

NOTICE BY THE HOMEOWNER HOUSING COMMITTEE

UNDER

PROPERTY FACTORS (SCOTLAND) ACT 2011

(the "Act")

hohp Ref: HOHP/PF/13/0254

Re Landscape Contract Area – Holmes Park Development, Joseph Cumming Gardens, Broxburn, West Lothian (the "Landscaped Area")

The Parties:-

Mr David McLeod, 13 Joseph Cumming Gardens, Broxburn, West Lothian EH52 5AN (the "Homeowner")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD (the "Factor")

Notice issued under Section 19 (1) (b) of the Property Factors (Scotland) Act 2011 (the "Act") by a Committee of the Homeowner Housing Panel in an Application by the Homeowner under Section 17 of the Act.

Committee Members

Jamie Millar (Chairman) and Colin Campbell (Housing Member).

Notice

The Committee proposes to make the following Property Factor Enforcement Order:-

Within six weeks from the date of issue of the Property Factor Enforcement Order the Factor must obtain from Lawsons Premier Groundcare or others a copy of the landscaping contract issued by the Developer appointing Lawsons Premier Groundcare as the landscaping contractor for Holmes Park Development, Joseph Cumming Gardens, Broxburn, West Lothian together with any contract amendments and provide a copy of the landscaping contract and any amendments to the Homeowner and to the Homeowner Housing Panel at no cost to the Homeowner or to the Homeowner Housing Panel.

Right of Appeal

The parties' attention is drawn to the terms of Section 22 of the Act regarding their right to appeal and the time limit for doing so. Section 22

provides:-

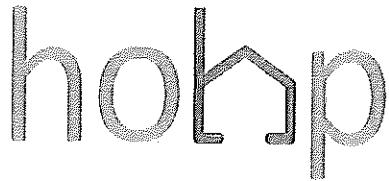
- “..(1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or a homeowner housing committee.
- (2) an appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made.”

Jamie Millar

Chairman

31/3/2014

Date



DETERMINATION BY HOMEOWNER HOUSING COMMITTEE
STATEMENT OF DECISION OF THE HOMEOWNER HOUSING
COMMITTEE

UNDER

THE HOMEOWNER HOUSING PANEL (APPLICATIONS AND DECISIONS)
(SCOTLAND) REGULATIONS 2012 (the "Regulations")

hohp Ref: HOHP/PF/13/0254

Re Landscape Contract Area – Holmes Park Development, Joseph Cumming Gardens, Broxburn, West Lothian (the "Landscaped Area")

The Parties:-

Mr David McLeod, 13 Joseph Cumming Gardens, Broxburn, West Lothian EH52 5AN (the "Homeowner")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD (the "Factor")

Decision issued under Section 19 (1) (a) of the Property Factors (Scotland) Act 2011 (the "Act") by a Committee of the Homeowner Housing Panel in an Application by the Homeowner under Section 17 of the Act.

Committee Members

Jamie Millar (Chairman) and Colin Campbell (Housing Member).

Background

1. By application dated 8 August 2013 and received on 9 August 2013 the Homeowner applied to the Homeowner Housing Panel ("HOHP") for a determination whether the Factor had failed to comply with the Property Factors Duties (the "Duties") and/or had failed to comply with the Property Factors Code of Conduct (the "Code") in terms of the Act.
2. The application by the Homeowner alleged the following failings on the part of the Factor:-
 - 2.1 Breach of the Code in respect of:-
 - 2.1.1 Financial obligations – Section 3.3 of the Code; ("Complaint 1");
 - 2.1.2 Carrying out repairs and maintenance – Sections 6.3 and 6.6 of the Code; ("Complaint 2")
 - 2.2 Failure to carry out the Duties ("Complaint 3").

3. Following submission of the Homeowner's Application the HOHP entered into further correspondence with the Homeowner, the purpose of which was to clarify further details in relation to the nature and extent of the Homeowner's Application. The Application and all correspondence between HOHP and the Homeowner have been copied to the Factor.
4. By letters dated 11 December 2013 HOHP notified the Homeowner and the Factor that the President of HOHP had decided to refer the Application to a Committee of HOHP (the "Committee").
5. Following referral of the Application to the Committee the Factor submitted written representations dated 12 December 2013 and intimated that the Factor wished to have the application considered by written representations only. A copy of the Factor's written representations was provided to the Homeowner by HOHP.
6. Following referral of the Application to the Committee the Homeowner submitted written submissions dated 23 December 2013 and intimated that the Homeowner wished to have the application considered by written representations only. A copy of the Homeowner's written representations was provided to the Factor by HOHP.
7. The Factor submitted further written representations dated 7 January 2014, a copy of which was provided to the Homeowner.
8. The Homeowner submitted further written representations dated 16 January 2014, a copy of which was provided to the Factor.

Hearing

9. The Committee met at the HOHP office at Europa Building, 450 Argyle Street, Glasgow G2 8LH on 24 January 2014 to consider the issues by written representations only. Neither the Homeowner nor the Factor attended or was represented at the meeting.
10. Having considered the application, the Committee considered that it required further information to reach a conclusion. The Committee noted that Regulation 10 (1) permitted the Committee to make such inquiries as the Committee thinks fit for the purpose of exercising their functions under the Act and that Regulation 13 (1) permitted the Committee to give directions to the parties relating to the conduct or progress of the proceedings. The Committee resolved to continue the application and to issue the following direction in terms of Regulation 10 and Regulation 13.

Direction

11. The Factor was directed to provide to the Committee and to the Homeowner within 21 days the following information:

In the absence of the original contract documentation how does the Factor ascertain:-

- (a) that the correct landscaping works are charged for at the correct rates;
 - (b) that the landscape contractor is permitted under the contract to increase the charges for work done; and
 - (c) the date of termination of the landscape contract?
12. The Direction was issued to the Factor on 29 January 2014.
13. The response of the Factor dated 18 February 2014 was received by HOHP on 17 February 2014 and a copy was sent to the Homeowner on 19 February 2014.

Continued Hearing

14. The Committee resumed its consideration of the application on 26 March 2014. Neither the Homeowner nor the Factor attended or was represented.

Findings of Fact

15. The Homeowner and Mrs Jacqueline Anne McLeod are the proprietors of 13 Joseph Cumming Gardens, Broxburn, West Lothian EH52 5AN, (the "Property") their title being registered in the Land Register of Scotland under Title Number WLN42545.
16. The Property is subject to the title conditions contained in Land Certificate Title Number WLN42545 (the "Title Conditions").
17. In terms of the Title Conditions the Property has an equal right of common property in inter alia the Landscaped Area and is burdened with a liability to meet a 1/44th share of the cost of maintenance of the Landscaped Area.
18. The Factor has been duly appointed by the developer of the Holmes Park Development as the factor in terms of the Title Conditions.
19. The Factor was registered under the Act on 7 December 2012.
20. The landscape contractor was appointed by the developer of the Holmes Park Development prior to the appointment of the Factor.
21. In his letter of 2 October 2013 to HOHP the Homeowner withdrew Complaint 3.

Summary of written representations from the Homeowner

22. The Homeowner states that despite various requests for information on the landscaping aspect of the factoring service which the Factor has managed and charged for since March 2011 this information has not been forthcoming. The information requested included names of contractors invited to tender and prices received (excluding any commercially sensitive manner) all of which the Factor has failed to

provide.

23. The Homeowner considers that the Factor has failed to show transparency in the provision of the landscaping service and has failed to build trust in financial matters. The Homeowner considers that he does not know what he is paying for, how the charges are calculated and that no improper payment requests are involved. The Homeowner considers that there is insufficient clarity and transparency in the accounting procedures of the Factor. The Homeowner considers that the Factor has failed to supply supporting documentation and invoices or other appropriate documentation for inspection and copying when requested to do so.
24. The Homeowner considers that the Factor has failed to show how and why the Factor appointed the landscape contractor and has failed to make available all documentation relating to any tendering process for inspection by the Homeowner free of charge.

Summary of written representations from the Factor

25. The Factor's position is that the contract for the landscaping was awarded by the developer prior to the appointment of Factor. The Factor does not hold the documentation relating to the original tendering exercise carried out by the developer.
26. The Factor's position is that the Factor has provided all information relating to the current contract which the Factor has available.
27. The Factor has offered the Homeowner the opportunity to examine all invoices relating to any contract in the Factor's office following a prearranged appointment. Alternatively the factor has offered to send copies in the post for a charge of £10 plus VAT per invoice.

Reasons for Issue of the Direction

28. The Committee issued its direction to the Factor to assist the Committee in understanding how in the absence of any contract documentation the Factor was able to ascertain that the correct landscaping works are charged for at the correct rates, that the landscape contractor is permitted under the contract to increase the charges for work done and the date of termination of the landscape contract.

Factor's response to the Direction

29. The Factor responded to the Direction by stating that the Factor is confident that the correct landscaping works are charged for at the correct rates as the site is inspected on a regular basis, the Factor holds a plan which clearly defines all areas to be maintained and that

the Factor is satisfied that the rate being charged is fair having regard to similar developments of the size, type and nature in the Factor's portfolio.

30. The Factor states that none of the contracts held by the factor prevent contractors from proposing that rates are increased an annual basis. The Factor considers that the increase of 2.5% per year proposed by the landscape contractor is fair and reasonable. The Factor states that if the Factor considered a proposed increase to be unreasonable the Factor would retender the contract. The Factor stated that its contracts are on a monthly rolling basis unless specifically requested. The contracts can be terminated on one month's notice by either party.
31. The Committee does not consider that the response from the Factor provides the information requested in the Direction. The Factor's position is that the Factor holds neither the information about tendering of the landscape contract by the developer nor a copy of the landscape contract. The Factor has failed to provide information to either the Homeowner or the Committee explaining satisfactorily how the Factor is implementing or supervising the landscape contract in respect of which the Factor has no information.

Determination of Complaints

Complaint 1

32. Section 3.3 of the Code requires the Factor to provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for.
33. The Committee is satisfied that the Factor has not failed in this respect.
34. Section 3.3 of the Code goes on to require the Factor in response to reasonable requests to supply supporting documentation and invoices or other appropriate documentation for inspection and copying in connection with the financial breakdown of charges made and the description of the activities of the works carried out. The section permits the Factor to impose a reasonable charge for copying, subject to notifying the Homeowner of this charge in advance.
35. The Committee is satisfied that the Factor has offered to supply copies of invoices subject a reasonable charge for copying or permit the Homeowner to inspect invoices but the Committee is not satisfied that the Factor has supplied or permitted inspection of supporting documentation, the Factor founding on its failure to do so being due to the fact that the Factor has no contract documentation. The Committee is not satisfied that the Factor has made sufficient endeavours to obtain copies of the contract documentation.

Complaint 2

- 36. Sections 6.3 of the Code requires the Factor on request to be able to show how and why the Factor appointed contractors, including cases where the Factor decided not to carry out a competitive tendering exercise or to use in-house staff. As the Factor did not carry out the tendering exercise for the landscape contract which was carried out by the developer prior to the appointment of the Factor, the Committee finds that there was no failure to comply with section 6.3.

- 34. Sections 6.6 of the code requires the Factor to make available for inspection by the Homeowner on request, free of charge, documentation relating to any tendering process (excluding any commercially sensitive information). As the Factor did not carry out the tendering exercise for the landscape contract the Committee has concluded that there is no failure to comply with section 6.6.

Decision

- 35. The committee upholds complaint number one and concludes that the factor has failed to comply with section 3.3 of the Code. The decision is unanimous.

- 36. The Committee is of the view that it would be appropriate to issue a Property Factor Enforcement Order in respect of the failure to comply with the Code which the Committee has found.

- 37. Section 19 (2) of the Act states that in any case where the Committee proposes to make a Property Factor Enforcement Order, the Committee must before doing so
 - (a) give notice of the proposal to the Factor; and
 - (b) allow the parties an opportunity to make representation to the Committee.

If the Committee is satisfied, after taking account of any representations made, that the Factor has failed to carry out the property factor's duties or, as the case may be, to comply with the Section 14 duty, the Committee must make a Property Factor Enforcement Order.

- 38. The service of this decision to the parties should be taken as notice for the purposes of section 19(2)(a) of the Act and the parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) of the Act reach HOHP's office by no later than 14 days after the date of service of this decision upon them. If no representations are received within that timescale, then the Committee may proceed to make a Property Factor Enforcement Order without seeking further representations from the parties.

- 39. Failure to comply with a Property Factor Enforcement Order may have serious consequences and constitute a criminal offence.

40. The Committee proposes to make the following Property Factor Enforcement Order:-

Within six weeks from the date of issue of the Property Factor Enforcement Order the Factor must obtain from Lawsons Premier Groundcare or others a copy of the landscaping contract issued by the Developer appointing Lawsons Premier Groundcare as the landscaping contractor for Holmes Park Development, Joseph Cumming Gardens, Broxburn, West Lothian together with any contract amendments and provide a copy of the landscaping contract and any amendments to the Homeowner and to the Homeowner Housing Panel at no cost to the Homeowner or to the Homeowner Housing Panel.

Right of Appeal

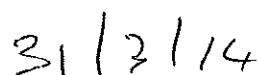
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- "..(1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or a homeowner housing committee.
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Jamie Millar

Chairman


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Date