



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 ref: HOHP/PF/15/0116

Re: 71 Nicolson Street, Greenock PA15 1NR (the property)

The Parties:

Mr Brian Johnston, 71 Nicolson Street, Greenock PA15 1NR (the homeowner)

Oak Tree Housing Association, 41 High Street, Greenock PA15 1NR (the property factor)

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

Committee members: Sarah O'Neill (Chairperson), Carolyn Hirst (Housing member)

Decision of the committee

The committee determines that the property factor has not failed to carry out its property factor's duties as defined in section 17 (5) of the Act.

The committee's decision is unanimous.

Background

1. By application dated 3 August 2015, the homeowner applied to the Homeowner Housing Panel ('the panel') to determine whether the property factor had failed to comply with its duties under the Property Factors (Scotland) Act 2011. In his application form, the homeowner complained that the factor had failed to comply with its duties under section 14 of the Property Factors (Scotland) Act 2011 in respect of section 6 (carrying out repairs and maintenance) of the code of conduct for property factors ('the code'). He also complained that the factor had failed to carry out the property factor's duties as defined in section 17(5) of the Act.
2. He enclosed with his application form copies of the following:

- a notification letter to the property factor dated 3 August 2015, setting out the reasons why he believed it had failed to comply with its property factor's duties as defined in section 17 (5) of the Act.
 - a stage 2 complaint letter from the property factor to the homeowner dated 27 July 2015, setting out its response to his formal complaint about the close decoration which was the subject of his application.
 - a copy of the property factor's Written Statement of Services (WSS).
3. The panel wrote to the homeowner on 14 August, asking him which paragraph of section 6 he believed the property factor had failed to comply with. The homeowner replied by email on 17 August, advising that he had ticked the box on the application form relating to section 6 of the code before realising that this section did not include a paragraph relating to carrying out unnecessary work or to a responsibility on the factor to prove that work is needed. He therefore confirmed that he was content for his application to proceed on the basis of the duties complaint alone.
 4. In response to a request from the panel for a copy of his title deeds, he then wrote to the panel on 24 August 2015, advising that a copy of the deeds had been posted. The land certificate relating to his property was duly received by the panel. The homeowner also wrote to the panel on 16 September by email, enclosing a copy of a letter from the property factor dated 14 September. He then wrote to the panel on 6 October, attaching photographs of the common close of the tenement within which his property is situated. He also enclosed copies of various emails between himself and Sean Marshall, Senior Development Officer with the property factor regarding the common close redecoration dated between 4 June and 21 July 2015. He then sent further written submissions about his complaint to the panel on 7 October.
 5. On 9 October 2015, the President of the Panel issued a minute of decision to both parties, stating that she considered that in terms of section 18(3) of the Act there was no longer a reasonable prospect of the dispute being resolved at a later date; that she had considered the application paperwork submitted by the homeowner, comprising documents received in the period of 7 August to 9 October 2015; and intimating her decision to refer the application to a panel committee for determination. On 15 October 2015, the President issued a notice of referral to both parties, requesting written representations by 5 November 2015.
 6. A further email was received from the homeowner on 21 October, forwarding an email from the office of his MSP. Written representations were received from the property factor on 4 November, together with a document inventory and supporting documents and photographs. An email was received from the

homeowner on 5 November, responding to the property factor's written representations. No further written representations were received from the homeowner.

7. On 19 November, the committee issued a direction to the parties. The committee directed the homeowner to provide within 21 days further details of the reasons why he considered that the property factor has failed to carry out its property factor's duties, including in particular the source/s of the duties which he believes have not been complied with.

8. The committee directed the property factor to provide within 21 days:

- A copy of its initial letter to the homeowner regarding the cyclical maintenance programme.
- Details of the process and/or criteria by which it makes decisions about what work, including internal paintwork to common areas, it will carry out as part of its cyclical maintenance programme in respect of properties which it is responsible for factoring, including that relating to the homeowner's property.
- A copy of the schedule to its WSS setting out the legal basis of the factoring arrangements in respect of the homeowner's property, which was referred to in Part 1 of the WSS, together with any information sent to homeowners in general, and the homeowner in particular, relating to the legal basis of the factoring arrangements.

9. Responses to the direction were received from both parties on 7 December 2015.

The hearing

10. A hearing took place before the committee on 17 December 2015 at Wellington House, 134-136 Wellington Street, Glasgow G2 2XL. The homeowner represented himself and gave evidence on his own behalf. The property factor was represented by its solicitor, Ms Lynn Rayner, a partner with Patten and Prentice LLP. Brian Praties, Development and Technical Services Manager and Sean Marshall, Senior Development Officer with the property factor were also present, and gave evidence on its behalf. Nick Jardine, Director and Michael McKendrick, Senior Maintenance Officer, were also in attendance, but did not give evidence to the committee. Neither party called any other witnesses to give evidence on their behalf.

Preliminary issue

11. The homeowner indicated to the committee that he wished to amend his application to include a complaint that he had not been consulted about the proposed works before they were agreed. This was not part of his original application; he had first raised the issue in his email response of 7 December to the committee's direction. He made reference in that email to the code of conduct (but did not specify any particular section) and to the requirements of Schedule 1 of the Tenements (Scotland) Act 2004 rule 2, and said that his doors and windows had been painted without his being asked or giving written approval. Mr Praties indicated that the property factor had received a copy of this email the week before the hearing, but Ms Rayner told the committee that she had not seen the email.
12. The committee adjourned the hearing briefly to consider the homeowner's request to amend his application. It noted that the issue had not been raised by the homeowner prior to 7 December, and that the property factor had not become aware of it until after that date. The committee therefore took the decision that the property factor had not been given fair notice of this complaint. In terms of regulation 22 (1) of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012, an application to the panel may not be amended to refer to any failure by the property factor which is not referred to in the notification from the homeowner to the property factor for the purposes of section 17 (3) of the Act. As the homeowner had not included any reference to this matter in his notification letter of 16 February, the matter could not therefore be considered by the committee. The chairperson noted that it would, however, be open to the homeowner to bring a new application in respect of this complaint, should he wish to do so.

The homeowner's complaint

13. The homeowner's primary complaint was that the painting of the common close, which was proposed at the time of his initial application and had been partly carried out in October 2015, was unnecessary and that the property factor had failed to provide objective evidence for the works. He did not dispute that he had a responsibility to pay for such works, but he did not consider that the works were required, as he believed that the internal paintwork was in good condition. He stated in his email to the panel of 7 October that 'what light damage there is is easily repairable without recourse to painting the entire close.' He told the committee that his complaint related only to the painting of the internal close walls, floors and stairs. In relation to the floor and stairs, he believed that these should never have been painted in the first place, and that if this had not been done, there would be no need for them to be repainted.

14. He told the committee that both his local councillor and his MSP had visited the property and agreed that the paintwork was in good condition. He had produced no evidence to support this, and Ms Rayner told the committee that the property factor was not prepared to accept the homeowner's evidence on this point in the absence of any written confirmation from his MSP and his councillor. The homeowner pointed out that he had sent an email to the panel on 16 September, advising that he had asked his councillor and MSP to intervene on his behalf, and asking whether the panel would contact them, or whether they would need to contact the panel. He said he had had no response to this query.
15. On checking with the panel administration during the course of the hearing, the committee established that no response had been sent to the homeowner on this point. In the interests of fairness, the chairperson said that the committee would issue a direction following the hearing, inviting the homeowner to produce evidence from his councillor and MSP for the committee to consider. A second direction to this effect was issued to the parties on 22 December. The homeowner forwarded to the committee an email dated 5 January 2016 from his councillor, Mr Kenny Shepherd, confirming that he had visited the property on 4 August 2015 and that in his opinion, the close was in good condition and did not require any remedial work at that time.
16. On 22 January 2016, a letter was received from the homeowner's MSP, Mr Stuart McMillan, confirming that he had visited the property in August 2015 before it was repainted. He stated that there was clearly some wear and tear on the close floors, with gripping eroded on the concrete floors and several stairs, which he felt could be dangerous. He also said that, 'in my opinion, the walls did not necessarily merit new paint work.'
17. The homeowner also submitted photographs of the close and stairs, which had been taken before the paint work was carried out, which he believed supported his position.
18. In his response to the committee's first direction requiring him to provide further details of the reasons why he considered that the property factor has failed to carry out its duties, the homeowner drew the analogy of a garage servicing a car and replacing components which were perfectly serviceable and not in need of replacement. He also made reference to the Supply of Goods and Services Act 1982, which he stated would give him protection from the property factor carrying out 'unjustifiable actions'.
19. The chairperson asked him to confirm whether this was a reference to the implied term in section 13 of that Act, which states that a provider of services

will carry out those services with reasonable care and skill. He confirmed that this was correct. The chairperson pointed out that the Act (which was superseded by the Consumer Rights Act 2015 on 1 October 2015, after his application was made) did not apply in Scotland, but that the common law in Scotland implied a similar duty on service providers.

20. The homeowner told the committee that he also had a secondary, related complaint. This was that the property factor had failed to provide him with value for money by carrying out works which were unnecessary, and failing to provide any justification for the works.

21. He told the committee that he wished to be compensated for the cost of the painting of the close. He also said that he should not have to pay for the painting of his own front door and windows, as he had not been consulted about this.

Findings in fact

22. The committee finds the following facts to be established:

- a) The homeowner is the owner of Flat 0/2, 71 Nicolson Street, Greenock PA15 1TL. The property is a ground floor flat within a tenement comprising 10 flats. There were 8 flats at the time he purchased the flat. Two further basement flats were created when the tenement was renovated around 1993.
- b) The property is registered in the Land Register for the county of Renfrew under title number REN80092. The homeowner took entry to the property on 31 December 1993.
- c) Of the remaining nine flats within the tenement, seven are owned by the property factor as a registered social landlord and are occupied by its tenants. The other two flats are privately owned.
- d) Oak Tree Housing Association is the property factor responsible for the management of the common areas of the tenement. It is stated in the schedule to the property factor's WSS that the basis of its authority to act as property factor is the Deed of Conditions. Ms Rayner confirmed to the committee at the hearing that this was an error, and that there was in fact no Deed of Conditions relating to the tenement. The basis of the property factor's authority to act was in fact custom and practice, and the schedule would be amended to reflect this.
- e) The Land Certificate for the property sets out the rights of common property within the tenement, but does not make specific mention of the common close and stairs. The burdens section of the Land Certificate shows that responsibility for common repairs is set out in a Disposition by the Executors of Robert Blair to James Watt Housing Association Limited registered on 17 March 1988. Ms Rayner confirmed to the committee that this Disposition

provided the sole basis for the homeowner's common responsibilities as set out in the schedule to the WSS.

- f) The said Disposition states that the homeowner is obliged to pay a one-eighth share of the expense of 'maintaining, repairing and renewing' the common parts, which include the 'stairs, railings and passages'. It goes on to state that 'when a majority of the proprietors of the houses in said tenement consider it desirable to have any mutual repairs executed they shall have power to order the same to be done and our disponees and their foresaids whether consentors or not shall be bound to pay their share of the expenses thereof'.
- g) Oak Tree Housing Association became a registered property factor on 7 December 2012.
- h) The property factor's contractual duties in relation to the management and maintenance of the common areas within the tenement are set out in:
 - i. the property factor's WSS
 - ii. the property factor's factoring policy, which was adopted in April 2004 and reviewed in March 2015. This is not referred to in the WSS, and the committee only became aware of this when it was mentioned by the property factor at the hearing. The committee issued a second direction to the parties on 22 December, requiring the property factor to provide a copy of this policy. This was received on 21 December.
- i) Mr Marshall wrote to the homeowners within the tenement on 19 May stating that the common areas were included in the property factor's cyclical maintenance programme for both internal and external decoration, and that, following a recent inspection, it could see no reason why the works should not go ahead as planned. He went on to say that the property factor intended to carry out a tendering exercise in the coming weeks, and that the tender process was likely to be concluded in July. In the final paragraph, he stated: 'In the spirit of consultation, the Association would welcome your thoughts on the proposed works' and invited the homeowners to contact him to discuss the matter in more detail.
- j) Following an exchange of emails between the homeowner and Mr Marshall between 4 June and 9 July regarding his complaint that the works were not necessary, Mr Praties wrote to the homeowner on 27 July in response to his second stage complaint. In this letter, he stated that the close had been subject to a pre-inspection, and that while it had been stated (by Mr Marshall) that the close decoration was not crucial, the view was that the close would benefit from the paint being freshened up. He then confirmed that it was the property factor's intention to include the painting of the common close area of 71 Nicolson Street in the year's communal painting programme.
- k) Mr Marshall wrote to the homeowner on 12 August 2015, stating that four contractors had been appointed to tender for the works; that three had tendered; and that one had been selected following a quality and price assessment; that his share of the estimated cost was £438.40 plus VAT, representing 10% of the total cost; and that as part of the consultation

process, a consultation surgery was to be held on 25 August, at which the project quantity surveyor would be in attendance.

- l) The homeowner did not attend the meeting on 25 August.

Statement of reasons for decision

23. The question before the committee was whether, on the balance of probabilities, the property factor had failed to carry out its duties in terms of section 17(5) of the Act. Section 17 (4) provides that references in the Act to a failure to carry out the property factor's duties include references to a failure to carry them out to a reasonable standard. This in essence reflects the common law in Scotland in relation to the requirement for a provider of professional services to carry these out with reasonable care and skill.
24. The homeowner had made reference to the Supply of Goods and Services Act, and had confirmed to the committee that this was intended to be a reference to the implied term in section 13, which states that a provider of services will carry out those services with reasonable care and skill. The committee therefore treated this as a reference to the Scots common law, which has similar effect. Following the principles set out in *Hunter v Hanley* (1955) SLT 213, the test was therefore whether the property factor had failed to carry out its duties in such a way as any property factor of reasonable skill would do, if acting with reasonable care.
25. Ms Rayner explained in her email response of 7 December to the committee's first direction that, in order to ensure that properties remain in a good state of repair, the property factor operates on the basis of a five year life cycle for painting common areas and closes. This cycle was considered reasonable after consultation with other social landlords, owners and tenants, and the last consultation process, which included the homeowner, took place in 2010-11
26. It was explained that painting would not necessarily be carried out every five years, but that properties scheduled for work were inspected prior to the work being carried out to assess whether it should go ahead. If the inspection found that the decoration was in good condition, it was recommended that the work be deferred for a further five years. The criteria applied by the property factor in determining whether or not work was required was that if more than 30% of elements required replacement, there was a general assumption that work would be done in accordance with the planned cycle. In terms of painting work, if more than 30% of the surface area requires attention, it is recommended that the work should go ahead.
27. Mr Praties told the committee that the property factor had instructed a quantity surveyor to inspect the close, in order to determine whether work should be

done. The surveyor had taken the view that the 30% criteria had been met. It was the property factor's contention that the photographs of the close which it had submitted, which had been taken in October 2015 prior to the painting of the close walls, clearly showed that this threshold had been exceeded.

28. In 2008, when the previous inspection was carried out, the quantity surveyor had found the internal decoration within the tenement to be in good condition, with the exception of the floor painting. On the surveyor's advice, the floor had been painted, but the close had not otherwise been painted at that time. The close had not therefore been painted for at least 10 years prior to the recent redecoration. Neither the property factor nor the homeowner was certain as to when the close walls had last been painted, but both thought it had probably been in 2005.
29. In response to the homeowner's contention that such damage as did exist to the close walls could be patched up, rather than painting the entire close, Mr Praties said that this difficult to do, as there was a need to repair areas of cracking plaster prior to repainting. He said that it was not just a matter of filling the cracks with plaster, and that it may be necessary to chip away plaster and then re-plaster before painting. If cracking plaster was covered up with paint, this would be unsightly. The committee noted that, while he did not believe the works were justified, the homeowner appeared to accept that at least some minor repairs were necessary.
30. It appears to the committee that whether the works were required was largely a matter of opinion, and that there was a difference of opinion between the property manager and its quantity surveyor on one hand, and the homeowner and his elected representatives, on the other. The committee accepted that the property factor had criteria in place as to when works would be instructed, noting that, while whether these had been met was to an extent subjective, these criteria had been applied in both 2008 and 2015.
31. The homeowner told the committee that the photographs submitted by the property factor were extreme close ups, which misrepresented the actual condition of the close as a whole. Mr Praties, on the other hand, said that the homeowner's photographs were selective, and had concentrated on some specific and localised areas. It appeared to the committee that, on balance, the photographs submitted by the property factor suggested that painting was required in at least some areas of the close walls, and that the floors required to be painted. There was a difference of view between the parties regarding the painting of the floors and the stairs. The homeowner was unhappy that they had been painted in the first place, and there was some dispute over when they had first been painted. The committee could not consider matters

which had occurred prior to 1 October 2012, as regards the property factor's duties, however.

32. The photographs clearly showed that the paint on the floors and stairs had worn off significantly in places, and the correspondence suggests that the homeowner accepted this. In his view, there was no logic in painting the stairs for decorative effect, and they should be left as they were. Mr Marshall told the committee that the property factor was currently investigating possible solutions which would have a longer lifespan than the current paintwork, before repainting the stairs and floors.
33. On balance, the committee accepted the property factor's argument that it was required to consider the interests of the other owners and tenants within the close, and that it was in their interests that the common areas, including the floors/stairs, were maintained in good condition. The committee also had regard to the fact that the property factor itself, as the owner of seven of the ten flats, would be paying the bulk of the cost for the works.
34. Having considered all of the evidence before it, the committee determines that, on the balance of probabilities, the property factor has not failed to carry out its duties in terms of section 17(5) of the Act. While it could have communicated this more clearly to the homeowner, the property factor appeared to have properly applied its criteria for carrying out works. Applying the *Hunter v Hanley* test, and giving consideration to section 17 (4) of the Act, the committee considers that the evidence before it does not support a conclusion that the property factor had failed to carry out its duties in such a way as any property factor of reasonable skill would do, if acting with reasonable care.
35. With regard to the homeowner's second, related complaint about value for money, while it is possible that another property factor would take a different view as to whether the work needed to be done, it does not seem unreasonable to the committee that a decision should be taken to repaint a close which has not been painted in at least 10 years. The property factor had to take into consideration the likely state of repair of the paintwork at the end of the next cycle, in another five years' time, in deciding whether to carry out the works in 2015.

Observations by the committee

Consultation

36. The committee cannot make a determination on the issue of whether there was adequate consultation with the homeowner, as it refused his request to

amend his application to include this, for the reasons set out at paragraph 12 above. It does, however, make the following general observations about the property factor's consultation approach.

37. Part 3 of the WSS states that owners will be consulted with before cyclical maintenance works are undertaken, and specifically mentions internal and external paintwork in that regard. It also says that, if a repair is likely to cost more than the agreed specified limit, the property factor will seek agreement from the majority of owners within a property before carrying out the repair. Ms Rayner told the committee that the property factor would always seek to consult homeowners before carrying out works, and had done so here. She said that there was no specified limit in this instance, but the committee notes that the factoring policy states at section 5.1.1 that the specified limit for factored properties is £1000.
38. The committee considers that there is a question here as to what the property factor means by 'consultation'. The committee notes that section 2.4 of the code states that a property factor must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges in addition to those relating to the core service. It is not clear to the committee how the property factor's consultation process operates.
39. Part 3 of the WSS makes reference to consulting owners, but it does not set out a consultation procedure. Section 7 of the factoring policy, which is headed 'consultation with owners' states at section 7.1 that the property factor will 'inform and consult owners regarding any changes to the services provided, the level of the management fee, the cyclical and planned maintenance programme and any significant issues relating to the maintenance or management of the property.' It does not specify *how* this will be done. Section 7.2 goes on to provide that where disagreement exists over proposed work, each owner will have a vote, in line with the voting rights in the deed of conditions or factoring agreement as relevant.
40. In this case, while the relevant Disposition sets out the proportion of the cost of common repairs for which homeowners are responsible, it does not set out a process for voting on common works, beyond stating that a majority of owners can order the works to be done. Given the lack of a clear procedure for decision making, there is a question as to whether this should be governed by Rule 2 of the Tenement Management Scheme in terms of section 4 and Schedule 1 of the Tenements (Scotland) Act 2004, which sets out such a procedure for scheme decisions.

41. The committee observes that the reality of the situation here, given that the property factor owns seven of the ten flats within the tenement, is that the consultation outcome would have been the same, regardless of how the consultation process was conducted. It is noted that one of the other two homeowners had confirmed their agreement to the works going ahead, and the other, who was in the process of selling their property, did not respond. There was accordingly a majority of owners in favour of the work going ahead.
42. The committee also notes the homeowner's position that the property factor should not have painted his own front door and windows without consulting him. While the committee accepts that, as Ms Rayner explained, this approach is more cost effective for homeowners than having the work done separately at a later date should they change their mind, this work should not have been done without his consent. The committee welcomes the undertaking which Ms Rayner made at the hearing on behalf of the property factor that the cost of this work would be deducted from the homeowner's final bill for the works.

Communication

43. The committee observes that the property factor's written communication with the homeowner with regard to the works was generally not of a high standard. For example, the committee has seen no evidence that the criteria for carrying out cyclical maintenance works were ever clearly explained to the homeowner. The criteria are not referred to in its factoring policy, its March 2015 newsletter, or in its letters to the homeowner of 19 May or 27 July. It appears to the committee that had this been explained to the homeowner, he would at least have had a clearer understanding of the rationale for carrying out the works. The letter of 27 July and the email correspondence with Mr Marshall actually suggest that the works were being done primarily for aesthetic reasons and 'freshening up', and even stated that these were not crucial. It is perhaps therefore not surprising that the homeowner formed the view that the works were unnecessary.

Written statement of services

44. Firstly, the committee notes that there are no references to the property factor's factoring policy in its WSS. It would be helpful to homeowners if references were made to the policy where appropriate- for example, the WSS does not set out a specified limit for repairs, but the factoring policy states that this is £1000. Secondly, the schedule to the WSS, which is referred to in part 1 of the WSS, incorrectly states that the property factor's authority to act comes from a Deed of Conditions, when no such deed exists. The committee notes that the property factor has undertaken to amend this, and hopes that this will be done promptly. It is very important that both the property factor and

homeowners are clear about the legal basis for both their relationship and their respective rights and responsibilities.

Right of appeal

45. The parties' attention is drawn to the terms of section 22 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 a decision of the president of the homeowner housing panel or 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.

More information regarding appeals can be found in the information guide produced by the homeowner housing panel. This can be found on the panel's website at:

<http://hohp.scotland.gov.uk/prhp/2649.325.346.html>

Sarah O'Neill

Chairperson Signature

Date.....25/11/16.....