are not a party to these proceedings; and

(ii) Although the Committee has evidence of the damage to an item of furniture designed to house a stereo and a number of vinyl LP records, no vouching is produced to enable the Committee to quantify any loss caused as a result of the damage to those moveable items.

(i) It is beyond dispute that the applicant made his application to the Homeowner Housing Panel on 25 November 2012. It is the applicant's position that his complaints that the respondent has failed to comply with section 1, section 2.5, section 5.4 & 5.5, section 6 and section 7 of the code of conduct (and so failed in the duties imposed by section 14 of the 2011 Act) relates to a course of conduct throughout October 2012. The latest date complained of by the applicant is 26 October 2012.

(j) The applicant accepts that the respondent was not registered as a property factor until 2 November 2012. The applicant's complaints that the respondent has breached the code of conduct therefore pre-date the respondent's registration as a property factor.

(k) Section 14(5) of the 2011 Act obliges a registered property factor to ensure compliance with the property factor code of conduct. The evidence before the Committee indicates that the complaints of breach of the code of conduct predate the respondent's registration as a property factor. There is no evidence before the Committee of a breach of the code of conduct after 2 November 2012. Communication between the applicant and the respondent came to an end of 26 October 2012.

(l) If the applicant renewed his request for a statement of service, and attempted to engage with the complaints procedure (of new) after 2 November 2012, then the Committee would be able to consider matters relating to the code of conduct. The weight of evidence indicates that the applicant did not receive a written statement of services from the respondent, despite requesting one. The weight of evidence indicates that the lack of communication from the respondent - and the respondent's lack of response to reasonable requests from the applicant - amounts to a failure in communication. The weight of evidence indicates that the respondent was not prepared to enter into a meaningful and effective complaints resolution procedure. But, as the evidence clearly indicates that all communication between the parties had ended before the respondent was registered as a property factor, we cannot give any further consideration to the applicant's complaint that the respondent has failed to comply with the property factor code of conduct.

(m) The Committee therefore finds that the applicant establishes that the respondent has breached the property factor's duties, but that there is no complaint competently before the Committee in relation to the property factor code of conduct.

Decision

8. We propose to make the following property fact enforcement order:

Within 28 days of the communication to the respondent of the property factor enforcement order, the respondent must pay to the applicant £450, representing

- (a) The £350 insurance excess necessarily paid by the applicant, &*
- (b) £100 for the inconvenience suffered by the applicant*

9. Section 19 of the 2011 that provides as follows:

"...(2) in any case with the committee proposes to make a property factor enforcement order, they must before doing so –

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to them.

(3) if the committee are satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factors duties or, as the case may be, to comply with the section 14 duty, the committee must make a property factor enforcement order...."

10. The intimation of this decision to the parties should be taken as notice for the purposes of section 19(2)(a) and the parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) must reach the Homeowner Housing Panel's office by no later than 14 days after the date that this decision is intimated to them. If no representations are received within that timescale, then the committee is likely to proceed to make a property factors enforcement order without seeking further representations from the parties.

11. Failure to comply with a property factors enforcement order may have serious consequences, and may constitute an offence.

Appeals

12. The parties' attention is drawn to the terms of section 21 of the 2011 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
Chairperson

Date

7/5/2013