



**Determination of the Homeowner Housing Committee
Statement of Decision by the Homeowner Housing Committee
under the Homeowner Housing Panel
(Applications and Decisions)(Scotland)
Regulations 2012 ("the Regulations")**

HOHP reference: HOHP/PF/13/0033

Re: Property at Flat G2, Mount Zion Church, Church Road, Quarriers Village, Bridge of Weir, PA11 3TD ("the Property")

The Parties:-

Forrest, residing at Flat G2, Mount Zion Church, Church Road, Quarriers Village, Bridge of Weir, PA11 3TD ("the Homeowner")

And

Property 2 Limited, having a place of business at 2 North Kirklands, Eaglesham Road, Glasgow, G76 0NT ("The Factor")

Background

1. By an application dated 25 January 2013, the Homeowner made a complaint to the Homeowner Housing Committee ("the Panel") with reference to alleged breaches of both the Code of Conduct for Property Factors ("The Code") and the property factor's duties relative to the management of property at Flat G2, Mount Zion Church, Church Road, Quarriers Village, Bridge of Weir, PA11 3TD.
2. Following correspondence between the Homeowner and the Committee and, following upon receipt of the supporting papers from both the Homeowner and the Factor, the Committee convened to consider the application on 18 October 2013.
3. At the hearing on 18 October 2013, the Homeowner was present. The Factor was represented by their Managing Director, Mr Graham McEwan.
4. At the start of the hearing, and in an effort to clarify the nature and extent of the Applicant's complaint, the Homeowner Housing Committee made reference to the Applicant's email to the Factor dated 28 May 2013 and in particular the eight numbered paragraphs therein whereby the Homeowner set out the areas she believed the Factor had failed to carry out the Factor's duties as set out in Section 17(5) of the Property Factors (Scotland) Act 2011.
5. Following discussions with the Homeowner in relation to an alleged breach (which related to an allegation that the factor falsely stated to an owner that a lift contractor would not attend to the release of that owner's son from being trapped on the lift until that owner had paid outstanding monies), the Homeowner indicated that she wished to withdraw that part of her complaint.

6. As the Committee proceeded to consider each of the further complaints of the Applicant, it became evident that there was confusion as to which of the papers lodged by both parties were to be referred to in respect of each of the respective headings of complaint. It was also apparent that both parties were referring to certain previous communications which had not been lodged with the Panel.
7. The Committee accordingly decided to adjourn the hearing and to direct the parties to lodge a further bundle of papers with the Committee in which they would set out their case in a manner which could be clearly followed by reference to papers which would be numbered and indexed.
8. The Committee thereafter reconvened to continue the hearing of the case on 25 November 2013.
9. The Homeowner was present at this hearing. The Factor was again represented by Mr Graeme McEwen.

Following the initial hearing on the 18 October 2013 and, following the submission by the applicant of a further bundle of papers, which further specified her case, certain of the original complaints made by the Homeowner were consolidated, whilst others of the original complaints were not insisted upon in their original terms.

10. Each of the Applicant's complaints were considered in turn. On each occasion the Homeowner was asked to clarify whether she considered the complaint to be a breach of the Code of Conduct or a breach of the Factor's Duties. Thereafter, the Homeowner was given an opportunity to present her case in support of her complaint and the Factor was given an opportunity to respond. This determination makes reference to each of the alleged failures which the Homeowner presented to the Committee.

General findings in fact

11. The Homeowner is one of two joint heritable proprietors of the subjects situated and known as Flat G2, Mount Zion Church, Church Road, Quarriers Village, Bridge of Weir, PA11 3TD. The Homeowner jointly owns the property with her sister.
12. The Factor is the property Factor responsible for the repair and maintenance of the common parts of the subject at the development known as Mount Zion Church mentioned in the preceding paragraph. Their responsibilities for those common parts are as set out in a Deed of Declaration of Conditions registered on 7 December 2009 by Clyde Building Group Limited.
13. The Factor became a registered Factor under and in terms of the Property Factors (Scotland) Act 2011, on 7 December 2012. The Factors duties under Section 14(5) of the Act to comply with the Code of Conduct for Property Factors arise from that date.

Complaint regarding failure to provide a written statement of service

14. The Homeowner maintained that the Factor had failed to provide a written statement of services as required by Section 1 of the Code of Conduct of Property Factors.

The Code requires that the Factor "must provide each Homeowner with a written statement setting out in a simple and transparent way, the terms of service delivery, standard of arrangements in place between you and the Homeowner".

15. By an email of 12 February 2013, the Homeowner had requested from the Factor a written statement of service.
16. In terms of the Code the Factor must supply a full written statement if requested to do so by a Homeowner within 4 weeks of that request.
17. On 12 February 2013, the Factor replied to the Applicant's request. The Factor referred the Homeowner to information on the Factor's website. The Factor also copied onto his email details of that statement of service (which the Factor had named a Declaration of Service).
18. The Homeowner maintains that the statement of service (otherwise known as the Declaration of Service), as exhibited by the Factor does not meet the requirements of the Code. In particular, it is not a written statement that is in a simple and transparent form and, further, it does not fully specify all the matters which the Code requires to be set out in accordance with Section 1 of the Code.
19. The Factor accepted that he had named his Statement of Service as a Declaration of Service. The Factor explained in evidence that all new owners were given an information pack which set out further specification of the Factor's services. The Factor confirmed that this information pack was given to all new owners. He also stated in his evidence that the information pack had been given to all owners at the time that Factors assumed responsibility for the factoring services at the development. Accordingly, he was able to confirm in his evidence that the Homeowner received a copy of the information pack at that time.
20. The Homeowner could not recall having received an information pack.
21. The Factor confirmed that the "Declaration of Service" applies to any development where the Factor provides factoring services. It has not been adopted for the specific requirements of the Property.
22. The issue for the Committee is to consider whether the Factor has provided a written Statement of Services as required by the Code which sets out in detail those areas identified within the Code which are required by a full written Statement of Services.
23. Having considered the matter the Committee determined that the Factor has failed to provide a written Statement of Services as required by the Code. The manner in which the Factor sets out his services is at best confused. The Factor makes reference to information on his website and, at the same time, makes reference to an information pack. The Committee consider that it is essential that a Homeowner should only have to have regard to one written document to consider the full statement of services to be delivered by the Factor. The Statement of Services has to be in writing. Whilst information is available on the website for Owners, the Committee do not consider that method of communication meets the requirements of the provision of a written statement of Service. It is for the Factor to provide a written hard copy of his full Statement of Services to each owner within any development which he factors. There is no reference in the Statement of Service to the information pack. There is no reference in the information pack to the Statement of Service.
24. Further and in any event, the information which is on the Factor's website and the information which is available within the Factor's information pack do not fully cover all the matters required to be set out in a Statement of Service in accordance with the Code.
25. The Code required that the Factor should set out a statement of the basis of any authority on which the Factor acts on behalf of the Homeowner. There is no clear statement to this effect within any of the paperwork provided by the Factor. The Code required the Factor to set out the services provided to include core services with target times for taking action in respect to routine and emergency and repairs. The information provided by the Factor fails to indicate such target

times. The Code required that the Statement of Service should state what proportion (expressed as a percentage or fraction), of the management fees and charges for common works and services each owner within the group is responsible for. The information currently supplied by the Factor does not provide this breakdown to the Homeowner.

26. It is not for the Committee to rewrite the Statement of Service. It is for the Factor to provide a full written Statement of Service which complies with the Code. The Committee are satisfied that the current information supplied by the Factor on his website (taken together with the information provided by the Factor in this information pack) fails to meet the requirements of the Code and the Factor has breached the Code of Conduct in this respect.

Complaint regarding failure to produce clear accounts

27. The Homeowner maintains that the Factor has failed in his duties under the Code of Conduct (Section 3) in that there is no clarity and transparency in his accounting procedures. In Particular, the Homeowner complains that the Factor has failed to explain what the Homeowner is paying for, how the charges were calculated and to ensure that no improper payment requests were involved. The Homeowner further complained that the Factor has delayed in providing information of a financial nature and often provides information in a "piecemeal" fashion which displays an inadequate accounting system.
28. In this respect, the Homeowner drew the Panel's attention to an invoice issued by the Factor dated 30 April 2013 with reference invoice number: MOUNT073. The Homeowner drew the Panel's attention to a whole series of emails between the Homeowner and the Factor, whereby the Homeowner had questioned certain of the expenditures set out by the Factor in invoice number MOUNT073. In particular, the Homeowner had questioned why they were being charged for gutter cleaning as the Homeowner did not consider the contractor had carried out that work to a reasonable standard. The Homeowner further questioned amounts paid to Scottish Power in relation to the communal electricity (excluding a supply to a lift). The Homeowner queried what was meant by the charge against the heading "out of hours".
29. The Homeowner had also queried the number of visits made by certain contractors. The Factor had responded by giving some information to the Applicant. That information gave details of the extent of the services provided by certain contractors together with dates of their visit. The Homeowner further queried the amount of commission and admin charges which related to an insurance policy charge which appeared on the statement MOUNT073.
30. The Factor explained that in relation to certain charges such as the repairs to the gutters they had taken a commercial decision (as far as the Homeowner was concerned), and decided simply not to charge the Homeowner for those particular parts of the service which they had provided. They had accordingly written off certain of the charges on invoice MOUNT073. In relation to other parts of the Homeowner's complaint, they had made certain information available. They had for example given copies of the electricity account which they had received and which they were now seeking to onward charge to the Homeowners at the development. They had attempted to answer the Homeowner's questions regarding the adequacy of the services available. In relation to the question of how much of the insurance costs related to administration or commission charges they had made available certain information from their insurance broker which gave a breakdown of insurance premiums and commissions. That appeared to give information which regard to an overall premium for the insurance policy together with a premium tax and then stated "OR commission". At the hearing it was established that OR was an abbreviation for One Risk and that information with regard to the total commission paid for the premiums had been made available.

31. The question for the Committee in this matter is whether the Factor has complied with the Code. In Particular, the Committee require to consider whether the Factor had met the obligations of the Code to ensure that Homeowners know what it is they are paying for, how the charges were calculated and that no improper repayment requests are involved.
32. The Code's overriding objectives include (a) clarity and transparency in all accounting procedures; and (b) the ability to make a clear distinction between Homeowner's funds and a Property Factor's funds.
33. It was evident to the Committee from the confusion of paperwork which was presented that the Homeowners could not be expected to fully understand how charges made against them had been calculated nor could they clearly understand what it was that they were in fact paying for and that they were only being requested to pay for their share of any appropriate charges. The Factor has failed to provide a clear and transparent accounting procedure which sets out the Homeowner's liability in relation to common charges etc.
34. The Committee are unable to clarify from the papers available (and from the evidence presented), which of any outstanding sums claimed by the Factor are legitimate heads of claim. It is not, however, for the Committee to make such an assessment. The Committee are satisfied on the evidence available that the Factor has failed in his duties under the Code of Conduct to provide the Homeowners with clear and transparent accounting procedures which allow the Homeowner to identify what it is they are paying for, how the charges were calculated and to ensure that no improper payment requests are involved, all as required in terms of the Code of Conduct, Section 3. The Factor has accordingly failed to comply with Section 3 of the Code.

Complaint regarding failure by the Factor to conduct himself in a professional manner (alleged breach of Clause 2.2 of the Code)

35. The Homeowner maintains that the Factor has failed to conduct himself in a professional and respectful way when communicating with the Applicant. The Homeowner avers that this is a breach of Section 2 of the Code within the context of Communication and Consultation. In particular, the Code states that the Factor must not communicate with Homeowners in anyway which is abusive or intimidating or which threatens them. In this respect the Homeowner made reference to a number of emails which the Factor had sent to her. The Homeowner maintained that these were unprofessional and disrespectful. It is the Panel's view that whilst the emails themselves are curt in nature, they do not in themselves form evidence of actions which can be described as abusive or intimidating.
36. The Homeowner further complained that the Factor would regularly contact her out with normal office hours for example around 8.30am in the morning. The Factor would also call frequently to chase outstanding bills. The Homeowner would complain that the Factor had not responded to her reasonable enquiries as to the nature and extent of the sums claimed. The Homeowner found the Factor's approach in this respect threatening and intimidatory.
37. The Homeowner further complained that in one particular phone call from the Factor, the Homeowner was advised by the Factor that he was going to cancel her buildings insurance because there continued to be a dispute about payment of outstanding invoices due to the Factor. The Homeowner stated that she found the terms and nature of the phone call to be intimidating.
38. The Factor in his evidence to the Committee, did not accept that he had ever behaved in a manner which is abusive or intimidating or which has threatened the Applicant. The Factor candidly accepted that some of his communications could be more carefully expressed but he highlighted that communications with the Homeowner were extremely fraught and that he was receiving a high number of emails and correspondence from the Homeowner on a regular basis.

39. Having regard to all the evidence before it, the Committee are satisfied on the evidence available there is an insufficiency of evidence to establish that the Factor has acted in a manner which could be described as abusive or intimidating or which threatened the Applicant. It was clear to the Committee from the evidence provided, (both in writing and orally at the hearing itself), that there has been a fundamental breakdown in the relationship between the Factor and the Applicant. Relations between the parties have become extremely strained. As a consequence, communications have become terse and perhaps even abrupt and curt. Notwithstanding this, however, the Committee are satisfied that there is not a sufficiency of evidence to support the Applicant's complaint that the Factor has behaved a manner which is in breach of the Code.

Complaint regarding failure by the Factor to consult re additional costs

40. The Homeowner maintains that there has been a failure in the debt recovery procedures of the Factor. In Particular, the Homeowner makes reference to Section 4.7, 4.8 and 4.9 of the Code of Conduct.
41. The Homeowner maintained that the Factor failed to consult with Homeowners regarding extraordinary works which were required at the property and which would incur additional costs for the Homeowners. In this respect, the Homeowner submitted emails which were exchanged between the Factor and other Homeowners at the property. None of these emails appeared to clearly intimate any particular issue directly between the applicant and the Factor. There was no clear evidence available to the Committee to form any view on a failure of the Factor in this respect. The Committee accordingly determined that there was no failure on the part of the Factor to comply with any part of the Code in this particular matter.

Complaint regarding insurance commission

42. The Homeowner has complained that the Factor has failed to provide answers to a reasonable request by the Homeowner to provide in clear terms what commission was received by the Factor as a result of the renewal of the insurance policy. In this respect the Homeowner sought to reply upon Section 5 of the Code of Conduct.
43. The Committee noted that the copy emails which the Homeowner lodged in respect of this matter were dated on or before the 21 November 2012.
44. The Factor's duty to comply with the Code of Conduct in terms of Section 14 of the Property Factors (Scotland) Act 2011 did not arise until the Factor became a registered Factor in terms of the Act. The Factor was registered in terms of the Act on 7 December 2012. Accordingly, the Factor was only under an obligation to comply with the Code of Conduct from the date of his registration as a Factor on 7 December 2012. The Homeowner has raised this issue as a specific breach by the Factor of the Code of Conduct.
45. Accordingly, the Committee have determined that there is no evidence of any breach in respect of this particular allegation of breach which occurred after the Factor was registered, being the date upon which he was required to comply with the Code of Conduct.

Complaint regarding failure in debt recovery procedures

46. A large volume of emails and other materials were supplied to the Committee in connection with what the Homeowner maintained was a failure by the Factor to follow clear debt recovery procedures in accordance with the Code.

47. In the course of evidence between the parties, it was agreed that a Court action had been raised in relation to alleged outstanding figures due by the Homeowner to the Factor. This matter had been settled extra judicially and without any final determination by the Court.
48. Separately, but in a related matter, the Factor had received settlement of an insurance claim following a flood within the Applicant's property. The cheque made payable by the insurance Company was payable directly to the Applicant.
49. The Homeowner maintains in her evidence that the Factor refused to release the cheque to her despite the fact it was made out to her and it was her entitlement to receive that cheque forthwith.
50. In the course of the evidence from both the parties, it became apparent that the Factor may have held onto the cheque for two or three days and, during that time, the Parties continued to have further disputes regarding overall sums due.
51. The Factor accepted that he should have released the cheque to the Homeowner as soon as it had been received by him.
52. Having considered all the papers, and having heard evidence on the matter, the Committee are not satisfied that there is a clear sufficiency of evidence to establish that the Factor has failed to follow debt recovery procedures in accordance with the Code. The Committee are also not satisfied that there is a sufficiency of clear evidence to establish whether or not the Factor has failed in respect of any of the Factor's duties. The Homeowner did not make any specific reference to any particular Factor's duty with which she felt the Factor had failed to comply. The Homeowner simply appeared to consistently refer to the code and the debt recovery procedures.
53. In all the circumstances, the Committee were not satisfied that there was a sufficiency of evidence to establish that there was a failure on the part of the Factor in respect of these debt recovery matters.
54. The Committee would comment, again, that it was evident that there was a fundamental breakdown in the relationship between the parties. Animosity between the parties clearly contributed to the overall breakdown in communication on debt recovery issues and issues in relation to the insurance cheque which was payable to the Applicant.
55. The role of the Committee is to establish whether there has been a failure on the part of the Factor in respect of the Code of Conduct or any particular Factor's duties. The Committee is not a forum for resolving a catalogue of issues between the parties which have arisen as a direct failure and breakdown of the relationship between the parties.

Complaint regarding Management fee increase

56. In her submission to the Panel, the Homeowner submitted that the Factor has increased his management fee in a manner which is a breach of the Factor's duties.
57. The Homeowner was not, however, able to substantiate the basis of her claim by reference to any particular duty or indeed to the Factor's powers and duties as set out in the Title Deeds to the property. The Committee accordingly determined that there was no failure by the Factor of any breach of the Factor's duties or a breach of the Code of Conduct in respect of this matter.

Summary

58. In summary, the Panel, having considered all the available written evidence and, as spoken to in evidence, by both the Homeowner and the Factor, have determined that there have been two failures on behalf of the Factor to comply with the Code of Conduct:-

- (a) The Factor has failed to comply with the Code of Conduct by failing to provide a written statement of services which complies with the requirements of Section 1 of the Code of Conduct of Property Factors.
 - (b) The Committee are further satisfied that the Factor has failed to comply with the Code in relation to his accounting procedures as required by Section 3 of the Code.
59. With regard to all the other complaints raised by the Applicant, the Committee have found that there has been an insufficiency of evidence to establish that there has been a breach by the Factor in respect of the Code of Conduct in relation to these issues or in relation to any particular Factor's duties. The Applicant's case has been presented in a confused manner. The basis of the Applicant's claims whether in terms of the Code or in terms of the Factor's duties have not, in respect of these other matters, been clearly set out and there has not been clear evidence to support the variety of breaches which are alleged.

Decision

- 60. The Committee found that the Factor's failed to comply with the following Sections of the Code in terms of Section 17(1)(b) of the Act:-
 - (a) failure to provide the Homeowners' with a written statement setting out, in a simple and transparent way, the terms of the service delivery standards of the arrangements in place between the Factor and the Homeowner, in particular, the written Statement of Service fails to comprehensively address the variety of issues as set out in the Code which are required to be covered by a written Statement of Service;
 - (b) the Factor has failed to issue accounts which meet the overriding objective in Section 3 of the Code (financial obligations) such that accounts issued are clear and transparent. In particular, and despite reasonable requests from the Applicant, the Factor has failed to demonstrate what the Homeowner is being requested to pay for, how the charges were calculated and to ensure that no improper payment requests are involved.
- 61. The Committee does not find that the Factor has failed to carry out any Property Factor's duties as defined in Section 17 (5) of the Property Factors (Scotland) Act 2011.
- 62. The Decision of the Committee is unanimous.

Draft Property Factor Enforcement Order

- 63. Section 19 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 representations to the Panel.
- 64. 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.
- 65. 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 reached the Panel's office by not later than 21 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.

66. Failure to comply with the Property & Factor Enforcement Order may have serious consequences and constitute a criminal offence.
67. The panel proposes to make the following Property Factor Enforcement Order:-
 - (a) within 6 weeks from the date of issue of the Property Factor Enforcement Order, the Factor must:-
 - (i) provide to the Homeowner a written Statement of Service which is compliant in all respects with the requirements of Section 1 (written Statement of Services) of the Code of Conduct for Property Factors;
 - (ii) provide the Homeowner with a detailed financial breakdown of any outstanding sums which the Factor claims are now due to the Factor in respect of services already provided to the Homeowner in doing so the Factor should ensure that it is clear from the information provided to the Homeowner that the information supplied is sufficient and such that the Homeowner is able to identify what it is they are being asked to pay for, how the charges are calculated and to so that the Homeowner can ensure that no improper payment requests are involved.
 - (iii) provide documentary evidence to the Committee of the Factor's compliance with the above Property Factor Enforcement Order by sending such evidence to the Office of the Homeowner Housing Panel by recorded delivery post.

Right of Appeal

68. 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:-
 - (a) 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 Committee or a Homeowner Housing Committee; and
 - (b) 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..."

Signed
Andrew Cowan, Chairperson

Date..... 23/2/13