



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

HOHP reference: HOHP/PF/13/0302

Re: Unit 2, 95 Morrison Street, Glasgow G5 8BE ('the property')

The Parties:

Mason Evans Partnership Limited, Unit 2, 95 Morrison Street, Glasgow G5 8BE ('the homeowner')

Cassea Limited, Forsyth House, 111 Union Street, Glasgow G1 3TA ('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 committee determines that the factor has not failed to comply with its duties under section 14 of the Property Factors (Scotland) Act 2011 in respect of section 3.2 of the code of conduct for property factors.

Background

1. By application dated 16 October 2013 and signed by Mrs Maureen Mackay, Director/Company Secretary of the Mason Evans Partnership Limited, 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 ('the Act'). In its application, the homeowner alleged that the factor had failed to comply with section 3.2 of the code of conduct for property factors ('the code').
2. 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. An email was received from the factor on 8 January, requesting an extension to the deadline for written representations due to the

closure of its office for 14 days over the Christmas period. The committee agreed to grant an extension of 2 weeks. Written representations were received from the homeowner on 24 January 2014, and written representations, together with four appendices, were received from the property factor on 28 January 2014. Further written representations were received from the homeowner on 6 February 2014.

3. The committee issued a direction to the parties on 19 February 2014, requiring the homeowner to provide to the committee a copy of either the land certificate for the property or a copy of the Deed of Conditions for the development within 14 days. The homeowner submitted the Deed of Conditions, together with a Supplementary Deed of Conditions, to the committee on 25 February. Both parties were notified by a letter from the panel dated 27 February that a hearing was to be held on 20 March 2014.
4. Following referral of the application to the committee, the committee considered whether the Mason Evans Partnership Limited, as a limited company and owner of a commercial unit, was a 'homeowner' which could bring a competent application to the panel under section 17 (1) of the Act. The committee considered the definition of 'land' under section 25 (1) and Schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010, which states '*land includes buildings and other structures, land covered with water, and any right or interest in or over land.*' The Mason Evans Partnership Limited owns a commercial unit within a building which is used primarily for residential purposes, the common parts of which are managed by a property factor. The committee found that it is therefore a homeowner in terms of section 10 (5) of the Act.

Hearing

5. A hearing took place before the committee at the panel's offices, Europa Building, 450 Argyle Street, Glasgow on 20 March 2014. Mr David Mason, Managing Director of the Mason Evans Partnership Limited, represented the homeowner. He gave evidence and called no witnesses. The factor did not appear and was not represented.

Preliminary issue

6. The committee considered whether the hearing should go ahead in the absence of the factor. The committee was satisfied that, in terms of regulation 23 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 ('the regulations'), the requirements of regulation 17 (1) regarding the giving of notice of a hearing had been complied with. The committee therefore decided to proceed to make a decision on the basis of

the oral representations made by the homeowner at the hearing and the written representations submitted by both parties.

Findings in fact

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

- The homeowner is the owner of Unit 2, 95 Morrison Street, Glasgow G5 8BE. The property is a commercial unit situated on the ground floor of the Co-operative building, 95 Morrison Street, Glasgow G5 8BE, which contains a mix of residential properties and commercial premises.
- TLP Limited was appointed by the proprietors' association for the said Co-operative Building as property factor responsible for the management of the communal areas of the building from 1 January 2008.
- The homeowner paid a deposit of £250 to TLP Limited in July 2008. This deposit constituted a float payment to be held by the factor in respect of common repairs, as required by Clause (Seventh) of the Deed of Conditions for the Co-operative building dated 23 March 2000 and registered in the Land Register for Scotland on 24 March 2000 under the Title Number GLA 141870 ('the Deed of Conditions').
- The homeowner received a letter from Cassea Limited dated 10 December 2009 which stated: *'We enclose your management fees for 2010 for your property at 95 Morrison Street, Glasgow. As per our previous letter, we are now renamed CASSEA (formerly TLP Estates & Properties).'*
- Cassea Limited was the property factor for the building until December 2012, when it terminated the factoring arrangement.
- In January 2013, Greenhome Property Management was appointed by the proprietor's association as property factor for the building.
- The factor became a registered property factor on 12 November 2012. Its duty under section 14 (5) of the Act to comply with the code arose from that date.
- The factor did not repay the £250 deposit paid to TLP Limited to the homeowner on the termination of the factoring arrangements.

The complaint made by the homeowner

8. The homeowner's complaint was quite straightforward. It alleged that the factor had failed to comply with section 3.2 of the code, which states:

'Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.'

9. The homeowner complained that the deposit of £250 which it had paid to TLP Limited in 2008 had not been returned to it by Cassea Limited, the outgoing factor, when it terminated its factoring arrangements for the Co-operative building. The homeowner had paid the cheque for the deposit to TLP Limited in July 2008. The invoice dated 11 June 2008 for the deposit charged to the homeowner was printed on TLP Limited's headed paper, but in the bottom left hand corner stated 'TLP Estates & Properties Ltd'.
10. In its written representations, the homeowner pointed out that Cassea Limited's Managing Director, Gordon Holms, had been a Director of TLP Estates & Properties Limited. A letter to homeowners from Mark Stilges, Director of TLP Limited, dated December 2007, stated: *'On behalf of myself and Gordon Holms, we write to introduce our company to you'*. Mr Mason argued at the hearing that the letter dated 10 December 2009 from Gordon Holms to the homeowner clearly stated that Cassea Limited was a new name for TLP Estates & Properties. He pointed out that the letter also stated *'Casseea have not increased their management fees nor have we for the 2nd year in succession surcharged you for non -payers or any other unforeseen costs.'* He argued that this clearly suggested that the two companies were one and the same. He therefore believed that the argument made by the factor that the two companies were not related was deliberately misleading. The homeowner believed that TLP Limited, TLP Estates & Properties Limited and Cassea Limited were essentially one and the same company.
11. Mr Mason also stated at the hearing that when Cassea Limited took over as property factor, the homeowner was never asked for another float payment, and he therefore assumed that Cassea Limited still held the float money. Moreover, in terms of the Deed of Conditions, a vote was required by the proprietors' association to appoint a new factor and there had been no such vote before Cassea Limited took over.
12. The homeowner had requested that Cassea Limited refund the deposit firstly by email dated 20 August 2013, and then by recorded delivery letter dated 16 September 2013. No response had been received to these requests.
13. The new factor for the building, Greenhome Property Management, took over from Cassea Limited in January 2013. In a letter to the homeowner dated 19 November 2013, Greenhome Property Management confirmed that Cassea Limited did not transfer any float payments to it when the property management changed hands. The homeowner's argument was that Cassea Limited was obliged either to transfer the float payment of £250 which it had paid to TLP Limited to the new property factor or return it to the homeowner. As the float payment had not been transferred to the new factor, and as the

homeowner had paid all of the factor's invoices, Cassea Limited was therefore liable to repay the £250 to the homeowner.

14. The homeowner made reference to Clause (Seventh) of the Deed of Conditions in support of its argument. This states:

'Each proprietor on taking entry to his Flat or Ground Floor Unit shall deposit with the Property Manager the sum of £250 or such greater sum as may be determined in respect of the first sale of each individual Flat or Ground Floor Unit by the Developer and thereafter by the Proprietors' Association voting at a meeting as hereafter provided. Such sum will be held by the Property Manager as a float from which to disburse the cost of repairs as herein provided and will be topped up quarterly in advance of payment by payment of the Proprietor's share of common repairs, Common Charges to the Property Manager. Such deposit will be refunded on a Proprietor ceasing to be a Proprietor of the Dwellinghouse under deduction always of any sum due by him.'

15. The homeowner also made reference in both its written representations and at the hearing to the Office of Fair Trading (OFT) having highlighted the obligations that lie with property factors in relation to the repayment of float payments to homeowners.
16. Mr Mason was asked by the committee whether the homeowner had paid a further float payment to the new factor, Greenhome Property Management, when it took over as property factor. He was unsure about whether such a payment had been made.

The representations made by the factor

17. In its written representations, the factor stated that the float payment was invoiced by TLP Limited, not Cassea Limited, and that there was no relationship between the two companies. It stated that Cassea Limited were not directors or shareholders in TLP Limited, and that the property was managed by TLP Estates and Properties Limited.
18. The factor also stated that the reason it terminated its property management of the building was the outstanding debt levels, and that *'deposits where paid were used as per the title deeds to offset common debt.'* The factor submitted its 'expenditure reviews' for the Co-operative building for each of the four years 2009-2012 with its written representations.

Further direction made by the committee

19. Following the hearing, the committee issued a further direction on 2 April requiring the homeowner to confirm to the committee within 14 days whether a) the homeowner had paid a deposit to CPM Asset Management Limited, the factor for the building prior to TPL Limited, and if so, when this deposit was paid, the amount of the deposit and whether this deposit was repaid when TLP Limited took over responsibility for managing the building and b) the homeowner paid a deposit to Greenhome Property Management Limited, when it took over responsibility for the management of the building in January 2013, or at any time after that date, and if so, when this deposit was paid and the amount of the deposit, together with any relevant documentation. The direction also required both the homeowner and the factor to provide to the committee within 14 days a copy of the final bill sent to the homeowner by the factor following the change of property factor in January 2013.

20. The homeowner responded to the direction by letter dated 8 April 2014. This advised that given the time which had elapsed since it had moved into the property in 2002, it was unable to confirm whether a deposit had been paid to CPM Asset Management Limited. It also confirmed that no deposit had been paid to Greenhome Property Management Limited since it took over the management of the property in January 2013. The homeowner also enclosed a copy of the final bill received from Cassea Limited for the period January-December 2012, noting that this stated it had been paid in full. A response was received by email from Cassea Limited dated 15 April 2014. This stated that it had decided not to send a final bill to owners after terminating its contract with the entire building, because it was already exposed to significant debt and that it took the view this would have been '*a pointless exercise and costly affair*'.

Statement of reasons for decision

21. The committee determines, firstly, that Cassea Limited was the factor in respect of the property from December 2009 until December 2012. Cassea Limited is a registered property factor, and its Managing Director, Gordon Holms, is named as the responsible person for the company on the register of property factors. Cassea Limited was therefore obliged to comply with the code of conduct from 12 November 2012, the date of its registration as a property factor. It was therefore subject to the code in respect of the property from that date until it terminated its factoring arrangements for the Co-operative building on 31 December 2012.

22. Secondly, the committee determines on the basis of the evidence before it, on the balance of probabilities, that while Cassea Limited, TLP Limited and TLP

Estates and Properties Limited were legally separate companies, their directors had held them out to be the same company in their correspondence with homeowners. Company searches instructed by the committee on its own initiative show that TLP (The Lane Partnership) Limited was dissolved in January 2010 and its sole director was Mark Stilges. TLP Estates and Properties Limited was incorporated in 2008 and is currently active with a proposal to strike it off. Two of its three directors were Mark Stilges, whose appointment was terminated in March 2009 and Gordon Holms, whose appointment was terminated in August 2011. Cassea Limited was incorporated in May 2009, and Gordon Holms is currently its sole director.

23. The representations made by the factor stating that there is no relationship between Cassea and TLP Limited are contradicted by the statement made in the letter of 10 December 2009 from its Managing Director, Gordon Holms, that Cassea was formerly TLP Estates & Properties. This, taken together with the invoice from TLP limited, which also named TLP Estates & Properties Limited, and the references to *'the 2nd year in succession'* Cassea's letter of 10 December, clearly inferred that the change was simply a renaming of the company, rather than a transfer to a new company or new management.
24. The committee found Mr Mason to be a credible witness and accepted his evidence that Cassea Limited had held itself out to be the same company as TLP Estates and Properties Limited. It also accepted his evidence that neither Cassea Limited nor TLP Estates and Properties Limited had requested a further float payment from homeowners, over and above that paid to TLP Limited. The factor had submitted copies of its 'expenditure reviews' for the years 2008-9, 2009-10, 2010-11 and 2011-12 to the committee. These appeared to be management accounts for the Co-operative building for each of these years, although the committee observed that they were unclear and difficult to follow. While there was reference to a *'management float charged'* in the 2008-9 and 2009-10 accounts, in the 2010-11 and 2011-12 accounts instead made reference to *'management charges invoiced'*. There was no clear reference to any transfer of the floating fund, and the committee concluded that the floating fund may have been aggregated with management charges in the accounts. The committee reached the conclusion on the basis of Mr Mason's evidence and these accounts that on the balance of probabilities the floating fund had been transferred from TLP Limited / TLP Estates and Properties Limited to Cassea Limited.
25. The committee then considered whether Cassea Limited had failed to comply with section 3.2 of the code. This states that funds due to homeowners must be returned on settlement of the final bill *'following change of ownership or property factor'*. In this case, there has been no change of ownership, but

there has been a change of property factor. At first glance, therefore, section 3.2 applies in this case.

26. The position is not straightforward, however. Firstly, the requirement to return funds due to homeowners is qualified by the words '*Unless the title deeds specify otherwise*'. Secondly, there is a question as to whether the deposit paid constitutes '*funds due*' to the homeowner at the point of settlement of the final bill. Thirdly, section 3.2 provides that '*funds due*' are to be paid '*less any outstanding debts*'.
27. The first two points are related. Clause (Seventh) of the Deed of Conditions states that the deposit is to be refunded when the owner ceases to be an owner: '*Such deposit will be refunded on a Proprietor ceasing to be a Proprietor of the Dwellinghouse under deduction always of any sum due by him.*' The committee concludes that the reference to a 'dwellinghouse' here is intended also to apply to the ground floor units, given that the first sentence of the same paragraph requires each owner to pay the deposit on '*on taking entry to his Flat or Ground Floor Unit*', and that this provision therefore applies to the property.
28. The Deed of Conditions is silent as to what should happen to the deposit paid where there is a change of property factor. It does not state whether 'property factor' includes the original factor's successors. The Deed of Conditions clearly envisages that there may be a change of property factor - clause (Seventh) provides that a new property manager can be appointed by a majority decision at a meeting of the proprietors' association, as happened when TLP Limited was appointed.
29. The homeowner argued that Cassea Limited should have transferred the deposits paid by homeowners to Greenhome Property Management on the transfer of responsibility for property management of the building. The homeowner made reference in its written representations and at the hearing to the Office of Fair Trading (OFT) having highlighted the obligations of property factors in this situation. The committee notes that the OFT considered this issue in its 2009 report '*Property Managers in Scotland: a Market Study*', which states at paragraph 4.2 that:

'Once the owners of the shared property have agreed to appoint a new property manager there may be some issues around the 'float'. The owners of the shared property will, in most cases, have already paid a 'float' to the incumbent property manager and this may be used against any final invoices or unpaid fees. This means that the individual flat owners in the block or development may find themselves having to fund another 'float' with the new

property manager at least until the accounting has been finalised with the previous property manager.'

32. The report therefore recommended that any regulatory scheme for factors should provide that a float should automatically be returned to the consumer at the point of settlement of the final bill, without having to request its return. This is the purpose behind section 3.2 of the code, but this is subject to the words '*Unless the title deeds specify otherwise*'. There is accordingly a question in this case as to whether the £250 deposit constituted 'funds due' at the point of the change of factor.
33. Thirdly, section 3.2 provides that 'funds due' are to be paid '*less any outstanding debts*'. The homeowner argued that the float payment should have been returned to it on the change of property factor in terms of section 3.2, as it had paid all of the money due to the factor. The committee accepted the homeowner's evidence that it had paid all sums due to the factor. The factor stated in its representations that it had used the floats which had been paid '*as per the title deeds to offset common debt*'. The committee therefore concludes from both this and the factor's written representations that it was exposed to significant debts that the factor's position is that it used the floating fund to offset unpaid common charges owed by other owners. Clause (seventh) of the Deed of Conditions provides: '*In the event that the Property Manager is unable to recover after due process of law the share of any Proprietor as determined hereto, [i.e. payment of common charges] the remaining Proprietors shall contribute and provide pro rata to the Property Manager the share of such defaulting proprietor*'.
34. In terms of the Deed of Conditions, therefore, if the factor were to require the other proprietors to pay the shares of those in default, it would first need to take legal action against the defaulters to recover the money due, and only if unsuccessful could it then require the other proprietors to pay this. There was no evidence before the committee that such legal action had been taken against defaulting owners. There is no reference to this having been done in either the management accounts submitted to the committee, or the final bill or any other correspondence sent to the homeowner. There is therefore no evidence before the committee which would allow it to conclude that the factor was entitled to use the deposit paid by the homeowner to offset these debts, or to treat these debts as an '*outstanding debt*' on the homeowner's account.
35. That said, the committee determines that the deposit payment does not constitute 'funds due' in terms of section 3.2. The committee draws the inference from the wording of the Deed of Conditions that the deposit payment would only become 'funds due' to the homeowner on the sale of the property. There is of course an issue here for the incoming factor, which is

likely to face requests for the refund of deposits paid by homeowners at the time they sell their property, in accordance with the Deed of Conditions. Presumably, the new factor would then request a float payment from the incoming owner, in terms of the Deed of Conditions. Moreover, the homeowner confirmed following the hearing that it had paid no deposit to the new factor, Greenhome Property Management. The homeowner has therefore suffered no financial loss with regard to the deposit at this stage.

36. While an argument might be made that a property factor has a duty as the homeowners' agent to transfer the floating fund to new factor, the code does not provide for this. The code is focused on the relationship between the factor and the homeowner, and says nothing about whether an outgoing factor should transfer a floating fund to its successor.
37. While the committee has concerns about some of the evidence before it regarding Cassea Limited's management of the Co-operative building, and has considerable sympathy with the homeowner's concerns, it can only consider the complaint before it, which relates to section 3.2 of the code. While section 3.2 is designed to protect homeowners' funds, in this case the committee had to have regard to the provisions in the title deeds, which are contrary to the main thrust of section 3.2.
38. The committee observes, however, that some of the evidence before it might be relevant to a potential failure to comply with other parts of section 3 of the code. The overriding objectives of section 3 include: the protection of homeowners' funds; clarity and transparency of all accounting procedures' and an ability to make a clear distinction between homeowners' funds and a property factor's funds. The committee notes that the evidence before it suggests a lack of clear financial accounting to homeowners by Cassea Limited. The homeowner was not provided with a detailed final bill on the change of property factor, and Cassea Limited actually stated in its representations to the committee that it considered sending homeowners a final bill to be '*a pointless exercise and costly affair*'. There is an assumption underlying section 3.2 that a final bill will be produced, and there is also a requirement in section 3.3 to provide homeowners with a detailed financial breakdown of charges made and activities and works carried out which are charged for.
39. The committee also observes that there is evidence that the factor misled homeowners with regard to its relationship with TLP Properties Limited and TLP Estates and Properties Limited. The committee notes, however, that much of the evidence before it predates the coming into force of the Act. The factor's duties under the code did not arise until 12 November 2012, when it became a registered property factor, and its obligation to carry out the

property factor's duties under 17(5) of the Act did not arise until 1 October 2012.

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>

Sarah O'Neill

Chairperson Signature .

Date...27/5/19...