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

hohp Ref: **HOHP/PF/13/0018**

Re: **Properties at Broomhill Court, Stirling, FK9 5AF (collectively "the Property")**

The Parties:-

Mr & Mrs AG Smith, 16 Craiglea Road, Perth, PH1 1LA ("the applicants")

Hacking & Paterson Management Services, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ("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); Brenda Higgins (Housing Member); Andrew Taylor (Surveyor Member)

Decision of the Committee

The Committee finds that the respondent has failed to carry out its property factor's duties in relation to headings 5, 7 and 8 of the final summary of complaint received by HOHP on 3 July 2013 in terms of s 17 of the 2011 Act.

There was a failure to comply with its duties under s 14 of the 2011 Act in relation to headings 7 and 8 of the final summary of complaint.

The decision is unanimous.

Background

1. By application dated 18 January 2013, the applicants applied to the Homeowner Housing Panel for a determination of whether the respondent had failed to comply with the property factor's duties imposed by section 17 of the 2011 Act and failed to comply with the duties set out in sections 6.3, 6.9 and 7.2 of the Code of Conduct imposed by section 14 of the 2011 Act.

2. By letter dated 18 March 2013, 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.

3. Following service of the Notice of Referral, representations were received from the respondents which resulted in three Directions being issued: dated 19 April 2013; 21 May 2013 and 19 June 2013.

4. A hearing set down for 24 June 2013 required to be postponed due to the applicants' failure to comply with the second direction dated 21 May 2013. A hearing was subsequently held at Europa House, 450 Argyll Street, Glasgow on 19 July 2013. The applicants both appeared and were unrepresented and gave evidence on their own behalf with no other witnesses being called by them. The respondent appeared and was represented by Mr David Doran, one of their employees, who gave the sole evidence on their behalf. Both parties were asked questions by the Committee members in relation to points made by the opposing party in the course of correspondence and also arising from the evidence given at the hearing itself. The Committee considered each of the witnesses to be credible and reliable, who gave their evidence in a measured and unexaggerated manner.

5. In compliance with the third Direction dated 19 June 2013, the respondents produced an indexed, paginated set of documents for use by the Committee and the parties at the hearing. Also in compliance with the third Direction, the applicants for their part produced a final summary list of complaints which they claimed were still outstanding as at the date of the hearing, which were illustrated by reference to correspondence already submitted and notified to the respondent.

6. The summary of complaints although dated 3 August 2013 was agreed to have been received by the Homeowner Housing Panel on 3 July 2013. It is referred to in this decision as the letter of 3 July 2013. The list of complaints, which were ten in number were said to reflect primarily the terms of the applicants' letter of complaint to the respondents dated 26 November 2012. That letter bears to have been replied to by the respondents by letter dated 12 December 2012. The applicants contended that the response was inadequate and that, as at 3 July 2013, the outstanding points of complaint fell under ten headings follows:

1. Roof
2. Fire safety checks
3. Edinmore Contracts Ltd (repair to external tap)
4. Contractor costs
5. Electricity
6. Garden
7. Painting
8. Fence
9. Gutter
10. Insurance

7. The applicants were content to structure their evidence following these ten headings in the same order. For their part, the respondents, also followed the format and order of evidence as set out in the letter of 3 July 2013. No objection was made by the respondents to the effect that they had not received fair notice of any of the items forming the list produced by the applicants in compliance with the third Direction. It therefore formed the basis of the Committee's deliberations and decision on the application.

Committee Findings

1. The applicants are the joint heritable proprietors of flats 11 and 21 of the property known as and forming Broomhill Court, Stirling, FK9 5AF. Flat 11 is registered in the Land Register under title number STG52607 and forms a third floor flat within the overall block development known as 1-25 Broomhill Court. Flat 21 is a second floor flat registered in the land register under title number STG51771 and is part of that same block development. It was accepted the same real burdens and common obligations apply to both flats.

2. The respondent is the property factor responsible for the repair and maintenance of the common parts of 24 flats comprising the block development mentioned in the preceding paragraph. Their responsibilities for those common parts are as set out in a Deed of Declaration of Conditions registered on 24 February 2004 by Stewart Milne Group who were responsible for creating the development including the Property.

3. By letter dated 22 October 2012, the respondent intimated their Terms of Service and Delivery Standards applicable to the common parts of the Property to applicants.

4. The respondent became a registered property factor on 1 November 2012 and its duty under s 14(5) of the 2011 Act to comply with the code arises from that date.

The outstanding complaints

5. The jurisdiction of the Committee to entertain the complaints in relation to factors' duties arises from the date of 1 October 2012. This was found to be a feature which circumscribed many of the applicants' claims.

6. Regulation 28 (1) of the Homeowner Housing Panel (Application and Decisions)(Scotland) Regulations 2012 ("the 2012 Regulations") provides "subject to paragraph (2), no application may be made for the determination of whether there was a failure before 1 October 2012 to carry out the property factor's duties." Regulation 28(2) provides that the committee "...may take into account any circumstances occurring before 1 October 2012 in determining whether there has been a continuing failure to act after that date."

7. The phrase "may take into account" indicates that it is a matter of discretion on the part of the Committee, the extent to which they choose to take into account matters occurring before the commencement date of the 2012 Regulations of 1 October 2012 in determining whether they find that there is a failure to comply with factors' duties after that date. The Committee noted that certain of the complaints dated from 2011 and even prior to that, but where the respondent had refuted the complaint and had taken no action as a result.

8. In those circumstances, the Committee had to bear in mind that the saving in Regulation 28(2) could not be said to apply simply by reason of the applicant's subjective ongoing dissatisfaction with either the response provided to them by the respondent, or action taken by the respondent, prior to 1 October 2012. If that were so, complaints could go back indefinitely prior to the commencement date at the behest of one party, the complainer. The Committee considered that could not have been the intended consequence of that part of the legislation. It did, however, bear the complaints prior to the commencement date in mind in order to consider whether any alleged failure on the part of the respondent was truly a continuing one after that date. The committee's reasoning and decision in relation to the outstanding issues is as follows:

Discussion of particular heads of claim

1. **Roof**: The Committee was provided with a survey by Messrs DM Hall dated 18 June 2013 by the applicants. The survey reveals that the roof at the property has a defect which has been apparent for quite some time. The defect consists of undulations in the roof which have been caused by the timber framed part of the roof construction having settled and shrunk whilst other stone blockwork parts around the stairs and other areas have not. According to the report, shrinkage in those circumstances could have been expected but the necessary arrangements were not put in place in order to cope with the movement which occurred after construction in approximately 2005. An estimate had been obtained from Edinmore Contracts Ltd on 18 July 2011 which placed the cost of remedying this defect at £6,200 plus VAT which would have to be divided among the owners of the block were the works to proceed. An earlier, related, estimate in relation to the uneven wall head dated 3 March 2008, also from Edinmore Contracts Ltd was for £2,600 plus VAT.

   The applicants contend that the respondent ought to have ensured that the wall/roof defect was remedied while the block was still under warranty by the builders, Stewart Milne Group. Having failed to do so, they ought to have made a claim on their Professional Indemnity Insurance in order to cover the costs of a full independent roof survey and the necessary repairs. The respondent did not do so. The DM Hall report makes clear that the roof defect still remains outstanding as an item of common repair which has not

been remedied as at 18 June 2013, so the claim is a valid one in terms of the 2011 Act.

In his evidence, Mr Doran pointed out that the Date of Entry to the Property was 8 and 27 July 2005 by reference to the Title Sheets found at pages 33 to 38 of the respondent's bundle. The two year defect liability on the part of the builder therefore ended in July 2007. The respondent was not informed of the defect until March 2008 as narrated in the respondent's letter dated 12 December 2012 to the applicants. Subsequently, the quotation for works dated 3 March 2008 referred to earlier was obtained. Despite the warranty period having expired, at the request of the respondent, Stewart Milne agreed to carry out works to the roof and did so at no cost to the owners of the flats within the common block. The minutes of the co-owners meeting dated 23 November 2010 appeared to indicate that the roof had been repaired as it did not form any part of the discussion on that date.

Unfortunately, matters did not rest there and further problems with the roof were brought to the respondent's attention in 2011 with respect to the side of the roof not previously repaired by Stewart Milne. At the request of the owners, the respondent contacted NHBC to see if the repairs could be effected under the Buildmark cover scheme. By letter dated 9 August 2011, NHBC indicated that they would not cover the cost of the works being carried out as they fell below the cost threshold covered by the relevant buildings repair policy (bundle pp 72-73). Stewart Milne were again approached but declined to effect further repairs by letter date 10 April 2012 as their liability period had expired (bundle p 74). Pages 1-15 of the bundle are the mandates sent by the respondent to the owners of the block to obtain authorisation to instruct the survey from DM Hall referred to above and letters to chase up those owners who did not reply. At page 176-168 is an estimate obtained by the respondent from Hugh Scott Builders and Slaters dated 19 September 2012 for repairs to the other side of the roof amounting to £5,742 plus VAT.

The committee accepted the evidence of Mr Doran that at the time the roof defects were originally notified to the respondent the warranty period had expired. It was therefore factually incorrect to state that they ought to have instructed repairs within the guarantee period and that having failed to do so, they ought to have made a claim on their professional indemnity policy. Nonetheless, the respondent successfully enjoined Stewart Milne to effect works at no cost to the proprietors. When further defects appeared, the respondent followed up matters with NHBC seeking to have repairs paid for down that particular route, albeit without success. It further obtained an estimate for works to be carried out and issued and then followed up mandates for the additional survey report by DM Hall at the instigation of the applicants. It also made a further approach to Stewart Milne.

Whilst the committee was of the view that the defects to the roof at the Property were an ongoing matter going beyond 1 October 2012 in terms of Regulation 28 of the 2012 Regulations, it nonetheless considered that the respondent had made all reasonable endeavours to have the problem with the roof rectified at the time at which it was drawn to their attention, as noted in the previous paragraph. It therefore found that the respondent had not failed to carry out their duties as factor in terms of s 17 of the 2011 Act.

2. **Fire safety checks**: The applicants referred to the minutes of a co-owners meeting dated 12 May 2011, at which time the co-owners resolved to instruct an alternative contractor to carry out fire safety checks. The contractor had been a company called Lambert who charged £368 per annum per stair. The charge for that service had appeared without explanation in the quarterly factor statement. One example was the statement of 9 November 2011. Another supplier, Rapid Fire Services, was identified in the minutes as being able to supply a cheaper quote at £290 plus VAT. Further, a charge was levied on owners on 21 July 2011 in respect of a company called Asco for Dry Wet Riser Maintenance for £105 plus VAT, whereas on 2 October 2012, the charge was £65 plus VAT. Despite queries from the applicants, the reason for the disparity in charges was never explained. The applicants also considered that the resolution minuted on 12 May 2011 constituted instructions to the respondent to change the contractor but this was not carried out by the respondent. Also, a query regarding the applicable legislation and the requirements of it (in respect of which the charge was incurred by the co-owners) was not answered by the respondent.

   In his evidence, Mr Doran pointed to the letter dated 12 December 2012 which made reference to the relevant legislation. The letter also made reference to a tendering exercise having been carried out by the respondent, after which the company Asco Fire Group was found to have been more competitive. That fact was vouched at page 161 of the bundle in a letter to Asco from the respondent dated 13 September 2011 where a price of £220 per stair per annum was confirmed.

   The Committee considered that providing details of the relevant fire legislation was not within the normal duties of a factor. It noted, however, that in any event, the issue was dealt with in September 2011 and therefore outwith its jurisdiction. Notwithstanding that, it did note that the issue might have been avoided altogether had the applicants been better informed and had matters explained to them at the relevant time, in particular in relation to the change of contractor. It found this particular failing on the part of the respondent to have been a feature present in many of the complaints placed before it.

3. **Edinmore Contracts Ltd (tap repair)**: The applicants took issue with a repair to an external tap near to the bin stores which cost £210. It was

alleged that this constituted a breach of paragraph 6.3 of the code which requires factors to show how and why contractors were appointed. The allegation was that the repair cost was excessive and ought in any event to have been carried out by a local tradesperson at a lower cost. The committee noted that the repair was carried out on 6 September 2012. The respondent's duties to comply with the code in terms of s 14(5) of the 2011 Act does not therefore apply, since they were registered on 1 November 2012. In addition, the date of the repair means that the respondent has not failed in its duties under s 17 of the 2011 Act. The fact that the applicants remain dissatisfied with the cost of the repair undertaken, or the fact that there was an external tap still present after the development was completed (when it arguably ought to have been removed) does not bring Regulation 28 of the 2012 Regulations into play. These issues therefore fall outwith the jurisdiction of the Committee.

4. **Contractor costs**: A similar issue to the above was raised by the applicants more generally in relation to other common works instructed by the respondent. At page 27 of the bundle, there is a minute of a meeting of co-owners dated 17 April 2012 where a list of contractors habitually used by the respondents is provided to the meeting. Again, the specific repairs referred to in the final statement of complaint pre-date both the commencement of the Regulations and the date of the respondent's registration. Accordingly, the Committee found that there have been no failures in duty in terms of section 14(5) or 17 of the 2011 Act in relation to this issue also.

5. **Electricity**: This issue concerns the provision of electricity for communal parts of the block of which the Property forms part. The provider had been Scottish Power. The applicants were aware of the annual contract coming up for renewal on 31 October 2012 by virtue of an email sent by Scottish Power to another proprietor within the block on 6 January 2012. The applicants considered that the opportunity to change suppliers as at that date had not been taken by the respondents. They formed this view because the quarterly factor statement they received in February 2013 showed that Scottish Power were still being paid for the provision of communal electricity as at 18 December 2012. Further, there appeared to be a different tariff being charged in respect of their block and another block also within Broomhill Court with no explanation being provided.

   Mr Doran referred to page 32 of the bundle which was a letter to the co-owners dated 18 August 2012 referring to a change in electricity supplier. He explained that the original intention had been to change over to Npower as narrated in that letter. However, there had been difficulties with the result that the supplier chosen was ultimately E.on. The new supplier was chosen having carried out a comparative exercise which involved comparing unit costs and standing charges between the different possible suppliers. The Scottish Power tariff was charged in December 2012 due to a three month

bedding in period before the new supplier changed over to the new tariff. The Committee was satisfied that the respondent had acted reasonably in the exercise of its duties in securing a change in electricity supplier despite the difficulties it had encountered. However, the Committee was not satisfied with the level of explanation given to the applicants regarding the circumstances (or fact of) the changeover in electricity supplier. It also considered that a certain level of confusion remains regarding whether the most advantageous price had in fact been obtained following upon the comparative exercise prior to the changeover and the reason for the neighbouring block being subject to a differing tariff for electricity.

The matter is covered by paragraph 8 of the respondents Terms of Service where it is stated that a core factoring service is "Dealing with homeowners communications and enquiries." The Committee has therefore decided that there has been a failure in terms of s 17 of the 2011 Act in relation to the respondent's duties as factor under this head. It therefore proposes to issue a Property Factor Enforcement Order in the terms narrated at the end of this decision.

6. **Garden**: The applicants confirmed at the hearing that their complaint regarding the state of the communal garden at the Property had been rectified and that they were therefore content to withdraw this issue of complaint.

7 & 8: **Painting and Fence**: Both of these heads raise similar issues of general maintenance so the Committee considered them together. The applicants gave evidence that there were defective areas of paintwork on the communal stairwell at the Property, in particular in relation to the banisters. Instead of being properly stained, it had just been rubbed down and left unfinished. In October 2011, Mr Kingham, Director and Mr Gifford of the respondents visited the Property and agreed that the work to the stairwell had been carried out to an inadequate standard and that a painter should be required to return and rectify the poor workmanship. Photographs taken on 31 May 2012 showed that no such rectification had in fact taken place and as at the date of the hearing, that remained the case.

In relation to the common fence, the applicants gave evidence of repair work having been carried out in January 2011 following storm damage. They contended that the work was not carried out by an appropriate tradesman, namely a gardener rather than a fencing contractor. A missing post was not reinstated and nails were left sticking out of the fencing so far that in Mr Smith's words "you could hang a coat on it." As with the stairwell redecoration, the poor workmanship was not rectified as at the date of the hearing. In those circumstances (i.e. a defect occurring prior to the commencement date but continuing after 1 November 2012), the Committee

considered that it had jurisdiction to consider the issues, both in terms of the s 17 and s 14 of the 2011 Act.

Mr Doran gave evidence by reference to minutes of a co-owners meeting of 17 April 2012 that both items of work had been carried out to the satisfaction of the other co-owners in the block. In his view, the remedial works were only inadequate in the view of the applicants. In relation to the fencing, the choice of a gardener to carry out remedial works was a reasonable one and the after the work was re-done, no concerns were raised by the other homeowners in the block. The Committee questioned Mr Doran closely about whether the respondents had any system of inspection in place to ensure that where works were required to be re-done after complaint, they were indeed carried out to an adequate standard. From the answers received, it appeared that there was none and that since the contractors were trusted and had been engaged for a number of years, their assurance that works had been adequately re-done was always taken at face value.

The Committee considered that there was no failure in duty in terms of section 6.3 of the Code which requires to the respondent to show how and why contractors were appointed under reference to the minutes of 17 April 2012 referred to earlier. The information provided under the first heading of that minute applied equally post-registration on 1 November 2012. However, it considered that given that there were complaints of inadequate workmanship, it would have expected the respondent to have not only instructed remedial works, but thereafter to carry out a re-inspection to ensure that such works were carried out properly. It considered that this general duty to be subsumed under heading 4 of the respondent's Terms of Service which states a core factoring service to be "Investigating claims of inadequate work or service from contractors and service suppliers and pursuing them to remedy these." It preferred the evidence of the applicants that it was acknowledged (after inspection) by Messrs Kingham and Gifford that works had not been carried out to an adequate standard but that remedial works had not in fact been undertaken despite assurances to the contrary. It perhaps provides only emphasis, but since section 6.9 of the Code had been raised by the applicants, the Committee also finds that the respondents failed in the duty outlined in that paragraph which provides in part: "You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided."

The Committee has therefore decided that there has been a failure in terms of sections 14(5) and 17(1) of the 2011 Act in relation to the respondent's duties as factor under heads 7 and 8. It therefore proposes to issue a Property Factor Enforcement Order in the terms narrated at the end of this decision.

9. **Gutter**: The applicants confirmed at the hearing that their complaint regarding the leaking gutter at the Property had been rectified and that they were therefore content to withdraw this issue of complaint.

10. **Insurance**: The respondents have a duty to arrange common insurance for the Property. In 2011, the quote which they obtained would have cost £260.39 per flat. Mrs Smith went to her own insurance broker who finally provided her with a premium quote of £177 for the same reinstatement value of £183,000. The applicants now arrange their own buildings insurance and have done since 1 June 2012. They now seek a refund from the respondents for what they state to have been an overcharged amount during 2011. The alleged failure to provide the more competitive quote arose around 12 May 2011 when the respondents arranged the annual block policy. Accordingly, the Committee has no jurisdiction in relation to this issue. The Committee did note however, that in arranging a new block policy, the respondents might have explained what that term in fact meant. It became apparent from the evidence that the applicants were under the impression that they were being asked to pay for a premium which extended further than the block of flats in which the Property is located. They were also under the impression that the respondent was separately charging a commission on that premium. Both of those impressions might have been misapprehensions. A simple explanation might have allayed those concerns if they were indeed unfounded. In any event, the Committee is unable to reach any finding under this head of complaint.

For the sake of completeness and avoidance of doubt, no evidence was led or submission made in relation to any alleged failures on the part of the respondent to comply with section 7.2 of the code of practice. Accordingly, the Committee makes no finding in relation to that issue.

Decision

9. In accordance with s 19(3) of the 2011 Act, having been satisfied that the respondent has failed to carry out the property factor duties, the Committee must make a Property Factor Enforcement Notice. Before making an order, to comply with s 19(2) of the Act, the Committee before proposing an order must give notice of the proposal to the factor and must allow the parties to give representations to the Committee.

10. The intimation of this decision to the parties should be taken as notice for the purposes of s 19(2)(a) and the parties are hereby given notice that they should ensure that any written representations which they wish to make under s 19(2)(b) must reach the Homeowner Housing Panel's office by no later than 14 days after the date the decision is intimated to them. If no representations are received within that timescale, then the committee will proceed to make a Property Factor

Enforcement Notice in the following terms without seeking further representations from the parties.

11. Therefore, the Committee propose to make the following Property Factor Enforcement Order:

Within 28 days of the communication to the respondent of the Property Factor Enforcement Order, the respondent must:

1. Provide a detailed breakdown of charges including meter readings, unit charges and standing charges applied both prior to and immediately after the changeover in communal electricity charges by Scottish Power and E.on to demonstrate that there was no overcharging at the time of changeover between those two utility providers.
2. Further, to provide evidence regarding electricity charges made in relation to the other block within Broomhill Court and to explain the apparent difference in charges between them.
3. In the event that compliance with Order 1 and 2 above demonstrate overcharging has occurred, to refund the applicants to the full extent that such overcharging has taken place.
4. To provide documentary evidence of compliance to the Homeowner Housing Panel with Orders 1, 2 and, if applicable, 3 above within 7 days of having done so.
5. At their own expense instruct remedial works to be carried out in relation to the communal fence and common stairwell to a reasonable standard of workmanship and thereafter to inspect such works upon completion and to confirm to the Homeowner Housing Panel that such works have been carried out to the satisfaction of the applicants within 7 days of having done so.

11. **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..."

Signed Maurice O'Carroll **Date** 2 August 2013
Chairperson