



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

Hohp ref:HOHP/PF/14/0132

Re: Property at Flat 3/2, 23 Turnbull Street, Glasgow G1 5PR

The Parties:-

Nicola Clelland, Unit 14, 57-59 Grasmere Road, Cremorne, Sydney, NSW 2090, Australia ("the Homeowner")

Ross and Liddell, 60 St Enoch Square, Glasgow G1 4AW ("the Factor")

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, 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 complied with the Property Factor's duties, determines that, in relation to the Homeowner's Application, the factor has complied with the property factor's duties and complied with the Code of Conduct for property factors.

Following on from the Applicant's application to the HOHP, which comprised of documents received in the period 5th September 2014 until 11th February 2015, the Convener with delegated powers under Section 96 of the Housing (Scotland) Act 2014 referred the application to committee on 25th February 2015.

Hearing

A hearing took place at the offices of the HOHP on 11th June 2015. The hearing commenced early at 9 am local time to take account of the time difference with Australia where the Applicant ordinarily resides.

The Applicant resides in Australia and gave evidence directly by way of a conference call telephone link along with her partner, Padraig Harrington.

The Respondent was represented by Mr. William Alexander Frew who is a Senior

Property Manager of the Respondent and Mr. Michael Ritchie, Solicitor from Messrs. Hardy MacPhail, Solicitors.

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 4 September 2014 to 11 February 2015 and letter by the Respondent to the Homeowners Housing Panel dated 17 March 2015 together with their First and Second Inventory of Productions and their written submissions which were undated but intimated to the HOHP and the Applicant on 18 May 2015.

Preliminary Issues

The Respondent had made an application for a Direction under the 2012 Regulations which was granted by the Committee. In response to that, the Applicant had emailed the HOHP on 5 June 2015 confirming that she did not have a written contract with Durashield, attaching email correspondence from Durashield which confirmed the lack of a written contract. The Applicant had intimated this to the Respondent at the same time as she had intimated it to the HOHP. Unfortunately, this was not intimated to the Committee. The Applicant was good enough to email a fresh copy of this to the HOHP who then provided the Committee with a copy of this correspondence at the hearing. The Committee took a short recess to consider this new written evidence. On reconvening the hearing, both parties confirmed that they had no objection to this correspondence being accepted and considered by the Committee.

Separately, the second inventory of productions for the Respondent had been lodged late with the HOHP in terms of the 2012 Regulations. However, the Applicant helpfully confirmed that she had no objection to this being accepted by the Committee.

The Legal Basis of the Complaints

The Applicant complains under reference to Section 2.1 and to a breach of the property factor's duties (as defined by Section 17 subsection 5 of the 2011 Act).

The Code

The element of the Code relied upon in the application provides:-

"2.1 You must not provide information which is misleading or false."

We make the following findings in fact:

The Applicant is the owner of the property known as Flat 3/2, 23 Turnbull Street, Glasgow and she has owned this property since on or about February 2010. The property is registered in the Land Register of Scotland under Title Number GLA122803.

The Applicant purchased the property from her now deceased father. The Applicant had previously resided in the property from 2001 until 2004 when it was owned by her father. She resided there while she was a student at Strathclyde University.

The Respondent is the factor of the common parts of the block of flats within the property at 23 Turnbull Street.

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).

Mr. William Frew, employee of the Respondent, managed the development wherein the property is located from 2007 until 2013.

The property is located in an area designated as a Conservation Area by Glasgow City Council.

The Land Certificate obliges proprietors of the block of flats wherein the property is located to "...adhere to a common colour scheme in respect of the exterior parts of the Development and the Flats therein, the common parts thereof and all the woodwork, window frames....".

The company employed by the Applicant, namely, Durashield, erroneously and against the Applicant's instructions installed white framed windows rather than blue framed windows as per the colour scheme required by the Land Certificate and therefore breached the terms and conditions of the Land Certificate.

The windows in the property do not constitute part of the common parts in terms of the Land Certificate which the Applicant accepted in evidence. Esto they had formed part of the common parts, the Respondent did not provide the Applicant with permission to replace the original wooden framed windows with UPVC windows.

As at the date of the hearing, the two white UPVC framed windows remained in situ in the property.

The Applicant instructed Durashield to install UPVC framed windows which, although not specifically contrary to the terms of the Land Certificate, was contrary to the terms of the Conservation Area in which the property is located and contrary to local planning regulations and legislation.

The Respondent did not provide the Applicant with advice regarding the installation of UPVC windows.

The Respondent and the Applicant were both unaware that the property was located within a Conservation Area at the time the windows were installed.

The Applicant and the Respondent were both unaware that the windows breached planning regulations until the Respondent received a complaint from another common owner in the development about the replacement windows. On receiving this complaint, the Respondent checked with the planning department of Glasgow City Council. The planning department confirmed that the replacement windows installed by Durashield breached planning regulations.

The Respondent did not provide the Applicant with advice regarding the type of replacement windows she should use.

The Respondent provided the Applicant with the names and contact details of two joinery contractors to try to assist the Applicant with the difficulties she was encountering with the original timber framed windows which were no longer wind and watertight.

The windows were installed after the Applicant had moved to Australia and the Applicant was not present to check the installation of the windows herself.

The Applicant has rented out the property throughout her ownership of the property. The Applicant employs a property manager, The Property Bureau, to manage the property. The property manager checked the installation of the windows from the inside of the property only and did not realise that the windows were the wrong colour.

The Applicant did not check her Land Certificate before installing the replacement windows.

Reasons

The Applicant stated in evidence that she was clear that she had sought the advice of the Respondent about replacement of the two original timber framed windows prior to contracting with Durashield. She stated that she had obtained the "permission" of the Respondent by speaking to the Respondent's Mr. Frew and that he has advised her that she could install UPVC windows "as long as they looked and felt the same". This wording was referred to by the Applicant both in email correspondence which she had with the Respondent and once again by the Applicant when it formed part of her Application to the HOHP.

In response, Mr. Frew advised that he remembered providing the Applicant with the details of the two joinery contractors but he did not remember any subsequent conversations with the Applicant in relation to the problem she had with her windows leaking. He advised that, given that he had been employed as a property manager by the Respondent for some twenty years, he would never have used the term "same look and feel". In particular, he took exception to the word "feel" as he stated that he it is simply not a phrase he would use to describe windows.

Mr. Frew stated he gets questions about windows and other ancillary matters to do with the properties he manages every day of his working life. He was clear that if questions such as these arise, his only advice to owners is to check their Title Deeds, in particular he would refer them to their Deed of Conditions.

Mr. Frew was clear that he would not have responded to the Applicant as she had claimed in relation to the "look and feel" of any replacement windows. He advised that, apart from not being a phrase that he would ever use, to answer as the Applicant had claimed he had, would have called for him to speculate which would have cost him his job. He was very clear that he would never speculate and would always advise owners to check their Deed of Conditions. To do otherwise, would, he stated, call for speculation and he would not have continued to be employed by the Respondent if he indulged in speculation of this type.

The Applicant advised that she had wanted to get the windows replaced before she moved to Australia but the installation was delayed due to bad weather, hence the installation did not take place until she had moved abroad. She had no opportunity to check the windows herself.

The Applicant accepted in evidence that she had not checked her Land Certificate. In particular, the Committee referred her to Clause Second Paragraph (6) of the Deed of Conditions registered 5 September 1996 by Woolwich Homes Limited wherein it is stated that "...and any alterations to any Flat shall conform in all respects to any Local Authority, Town and Country Planning or other relevant statutes and regulations in that behalf.....". The Applicant advised that she had not checked this nor had Durashield advised her to check either her Land Certificate of with the local authority in relation to the replacement windows. Furthermore, the Applicant accepted that she had sought estimates for the replacement windows from four different glazing companies, none of which offered timber framed windows as an option.

The Applicant confirmed to the Committee that she had not approached any company with a view to having new windows made using wood.

The Applicant confirmed that she was legally represented when she purchased the property but that she had not been advised at that point that the property lay within a Conservation Area.

The Applicant accepted that she knew that the windows had to be a specific colour (blue). However, she advised that she did not know that they could not be made from UPVC. She further advised that Durashield have accepted that they made a mistake in respect of the colour of the windows.

The Applicant accepted that, due to her imminent and subsequent departure abroad, she had not entered into a written contract with Durashield but that Durashield had sent a surveyor out to her property.

The Applicant advised that the planning department has confirmed that the windows will have to be replaced again so that the windows conform to both the Land Certificate in terms of colour and the planning regulations and legislation in terms of

the material of which the frames are constructed.

The Applicant accepted that the Respondent's property factor's duties related only to the common parts of the development, of which the windows did not form part. However, her view was that as there needs to be uniformity in the appearance of the flats, the Respondent had some responsibility in that respect. Her view was that Mr. Frew should not have provided her with any advice at all.

The Applicant advised that when she raised the issue of planning with Durashield, they told her that in Scotland it was the homeowner's responsibility to ensure that windows were compliant with planning matters. The Applicant was never provided with a document stating the terms and conditions of business by Durashield.

The Applicant advised that she had approached four companies with a view to getting estimates for the replacement windows and that they were all companies which offered UPVC windows only. The Applicant advised that three of the four companies refused to quote/install due to the height of the location of the property. The Applicant could not remember the names of the three companies other than Durashield.

Mr. Frew for the Respondent advised that he had been employed by the Respondent for around twenty years and had been in the position of Senior Property Management for about six years. He accepted that he had a conversation with the Applicant about her windows and that he had provided her with the names of the joinery contractors. However, he advised that he did not remember any other conversations about the Applicant's windows. He stated that there had been a number of issues with windows at that particular development. He was clear and unequivocal that in respect of all questions from owners such as relating to windows, satellite dishes and the like, he would always refer owners to the Deed of Conditions for their properties as this is where most of the answers can be found. He was clear in evidence that he would not have speculated as this would have cost him his job and he would not have lasted in his present employment for twenty years if he had speculated about issues such as these.

Mr. Frew confirmed that he was not aware that the property was located within a Conservation Area. He advised that he was not sure what effect, if any, this would have on any property as he is more cognisant with Listed buildings.

When asked if he should have been aware that the property was located within a Conservation Area, Mr. Frew advised that the responsibility of the Respondent was to manage the property according to the Deed of Conditions.

Mr. Frew advised that he was not aware of any other UPVC windows having been installed in the development at the time the Applicant installed them in the property.

The Applicant sent an email to Mr. Frew at 00.23 hours on 4 July 2014 wherein she advised that both her property manager and Durashield knew that the windows had to be of "the same spec". When questioned re this, the Applicant stated that they should look and feel the same.

When questioned further about any possible further conversations he may have had with the Applicant, Mr. Frew was honest in stating that he receives queries such as those about windows several times a day and cannot remember every conversation. He did remember the initial conversation but was clear that, as the problem pertained to something which was not a common repair issue, he provided the Applicant with the names of the contractors to try and be helpful. He was clear that he would not have become more involved as it was outwith his remit as factor and that he would have referred her to the Deed of Conditions.

Mr. Frew was clear that he had never had a conversation with Applicant about UPVC windows and that he would have remembered this, nor did he provide her with "consent" to install these windows as the consent was simply not his to give.

Discussion

It appeared to the Committee that the main difference in the facts as between the Applicant and the Respondent was that the Applicant's view was that she had obtained the consent of the Respondent for the UPVC windows having had several conversations with Mr. Frew. Mr. Frew was clear that he only remembered the one conversation with the Applicant about her windows and that he never provided her with advice regarding the type of windows which should be installed. In this regard, the Committee preferred the evidence of the Respondent. Mr. Frew is a property manager of twenty years standing who had a previous background of having worked as a joiner for a number of years. It seemed unlikely, on the balance of probabilities, to the Committee that Mr. Frew would have used the phrase "look and feel" when describing windows given his employment history. The Applicant insisted that Mr. Frew had used this phrase. The Committee also accepted Mr. Frew's evidence that his stock answer in relation to questions such as these from owners is to refer the owners to their Deed of Conditions without speculation by him. The Applicant accepted in her own email to Mr. Frew of 4 July 2014 that she knew that the windows had to be of the "same spec". The Applicant did not offer a clear reason as to why she did not approach a company which would have constructed timber framed windows, explaining that she chose to approach companies which used UPVC windows only. The Applicant accepted that her windows were not part of the "common parts" of the development and, as such, the Respondent did not manage these. When questioned by Mr. Ritchie, the Applicant accepted that she should have sought advice from Durashield about the windows but instead had entered into a contract with them without seeing their terms and conditions of contract.

Observations

The Committee noted that it was unfortunate that there was no written record kept by either party of the contact between the Respondent and the Applicant prior to the Applicant arranging for the installation of the windows.

The Committee also notes that it is unfortunate that the Respondent did not know that the property was located in a Conservation Area. However, the Committee notes that Mr. Frew advised that, on discovering that the Development was located within a Conservation Area, he sent a letter out to all owners advising them of that fact.

It may well be that the Applicant can pursue other rights of relief in relation to this 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....."

Signed.....

Patricia Anne Pryce
Chairperson

Date.....

24th June 2015