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

HOHP reference: HOHP/PF/13/0232

Re: 6 Meiklejohn Street, Stirling, FK9 5HQ **('the Property')**

The Parties:

Raymond Milne residing at 6 Meiklejohn Street, Stirling, FK9 5HQ **('the Homeowner')**

Hacking & Paterson Management Services, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL **('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:

Ewan K Miller, Chairperson and Legal Member; and Susan Napier, Surveyor Member

Decision

The Committee determined that the Factor had breached Section 5.3 of the Code of Conduct for Property Factors ("the Code").

Background

By application dated 20 June 2014 the Homeowner applied to the Homeowner Housing Panel ("the Panel") to determine whether the Factor had failed to comply with the duties imposed upon the Factor by the Act.

The application by the Homeowner alleged failings on the part of the Factor. Firstly that the Factor had breached the Code and, in particular, Sections 2.1, 2.5, 5.2 and 5.3. Secondly, the Homeowner alleged that the Factor had failed to comply with the Property factor's duties as defined in Section 17(5) of the Act. This allegation related to the Factor overinsuring the common grounds of the larger subjects of which the Property formed part. The title deeds to the Property required insurance of at least £2million to be in place but the Factor had insured at £5million.

By letter dated 24 September 2013, the President of the Panel intimated her decision to refer the application to a Homeowner Housing Committee.

The Homeowner, by letter dated 15 November 2013, indicated that he was content for the matter to be considered by written representations only and without a hearing. The Factor had also confirmed that matters need only be considered by written representations on 7 October 2013. The matter was considered by the Committee based on the written submissions and a decision reached.

Preliminary issues

By written submission via their solicitor dated 7 October 2013, the Factor made a number of preliminary points:-

1. The Factor noted that the written application to the Panel was dated 21 June 2013. However, the formal notification letter to the Factor from the Homeowner setting out the specific breaches of the Code was not issued until 2 August 2013. As a result, the Factor submitted that the application was incompetent and could not proceed. The Factor highlighted that in terms of Section 17(3)(a), an application to the Panel cannot be made unless a homeowner first notifies the Property factor in writing as to why the homeowner considers 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 duties. As the application to the Panel predated the notification letter to the Factor, the Factor's submission was that the test within Section 17(3)(a) of the Act could not have been complied with.

   The Committee considered the submission by the Factor in this regard. The Committee noted that a recent decision of another Committee of the Homeowner Housing Panel (Eugene Lopkin –v- Hacking & Paterson Management Services – Ref HOHP/PF/14/0019) addressed the same point as was being raised by the Factor. The decision of the Committee in the Lopkin –v- Hacking & Paterson Management Services Limited case was that the fact that the letter of notification postdated the application form was not, in itself, sufficient grounds to mean the application was incompetent. The Committee was of the view that the situation in this case was identical and accepted the arguments set out in the case of Eugene Lopkin –v- Hacking & Paterson Management Services. Accordingly, and for the same reasons set out in the Eugene Lopkin –v- Hacking & Paterson Management Services case, the application was competent and should proceed.

2. The Factor's solicitor submitted that the application and the notification were unclear. It was not obvious to the Factor what the conduct complained about was. Accordingly the Factor had not been given fair notice of the case against it to allow it to properly defend itself. The Committee could not see any justification for this submission. The application itself was clear and it stated there had been breaches of Sections 2.1, 5.2, 5.3 and 7.1 (although the compliant regarding 7.1 was subsequently dropped by the Homeowner). It also set out that the breach of the Property factor's duty related to the overinsurance of the common parts for Property owner's liability insurance.

The Homeowner had submitted copies of lengthy correspondence passing between himself and the Factor. At no point in the course of that correspondence did it appear to the Committee that the Factor was unaware of the issues that were being complained of. The Committee also noted that the Factor's solicitor had also managed to prepare a full response to the various allegations by way of their letter of 7 October 2013. There did not appear to be any difficulty on the part of the Factor or their solicitor in understanding the points at issue. The only area that was unclear was whether the complaint included an alleged breach of Section 2.5 of the Code. For the purposes of reaching a decision, the Committee did consider whether or not there had been a breach of Section 2.5 of the Code. As can be seen from this decision, no breach of Section 2.5 was found to have occurred and accordingly the Committee did not view it as prejudicial to the Factor to include this in its decision. Overall, the Committee was satisfied that it was appropriate for it to reach a decision on the Homeowner's complaint and that the Factor had fully understood the position. There was no competency issue that prevented a decision on the substantive aspects of the case being reached by the Committee.

3. The Factor was of the view that the complaint related, at least partially, to events that had taken place prior to 1 November 2012. The Factor had not become a registered Property factor until 1 November 2012 and therefore they were under no duty to comply with the Code until 1 November 2012. The Committee did not view this submission as being, of itself, a preliminary objection. Rather it was an observation as to the law. The Committee was aware that the Code of Conduct and would not apply to the Factors until they had become registered Property factors. Accordingly the Committee was not anticipating that issues complained of that related entirely to the period prior to 1 November 2012 would be relevant to it. The Committee was of the view that issues that had arisen prior to 1 November 2012 and that continued after that date could, however, still be issues upon which it may adjudicate. The Committee was satisfied that there were no preliminary issues that required to be resolved in relation to this point and that it was competent for it to proceed to determine the substantive issues in this matter.

Substantive matters

Section 2.1 of the Code

- "***You must not provide information which is misleading of false"***

  The Homeowner drew attention to the fact that the Factor's terms of service stated that:-

  "HPMS does not receive any commission, fee, payment or any benefit from any contractor or service supplier appointed by them on behalf of homeowners; nor do they have any financial or other interest with any contractors appointed by them".

The Homeowner highlighted that it had come to light that the Factor did receive a commission from the insurance broker through which the Factor placed the policy of insurance. The Homeowner contended that an insurance broker was a service supplier and therefore the above statement within the terms of services was false and misleading as commission was paid.

In reply, the Factor highlighted that the terms of service also stated the following:-

"Where HPMS place insurance for common Property through a broker on behalf of homeowners a summary of cover, including specific policy details can be provided upon request. Confirmation of any commission or payment received by HPMS, in relation to policy administration matters handled by HPMS on behalf of the insurers, will also be provided upon request".

The Factor submitted that it was clear that there was a distinction within their terms of service between contractors and service suppliers who were carrying out works at properties and its separate arrangements regarding insurance broking. It remained the case that the Factor did not receive commissions from contractors/service suppliers who carried out work at properties but they did indeed receive commission from insurance brokers.

The Committee considered that the Factor had not breached Section 2.1 of the Code. Whilst the Committee could understand the Homeowner's argument that an insurance broker was a supplier, it was clear from the Factor's Terms of Service that the Factor had set out that a different position applied in relation to the insurance arrangements.

The Committee noted that a similar distinction existed within the Code. The Code separated out commissions received from contractors and commissions received from insurance brokers. Section 6.7 of the Code specifically dealt with commission from contractors, whereas commission payments from insurers were dealt with in Section 5.3 of the Code.

It appeared to the Committee that the Factor had simply tried to follow the distinction made in the Code and had separated these areas within their terms of service and had separate clauses relating to contractors and insurance. The use of the word "service suppliers" was a little unfortunate and the Factor may wish to review their Terms of Service to see whether the wording could be amended to make it more clear that this did not cover insurance position. However, the Committee was satisfied that the Terms of Service was sufficiently clear that a distinction applied between insurance brokers and other contractors/suppliers that the Factor used. Accordingly there had been no breach of Section 2.1 of the Code.

Section 2.5 of the Code

- "***You must respond to enquiries and complaints received by letter or email within a prompt timescale. 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 time should be confirmed in the written statement".***

  The Homeowner had submitted that the Factor had been very slow in responding to his correspondence and that the Homeowner had, in the past, been ignored completely. The Committee noted that it appeared to be the case that a number of the Homeowner's complaints related to a period prior to 1 November 2012 when the Homeowner had first raised the question of insurance with the Factor. The Committee was, as was noted in preliminary issue 3 above, satisfied that it was not appropriate for it to look at events that related solely to a time period prior to 1 November 2012. The Committee considered the progress of the Homeowner's complaint since that date. Whilst the complaint could have been dealt with a more promptly on occasion, the Committee was satisfied that it had been progressed by the Factor. It was unfortunate that the complaint had not been dealt with through the formal complaints process by the Factor from the outset as it did appear to the Committee that the Homeowner had made a formal complaint to the Factor. When the formal letter of notification was received by the Factor, the Factor then took this as a justification to then put the complaint through its formal complaints process. This simply delayed matters and the parties revisited old ground throughout the formal complaints process. However, overall the Committee was satisfied that the Factor had complied with its obligations and, whilst matters could have been dealt with differently and more speedily, there had been no breach of Section 2.5 of the Code.

Section 5.2 of the Code

- ***"You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this."***

The Homeowner raised concerns with the Factor regarding the Property owners liability section of the insurance policy covering the development. There had initially appeared, on the face of it, to be some dubiety as to the manner in which the insurance premiums had been allocated between houses and flats within the development. There also appeared to be some suggestion that both the flat owners and houses within the development had separate Property owner's liability insurance. From a review of the correspondence the Committee did note that the dubiety appeared to relate primarily to a time period which predated the Factor's registration on 1 November 2012. After investigation, the Factor had clarified and stated unambiguously that there was only one insurance policy and that the premiums had been correctly allocated and charged. It appeared to the Committee, after this initial dubiety had been clarified, that the Factor had dealt with the Homeowner in a transparent fashion regarding the insurance policy. Copies of the insurance policy had been provided to the Homeowner on a number of occasions by the Factor. The Factor had confirmed that there was, in fact, only one Property owner's liability insurance policy covering the development and that the factor had only charged one insurance premium against the Property. Accordingly whilst it was unfortunate that there had been some initial dubiety about the exact cover in place it did appear to the Committee that since 1 November 2012 the Factor had generally been compliant with the terms of Section 5.2 of the Code.

Section 5.3 of the Code

- ***"You must disclose to homeowners in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance."***

The Homeowner's complaint in respect of Section 5.3 of the Code was that clear information had not been provided and that the commission that the Factor received from the insurance provider via their broker had not been disclosed without prior request. The commission payment was being received by the Factor at the time of the issue of the Terms of Service and it should have been disclosed in full at that point

In response, the Factor based their submission on that part of their Terms of Service which stated:

"where HPMS place insurance for common Property through a broker on behalf of a homeowner a summary of cover including specific policy details can be provided upon request. Confirmation of any commission or payment received by HPMS, in relation to policy administration matters handled by HPMS on behalf of the insurers, will also be provided upon request."

The Factor's position was that when requested by the Homeowner they had disclosed the level of commission they received. As a result of this disclosure they were not in breach of Section 5.3 of the Code.

The Committee considered this point. The Factor's Terms of Service were dated 22 October 2012. It appeared, therefore, to be in place at the point the Factor became registered on 1 November 2012. The disclosure of the commission did not appear to have taken place until 14 March 2013.

The Committee had no issue in determining that the Factor had, when requested, made a full disclosure that commission was received and the level of it. However, the key question for the Committee was whether Section 5.3 of the Code required an upfront disclosure that not only was commission being received but the amount/percentage of the commission.

On a general examination of the Code, it appeared to the Committee that the Code did allow for certain situations where information only need be made available to homeowners upon request. Examples within the Code where this is applicable would be Sections 3.3, 5.2, 5.6, 5.7, 6.3 and 6.6. The Committee accepted the Code envisaged certain situations where it would be acceptable not to fully disclose information to homeowners from the outset but rather to provide more detailed information upon request.

The Committee noted that Section 5.3 of the Code was not a section that made provision for disclosure on request. It appeared to the Committee that if the intention of the Code had been to allow disclosure upon request then Section 5.3 would simply have stated that this was allowable. The wording of Section 5.3 of the Code was clear – any commission received must be disclosed. The wording within the Factor's Terms of Service not only failed to disclose the amount/percentage of commission being paid but also failed to make it clear that a commission was being received at all. The only information that was imparted in the Terms of Service was that confirmation of any commission paid would be given on request. The Committee viewed this as unsatisfactory. As is stated in the narrative at the start of Section 1 of the Code, the written statement is meant to set out in a simple and transparent way the arrangements in place between the parties. To fail to disclose openly whether a commission was paid or not and, where a commission was being paid, the amount/percentage of that commission was not transparent. This was a clear breach of the terms of Section 5.3 of the Code. The fact that the Factor provided a mechanism for the Homeowner to find out this information and did subsequently provide the information sought did not make good the initial breach of the Code.

The Committee did not consider that it was necessary for the Factor to specify the exact amount in the written statement that was being received by way of insurance commission (although the Factor could do so if they so wished). The Committee recognised that the amount of commission received each year would vary as the premia varied. The Committee recognised that it would be onerous for a factor to have to reissue its written statement every time the amount of commission received changed. It would, therefore, be permissible to simply state the percentage of commission received, in this particular case it being 25%. The written statement would only need to be reissued if that percentage changed. Homeowner's should, if the terms of Section 5.2 of the Code are being followed, have information as to the premiums paid and would, therefore, be able to calculate the exact commission paid themselves without requiring to have recourse to the Factor.

The Committee also noted the common law of agency in relation to disclosure of commission between principal and agent, being a relationship that would generally apply to that between a factor and a homeowner. The relationship of principal and agent is a fiduciary relationship. It is well established that it is not appropriate for an agent to make a secret profit. In order to avoid a breach of this fiduciary duty, full disclosure of any commission must be made between the principal and agent. It appeared to the Committee that the same principle must apply to the payment of commissions to factors.

The Committee noted that the law on this point has been largely shaped by two Scottish appeals to the House of Lords, particularly Aberdeen Railway Co v Blaikie 1854 Macq 461.

The Committee also noted the terms of Imageview Management Limited v Kelvin Jack [2009] EWCA Civ 63 which provides a useful summation of the common law position on secret profit by an agent. In particular the Committee noted the judgement of Jacob LJ (at para 6) where he states:-

"The law imposes on agents high standards...An agent's own personal interests come entirely second to the interest of his client. If you undertake to act for a man you must act 100%, body and soul, for him. You must act as if you were him. You must not allow your own interests to get in the way without telling him. An undisclosed but realistic possibility of a conflict of interest is a breach of your duty of good faith to your client"

The Committee also noted the decision of Lord Atkin in Rhodes v Macalister (1923) 29 Com Cas 19 as to the course of action an agent should take in relation to commission payment:-

"The complete remedy is disclosure, and if an agent wishes to receive any kind of remuneration for the other side and wishes to test whether it is honest or not he has simply to disclose the matter to his own

employer and rest upon the consequences of that. If his employer consents to it, then he has performed everything that is required of an upright and responsible agent"

The Committee was of the view that given the common law position on secret profit by agents, it would be inappropriate for Section 5.3 of the Code to sit in conflict with that. The law of agency fortified the Committee's view that upfront disclosure was required by Section 5.3.

The Committee also considered what remedy, if any, was appropriate given the breach of the Code. The Committee noted that the common law position regarding a breach of fiduciary duty by the obtaining of secret profit was a strict one requiring the repayment of any commission received. In this particular case the commission received was minimal (less than £1 per annum). Notwithstanding the fact that the amount was minimal, the Committee was of the view that it was appropriate to set the correct precedent to cover the situation where factor's fail to properly disclose commission received in breach of the Code and also their common law obligations. Accordingly, the Committee was satisfied that the appropriate remedy was for the Factor to credit the Homeowner's account with a sum equal to the amount earned by the Factor in commission on the Property owners liability insurance since 1 November 2012 in respect of the Property

Breach of Property Factor's Duties

The Homeowner complained that the Factor had breached his Property factor's duties by overinsuring the development. As a result, the insurance premia were higher than they needed to be. This ultimately benefited the Factor by increasing the amount of commission received by them. The Factors had provided for £5M of cover whereas the title deeds specified that at least £2M of cover needed to be put in place.

The Committee had little difficulty in determining that the Factor had not breached their Property factor's duties in this regard. The wording of the titles was clear. The Factor had to insure for *at least* £2M. The wording was clear that the amount was not capped at £2M and it would therefore be competent for the Factor to insure for more. £5M was a common amount to insure for Property owner's liability and was, in the view of the Committee, an appropriate amount in line with the principles of good estate management. The Factor could not simply insure for any amount, say £100M, as this would not be appropriate and would give rise to a suggestion the Factor was overinsuring to simply increase the amount of commission received. However, provided the Factor insured for an appropriate amount (consistent with the level of cover generally offered for the type of risk insured against) then the Committee did not see any breach had occurred.

Property Factor Enforcement Order

The Committee then considered whether it wished to propose to make a Property Factor Enforcement Order ("PFEO").

The Committee proposes to make the following PFEO:-

"Within 28 days of service of the PFEO on the factor, the Factor must:-

1. Amend the relevant section of its Terms of Service to state the amount or percentage of commission received in respect of policies of insurance organised by it and to reissue the Terms of Service to all homeowners within the development."

2. To credit the Homeowner's account with the Property Factor with a sum equivalent to the amount received by the Factor in commission arising from the Property owners liability insurance for the development since 1 November 2012 in respect of the Property."

A copy of the proposed Property Factor Enforcement Order is contained in the accompanying notice issued under Section 19(2)(a) of the Act.

Appeals

The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides
"(1) An appeal on a point of law only may be made by summary application to the Sheriff against a decision of the president of the Homeowner Housing Panel or a Homeowner Housing Committee. (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made ... "

Ewan Miller

Chairperson Signature ..... Date..... 5/8/19