



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

HOHP Ref: HOHP/PF/13/0073

Re: Property at 15 Larchfield Neuk, Balerno, EH14 7NL

The Parties:-

The homeowner – Mrs Yvonne Williamson residing at 15 Larchfield Neuk, Balerno, EH14 7NL (“the applicant”)

The property factor – Sheltered Housing Management Ltd, South Hawkhillock, Ardallie, Aberdeenshire, AB42 0TS (“the respondent”)

**DECISION BY A COMMITTEE OF THE HOMEOWNER HOUSING PANEL IN
AN APPLICATION UNDER SECTION 17 OF THE PROPERTY FACTORS
(SCOTLAND) ACT 2011 (“THE 2011 ACT”)**

Committee Members:

Richard Mill (Legal Chairperson)
Robert Buchan (Surveyor Member)

Decision of the Committee

The committee unanimously determined that the respondent has failed to comply with their section 14 duty, arising from the 2011 Act, to comply with the Code of Practice by -

1. Failing to respond to the applicant’s enquiries and complaints within prompt timescales. (a breach of section 2.5 of the Code)
2. Failing to issue to the applicant a written statement of services timeously. (a breach of section 1 of the Code)
3. Failing to provide their full contact details (a breach of section 2.3 of the Code). This failure was rectified during the process by a fresh updated version of the written statement of services being produced.
4. Failing to specify arrangements for dealing with out-of-hours emergencies (a breach of section 2.3 of the Code). This failure was rectified during the process by a fresh updated version of the written statement of services being produced.
5. Failing to specify a procedure to consult with the applicant and other homeowners and seek their written approval before providing work for services which will incur charges or fees in addition to those relating to

the core service (a breach of section 2.4 of the Code). This failure was rectified during the process by a fresh updated version of the written statement of services being produced.

6. Failing to hold professional indemnity insurance from the date of registration (a breach of section 5.1 of the Code). This failure had been rectified prior to the oral hearing and cover was in place from 20 August 2013.
7. Failing to specify arrangements for notification of matters requiring repair, maintenance or attention (a breach of section 6.1 of the Code). This failure was rectified during the process by a fresh updated version of the written statement of services being produced.

The committee do not find it necessary to make any Property Factor Enforcement Order.

Background

The application to the Homeowner Housing Panel from the homeowner was received on 14 May 2013. Further necessary information was requested from the homeowner prior to referral of the application to the committee.

The homeowner raised complaints, both in terms of the Code of Conduct for Property Factors ("the Code") and the property factors failure to comply with property factor duties.

A Hearing was assigned on the application to take place on 9 October 2013. Once the application was received by the committee a Direction was issued requiring any further productions or papers to be lodged by Wednesday 25 September 2013.

The agent for the property factor lodged a lengthy Inventory of Productions and Lengthy List of Authorities in advance of the Oral Hearing.

The applicant represented her own interests personally and was not legally represented. The applicant was accompanied by her husband. The property factor was legally represented throughout the process and formal written representations were lodged on their behalf.

Hearing and Further Procedure

The principal Oral Hearing took place on 9 October 2013 at Thistle House, Edinburgh. The applicant appeared personally but was unrepresented. The property factor was represented.

The applicant gave evidence on her own behalf. She was accompanied by her husband.

Bruce Miller, Managing Director of Sheltered Housing Management Ltd gave limited evidence on behalf of the property factor. Otherwise a written statement of Mr Miller was produced.

The committee conducted the Hearing on 9 October 2013 in an open manner

discussing, in turn, with each of the parties the various Heads of Complaint of the applicant. Following discussion not all of the applicant's complaints were insisted upon. Some of her complaints were resolved simply as a result of clarity evolving. The applicant had not received legal advice upon her application and was not represented. Discussion before the Committee assisted the applicant in her understanding of certain matters.

As a result of these inquiries it became apparent to the committee that there may be considerable scope for resolution of the applicant's concerns in the absence of the committee requiring to formally determine the matter and to prepare full Findings and Reasons. The agent on behalf of the property factor, having taken further instructions on that day, intimated a number of undertakings which related to amendments proposed to the written statement of services already issued. It was agreed that within a period of 14 days from the Hearing on 9 October 2013 that a fresh written statement of services would be produced to the applicant, and copied to the committee. The anticipation was that the applicant could then withdraw her application. Amendments were agreed to be made in respect of the following :

1. Full details of the property factor, including telephone and email details.
2. Details of when the Warden is on duty and how to contact the warden, including a telephone number.
3. Clarity in relation to the procedure as to how emergency repairs are intimated and progressed.
4. Clarity to be provided as to how to inform the respondent of necessary repairs and how these are advanced, including when quotations will be obtained from more than one contractor prior to instructing work.
5. Clarity to be given on how often the property factor will carry out inspections of the development for the purposes of identifying any areas of repair.

The property factor was also encouraged to make it clear to the applicant when the first detailed accounting would be made as required in terms of section 3.3 of the Code.

The committee adjourned further consideration of the application.

Within the 14 day agreed period a fresh written statement of services was produced to the applicant and copied to the committee by correspondence dated 21 October 2013. The applicant indicated that her concerns were still unresolved and was not in a position to withdraw her application. In the circumstances the committee assigned a hearing date to reconvene and consider the application further.

A further Hearing of the committee was assigned to take place on 10 December 2013. In advance of that Hearing a supplementary written statement of Mr Miller was produced together with a written statement of Linda Knox, Warden.

Further discussion took place before the committee on 10 December 2013

when largely the applicant conceded that the revised written statement of services issued after the first committee hearing met the requirements of the Code despite perhaps not meeting her own expected standards of service.

It was agreed that the committee would issue a written determination upon the application.

The committee considered the evidence presented on behalf of both parties together with all available papers and submissions. The committee were satisfied that they had sufficient information to reach a fair determination of the application. The committee reserved their decision to enable them to give full consideration to the application and the issuing of this written decision.

Findings in Fact

1. The applicant and her husband purchased 15 Larchfield Neuk, Balerno EH14 7NL in or about September 2010. The property forms part of Larchfield Neuk, Balerno, Edinburgh EH14 7NL, a sheltered housing development on the south western outskirts of the City of Edinburgh ("the Development").
2. The Development was built in or about 1985 for the specific purposes of providing sheltered housing for the elderly. A Deed of Conditions was granted by Wimpey Homes Holdings Ltd, recorded in the division of the General Register of Sasines applicable to the County of Midlothian ("the Register") on 27 February 1985 ("the Deed of Conditions"). The applicant's property is burdened by this Deed of Conditions.
3. The Deed of Conditions sets out the general arrangements for the Development including (in terms of clause (FOURTH)) the terms of the management and service charge. This sets out the arrangements for amongst other items, maintenance, repair and renewal, insurance, and the existence of a management scheme and payment therefor.
4. The property factor has been the designated manager in terms of the Deed of Conditions since the Development was built. The respondent was appointed as the managing agents for the Development when it was built in terms of a Minute of Agreement between Wimpey Homes Holdings Ltd and the property factor recorded in the Register in 1985.
5. Following agreement between Wimpey Homes Holdings Ltd and the respondent in 1990 parts of the Development were conveyed to the respondent in terms of a Disposition recorded in the Register on 25 November 1992. As a result the respondent is the heritable proprietor of the warden's house, warden's office, guest bedroom, common room with ancillary toilets, kitchen, etc and the garden ground pertaining to these subjects within the development.
6. The respondent's duties arise from, and are stipulated within, the Deed of Conditions.
7. Throughout the years the arrangements set forth in the Deed of Conditions were for the sake of easy reference translated into a standalone document named "Management Scheme" which was

circulated amongst residents and new owners.

8. The respondent's requirement to comply with their duties arising from the Deed of Conditions in accordance with the 2011 Act commenced on 1 October 2012.
9. The respondent became a registered property factor on 12 March 2013 and accordingly their duty under section 14(5) of the 2011 Act compliant with the Code arises from that date.
10. The respondent has a current buildings insurance policy in place, the current period of which is 15 July 2013 to 14 July 2014.
11. The respondent holds professional indemnity insurance as property manager of the development and other subjects. The respondent did not, as required by the Code, hold professional indemnity insurance from the date of registration. Professional indemnity insurance was arranged and was in force from 20 August 2013.
12. The applicant and her husband have been unhappy with the standard of services provided by the property factor for some time.
13. Some other residents within the Development have also been unhappy with the services provided by the respondents. The Development's Residents Association have met. They have not formally dismissed the property factor but have sought to instruct the respondent to discuss the transfer of their property factor duties to Hanover (Scotland) Housing Association Ltd.
14. The applicant requested a written statement of services on 13 June 2013. A written statement of services was supplied to the applicant by the respondents agents with a letter dated 6 August 2013. The supplying of the written statement of services requested was outwith the four week period set out within section 1 of the Code.
15. The applicant had issued items of correspondence to the respondent in November 2012, and January, March and May 2013 which had not been responded to or promptly responded to.
16. The written statement of services issued to the applicant (late) upon request did not meet all the requirements set out within the Code.
17. There is a lack of communication between the parties. The respondent is principally responsible for this unfortunate position. The respondent has not approached communications with the applicant in an open or transparent way.

Reasons for Decision

Only a *registered* property factor requires to comply with the Code (Section 14(5) of the 2011 Act). Accordingly the committee was only able to scrutinise the respondent's compliance with the Code from the date of registration, namely 12 March 2013.

Not all of the applicant's complaints were insisted upon. The committee considered those insisted upon. The complaints insisted upon were resolved ultimately when the committee met with the parties on 10 December 2013 when the applicant reluctantly conceded that the revised written statement of services issued after the first committee hearing met the requirements of the Code despite not meeting her own expected standards of service.

There were relatively few material facts in dispute between the parties. The vast majority of relevant facts were obvious from the terms of the indexed papers available to the committee. Though present at the principal Oral Hearing on 9 October 2013, Mr Miller had sought to avoid the giving of formal evidence and a written statement from him had been produced in advance. Nonetheless the committee engaged him directly in relation to a number of matters for the purposes of clarification and in order to satisfy the committee's inquiries. The committee were not impressed with the evidence of Mr Miller nor his presentation. The committee found Mr Miller evasive and inconsistent. On occasions he sought to avoid answering questions. He was not a credible or reliable witness. By comparison the committee found the applicant both credible and reliable.

Discussion of Applicant's Code Complaints and Respondents Reply

Code Complaints

- i. Section 1 of the Code. A written statement of services was not supplied timeously. This was accepted by the respondent with an explanation that they had not had the resources to comply timeously but had subsequently instructed their legal agents to prepare same. This is a breach of the Code.
- ii. Section 2.3 of the Code. There were two issues in relation to this same section of the Code. The applicant complained that there were insufficient contact details for the respondent available and that there was no notification of a telephone number for the warden and a lack of clarity regarding their working hours. There was also no information regarding how to notify of emergencies and how these would be dealt with. It was accepted by the applicant that the relevant telephone numbers now appear upon the community noticeboard within the Development but she stated this had only been placed there in or about July 2013 with a backdated date of September 2012. The committee accepted the applicant's evidence in this respect. There was no credible or reliable available evidence to contradict this. The written statement of services makes reference to the ability to contact the warden on an emergency basis 24 hours a day, 7 days a week. The telephone number is available within the Development but not referred to within the written statement of services. The Code requires all contact details to be made available which was not the position with any degree of clarity. This is a breach of the Code. There was no information available in relation to emergency repairs. This is also a breach of the Code. Following discussion at the first hearing before the committee on 9 October this was remedied by the telephone numbers of both the respondent and the warden together with the email address of the respondent being specified within the written statement of services and detail provided of the procedure of notification of

emergency works.

- iii. Section 2.4 of the Code. The applicant complained that the respondents do not have a procedure to consult with owners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. The respondent denied the failure to abide to the Code in that respect and no examples have been provided of such an event occurring. The Code is clear however that a procedure requires to be in place to deal with such a scenario. It was accepted that no procedure exists. This is a breach of the Code. Following discussion at the first hearing before the committee on 9 October this was remedied by a clause being inserted within the written statement of services to the effect that when an item of maintenance at the development is required and the likely costs of that particular maintenance exceeds the sum of £5,000 then the respondents will obtain at least two competitive quotations for such works.
- iv. Section 2.5 of the Code. The applicant complained that communications to the respondents were not responded to timeously. In particular she complained that letters were written to the respondents in November 2012 and January, March and May 2013 to which no response has been received. Copy letters written by the applicant to the respondent dated 26 March 2013 and 13 May 2013 were produced. The committee accepted that all such correspondence had been sent. The respondent was not able to give any reasonable or adequate explanation for failure to respond to these letters. This is a breach of the Code.
- v. Section 3.3 of the Code. The applicant complained that she does not have a proper breakdown of her service charges for 2012-2013. These total £165.81 per calendar month. It appeared to the committee that this issue was perhaps the most significant of the applicant's complaints. The failure to provide the breakdown is perhaps not of itself significant but the concern is that there is insufficient justification for such charge. Historically rather crude Statement of Accounts appear to have been produced by the respondent's for periods ending in June of each year. A copy of such Statement for the year ending June 2011 was available for scrutiny. The committee were advised that the purpose of such Statement was both to vouch the basis of the previous year's monthly charges and to project a budget for the forthcoming year.

The Code requires a detailed financial breakdown of charges be made and a description of activities and works carried out which are charged for. The requirement is that such information be produced "at least once a year." If requested, supporting documentation and invoices or other appropriate documentation requires to be supplied. The property factor became registered for the purposes of the Code on 12 March 2013. The committee could not see how a failure to produce such information could breach the terms of the Code until a year after registration lapses.

Throughout the proceedings the respondent made a commitment to make detailed annual accounts available by the end of February 2014 and year on year after that in the future. The committee sought to

obtain an undertaking from the respondent that such detailed financial breakdown would be produced to the homeowner prior to the expiry of 1 year following registration. The respondent regrettably was reluctant to do so.

A subsidiary issue linked to the charges being made arose throughout the process. The residents of the Development have some use of the residents' lounge which is owned by the respondents. Their entitlement to do so is unclear and could not be demonstrated other than with reference to custom and practice. The respondents charge "rent", (as defined by their own historical Statements of Accounts) and also control the residents' use of the lounge (the applicant and others have been physically prevented from using the lounge to hold residents association meetings to discuss inter alia dismissal of the respondent). The committee were of the view that this was not a matter which they were able to make any formal determination upon given that it was accepted that this was not a formal, notified complaint of the applicant and given the committee's general view regarding the necessity of a year elapsing from registration to be able to determine any breach of section 3.3 of the Code. The committee formed the view on the available evidence and information that the request of the applicant by the respondent for the payment of rent (and others within the Development) may well not be justified and further that attempts to control the applicants (and others) use of the lounge would be quite unfair and unreasonable and not a step taken by the respondent for the benefit of the applicant. The committee noted that they were not provided with any relevant information upon which the rental figure charged annually is calculated.

- vi. Sections 3.5a and 3.6a of the Code. The applicant queried why there is no floating or contingency funds. There is no formal requirement to have such funds. There is no provision for the respondent holding of such funds in terms of the provisions of the Deed of Conditions. There is no breach of the Code.
- vii. Section 5.1 of the Code. At the time of the committee's consideration of this issue, the respondent was able to confirm that professional indemnity insurance had been arranged. A copy certificate disclosing cover from 20 August 2013 was produced. There had however been a period of time for a number of months following the respondent's registration as a property factor that such professional indemnity insurance was not in place. The committee noted that there had accordingly been a breach of the Code for a period of some 5 months.
- viii. Section 5.2 of the Code. The applicant wished details of the up-to-date insurance schedule. The previous insurance certificate which expired on 9 July 2013 was upon the community noticeboard within the development. The respondent produced a copy of the existing buildings insurance certificate. The Code requires the respondent to show, upon request, the basis upon which the homeowner's share of the insurance premium is calculated, including the sum insured, the premium paid and any excesses which apply. The new insurance certificate now in force (to cover the period 15 July 2013 to 145 July 2014) was confirmed by a document produced. This does not contain

this full information. The committee were unclear if any direct request for such information had been made. The respondent indicated that such information would be made available if asked for. This is not a breach of the Code.

- ix. Section 5.8 of the Code. The applicant queried whether or not annual updated valuations be obtained for the purposes of the buildings insurance policy being renewed. The respondent confirmed that annual indexation is used for insurance purposes which is acceptable to the underwriters. The Code requires homeowners to be informed of the frequency with which property valuations are, as a matter-of-fact undertaken. There are no property valuations therefore undertaken and accordingly the issue is irrelevant though the committee were of the view that it may be beneficial, for the sake of clarity, that it was specifically disclosed that such revaluations were not, as a matter-of-fact, being undertaken. The committee concluded that in all of the circumstances there is no breach of the Code. It is however generally considered good practice that insurance revaluations are undertaken every 5 years or so.
- x. Sections 6.1 of the Code. The applicant complained that there is a lack of appropriate procedure in place for the purposes of routine works being notified to the respondents and undertaken. Part of this complaint related to the lack of any formal tendering process. The applicant indicated a wish to be included "in interviews with contractors". The applicant would not, in terms of the Code, be entitled to that direct input. She is entitled to seek that the respondent justify their actions if challenged and asked for information regarding their decision-making. It was accepted that no such procedure was set out within the initially produced written statement of services. This is a breach of the Code. Following discussion at the first hearing before the committee on 9 October this was remedied by the telephone number being specified within the written statement of services and detail provided of the procedure of notification of emergency works.
- xi. Section 6.4 of the Code. The applicant believed the respondent is responsible for carrying out inspections of her property and other properties within the development. The Deed of Conditions does not stipulate the necessity of carrying out routine inspections or planned programme of works. No obligation upon the respondent exists. There is no such obligation incumbent upon the respondent. This is not a breach of the Code. The applicants concerns were met somewhat by discussions leading to amendment of the written statement of services reflecting that annual inspections of alarm systems and all communal areas within the development will be undertaken.

The applicant also raised Duty complaints.

The applicant complained that the level of maintenance of the buildings within the Development and standard of cleaning and gardening within the Development including the alarm system, walls, fences and car park are not up to standard. This was disputed. The committee had no objective evidence to make a determination upon this issue.

The majority of the failures to comply with the Code were rectified, as outlined, by the production of a revised written statement of services. The agent for the property factor assured the committee that such revised statement would be issued to all residents within the Development.

Two of the breaches, namely the failure to previously correspond promptly and the failure to issue the written statement of services timeously could not be rectified.

The committee formed the view that such matters were regrettable but there would be no benefit to the homeowner to make any Property Factor Enforcement Order.

The committee would remind the applicant that should she be in any doubt regarding her own rights and obligations arising from her relationship with the respondent that she should obtain independent legal advice. She is similarly reminded that her property is legally burdened by the management scheme.

It was noted by the committee that the applicant indicated that she was unaware of the exact nature of the management scheme in operation at the time of her purchase of the property. The applicant ought to have made such proper inquiry in order to satisfy herself regarding this. No doubt like many other prospective home purchasers, once she and her husband had decided to purchase the property, the finer detail may, at that time, have not been at the forefront of their minds. It may very well be the case that should the applicant have known the full details of the management scheme in place that she would not have purchased the property. Ultimately, the applicant's remedy, if she is unhappy with the standards of service being offered by the respondents, is that she can seek dismissal of the respondent subject to the necessary procedures being followed.

Appeals

In terms of Section 22 of the 2011 Act, any Appeal is on a point of law only and requires to be made by Summary Application to the Sheriff. Any Appeal must be made within 21 days beginning with the day on which the Decision appealed against is made.

Richard Mill
Chairman

17th December 2013