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

Hohp Ref: HOHP/PF/14/0140

Re:

Property at Flat 1/1, 11 Rhindmuir Gate, Baillieston, Glagow, G69 6EW ("the Property")

The Parties:-

Mr Desmond Mowat, residing at the Property ("the Homeowner")

First Stop Properties Limited, trading as Pfams, 37 Cadzow Street, Hamilton, ML3 6EE ("the Factors")

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

Committee Members:

Maurice O'Carroll (Chairman)
Elaine Munroe (Housing Member)

Decision of the Committee

The Factors have failed to comply with their duties under s 14(5) of the 2011 Act in terms of Sections 3, 4 and 6 of the Code of Conduct for Property Factors.

The decision is unanimous.

Background

1. By application dated 15 September 2014, the Homeowner applied to the Homeowner Housing Panel ("HOHP") for a determination of whether the Factors had failed to comply with the duties set out in sections 3, 4 and 6 of the Code of Conduct imposed by section 14(5) of the 2011 Act. He also requested a determination as to whether the Factors had failed to comply with their general duties in terms of section 17(5) of the Act ("the Application").

2. Prior to the Application being submitted, the Homeowner sent formal notifications to the Factors dated 7 October 2014 in accordance with section 17(3) of the Act. The formal notifications were sent on pro forma letters provided by HOHP. The first of these indicated that the Homeowner considered that the Factors had failed in their duties in that they had not complied with Sections 3.3, 4.4, 4.6, 4.8, 4.9, 6.1 and 6.4 of the Code. A separate formal notification indicated a failure to comply with the Factor's duties in terms of section 17(5) of the Act in respect of their financial obligations, their debt recovery procedures and their failure to carry out repairs and maintenance as required.

3. Notices of referral to the Committee were sent to the parties on 18 May 2015. In response to the notification, the Factors sent in representations dated 8 June 2015 in which they refuted the claims made in the Homeowner's Application.

4. An oral hearing in relation to the application was held on 9 July 2015 within the offices of the Homeowner Panel, Europa Building 450 Argyle Street, Glasgow. The Homeowner attended on his own without representation and gave evidence and submissions to the Committee on his own behalf. The Factors were not present at the hearing and nor were they represented, despite having acknowledged receipt of notification of the hearing date.

5. At the outset of the hearing, it was clarified that the Factors no longer act as property managers in respect of the Property, having been dismissed by the homeowners in the Development with effect from 30 September 2014.

Committee findings - general

The Committee made the following findings in fact pursuant to Regulation 26(2)(b)(i) of the 2012 Regulations:

6. The Homeowner, is the heritable proprietor of the Property which consists of a flat within a development registered in the Land Register under title numbers LAN 64899 and LAN 110591 ("the Development") constructed by The Bothwell Development Company Limited. His occupation is as a self-employed taxi driver.

7. A Deed of Conditions in respect of the Development dated 16 August 2006 was recorded in the Land Register by the developers. The Factors were appointed by the developers in terms of that deed and remained so until 30 September 2014 when they were removed by a majority vote of the residents of the Development.

8. First Stop Properties Limited were registered as factors on 8 January 2013. They operated through a separate legal entity, Property Factors and Management Services Limited known as Pfams. This is narrated in all of the Factors' invoices where it is stated at the foot of each "Pfams is the Factoring Division of First Stop Properties Limited." The property factor duties of Pfams, the *de facto* Factors, arose from 9 January 2013.

9. The Development consists of twenty flats and one end terraced single storey dwelling house, comprising twenty-one factored properties in total. Common charges were therefore split 21 ways. Management fees amounted to £10 per month plus VAT. Invoices for all factoring services were rendered sometimes monthly and sometimes quarterly.

10. The main source of the difficulty which the Homeowner has had with the Factors is in relation to payment of factoring charges. On 24 February 2009, the Homeowner received a final demand from the Factors requiring payment of the sum of £818.28 in respect of overdue payments. At that time, he arranged to pay half of that sum immediately and entered into a payment plan with the Factors in order to clear his outstanding indebtedness. In terms of the payment plan agreed between the parties, the Homeowner paid the Factors £100 per month.

11. Unfortunately, during August 2011, the Homeowner defaulted on that agreement. At that time, his father had been seriously ill in hospital and his mother was also unwell, as a result of which, the Homeowner was unable to work. To compound matters, around that time he had just purchased his Hackney cab and he was therefore in severe financial difficulty.

12. Due to his default, the Factors put matters into the hands of the collection agency of Walker Love and a new payment plan was entered into at that time. In terms of that plan, the Homeowner was required to pay £150 per month. Unfortunately, the terms imposed by Walker Love included a 10% collection charge plus VAT for which the Homeowner was liable. This meant that for every £150 he paid to clear his debt, £132 was actually credited to his account for that purpose.

13. This payment plan was maintained without default by the Homeowner and subsisted until the date of the hearing on 9 July 2015 (although as of March 2015 payments were reduced to £50 per month). As at 29 August 2014, according to a statement produced by the Factors on that date, his indebtedness amounted to £2,929.85.

14. The Homeowner sought advice from the Easterhouse Citizen's Advice Bureau in respect of his financial difficulties on 13 August 2014. The Bureau wrote to the Factors on his behalf on 2 October 2014. On 7 October 2014, the Factors replied to Easterhouse CAB confirming that they were continuing to employ the services of Walker Love to obtain arrears payment from the Homeowner at the rate of £150 per month. They therefore acknowledged that they were continuing to collect payments from the Homeowner after the date of their cessation as property factors for the Development.

15. On 17 February 2015, the Homeowner obtained a loan from another source and made a one-off payment to the Factors via Walker Love in the sum of £1,731.29. That sum was his calculation of the final amount due and owing in respect of his

outstanding debt for factoring charges. He was, however informed at that time by Walker Love that he still had a further amount of approximately £700 to pay. At the time of the hearing, that amount had been reduced to £580.69, which the Homeowner is presently paying off at the rate of £50 per month. The reason for the Homeowner's error in relation to the final amount which he required to pay to clear his debt is discussed below in relation to Section 3.3 of the Code.

16. A Notice of Potential Liability ("NOPL") was registered against the Property on or about 5 June 2014 by Alex Adamson LLP, debt collectors, on the instruction of the Factors. The Factors produced an invoice dated 25 July 2014 addressed to the Homeowner for £132 being the cost of preparation and registration of the NOPL plus VAT to be added to his outstanding debt. The Homeowner did not see the paperwork in relation to this charge until November 2014, despite having received an assurance from an employee within the Factors that he would be provided with it in June 2014 when the charge was levied.

17. The Committee found the Homeowner to be a credible and reliable witness who gave his evidence in a straightforward and unexaggerated manner.

Findings in relation to the alleged breaches of duty

Section 3 of the Code

18. Section 3.3 of the Code provides that factors must supply homeowners with a detailed financial breakdown of charges made and description of the activities and works charged for at least once a year.

19. The Homeowner gave evidence that he had never received such a financial statement in all of the time that the Factors managed the Development. The Committee was directed to a statement dated 29 August 2014. As noted above, it detailed the Homeowner's level of indebtedness of that date. It also listed all common charges and interest charges made from 19 September 2011 to 28 July 2014 which made up the balance due as at that date. Incidentally, it did not contain a column detailing the Homeowner's payments in terms of his repayment plan to be set against those charges. In any event, that statement does not constitute an annual statement as required by Section 3.3. of the Code. The Committee therefore found the Factors to have breached that section.

20. The Committee also considered the accuracy of financial statements, such as they were, being provided to the Homeowner at the time of the hearing. It concluded that the Homeowner was left in a state of uncertainty in relation to the amounts which he actually owed for factoring services due a lack of clarity and accuracy in the information being provided to him. After 30 September 2014, the responsibility for that failure may well rest in the first place with Walker Love. However, as they are instructed by the Factors on an ongoing basis to collect factoring debts from the Homeowner in respect of the period when they were his Factors, the responsibility for transparency in financial matters ultimately lies with them, as the Factors and creditors. As the letter of 7 October 2014 referred to

above makes clear, as old debts were being paid off, new charges were accruing to his account. The Homeowner was not adequately kept abreast of the extent to which this was happening. Further, and more importantly, the Homeowner was not accurately credited with amounts which he had actually paid in order to clear his debt to the Factors as he should have been.

21. The Homeowner provided the Committee with summaries of payments which he had produced. One summary was of the amounts which had been taken from his bank account in payment of the factoring debt. This was verified by the Committee against the Homeowner's bank statements which were produced at the hearing. Another summary produced by the Homeowner showed the extent to which his account had been credited with those payments. According to the summaries, the Homeowner had paid a total of £4,666.29 between the dates of 9 May 2012 and 2 July 2015. However, the summary of credited payments showed a total of £4,266.29. In the Property Factor Enforcement Order to follow hereon, the Factors will therefore be required to repay the shortfall of £400 not credited to the Homeowner, or else provide a full reconciliation demonstrating that he received full credit for all payments made by him further to extinguishing his debt.

Section 4 of the Code

22. Section 4.4 of the Code requires factors to provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations. This matter is covered by the Written Statement of Services provided by the Factors during June 2014 at page 4. It is there stated that all owners are jointly and severally liable for all factoring costs and that non-recoverable charges may be claimed from the remaining owners. The Written Statement of Services was provided belatedly in June 2014. Given the provision narrated in the Written Statement and given that it was also a matter covered by Clause (NINTH) of the Title Deeds, the Committee did not consider it necessary to find that there had been a breach of Section 4.4. of the Code.

23. Section 4.6 of the Code requires Factors to keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation). On or about July 2014, the Factors circulated a table entitled "schedule of bad debt being charged to remaining 16 owners at Rhindmuir Gate as per Deed of Conditions." In the table, the alleged bad debtors are named, their addresses provided and in the final column the extent of outstanding debt is detailed. In the case of the Homeowner, his debt is stated as being £2,929.85, being the second highest there listed. The 1/16th share ascribed to the remaining owners is stated as being £592.98. The schedule was apparently circulated due to the imminent replacement of the Factors, which in fact occurred approximately two months later.

24. There is no doubt that it is provided at Clause (NINTH) of the Deed of Conditions that bad debt is the joint and several liability of all of the homeowners within the

Development and that any unpaid debt may be collected from the remaining proprietors. However, a number of issues arise from the circulation of the table. In the first place, it was not circulated to all of the homeowners within the Development, only those who had no outstanding fees at that time. This meant that the Homeowner was not provided with a copy of that table circulated to the owners of the remaining 16 properties. Secondly, it is not clear whether the Factors did in fact collect the sum of £592.88 or any other sum from any of the co-proprietors. If they did so, that would have the effect of reducing the amount of indebtedness on the part of the Homeowner. The Factors are therefore required in terms of the Property Factor Enforcement Order ("PFEO") to follow hereon to disclose whether or not that was the case.

25. A third issue arises from the fact of what happened: Due to the detailed disclosure of the "bad debt" including the identities of the non-payers, the Homeowner was subject to the embarrassing experience of being "door stepped" by one or more of the other owners of the Development who demanded to know why it was they were being required to pay his debt. The Homeowner gave evidence, which the Committee accepted, that he was acutely embarrassed and was forced into the humiliating position of having to show those proprietors evidence of his payment plan. This was so that they could be assured that he was making efforts to repay his indebtedness, thereby reducing the amount which they would ultimately be liable for in terms of the Deed of Conditions.

26. A fourth issue arises in terms of Data Protection as touched upon in Section 4.6 of the Code. In their written submissions, the Factors claim to have sought legal advice in this regard and to have acted upon it. The HOHP is not the appropriate forum to adjudicate on disputes in relation to the disclosure of personal data. However, the Committee notes that the Data Protection Act 1998 exists to protect personal data in respect of living persons. Section 4 refers to the principles which apply under the Act. These are set out in Part 1 of Schedule 1 of the 1998 Act. Paragraph 1 of that Part provides that personal data shall be processed fairly and lawfully and shall not be processed unless at least one of the conditions in Schedule 2 is met. In the absence of consent, Schedule 2(2) provides a permissible condition whereby the data processing is necessary for the performance of a contract to which the data subject is a party.

27. The Committee doubts whether the disclosure of the Homeowner's personal details could be described as *necessary* for the performance of the Homeowner's contract with the Factors. Even if it were, the Committee also doubts whether the disclosure of the person information in the manner in which it was done could be described as having been done *fairly*, given what in fact occurred. If the Factors considered it necessary and fair to disclose personal information relating to the Homeowner, then they ought to have done so fully: To be fully transparent, the table ought also to have included beneath or alongside the Homeowner's outstanding indebtedness, a statement to the effect that he was currently paying

off the outstanding debt at the rate of £150 per month (less 10% plus VAT being charged by Walker Love).

28. The Committee's view in the absence of such full disclosure along those lines was that the Factors' action went beyond the scope of what was necessary in terms of Section 4.6 and did not equate to what was done. It considered that the disclosure was a gratuitous and damaging revelation which foreseeably led to the angry remonstrations from the Homeowner's neighbours with the consequences noted above. Incidentally, and for this reason, the Committee also found the Factors to have breached Section 4.9 of the Code which forbids Factors from behaving in an intimidating or threatening manner towards homeowner debtors.

29. In any event, aside from any issues relating to data protection or insensitive disclosure of personal details, since the Factors did not intimate the table of debtors to the Homeowner, they acted in breach of Section 4.6 of the Code. The potential payment of outstanding debts by the other owners in the Development could have had implications for the Homeowner as noted above. The Committee therefore finds the Factors to be in breach of Section 4.6 and also Section 4.9 of the Code in relation to this particular chapter of evidence.

30. Section 4.8 of the Code states that factors must not take legal action against homeowners without taking reasonable steps to resolve the matter and without giving notice of their intention. As noted above, reasonable steps were indeed being taken to resolve the matter, since regular monthly payments were being made by the Homeowner. Of itself, this ought in fact to have precluded legal action being taken at all in terms of that section.

31. Nevertheless, the Factors proceeded to register a NOPL against the Homeowner's property without warning in June 2014. He was only provided with the relative invoices in November 2014, some five months after it was put in place. To make matters worse, he was charged at total of £132, or one month's debt repayment, for the cost of preparing and registering the Notice in the Land Register. The Factors point out that since they were about to be removed as managers for the Development, this was their only means of securing repayment. That submission was rejected by the Committee. In the first place, the repayment plan was in place and was being adhered to by the Homeowner with no indication that any default was likely, so no additional security was necessary. Secondly, the Factors still could have had recourse to the Sheriff Court in the event of default under the factoring contract so that registering a NOPL was not their only means of ensuring repayment of the debt. In any event, no prior notice was given in advance of registration as noted above. Therefore, the Committee found the Factors to have breached Section 4.8 of the Code.

Section 6 of the Code

32. Section 6.1 of the Code requires Factors to have in place procedures to allow homeowners to notify them of matters requiring repair, maintenance or attention.

This obligation is covered by section 8 of the WSoS whereby the obligation is placed upon the co-owners to notify the Factors of matters requiring their attention. The obligation arising under Section 6.1 of the Code would, however, be meaningless if the Factors did not have a concomitant obligation to follow up on those reports and to carry out the repairs and maintenance requirements as reported to them. Moreover, the Committee noted that the WSoS was not supplied to the Homeowner until June 2014. There was accordingly, a breach of that section of the Code at least between 9 January 2013 and June 2014.

33. The Homeowner supplied the Committee with photographs on or around June 2014 which reveal the following: a perimeter fence which keeps falling over and is only upright because it is supported by the trees behind it. The Committee was informed that the fence had been erected hastily at the time of the creating of the Development and had only been sunk to a depth of around 15cm. As a consequence it lacked the stability to remain upright and was frequently blown over in bad weather; broken electrical sockets in the common stairwell; grass cuttings gathering against the walls of the building as they had not been collected after being cut. Rather, they were simply blown using a mechanical blower after routine cutting; inspection covers which were damaged by the landscape contractors and left unrepaired; and overgrown shrubs throughout the Development.

34. The Committee accepted the evidence of the Homeowner in relation to these matters and noted that the fence issue also presented a danger of damage to parked cars in the communal car park during bad weather. Accordingly, it found the Factors to have been in breach of this section of the Code in terms of the maintenance which it undertook, quite apart from the failure to supply a statement of the applicable procedures until June 2014.

35. Section 6.4 of the Code provides that if the Factors provide periodic property inspections, then they must produce a programme of works. At paragraph 13 of the WSoS, the Factors undertake to carry out property inspections at least four times a year. Accordingly, this section is applicable. The comment above in relation to a failure to supply that statement until June 2014 applies equally in relation to this paragraph of Section 6 of the Code. There was a breach at least between 9 January 2013 and June 2014.

36. In relation to substantive compliance, the Committee had sight of an undated summary of progress of works produced by the Factors which in the view of the Committee did not constitute compliance with this section of the Code. The Committee also noted that a Programme of works covering ground maintenance, close cleaning and inspections was provided to the Homeowner under cover of a letter dated 24 November 2014. This was after they had ceased to be factors for the Development. Their reason for not supplying it sooner was that it had not been requested. Again, the requirement of the Section 6.4 of the Code would be meaningless if the programme of works was not actually communicated to

homeowners. Accordingly, the Committee found the Factors to have breached Section 6.4 of the Code.

Decision

37. In all of the circumstances narrated above, the Committee finds that the Factors have failed to comply with their property factor's duties in terms of s 14(5) of the Act in respect of sections 3.3, 4.6, 4.8, 4.9, 6.1 and 6.4 of the Code.

It has therefore determined to issue a Property Factor Enforcement Notice which will follow separately.

38. **Appeals**

The parties' attention is drawn to the terms of s 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..."

Signed M O'Carroll
Chairperson

Date 31 July 2015