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

Hohp Ref: **HOHP/PF/13/0327**

Re: **Property at Flat 4, 24 Woodside Place, Glasgow, G3 7QL ("the Property")**

The Parties:-

Mrs Diana Dundas, Flat 4, 24 Woodside Place, Glasgow, G3 7QL 9TN ("the Applicant")

Ross & Liddell Ltd, 60 St Enoch Square, Glasgow, G1 4AW ("the Respondent")

Decision by a Committee of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011

Committee Members:

Maurice O'Carroll (Chairman)
Douglas McIntyre (Housing Member)
Andrew Taylor (Surveyor Member)

Decision of the Committee

The Respondent has failed to comply with its duties under s 14(5) of the 2011 Act.

The decision is unanimous.

Background

1. By application dated 5 February 2014, the Applicant applied to the Homeowner Housing Panel for a determination of whether the Respondent had failed to comply with the duties set out in the Code of Conduct imposed by section 14(5) of the 2011 Act.

2. Three sections of the Code in particular were alleged to have been breached, namely sections 2.1, 2.5 and section 7. The complaints stem from a failure to remedy water ingress from the chimney area which caused, and continues to cause, severe dampness in the second bedroom of the Property. The alleged failures relate to misleading or false information, a failure to deal with complaints

and enquiries promptly and failure to have an adequate complaints procedure in place.

3. By letter dated 27 February 2014, the President of the Homeowner Panel intimated a decision to refer the application to a Homeowner Housing Committee. A notice of referral was served on both parties as at that date.

4. Following service of the Notice of Referral, the Applicant submitted a single page of representations in addition to the correspondence and documents already submitted. By letter dated 18 March 2014, the Respondent wrote to the Homeowner Housing Panel to indicate that (a) the Respondent had been dismissed as property factor (with effect from 1 April 2014) and (b) the Applicant had submitted a claim for professional negligence against it which had been submitted to their professional indemnity insurers. The letter further stated that in view of those developments, it would not be possible for the Respondent to provide any further information or to attend any hearing before the Committee.

5. In the event, the Respondent decided nonetheless to appear at the hearing of the parties as arranged and submitted a paginated set of documents comprising 123 pages on 6 June 2014. The Applicant had submitted supporting documentation along with the originating application, with further information being added on 14 February 2014.

6. A hearing took place at Europa House, 450 Argyll Street, Glasgow on 16 June 2014. The Applicant was represented by her husband, Mr Calum Dundas who provided evidence as to fact with the occasional assistance of the Applicant. The Respondent appeared and was represented by Mr Gerry Gilroy, Director of Building Surveying for Ross & Liddell Surveying Limited. Neither party had legal representation. Both parties were asked questions by the Committee members in relation to the documents submitted prior to the hearing and also arising from the evidence given at the hearing itself.

7. At the outset of the hearing, the Committee made clear that its role was to consider the alleged breaches of the Code and would not cover any areas which would impinge upon the ongoing claim regarding professional negligence referred to above. Mr Dundas for the Applicant very fairly outlined the scope of his evidence in recognition of that limitation. Accordingly, he did not, for example seek to impugn the decision taken by the Respondent to appoint Ross and Liddell Surveying Limited as surveyors to address the water ingress to the Property. Their appointment was in any event agreed by mandate to the relevant homeowners at numbers 21/23 Woodside Place and the Applicants dated 1 December 2009. Nor did Mr Dundas seek to challenge the decision to attempt to address the water ingress by taking down the mutual chimney head and replacing it. In addition to potentially touching upon issues of negligence, Mr Dundas also acknowledged that neither of those actions occurred after the date

of registration of the Respondent as factors and were not therefore covered by the terms of the Code.

Committee Findings

The Committee made the following findings in fact pursuant to Regulation 26(2)(b)(i) of the 2012 Regulations:

8. The Applicant is the heritable proprietor of the Property which is known as and forming flat 4, 24 Woodside Place, Glasgow, G3 7QL, registered in her maiden name of Mackay under Title number GLA150486 on 14 May 2008. The Property is a flatted dwelling within a three storey tenement at that address and subject to common burdens regarding communal maintenance and repair as set out in the Deed of Conditions applicable to the property registered on 14 August 2000. It was converted into flats in approximately 2001. The building comprising the Property was listed on 25 July 1966.

9. The Respondent is the property factor responsible for the repair, maintenance and insurance of the common parts of the common stairwell at the Property on behalf of the common owners including the Applicant.

10. The Respondent's written statement of services, which were headed "Service Level Agreement" was provided to the Committee prior to the hearing. The footer of the document bears the date of January 2013 and it was issued to the Applicant following the entry into force of the 2011 Act on 1 October 2012.

11. The Respondent was under a duty to comply with the Code of Conduct in terms of s 14(5) of the 2011 Act from the date of its registration as property factor which was 1 November 2012. As noted above, Ross and Liddell Surveying Ltd were mandated to act on behalf of the Respondent Ross and Liddell Ltd in relation to the chimney replacement and water ingress issue which forms the subject matter of the application. For the purposes of this decision, all references to the Respondent are in relation to the former acting on behalf of the latter in relation to those works unless otherwise stated.

Discussion of evidence and alleged breaches of duty

Section 2.1 of the Code

12. A time line was produced by both parties in relation to the relevant events and correspondence, neither of which was contested in terms of accuracy by the other party. Events began as far back as September 2008 when the Applicant complained to Brendan McCaughey, the Respondent's property manager, about rain ingress into the Property. The mandate appointing the surveyors has been noted above. Quotes were obtained from two contractors by the Respondent in August 2010, the lowest of which was £13,783 plus VAT and outlays, including the obtaining of listed building consent. The total amount payable by the affected homeowners including the Respondent's 10% fee came to £17,974.56.

13. After the original chimney had been dismantled, the Applicant successfully obtained a grant for 40% of the approved cost of the works from Glasgow Heritage Trust ("GHT") in October 2011 which amounted to £6,948.05. As its name implies, GHT was concerned with maintaining the historical and architectural heritage of the listed building. The Committee was supplied with a copy of the enquiry form submitted to GHT. At the top of that form, it is stated: "For your property to be considered eligible for assistance it must be within one of Glasgow's twenty two conservation areas or be a category A or B listed building requiring comprehensive repairs. Additionally, the proposed works must be of a type supported by the Trust." The Committee also had sight of the grant contract signed by GHT which underscored the particular specification of works that would be supported by the grant. As the Committee understood matters, what that boiled down to was that GHT provided funds on the strict condition that the works undertaken were aimed at ensuring the restoration of the chimney in a form which was a near as possible to the original one at the Property. That is to be contrasted with the more direct aim of the Applicant and Respondent to carry out repairs so as to remedy the problem of water ingress.

14. Finally, on 19 June 2012, the Respondent informed the Applicant and the other affected owners (one of which was a shop premise) that the necessary works had been completed to its satisfaction with the implication being that the water ingress issue in the Property had therefore been resolved. Unfortunately, that did not prove to be the case and water ingress to the Property, if anything, increased after the works had been completed.

15. The alleged breach of section 2.1 of the Code fell into three parts. The first of these was in respect of the various assurances provided to the Applicant that the problem of water ingress to the property had been resolved. These were helpfully summarised in Mr Dundas' letter dated 12 December 2013 to Mrs Irene Devenny, the Respondent's Managing Director. The Applicant's clear position in evidence was that those statements were misleading or else false as was evident by the fact that the dampness persisted at the time the statements were made and still remained the case as at the date of the hearing.

16. The second such statement, related to the first, was the constant assurances by the Respondent that the walls in the property simply needed to dry out. These assurances were made despite the continuing water ingress in the spare room of the Property being clearly apparent to the Applicant and her husband and having been complained about on many occasions and evidenced by photographs. This was also in spite of the Applicant taking precautions such as opening windows, installing a dehumidifier and using a hydrometer to measure levels of moisture in the second room which showed up to 50% humidity after rainfall. The Applicant did not consider the mis-statements to have been deliberate, but rather were provided by way of excuse to put them off and to delay in resolving the issue.

There was, it was said, no rationale for the statements complained of, given the continuing problem with water ingress.

17. Finally under this heading, the Respondent asserted that the fact that the correct action had been taken by them was supported by the fact that GHT had provided a grant towards the cost of the works to the common chimneys in October 2011. This was stated to have been a misleading statement as the GHT grant had only been obtained after an application by the Applicant after April 2011 and was only in respect of the specification of work required after the chimney had been taken down in order to restore it to its original condition as part of the listed building. The GHT grant was not, therefore, affirmation that the Respondents had taken the correct action to resolve the water ingress issue. That was an inaccurate statement in itself, whatever else might be the case about any proposed solution to the problem, (that potentially being a matter for proceedings in a different forum).

18. In response, Mr Gilroy gave evidence regarding his involvement. He is a Director of Ross & Liddell Surveying Limited as well as a Director of Ross & Liddell Ltd, the property factor responsible for the maintenance of the property. Following the mandate referred to above, he acted a property manager of the Property as well as the relevant surveyor during the period in question. In response to the first part of the complaint under this heading, he pointed out that the quotations provided in the Applicant's letter of 12 December 2013 were expressions of hope, not assertions of fact. For example, in his communication of 5 September 2013, Mr Gilroy was quoted as saying "When these joints are remade, *in all probability* the problem of 'water' ingress *should* be eliminated." The qualifying words used (italicised here) showed that nothing more than opinion was being provided. The other excerpted quotes used were similarly qualified and were therefore not misleading.

19. In relation to the second head, Mr Gilroy pointed out that the chimney had been damp to the point of saturation for a considerable period of time, so much so that it had disintegrated upon removal in 2011. In his experience, it was common for there to be continuing dampness in such situation which may take many years to dry out. The assurances that drying out was all that was necessary was an appropriate professional assessment or fair comment at the time. It was only in hindsight that such a view could be seen to have been wrong. Until such time as it was shown that water was still getting into the Property with fresh dampness traced and that more than mere drying out was necessary, what he had stated had been a reasonable view to have taken and therefore to have relayed to the Applicant and Mr Dundas.

20. In relation to the third head, Mr Gilroy pointed to a letter dated 17 December 2013 from Mrs Devenny to Mr Dundas in response to his letter of 12 December, the first paragraph of which was in the following terms: "Glasgow Heritage Trust who provided 40% funding towards the cost of re-building the chimneys, from their

inspection and the evidence presented confirmed that the chimneys required re-building. And, as you correctly advise, in June 2012 the chimneys were inspected by Glasgow Heritage Trust and independently confirmed as being satisfactorily re-built." That statement taken on its own is a correct statement of fact. However, as narrated above, the Committee was of the view that the aims of GHT were in fact somewhat narrower than those of the Applicant and Respondent. In an earlier letter from Mrs Devenny to Mr Dundas dated 22 November 2013, the following statement was made: "This conclusion [i.e. the Respondent's overall proposed solution to the problem of water ingress as discussed in the previous paragraph of the letter] was effectively independently confirmed by Glasgow Heritage Trust who provided 40% funding towards the cost of rebuilding the chimneys. If the chimneys did not require re-built no grant funding would have been offered."

21. The Committee accepted the evidence of Mr Gilroy in relation to the first two parts of the complaint in relation to section 2.1 of the Code. It did not consider the respondents to have made deliberately misleading or false statements in relation to the water ingress issue being resolved or the need for the walls of the Property to dry out. Having said that, it did consider the third part of the complaint under this head to have been well founded. It was the view of the Committee that the assertion made in the letter of 22 November 2013 was misleading. As noted above, the focus of GHT was the aesthetics and conservation aspects of the chimney which arose after the chimney had been taken down. It did not support the Respondent's view regarding the necessity of taking down the chimney or any other ancillary works which were aimed at preventing water ingress. That was a decision for the Respondent alone. Whether the approach taken was negligent or not is not for the Committee to consider, but it was of the view that the allocation of a grant by GHT ought not to have been prayed in aid of its own actions in the course of correspondence to the Applicant as homeowner. Accordingly, the Committee finds the Respondent to have breached their duty in terms of section 2.1 of the Code not to provide information which is misleading or false in that respect.

Section 2.5 of the Code

22. A clear example of the Respondent's failure to respond to enquiries and complaints within prompt timescales is contained within the Applicant's letter of complaint to Mrs Devenny dated 12 November 2013. In the fifth paragraph thereof, the Applicant details a visit by Mr Gilroy to the Property on 28 June 2013 (following a letter of complaint sent on 26 June 2013) which led to a promise by him to keep the Applicant updated as to progress. A holding email was sent by the Respondent on 10 July 2013 which prompted a chasing email from the Applicant on 18 July 2013 seeking a substantive response. No reply was received to that reminder and it took a phone call from Mr Dundas to the Respondents on 4 September 2013 before an email response from the Respondents was received the following day, although a further inspection by Mr

McCaughey had also taken place on 3 September 2013. There was therefore a ten week gap in which nothing was achieved according to Mr Dundas.

23. Prior to that, Mr Dundas gave evidence of Brendan McCaughey having visited the Property on 12 January 2013, after he which he promised that a report would be forthcoming after consulting with his colleague (Mr Gilroy). That lapse in communication had been presented to the Committee as a failure in terms of section 2.1 of the Code. The Committee did not consider that to have been a misleading statement but was one which could be characterised as evidence of undue delay in terms of section 2.5 of the Code. Mr Dundas indicated at the hearing that he was content for the Committee to also consider those facts in that particular context.

24. Mr Gilroy in his evidence pointed to a brief email dated 12 February 2013 from Mr McCaughey to the Applicant summarising the outcome of the visit that day. In that five line communication he detailed difficulty in obtaining access to the louvre vent grill in the bedroom and suggested waiting 6-8 weeks for signs of the wall drying out. Evidently, the Applicant was expecting a more substantive report based upon her discussions that day with Mr McCaughey which gave rise to that specific complaint before the Committee. Aside from that emailed report, Mr Gilroy indicated that there had been considerable difficulty in gaining access to the roof in order to inspect the chimney, due in part to the neighbouring proprietors having lost the keys to the roof hatch. He also cited a wish on the part of the Applicant not to be disturbed during that period on account of her pregnancy.

25. The whole issue of delay was summed up by Mr Dundas who pointed out that the Respondent had signed off the works as having been carried out to their satisfaction on 19 June 2012, but that no substantive action was taken until September 2013, a total of 66 weeks later. That period was characterised by a failure on the part of the Respondents to respond adequately to complaints made of continuing and increasing dampness despite precautions having been put in place by the Applicant, and of failure to take remedial action. That characterisation was firmly refuted in evidence by Mr Gilroy.

26. The Committee had sympathy with the Respondent regarding difficulties encountered with roof access and other factors preventing it from taking action which were beyond its control. The Committee also acknowledges that there was to a certain extent ongoing dialogue between the parties during the 66 week period cited by Mr Dundas. However, the overriding impression which the Committee had was one of a failure on the part of the Respondent to keep the Applicant properly informed of progress and to take appropriate action promptly. It considered that the Applicant was frequently required to chase the Respondent regarding progress in relation to works which were acutely affecting her quality of living, rather than the Respondent operating proactively to keep abreast of matters.

27. The Committee noted that the Applicant had advised of damp staining on the walls of the spare bedroom and to very high levels of moisture being recorded very shortly after the works had been signed off by the Respondent in June 2013. It considered that despite the precautions taken by her regarding ventilation and the installation of a heater and industrial dehumidifier, the Applicant's concerns were not taken seriously enough during that 66 week period. It ought to have been clear prior to September 2013 that the Applicant was correct in asserting that the problem of water ingress had not been addressed and that more robust action required to be taken by the Respondent to attempt to combat the continuing problem. Accordingly, in the circumstances the Committee finds the Respondent to have breached its duty in terms of s 2.5 of the Code to respond to enquiries and complaints received within prompt timescales.

Section 7 of the Code

28. Section 7.1 of the Code requires property factors to have a clear written complaints procedure which sets out a series of steps with reasonable timescales which they will follow. That obligation is linked to the requirement of section 1 of the Code to provide homeowners with a copy of the factor's in-house complaints procedure. At part D of section 1 of the Code, it is specifically provided that factors' in-house complaints procedures may also be available online (by which it is taken to mean, as an *alternative* to providing it in hard copy form within the Written Statement of Services, rather than *in addition* thereto).

29. The Respondent's Written Statement of Services under the heading "Complaints Procedure" states "we have therefore put in place a defined complaints procedure with a view to investigating and resolving clients' concerns quickly and effectively." The Committee noted that the Respondent's Written Statement of Services did not itself contain a stepped procedure for the escalation of complaints within reasonable timescales as required by the Code. At its own instance, the Committee obtained a copy of the Respondent's complaints procedure from its website. That provides a stepped procedure requiring homeowners to submit details of complaints to the property manager concerned, thereafter to named individuals depending upon the geographical region and finally to Mrs Irene Devenny, Managing Director. Details of how an application may be made to the Homeowner Housing Panel are also provided where complaints still remain unresolved.

30. The Respondent has therefore complied with section 7 of the Code at least in formal terms. The Committee noted however that in his email of 26 June 2013, Mr Dundas concluded with the following paragraph "Can I please request a formal response from senior management within Ross & Liddell, which details exactly what you are proposing to do, and within what timeframes to address the situation." That statement encapsulates what section 7 of the Code seeks to provide by way of procedure. As note above, Mr Dundas entered into direct correspondence with Mrs Devenny. However, it did not appear to have resulted

from a systematic application of a stepped complaint escalation procedure. Indeed, Mr Dundas' letter of 26 June 2013 was never acknowledged by the Respondent as being a formal letter invoking its in-house complaint procedure. The Committee therefore considers that the Respondent did not actually *follow* the written complaints resolution which it had in place as required by section 7.1 of the Code. The involvement of Mr McCaughey, Mr Gilroy and Mrs Devenny appear to have taken place in an *ad hoc* fashion, rather than as part of an identified complaints procedure which was commenced and then followed through in progressive stages. It therefore finds that the Respondent to have breached section 7.1 of the Code to that extent.

31. Given the technical nature of the breach of section 7 of the Code as found by the Committee, it is not considered necessary to include it within a Property Factor Enforcement Notice. It is recommended, however, that the Respondent considers including the complaints procedure within its Written Statement of Service in order to provide greater clarification to homeowners. The Committee also considers that internal guidance would be helpful to enable property managers and management within the Respondent's organisation to recognise formal complaints when they are made and to institute progressive steps aimed at their resolution.

32. Finally, the Committee noted the submission of the Applicant that in all of the six years since the problem with the roof at the Property has surfaced, there has never been any form of admission from the Respondent, whether by apology or otherwise, that the works to the roof have not been successful or that the problem has not been resolved, despite them having been paid for their services during all of that time.

Decision

37. In all of the circumstances narrated above, the Committee finds that the Respondent has failed to comply with its property factor's duties in terms of section 14(5) of the Act in respect of sections 2.1, 2.5 and 7 of the Code.

It has therefore determined to issue a Property Factor Enforcement Notice which will follow separately.

38. **Appeals**

The parties' attention is drawn to the terms of s 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..."

Maurice O'Carroll

Signed **Date** 4 July 2014

Chairperson