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

Hohp ref:HOHP/PF/14/0107

Re: Property at 48 Craigpark Drive, Dennistoun, G31 2NP ("the property")

The Parties:-

Mrs. Ivy Lorna Kerwin, The Beeches, Cannop Crescent, Bents, Stoneyburn, EH47 8EH ("the Applicant")

Ross and Liddell, 60 St. Enoch Square, Glasgow, G1 4AW ("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:
Patricia Anne Pryce (Chairperson); Mike Links (Surveyor Member)

Decision

The committee unanimously determined that the Respondent has failed to comply with their Section 14 duty, in terms of the 2011 Act, to comply with the Code of Conduct by failing to inform the Applicant of the progress of the tender invitation process for repairs required at the property from 13 August 2013 until February 2014 (a breach of Section 6.1 of the Code).

We make the following findings in fact:

The Applicant was the owner of a ground floor flat known as Flat 0/2 at 48 Craigpark Drive, Dennistoun, Glasgow which was situated in a block of flats consisting of eight flats in total until 15th December 2014 when she sold it to a third party.

The Respondent was, until 30th April 2014, the factor of the common parts of the block of flats within the property at 48 Craigpark Drive, Dennistoun.

The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a property factor (13th August 2013).

Following on from the Applicant's application to the HOHP, which comprised of documents received in the period 24th July 2014 until 10th November 2014, the President referred the application to committee on 2nd December 2014.

Hearing

A hearing took place at the offices of the HOHP on 26th February 2015.

The Applicant attended on her own and gave evidence directly.

The Respondent was represented by Mr. Brian Fulton who is a Director of the Respondent and Mr. Alistair Harkness who is employed as a Property Manager by the Respondent.

There was an observer present.

Introduction

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the Homeowner Housing Panel (Applications and Decisions)(Scotland) Regulations 2012 as "the 2012 Regulations".

The Committee had available to it and gave consideration to: the Application by the Applicant which comprised of all paperwork submitted by the Applicant in the period of 24 July 2014 to 10 November 2014 and letter by the Respondent to the Homeowners Housing Panel dated 23 December 2014 together with enclosures contained therein.

Preliminary Issues

In her application, the Applicant had sought to rely on the entirety of Section 4 of the Code. When the Hearing commenced, the committee sought clarification from the Applicant as to whether or not she intended to rely on a breach of all nine parts of Section 4 of the Code. The Applicant helpfully conceded that she only intended to rely on Section 4.1, 4.4, 4.6 and 4.7 of this part of the Code and not Section 4 in its entirety.

The Legal Basis of the Complaints

The Applicant complains under reference to Sections 4, 6.1, and 6.9 and to a breach of the property factor's duties (as defined by Section 17 subsection 5 of the 2011 Act).

The Code

The elements of the Code relied upon in the application provide:-

4.1 You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.

4.2 If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case.

4.3 Any charges that you impose relating to late payment must not be unreasonable or excessive.

4.4 You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.

4.5 You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.

4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).

4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.

4.8 You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

4.9 When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position. Code of Conduct for Property Factors; effective from 1 October 2012

6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.

6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

The Factual Complaints

There are a variety of these and they will be addressed in order of the alleged breaches of the Code.

1. *Breach of Section 4*

The Applicant went through her evidence and, as indicated above, helpfully confirmed that she only wished to proceed on the basis of Sections 4.1, 4.4, 4.6 and 4.7 of the Code within this Section of the Code.

2. *Breach of Section 4.1*

The Applicant conceded that the Respondent had no need to proceed against her in relation to debt recovery matters and that she could not provide evidence of a breach of this part of the Code as she did not know who the owner was who did not pay the debts due to the Respondent due to data protection legislation but she felt that the evidence was apparent insofar as the Respondent had consistently allowed debt to build up at the tenement block where the property was situated.

Mr. Harkness, on behalf of the Respondent, advised that the Respondent had issued all of the owners at the property with their Statement of Services which contained a clear debt recovery procedure and that this procedure had been consistently applied at the property address. He advised that there was an issue with one of the eight owners at the property address who did not pay but that the Respondent had taken various measures against this person including registering a Notice of Potential Liability against this owner's property and obtaining a decree against this person. He advised that this had produced some measure of success as the owner in question had begun to pay back some of the debt to the Respondent. Mr. Harkness further advised that, in relation to the owner in question, there had been various repayment arrangements made over the years which had been maintained for a while and then defaulted on by the owner.

As a result of the evidence led before the committee, it was apparent to the committee that the Respondent has a clear written procedure for debt recovery contained within the Respondent's Statement of Service which the Respondent has consistently applied in the present case. In light of the foregoing, the committee finds that the Respondent did not breach Section 4.1 of the Code.

3. *Breach of Section 4.4*

The Applicant's evidence in relation to this alleged breach was short and succinct. She advised that she had never received from the Respondent a statement as to how service delivery by the Respondent would be affected where an owner did not fulfil their financial obligations.

Mr. Harkness for the Respondent referred the committee to the Respondent's letter to the Applicant of 7 April 2014 wherein he submitted that the Respondent had clearly advised the effect that continued non-payment would have on service delivery by the Respondent. In that letter, a copy of which was produced by the Applicant to the committee, the Respondent made it clear that the Respondent may have to terminate its appointment to manage the properties at 48 Craigpark Drive.

Mr. Harkness further submitted that over the years all of the owners, including the Applicant, were well aware of the affect that the debt was having on the ability of the Respondent to have repairs carried out at the property.

Mr. Fulton added that there had been discussion with owners for some time and that the Respondent had been clear throughout that the debt issue at the property was preventing repairs from taking place.

As a result of the evidence led before the committee, it was clear to the committee that the outstanding debt problem had been an issue at this property for a number of years and that all of the owners must have been aware of the affect that this was having on the ability to have repairs carried out at the property. Allied to this, although somewhat late in the day, the Respondent did make the position clear in the Respondent's letter of 7 April 2014. Given all of the foregoing, the committee finds that the Respondent did not breach Section 4.4 of the Code.

4. *Breach of Section 4.6*

The Applicant advised that she was not saying that the Respondent never informed she and her fellow owners of the debt problem but her issue was that the Respondent was inconsistent in terms of their provision of information to the owners. She advised that she received an invoice on a six monthly basis from the Respondent and was told nothing in between times unless she specifically questioned the Respondent. She advised that information always had to be prompted by a question from the owners and that this issue always arose with major repairs.

Mr. Harkness submitted on behalf of the Respondent that, as the Applicant had alluded when giving evidence, all of the owners at the property were aware of the ongoing debt problems. However, he advised that, irrespective of the debt problem at the address, the Respondent would always consider every report regarding a repair. He was clear that the Respondent investigated and advised on every report regarding a repair and that the Respondent had never said that no repairs would be carried out. If, for example, a repair was an emergency or was related to public safety, Mr. Harkness was clear that a repair of that nature would be instructed by the Respondent.

In light of all of the evidence led before it, the committee finds that the Respondent did keep the owners informed of debt recovery problems at the property, albeit on an informal basis and generally as and when repairs were required, advising owners of the impact that the debt was having on the inability to carry out repairs. Given this, the committee finds that the Respondent did not breach Section 4.6 of the Code.

5. *Breach of Section 4.7*

The Applicant helpfully submitted in evidence that she did not wish to insist on this alleged breach of the Code. The Applicant advised that as she and the other owners had not been charged for the outstanding sums due by the debtor owner, she did not wish to insist on the breach of this particular section of the Code.

6. *Breach of Section 6.1*

The Applicant advised that there was a survey carried out at the property on or about September 2011 which advised that there were a number of major repairs which required to be carried out at the property. The Applicant submitted that the Respondent had received a majority of mandates from the owners by 8 May 2013 to allow the Respondent to proceed with the tender invitation works in respect of these repairs. The Applicant referred to the Respondent's letter to the owners of 6 June 2013 wherein the Respondent advised that a majority of mandates had been received that the Surveyor from the Respondent's own surveying department would revisit the property and start to prepare the specification of works to allow tenders to be obtained.

The Applicant complained about the initial delay of three weeks in writing to the owners on 6 June 2013.

The Applicant advised that she heard nothing further until 24 July 2013 when her daughter phoned the Respondent for an update.

The Applicant advised that she received no further word from the Respondent until she received the letter from the Respondent of 26 February 2014 advising that the delay in carrying out the tender specification documents was due to a high workload within the Respondent's Surveying department. The Applicant noted that this letter was only received due to her letter of complaint to the Respondent of 17 February 2014.

The Applicant advised that she was very concerned about this lack of communication as she felt the property was being adversely affected by the lack of necessary repairs. She was increasingly concerned by the lack of information regarding progress received from the Respondent, particularly as the Respondent had advised the owners that this preparation of specification in relation to the tendering process should take around three or four months to complete. She advised that it took in the region of eleven months for the Respondent to produce the tendering report within informing the owners in the interim of the progress of these works.

The Applicant was of the opinion that the Respondent had taken triple the time to produce this work from that originally stated by the Respondent and without keeping the owners informed of the progress around this.

Mr. Harkness accepted in evidence that there was no letter sent to the owners from the Respondent's letter of 6 June 2013 until the Applicant received a letter from the Respondent dated 26 February 2014.

Mr. Harkness referred to the Surveying department of the Respondent as an "external consultant" but, when questioned about this by the committee, agreed that the Surveying department was in fact part and parcel of the same company of the Respondent and was not an external consultant.

Mr. Fulton advised that the delays in this matter were not fully appreciated by the management department of the Respondent. Mr. Fulton accepted that there had been a delay but this was within the context of an even longer delay in the owners

providing mandated authority to proceed with the repairs.

When questioned by the committee, Mr. Fulton confirmed that the Respondent had never considered outsourcing this piece of work to another business, despite the staffing and resource issues the Surveying department of the Respondent was experiencing.

Given all of the evidence led before the committee, it was clear to the committee that the Respondent accepted that there had been a delay in progressing the preparation of the specification of works documents for the tendering process. The committee notes that it was accepted by the Respondent that there had been no letter sent by the Respondent to the Applicant from 6 June 2013 until 28 February 2014 which second letter was only sent in answer to a written complaint received by the Respondent from the Applicant. Despite having possession of majority authority from the owners at the property from 8 May 2013, effectively the owners heard nothing about the progress of this piece of work until the end of February 2014. In light of the foregoing, the committee finds that the Respondent did breach Section 6.1 of the Code and that by failing to keep the Applicant informed of the progress of the preparation of the specification of works documents for the tendering process.

7. *Breach of Section 6.9*

The Applicant advised that she felt that the service of the provision of the survey report was inadequate but that she was being asked to pay for it and the Respondent did nothing about this to pursue the issue of the survey not being received within an appropriate time.

In relation to the issue surrounding the drainage problem at the property which had caused raw sewage to leak into the garden at the property, she advised that the Respondent had instructed a contractor to come and deal with this issue. The contractor had employed the use of rods to try and clear the blockage but this was not successful. This contractor then provided an estimate to the Respondent that it would cost somewhere in the region of £625 to clear the blockage by jetting it. The Applicant advised that she instructed her own contractor out of desperation who attended at the property, used a jetting system and managed to clear the blockage within an hour or so at a cost of only £90.

The Applicant was of the view that the contractor employed by the Respondent was not very competent and her view was that if someone comes into your own home and does not do a job properly, you do not pay that person. The Applicant felt that the Respondent should have done more to tackle what she viewed as being an incompetent contractor.

In relation to the Applicant's evidence about the survey being inadequate, Mr. Fulton for the Respondent advised that while this process was delayed, it was not necessarily inadequate. Mr. Fulton advised that the Respondent had encountered similar delays when trying to get sufficient mandates from the owners to get a majority to allow the works to go ahead.

Mr. Harkness advised that in relation to the drainage works which were carried out, any estimate for works which came in above £300 always required to be notified to

the owners before proceeding. The works carried out by the contractor instructed by the Respondent had been carried out under this threshold. He advised that the estimate for the £625 would have been deemed excessive by the Respondent and that further quotes would have been obtained but that the Applicant had opted to instruct her own contractor. To clarify, Mr. Harkness advised that both visits by the contractor instructed by the Respondent were included in the one invoice. Mr. Harkness also confirmed that the Respondent had never gone as far as instructing the contractor in relation to the £625 estimate.

In relation to this alleged breach, the committee finds that the Respondent could not pursue itself in connection with the survey and the delays incurred in that process. The Respondent cannot be a "contractor or supplier" to itself in terms of its own Surveying department. As regards the issue around the contractor and the drainage problem, while the Applicant may not have liked the result that the contractor instructed by the Respondent produced, this did not mean that the work or service provided was inadequate. Given the foregoing, the committee finds that the Respondent did not breach Section 6.9 of the Code.

8. *Failure to carry out the property factor's duties*

The Applicant referred the committee to the extract from the Land Register under title number GLA52635 which she had produced as part of her application and upon which she based her contention that the Respondent had failed to carry out the property factor's duties. Her opinion was that the Respondent had failed to use the majority vote early enough in relation to the repairs outstanding on the property. The Applicant was of the view that had the Respondent carried this out, the build up of work required at the property could have been avoided. The Applicant advised that the Respondent had failed to carry out these duties and used the debt due by the eighth owner as an excuse. She advised that the delay in dealing with the repairs is part and parcel of the factor's duties and the Respondent had failed in this regard.

Mr. Harkness advised that in relation to the property there was a history of proposals for repairs being made but no majority being obtained from the owners to allow these repairs to go ahead and that the Applicant was well aware of this.

The Applicant did accept that there was such a history of lack of majority consent at the property.

Mr. Harkness also pointed out that it took from the original survey in September 2011 until May 2013 to obtain the majority needed to allow the tender specification documents to be advanced. He accepted that there was a substantial delay not only on behalf of the Respondent but more so on behalf of the owners.

The Applicant pointed out that the Respondent had a majority in September 2011.

Mr. Fulton advised that the majority was received at October 2012, not September 2011, and it was almost immediately withdrawn by the actions of one owner and certainly before it could be actioned in terms of instructing that the works specification documents to be carried out for a tendering process.

Respondent in relation to the alleged breach of the property factor's duties. The

committee accepted that the Respondent had no authority to act in terms of the survey until October 2012 but that one of the mandates was then almost immediately revoked by an owner preventing the Respondent from implementing the mandates until the Respondent this mandate was reinstated by that owner in May 2013. The Respondent then instructed a surveyor in June 2013 so there would appear to have been no delay on the part of the Respondent in terms of instructing the works necessary for the repairs. Furthermore, the Applicant accepted that there was a history of lack of consent and mandated authority at the property in dealing with repairing issues. Given the foregoing, the committee finds that the Respondent did not breach the property factor's duties.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make the following property factor enforcement order:

Within 28 days of the date of communication to the Respondent of the property factor enforcement order, the Respondent must:

1. Issue an apology to the Applicant in respect of the Respondent's failure to communicate adequately and failing to keep the Applicant informed of the progress of the preparation of the works specification documents for the tendering process, contrary to the Code.
2. Make a payment to the Applicant of £200 in recognition of the inconvenience caused to her.
3. Provide documentary evidence to the Committee of the Respondent's compliance with the above Property Enforcement Factor Order by sending such evidence to the office of the Homeowner Housing Panel by recorded delivery post.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the committee proposes to make a property factor enforcement order, they must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to them.

(3)If the committee are satisfied, after taking account of any representations made under subsection (2)(b), 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, the committee must make a property factor enforcement order."

The intimation of this decision to the parties should be taken as notice for the purposes of section 19(2) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the Homeowner Housing Panel's office by no later than 14 days after the date that this decision is intimated to them,. If no representations are received within that timescale, then the Committee is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a property factor enforcement order may have serious consequences and may constitute an offence.

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....."

Signed.....

Date.....5th March 2015

Patricia Anne Pryce

Chairperson