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**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/14/0152

Re:

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

**The Parties:**

Dafydd McIntosh residing at 18 Kirkton Drive, Burntisland, Fife, KY3 0DD ('the Homeowner')

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

**Committee members:**

Jacqui Taylor (Chairperson), Brenda Higgins (Housing Member).

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**Decision of the Committee**

The Committee, having made such enquiries as it saw fit for the purposes of determining whether the Property 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 Property Factor has failed to comply with Sections 2.1 and 2.2 of the Code of Conduct.

The decision is unanimous.

## **Background**

1. The Property Factor's date of registration as a property factor is 6<sup>th</sup> March 2013.
2. By application dated 24<sup>th</sup> September 2014 the Homeowner applied to the Homeowner Housing Panel ('the Panel') for a determination that the Property Factor had failed to comply with:-
  2. 1: The following sections of the Property Factor Code of Conduct:
    - o Section 2: Communications and Consultation.  
Sections 2.1,2.2 and 2.5
  - 2.2: The Property Factor's duties.

Further details of the Complaint were provided. The applicant stated:

'The factor produced a letter to residents by post 15/9/14 titled Information Letter 2014. The letter set out how the factor will recover legal fees incurred in various small claims actions they instigated. I was a respondent in the small claims court action which was part heard in proof. The factor dismissed the case with no expenses due by either party. This is confirmed in writing. There was no decree or determination.'

The factor did not respond to my complaint or acknowledge the content dated 16/9/14. The factor was given until 22/9/14 to respond, they did not.

The factor replied on 24/9/14 stating 'we have passed on your email to our solicitors'. I provided a short time frame for the factor to respond. They have never responded appropriately to any issue. This is my second complaint via the HOHP.

I previously raised a complaint with the HOHP. This resulted in a PFEO and failure to comply. The factor has taken to naming me directly in correspondence in a defamatory way. I have had to suffer the questioning of my affairs from my neighbours. I have felt enormous stress caused by their actions and I feel intimidated by their aggressive behavior. I am at the end of my tether with their actions.

I want a public apology sent to all residents with regards to the comments about me. I want the correct annual fee to be applied. I want a retraction of the letter and an accurate letter to be distributed. I want compensation of £1000 for the hurt, loss of salary and time taken to address their errors. This has taken 18 months, 1 HOHP hearing, 8 court hearings and they still don't care. I want the Scottish Ministers to take appropriate action against this factor.

The Property Factor's Solicitors sent written representations dated 17<sup>th</sup> November 2014.

They stated *inter alia*:

'The applicant was previously in arrears in respect of outstanding common charges from the period December 2011 to May 2014. As a result the factors issued small claim proceedings at Kirkcaldy Sheriff Court in respect of the recovery of same.

The position remains that Collinswell Land undertook work prior to January 2010 which was then invoiced by Hacking and Paterson. In the newsletter of September 2011 the factors sought to outline a possible solution to recover charges which remained outstanding for the last quarter of 2009. The applicant suggests that the factors did not undertake the work but he has already been provided with a copy of a letter from Hacking and Paterson dated 17<sup>th</sup> November 2008 which notes the position. As regards the previous decision to increase the factoring charges from £140 to £175 per annum, at the time the factors believed the decision had been correctly arrived at. The costs of maintenance had previously been fixed at £140 per annum. The cost of maintenance on an annual basis had been increased. Following a part heard small claim hearing in June 2014 the factors accepted that the meeting at which the decision to increase the annual charge may not have been properly convened. As a result the factors were presented with a situation whereby each resident would be entitled to a refund of increased charges. The cost of the work undertaken had increased over the years and the previous maintenance charge of £140 did not cover these. The factors newsletter of September 2014 notes the options available to cover the costs of work done. It is not intent in anyway to be misleading or intimidating. The factors have attempted to resolve the situation for the whole of the residents of Collinswell Park. The applicant remains dissatisfied and continues to complain strenuously and vigorously.'

### **Hearing**

A hearing took place in respect of the application on 12<sup>th</sup> January 2015 at George House, 126 George Street, Edinburgh, EH2 4HH.

The Homeowner appeared on his own behalf and was accompanied by David Crooks.

The Property Factor did not attend the hearing and was not represented. The Committee was satisfied that the Property Factor had received intimation of the hearing. Their solicitors Gebbie and Wilson had advised that they would not be attending the hearing.

### **Procedural background**

The President had issued a Minute made under Section 18(1) of the Property Factors (Scotland) Act 2011 dated 28<sup>th</sup> October 2014 which acknowledged that the Application comprised the documents received during the period 30<sup>th</sup> September 2014 to 22<sup>nd</sup> October 2014 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 homeowner had made further written representations after 22<sup>nd</sup> October 2014, which inter alia amended the terms of the application. The Committee advised the homeowner that the amendments to the application could not be considered as they had not been intimated to the property factor. The homeowner confirmed that he wished the hearing to address the terms of the original application and he did not require the hearing to be adjourned to allow the amended application to be intimated to the Property Factor and to allow the Property Factor time to respond to the amended application.

The Committee confirmed to the homeowner that the hearing would only consider the terms of the Application as defined in the President's Minute.

The Homeowner gave evidence on his own behalf. The Committee considered the evidence and submissions of the applicant and the Property Factor's written submissions. The Committee were satisfied that they had sufficient information to reach a fair determination of the application.

### **Findings of Fact**

1. The Homeowner is the proprietor of the property 18 Kirkton Drive, Burntisland, Fife his title being registered in the Land Register of Scotland under Title Number FFE92562. His property forms part of the Inches, a housing development by Taylor Wimpey. The Inches in turn forms part of Collinwell Park, a large modern housing estate on the western side of Burntisland.
2. 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 14<sup>th</sup> June 2006. Clause 10 of the Deed of Conditions sets out the Property Factor's power and authority to act.
3. Collinwell Land Management Limited assumed responsibility as Property Factor for the periphery open communal areas around the larger Collinwell Park estate on 1<sup>st</sup> January 2010. This followed the resignation by the former property factor Hacking & Paterson.
4. Collinwell Land Management Limited became a registered property factor on 6<sup>th</sup> 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.
5. New property factors have recently been appointed and Collinwell Land Management Limited ceased acting as property factors for the property on 31<sup>st</sup> December 2014.

### **Oral Representations from the homeowner at the hearing.**

6. The Homeowner explained that his application concerned the terms of the letter the Property Factor had sent to individual homeowners in September 2014. The letter was headed 'Information Letter. Collinwell Land Management Costs: Court Action.' He explained that the letter contained information that was not correct and therefore breached the terms of paragraph 2.1 of the Code of Practice.

As background he advised that a number of homeowners had not paid factors fees, part of which they considered had been wrongly charged. The Property Factor raised small claims actions at Kirkcaldy Sheriff Court. As there were a large number of similar actions the Sheriff selected their case as a test case. The case was partly heard on 9<sup>th</sup> June 2014 and thereafter the case was settled without a judicial decision having been made.

He explained that the inaccuracies are as follows:

(i) Last Sentence of Paragraph Two: '*Against this background settlement terms which were agreed to avoid further costs, which would have had to be met by all residents and the case was disposed of. This does not mean that these persons will be excused their liability for all existing losses; an invoice will be issued to them in due course.*'

He explained that he considered this statement to be threatening and false. The court action was settled on the basis of no expenses being due to or by either party. No court decree was made. The deed of conditions does not state who should pay for legal costs.

(ii) The Third last sentence of Paragraph Four: '*The alternative is that we simply leave the statements as they currently stand. For the avoidance of doubt, any resident who has been issued with a £35 Credit note will receive an invoice from Hacking and Paterson to recover that quarters charge. Hacking & Paterson will then submit these funds to Collinswell Land Management limited who in fact did the work....'*

He explained that this statement was incorrect as it was Collinswell Land limited who did the work and not Collinswell Land Management Limited.

(iii) The last sentence of Paragraph Four: '*Mr McIntosh wanted this clumsy method'*

He explained that this is simply incorrect. He considered this statement to be intimidating as he is named. Many people in the development have asked him about this.

(iv) Paragraph Five: '*Separately in 2012 Collinswell Land Management Limited agreed with the remaining developers to increase the annual factoring charge from £140 to £175 per annum as it was anticipated that the costs of providing the services were likely to increase which in fact they did. It was maintained that the meeting had not been properly convened.'*

He explained that this is completely false. Taylor Wimpey were the developers of Area Three which was finished in 2011; Stewart Milne were the developers of Area One which was finished in 2008/2009; Betts were the remaining developer but they are not party to the Deed of Conditions. Also he explained that the manager burden expired on 14<sup>th</sup> June 2011 (five years from the date of registration).

Even if the Property Factor had a meeting with the developers this should not have happened as there is no provision for this in the Deed of Conditions.

(v) Paragraph Six: '*If this were to be correct each resident could seek a refund of the increased charge. However, the charge itself covered the actual costs of the work done. 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 explained that he considers this statement to be misleading as it gives the impression that the Sheriff endorsed the Property Factor recovering costs. This is not the case as the case settled out of court.

(vi) The first sentence of Paragraph Nine: 'As a result of Mr McIntosh & Mr Crook's action and the other few residents involved, we have conducted a full audit of all costs and divided them equally amongst the residents.'

He explained that he considers this statement to be abusive and misleading. He had not raised the court action. The court action had been raised by the Property Factor against him. He objects to them being singled out in this newsletter. The letter should have stated either:

'As a result of Collinswell Land Management Limited's errors' or 'As a result of the test case'.

(vii) Last sentence of Paragraph Nine: A full list of the few residents who have caused these losses is available and is not subject to the Data Protection Act ..'

He considers this statement to be inciteful. He advised that it has put the people who attended court into a state of alarm.

He also gave evidence in response to the Property Factor's written representations:

(i) Clause 1: 'In total there are approximately 339 plots within the Collinswell Development.'

He advised that this is incorrect. The Property Factor register indicated that there were 242 plots in March 2013; 339 plots in December 2013 and 270 plots in June 2014. The email dated 5/6/14 refers to 292 plots.

(ii) Clause 4: 'The factors do not sub contract the works in respect of the majority of services provided to the residents in Collinswell Park.'

He explained that this is incorrect as the Company Accounts state that the Company does sub contract work.

(iii) Clause 5: 'Annual accounts are compiled and circulated to each resident on the estate providing a full breakdown of each year's financial activities.'

He explained that this is incorrect. The accounts are not circulated. The Property Factor makes the accounts available. He was only given a copy as a production in the court case.

In summary he explained that it is his view that it is the Property Factor's responsibility to understand the rules. He believes that the Property Factor has circumvented the rules for financial gain, which he considers to be unacceptable.

He advised that he wants a public apology and a letter sent to all the owners correcting the errors that were made in the newsletter. In particular he considers that his name was included in the newsletter needlessly.

## 7. Decision

- (i) Last Sentence of Paragraph Two: 'Against this background settlement terms which were agreed to avoid further costs, which would have had to be met by all residents and the case was disposed of. This does not mean that these persons will be excused their liability for all existing losses; an invoice will be issued to them in due course.'

This head of complaint is upheld.

The letter from Gebbie and Wilson (the Property Factors' solicitors) to the Homeowner and Mr Crooks dated 12<sup>th</sup> June 2014 confirms that the case was settled on the basis that no expenses were due to or by either party.

The Committee considered the sentence '*This does not mean that these persons will be excused their liability for all existing losses; an invoice will be issued to them in due course.*' to be misleading as no award of expenses had been made by the court.

- (ii) The Third last sentence of Paragraph Four: 'The alternative is that we simply leave the statements as they currently stand. For the avoidance of doubt, any resident who has been issued with a £35 Credit note will receive an invoice from Hacking and Paterson to recover that quarters charge. Hacking & Paterson will then submit these funds to Collinswell Land Management limited who in fact did the work....'

This head of complaint is upheld.

In the Property Factor's written representations the Property Factor states: 'The applicants suggests that the factors did not undertake the work but he has already been provided with a copy of a letter from Hacking and Paterson dated 17<sup>th</sup> November 2008 which notes the position.'

However the Committee noted that the letters from Hacking and Paterson to the Homeowner and Mr Crooks dated 17<sup>th</sup> November 2008 and 27<sup>th</sup> November 2009 confirm that the work was carried out by Collinswell Land Limited.

The letter dated 17<sup>th</sup> November 2008 states:

'We have noted that Collinswell Land Limited will maintain the periphery amenity ground surrounding the residential developments at Collinswell Park, Burntisland.'

The letter dated 27<sup>th</sup> November 2009 states: 'In terms of the over arching deed of Conditions for your property, Collinswell Land Limited will assume the role of factor for the periphery common areas around Collinswell Park at 1<sup>st</sup> January 2010. Collinswell Land Limited will also continue to maintain the completed areas within the park, on behalf of the plot proprietors.'

The Committee found the words 'Collinswell Land Management Limited who in fact did the work' to be false.

(iii) The last sentence of Paragraph Four: 'Mr McIntosh wanted this clumsy method'

This head of complaint is upheld.

The Committee accepted the evidence of the homeowner that this is 'simply inaccurate'.

The Committee found this sentence to be false.

(iv) Paragraph Five: 'Separately in 2012 Collinswell Land Management limited agreed with the remaining developers to increase the annual factoring charge from £140 to £175 per annum as it was anticipated that the costs of providing the services were likely to increase which in fact they did. It was maintained that the meeting had not been properly convened.'

This head of complaint is upheld

The Homeowner's evidence is that the Property Factor did not meet with the remaining developers in 2012 and even if they did the meeting did not comply with the Deed of Conditions.

The Property Factor's written representations state that: '*the factors accepted that the meeting at which the decision to increase the annual charge may not have been properly convened*'

The Committee finds that the words 'It was maintained' to be misleading as their own written representations state that they accepted that the meeting was not properly convened.

(V) Paragraph Six: 'If this were to be correct each resident could seek a refund of the increased charge. However, the charge itself covered the actual costs of the work done. 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).

This head of complaint is upheld.

The letter from Gebbie and Wilson to the homeowner dated 12<sup>th</sup> June 2014 confirmed that the case at Kirkcaldy Sheriff Court was part heard and detailed the settlement terms. The Property Factor's written representations also referred to the fact that the case was part heard and that the factors accepted that the meeting at which the decision to increase the annual charge was made may not have been properly convened.

Unfortunately the Property Factor's written representations do not clarify the position with regards to the legal expenses.

However the Committee acknowledged that as the case was settled and not judicially determined the Sheriff would not have made a determination on the matter of costs.

Consequently the Committee found this paragraph to be misleading.

- (vi) The first sentence of Paragraph Nine: 'As a result of Mr McIntosh & Mr Crook's action and the other few residents involved, we have conducted a full audit of all costs and divided them equally amongst the residents.'

This head of complaint is upheld.

It was inaccurate to state that court action was raised by the Homeowner. The court action was raised by the Property Factor against the homeowner. The Property Factor lodged in evidence a copy of the Inventory of Productions in connection with case Collinswell Land Management Limited against the homeowner Case Reference SA55/14 which confirmed this.

Consequently, the Committee found this sentence to be misleading and false.

- (vii) Last sentence of Paragraph Nine: A full list of the few residents who have caused these losses is available and is not subject to the Data Protection Act.'

This head of complaint is upheld.

The Committee accepts the Homeowner's evidence that this statement has put the residents who attended court, including himself, in a state of alarm.

As previously stated the Court action was raised by the Property Factor. The case was settled on the basis that no expenses were due. Therefore the Committee found it to be misleading to refer to the residents causing the losses.

The Committee considered the Homeowners evidence on the terms of the Property Factor's written representations. However they did not make a decision on the accuracy of these points as they are not material to the application.

## 8. Property Factor Enforcement Notice

In all of the circumstances narrated above, the Committee finds that the Property 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 and 2.2.

The Committee has therefore determined to issue a Property Factor Enforcement Notice.

Section 19 of the 2011 Act requires the Committee to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations to the Committee.

The Committee proposes to make the following Order:

*'Within 28 days of this decision being issued to the parties:*

- (1) The Property Factor is required to issue a letter of apology to all of the residents. The letter must apologise to the Homeowner and other residents for providing misleading and inaccurate information in their Information Letter dated September 2014.*

*The letter of apology should also correct the inaccurate statements in the said Information Letter and should:-*

- (i) *Emphasise that they settled the court action as they conceded that their invoice dated 25<sup>th</sup> January 2010 included a previous quarter of factoring charges which they were not entitled to collect amounting to £35.*
  - (ii) *Explain that the Sheriff made no judgement to the effect that they were entitled to recover legal costs.*
  - (iii) *Apologise for specifically naming the homeowner and Mr Crooks.*
  - (iv) *Clarify that they had raised the court action and it was not the homeowner and Mr Crooks who had raised the Court action.*
- (2) *The Property Factor must pay the homeowner £100 for the inconvenience he had suffered from their own funds and at no cost to the owners.'*

The intimation of this Decision to the parties should be taken as Notice for the purposes of Section 19(2)(a) of the 2011 Act that the parties are hereby given Notice that should they wish to make any written representations in relation to the Committee's proposed Order that they must be lodged with the Homeowner Housing Panel within 14 days of the Date of this Decision. If no representations are received then the Committee will proceed to make the Order Proposed. If representations are received they will be considered by the Committee prior to the making of any order.

The Property Factor should note that failure without reasonable excuse to comply with a Property Factor Enforcement Order is a criminal offence in terms of section 24 of the 2011 Act. Additionally Scottish Ministers can take any failure into account in respect of the future registration of the Property Factor on the register of property factors.

## **9.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.'

Jacqui Taylor

Signed .. ... Date 13<sup>th</sup> February 2015

Chairperson