



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/PF/16/0080

22 Earl Rise, Dundonald, KA2 9JJ, forming part of Castle Grange Estate, Dundonald. ('the Property')

The Parties:

Ian McLaughlin residing at 22, Earl Rise, Dundonald, KA2 9JJ ('the Homeowner')

Rentlease, 123 Main Street, Prestwick, KA9 1LA ('the Factor')

Committee members:

Jacqui Taylor (Chairperson) and Kingsley Bruce (Surveyor Member).

Decision of the Committee

The Committee determines that the Factor has failed to comply with Sections 6.3 and 6.9 of the Code of Conduct.

The decision is unanimous.

Background

1. The Factor's date of registration as a property factor is 7th November 2012.
2. By application dated 29th May 2016 the Homeowner applied to the Homeowner Housing Panel ('the Panel') for a determination that the Factor had failed to comply with:-
 2. 1: The following sections of the Property Factor Code of Conduct ('The Code'):
 - Section 6: Carrying Out Repairs and Maintenance.
Sections 6.3, 6.6 and 6.9 and
 - 2.2: The Property Factor's duties.

3. The application had been notified to the Factor.

4. By Minute of Decision by Maurice O'Carroll, Convener of the Homeowner Housing Panel dated 1st July 2016, he intimated that he had decided to refer the application (which application paperwork comprises documents received in the period 1st June 2016 to 26th June 2016) to a Homeowner Housing Committee ('The Committee').

5. The Committee issued a Direction to the parties dated 22nd July 2016 directing the parties to attend a pre-hearing site inspection at 22 Earl Rise, Dundonald, KA2 9JJ at 9.45 am on 31st August 2016. The homeowner and his wife, Blair Russell and David Toner of Rentolease, Colin Andrew, a representative of the resident's committee, and Ian Smith, the contractor, attended the site inspection. The Committee saw that the communal shrubs in question were alive and there was a handful of flowers on the new growth.

6. An oral hearing took place in respect of the application on 31st August 2016 at Russell House, King Street, Ayr, KA8 0BQ. The same parties attended the hearing.

The details of the application and the parties' written and oral representations are as follows:

The Homeowner had completed section 7 of the application stating: '*Communal bushes cut in January 16th during snow. This is out with any RHS pruning date.*'

SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE

6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a comprehensive tendering exercise or use in house staff.

The Homeowner's Complaint: The Homeowner explained that he considered that the contractor, Ian Smith, had insufficient knowledge to competently prune the shrubs within the estate and he questioned why the Factors had given the contract to the contractor.

The Factor's response: David Toner explained that the Factor is directed by the resident's committee following matters agreed at the AGM. The committee take responsibility for the management of the estate throughout the year. Decisions made at the AGM are intimated to the residents in the Minute of the AGM. The Factor does not have power to independently employ or dismiss contractors. These decisions would have to be made by the residents at the AGM. He accepted that this was not made clear in the Factor's Written Statement of Service. He advised that this arrangement stems from the Deed of Conditions, but he acknowledged that the full copy of the Deed of Conditions had not been exhibited to the Committee. David Toner explained that he has a copy of the Minute they prepared following the AGM on 16th February 2016 but acknowledged that the official Minute would not be issued to residents until prior to the AGM next year. He explained that there had been a tendering process for contractors approximately six years ago but since that time Ian Smith has been the contractor for the estate.

The Committee's Decision:

This head of complaint is upheld.

The Committee are mindful that Code of Conduct for Property Factors requires the Factor to provide the Homeowner '*with a written statement setting out, in a simple and transparent*

way, the terms and service delivery standards of the arrangement in place between them and the Homeowner.' The Factor's written statement of service does not explain to the Homeowner the relationship between the Factor and the resident's committee. In the Committee's experience the fact that the Factor does not have power to hire or dismiss contractors, independent of the decision made by the residents at the AGM, is an unusual arrangement and consequently the Committee consider that there is a heightened obligation on the Factor to explain this arrangement in clear and transparent terms in the Written Statement of Service.

The Homeowner did not attend the AGM on 16th February 2016. David Toner explained that the Minute of that meeting will not be distributed to Homeowners until prior to the AGM in 2017. The Factor has not separately advised the homeowners of the decisions made at the AGM and consequently they have not shown the Homeowner why Ian Smith was appointed and why no tendering process was carried out, as required by section 6.3 of the Code.

6.6 If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.

The Homeowner's Complaint: The Homeowner explained that he didn't receive quotes from the Factor. He had asked for these by phone in a conversation with Blair Russell.

The Factor's response: David Toner and Blair Russell made no response.

The Committee's Decision:

This head of complaint is not upheld as this section of the Code is not applicable as the Factor did not use a tendering process to appoint the contractor.

6.9 '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 explained that Ian Smith had pruned the communal bushes in January, before the recommended pruning date. In March/April the bushes were looking awful. At this time of year the bush should be in full bud. Mr McLaughlin explained that he is a qualified playground inspector and he is very experienced in these matters.

The Factor's response: Ian Smith, on behalf of the Factors, explained that he had spoken to the Homeowner in April and agreed with him that they would wait to see if the bushes grow back or if the resident's committee decides that the bushes should be hard cut back or replaced. If the bushes required replacement. Ian Smith, the contractor stated that this would be undertaken at his own expense. David Toner confirmed that if the shrubs had to be replaced the contractor would be responsible for the cost or replacing the shrubs. He acknowledged that the email from Blair Russell to the Homeowner dated 30th March 2016 did not clarify that the contractor would be responsible for the cost of any replacement shrubs.

The Committee's Decision

This head of complaint is upheld.

The Committee acknowledged that the communal shrubs were still alive but they were not as developed as they should be for this time of year. The Code requires the Factor pursue the contractor to remedy any defects in any inadequate work. The Committee accepts that it had been agreed with the contractor that they would wait to see if the bushes grow back but the Factor had failed in their obligation to communicate to the Homeowner that if the resident's committee determined that the communal bushes had not recovered sufficiently the contractor would be liable for the cost of any replacement bushes.

Property Factor's Duties.

The Homeowner's Complaint: The Factor had not told the Homeowner that the residents committee decide matters concerning the estate.

The Factor's response: David Toner explained that he had sent the Homeowner an email dated 26th May which set out the position. The email states:

'As you are aware Rentlease is factor for Castle Grange estate in Dundonald and as such we are charged with managing the common areas. Our remit, spend, appointment of contractors etc are all decided by the residents at the AGM held each year with devolved power to the Committee to oversee the agreement and decision made at the AGM. We do not have authority or agreement from the residents to act outwith this remit.

We do not have the authority to instruct additional costs or dismiss contractors without the agreement firstly of the Committee whose parameters of spend have been agreed with at the AGM. You will be aware we have to try and represent all residents at Castle Grange equally and to ensure that any complaint or comments are passed to the Committee and in turn can be raised at the AGM.

In regard to the issue with the bushes this has been raised by you, reported to the committee and contractor, inspected by ourselves, the committee and the contractor and yourselves. The committee have agreed that these bushes will be monitored through the growing season and reviewed later in the year.

Please accept our apologies that you feel this has not been dealt with but we can assure you that we have taken your complaint seriously and have investigated this for you...'

The Committee's Decision: This head of complaint is not upheld. The Factor explained the position in their email of 26th May 2016.

Property Factor Enforcement Order.

The Committee are mindful of the terms of sections 19(1)(a) and (b) of the 2011 Act which requires the Committee to decide whether the Factor has failed to carry out the Property Factor's duties or comply with the requirements of the Code of Conduct and if so whether to make a Property Factor Enforcement Order.

The Committee acknowledged that the main failing of the Factor related to the fact that the Written Statement of Service fails to explain the Factor's relationship with the resident's committee. However, as the Homeowner had not stated in his application that the Factor has failed to comply with section 1 of the Code of Conduct it is not competent for the Committee to require the Factor to amend their Written Statement of Service. Also as the application largely concerns pruning of communal bushes that are still alive the Committee decided not to make a Property Factor Enforcement Order.

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 5th September 2016

Chairperson