

Decision of the Homeowner Housing Committee issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011 and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

HOHP reference: HOHP/PF/13/0296

Re: Property at 10 Wellington Street, Greenock PA15 4 QB

(‘ collectively the property’)

The Parties:

Eric David Mundy, c/o Homefinders Inverclyde, Kingston House, Jamaica Street, Greenock, Inverclyde, PA15 1XX (‘the homeowner’)

Morison Walker Property Management Limited, 23 Patrick Street, Greenock, PA16 8NB (‘the property factor’)

Decision by a committee of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011(‘the Act’)

Committee members: Patricia Anne Pryce (Chairperson); Carol Jones (Surveyor Member); Susan Shone (Housing Member).

Decision (including Statement of Facts and Reasons for Decision)

The committee unanimously determined that the Respondent has failed to comply with their Section 14 duty, in terms of the 2011 Act, to comply with the Code of Practice by:-

1. Failing to have a clear written complaints resolution procedure insofar as the Respondent failed to produce a copy of this procedure to the Applicant to allow the Applicant to follow this procedure. A simple reference to a complaints procedure within the Respondent’s Statement of Service was deemed to be insufficient by the committee (a breach of Section 7.1 of the Code).
2. Failing to confirm when the in-house complaints procedure had been exhausted. The Respondent failed to confirm their final decision with their senior management and subsequently failed to provide details of how the

Applicant could apply to the homeowner housing panel (a breach of Section 7.2 of the Code).

By the time this matter came before the committee for a hearing, the Respondent was no longer the factor of the property, having terminated their contract with the owners of the properties at 10 Wellington Street with effect from 28th February 2014. In all the circumstances of the case, the committee did not find it necessary to make a Property Factor Enforcement Order.

We make the following findings in fact:

The Applicant is the owner of a ground floor flat known as 10 Wellington Street and situated in a block of flats at 8 - 12 Wellington Street, Greenock.

The Applicant is also the owner of an area of the basement of this property known as 10A Wellington Street, Greenock.

The Respondent was, until 28th February 2014, the factor of the common parts of the block of flats within the property at 8 - 12 Wellington Street, Greenock.

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 dated 13th October 2013, the Applicant was requested by the HOHP to produce further information.

The President referred the application to committee on 6th March 2014.

Hearing

A hearing took place at the offices of the HOHP on 6th October 2014.

The Applicant attended along with his property manager, Mr. Campbell Giseby. Both the Applicant and Mr. Giseby gave evidence directly.

The Respondent was represented by Mrs. Florence Gallacher who is a property manager and Director employed by the Respondent. Derek Robinson who is employed as a property inspector by the respondent was also in attendance. Both Mrs. Gallacher and Mr. Robinson gave evidence directly.

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 dated 13th October 2013; email by Mr. Giseby to the HOHP dated 15th November 2013 together with the enclosures contained therein; email by Mr. Giseby to the HOHP dated 6th December 2013; copy Small Claims Summons Number SA223/13; copy Small Claims Summons Number SA222/13; email by Mr. Giseby to the HOHP dated 20th January 2014 together with enclosures contained therein; letter by the Applicant to the HOHP dated 20th January 2014 together with enclosure contained therein; email by Mr. Giseby to the HOHP dated 10th February 2014 together with enclosures contained therein; letter by the Applicant to the Respondent dated 13th February 2014; letter by the Respondent to the HOHP dated 13th February 2014; letter by the Respondent to the HOHP dated 9th April 2014 together with enclosures contained therein; email by Mr. Giseby to the HOHP dated 22nd April 2014 together with Land Certificate Title Number REN1948 contained therein; email by Mr. Giseby to the HOHP dated 9th May 2014 together with undated submission by the Applicant contained therein; email by Mr. Giseby to the HOHP dated 25th June 2014 together with enclosures contained therein; letter by the Respondent to the HOHP dated 2nd July 2014 together with enclosures contained therein; email by Mr. Giseby to the HOHP dated 14th July 2014 together with letter by the Applicant to the HOHP contained therein; letter by the Respondent to the HOHP dated 25th July 2014 together with enclosures contained therein; email by the Applicant to the HOHP dated 5th September 2014.

Preliminary Issues

1. Failure by the Applicant to Comply Fully with the Direction

The Committee raised with the Applicant the incomplete response by the Respondent to the Direction which had been issued by the Committee on 7th April 2014. A copy of the said Direction is appended hereto and referred to for its terms. In particular, the Committee took issue with the fact that the Applicant had failed to produce the relevant expert reports as directed by Section 3 of the Direction. The Applicant and Mr. Giseby confirmed that although they had instructed Peter Cox and Company to attend the property, no written report was available from this company.

Despite the lack of full response to the Direction, the Committee took the decision that the hearing could proceed at this stage as the Applicant and Mr. Giseby were adamant that there were no expert reports available in respect of the property.

2. Did the hearing relate to the property at Wellington Street only?

In documents forwarded to the HOHP by the Applicant, the Applicant also made reference to a property at Murdieston Street in Greenock which also seemed to be the source of dispute between the Applicant and the Respondent. The Applicant confirmed to the committee that the hearing and present application was in respect of the property at 10 Wellington Street only.

3. Receipt of the Statement of Services

In his application to the HOHP, the Applicant had advised that he had not received a Statement of Services from the Respondent. However, the committee referred the Applicant to a copy letter he had provided to the HOHP and which was before the committee at the hearing. This copy letter was dated 14th May 2013 and had been sent by the Respondent to all of the owners at 10 Wellington Street enclosing a copy of the Respondent's Statement of Services. On the copy letter provided to the committee by the Applicant, the word "received" was handwritten at the top of the letter. The Applicant confirmed that he had received the Statement of Service and therefore did not wish to insist on the breach of Section 1 of the Code he had alleged in his application to the HOHP.

The Legal Basis of the Complaints

The Applicant complains under reference to Sections 1, 2.3, 2.4, 2.5, 6.1, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 6.8, 7.1 and 7.2 and to a breach of the property factor's duties (as defined by Section 17 subsection 5 of the 2011 Act).

The Code

The elements of the Code relied upon in the application provide:-

"1. You must provide each 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 you and the homeowner. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code. You must provide the written statement: to any new homeowners within four weeks of agreeing to provide services to them; to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage; to existing homeowners within one year of initial registration as a property factor. However, you must supply the full written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies); to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement.

2.3 You must provide homeowners with your contact details, including telephone number. If it is part of the service agreed with homeowners, you must also provide details of arrangements for dealing with out-of-hours emergencies including how to contact out-of-hours contractors.

2.4 You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).

2.5 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 (Section 1 refers).

6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.

6.2 If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs, wherever possible.

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 competitive tendering exercise or use in-house staff.

6.4 If the core service agreed with homeowners includes periodic property

inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.

6.5 You must ensure that all contractors appointed by you have public liability insurance.

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.

6.7 You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.

6.8 You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.

7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.

The Factual Complaints

There are a variety of these and they will be addressed in order of the alleged breaches of the Code.

1. Section 1 Written Statement of Service

This alleged breach has already been addressed under Point 3 of "Preliminary Issues" above. Given that the Applicant confirmed that he had in fact received a copy of the written Statement of Services from the Respondent by letter dated 14th May 2013, the committee finds that the Respondent did not breach Section 1 of the Code.

2. Breaches of Sections 2.3, 2.4 and 2.5 of the Code

In the course of giving evidence, the Applicant very helpfully confirmed that he did not wish to insist on the alleged breaches of Sections 2.3, 2.4 and 2.5 of the Code. The Applicant stated that the Respondent had not breached these particular sections of the Code. Given the foregoing, the committee finds that the Respondent did not breach Sections 2.3, 2.4 and 2.5 of the Code.

3. *Breaches of Sections 6.1 and 6.2*

Once again, the Applicant helpfully confirmed that he did not wish to insist on the alleged breaches Sections 6.1 and 6.2 of the Code. He confirmed in evidence that the Respondent had complied with these Sections. In light of this, the committee finds that the Respondent did not breach Sections 6.1 and 6.2 of the Code.

4. *Breaches of 6.3, 6.4, 6.5, 6.6, 6.7 and 6.8*

The Applicant confirmed in his evidence that he wished to insist on these alleged breaches of the Code. However, neither the Applicant nor his property manager, Mr. Giseby, provided any evidence to the committee that the Respondent had breached any of these particular sections of the Code. The essence of the Applicant's complaint against the Respondent is that the Respondent failed to take action in respect of water ingress into the basement of the property and failed to resolve long term water damage as a result. No evidence was led before the committee to substantiate these alleged breaches. As a result, the committee finds that the Respondent did not breach Sections 6.3, 6.4, 6.5, 6.6, 6.7 and 6.8 of the Code.

5. *Breaches of 7.1 and 7.2*

In his the evidence, the Applicant confirmed that he had never received a copy of the Respondent's complaints procedure nor had the Respondent ever advised him how to apply to the HOHP. Mrs. Gallacher, for the Respondent, confirmed that the complaints procedure had not been sent to the Applicant. Mrs. Gallacher also accepted that in her correspondence with the Applicant and Mr. Giseby, she had not provided the Applicant with details of how the Applicant could apply to the HOHP. Mrs. Gallacher's explanation was that she had simply not treated the Applicant's complaint as a complaint in terms of procedure. However, the committee finds that the Respondent has breached Sections 7.1 and 7.2 of the Code by failing to provide the Applicant a copy of the complaints procedure and by failing to provide the Applicant details of how to apply to the HOHP.

6. *Failure to carry out the property factor's duties*

The Applicant's application form to the HOHP alleges a breach of these duties without specifying how he believed the Respondent had breached them. As a result, in terms of point 4 of the Direction issued by the committee on 7th April 2014, the Applicant was directed to state how he believed that these duties had been breached. By email dated 9th May 2014, Mr. Giseby sent to the HOHP an undated submission by the Applicant which sought to address the issue of the alleged breach of the property factor's duties. In essence, the Applicant states in his submission that the Respondent failed to address the issue of water ingress in the basement of the property over a number of years. The Applicant alleged that the Respondent has

failed to address the water ingress problem since the Respondent was first made aware of it around 2010 and 2011 until the end of their tenure as factors for the property. The Applicant's position is that the Respondent failed to offer any solution to the water ingress problem.

In the course of giving evidence, the Applicant stated that the Respondent had failed to address the water ingress problem despite receiving complaints about this on several occasions over a number of years. However, the Applicant was clear in his evidence that he has spent the vast majority of the period over which the complaints have taken place living and working abroad in places such as Mongolia. The Applicant accepted that he could be difficult to contact as communication in countries such as this could prove difficult. Furthermore, the Applicant accepted that at one point his email account appeared to have been hacked making it very difficult for the Respondent to make contact with him. As such, Mr. Giseby, the owner of Homefinders Inverclyde Limited t/a Homefinders Estate and Letting, acted as letting agent for the Applicant's properties. Mr. Giseby gave evidence confirming that he had acted as agent for the Applicant since late 2011.

However, the committee noted that the extent of Mr. Giseby's authority to act on behalf of the Applicant was not clear. On the one hand, Mr. Giseby gave evidence stating that he corresponded with the Respondent by phone and email on behalf of the Applicant. On the other hand, the Applicant advised that Mr. Giseby's role was simply to deal with tenants and any issues arising out of the tenants. It was clear to the committee that Mr. Giseby's role extended de facto beyond dealing with issues arising from tenants. Mr. Giseby, Mrs. Gallacher and Mr. Robinson all gave evidence which demonstrated that Mr. Giseby was in essence the primary point of contact for the Respondent when dealing with issues arising out of repairs and maintenance.

Mr. Giseby was, in the view of the committee, less than clear when giving evidence. When queried about his role by the committee, he advised that he had always been the agent for the Applicant in respect of his ground floor property at 10 Wellington Street but that he had advised the Respondent by letter that he would no longer have anything to do with the Applicant's basement property, known as 10A Wellington Street, and that the Respondent should correspond directly with the Applicant in respect of 10A. However, by letter of 14th September 2012 to Respondent, Mr. Giseby advised that all correspondence in respect of these two properties should be sent directly to the Applicant. As a result, the committee found Mr. Giseby's evidence inconsistent and unclear and at odds with the documentation which had been provided to the HOHP and which was before the committee.

The committee also found the evidence of the Applicant at times less than clear or consistent. For example, the Applicant could recall small and insignificant details of the general state of the property at the time he purchased it in 2008 and yet could not recall if the surveyor whom he stated had carried out the survey on the property on his behalf had mentioned the chance of dampness in 10A Wellington Street, given the low lying position of this property.

The Applicant was clear that he had not obtained a report from Peter Cox and Company in respect of the water ingress problem in the basement as this would have cost him £90 plus VAT. However, the Applicant was content to pay £20 every four to six weeks by way of an electricity card to maintain the running of a pump which he has had placed in the property at 10A.

In contrast, the committee found the evidence of Mrs. Gallacher and Mr. Robinson to be clear and consistent. In terms of the time line in respect of the complaints about the water ingress, Mrs. Gallacher was clear that the Respondent first received a phone call from Mr. Giseby on 13th October 2011 advising that there was a problem with a buildup of rubbish and sewage in the basement of the property. The rubbish was removed on 26th October 2011.

Mrs. Gallacher confirmed that the Respondent instructed CES Drainage to attend the property on 28th October 2011 to investigate the waste leak, clear the water and disinfect the area. CES Drainage attended on 28th and 30th October 2011 and carried out the necessary works at that time. The Respondent thereafter sent out a letter to the owners of the property on 28th November 2011 explaining the works carried out. Mrs. Gallacher also referred to the letter which had been sent to the Applicant dated 21st October 2011 by Environmental Services of Inverclyde Council, a copy of which was before the committee.

Mr. Robinson advised in evidence that a meeting took place at the property with him, Mr. Giseby and Richard Mowat of Environmental Health from Inverclyde Council. He advised that it was agreed that the floors in 10A should be lifted and the plaster board removed to try and allow for the identification of the source of the water ingress. It was agreed that Mr. Giseby would contact the Respondent to arrange for the Respondent/contractors to have access to 10A. Mr. Giseby failed to contact the Respondent to arrange for access. Both Mrs. Gallacher and Mr. Robinson were clear that they heard nothing further from either Mr. Giseby or the Applicant until they received an email from the Applicant on 9th March 2012 wherein the Applicant advised that he and his agent had been having further investigations carried out into

the water ingress issue. In terms of this email, the Applicant apparently seemed positive with the role of the Respondent at that time.

Both Mrs. Gallacher and Mr. Robinson were clear in evidence that they heard nothing further from either the Applicant or Mr. Giseby until they received the next email from the Applicant dated 20th May 2012. They were both clear that they had received no further communication and that they still awaited hearing from Mr. Giseby regarding arranging access to 10A to try and find the source of the water ingress.

Mr. Robinson advised that he replied to the Applicant's email of 20th May 2012 by email of 23rd May 2012 wherein he confirmed what had been agreed at the meeting in December 2011 with Mr. Mowat and Mr. Giseby. A copy of this email was produced and seemed to the committee to be helpful and appropriate in its terms. However, the Applicant by return email on 23rd May 2012 advised that he was unhappy, would instruct Mr. Giseby to withhold all further payment to the Respondent and that the Respondent would hear directly from his lawyer.

Mrs. Gallacher and Mr. Robinson gave evidence to the effect that the Respondent remained willing to try and get to the source of the water ingress problem but that the Applicant refused to allow them access to 10A for this purpose when the floors were lifted and the plaster removed. At the one point the plaster was removed, it was replaced three days later by workmen instructed by Mr. Giseby/the Applicant effectively preventing the Respondent from having access to 10A to try and identify the source of the water ingress.

There was a wealth of subsequent correspondence between the parties before the committee. It was clear from this extensive correspondence that the Respondent remained willing to work with the Applicant to try and identify the source of the water ingress in the basement of the property. However, from the correspondence, it is equally clear that from the terms of the Applicant's email of 23rd May 2012 to the Respondent onwards, the Applicant became unwilling to enter into useful and productive dialogue with the Respondent.

The committee was particularly impressed with Mr. Robinson when he was giving evidence. He was clear, consistent and knowledgeable about his area of business, having been employed by the Respondent for 20 years as a Property Inspector. He was equally clear that the result of the meeting with Mr. Mowat and Mr. Giseby in December 2011 was that access to the property at 10A would be required to try and

identify the source of the water ingress. Mr. Giseby, in his evidence, tried to cast doubt on this outcome. Mr. Giseby also claimed that he had attempted to contact the Respondent over that Christmas period to arrange access as he claimed there was further water ingress but the Respondent was closed for Christmas and there was no means by which to leave a voice message. Both Mr. Robinson and Mrs. Gallacher were entirely clear that there was an answering machine and, if Mr. Giseby had phoned the Respondent's office, he would have been able to leave a message which would have been responded to. Mr. Robinson was clear, on the basis of his 20 years of experience as a property inspector, together with the recommendation of the Environmental Services officer, that clear access would be required to 10A to try and identify the source of the water ingress. He advised that, to date, the Applicant had failed to provide such clear access.

In short, it was clear to the committee on the basis of all of the documentation before it together with the evidence provided at the hearing from all who attended that the Respondent had responded timeously at every step of this process from 2011 onwards when the issue of the water ingress was first reported to the Respondent. The Respondent has instructed contractors timeously, worked closely with Environmental Services of Inverclyde Council and attempted at every step to work with the Applicant and Mr. Giseby to try and identify the source of the water ingress. In contrast, it was clear to the committee that from the 23rd May 2012 onwards, the Applicant was apparently unwilling to work with the Respondent to identify the source of the water ingress. The committee acknowledges that the geographical distance in which the Applicant more often than not found himself as a result of working abroad together with Mr. Giseby's lack of consistency and clarity in relation to this whole issue may have added to the Applicant's rather unfortunate and unhelpful attitude to the water ingress problem at the property. However, despite the Applicant's opposition, the Respondent remained willing to work with him to try and find the source of the water ingress.

Given all of the foregoing, the committee finds that the Respondent did not breach its property factor's duties.

Observations

The committee recommends that the Respondent undertakes a review of its written Statement of Services, in particular, in relation to the complete lack of detail in the section of that document relating to the Respondent's complaints procedure. It is simply not sufficient at the moment.

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 committee records that the Respondent did breach the code in relation to its complaints procedure (Sections 7.1 and 7.2 of the Code).

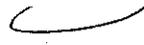
Appeals

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.

Signed.....

Date *27th Oct 2014*

Patricia Anne Pryce



Chairperson