



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

hohp Ref: HOHP/PF/13/0048

Re: Property at Flat 20, 160 Pentland Road, Glasgow ("the Property")

The Parties:-

Mrs Anne Shepherd, Flat 20, 160 Pentland Road, Glasgow ("the Applicant")

**GHA (Management) Limited, Glasgow t/a YourPlace Property Management
Granite House, 177 Trongate, Glasgow ("the Respondent")**

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

Committee Members:

John McHugh (Chairman); Tom Keenan and Colin Campbell (Housing Members).

DECISION

The Committee has jurisdiction to deal with the Application.

The Respondent has not failed to carry out its property factor's duties.

The Respondent has not failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

- 1 The Applicant is, with her husband, the joint owner of the Property.
- 2 The Property is a flat situated within a block of 30 flats.
- 3 The block is known as 160 Pentland Road.
- 4 The Respondent is the factor of the block of flats at 160 Pentland Road.
- 5 The property factor's duties which apply to the Respondent arise from the written Statement of Services entitled "YourPlace Everything you need to know about Our factoring services"

- 6 The Respondent's property factor's duties arose with effect from 1 October 2012.
- 7 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor.
- 8 The date of Registration of the Respondent was 22 November 2012.
- 9 The Applicant has notified the Respondent in writing as to why she considers that the Respondent has failed to carry out the property factor's duties and its duties arising under section 14 of the 2011 Act. She has done this by her letter of 23 November 2012.
- 10 The Applicant's letter of 23 November raised specific concerns regarding the Respondent's failure to provide a fee structure and the Respondent's failure to provide information regarding the process operated by the Respondent to review fees.
- 11 The Respondent has attempted to resolve the Applicant's concerns by its letters of 30 October 2012 and 20 December 2012.
- 12 The Applicant's concerns have not been addressed to her satisfaction.

Hearing

A hearing took place at the offices of the Homeowner Housing Panel, Glasgow on 27 June 2013.

The Applicant was present and was represented by Mr Sean Clerkin. The Applicant gave evidence. She called no other witnesses.

The Respondent was represented by Mr David Adams, Senior Solicitor employed by the Respondent and by Ms Alison McDiarmid the Respondent's Operations Manager and Mrs Jennifer Russell, its Managing Director. All gave evidence on the Respondent's behalf.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as "the 2012 Regulations".

The Respondent became a Registered Property Factor on 22 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee had available to it and gave consideration to: the Application dated 5 March 2013 and documents lodged with it; the Applicant's letter of 5 April 2013 and its enclosures; the letter by the Applicant's representative, Mr Clerkin received on 19 April 2013; the Respondent's Response dated 8 May 2013; the supporting documents lodged with the Response and the skeleton argument lodged at the hearing (which summarised what was to be said at the hearing on behalf of the Respondent and which contained no new information).

REASONS FOR DECISION

Jurisdiction

The Applicant complains regarding an increase in management fees which took effect on 1 July 2012. The Applicant first raised her complaint with the Respondent on 16 October 2012.

The Statement of Services imposed duties with effect from 1 October 2012. The Code only applies to the Respondent with effect from the date of its registration, which post-dates the raising of the complaint.

Accordingly, at the time of the increase, the Respondent neither owed a duty arising from its property factor's duties under the Statement of Services nor under the Code. By the date the complaint was raised, duties had begun under the Statement of Services, but not the Code. By the time the complaint had reached a more advanced stage, the Code duties had arisen.

Mr Clerkin confirmed during the hearing that the Applicant was not insisting upon her complaint by reference to the property factor's duties arising under section 17 of the 2011 Act but only upon alleged breaches of the Code.

Although provisions exist (Regulation 28(1) of the 2012 Regulations) which may allow the Committee to take into account "any circumstances occurring before 1 October 2012 in determining whether there has been a continuing failure to act", those provisions are not relevant in the present case given that we are only concerned with alleged breaches of the Code.

Mr Adams for the Respondent confirmed that the Respondent took no issue with our jurisdiction to hear the case and would make no argument that the matters complained of pre-dated the date upon which Code duties arose.

In the present case, the Applicant is not complaining about the actual increase itself which took place in July 2012. We would have no jurisdiction to hear such a complaint. Rather, the Applicant's complaints relate to a continuing failure by the Respondent to provide certain information to her. She has complained of that failure to the Respondent post 22 November 2012 and it continues to persist to the present day.

It appears to us that the Applicant has made complaints in her application which relate to alleged failures occurring after 22 November 2012. We are, accordingly, of the view that we have jurisdiction to hear the Application.

The Legal Basis of the Complaints

The Applicant originally complained under reference to Sections 1.1a C e. and f. and 2.1 of the Code. She also complained of a failure to carry out the property factor's duties.

During the course of the hearing, Mr Clerkin confirmed that the Applicant was no longer insisting upon failings under Code paragraph 2.1, nor upon a failure to carry out the property factor's duties.

Both the Applicant and Respondent have lodged a document headed "YourPlace Everything you need to know about Our factoring services" which the parties agreed at the hearing should be taken as the agreed Written Statement of Services which had been issued by the Respondent to the Applicant in furtherance of its obligation under Section 1 of the Code. We refer to that document in this decision as "the Statement of Services".

The Statement of Services contains the following (under the heading "Our management fee") at page 06:

"We charge our customers an annual management fee which covers the cost of providing a wide range of services, including organising routine and major repairs, maintenance projects, attending proprietors' meetings, taking minutes and recording votes, consulting and communicating with you through the YourPlace Matters newsletter, and our website, and running the shop in the city centre.

The management fee is based on a number of factors. These include the management cost per property, staff overheads, business expenditure, annual inflationary increases and a financial return set by our Board of Directors.

We review the fee as part of our budget process. It is reviewed by our Board of Directors who consider the market, the economic climate, and the demands on our services from owners. We aim to keep costs as competitive as possible."

The Code

The elements of the Code relied upon in the application provide:

"...The written statement should set out:

...1.1a C

e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;

f. what proportion, expressed as a percentage or fraction, of the management fees and charges for common works or services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;”

The Factual Complaints

It was agreed by the parties that the factual matters in dispute were:

- 1 The lack of an explanation of what services are provided in return for the Management Fee imposed by the Respondent upon the Applicant (which we describe in this Decision as “the Management Fee”)
- 2 The lack of explanation of the review process which leads to a decision to increase the Management Fee.
- 3 The absence of a breakdown of the matters which make up the Management Fee.

The parties agree that the Respondent operates a practice of charging a flat fee to all of its customers including the Applicant (the Management Fee). The flat fee, by its nature, is applied across the board to all properties managed by the Respondent (of which there are approximately 24,000) regardless of property type or location. In financial year 2011/12, the Management Fee was £89 plus VAT (£106.80). In financial year 2012/13, the Management Fee was increased by the Respondent to £99 plus VAT (£118.80). However, the Respondent elected to delay the introduction of the new management fee until the second quarter of financial year 2012/13, with the effect that the actual 2012/13 Management Fee payable by all of its customers, including the Applicant, became £115.80 including VAT. The actual annual increase for 2012/13 in the Management Fee was therefore c.8.4%.

In addition to the Management Fee, the Respondent imposes upon its customers, including the Applicant, other charges for specific repairs or services provided which relate to a particular property. Such charges are allocated among customers in accordance with the liability of each property under eg the title deeds. Those charges are not in issue in this case.

The Respondent issued a letter of 6 June 2012 to the Applicant (Document 2 lodged by the Respondent). It detailed a number of matters including the intended increase with effect from 1 July 2012 of the Management Fee. It contained no specific information regarding the methods which the Applicant had used nor the factors considered in reaching its decision to increase the Management Fee. It did however invite the Applicant to contact the Respondent should she wish to discuss the new charges.

The Applicant did so by writing to the Applicant an undated letter and a letter dated 16 October 2012 (Items 3 and 4 of the Respondent's documents). These letters were treated by the Respondent as a complaint. The Respondent answered the complaint by its letter of 30 October 2012 (Respondent's document 6). That letter contained an explanation of the management service provided and the increase. The Applicant remained dissatisfied and proceeded to Stage 2 of the Respondent's Complaints Procedure (Applicant's letter of 23 November 2012, being Respondent's Document 9). The complaint at that stage centred upon the Management Fee, the absence of a fee structure and details of the procedure followed to justify the increase. The Respondent completed Stage 2 of the Complaints process by letter of 20 December 2012 (Respondent's Document 11). The Respondent answered the complaint by providing information regarding its compliance with the Code by reference to relevant extracts from the Statement of Services as well as information regarding the increase.

All of the above are factual matters which the parties confirmed at the hearing are not in dispute. Mr Clerkin also accepted that the correspondence lodged by the Respondent was an accurate record of the parties' correspondence.

The Applicant appears unhappy with the level of the increase, which exceeds the rate of inflation.

1 & 3 Lack of an Explanation and the Absence of a Breakdown

It quickly became apparent at the hearing that these were truly one issue or at least two issues so closely connected that both required to be dealt with and discussed together.

Mr Clerkin referred to the fact that the Applicant "does not know what she is getting" in return for the Management Fee. On exploring that further, it was clear that there is no dispute between the parties that the Respondent delivers, and the Applicant receives, services. The Applicant's concern is that while she has been provided with some detail of the matters which are provided in return for the Management Fee, both by the Statement of Services and by the subsequent correspondence, she is not satisfied with the level of detail provided.

He also referred to the potential for "exploitation" by the Respondent of its dominant position against homeowners such as the Applicant who was the weaker party. He indicated that he was not aware of, nor did he allege, any specific exploitation. He felt that a lack of transparency in relation to the matters which made up the Management Fee risked the possibility of exploitation. In response to questions raised by Ms McDiarmid, he said that if a detailed breakdown of the Management Fee were to be provided, then a homeowner such as the Applicant could raise observations with the Respondent about the elements of the Management Fee including the level of staff costs.

We observed to Mr Clerkin that details of the Respondent's finances might be available (albeit on a historical basis) from their statutory accounts lodged with Companies House.

The Respondent's position is that it is neither willing nor obliged to produce a breakdown of its Management Fee. It considers that there would be a cost to it in preparing these details and that no homeowner would receive any meaningful benefit by its doing so.

Mr Clerkin was able to direct us to no specific legal requirement upon the Respondent to produce the detailed breakdown which the Applicant desires.

He argues that paragraph 1.1 a C e. of the Code, which refers to the need to provide a "fee structure", requires to be interpreted in accordance with the spirit of the legislation. He argues that, properly construed, Paragraph e. creates an obligation upon the Respondent to produce a breakdown of the Management Fee.

Mr Clerkin also made a submission that there was no *consensus in idem* between the parties. That is a reference to a Latin maxim employed by lawyers when considering whether or not parties have formed a contract. Mr Clerkin employed this to argue that the contractual relationship between the Applicant and Respondent lacked the necessary consensus because the Applicant did not have information about what services were provided by the Respondent in return for the Management Fee. We consider that the rule concerning consensus has no application to the current setting where we are not concerned with any dispute concerning whether a contract has been formed between the Applicant and the Respondent.

The Respondent considers that all that it is obliged to do is to produce general information of the kind contained at p06 of the Statement of Services and that it has met the obligation contained in the Code.

The Respondent's Statement of Services contains an explanation of the matters which make up the Management Fee. They are also explained in the Respondent's letters of 30 October 2012 (Respondent's Document 6) and 20 December 2012 (Respondent's document 11).

We consider that the Respondent has complied with its duties under the Code.

There was little reliance at the hearing on paragraph f. It is not the Applicant's case that there is any complaint arising from the first sentence of paragraph f. The second sentence only requires the Respondent to state that a flat fee is in operation. It does not actually do this in the Statement of Services by using the term "flat fee". It is evident however, and both parties accept, that the Management Fee is charged on a "flat fee" basis. We draw the inference from the wording of the Statement of Services (and in particular from the wording of the sections of the Statement of Services at p04 under the heading "Our Services" and at p06 under the heading "Financial arrangements") read as a whole that the Management Fee is a flat fee. In particular, we interpret the sentence "Each property is charged a set management fee for the year" at p06 in context to be notification of the fact that the Management Fee is a flat fee.

2 Explanation of the Review Process

The Applicant is not satisfied with the explanation provided for the increase. That explanation is contained in the Respondent's letter of 20 December 2012 (Respondent's document 11).

Ms McDiarmid emphasised that the Respondent and its Board took any decision to increase fees responsibly. The Respondent was well aware that some homeowners might find it difficult to pay increased fees. She advised that the Respondent's Board when considering any increase in the Management Fee would also consider other fees relating to services provided to homeowners on a property specific basis. Some of those were not increasing by the same proportion. Ms McDiarmid thought that the effect of more modest increases to other fees was that the overall increase in factoring fees charged to the Applicant would be considerably less than 8.4%.

The Respondent's explanation of its review process is contained within the Statement of Services p06 and the Respondent's letter of 20 December 2012 (Respondent's document 11). We consider this to meet the obligation arising under paragraph 1.1a C e. of the Code.

Return

There was some discussion in response to a question from the Committee in relation to the entitlement of the Respondent to make a return (or profit) on its factoring activities in the Applicant's block. Mr Adams referred to the Deed of Conditions governing the parties' relationship which allows for "remuneration" of the factor as well as reimbursement of any expense properly incurred in performing its duties as a basis for the Respondent to be entitled to make a return. He also referred to p06 of the Statement of Services which refers to a "financial return" (see above).

The Respondent is a private limited company. It provides factoring services to The Glasgow Housing Association Ltd ("GHA"). GHA is a charity. Mrs Russell advised

that the Respondent donates any return it makes on its activities to GHA who then use the proceeds for certain good causes in the community. In this respect the Respondent differs from other commercial private factors who might use any returns made to pay dividends to their owners or shareholders.

We do not require to make any finding regarding whether the Respondent makes a return, whether making a return is itself reasonable as a concept or whether the level of return (about which we have no information) is appropriate. Those are not matters raised in the complaint.

APPEALS

The parties' attention is drawn to the terms of section 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 day on which the decision appealed against is made..."

John McHugh

Signed

Date *3 July 2013*

JOHN M MCHUGH

Chairperson