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

Aylmer Millen, 5 Hillpark Grove, Edinburgh EH4 7AP ("the Applicant")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD ("the Respondent")

Reference No: HOHP/LM/16/0031

Re: Property at Hillpark Grove, Edinburgh ("the Property")

Committee Members:

John McHugh (Chairman) and Ahsan Khan (Housing Member).

DECISION

The Respondent has 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 the owner of 5 Hillpark Grove, Edinburgh EH4 7AP (hereinafter "the Property").

2 The Property is located within a mixed development of houses and flatted blocks and associated common areas known as Hillpark Grove (hereinafter "the Development")

3 A Deed of Conditions governs the arrangements for the sharing of costs relating to common property within the Development among the proprietors of the properties within the Development.

4 There are 156 individual residential units in the Development.

5 The Respondent is the property factor responsible for the management of common areas within the Development.

6 The Respondent was appointed to the role of property factor by the developer of the Development.

7 The property factor's duties which apply to the Respondent arise from the Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.

8 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

9 There is an Owners Association relating to the development known as the Hillpark Residents Association ("HRA").

10 Membership of the HRA is optional.

11 The HRA holds meetings of proprietors to which all proprietors are invited.

12 The HRA has invited proprietors to make voluntary contributions to its outlays including meeting hall charges.

13 The Applicant has, by his correspondence, including by his emails of 3 April 2015, 12 and 19 February and 2 April 2016, notified the Respondent of the reasons why he considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.

14 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at George House, Edinburgh on 4 July 2016.

The Applicant was present at the hearing.

The Respondent was represented at the hearing by its Managing Director, David Hutton, by Stephanie Haig, its Managed Development Team Leader and by Fraser McIntosh, its Property Manager. No other witnesses were called by either party.

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 7 December 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 documents lodged on behalf of the Applicant and the Respondent.

The documents before us included a Deed of Conditions by MacTaggart & Mickel Limited recorded 4 April 2002, which we refer to as "the Deed of Conditions" and the Respondent's Written Statement of Services dated June 2014 which we refer to as "the Written Statement of Services".

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Written Statement of Services and the Deed of Conditions are relied upon in the Application as a source of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant complains of breaches of Sections 1Aa; 1Ce; 2.1, 3.3 and 7.1 and 7.2 of the Code.

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

"The written statement should set out:

A. Authority to Act

1.1a For situations where the land is owned by the group of homeowners
The written statement should set out: A. Authority to Act a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group...

...C. Financial and Charging Arrangements
e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee...

...Section 2: Communication and Consultation

2.1 You must not provide information which is misleading or false....

...Section 3: Financial Obligations

... 3.3 You must provide to homeowners, 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...

...Section 7: Complaints Resolution

7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel."

The Matters in Dispute

The Applicant complains in relation to the following issues:

(1) The increase in the Respondent's Management Fees

(2) The charging by the Respondent of meeting hall costs relating to a residents' association meeting.

(3) the handling of his complaint to the Respondent including alleged misrepresentations made.

We deal with these issues below.

(1) The increase in the Respondent's Management Fees

The Applicant received a letter from the Respondent dated 16 October 2015. It advised that it proposed to increase its annual management fee to £54.82. The original fee had been £44.64. The proposed increase amounts to one of c.22.8%.

It was stated in the letter of 16 October 2015 that the increased management fee would reflect various improvements in the service offered by the Respondent to homeowners on the Development including the provision of an emergency response service. It was further stated that the new fee would apply from the next billing period.

The Applicant was concerned by the level of the increase and raised his concerns by letter of 12 February 2016. He was doubtful that the new emergency service would provide significant practical benefit to the owners of houses, as opposed to flats. He was concerned that the Respondent had attributed different figures at different times to the element of the increase that related to the new emergency service.

The Written Statement of Services provides (at Clause 3A):

"Fees are reviewed annually relative to market rate comparisons for similar developments with similar services provided. Unless otherwise stated this review is carried out in November of each year and where any changes are operative, this is communicated to clients in December to become effective from January the following year. Where there is an Owners' Association, proposed changes to the fee will be discussed with the Association for approval prior to letters being issued to owners."

The Applicant was concerned that the Respondent had not followed the procedure outlined in the Written Statement of Services.

There is in existence an Owners Association at the Development. It is known as the Hillpark Residents Association ("HRA"). It appeared to the Applicant that the intimation to the HRA was made either simultaneously or perhaps one day before the letter of 16 October was issued to homeowners including the Applicant.

There appears to have been no reasonable opportunity to obtain the approval of the Owners' Association before writing to the general body of homeowners. Additionally, the form of intimation to the HRA appears to have been only in terms of the letter of 16 October itself. That letter informs of the increase as a fact. It does not invite comment or approval.

Further, Mr McIntosh had advised the Applicant by email of 14 December 2015 that the fee increase *"has already been detailed and accepted by the Hillpark Residents Association (HPRA)"*. That statement was not accurate and the Respondent now accepts this.

Additionally, the Applicant is not satisfied by the evidence provided that the Respondent has set its increase having regard to comparator rates.

The Applicant complains by reference to the Written Statement of Services and to the Code, in particular Sections 1C e.; 2.1 and 3.3.

At the hearing, Mr Hutton expressed the view that in terms of the Deed of Conditions Clause SIXTH 5, the Development was not yet complete and so the powers which would have been delegated to a properly convened meeting of the owners remained with the developer who had appointed the Respondent as factor. That being the case, the Respondent considers that the owners association enjoyed no formal status or right to consultation. Despite this, the Respondent considered it to be good practice to consult with the HRA and had done so on a number of issues.

The Applicant disagrees and considers that the Development is complete and so the provisions of the Deed of Conditions relating to meetings of proprietors ought to apply.

We do not consider that we have to decide whether the Development is complete as the obligation to consult with the owners' association arises from the Written Statement of Services as opposed to the Deed of Conditions.

The Written Statement of Services contains no qualification as to the status of the owners association. The obligation is to "discuss" with the association. The Respondent's position is that it sent the notification in the same terms as that sent to the Applicant on 16 October 2015 to the HRA on the previous day. There can, in those circumstances, be no dispute that no discussion took place and there is no suggestion by the Respondent that such discussion did take place at that time.

The Respondent observes, correctly, that the increase would not have taken effect until the following January and so there would have been ample time for discussion. However, in the letter of 16 October 2015 the Respondent states *"we...inform you we will be increasing your annual management fee."* No opportunity for discussion is suggested nor comment/approval invited.

In the circumstances we consider that the Respondent is in breach of the terms of its property factor's duties created by its written Statement of Services Clause 3A in respect of its failure to discuss the management fee increase with the HRA.

As regards the Code, the provisions of Section 1 do not appear to us to be relevant as they relate to the content of the Written Statement of Service, as opposed to compliance with it, which does not appear relevant in this case.

As regards Code Section 2.1, although it is of concern that the information given to the Applicant that the HRA had approved the increase was not correct, we consider that a breach of Clause 2.1 requires evidence from which it may reasonably be inferred that there is some element of intention to mislead or to knowingly (or at least recklessly) provide false information. We are prepared to accept that the information provided was done so in simple, unintentional error and so we find no breach of Section 2.1.

The Applicant relies upon Section 3.3 which, as he put it at the hearing, applies "obliquely" to the current circumstances and to the lack of information concerning the comparators employed to arrive at the increase. We do not consider that the terms of Clause 3.3 are relevant to the current circumstances and we find there to have been no breach of it. We do not find there to have been a breach of the property factor's duties in this regard and accept the evidence of the Respondent that it did consider market comparators in the context of setting the increase in the way which the Written Statement of Services provides.

(2) The charging by the Respondent of meeting hall costs

There is in existence an owners association at the Development. It is known as the Hillpark Residents Association ("HRA"). Membership of the HRA is voluntary. The Applicant has been an active member.

The HRA holds an annual meeting in a local community hall. The venue charges the HRA for the hire of the meeting room.

The HRA has invited all homeowners to join. Many have chosen not to do so, as is their right. Those who have joined have been asked by the HRA to pay towards the annual running costs of the HRA. The contribution asked for, and paid by, those who are members of HRA includes a contribution toward the meeting hall charge.

In its invoice of 2 April 2015, the Respondent imposed a charge upon the Applicant and other homeowners of 32p which related to the HRA's meeting hall charges.

The Applicant is concerned that the Respondent has acted outwith its authority as factor by invoicing for charges which are of a voluntary nature and presenting them as an obligatory payment. He is further concerned that the Respondent's action will have the effect of causing some proprietors who have paid directly a contribution to the HRA to effectively be required to pay the same cost twice.

The Applicant recognises that the meeting hall charge is itself a worthwhile outlay and that it is for a relatively small amount. Nonetheless, he is concerned that the Respondent's actions, if unchallenged, may set a precedent for the Respondent to demand payment of other charges without authority.

The Applicant complains by reference to the Written Statement of Services and to the Code, in particular Sections 1A and 3.3.

The Respondent has consistently maintained that the issue of the meeting hall charge had been dealt with by a Committee of the HOHP in an earlier application. The Applicant advises that he had intended to include this issue in representations at the hearing of an earlier HOHP application but had overlooked doing so, that there is no determination on the matter and so he should be at liberty to pursue the matter.

At the hearing, the Respondent expressed the view that it had never refused to discuss the issue of the meeting hall charge, but we find that position to be incorrect and entirely at odds with the available correspondence.

We consider that the question of the meeting hall charge had not been determined previously and that the Applicant was entitled to raise it and to receive a considered response.

The Respondent explained at the hearing that it had been trying to be helpful by passing the meeting hall charge to all proprietors via its invoicing. It had been well intentioned in doing so.

We note that the Respondent has the power under the Deed of Conditions to call a meeting of proprietors and therefore any reasonable expense resulting could properly be passed onto proprietors. In this instance it therefore appears to us that the recovery of the meeting charge expense is reasonable and that there is neither a breach of the Code nor of the Respondent's property factor's duties.

Nonetheless, we would observe that the Respondent in the circumstances of this case seems to have given little thought to its actions in passing on the meeting hall charge to owners in the way which it did and we can appreciate that the Applicant would wish to highlight his concern against the background that he was fearful that the Respondent might in future attempt to recover inappropriate charges via its invoices to proprietors.

(3) The Handling of the Applicant's Complaint to the Respondent including alleged misrepresentations

The Applicant complains regarding the Respondent's handling of his complaint to it. He complains, in particular, regarding the Respondent's letter of 19 February 2016. He is dissatisfied with the explanations proffered in relation to the increase in the management fee and the related consultation period; the Respondent's reference to its Customer Feedback Sheet in relation to the internal complaints escalation procedure; and the Respondent's claim that the question of meeting hall charges had already been determined by a Committee of the HOHP.

The Applicant complains by reference to sections 2.1; 7.1 and 7.2 of the Code.

The Applicant's complaint was initially responded to by the Respondent's Fraser McIntosh, a Property Manager. The complaint was then escalated to Stephanie Haig, Managed Development Team Leader, who issued the letter of 19 February 2016.

The letter of 19 February 2016 explained that the notification of the management fee increase had been sent to the HRA one day before the general increase, which the Respondent considered appropriate given that the increase would not take effect until January 2016. It indicated that the Respondent considered that it had provided adequate information regarding the basis of the calculation of the increase. As regards the meeting hall charges, it indicated that these were already the subject of an earlier HOHP Committee decision and that further correspondence on that matter would not be entertained.

The Respondent produced a Customer Feedback Information Sheet which sets out its procedures for dealing with complaints. It provides for a complaint to be dealt with by a Property Manager in the first instance and then escalated to a Line Manager. The Applicant takes exception to the policy contained in the Customer Feedback information Sheet as it is not consistent with the complaints handling procedure set out in the Written Statement of Services. The Written Statement of Services provides for the first stage complaint to be dealt with by a Property Manager and, where the complaint is not resolved satisfactorily, for a second stage complaint to be addressed by a Head of Department.

Additionally, the Applicant is concerned that the second stage complaints handler, being a Line Manager, is unlikely to be sufficiently distanced from the first complaint handler so as to bring a truly independent assessment of the matter.

Further, the Applicant was concerned that Ms Haig had, in her email of 19 February 2016, enclosing the letter of the same date, described the Customer Feedback Information Sheet as having been "recognised" by HOHP and thereby claimed some kind of approved status for the document.

After the Application had been submitted the Respondent undertook a further voluntary review of the matter and wrote to the Applicant by letter of 20 April 2016. The Respondent issued a further letter to the Applicant on 4 May 2016.

In the letter of 20 April 2016, the Respondent issued an apology. It accepted that the management fee increase had not been clear and that there should have been no implication that the management charge had been the subject of prior approval by the HRA. The letter of 20 April 2016 stated: *"I apologise for any previous lack of clarity in CWL's responses to you, subsequent to the above communication, including an inference that the Hillpark Residents Association Committee (HPRAC) had received and accepted our management fee increase notification."*

The communication with HRA was described as "a courtesy" because the HRA had no official status.

The letter of 20 April set out anonymised figures showing management charges applied at factored developments which were said to offer evidence of suitable comparators which had been considered when setting the management fee for the Development.

It was explained by the Respondent at the hearing (as had been stated in the letter of 4 May) that the Respondent is a relatively small organisation with a relatively flat management structure. Ms Haig is both a Head of Department and a Line Manager and so the second stage complaints handling would appear to have satisfied the terms of the Written Statement of Services.

It is of concern that incorrect information (that the HRA had approved the fee increase) was given to the Applicant in the email of 4 December 2015. It is of further concern that when that information came to be known as incorrect, the position was not stated unequivocally to the Applicant. There was neither an implication (nor an "inference" as per the letter of 20 April) that the HRA had approved the increase. This was presented, incorrectly, as fact and, in the circumstances of this case, the appropriate course would have been for the Respondent to specifically acknowledge and explain this.

We have already considered the terms of the earlier email (advising HRA approval) and decided that, as it could be explained by innocent mistake, there was no breach of Code Section 2.1. We do not consider that the further correspondence on the issue creates a situation where false or misleading information was provided.

The Applicant highlights the obligation in Section 7.1 of the Code to have a "clear" complaints procedure. There is an acknowledged tension in the terminology of the Customer Feedback Information Sheet and the Written Statement of Services which has lead to confusion in this case. Nonetheless, we do not consider this to be sufficient to say that there is not a clear process in this case and the tension has made little practical difference in the circumstances found here.

In relation to Code Section 7.2, the Applicant was concerned that his complaint had not been referred to senior management but, given the confirmation regarding Ms Haig's status we find that not to be the case and there to have been no breach of Section 7.2.

It is also of concern that the Respondent claimed that the issue of the meeting hall charge was the subject of a determination by a Committee of the HOHP when that appears not to be the case. The matter does seem to have been the subject of

some discussion (but not decision) in an earlier application and we therefore take the view that the Respondent was proceeding under a mistaken belief (as opposed to adopting a dishonest position) in this regard and that no breach of the Code arises.

It is also of some concern that the Respondent presented its Customer Feedback Information as having some kind of recognised status in the eyes of the HOHP. Even if that document was produced in response to a Property Factor Enforcement Order in another case, that would not accord the document any formal recognition. We identify no intention to mislead nor any breach of the Code but the Respondent would be well advised to ensure that any claims which it may make in relation to documents which it produces are not capable of being misconstrued as claims to any kind of official recognition by the HOHP.

We do not find there to have been a breach of the property factor's duties in relation to any of these matters.

Observations

The Respondent was keen, at the hearing, to point out that there had never been any intention to mislead the Applicant or to make the process of dealing with the Applicant's complaints more difficult. Mr Hutton, quite fairly, recognised that some of what had happened was not of a satisfactory standard and appeared to the Committee to be keen to ensure that the Respondent's management of the Development should, in future, proceed without similar difficulties to those which had occurred previously.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

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..."

J McHugh

JOHN M MCHUGH

CHAIRMAN

DATE: 16 August 2016