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

HOHP reference: HOHP/PF/15/0003

Re: ('the property') Application to Homeowner Housing Panel ("HOHP") in respect of: Flat 8, 112 Hillpark Grove, Edinburgh, EH4 7EF.

The Parties:

('the homeowner') Mr Michael Sturgeon, Flat 8, 112 Hillpark Grove, Edinburgh, EH4 7EF

('the factor') Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD

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

Committee members:

(Chairperson) Simone Sweeney

(Surveyor member) Ian Murning

Decision of the committee

Decision

1. The committee determines; that the factors have failed to comply with section 2.5 of the Code of Conduct for property factors ("the code") in terms of section 17(1) (b) of the Property Factors (Scotland) Act 2011 ("the Act") as required by section 14(5) of the Act and have failed to comply with the property factors' duties as defined by sections 17 (4) and 17 (5) of the Act.

Background

2. By an application dated 5th January 2015 the homeowner applied to the HOHP for a determination on whether or not the property factors had failed to; (i) comply with sections 2.5, 6.3 and 6.6 of the Code of Conduct imposed by section 14 of the Act and; (ii) carry out the property factor's duties in terms of section 17 of the Act by, firstly, entering into a contract for lift maintenance without ascertaining if the contract was appropriate and offered value for money; secondly, failing to provide details of the contract to the homeowner and; thirdly, failing to answer queries about the contract brought by the homeowner both over a period of six months.

3. Each party presented evidence to a committee of the HOHP at a hearing which took place at George House, 126 George Street, Edinburgh, EH2 4HH on Thursday 30th April 2015 at 10.30 am. Representations in support of his application were made by the homeowner, only. The property factors were represented by property manager, Fraser McIntosh and associate director, Sarah Wilson.

Evidence of the homeowner

4. The homeowner was invited to address the committee on each part of his complaint. Starting with the allegations of a breach of section 2.5 of the code, the homeowner submitted that he felt that the property factors had failed to answer his email queries to them in full and in a reasonable length of time. The homeowner claimed that he had first emailed the property factors on 31st July 2014 upon receipt of an invoice which he had received from them. The invoice had included a charge for lift maintenance which had come as some surprise to him as he had been unaware that he had any responsibility for this cost, having never been charged for it prior to this date. Having not received a response to this initial query he submitted that he required to send two further emails to the property factors in October and November 2014 addressing the same issue. The emails were within the committee's papers. The homeowner did not specify where within these emails the property factors had failed.

5. The invoice was contained within the papers before the committee. It shows charges for the period, 2nd July to 1st October 2014. The second entry on the invoice, dated 19th July 2014, reads, *"Express Lifts Alliance Limited Lift maintenance contract 19/07/2014 -18/10/204: 19/07/2014- 18/10/2014."* The charge for the homeowner is £43.94 inclusive of VAT.

6. An email from the homeowner to the property factors dated, 31st July 2014 was relied upon by the homeowner. The email was addressed to the property factors' Jamie Ramsay a property manager employed by the property factors. The email read,

> *"I note that there is an new invoice raised against my account, which is dated 16th July, ….*
> *…I also have a query about the lift maintenance charge on it- the invoice states it is for the period 19/4/2014 -18/07/14?*
> *This seems an excessive charge for 3 months maintenance? – is this an annual charge? Please can you confirm."*

A reply email from the property factors dated, 4th August 2014 forms part of this document. It reads,

> *"In regards to the lift maintenance charge, I am also investigating if a technical error has brought about this being incorrectly charged. If this is the case I will have this refunded to you and the other owners in the block."*

7. It was the homeowner's position that his query remained unanswered and he had emailed the property factors again on 22nd October 2014. A copy of that email was within the papers. The email, addressed to Fraser McIntosh, read,

> *"There was a Lift Maintenance charge on our July invoice, which i queried and asked if it was an quarterly or annual charge. I haven't had an answer, which is a concern, however the same charge has appeared in our October invoice indicating that it is possibly a quarterly charge? Perhaps you could find out and confirm?"*

A reply from Mr McIntosh, dated, 30th October 2014, was produced. It states,

> *"Please accept my apologies in regards to the delay in getting back to you. I am in the process of handover with my new team and appreciate your patience with this.*
>
> *I can confirm that the lift maintenance at the above site is charged out to the development on a quarterly basis, with the next quarter being 19.10.14 -18.01.15."*

The homeowner expressed his concerns to this answer in another email of even date,

"You have advised that the lift maintenance is a quarterly charge. As intimated in my previous emails I consider this to be excessive. (£1318.40 + vat – annually) Please can you advise what maintenance is actually carried out every quarter and confirm why quarterly maintenance is required on such and installation."

A response was issued from the property factors on 4th November 2014 which acknowledged the homeowner's concerns. Further emails (20th and 23rd December 2014) were within the papers from the homeowner to the property factors regarding, amongst other things, his concerns about the costs levied against him for lift maintenance. Replies were issued by the property factors on 23rd and 24th December 2014. In the email from the property factors, dated 24th December 2014, is stated the following:

"...I have subsequently spoken with Express Lifts regarding the invoice they sent to us for payment and they had an error on this and it was a charge for block 48 and not yourselves therefore a credit for this had been applied to your account today and will be included with your January 2015 invoice. Sincere apologies for this."

8. The homeowner provided some background to the matter. He had purchased the property in April 2011. The property was a flat within a modern development. He had purchased the property from the developers, Messrs McTaggart and Mickel. At this time, the homeowner thought that about 10 flats had been purchased within the development, others lay unoccupied. The common areas of the development, including the lift, were managed by the developers. He understood that the property factors did not take over their responsibilities at the development until 29th April 2013. Neither the homeowner nor any of the other owners at the development had any involvement or knowledge that this hand over was being conducted and he received nothing in writing from either the property factors or McTaggart and Mickel to notify him of the change. An invoice from the property factors dated January 2014 (a copy of which was within the papers before the committee) was his, "*first communication*" from the property factors. This invoice did not contain any charge for lift maintenance.

9. With regards to the alleged breach of section 6.3 of the code, the homeowner submitted that, despite requests, the property factors had failed to show how, when and why they had appointed the contractors, Express Lifts, to maintain the lift. Within email of 22nd October 2014 is a query from the homeowner to the property factors,

   "If the charge is quarterly, my view is that the charge is excessive for a 4 stop, 8 person lift , and would ask why quarterly maintenance has been procured?....Can you confirm if this service was tendered..."

   In a second email of the same date, the homeowner requested, "I would also like visibility of the Tendering exercise to appoint Express Lifts." It was the homeowner's evidence that, as at the date of the hearing, he had still not received this information. He submitted that the failure to do so, despite requests, suggested to him that the property factors had either not undertaken a competitive tendering process to appoint Express Lifts or, if they had, were withholding information which created a breach of section 6.6 of the code.

10. The homeowner felt that the property factors had failed to carry out their property factors' duties. He specified the failures as being for the same reasons he considered the property factors to have breached the code, mainly failing to provide contractual information requested and entering into a contract for lift maintenance without ascertaining that it would be value for money, in the first instance. Beyond that the homeowner submitted that a great deal of his own time had been taken up in pursuing this matter and cited the examples of writing emails and attending hearings. The homeowner felt that the property factors owed him compensation for

the failures which he had identified and specified this as repayment of all fees he had paid to the property factors since July 2014.

Evidence of the property factors

11. In response the property factors denied any allegation of a breach of section 2.5 of the code on their part. They maintained that a response would have been issued to every email which they had received from the homeowner. It was highlighted to the committee that the homeowner had failed to cite any example of an email to which he had not received a reply.

12. Moreover, the property factors argued that they had satisfied the homeowner's request for details of their lift maintenance contract by providing the homeowner with a copy of their lift tendering process of March 2015. The property factors disputed any allegation of a breach of section 6.6 of the code, therefore. A copy of this document was within the committee's papers and the homeowner had a copy. It was the submission of the property factors that this was the first tendering process which they had followed for lift maintenance since assuming responsibility as factors of the property. It was their evidence that the tendering procedure had not yet been exhausted. Presently Express Lifts retained the contractors which maintaining the lift at the property.

13. Fraser McIntosh, for the property factors, provided the committee with a brief history of the matter. He confirmed that the property factors were first appointed by Messrs McTaggart and Mickel in 2005. The property is within a new build development which was built in phases. Since completion of the building in which the homeowner's property is located, Express Lifts have maintained the lift. They continue to do so. Mr McIntosh referred to a document with the title, "Express Lifts Alliance, Comprehensive Maintenance Contract." This was within the papers before the committee. The homeowner had been provided with a copy. Mr McIntosh explained that there was no contract between the property factors and Express Lifts. The title of the document was misleading. Rather the document was a warranty. Express Lifts had installed the lift at the property in January 2012. They had provided a warranty of three years over the lift which had expired in January 2015. As the property factors had had no involvement in the appointment of Express Lifts, it was Mr McIntosh's position that there had been no breach of section 6.3 of the code by them. Mr McIntosh conceded that this had not been explained to the homeowner.

14. Mr McIntosh conceded that the property factors had been slow to address a new maintenance contract. However the property factors have ensured a "fail safe" system meantime whereby Express Lifts allow the warranty period to roll on. He advised that the company had inspected the lift since January 2015 although he couldn't specify the date. The company will continue to maintain the lifts without any charge to the owners. Only if parts are required to complete any repair works, will the owners have a charge appearing on their invoices for lift maintenance. Mr McIntosh confirmed that the property factors had not shared this information with any of the owners. He conceded that it was foreseeable that repairs could be required to the lift at any time. He accepted that it might meet an owner with some surprise to be charged for things for which they had not received prior notice. Mr McIntosh accepted that the property factors could have brought this to the attention of the owners, in writing and that it was still open to them to do so.

15. Mr McIntosh submitted that there had been an error in the invoice issued to the homeowner for the period, 2nd July to 1st October 2014. It had contained a charge for lift maintenance, in error. Mr McIntosh agreed that the homeowner's invoice showed a charged for £43.94. However,

once the error had been identified, it was removed. Mr McIntosh submitted that the reimbursement was detailed on a subsequent invoice issued to the homeowner for the period, 2nd October 2014 to 1st January 2015. The committee was directed to a copy invoice which was within the papers before the committee. The homeowner did not dispute having accepted this invoice. Mr McIntosh confirmed that no charges had been made to the homeowners for lift maintenance since.

16. Ms Wilson advised the committee that the homeowner has already received a refund of all management fees paid from the date on which the property factors took over management of the property on 29th April 2013 to 30th September 2014. The management fees which are charged to the homeowner are approximately £26.76 per quarter. The refund had been paid in settlement of a separate application to the HOHP by the homeowner and not in connection with this matter.

Findings in fact

17. That the homeowner is the heritable proprietor of the property at Flat 8, 122 Hillpark Grove, Edinburgh, EH4 7EF ("the property").

18. That the property factors are currently responsible for arranging and administering repair and maintenance of the common parts of the property.

19. That the property is situated in a block of flats, the common areas of which, include the lift.

20. That the property was purchased by the homeowner in April 2011 from builders, McTaggart and Mickel. That the property was new at the time of purchase and that not all the properties were occupied at the date on which the homeowner took up occupation of the property.

21. That, at the date of purchase of the property, McTaggart and Mickel was responsible for arranging and administering repair and maintenance of the common parts of the property, which included the lift.

22. That, at the date of purchase of the property, Express Lifts had the responsibility of maintaining the lift, on the appointment of McTaggart and Mickel and that they continue to do so.

23. That the property factors were appointed by McTaggart and Mickel on 29th April 2013 to arrange and administer maintenance of the common parts of the property.

24. That the property factors had no involvement in the appointment of Express Lifts to maintain the lift at the property.

25. That no contract exists between the property factors and Express Lifts to maintain the lift at the building.

26. That the document with the title, "Express Lifts Alliance Comprehensive Maintenance Contract" was not in fact a contractual agreement between Express Lifts and the property factors. Rather it forms a warranty for lift maintenance. The title is misleading, therefore.

27. That there is no evidence before the committee that it had been explained to the homeowner in advance of the hearing that; (i) there was no contract existing between the property factors

and Express Lifts and that ;(ii) the document with the title, "Express Lifts Alliance Comprehensive Maintenance Contract" was in fact a warranty.

28. That there being no contractual arrangement between the property factors and Express Lifts, no contract could be provided to the homeowner. There is no breach of section 6.6 of the code by the property factors, therefore.

29. That there was no involvement in the appointment of the property factors by the homeowner or any other residents at the development in which the property is located.

30. That being so, there is no breach of section 6.3 of the code therefore.

31. That the homeowner was issued with an invoice from the property factors for the period 2nd July to 1st October 2014 which contained a charge of £43.94 in respect of lift maintenance.

32. That this charge was included in error.

33. That there have been no further charges to the homeowner for lift maintenance.

34. That, in October 2014, the property factors issued to the homeowner an invoice for the period, 2nd October 2014 to 1st January 2015 which shows a credit in the sum of £43.94 for the lift maintenance charge.

35. That the homeowner had expressed his concerns about the charge for lift maintenance in emails to the property factors dated, 31st July, 22 nd and 30th October, 20th and 23rd December 2014.

36. That the property factors responded to these emails on the following dates: 4th August, 30th October, 4th November, 23rd and 24th December 2014.

37. That, by email of 24th December 2014, for the first time the property factors communicated to the homeowner, expressly, that the charge had been included, in error.

38. That the erroneous charge, having been identified by the property factors no later than October 2014, could have been communicated to the homeowner in the email responses referred to at paragraph 28, above.

39. That the property factors acknowledged the emails of the homeowner timeously but failed to respond to the enquiries as quickly and as fully as possible.

40. That this failure is a breach of section 2.5 of the code.

41. That, on taking up their appointment as property factors for the property in April 2013, the property factors did not make contact with the homeowner to identify themselves.

42. That, the homeowner became aware of the property factors' involvement on receipt of their invoice of January 2014. He had no difficulty making contact with them thereafter.

43. That the property factors have breached section 2.5 of the code by failing to address the homeowner's query of 31st July until 24th December 2014.

Reasons for decision

44. Section 2.5 states that, "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 if you require additional time to respond. Your response times should be confirmed in the written statement." Whilst the homeowner's emails to the property factors were acknowledged timeously, the property factors failed in their duty to deal with the enquiry quickly and as fully as possible. The homeowner raised his concerns about a charge for lift maintenance in his email to them, dated 31st July 2014. In their invoice to the homeowner of October 2014 the property factors corrected the error which they had made in their invoice from July 2014 by removing the charge for lift maintenance. It was clear from the content of the homeowner's emails of 22nd October, 30th October, 4th November, 20th and 23rd December 2014 that the homeowner continued to hold the same concern. Having addressed the issue in October it was open to the property factors to respond to these emails and explain the error to the homeowner. The committee finds the property factors to have breached section 2.5 for failing to do so.

45. For the reasons set out in paragraph 44, above, the committee finds the property factors to have breached their duties in terms of the Act.

Property Factor Enforcement Order (PFEO)

46. The committee proposes the following Property Factor Enforcement Order (PFEO):

47. Within 28 days of service of the PFEO, the property factors must:

48. Issue a written apology to the homeowner for their failure to comply with section 2.5 of the code of conduct and for their failure to meet the property factors duties as required by the Act.

49. Make a payment to the homeowner of £50 in recognition of the inconvenience which the homeowner has experienced and by way of compensation for a failure to provide an adequate service between July and December 2014.

50. Section 19 of the Act provides as follows:

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

give notice of the proposal to the property factor, and allow the parties an opportunity to make representations to them.

(3) If the committee is 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."

51. The service of this decision to the parties should be taken as notice for the purposes of section 19(2) (a) and the parties are hereby given notice that they should ensure that any written

representations which they wish to make under section 19(2) (b) reach the HOHP's offices no later than 14 days after the date of service of this decision upon them. If no representations are received within that timescale, then the committee may proceed to make a property factor enforcement order without seeking further representations from the parties.

52. Failure to comply with a PFEO may have serious consequences and constitute a criminal offence.

Appeals

53. The parties' attention is drawn to the terms of section 22 of the Act regarding the right to appeal and the time limits which apply. Section 22 provides that,

"(1)An appeal on a point of law only may be made by summary application to the Sheriff against a decision of the president of the Homeowner Housing Panel or a Homeowner housing committee.

(2)An appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made.

Chairperson .....Glasgow

Date 5th August 2015