

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

HOHP Ref: HOHP/LM/13/0292
and HOHP/LM/13/0293

The Parties

John J Catterson, residing at 4 Mains River, Erskine, ("the first applicant")

Robert Smith, residing at 2 Mains River, Eskine, ("the second applicant")

Bridgewater Housing Association, First Floor, Bridgewater Shopping Centre, Erkine, PA8 7AA, ("the respondent")

Decision by the Committee of the Home Owner Housing Panel

In applications made under Section 17 of the Property Factors (Scotland) Act 2011, the committee, having made such enquiries as it saw fit for determining whether the respondent has 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 factors duties.

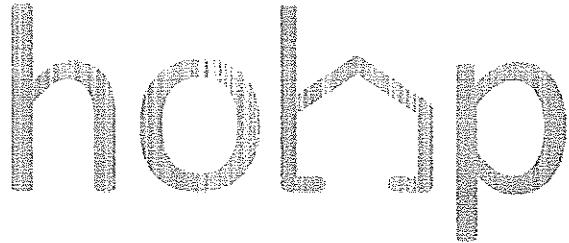
Committee Members

Paul Doyle (Chairperson)
George Campbell (Surveyor Member)

Background

1 By two separate applications dated 23 September 2013, both applicants have applied to the Home Owners Housing Panel for a determination as to whether the respondent had failed to comply with the code of conduct imposed by Section 14 of the 2011 Act. The applicants are next-door neighbours. Their complaints are in similar terms and stem from the close proximity of a tree, owned and maintained by the respondent, to the applicants' attached dwelling-houses.

2 The applications by each applicant stated that the applicants considered that the respondent had failed to comply with Sections 2.1, 2.5 and 6.9 of the



code of conduct, because the respondent either refused or delayed to instruct work to prevent the roots of the tree adjacent to the second applicant's property from damaging the second applicant's driveway and from damaging the sewers and drainage serving each applicant's dwellinghouse.

3 By letter dated 9th December 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 directing both all parties to make any further written representations by 30th December 2013.

4 By letter dated 30 October 2013, the respondent made further written representations. By letter dated 28 October 2013, the second applicant made further representations.

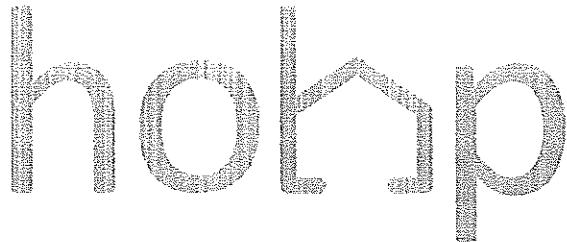
5 In his application form, the second applicant nominated the first applicant as his representative. By letter dated 23 December 2013, the solicitors for the respondent set out the respondent's position and provided photographs of each applicant's property and the tree situated on land owned by the respondent adjacent to those properties.

6 A hearing was held at Europa House, Argyle Street, Glasgow, on 20 February 2013. All parties were timeously notified of the time, date and place of the hearing. Both applicants were present and the second applicant was represented by the first applicant. The respondent was represented by Derek Hogg, Solicitor. Two witnesses (Gary Stapleton and Ian Munro) were present and gave evidence for the respondent.

7 The first applicant answered questions for both applicants from committee members, before answering questions from Mr Hogg for the respondent. We then heard evidence from Mr Munro and Mr Stapleton. Each of the respondent's witnesses were asked questions in examination in chief by the respondent's solicitor, before answering questions from committee members and then from the first applicant, in both his role as applicant and as representative for the second applicant. The committee then reserved their determination.

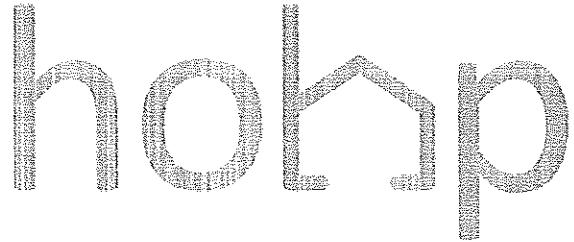
Findings in Fact

8 (a) The first applicant is the heritable proprietor of the subjects known as and forming 4 Mains River, Erskine. The second applicant is the heritable proprietor of the property known as and forming 2 Mains River, Erskine. The two properties are terraced properties which are adjoined to each other. To the front of each applicant's property, there is an area of driveway. The second applicant's



drive has been slabbed & connects directly to the mono-blocked common front access. The mono-blocked surface of the common front access, the second applicant's drive & some of the slabs there are uneven.

- (b) Adjacent to the second applicant's property, there is amenity ground owned and maintained by the respondent.
- (c) Within 2 yards of the boundary between the second applicant's property and the respondent's amenity ground (and situated on the amenity ground), there is a mature forest tree ("the respondent's tree"), which is approximately 30 years old and is taller than the height of the applicants' properties.
- (d) The root system of the respondent's tree extends underground over an area of the equivalent of the canopy of the tree. The canopy of the tree extends over the drive area situated to the front of the second applicant's household. The roots of the tree therefore, extend below the surface of the drive area of the second applicant's household.
- (e) No part of the tree affects the heritable property owned and occupied by the first applicant.
- (f) The second applicant believes that the driveway to his property is cracked and uneven because of the presence of the roots of the tree in the soil below his driveway.
- (g) In the last 20 years, the second applicant has repaired and replaced the concrete slabs to his driveway on at least 4 occasions. It was last replaced in or about 2008.
- (h) On 20 May 2013, the applicants contacted the respondent to voice their concerns that the respondent's tree was causing damage to their properties. The first applicant now concedes that no damage has been caused to his property, but he is concerned that there is the potential for damage to the water, sewage and drainage systems serving both applicants' properties. Throughout May and June 2013, the applicants and the respondent exchanged correspondence discussing the presence of the respondent's tree, & its close proximity to the second applicant's boundary. As a result of the applicants' complaint, the respondent asked the consultant landscaping clerk of works to the respondent (Mr Hardie) to inspect the respondent's tree & the exterior of each applicant's property. On 30th May 2013. He reported that there was no evidence of tree roots present on either of the applicants' properties.



(i) On 17 July 2013, an employee of the respondent, Ian Munro, inspected the respondent's tree and the front of each applicant's house himself. He was disappointed with the findings of Mr Hardie and immediately conceded that Mr Hardie was incorrect to report that there was no evidence of the presence of tree roots on either applicant's property - because Mr Munro could see tree roots at the boundary between the second applicant's property and the respondent's property. Mr Munro told the first applicant that he was dissatisfied with Mr Hardie's report and arranged for an arboriculturalist to survey the tree and provide a report on the tree root system to try to determine whether or not the tree root system was damaging either applicant's property.

(j) On 29 July 2013, Angus McKay, arboriculturalist appointed by the respondents, carried out a survey of the respondent's tree & the drive ways serving each applicant's property in the presence of Ian Munro, the respondent's factoring officer, James Hardie, the respondent's consultant landscaping clerk of works and both applicants. He then prepared a written report. An excerpt copy of Mr McKay's report, dated 30 July 2013, is attached to these presents. We adopt the terms of Mr McKay's report as part of our findings in fact.

(k) Mr McKay recommended that works be carried out to create a root barrier and to prune back roots smaller than 25mm in diameter.

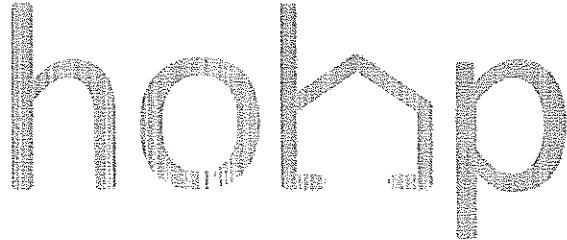
(l) The respondent offered to instruct the works recommended by Mr McKay, however both applicants have rejected the respondent's offer.

(m) The respondent wrote to both applicants on 14 June 2013, 27 June 2013, 18 July 2013 and 22 August 2013. The respondent's staff spoke directly to the applicants at each site visit in July 2013.

(n) On 22 June 2013, the applicants obtained a quotation for the removal of the existing paving slabs to the front of the second applicant's property, removal of roots from the property and replacement of the current driveway at the second applicant's property with a new driveway (of similar composition) and passed a copy of that estimate to the respondent. The applicants were told that those works would cost in the region of £2,400.

(o) There is no evidence of root damage to water, drainage or sewage systems serving either of the applicants' properties. There has been no interruption of the supply of water, nor an indication of compromise of drainage in either property. There is no reason to believe that the roots have compromised the water drainage or sewage systems serving either of the properties.

(p) The applicants asked Scottish Water to inspect a manhole cover and frame which forms part of the sewage system serving the second applicant's



property. Scottish Water inspected the manhole cover and frame on 11 January 2014 and agreed to repair/level the manhole cover.

(q) The respondent registered as property factors on 15 October 2012.

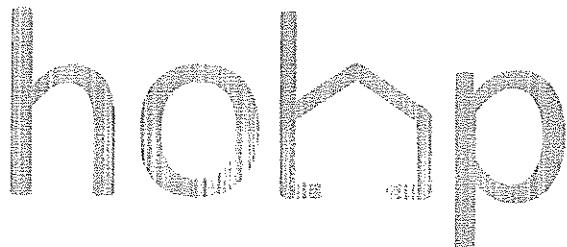
Reasons for Decision

9 The hearing in this case took place within the offices of HOHP, Europa Building, 450 Argyle Street, Glasgow on 20 February 2014. Both applicants were present. The first applicant presented his own case and then acted as representative of the second applicant. The second applicant was accompanied by his daughter, who had not come to provide evidence, but to provide moral support for her father. The respondent was represented by Mr D W Hogg, Solicitor. There were two witnesses for the respondent, Ian Munro, the respondent's factoring officer, and Gary Stapleton, the respondent's technical services manager.

10 To assist the applicants in presenting evidence in this application, committee members asked the first applicant questions. The first applicant then answered questions in cross examination from the respondent's solicitor, before taking the opportunity to clarify the points which had arisen so far. The committee then heard evidence from both Mr Munro and Mr Stapleton. Both Mr Munro and Mr Stapleton answered questions from the respondent's solicitor first of all. They then answered questions from committee members, before answering questions from the first applicant, both in his role as applicant and as representative of the second applicant. Having heard the oral evidence, the committee then reserved their determination.

11 The first applicant candidly admits that there has been no damage to his property. In answering questions from committee members, the first applicant stated that although he had concerns about the impact of tree roots on his property and his neighbour's property, no damage had been caused to his property by the date of hearing. His oral evidence is entirely consistent with what the second applicant said in his application dated 23 September 2013. In his application, the first applicant speaks of his concern that there was potential for his property to be flooded and records that he has asked for a "...proper investigation to be carried out to ensure me that the sewage tank was clear of tree roots..." The first applicant's position is quite clearly that he is concerned about the potential for future damage. He is not complaining about something which has already happened.

12 The second applicant's position is slightly different. It is the second applicant's position that because of the close proximity of the respondent's tree, damage has been caused to the slabs in his driveway. In providing details about



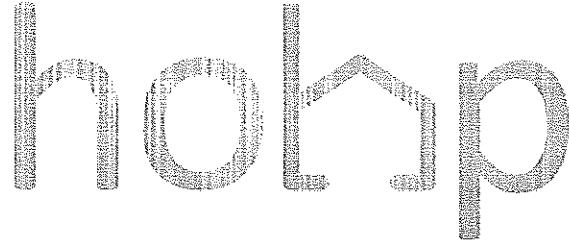
his complaint, the second applicant insists that roots must be removed from the soil below his driveway and "*the factor refuses to allow the work to be carried out*".

13 On the evidence before the committee, the second applicant's assertion that the factor refuses to allow work to be carried out is not supported. The reliable evidence placed before the committee indicates that the respondent reacted to the concerns of both applicants within days and that they did not simply accept the report from their own consultant landscaping clerk of works. Instead, their factoring officer re-inspected the amenity area, the respondent's tree and the applicants' properties before coming to his own conclusions that the consultant landscaping clerk or work's report could not be relied upon. A further report from an arboriculturalist was commissioned by the respondent. The respondent does not just rely on that report, but offers to carry out the works recommended in Mr McKay's report.

14 The applicants declare (in the second applicant's letter of 28 October 2013) that they view Mr McKay's report as "...*being biased*..." but do not say why they challenge Mr McKay's report. No reliable evidence is placed before the committee to suggest any fault in either the inspection, methodology, observations or recommendations of Mr McKay.

15 The applicants both rely on an estimate obtained for repairs and reinstatement of the driveway to the front of the second applicant's property, dated 22 June 2013, prepared by NGS Property Maintenance. The works suggested in that estimate are in fact supportive of the recommendations of Mr McKay. The conclusion that we come to, having considered all documentary and oral evidence in this case, is that Mr McKay's report can be relied on and that the respondent has timeously offered to carry out the works recommended by Mr McKay at the respondent's own cost. It is the applicants who have refused to allow that work to be carried out. The respondent cannot be held responsible for the applicants' intransigence.

16 The applicants focus on Paragraphs 2.1, 2.5 and 6.9 of the Code of Conduct for Property Factors. Paragraph 2.1 of the code provides "*you must not provide information which is misleading or false*". When we consider each strand of evidence placed before us, we find that the respondent has not provided false or misleading information. It is true that the report from Mr Hardy, the consultant landscaping clerk who works for the respondent, was not a report that could be relied on, but what is important is that it is a report that the respondent did not rely on and which, within days of its receipt, the respondent distanced themselves from. The respondent made no attempt to use the report from their consultant landscaping clerk of works to avoid the complaints of the applicants, nor do they use the report in an attempt to cause confusion. There has been no



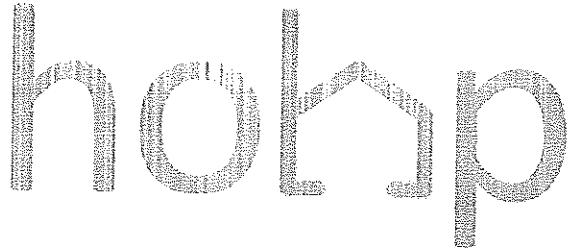
attempt to mislead. In fact, the respondent took great care to place no reliance on a report in which they had no confidence.

17 Paragraph 2.5 of the code provides "*you must respond to enquires and complaints received by letter or e-mail within prompt timescales. Overall your aim should be to deal with enquires and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement*" The documentary evidence placed before us indicates that there was free and open communication between the applicants and the respondent throughout May, June, July and September of 2013. Both case files placed before us show that each of the applicants' complaints, and their correspondence in pursuit of those complaints, were responded to without delay by the respondent. We note that the respondent dealt with the applicants' complaints in writing and that their letters to the applicants adopted a civil tone and focused quite clearly on each of the points raised by the applicants.

18 Paragraph 6.9 of the code provides "*you must pursue the contractual supplier to remedy the defects in any inadequate work or service provided*" This is not a case where it is suggested that there has been provision of inadequate work or service. In this case, it is suggested that there is damage to the heritable property at 2 Mains River, Erskine, and the potential for damage to the heritable property at 4 Mains River, Erskine. The weight of reliable evidence indicates that as soon as the respondent was alerted to the concerns of the applicants, they carried out inspections of the property and that they have chosen to rely on Mr McKay's inspection for good reasons. The reliable evidence indicates that the respondents are willing to carry out the recommended works. Neither of the applicants identifies either a contractor or a supplier who has carried out defective work, nor one who has failed to provide a service.

19 When we take an holistic view of each strand of evidence in this case, we come to the conclusion that the respondent has not failed to honour any part of the Code of Conduct of Property Factors in their dealings with either of the applicants. We find that the complaints are without foundation and that whilst both applicants may be concerned about the impact that the respondent's tree has on their property, neither of the applicants has allowed the respondent to carry out the work which has been identified as necessary to prevent damage and to remediate any slight damage which may have been caused to the second applicant's driveway.

20. It is the applicants who are the barrier to the completion of the work that was recommended in July 2013. It is the applicants who have refused or delayed to facilitate the work. The respondent is prepared to carry out the work and to shoulder the costs of that work. On the evidence before the committee, the



committee comes to the conclusion that the respondent's offer is still available to the applicants to accept.

21 The weight of evidence therefore indicates that the respondents have honoured their obligations in terms of the Code of Conduct and that there is no substance in either of the applications placed before the committee.

DECISION

22. The Committee therefore 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

23. 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
Chairperson

Date 3/3/2014



LANDSCAPE CONSULTANTS

ANGUS MACKAY

**BRIDGEWATER HOUSING ASSOCIATION
GROUND ADJOINING NO 2 MAINS RIVER, ERSKINE**

30/07/13 -- REPORT ON NORWAY MAPLE NO 04549.

This report was prepared at the request of Mr J Hardie, Senior Site Supervisor/Horticulture Consultant to Bridgewater Housing Association.

DATE OF INSPECTION 29/07/13

SCOPE

To carry out a Ground Level Tree Survey to BS 5837: Trees in Relation to Design, Demolition & Construction, and to check root system of tree to the East side of the root plate.

BACKGROUND

The tree in question has been reported as having damaged and loosened the slabs in the driveway of No 2 Mains River Road.

INSPECTION

A site meeting was held where the following were present:-

Mr Ian Munro Factoring Officer, Bridgewater Housing Association

Mr James Hardie Consultant Landscaping Clerk of Works to Bridgewater Housing Association.

Mr R Smith No 2 Mains River.

An other, Mains River.

Mr A Mackay, Arboriculture Consultant – Mackay Consultants.

OBSERVATIONS FROM SITE VISIT.

- Prior to the meeting, a Ground Level Tree Survey to BS 5837: 2012 was carried out by A Mackay, and the findings are attached.
- 3 No rows of slabs have been laid in the front garden of the property some years ago.
- The first row of slabs, nearest the tree, was uneven in places.
- Slabs were lifted at random, and all showed to have been laid on soil with mixed broken brick etc at around 50 – 60mm.
- 2 No slabs in row one showed to have tree roots from the adjoining Norway Maple just below the surface. The diameter of the roots found was approximately 25 – 30mm and 35 – 40 mm just below the slabs.

PROJECT MANAGEMENT HORTICULTURE & ARBORICULTURE ADVISORY SERVICE
ANGUS MACKAY, D.H.E., I.D.T., M.I.O.G., Cert. Arbor. 28 Ballater Drive, Bearsden, Glasgow G61 1BX

Tel/Fax: 0141-942 7530 Mobile: 07860 836719
E-Mail: angus@mackayconsultants.com Website: www.mackayconsultants.com

V.A.T. No. 481 7451 32



LANDSCAPE CONSULTANTS

ANGUS MACKAY

- Further slabs lifted in row 1 showed no significant roots.
- 2 No slabs lifted in row 2 showed minor roots under one and no roots under the other. This row has also been laid on soil.
- The 2 no slabs in row 1 showed 'heaving' mainly due to the root system, but also due to the 'substrate' (soil) which they were laid on. Other slabs with no roots under them were also uneven, probably due to having been laid on soil without a proper base of type one and whin dust/sand.
- Mr Smith confirmed that vehicles used the driveway from time to time which would not help the situation.
- 1 No slab was cracked at the entrance in row No 1
- It is understood the tree is not covered by a Tree Preservation Order, nor is it in a Conservation Area.
- An adjoining manhole was checked and the "invert" level found to be 750mm.

RECOMMENDATIONS

- Permission from the land owner should be obtained prior to any excavations/works commencing.
- Services should be checked prior to any works commencing.
- An Arboriculture Method Statement to BS 5837:2012 should be prepared in advance of any works.
- Excavate trench along row no 1 slab edge within gravel slap to a depth of 600mm and insert Root Barrier (Re Root 600). The barrier should be 25mm below the gravel.
- The top 300mm of Excavations should take place carefully by hand, this is where most of the roots of a tree of this age would be found.
- During excavations a qualified arboriculturist should be in attendance. Roots smaller than 25mm diameter may be pruned back, making a clean cut with a suitable sharp tool. Roots occurring in clumps of 25mm and over should be severed only in consultation with the arboriculturist as such roots may be essential to the health and safety of the tree.
- Prior to back filling, the retained roots should be covered with uncompacted sharp sand (Not builders sand) or other loose inert granular fill.
- Major roots to be removed from under affected slabs.
- On completion of the works and to compensate for possible loss of root system and regain the Root Shoot relationship a 5% crown thin of the tree is recommended.
- Site should be left in a clean and tidy condition acceptable to the land owner


A Mackay DHE Landscape Consultant

PROJECT MANAGEMENT HORTICULTURE & ARBORICULTURE ADVISORY SERVICE
ANGUS MACKAY, D.H.E., I.D.T., M.I.O.G., Cert. Arbor. 28 Ballater Drive, Bearsden, Glasgow G61 1BX

Tel/Fax: 0141-942 7530 Mobile: 07860 836719
E-Mail: angus@mackayconsultants.com Website: www.mackayconsultants.com

V.A.T. No. 481 7451 32