



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

Reference: HOHP/PF/14/0034

Re: Flat 3/1, 29 Winton Drive, Glasgow, G12 OPZ

The Parties:

Ms James Maclaren, Flat 3/1, 29 Winton Drive, Glasgow, G12 OPZ ("the homeowner")

Property2, 2a North Kirklands, Eaglesham Road, Glasgow, G76 ONT ("the property factor")

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).

Committee Members

Martin McAllister (Chairperson) and Mike Links (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

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.

Background

1. The factor's date of registration as a property factor is 7th December 2012.
2. By application dated 25th February 2014 the homeowner applied to the Homeowner Housing Panel ("the Panel") for a determination that the factor had failed to comply with the Code of Conduct for Property Factors and had failed in its Property Factor's duties. The specific matters complained about in relation to breach of the Code of Conduct for Property Factors were breach of 6.2 and 6.4 (failure to have in place procedures for dealing with emergencies and for giving contractors access to properties in order to carry out emergency repairs and failure of having in place a programme of works for periodic property inspections/ planned programme of cyclical maintenance. The alleged failure to carry out Property Factor's duties was surrounding the property factor's failure to assume that an issue which arises and affects more than one apartment, was not a common problem rather than a problem of a single owner. The Homeowner also complained of what he considered to be a threat contained within a communication from the Property Factor to him on 12th December 2011.
3. By Notice of Referral dated 18th June 2014 the President of the Panel intimated that she had decided to refer the application to a Homeowner Housing Committee ("the Committee").
4. Following service of the Notice of Referral, the Homeowner made written representations on 23rd June 2014 and the Property Factor made written representations on 3rd July 2014..
5. On 29TH July 2014 the Committee issued a Notice of Direction to the parties seeking the Homeowner to produce a copy of the Zurich Policy referred to by him in his representations and copies of builder's reports, estimates or invoices relating to the subject matter of the application. The Property Factor was required to produce a copy of the common insurance policy, copies of any builder's reports or estimates relating to the subject matter of the application and any correspondence between the property factor and Zurich with regard to the subject matter of the application. On 31st July the Homeowner produced a copy of the Zurich

Policy referred to in the application and copies of emails and letters relating to builder's reports, estimates or invoices relating to the subject matter of the application. On 5th August the Property Factor produced a copy of the common block insurance policy and copies of emails from Zurich regarding the claim. It also produced a copy of an email from Cunninghame Lindsay, loss adjustor.

Inspection

6. An inspection in terms of Regulation 16 of The Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 (the Regulations) was carried out on 15th September 2014 prior to the Hearing. Present at the Inspection were the Committee members and the Homeowner's father and stepmother.

Hearing

7. A hearing took place in respect of the application on 15^h September 2014 at Europa Building, 450 Argyle Street, Glasgow. The homeowner who was in Japan participated by telephone link. The property factor was represented by Mrs Lisa Pieper, who is employed by the property factor in its Portfolio Management Team.

Preliminary Issues

8. The Committee indicated that it considered that there were two preliminary issues that required to be addressed.

The first is whether or not an application could be considered by the Committee in view of the fact that the repair and the alleged failure of the property factor occurred prior to 1st October 2012. Regulation 28 of the Regulations states:

“(1) Subject to paragraph (2), no application may be made for determination of whether there was a failure before 1st October 2012 to carry out the property factor's duties.

(2) The president and any committee may take into account any circumstances occurring before 1st October 2012 in determining whether there has been a continuing failure to act after that date.”

The second issue is whether or not the area where the work was done and which is the subject matter of the Homeowner's application formed

part of common property or property solely within the ownership of the Homeowner. The Committee invited parties to address it on these matters. The parties did so and the committee decided to reserve its position and did not adjourn for consideration. It heard both parties not only on the preliminary matters but also on the merits of the application.

Findings in Fact

9. The Committee finds the following facts to be established:-

9.1 The applicant is the heritable proprietor of the property known as Flat 3/1 29 Winton Drive, Glasgow G12 OPZ. The property is registered in the Land Register of Scotland under Title Number GLA188589. The applicant has owned the property since July 2006.

9.2 The property is described in the Land Certificate as being a fourth floor flat but it might also be described as a flat on the third floor there being three flats below it including a ground floor flat. Flats are entered by a common close and the upper flats are served by a lift.

9.3 The proprietor of the property has an obligation to be responsible for sharing the cost of certain common repairs with the other proprietors of the tenement of 29 Winton Drive. The obligation extends to those repairs to what are described in the Land Certificate as the "Block Common Parts" and include *inter alia* "the foundations, outside walls.....roof and roof void....the sewers, drains...rhone, conductors, gutters...waste pipes"

9.4 The property has doors in the living room which lead out to a small balcony area. No other proprietor has access to the balcony area. At one side of the balcony area there is a drainage outlet which takes water from the floor of the balcony to a down pipe which runs from the gutter above the flat to the drainage at ground level.

9.5 In November 2011 an issue was discovered in the flat immediately below the property. There was serious water ingress to the ceiling. The matter was reported to the homeowner who reported it to the property factor who responded that, since the water appeared to be coming from the homeowner's property, it was for him to attend to it.

9.6 The homeowner made a claim on the Zurich Insurance Standard 10 New Home Structural Defects Insurance Policy applicable to his property and issued when the block of flats of which the property forms part was erected. The claim was accepted and the work was done. The property owner has paid an excess of £1612 to Zurich Insurance.

9.7 In October 2013 the homeowner asked the factor to collect funds from the other flat owners to repay to him what he considered to be their share of the excess.

9.8 There are currently cracks in the exterior of the building which are being investigated by the factor to ascertain if a claim can be made under the Zurich defects policy.

Finding in Fact and Law

10.1 The balcony area of the property is a pertinent of the property in terms of Section 3 of the Tenements (Scotland) Act 2004 and does not comprise part of common property.

Finding in Law

11. It is competent for the application to be considered by the committee and for the transitional procedures in Regulation 28 of The Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 to apply.

Reasons

12.1 Both parties agreed that the homeowner had sought assistance from the property factor in October 2013 to recover the excess. This was obviously after 1st October 2012 even though the work was done to the property prior to that date.

12.2 The Land Certificate was before the committee and the title plan included the balcony area. From the inspection it was evident that no other proprietor in the block of flats had access to the balcony. The homeowner described the balcony as a pseudo balcony. Members of the committee had observed that it was small but that it was capable of being stood on. It was also observed from the inspection that the work done had involved resurfacing the floor of the balcony, raising the step from living room to the balcony and the consequent replacement of the glazing unit. The inspection had also given the committee an opportunity to examine the construction and layout of the balcony area and relate it to the work done to rectify the problem. The Land Certificate set out the responsibility of all proprietors of the flats in the block to share in the

common repairs.

12.3 The homeowner stated that he had, in the first instance, approached the factor when he had been made aware of the problem to the flat downstairs and been told by the property factor that, since the water appeared to be emanating from his flat, it was his responsibility to rectify it. Mrs Pieper was not employed by the property factor at that time but she confirmed that this was the normal approach to such matters since often it related to such things as washing machines. The homeowner agreed that he had thereafter not approached the property factor with regard to recovering the excess until the work had been completed and he had received a report from the loss adjustor which had confirmed the source of the problem. During the period in question the homeowner had been living abroad. The homeowner supplied a copy of the report and highlighted certain sections. It was not disputed by either party that the defect which was rectified under the policy was a dampproof course not having been connected to the flat roof area on the balcony allowing water ingress into the property.

12.4 The homeowner stated that he considered that the area in question was a gutter and formed part of the roof of the flat below. Because of this he considered that any repair to the area should be common. Mrs Pieper said that her understanding was that the claim had been dealt with by Zurich under that part of the policy applying to the homeowner's policy and not to that part relating to common repairs and in support of this she referred to an email from Messrs Cunninghame Lindsey, loss adjustors dated 1st November 2013 which stated " the claim... was accepted under the policy applicable to Mr McLaren's home, and not the common parts policy." The homeowner stated in evidence that he considered that the factor should have accepted responsibility from the start of the problem and should have investigated if works could have been carried out under the common repairs part of the policy.

12.5 The committee observed at inspection that there were cracks to the exterior of the building and Mrs Pieper said that these were being investigated as a possible claim under the Zurich policy and the homeowner said that the property factor was only taking this approach because of what had been learnt from the experience of the other claim. The homeowner accepted that the issue of the cracks was not part of his application.

12.6 Mrs Pieper said that she would have great difficulty in justifying charging the other property owners for the excess especially when she had been advised that it was a repair particular to the homeowner's property.

12.7 An email had been sent by the property factor on 12th December 2011 in which it was recommended that the property owner seek legal advice.

Discussion

The members of the Committee considered the evidence

The first matter to be considered was whether or not the committee could deal with the application because it could not determine any matter where there was a failure of the property factor prior to 1st October 2012. It considered that the critical date was October 2013 when the homeowner had asked the property factor to recover the excess. It considered that it could determine the application and could rely on Regulation 28(2) of The Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 to consider circumstances occurring before 1st October 2012.

The second matter to be considered was whether or not the repair carried out to the balcony area was the responsibility of the homeowner alone or fell to be shared. The members of the committee had some sympathy with the homeowner's position that the balcony was a gutter and a roof of the flat below and that it was therefore common. It could understand why the homeowner may have made that assumption. The balcony is small. The Land Certificate provided some assistance in determining what were described as "Block Common Parts." Roofs and gutters were two of the particular items detailed. What had to be determined was whether or not, in the particular circumstances of the balcony, this was solely a gutter and a roof and part of the Block Common Parts. It was accepted that the balcony is not wide enough to, for example, place a chair on and that it was only barely wide enough to stand on but the members of the committee did so during the inspection. Although the Land Certificate did make specific reference to gutters and roofs it was silent on balconies. The committee found assistance in The Tenements (Scotland) Act 2004. Section 3 deals with pertinents and, in particular, rights of common property. Section 3(4) (a) of the Act states that if a part of a tenement "wholly serves one flat, then it shall attach as a pertinent to that flat." There might be an argument that the balcony serves as a roof to the flat below and a gutter for all the properties in the tenement but the committee took the view that it is a balcony that the property owner has use of no matter how limited and that its function as a gutter or roof was ancillary to that of balcony.

Having determined that the balcony is not part of the common parts of the tenement the committee did not require to consider the merits of the application as far as the recovery of the excess is concerned. It did however consider that, had it been required to do so, it would have considered it significant the time delay before the homeowner approached the property factor to seek reimbursement. It was almost two years and although the homeowner's position was that he could not make the approach until he had the report from the loss adjustor and that the property factor should have taken on the matter from the outset, it appeared to the committee that, as the person making the claim and cooperating with the loss adjustor in getting the

work done, he should have taken an opportunity sooner to establish whether or not the work was a common repair and, if he considered that it was, approached the property factor at that time. The committee did consider whether or not the property factor's email of December 2011 was threatening and whether or not the property factor had breached sections 6.2 and 6.4 of the Code of Conduct for Property Factors. Neither party led evidence on the matters. The committee considered that the terms of the email were not threatening. It seemed a reasonable suggestion that the homeowner obtain legal advice and it may have been of some assistance to him had he sought such advice. The committee had no evidence before it to substantiate that the property factor had been in breach of the Property Factor's Code of Conduct.

Note

Subsequent to the Hearing and the members of the committee having made their Decision, the homeowner sent two emails for consideration by the committee. The emails contained no new information but a restatement and attempted reinforcement of what the homeowner had either stated in evidence or previously provided in written form. The information had been provided previously but, even if it had not, the committee considered that it would be inappropriate to consider the emails and that to do so might be prejudicial to the other party. Both parties had the opportunity to submit written evidence and to be heard at the Hearing.

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 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...."

Martin McAllister

Chairman of Committee. 

Date 22.9.14