



Decision of the Homeowner Housing Committee

(Hereinafter referred to as "the Committee")

Under the Property Factors (Scotland) Act 2011

Case Reference Number: HOHP/PF/16/0010

Re : Property at Flat 10, 25 Simpson Loan, Edinburgh EH3 9GE ("the Property")

The Parties:-

Mr Jason Watson, Flat 18, 15 Simpson Loan, Edinburgh EH3 9GB ("the Applicant")

Quartermile Estates Limited, Estate Office, 9 Simpson Loan, Edinburgh EH3 9GQ ("the Respondents")

The Committee comprised:-

David Bartos - Chairperson
Carolyn Hirst - Housing member

Decision

1. The Respondents have failed to comply with section 14(5) of the Property Factors (Scotland) Act 2011 through breach of sections 2.1 and 3.3 of the Code of Conduct for Property Factors.
2. The Applicant's complaints of the breach of sections 2.4, 2.5, 3.4 and 5.2 are rejected.

Background:-

3. By application received on 5 February 2016, the Applicant applied to the Homeowner Housing Panel ("HOHP") for a determination that the Respondents had failed to comply with sections 2.1, 2.4, 2.5, 3.3, 3.4 and 5.2 of the Property Factor Code of Conduct in respect of the Property.

4. By a further application received by the HOHP on the same date the Applicant lodged a further application to the HOHP in relation to a property at Flat 18, 15 Simpson Loan, Edinburgh (numbered HOHP/PF/16/0009).

Findings of Fact

5. Having considered all the evidence, the Committee found the following facts to be established:-

- (a) The Property is a flat which is part of the Quartermile development in the Meadows area of Edinburgh. The development comprises a number of blocks of flats with the Property being in one of the blocks which formerly formed part of the Royal Infirmary. All of the blocks have a "Q" number. The block of which the Property forms part is numbered Q11. The block has the street numbers 25 and 26. Within the block there are 27 flats. The Property is Flat 10, 25 Simpson Loan.
- (b) The Applicant and Derek Hamilton have been the owners of the Property since 2009. They have leased the Property in the past and are currently seeking to do so.
- (c) The Property is burdened by a Deed of Conditions ("the Deed"). It and the block also form part of a larger development at Quartermile ("the Estate"). This development includes another flat owned by the Applicant and Mr Hamilton, namely Flat 18, 15 Simpson Loan. The development is also burdened by the Deed.
- (d) The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 28 January 2013. They produced a Statement of Services ("the Written Statement") dated 4 April 2014. This was issued to the Applicant and Mr Hamilton shortly after that date.
- (e) The Written Statement set out the Respondents' "core services" which included the following :

"Insurance Cover: [the Respondents] will secure all necessary insurance cover for both the buildings and the estate on a yearly basis. A separate broker may be used to obtain best cost on these policies and cover the cost of which may fluctuate on a yearly basis in line with market prices, claim history or any other factor . . ."

"Window/Cladding Cleaning: [the Respondents] will procure the services of a reputable window cleaning contractor who undertake regular cleaning of glazing, and cladding, where appropriate, using the most appropriate methods on a building by building basis. . ."

"Maintenance: [the Respondents] will appoint specialist contractors to regularly inspect and maintain all aspects of the common areas of the estate and each individual block including (but not exclusively): . . .

block internal common areas including the maintenance of secure access systems and the maintenance of all shared plant and equipment . . .”

- (f) Section C parts (e) and (f) of the Written Statement provide for the issue by the Respondents to owners such as the Applicant of yearly budgets of service charges. Section C (i/j/k) of the Written Statement provided for the “Service Charge demands” for each individual block and the Estate being sent to owners in four invoices sent out in the mail 28 days in advance of 1 January of each year and three-monthly thereafter with payment being due on 1 January and three-monthly thereafter.
- (g) In about December 2013, and following a meeting of an Estate management committee with the Respondents on 21 November 2013, the Respondents issued to the Applicant and Mr Hamilton a document headed “Budget Calculation 2014” for the block numbered Q11 at 25 and 26 Simpson Loan (“the Budget”). The items in the Budget included the following:

“P 02 Whole Building – Standard

D010 M&E Maintenance Contract	8,263.00
D020 M&E Repairs	500.00

...

P 06 Whole Building – Exempt Rate

F020 Buildings Insurance	9,142.00"
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The total expenditure budgeted for the Property’s block amounted to £ 43,686.

- (h) Following the Budget they received three-monthly invoices from the Respondent. These invoices were for the Property’s proportion of the total in the Budget for the block. That proportion was 4.1076%. None of the invoices provided any further detail on the items being invoiced beyond the wording used in the Budget.
- (i) On or about 9 October 2015 the Respondents issued to the Applicant and Mr Hamilton a Service Charge Certificate covering the period 1 January to 31 December 2014 (“the Certificate”). This stated the charges being made to the owners in the block as a whole and the Applicant and Mr Hamilton’s proportion thereof. The total expenditure listed on the Certificate amounted to £ 43,695 of which the proportion for the Property was £ 1,794.83. The items in the Certificate included the following:

**“Whole Building
Schedule 2**

	Total Expenditure
M&E Maintenance Contract	8,263.00
M&E Repairs	1,327.92

Schedule 6

Buildings Insurance

10,880.99"

- (j) By e-mail dated 18 November 2015 addressed to the Respondents the Applicant asked for clarification of the reasons for the increase in the "M&E" (mechanical and electrical) and buildings insurance expenditure. By e-mail dated 20 November 2015 the Respondents supplied the Applicant with a spreadsheet showing some commentary on the divergence between the figures for expenditure in the Budget and Certificate ("the Comparison Spreadsheet").
- (k) The Comparison Spreadsheet stated, among other things:

“	Comments
Q11 M&E Repairs	Repairs and replacement to emergency lights. This was an unexpected expenditure item and was not budgeted.
Q11 Building Insurance	Underbudgeted, Insurance Costs not received until after budget was set.”

- (l) The Applicant replied with an e-mail dated 21 November 2015 to the Respondents. In the e-mail he asked the Respondents about why the emergency lighting works had not been disclosed earlier. He also asked whether best value had been obtained by the Respondents for the owners. On the issue of insurance he asked about why a figure had been budgeted for insurance without knowledge of the actual costs and without indication that it was a provisional figure.
- (m) The Respondents did not respond to the Applicant's e-mail. On or about 5 December 2015 the Applicant wrote a letter to the Respondents attaching the e-mail, intimating complaints under sections 2, 3, and 5 of the Property Factors Code of Conduct and seeking a response to his complaint about the discrepancy between the budgeted figures and certified figures mentioned above. Other than in acknowledging its receipt the Respondents did not respond to the Applicant's letter.

6. A Convener of the Homeowner Housing Panel, using his delegated powers under section 96 of the Housing (Scotland) Act 2014, decided under section 18(1) of the 2011 Act to refer the application to a Homeowner Housing Committee. That decision was intimated to the Applicant and to the Respondents by a Notice of Referral dated 10 March 2016.

7. Following intimation of the Notice of Referral, the Respondents also intimated written submissions contained in a letter of 31 March 2016 to HOHP.
8. The Notice of Referral intimated the hearing to take place on 16 May 2016 at George House, 126 George Street, Edinburgh at 10.30 hrs. Following correspondence with the Applicant this hearing was postponed firstly to 30 June and then to 25 July 2016 at the same time and place. The proposed postponements were intimated to the Respondents who had no objection.
9. The parties also lodged documentary productions. Those lodged by the Applicant were attached to his application and were also in an inventory received by the HOHP on 9 May 2016. Those lodged by the Respondents were in three schedules attached to their letter of 31 March 2016.
10. The date of 25 July 2016 and the said time and place were intimated to the Applicant and the Respondents by letter from the Committee's clerk sent on or about 16 June 2016.
11. Given the overlap of the complaint in the present case with that in the application numbered HOHP/PF/16/0009 the same hearing was fixed to hear that application also.

The Evidence

12. The evidence before the Committee consisted of:-
 - The application form and its attachments, including the Respondents' Written Statement
 - The Applicant's productions lodged on 9 May 2016 numbered 1 to 8
 - The e-mails and letters mentioned above
 - The Respondents' productions lodged with their letter of 31 March 2016
 - The oral evidence of the Applicant

The Hearing

13. The hearing took place on 25 July 2016 at 10.30 a.m. at the venue fixed for it. The Applicant attended the hearing accompanied by Mr Hamilton. There was no appearance on behalf of the Respondents. The Respondents had indicated to the HOHP that they wished to have their case considered on their written representations only.
14. The only evidence given was that of the Applicant. He spoke to the matters contained in findings in fact (a), (b), (g) to (j) and (o). The Committee found that he gave evidence in a candid fashion, and answered the questions from the Committee as best as he could. He was however unsure about whether the invoices that he and Mr Hamilton had received had charged VAT or not. As a consequence the Committee find

that his evidence on the VAT aspects of any of the Respondents' charges could not be relied on. Other than in that respect his evidence, which understandably overlapped with his submission, was accepted.

15. The Applicant's complaint has two aspects:

- (1) The buildings insurance (incl. clarity over VAT)
- (2) The mechanical & electrical ("M&E") charges

During the course of his submission the Applicant indicated that he was no longer founding on sections 2.5 and 3.4 of the Code.

The Buildings Insurance (incl. clarity over VAT)

Section 2.1 of the Code of Conduct

16. The Applicant complained that the Respondents were in breach of their duty under section 2.1 of the Code which provides,
"Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:
2.1 You must not provide information which is misleading or false."
17. The Applicant's complaint was that the item in the Budget for buildings insurance was misleading. There was no indication in the Budget that the figure for insurance was provisional or that a quotation for insurance had not been obtained in terms of the budgeted figure. His position was that the budgeted figures were the limits of the Respondents' authority to spend. The figure for insurance led a homeowner to think that no more would be spent on insurance than stated.
18. The Respondents submitted, in writing, that they had informed the Applicant by e-mail dated 24 September 2013 that they instructed brokers to review the market "closer to the renewal date at the end of the year" and that for budgeting purposes in October they would have to go on best advice from their broker on "likely costs". The cost of insurance had increased as a result of increased reinstatement values, greater-than-inflation increase in insurance costs and additional clauses being inserted.
19. The Applicant could not remember receiving this e-mail but accepted that he had received it. He submitted that the point remained that the figure for insurance in the Budget was misleading. No reference to the figure being a "likely" one was made in the Budget.
20. The duty in section 2.1 of the Code stresses the importance of good communication to avoid misunderstandings.
21. The Committee accepted that a budget of its very nature is an anticipated estimate of future expenditure (or income). It is not a precise document. Frequently figures in a budget are not matched by subsequent actual

expenditure. Certain divergences can be expected. However in the present case, the actual expenditure on insurance was some 19% higher than the budgeted cost. Furthermore the estimate was in relation to a one-off item where the reader might anticipate greater accuracy than for other items where there might or might not be future ongoing expenditure. If, as the Comparison Spreadsheet appears to show, there was no estimate of premium available at the time of the budget the reasonable reader would have expected some qualification of the figure for the premium as provisional.

22. In all the circumstances the Committee concluded that the inclusion of a figure of £ 9,142 for Buildings Insurance in the Budget for 2014 without qualification as to a quotation requiring to be obtained, was misleading and that the Respondents breached section 2.1 of the Code in that respect.

Section 3.3 of the Code of Conduct

23. Section 3.3 of the Property Factor Code of Conduct provides, "You must provide . . . in writing at least once a year (whether as part of billing arrangements or otherwise). . . a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying subject to notifying the homeowner of this charge in advance."
24. The Applicant complained about a lack of clarity in the Budget and the Service Charge Certificate issued by the Respondents. The lack of clarity was in whether VAT was included or not in relation to the insurance.
25. The Respondents did not address this complaint in their written submission.
26. The duty in section 3.3 is to provide a detailed financial breakdown of charges made at least once a year. That duty can be fulfilled in either the invoices issued to homeowners or in some other document such as an annual statement.
27. The Committee was not provided with any VAT or other invoice that the Respondents had issued. The Applicant himself was unclear about whether and if so to what extent VAT fell to be added to the various items in both the Budget and the Certificate. In short he was unable to say to what extent he and Mr Hamilton had paid VAT as part of the Respondents' charges and to what extent, if any, the sums in the invoices he and Mr Hamilton had paid diverged from the Certificate.
28. Whether VAT was being charged by the Respondents should be evident from the invoices issued by the Respondents. In these circumstances the

Committee was unable to find that the Respondents had failed to comply with section 3.3 as complained of by the Applicant in relation to VAT.

Section 5.2 of the Code of Conduct

29. The Applicant complains of a breach of section 5.2 of the Code which provides,
 "You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested in which case you may impose a reasonable charge for providing this."
30. At the hearing the Applicant submitted to the Committee that section 5.2 had been breached as he had not been informed about how the block's buildings insurance premium of £ 10,880.99 had been calculated, the sum insured, the name of the insurer and the terms of the policy. He would not know whom to go to when making a claim.
31. The Respondents did not address this complaint. This is not surprising as it was not expressed in the application, despite the mention of section 5.2 in it. In these circumstances the Committee was constrained to reject this complaint.
32. However the Committee does note in passing that a factor must provide each homeowner with clear information showing the (a) basis upon which their share of the insurance premium is calculated, (b) the premium paid, and (c) the name of the insurer and (d) the policy terms. The "premium paid" means the premium to be paid for the common policy from which the homeowner's share is calculated. The purpose of the provision of this information is to enable the homeowner to assess whether the cost of the common policy is reasonable and whether his share of that common cost is calculated correctly. The first purpose is supported by sections 5.6 and 5.7 of the Code which require the provision of information concerning the appointment of the insurer and any tendering or selection process. The second purpose is to ensure transparency of the allocation of the share of the overall premium.

The M & E Complaint

Section 2.1 of the Code of Conduct

33. The Applicant's complaint was that the item in the Budget for mechanical & electrical ("M&E") repairs of £ 500 was misleading. This was a figure taken from the air. The ultimate cost of such repairs was £ 1,327.92 which indicated that the budgeting was misleading.

- 34. The Respondents submitted that the additional cost was incurred due to replacement of emergency lighting items which required immediate attention. This echoed the comments in the Comparison Spreadsheet for M&E Repairs.
- 35. As noted above in relation to the insurance item, a budget of its very nature is an anticipated estimate of future expenditure (or income). It is not a precise document. Frequently figures in a budget are not matched by subsequent actual expenditure. Certain divergences can be expected. In the present case, the replacement of emergency lighting items was actual expenditure that was unexpected. The Applicant does not suggest, as he does in relation to insurance, that such should have been anticipated and prior estimates obtained.
- 36. The mere fact that M&E repairs turned out to be in excess of those budgeted, in the circumstances set out by the Respondents, does not of itself make the originally budgeted figure misleading. In assessing whether a statement is misleading or not, one must not take use hindsight but restrict oneself to the information available at the time of the statement.
- 37. For these reasons the Committee concluded that it has not been established that the provision of the figure of £ 500 for M&E Repairs in the Budget for 2014 was the provision of misleading information. It rejected the complaint of a breach of section 2.1 of the Code in that respect.

Section 2.4 of the Code of Conduct

- 38. The Applicant complained that the Respondents were in breach of their duty under section 2.4 of the Code which provides,
 "Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:
 You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have an agreed level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)."
- 39. The Applicant's complaint was that through agreeing the Budget the delegated authority of the Respondents was limited to the items in the budget at the figures given therein. The provisions of section 2.4 of the Code superseded any unlimited authority claimed by the Respondents in their Written Statement. In the present case the homeowners had not been informed about the incurring of the additional M&E Repairs charges until October 2015 with the Certificate when they had been incurred in 2014.

- 40. The Respondents submitted, in writing, that "it would appear reasonable to assume" that emergency expenditure and cost management were discussed at meetings of the Applicant and other residents with GVA to whom the Respondents had delegated their factorial duties. It was submitted that the costs to date had been issued and discussed at budget meetings in October 2014, although the overspend on "budget codes" may not have been prevalent in those discussions given the budget savings made elsewhere. Reference was also made to a provisional expenditure report for block Q11 having been e-mailed to the Applicant on 19 March 2015.
- 41. A factor's duty in section 2.4 relates to work or services which are not included in the core service as stated in the Written Statement. Only if a service is not within the core service does the duty in section 2.4 arise unless one of the exceptions in section 2.4 applies.
- 42. The core service in the Written Statement included maintenance of all aspects of the common areas of each individual block including the maintenance of all shared plant and equipment. The response times in the Written Statement include as "Priority 2" the attendance to electrical faults and circuit failures affecting lighting or critical systems within 12 hours following a request at any time.
- 43. In these circumstances the Committee found that the Applicant's complaint concerning the exceeding of the M&E Repairs budget related to core services. It did not involve any duty arising on the Respondents under section 2.4 let alone any breach of section 2.4. The complaint under that section was rejected.

Section 3.3 of the Code of Conduct

- 44. The Applicant complained of a breach of section 3.3 in the lack of clarity in the Certificate relating to the M&E Repairs amounting to £ 1,327.92. It was unclear what the repairs and replacements were. The Comparison Spreadsheet did not cast any clarity on the cost of labour or the nature of and cost of materials. No invoice stated more than what was on the Certificate.
- 45. The Respondents relied on the Comparison Spreadsheet with its reference to "repairs and replacements to emergency lights".
- 46. The Committee found that the requirements of section 3.3 were clear. They were to provide at least once a year a detailed financial breakdown of the charges made and a description of the activities and works carried out which are charged for. The Applicant's submission was well founded. There was no real description of the activities and works charged for in respect of the emergency lights "repairs and replacements". Did they relate to some floors and not others ? Nor was there any detailed breakdown of the charges made for those repairs or replacements. What

was the division between labour and materials ? In these circumstances the Committee found that the Respondents had breached section 3.3.

47. The other sections of the Code were not founded on in relation to the M&E complaint.

Property Factor Enforcement Order

48. In his application the Applicant sought:
 - reimbursement of the amounts by which the amounts of buildings insurance and M&E Repairs in the Certificate exceeded the amounts (if any) in the Budget;
 - provision by the Respondents of a detailed breakdown of charges and works as required by section 3.3;
 - provision to ensure non-misleading budgeting and detailed break-downs in the future;
 - use by the Respondents of the best work available for reasonable rates.
49. The Respondents submitted that no payment was due as the Applicant had not suffered a financial loss from any breach.
50. The Committee found no evidence that the Applicant had suffered any financial loss as a result of the provision of misleading information in the Budget in breach of section 2.1 of the Code. It was not suggested, for example that the Applicant had been financially embarrassed or suffered any financial loss as a result of higher buildings insurance not having been budgeted in advance.
51. While the Applicant mentioned at various times in his submission that the Respondents had acted without lawful delegation in incurring sums in excess of the budget, that is not something covered by the sections of the Code complained of. The Committee observe in passing that the application did not found on any property factor's duty not in the code, such as a common law duty to act within its powers. The Committee concluded that there was no basis to order reimbursement as sought.
52. Instead it decided to propose to order that the Respondents in their next budget provide an explanatory note that the M&E Contract excludes M&E Repairs. With regard to the insurance the Committee decided to propose to order that In the event that a quotation for insurance has not been obtained, the Respondents provide an explanatory note that the buildings insurance is subject to alteration upon a quotation being obtained.
53. With regard to the breach of section 3.3 the Committee proposed the provision of a detailed break-down of charges and work charged for under the "M&E Repairs". No compensation for inconvenience for either breach was sought by the Applicant.
54. The Committee noted the Applicant's wish to ensure that similar occurrences do not happen in the future. Unfortunately the Committee can

provide for remedies based on past action only. It expresses the wish that the Respondents take note of its findings and proposals and takes from them lessons for the future.

55. The Committee is not in a position to propose orders in relation to quality of and rates of work for the future.

Court Proceedings

56. The parties are reminded that except in any appeal, no matter adjudicated on in this decision may be adjudicated on by a court or another tribunal.

Opportunity for Representations and Rights of Appeal

57. The Applicant and Respondents are invited to make representations to the Committee on this decision and the proposal. The parties must make such representations in writing to the Homeowner Housing Panel by no later than 14 days after the notification to them of the Notice of Proposal and this decision.
58. The opportunity to make representations is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.
59. Following the making of representations or the expiry of the period for making them, the Committee will be entitled to review this decision. If it remains satisfied after taking account of any representations that the Respondent has failed to comply with the Code of Conduct it must make a property factor enforcement order. Both parties will then have a right to appeal on a point of law against the whole or any part of such final decision and enforcement order.
60. In the meantime and in any event, the parties are given a right of appeal on a point of law against this decision by means of a summary application to the Sheriff made within 21 days beginning with the date when this decision is "made". All rights of appeal are under section 22(1) of the Act.

Signed

.....Date: 28 July 2016

David Bartos, Chairperson