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

hohp Ref: **HOHP/PF/14/0019**

Re: **Property at Flat 0/2, 22 Waverley Gardens, Glasgow, G41 2EG ("the Property")**

The Parties:-

EUGENE LOPKIN, residing at 52 Titwood Road, Glasgow, G41 2TG ("the Homeowner")

HACKING & PATERSON MANAGEMENT SERVICES, Property Factors, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ("the Factor")

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

Committee Members: Ewan K Miller, Chairperson
Kingsley Bruce, Surveyor Member
Brenda Higgins, Housing Member

Decision - Preliminary Issues

The Committee rejected the submissions of the Factor in relation to preliminary matters of competence and determined that it was appropriate for the Committee to proceed with the case on the substantive issues.

Decision - Substantive Issues

The Committee determined that there had been no breach by the Factor of Part 5.6 of the Code of Conduct for Property Factors.

Background

1. By application dated 5 February 2014, the Homeowner applied to the Homeowner Housing Panel ("the Panel") to determine whether the Factor had failed to comply with the duties imposed upon the Factor by the Property Factors (Scotland) Act 2011 ("the Act").

2. The application by the Homeowner alleged a failure on the part of the Factor to comply with the Code of Conduct for Property Factors ("the Code") and, in particular, Section 5.2 of the Code which states that "*on request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes*".

   The Homeowner was unhappy at the cost of the premium for the common insurance policy obtained by the Factor. The Homeowner also alleged that there had been a failure to consult with the other homeowners within the development and a failure to allow them to decide whether or not the policy was acceptable.

3. By letter dated 26 February 2014, the President of the Panel intimated her decision to refer the application to a Homeowner Housing Committee.

Hearing

A Hearing took place at the offices of the Panel at Europa Building, 450 Argyle Street, Glasgow on 13 May 2014 before the Committee.

The Homeowner represented himself. He gave evidence himself but called no witnesses.

The Factor was represented by Mr Neil Watt, one of their Directors. He gave evidence on behalf of the Factor. He called no witnesses.

Preliminary competency issues

The Factor raised three preliminary issues regarding the competency of the application:-

Issue 1

Compliance with Section 17(3) of the Act

- Section 17(3) of the Act states that "*no application can be made to The Homeowner Housing Panel unless (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duty or, as the case may be, to comply with the Section 14 duty and (b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concerns.*"

  The Factor submitted that the Homeowner's application was dated prior to the requirements of both Section 17(3)(a) and (b) of the Act being satisfied. In the Factors' submission the application had been submitted prematurely and was therefore incompetent and should not proceed.

  In relation to Section 17(3)(a), the Factor highlighted that the date of the Homeowner's application to the Panel was 5 February 2014. However, despite the date of the application, the Factor did not receive a formal "Letter of Notification" setting out the Homeowner's complaint in relation to Section 5.6 of the Code until the Homeowner hand delivered the Letter of Notification to the Factor on 7 February 2014. Accordingly it was not competent for the Homeowner to lodge his application with the Panel on 5 February 2014 as the test of notification had not been met under Section 17(3)(a).

  The Factor made a similar submission in relation to Section 17(3)(b). As highlighted above, the Homeowner's application was made on 5 February 2014. The Factor's final rejection of the Homeowner's complaint under the Factor's complaints procedure was not issued until 14 February 2014. The Factor submitted that the application was incompetent as the application could not properly be made until such time as it was clear that the property factor had refused to resolve the Homeowner's concern or was unreasonably delaying in resolving the complaint. Given the Factor was progressing the complaint timeously through the complaints procedure up until 14 February 2014 it was readily apparent that the test in Section 17(3)(b) had not been met.

  The Committee considered the submission of the Factor. On a narrow interpretation of Section 17 of the Act, it did appear that the Factor's submissions were correct. The Homeowner's application pre-dated both the Letter of Notification and the Factor's final rejection letter. On that narrow interpretation the application ought not to have been submitted by the Homeowner until 15 February 2014 at the earliest, being the first day that the two tests in Section 17(3) had been met.

The Committee was conscious that a broader interpretation of the provisions of Section 17(3) may require to be taken. The Committee considered that the terms of Section 18(3) of the Act and also Rule 3 of the Homeowner Housing Panel (Application & Decisions) (Scotland) Regulations 2012 ("the Regulations") needed to be taken into account.

The Committee was aware that nearly all of the applications received by the Panel did not, upon first receipt, meet all of the requirements necessary to allow an application to progress. In particular a significant majority of applications do not comply with the two tests set out in Section 17(3)(a) and (b). The majority of applications contain copies of large amounts of general complaint correspondence with the Factor. They do not, however, often contain reference to the particular section(s) of the Code alleged to have been breached or narrate in sufficient detail the specific property factor's duty being complained about. It is also common for applications to be unclear about whether the property factor's internal complaints process has been gone through in full.

In the view of the Committee, there were two options open to the President in this situation. The President could take the narrow interpretation sought by the Factor and simply reject the application by the Homeowner at that stage as having breached one or other (or both) of the tests in Section 17(3). It seemed to the Committee that homeowners were encountering difficulty in completing what were quite technical application forms. As a result, the vast majority of cases would immediately be rejected by the President as having failed to comply with Section 17(3) was the narrow approach to be followed.

The Committee noted that where the President rejects an application the President is required in terms of Section 18(5)(a) of the Act to advise homeowners of the reason for the rejection. After such rejection, it would be highly likely that a good number of homeowners would then take the necessary steps to ensure compliance with the terms of Section 17(3) and, in due course, resubmit their applications to the President for consideration again. Were the President to adopt this approach this would lead to an increased workload for the Panel and would appear to be putting barriers up to homeowners seeking access to justice. The purpose of the Panel is to provide access to justice to homeowners in dispute with property factors. Accordingly, an overly strict approach to the assessment of initial applications under Section 17(3) seemed inappropriate to the Committee.

The Committee was aware that the President took a broader approach and utilised the terms of Section 18(3)(b)(i) of the Act. This allows the President, upon receipt of an application, to effectively put the application on hold until such time as further information had been received. In practical terms this means that the President will, on occasion, advise parties that an application cannot be progressed until the terms of the two tests in Section 17(3) have been complied with and evidence of this has been provided. It appeared to the Committee that the Homeowner's application was a case in point. The application had been made to the Panel on 5th February 2014 but it did not appear to the President that sufficient notification had been made to the Factor of the particular section of the Code that had been breached. Accordingly, the application was put on hold in terms of 18(3)(b)(i) and was not fully considered by the President until the tests in terms of Section 17(3) had been complied with.

In this particular case, all the documentation necessary to allow the President to make an informed decision as to whether or not to refer the case to a Committee was not received until late February. The President then made a decision on 26 February to refer the case to a Committee. By this date, the requirements of both Section 17(3)(a) and (b) had been met by the Homeowner. Given this approach adopted by the President, it appeared to the Committee that the date of the initial application to the Panel was of little import in assessing the validity of referrals to a Committee. The relevant date was the date the President made the decision to refer the matter to a Committee and whether the two tests in Section 17(3) of the Act had been met at that later date.

The Notice of Referral by the President dated 26 February 2014 clearly stated that the application comprised not only the original application form but all the subsequent correspondence between the Panel and Homeowner, sufficient to allow the President to make a decision under Section 18. On the basis of the broader interpretation of the application

process taken by the President the fact that the original application predated the Letter of Notification and Factor's rejection letter was not fatal to the competency of the matter.

The Sub-Committee was satisfied that it was appropriate to accept the President's broader interpretation of the legislation rather than the narrow interpretation of Section 17(3) favoured by the Factor. There were a number of factors that the Sub-Committee took account of when determining this.

Firstly, the Sub-Committee noted, as highlighted above, that the narrow interpretation sought by the Factor would result in virtually all applications to the Panel being rejected upon first receipt. This seemed to the Committee to raise a question about access to justice and seemed to be contrary to the aims of the Act and the Code.

Secondly, the narrow interpretation would result in a significant increase in work for the Panel as applications would be rejected at first instance and would then require to be resubmitted, reviewed and allocated once again.

Thirdly, the Committee noted that the overriding objective set out in Rule 3 of the Regulations included ensuring that there was informality and flexibility in the proceedings and also ensuring that parties were on an equal footing procedurally and were able to participate fully in the proceedings, including assisting any party in the presentation of the parties case without advocating the course they should take. As has been noted above, because of the complexities of the Act and the Code, it is not an easy process for a layperson to complete an application form correctly on the first occasion. Accordingly, the Committee was satisfied that it is appropriate for the President to put applications on hold and to give some guidance as to why a homeowner's application was not yet competent. The Committee did not see any prejudice to property factors by this course of action being adopted. It ensured that the terms of the tests in Section 17(3) were fully met and that property factors were fully aware of the specific complaint against them and had had an appropriate opportunity to seek to resolve the matter.

Lastly, the Committee was aware that it was accepted by other tribunals that an overly technical approach to the completion of forms by a layperson should not be taken. The Committee noted, as one example, the case of Burns International Security Services (UK) Limited –v- Butt where the Employment Appeal Tribunal stated that –

"it seems to us that in the field of industrial relations when application forms are frequently completed by individual employees without professional assistance a technical approach is particularly inappropriate.....

It was pointed out in Cocking –v- Sandhurst (Stationers) Limited [1974] ICR 650 that the rules did not require that the complaint as presented should be free of all defects and should be in the form in which it finally came before the Tribunal for adjudication. The purpose of the Rules is to ensure that the parties know the nature of the respective cases which are made against them"

The Committee was of the view that the approach taken by the President in utilising Section 18 to allow applications to be put on hold pending full compliance with Section 17(3) was precisely the type of circumstance envisaged by the Employment Appeal Tribunal.

Accordingly the Committee was satisfied that it need not follow the narrow interpretation of Section 17(3) sought by the Factor. The broader interpretation used by the President in incorporating Section 18 as a holding step seemed, in the circumstances, to be appropriate.

Accordingly by the time the application (the definition of "application" including the additional documentation received after the submission of the original application form) was finally determined upon by the President that the tests under both Section 17(3)(a) and (b) had been met. It was therefore competent for the Committee to continue and hear the substantive issues of this case. The Committee noted that the Factor has a right of appeal to the Sheriff against the decision taken by the Committee on this preliminary point.

Issue 2

The Homeowner's submission of further documentation under Rule 12 of the Regulations

- Subsequent to the Notice of Referral, the Homeowner had submitted four further documents to the Panel. These were a form required by the Panel Office requesting information on the Homeowner's wishes to have the matter dealt with by way of written representations or an oral hearing, clarifying whether the Homeowner had any special requirements and seeking dates as to availability. The Factor was also requested to complete a similar form. Two further letters dated 26 February and 29 March were also submitted by the Homeowner. These simply forwarded letters that the Homeowner had received from the Factor. The last document was an email of 17 April 2014 which provided an updated insurance quotation from one that had previously been presented to the Factor by the Homeowner in February 2013.

  The Factor submitted that it was not clear to them what the purpose of these documents was and whether they were being submitted under Regulation 12 or Regulation 22. The Factor also highlighted that if they were being submitted under Regulation 12 they appeared to breach the terms of Practice Direction 3 issued by the President. Practice Direction 3 required the documentation to be lodged in a paginated and indexed inventory.

  The Committee was of the view that it was readily apparent that the documentation was being submitted in relation to Regulation 12. Regulation 22 related to amendment of an application whereas this was clearly some minor pieces of additional information that were being submitted. Two of the documents simply forwarded letters received by the Homeowner from the Factor, so it seemed somewhat unlikely that the Factor would then not know what the documentation was.

  Regulation 12 allows either party to submit further documentation that they would seek to rely on at the Hearing. This was clearly what the Homeowner was seeking to do. In any event, the documentation being submitted was simply updating the Committee on the documentation that was passing between the parties and was of little material relevance to any decision. Accordingly the Committee did not see that there were any competency issues to be addressed here. Whilst the Committee would prefer to receive documentation that any party wished to rely on in the format suggested by Practice Direction 3, the Committee had the discretion to receive documentation in a more informal arrangement. Practice Direction 3 was intended to deal with the situation where large amounts of documentation were being submitted in a disorganised fashion. The Committee was readily satisfied that the argument of the Factor was without merit in relation to this point.

Issue 3

Complaint by Homeowner under Section 2.4 of the Code

- The Factor highlighted that the original application form submitted on 5 February 2014 made reference to breaches of Sections 2.4 and 5.6 of the Code. The subsequent letter of notification received by the Factor on 7 February 2014 only made reference to a breach of Section 5.6 of the Code. It was accepted by both parties that the Hearing was only dealing with a complaint under Section 5.6 of the Code and that the complaint under Section 2.4 of the Code was no longer progressing. However the Factor raised two issues arising from this. The Factor submitted that in terms of Section 22(1) of the Regulations, no application may be amended to refer to any failure by the property factor which is not referred to in the notification from the Homeowner. The Factor argued that the removal of 2.4 was an amendment and that this ought not to have been done. The Factor was also concerned that there could be references within the Committee papers to the original complaint about Section 2.4 and that this could impact on the Committee's view of any breach under Section 5.6.

  The Committee did not agree with the Factor's submission. The purpose of Section 22 of the Regulations was to avoid additional complaints being added at a later date. It was not designed to stop the removal of an aspect of the complaint, which was ultimately to the

benefit of the Factor. In any event, as has been set out in Issue 1 above, the complaint regarding Section 2.4 of the Code had effectively been removed from the application by the time it was assessed by the President and referred to the Committee on 26 February 2014.

The Committee was also unimpressed with the Factor's argument that the Committee may be negatively influenced by any passing reference to a breach of Section 2.4 of the Code. It is common in Court and Tribunal matters for there to be changes in relation to a complaint as matters proceed. The Committee was satisfied that it had sufficient mental acuity to put aside any questions in relation to Section 2.4 of the Code and focus purely on whether a breach of Section 5.6 of the Code had occurred. Accordingly the Committee was also satisfied that there was no issue of competency in relation to the third aspect of the Factor's preliminary points.

In relation to Issues 1, 2 and 3 the Committee was satisfied that it was competent for them to proceed and decide the issue on the substantive points.

Substantive Issue

Breach of 5.6 of the Code

On request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes

The Homeowner submitted that the Factor had failed to comply with Section 5.6. In terms of the title deeds to his property, the Homeowner submitted that the Factor was obliged to consult in order to establish the amount of insurance to be placed, that the Factor required to obtain competitive insurance quotations and that the Factor had failed to secure the best insurance available for the owners in return for their factoring fees. He submitted that Factor had not obtained multiple quotes and ought to have obtained a better deal. The Homeowner produced information regarding two other properties that he owned where the insurance premia were lower. He also produced quotes in relation to the Property itself that were at lower premia. He also highlighted that the policy did not cover his requirements as a landlord.

The Committee noted that the Land Certificate for the property provided, *inter alia,* that *"the said tenement numbers 22 and 24 Waverley Gardens aforesaid and others shall be kept insured against loss or damage by fire by a common policy in the joint names of the proprietors or in name of me or my factors in trust for the respective proprietors for an amount to be determined by a majority thereof in voting power and that with such insurance company as they may select....."*.

The Factor submitted that they had not breached Section 5.6 of the Code. The Factor placed the insurance via an insurance broker. The insurance broker sought multiple quotes from the insurance marketplace The Factor produced a letter from their broker confirming that they had obtained multiple quotes and had placed the insurance with the insurer providing the best cover and at the best price.

The Factor was of the view that the other quotes obtained by the Homeowner were not relevant. In comparing insurance quotes a variety of factors such as the level of cover, the items covered, claims history, etc. all needed to be taken into account and it was impossible to say that the quotes being provided by the Homeowner matched equally in every regard the cover obtained through the Factor's broker.

Whilst no meeting or direct vote had been held with the homeowners in the block to get a majority decision, the Factor had advised the homeowners of where the insurance was being placed and the premium. No objections had been received other than from the Homeowner and therefore, as far as the Factor was aware, the majority of proprietors did not object to the companies they had been choosing nor the amount of insurance cover being provided.

The Committee considered matters and determined the Factor had not breached 5.6 of the Code. The fact that the insurance did not provide landlord cover suitable for the Homeowner was irrelevant. The obligation in terms of the title was for the Factor to provide cover against fire. Not all properties within

the larger building would be let and the Homeowner could obtain landlord cover on his own account should he so desire.

It appeared to the Committee that the Factor had obtained multiple quotes. The Factor had only gone to a single broker rather than to multiple brokers but the fact remained that the broker they had approached had then gone to the insurance market and obtained quotes from numerous providers. Accordingly the Committee was satisfied that the Factor had used reasonable endeavours to obtain value for money for the Homeowner. Multiple quotes had clearly been obtained by the broker.

Whilst the Committee accepted that the Homeowner had obtained cheaper quotations elsewhere, the Factor's point regarding it being difficult to compare insurance quotations was correct. In addition, the information regarding the cost of insurance on the Homeowner's other properties were irrelevant. The type of construction and location of these other properties could have a significant impact on the cost of the insurance premia.

The Committee also considered whether the Factor had complied with the terms of the titles by obtaining a decision from the majority of proprietors in relation to both the level of cover obtained and the placing of the cover. The Committee noted that a meeting of the proprietors had never been convened and, in an ideal world, the Factor would get a majority decision each year from all the proprietors as to the level of cover to be provided and with whom the cover was to be placed. The Committee did note, however, that the Factor had written to the homeowners each year advising them as to where the cover was being placed and the amount and the cost of the premium. It did not appear that any of the homeowners had objected to this course of action. During the course of the Hearing, the Homeowner himself acknowledged that he had been trying to get a meeting of the proprietors organised. Despite his efforts, only four of the eight proprietors (including him) had responded. Accordingly it did not appear to the Committee that getting a majority of proprietors to participate in decision making on this point was possible. The Committee was of the view that it was better, in the absence of any ability of the proprietors to form a majority, that the Factors continue to provide insurance that had been competitively sourced through a broker rather than allowing the building to become uninsured.

The Committee noted that the Factor was receiving a significant commission of around 25% of the premium back from the broker. The Homeowner did not appear to object to the Factor receiving that commission and indeed the Committee noted that it was acceptable in terms of the Code for a Factor to receive commission, provided the level of the commission was disclosed.

Taking all the circumstances into account, the Committee was of the view that the Factor had complied with the terms of Condition 5.6 and therefore there had been no breach of the Code.

Summary of Decision

The Committee determined that the Factor's submissions in relation to the competency of the action did not succeed and that it was competent for the Committee to hear the substantive points. On the substantive points, the Committee determined that the Factor had not breached the Code of Conduct. Accordingly no further orders or directions were required by the Committee and the matter was considered to be at an end.

Right of Appeal

The parties' attention is drawn to the terms of Section 22 of the 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 the decision of a Homeowner Housing Panel or a Homeowner Housing Committee;

(2) an appeal under sub-section (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made.....".

Ewan Miller

Signed ..... Date 8.7.14
Chairperson