



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

The Parties:-

Mr Greenan, Block 3, Largs Point, Rosebank Gardens, Largs, KA30 8TD ("the applicant")

Hacking and Paterson Management Services, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ("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

Simone Sweeney (Chair) Colin Campbell (Housing Member) Susan Napier (Surveyor Member)

Decision

The committee determines;

- (i) That the complaints which form the basis of this application relate to a consultation process, provision of quotes and decision for works to proceed, all of which was concluded by 5th September 2012.
- (ii) That Section 17 of the Property Factors (Scotland) Act 2011 ("the Act") did not come into force until 1st October 2012.
- (iii) That, in any event, there has been no evidence led of any failure on the part of the respondent to comply with the property factor's duties created by Section 17 of the Act.
- (iv) That because the duty to comply with the Code of Conduct in terms of Section 14 of the Property Factors (Scotland) Act 2011 did not arise in this case until 1st November 2012, when the respondent became a registered factor in terms of the Act, the question of compliance with the Code of Conduct cannot be considered before that date.
- (v) That the respondent's letter to the applicant of 22nd January 2013 was part of the complaints procedure under section 7.2 of the Code of Conduct. That this letter was in breach of that section of the Code of Conduct created by Section 14

of the Act in that it failed to advise the respondent of how to apply to the Homeowner Housing Panel.

- (vi) That there was no prejudice to the applicant as he made such an application on the 6th of February 2013.
- (vii) However, having decided that the respondent is in breach of Section 7.2 of the Code of Conduct, the committee has decided not to issue a property factor enforcement order in terms of Section 19 (1) (b) of the Act.

This decision is unanimous.

Background

1. By application of 6th February 2013, the applicant applied to the Homeowner Housing Panel for a determination on whether or not the respondent had failed to; (i) comply with sections 2, 6 and 7 of the Code of Conduct imposed by Section 14 of the Act and; (ii) carry out the property factor's duties in terms of Section 17 of the Act by, firstly, failing to comply with their duties in terms of the Deed of conditions by instructing works at the applicant's property without prior consultation with the applicant and other homeowners and, secondly, instructing works to the applicant's property which caused damage to the external fabric of the building and prejudiced a 25 warranty over the external fabric of the building.
2. Following sundry procedure at a hearing at the Europa Building, Glasgow on 13th November 2013, a committee of the Homeowner Housing Panel ("the committee") heard evidence from both parties. The applicant was not represented. He gave evidence personally and evidence was led from two of his neighbours, Mr and Mrs Gibb. The respondent was legally represented by Mr Upton, solicitor and evidence was heard from a Director of the respondents, Mr Lennox.

Preliminary Jurisdictional issue

1. At commencement of proceedings, Mr Upton raised a preliminary issue. It was submitted that the committee had no jurisdiction to hear the application and that the application was incompetent. Mr Upton submitted that the complaints which form the basis of the application related to a consultation process, tendering process and a decision for works to proceed, all of which were concluded by 5th September 2012. Mr Upton referred to the fact that the Act did not come into force until 1st October 2012. Therefore there was no requirement on the respondent to satisfy their duties in terms of the Act prior to this date.
2. Moreover, it was said that as the respondent only became a registered property factor on 1st November 2012 then, in terms of the Act, the respondent was only under an obligation to satisfy the Code of Conduct from this date.
3. The applicant, in response, submitted that his application had been made on 6th February 2013 and took exception to this issue of competency being raised at

the hearing. He referred to the preliminary hearing of the case which had taken place on 22nd August 2013. The applicant referred to the fact that the respondent had not been successful at that hearing in arguing that the application was incompetent on the points raised at that time. The applicant took the view that the respondent could have raised this new matter before the substantive hearing was fixed to hear evidence.

4. The committee enquired of Mr Upton when his firm had first received instructions from the respondent. Mr Upton advised that the respondent had sought the advice of his firm in October 2013. Written representations had been lodged by his firm on behalf of the respondent on 22nd October 2013. It was said that this issue of competency had only come to his attention in the preceding 7 days. When asked by the committee why the respondent had failed to intimate to the applicant, in advance of the hearing, the intention to take this preliminary point, Mr Upton submitted that no fair notice was required of a matter of law.
5. Mr Upton accepted that there had been communications between the parties since the date of registration on 1st November 2012 and since the Act had come into effect on 1st October 2012.
6. Mr Upton accepted that the committee could make enquiries of matters before 1st October 2012 on the basis of Regulation 28 of the Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 ("the Regulations"). Regulation 28 states:

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

(2) The president and any committee may take into account any circumstances occurring before 1st October 2012 in determining whether there has been a continuing failure to act after that date."

Decision on Preliminary Jurisdictional Issue

1. The committee accepted the submissions of Mr Upton that the respondent was not bound by the duties imposed upon them by the Act until 1st October 2012.
2. The committee accepted that the respondent only registered as property factors on 1st November 2012 and that the respondent was not bound to comply with the Code of Conduct until this date.
3. However, the committee found that Regulation 28 of the Regulations enabled the committee to hear evidence of both parties of circumstances prior to 1st October 2012 so that the committee could determine if there had been any continuing failure to act after that date.

Findings in Fact

1. The applicant is the heritable proprietor of a property at Block 3, Largs Point, Rosebank Gardens, Largs, KA30 8TD ("the property").
2. The respondent is the property factor responsible for arranging and administering repair and maintenance of the common parts of the property.
3. On 24th July 2012, the respondent wrote to the applicant indicating an intention to instruct contractors to clean the render at the front elevation of the property. This letter made reference to the respondent having sought the advice of the manufacturer of the render. The manufacturer had recommended that the render be washed with a product called 'Algae clean'. The committee accepts that the respondent did not state that it was their intention to follow the manufacturers' recommendations in this letter.
4. The letter of 24th July 2012 enclosed a mandate for the applicant to sign if he was in favour of the works proceeding. The letter made clear that the works would proceed if a majority of owners consented to the proposal. The mandate stated that the proposed works would be undertaken by a company called JMC Pressure Washing Services. The letter stated that the cost for the works was £670 per block. The mandate stated that the "nature of works" was, "render washing".
5. By letter of 13th August 2012, the applicant wrote to the respondent requesting further quotations be obtained.
6. The respondent received an alternative quotation from contractors, Robert MacFarlane, dated 21st August 2012. This quote was to apply 'Algae clean'. By letter of 22nd November 2012, the respondent subsequently advised the applicant that the alternative quote was rejected because it was more expensive.
7. A meeting of the Rosebank owners association took place on 5th September 2012. A representative of the respondent was present. The minutes of the meeting (which were produced by the applicant) read, at item 3:

"Following the letters from H and P asking owners to vote on this subject I can confirm that there were 5 in favour in block 3 and 6 in favour in block 4. Both being majority votes this work will be authorised by H and P (the property factor) to the same contractor that did Blocks 1 and 2 last year. This will cost each owner in blocks 3 and 4 a figure of £83.75 per flat. Alternative prices were obtained and were much higher. It is hoped this work will be done quite soon."

8. The committee heard evidence from the respondent's Director, Mr Lennox, that the contractor which the respondent appointed to undertake works to the property was JMC Pressure Washing Services.
9. The quotation from Robert MacFarlane, dated 21st August 2012, was not put before the meeting of the Rosebank owners association on 5th September 2012.
10. The respondent instructed JMC Pressure Washing Services to undertake render wash at the property. The works were completed on 5th November 2012. The work

undertaken involved a pressure wash applied to the render. The contractors did not apply the chemical 'Algae clean' to the render.

11. That the render does not come with a 25 year warranty.
12. That the builders of the property, Ossian Construction have, through receivers confirmed to the respondent that there is no warranty over the render.
13. That there were cracks on the render.
14. That no evidence was led to support any evidence that these cracks or any damage to the render was a result of the work undertaken by JMC Pressure Washing Services.
15. That a claim had been made to NHBC by the respondent on behalf of the owners of properties (including the applicant) and that the respondent arranged to have the defective render repaired.
16. The respondent accepts that communications between the parties on this matter continued after 1st October 2012, the date on which the Act came into force and the date from which the respondent was required to comply with the property factor's duties under the Act.
17. That in terms of Regulation 28(2) of the Regulations, the committee may take into account any circumstances occurring before 1st October 2012 in determining whether there has been a continuing failure to act after that date.
18. The applicant sent to the respondent various emails and letters between 13th August 2012 and 16th February 2013 in respect of his complaint about the way in which the render had been cleaned.
19. The applicant made his application to the Homeowner Housing Panel on 6th February 2013. Within that application the applicant sets out that his complaint, in terms of the Code of Conduct, was an alleged failure of the respondent to comply with Sections 2 (Communication and consultation) 6 (Carrying out repairs and maintenance) and 7 (Complaints resolution) of the Code and the duties imposed on them by Section 14 of the Act.
20. It is accepted by the applicant that the Act did not come into force until 1st October 2012.
21. It is accepted by the applicant that the respondent became a registered property factor on 1st November 2012. It is accepted by the applicant that the obligation on the respondent to comply with the Code of Conduct in terms of Section 14 (5) of the Act applies from 1st November 2012.
22. That the respondent accepts that Regulation 28 of the Regulations enables the committee to consider whether there has been a continuing failure after 1st October 2012.
23. That the respondent sent a letter to the applicant on 22nd January 2013. This letter was in response to a letter from the applicant of 11th January 2013. The letter of 11th January 2013 was part of the applicant's complaint. That letter bore the title, 'Render Wash'. It began:

"In line with your Complaints Procedure we have written to Mr Leishman and Mr Kingham on the above subject without any success, this letter is intended, with your assistance, to resolve this matter."

The response by the respondent to the applicant of 22nd January 2013 states in so far as is relevant:

"...we believe that we have exhausted your complaint in this respect and have consequently nothing further to add to our previous correspondence on the subject."

24. Section 7 of the Act's Code of Conduct for property factors deals with complaints. Section (2) of the Code reads:

"When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the Homeowner Housing Panel."

25. The respondent accepts that this information was not included in the letter of 22nd January 2013 which the respondent sent to the applicant.
26. That the respondent attempted to address this error in letter of 20th May 2013. The letter of 20th May 2013 reads, in so far as is relevant:

"Regrettably our letter of 22nd January 2013 did not provide you with details of how you may apply to the Homeowner Housing Panel. For that administrative error, we apologise unreservedly."

Reasons for Decision

1. The committee is of the view, based on the findings in fact, that the consultation process, provision of quotes and decision making process complained of by the applicant, were concluded by 5th September 2012 and that accordingly pre-date the coming into force of the Act.
2. The committee is of the view, based on the findings in fact, that in any event, there was no evidence led of any failure by the respondent to comply with the duties under the Act in relation to the cleaning of the render on the property.
3. The committee is of the view that there was a breach of Section 7.2 of the Code of Conduct by the respondent in respect of the content of the letter of 22nd January 2013 which the respondent sent to the applicant. The letter of 22nd January 2013 from the respondent to the applicant should have advised him of his right to appeal to the Homeowner Housing Panel. It did not.
4. It is mandatory on the committee, in terms of Section 19(1) of the Act, for the committee to decide whether the property factor has failed to carry out the property factor duties or to comply with the Section 14 duty. The committee is

satisfied that the terms of Section 19 (1) (b) affords the committee a discretion as to whether or not a property factor enforcement order requires to be made in such circumstances. Should it be decided that such an order were to be made, it is incumbent upon the committee to allow the parties to make representations in terms of Section 19 (2). Having heard such representations, should the committee be satisfied that the property factor has failed to carry out the property factor's duties or has failed to comply with the Section 14 duty, it is mandatory on the committee to make a property factor enforcement order in terms of Section 19 (3). In this case, the committee has decided, in the proper exercise of its discretion in terms of Section 19 (1) (b), that no such order should be made notwithstanding the decision of the committee that the respondent breached Section 7.2 of the Code of Conduct (the Section 14 duty). Had the committee decided to make a property factor enforcement order in this case, that order would have been for the respondent to issue an apology to the applicant. Given that the respondent has already issued an apology to the applicant by letter of 20th May 2013, the committee does not deem it appropriate for another apology to be made. Further and, in any event, there was no prejudice to the applicant by the breach.

Appeals

The parties' attention is drawn to the terms of section 22 of the Act regarding the right to appeal and the time limits which apply. Section 22 provides that,

"(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."

Chairperson: Simone Sweeney

Date 05/12/2013