



Decision of the Homeowner Housing Committee issued under section 19(1) of the Property Factors (Scotland) Act 2011 and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

Reference: HOHP/PF/14/0196

Re: Property at 74 Harbour Road, Tayport, Dundee, DD6 9EU ("the Property")

The Parties:-

Mr Chris Dawes, Sandy Ridge, Heath Rise, Whitmore Heath, Staffordshire, ST5 5JA ("the Applicant")

Factor4you, River Court, 5 West Victoria Dock Road, Dundee, DD1 3JT ("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:

Maurice O'Carroll (Chairman)
David Hughes-Hallett (Housing Member)

Decision of the Committee

The present application requires to be rejected as incompetent.

Background

1. By application dated 28 November 2014, the Applicant applied to the Homeowner Housing Panel ("HOHP") for a determination of whether the Factors had failed to comply with the duties set out in section 4 of the Code of Conduct imposed by section 14(5) of the 2011 Act and with the factor's general duty to account for homeowners' funds in terms of section 17(1) of that Act. The Code complaint was subsequently dropped by the Applicant.
2. Notices of referral to the Committee were sent to the parties following a Minute of Decision by the Vice President of HOHP dated 12 January 2015. In response to the notices of referral, the Homeowner indicated that he wished the application to be dealt with by way of a written representations hearing. The Factors for their part did not respond to the notices of referral. Accordingly, an oral hearing required to be fixed since the agreement of both parties is required for a hearing on written representations only.

3. Prior to the Hearing, a Committee of the Homeowner Housing Panel issued a Direction dated 23 February 2015 which required the Factor to respond to the notice of referral and to provide his submissions in relation to the application. The Direction stipulated that failure to comply with its terms would mean that the Committee hearing would proceed in his absence. The Factor did not comply with the Direction. Accordingly, an oral hearing was fixed without further reference to the Factor. The Direction also required the Homeowner to furnish the title deeds to the Property to the Committee. Title deeds which were accurate as at 30 July 2002 were supplied to the Committee further to that Direction under cover of a letter from the Applicant dated 24 February 2015.
4. A hearing in relation to the application was held on 27 April 2015 within Caledonian House, Greenmarket, Dundee. The Homeowner appeared on his own behalf without representation. The Factor did not appear and was not represented. As indicated in the Direction, the hearing proceeded in the absence of the Factor.
5. At the outset of the hearing, the Chairman raised a number of preliminary issues. Among these was a matter raised by the Applicant himself in the covering letter enclosing the title deeds dated 24 February 2015. It was indicated that in 2007, the Applicant had "signed over" the Property to his son, Henry Dawes. As the proprietorship section of the title deeds listed the Applicant and his wife as heritable proprietors, the Chairman sought to ascertain the exact extent to which the property had been made over to Henry Dawes. It was clarified that full ownership of the property had been disposed by the Applicant to his son, rather than any property right short of that, such as a lease. It was therefore clear at that point that the title deeds supplied further to the Direction of 23 February 2015 were out of date: An up to date extract would have revealed the current owner to be Henry Dawes instead of the Applicant and his wife.
6. Having noted the position, the Committee continued to hear the Applicant's evidence in relation to the merits of the application placed before it. Having heard the Applicant's evidence, the Committee was minded, unanimously, to uphold the complaints contained within the application and to grant the remedies sought, including compensation. However, mindful of the fact that it is only entitled to exercise its powers in accordance within the terms of the Property Factors (Scotland) Act 2011, it was obliged to revisit the competency of the application in view of the ownership position as clarified fully at the hearing.
7. Section 17(1) of the 2011 Act provides that a *Homeowner* may apply to the housing panel for a determination as to whether the factor has failed to carry out the property factor's duties. Section 17(3) provides that no application may be made unless the *Homeowner* has notified the property factor in writing as to why he considers that the property factor has failed to carry out its duties (emphasis added). Section 10(5) of the Act defines "Homeowner" as being the owner of

land used for residential purposes the common parts of which are managed by a property factor. No lesser right consistent with occupation of the Property is contemplated by the Act, such as tenant or liferent.

8. It is therefore clear from the Act that an application may only be made by a person who is the owner of the property to which the application relates. The Applicant was the homeowner until 2007. By the time of the events complained of, between 2010 and 2015, and at the time of the lodging of the application, the Applicant was no longer the homeowner. Rather, his son Henry Dawes was the homeowner and therefore the only person permitted to make an application to the Panel. The requirements of s 17(3) of the Act were complied with, but again not by the homeowner as required by the Act, but by the Applicant who had by then ceased to be the homeowner. The Committee was in no doubt that the Applicant had the full authority of his son to pursue proceedings before the Panel. However since the application ran in the name of Chris Dawes and not Henry Dawes, that authority was of no avail in the circumstances. Accordingly, the Panel reluctantly required to come to the conclusion that the application before it was in legal terms incompetent, irrespective of its merits.
9. Provision is made in Regulation 22 of the Homeowner Housing Panel (Applications and Decisions)(Scotland) Regulations 2012 for amendment to the application. However, the Committee is of the view that amendment may not properly extend to substituting the correct party to the application in place of the wrong one. Further, in terms of Regulation 22(1) no application may be amended to refer to any failure by the property factor which is not referred to in the notification from the homeowner further to s 17(3) of the Act. It follows that even if Henry Dawes were to be substituted for Chris Dawes in the application, notification to the factor of his failures in duty would require to be undertaken afresh by the Homeowner in any event in order to comply with the Regulations.
10. For the reasons outlined above, the Committee is obliged to reject the application as incompetent. It is open to Henry Dawes to lodge a fresh application in identical terms to that considered by the Committee in the present case. In the event that a fresh application were to be forthcoming from Henry Dawes as homeowner, and should the President decide once again to refer the application to a Committee for determination, it would expedient for that application to be referred to the same Committee that considered the present application. Further, it would be open to the Applicant to notify the Factor in terms of section 17(3) of the Act of his failures in duty on behalf of his son, making that representative capacity clear. Indeed, the application itself could be made by Chris Dawes on behalf of his son, again, making that representative capacity clear. In this manner, it would be hoped that although a fresh application and notification are both necessary, these steps may be dealt with speedily resulting in a full determination of the merits in relatively early course.

Decision

11. In all of the circumstances narrated above, the Committee rejects the present application as incompetent.

Appeals

12. The parties' attention is drawn to the terms of s 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 date on which the decision appealed against is made..."

Signed

M O'Carroll
Chairperson

Date 1 May 2015