Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

hohp Ref: **HOHP/PF/14/0024**

Re: **Property at Flat 1/1, 183 Craighall Road, Glasgow, G4 9TN (collectively "the Property")**

The Parties:-

Mr Emmanuel Egbuka, 1/1, 183 Craighall Road, Glasgow, G4 9TN ("the Applicant")

Grant & Wilson Property Management Ltd, 65 Greendyke Street, Glasgow, G1 5PX ("the Respondent")

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

Committee Members:

Maurice O'Carroll (Chairman) and Carolyn Hirst (Housing Member)

Decision of the Committee

The Respondent has failed to carry out its property factor's duties.
The Respondent has failed to comply with its duties under s 14(5) of the 2011 Act.

The decision is unanimous.

Background

1. By application dated 10 February 2014, the Applicant applied to the Homeowner Housing Panel for a determination of whether the Respondent had failed to comply with the duties set out in the Code of Conduct imposed by section 14(5) of the 2011 Act, or with their general duties in terms of s 17 of the Act.

2. In total, 28 paragraphs of the Code, within all sections 1 through to 7 were alleged to have been breached or 36 if one were to consider each of the constituent parts of the alleged breaches under Section 1 of the Code to form part of the overall complaint under the Code. The alleged breaches in duty in terms of s 17 of the Code arise from the same facts.

3. By letter dated 12 March 2014, the President of the Homeowner Panel intimated a decision to refer the application to a Homeowner Housing Committee. A notice of referral was served on both parties as at that date.

4. Following service of the Notice of Referral, the Respondent submitted an inventory of 27 documents dated 1 April 2014, together with relative copy documents. The Applicant also submitted copy correspondence under cover of an email dated 8 April 2014, comprising 30 pages.

5. A Direction dated 22 April 2014 was issued by the Committee. In the Direction, the Committee sought to obtain for its own information the receipts and vouchings referred to in the Applicant's formal complaint, sent to the Respondents in an email dated 14 January 2013. Those receipts and vouchings arose from quarterly invoices from the Respondents numbered 633165 and 644797 dated 23 August and 21 November 2012 respectively. The Respondent was required to comply with the Direction prior to midday on 1 May 2014.

6. By letter dated 29 April 2014, the Respondent gave notice with reasons why it was not willing to comply with the Direction. Unfortunately, it did not in fact comply with the Direction and intentionally failed to do so. This will be discussed below in relation to the Property Factor Enforcement Order ("PFEO") to be issued following this decision. On 1 May 2014, it did, however, provide an inventory of a further four documents comprising email correspondence between the parties, a timeline of correspondence and a summary of buildings insurance cover issued by Liverpool Victoria dated 1 October 2012.

7. A hearing took place at Europa House, 450 Argyll Street, Glasgow on 2 May 2014. Given the number of paragraphs of the Code which required to be considered, one day proved to be insufficient. Accordingly, the hearing was continued to 19 May 2014 in order to conclude the evidence of the parties and to hear submissions. On both occasions, the Applicant appeared accompanied by his wife, Jennifer Egbuka. The Applicant presented all of his own evidence with the occasional assistance of his wife. The Respondent appeared and was represented by Mr Allan McLean, Senior Property Manager and Mr Graham Stewart, Property Manager. Both gave evidence on behalf of the Respondent, although this predominantly came from Mr Stewart. Neither party was legally represented. Both parties were asked questions by the Committee members in relation to the documents submitted prior to the hearing and also arising from the evidence given at the hearing itself.

Committee Findings

The Committee made the following findings in fact pursuant to Regulation 26(2)(b)(i) of the 2012 Regulations:

8. The Applicant is the heritable proprietor of the Property which is known as and forming flat 1/1, 183 Craighall Road, Glasgow, G4 9TN, registered in his name

under Title number GLA192050 on 1 February 2007. The Property is a flatted dwelling within a four storey tenement at that address and, in common with 131 other tenement proprietors within that block and elsewhere, subject to common burdens regarding communal maintenance, repair and insurance as set out in the Deed of Conditions applicable to the property registered on 24 November 2005.

9. The Respondent is the property factor responsible for the repair, maintenance and insurance of the common parts of the common stairwell at the Property. As explained by Mr Stewart, the Respondent as factors are responsible for the properties at 169-183 Craighall Road (odd numbers only), 27 Dawson Road and 298-304 (even numbers only) Possil Road. The costs of communal works which affect all of those properties are allocated in the quarterly statements in 1/132 shares. Other common repairs are allocated in 1/20 shares, presumably in relation to the tenement block occupied by the Applicant. In any event, the shared allocations which were the subject of communal repairs and maintenance were not the subject of dispute between the parties.

10. The Respondent was under a duty to comply with the Code of Conduct in terms of s 14(5) of the 2011 Act from the date of its registration as property factor which was 7 December 2012. Prior to that date, its duties were as summarised in the burdens section of the Disposition in favour of the Applicant as set out in Entry Number 3 of Title Sheet GLA192050 referred to above. In terms of those duties, the Respondent was appointed by the developers of the communal block to fulfil the obligations on the common proprietors to repair, maintain and insure the common parts of the tenement block.

11. In terms of the Deed of Conditions, the majority of the common owners were entitled to dismiss the Respondents and appoint a new Manager (i.e. factor) of their choosing after the expiry of five years from the date of the registration of the Deed of Conditions applicable to the property (i.e. after 24 November 2010). It would appear that no such majority vote took place after that date so that the present Respondent remained as property factor to the present day.

12. The Respondent's written statement of services, which were headed "Terms of Service & Delivery of Standards" was provided to the Committee prior to the hearing. It is an undated document comprising two close typed pages which was issued to all homeowners following the entry into force of the 2011 Act on 1 October 2012. The Applicant did not allege that the Respondent failed to supply him with a copy of that document as required by Section 1 of the Code.

Discussion of evidence and alleged breaches of duty

13. The progression of evidence was hampered by the sheer number of alleged breaches of the Code listed at section 7 of the application form. Whilst the Applicant is quite entitled to have all aspects of his complaints investigated, there were some alleged breaches listed which proved to have no foundation. For

example, a breach was alleged in respect of paragraph 7.4 of the Code which requires the Factor to retain correspondence relating to complaints for three years. There was no evidence of any such failure and even if there had been, it would be difficult to know how the Applicant could become aware of such a failure or in this case how he could have been prejudiced by such a failure had there been one. Additionally, a great deal of time was taken up with calling upon the Respondents to account as to whether their written statement of services complied with the minimum content set out in Sections C, D, E and F of section 1 of the Code since that was brought into issue in the application form. Ultimately, that investigation proved fruitless as it was apparent that there was no such failure, a position which the Applicant ultimately had to accept.

14. In terms of the evidence led, again a great deal of time was spent ascertaining the exact scope of the Applicant's source of complaint. At one stage, he appeared to be challenging the authority of the Respondents to act as factors in any capacity at all, although that was not specifically focused in the application form itself. He also stated that he was disputing five years invoices although his formal letters of complaint referred to only two specific invoices. The overall position of the Applicant was that the actings of the Respondents were so lacking in transparency in every respect, that he considered it necessary to challenge them under every section heading of the Code. An example of such a lack of transparency was the change in the communal insurance provider in 2012 which was effected without consultation with the homeowners affected. That provided the trigger for him to query all of the Respondents actings following upon that action.

15. The Committee did not find that position or approach to be entirely justified in the circumstances. Accordingly, it restricted its consideration of the application to the matters stated in the application form (as pared down in the course of evidence before it), together with the matters contained within the formal email of complaint dated 14 January 2013 issued in compliance with s 17(3) of the Act. In doing so, it also required to have regard to other relevant correspondence arising both before and after those dates as noted below. Ultimately, the Committee considered that the complaint contained within the application consisted of a failure in communication on the part of the Respondents, a failure to carry out their duties in relation to the provision of communal insurance and a failure to deal with the Applicant's complaints expediently. Therefore the detailed consideration of the alleged breaches of Code are concentrated around Sections 2, 5 and 7.

Section 2 of the Code

16. An email dated 3 January 2013 was sent on behalf of the Respondent by their then property manager, Clarke Elsby to the Applicant stating that a copy of the buildings insurance details was sent to all owners with their August 2012 statement. The communication further stated that their insurance manager, John Beeny would re-send that information to the Applicant. The Committee was

satisfied on the evidence of the Applicant (whom it found to be credible) that neither part of that statement was correct: The first the Applicant saw of the relevant insurance schedule was immediately prior to the hearing held on 2 May 2014. The only other insurance schedule seen by him was the one provided in his welcome pack during 2007 which was superseded by the time of the events giving rise to the present application. Contrary to its assertion, no insurance schedule was sent to the Applicant with his August 2012 statement by the Respondent, nor was one re-sent by their insurance manager. Accordingly, the Committee finds the Respondent to be in breach of their duty in terms of section 2.1 of the Code not to provide information which is misleading or false.

17. The Committee did not find the Respondents to have communicated in a way which was abusive or intimidating, given the proviso included in parenthesis in section 2.2 of the Code: The Committee found that the only threat directed at the Applicant was that of legal action if his account remained unsettled, which the Respondent was entitled to do. In the event, the threatened registration of a Notice of Potential Liability was not carried out when the Applicant cleared his outstanding arrears with the Respondent in January 2014. The Committee notes incidentally that the Respondent did not apply interest or late payment charges in respect of disputed items contained within the quarterly invoices prior to that date.

18. The Applicant alleged a general lack of transparency regarding charging arrangements in terms of section 2.4 of the Code. An example he gave was regarding the repainting of the bin stores. On 18 July 2013, he was given seven days' notice that painting would take place but with no idea as to whether a majority of homeowners had consented or whether the job was completed satisfactorily. The matter is answered by reference to Section 6 of the Written Statement of Services provided by the Respondent which stipulates that repairs under £350 per owner may be carried out by the Respondent without the need for agreement by a majority of homeowners. The bin store repainting came within that particular threshold. What appeared not to be appreciated by the Applicant was that the clause provides delegated authority to carry out works below that cost threshold without any reference to the homeowners. There is accordingly no breach of that section of the Code.

19. Section 3.3 of the Code requires factors to provide a detailed financial breakdown of charges. In response to a reasonable request, they must supply supporting documentation and invoices for inspection and copying. A charge may be imposed for copying subject to notifying the homeowner of this charge in advance. These matters are covered within section 3 of the Written Statement of Services which provides for free viewing of contractors' and suppliers' accounts within 14 days of the issuing of the quarterly invoice. After that period has passed, it is stipulated that a charge of £5 plus Vat per invoice will be made. Leaving aside the allegation that the detail provided in the invoices is insufficient (with which the Committee disagrees), all of that is on the face of it, compliant

with the Code. However, the circumstances which arose further to that clause brought the terms of section 2.5 of the Code into play.

20. Section 2.5 requires enquiries and complaints to be dealt with (i.e. resolved) as quickly and as fully as possible. By email dated 27 November 2012, the Applicant requested certain information of the Respondent, including a request to see the receipt vouchers in support of the current items on the bill for inspection (this being the quarterly invoice dated 21 November 2012 – reference number 644797) and a request for the receipt vouchers for the previous statement dated 23.0812, reference number 633165. A reminder email dated 20 December 2012 was sent by the Applicant to Mr Elsby for the Respondent which broke down the information requested into five headings, covering the vouchings for the quarterly invoices referred to above, information regarding the Applicant's insurance claim and a further query regarding the contract for lift maintenance and insurance. The formal email of complaint dated 14 January 2013 substantially replicates the demand for the information sought in those earlier emails. Whilst there may be some overlap and confusion with the complaints procedure undergone in terms of section 7 of the Code and whether or not there was in reality one or two formal complaints processes, one fact remained: the Applicant did not have his query and, subsequent complaint regarding those issues resolved. That remained the case as at the date of the hearing, that is to say, well over a year from the date of the first request for information. The aim discussed in section 2.5 of the Code has therefore clearly not been achieved.

21. The Applicant's position in evidence was that it was clear from his emails of 27 November and 20 December 2012 that he wanted to see every invoice or vouching in respect of each of the August and November 2012 quarterly statements referred to. Given the timing of the request, a charge would have been imposed in respect of the first statement, or in respect of both statements by the time of the reminder. The Applicant stated that the likely charges did not dissuade him from his desire to seek the information requested. When asked why, after the 21 November 2012 invoice, he did not simply pick up the telephone and arrange an appointment to go into the Respondent's office to view the necessary vouchings, he stated that email was his preferred method of communication and therefore he would not have made a telephone call to make such an arrangement. Having sent his email of 27 November, he considered it to be an obligation on the part of the Respondent to invite him to their offices in order to satisfy his enquiry. No such invitation was ever made.

22. For its part, the Respondent stated that by email dated 3 January 2013, Mr Elsby sought to clarify which contractors' invoices the Applicant would like to view. It received no response to that query and in the absence of which, they could not further the request, for example by sending copy vouchings to the Applicant, as to do so would be to incur charges to the Applicant's account which itself would be the source of legitimate complaint. Thus, an impasse between the parties resulted.

23. The temptation for the Committee was to find that both parties were equally intransigent and therefore not to uphold the complaint. However, there were two aspects of the Respondent's actions in particular that caused the Committee some concern: Firstly, at point 3 of his email of 20 December 2012, the Applicant requested "copies of my actual insurance claim letter that was sent to the insurers on my behalf which was rejected. This should also include the rejection letters from the insurers." The response on 3 January by Mr Elsby failed to address the first part of the enquiry at all and provided an excerpt of the repudiation letter provided by the insurers in relation to the second part. In evidence, Mr Stewart explained that the insurance claim letter sought was not provided as the claim had been submitted on a standard form. Since the word "letter" as opposed to "form" was used by the Applicant, the request was not complied with and, moreover, ignored. The Committee found this to be a very regrettable and counter-productive attitude to have taken and one which undermined the aim of the Code regarding communication as set out in the preamble to Section 2.

24. Secondly, by email dated 31 January 2014, Lorraine Killen on behalf of the Respondent sent a complaints form for the Applicant to fill in further to their complaints procedure. That is, just over a year after his formal complaint email of 14 January 2013. An example of such a complaint form was supplied to the Committee prior to the hearing. In evidence, Mr Stewart accepted that it would have been legitimate to have inserted into the email "refer to email attached" and append the email of 14 January 2013 or other prior correspondence as appropriate. The complaint form could not therefore, on any view, serve any useful purpose in the circumstances which applied. In the event, the Applicant declined to complete the complaints form and correspondence between the parties continued despite this. The Committee found it extraordinary that a full year after a clearly stated complaint had been made to the Respondent, the Applicant should have been required to fill in a complaints form. In the view of the Committee, that requirement represented nothing less than a time wasting and obstructive device that could only serve to aggravate frustration on the part of the Applicant and at the same time do nothing to resolve his complaint and outstanding enquiries. In these circumstances, the Committee was of the view that the Respondent had failed to comply with the duty imposed by section 2.5 of the Code.

25. The Committee would like to make some further observations: It appeared from some of his responses at the hearing that the Applicant had either not read or had not understood all of what was contained in or was required by the written statement of services which may have contributed to the difficulties between the parties. Once it became clear that an impasse had resulted, the Committee would have expected the Respondent to do more to break that impasse and to promote communication between the parties. One way would have been to have acted in a more proactive manner: For example, to contact the Applicant directly by telephone and clarify with him the vouchings he was referring to and to invite

him in to the office to view them, whilst at the same time explaining the costs that would be incurred (since he wanted to see them all), rather than just letting matters drift as they did. Further, the insistence on exact wording regarding requests made and the late production of a complaints form were the very antithesis of such an approach.

26. The Committee notes that matters were not assisted by the Applicant for some unknown reason not receiving the emails listed as items 16-19 of the Respondent's inventory of documents which is regrettable. It is also regrettable that even at the stage of the hearing, the Respondent failed to comply with the Direction to produce the information first sought by the Applicant. Mr Stewart appeared to be about to produce certain unspecified documents at the end of the first day of the hearing but ultimately refrained from doing so. The content of those documents will have to remain a mystery, but had they been in answer to the Direction and the Applicant's original enquiry and complaint, matters could have been foreshortened to that extent. Finally, the Committee had sight of the form as sent to the insurers by the Respondent as first sought by the Applicant. Again, it is regrettable that this document was not produced either prior to the hearing or subsequent to it being shown to the Committee.

27. The Committee notes the submission at point 5 of the Respondent's letter of 29 April 2014 that to comply with the Direction would result in the Applicant circumventing the Written Statement of Service and the obligation set out in section 3.3 of the Code. However, by their actions matters have now come to the point whereby the Applicant's request for information has not been answered. To now require the documentation needed to provide that information, sought over a year ago, is the only practical way in which a remedy can be provided to the Applicant. That is not to state that homeowners have a general right to be supplied with information after the 14 day period has passed and to obtain it free of charge, merely that this Applicant has that right in relation to the present Application under consideration.

28. The Committee further notes that the information sought in relation to the August 2012 statement precedes the entry into force of the Act which was 1 October 2012 and the registration of the Respondent on 7 December 2012. However, the request was first made on 27 November 2012 which post-dated the entry into force of the Act. The obligation to provide that information arose as part of the general duties of the Respondent in terms of s 17 of the Act, even if not directly in terms of the Code. For that reason the Committee has also found the Respondent to be in breach of its general factor's duties.

29. In any event, Regulation 28 (1) of the Homeowner Housing Panel (Application and Decisions)(Scotland) Regulations 2012 ("the 2012 Regulations") provides "subject to paragraph (2), no application may be made for the determination of whether there was a failure before 1 October 2012 to carry out the property factor's duties." Regulation 28(2) provides that the committee "…may take into

account any circumstances occurring before 1 October 2012 in determining whether there has been a continuing failure to act after that date." The phrase "may take into account" indicates that it is a matter of discretion on the part of the Committee, the extent to which they choose to take into account matters and circumstances occurring before the commencement date of the 2012 Regulations of 1 October 2012 in determining whether they find that there is a failure to comply with factors' duties after that date. In this case, even although the vouchings which may have formed part of the August 2012 statement, or indeed the origin of the complaint giving rise to the insurance claim referred to below, occurred prior to the commencement date of the Act, the Committee in the exercise of its discretion has decided to consider those matters as they remained unresolved as at the dates of the hearing on 2 and 19 May 2014.

Section 5 of the Code

30. Consideration of section 5.2 of the Code overlaps in this case with the findings made in respect of section 2.1 of the Code. The Committee has already found that no information was supplied to the Applicant, showing the basis upon which his insurance premium was calculated. The Committee accepted that Applicant's evidence as credible that he only received the relevant insurance policy schedule shortly prior to the hearing. The Respondent provided evidence that the Liverpool Victoria insurance schedule was on their website. However, the obligation in the Code is a positive one to *provide* the homeowner with the relevant clear information. Accordingly, the Committee finds the Respondent to have breached section 5.2 of the Code.

31. As noted above, the insurance issue was the origin of the dispute between the parties. Aside from not having a proper explanation for the communal insurance premium increase, the Applicant was also affected by water ingress into the bathroom of the Property in respect of which an insurance claim was made. Initially his claim was repudiated by the insurers on the basis that it was partly caused by a lack of maintenance. That was the subject of a great deal of correspondence between the parties, initially with a Miss Olumese on the Applicant's behalf. Ultimately, the Applicant did not wish to make much of this issue on the basis that he had carried out the repairs himself and the matter was now closed. However, there were two matters which were of concern to the Committee.

32. Firstly, despite the repair being of a private nature affecting only the Applicant's property, he was obliged to pursue his claim through the Respondent as factors. The reason for this was explained by Mr Stewart as being that it was the only bondholder for the policy which covered all claims, whether private or communal, which affected the Applicant's property. This meant that the Applicant was effectively reliant upon the Respondent to pursue a claim on his behalf. He could have appointed contractors to carry out repairs himself but could not correspond directly with the insurers. For this reason, the Committee findsthe Respondent to have breached section 5.5 of the Code which provides that homeowners must be

kept informed of the progress of their claim or to be provided with sufficient information to allow them to pursue the matter themselves. The Applicant was never placed in a position to pursue the claim against the insurers himself. He therefore found himself in the frustrating position of not being able to negotiate with the insurers regarding their initial repudiation or to find out what was said on his behalf or their response thereto, hence the request for information narrated above, which itself was not complied with. The Committee therefore considers that in order to be compliant with section 5.5 of the Code in future, the Respondent requires to have a system in place whereby homeowners are able to pursue insurance claims directly themselves should they wish to, with the Respondent providing all of the necessary information to facilitate that course of action if desired.

33. Secondly, it would appear that eventually a sum of money was finally recovered by the Respondent on behalf of the Applicant. The letter on unheaded paper of 12 February 2013 from Mr Elsby informing him of that fact was never received by the Applicant. Ultimately, an initial offer of £671 under deduction of a £350 excess was increased by the insurers after negotiation to a total sum of £974. That sum of money has correctly been placed in a deposit account by the Respondent, although the Applicant now states that he has no interest in claiming it. To complicate matters slightly, the Committee was informed by Mr Stewart that the insurers are now stating the sum which they have paid out may not now be due because the works were not carried out by an approved contractor. The Committee was not provided with any correspondence to that effect and that position has not been confirmed. In the event that the insurers do indeed seek to reduce or cancel that payment, the Committee would require to see correspondence evidencing that intention with an explanation as to why they are not personally barred from now doing so. In the absence thereof, the Committee considers it appropriate that the sum of £974 be made over to the Applicant forthwith in settlement of his insurance claim.

34. In the circumstances the Committee finds the Respondent in breach of sections 5.2 and 5.5 of the Code. It does not find any breach in respect of sections 5.3, 5.4, 5.6, 5.7 and 5.8.

Sections 4 and 6 of the Code

35. The Committee did not find any separate breaches under section 4 or 6 of the Code that have not already been covered under the other headings of complaint.

Section 7 of the Code

36. The Respondent's Written Statement of Services at section 7 provides for a three stage complaints resolution procedure with timescales for acknowledgment and response in relation to Step 2, but not in relation to Step 3. Step 3, which in effect consists of two stages, refers to a 'final response' being made by the Managing Director (Mr Mitchell) if the complainant remains dissatisfied by the response received from the General Manager (Mrs Gilmour). To that extent, the

Respondent's complaints procedure is compliant with sections 7.1 and 7.2 of the Code. The crucial issue, however, is whether the complaints procedure resolves the complaint generated by the homeowner. This has been discussed in full above in relation to the breach found under section 2.5 of the Code. As noted above, section 7.4 is not relevant. Accordingly, the Committee finds no breach of section 7 of the Code under reference to its substantive findings under section 2.

37. The Committee did observe, however, that the written complaints resolution appeared in practice to operate in a confused fashion. This might have been partly due to the characterisation of the complaint being in two parts by the Respondent. The late introduction of a requirement to complete a complaints form has been discussed above. In any event, it would appear that complaint management procedures as operated by the Respondent would benefit from increased simplicity and clarity in their operation. The Committee therefore notes with some concern that it was informed that the Respondent has now introduced a five stage complaints resolution procedure in its latest Written Statement of Services. It appears to the Committee that to increase the internal complaints process in this manner would likely produce the opposite effect.

Decision

37. In all of the circumstances narrated above, the Committee finds that the Respondent has failed to comply with its property factor's duties in terms of section 17(1)(a) of the 2011 Act. It also finds that it has failed to comply with its section 14 duty in terms of s 17(1)(b) of the Act in respect of sections 2.1, 2.5, 5.2 and 5.5 of the Code.

It has therefore determined to issue a Property Factor Enforcement Notice which will follow separately.

38. **Appeals**

The parties' attention is drawn to the terms of s 22 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 a Homeowner Housing Committee; (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made…"

Maurice O'Carroll

Signed **Date** 10 June 2014

Chairperson