Decision of the Homeowner Housing Committee issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011 and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

HOHP reference: HOHP/PF/15/0023

Re: Flat 3/1, 29 Winton Drive, Glasgow G12 0PZ ('the property')

The Parties:

Mr James McLaren, residing at 34 Balmaha Road, Drymen, Glasgow G63 0BY ('the homeowner')

Be Factored (formerly Property2) 2a, North Kirklands, Eaglesham Roadd, Glasgow G76 0NT ('the factor')

Decision by a Panel of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

Panel members:

David M Preston (Chairman); Mrs Sally Wainwright

Decision:

The Committee found that the factor had breached the Code of Conduct for Property Factors in respect of sections 2.1, 2.5 and 7.1 and determined to issue a Property Factor Enforcement Order.

Background:

1. By application dated 2 March 2015, the homeowner complained to the Homeowners Housing Panel (HOHP) that the factor had broken sections 2.2, 2.5 and 7.1 of the Code of Conduct for Property Factors (the code).

2. The hearing took place at the offices of HOHP at 450, Argyle Street on 23 June 2015. Present at the hearing were: the homeowner who represented himself; and Mr Graeme McEwan and Ms Lise Pieper who represented the factor.

3. The application was accompanied by: exchanges of email correspondence between the parties between 28 September 2014 and 25 November 2014; and a copy of the factor's written statement of service dated December 2013. Thereafter the homeowner submitted a copy letter from Hunter & Co, his solicitor in connection with the sale of the property, dated 11 March 2015 and accompanying Statement of Account; copy invoice number 617615 from the factor; email correspondence between the parties between 21 March 2015 and 19 April 2015.

4. It was a matter of agreement between the parties that the homeowner had sold the property in March 2015 and he was no longer the homeowner. The homeowner contended that as he still retained a financial interest in the progress of a common repair by virtue of the fact that a sum of £2,500 had been retained by the purchaser from the purchse price pending completion of the work, the factor was under an obligation to continue to keep him advised of progress.

5. The Committee decided to hear the complaint in respect of each section of the complaint separately.

Section 2.1

6. The homeowner complained that the correspondence from the factor was threatening. In particular he stated that an email from the factor had said that he would be charged for correspondence. The Committee identified an email from Mr McEwan dated 7 October 2014 in which he said "I would refer you to my letter in respect to property2 charges for time." The homeowner agreed that this was the email to which he was referring.

7. The factor made no comment on this point.

Section 2.5

8. The homeowner complained that his reasonable enquiries had not been dealt with by the factor satisfactorily.

9. In particular he referred to his email dated 30 September 2014 in which he had asked Ms Pieper to:

    a. reissue "letter from Zurich00300071.doc" from 27/8/14;

b. cc me on all (including past) correspondence to Zurich and the loss adjusters (including email;
c. acknowledge explicitly that Property2 will not use my name in this correspondence, unless as an equal part of a list of all nine owners;
d. acknowledge explicitly that Property2 has not and will not use my Zurich Building Guarantee Certificate (No. ZH 03 05 02709 007) in any correspondence.

10. The homeowner had previously, by email of 28 September, asked for a copy of the "letter to Zurich00300071.doc" which was indicated as being attached to an email from the factor dated 27 August 2014. He had received no response from the factor to that request and was not provided with a copy of such a letter.

11. Ms Pieper stated in an email of 6 October 2014 that she had noted the homeowner's points in his email of 30 September.

12. The homeowner was not satisfied that her response was satisfactory and referred the issue to the factor's director, Mr McEwan who indicated that he also felt that the points had been addressed.

13. The homeowner was of the view that all owners should be copied into all correspondence with the insurers. He did not wish his name to be associated with the claim as he did not want to become liable for the excess on the policy. He wanted the factor to specifically tell him that they had not and would not use his name in relation to the claims but they did not answer that question.

14. In response at the hearing the factor continued to maintain that they had dealt satisfactorily with the points raised by the homeowner by noting them. They did not consider that any other action was required. They also stated that they were not aware of the homeowners individual policy number or reference and therefore were not able to use it.

15. In relation to the homeowner's complaint that he had never received a copy of the "letter from Zurich00300071".attached to an email from the factor: at the hearing the factor said that the attachment was, in fact, a letter from Ms Pieper dated 21 August 2014 which advised that she was dealing with the claims under the Zurich building guarantees on behalf of a majority of owners and submitting a claim form. The homeowner had asked for sight of the attachment referred to ie a letter from Zurich. Ms Pieper said that she had wrongly entitled the attachment.

16. The factor explained that there were effectively two insurances which had been possibly involved in the issue. Firstly there was a whole buildings insurance policy which covered the usual buildings risks such as flood, fire etc which had been arranged through their brokers with Zurich for which the shares of premium

were charged to the homeowners in their factoring accounts. Secondy the builder had provided each homeowner with individual building guarantees with which they, as factors had no involvement. The problem with the cracking in the building was not an issue which was covered by the whole buildings policy. However, the factor had agreed to coordinate the claims by the individual owners under their building guarantees and it was in that context that Cunningham Lindsey had been engaged by Zurich and the letter of 7 October 2014 from Mr McClements had been sent to the homeowners to advise that the building guarantees would not cover the damage.

17. The factor sent a copy of the letter dated 7 October 2014 from Stewart McClements, Buiding Consultant relative to Mr McClements' inspection of the cracking on the front elevation of the building. In that letter, Mr McClements referred to a "previous letter" which had followed his colleague's earlier visit.
    a. The homeowner requested sight of a copy of the previous letter, to which Ms Pieper had responded on 9 October, stating that there was no previous letter.
    b. Subsequently Ms Pieper advised the homeowner by email of 25 November 2014, that that the previous letter was in relation to the appointment and discussions regarding the appointment.
    c. At the hearing, the factor produced a copy of a letter from Cunningham Lindsey dated 9 September 2014 from Noel Hamilton, Building Consultant. Ms Pieper confirmed that this was the "previous letter" referred to in the letter from Mr McClements.
    d. She explained that she had felt unable to copy that letter to the homeowner as it contained specific information in relation to other properties and owners in the block.
    e. The Committee considered the terms of the letter and allowed a redacted copy to be lodged and provided to the homeowner.
    f. The letter did not deal with the appointment or any such discussion. It explained the terms of the warranties relative to the individual flats in the development relative to major damage and why therefore the cracking was not covered by the individual warranties.

18. The homeowner also complained that he had not been kept in the loop in regard to the actions of the factor in relation to the repairs of the cracked rendering. Since making the application he had sold his flat in March 2015 and a retention had been made of £2500 to cover his share of the cost. He was of the view that accordingly the factor maintained an obligation towards him as he had a financial interest in the work being carried out. He stated that he was not aware of what the factor had been doing in relation to the common repair.

19. In any event the factor had not kept the homeowner advised of the actions (if any) being taken by them in relation to the necessary repairs between the time of the letter from Mr McClements and the present time.

20. In response, the factor explained the actions they had taken in respect of the common repair. Having discovered that the repair would not be covered by insurance, they spoke with Cunningham Lindsey to find out which contractor they would use to carry out the repairs to the cracks in the render. They had been referred to a contractor called Edinmore Contracts who visited to inspect the problem. They eventually produced a report which advised that the render which had been used by the builder was not suitable for cold climates. Edinmore had eventually provided a quote on 16 April 2015, which was after the homeowner had sold his flat. A further quote had been obtained which was significantly cheaper and involved patching the render as opposed to a full repair. These quotes differed by approximately £20,000 and the factor intended to obtain a third quote. They explained that between the end of 2014 and the present time there had been numerous correspondence between them, Cunningham Lindsey and Edinmore.

21. The factor produced copies of their newsletter entitled Factor File from August and November 2014 and February and May 2015 in which details of their actions had been explained. All owners received a copy of the newsletter but the homeowner would not have received the May copy as he had sold his flat.

22. After the date of the application the homeowner complained that the factor had not responded to his solicitor in connection with the sale of the property. He referred to the letter from Hunter & Co dated 11 March 2015 and the Statement of Account attached. He complained that the factor had jeoporised the sale of the property through their inaction and had caused him to suffer a retention of £2500 from the sale price through their failure to deal with the repair.

Section 7.1

23. The homeowner complained that he had, by email of 25 November 2014 asked Mr McEwan to refer his 4 points to the "Complaints Handling Procedure", but he heard nothing further from the factor. In particular no action had been taken in relation to the complaint being formally dealt with.

24. In response, the factor maintained that as the complaints procedure involved the matter being referred to Mr McEwan as Director of the factor, the procedure had been followed and as he had previously responded to the homeowner there was therefore nothing further to be done in relation to the formal complaints procedure.

Findings in Fact

25. It was a matter of agreement between the parties that the property had been sold by the homeowner in March 2015. The Committee accordingly found that the relationship between the parties as factor and homeowner terminated at the date of sale. The factor became responsible to the purchaser of the property from the date of sale. The homeowner produced no evidence in support of his contention that the factor had caused a delay in, or jeodordised settlement of the transaction. The letter from Hunter & Co did not indicate that there had been any delay. There was no evidence as to the contracted date of settlement or of the actual date on which it took place.

26. So far as the retention of £2500 from the price was concerned, the Committee found that this was a private arrangement between the homeowner and the purchaser which was normal in situations where there is outstanding work required to property at the point of sale. However that did not result in any on-going relationship between the factor and the homeowner. The factor would look to the purchaser to settle the appropriate share of the works attributable to the property and would be responsible for informing them of progress. The homeowner's interest in the work had ended with his sale. It was noted that the retention was intended to cover the cost of the work. If the cost was less than that sum, the balance would be returned to the homeowner, and if the retention did not cover the cost, the purchaser would cover the balance.

Section 2.2:

27. The Committee did not find that the factor was in breach of this section of the code.

28. The Committee did not consider that the terms of the email of 7 October 2014 coud be regarded by any reasonable person as being abusive, intimidating or threatening, albeit that a more detailed response to the homeowner might have been given.

Section. 2.5

29. The Committee found that the factor was in breach of this section of the code. In particular the Committee was not satisfied that the factor had dealt with the homeowner's enquiries and complaints as fully as possible.

30. In relation to the email of 30 September the Committee found that:

    a. the factor did not respond adequately in relation to the attachment in the previous email which had been wrongly described. The homeowner had,

in his email of 28 September 2014 told the factor that the attachment had, in fact been a letter from Ms Pieper which the factor did not acknowledge until the date of the hearing, despite having been asked about this on a number of occasions. That was inadequate on the part of the factor.

b. the factor had dealt reasonably with the other three points by noting them. The correspondence with Zurich or the loss adjusters had effectively come to an end by virtue of the letter from Mr McClements of 7 October as they were advised that the repairs to the cracking would not be covered by insurance. There was therefore no further correspondence in contemplation at that time which would have been relevant to the points raised by the homeowner.

c. The Committee was satisfied that either the factor did not know the homeowner's building guarantee reference number in which they had not been involved, or, if they did, it had been provided by the homeowner along with the other references which they had obtained from the owners to enable them to handle a claim on their behalf. If the homeowner had so consented and provided his number, then it was reasonable for the factor to have used it with the homeowner's tacit approval at that time. If he had not so consented they could not have used it.

d. by "noting" the points, the Committee was satisfied that the factor had acknowledged the points as requested by the homeowner. Had they subsequently acted contrary to those instructions, the matter would have been different. No evidence was produced of any contravention of those points.

31. In relation to the "previous letter" referred to in the letter from Mr McClements, the Committee found that the factor was in brech of this section of the code.

32. The factor had not adequately responded to the homeowner's reasonable request to have sight of a letter referred to as part of Mr McClements' consideration of the issues referred to him. Instead of providing a copy letter, or of paraphrasing it along with an explanation that the factor considered that they were, by virtue of a duty of confidentiality to other owners, precluded from sending it to him, they first of all told him there was no such letter. They subsequently told him that the letter related to other matters, which it did not. Finally at the hearing the truth of the matter was revealed and the letter was produced which, subject to a comparativey minor redaction, was able to be copied to the homeowner with no breach of confidentiality.

33. The Committee was conscious that the application did not specifically refer to a breach of section 2.1 of the code, but felt that the homeowner had not been in possession of the true information until the date of the hearimg and accordingly the Committee considered that with regard to the over-riding objective under Rule

3, such a finding can be made. The factor was given due notice of complaints under section 2 of the code.

34. In relation to the homeowner's complaint that he had not been kept in the loop and informed about progress of the common repair, the Committee was satisfied that sufficient information had been provided by the factor in their quarterly newsletter about the progress of the matter and their actions. The newsletter explained the factor's efforts to contact contractors and obtain quotes. The most recent newsletter of May 2015 providing the up to date information had post-dated the sale of the property.

Section 7.1:

35. The Committee found that the factor was in breach of this section of the code.

36. In his email of 25 November2014 the homeowner asked Mr McEwan to refer his points to the "complaints procedure".

37. The Committee had regard to the factor's "complaints handling procedure" as pubished on their website which states:.

"We aim to respond initially to all complaints within 5 days; although full resolution is dependant on availability of information and contact with any third parties. The following rules apply:

- Initial reply to complaint with complaint reference number within 48 hours
- Communication with update or conclusion within 14 days If for any reason we are unable to return to you within that timescale, we will write to you explaining why, for example that we are carrying out investigations with a third party
- If issue is not satisfactorily resolved item passed to Director Level for full analysis and resolution"

38. The Committee considered that the complaints procedure as stated was inadequate to deal with the situation which had arisen in this case. The homeowner had referred a number of issues directly to the Director (Mr McEwan) throughout the correspondence and ultimately when asked to refer the matter through the procedure, Mr Mcewan took the view that as it would be dealt with him in any event, the matter was closed.

39. No initial reply with a complaint reference number was given within 48 hours. There was no subsequent communication and there was no evidence of any analysis of the matters complained of or any attempt at a resolution.

Conclusion and Property Factor Enforcment Order:

40. The Committee determined that generally the breaches of the code which it found established were largely technical in nature and occurred in the face of what the Committee considered to be an unreasonable volume of correspondence. It considered that the tone of the correspondence from the homeowner was intemperate. However, the Committee determined that the factor should have maintained a standard of correspondence and response to the homeowner which complied with the terms and spirit of the code.

41. Accordingly the Committee determined that if the matter rested on section 2 of the code, no property factor enforecement order would be appropriate.

42. However in relation to section 7 of the code, the Committee found that the Complaint Handling Procedure as published by the factor on their website did not adequately cover the situation which had arisen in this case and could reasonably be expected to arise in future, nor did it meet the standards for a complaints procedure set out in the code.

43. Accordingly the Committee proposed to make a property factor enforcement order to require the factor to review the ir complaints handling procedure.

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 ... "

Chairperson Signature . Date.....9-7-15.....