

**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 ref: HOHP/PF/13/0295**

**Re: 18 Strathclyde Gardens, Drumsagard G72 7ET ('the property')**

**The Parties:**

**Mrs Natalie Holms, 18 Strathclyde Gardens, Drumsagard G72 7ET ('the homeowner')**

**PFAMS (a division of First Stop Properties Limited), 37 Cadzow Street, Hamilton ML3 6EE ('the factor')**

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

**Committee members:**

Sarah O'Neill (Chairperson)

Thomas Keenan (Housing member)

**Decision of the committee**

The factor has failed to comply with its duties as a property factor under section 17 (5) of the Act. The factor has not failed to comply with its duties under section 14 of the Property Factors (Scotland) Act 2011 in respect of sections 2.5 and 7 of the code of conduct for property factors.

The committee's decision is unanimous.

**Background**

1. By application dated 24 September 2013, the homeowner applied to the Homeowner Housing Panel ('the panel') to determine whether the factor had failed to comply with its duties under the Property Factors (Scotland) Act 2011. In her application, the homeowner complained that the factor had failed to comply with sections 2.5 (communications and consultation) and 7 (complaints resolution) of the code of conduct for property factors ('the code'). The homeowner also complained that the factor had failed to carry out the property factor's duties as defined in section 17(5) of the Act.

2. The homeowner later sent to the panel a copy of a letter dated 10 October 2013 which she had sent to the factor setting out the reasons why she believed the factor had failed to comply with its duties under section 17(5) of the Act. On 31 October 2013, she wrote to the panel advising that she had notified the factor more than two weeks previously why she believed it had failed to comply with sections 2.5 and 7 of the code. She subsequently advised the panel in an email dated 13 November that she had not retained a copy of her letter to the factor.
3. By letter dated 16 December 2013, the President of the panel sent a notice of referral to both parties, intimating her decision to refer the application to a panel committee for determination. Written representations were requested by 13 January 2014. No written representations were submitted by the homeowner to the committee before that date. Written representations were received from the factor on 11 January 2014. The response from both parties to the notice of referral indicated that they wished to have the application considered by written representations and without a hearing.
4. The committee considered whether to dispense with an oral hearing and deal with the case by means of written representations only, as provided for under regulation 18 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 ('the regulations'). The committee took the view, after consideration of the written evidence before it, that the requirements of regulation 18 (1) (a) (that the parties had agreed in writing to dispense with an oral hearing) and 18 (1) (c) (that, given the nature of the issues raised, to deal with the case by written representations would not be contrary to the interests of the parties) had been met. The committee determined, however, that it did not have sufficient evidence available to it to enable it to come to a decision, in terms of regulation 18 (1) (b).
5. The committee therefore issued a direction on 19 February 2014 to the parties, requiring both parties to provide to the committee within 21 days of receipt of the direction the following documents:
  - A copy of the electricity bill(s) which were the subject of the complaint
  - A copy of the letter sent by the factor to the homeowner requesting payment of this bill(s).
  - A copy of any formal complaint letters to the factor from the homeowner relating to her complaint about the electricity bill(s).
  - A copy of any other written correspondence between the property factor and the homeowner relating to the disputed bill(s) which has not already been sent to the committee.

6. The direction also required the homeowner to provide to the committee within 21 days further details, including any written evidence, of the reasons why she believed the factor had failed to a) comply with sections 2.5 and 7 of the code of conduct and b) carry out the property factor's duties, including which duties she believed the factor had failed to carry out. Finally, the direction required the factor to provide to the committee within 21 days of receipt the following information:
  - Confirmation of the source of its authority to act in relation to the development within which the homeowner's property is situated.
  - A copy of any relevant Deed of Conditions for the development.
  - A copy of all written correspondence between the factor and Scottish Power in relation to the disputed electricity bill(s).
7. No response to the direction was received from the factor by the date specified by the committee. An email was received on 10 March from the homeowner, advising that she was ill and had been in hospital, and may therefore be unable to supply the information requested.
8. Given the circumstances, the panel sent a reminder letter to the parties on 18 March, allowing them a further 4 weeks to comply with the direction, and advising that if written representations were not received within that period, the committee would fix an oral hearing. A further response was received from the homeowner, via two emails dated 27 March 2014. A response from the factor was received by letter dated 28 March 2014, together with the relevant electricity bills, a copy of the Deed of Conditions, and an invoice and recent statement relating to the homeowner's account. The letter also advised that there had been no written correspondence between the factor and Scottish Power, as the latter preferred to be contacted by telephone and all correspondence was by that method.
9. The committee noted that while some further information might have been helpful to it, it appeared from the parties' responses to the direction that some of the further documents requested either did not exist or the parties did not have them. Bearing this in mind, the committee determined that it was now in a position to make a determination by written representations in terms of regulation 18. The parties were notified on 2 May that the case would be decided by way of written representations and were given until 20 May 2014 to submit any further representations. No further submissions were received from either party.

## The hearing

10. The committee met to decide the case by way of written representations at the offices of the Homeowner Housing Panel, Europa Building, 450 Argyle Street, Glasgow on 27 May 2014.

## Findings in fact

11. The committee finds the following facts to be established:

- The homeowner is the owner of 18 Strathclyde Gardens, Drumsagard, G72 7ET.
- The factor is the property factor responsible for the management of the communal areas of the development. The factor was appointed as property factor for the development by the developer in terms of the Deed of Conditions dated 9 October 2006.
- The factor's contractual duties in relation to the communal areas of the development are set out in:
  - the said Deed of Conditions
  - the factor's Written Statement of Services sent to the homeowner on 28 September 2013.
- The factor became a registered property factor on 9 January 2013. Its duty under section 14 (5) of the Act to comply with the code arose from that date.

## The complaints made by the homeowner

12. The homeowner's complaints relate to a backdated electricity bill received by the factor in respect of the communal electricity supply for numbers 15-22 Strathclyde Gardens, Drumsagard, Glasgow. She stated that the backdated bill was for a period of three years, but the papers submitted by the factor show that it was in fact for a period of 2 years and 3 months. She received an invoice from the factor dated 31 May 2013, which included a charge of £175.70 (including VAT) in respect of the communal electricity supply for the period 11 January 2011 to 15 April 2013. The homeowner made three separate complaints in her application relating to this bill, as set out below.

13. **Complaint 1-** the factor has failed to carry out the property factor's duties as defined in section 17(5) of the Act.

The homeowner complained that the factor had not managed the situation regarding the electricity bill properly because it had taken so long to bill homeowners for the electricity used. She argued that if she had been billed directly by the power company, it could only have backdated her bill for one

year. She stated that as a result of this poor management, she had received a large bill instead of paying for the energy as and when it was used. She stated that her complaint could be resolved if the factor reduced the bill to include only the last 12 months of the period the bill related to.

14. **Complaint 2** - the factor has failed to comply with its duties under section 2.5 of the code, which states:

*'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 as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers).'*

It was not clear from the homeowner's initial application why she believed the factor had failed to comply with this section of the code. The application did state that she had '*emailed the factor on numerous occasions with little and unhelpful feedback*', and there did appear to be some evidence from the email correspondence submitted with her application that there had been some delays in responding to her emails. In her email of 27 March in response to the committee's direction, however, she stated that she believed the factor had failed to comply with section 2.5 because it had failed in its management duties by taking three years to bill her for the communal energy supply.

15. **Complaint 3** – the factor has failed to comply with section 7 of the code. This relates to complaints resolution. The homeowner's initial application form did not make reference to a specific part of section 7. In her email to the panel of 26 November 2013, she indicated that she believed the factor had not complied with section 7 of the code because it did not provide her with details of how she could apply to the panel when it sent her its final decision on her complaint. In her email response of 27 March 2014 to the committee's direction, she said that she believed the factor had failed to comply with section 7 as it had failed to come to a reasonable resolution of the matter and did not inform her about the panel. The committee therefore concluded that her complaint related to section 7.2 of the code of conduct, which states:

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

#### **The representations made by the factor**

16. In its written representations, the factor stated that it had received no written notification from the homeowner that she believed it had failed to comply with

the code, and that she intended to lodge a complaint with the panel. The factor stated that the homeowner had at no time asked for details of its complaints procedure, and pointed out that the homeowner had been issued with its written statement of services, which includes these procedures.

17. The factor said it had had major problems with the supplier, Scottish Power, for several of the landlord supply accounts it managed, which had taken a considerable time to rectify. It stated that the supplier issued only annual invoices for the supply, and refused to provide the factor with more frequent invoices. It said there had been issues with missing invoices, invoices raised then later cancelled and incorrect invoices, and as a result it had been necessary to close the accounts and open up new accounts. Although it had paid these bills, the factor did not charge owners until it had sorted out the problems and obtained correct accounts, which had taken months. Scottish Power had advised the factor that as a landlord supply was not a residential account, there was no time limit on the backdating of bills.
18. The factor stated that it believed it had acted in the best interests of owners by not charging them in respect of incorrect bills, which was in its opinion good management practice. It also pointed out that it had written to owners advising them that it was happy for them to pay the bill over a three month period to spread the cost. It also said that the homeowner was the only owner who seemed to have an issue with the bill.
19. The factor further stated that there had been numerous emails and telephone conversations between it and the homeowner regarding the electricity bill, among other things. It said some of these emails were replied to by telephone rather than email, for ease of communication/clarification. The factor stated that so far as it was aware, all emails and telephone calls had been replied to and all maintenance/queries had been attended to.

#### **Statement of reasons for decision**

20. **Complaint 1:** the committee accepts that the factor appears to have experienced considerable problems with obtaining accurate bills from the energy supplier in respect of the communal electricity supply. The committee notes the factor's argument that it was acting in the best interests of homeowners by not invoicing them in relation to the bills until these issues were resolved. It also notes that the factor had offered to spread the payments over a three month period to make it easier for owners to pay.
21. That said, the factor's written statement of services clearly states, at paragraph 5 of the section headed 'Financial and Charging Arrangements' on page 4: *'invoices for management fees and common charges are charged*

*monthly in arrears*'. The committee determines that 'common charges' includes charges for the communal electricity supply. As it is clear that the factor did not bill homeowners for these charges on a monthly basis for more than 2 years, the committee determines that the factor has failed to comply with its duties as set out in its written statement of services.

22. The factor's duties under section 17(5) of the Act arose on 1 October 2012. While the bill related to a period beginning in January 2011, the factor had failed in respect of this duty between 1 October 2012 and the issue of its invoice to the homeowner dated 31 May 2013. In any case, regulation 28 of the regulations provides that the committee may take into account any circumstances occurring before 1 October 2012 in determining whether there has been a continuing failure to act after that date.
23. In the committee's view, rather than waiting until the problems with the bills were resolved, the factor could have billed out an estimated amount for the bills to homeowners each month. This would have been in compliance with its written statement of services, and would have ensured that owners' bills did not mount up over time. It could then have adjusted homeowner's accounts accordingly once the bills were finalised. The factor could also have written to homeowners advising them of the difficulties with the bills, and explaining why they were being invoiced for an estimated amount.
24. The committee notes, however, that while the factor should not have expected the homeowner to pay this bill in one lump sum - or even over a three month period - the homeowner nevertheless had a responsibility to pay for her share of the communal energy use. While the committee accepts that the factor's approach resulted in the homeowner being landed with one large bill, it does not therefore accept the homeowner's argument that the factor should reduce her bill for the communal energy supply to include only twelve months, which would amount to a reduction of approximately £100 in the overall amount due.
25. **Complaint 2:** the committee notes that neither the homeowner's initial application nor her response to the direction clearly sets out any relevant evidence to support a complaint under section 2.5 of the code. The committee concludes that in her response of 27 March to the committee's direction, the homeowner confused the duty to comply with section 2.5 with her complaint about failure to carry out the property factor's duties. The committee notes that the factor's written statement of services states that it will respond to letters and emails within 5 working days of receipt. Some of the email correspondence submitted by the homeowner suggests that this may not always have been followed in relation to her enquiries, but the factor stated that some emails were replied to by telephone. On the basis of the evidence

available to it, the committee therefore determines that, on the balance of probabilities, the factor has not failed to comply with section 2.5 of the code.

26. **Complaint 3:** the homeowner referred only to section 7 of the code in her initial application form. The committee concludes, however, on the basis of her subsequent correspondence with the panel that her complaint relates to section 7.2 of the code. This provides that the homeowner should be notified in writing when the in-house complaints procedure has been exhausted without resolving the complaint, and that this letter should provide details of how the homeowner may apply to the panel.
27. It is clear from the correspondence submitted by the applicant that she had complained to the factor by email on several occasions between July and September 2013 regarding the communal electricity bill. There is, however, no evidence from any of the correspondence that her complaint was treated as such by the factor in terms of the complaints procedure set out in its written statement of services. The factor stated in its written representations that the homeowner had at no time asked for details of its complaints procedure, and pointed out that the homeowner had been issued with its written statement of services, which includes this procedure.
28. It is implicit in the homeowner's application and representations regarding section 7 of the code that she believed she had made a complaint to the factor. The committee concludes on the basis of the factor's representations that it did not consider the homeowner's complaint to be a complaint, because she did not explicitly label it as such, or make explicit reference to its complaints procedure. It appears therefore that the factor believed that the onus was on the homeowner to state that she was making a complaint, and to ask for this to be dealt with under its complaints procedure.
29. The committee does not accept this interpretation, and considers that the onus should be on the factor to identify a complaint as such, and deal with it under its written complaints procedure. The committee notes that the factor does have a written complaints procedure, as required under section 7.1 of the code. It reaches no conclusion, however, as to whether its procedure is compliant with section 7.1, as this is not the subject of the homeowner's complaint. The committee observes that there is no explicit requirement on property factors under the code to follow their complaints procedure, as might be expected. Nor is there any provision as to where the onus lies in relation to activating the written complaints procedure, when a complaint has been made.
30. The question here is whether the factor has failed to comply with section 7.2 of the code. It is not clear, however, whether the in-house complaints

procedure has been exhausted, because it does not appear to have been employed at all by the factor. The homeowner, however, appears to have believed otherwise.

31. In its response to the committee's direction, the factor stated that no formal complaint letter was ever received from the homeowner. The homeowner said the factor had a copy of the formal complaint letter she had sent, but she did not send this to the committee herself. The direction also required both parties to send the committee a copy of any other written correspondence between the parties relating to the disputed bills which had not already been sent to the committee. Both parties stated that there was no further correspondence about the matter. On the basis of the correspondence before the committee, an email (undated) from the factor in response to an email from the homeowner dated 8 September 2013 appears to be the last correspondence from the factor in response to the complaint.
32. This email stated: *'I reiterate that there were issues with the Scottish Power bills and that as good management practice this was not invoiced to our clients until we knew it had been corrected. This invoice is not optional and is due in full, as previously stated we will accept this to be paid over three months to make the payments easier. If it is not paid in full or paid over an agreed period then it will be passed over to our normal collection procedures including any costs incurred.'*
33. The committee concludes that the wording of the factor's email of 8 September 2013 clearly suggests that it was considered by the factor to be the end of the matter. Neither this nor any of the factor's previous emails made any mention of either the factor's written complaints procedure or the homeowner housing panel.
34. It is also clear from the evidence that the homeowner did not consider that her complaint had been resolved. Section 7.2 clearly states that where the factor's in-house complaints procedure has been exhausted without resolving the complaint, the homeowner should be notified in writing. It also states that this letter should provide details of how the homeowner may apply to the homeowner housing panel. No such written notification was sent in this case, and there is no evidence that the factor made the homeowner aware that she could apply to the panel.
35. The committee notes, however, that firstly, the factor said it had received no written notification from the homeowner of the reasons why she believed it had failed to comply with the code. The homeowner was unable to provide a copy of the notification she said she had sent to the factor, and there is accordingly insufficient evidence that this was in fact sent. If it was not sent,

the factor would not have had the opportunity to address this issue before the homeowner made her application to the panel. The committee also determines that there is insufficient evidence before it to reach a conclusion as to whether the factor's in-house complaints procedure had in fact been exhausted.

36. The committee therefore concludes that there is insufficient evidence before it to support a finding that there has been a breach of section 7.2 of the code. The committee therefore determines that on the balance of probabilities, the factor has not failed to comply with section 7.2 of the code. The committee observes, however, that the factor does not appear in its opinion to have identified the homeowner's complaint as a complaint at an early stage, or to have dealt with her complaint in the manner which might have been expected. The committee also observes that in its view the onus should be on the factor rather than the homeowner to identify a homeowner's expression of dissatisfaction as a complaint, and deal with this accordingly under its written complaints procedure.

#### **Proposed Property Factor Enforcement Order**

37. The Committee proposes to make a property factor enforcement order (PFEO) as detailed in the accompanying Section 19(2) (a) notice.

#### **Right of appeal**

The parties' attention is drawn to the terms of section 22 of the Act regarding their right to appeal, and the time limit for doing so. It provides:

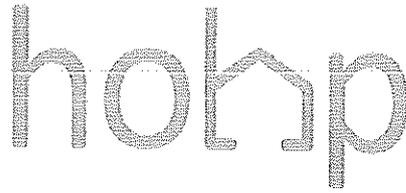
- (1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or homeowner housing committee.
- (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made.

More information regarding appeals can be found in the information guide produced by the homeowner housing panel. This can be found on the panel's website at:

<http://hohp.scotland.gov.uk/prhp/2649.325.346.html>

Chairperson Signature Sarah O'NeillSarah O'Neill  
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Sarah O'NeillSarah O'Neill

Date... 13/6/14 .....



**Notice of proposal to make a Property Factor Enforcement Order made under Section 19(2)(a) of the Property Factors (Scotland) Act 2011 ("the Act") following upon a Decision of the Homeowner Housing Committee in an application under Section 17(1) of the Act**

**HOHP ref: HOHP/PF/13/0295**

**Re: 18 Strathclyde Gardens, Drumsagard G72 7ET ('the property')**

**The Parties:**

**Mrs Natalie Holms, 18 Strathclyde Gardens, Drumsagard G72 7ET ('the homeowner')**

**PFAMS (a division of First Stop Properties Limited), 37 Cadzow Street, Hamilton ML3 6EE ('the factor')**

**Committee members:**

Sarah O'Neill (Chairperson)

Thomas Keenan (Housing member)

**This notice should be read in conjunction with the the Committee's Decision under Section 19(1)(a) of the Act of the same date.**

The Committee proposes to make the following Property Factor Enforcement Order ("PFEO"):

Within 28 days of the communication to the factor of this Property Factor Enforcement Order, the factor must:

1. Credit the sum of £25 to the applicant's account in recognition of the inconvenience caused to her by the factor's failure to comply with its duties as a property factor with regard to the communal electricity relating to the property.
2. Provide documentary evidence to the committee of its compliance with this Property Factor Enforcement Order by sending such evidence to the office of the Homeowner Housing Panel by recorded delivery post.

Section 19 of the 2011 Act provides as follows:

*"... (2) In any case where the committee proposes to make a property factor enforcement order, they must before doing so...*

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to them.

(3) If the committee are satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the committee must make a property factor enforcement order..."

The intimation of the Committee's Decision and this notice of proposal to make a PFEO to the parties should be taken as notice for the purposes of section 19(2) (a) of the Act and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2) (b) of the Act reach the Homeowner Housing Panel's office by no later than *(insert timescale)* after the date that the Decision and this notice is intimated to them. If no representations are received within that timescale, then the Committee is likely to proceed to make a property factor enforcement order ("PFEO") without seeking further representations from the parties.

**Failure to comply with a property factor enforcement order may have serious consequences and may constitute an offence.**

Sarah O'Neill

Chairperson Signature ..

Date...13/6/18...