



Decision of the Homeowner Housing Committee issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011 and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

HOHP reference: HOHP/PF/15/0052

Re: 26 Hazel Road, Grangemouth FK3 8PL ('the property')

The Parties:

Mrs Catherine Johnstone, residing at the property ('the applicant')

Falkirk Council, Municipal Buildings, Falkirk FK1 5RS ('the respondent')

The Homeowner Housing Committee: Martin McAllister, legal member and Mike Links, surveyor member.

Decision by a Committee of the Homeowner Housing Panel in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 (the 2011 Act).

Decision of the Committee

The Committee, having made such enquiries as it saw fit for the purposes of determining whether the factor has complied with the Code of Conduct for property factors, as required by Section 14 of the 2011 Act and carried out the property factors duties as defined in Section 17 (5) of the 2011 Act

Determines that, in relation to the Application, the Committee has no jurisdiction to deal with it since Falkirk Council is not and was not the property factor in respect of the property. The Committee dismisses the application.

Background

1. By application dated 20th April 2015 the applicant applied to the homeowner housing panel ("the Panel") for a determination that Falkirk Council had failed to comply with the Code of Conduct for Property Factors (the Code) and had failed to carry out the property factor's duties. The specific matters complained about in relation to breach of the Code were breach of Sections relating to Communications and Consultation and Carrying out Repairs and Maintenance. After the application had been lodged the parties attempted to resolve matters without success and the President of the homeowner housing panel decided to refer the matter to a homeowner housing committee (the Committee) on 17th November 2015.

2. The property factor made written representations on 22nd December 2015 and lodged productions on 21st January 2016.

Hearing

3. A Hearing took place in respect of the application on 29th January 2016. Mr Peter Johnstone was present and the respondent was represented by Mr Peter Gilmour, solicitor. The Committee indicated that it intended to deal with the preliminary matters first and, if necessary, to adjourn and determine those.

Background

4. The application is in connection with repairs to a roof where the applicant is the proprietor of a downstairs flat and Falkirk Council is the proprietor of the flat immediately above it. The relevant title deed states that the obligation for maintenance of the roof rests with the two proprietors of the flats. The applicant's contention is that Falkirk Council as property factor did not timeously deal with matters causing financial loss to the homeowner.

Preliminary Matter regarding ownership of the property.

5. Mr Johnstone confirmed that he and his wife signed the application. He said that his wife owned the property prior to their marriage and that the title had never been changed to joint ownership. The Committee indicated that it was happy to deal with the matter on the basis that Mr Johnstone was representing his wife and indicated that it did not require to adjourn to determine this matter. It noted from the papers before it that Mr Johnstone had been involved in the correspondence on the matter with Falkirk Council.

Preliminary Matter regarding jurisdiction.

6. In its letter of 22nd December 2015 Falkirk Council stated that it "*contests the competency of the application by Mr Johnstone on the basis that the Homeowner Housing Committee has no jurisdiction to entertain his application.*" In a letter to the Panel dated 17th May 2015 Mr Johnstone stated that he had spoken to an individual at Falkirk Council "*who advises they do not provide a factoring service to us and therefore do not provide a written statement of services.*" In the documentation before the Committee was information that the respondent is registered in the register of property factors but that, according to the respondent, this is in connection with properties not including 26 Hazel Road, Grangemouth.

6.1 Mr Gilmour stated that he considered that, on the basis of the documents forming part of the application, the Committee was not entitled to deal with the application. He referred to Section 2 (1) of the 2011 Act where the definition of "property factor" is given and, in relation to this particular application, Section 2(1) (b) in particular:

2. (1) In this Act, "property factor" means-

- (a) a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes,
- (b) a local authority or housing association which manages the common parts of land used to any extent for residential purposes and owned-
 - (i) by two or more other persons, or
 - (ii) by the local authority or housing association and one or more other person,

Mr Gilmour said that the applicant owns the ground floor flat at 26 Hazel Road and that Falkirk Council owns the upper flat which is 24 Hazel Road. Mr Gilmour said that the application did not disclose that Falkirk Council is the property factor and he submitted that, for Mrs Johnstone to succeed in her application, she would have to establish that there was some element of management of the common parts. Mr Gilmour said that the title position is that both proprietors are responsible for maintaining the roof. Mr Gilmour conceded that the roof was common to both properties.

6.2 Mr Gilmour referred the Committee to the terms of Section 10(5) of the 2011 Act:

"In this Act "homeowner" means –

- (a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or
- (b) an owner of residential property adjoining or neighbouring land which is-
 - (i) managed or maintained by a property factor, and
 - (ii) available for use by the owner.

Mr Gilmour said that the local authority does not manage any common parts. He said that there was no written statement of services enclosed with the application because none existed. He contended that the use of the word "managed" was critical for the Committee in considering the application.

6.3 Mr Gilmour referred the Committee to a decision of another homeowner housing panel committee. A copy of the decision had been lodged. This is a decision dated 21st May 2014 where Falkirk Council was the respondent. The reference is HOHP/PF/13/0250. Mr Gilmour invited the Committee to consider the terms of the decision which was a case where the committee determined that there had been no management of common parts by Falkirk Council and that therefore a

homeowner/property factor relationship did not exist. The application in that case was dismissed.

6.4 Mr Gilmour said that what the application disclosed was that there was and is a dispute between two owners who are proprietors of common parts. He said that the applicant alleges that Falkirk Council, proprietor of the upper flat at 24 Hazel Road failed to timeously advise the proprietor of 26 Hazel Road that roof repairs required to be carried out. Mr Gilmour explained that the Council's tenant had reported a problem with the roof and a temporary repair had been done. He said that the applicant alleges that the Council had wrongly stated the cause of the damage to the roof which led to difficulties with the insurers of 26 Hazel Road. He said that the matter had been considered by the Financial Ombudsman who had required the insurers to look at the claim again. Mr Gilmour maintained that Falkirk Council did not manage repairs to the roof but had an interest in getting them done because of its ownership of the upper flat. Mr Gilmour said that in the particular circumstances of the case the Council may have behaved unreasonably in delaying for a period of six/seven months to approach Mr and Mrs Johnstone to have a discussion about getting the roof repair done. He did not concede that this was unreasonable but said that, even if there had been a delay which caused prejudice to the applicant, it was not a matter for consideration by the Committee. Mr Gilmour said that the repair is still outstanding.

6.5 Mr Gilmour accepted that the absence of any contract between parties for factoring services or the absence of a written statement of services would not, by itself, be definitive in determining whether or not a party such as Falkirk Council was a property factor. He maintained that, in the case of 26 Hazel Road, no factoring services had been provided by Falkirk Council. Mr Gilmour said that any repairs which had been carried out in the past and which might have been arranged by Falkirk Council were consistent with their role as co proprietor of the common parts rather than as a property factor. He said that the proprietor of 26 Hazel Road had the same obligation to ensure that common parts are properly maintained.

6.6 Mr Gilmour invited the Committee to dismiss the application for want of jurisdiction.

7 Mr Johnstone addressed the Committee.

7.1 Mr Johnstone referred to the application and to the various documents he had lodged. He outlined the basis of the dispute. There had been an issue with the roof and temporary repairs had been carried out. He said that neither he nor his wife had been formally advised of the problems with the roof when they had occurred and when the temporary repair had been carried out but he conceded that the tenant of 24 Hazel Road had told his wife that there had been workmen working on the roof. Some six or seven months after the temporary repair the Council had approached Mr and Mrs Johnstone and indicated that a more permanent repair required to be done and that the cost attributable to 26 Hazel Road was around £2000. Mr and Mrs Johnstone

referred matters to their insurers who repudiated the claim because they said that the issue had been caused by wear and tear rather than storm damage.

This matter had been referred to the Financial Ombudsman who had suggested that the insurers examine the claim again.

7.2 Mr Johnstone referred the Committee to the various weather reports which he had lodged with his application and which, in his view, supported his contention that damage to the roof had been caused by storm damage.

7.3 Mr Johnstone said that he believed the inaction of Falkirk Council for six/seven months would have led to deterioration in the condition of the roof. He said that he believed that this has led to increased costs.

7.4 Mr Johnstone said that his claim to insurers had been made more difficult because the Council failed to get a report on the roof done when the problem first arose and at the time the temporary repair was executed.

7.5 Mr Johnstone referred the Committee to the papers he had lodged in connection with his dealings with the Council's complaints process on the matter and correspondence with the Scottish Public Services Ombudsman who had rejected his complaint because it was a matter dealing with "contractual and commercial transactions."

7.6 Mr Johnstone said that in the past the Council had arranged minor roof repairs and that he and his wife had paid the appropriate share of these repairs. He said that these repairs were carried out some years ago and he could not remember the details. He said that he was not aware of any other common repairs being carried out.

7.7 Mr Johnstone said that he believed that there should be some organisation to which he could take such complaints against the Council. He said that going to a court would cost him money. He said that he thought that the 2011 Act did apply in this case and invited the Committee to deal with the application.

Determination

8. The Committee adjourned and, having considered matters, delivered its determination of the application:

The Committee dismisses the application before it because it does not consider that it has the jurisdiction to deal with it. In the particular circumstances of the case, Falkirk Council was not and is not a property factor in respect of 26 Hazel Road, Grangemouth.

Reasons and Discussion

9. The position of the respondent has been consistent and is summarised in its letter to the homeowner housing panel dated 22nd December 2015 where it stated that it

"contests the competency of the application by Mr Johnstone on the basis that the Homeowner Housing Committee has no jurisdiction to entertain his application." The matter for the Committee was focused. Does and did Falkirk Council provide property factoring services to Mrs Johnstone, the proprietor of 26 Hazel Road, Grangemouth?

9.1 The absence of a written statement of services and any other kind of agreement is not, in the Committee's view, fatal to the application. The Code of Conduct for Property Factors at Section 1 states "*You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner.*" It seemed to the Committee that a property factor carrying on factoring duties could not escape jurisdiction of the homeowner housing panel simply because it had not issued a written statement of services. Indeed such an omission would be considered by a homeowner housing panel committee to be a failing. In a similar way the absence of any other documentation would not, in itself, be fatal to any application to the homeowner housing panel.

9.2 In the absence of any written statement of services or other relevant documentation in relation to this application, the Committee required to examine what was actually occurring in relation to this roof repair and, in particular, whether Falkirk Council was acting as a property factor in seeking to have repairs carried out. The factual position was not in dispute. A roof repair requires to be done and the cost of it falls to be shared by two proprietors. It is also not in dispute that there was a delay of some six/seven months between the temporary repair being carried out and an approach being made to the applicant about a permanent repair.

9.3 The liability for repairs to the roof and 24 and 26 Hazel Road was set out in a Feu Disposition by Falkirk District Council in favour of Andrew Green and another recorded in the Division of the General Register of Sasines on 29th May 1985. This deed is in respect of the dwellinghouse now owned by the applicant. It states *inter alia*

....the roof, outside walls, foundations, rhones and rainwater conductors serving the said dwellinghouse and the said first floor dwellinghouse shall be maintained equally by the Feuars and the proprietors of the said first floor dwellinghouse...."

Neither of the parties disputed that the proprietors of each of the two flats at 24 and 26 Hazel Road share responsibility for repairs to the roof.

9.4 The crux of the issue before the Committee is whether or not the respondent carried out any management of the common parts of the tenement. Mr Johnstone said that some repairs had been carried out in the past and that these had been initiated by Falkirk Council. He conceded that such work had been carried out some years previously. In this particular case a temporary repair had been carried out to the roof and Falkirk Council had executed it. Falkirk Council then approached the applicant some six/ seven months later seeking to carry out a permanent repair. Does this amount to managing the common parts in terms of the 2011 Act? The Committee did

not consider that these events, by themselves, constituted "management" even when considered with the work carried out in previous years. The Committee did not consider that what Falkirk Council had done was more than any other co proprietor of common parts might have done.

9.5 The Committee considered the terms of Section 2 of the 2011 Act:

- (1) *In this Act, "property factor" means-*
 - (a) *a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes,*
 - (b) *a local authority or housing association which manages the common parts of land used to any extent for residential purposes and owned-*
 - (i) *by two or more other persons, or*
 - (ii) *by the local authority or housing association and one or more other person,*

Falkirk Council is a local authority which owns 24 Hazel Road, Grangemouth and Mrs Johnstone owns 26 Hazel Road, Grangemouth. It is therefore possible that Section 2 (1) (b) (ii) of the 2011 Act may apply. The Committee considered however that, in the particular circumstances of the application before it, the respondent did not manage the common parts.

9.6 the Committee considered the terms of Sections 10 (5) and 17 of the 2011 Act :

- 10 (5) *"In this Act "homeowner" means –*
 - (a) *an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or*
 - (b) *an owner of residential property adjoining or neighbouring land which is-*
 - (i) *managed or maintained by a property factor, and*
 - (ii) *available for use by the owner.*

This provision has to be looked at with Section 2 of the 2011 Act. Mrs Johnstone is the owner of residential property but the Committee did not consider that it had been established by the applicant that the respondent managed the common parts of the tenement. Section 17 of the 2011 Act states that the Committee must have before it an application from a homeowner. The committee therefore found that, in relation to the application before it and applying the statutory provisions to the particular circumstances of the case as outlined in the application and the submissions of the parties, the applicant is not a homeowner in terms of Section 10 (5) of the 2011 Act and that consequently the Committee does not have any jurisdiction to determine the application before it.

9.7 The Committee considered the Decision of another homeowner housing panel committee which it had been referred to. It found the Decision helpful but not definitive as far as consideration of the application before the Committee. The Decision of the previous committee is not binding on the Committee. The Committee considered the submissions made to it and came to its determination based on the submissions, the application and all the documents lodged by the parties.

9.8 The Committee had some sympathy with the position of the applicant. The delay of six/seven months in addressing the issue of the permanent repair may have not been significant but it is possible that it was. The members of the Committee hoped that the parties will come to an amicable resolution of the matter.

Appeals

The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for 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...."

Regulation 26 (3) of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 states that the decision is made "by giving notice of the decision" to the parties.

Chairman of Committee

Martin J. McAllister

Date 3rd February 2015