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

hohp Ref: HOHP/PF/13/0240

The Parties:-

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

Property Factor: Grant & Wilson Property Management Ltd, 5 Coalhill, The Shore, Edinburgh EH6 6RH ("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")

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

Committee Members:

John McHugh (Chairman); Sara Hesp (Surveyor Member); Colin Campbell (Housing Member).

Decision

The Committee hereby determines that the Property Factor Enforcement Order has been complied with in respect of its paragraph 1.

The Committee hereby determines that the Property Factor Enforcement Order has not been complied with in respect of its paragraphs 2, 3 and 4.

The decision is unanimous except in respect of the single matter noted below where the decision has been reached by a majority.

Reasons for Decision

The Committee issued a Property Factor Enforcement Order on 20 June 2014 ("the PFEO").

In terms of section 23(1) of the 2011 Act, the Committee is to determine whether the Respondent has complied with the PFEO.

Hearing of 10 October 2014

The Committee held a hearing on 10 October 2014 to give consideration to the extent to which the PFEO had been complied with. The Committee heard the parties' submissions on the matter. The Respondent was represented by Mr Neilly, solicitor, who appeared alone. The Applicant represented himself.

Mr Neilly sought to be allowed to lodge documents which were late in that they had not been lodged with the HOHP seven days prior to the hearing as required by Regulation 12 of the 2012 Regulations. The Applicant opposed this application. The documents in question were two emails from another homeowner within the Development which confirmed receipt of correspondence from the Respondent and a copy of a Decision on compliance in an earlier HOHP case. After careful consideration, we decided that it would be fair in all the circumstances to allow the documents to be received and considered by us. We considered, in allowing the documents to be received, that there was the potential for prejudice to the Applicant to arise. We had regard to the fact that the Applicant had not seen these documents previously and he was offered the opportunity of an adjournment to allow him sufficient time to investigate any issues arising from the documents. The Applicant indicated that he did not wish to adjourn and preferred to proceed with the hearing.

The Applicant also applied to have a document received late, being an email of 11 September 2013 by him to the Respondent. This was not opposed and we allowed the document to be received since to do so appeared fair, not least of all because the document by its nature was already within the knowledge of the Respondent.

The Committee had before it, and gave consideration to, the parties' earlier communications regarding compliance with the PFEO, including the Applicant's communications of 9 and 14 July; and 1 and 26 August; the Respondent's emails of 4 and 22 July; and 4 August and the Respondent's solicitor's communication of 9 October, all 2014.

The parties addressed the Committee by reference to each of the numbered paragraphs of the PFEO, which had required the Respondent, within 28 days, to:

1 *Apply the terms of the Deed of Conditions to its management of the Development and in particular in relation to the apportionment of common charges as required by Clause TENTH of the Deed of Conditions;*

2 *Make a payment to the Applicant of £150 in recognition of the stress and inconvenience caused to him as a result of the Respondent's failings;*

3 *Send by post to the proprietors of each and every flat in the Development and to the Medical Practice a copy of the Committee's Decision and this PFEO.*

4 *Provide evidence of compliance with paragraph 3 above by sending to the office of the Homeowner Housing Panel Certificates of Posting issued by Royal Mail.*

Adopting the same numbering, we summarise below the parties' arguments and the reasons for our decision:

1 The Respondent's submission was that there had, since the issue of the PFEO, been a change in the Respondent's treatment of the medical practice and the Development and that there was therefore compliance. The Applicant was not satisfied that this was necessarily true. He agreed that the Respondent's statements of charges now showed the correct 1/23 (as opposed to the previous 1/24) division of common charges. However, he observed that he did not have any detail of the original total cost of works from which he could satisfy himself that there truly had been a change in the apportionment arrangements between the Development and the medical practice. The actual amount charged to him for gardening had remained the same despite the change in the apportionment. He was suspicious that there may have been no actual change in arrangements. His suspicion was further raised by what he described as the unwillingness of the Respondent to display original cost information to him.

The Respondent's submission was that there had been genuine compliance and that the statements lodged which refer to a 1/23 charge demonstrated this.

After being granted an adjournment to allow him to take his client's instructions on other matters, Mr Neilly was able to advise that his clients had indicated that they would provide original cost information to the Applicant to enable him to be satisfied on the matter. While that offer was welcome and appropriate, it was not something which the Committee sought, nor something upon which it relies in arriving at the present decision.

If the Applicant remains dissatisfied by any information given to him by the Respondent, then he would be free in due course to raise a fresh application to the HOHP focused on this particular issue.

We are of the view that the available evidence indicates that there has been a change of practice by the Respondent and, accordingly, we find that there has been compliance with paragraph 1 of the PFEO. This is on the basis that there is no substantial evidence to the contrary from the Applicant but, instead, simply a suspicion on his part supported by some circumstantial evidence.

In this respect, our Decision is by majority, with the dissenting member of the Committee (Ms Hesp) considering that it would have been open to the Committee to conclude that the weight of evidence was such that it ought to have been inferred that there had not been a change of practice and, accordingly, a failure to comply.

2 The Applicant and Respondent were agreed that a £150 credit had been applied to his factoring account with the Respondent as opposed to a payment having been made to him.

The Applicant regarded this as a failure to comply with the terms of the PFEO.

The Respondent contended that the credit was practically equivalent to a transfer of funds. The sum of money was not substantial and the Applicant would soon have the benefit of the credit as charges on the account, which he would otherwise have had to settle, would quickly reach the sum of £150.

The Applicant observed that he regarded the amount as substantial and that he had in fact made payments to account such that he had not received the benefit of the credit.

Mr Neilly had produced an earlier Decision of a Committee of the HOHP where his client had been ordered to pay a sum to the homeowner in that case but where that had been achieved by a credit to that homeowners' account. The Respondent's representative had been unaware that in that earlier case the homeowner had agreed to accept a credit to her account as equivalent to the ordered payment.

We regard the position as clear. Payment was ordered and was not made. A credit entry to an account is not equivalent to payment, not least of all because the Applicant would have to wait to enjoy the benefit of the credit. We would not have regarded ourselves bound by the previous Committee's decision to which we were referred, even if it had been in point, which it was not.

We find that there has not been compliance with this paragraph of the PFEO.

3 & 4 We deal with these paragraphs together as they are so closely related.

The Applicant's position was that he had not received the letter apparently sent to all owners by the Respondent on 30 June 2014. He was not sure which of the other homeowners on the Development had. He had no way of knowing. He pointed to the fact that it was unclear what documents had been enclosed with the letter; to an apparent discrepancy regarding the dates of the letter; and that there was no evidence of posting. The Applicant had received a similar letter dated 4 July 2014 which enclosed only a copy of the Proposal to make a PFEO dated 26 May 2014. He was not satisfied that other homeowners would have received the correct enclosures, since he evidently had not done so.

The Respondent's position was that letters with the required enclosures had been sent to all homeowners on 30 June 2014 except to the Applicant, who had received his own tailored letter dated 4 July 2014. There was no evidence of posting but there was a copy of a franking receipt issued by the Respondent's own franking machine relating to the payment of postage of £1.94.

We find that the documents required to have been sent by paragraph 3 of the PFEO were not sent. The evidence produced to demonstrate compliance is not helpful. The email correspondence from Mr Ingham, a fellow homeowner, suggests that something was received by him from the Respondent although it is unclear what that might have been and Mr Neilly could offer no explanation as to why Mr Ingham

had apparently received two separate letters some time apart, which did not appear to accord with the explanation provided by his clients.

The Respondent has been the architect if its own misfortune in that its letter to homeowners dated 30 June (or 4 July) 2014 bears to enclose "a copy of the [Committee's] findings" which leaves the reader unclear as to whether the enclosure was any one of the Decision, the Proposal, the PFEO or something else.

In any event, we accept the evidence of the Applicant that the required enclosures were not sent to him as a homeowner which of itself establishes a failure to comply. We draw the inference that any letters to other homeowners would have been similarly deficient in terms of their enclosures.

We find that no evidence of posting has been produced as required by paragraph 4 of the PFEO. A single copy of a franking receipt proves nothing of relevance. It is not evidence of posting, being simply evidence of the use of the franking machine within the Respondent's own office. The Respondent's conduct in this regard demonstrates an extraordinary failure to take simple steps which could easily have been taken to achieve and demonstrate compliance. The Respondent's failure in this regard leads the Committee to infer that the Respondent has adopted an indifferent attitude to compliance with the PFEO.

We find that there has not been compliance with these paragraphs of the PFEO.

Applications to vary under section 21(1) of the 2011 Act

During the course of submissions, the Chairman observed that it appeared likely that the Committee might find that there had been a breach of the PFEO. The Chairman observed that there might be serious consequences for the Respondent were that to be the case. Mr Neilly accepted the Committee's invitation to seek his client's further instructions and thereafter volunteered an undertaking that a payment of £150 would be made to the Applicant promptly and that a fresh letter would be issued to all homeowners with appropriate evidence of posting.

The Chairman indicated that it was possible that the Committee might entertain an application to vary the time limit for compliance with the PFEO such that it be extended to include the date of any subsequent payment and posting of the further letter to homeowners. It was made clear that the Committee might not be prepared to grant such an application. The Respondent made the application. The Applicant was opposed to it.

The Committee gave careful consideration to the matter but declined to grant the Respondent's application to vary the PFEO. The Committee was unable to identify any good reason for the failure to comply within the original timescale provided by the PFEO. In those circumstances, it felt that it would not be reasonable to exercise its discretion to vary the PFEO.

The Applicant also applied at the hearing for a variation of the PFEO. He wished the payment to him to be increased by £250 to £400. He believes that his historical losses due to the apportionment practices adopted by the Respondent, while being difficult to calculate accurately, would likely amount to around £400. The Respondent opposed this application on the basis that there was no evidence of the extent of the Applicant's losses, that the application seemed to be an attempt to unravel the original decision and would be arbitrary.

The Committee gave careful consideration to the matter but declined to grant the Applicant's application to vary the PFEO. We did not consider that it would be reasonable to vary the PFEO as suggested as there was an absence of evidence of the losses to which the Applicant referred.

Factors in Mitigation

Although the Committee was not willing to exercise its discretion to vary the PFEO and thereafter find that there had been compliance with the PFEO (as varied), the Committee was pleased to observe that the Respondent had adopted a sensible approach at the hearing on 10 October by making the undertakings which it did and by providing evidence to the Committee of its compliance with those undertakings shortly after the date of the hearing. That displayed a late but welcome change in outlook by the Respondent. The Committee considers that anyone who may be required to consider this Decision and any consequences which may flow from it might properly have regard to the Respondent's actions in this respect.

Effect of Decision

Notice of the failure to comply will be sent to the Scottish Ministers in accordance with section 23(2) of the 2011 Act.

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..."

Signed ..... **Date** 11 November 2014

JOHN M MCHUGH

Chairman