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

hohp Ref: **HOHP PF/16/0026**

The Property: **Flat 21, 4 Lindsey Road, Edinburgh 6 4EP**

The Parties: –

Jason Dove and Ievgeniia Dove, residing at the property ("the homeowners")

and

Trinity Factoring Services Ltd, 209 – 211 Bruntsfield Place, Edinburgh EH10 4DH ("the factors")

Committee Members: David Preston (Chairman); and Mrs Elizabeth Dickson (Housing Member).

Decision:

The Committee found that the Factors had failed to comply with the Code of Conduct for Property Factors.

Background:

1. By application dated 28 February 2016 Mr Dove applied to the Homeowner Housing Panel ("the Panel") on behalf of the homeowners to determine whether the factors had failed to comply with the Code of Conduct for Property Factors (the Code of Conduct) and had failed to carry out the Property Factors' duties imposed by the Act. In subsequent correspondence and by email dated 1 May 2016, Mr & Mrs Dove restricted

the application to the extent that they complained that the factors had failed to comply with sections: 2.1; 2.5; 4.5; 4.8; and 4.9 of the Code of Conduct.

2. By Minute dated 12 May 2016 the President of the Panel, through the authority delegated by her to a Convener of HOHP, issued a Minute of Decision to both parties, stating that she considered that in terms of section 18(3) of the Act, there was no longer a reasonable prospect of the dispute being resolved at a later date; that she had considered the application paperwork submitted by the homeowner, comprising documents received in the period 9 March 2016 to 11 May 2016 (detailed above); and intimating her decision to refer the application to a panel committee for determination.

Hearing:

3. A hearing took place at George House, 126 George Street, Edinburgh EH2 4HH 21 September 2016. Present at the hearing were: Mr & Mrs Dove; Mr George McGuire and Mr Grant Beeson, both from the factors, who were represented by Mr Andrew Foyle of Shoosmiths, Solicitors.

4. The homeowner's application had been accompanied by copy correspondence and paperwork. No productions had been lodged by the factors. By email dated 20 September 2016 Mr Foyle submitted representations in the form of a letter dated 6 July 2016 to which Mr Mrs Dove had responded by email to which a number of further emails between them and the factor was attached.

5. In addition to the written evidence submitted by the parties, representations were made by Mr & Mrs Dove, Mr Foyle and Mr McGuire.

6. Following the initial introductions, the chairman outlined the procedure which it was intended should be followed and explained the function of the Committee.

7. There were no preliminary matters to be considered

Evidence and Representations

Homeowner

8. Mrs Dove summarised the application. By way of background, she explained that they had bought the property in June 2014. They were aware that the property had been re-

possessed but they had not been made aware by their solicitors that there was Notice of Proposed Liability (NOPL) registered against the title. They had become aware of the problem on receipt of their first bill from the factors which was received on 19 July 2014. This matter was then the subject of a complaint by them to the Scottish Legal Complaints Commission which had concluded with their former solicitor, Tracy Wilson being responsible for settling the outstanding debt of the previous owner and procuring a discharge of the NOPL. So far as Mr & Mrs Dove were concerned matters were therefore in the hands of Ms Wilson and Shoosmiths to be resolved. Mrs Dove explained that she had made numerous telephone calls and email enquiries to the factors as to the progress of the resolution of the problem but her enquiries had largely not been responded to. She complained that she had found the factors to be unhelpful and almost obstructive in having the NOPL discharged which had taken 18 months to achieve. She based this on the information she had been given by Ms Wilson that Shoosmiths had been awaiting information from the factors.

9. In answer to the factors position that they were not aware of the fact that Ms Wilson was required to be personally responsible for the arrears, Mrs Dove said that she had informed the factors of that fact and directly Committee to the email from her to Kimberly Duncan dated 31 July 2014 in which it was explained that it had been decided that the solicitor would cover the cost for the NOPL. She also directed the Committee to an email dated 5 August 2014 from Kimberly Duncan to Shoosmiths in which it was stated that the purchaser had informed her that the homeowner's solicitors would be paying the debt

10. On 8 October 2015, Mr & Mrs Dove were told by Ms Wilson that a further NOPL had been registered on 22 September 2015 in respect of outstanding charges incurred since the Doves had moved in. When a copy of the NOPL was obtained from the Land Register it was stated to be for "... the costs in respect of property factoring and management services between the period 27 June 2014 until 17 September 2015...".

11. Mrs Dove said that they had paid all accounts to the factors on receipt and that the only account which had not been settled by 17 September 2015, as far as they were concerned, was received by them in September 2015 and was stated to have a due date for payment of 25 September 2015. She could therefore not understand the basis upon which it could be said that there were any outstanding charges at the date of registration of the NOPL.

12. Mrs Dove complained that they were being told by their former solicitor but the reason for the NOPL, as stated therein, was for outstanding factors accounts and yet the factors were telling them that it had been registered because they understood that the property was potentially going to be put up for sale. She had no knowledge of where such information could have come from.

13. Mrs Dove further complained that there was extensive evidence which had been produced in terms of the emails that the factors had not been providing the necessary information to Shoosmiths to allow the negotiations with Ms Wilson to be concluded. She also pointed out that it taken over a month to clear the NOPL after the date had been cleared. She also complained that the factors had persistently failed to respond to her emails and telephone calls, despite assurances that people would get back to her.

Factor

14. In response, Mr Foyle suggested that there were a number of facts which were in his view matters of agreement, namely that the applicants are the owners of the property and its clients are the factors of the property.

15. Mr Foyle explained that the flat had been owned by a Mr Balenthiran who had incurred arrears of factoring charges and an NOPL had been registered on in August 2013;

16. Mr Foyle said that it was accepted the flat had been repossessed in March 2014 and marketed. It had been purchased by Mr Mrs Dove. However the Dove's solicitors had overlooked the NOPL. The factors now understood that this had been the subject of a complaint to SLCC as a result of which the solicitor had agreed to be personally responsible for discharging the NOPL and it appeared that the solicitor was to pay this out of their own pocket.

17. Negotiations for settlement of this were protracted in respect of the sums due relating to interest and fees.

18. In respect of the second NOPL Mr Foyle said that Ms Wilson began to press for a settlement figure after a long period of silence between August 2014 and July 2015 and that this had been interpreted by the person dealing with the matter in his firm as being in anticipation of a sale of the property. This information had been passed to the

factors and, as a statement for the period 5 September 2015 to 4 March 2016 had been issued at that time, they received instructions to register a further NOPL.

19. Mr McGuire explained that when they were told that there was a possibility that the property might be put on to the market, they considered the position and in view of the difficulties about settling the debts under the previous NOPL they made a judgement that in order to protect the interests of the owners of the properties in the development they would register further NOPL. He was satisfied that they were entitled to do this the basis that they would not necessarily be made available on any sale of the property until it was too late to protect the funds they held on behalf of the other owners if it turned out to be a shortfall in respect of the property. He accepted that no notification had been given to the homeowners of the NOPL.

20. Mr McGuire accepted that the factors had not made any effort to check with the homeowners as to whether they did intend to market the property or not. He said that homeowners very often do not tell the truth in such circumstances and that the factors therefore did not see any point in checking that. He said that homeowners very often give false information when there are arrears on their account.

21. Mr McGuire explained that they are seldom told when a property is put on to the market. The first they hear about it is usually shortly before settlement of the sale when they are usually contacted by the seller's solicitor asking for details outstanding costs or work. They then apportion the costs as at the date of entry. Where there are arrears on an account it is possible for them to register a NOPL which makes the debt attach to the property and makes any subsequent owner responsible for the arrears even if they had not caused them. He explained that this was necessary to protect the interests of the other owners who would be prejudiced if the factors did not pursue the arrears as it was the development account which had the shortfall.

22. Mr McGuire maintained that throughout the correspondence with the homeowners it had been made clear that the responsibility for the debt had passed to them because of the NOPL. The factors therefore were entitled to pursue the homeowners and recover the debt by whatever means they could.

23. Mr McGuire explained that in the case of 4/21 Lindsay Road, they had been told by Aberdein Considine in June 2014 that the flat had been sold. They had also been told that under the contract of sale the purchasers would be responsible for clearing the NOPL. In any event, until they received payment of the arrears, the NOPL would

remain in place and the debt became the responsibility of the purchasers. Mr McGuire not been aware of the circumstances where it appeared that Mr & Mrs Dove's solicitor had become responsible personally for the outstanding sums. The factors had then been told by Shoosmiths that the property might be about to be marketed and judgement was taken that it was necessary to lodge a further NOPL to protect the development fund. He acknowledged that Mr & Mrs Dove had not been given any notification of the NOPL and no notice was required to be given under the Tenements Scotland Act. The factors considered that they had to act as a matter of urgency to protect the fund because they had no idea of when sale might take place and if the NOPL was not in place then it would be difficult to recover the shortfall.

24. Mr McGuire said that it was now apparent that the solicitors had been arguing over the amount of the debt as it was clear that it was a matter of personal interest to them.

Findings and Reasons:

25. The Committee considered all of the evidence to which it had been referred by the parties both written and oral.

26. When the homeowners purchased the property there was an NOPL registered against the title in respect of prior arrears of factoring charges which had not been attended to by the homeowners' solicitor.

27. An arrangement was subsequently made between the homeowners and their former solicitor that she would be personally responsible for clearing the debt. Details of such an arrangement were not specifically notified to the factors but it was clear from the email of 5 August 2014 that the solicitor would be paying the debt. In addition, Kimberley Duncan specifically advised Shoosmiths in the email dated 5 August 2014 that Wilsons Solicitors would be paying the debt. At the very least the factors should have clarified the situation.

28. There were negotiations between Ms Wilson and Shoosmiths between August 2014 and October 2015 with regard to settlement of the debt. The Committee noted the email correspondence at the end of October 2014 in which Mrs Dove was chasing for information regarding progress in achieving settlement. There was then a long gap until the end of April 2015 when it was evident that progress had not been made. An

email of 8 October from Ms Wilson indicated that she was still awaiting a final figure to enable settlement. It was not until 13 October 2015 that the debt was cleared.

29. The Committee was advised that when Ms Wilson began to put pressure on to them to achieve settlement, they interpreted that as being because the property might be going onto the market. The Committee found that there was no basis for such an interpretation in the circumstances of this case. In any event it had taken from August 2014 to October 2015 to achieve the settlement and the Committee found no justification for such a delay. It is the responsibility of an instructing client, (the factors) to ensure that their agents (Shoosmiths) carry out their instructions timeously. Indeed the factors acknowledged the unreasonable delays in their letters dated 16 November and 7 December 2015 to the homeowners.

30. As a result of the misinformation about a possible sale of the property, the factors had proceeded as a matter of urgency to a further NOPL but gave no notice of any such intention to the homeowners and did not tell them about it. The homeowners had been told about it by their former solicitor. In answer to the Committee Mr McGuire confirmed that apart from the arrears on the account which had been outstanding at the time of their purchase, Mr & Mrs Dove had paid all accounts quickly.

31. The Committee found that it was unreasonable for the factors not to have checked with Mr & Mrs Dove about their intentions to market the property or to advise them of the NOPL. The factors had no reason to suspect that Mr & Mrs Dove would give them false information. Mr & Mrs Dove had maintained regular communications with the factors over a prolonged period and had demonstrated that they were keen and anxious to clear the outstanding debt and have the original NOPL removed.

32. The Committee accepted that there was a possibility of confusion in the particular circumstances of this case. Whilst the homeowners may have told the factors that Ms Wilson was responsible for paying the outstanding debt and was negotiating it, the factors may not have fully appreciated that this was being paid by her personally. That was a separate agreement between the homeowners and Ms Wilson in which the factors were not involved.

33. While the factors were familiar with the procedure and consequences of the NOPL, they had assumed that the homeowners were obtaining legal advice. That assumption was unfounded although the Committee noted that the email from Kimberly Duncan dated 21 July 2014 suggested that homeowners should consider contacting their

solicitors again. The Committee considered that it would have been reasonable for the factors to have provided a clear explanation of the consequences and effect of the NOPL rather than assume that the homeowners would have access to legal advice.

34. The Committee was of the view that the use of the NOPL procedure is a very significant step. It is a notice of debt which appears on a public register and as such can result in a damaged reputation. Although the homeowners' name does not appear on the NOPL itself, it is registered against the title of the property belonging to the debtor at the time of registration. It was suggested to the committee that the homeowners have suffered no economic loss as a result of the registration of the NOPL in September 2015 but the Committee found that there were potential serious reputational repercussions for the homeowners and that the factors should not in the circumstances of this case have proceeded without giving notification of their intentions providing homeowners with an opportunity of clarifying the situation.

35. The Committee considered the factors' Debt Recovery Procedures which make no mention of the possibility of the consequences of an NOPL being applied. The procedure includes various time limits, none of which were applied in this case.

36. The Committee noted that the NOPLs had been discharged in December 2015, some considerable time after the date on which the original notice had been cleared and also after clarification of the misinformation. The Committee found the delay to be unreasonable

Determination:

37. The Committee found that the factors were in breach of Section 2 of the Code. There was evidence from the email correspondence produced to the Committee of a significant failure to communicate effectively or to respond to reasonable requests and complaints within prompt timescales from the homeowner over a protracted period of time as provided in Section 2.5. In addition the Committee found that misunderstandings and the dispute between the parties would have been avoided if the factors had not assumed that the homeowners were being advised about the consequences and effect of the NOPL. In particular they could have specifically advised the homeowners that it was open to them at any time to clear the debt and then recover that outlay from their solicitor, as Mr McGuire explained at the hearing.

38. The Committee found that the factors were in breach of section 4 of the Code. Whilst the factors have a clear process for debt recovery, it does not contain any reference to the NOPL procedure or its effect. The homeowners maintained contact with the factors throughout the period from their purchase of the property and the clearing of the NOPL, as provided in the debt recovery procedure, but the problem persisted and ultimately the factors registered a further NOPL which was not justified. In addition the factors had accepted and acknowledged in their letters of 16 November and 7 December 2015 that there had been excessive delays in the correspondence.

39. There was a clear breach of section 4.5 of the Code in that the factors took the ultimate ad extremely serious step of instructing the second NOPL without any warning or notice to that effect despite having been in constant contact with the homeowners at the time. Mr McGuire advised that they had made a judgement to proceed in that way, as they were entitled to do. However in view of the extent and nature of the communication from the homeowners and the fact that all of the factoring accounts presented to the homeowners following their purchase of the property had been paid on demand, that decision had been wrong and was in breach of section 4.5. it would have been reasonable to expect that when instructing their solicitors to proceed, notification of those instructions could have been given to the homeowners to enable them to make representations.

Proposed Property Factor Enforcement Order:

40. Having determined that the factor had failed to carry out the property factor's duties and to comply with the Code, the Committee was required to decide whether to make a PFEO.

41. The Committee considered that the factors should amend their Debt Recovery Procedure to cover the final step of registering a NOPL against homeowners, together with an explanation of the effect of consequences of such a step.

42. The Committee determined that the homeowners should be compensated for the time, effort and stress occasioned by the factor's continuing failures: to communicate essential information.

43. The Committee took into account the volume of correspondence they had sent to the factor, much of which was not answered to their satisfaction and considered that the sum of £350 would be appropriate.

Right of Appeal:

44. The parties' attention is drawn to the terms of Section 22 of the Act regarding the 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 the 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

07-Oct-16

X

CHAIRMAN

Signed by: DAVID MICHAEL PRESTON