



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

Hohp ref:HOHP/LM/15/0066

Re: Property at Flats 12 and 31 land at The Monaltrie, Bridge Square, Ballater, AB35 5QJ

The Parties:-

Ms Christina Sleigh, 16 Lagreach Brae, Pitlochry, PH16 5QQ (“the Homeowner”)

The Property Management Company Limited, Little Square, Oldmeldrum, Aberdeenshire, AB51 0AY (“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:

Patricia Anne Pryce (Chairperson); Andrew Taylor (Surveyor Member)

Decision

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 unanimously that, in relation to the Homeowner’s Application, the factor has not complied with the property factor’s duties but has complied with the Code of Conduct for property factors.

In all the circumstances of the case, the Committee did not consider it necessary to make a Property Factor Enforcement Order.

We make the following findings in fact:

The Applicant is the owner of two flatted dwelling houses (Flat numbers 12 and 31) at The Monaltrie Development, Bridge Square, Ballater which is situated in a development which was built on or about 2007 and 2008.

The Applicant is due to pay a share of the costs of maintaining the communal landscaped lands within the development in terms of the Deed of Conditions registered on 26 November 2007 by Deeside Developments (Monaltrie) Limited. These communal lands are referred to as “mutual areas” within the said Deed of Conditions.

The Respondent is the property factor for this development, including the mutual areas referred to above, in terms of the said Deed of Conditions.

The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a property factor (1st November 2012).

Following on from the Applicant's application to the HOHP, which comprised of documents received in the period 11th May 2015 until 14th August 2015, the President referred the application to committee on 18th August 2015.

Hearing

A hearing took place at The Credo Centre, 14-20 John Street, Aberdeen on 28 October 2015.

The Applicant attended on her own and gave evidence directly. The Applicant's partner, Mr Allan Milligan, also attended and gave evidence directly.

The Respondent was represented by Mr. Martin Rochford who is a Director and owner of the Respondent and Mr. Richard Burnett who is a Director of the Respondent.

Introduction

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the Homeowner Housing Panel (Applications and Decisions)(Scotland) Regulations 2012 as "the 2012 Regulations".

The Committee had available to it and gave consideration to: the Application by the Applicant which comprised of all paperwork submitted by the Applicant in the period of 11 May 2015 to 14 August 2015, letter by the Applicant to the Homeowners Housing Panel received 16 October 2015 together with enclosures contained therein and letter by the Respondent to the Homeowners Housing Panel ("HOHP" hereinafter) dated 18 September 2015 together with enclosures contained therein.

Preliminary Issues

The Committee had before it on the day of the hearing two separate applications by the Applicant against the Respondent with the second application made under reference number HOHP/PF/15/0067. The Committee advised the parties that it intended to hear these two applications separately and treat these two applications as separate matters, albeit both to be heard on 28 October 2015 as, in the opinion of the Committee, the two applications related to two separate and unrelated matters other than having the parties in common and arising out of the same development.

Furthermore, the circumstances giving rise to both applications arose out of events which took place some years apart. The Committee decided that it would hear the present application first.

Separately, the Committee advised parties that the Mr Richard Burnett, Director of the Respondent, was a member of the HOHP. All present acknowledged that they were aware of Mr Burnett's relationship with the HOHP. The Committee assured all present that parties would be heard in a fair and unbiased manner.

In her application, the Applicant had sought to rely on the entirety of Section 1 of the Code together with an alleged breach of Section 2.4 of the Code. At the hearing, the Applicant helpfully conceded that she was no longer insisting on these alleged breaches.

The Legal Basis of the Complaints

The Applicant complains under reference to Section 3 of the Code and to a breach of the property factor's duties (as defined by Section 17 subsection 5 of the 2011 Act).

The Code

The element of the Code relied upon in the application is as follows:-

"SECTION 3: FINANCIAL OBLIGATIONS

While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The overriding objectives of this section are:

- Protection of homeowners' funds
- Clarity and transparency in all accounting procedures
- Ability to make a clear distinction between homeowners' funds and a property factor's funds

3.1 If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

3.2 Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.

3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges

made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

3.4 You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).

If you are a private sector property factor:

3.5a Homeowners' floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners.

3.6a In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened in the name of each separate group of homeowners.

If you are a Registered Social Landlord or local authority property factor:

3.5b Homeowners' floating funds must be accounted for separately from your own funds, whether through coding arrangements or through one or more separate bank accounts.

3.6b In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account or accounting structure must be used for each separate group of homeowners."

The Factual Complaints

These will be addressed in the order of the alleged breach of the Code and the Property Factors' duties:-

1. Breach of Section 3 of the Code

The Applicant in her evidence confirmed that she had not stated clearly within her application upon which particular part of Section 3 of the Code she wished to rely. She accepted that her complaint in relation to financial matters did not seem to fall within any particular part of Section 3 of the Code. She accepted that Sections 3.1 and 3.2 did not have any relevance to her application. She accepted that in terms of Section 3.3 she received regular detailed invoices from the Respondent. She also accepted that there were procedures in place in terms of Section 3.4 of the Code.

Given the evidence, the Committee is of the opinion that the Respondent did not breach Section 3 of the Code.

2. Failure to carry out the property factor's duties

The Applicant stated in evidence that she felt that the Respondent had breached

these duties by recovering sums of money from all of the owners which they had no authority to do. She referred to all of the documentation which she had lodged as part of her application to the HOHP. In particular, she referred to the Minutes of the Owners' meeting which took place on 8 September 2013. In relation to the Care and Maintenance of the riverbank, it is clearly stated here that work was required "...and in the first instance advice will be sought from A Ellis or J Anderson, both local contractors. Based on earlier work in 2010 an indicative budget of £200 was agreed.....". The Applicant advised that she had a number of issues with what then ensued. Mr Burnett of the Respondent was present at this meeting. The Applicant advised that only ten flats were represented at this meeting and in terms of the Deed of Conditions referred to above, this meeting was inquorate and should have been properly reconvened to a later date as confirmed within the said Deed of Conditions.

The Applicant advised that not only did the meeting continue, work was subsequently instructed for trees to be pruned and felled at the riverbank by one of the other owners. The work instructed cost £820 which went beyond what was agreed at the meeting.

The Applicant accepted that she did not take exception to the meeting being inquorate until over one year later. The Applicant also accepted that she paid the money for this work without questioning it at that time. The Applicant confirmed that she has never sought return of this money nor did she seek return of it at any time.

The Applicant advised that she was unhappy with the work which was carried out as there were trees cut down which were of environmental value as well as of aesthetic importance to the Applicant. The Applicant advised that previous work of this nature, to the trees on the riverbank, had required reference to the Planning Authority.

The Applicant accepted that in the Minute of the Owners Meeting of 31 August 2014 she did not raise this as an issue. The Applicant accepted that it is raised as an issue in the Minute of the Owners Meeting of 22 March 2015.

When asked why she left it so long to raise as an issue, the Applicant advised that she was very busy and had been out to Australia to visit her son.

The Applicant was of the opinion that, put succinctly, the Respondent had breached the property factor's duties by ingathering this money for the pruning of the trees despite being aware that this work was carried out without the proper authority of the owners at the Monaltrie. The meeting where the decision was made was inquorate and the Respondent was represented there. Furthermore, the work which was carried out then went beyond what was agreed at this meeting in terms of actual work being carried out and the financial limit which had been agreed. The Respondent had been sent the invoice directly from the contractor who had carried out the works and had ingathered this money from the owners without questioning either the work or the financial limit which had been breached.

Mr Richard Burnett, Director of the Respondent, then gave evidence. He confirmed that he had been employed by the Respondent since 2008 as a Director and that he was Operations Director at the company. His role caused him to act as property manager for around twelve developments with the Monaltrie being one of these

developments. He advised that he is a chartered surveyor.

Mr Burnett confirmed that he was present at the Owners Meeting on 8 September 2013. He confirmed that one of the owners, Mr Jerry Atkin, was given authority to go and deal with the issue of the trees.

Mr Burnett accepted that there was no quorum for this meeting. However, he explained that the owners in the Monaltrie development are particularly active in the running of the development so he did not perceive this as an issue nor did he foresee any problem in Mr Atkin being tasked to instruct the works for the trees at the riverbank. He explained that the Respondent was not instructed to carry out these works but that was not an unusual occurrence at this development as the owners were actively involved in the day-to-day running of the development.

Mr Burnett accepted that there was no quorum for this meeting and that there was no instruction in writing that these works should be carried out.

Mr Burnett advised that he was only aware that the works had been carried out when he was sent the invoice directly from the contractor in order to ingather the funds from the owners.

Mr Burnett confirmed that the issue regarding the lack of authority and the trees being pruned and felled was first raised with him by the Applicant in an email of 10 December 2014, more than a year after the works were carried out.

Mr Burnett confirmed that the Respondent did not instruct the works but did ingather the funds to pay the invoice in respect of the works which were carried out. Mr Burnett was of the opinion that the works, while instructed at an inquorate meeting, were authorised retrospectively by two subsequent meetings of the owners.

Mr Burnett confirmed that this was the only occasion where something like this has happened.

Mr Burnett, when questioned by the Committee, was of the opinion that the wording of the Minute of the Owners Meeting of 8 September 2013 authorised Mr Atkin to have the works carried out, not just seek "advice" which was the word which was used in the minute.

Mr Burnett was of the opinion that he had carried out the wishes of the owners which was verified in the two following meetings as no one else had complained about these works being carried out other than the Applicant. He confirmed that the Respondent had subsequently resigned as factor for the Monaltrie development in light of this issue but that the owners had asked the Respondent to remain as factor which the Respondent had done.

Mr Martin Rochford then gave evidence. He confirmed that he was both a Director and the owner of the Respondent since he purchased the Respondent in 2002. He is a chartered surveyor.

Mr Rochford clarified that the owners tended to pay by direct debit as this allowed

the Respondent to work out an annual budget for the development at the Monaltrie which then made it easier for the owners to budget. The owners also received a financial discount if they paid by this method and the Applicant paid and continues to pay in this manner.

Mr Rochford confirmed that this method of payment also allowed the owners to query any sum which they were being asked to pay and that they could prevent any increased amount from being taken from their account or ask for such a sum to be returned to them by the bank which would be legally obliged to return the money to the owners. This ensured that the owners had control over what they chose to pay and also allowed them to query payments. He confirmed that the Applicant had never done this.

In light of all of the foregoing, the Committee is of the opinion that the Respondent did breach the property factor's duties by ingathering money which the Respondent had no authority to do. The Respondent was present at the inquorate meeting which purported to instruct these works. The Respondent was aware that the meeting was inquorate and therefore could not properly instruct any works.

Furthermore, the Committee is of the opinion that the works "instructed" went beyond what was apparently agreed at that meeting, namely, the obtaining of "advice" and with a financial limit of £200. The invoice which the Respondent received and then ingathered funds from the owners without question amounted to some £820, more than four times the financial limit which was agreed at that meeting.

However, both the Respondent and the Applicant confirmed that this was a one off event which had not been repeated. Further, the Applicant confirmed that she had never sought return of the monies she paid out in respect of these works. The Applicant also confirmed that she had delayed more than a year in raising this issue with the Respondent.

Given the whole circumstances narrated above, while the Committee accepts that the Respondent did breach the property factor's duties, the Committee considers that no order is required in this matter. The Applicant does not seek return of the money she paid in respect of this matter and she accepts that the work was carried out. The Committee accepts that this type of event is a one off matter which had not been and will not be repeated.

Reasons for Decisions

Section 19(1)(b) affords the Committee discretion as to whether or not to make a Property Factor Enforcement Order. The Committee concluded that there would be no purpose, justification or necessity to do so in this particular case. The Respondent submitted in evidence that this type of situation had not been repeated. The Applicant did not indicate a wish for any monies to be returned to her. The Committee records that the Respondent did breach the property factor's duties.

Appeals

In terms of Section 22 of the 2011 Act, any appeal is on a point of law only and requires to be made by Summary Application to the Sheriff. Any appeal must be made within 21 days beginning with the day on which the decision appealed against is made.

Patricia Pryce

Signed.....

Patricia Anne Pryce
Chairperson

Date 8 November 2015.....

