



Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011

Hohp ref:HOHP/PF/15/0035

Re:

9 Kirkton Drive, Burntisland, Fife, KY3 0DD ('the Property')

The Parties:

Steven Murray residing at 9 Kirkton Drive, Burntisland, Fife, KY3 0DD ('the homeowner')

Collinswell Land Management Limited, Collinswell House, Aberdour Road, Burntisland, Fife, KY3 0AE ('the factor')

Committee members:

Jacqui Taylor (Chairperson), Ann MacDonald (Housing 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 failed to comply with Sections 2.1; 2.5; 3.3; 3.5a; 4.9 and 7.2 of the Code of Conduct and also failed to comply with property factor's duties.

The decision is unanimous.

Background

1. The factor's date of registration as a property factor is 6th March 2013.
2. By application dated 31st March 2015 the homeowner applied to the Homeowner Housing Panel ('the Panel') for a determination that the factor had failed to comply with:-
 2. 1: The following sections of the Property Factor Code of Conduct:
 - Section 2: Communications and Consultation.
Sections 2.1; 2.2; 2.4 and 2.5
 - Section 3: Financial Obligations
Sections 3.3; 3.4; 3.5a
 - Section 4: Debt Recovery
Sections 4.6 and 4.9
 - Section 7: Complaints Resolution
Section 7.2
 - 2.2: The Property Factor's duties.

Further details of the complaint were provided in the application:

1. *'My account has not been managed appropriately including adherence to the deed of conditions in terms of charging arrangements and statement of accounts.'*
2. *'Information relating to the annual maintenance increase in 2012 was held in accordance with the deed of conditions.'*
3. *'Threats of additional charges being applied to the account in contradiction to the deed of conditions and written statement of services.'*
4. *'No statement of account relating to my float/deposit paid in contravention of the code of conduct and deed of conditions.'*
5. *'CLML have failed to answer or provide satisfactory information relating to the above points.'*
6. *'Account information relating to my property was disclosed in a public forum without my permission by the then current director and registered fit person on the property factor register, Mr Alexander (Zander) Williamson in contravention of the data protection act and code of conduct.'*

The President issued a Minute made under Section 18(1) of the Property Factors (Scotland) Act 2011 dated 16th April 2015 which acknowledged that the Application comprised the documents received on 1st April 2015 and stated that as she considered that there was no reasonable prospect of the dispute being resolved she decided to refer the application to the Committee.

The Committee was satisfied that the property factor had received intimation of the application. Mr S Williamson, Secretary and PA of Collinswell Land Management Ltd sent an email to the HOHP dated 30th April 2015 referring to the application. He stated that they were no longer a factor and the company would be winding down and going into controlled, voluntary liquidation.

The factor did not lodge any defences to the application made by the homeowner.

Prior to the hearing the chairperson of the Committee carried out searches and determined that Collinswell Land Management Ltd was still a registered Company and a registered factor.

Hearing

A hearing took place in respect of the application on 29th July 2015 at George House, 126 George Street, Edinburgh, EH2 4HH.

The homeowner appeared on his own behalf.

The factor did not attend the hearing and was not represented.

The homeowner gave evidence on his own behalf.

Findings of Fact

1. The homeowner is the proprietor of the property 9 Kirkton Drive, Burntisland, Fife his title being registered in the Land Register of Scotland under Title Number FFE92493. His property forms part of the Inches, a housing development by Taylor Wimpey. The Inches in turn forms part of Collinswell Park, a large modern housing estate on the western side of Burntisland.

The Property is subject to the title conditions contained in the Land Certificate and created in *inter alia* Deed of Conditions which was registered on 14th June 2006. Clause 10 of the Deed of Conditions sets out the factor's power and authority to act.

Collinswell Land Management Limited assumed responsibility as Property Factor for the periphery open communal areas around the larger Collinswell Park estate on 1st January 2010. This followed the resignation by the former property factor Hacking & Paterson.

2. Collinswell Land Management Limited became a registered property factor on 6th March 2013 and accordingly their duty under section 14(5) of the 2011 Act to comply with the Code of Practice arises from that date.
3. New property factors have recently been appointed and Collinswell Land Management Limited ceased acting as property factors for the property on 31st December 2014.

Oral Representations from the homeowner at the hearing.

The homeowner explained that his application concerned breaches of the following sections of the Code of Conduct for Property Factors and also Property Factors' duties.

Section 2.1: You must not provide information which is misleading or false.

The homeowner advised that the factor had provided information which had been misleading or false:

1. The homeowner had resided in the property since 2008 and since that time the factor had charged factoring charges of £35 per quarter until 31st December 2011. Thereafter they had increased the charge to £43.75 per quarter. They had not obtained the correct authorisation for the increase. No residents meeting had taken place to authorise the increase. Their invoices issued after 31st December 2011 were misleading and false as they incorrectly charged £43.75 per quarter.
2. The homeowner sent the factor an email dated 16th September 2014 which stated inter alia:

'Can you please respond with the following, if available, that will hopefully clarify the situation:

Evidence of the annual maintenance charge increase. This may come as a copy of the meeting invite(s) sent to all residents (plot proprietors) that the annual maintenance charge was to increase from £140 to £175 and the corresponding meeting minutes and outcome of the vote, in line with the title deeds. This is stated as held in 2012 in your newsletter.

Evidence of additional charges on top of the agreed annual maintenance fee.

This may come as a copy of the meeting invite(s) sent to all residents (plot proprietors) in 2013 setting out the vote that all residents share legal costs (or additional charges) for recovering legal fees additional to the annual maintenance charge, before these charges were made. Again a copy of the meeting minutes and the outcome of the vote, in line with the title deeds.

I also initially made a payment of £140 when I purchased my home but this does not show on my account, can this be rectified and a full statement issued to me please.'

The factor replied to the homeowner stating:

'The accounts will be made available for 2013 shortly which will answer a number of your questions, we resent being called misleading, we try our utmost to provide information to all those who ask. We have not yet released the list of people who have caused a substantial amount of money to be owed to the company, the angst you seem to have experienced is certainly not down to us releasing your name as this has not happened yet. We will not release anyone's name who is protected under the Data Protection Act. We are sorry to hear we have not answered your queries.'

The homeowner explained that the email from the factor did not answer the questions he had asked in his email of 16th September 2014 and he considered the factor's response to be misleading.

3. Zander Williamson, the factors' representative, attended the residents meeting held on 4th December 2013. The homeowner explained that Zander Williamson had released account information that was incorrect and false as he had stated that the homeowner's account was in arrears. The homeowner explained that the account was not in arrears but the charge of £45 per quarter in dispute.

4. The homeowner advised that the factors' statement of account dated 2nd March 2015 is misleading. The entries are not listed in date order, they included a charge for the period prior to 1st January 2010 which should not have been included as it predates that date the factor became factors of the development and item number 116 was included twice. The account is misleading and not factually correct.

Section 2.2: You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).

The homeowner explained that the factor had sent the residents an 'Information Letter dated September 2014'. He explained that he found sections of the letter to be abusive and intimidating:

Section marked (e):

'If a resident seeks a refund of the increased charge Collinswell Land Management Limited will require to revisit the residents account and the shortfall will be allocated and charged to their account. (As stated by the Sheriff- CLML are entitled to recover their costs.'

He found this statement to be intimidating as it essentially means 'pay up or we will pursue you'. He also found reference to the Sheriff's comments intimidating. He had no way of verifying whether the Sheriff made these comments or not and in any event the case was not against him.

Sections marked (g) and (h).

'With legal costs now running past £25,000 it is not possible for us to continue to absorb these costs. These losses will be allocated to each resident and, in due course, invoiced. A full list of residents who have caused these losses is available and is not subject to the Data Protection Act.'

He found this statement to be intimidating because:-

- (i) the factor was threatening to disclose a list of names and it may not be correct to say that the people on the list have caused the losses mentioned and
- (ii) The factor states that they will charge all costs equally among the residents without reference to the authority of the deed of conditions.

Also at the residents meeting on 4th December 2014 Zander Williamson specifically pointed at him and released his account information. He could not remember the exact words that had been used. However the letter from Councilor Susan Leslie dated 13th October 2014, enclosed with the application, confirms this. Her letter states:

'I witnessed Mr Zander Williamson refer to individuals factoring accounts, in particular Mr Steven Murray. He pointed directly to Mr Murray in the room, and he then disclosed information relating to the balance and history of Mr Murray's factoring account held by Collinwell Land Management.'

The homeowner explained that he found Zander Williamson's conduct to be threatening.

The homeowner also advised that privately after the residents meeting on 4th December 2014 Zander Williamson referred to him as a sponger. No one witnessed this statement however in the email from the factor to the homeowner dated 30th March 2015, Zander Williamson states:

'I remind you that we are no longer factors, we no longer have a factoring company which will no doubt please you. When we met I made my opinion of you clear.'

The homeowner explained that he found this to be abusive.

Section 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).

The homeowner explained that the factors have not provided evidence of the authority to increase the annual factors charges from £140 per annum to £175 per annum. The factor has failed to follow the procedure set out in the Deed of Conditions and the written statement of service.

Section 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.

The homeowner explained that the factor had responded to his emails reasonably quickly but did not respond 'as fully as possible'. His email of 16th September asked specific questions but he has not been provided with the answers. They have never stated that they don't have the information requested and had added other irrelevant information. For example he stated in his email to the factor dated 16th September 2014:

'I also initially made a payment of £140 when I purchased my home but this does not show on my account, can this be rectified and a full statement issued to me please.'

The email reply from the factor dated 22nd September states:

'The £140 you paid on entry to your home does not show on your account as this is not a payment, it is a float. As you are aware reading your Deed of Conditions Rule 13 states ...'

The homeowner explained that the factor never specifically acknowledged that they hold the float money.

Section 3.3: You must 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. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

The homeowner explained that he has never received an annual statement from the factor. He has only received the statement dated 2nd March 2015 which is for the period 1st October 2009 to 31st December 2014.

The statement states the quarterly charge and does not give a breakdown of costs and expenses.

Also the written Statement of Services refers to a maintenance schedule but this was not attached and he has never been provided with one.

The homeowner also explained that in terms of the Deed of Conditions the float should be held in trust. No details have been provided showing that the float has been held appropriately.

Section 3.4: You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).

The homeowner explained that the quarterly charges that he pays are advance payments. He has requested confirmation that the advance payments are held in trust but has received no response from the factor.

Section 3.5a: Homeowners' floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners.

The homeowner explained that his emails to the factor dated 16th September 2014, 25th September 2014 and 18th March 2015 requested confirmation that the deposit was held in a separate account from the factor's funds. The factor has not confirmed this point.

Section 4.6: You must keep homeowners informed of any debt recovery problems of other homeowners which would have implications for them (subject to the limitations of data protection legislation).

The homeowner explained that Zander Williamson breached the Data Protection provisions at the public meeting held on 4th December 2013 by pointing at him, alleging that his account was in arrears and not explaining that the account was in dispute.

Section 4.9: when contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position.

The homeowner explained that the factor knows that they do not have the legal authority to charge the higher annual factoring fees amounting to £175 per annum. However they insist on charging this higher amount. He considers this to be a breach of Section 4.9 of the Code of Practice.

Section 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 homeowner explained that in the email correspondence he had with the factor regarding his email of 16th September 2014 the factor never advised him that their final decision had been confirmed with senior management and he was never advised to apply to the Homeowner Housing Panel.

Failure to Comply with the Property Factor's Duties.

The homeowner explained that he considers that the factor has a duty to behave in a professional manner. He considers that they did not comply with this duty as they failed to provide straight forward answers to the questions he asked.

Decision

The Committee considered the evidence and submissions of the applicant. The Committee were satisfied that they had sufficient information to reach a fair determination of the application.

Section 2.1: You must not provide information which is misleading or false.

This head of the complaint is upheld. The Committee accepted the submissions of the homeowner to the effect that the factor had provided the information described by the homeowner which had been misleading or false.

Section 2.2: You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).

This head of the complaint is not upheld.

To intimidate means to instill fear. The homeowner had not provided any evidence that this was the intention of the factor.

The homeowner had been unable to recall the exact words used by Zander Williamson at the meeting on 4th December 2014. Therefore the Committee were unable to determine whether or not the words used could be construed as threatening.

The homeowner was unable to provide evidence that Zander Williamson had called him a sponger and therefore the Committee were unable to determine that the factor had communicated in an abusive way.

Section 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).

This head of the complaint is upheld.

There is no provision within the Written Statement of Service detailing the 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.

Section 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.

This head of the complaint is upheld.

The Committee accepted that the factor had not fully responded to the homeowner's email of 16th September.

Section 3.3: You must 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. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

This head of the complaint is upheld.

The Committee accepted the homeowner's submission that annual detailed financial breakdowns of charges made and a description of activities and works carried out which are charged for had not been provided by the factor. The statement dated 2nd March 2015 covered the period 1st October 2009 to 31st December 2014. It was simply a list of invoices rendered and payments made. It was not an annual statement and no details of the activities and works charged for were provided.

Section 3.4: You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).

This head of the complaint is not upheld.

The obligations contained in this section of the code apply to the situation where the homeowner requires a refund or needs to transfer his share of the funds, such as sale of

the property. This section of the code does not require the factor to hold the advance quarterly payments in trust.

Section 3.5a: Homeowners' floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners.

This head of the complaint is upheld.

The homeowner had requested clarification of the position regarding the floating funds. The factor had not provided evidence that they were held in a separate account or confirmation of this point.

Section 4.6: You must keep homeowners informed of any debt recovery problems of other homeowners which would have implications for them (subject to the limitations of data protection legislation).

This head of the complaint is not upheld.

The Committee does not determine whether or not there has been a breach of the data protection provisions.

Section 4.9: When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position.

This head of the complaint is upheld.

The Committee determined that the factor had misrepresented their authority by charging annual factoring fees of £175 when they had not demonstrated that they had followed the proper procedure to increase the fees.

Section 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.

This head of the complaint is upheld.

The Committee accepted the evidence of the homeowner that the factor had never treated his concerns as a formal complaint, they had not communicated to the homeowner that their response to the homeowner's email of 16th September was their final decision or that he could apply to the homeowner housing panel.

Failure to Comply with the Property Factor's Duties.

This head of the complaint is upheld. The Committee accepted that the response from the factor dated 29th September 2014 and the statement of accounts they referred to did not answer the homeowner's direct questions. They acknowledged that it is a duty of a property factor to act and correspond in a professional manner. They determined that the said email of 29th September 2014 fell below this standard as it was evasive. Mr Williamson states 'we

are sorry to hear we have not answered your queries' but he fails to answer the questions asked.

Property Factor Enforcement Notice

Given the circumstances narrated above, the Committee finds that the factor has failed in its duty under section 17(1)(b) of the 2011 Act to comply with the requirements of the Code of Conduct in respect of sections 2.1; 2.5; 3.3; 3.5a; 4.9 and 7.2 and also failed to comply with the property factors Duties.

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

Appeals

The parties' attention is drawn to the terms of section 21 of the 2011 Act regarding their right to appeal and the time limit for doing so.

It provides:

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

Signed Date 18th August 2015

Chairperson