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

**hohp Ref:** **HOHP/PF/15/0018**

**Re:** **Property at 0/2 13 Strathcona Street, Anniesland, Glasgow, G13 1JB ("the Property")**

**The Parties:-**

**MR AND MRS JAMES DEVINE residing at 0/2 13 Strathcona Street, Anniesland, Glasgow, G13 1JB represented by their representatives Messrs Kenneth and Ross Morton ("the Homeowners")**

**SPEIRS GUMLEY, a Company incorporated under the Companies Acts and having their Registered Office at 194 Bath Street, Glasgow, G2 4LE (represented by Mr Brian McManus of Speirs Gumley) ("the Factor")**

**Decision by the Committee of the Homeowner Housing Panel in an application under Section 70 of the Property Factors (Scotland) Act 2011**

Committee Members: Ewan K Miller (Chairman); and Ms Carol Jones (Surveyor Member).

**Background**

1. By application dated 21 February 2015 the Homeowners applied to the Homeowner Housing Panel ("the Panel") to determine whether the Factor had failed to comply with the duties imposed on the Factor by virtue of the Property Factors (Scotland) Act 2011 ("the Act").

2. The application by the Homeowners alleged failings on the part of the Factor. Firstly, that the Factor had breached the Code of Conduct for property factors ("the Code") and, in particular, Sections 2.1 and 6.1 of the Code. Secondly, the Homeowners alleged that the Factor had failed to comply with the "property factor's duties" as such term is defined in Section 17(5) of the Act. This allegation related to a failure on the part of the Factors to disclose information about repairs to the Property that were in contemplation.

3. By letter dated 4 March 2015 the President of the Panel intimated to the parties her decision to refer the application to the Homeowner Housing Committee ("the Committee") for determination.

**Hearing**

4. A Hearing took place at Europa House, Argyle Street, Glasgow, G2 8LH before the Committee on 1 June 2015.

   The Homeowners were represented by Messrs Kenneth and Ross Morton.

   The Factor was represented by one of their employees, Mr Brian McManus.

**Background to the Dispute**

5. The Property was originally owned by a Ms Sheila Parr. She contracted with the Homeowners to sell the Property to them with an entry date of 7 November 2014. Ms Parr was represented by Brunton Miller, Solicitors and the homeowners were represented by McVey & Murricane, Solicitors.

   The tenement in which the Property is located is factored by the Factors.

   As is common with the sale of a factored property, Brunton Miller wrote to the Factors on Friday 31 October 2014. They advised the Factors in relation to the sale of the property and to ascertain the position in relation to repairs. They also raised queries regarding a common insurance policy and the apportionment of common charges, for the purposes of this decision these additional queries are of no relevance. A copy of the letter of 31 October 2014 is annexed to this decision. On 3 November 2014, the Factor replied to the various queries that had been raised by Brunton Miller. A copy of this letter of 3 November 2014 is also annexed to this decision for information. Other than these two pieces of correspondence no further documentation from the conveyancing process was placed before the Committee.

   In due course the Homeowner's purchase of the property was completed and they became the proprietors of the Property. Shortly after moving to the Property, the Homeowners received a letter by email from the Factor dated 27 November 2014. This letter disclosed that there were issues with the condition of the roof and that repair works were proposed. Three quotes had been received (one being for a "patch" repair of the roof and the other two being more substantive repairs). The more substantive repairs were to cost more than £6,000 including VAT, with the Homeowner's share being in excess of £1,000.

   The Homeowners were, not unsurprisingly, surprised to receive information regarding potential repairs so soon after moving in to the Property. After some investigation they ascertained that the Factor had commenced the process of obtaining quotations for potential repair works prior to the letter of 31 October 2014 from Brunton Miller. At that point the quotes had only been sent to a Mrs Helen Mullen who lived on the top floor of the tenement of which the Property forms part. Mrs Mullen was the proprietor who was impacted by leaks from the roof of the tenement.

   The Homeowners complained to the Factor about the fact the potential repairs had not been reported in response to the query from Brunton Miller. The Factor denied any liability. In due course the complaints process between the two parties was exhausted and the matter was referred to the Panel and thereafter the Committee for determination.

**Homeowner's Submission**

6. The Homeowners representative provided a helpful summary of the timeline of the dispute. They highlighted that leaks to the roof had first been reported to the Factor in August 2014. Various estimates had been obtained during the course of September 2014. The Factor, in the Homeowners representative's submission, was well aware that there was going to be a need for roof works when the letter from Brunton Miller was received on 31 October 2014. The Homeowners representative accepted that the letter to Brunton Miller only asked for information in relation to "common or mutual repairs of a substantial nature instructed or carried out but not yet paid for". They accepted that it did not ask about works that were proposed or in contemplation at that point. Their contention was that the roof repairs had been "instructed" at that date and therefore fell within the ambit of the request in the Brunton Miller letter. Whilst the works had not yet started the works were clearly essential and would have to be carried out. Mrs Mullen, as the top floor proprietor, was being affected by the roof leaks and it was therefore inconceivable that the works could not go ahead. This meant, therefore, that the works were not merely in contemplation but were being instructed. By instructing quotations to be obtained the Factor should have taken the view that the works were "instructed" and disclosed them in response to the letter from Brunton Miller. The failure by the Factor to disclose such information was a breach of their duties to the homeowner as any reasonable Factor would have taken the view that such information should be disclosed.

**Factors submission**

7. The Factor's representative did not make a substantive submission to the Committee but simply highlighted the response given to the Homeowners by Lorraine MacDonald of the Factors in a letter to the Homeowners on 20 February 2015. The Factor's position was simple. They had been asked a specific question by Brunton Miller as to whether or not there were any works instructed or carried out but not yet paid for. Their position was that they had not highlighted the potential roof repairs because that was a factually accurate representation of the position vis a vis the question asked. They had specifically highlighted to Brunton Miller in their response that they were not giving an answer in relation to any works which may be in contemplation. Their response stated that should further queries require to be made regarding contemplated work then they should be made of the seller (in relation to this specific point the homeowners representatives pointed out that the seller, Ms Parr would have been unaware of the contemplated works as the Factor had only provided the quotes at this stage to Mrs Mullen as the top floor proprietor and so Ms Parr would have replied in the negative as well).

   The Factor's representative did not agree that at the stage of obtaining quotes that the works were "instructed" and that it was inevitable that the works would be carried out. Works were often contemplated but not always carried out due to lack of funds or homeowners determining not to carry out the repairs. The Factor's representative pointed out that it was now June 2015 and the works had still not been carried out as the various proprietors within the tenement had not been able to reach agreement and were obtaining further quotes themselves – on that basis it was not correct to say that the works had been "instructed" back in September when quotes were being obtained.

**Decision**

8. The Committee considered that there were two questions to be determined. Firstly whether the letter from Brunton Miller dated 31 October 2014 in relation to "instructed works" was broad enough to catch the contemplated works to the roof. Secondly, if the terms of the letter from Brunton Miller was not wide enough to require the Factor to disclose the contemplated works, was there still a general duty of care owed by the Factor that meant that they should have disclosed the contemplated roof repairs.

   For the purposes of this decision the Committee did not feel it necessary to separate out the alleged breaches of the Code of Conduct and the alleged breaches of property factor's duties. The application from the Homeowners related solely to whether or not there was an obligation on the Factor to disclose the contemplated works or not. If there was an obligation the breach would be found for both the Code of Conduct and the property factor's duties. If there was no such obligation on the Factor then there would be no breach of either the Code of Conduct or property factor's duties.

   **The Committee considered that the Factor had not breached either the Code of Conduct or the property factor's duties as defined in the Act.**

**Reasons**

9. Whilst the Committee had considerable sympathy with the situation the Homeowners found themselves in, nonetheless, the Factor had not acted inappropriately. The simple fact of the matter was that Brunton Miller had written to the Factor on 31 October 2014 asking whether or not there were any works carried out and not yet paid for or any works instructed but not yet paid for. The Committee was of the view that as at that date the works were merely contemplated or proposed. They were not yet instructed.

   The Committee could not agree with the Homeowner's representatives interpretation of when works became "instructed". It is standard practice withinthe Scottish conveyancing process when writing to a factor to ascertain the position not only in relation to instructed works (whether paid or

otherwise) but also to enquire about contemplated works. Whilst it may well be likely that the contemplated roof repairs will take place at some point, at the time of the letter of 31 October 2014 the works were only being contemplated. They were not "instructed". To classify the works as "instructed" would go beyond the everyday usage that the ordinary man in the street would place upon the word "instructed". To fall into the category of "instructed" there would generally, in the view of the Committee, require to have been a specific direction to a contractor or tradesman to carry out the works. As an absolute minimum there would have required to have been a decision by a majority of homeowners within the tenement to progress the repair. Neither such situation had occurred and therefore the works could only be classified as "contemplated" and not "instructed".

There was no doubt that the works were in contemplation and they may well be carried out at some point. However, as the Factor's representative had pointed out, the works still had not yet started some 7 months later. This did indeed lend credence to the argument that they were only in contemplation in October 2014.

On that basis the Committee was of the view that the Factors had answered the questions received from Brunton Miller accurately. Further to that, the Factors had specifically stated in their response that they were not giving confirmation in relation to the question of contemplated work. Whilst it was both unfortunate and perhaps a little unhelpful that the Factor had not elected to simply give a response in relation to contemplated works, nonetheless they were not asked to do so and had specifically stated that they were not doing so.

The Committee also considered whether there was a general obligation as part of a duty of care due by the Factors to the Homeowners to disclose the contemplated works to Brunton Miller. Again whilst the committee considered that it would have been helpful had they done so (and there was no particular reason for them not having done so) nonetheless in the circumstances where the factors had specifically stated that they were not answering that query the Committee could not perceive that they would still be caught by a general duty of care. Had the specific disclaimer in relation to contemplated by the Factors not been given then the Committee may have taken a different view. However, the fact of the matter was that the Factor had removed any possibility of them owing a duty of care on disclosing contemplated works by virtue of the wording in their letter .

As stated above, the Committee had considerable sympathy for the Homeowners that they should have been left in this position. The letter from Brunton Miller was poorly drafted in that it did not ask all three of the strands of the questions one would normally anticipate being asked of a factor in relation to repairs. It had omitted to ask whether there were contemplated works. The Committee had not had sight of any further correspondence between the seller and the Homeowner via their respective solicitors. It may be helpful for the Homeowners to ascertain what response Brunton Miller gave McVey & Murricane. It may be the case that the Homeowners solicitor should have spotted that the letter from Brunton Miller did not answer the three standard queries that ought to have been asked. The Homeowner's solicitor may have seen the letter from the Factor to Brunton Miller and possibly ought to have been alerted to the fact that there was still a risk that there were contemplated works. However, such issues go beyond the jurisdiction of the Committee and are a matter for the Homeowners to address with their solicitors.

**Summary of Decision**

10. The Committee determined that the Factor had not breached any of the sections of the Code of Conduct alleged by the Homeowners nor had they breached the property factor's duties as defined in the Act. Accordingly, no further orders or directions were required by the Committee and the matter was considered to be at an end.

**Right of Appeal**

11. The parties attention is drawn to the terms of Section 21 of the 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 the decision of a Homeowner Housing Panel or a Homeowner Housing Committee;

(2) an appeal under sub-section (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made.....".

Signed .....
Chairperson

... Date..... 30/6/2015 .....

(6)

letter from sellers solicitor asking about any repairs

BruntonMillerSolicitors

O Glasgow Office 22 Herbert Street Glasgow G20 6NB tel 0141 337 1199 fax 0141 337 3300
Partners: Douglas Dalgleish James Young Edward Dodd Thomas Steel Archibald Manuel Fiona Collie
Consultant: John Steele Financial Consultant Neil Carolan
*DX GW21, Glasgow - LP20, Glasgow 7*

Our ref: TS/CA/1874

4748028
Ins - NIL
£ - 50.00

Speirs Gumley
Property Management
194 Bath Street
GLASGOW G2 4LE
BY POST AND FAX: 0141 332 7899

Friday, 31 October 2014

Dear Sirs

**MS SHEILA PARR**
**MR AND MRS JAMES DEVINE**
**FLAT 0/2, 13 STRATHCONA STREET, ANNIESLAND, GLASGOW G13 1JB**

We act on behalf of Ms Sheila Parr in connection with the sale of the above property. Our client has concluded a bargain for the sale of the property to Mr and Mrs James Devine with entry as at Friday, 7th November 2014.

Please confirm that you will note the change of ownership for your records.

Please also confirm the following:-

1. That you will apportion the common charges as at the date of entry.
2. That there are no common or mutual repairs of a substantial nature instructed or carried out but not yet paid for.
3. Whether there is a common Insurance Policy, and if so exhibit the same.

Yours faithfully

BRUNTON MILLER
Partner

(6)

speirs gumley

Brunton Miller
TS/CA/1874
22 Herbert St
Glasgow
G20 6NB

Our Ref: 47480028
File Ref: od/sales

03 November 2014

Dear Sirs

**Name: Sheila Parr**
**Property Address: Flat 0/2, 13 Strathcona Street, Glasgow**

I refer to your letter of 31 October 2014 and note the sale of the above property to Mr & Mrs James Devine, with a date of entry as at 07/11/2014 and have amended our records accordingly.

In accordance with our normal accounting procedure, a quarterly Common Charges Account will be issued for your client as at 28 November 2014. In this account we will include our standard apportionment fee of **£78.00 inclusive of VAT. We would be obliged if you could inform your client that an apportionment fee will be charged to them.** The final account will be issued at the following quarter 28 February 2015 and will include your client's float rebate of £50.00 which we currently hold, together with any common charges due to the date of sale.

We confirm that the common charges accounts have been paid to date.

Please advise the purchasers Solicitors that a Float of £50 requires to be paid.

There is no common buildings insurance Policy.

We have not instructed any repairs of a major nature which have not yet been carried out or have not yet been paid for. We are not prepared to comment on any repairs which may be in contemplation by the owners. Enquiries should be made direct to the seller.

While this information is believed to be correct, it is given without warranty and the purchaser and his/her Solicitor should satisfy themselves on all aspects.

If you require any further assistance please contact the Operations Department on 0141-302-1201.

Yours faithfully

**Tracy McLenaghan**
Operations Department