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

Ref: HOHP/PF/14/0195

Re: Property at Flat 22, Royal Marine Apartments, Marine Road, Nairn, IV12 4EN ("the Property")

Parties: Mr John Jeffrey, Flat 22, Royal Marine Apartments, Marine Road, Nairn, IV12 4EN ("the Homeowner")

Amy Mitchell, Time-to-Let Property Management Services, Rumachroy Lodge, Meikleburn, Nairn, IV12 5UX ("the Factor")

Decision of the Homeowner Housing Panel in respect of an application under Section 17 of the Property Factor (Scotland) Act 2011 ("the Act")

Committee Members
Ewan Miller, Chairman; and Mike Scott, Lay Member.

Decision of the Committee

The Committee, having made such enquiries as it saw fit for the purposes of determining whether the Factor had (a) complied with the Code of Conduct for Property Factor as required by Section 14 of the 2011 Act; and (b) complied with the Property Factor Duties determined that, in relation to the Homeowner's application, the Factor had complied with the Code of Conduct for Property Factors and also with the Property Factor Duties.

Background

1. By application dated 25 February 2014 the Homeowner applied to the Homeowner Housing Panel ("the Panel") for a determination that the Factor had failed to comply with the Code of Conduct for Property Factor and had also failed in its Property Factor Duties.

   The complaint fell broadly into two categories. The substantive complaint was that the Factor had sanctioned payments in relation to the modification of parts of the communal facility and building within which the Property was located. Payments for these modifications had been taken from the communal account. The Homeowner had queried what professional advice had been sought to ensure that any such

changes were made safely. The Homeowner alleged the Factor had avoided answering this question. The Homeowner was concerned that alterations had been made to common parts (which he had a *pro indiviso* share in) without his consent and that caused safety concerns.

2. The second strand of the Homeowner's complaint was in relation to the handling of the Homeowner's complaint. The Homeowner alleged a breach of Section 2.5 of the Code in that the Factor had failed to respond to his enquiries and complaints received by letter or email within prompt timescales. He also alleged a breach of the Factor's Statement of Services under Clause 1.3 of the Statement.

   The Homeowner also alleged a breach of Clauses 7.2 and 7.3 of the Code in that the Factor had not issued a letter to the Homeowner in response to the complaint and that the Factor had contravened the Code of Conduct. The Factor had also threatened to charge for handling the Homeowner's complaint in breach of Section 7.3 of the Code.

3. By Notice of Referral dated 27 March 2015, the President of the Panel intimated that she had decided to refer the application to a Homeowner Housing Committee ("the Committee").

4. Following service of the Notice of Referral, the Homeowner made further representations to the Committee on 10 April 2015 and 16 June 2015. The Factor made representations to the Committee on 27 March 2015, 10 April 2015, 10 June 2015 and 17 June 2015.

Hearing

A hearing took place in respect of the application on 10 September 2015 at 10.30am in Nairn Community & Arts Centre, King Street, Nairn, IV12 4BQ. The Factor was present and represented herself. She had two witnesses with her who spoke to events – Mr Robin McLaren, Chairman of the Royal Marine Apartments Residents Association ("RMARA") and Mr John Quinn, Secretary of RMARA. The Homeowner worked abroad and was not present nor represented. He had indicated that he was happy to rely on his written representations.

Preliminary Issues

(1) The Factor and her witnesses made a representation that the application by the Homeowner was vexatious and frivolous. They highlighted the terms of Section 18(2)(a) which states that the President of the Panel may reject an application if she considers that it is vexatious or frivolous.

The Factor and her witnesses represented that the Homeowner was a contrary and difficult character who deliberately complained about minor and inconsequential matters. They submitted that 90% of the Committee's time was consumed by dealing with him. All other residents were happy with the Factor (a fact they evidenced by referring to the number of individuals from the development that had come to the Hearing to support the Factor).

The Homeowner had lodged numerous complaints with the Residents Association in the past and was, in their submission, being deliberately awkward. On that basis his application should be rejected as it was simply further mischief making by him. As

one example they highlighted that the Homeowner had previously complained about drawing pin holes within the development.

The Committee considered the matter and was satisfied that it was not appropriate for the application to be deemed to be vexatious and frivolous.

The Committee did not consider that they had jurisdiction to reject an application at this stage as being vexatious and frivolous. Whilst reference had been made to Section 18(2)(a) of the Act, the power contained in that Section belonged to the President and not the Committee. The President had referred the case to a Committee and must, therefore, have been satisfied that the case was not vexatious or frivolous. Accordingly the Committee did not have the jurisdiction to dismiss the case on that basis.

In any event the Committee would not have dismissed the case as being vexatious or frivolous even had it had the power to do so. There was no evidence within the case file of the Homeowner being a serial complainer. The Committee accepted that it may well be the case that the Homeowner had caused numerous complaints within the development but that was neither here nor there for the purposes of this case. There appeared from a reading of the papers to be a case to answer for the Factor. The Homeowner was correct that he owned the common parts of the development and therefore he had certain rights that had to be considered.

The fact that all the other homeowners were satisfied with the position and were supporting the Factor did not necessarily mean that the Homeowner did not have a valid case. Accordingly the Committee was satisfied that it could not reject the application as being vexatious or frivolous nor that it would have been appropriate to do so in any event.

(2) Provisions within the Deed of Conditions

The Factor had taken legal advice and wished to draw the Committee's attention to the terms of Clause 6 of the Deed of Conditions relating to the development. This provided that a residents association would be formed. The clause provided that "said association will be responsible for the promulgation of such rules and regulations (so far as not in conflict with the terms of this Deed of Conditions) as might be deemed necessary by a simple majority of the feuars…..". The clause also provided later on that "the said association shall appoint or employ factors to administer and be responsible for instructing and supervising the insurance, maintenance, renewal and, as appropriate, replacement and rebuilding of common parts of the building and the common area".

The Factor's submission was that the Association were the ones responsible for making regulations regarding the Property. They had instructed her in relation to the changes to the common parts and therefore she had simply been complying with the terms of the Deed of Conditions. The Deed of Conditions specifically stated that the residents association had the power to instruct the Factor.

Their submission was that provided that the Factor carried out instructions in line with the requirements of the residents association, then she should not be held responsible to a homeowner raising an individual complaint. The two witnesses, Mr McLaren and Mr Quinn confirmed that the Factor had simply been carrying out

requests of RMARA. These decisions had been properly made and done in accordance with the Constitution of RMARA and the Deed of Conditions. Accordingly RMARA did not wish to see the Factor held to account for what they perceived as their own decisions.

The Committee considered this preliminary point but was not satisfied that it was appropriate for it not to proceed to hear the case.

In essence the point being put forward was one that the Factor was "simply following orders". The Committee accepted that this may prove to be the case but, nonetheless, that was not of itself a defence to a homeowner's complaint. The Act and the Code of Conduct effectively introduced a system of a professional regulation. Accordingly a factor cannot simply blindly follow instructions from a residents association or another party where to do so would put it in conflict with the Act and the Code.

In any event RMARA, in terms of the Deed of Conditions, could only make such rules and regulations as were not in conflict with the other terms of the Deed of Conditions. The Homeowner had a *pro indiviso* right of common property to various areas within the development and therefore had certain rights. The Factor would require to always ensure that RMARA was acting in accordance with the Deed of Conditions and was not going outwith its own powers.

In any event the Homeowner had made a complaint against the Factor and was entitled to have their complaint dealt with in accordance with the Code. The obligations to comply with the Code took priority over any instructions from RMARA that sat in conflict with the Code.

Accordingly, whilst RMARA had a significant influence in determining what the Factor should and should not do, nonetheless the Factor required to always have regard to her professional responsibilities in terms of the Act and Code of Conduct. Accordingly it would not be appropriate to dismiss the complaint on the basis that she had only acted in line with RMARA's instructions.

Breach of Property Factors Duties – alterations to common parts

The Homeowner's complaint was that the Factor had allowed changes to common parts of the development. The principal complaint appeared to relate to a small plant room within the larger development. This had previously been used for the drying of laundry but some residents, after agreement with RMARA, had converted it to a small arts and crafts room. The Committee, following the Hearing, inspected the plant room. It was a relatively small room that was freshly decorated and had laminate flooring. There were a couple of tables with some chairs. There was some shelving. There was electric cabling within the room, although some of this had been boxed off.

The Homeowner had also complained regarding a bookcase that had been put in a communal area and also to the wedging open of a fire door.

The Homeowner objected to these alterations to what he saw as common property, of which he had a share in. He also had concerns that the proper safety assessments had not been carried out.

The Committee first considered the position in relation to common property. As a general rule (Bells Principles, Section 1075) no alterations can be made to common property without the consent of each *pro indiviso* proprietor.

This rule has frequently been applied by the Courts i.e. *Taylor v Dunlop (1872) 11M 25* and *Anderson v Dalrymple (1799) MOR12831.*

This general principle of law is, however, subject to a *de minimis* principle. The basis of this is largely set out in the case of *Barkley v Scott (1893) 1 SLT 191.* Very minor alterations to common property can be made without the consent being required of all common proprietors.

The Committee first considered the terms of the Deed of Conditions. The Deed of Conditions was not particularly well drafted and had a relatively poor description of the common areas. Whilst it listed various items such as the roof, walls and lifts it omitted communal areas such as the plant room. However there was a general provision that "all other things not specifically mentioned herein which are of common service to the building". The Committee was satisfied that the plant room did indeed fall within the definition of common property. It was therefore relevant to ascertain whether or not the consent of all homeowners had been required to the alteration or whether it fell within the *de minimis* rule.

The Committee was satisfied that the *de minimis* rule applied on this occasion. The physical layout of the plant room had not been changed. It had been repainted and a replacement full floor laid. Some furniture had been put in it. As far as the Committee could see there had been no structural alterations to the common property itself. Rather the use to which that area of space was put to that it had changed. It appeared to the Committee that this was an innocuous change of no real significance.

The Committee also noted that RMARA and the Factor had obtained advice from a Desmond Strong of the DDS Consultancy regarding fire safety. It also appeared to the Committee that Mr McLaren was well versed with safety matters having held a senior position in Scottish Power. Accordingly the consent of the Homeowner was not required to make such a change and was well within the ambit of the powers of RMARA as described in the Deed of Conditions. The Factor and RMARA had disclosed the proposed change with the insurance company of the development. They appeared to have acted in an appropriate and prudent manner

In relation to the bookcase in the hallway, this was such a trivial matter that the Committee consider it of no merit or further mention.

In relation to the fire door, the Committee again noted that the RMARA and the Factor had taken advice from DDS Consultancy and had implemented various improvements. The fire doors had release mechanisms that ensured appropriate safety precautions were in place.

The Committee noted that the cost of the changes to the plant room were £179. No labour charges had been made and it was only the cost of the paint and flooring that had been incurred. The Committee noted that the spend of £179 had to be taken in the context of an annual spend within the development of £50,000.

Accordingly the Committee was readily satisfied that the complaint by the Homeowner had little merit or foundation. There was no negative impact on any party within the development and RMARA had had the power to carry out this change. Accordingly the

Factor was entitled, and indeed obliged, to implement this change as it had the authority of RMARA and it did not breach the terms of the Deed of Conditions nor any of the Property Factors Duties or Code of Conduct. Accordingly this aspect of the Homeowner's complaint was dismissed.

Complaint Handling by Factor (Sections 2.5, 7.2 and 7.3 of Code and 1.3 of Written Terms of Service)

Code of Conduct - Condition 2.5

"You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and fully as possible....."

The Homeowner had sent an email to the Factor on 11 July 2014 querying the position in relation to the electrical plant room, the fire door and the furniture and bookcase.

The Factor had replied on 30 July 2014 advising she had passed the Homeowner's queries on to RMARA and they would respond directly either via the Factor's monthly reports to RMARA or via the Committee minutes which were available to all residents.

On 8 August 2014 the Homeowner advised the Factor that this response was not acceptable and he wished a formal response from the Factor in terms of Section 2.5 of the Code of Conduct. The Factor replied on 9 August 2014 again advising that the matter had been passed to the Committee and that any results would be shown through the monthly reports or Committee Minutes. The Homeowner complained again on 9 September and looking for information regarding a fire visit. The Factor replied on 11 September providing this information. Again she advised that minutes and monthly reports would deal with any such complaint. The Committee considered the matter.

The Factor advised that she had been on holiday when the original email of 30 July had been received and had subsequently been undergoing medical attention for a foot injury. The Committee considered that whilst it was unfortunate that it had taken a little longer than would normally be appropriate to respond to the Homeowner's initial complaint, nonetheless the time period was not excessive. The Factor was the only principal in the business and had been on holiday. It was not unreasonable in these circumstances for matters to take a little longer to respond to. Accordingly the Committee found that the Factor had not breached the Code in this regard.

The Committee did, however, consider that the processing of the complaint by the Factor could have been dealt with better. The stock response appeared to be to refer the Homeowner to the minutes of RMARA and that they would advise him of any action that was being taken in relation to his complaint.

As highlighted earlier in this decision, it is not always appropriate for the Factor to simply follow the instructions of RMARA. This is particularly the case where a complaint relates to her conduct and the terms of the Code of Conduct as being highlighted to her by the complainant. A direct complaint from a homeowner should be responded to directly by the Factor.

The Committee appreciated that the Homeowner may have had a long history of complaining and that the methodology of simply referring him to Committee minutes to deal

with his difficult attitude had been adopted. However, the Factor should still have responded to the complaint directly.

However, despite this, the Committee did not feel that the Factor had breached the Code in any sufficiently meaningful manner to warrant a finding against her. The Homeowner was, in due course, provided with information regarding the fire safety checks that had been done and he had always had access to the minutes of the committee meetings. The Factor had followed the wishes of RMARA in dealing with the Homeowner. Whilst this was not, as already highlighted, a defence to her actions, nonetheless it was a mitigating factor.

Overall, looking at the position in the round, the Committee was satisfied that whilst the Factor should be more conscious of the obligations upon her in terms of the Code in relation to complaint handling, there had been no material breach and no finding would be made against her in relation to 2.5 of the Code.

In relation to the complaint under Property Factors Duties under 1.3 of the Written Statement of Service (which stated that the Factor would "deal with client and residents communications and enquiries") again the points made already by the Committee applied but no finding against the Factor would be made.

Code of Conduct – 7.2 and 7.3

The Homeowner's complaint under 7.2 and 7.3 was the Factor had not issued a final letter in response to his complaint (7.2) and that the Factor had threatened to charge costs for reviewing the complaint (7.3).

Whilst a final letter had not been issued to the Homeowner, there had been numerous correspondence by email and it was clear from the correspondence that the Factor was not going to carry out anything further in response to the Homeowner's complaint. Accordingly the Committee was satisfied that whilst a clearer letter should have been issued in relation to the inability to resolve the complaint, nonetheless, the Factor had not acted inappropriately. The Homeowner knew the complaint process had been exhausted. Accordingly no breach was found against the Factor.

In relation to 7.3 of the Code, whilst it was not particularly appropriate for the Factor to threaten to charge the Homeowner for dealing with the complaint, the wording of the section of the Code was "unless explicitly provided for in the property titles or contractual documentation, you must not charge for handling complaints".

Whilst the Factor had, perhaps unwisely, threatened to charge for the complaint handling, the fact of the matter was that no such charge had been made. Accordingly as no charge had been made, there could not be a breach.

Accordingly the Committee found there had been no breaches of Section 7 of the Code.

Summary

The Committee found that there had been no breach of the Code of Conduct and no breach of the Property Factors Duties. Accordingly the case was dismissed and there was no further action to be taken against the Factor.

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 date on which the decision appealed against is made ... "

Ewan Miller

Chairperson Signature ..... Date.....3/12/15.....