hohp

PROPERTY AT FLAT 8, 112 HILLPARK GROVE, EDINBURGH EH4 7EF

The Parties:-

The homeowner – Mr Michael Sturgeon ("the applicant")

The property factor – Charles White Ltd ("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")

Case reference: HOHP/PF/16/0098

Committee Members

Richard Mill (Legal Chairperson)
Ian Murning (Surveyor Member)

Decision of the Committee

The committee unanimously determined that the respondent has complied with all sections of the Code of Conduct for Property Factors.

Procedural Background

The homeowner made application to the Homeowner Housing Panel in terms of an application dated 4 July 2016 which was received on 6 July 2016. On 8 July 2016 a decision was made under Section 18(1) of the Act referring the application to Homeowner Housing Committee.

A Direction was issued dated 21 July 2016 seeking a copy of the relevant Written Statement of Services and relevant Deed of Conditions for the development within which the applicant's property is situated. This was complied with.

Hearing

The oral hearing took place on 15 September 2016 at George House, 126 George Street, Edinburgh EH2 4HH.

The applicant appeared personally and represented himself. The property factor was represented by David Hutton, Director, Fraser McIntosh, Development Manager, and Karen Jenkins, Line Manager.

Findings in Fact

1. The applicant is the homeowner of Flat 8, 112 Hillpark Grove, Edinburgh EH4 7EF ("the property").

2. The property forms part of the Hillpark Brae Development completed by Mactaggart & Mickel ("the development") which lies to the east of Corstorphine Hill, Edinburgh.

3. The development comprises both individual dwelling houses and blocks of apartments. The applicant's property is a third floor flat.

4. The common areas of the whole development are managed and maintained by a property factor.

5. The property titles which apply to the development included Deed of Conditions which sets out the arrangements for the management of the development by the property factor.

6. The respondent has been the relevant property factor for the development throughout its existence.

7. The respondent became a registered property factor on 7 December 2012 and accordingly their duty under Section 14(5) of the 2011 Act to comply with the Code arises from that date.

8. The property factor issued a Written Statement of Services for the development to homeowners in June 2014. Their responsibilities to maintain and repair the common parts of the block include the lift shaft and the lift. This is set out within the Written Statement of Services.

10. Fraser McIntosh who is employed by the respondent is the relevant property manager for the development.

11. Following a tendering process in 2015, a majority of relevant owners (five of nine) opted for the contract tendered provided by Otis.

12. The contract with Otis commenced on 19 January 2016 for an initial term of 3 years. Otis are obliged to respond to a trapped passenger within 60 minutes and respond to a breakdown within 240 minutes.

13. On 20 May 2016 another owner occupier within the development, namely Fiona Donaldson, became trapped in a lift within the development. This was at around noon. Initial calls via the emergency telecom system within the lift to Otis did not achieve an immediate response from an engineer. Accordingly further calls were made by the said Fiona Donaldson to the respondent's organisation. The respondent communicated with Otis and an engineer was made available. The engineer did not arrive until 2.45 pm, some 2 hours 45 minutes after the said Ms Donaldson initially raised the alarm.

14. The respondent does not have keys to the lift room directly available on site on the development. This is a habitual practice and ensures that free access is not afforded to anyone unless properly authorised. The respondent keeps keys to the lift room within their own office. Those keys are available 24 hours a day 7 days a week. The keys for the lift room within the applicant's development had, in fact, been missing from the respondent's office for some time and, at least, since January 2016 when Otis took over the contract. The keys are understood to have been held by the former lift maintenance company and not returned. As a consequence entry to the lift room was delayed for the purposes of carrying out repair items to the lift. The respondent arranged for the locks to the lift room to be changed. This caused a delay for the repairs to be undertaken by a few days.

15. The respondent has taken the matter up with and complained to Otis regarding their delayed response within the development on 20 May 2016. Following initial informal correspondence a formal complaint was issued in writing dated 9 June 2016. No response was received. The respondent pursued Otis further by way of email communication on 5 July 2016 and again on 13 July 2016. The respondent further pursued relevant individuals in Otis for a response to their complaint by way of email dated 8 August 2016. An emailed response from Otis was received by the respondent on 11 August 2016. This did not comprehensively respond to the concerns and enquiries set out in the originating formal complaint of 9 June 2016. The applicant was advised that this response had been received, but not provided with a copy of it. The respondent has pursued Otis further in writing and in addition to telephone calls seeking to elicit a response, a more formal item of correspondence was issued on 31 August 2016 advising that the respondent intends to instruct their solicitors to pursue the matter if an adequate response is not received. To date Otis have not responded.

16. The property factor has a 24 hour a day 7 day a week emergency telephone number which is handled by an experienced property manager in order that the homeowners can make contact with them.

Reasons for Decision

The committee was satisfied following the Hearing that they had sufficient evidence both in the form of written papers available and having heard from parties in order to reach a fair determination of the issues raised in the application.

The applicant raises a succinct number of issues within the application of relevance to Sections 2.1, 2.5 and 6.2 of the Code. These are in the following terms:-

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

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 as fully as possible, and keep homeowners informed if you require additional time to respond. Your response time should be confirmed in the Written Statement.

6.2 If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out of hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs, wherever possible.

The applicant gave evidence and made submissions in respect of all three aspects of the Code. The respondent's representative similarly gave evidence and made relevant submissions.

2.1

The applicant stated that there had been a miscommunication issued by the respondent on 21 July 2015, some 10 months before the lift incident. Correspondence had been received by him from the respondent, at that time, advising that all relevant information and contact details and reference numbers for the new lift contractor, namely Otis, would be provided at the time of the changeover. This information had not, in fact, been supplied in January 2016.

The committee concluded that undertaking to provide this information and then not providing it is not misleading or false. It was an undertaking which was never fulfilled. When one looks at the type of information which was to be conveyed, which was not, it was of minimal value and no prejudice has been sustained by either the applicant or any other homeowners. The applicant had not, until the hearing, specifically asked for this information. Such information is now in his possession as it is disclosed within the papers for this process.

The applicant also relied upon the terms of an email dated 25 May 2016 sent to himself from the respondent's representative, Fraser McIntosh. He stipulated that two elements of the email were misleading or false. The first concern of the applicant related to the comment within the email that "Otis are fully aware of the availability of the keys, even in an out of hour's situation". As it happens the keys, as identified within the committee's earlier findings, were not held within their office. This was however the belief of Mr McIntosh and the respondent's organisation at large when the email had been written. This is the usual practice and procedure of the respondent. Neither Mr McIntosh nor the respondent were providing information which they knew to be misleading or false. The statement was made to reflect their usual practice.

Another aspect of the said email relied upon by the applicant, was the suggestion that the lift remained out of action to enable the repair to be undertaken safely by Otis. Instead the applicant asserted that the delay was as a consequence of the missing keys. Whilst the missing keys certainly delayed the repair by a short period of days, the repair itself would have taken some time to complete and the statement relied upon by the applicant within the said email was of a generalised nature, again to reflect usual practice and

it is obvious to the committee that there was no intention to mislead the applicant or to provide false information to him.

2.5

The applicant expressed serious concern that some 4 months after the event no adequate explanation has been provided to him for the Otis failures on the day that his neighbour, Ms Donaldson, was trapped in the lift. His view is that the respondent ought to have been able to have all their questions answered by now and resolved any issues which arise. The applicant accepted that his own correspondence with the respondent had been timeously responded to albeit that some components of his correspondence had not been replied to in detail, but only as a consequence of the respondent not having the information to enable them to do so.

The committee is entirely satisfied that the respondent has responded appropriately and timeously to the applicant. The applicant has been kept up to date with the endeavours made by the respondent to pursue Otis in respect of the evident failures on the part of that third party contractor. The committee are unable to identify what additional steps the respondent could have taken to meet the additional expectations of the applicant.

6.2

The applicant's position in respect of this aspect of the Code is that the respondent is equally liable and culpable, along with the third party contractor Otis, in failing to meet homeowners' expectations. The applicant's basis for this is that the appointment of the third party contractor has been made by the respondent. This reasoning is flawed.

Third party contractors and, in this instance Otis, were appointed by the property factor on behalf of the applicant and all other homeowners after a tendering process and after a majority of relevant owners voted in favour of the appointment. The respondent is acting as an intermediary to arrange for the contract to be put in place. This is one of the services which they provide. The respondent is not culpable for failings on the part of third party contractors such as Otis. The respondent has an adequate system in place to address emergencies. There is no issue which arose here for Otis, when they did arrive, to access the lift to enable Ms Donaldson to be released. There is no prohibition of access for the emergency. There was a delay thereafter in terms of access to the lift room but this was not an emergency repair. In any event, it is clear on the basis of the evidence that the respondent does have in place a system and procedures for dealing with all emergencies.

Discussion and Observations

It is clear to the committee that Otis failed to respond to the emergency call made by the applicant's neighbour, Ms Donaldson, when she was trapped in the lift on 20 May 2016. The respondents are not responsible for that. When the respondents were

directly contacted, they immediately took steps to contact Otis as a consequence of which a relevant engineer attended and Ms Donaldson was released from the lift.

For the foregoing reasons set out within this Decision, the committee is satisfied that the respondents have complied with the Code of Conduct for Property Factors. The committee formed the impression that the applicant is disgruntled generally with the services provided by the respondent and, indeed, the applicant was candid enough to indicate that though he was unable to prove it he feels that the respondent has not acted in good faith. The committee do not share that view and on the basis of the totality of the evidence, finds that the respondent has acted in good faith in their dealings with the applicant and other homeowners.

The respondent does appear to have failed in that the lack of keys for the lift room was something which was not identified for a number of months. The keys to the lift room were missing for a period of at least between January 2016 and May 2016 and accordingly access to the lift room throughout that period of time would not have been possible. This appears to have occurred as a consequence of the former lift maintenance company retaining the keys erroneously. Notwithstanding that the respondent had a duty to ensure that that matter was identified within a reasonable period of time. Presumably this should have been detected at an earlier stage when an inventory was taken of keys for all access purposes on all developments. It is perhaps regrettable that the matter had not been identified earlier and the consequences in the view of the committee are that the longer-term repairs to the lift were delayed by some 3-4 days. This failing on the part of the respondent is more in keeping with a failure of their general duties – something which the respondent has not complained of – rather than a breach of the Code of Conduct.

The respondent had candidly accepted their failure in respect of the keeping of the keys at an earlier stage before the committee hearing and sincerely apologised for these circumstances. This sincere apology was reiterated personally to the respondent throughout the course of the hearing before the committee.

In all of the foregoing circumstances, the committee does not make any Property Factor Enforcement Order.

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.

Signed
Chairperson

Date 20 September 2016