



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/13/0065

Re: 41 Dorchester Court, 1 Dorchester Place, Glasgow, G12 0BS ('the Property')

The Parties:

Mrs Linda Kirk-Wilson, 41 Dorchester Court, Dorchester Place, Glasgow, G12 0BS ('the homeowner')

Grant & Wilson, 65 Greendyke Street, Glasgow, G1 5PX ('the factor')

Committee members:

Jacqui Taylor (Chairperson) and Ian Mowatt (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 determined that, in relation to the Homeowner's application, the factor has complied with the Code of Conduct between 7th December 2012 and 22nd April 2013.

Background

1. The factor's date of registration as a property factor is 7th December 2012.
2. By application dated 22nd April 2013 the homeowner applied to the Homeowner Housing Panel ('the Panel') for a determination that the factor had failed to comply with:-
 - The sections of the Property Factor Code of Conduct pertaining to carrying out repairs and maintenance and
 - The Property Factor's duties.

The homeowner explained in her undated letter to The Panel Clerk, received by the HOHP Office on 22nd May 2013:

'She believed that the factor had not complied with Section 6.9 of the Code of Conduct in that they have failed to pursue a contractor to remedy faults in the service provided. She explained that Grant & Wilson maintain that because they were not the factor when the work was carried out they are not responsible for pursuing the contractor. Her view is that they are now factor and should pursue the matter with Redpath Bruce.'

She enclosed a copy of the report from Bromac dated 20th February 2012, addressed to Grant & Wilson. The section of the report relating to the wall in question states:

'We are led to believe that the wall to the left hand side of Garage entrance has been re-rough casted approximately 3 years ago.

It is our understanding that 4 of the 5 drainage channels were rough casted over and we would recommend that the Company who carried out the roughcasting be recalled to reopen the drainage channels so that any excess ground water can drain away adequately.

As the garage is merely used for storage and given that there is not physical water penetrating the area we do not see any real need to carry out remedial work at this time.

We would however recommend that the area be monitored and should water be found to be penetrating the area it may prove necessary to install a base drainage channel.'

3. By Notice of Referral dated 14th June 2013 the President of the panel intimated that she had decided to refer the application to a Homeowner Housing Committee ('The Committee').
4. The Committee issued a Preliminary Direction under paragraphs 13(1) and 13(3)(d)(i) of the Regulations providing as follows :-

'Considering that the Committee require a copy of the burden writs pertaining to the Property and a location plan showing the exact location of the wall requiring repair referred to in the application The Committee directs the homeowner to produce to the Homeowner Housing Panel within 14 days either:

- (1) *Full copies of the deeds referred to for burdens in the title deeds of the Property ('the burden writs') and an OS map showing the exact location of her property and the boundary wall requiring repair referred to in the application or*
- (2) *Considering that the titles of the other flats in the block of which The Property forms part will refer to the same burden writs and it would be more cost effective for the homeowner to obtain a copy of a land certificate of one of the other flats the Committee directs that it*

will accept as an alternative to Direction (1) above a full copy of a Land Certificate of one of the following properties 37,38,39,40 or 42 Dorchester Court to include the burden writs and an annotated copy of the title plan of that land certificate to be annotated to show the exact location of the boundary wall requiring repair referred to in the application.

The Homeowner's application states that she considers that the factor has breached Section 6.9 of the Code of Conduct for Property Factors in relation to matters that occurred in 2008 and 2011. Regulation 28 of the Homeowner Housing panel (applications and decisions) (Scotland) Regulations 2012 provide:

'28(1) subject to paragraph (2), no application may be made for determination of whether there was 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.'

Therefore the Committee can only consider any failures that have taken place between the date of the factor's registration in the register of property factors (which was 7th December 2012) and the date of the Homeowner's application (which was 22nd April 2013).

The homeowner is directed to provide The Homeowner Housing Panel within 14 days reasons as to why it is competent for them to consider the alleged breaches of the code that occurred in 2008 and 2011.'

In response to the Preliminary Direction the homeowner sent to the HOHP offices:

1. *A copy of one of the deeds referred to for burdens in her titles, namely the Disposition by Frank Andrew Weir Mickel with consents therein mentioned in favour of Nationwide Building Society dated 21st and 24th February and recorded GRS (Barony and Regality of Glasgow) 7th and March 1961.*

2. *Written submissions stating:*

'The dispute which has arisen with Grant & Wilson and the delay in dealing with this problem is a direct result of a series of failures of a number of firms to carry out their duties competently or timeously. I believe that the current dispute needs to be considered in conjunction with the previous actions in 2008 and 2011 to see the matter in perspective and to understand why it has dragged on for so long.

In 2008 the Sun Alliance Building Society refused to accept the claim for rebuilding of the wall for 4 months despite the fact that the claim was perfectly genuine. They eventually agreed to the rebuilding after representations from Redpath Bruce and several owners. Following the rebuilding Redpath Bruce were notified immediately that the drainage was not adequate. The factor faxed the builder Hugh Scott and took no further action. The builder did not respond. They did not pursue the matter. They failed to carry out their duty to deal with the unsatisfactory work or to communicate with me.

In 2011 when it became apparent that damp had become a major problem with the wall itself which had started to crumble and inside my garage which had now become very damp Grant & Wilson contacted Redpath Bruce about the problem. Contact was made with the builder Hugh Scott who denied responsibility for the problem. Neither factor challenged the builder's rebuttal. At no time was the builder asked to come out and inspect the wall. Both factors

failed to deal with the problem. Redpath Bruce had failed to deal with the problem for the second time. Grant & Wilson failed to inform me of the contact that had been made with Redpath Bruce and of their decision to ignore the problem. They failed in their duty to communicate with me. It was not until a year later that I was told about the contact with Redpath Bruce.

The actions in 2008 and 2011 when both factors had opportunities to deal with the problem have contributed significantly to the long delay and failure to deal with the problem and I think they are very relevant to the current situation. I would ask that they be taken into account when the situation is assessed.'

5. The HOHP offices provided the Committee and the parties with a copy of the Land Certificate of one of the neighbouring flats in the same block as the Property which included a title plan and full copies of the deeds referred to for burdens.
6. Following service of the Notice of referral, the factor made written representations as follows:

- Letter dated 27th June 2013.

'We note that section 17 of 2011 Act provides that a factor 'must have refused to resolve, or unreasonably delayed in attempting to resolve, the homeowners concern.' It is our position that we have not refused to resolve or delayed in attempting to resolve this owner's concern and we should be afforded the opportunity to do so by means of following our complaints procedure.

Our written statement of Services was provided to the owner as part of our quarterly accounting when the relevant documentation was enclosed for each owner and includes details of our complaints procedure and how homeowners may make an application to the Homeowner Housing Panel if they remain dissatisfied following completion of this procedure.

We have not been afforded the opportunity to resolve the Owner's concerns under our complaints procedure. It is clear from review of our paperwork that response was provided to Mrs Linda Kirk- Wilson on 13th March 2013 and an application was made on 23rd April 2013.

From our service standards which we have mentioned above, there is a clear line of procedure to ensure that our robust complaints handling is completed and that this relates to step three which states that in the unlikely event that Owners remain dissatisfied, they may refer matters to the Managing Director.

As part of this process, we would meet with the Owner to discuss and resolve matters, however, this section has been by-passed.

We would therefore invite the panel to reject the owner's application at this time in terms of Section 18(2) of the 2011 Act in order to afford us a reasonable opportunity to resolve their dispute.'

- Letter dated 11th July 2013.

Which states inter alia:

' The owner has not completed our complaints procedure in respect of Manager Director level as previously outlined in our letter of 27th June 2013.

Therefore, all steps to resolve have not been reasonably allowed by us as factors and consequently we consider the application to be premature.

In addition, the nature and extent of the enquiry relates to an issue which was undertaken four or five years ago by the Property factor who was in place at that time. The factor has changed twice since that time.

The owner in question is the only one who has made a comment on the original repair and has not substantiated the claim.

We attach for your attention confirmation of alternative Contractors regarding the condition of the wall which contradicts the underlying basis of the Owner's complaint that the wall requires to be replaced.

- *Letter from John Fulton (Plumbers) Limited dated 9th July 2013.*

Which letter states:

'After our most recent visit to the above mentioned property and inspection of the retaining wall to the rear access lane, we find that the back of the retaining wall (soil side) has not had a liquid damp proof membrane or other form of DPM material applied to prevent water saturation passing through the wall and would be susceptible to frost damage, also that there are a lack of drainage holes through the wall to allow the water to be cleared from the rear of the wall.

There are signs of water penetration/saturation from the lower part of the wall, resulting in the roughcast delaminating from the wall.

Since retaining walls should generally be designed with a well drained granular backfill, if surface drainage is allowed to penetrate and accumulate in the backfill, the pressure against the wall can be doubled and could result in wall failure; this pressure could be alleviated at the bottom of the wall by means of series of weep holes along the full length of the wall.'

7. Hearings

Two hearings took place in respect of the application on 28th August 2013 at The Europa Building, 450 Argyle Street, Glasgow, G2 8LH and on 24th September 2013 at The IET Glasgow, Teacher Building, (Berguis Room, 2nd Floor), 14 St Enoch Square, Glasgow, G1 4DB. At both hearings the Homeowner appeared on her own behalf and the factor was represented by Amanda Gilmour, associate Director of Grant & Wilson and Linda Thomson, senior property Manager with Grant & Wilson.

The homeowner clarified that her application is only concerned with the fact that the factor failed to pursue the builder Hugh Scott Builders & Slaters Limited, who rebuilt the retaining wall in question in June/July 2008 and require them to re-open the drainage channels referred to in Bromac's report dated 20th February 2012. The Committee accepted that the application was restricted to considering whether the factor had complied with Section 6.9 of the Code of Conduct.

Jurisdiction

As a preliminary matter the Committee addressed the matter of jurisdiction. The Committee advised the parties of the terms of the Homeowner Housing Panel (applications and decisions) (Scotland) Regulations 2012, clause 28(1) which provides as follows:

'28(1) subject to paragraph (2), no application may be made for determination of whether there was 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.'

Consequently, as the application relates to the factor's failure to comply with the Code, the Committee could only consider any failures between the date of the factor's registration in the register of property factors, which was 7th December 2012, and 22nd April 2013, which was the date of the Homeowner's application.

The Committee asked for the parties submissions in relation to the terms of the factor's letter of 11th July which stated that the homeowner had not complied with the factor's complaints procedure.

Amanda Gilmour explained that the homeowner had not complied with the complaints procedure set out at paragraph 7 of their Terms of Service & Delivery of standards. She had not followed the last step which states: If you are dissatisfied with this response received you can then place your complaint in writing to: Grant & Wilson Property Management, The managing Director G & W, 65 Greendyke Street, Glasgow, G1 5PX. You can write to Grant & Wilson Property Management Limited.' Consequently she was premature in applying to the HOHP.

The Committee referred Amanda Gilmour to her letters dated 6th February and 13th March.

The letter of 6th February concludes by stating:

'As mentioned above it is not our remit to liaise with previous Property Management Companies or contractors.'

The Letter of 13th March concludes by stating:

'We can only suggest that you raise a complaint direct with Redpath Bruce in this regard as we can no longer assist in this matter.'

The Committee asked Amanda Gilmour why these two letters did not direct the homeowner to the last section of the Complaints Procedure.

She explained that she considered that they did not have a duty to deal with this matter and consequently they did not believe that the homeowner would have an opportunity to take the matter further.

The homeowner emphasised that the last section of the complaints procedure states that if you are dissatisfied with this response you CAN then place your complaint in writing'. The complaints procedure does not say 'must'.

The Committee considered that as the factor's letter of 13th March 2013 stated that the factor was no longer able to assist in this matter the homeowner was left with no alternative but to apply to the Homeowner Housing Panel.

The Committee determined that they have jurisdiction to deal with the homeowner's application.

Factual Background

1. The application concerned a retaining wall that was the common property of the flats numbers 37 to 42 Dorchester Court, 1 Dorchester Place, Glasgow G12 0BS.

2. The wall in question was damaged in a storm in 2008. A fence had been cemented into the wall and the wind had torn the fence out of the concrete fixings in the wall with the result that the wall had fallen down.

3. The factor at the time was Redpath Bruce and they intimated an insurance claim to Sun Alliance. Sun Alliance did not initially agree to accept the claim but they eventually agreed to repair the wall.

4. The original wall had a number of weep holes.

5. The estimate for the repair from Hugh Scott Builders & Slaters Limited was dated 21st January 2008 and was addressed to Messrs Redpath Bruce.

The estimate stated:

'Further to our inspection we offer to carry out the following works for the sums indicated, as per conditions overleaf:

Storm Damage

- 1. Dismantle fence and lay aside for re-use at gable property.*
- 2. Re-build all wall using concrete blocks.*
- 3. Apply two coats render to wall with a roughcast finish.*
- 4. Supply and install Marshalls concrete copes.*
- 5. Reinstate fence using existing fence.*
- 6. Clean up and remove debris from site.*

For the sum of One Thousand and Seven Hundred and Thirty Five pounds (£1735) plus VAT.

All our work complies with Health and Safety regulations and whilst care will be taken, no responsibility will be accepted for garden plants, TV or radio aerials, satellite dishes, telephone wires or street lighting.

Our price will remain open for a period of 60 days for your acceptance and thereafter until material or labour charges fluctuate.'

The homeowner confirmed that the description of the works in the estimate was correct in so far as it related to the repair to the wall.

6. Hugh Scott Builders & Slaters Limited were not aware of the existence of weep holes in the original wall when they reinstated the wall. Their letter to Redpath Bruce dated 17th November 2011 states:

'We were not aware that any other weep hole existed to this wall as this was demolished when we costed this wall, however the reason for one weep hole is this is the lowest point, however, this would still not stop water percolating through the brickwork no matter how many weeps are fitted as this retains soil.'

7. Redpath Bruce stopped factoring the Property on 1st July 2008 when Morag Davis took over the factoring. Morag Davis stopped factoring the property on 1st April 2009 when Grant & Wilson took over the factoring.

8. When Grant & Wilson took over the factoring of the property they wrote to the owners on 24th July 2009 inviting them to tell Grant & Wilson of any outstanding matters.

9. Amanda Gilmour advised the Committee that only one response was received to that letter and it did not relate to the wall.

10. Scott Robertson of Grant and Wilson wrote to the homeowner on 16th September 2011 acknowledging that they had been instructed to investigate water ingress to the garages and drainage from the wall to the gable end.

11. On 8th December 2011 the factor wrote to the homeowner sending her a copy of the letter from Hugh Scott Builders & Slaters Limited to Redpath Bruce dated 17th November 2011. That letter stated *inter alia*: *'they were not aware that any other weep hole existed to the wall as it was demolished when they costed the wall...'*

12. The factor advised that they were unable to take the matter further on behalf of the owners as these repairs were instructed and completed by the previous management company for the property and they suggested that she contact Redpath Bruce or Hugh Scott direct in this regard. The homeowner did not receive that letter until she was provided with a copy in October 2012. The Committee accepted the homeowner's evidence on this point.

13. Dean Currie of Grant & Wilson wrote to the homeowner on 3rd October 2012 and stated *inter alia*: 'We would advise as Grant and Wilson Property Management Limited were not managing agents of the property at the time of the wall rebuild we can take no action in respect of any work that was carried out under the management of the previous factor.'

14. Lorraine Killin of Grant & Wilson wrote to the homeowner on 31st October 2012 and stated *inter alia*: 'The boundary wall was built by a contractor through a previous factor. We have been in touch with the contractor who has confirmed that it was their understanding that there was only one weep hole and as such, Grant & Wilson Property management limited cannot be held liable for a matter over which we had no instruction nor involvement at the time of the work being undertaken.'

15. Lorraine Killin of Grant & Wilson wrote to the homeowner on 22nd November 2012 and stated *inter alia*: 'We can reiterate that the problem with the boundary wall will have to be taken up with the previous factor as we had no involvement in this and cannot be held liable.'

16. There are two reports on the condition of the wall.

16.1 The first is a report from Bromac dated 20th February 2012. The report was in relation to various matters. In relation to the wall it states:

'We are led to believe that the wall to the left hand side of the garage entrance has been re-rough casted approx. 3 years ago.

It is our understanding that 4 of the 5 drainage channels were rough casted over and we would recommend that the Company who carried out the roughcasting be recalled to reopen the drainage channels so that any excess ground water can drain away adequately.'

16.2 The second is a report from John Fulton (Plumbers) Limited dated 9th July 2013. The report states:

After our most recent visit to the property and inspection of the retaining wall to the rear at the access lane, we find that the back of the retaining wall (soil side) has not had a liquid damp proof membrane or other form of DPM material applied to prevent water saturation passing through the wall and would be susceptible to frost damage, also that there are a lack of drainage holes through the wall to allow the water to be cleared from the rear of the wall.

There are signs of water penetration/ saturation from the lower part of the wall, resulting in the roughcast delaminating from the wall.

Since retaining walls should generally be designed with a well drained granular backfill, if surface drainage is allowed to penetrate and accumulate in the backfill, the pressure against the wall can be doubled and could result in wall failure; this pressure can be alleviated at the bottom of the wall by means of series of weep holes along the full length of the wall.'

The parties were largely in agreement as to the factual background. The disagreement between the parties concerned whether or not the factor had breached the terms of section 6.9 of the Code of Conduct.

Section 6.9 of The Code of conduct.

Section 6.9 of The Code of Conduct states:

'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 factor.'

The homeowner submission is that the factor has not pursued the original contractor and consequently the factor is in breach of section 6.9 of the Code of Conduct.

In her view the factor is simply saying that they are excused from taking further action. She reflected that she doesn't consider it would be a big job to drill the required weep holes.

The factor's submission is that the work was carried out in 2008 and the factor cannot be held to be in breach of section 6.9 of the Code of conduct as the factor cannot force the original contractor to inspect and repair the original job.

Amanda Gilmour explained that Grant & Wilson wrote to the owners on 24th July 2009, when they became factors, and invited the owners to tell them of any outstanding issues. She explained that they received no intimation that the retaining wall was an outstanding issue. The factor did not know of the issues with the wall until 2011. Redpath Bruce forwarded to them a letter Redpath Bruce had received from the contractor dated 17th November 2011 advising that the contractor cannot be held responsible. This was forwarded to the owners with a letter from Grant & Wilson dated 8th December 2011. Amanda Gilmour provided the Committee with a copy of that letter before the continued hearing held on 24th September 2013.

Amanda Gilmour explained that Grant & Wilson cannot force the contractor to go back and rectify the wall as they did not instruct the original repair.

In her view the Code of Practice and Grant & Wilson's terms of service do not apply to inherited issues. The owners need to take legal action to pursue the matter. As factors they cannot force the work to be done as they never instructed it. The Terms of service say that they will investigate unsatisfactory works. They have investigated the works.

Decision

The Committee acknowledged that they can only consider whether or not the factor has breached section 6.9 of the Code of Conduct from 7th December 2012.

The factor has not pursued either Hugh Scott Builders & Slaters Limited or Redpath Bruce regarding this matter since September 2011. Since that time they have consistently advised the homeowner that they were unable to take the matter further.

The Code of Conduct states that the factor must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. The Code of Conduct does not restrict this obligation to current contracts.

The Committee considered the obligation on the factor to pursue contractor's that they had not instructed.

The Committee acknowledged that the contract for the original repair to the wall was between Redpath Bruce and Hugh Scott Builders and Slaters Limited and was dated 21st January 2008. The factor took over from the previous factor Morag Davis as they had gone out of business. There had been no formal handing over of ongoing contracts. This was confirmed by the letter from the factor to the owners of Dorchester Court dated 24th July 2009 which explained that *'as Morag Davis Limited had gone out of business it was difficult for them to retrieve all relevant information and they asked that the owners advise them of outstanding issues'*.

Therefore there was no contract between the factor and either Hugh Scott Builders & Slaters Limited or Redpath Bruce in relation to the wall.

The Committee acknowledged that the factor had asked Redpath Bruce to contact Hugh Scott Builders & Slaters Limited regarding the weep holes in the wall. Hugh Scott Builders & Slaters Limited replied to Redpath Bruce by letter dated 17th November 2011 advising that *'they were not aware that any other weep hole existed to this wall as it was demolished when they costed the wall'*. That letter was forwarded by the factor to the owners on 8th December 2011, albeit the homeowner did not receive her copy of the letter until 2012. The factor's letter to the homeowner dated 31st October 2012 explained that *'they had been in touch with the contractor who has confirmed that it was their understanding that there was only one weep hole and as such Grant & Wilson cannot be held liable for a matter over which they had no instruction nor involvement at the time of work being undertaken.'*

As there was no contract the Committee accepted that the factor could not do anything further to pursue this matter.

Notwithstanding the fact that there was no contract between the factor and either Hugh Scott Builders & Slaters Limited and/ or Redpath Bruce the Committee considered whether there was evidence that the reconstructed wall had been inadequately built.

They acknowledged that the terms of Hugh Scott Builders & Slaters Limited's estimate dated 21st January 2008 did not refer to weep holes being built into the reconstructed wall. It was not therefore a requirement of the contract between Hugh Scott Builders & Slaters Limited and Redpath Bruce to build weep holes into the reconstructed wall.

Also no evidence had been produced to the effect that the wall was inherently defective due to the lack of weep holes. The report from Bromac recommended that *'the Company who carried out the roughcasting be recalled to reopen the drainage channels so that any excess ground water can drain away adequately'*. This was simply a recommendation and was not a finding that the wall was inherently defective. The report from John Fulton (Plumbers) Limited dated 9th July 2013 commented on the absence of a *'liquid damp proof membrane or other form of DPM material'* but did not conclude that the wall was inherently defective.

Consequently the lack of weep holes was not a requirement of the original contract and has not been proven to be an inherent defect and therefore does not result in the reconstruction of the wall being inadequate.

Therefore the factor has not failed to comply with section 6.9 of the Code of Conduct.

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.'

J Taylor

Signed

.....Date 8th October 2013

Chairperson