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

hohp Ref: Hohp/pf/13/0055

Re: Property at 18 Kirkton Drive, Burntisland, Fife KY3 0DD **("the property")**

The Parties:-

The homeowner – Dafydd McIntosh **("the applicant")**

The property factor – Collinswell Land Management Ltd **("the respondent")**

Decision by a Committee of the Homeowner Housing Panel in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 (the 2011 Act").

Committee Members

Richard Mill (Legal Chairperson)

Jean Thomson (Housing Member)

Sally Wainwright (Housing Member)

Decision of the Committee

The committee unanimously determined that the respondent has failed in its duty to comply with Sections 1 and 2 of the Code of Conduct for Property Factors.

Procedural Background

The application to the Homeowner Housing Panel from the homeowner was received on 2 April 2013. The president referred the application to a homeowner housing committee and Notices of Referral were issued on 10 April 2013. This afforded parties until 24 April 2013 to make written representations.

The pro forma application received raised alleged complaints both in terms of Sections 2 and 4 of the Code of Conduct for Property Factors ("the Code") and the property factor's failure to comply with property factor duties.

Once the application was received by the committee and the application was considered further together with the applicant's written representations it was clear that the applicant raised issues relevant to potential breaches of various Sections of the Code. In the circumstances a Direction was issued by the committee on 13 May 2013 giving Notice to the respondent that additional matters would be considered by the committee. The Direction afforded the property factor a further 28 days to make further written representations. They were requested in particular to set out in detail their compliance with the Code of Conduct.

The Direction issued on 13 May 2013 also sought additional papers from the respondent including the relevant written statement of services, maintenance schedule and service charging system. These were received on 16 May 2013. The property factor indicated that they would not be attending the Oral Hearing fixed to take place on 2 July 2013.

A request was made to the applicant to provide a copy of the relevant Deed of Conditions. This was supplied.

Hearing

The Oral Hearing took place on 2 July 2013 at Thistle House, Edinburgh. The applicant appeared personally but was unrepresented. The property factor did not attend. The committee was satisfied that the property factor had received intimation of the Hearing. They had confirmed that they would not be appearing. The committee was satisfied that the respondent had received fair notice of all the applicant's complaints to be considered.

The manner in which the application and written representations of the applicant had been presented made identification of his complaints somewhat difficult to categorise. Various heads of complaint were therefore agreed with the applicant which summarised his various complaints.

The applicant gave evidence on his own behalf. The committee considered the evidence and submissions of the applicant together with all of the available papers. The committee was satisfied that they had sufficient information to reach a fair determination of the application. The committee reserved their decision to enable them to give full consideration to the application and the issuing of this written decision.

Findings in Fact

1. The applicant purchased 18 Kirkton Drive, Burntisland, Fife KY3 0DD in December 2008. The property forms part of the Inches, a housing development by Taylor Wimpey. The Inches in turn forms a part of Collinswell Park, a large modern housing estate on the western side of Burntisland.

2. Collinswell Park is built on the site of a closed derelict aluminum

factory. There are communal landscaped areas, some of which are on top of a red mud pond which was created as a waste product of a former industrial process.

3. Part of the planning agreement between Fife Council and the developers of the site was the planting of over 6,200 trees and the continued maintenance and management of communal areas of landscaped ground throughout the housing estate. The construction and maintenance of the communal landscaped areas were agreed between the landowners, the land developers, Fife Council and the Scottish Environmental Protection Agency.

4. The property titles which apply to Collinswell Park and the applicant's property create provision for the communal landscaped areas to be maintained and managed by a property factor. The applicant's responsibility to pay for the work undertaken by the property factor to manage and maintain the communal landscaped areas arises from these titles. These burden him equally along with all other proprietors of the housing estate.

5. A Deed of Declaration of Conditions registered on 14 June 2006 (hereinafter referred to as "the 2006 Deed") by 4 proprietors/developers of the Collinswell Park estate imposes responsibilities upon each plot proprietor to maintain and be responsible equally for the costs involved of the maintenance of the open communal peripheral areas around the entire Collinswell Park estate. The 2006 Deed also creates provision for the appointment of a property factor and rules in relation to their involvement.

6. A Deed of Declaration of Conditions registered on 10 September 2007 (hereinafter referred to as "the 2007 Deed") by George Wimpey East Scotland Ltd imposes responsibilities upon each plot proprietor to maintain and be responsible equally for the costs involved of the maintenance of the communal open areas relative to The Inches development, being the development which the applicant's property is within. The 2007 Deed also creates provision for the appointment of a property factor and rules in relation to their involvement.

7. Collinswell Land Management Ltd assumed responsibility as property factor for the periphery open communal areas around the larger Collinswell Park estate on 1 January 2010. This followed the resignation of the former property factor Hacking & Paterson.

8. The respondent became a registered property factor on 6 March 2013 and accordingly their duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

9. The respondent was requested by the applicant in an email on 6 March 2013 to provide a copy of the written statement of services. The respondent failed to do so within 4 weeks.

10. The applicant has failed to pay his factoring invoices since late 2011. He has raised various queries with the respondent regarding the charges made. The parties are in dispute regarding the applicant's

payment of the property factor charges to the respondent. The parties have exchanged numerous emails in relation to this issue. Not all of the property factors correspondence has been professional nor business like. The respondent's communications have included abusive and threatening language. The applicant has been abused and insulted as a result.

11. The applicant is the currently elected chairperson of Collinswell Park Residents Association. The Association is not created in terms of the property titles but is a voluntary association created by those proprietors of Collinswell Park who wish to meet and promote the interests of their housing estate. Collinswell Park Residents Association have met to discuss the Collinswell Park Development. They have also discussed the continued appointment of the respondent as property factor. They concluded that they wish to dismiss and replace the respondent.

12. The decision of Collinswell Park Residents Association to dismiss the respondent as property factor has not been accepted by the respondent. They have disputed that a validly constituted meeting of the proprietors of Collinswell Park in accordance with the 2006 Deed has taken place. They also claim that the Developers of the site retain a veto against any Decisions reached by the proprietors.

13. The manager burden created in terms of the 2006 Deed allowing the Developers to make Decisions in respect of the property factor and providing them with a veto in respect of Decisions reached by proprietors in accordance with the 2006 Deed expired on the 5th anniversary of the 2006 Deed being registered ie on 14 June 2011.

14. The written statement of services issued by the respondent is inaccurate and misleading in respect of their authority to continue to act and their possible dismissal by the proprietors of Collinswell Park estate.

Applicant's Complaints

The applicant's complaints about the property factor fell into a number of broad categories.

i. The applicant complained that the property factor had not registered by 1 October 2012 in accordance with the terms of the 2011 Act. The applicant was advised at the oral hearing that the homeowner housing panel has no jurisdiction to deal with this complaint. The applicant accepted this and as such this was not insisted upon.

ii. The applicant's request for a written statement of services was not complied with timeously.

iii. The applicant complained that he had been abused and intimidated throughout their dealings with the property factor.

iv. The applicant complained that the property factor had issued false and misleading information.

v. Value for money - the applicant wished to know the full position with regards to the property factors accounts and additionally what proportion of the total costs of the works were being sought to be paid by him.

vi. Customer service – the applicant complained that the property factor's office is open for a limited period of time only, namely 9.00 am to 12 noon Monday to Thursday. After some discussion the applicant agreed that this was not a valid complaint covered by the terms of the 2011 Act and as such was not insisted upon.

vii. The applicant complained that the property factor is using their own grounds people and not putting the work out to tender. After some discussion the applicant agreed that this was not a valid complaint covered by the terms of the 2011 Act and as such was not insisted upon.

viii. Quality of service – the applicant complained that the necessary landscaping maintenance and grounds work have not been carried out with the required frequency or to the required standard.

Reasons for Decision

Only a registered property factor requires to comply with the Code (Section 14(5) of the 2011 Act). Accordingly the committee was only able to scrutinise the respondent's compliance with the Code from the date of registration, namely 6 March 2013.

The application before the committee related to complaints about the property factor of the peripheral open communal areas of the whole Collinswell Park estate. The property factor is Collinswell Land Management Ltd. The 2006 Deed places an equal responsibility upon all proprietors of the estate to maintain and pay for the communal areas and further provides for a factor to be appointed to carry out the necessary work. The 2006 Deed sets out the various rules which apply.

The internal areas of the applicant's own development are also the subject of factoring arrangements created in terms of the 2007 Deed. The property factor for those open spaces is Hacking & Paterson. The applicant is not in dispute with that property factor.

The applicant requested a copy of the written statement of services from the respondent by way of email on 6 March 2013. A copy of the email had been produced by the applicant. The Code imposes a requirement upon the respondent to produce a written statement of services, where requested, within a period of 4 weeks. The respondent failed to comply with that request. Indeed, they responded by return email on 13 March 2013 simply stating "all questions asked in this email have been answered in previous correspondence". This was obviously not the case. The applicant confirmed in his evidence that he had not received the written statement which the committee accepted. The respondent failed to comply with the request for the written statement of services which is a breach of Section 1 of the Code.

The 2006 Deed constitutes the factoring arrangements. A meeting of proprietors can be held to dismiss a factor. A meeting is not validly constituted unless all proprietors are invited and at least 20% of proprietors attend. Decisions are made by a majority vote of all of the votes cast.

Rule 14 of the 2006 Deed creates a "manager burden" in favour of the Developers. This entitlement continues for a period of 5 years beginning on the date on which the Deed was registered and secondly for the period during which one of the Area Developers is a proprietor of at least one plot *whichever is the shorter*. The committee did not have clear evidence to the effect that any relevant Developer is still a proprietor. The manager burden has however already come to an end and was extinguished as at 14 June 2011 being 5 years after the 2006 Deed was registered.

The reference within the written statement of services produced by the respondent to the committee states that their appointment remains until the Developers have completed their works. Similar submissions appear within the respondent's written representations. On the basis of the evidence available the committee rejected that proposition for the foregoing reasons. The respondent's position on this is misleading. The providing of this misleading information is a breach of Section 2.1 of the Code.

The committee concluded that should a validly constituted meeting of the proprietors in accordance with Rule 10 of the 2006 Deed take place and a decision in accordance with the said Rule is made, then the property factor can now be dismissed.

Collinswell Park Residents Association does not have itself powers or rights to make decisions in respect of issues pertaining to the property factor. All decisions must be strictly in terms of the 2006 Deed.

Within a chain of email correspondence between the parties on 20 March 2013, which was produced to the committee, it was noted that the respondent included the following comments to the applicant:-

> "You clearly have a very empty life".
>
> "It is only a sponger that does not pay his bills ...".
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> "Try growing up ..." and "... drivel on ...".

The committee was left in little doubt that the property factor has not acted in an appropriately professional nor business like way in communications and correspondence with the applicant.

In the property factors written representations they make specific reference to

> "Mr McIntosh was referred to as a scrounger by me, he is!"
>
> "Mr McIntosh is a troublemaking ..... (left empty in case it upsets his delicate disposition) and hell will freeze over before I apologise to such a person".

The respondent had used other similar language towards the applicant in

other emails. The committee accepted on the oral evidence of the applicant at the Hearing that he had felt abused and intimidated given the nature and intensity of the derogatory language used by the respondent.

The respondent had stated within their written representations that the applicant had been involved in a number of activities to cause nuisance and inconvenience to the respondent. This was denied by the applicant. There was no credible and reliable evidence upon which to support the respondent's claims in this respect.

The applicant should not be expected to receive communications from the respondent in the manner described. The respondent's behaviour is patently unacceptable. The committee applied an objective test and had regard to whether a reasonable person would feel abused, alarmed or threatened. The committee concluded that they would be. The respondent either wilfully or recklessly communicated in the manner described. This is a breach of Section 2.2 of the Code.

The applicant complained that he should not be threatened with legal action for recovery of the sums due to the property factor. In the view of the committee this complaint was unfounded. The property factor is entitled to threaten legal action for the recovery of sums due and the Code makes this clear.

The written statement of services produced to the Homeowner Housing Panel confirms the cost of the charges. It states:

> "The cost per annum is £175. This is invoiced on a quarterly basis, each invoice being for £43.75. Payments can be made by cheque, internet banking, going in to a branch, setting up a standing order with your own bank or we can send a direct debit form for completion and set up for you."

The written statement of services confirms the nature of the services provided and in particular makes reference to the maintenance schedule for the ground works. This schedule contains reference to 11 specific responsibilities of a gardening and landscaping nature and has a corresponding frequency narrated next to each activity.

For what it is worth the cost per annum to the applicant does not appear to the committee to be excessive having regard to the nature and extent of the works which require to be carried out and having regard to other comparable charging systems in place by property factors for similar housing developments. The original agreed cost per annum 6 years ago was £140.

Section 1 of the Code sets out the expected standard in relation to charging arrangements. The detail required in the current case where the land is owned by a party other than the group of home owners is less onerous than that where the land is owned by the group of home owners themselves.

The applicant is entitled to a clear understanding as to what he has to pay, when and for what. It was apparent from the applicant's evidence that he does have a clear knowledge regarding his obligations arising from the Burdens affecting his property and the committee were left in no doubt that the

applicant knows exactly what charges he has to pay and when. The committee concluded on the basis of the applicant's evidence that he is well aware of the services provided. He is not entitled to know in terms of the Code the exact details of the property factor's business activities and more general financial arrangements. The committee noted however that the property factors annual accounts appear on the website of Collinswell Land Ltd (a related Company of the respondent). One of the web pages specifically relates to the respondent's activities. As the respondent does not subcontract services provided it is not possible for them to produce invoices for work carried out.

In the current case each plot proprietor pays a flat annual fee. This is set out within the written statement of services currently in operation. The applicant has always been well aware of this.

The committee is satisfied that the applicant's complaints about the office opening hours of the property factor are not justified. The applicant is aware that the office of the property factor is only open for a limited period of time each week. It is open for a total of 15 hours and is open each working day. Otherwise the applicant has the ability to email the property factor at other times. This is not unreasonable. The Code does not prescribe any opening hours for property factors.

The applicant's complaints regarding the property factor using their own employees appeared to the committee to be unfounded. The current property factoring arrangements are in accordance with the 2006 Deed which all purchasers of homes on the Collinswell Park estate knew existed at the time of the purchase of their own plot. It is entirely a matter for the property factor as to how they make specific provision for the services which they are obliged and contracted to carry out. It is a matter for them as to who they employ and who, if at all, they subcontract to carry out the work.

The committee is not satisfied after hearing all of the evidence and considering all of the relevant papers that there was clear evidence to the effect that the maintenance works are not being carried out to an appropriate standard or quality. The applicant's complaints were not supported by any independent information such as a report from a suitably qualified gardening or landscaping company reporting on the alleged defective work. No evidence was offered to the committee from any other proprietor or source. The applicant did not pursue this particular matter with any vigour.

Proposed Property Factor Enforcement Order

Section 19 of the 2011 Act requires the committee to give notice of any proposed property factor enforcement order to the property factor and allow parties an opportunity to make representations to the committee.

The Committee proposes to make the following Order:-

> "Within 28 days of this Decision being issued to the parties, the respondent must:-
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> 1. issue an accurate and comprehensive written statement of services which fully conforms to the Code.

2. issue a written apology to the applicant for their failure to provide him with a written statement of services complying with the Code timeously; and, for abusing and intimidating him.

3. make a payment to the applicant in recognition of his hurt feelings and inconvenience caused to him in the sum of £100.

4. provide to the committee documentary evidence of their compliance with parts 1, 2 and 3 of this Order."

The intimation of this Decision to the parties should be taken as Notice for the purposes of Section 19(2)(a) of the 2011 Act and the parties are hereby given Notice that should they wish to make any written representations in relation to the committee's proposed Order that they must be lodged with the Homeowner Housing Panel within 14 days of the date of this Decision. If no representations are received then the committee will proceed to make the Order proposed. If representations are received they will be considered by the committee prior to the making of any Order.

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.

Appeals

In terms of Section 22 of the 2011 Act, any Appeal is on a point of law only and requires to be made by Summary Application to the Sheriff. Any Appeal must be made within 21 days beginning with the day on which the Decision appealed against is made.

Richard Mill

8 July 2013

(Chairperson)