Decision of the Homeowner Housing Committee
In an Application under section 17 of the Property Factors (Scotland) Act 2011
by

Aylmer Millen, 30/5 Eyre Crescent, Edinburgh EH3 5EU ("the Applicant")

James Gibb Residential Factors, 4 Atholl Place, Edinburgh EH3 8HT ("the Respondent")

Reference No: HOHP/PF/15/0090

Re: Property at 30/5 Eyre Crescent, Edinburgh EH3 5EU
("the Property")

Committee Members:

John McHugh (Chairman) and Sara Hesp (Surveyor Member).

DECISION

The Respondent has not failed to carry out its property factor's duties.

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner of Flat 30/5 Eyre Crescent, Edinburgh EH3 5EU (hereinafter "the Property").

2 The Property is located within a development which comprises two residential blocks known as 17 Eyre Place and 30 Eyre Crescent and associated common areas (hereinafter "the Development").

3 The adjacent property is a medical centre at 32 Eyre Crescent (hereinafter "the Medical Centre").

4 The buildings within the Development and the Medical Centre are physically connected.

5 The grounds of the Development and those belonging to the Medical Centre are not separated by a physical boundary such as a fence or wall.

6 The Development and the Medical Centre have different proprietors.

7 A Deed of Conditions governs the arrangements for the sharing of costs relating to common property within the Development among the proprietors of the flats within the Development.

8 There are 23 flats in the Development.

9 The Respondent is the property factor appointed by the owners of the flats within the Development.

10 The Respondent assumed the role of property factor from Grant & Wilson Property Management Ltd on or around March 2015.

11 The property factor's duties which apply to the Respondent arise from the Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.

12 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

13 The Respondent was responsible for arranging common buildings insurance cover for the Development.

14 The buildings sum insured increased annually in accordance with an indexation process.

15 The Respondent would call a meeting of owners of properties within the Development every year.

16 No meeting was called in 2014.

17 After intervention by the Applicant, a meeting eventually took place on 4 March 2015.

18 The Respondent arranged for the grounds maintenance works at the Development to be retendered around July 2014 in order to exclude the area of ground owned by the medical practice from the contract.

19 The Applicant has, by his correspondence, including his completed complaint form and attached document submitted to the Respondent on 22 November 2014, notified the Respondent of the reasons why he considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.

20 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at George House, Edinburgh on 23 September 2015.

The Applicant was present at the hearing.

The Respondent was represented at the hearing by Nic Mayall, its Managing Director and Graeme Stewart, its General Property Manager. No other witnesses were called by either party.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as "the 2012 Regulations".

The Respondent took over the business of the previous factor of the Development, Grant & Wilson Property Management Ltd in March 2015. There appears to have been an acquisition of the whole rights and obligations of Grant & Wilson and the Respondent has dealt with this case on the basis that it is responsible for the actions of Grant & Wilson and has not attempted to argue otherwise. In this Decision we describe the actions of Grant & Wilson as those of the Respondent and do not make any distinction between the two unless there is a specific contextual reason to do so.

Grant & Wilson became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included a Deed of Conditions by Adam Housing Society Ltd registered 13 December 1990, which we refer to as "the Deed of Conditions" and Grant & Wilson's "Terms of Service & Delivery of Standards" which we refer to as "the Written Statement of Services".

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Written Statement of Services is relied upon in the Application as a source of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant complains of breaches of Sections 2.1, 2.4, 2.5, 6.6 and 7 of the Code.

The elements of the Code relied upon in the application provide:

*"...**Section 2: Communication and Consultation***

2.1 You must not provide information which is misleading or false....

...2.4 You must have a procedure to consult with the group of homeowners 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. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)...

...2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)...

...Section 6: Carrying Out Repairs and Maintenance

6.6 If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.

...Section 7: Complaints Resolution

Section 17 of the Act allows homeowners to make an application to the homeowner housing panel for a determination of whether their property factor has failed to carry out their factoring duties, or failed to comply with the Code. To take a complaint to the homeowner housing panel, homeowners must first notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties, or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them. It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in-house complaints procedure and how they make an application to the homeowner housing panel

. 7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.
7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.
7.3 Unless explicitly provided for in the property titles or contractual documentation, you must not charge for handling complaints.
7.4 You must retain (in either electronic or paper form) all correspondence relating to a homeowner's complaint for three years as this information may be required by the homeowner housing panel.
7.5 You must comply with any request from the homeowner housing panel to provide information relating to an application from a homeowner...".

The Matters in Dispute

The matter in dispute is the behaviour of the Respondent toward the Applicant. The Applicant contends that the Respondent has been engaged in a campaign of obstruction of the conduct of the normal management of the Development. The Respondent denies that this is the case.

The Applicant offers to demonstrate the campaign of obstruction by reference to the following issues:

(1) The arrangements applying to annual increases in the buildings insurance sum insured.

(2) Delay and obstruction in the arranging of a meeting of residents.

(3) Failure to follow the provisions of Clause TENTH of the Deed of Conditions in the sharing of management charges.

The Applicant has stressed that his complaint to HOHP is not purely in respect of each of these specific items. Rather, his complaint is that the poor performance he has experienced in relation to each of these matters is itself a demonstration of the wider campaign of obstruction which he believes to have been waged against him by the Respondent.

There was a suggestion that there was a fourth head (being deficiencies in the way in which the complaint was dealt with) but the Applicant confirmed that he considers this to be subsumed within the other three heads.

We deal with these issues below.

(1) The arrangements applying to annual increases in the buildings insurance sum insured.

The Applicant was concerned that the Respondent was applying, year after year, an annual increase of 5% to the buildings insurance sum insured. He felt that the apparent application of such an increase was unreasonable and that the effect would be for the sum insured to become inflated beyond the true rebuilding cost required, with the effect that premiums would increase unnecessarily each year. He thought it more appropriate that the sum insured be adjusted each year in accordance with an appropriate index such as the Royal Institution of Chartered Surveyors' Building Cost Information Service Rebuilding Cost Index ("the BCIS").

He had raised his first enquiry of the factor on this matter on 19 December 2013. Correspondence on the issue continued until September 2014 when it was agreed that the issue of a potential revaluation of the Development would be put to a meeting of the proprietors.

The Applicant is concerned at the length of time taken to deal with his query and that the answers given were not clear. He is concerned that the existence of an earlier ongoing application to the HOHP was used as a reason for the Respondent not to answer the Applicant's questions.

We asked the Respondent's representatives for information on the insurance position. Considering that this was a live issue in the dispute, it was surprising that neither representative was able to give a clearer explanation of the history of increases to the buildings sum insured at the Development.

Mr Mayall was, however, clear that the increase for the current year had been fixed at 3%, as opposed to 5%. After much discussion, the best that the Respondent's representatives were able to say was that they believed that any increase was the result of indexation each year.

The Respondent explained that it was not itself responsible for calculating any increase but that it would rely upon, and follow advice from, the insurers as to the appropriate level of annual increase. The Respondent's representatives felt that the Respondent had behaved appropriately by following the professional advice which it had received.

The Applicant was unable to produce any documentary evidence of the annual increase of 5% although he held a firm belief that 5% had been applied each year for several years. He submitted that an increase of 5% would be unlikely to repeat each year if reference was actually being made to an index (as obviously the process of indexation would be likely to produce a different figure each year).

Although the correspondence is not as clear as it might have been, we observe that the Respondent did explain in its first letter to the Applicant on the matter that indexation was applied. Although there seems to have been loose terminology by the Respondent (particularly in their Ms Gilmour's email of 28 August 2014) the position indicated throughout does appear to have been that indexation applied. It might be observed that the explanations offered by the Respondent could have

been better framed and that the Respondent's view that it was entitled not to answer the Applicant's queries because of a separate on going HOHP application was not justified. Nonetheless, we do not find that these examples are themselves sufficient to evidence any kind of campaign of obstruction by the Respondent.

Further, although the Respondent may be criticised for the lack of clear explanation in some of its correspondence, we do not consider that its actions are sufficient to constitute either a breach of the sections of the Code or of the Written Statement of Service relied upon.

(2) Delay and obstruction in the arranging of a meeting of residents

The Applicant advised that it was the normal practice since Grant & Wilson had become factors of the Development in 2007, for them to arrange an annual residents' meeting in Stockbridge Library. He advised that he had attended these meetings and that they had been well attended by other proprietors. Formal business and voting on matters relating to the management of the Development had been undertaken.

In 2014, there had been no sign of the Respondent arranging the customary meeting and the Applicant queried this with the Respondent by email of 30 June 2014.

The Respondent wrote to the proprietors and advised in its letter of 5 September that 10 of the 23 proprietors had responded, with 8 of those confirming that they would attend. The meeting was duly set up by the Respondent to take place on 8 October 2014.

On 18 September 2014, the Respondent wrote cancelling the scheduled meeting. The explanation offered was that there were insufficient attendees to form a quorum as required by the Deed of Conditions.

The Applicant quickly responded to remind the Respondent that the Deed of Conditions only requires the meeting to be called by two proprietors.

The Applicant arranged for two proprietors (himself and one other) to advise the Respondent that they wished the meeting to be called. The Applicant was concerned by the response which he received thereafter in which the Respondent had sought to have him specify the date, time and place of the meeting to be called. He felt that the Respondent was being deliberately obstructive. After some further correspondence, the meeting was eventually called with the Respondent's assistance and it eventually took place on 4 March 2015.

The Respondent advised that the cancellation of the first meeting had been the result of contact received from owners who indicated that they were unable to attend and that the Respondent accordingly thought that cancellation and rescheduling of the meeting until a time when a voting quorum could be attained was the best option.

There was some suggestion by the Respondent's representatives that the previous annual meetings might only have been informal meetings. That suggestion seemed

to be without foundation and we prefer the Applicant's evidence in this regard as he had attended the earlier meetings.

Mr Stewart had been involved in the arrangements for the new meeting. He explained that he had attempted to follow to the letter the terms of the Deed of Conditions which is why he had insisted upon the Applicant providing the intended date and location of the meeting. He had not been motivated by a desire to be obstructive or to delay the meeting.

It was the general practice of the Respondent and of Grant & Wilson to try to assist in the arrangement of owners' meetings and that was what had been attempted here.

Having carefully considered the history and the parties' communications, we do not consider that the Respondent's actions are sufficient to constitute either a breach of the sections of the Code or of the Written Statement of Service relied upon by the Applicant.

(3) Failure to follow the provisions of Clause TENTH of the Deed of Conditions in the sharing of management charges.

The Applicant complained that there had been a failure to apply the terms of Clause TENTH of the Deed of Conditions. It provides:

"Each Flat shall be held by the Proprietor thereof under burden of payment along with the Proprietors of the other Flats in the Block of a one twenty third share of the cost of maintaining the whole of the Common Property and a one forty sixth share of maintaining the said Access Area."

The Development consists of 23 flats. They are attached to a medical practice and share a common access way. There had been a history of the Respondent arranging services both for the Development and for the medical practice and splitting the cost twenty four ways. The Applicant (rightly) had been concerned that the Respondent's practice did not follow the terms of the Deed of Conditions and had raised an earlier application to the HOHP (reference HOHP/PF/13/0240). That application resulted in a Property Factor Enforcement Order being made in terms of which the Respondent was obliged to ensure that it manages the development and apportioned common charges in accordance with Clause TENTH of the Deed of Conditions.

The Applicant had been suspicious that the Respondent might not be following what was required of it by the Deed and the PFEO. On 26 November 2014, the Applicant asked the Respondent for information about a recent increase in cost for the ground maintenance charges. This was explained by the Respondent as being the result of a re-tendering exercise which had been carried out after the issue of

the PFEO in the earlier application. At that time the medical centre had been formally excluded from the ground maintenance contract.

The Applicant remained concerned that the maintenance contractor may not have understood the boundary between the Development and the medical practice and asked to see a copy of any plan which had been given to the contractor. He was advised by the Respondent that a plan had been displayed to the contractor and that the property manager responsible for the Development had walked the site with the contractor and explained the boundary to him. The Respondent refused to supply a copy of the plan on the grounds that it was a title plan taken from the title of another flat proprietor.

On 13 February 2015, the Respondent (by email from its Lynne McLeod, Property Manager) indicated that the true position was that there had been no plan provided to the contractor and that, instead, reliance had been placed solely upon the site walk around involving the previous property manager and the contractor.

Lynne McLeod later revised the Respondent's position again, advising on the day of the scheduled residents' meeting (4 March 2015), that the plan provided to the contractors had now been discovered by the Respondent.

At the hearing, Mr Stewart explained that the previous Property Manager, Fraser McIntosh had left the Respondent's employment and it had been unclear to the Respondent whether a plan had been provided to tendering contractors or not. Mr Stewart had been preparing for the meeting on 4 March 2015 when he had come across the plan in Mr McIntosh's emails. He had produced the plan to the Applicant at the residents' meeting, explained the reason for the confusion and apologised.

The Applicant confirmed at the hearing that he remained sceptical of the explanation given.

We accept the explanation given by Mr Stewart. It appears unlikely that if the Respondent was trying in some way to disguise the true position that it would have done so in such a haphazard manner including revealing the existence of the plan on the date of the meeting. While that could have been interpreted as a last minute attempt to cover the Respondent's position, it seems to us that it does not really do that and instead its production in this way appears to fit with Mr Stewart's explanation. We also take into consideration a letter from Cameron Wilson, the ground maintenance contractor, dated 30 April 2015 which confirms that it had been shown a plan with the boundary marked.

The Applicant had also raised a concern that the Respondent was apparently seeking tenders for ground maintenance when the contract would exceed its tender discretion of £350. It seems to us that there is little in that complaint in that the Respondent would be entitled to invite tenders if it so chose as there would be no cost to the residents purely by performing the tendering exercise (as opposed to placing a contract).

The Applicant relies upon paragraph 6.6 of the Code. This obliged the Respondent to produce all tender documentation upon request. It appears to be common factual ground between the parties that this did not happen in the case of the plan given to contractors at re-tendering for the ground maintenance works. The position is that the existence of the plan was wrongly denied and that a plan was also witheld on the grounds of its relating to another proprietor's title before eventually being made available.

While we have some sympathy with the difficulty which may have faced the Respondent on the change of property manager, the correspondence appears to indicate an absence of appropriate record keeping to enable the Respondent to meet its Code 6.6 obligation. We also have in mind that since the earlier PFEO was issued on this matter, the Respondent would have been expected to be particularly vigilant that it could demonstrate compliance with Clause TENTH (particularly in relation to ground maintenance which was the focus of the earlier application to the HOHP) to the Applicant or anyone who might ask.

We find there to have been a breach of the Code of Conduct in relation to this matter.

We do not find there to have been a breach of the property factor's duties in relation to this matter.

Observations

It was clear to the Committee that relations between the parties are extremely strained. The Applicant has lost trust and faith in the Respondent because of what he perceives as its failure to respond reasonably to his requests for information. The Respondent appears to regard the repeated and detailed requests from the Applicant as unreasonable and to have formed an opinion that the Applicant can never be satisfied with any answers given. The parties therefore came to this process with deeply entrenched opposite positions.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

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 day on which the decision appealed against is made..."

JOHN M MCHUGH

CHAIRMAN

DATE: 3 October 2015