



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

hohp Ref: HOHP/PF/14/0058

Re: Property at 15 Larchfield Neuk, Balerno, Edinburgh, EH14 7NL
(collectively "the Property")

The Parties:-

Mrs Yvonne Williamson, 15 Larchfield Neuk, Balerno, Edinburgh, EH14 7NL ("the Homeowner")

Sheltered Housing Management Ltd, South Hawkhillock, Ardallie, Aberdeenshire, AB42 0TS ("the Factors")

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)
Ann MacDonald (Housing Member)

Decision of the Committee

The Factors have failed to comply with their duties under s 14(5) of the 2011 Act in terms of Sections 2.5, 3.3, 6.1 and 6.9 of the Code of Conduct for Property Factors.

The decision is unanimous.

Background

1. By application dated 14 April 2014, the Homeowner applied to the Homeowner Housing Panel ("HOHP") for a determination of whether the Factors had failed to comply with the duties set out in sections 1, 2, 3 and 6 of the Code of Conduct imposed by section 14(5) of the 2011 Act. Further specification of the complaints contained within the application was sent to HOHP and intimated to the Factors on or about 9 May 2014. These are referred to collectively as "the application" in this decision. By Minute of Decision dated 22 July 2014, the President of the HOHP determined that the application paperwork to be taken into account

comprises all documents received by HOHP in the period 15 April to 18 July 2014.

2. Notices of referral to the Committee were sent to the parties on or about 22 July 2014 following a Minute of Decision by the President of HOHP to do so. In response to the notice of referral, the Homeowner submitted written representations dated 19 August 2014. Those were taken account of by the Committee only insofar as they clarified or elaborated upon the original complaints contained within the application. The Factors for their part via their agents BBM Solicitors submitted 15 pages of written submissions and 7 items of authority in response to the notice of referral, all of which was taken into consideration by the Committee.
3. The Homeowner had previously made an application to HOHP in respect of the Factors alleging various breaches of the Code on 14 May 2013. That application had been followed by hearings of an HOHP Committee on 9 October and 10 December 2013. A decision was issued on 17 December 2013 which upheld breaches in respect of sections 1, 2.3, 2.4, 2.5, 5.1 and 6.1 of the Code. However, in light of certain actions taken by the Factors between the two hearing dates and undertakings having been given in relation to further action to be taken by the Factors to meet the Homeowner's concerns, the Committee was not minded to make a Property Factor Enforcement Order and none was in fact issued.
4. The Homeowner contends that certain of those undertakings were not honoured which has resulted in the present application. The preceding paragraph is included by way of background only. It is not part of the present Committee's function to review compliance or otherwise in respect of undertakings given to a separate prior Committee, or to revisit its determination and it does not do so. Its role is to consider the present application on its own merits based upon the supporting facts found at the hearing. Its jurisdiction to hear complaints in relation to the Code arises from 12 March 2013 which is the date of registration of the Factors. There was no separate complaint in relation to the Factors' duties generally arising from section 17 of the Act, that having been expressly withdrawn at the hearing.
5. An oral hearing in relation to the application was held on 9 October 2014 within George House, George Street, Edinburgh. The Homeowner attended accompanied by her husband. She was not represented and gave evidence on her own behalf, occasionally assisted by her husband. The Factors gave notice that they did not wish to attend in person at the hearing but chose instead to rely upon their written submissions referred to above, together with further written submissions contained within a letter sent by Messrs BBM on 7 October 2014.
6. The complaint in relation to section 1 of the Code was withdrawn, it being accepted by the Homeowner that the Written Statement of Services issued in

December 2013 complied with the Code requirements. The Committee therefore restricted its consideration to the complaints arising under sections 2, 3 and 6 of the Code.

Committee Findings

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

7. The Homeowner, together with her husband, are the heritable proprietors of the Property which is known as and forming 15 Larchfield Neuk, Balerno which they purchased in or about September 2010. The Property forms part of Larchfield Neuk, Balerno which is a sheltered housing development on the south western outskirts of Edinburgh ("the Development").
8. The Development was built in or about 1985 for the specific purposes of providing sheltered accommodation for the elderly. A deed of conditions was granted by Wimpey Homes Holdings Ltd and recorded in the division of the General Register of Sasines applicable to the county of Midlothian on 27 February 1985 ("the Deed of Conditions").
9. The Deed of Conditions sets out the general arrangements for the Development (in terms of Clause (FOURTH)) in terms of management and service charges. This sets out the arrangements, amongst other things, for maintenance, repair and renewal, insurance and the creation of a management scheme and the payment therefor.
10. The Factors have been designated as the property managers in terms of the Deed of Conditions since the Development was built. The Factors were appointed as such when the Development was built in terms of a Minute of Agreement between Wimpey Holdings Ltd and the Factors also recorded in the General Register of Sasines in 1985.
11. The Factors are the property factor responsible for the repair, maintenance and insurance of the common parts of the Development.
12. The arrangements set out in the Deed of Conditions were for the sake of easy reference translated into a standalone document named the "Development Management Scheme" which was circulated among the residents of the Development and new owners.
13. The Deed of Conditions as supplemented by the Development Management Scheme and Written Statement of Services sets the background for the arrangements between the Homeowner and the Factors. The Factors' obligations imposed by s 14(5) of the Code with which this decision is concerned are to be viewed in that context.

14. Following agreement between Wimpey Holdings Ltd and the Factors in 1990, parts of the Development were conveyed to the Factors in terms of a Disposition for nil consideration recorded in the General Register of Sasines on 25 November 1992. As a result, the Factors are the heritable proprietors of the warden's house, the warden's office, guest bedroom, common room with ancillary toilets and kitchen and the garden ground pertaining to those subjects within the Development.
15. The Factors were 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 12 March 2013.
16. There are 36 occupants in total within the Development. The Homeowner is not the only occupant dissatisfied with the property management services provided by the Factors. However, she has been the only one to take matters forward by way of the present application.
17. The Factors' approach to financial accountability for the service charges paid by the residents is neither clear nor transparent: The residents are with good reason in doubt regarding the justifiability of the level of management fees which they pay and how they are spent and protected.
18. There is a lack of communication between the parties. The Factors are principally responsible for this unfortunate position. The Factors have not approached communication with the Homeowner or others within the Development in an open or constructive way. Rather than communicate directly with the Homeowner , they have consistently chosen to do so via their solicitors.
19. The Committee found the Homeowner and her husband to be entirely credible and reliable in the giving of their evidence.

Discussion of evidence and alleged breaches of duty

Section 2 of the Code

20. Section 2.4 of the Code requires the Factors to have a procedure to consult with homeowners and to seek their approval prior to providing work which will incur charges or fees in addition to those relating to the core service. The Written Statement of Services at paragraph 5.7 provides that the Factors will obtain two competitive quotes where the likely costs will exceed £5,000. The Homeowner made reference to a quote for £5,500 in respect of exterior painting works having been obtained without estimates having been provided. The Homeowner pointed to a letter of complaint dated 4 July 2014 in relation to this matter in response to a letter from the Factors dated 27 June 2014 enclosing the annual budget for 2014-2015. As this issue arose after the date of the application, it could not be considered by the Committee. Accordingly, it finds no breach in terms of section 2.4 of the Code.

21. Section 2.5 of the Code requires the Factors to respond to enquiries and complaints received by letter or email within prompt timescales. The overall impression obtained by the Committee of the experience of the Homeowner was that it was characterised by a persistent failure to answer points raised in correspondence directly. However, when the Homeowner was pressed to point out specific evidenced examples of such failures to communicate, the only clear example which was given was in relation to a letter sent by her to Mr Miller, Director of the Factors dated 13 March 2014. The Committee could see that there had been no answer to the various points raised within that letter. Some of the substantive issues raised will be discussed further below. However, Messrs BBM wrote to the Homeowner on 30 May 2014 and acknowledged a failure to answer that piece of correspondence and, moreover, apologised on their client's behalf for the administrative oversight. Accordingly, while the Committee found there to be a breach of section 2.5 of the Code, it proposes to make no Property Factor Enforcement Order in respect of it, given the apology received on 30 May 2014, albeit after a period in excess of ten weeks.

Section 3 of the Code

22. This section formed the main concern of the Homeowner. She pointed to the first two bullet points of the Section which demonstrate the spirit of the provisions under it. They are as follows: The overriding objectives of this section are: Protection of homeowners' funds; and clarity and transparency in all accounting procedures. The preamble to that section is also instructive. It states: "while transparency is important in the full range of your services, it is especially important for building trust in your financial matters." As noted above, it is the finding of the Committee that these overriding aims and objectives were not met by the Factors in this case.
23. Section 3.3 of the Code provides that Factors must provide to homeowners in writing at least once a year, a *detailed* breakdown of charges made and a description of the activities and works carried out which are charged for. In the written submissions provided on behalf of the Factors, the point is made at paragraph 4.3 that the Factors operate in a manner which differs from the mode of operation employed by other Factors. That may well be the case, but they are nonetheless required by virtue of s 14(5) of the Act as registered factors to comply with the basic requirements of the Code in light of its overriding objective.
24. In this instance, the residents of the Development are indeed provided with a single annual statement of accounts, rather than a monthly or quarterly service charge statement as might be the case with other factors. The Committee was provided with a statement of accounts to 31 December 2013 detailing a total expenditure of £71,630 and a further statement of accounts to 31 December 2013 and budget for 2014-2015. The latter projected the higher expenditure figure of £79,147 and set out a monthly charge for 2014-2015 of £183.21 per resident. The items of expenditure are seven in number and cover Manager

Salaries and Costs, Telephone, Insurance, Electricity, Repairs and Maintenance, Gardening and what is termed a "Facilities Charge." A note is provided underneath that entry in parenthesis stating that it "covers the cost of all services and facilities provided by SHM." It is the largest single item of expenditure amounting to £28,311 in 2013 and projected to be £29,160 in 2014-2015. The Committee was also provided with a previous statement of accounts to 30 June 2011 where what is now a Facilities Charge was covered by the headings of "Management Charge and Rental Charge for Manager's house/office etc." The monthly charge for the period 2011-2012 was £165.81 per resident.

25. In the view of the Homeowner, the annual accounts and budget are not sufficiently detailed. They ought to be broken down further in the interests of transparency and clarity and to know what the figures are actually for and that the expenditure was incurred. In particular she seeks a further break down of the charges in respect of Repairs and Maintenance and the Facilities Charge. The latter was introduced as a result of the HOHP Committee decision of 17 December 2013 at page 8 where it was noted that it was not clear how the annual "rental charge" was calculated. The change made in the annual accounting was apparently in recognition of the fact that there is no lease over the communal parts of the Development in the ownership of the Factors and that therefore there could be no rent payable.
26. Further to the second part of Section 3.3 of the Code, the Homeowner arranged to inspect the supporting documentation and invoices underlying the annual charges made at the Factors' offices. She did not get a copy the relevant invoices, but the details of them were read out to her for her to take notes. The notes were provided to the Committee and spoken to the by the Homeowner. It appeared that there was a discrepancy between the figures supporting the utilities and repairs charged and those appearing on the annual accounts. The bills for electricity charge totalled £1258 while the accounts stated £1970, the bills for repairs were £5169 but the accounts stated £5478. There was no breakdown of the overall insurance charge. Further, all of the residents had been charged a share of the McGill call system amounting to £1909 even although the special pendants required to provide that service were issued to only six residents. Finally, the payment of the insurance premium was not evidenced to reassure the residents that it was valid, there was no information provided beyond the communal sum covered, nor was it broken down in such a way as to demonstrate, for example, that the Factors did not obtain a commission in respect of it.
27. A letter of complaint dated 4 June 2014 was sent by the Homeowner to the Factors detailing the above discrepancies among other issues which had also previously been the subject of complaint. As noted in paragraph 1 above, that letter is included within the paperwork comprising the current application by virtue of the President's Minute of Decision dated 22 July 2014. The underlying issue regarding transparency of the Factor's accounting procedures is clearly made in

the application and related notifications of failure in terms of s 17(3) of the Act. Aside from what was evident or not from the inspection of supporting documentation, the Homeowner also pointed out discrepancies between the 2013 accounting and 2014-2015 budget referred to above. For example, in the original 2013 statement of accounts, managers' salaries and costs are stated as being £19,879 with a Facilities Charge of £32,868. In the following document for both years, the former figure is stated as being £24,436 and the latter as being £28,311. The change in figures was explained by the Factors as being a result of a payroll error in relation to the management costs, but with the alteration in the Facilities Charge, the total amount applicable to 2013 came out the same, namely £71,630. This means that the Facilities Charge can and does fluctuate by more than £4,000 one way or another according to what suited the Factor's accounting methods, irrespective of what the underlying charges actually are.

28. In their written representations at paragraph 5.12 it is contended on behalf of the Factors that: "the Respondents are not legally obliged to ensure that the monthly charge directly relates to the actual sums expended from year to year by the Respondents in relation to the services provided at the Development." The Committee found that to be an astonishing submission with which it could not agree. In terms of section 3.3 of the Code noted above, the Factors are only obliged to provide a breakdown at least once a year. The crucial point which has been italicised above is the word "detailed." The Committee does not consider that the financial breakdown provided by the Factors to be detailed enough to comply with the Code. It therefore finds the Factors to be in breach of section 3.3 of the Code.
29. The requisite level of detail is not specified in the Code. Accordingly, it is a matter of judgment on the part of the Committee to decide what would be the appropriate level of clarity given the overriding objective of this section of the code.. The accounts should clarify the sums held on behalf of the residents and provide assurance that it is being properly held and spent on their behalf. Therefore, any future annual accounting must start with a statement of the sums received from the residents and how that money is spent on their behalf. In doing so, the Factors should ensure that the invoices received tally with the budget made and the monthly amounts charged to the residents. In relation to the facilities charge, the reference in the written submission from the Factor referring to the HOHP decision of Shepherd v GHA was considered. Given the value of the facilities charge in relation to the overall charge to individual owners and as the range of services being covered are not detailed, it is appropriate that these are explained by reference to actual charges where they are invoiced with a management charge for the balance for the management overhead of the company being made in relation to the Development. In particular, in terms of the Property Factor Enforcement Order to follow hereon, the Committee requires therefore to see a detailed breakdown of each of the following items:
 - (1) Repairs and Maintenance, showing the cost of all contractors by name and invoice amount;

- (2) The Facilities Charge to show in detail all of the items of actual expenditure which it covers in any given year;
- (3) The Insurance Charge, to show the premium actually paid and when it was paid and separately, whether any commission has been obtained by the Factor by exhibiting the relevant invoice in a common area such as the lounge of the Development.

Section 6 of the Code

30. Section 6.1 of the Code requires Factors to have in place procedures to allow homeowners to notify them of matters requiring repair, maintenance or attention. It is implicit within that provision that apart from providing a channel for communication for such notification, Factors must actually also act upon it, otherwise it would be meaningless.
31. The Homeowner informed the Committee that despite requests for them to carry out paint work to the communal areas each year it had never been followed up. She gave examples of paintwork requiring to be done on the exterior of houses within the Development, for example on wooden window cills and soffits. The bins stores had never been painted despite requests for that work to be carried out. Nor had any fencing or gate uprights in the communal areas ever been painted. The Factors had never conducted any sort of survey to establish where such communal works might be necessary with the result that they had never been done.
32. The Committee was satisfied on the evidence heard that letters had been sent to the Factors calling upon them to carry out repair and painting works to the communal parts of the Development but that they had not been acted upon. It had sight of photographs which supported the Homeowner's oral evidence in this regard and although they were dated July and submitted later than the application they were accepted as being factual and an accurate representation of the position at the time of the application. Without the photographs, the Committee would have been entitled to carry out a site inspection to verify the oral evidence if it had chosen to do so. It was satisfied that the garden fencing, plant beds, flowers and shrubs all showed signs of neglect. It also heard evidence which it accepted as credible that the bin stores had not been painted or any other exterior painting carried out since the time of the application. Accordingly, it finds the Factors to be in breach of section 6.1 of the Code. In terms of the Property Factor Enforcement Notice to follow hereon, it intends to require the Factors to carry out the repair, redecoration and maintenance works specified therein.
33. As a final point in relation to section 6.1 of the Code, the Homeowner gave evidence regarding the poor state of decoration of the lounge and the fact that the Residents' Association was not permitted to hold its meetings there. In their written submissions, the Factors make the point that they own the lounge further to the 1990 disposition referred to above and that they are not obliged to afford any particular level of comfort to the residents of the Development. In the view of

the Committee that submission again demonstrates a very unfortunate attitude towards the residents of the Development which has been allowed to permeate much of the unconstructive communication and dealings between the parties. The residents are not using the communal areas of the Development on sufferance or according to the grace of the Factors. That is made clear by the specific purpose underlying the development by Wimpey in 1985. Access has been afforded to the lounge since the 1990 Disposition in favour of the Factors for a period in excess of 20 years. It is therefore reasonable for the Homeowner and other residents to have unfettered access to it and moreover for it to be in a fit state for occupation. Further, the Deed of Conditions specifically envisages the creation of the Residents' Association for the purposes therein stated. It should therefore be permitted free access communal parts of the Development, in particular the lounge, in order to carry out those functions. Whilst not making any specific enforcement order further to these observations, the Committee strongly suggests a radical re-think in the attitude of the Factors in relation to its dealings and communications with the Homeowner and residents of the Development. A useful starting point might be to discuss improvements by way of redecoration and general upgrading that might be carried out to the lounge. A reasonable contribution towards the costs of carrying out such works could be agreed with the Residents' Association and incorporated into the budget for 2015-2016.

34. In terms of section 6.9 of the Code, Factors are required to pursue contractors or suppliers to remedy defects in any inadequate work or service provided. The Homeowner gave evidence regarding work in the communal gardens not having been done but the gardening contractor not being pursued to remedy his inadequate work and services despite the Factors being called upon to do so. The present gardening contractor is a Mr Tom Murray who was appointed in 2012 to tend to the trees, shrubs, lawns and flowerbeds. According to the Homeowner, he provides half as many hours of service as his predecessor although the residents are charged the same amount as before. The trees are allowed to overgrow and the flower beds are not maintained by hoeing or otherwise maintained or planted. Further, he refuses to tend to the trees or larger shrubs which has resulted in complaints from neighbours to the Development in respect of encroachment caused by tree branches and shrubs. While the Factors' written submission that the hours to be worked are not relevant was accepted, the photographic evidence referred to above confirmed that areas of the expected service were not being carried out to a reasonable standard and that this had not been taken up with the contractor.
35. The Homeowner gave evidence that the Factors' warden attended the development on or about 14 July 2014 at the request of the Homeowner and agreed that remedial works to the garden areas of the Development were necessary. However, no action was taken by the Factors further to that inspection and agreement. The Committee noted the written submissions made on behalf of the Factors that certain works are seasonal and therefore that the complaints within the application are premature. However, the Homeowner confirmed that

as at the date of the hearing no works either in relation to the external redecoration to communal areas of the Development or the garden had been carried out or completed satisfactorily further to the section 17(3) notices sent by the Homeowner at the time of the application despite the summer since having passed. Therefore, the Committee accepted the evidence of the Homeowner that complaints made to the Factors with respect to defective gardening works were not acted upon and that they had refused or unreasonably delayed in carrying out the necessary works.

36. Accordingly, it finds the Factors to be in breach of section 6.9 of the Code. As in relation to section 6.1, a Property Enforcement Notice will follow hereon requiring the Factors to ensure that remedial measures are taken in respect of inadequate gardening services provided to the Homeowner and other residents of the Development.

Decision

37. In all of the circumstances narrated above, the Committee finds that the Factors have failed to comply with their property factor's duties in terms of s 14(5) of the Act in respect of sections 2.5, 3.3, 6.1 and 6.9 of the Code.

It has therefore determined to issue a Property Factor Enforcement Notice in relation to sections 3.3, 6.1 and 6.9 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..."

Signed

M O'Carroll
Chairperson

Date: 24 October 2014