Housing and Property Chamber
First-tier Tribunal for Scotland

Notice of proposal to make a Property Factor Enforcement Order made under Section 19(2)(a) of the Property Factors (Scotland) Act 2011 ("the Act") following upon a Decision of the Housing and Property Chamber First-tier Tribunal for Scotland in an application under Section 17(1) of the Act

Case reference: HOHP/PF/16/0107

Re:- 39D Ettrick Terrace, Johnstone PA5 0NS ('the property')

The Parties:

MCV Properties Ltd ('the homeowner');

and

Linstone Housing Association ('the property factor')

Tribunal members:

Richard Mill (legal member) and Colin Campbell (ordinary member)

This document should be read in conjunction with the Committee's Decision under Section 19(1)(a) of the Act of the same date.

The Committee proposes to make the following Property Factor Enforcement Order ("PFEO"):

"Within 8 weeks of this Decision being issued to the parties, the respondent must:-

1. **Cancel/credit the charge previously made to the applicant's factoring account to the extent of £406.**

2. **Prepare a schedule of proposed staff training to ensure that all relevant staff within their organisation are fully aware of the respondent's obligations which arise both in terms of the Code of Conduct and their general duties as Property Factor, and to evidence said compliance by way of Certification by the respondent's Chief Executive.**

3. **To deliver to the Applicant (and copy to the Tribunal) a full detailed technical specification of all of the external wall**

insulation works undertaken affecting the property, together with full technical specifications of additional work undertaken at the time of the insulation works such as guttering and re-painting works, and to supply additionally all relevant Building Warrants, Structural Engineer and Architect Reports, together with vouching in respect of all relevant Warranties."

The intimation of the Committee's Decision and this notice of proposal to make a PFEO to the parties should be taken as notice for the purposes of Section 19(2)(a) of the Act and parties are hereby given notice that they should ensure that any written representations which they wish to make under Section 19(2)(b) of the Act reach the Homeowner Housing Panel's office by no later than 14 days after the date that the Decision and this notice is intimated to them. If no representations are received within that timescale, then the Committee is likely to proceed to make a property factor enforcement order ("PFEO") without seeking further representations from the parties.

The property factor should note that failure without reasonable excuse to comply with a property factor enforcement order is a criminal offence in terms of Section 24 of the 2011 Act. Additionally, Scottish Ministers can take any failure into account in respect of the future registration of the respondent on the Register of Property Factors.

Legal Member Signature R Mill Date 3 February 2017

Decision of the Homeowner Housing Committee issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011 and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

Case reference: HOHP/PF/16/0107

Re:- 39D Ettrick Terrace, Johnstone PA5 0NS

The Parties:-

MCV Properties Ltd ('the homeowner');

and

Linstone Housing Association ('the property factor')

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

Tribunal Members:

Richard Mill (legal member) and Colin Campbell (ordinary member)

Decision

The Tribunal unanimously determined that:

i. The respondent has breached Sections 2.1, 2.4 and 3.3 of the Code of Conduct for Property Factors.

ii. The respondent has breached their duties as Property Factor by acting without authority.

Background

The title to the property at 39D Ettrick Terrace, Johnstone, is held by MCV Properties Ltd. The application has been made by Lynne McArthur, a director of the company. References within this decision to "applicant" refer to both MCV Properties and Lynne McArthur.

The application was made to the now former Homeowner Housing Panel whose functions are now the responsibility of the Housing and Property Chamber, First-tier Tribunal for Scotland.

The applicant complained that the respondent had breached the Code of Conduct for Property Factors ("the Code"), specifically sections 3.3, 6.1, 6.4, 6.7 and 6.9. No complaint was made regarding the respondent fulfilling their duties.

The applicant's complaints arise from the respondent's instruction of a wall insulation programme within the development in which the Property is situated. The respondent is a large community based Housing Association. The respondent manages properties within the development in which the Property is situated on behalf of both private owners and the association's own tenants. They act as Property Factor in respect of the privately owned properties.

In 2013, the respondent selected the energy company, E.ON, to embark upon a large scale project which would cover approximately 1,800 properties managed by them across a number of residential developments. In accordance with the Energy Company Obligations (ECO) introduced by the Government, E.ON were to provide significant funding towards the work with the remainder of the costs being covered by the respondent for their own tenants and, in the case of private owners additional funding was made available through the Scottish Government's Home Energy & Efficiency Programme Scotland Area Based Scheme (HEEPS ABS). The respondent secured funding on the usual basis, namely that the 5% VAT element was not recoverable and had to be paid by the private owners themselves. The works related specifically to external wall insulation works. The primary costs for private owners were met entirely. The respondent required to bear approximately 50% of the principal costs in respect of their tenanted properties.

The applicant's complaints originate from the respondent's alleged failure to take instruction from the applicant; instead liaising and taking instructions from the applicant's tenant and/or letting agent. The applicant complains that they were not provided with information regarding the works to be undertaken and given no opportunity to agree or disagree to the works. They subsequently failed to receive an adequate and detailed breakdown of the charges in respect of the works completed.

Upon consideration of the papers the Tribunal issued a Direction dated 3 November 2016 requiring the respondent to produce a copy of the relevant title deeds and a copy of their written statement of services. This was complied with and the documents were received on 20 November 2016.

An initial hearing was assigned on 8 December 2016. The applicant stated shortly in advance of that hearing that she had not received prior communications and was accordingly not prepared for the hearing. In the circumstances the hearing was postponed and a fresh hearing fixed for 20 January 2017.

Additional enquiries made with the applicant prior to the Hearing fixed on 20 January 2017 revealed their unavailability. By e-mail of 12 January, the applicant acknowledged that their non-attendance could potentially hinder their case.

However, they stated they had spent a considerable amount of time in preparation and did not feel they could add anything in writing that had not already been covered.

The Tribunal had regard to the fact that this was to be the second occasion which the applicant was not able to participate in the Oral Hearing assigned. Regard was had to the statement that all relevant documents and representations had been submitted on behalf of the applicant. In the circumstances, and having regard to the interests of justice, the Tribunal directed that the Oral Hearing fixed to take place on 20 January 2017 should proceed. It was acknowledged that the applicant would not be present. It was made clear that the applicant could make arrangements for any other representative to attend or be present should they wish. The Tribunal required the respondent to be in attendance and be represented in order that the Tribunal could make relevant inquiry into the facts in order that the reference could be determined fairly.

Hearing

As expected the applicant was not present. No one attended to represent their interests. The respondent was represented by Gary Dalziel, Director of Finance & Corporate Services, and David Adam, Director of Housing & Property Services; both of Linstone Housing Association.

Inquiry was made with the respondent's representatives in attendance. An opportunity was thereafter afforded to the respondent's representatives to make any other representations and submissions. An undertaking was given to the Tribunal that a copy of the relevant Factoring Agreement, which had not been produced, would be submitted by the end of the day of the Hearing. The Tribunal reserved their decision.

The Factoring Agreement together with additional documentation was subsequently received and considered. This was copied to the applicant. Exchanges of views of the parties received subsequently were recorded. All of this additional documentation and correspondence was considered along with the principal papers which had been available for the Hearing.

Findings in Fact

1. The respondent is a Housing Association created following a stock transfer from Scottish Homes. In addition to being a landlord the respondent also acts as Property Factor to a substantial number of private owners within larger units which the respondent has the majority ownership of. The respondent is a "not for profit" organisation.

2. The respondent is a registered Property Factor, registered number PF000202.

3. The respondent has issued a generic Written Statement of Services applicable to their entire housing stock.

4. In terms of the Written Statement of Services, the respondent has an imposed ceiling of £400 per dwelling house in respect of routine maintenance and repair work. In the event that works are required to the block under the factoring service which will cost more than £400 per dwelling house, the respondent has an obligation to write to all owners within the block in order to obtain an agreement of a simple majority of owners prior to works commencing. The only exception is in the event of emergency work being required.

5. The respondent entered into contractual obligations with E.ON to carry out energy efficiency works throughout their entire housing stock. They made arrangements for such works to be completed to both their rental stock and to the properties which were privately owned. The respondent has an interest in approximately 2,100 properties of which approximately 1,300 are owned by them and tenanted, and approximately 800 which are privately owned and which they factor.

6. On 18 December 2013, a letter was issued by the respondent to the applicant in respect of the proposed wall insulation work. The applicant claims not to have received this letter. The suggestion made within the correspondence was that a failure to "sign up" to the funding may result in the applicant being liable for their full share of the works costs.

7. On 26 November 2015, the applicant's tenant, Nicola Meikle, who resides within the property, entered into a contract with E.ON in respect of the wall insulation work planned.

8. The relevant wall insulation programme affecting the property was undertaken and completed over the period July to September 2015. Additional works were also undertaken at the same time at no additional cost to private owners, including the applicant, which included repairs and renewals to gutterings and re-painting works.

9. The applicant was invoiced in respect of the VAT element liable to be paid in respect of the insulation works undertaken within an invoice covering the period 01/06/2015 to 30/11/2015. The relevant entry pertaining to the work is dated 30/11/2015 and is described as "Various ECO Work". The amount as specified is £406 and is specified as a 100% share. The date of the invoice is 25/04/2016.

10. The applicant has questioned the charge incurred by them in the sum of £406.00. The nature and extent of the works has been questioned and the respondent's authority to instruct the works. The respondent has not provided satisfactory answers to the applicant's questions and their response, at times, has been misleading.

11. The respondent did not have authority to instruct the wall insulation works in respect of the applicant's property. The applicant did not instruct the works.

12. The insulation works carried out have enhanced the property. The property is more energy efficient. Energy bills incurred within the property will be reduced as a consequence of the insulation works carried out. The insulation works have added value to the property. The applicant has also benefited from other additional works being undertaken at the same time as the insulation works at no cost to them. The respondent has also benefited from the co-operation of the owners of the properties which they do not own as without the involvement of all owners of the residential units the energy efficiency works would not have been capable of being carried out.

Reasons for Decision

The Tribunal was satisfied that it had sufficient evidence to come to a fair determination on the application.

The Tribunal found the representations made by those in attendance representing the respondent's interests at the Oral Hearing somewhat confused. Their stated position in respect of the respondent's authority to act in respect of the wall insulation programme which related to the applicant's property was unclear and inconsistent. In total five possible alternatives were relied upon for their authority to act (as detailed below). This similar approach is seen in the written communications between the respondent and the applicant in the papers available for review lodged by both parties.

The respondent had failed to lodge in advance of the Hearing, a copy of the relevant Factoring Agreement upon which reliance is made for their authority to act. This is surprising. The respondent's representatives were unable to provide clarity and details to the precise specific costs per housing unit regarding insulation works, nor were they able to provide clarification as to the total value of the energy efficiency project, despite this being a significant scheme involving the management of millions of pounds of public money. Again this is concerning.

The Tribunal's general impression is that the respondent acts as a reluctant Factor and principally sees themselves as a landlord protecting their own interests as a Housing Association and the interests of their own tenants.

The respondent's principal focus in their representations and submissions was to the effect that the applicant had substantially benefited from the energy efficiency works at very little cost - namely only the 5% VAT element, and as a consequence of the benefits to them there should be no complaint. It seems little consideration had, in fact, been given either at the time or throughout the duration of this reference before the Tribunal as to their relevant authority to act.

The respondent's representatives were candid enough to admit that at the time of the insulation works being instructed and managed, matters were somewhat muddled. They personally did not have experience of such a large project of this type. The general impression formed by the Tribunal was that the respondent was at all times keen to ensure that their own housing stock benefitted from the relevant grants available to them as a Housing Association which was to also benefit their own tenants and it was this that was driving their actions. The respondent's

representatives admitted that there was a considerable degree of pressure in terms of timescales involved with the physical funding year or year often becoming available in the form of grants in the month of July, but with the requirement to have the monies spent by September of the same year. This could only be done in the eventuality of each and every individual housing unit electing for the work to be done. This, of course, was easy for the majority of the units which the respondent owns but was somewhat more difficult in respect of the privately owned properties, many of which are owned by absent landlords with the properties tenanted.

The five stated bases which the respondent has relied upon for their authority to act are:-

i. At the Oral Hearing the respondent's representatives relied upon the Deed of Conditions granted by Scottish Special Housing Association in 1973. Although not fully vouched, the Tribunal accepts that the interests of said association have ultimately transferred in respect of the relevant property to the respondent. The said Deed of Conditions entitles work to be undertaken within the respondent's sole discretion, but restricted to "maintenance, repair and renewal". The energy efficiency works are not, in the view of the Tribunal, of such a nature. The Deed of Conditions does not provide authority to the respondent. In any event it is untenable to suggest that the respondent retain sole responsibility to instruct such major works costing some £8,000 to a private owner regardless of whether or not grant funding was to be available.

   Following the Oral Hearing a copy of a Feu Disposition by Scottish Special Housing Association granted in 1988 was produced. This was the relevant break-off Deed in respect of the disponing of the applicant's property. A schedule was annexed to the Disposition which set out the arrangements for the appointment of factor and administration of the factoring conditions. Given the importance of this document it is disappointing that the respondent had not adequately prepared the case and lodged this in advance of the Oral Hearing. The powers of the factor are contained within Clause (b) of Part II. The respondent failed to produce the whole document. The Tribunal is satisfied that the Deed does not afford the respondent the authority to instruct £8,000 of insulation works as they have done.

ii. The Factoring Agreement. Documentation provided after the Oral Hearing from the respondent vouches the fact that an initial £250 limit was set in respect of charges to be incurred in respect of core services. This was increased to £400 from 1 January 2002. The Factoring Agreement is now somewhat aged and, to some extent, has now been superseded by the Written Statement of Services issued by the respondent following the introduction of the regulation of property factors. The terms of this are similar in terms to the Written Statement of Services and provide a ceiling on the cost of the works to be carried out under the respondent's delegated authority. This delegated authority did not entitle the respondent to instruct the works

iii. It was suggested that the insulation works carried out were deemed by the respondent as being "essential maintenance work". The works were clearly not essential and an attempt to rely upon an emergency scenario is not tenable and this does not provide authority to the respondent to carry out the work.

iv. It was suggested that the works were of a minimal nature of some £400 and therefore within the respondent's delegated authority arising from the Written Statement of Services. The unit cost to the applicant in respect of the principal work is some £8,000. The fact that the applicant is simply being charged the VAT element which is a much lower figure is irrelevant. In any event that VAT figure is in excess of the £400 ie £406. Such delegated authority stipulated within the Written Statement of Services does not provide the respondent's authority.

v. It was suggested that the respondent was casting the majority votes to carry out work in excess of the delegated authority limit of £400. It was suggested in the oral evidence of the respondent's representatives that as the work did exceed the £400 threshold then they were exercising their majority vote to have the relevant work carried out. By further explanation it was accepted that no such formal process of vote gathering or vote casting was carried out and therefore this does not provide authority to the respondent.

The applicant alleged that the respondent breached Sections 3.3, 6.1, 6.4, 6.7 and 6.9 of the Code of Conduct.

Section 3.3 of the Code of Conduct requires the respondent to provide to homeowners a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In relation to reasonable requests, the respondent must also supply supporting documentation and invoices or other appropriate documentation. The Tribunal was satisfied that such information was not made available. The entry within the invoice in relation to the £406 did not provide sufficient detail. Even if the correspondence was entered into with the applicant, a full breakdown of the charges was not sufficiently provided standing the lack of detail regarding all of the work which was actually carried out. No originating documentation in respect of the grants made available, charges from E.ON etc have ever been vouched notwithstanding the applicant's clear desire to have further information. Reasonable requests have been made of the respondent which have not been answered adequately. The Tribunal was satisfied in these circumstances that Section 3.3 of the Code has been breached.

Sections 6.1, 6.4, 6.7 and 6.9. The Tribunal was satisfied that there had been no breach of these Sections of the Code of Conduct. The respondent does have in place procedures to allow homeowners to notify them of matters requiring repair, maintenance or attention. The respondent has a programme of works in respect of cycle maintenance. No commission fee or other payment or benefit has been

received by the respondent. There have been no defects or alleged defects in respect of any of the work carried out.

Though not raised by the applicant, the Tribunal had little hesitation in identifying that two subsections of Section 2 of the Code of Conduct had been breached by the respondent. These are Sections 2.1 and 2.4.

In December 2013, the respondent wrote to the applicant advising that failure to "sign up" to the energy efficiency scheme may result in them being liable for the full costs of the work. This is inaccurate and was accepted to be inaccurate by the respondent's representatives at the Hearing. In subsequent correspondence, both by email and letter, various representatives of the respondent's organisation stipulated to the applicant that the works were deemed essential maintenance which is evidently not the case. Inconsistent statements were made within said correspondence. Section 2.1 of the Code has been breached.

Section 2.4 of the Code requires that written approval from homeowners will be attained before providing work or services which will incur charges or fees in addition to those relating to the core service. This did not happen. This is a breach of Section 2.4 of the Code.

The Tribunal note and record that the terms of the communication with the applicant in relation to their enquiries has been less than satisfactory. A full explanation has not been given to the applicant in respect of the history and process by which the works came about and took place. No indication has been given as to the full technical detail of the works carried out - both in respect of the external insulation works themselves or extra works which are said to have been carried out at no additional cost which we are advised comprised of repairs and renewals to gutterings and decoration works. The applicant made clear in her application that she was concerned about the structure of the building and sought assurances in this respect, including making a request for relevant Building Warrants. The respondent has not made any effort to meet the applicant's requests in this respect. The respondent's representatives at the Hearing stipulated that such documentation had been validly obtained.

The Tribunal acknowledges that the applicant has had significant works carried out at no cost which is of benefit to them. This however does not justify the failings of the respondent. The respondent also has to equally understand they have been the beneficiary of private owners across their housing stock range co-operating so as to enable them as principally a Housing Association with tenanted stock benefiting significantly from the insulation programme.

The proposed Property Factor Enforcement Order to follow addresses the failings of the respondent and the individual components are proposed with the following rationale in mind:-

i. The requirement for staff training. This is proposed to be ordered as a consequence of the Tribunal's conclusions that the respondent has failed to adequately understand their obligations, both in terms of the Code of Conduct and authority to act. Appropriate and adequate staff

training of all relevant staff should ensure that there is no repetition of these failings.

ii. The Tribunal has concluded that the respondent had no authority to arrange for the wall insulation works to the applicant's property and that the applicant has no legal liability to pay the VAT element which the respondent seeks to charge them. As a consequence they should not require to pay this sum.

iii. The applicant is entitled to full information in respect of all of the works carried out and is entitled to the relevant documentary evidence in respect of the work such as the Building Warrants and Warranties relative thereto. This documentation may well be required in the event of re-sale of the property.

The Tribunal has proposed a Property Factor Enforcement Order as detailed in the accompanying Section 19(2) Notice of even date.

Appeals

A party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Legal Member Signature R Mill Date 3 February 2017