



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/15/0040 and HOHP/15/0115

Re: 122 Novar Drive, Glasgow, G12 9SY ('the Property')

The Parties:

Damien Donnelly residing at 122 Novar Drive, Glasgow, G12 9SY ('the Homeowner')

W.M.Cumming, Turner & Watt, 40, Carlton Place, Glasgow, G5 9TS ('the Factor')

Committee members:

Jacqui Taylor (Chairperson) Elizabeth Dickson (Housing 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 and sections 2.1, 2.5 and 4.6 of the Code of Conduct for property factors.

Background

1. The Factor is property factor of the property 122 Novar Drive, Glasgow, G12 9SY. The Factor's date of registration as a property factor is 7th December 2012.
2. The Homeowner is heritable proprietor of the second floor property 122 Novar Drive, Glasgow in terms of Land Certificate GLA33511.
3. By applications dated 12th April 2015 and 14th July 2015 the Homeowner applied to the Homeowner Housing Panel ('the Panel') for a determination that the Factor had failed to comply with:-

3.1: The following sections of the Property Factor Code of Conduct:

- Section 2: Communications and Consultation.
Sections 2.1 and 2.5
- Section 4: Debt Recovery
Section 4.6
- Section 6: Carrying out Repairs and Maintenance
Section 6.9

3.2: The Property Factor's duties.

4. The application had been notified to the Factor.
5. By Minute of Referral dated 14th August 2015 the President of the panel intimated that she had decided to refer the applications to a Homeowner Housing Committee ('The Committee').
6. Both the Factor and the Homeowner returned the completed HOHP response form indicating that they wanted the applications to be considered at an oral hearing. The Factor's solicitors, Hardy Macphail, subsequently advised that the Factor would not be attending the hearing.
7. An oral hearing took place in respect of the application on 18th November 2015 at Wellington House, Wellington Street, Glasgow, G2 2XL. The Homeowner appeared on his own behalf without representation. The Factor did not attend the hearing and was not represented.

Committee findings - general:

8. The homeowner is the proprietor of the property, his title being registered in the Land Register of Scotland under Title Number GLA33511. The property is subject to the title conditions contained in the Land Certificate and created in *inter alia* Disposition by Trustees for the City of Glasgow District of the Loyal Order of Ancient Shepherds (Ashton Unity) Friendly Society to William Wolfendale and his executors and assignees recorded GRS (Glasgow) 7th October 1969. He is responsible for a 12.5% share of the common repairs as there are eight properties in the building.

9. The application relates to issues concerning a communal roof repair; a drain repair communication and complaint handling.

14. Details of the applications, the Homeowner's written and oral submissions, the Factor's written representations and the Committee's Decisions are as follows:

Section 2.1 of the Code

You must not provide information which is misleading or false.

The Homeowner's Complaint:

The Homeowner was concerned that he had paid the Factor his contribution towards a communal roof repair in February 2014 but had not received confirmation that the works had been completed, despite asking for confirmation of this. He received an email from the Factor dated 17th October 2014 which advised:

'The common building repairs were instructed to the Contractor on 5th August 2014'

The Homeowner chased up the Factor on 7th January 2015 and received a response the same day which stated:

'Robert Watt our repair manager called Gilmour & Son yesterday regarding a commencement date for the work. Gilmour & Son advised that the delay was due to the bad weather and problems with sourcing scaffolding. They have informed us that they have now sourced the scaffolding and they intend to proceed with the repairs on Monday 12th January 2015. I can understand your frustration in this matter but the delay in instructing this work was due to the non payment of the estimate by some of the owners in the property...'

The Homeowner explained that he considered these emails to be conflicting and misleading.

He also was concerned that he asked the Factor for an update on the roof repair on 2nd November 2014, after having being advised that the repair had been instructed on 5th August 2014, but did not receive the exact details of when the repair was carried out until the Factor replied to his complaint letter on 10th April 2015. They explained that the repair was carried out on 12th January 2015 for a couple of days. He explained that he doubted if the work was done on 12th January 2015 as he remembered that it was very windy at that time. However he accepted that he did not have evidence that the work was not done and did not wish to pursue this point.

The Factor's response:

'Whilst the respondents accept there has been delay in carrying out these works they do not accept that they have in any respect made any representations to the applicant which could be considered to be misleading or false.'

Decision

This head of complaint is upheld.

The emails of 17th October 2014 and 7th January 2015 contained conflicting information regarding the instruction of the repairs and the reason for the delay. The Committee considered the two emails to be contradictory and misleading.

15. Section 2.5 of the Code

You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.

The Homeowner's Complaint:

The Homeowner explained that he sent emails to the Factor dated 29th March 2014, 10th April 2014, 16th May 2014 and 27th June 2014 asking when the roof repairs had been carried out and he did not receive a response to any of these emails.

The Homeowner also explained that he sent an email to the Factor on 28th March 2015 asking why they could not act immediately and instruct the repair to the drain on health and safety grounds. He also asked if it was possible that neighbouring tenements could be responsible for the drain. These points were never answered.

The Factor's response:

'The Respondents do not accept that they have failed to respond to enquiries received by letter or email within prompt timescale. Reference is made to the email correspondence which has passed between the Applicant and the Respondent, in particular the Applicant himself makes reference to his complaint of 6th April 2015, the Respondents response of 9th April 2015 and their further response of 10th April 2015. On 11th April 2015 the Applicant intimated that he intended to refer the matter to the Homeowner Housing Panel'.

Decision

This head of complaint is upheld.

The Committee read the email trail provided and found that the Factor did not clarify when the roof repair was carried out until their email of 17th October 2014. The Homeowner first asked this question in his email of 29th March 2014. The Committee determined that the factor had not responded within prompt timescales.

The Factor's responses of 9th and 10th April did not address the Homeowner's questions asking why they could not act immediately and instruct the repair to the drain on health and safety grounds and also asking if it was possible that neighbouring tenements could be responsible for the drain. The Committee determined that the Factor had not answered the Homeowner's questions as fully as possible.

16. Section 4.6 of the Code

You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).

The Homeowner's Complaint:

The email from Robert Watt, representative of the Factor, to the Homeowner dated 10th April 2015 stated inter alia:

'Unfortunately, with the amount of arrears in your property our accounts department advised that these works could not be instructed until the relevant shares have been received.'

The Homeowner explained that this email implies that the Factors might have instructed the repairs had it not been for the amount of arrears. He also explained that he had not been advised that there were any debt recovery problems until the email of 10th April 2015.

The Factor's response:

'The obligation is to keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them. Their failure to fund repairs by the proprietors is not a debt recovery problem. The expense had not been incurred. The Respondents are not obliged to carry out repairs to property until such time as they have received full funding from co- proprietors. The Respondents accept that they have delegated authority of the co-proprietors to instruct repairs. The Respondents in their Statement of Services state that repairs exceeding the sum of £250 will not be instructed until such time as work has been approved by majority of the owners to the full amount of the estimated cost. Although the Respondents have a discretion to instruct works exceeding £250 if they consider them to be justified on the grounds of health and safety they are not obliged to do so. Funding of the works must come from the co proprietors if full funding is not received it is a matter for the discretion of the Respondents as to whether or not they instruct the works and recover the repairs costs from those proprietors who have not paid for the cost in advance.'

Decision

This head of complaint is upheld.

The Factor never advised the Homeowner that the level of debt/ account arrears would have an impact on instructing repairs until their email of 10th April 2015, by which time repairs were being impeded by the arrears.

Section 6.9 of the Code

You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

The Homeowner's Complaint:

The Homeowner accepted that this section of the Code does not relate to the Factor's delay in chasing up the repairs.

Failure to carry out Factor's duties:

The Homeowner's Complaint:

'Failure to act on a decision of majority of owners, thereby delaying work on drains to remedy a health hazard (raw sewage overflowing into back court and on public thoroughfare).

Failure to treat the issue as a health and safety matter, despite his repeated requests to do so, with photographic evidence of sewage in the back court sent on two separate occasions.

Failure to check which property was responsible for the defective drain. He had asked if it was possible the drain was owned by another property but this was ignored. Consequently, owners at 122 Novar Drive have paid in full for work on the drain some months ago only for that work to be halted after the discovery that the drain was the responsibility of 120 Novar Drive. '

The Factor's Response:

'The Respondents do not accept that they have breached their property factors duties. The applicant makes reference to delays instructing works to be carried out. Reference is made again to the applicant's submissions relating to paragraph 6.9 of the Code of Conduct. The Respondents did not have an obligation to instruct the works until such time as they were fully funded by the co-proprietors. C. Hanlon Limited were instructed to clear a blockage in the rear pipe in November 2014. This work was immediately instructed and carried out. In December 2014 contractors were then instructed to prepare an estimate for the full costs of the pipe repair. The estimate was sent to all owners on 5th December 2014. Reminder letters were sent on 13th May 2015. An alternative quotation was received. The co-proprietors were pressed for payment. Reference is made to the email correspondence lodged by the applicant sent in the period from March to April 2015. The applicant only paid his share of the costs on 9th April 2015. The applicant was the seventh owner to pay. Notwithstanding that the Respondents had not received full payment the works were instructed to be carried out.

The applicant's position in relation to this is contradictory. He is seeking repayment of the cost of the works carried out by C.Hanlon Limited but also criticising the Respondents for not instructing the works to be done. It is not for the Respondents to fund repairs to the property. Works were instructed in good faith. The applicants have instructed a competent tradesman to carry out the works. The cost of carrying out the works and in determining that the true source of the sewerage was from 120 Novar Drive is a track and trace charge which the co proprietors require to pay. The pipe emanating from 120 Novar Drive through the garden ground of 122 Novar Drive has been there for a period in excess of forty years. The proprietors at 120 Novar Drive will have a servitude right through the garden ground at 122 Novar Drive. It is debatable as to who is responsible for the cost of the repair to this pipe as the tree causing damage to the pipe is a tree which is planted in the premises at 122 Novar Drive. The Respondents are however in the proprietors' interest and in the interest of the applicant seeking to have the cost of the repair carried out by the proprietors at 120 Novar Drive.'

Decision

This head of complaint is partially upheld.

The Factor's duties regarding the instruction of common repairs stem from the title deeds and the Statement of Services.

Clause (Tertio) of the said Disposition by Trustees for the City of Glasgow District of the Loyal Order of Ancient Shepherds (Ashton Unity) Friendly Society states that common repairs shall be determined by a majority of owners and the owners may delegate to the Factor the execution of any common or mutual matters.

The Statement of Services states that if the anticipated cost of common repairs exceeds £250 *'it shall be instructed and carried out only when the work has been approved by a majority of the owners to the full amount of the estimated cost. It shall be within the Factor's discretion to instruct works at a cost exceeding £250 if they consider the expense to be justifiable on grounds of health and safety and to recover forthwith the costs thereof.'*

The Homeowner sent the Factor emails dated 14th and 28th March 2015 advising that there was raw sewerage coming from the drain and he attached photographs. In his email of 30th March 2015 and subsequent emails he questioned why the Factors were not instructing the repair on health and safety grounds. This question appears to have gone unanswered.

The Factors confirmed in an email dated 25th March 2015 that five owners have paid, the Homeowner had agreed to pay and they were waiting on responses from two other owners. As there are eight owners in the tenement at this point a majority of owners had approved the

works. In terms of the Statement of Services the works should have been instructed once a majority had approved the work.

The email from the Factors dated 10th April 2015 states 'Unfortunately, with the amount of arrears in your property our accounts department advised that these works could not be instructed until the relevant shares have been received.'

The Committee acknowledge that the email from the Factor dated 10th April 2015 states that they will not instruct the repair until all the owners have paid. The Committee therefore determine that the Factor has failed to carry out their duty by failing to instruct the repair once a majority of owners had approved the repair.

The Committee accepted the Homeowner's evidence that there was raw sewerage coming from the drain. Accordingly they also determine that the Factor has failed in their duty by failing to reasonably exercise their discretion and instruct the repair on Health and Safety Grounds.

In connection with the difficulty regarding ownership of the defective drain the Committee acknowledge that the Factor did not answer the Homeowner's email dated 26th March 2015 regarding this point. However they do not consider that the Factor could have done anything further prior to the excavation to establish ownership of the drain. As far as the Committee is aware this is not a matter that would be within the records of Scottish Water or the Council given that the property is probably over 100 years old. Accordingly the Committee determine that the Factor has not failed in their duty to mitigate expense and take further preliminary steps to check which property was responsible for the defective drain before instructing the excavation.

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 sections 2.1, 2.5 and 4.6 of the Code of Conduct for property factors and the duties of a property factor.

It has therefore determined to issue a Property Factor Enforcement Notice in relation to their failure to comply with sections 2.1, 2.5 and 4.6 of the Code of Conduct for property factors and the property factor's duties, which will follow separately.

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 8th December 2015

Chairperson