hohp

PROPERTY AT 2 MILTON, 41b STATION ROAD, CARLUKE ML8 5AD

The Parties:-

The homeowner – James Bryden, 2 Milton, 41b Station Road, Carluke ML8 5AD ("the applicant")

The property factor – Newton Property Management Ltd, 87 Port Dundas Road, Glasgow G4 0HF ("the respondent")

DECISION BY A COMMITTEE OF THE HOMEOWNER HOUSING PANEL IN APPLICATIONS UNDER SECTION 17 OF THE PROPERTY FACTORS (SCOTLAND) ACT 2011 ("THE 2011 ACT")

Case references : HOHP/PF/15/0156, HOHP/PF/15/0157 and HOHP/PF/15/0161

Committee Members

Richard Mill (Chairman)
Mike Links (Surveyor Member)
Colin Campbell (Housing Member)

Decision of the Committee

The Homeowner Housing committee unanimously determined:-

1. That the respondent has complied with their duty to comply with the Code of Conduct for Property Factors ("the Code").

2. That the respondent has complied with their duties.

Procedural Background

The applicant lodged three separate applications to the Homeowner Housing Panel. application reference HOHP/PF/15/0156 was received on 23 November 2015. application reference HOHP/PF/15/0157 was received on 2 December 2015. application reference HOHP/PF/15/0161 was received on 14 December 2015.

The proforma applications received raised alleged complaints both in terms of the Code of Conduct for Property Factors and the respondent's duties.

The three applications raised separate issues but they all related to the same property of the applicant. The three applications were conjoined.

The respondent sought an extension of the time allowed to lodge their detailed response and written representations to the three applications. This was on the basis of the volume of correspondence lodged by the applicant which required to be answered. The committee was satisfied that it was in the interests of justice to allow such an extension and by way of Direction extended the time period allowed to the respondent.

Hearing

A hearing on all three applications took place on 12 May 2016 in Wellington House, 134-136 Wellington Street, Glasgow G2 2XL.

The applicant appeared personally, giving evidence and making submissions in support of his applications. The respondent was represented by Mr Derek McDonald, Director, and Mr Scott Cochrane, Associate Director and Property Manager, in respect of the property. Both representatives gave evidence and made submissions on behalf of the factor. There were no other witnesses.

The applications before the committee related to a number of complaints. The paperwork lodged by both parties was extensive. The committee were fully familiar with the documentary evidence prior to the hearing. This comprised three full folders of documents lodged by the applicant in support of each of his three separate applications together with a large bundle lodged on behalf of the respondent containing submissions and supporting evidence in respect of each of the three applications.

The committee utilised their inquisitorial role in managing the hearing carefully and proportionately. All relevant issues were explored. Both parties were allowed the opportunity to address the committee upon each relevant issue.

Findings in Fact

1. The applicant is the homeowner of 2 Milton, 41b Station Road, Carluke ML8 5AD ("the property"). The property is one of a number of apartments forming a development completed by Robertson Frame Limited ("the development").

2. The development is a modern housing development completed in or around 2008. There are three blocks of flats. There are 26 apartments in total. The applicant's property is a ground floor duplex with split levels.

3. There is a Deed of Conditions which sets out arrangements for, amongst other items, maintenance, repair and renewal of the common parts of the development, including provision for a property factor.

4. The factor became a registered property factor on 1 November 2012. Their registration number is PF000108. The respondent is the property factor for the development.

5. The Deed of Conditions requires one-third of the homeowners to be present (or represented) in order that a meeting be quorate. This is to enable decisions to be taken in respect of the development, including maintenance and repairs issues.

6. The respondent has issued a Written Statement of Services in compliance with the Code of Conduct to all homeowners, including the applicant. This sets out the management contract. It also sets out the complaints procedure which will be utilised and the timescales which are applicable to such a process. Additionally, the respondents have a standalone "customer complaints procedure" document which is accessible to all homeowners.

7. The development has a private sewage system. In 2014 a contract existed between all of the homeowners in the development, administered by the respondent, with Ferrier Pumps to maintain the sewage system. As a consequence of an administration failure on the part of Ferrier Pumps, the routine maintenance/service visit had not been undertaken in 2014.

8. On 10 November 2014, the applicant identified a problem with the sewage system likely to be caused by the waste pumps having failed. Similar problems had occurred before. An early warning telephone alarm system designed to notify Ferrier Pumps of such a failure had not been triggered as a consequence of the particular failure, namely a blown fuse within the distribution board which controls both the pumps and the early warning alarm system.

9. The respondent attended promptly to the notification received by the applicant in respect of the difficulty with the sewage system. Ferrier Pumps attended to carry out an immediate response. The nature and cause of the breakdown was identified. One of the waste pumps required to be replaced.

10. The respondent pursued Ferrier Pumps in respect of the failures which had arisen on their part. It was identified that the earlier lack of the routine inspection did not contribute to the system failure and could not have been identified at such an inspection. As a consequence of the respondent's communications with Ferrier Pumps costs to the homeowners, including the applicant, was reduced including the callout charge to the site and assessment of the breakdown being undertaken at no cost.

11. The respondent approached other companies with a view to obtaining competitive quotes, both in respect of the installation of a new pump and to take over the maintenance contract. Ritchie MacKenzie & Co Ltd were identified as providing the most competitive quote. They were instructed to install the new pump and took over the maintenance contract in or about January 2015.

12. The respondent took up a potential insurance claim in respect of the pump failure with the insurance broker. This related to a potential claim against the block buildings insurance policy. The respondent was advised that there was

no appropriate cover. The relevant insurers at that time were LV. Homeowners, including the applicant, were updated regarding this.

13. A previous insurance claim in respect of an earlier failure of the sewage pumps had been made which had been settled by the then insurer, Zurich. The breakdown of the system was however due to entirely different circumstances.

14. The applicant, along with other homeowners, had been advised of the change in insurance company and the reason for such a change, namely a reduction in the annual premiums for insurance being provided on a like for like basis. The respondents are not to blame for the failure on the part of the then insurers, LV, to settle the claim.

15. The development is entered by vehicle via an electronic gate system. This consists of a pair of sling gates with one motor being master and another motor being slave, which slide as a pair to meet in the middle. There is a lengthy history of difficulties and problems having been encountered with the operation of the gates. In 2012, the respondents commissioned an Engineering Report from ABW Barriers & Gates Ltd which makes reference to the lengthy background of problems and the fact that the gates appear to be suitable for their purpose but they have not been installed as required.

16. From in or about January 2015, maintenance for the gates has been assumed in terms of a contract entered into between the homeowners managed by the respondents with PTM Security Solutions Ltd.

17. As a consequence of the applicant's complaints in relation to the gates, a representative of PTM Security Solutions Ltd has attended on site and carried out an assessment of the gates on three occasions in the last year, namely 8 May 2015, 29 June 2015 and 7 January 2016. They have also had direct discussions with the applicant. Complaints raised by the applicant, which included suggestions that the gates were opening and shutting themselves and remaining open on occasions, were not evidenced.

18. In recognition that there are potential issues with the gates the respondents have made significant enquiries over the years and made proposals to the homeowners allowing them to vote on alternative proposals. One such proposal has been the deactivation of the entrance gates with a view to selling off the gates and associated mechanical components. This was considered by the respondent to be a cost-effective solution to avoid incurring additional costs over time. The applicant has objected to that proposal. The applicant has also made proposals of his own which have been intimated for consideration to all other homeowners by the respondents. The applicant's proposals have not found favour with other homeowners.

19. The respondents convened a residents meeting for the development on 26 August 2015. This was for the purpose of discussing the electronic gates at the development amongst other items. The applicant chose not to attend the meeting. He was not represented.

20. The grounds and garden maintenance is currently undertaken at the development in accordance with a contract with Key West Landscaping Ltd. Tendering processes have been undertaken. In March 2014, the current contractor was appointed as a consequence of a competitive tendering process.

21. The applicant has raised concerns with the respondent regarding alleged failures on the part of Key West Landscaping Ltd. Such complaints have been investigated. Despite the applicant's complaints the common garden ground is well kept.

22. None of the owners of the other 25 homes on the development have complained to the respondent regarding the issues which the applicant has.

23. The applicant has communicated with the respondent at a high level of frequency in respect of a range of matters. There is no evidence of the respondent systematically having failed to acknowledge items of communication from the applicant or thereafter failing to explore or address the issues raised and subsequently clarify matters with the applicant thereafter. The respondent has communicated reasonably and effectively with the applicant at all times.

Reasons for Decision

The committee was satisfied that they had sufficient information and evidence before it at the conclusion of the hearing to determine the applications fairly. This included the extensive documentary evidence for both parties and the oral evidence and submissions.

The committee evaluated all of the evidence before it. The committee made findings in fact. Reference is made to the committee's findings numbered 1-23 upon which the committee's decision is based.

The committee considered the applicant's complaints in respect of the three broad issues raised by the applicant which corresponded to the three separate applications before the committee, those issues were:-

1. Waste Pump Failure and Insurance Claim (HOP/PF/15/0156)

   The applicant's complaints in respect of this application raised two subsidiary issues:

   - Dissatisfaction regarding pursuing a resolution with Ferrier Pumps;
   - Advancing a relevant insurance claim.

   The applicant alleged breaches of Sections 5.4, 5.5, 5.6, 6.9 and 7.1 of the Code of Conduct.

The applicant feels that he should not be responsible for the costs associated with the pump failure on or about 10 November 2014. At previous cost to the homeowners an alarm/warning system had been installed but that had failed. Ferrier Pumps had failed to carry out the routine inspection as a consequence of their failed administration.

It is clear that the respondents sought and obtained a detailed assessment of the pump failure. They did not let matters rest there. Confirmation was obtained confirming that the earlier failure on the part of Ferrier Pumps to carry out the routine maintenance would not have prevented the pump failure or prevented the warning system being triggered. Additionally, as a consequence of the respondents correspondence on behalf of homeowners, charges incurred by the homeowners to Ferrier Pumps in respect of the urgent callout and for the subsequent service and inspection were cancelled. In the event that Ferrier Pumps had been instructed to replace the defective pump, no labour costs would have been charged.

The committee conclude that the respondent reasonably and appropriately pursued Ferrier Pumps in respect of their failure. The respondent has complied with Section 6.9 of the Code of Conduct.

It is well evidenced that the respondents issued correspondence to the relevant insurance broker on behalf of homeowners in respect of a potential claim to the relevant insurer - LV. The respondent was clearly advised that there was no relevant insured risk in the particular circumstances of the identified pump failure. The respondent acted reasonably and cannot be said to have failed by not taking any other action on behalf of homeowners. The applicant, along with other homeowners, were kept advised of the respondents communications with the relevant insurance broker. The applicant's complaints regarding the respondents actions in this respect are unfounded. The respondent has complied with Section 5.4 and 5.5 of the Code of Conduct.

LV were appointed as the insurer following a review being undertaken in February 2013 by the respondents chosen insurance broker, namely Central Insurance. There was no impairment to the level of the insurance cover. The cover to be provided was on a like for like basis. Reasons for transfer of insurer from Zurich to LV were set out in correspondence made available to homeowners and was principally transferred on the basis that LV offered the most competitive terms on the market for the forthcoming year. The respondent has evidenced why they appointed LV. The respondent has not breached Section 5.6 of the Code of Conduct.

2. Secure Entrance Gates (HOP/PF/15/0157)

The applicant's complaints in respect of this application raised two subsidiary issues:

- The applicant's grievance at having to pay for maintenance on gates which he considers to be deficient;

- The applicant's insistence that the gates are not fit for purpose and should be replaced.

The applicant alleged breaches of Sections 6.1, 6.9 and 7.1 of the Code of Conduct.

There is little doubt about the fact that strenuous efforts have been made over the years by the respondent to investigate the applicant's complaints and any issues which have arisen in respect of the electronic gate system at the development. An extensive detailed Engineering Report was obtained in 2012 from ABW Barriers & Gates Ltd. Various proposals for long-term solutions, including both the complete replacement and complete removal have been put to the homeowners at large to vote upon, neither of which have found favour.

There is well documented evidence that the respondents have reacted to concerns expressed by the applicant on a regular basis regarding the gate entry system. On three occasions within the last year a formal inspection has been undertaken by those currently holding the maintenance contract, namely PTM Security Solutions Ltd. The applicant has also had an opportunity of discussing matters directly with a representative of PTM. Mr Cochrane, the Property Manager for the development, has inspected the gate system. Despite the applicant's complaints, no other homeowner has brought any concerns to the attention of the respondent. This is notwithstanding the applicant stating in his evidence to the committee that he has detected faults on 167 separate occasions in the last year.

The respondents held a meeting for homeowners in August 2015. The issue of the gates was discussed. The applicant chose not to attend. The majority vote was that there was satisfaction amongst homeowners regarding the gates and that they should be retained and maintained.

It is clear on the volume of evidence before the committee that the respondents have taken seriously the applicant's expressed concerns and have investigated the matters appropriately. The applicant has been kept fully updated. The respondent has complied with the sections of the Code which the respondent alleged that they have breached, namely Section 6.1 and 6.9.

3. Grounds Maintenance (HOP/PF/15/0161)

The applicant's complaints in respect of this application raised two subsidiary issues:

- The applicant suggested he is unaware as to the nature and extent of the grounds maintenance contract and the specification thereof;

- The applicant complains that the current gardening contractor has provided a substandard service.

The applicant alleged breaches of Sections 6.1 and 6.9 of the Code of Conduct.

The current gardening contractor, Key West Landscaping Ltd, was appointed in March 2014 following a tendering process. A standard generic grounds specification has been used on a rolling basis, throughout the years that the development has existed. A tendering process takes place by this generic specification being provided to contractors who carry out a site visit and then provide a quotation. The current contractor was appointed in March 2014 on the basis of the most competitive price. This was conveyed to all homeowners.

The applicant complained that he is unaware of the specification. Notwithstanding this he had produced, in support of his own application, a copy of the specification. The committee was satisfied that the applicant is fully aware as to the extent of the specification which the current contractor is obliged to adhere to.

The applicant complained about a number of aspects of the work being undertaken by the gardening contractor. The applicant however was unable to provide any evidence upon which the committee could rely to the effect that work which ought to have been done had not been.

One of the applicant's complaints related to the grass feeding. Following his complaints the respondent had made enquiries with the contractor. They advised in 2015 that grass feeding was to be undertaken on 28 May 2015. The applicant at the hearing accepted that this had in all likelihood happened. He called into question as to whether or not the second feed of the year, planned in October 2015, had been undertaken but was unable to evidence this. The committee tended to the view that such work had been undertaken.

The applicant made a complaint about the replacement of four trees in the development adjacent to his block. There have been problems with the trees dying off and some have been repeatedly replaced. Three of the four trees remain healthy now. The applicant suggested that the trees should not have been replaced and costs should not have been incurred to homeowners.

At the hearing photographs were produced by the respondent. The applicant accepted that these were a true and accurate representation of the garden grounds in the development and around his home. The committee was satisfied that the grounds are well kept and that there is no evidence of failures on the part of the contractor. The respondent has made due enquiry when asked to do so by the applicant.

The committee is satisfied that the trees adjacent to the applicant's block are a positive enhancement to the common grounds area. The suggestion made by the homeowner that they do not have an impact upon the vast majority of owners in the development is unfounded and irrelevant. The trees are part of the common grounds. The committee would expect the average homeowner to complain in the event that they were removed and not replaced.

The respondent has not breached Section 6.1 and 6.9 of the Code.

The applicant's common complaint in his applications that the respondents have breached Section 7 of the Code and in particular Section 7.1 relating to an appropriate complaints procedure is not upheld. The committee is satisfied, having regards to the terms of the Written Statement of Services and the standalone complaints policy of the respondent, that such section has not been breached. There is clear evidence within the documentary evidence that the complaints procedure has been followed and there are specific examples of the complaints policy having been followed in correspondence issued to the applicant by the respondent. One such example is a letter dated 6 November 2015 issued to the applicant by the respondent in which they note his formal complaint in respect of two topics (the waste pumps and insurance cover).

The terms of the written applications by the respondent also raised alleged failures on the part of the respondents to comply with their duties. At the hearing the applicant confirmed that such concerns were interrelated to the concerns which he had raised and made detailed submissions upon at the hearing relative to the Code of Conduct issues.

The respondent has not breached the Code of Conduct for property factors. The respondent has not failed in their duties as property factor. No Property Factor Enforcement Order is necessary.

Observations

It was evident to the committee that the applicant has generated a very high volume of correspondence with the respondent over a lengthy period of around some 5 years or thereby. It is equally evident to the committee that the respondent has invested a huge amount of resources and time in answering the applicant's correspondence.

The committee was disappointed to note that the applicant, without good reason, had failed to engage with the respondent by absenting himself from the meeting of

the homeowners arranged by the respondent in late August 2015. At the hearing the applicant commented that it would have "been a waste of time" attending. This appeared to the committee to be a rather flippant remark and perhaps suggests some lack of good faith on the part of the applicant in seeking to pragmatically resolve areas of contention within the development for his own and others benefit.

The committee noted Mr McDonald's invitation to the applicant at the hearing to actively participate in a committee of homeowners or residents association and to use such influence as he believes is appropriate to champion his own philosophies for the future management of the development. This would enable appropriate mandates with the required number of votes to be provided in favour of the respondent to carry out work in accordance with those who appear most committed within the development to the common parts and areas.

The committee would encourage the applicant to engage with the respondent in the manner suggested as a positive means by which to move forward in the future.

The committee observed that rather unusually there is no specific delegated authority by the homeowners in favour of the respondent to carry out work, whether repairs or renewals, to any authorised threshold or level in the absence of seeking approval. The practice adopted by the respondent has been to avoid the potential power which arises in their favour from the terms of the Deed of Conditions to instruct work as they see fit and instead the approach taken has been to openly advise homeowners of proposals or options and the costs and to indicate that any objections should be provided for consideration.

In this development, like many others, there is a reasonable proportion of properties which are not owner occupied and accordingly there is rarely a high level of active interest to such correspondence being issued. Whilst it appears to the committee that the respondent has acted reasonably and appropriately to date by adopting the approach which they have it does appear that it would be somewhat more efficient for the respondent to seek to enter into an agreement with the homeowners regarding an appropriate level of delegated financial authority.

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.

Richard Mill

Signed Date 19 May 2016
Chairperson