



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

HOHP Reference: HOHP/PF/13/0076

THE PARTIES:

Abid Sethi residing at 66 John Neilson Avenue, Paisley, PA1 2SX ("The applicant")

Hacking & Paterson Management Services, 1 Newton Terrace, Sauchiehall Street, Glasgow, G37PL ("The respondent")

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

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 s. 17 of the Property Factors (Scotland) Act 2011 ("The 2011 Act") &
- (b) Complied with the Code of Conduct, as required by s. 14 of the 2011 Act

Determined that the Respondent has neither failed to carry out the property factor's duties, nor has the Respondent breached the Code of Conduct for Property Factors

COMMITTEE MEMBERS

Paul Doyle (Chairperson)
Mr Andrew Taylor (Surveyor Member)
Mr David Hughes Hallet (Housing Member)

BACKGROUND

1. By application dated 15 May 2013 the applicant applied to the Home Owners Housing Panel for a determination as to whether the respondent had failed to comply with the property factors duties in terms of the 2011 Act, and failed to comply with the duties to comply with the Code of Conduct imposed by s14 of the 2011 Act.

2. The application by the applicant stated that the applicant considered that the respondent had failed to comply with s1 (1a) B,D, 2.5, 6.4,7.4 and 7.5 of the Code of Conduct, and failed to comply with the property factor's duties because the respondent either refused or delayed to instruct drainage works necessary for prevention of flooding to the common parts, and to the garden to the rear of the applicant's property.
3. By letter dated 23 May 2013, from the Home Owners Housing Panel, the applicant was asked to clarify his complaint in relation to s1.1a,B & D of the Code of Conduct and to specify the complaint that he might have in relation to s7.4 and 7.5 of the Code of Conduct.
4. By email dated 27 May 2013, the applicant stated his complaint in relation to s1.1a B of the Code of Conduct related to an inadequacy of landscaping services provided by way of ground maintenance and inspection services provided by the respondent. The applicant complained that respondent has failed in their duty to hold all complaints in terms of s7.4 of the Code of Conduct.
5. By letter dated 21 June 2013 the president of the Home Owners Housing Panel intimated a decision to refer the application to a Home Owner Housing Committee. The Home Owners Housing Panel served notice of referral on both parties, directing each party to make written representations no later than 5 July 2013.
6. Following service of the notice of referral both parties made further written representations to the Committee.
7. The Committee made a preliminary direction on 12th July 2013. In the following terms

The Homeowners Housing Committee directs

(1) The Homeowner to intimate to the Respondent & lodge with the Homeowners Housing Panel, not later than 26th July 2013, a written statement enumerating

(i) the sections of the Code of Conduct which he claims have been breached by the Respondent & providing detailed specification of the acts or omissions said to constitute those breaches (including specification of times, dates & places)

&

(ii) to provide detailed written specification of the acts or omissions said to constitute a breach of the property factor's duties

(2) The competence of the application in terms of s.17 of the Property Factors (Scotland) Act 2011 shall be considered as a preliminary matter. Parties are

directed to submit (& intimate) written representations directed at the intimation of the subject matter of this application by the applicant to the respondent not later than 26th July 2013.

8. A hearing was held at Europa House, Argyle Street, Glasgow on 9 August 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 respondent had earlier indicated that they had no intention of attending the hearing.
9. The applicant answered questions from Committee members. He had three witnesses with him, Silvana Maria Puddino, Roddy Macmillan, and Alberto Puddino, who are all neighbouring proprietors within John Neilson Avenue, Paisley. Each of the appellant's witnesses answered questions from tribunal members. The Committee then reserved their determination.

FINDINGS IN FACT

10. The Committee finds the following facts to be established;

- (a) The applicant is the owner of the property known as 66 John Neilson Avenue, Paisley, which is a detached dwelling house forming part of a larger development of dwelling houses and flatted dwelling houses. Beyond the boundary of the applicant's rear garden there is a banked area of landscaped common ground.
- (b) The respondent is the property factor responsible for the care and maintenance of the common parts of which the applicant's dwelling house forms part. On 22 October 2012 the respondent issued to the applicant a statement of terms of service and delivery standards. The applicant pays £10.50 plus VAT per quarter (for his household) to the respondent in consideration of the respondent carrying out the duties of a property factor. The respondent's duty under s14(5) of the 2011 Act to comply with the code of practice arose from 1st November 2012 when the respondent became a registered property factor.
- (c) On 23 May 2012 the applicant contacted the respondent to complain that his rear garden was flooding because of defective drainage to the landscaped common area to the rear of, and adjacent to, his property. The respondent also heard from neighbouring proprietors with similar complaints and started to investigate the source of the complaint. The respondent found that the landscaped area to the rear of the appellant's property was land that was common not only to the appellant and his immediate neighbours, but also to every heritable proprietor in the development, including the proprietors of flatted dwelling houses.
- (d) Barratt Homes built each of the properties in the development. The respondents contacted Barratt Homes, who insisted that adequate field drainage had been installed and referred the respondents to the NHBC. The respondent is not able to make a claim to the NHBC, only the heritable

proprietor of one of the properties in the development can make a claim to the NHBC.

(e) By July 2012 the respondent had instructed a number of estimates for the installation of drainage on the landscaped common area of land to the rear of the appellant's property. The cost of the work would have exceeded £12,000. In terms of the deed of conditions the respondent could not instruct the work without a mandate from a majority of proprietors. The respondents attempted to get that mandate but were unable to do so. The applicant and his immediate neighbours signed the mandate but other properties in the development, who were not affected by flooding in the area, declined to sign a mandate.

(f) On 30 October 2012 the respondent wrote to the applicant, confirming that one proprietor (not the applicant), had contacted the NHBC to intimate a claim. That claim had been declined as field drainage was not covered under the standard NHBC policy. The respondent wrote to the applicant to advise that, because it had not been possible to obtain instructions from a majority of owners in the larger development of which the applicant's house forms part, it would not be possible to instruct field drainage works.

(g) In the period from May 2012 until the submission of the application on 15 May 2013 the applicant was in repeated telephone contact with the respondent, attempting to discuss difficulties caused by the field drainage to the landscaped common area to the rear of his properties causing flooding in his garden. The applicant did not discuss any other complaints with the respondent. The applicant did not put any of his complaints in writing to the respondent.

(h) On 27 May 2013, for the first time, the applicant contacted the respondent by email, notifying his complaints to the respondent. The applicant complained that

- i. The plants and shrubs are inadequately maintained
- ii. That the respondent's invoices do not detail the maintenance works that are carried out.
- iii. That the drainage and flooding problem to the appellant's back garden continues.

(i) The respondent replied to the applicant on 29 May 2013 - stating that they were seeking estimates for necessary works to do with shrubbery and vegetation, providing a copy of the ground maintenance specification that contractors should attend to during fortnightly visits during the summer and monthly visits in the winter, and confirming that because it was impossible to obtain the majority consent of the proprietors, the drainage works could not be instructed by them.

(j) By email dated 29 May 2013, the applicant contacted the respondent again seeking to discuss his complaints but adding further grounds of complaint,

- (i) that the respondent's communication was inadequate.

(ii) that 1.1a, B c & d of the code of conduct are breached, setting out his reasons.

(k) The respondent replied to the applicant's email of 29 May 2013 in a letter dated 5 June 2013 answering the points raised by the appellant in his email of 29th May 2013, but disputing that they have failed to meet the requirements of the code of conduct.

(l) By email dated 14 June 2013 to the Home Owners Housing Panel, the applicant asked the committee to consider four areas of complaint:

- i. That the respondent has failed to carry out inspection of the estate.
- ii. That the respondent does not provide detailed invoices specifying the charges for ground maintenance and fence repairs.
- iii. That the quality of ground maintenance carried out on the respondent's instructions is inadequate.
- iv. That the respondent has failed to resolve the problem of flooding in the applicant's garden.

(m) On 1 August 2013 the applicant wrote to the Home Owners Housing Panel, making a submission in relation to s 17(3) of the 2011 Act. On the same date the applicant separately emailed the respondents enclosing photographs showing the growth of weeds and shrubs adjacent to the pavement at John Neilson Avenue, Paisley, and levelling accusations at the respondent of failure to comply with the Code of Conduct.

(n) On 3 August 2013 the applicant emailed the Home Owners Housing Panel, asking the Committee to make a property factor enforcement order and setting out the terms that he would like to see incorporated in such an order.

(o) On 24 July 2013 the applicant sent an email to the Home Owners Housing Panel, setting out his detailed allegations of the breach of the Code of Conduct.

(p) On 24 July 2013 the respondent wrote directly to the applicant, responding to the contents of the applicant's email to the Home Owners Housing Panel, dated 24 July 2013. In their letter the respondent reminds the applicant that their complaints handling procedure is available on their website but that they enclose a hard copy. They concluded their letter as follows "*If our response to the points raised in your email of 24 July 2013, and your email to our office of 29 May 2013 (and our response of 5 June 2013), does not provide you with the satisfaction that you require, we would respectfully request that you provide us with written confirmation of the reasons for considering that we have failed to resolve the complaint. The complaint will then be considered by a director, who will provide a written response in writing within 21 days of the receipt. If this final decision does not resolve your difficulty, you may at that stage apply to the Home Owner Housing Panel which has authority to consider complaints about property factors, in relation to the Property Factor (Scotland) Act 2011, once an internal complaint procedure has been exhausted.*

(q) By email dated 1st August 2013 the applicant stated that he was not happy with the manner in which his complaint to the respondent had been handled, and asked that his complaint be referred to one of the respondent's directors for further review.

REASONS FOR DECISION

11. (a) The applicant gave evidence, answering questions from committee members. The applicant was taken to the terms of his application dated 15 May 2013, which he identified as his own application and completed by him. The applicant confirmed that after he had submitted his application, he had communication with the Home Owner Housing Panel in an attempt to clarify the subject matter of his complaint. The applicant was then taken to the terms of his email, dated 24 July 2013. The applicant identified the email as his own. He went through the terms of the email and told us that that email set out his complaint. The applicant then answered a number of supplementary questions from committee members. The committee then heard from the applicant's three witnesses. Silvana Maria Puddino, Roddy Macmillan, and Alberto Puddino.

(b) The applicant's three witnesses stated that the respondent did not adequately maintain the common areas of land in the development of which the applicant's property forms part - complaining that, at most, the respondents arranged to have the grass cut twice a year. Each of the witnesses complained that there was a problem with drainage to the landscaped area to the rear of the applicant's property.

(c) s17 of the 2011 Act is in the following terms

"17Application to homeowner housing panel

(1) A homeowner may apply to the homeowner housing panel for determination of whether a property factor has failed—

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

(b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the "section 14 duty").

(2) An application under subsection (1) must set out the homeowner's reasons for considering 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.

(3) No such application may be made unless—

(a) 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, and

(b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(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 complaints in relation to s1.1a B & D, 2.5, 6.4, 7.4 and 7.5 of the Code of Conduct is set out in the applicant's application of 15 May 2013. On the applicant's own oral evidence, the applicant had not made a written complaint about any of those matters to the respondent prior to submitting his application to the Home Owner Housing Panel. The applicant's oral evidence was that he was in repeated telephone contact with the respondent for the year from May 2012 to May 2013 (and so throughout the relevant period from October 2012 until submission of his application). The applicant had no written contact with the respondent until the applicant's email of 27 May 2013.

(e) It was the applicant's position that his entire communication with the respondent until the submission of the application on 15 May 2013 was restricted to discussions surrounding the drainage on the landscaped common property to the rear of the appellant's property, and the flooding to the applicant's garden. In his correspondence with the Home Owner Housing Panel, the applicant explains that his complaints in relation to s7 of the Code of Conduct, relate to his neighbours problems with the respondent, rather than with his own problems with the respondent.

(f) It is not until 27 May 2013 that the applicant sent the respondent an email raising complaints about three factoring issues, (as opposed to the four issues raised in his application dated 15 May 2013). Twelve days after the application was submitted the applicant, for the first time, put a complaint in writing to the respondent.

(g) The complaint set out in the applicant's application dated 15 May 2013, in reality, relates to problems caused by the existing drainage serving the land held in common to the rear of his property. At section 7 of the application form the applicant claims that the problem started in February 2012 and declares that he is looking for compensation and for the problem to be fixed. The applicant's focus in this case, until twelve days after submission of his application, was in reality entirely on the question of drainage of the landscaped common area adjacent to his property.

(h) On 12 July 2013, the Committee issued a notice of direction to the parties in the terms noted above. Fifty eight days after the application was submitted, the applicant had still not properly focussed his claim, and had still not given the respondent fair notice of what case he intended to plead against the respondent.

(i) Although the appellant touched on complaints of a breach of the code of conduct on 29th May 2013, it was not until 24 July 2013 that the applicant set out full specification of the sections of the Code of Conduct that he alleged had been breached, and the manner in which he says the breaches had taken place. What is said in the applicant's email of 24 July 2013 differs significantly to what is said in his earlier emails. In his oral evidence the applicant stated that his email of 24 July 2013 formed the subject matter of his application.

(j) The respondent wrote to the applicant on 24 July 2013, addressing each of the applicant's complaints. It was on 24 July 2013 for the first time that the respondent had the opportunity to consider the specific aspects of the applicant's complaints, and to address them. The respondent concluded the letter to the applicant by explaining their complaints handling procedure, and by explaining that their complaints handling procedure had not come to an end. On the basis of the closing paragraph of the respondent's letter of 24 July 2013, at the date of hearing the complaint procedure is still live.

(k) In order to have breached either the property factor's duties or the Code of Conduct, the respondent would (*inter alia*) have to either refuse or delay to resolve the applicant's complaints (s17(3) of the 2011 Act). In this case the evidence before us indicates that at the date the applicant's application was made to the Committee (& at the date of hearing) the respondent has neither delayed nor refused to deal with the applicant's complaints. The evidence indicates that at the date of hearing the respondent is actively hearing the applicant's complaint, and inviting the applicant to participate in their complaints procedure. The evidence indicates that at the date of hearing the applicant is actively pursuing his complaint through the respondent's complaints procedure. The applicant's actions indicate that the respondent's complaints procedure is not yet exhausted. In an email from the applicant to the respondent on 1st August 2013 the applicant states "*I am not trying to be vexatious or frivolous in anyway. I would like this to be considered by a Director as I am clearly unhappy of your letter dated the 24th July 2013, to which I had previously wrote to on the 24th July 2013, and await your final response, to which I previously asked HPMS on the 29th May 2013*"

(l) The documentary evidence before us indicates that each time the applicant contacted the respondent in writing; they considered his written submission and responded, in detail, in a period of time measurable in days. The documentary evidence indicates that when the applicant complained about a drainage problem the respondents took action, but that their actions were frustrated because they were not given a mandate to instruct a contractor who had been identified, and who had indicated a willingness to carry out the works.

(m) The core issue in this case is the question of the drainage to the landscaped common area to the rear of the applicant's property. That is the focus of what is said by the appellant in his application of 15 May 2013 and was the sole subject matter of

the verbal communication between the applicant and the respondent, until after the applicant submitted an application to the Home Owner Housing Panel.

(n) The problem for the applicant is that the evidence in this case is that the respondent responded timely to the reports of flooding, carried out investigations, and identified a contractor and obtained an estimate for the costs of remedial works. It is not the respondent's fault that it was impossible to obtain consent from a majority of the proprietors to enable the work to be instructed. Without a commitment from the majority of the proprietors, the respondent would have acted incorrectly in instructing contractors. It is clear from the documentary evidence that the respondent did not fail in their duty to try to organise remedial works, but that they were prevented from instructing remedial works due to the lack of consent from the co-proprietors. We note that the respondent even tendered advice to the affected proprietors that a claim might be made on an NHBC policy (but that such a claim did not meet with success). The respondents have a responsibility to make reasonable attempts to obtain a mandate for remedial works for common property and to form a conduit for communication between the proprietors and contractors. The respondents fulfilled that role.

(o) If the applicant had provided evidence that written communication of his complaint had been exhausted prior to the date of hearing, then we could competently consider the question of whether the respondent had failed in their obligation. Even if we were to take the view that the respondent had refused or delayed to deal with the applicant's complaint in relation to the drainage, we would still come to the conclusion (for the reasons above) that there had been no failure in relation to property factor's duties, nor any breach of the Code of Conduct.

(p) The applicant's remaining complaints relate to sections 1, 2, 6 and 7 of the Code of Conduct. None of those complaints were intimated in writing to the respondent prior to the submission of the application. The evidence indicates that each of those complaints are still subject to a live complaints procedure which the applicant is actively engaged in. The time limits for that procedure have not yet passed. We therefore find that we cannot consider the complaints set out in the applicant's email of 24 July 2013 because of the operation of s.17(3) of the 2011 Act. We find, as a matter of fact, that the respondent has neither refused nor delayed to deal with the applicant's complaint. We therefore find that this application is premature.

(q) In any event, the email from the applicant dated 24 July 2013 is vague and lacks specification. The applicant has been given repeated opportunities to set out his claim, but fails to make a valid application, because he has failed to give fair & consistent notice to the property factor in writing of the failures that he alleges have occurred and the specific manner in which either the property factor duties, or the Code of Conduct have been breached. The applicant is still engaged in the respondent's published complaints procedure (a matter not brought to the committee's attention until 1st August 2013). It therefore cannot be said that the respondent has either refused or delayed to attempt to resolve the applicant's concerns.

(r) Therefore the Committee finds that the applicant fails to establish that the respondent has breached either the property factor's duties, or the Code of Conduct.

DECISION

12. The Committee there finds that the Respondent has neither failed to carry out the property factor's duties, nor has the Respondent 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

13. The parties' attention is drawn to the terms of section 22 of the 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
Chairperson

Date 20/08/2013