



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

**Hohp ref:HOHP/14/0201**

**Re: 34 Savoy Park, Ayr, KA7 2XA ('the Property')**

**The Parties:**

**James Anderson residing at 34 Savoy Park, Ayr, KA7 2XA ('the homeowner')**

**Speirs Gumley Property Management, 194 Bath Street, Glasgow, G2 4LE ('the factor')**

**Committee members:**

**Jacqui Taylor (Chairperson) Sara Hesp (Surveyor Member)**

**Decision of the Committee**

The Committee, having made such enquiries as it saw fit for the purposes of determining whether the factor has:

- (a) Complied with the property factor's duties in terms of the Property Factors (Scotland) Act 2011 ('the 2011 Act') and
- (b) Complied with the Code of Conduct for property factors, as required by section 14 of the 2011 Act

Determined that, in relation to the homeowner's application, the factor has not complied with the property factor's duties.

**Background**

1. The factor is property factor of the property 34 Savoy Park, Ayr. The factor's date of registration as a property factor is 1<sup>st</sup> November 2012.

2. The homeowner is joint heritable proprietor of the first floor property 34 Savoy Park, Ayr, KA7 2XA in terms of Land Certificate AYR80885.

3. By application dated 5<sup>th</sup> December 2014 the homeowner applied to the Homeowner Housing Panel ('the Panel') for a determination that the factor had failed to carry out Property Factor's Duties including, in particular:

*'A failure to carry out proper tests to ensure that repairs carried out were the correct and necessary repairs to deal with the problem of water penetration at our address resulting in work being carried out that proved to be completely ineffective in dealing with the problem. Also charging us with part of the cost of clearing builder's debris from the flat above, which was blocking the cavity and allowing water to bridge the cavity and penetrate our flat above the kitchen window.'*

4. By Minute of Referral dated 28<sup>th</sup> January 2015 the President of the panel intimated that she had decided to refer the application to a Homeowner Housing Committee ('The Committee').

5. The homeowner wrote to the clerk of the panel on 28<sup>th</sup> January 2015 advising that there had been further developments as the water ingress had reoccurred on 8<sup>th</sup> December 2014.

Consequently he had amended the details of the application. This amendment was intimated to the factor.

The amended application stated *inter alia* that the water ingress reoccurred on 8<sup>th</sup> December 2014 and 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> January 2015. There has not been further water penetration since that time. The homeowner explained that he has always maintained that the water penetration was the result of the window installation in the fault above. He stated that it was clear from the history of events that Speirs Gumley have failed to carry out the Property Factor's duties and they and their contractor were negligent in carrying out their investigations as to the cause of the water penetration. A proper inspection of the kitchen windows of the flat above was only carried out for the first time on 12<sup>th</sup> December 2014, during which the installation defects were discovered two years after the first ingress of water occurred, when in fact this was the obvious first place to investigate as the water penetration was located in the centre, between our two kitchen windows immediately below the kitchen windows above. Even when the scaffolding had been erected to open the cavity on 8<sup>th</sup> April 2014 there was a perfect opportunity to carry out a close inspection of the windows before proceeding with this work.

As a result of this negligence he has been subjected to two years of water ingress problems, unnecessary work carried out and demands for payment of resultant costs which he did not consider to be his responsibility. He has also suffered for the second time, damage to the kitchen, including plasterwork, loosening of wall tiles and paintwork, which cannot be claimed from the insurance company as they have already authorised and paid for redecoration to the ceiling after the previous instance

of water penetration, on the basis that the cause of the damage had been sourced and fully repaired. This is stated in Speirs Gumley letter of 14<sup>th</sup> July 2014.

In the circumstances, he considers that he is entitled to the following as a result of the negligence of Speirs Gumley and their contractors:-

(a) Reimbursement of all monies paid to Speirs Gumley in connection with the costs involved in carrying out the unnecessary work as a result of the above negligence.

(b) Cancellation of the amount of £889.01 which they are claiming for the outstanding cost of the work to the roof and the clearing of the blocked cavity, for which we have no responsibility.

(c) Reimbursement of the £100 excess which we had to pay in connection with the insurance claim for the redecoration of the kitchen ceiling.

Compensation for all the stress, worry and inconvenience suffered over this period of two years.

(d) There is also the question of the cost of the repairs to the wall tiles and plasterwork, together with the redecoration of our kitchen.

6. The factor returned the completed HOHP response form dated 23<sup>rd</sup> February 2015 indicating that they wanted the application to be considered at an oral hearing.

7. The homeowner also returned the completed HOHP response form dated 15<sup>th</sup> February 2015 and indicated that he wanted the application to be considered at an oral hearing.

8. The factor subsequently sent an email to the clerk of the panel dated 29<sup>th</sup> April 2015 and attached a timeline of correspondence, emails and invoices.

## **9. Hearing**

A hearing took place in respect of the application on 8<sup>th</sup> May 2015 at Russell House, King Street, Ayr, KA8 0BQ .

The homeowner appeared on his own behalf.

The factor was represented by Ian Friel, a Director of Speirs Gumley. Ian Calder, a building surveyor employed by Speirs Gumley Property Consultants also attended the hearing.

## **Findings of Fact**

(i) The homeowner is the proprietor of the property, his title being registered in the Land Register of Scotland under Title Number AYR80885. His property forms part of the development at Savoy Park, Ayr, KA7 2XA.

(ii) He purchased the property on 8<sup>th</sup> February 2012.

(iii) The property is subject to the title conditions contained in the Land Certificate and created in *inter alia* Deed of Conditions by Barratt Falkirk Limited which was recorded in the Division of the General Register of Sasines for the County of Ayr on 5<sup>th</sup> July 1982.

Clause eighth (c) of the Deed of Conditions sets out the factor's power and authority to act. It states *inter alia* :

'The factor shall have full powers to take charge of the care, maintenance and repair of the said common parts of the development, including without prejudice to the foregoing generality, the ornamental garden grounds ....The factor will have power, at his sole discretion, to decide what repairs and maintenance are necessary, to obtain estimates or quotations from reputable tradesmen to have repairs and maintenance effected and to instruct the same....'

(iv) Speirs Gumley were appointed factors in April/May 2012.

#### **Oral Representations from the parties at the hearing.**

The homeowner, as a preliminary matter, advised the Committee that he objected to the factor lodging the timeline of documents as they were lodged late and also they were not a complete record. He explained that a number of emails were missing. However he acknowledged that he had separately lodged the missing emails.

Mrs Taylor advised the parties that the regulations allow documents to be lodged no later than 7 days prior to the hearing and accordingly they had been lodged timeously.

The homeowner referred the Committee to Clause Eighth of the Deed of Conditions which narrates the factor's powers. He explained that given these powers the factor has a duty of responsibility and accountability. He considered this to be the factor's main duty and it was his position that they had failed in this duty.

The parties explained to the Committee the timeline of events by discussing at length the timeline of documents the factor had submitted.

The main details are:

December 2012	First water ingress to the home owner's property.
February 2013	J P Telfer attended at the property and bricked up airbricks.
February 2013	JL Nicol builders inspected March 2013- reported defective cement beds and mastic pointing.
March/ April 2013	Torrance builders inspected and carried out some pointing work.
December 2013	Second incident of water ingress to the homeowner's property. Water ingress reappeared after period of stormy weather.
March 2013	J P Telfer investigated and repaired roof.

November 2013	Owners instructed cavity wall insulation installation direct.
December 2013	Storm damage- flashing- insurance claim.
30 December 2013	Water ingress to the homeowner's property- same location as previously.
February 2014	Torrance builders cut hole in ceiling of kitchen and noted damp. They carried out pointing work but homeowner advised that more water ingress had occurred.
March 2014	Telfer builders removed three courses of tiles and fitted 4 slate vents and repaired section of lead valley.
21 <sup>st</sup> March 2014	The factor instructed Ian Calder of Speirs Gumley Building Surveyors to inspect the property to investigate water ingress.
24 <sup>th</sup> March 2014	Ian Calder verbally reported to the factor that costs should be obtained to open up brickwork to ascertain if cavity has been blocked and check pointing.
2 <sup>nd</sup> April 2014	Job instruction to Speirs Gumley Building Surveyors to proceed with instruction of Torrance Builders to erect scaffold and expose brickwork to determine cause of water ingress.
8 <sup>th</sup> /9 <sup>th</sup> April 2014	Torrance Builders and Speirs Gumley Surveyors on site to Complete/oversee works as quoted.
17 <sup>th</sup> April 2014	Invoice from Speirs Gumley: 'to taking instructions, visit site to undertake inspection of water ingress located within flat, obtaining quote for opening up of external brickwork to clear cavity, meeting with contractor to oversee works. Fee charged £525 plus vat. The invoice had been annotated with the appropriate payment codes.
June/July 2014	Email correspondence between the homeowner and the factor regarding the cause of the blocked cavity and insurance claims.
2 <sup>nd</sup> October 2014	Letter from Angus Lawrie, Director of the factor to the homeowner in response to complaint. The letter states inter alia: <i>'I support the action taken by Speirs Gumley to locate the source to prevent further water ingress into your property. I am aware that part of this process involved repairs to the pointing of the brickwork on the front elevation, inspection/repairs to the roof tiles and lead work together with mastic repairs to the windows of the flat directly above. I trust you will appreciate that water will on occasions travel indiscriminately and tracing the source normally involves a process of elimination, which unfortunately proved to be the case in this instance. As a result of the appointment of Speirs Gumley Building Surveyors, they were able to establish the cause as a blocked cavity with the use of a borescope being inserted into the cavity. Following this,</i>

	<i>Torrance Roofing and Building Services were appointed to undertake the necessary work, which I understand has now resolved the defect.....'</i>
24 <sup>th</sup> October 2014	Letter from Ian Friel, Director of the factor to the homeowner. The letter states <i>inter alia</i> : <i>'It was identified that the cavity between your flat, and flat 38 above, owned by Peter Vorberg, was holding dampness and needed to be exposed and investigated. Following thorough investigations by contractors, and then Speirs Gumley surveyors, the issue of water ingress affecting your property were finally resolved. The full cost of this investigation and subsequent repairs were allocated as a common expense to all three proprietors in your block, in accordance with the Deed of Conditions. We allocated the costs this way because the cavity is deemed to be a common part of the building and you agree with our position here ....</i> <i>The above instructions demonstrate that a period of 'trial and error' work was undertaken, with various contractors looking at repairing the most obvious external defects in a logical sequence. For our part, we instructed an experienced, professional building contractor whom we believed would use their skills and building knowledge to remedy matters....'</i>
9 <sup>th</sup> December 2014	Further water ingress to the homeowner's property.
12 <sup>th</sup> December 2014	Inspection carried out of the homeowner's property, the upper floor flat and loft area by Ian Calder of Speirs Gumley Property Services, a representative of Torrance Builders, the homeowner and the owner of the upper floor flat.
8 <sup>th</sup> January 2015	Letter from Ian Calder to the owners reporting on the inspection carried out on 12 <sup>th</sup> December 2014 advising <i>inter alia</i> that the vent tiles in the roof should be removed and the kitchen windows of the top floor flat should be checked to ensure that they are weather tight as he had found significant movement to the metal trim cill.
14 <sup>th</sup> January 2015	Andrew Wright Windows on site.
20 <sup>th</sup> January 2015	The homeowner reported that no further water ingress had occurred.

Mr Anderson confirmed that the water ingress was only experienced when there was heavy rain and wind.

He read to the Committee various diary entries:

*'20<sup>th</sup> March 2014: during heavy rain water ingress again. Gillian visited and witnessed. Urgent investigation required of the ceiling above.*

*21<sup>st</sup> March 2014: I phoned Gillian and suggested there may be a blocked cavity. Urgent inspection of the flat above required before the water penetration dries up.*

*24<sup>th</sup> March 2014: The surveyor visited.*

*3<sup>rd</sup> April 2014: email to the factor re lack of progress.*

*8<sup>th</sup> April 2014: scaffolding erected.*

*9<sup>th</sup> April 2014: cavity unblocked.*

*10<sup>th</sup> April 2014: more cavity unblocked and hole filled.*

*11<sup>th</sup> April 2014: scaffolding removed.'*

Ian Calder advised the Committee that when the bricks above the window of the property were opened up he saw some cavity wall insulation and also some debris that was consistent with construction debris from the time the property had been built. The clumps of debris were perhaps 10/15 mm or so wide in isolated areas. These areas of debris were not large enough to have caused the dampness. In his experience the debris would have needed to be solid packs of debris approximately 20/30 mm wide to bridge the cavity and to cause the dampness that had been experienced. He explained that he was of the view that the debris had not caused the dampness as it was not sufficiently big and there was not enough of it.

The homeowner explained that it is his complaint that the windows of the upper flat should have been examined earlier in the process. The investigation of the water ingress was not carried out in a logical manner.

Mr Friel explained that as property factors Speirs Gumley are agents of the owners. They appoint contractors on behalf of the owners. The factors are not responsible for the failings of contractors. This was a complex problem. The difficulty was exacerbated by the fact that the water ingress came and went. He explained that Speirs Gumley Property Consultants/ Surveyors are separate from Speirs Gumley, factors. There is no difference in the factor employing Ian Calder than employing another surveyor. Mrs Hesp asked him why they had employed their surveyors when they did. He explained that the factor engages tradesmen. They cannot be expected to be experts of diagnosis. Their manager recognised that the problem had been ongoing and decided it was appropriate to get a higher level of diagnosis. This is not always necessary. He accepted that looking through the timeline they did not feed back to the homeowner the results of opening up the cavity.

## **Decision**

The complaint is upheld.

The Committee acknowledged that the problem of water ingress in the homeowner's property was complex. They accepted that the factor is entitled to rely on the advice and findings of professional contractors and they are entitled to take time to work out the cause of the problem.

However when instructing and paying for the services of a surveyor to establish the cause of the dampness they did not ensure that a report following the inspection in April 2014 was provided.

Indeed the factor's letter to the owners dated 2<sup>nd</sup> April 2014 stated:

'Unfortunately further water ingress was experienced and due to the previous investigation and repairs carried out, I considered the appointment of a building surveyor necessary to inspect the area and determine the cause of water ingress. As such Speirs Gumley Building surveyors were appointed for this purpose, the cost of which amounted to £150 plus Vat.

In oral evidence at the hearing Ian Calder stated that when he viewed the cavity he saw some debris that was consistent with construction debris from when the property was built and he was of the view that the debris was not sufficient to bridge the gap and cause the dampness that was being experienced in the homeowner's property. This conclusion was not reported to the homeowner or the factor in the evidence presented to the Committee. From the timeline evidence the factor was still discussing issues with the blocked cavity, as being the probable cause of dampness, in June 2014.

The Committee noted that Ian Calder had provided a report dated 8<sup>th</sup> January 2015 following his inspection on 12<sup>th</sup> December 2014 but no similar report had been obtained in April 2014. The Committee were of the view that had this report been procured the factor would have continued the search for the cause of the water ingress and may well have investigated the windows of the flat above sooner. This may have avoided the most recent incident of water ingress to the homeowner's property.

The Committee were mindful that the test for breach of professional duty, as decided in the case *Hunter v Hanley* 1955 SC 200, is whether the professional took a course of action that no reasonable professional person would have taken.

The Committee determined that no reasonable professional factor would instruct a surveyor, pay for their services but not procure a report.

Therefore the Committee determined that the factor had failed in the factor's duty to procure the surveyor's report following their instruction to them on 2<sup>nd</sup> April 2014 which stated: 'Please proceed with instruction of Torrance Builders to erect scaffold and expose brickwork to determine cause of water ingress to flat 34.'



## **Property Factor Enforcement Order**

In all of the circumstances narrated above, the Committee finds that the factor has failed in its duty under section 17(1)(b) of the 2011 Act to comply with the duties of a property factor.

Section 19 of the 2011 Act requires the Committee to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations to the Committee.

The Committee proposes to make the following Order:

*'The factor must pay the homeowner £200 for the inconvenience he had suffered from their own funds and at no cost to the owners. The said sums to be paid within 28 days of the communication to the factor of the Property Factor Enforcement Order.'*

Section 19 of the 2011 Act provides:

'...(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 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)(a) 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 21 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 homeowner housing committee.

(2) An appeal under subsection (1) must be made within a period of 21 days beginning with the day on which the decision appealed against is made.'

Signed ..

.....Date 22<sup>nd</sup> May 2015

Chairperson