



Decision by a Committee of the Homeowner Housing Panel in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

hohp Ref: HOHP/LM/15/0159

Re: Property being woodland at Clayhills Grove, Balerno, Midlothian, EH14 7NE ("the Property")

The Parties:-

Mr Anthony J.E. Macfarlane residing at 10, Clayhills Grove, Balerno, Midlothian, EH14 7NE ("the homeowner")

Trinity Factoring Services Limited, 209/211, Bruntsfield Place, Edinburgh, EH10 4DH ("the factor"), hereinafter together referred to as "the parties"

Committee Members

Karen Moore (Chairperson)

Elizabeth Dickson (Housing Member)

Decision

The Committee determined that the factor had failed to comply with Section 6 (Carrying out repairs and maintenance) at paragraph 6.4.

Background

1. By application dated 7 December 2015 ("the Application") the homeowner applied to the Homeowner Housing Panel for a determination that the factor had failed to comply with Section 6 (Carrying out repairs and maintenance) at paragraph 6.4 of the Property Factor Code of Conduct ("the Code") by failing to prepare a programme of works in respect of the wild woodland landscape areas within the development known as Clayhills Grove ("the Development") of which the Property forms part as required by section 14(5) of the 2011 Act.

2. The Application comprised the following documents, which the homeowner helpfully indexed and cross referenced:-

- i. Copy email chain between the homeowner and the factor dated from 20 November to 4 December 2015;
- ii. Homeowner's letter of complaint to factor dated 10 November 2015;
- iii. Factor's Client Service Level Agreement ("the SLA");
- iv. Extract from homeowner's title deed;
- v. Plan of the Property;
- vi. Letter from the factor dated 9 December 2014 and
- vii. Letter from the factor dated 24 November 2014.

3. On 24 March 2016, the Committee directed the factor to provide a full copy of his title deed and a copy of the Minutes of a meeting which took place in July 2015, which did by letter dated 25 March 2016.

4. In addition, the homeowner made written representations and lodged documentary productions with the Committee, which again the homeowner helpfully indexed and cross referenced in the written representations.

5. The factor made written representations and lodged documentary productions with the Committee.

6. Each party's representations and productions were copied to the other party.

Hearing

7. A hearing took place on 18 May 2016 at George House, 126, George Street, Edinburgh. The homeowner was present. The factor was represented by Mr Callum Searle and Mr George McGuire.

Evidence on behalf of the homeowner.

8. The homeowner read a prepared statement a copy of which he gave to both the Committee and the factor, a copy of which is annexed hereto and is referred to for its terms *brevitatis causa*, and answered questions put to him by the Committee and the factor. The homeowner's position is that the factor has not put in place a programme of works in respect of the wild woodland landscape areas within the Development of which the Property forms part and that the factor is obliged to do so in terms of both the SLA which states in the preamble "*We will manage your development in accordance with the terms of your deed of conditions and current legislation*" and the Code at paragraph 6.4 which states "*If the core services agreed with the homeowners includes periodic property inspections and/or a planned*

programme of cyclical maintenance, then you must prepare a programme of works". The homeowner's position is that the onus is on the factor to advise the owners that the factor must put in place a programme of works. The homeowner agreed that the majority of the owners of the Development have not agreed to meet the cost of works to the wild woodland.

Evidence on behalf of the factor.

9. Mr McGuire made a statement to the Committee and both Mr Searle and Mr McGuire answered questions put to them by the Committee and the homeowner. Mr McGuire explained that the factor's position is that there is no requirement on the factor to have in place a programme of works in respect of the wild woodland landscape areas within the Property. Mr McGuire confirmed to the Committee that the factor carries out quarterly visual inspections of the Property and keeps a record of the dates and findings of these inspections. The factor does not report to the owners of the Development following the inspections other than at the owner's AGM. In particular, notwithstanding the nature of the homeowner's complaint, Mr McGuire agreed that the factor had not provided any reports on the inspections and the findings of the inspections to the homeowner as the homeowner had not specifically asked for them. Mr McGuire confirmed to the Committee that the factor carries out regular maintenance works such as grass cutting to the landscaped areas of the Property but does not carry out routine works to the wild woodland areas. Mr McGuire also explained that the factor carries out tree cutting works to the wild woodland areas as and when these are required following the inspections and/or following requests by the owners. Mr McGuire advised the Committee that the factor does not consider the works to the wild woodland areas a core service. Mr McGuire pointed out to the Committee that, from the findings of a report on a visual assessment, the risk of damage to the homeowner's home and property is a potential future risk which may not occur and is not a real and live risk. Mr McGuire advised the Committee that the factor is supportive of the homeowner's view that a programme of works should be in place but that a majority of the owners of the Development, as is required by the title deeds, did not support this view and did not want to incur the expense. Mr McGuire advised the Committee that the factor refutes the homeowner's position that the onus is on the factor to advise the owners that the factor must put in place a programme of works and is of the view that the factor should only do this if instructed by the owners.

Factual findings of the Committee.

10. The Committee took into account the Application and accompanying papers, the parties' written representations, the productions lodged by the parties and the submissions made by the parties at the Hearing.

11. The Committee found the following facts to be proved and not in dispute:-

- a) The Property is a landscaped area which forms part of the Development;
 - b) The Property is in the common ownership of the homeowner and 14 other owners all of whom have an equal responsibility for the maintenance and upkeep of the Property.
 - c) The Property is managed by the factor and has been since 2009.
 - d) The factor issued the SLA which states in the preamble *"We will manage your development on accordance with the terms of your deed of conditions and current legislation."*, and, at the paragraph headed "Inspections", states *"Although we aim to visit all sites at least once per month, we will more formally inspect developments at least 4 times per year"*
 - e) The factor carries out quarterly visual inspections of the Property, keeps a record of the dates and findings of the inspections but does not report to the owners of the Development following the inspections, other than at AGMs. It was noted that no AGM was held in either 2012 or 2013.
 - f) There are mature trees within the Property, one of which is situated close the homeowner's home and which is need of maintenance.
 - g) There has been extensive correspondence between the homeowner and the factor in respect of the extent of the factor's direct responsibility for the management of the Property and the maintenance of the wild woodland in particular.
 - h) The factor has attempted to obtain authority from the owners of the Development to have works carried out to the wild woodland no avail.
 - i) Edinburgh City Council, being the statutory planning authority with responsible for the Property, has registered a Tree Preservation Order against parts of the Property.
 - j) A visual assessment of the trees was carried out in February 2008, the outcome of which was that, although there is no immediate risk of damage, a programme of work is recommended.
12. The Committee found the dispute between the homeowner and the factor to be the extent of the factor's duty to put in place a programme of works.

Decision of the Committee

13. Therefore, the matter between the parties and the matter for the Committee's determination is: has the factor failed to comply with Section 6 (Carrying out repairs and maintenance) at paragraph 6.4 of the Code by failing to prepare a programme of works for the Property?

14. Section 6 (Carrying out repairs and maintenance) at paragraph 6.4 states:- *"If the core services agreed with the homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works"*

15. The Committee noted that it is not in dispute that the factor carries out quarterly inspections which in the Committee's view fall into the category of "periodic property inspections". The question for the Committee, therefore, is: "are these inspections "core services agreed with the homeowners"? The Committee had regard to the fact that factors only carry out land management services for the owners and that the SLA specifically lists inspections as a service offered. The SLA does not distinguish between the landscape amenity areas and the wild woodland areas. Therefore, the Committee had no difficulty in reaching the view that the quarterly inspections are part of the factor's core services. Accordingly, it follows that, as the factor carries out periodic property inspections, the factor must prepare a programme of works.

16. The Committee note the difficulty in having the owners agree to the works. However, it is the Committee's view that this is a separate issue and the next step in the process following the preparation of the programme of works. The owners may decide not to instruct the factors to carry out the programme of works, but, the fact that it is likely that the owners will not instruct the works, does not exempt the factor from the duty to prepare a programme of works.

17. Accordingly, the Committee found that the Factor had breached Section 6.4 of the Code.

18. The Committee therefore determined to issue a Property Factor Enforcement Order ("PFEO").

19. The decision is unanimous.

Proposed PFEO

1. In accordance with Section 19 (3) of the Act, having been satisfied that the Factor has failed to comply with the terms of s 14(5) of the Act the Committee must make a PFEO. In order to comply with Section 19(2) of the Act, the Committee before proposing an order must give notice of the proposal to the factor and must allow the parties to give representations to the Committee. The intimation of this decision to the Parties should be taken as notice in terms of Section 19(2)(a) of the Act and the Parties are hereby given notice that should they wish to make any representations in relation to the Committee's proposed property factor enforcement order that they must be lodged with the Homeowner Housing Panel within 14 days of the date of this Decision. If no representations are made, the Committee will proceed to make the order as proposed. If representations are made, they will be considered by the Committee prior to the making of any order.

20. The Committee propose to make the following property factor enforcement order:

"No later than [date 21 days from date of Order], the factor must prepare a programme of works for the Property, issue this to the homeowner and the other owners in the Development and must seek the instructions of all of the owners in the

Development in respect of carrying out any works specified in the programme of works.

In addition, no later than [date 21 days from date of Order], the factor must send a letter of apology to the homeowner and make payment of £100.00 to the homeowner in compensation for the inconvenience and upset caused to him."

Appeals

21. 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 a Homeowner Housing Committee. (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made..."

Chairperson

Date 27 May 2016.

27 May 2016

This is the statement referred to in
the foregoing decision ref HOHP/LM/15/159

Notes for HOHP Hearing 18th May 2016

Karel Moore
Solicitor and Notary
Public,
Glasgow

I would like to record my thanks to the Committee for agreeing to hear this application.

I would also like to apologise for the lack of brevity in my written representations and to express hope that these have been read and understood by the other party.

As the Committee is aware, the final written representation provides two things: a solution to the the problem and a detailed account of how the problem has arisen in the first place.

My purpose today is to identify the principal reason why this problem remains unsolved by the other party over the period since November 2011, in spite of my considerable efforts over the last 4 years to achieve its resolution.

In dealing with this, I want to rely principally on Trinity Factors' Client Service Level Agreement in its most recent iteration of April 2016 and as supplied by the Property Factor in his submission of 1st April 2016.

There are basically three elements to this complaint which I derive from the document. Two of these are commitments to manage the development in accordance with legal requirements that exist outwith the Client Service Level Agreement, these being the Deed of Conditions drawn up by Cala's solicitors and what the document calls "current legislation" which I interpret to mean the Property Factors (Scotland) Act 2011 and the Code of Conduct contained within it.

I acknowledge that the Property Factor has, in his written representation, relied on the Deed of Conditions and the responsibilities of Owners contained therein, with regard to any instructions to the Factor to carry out work.

This reliance, I contend, represented a decision by the Factor to ignore woodland risk based on the assumption that the majority of Owners was not directly threatened by it and that in any case, work was unaffordable because payment arrears had accumulated. I drew attention to this in my original complaint letter of 17th November 2014 to Mr George McGuire, Trinity Factors' Director of Operations. (Item 1 in Case Inventory)

With regard to the commitment to manage the development in accordance with "current legislation" the Property Factor's (Scotland) Act's Code of Conduct Section 6 Clause 6.4 states: "If the core service agreed with homeowners includes periodic property inspections and /or a planned programme of cyclical maintenance, then you must prepare a programme of works."

This statement was pointed out in my second complaint email to Trinity Factors of 9th November 2015. Mr McGuire responded on 24th November 2015 as follows "In regards to Clause 6.4 of the Code of Conduct as there is no agreement in place for cyclical works to the wild woodland area, there is no programme of works."

However this clause actually begins by stating "If the core service agreed with homeowners includes periodic property inspections....." and concludes... "then you must prepare a programme of works".

Which brings me to the final element of this complaint. I contend that what Mr McGuire did not address in his response to my complaint is the commitment to periodic property inspections contained in the Client Service Level Agreement

I now quote from the Inspections section in that Agreement: "...we will more formally inspect developments at least 4 times per annum. During our visit we will carry out a visual inspection of the external common fabric and internal parts (subject to access) and common grounds".

I contend that, as these periodic inspections are defined, in a legal agreement, by the Factor as a management responsibility, then they must have taken place at regular intervals and without any requirement for direction from Owners. It is not unreasonable to assume, therefore, that there is a documented record of these periodic inspections which sets out as proof at the very least, the date and time, over the last 4 years, when they took place, along with any appropriate observations made. No such record has been submitted by the Factor in his representation. And no agreement on a programme of works has yet been established according to the first three requirements requested in my written submission which is contained in Item 6 of the Case Inventory. The first three of these requirements have now been communicated, both verbally and in writing, to all Owners. They have not been rejected by any.

I therefore respectfully request that this complaint be upheld and that the fourth and fifth requirements be agreed.