Decision by a Committee of the Homeowner Housing Panel

In an Application under section 17 of the Property Factors (Scotland) Act 2011 by

Dev and Anne Sewnauth, 8 Abercrombie Drive, Bearsden, Glasgow G11 6BL ("the Applicants")

Case Ref: HOHP/PF/13/0070

Property Factor:

Hacking & Paterson Management Services, 1 Newton Terrace, Glasgow G3 7PL ("the Respondent").

Property Address:

Flat 6/2, 315 Glasgow Harbour Terraces, Glasgow G11 6BL.

Committee Members:

John McHugh (Chairman); Charles Reid Thomas (Surveyor Member); Ahsan Khan (Housing Member).

DECISION

The Committee has jurisdiction to deal with the Application.
The Respondent has failed to carry out its property factor's duties.
The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1 The Applicants are the owners of Flat 6/2, 315 Glasgow Harbour Terraces, Glasgow G11 6BL (hereinafter "the Property").
2 The Property is located within a development known as Glasgow Harbour Terraces.
3 The Respondent is the property factor appointed by the owners of the flats within the development.

4 Glasgow Harbour Terraces is a modern development consisting of 321 flats.

5 The Applicants have never lived in the Property. It is occupied by their two sons.

6 The property factor's duties which apply to the Respondent arise from the Statement of Services. Its duties arose with effect from 1 October 2012.

7 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor (1 November 2012).

8 The Applicants have, by their letters of 27 April and 10 June 2013 notified the Respondent of the reasons as to why they consider the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.

9 The Applicant's emails of 27 April and 10 June 2013 raised specific concerns regarding the contents of the Statement of Services; the debt recovery methods pursued by the Respondent; failure to keep an accurate record of payments due; failure to respond timeously or at all; failure to provide information; and the increase in the float contribution.

10 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicants.

Hearing

A hearing took place at the offices of the Homeowner Housing Panel, Glasgow on 4 September 2013.

The Applicants were both present although only Mr Sewnauth made submissions on their behalf. No other witnesses were called.

The Respondent was not represented and no witnesses were led on its behalf.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as "the 2012 Regulations".

The Respondent became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee had available to it and gave consideration to: the Application dated 9 May 2013 and the documents which accompanied it; the Applicants' letter of 27 April 2013; the Applicants' letter dated 10 June 2013 and its enclosures; the Applicants standard form intimation letter of 10 June 2013; a significant quantity of further documents lodged by the Applicant and intimated to the Respondent previously; and the Respondent's Response dated 18 July 2013 and the supporting documents lodged with the Response.

The documents before us included a Deed of Conditions by Vindex Glasgow Harbour Trustees Limited and Taylor Woodrow Developments Limited dated 25 September 2003 and 18 and 22 November 2004 (which we refer to as "the Deed of Conditions") and the Respondent's Written Statement of Services dated 22 October 2012 (which we refer to as "the Statement of Services").

The Applicants also tendered at the hearing a bundle of documents which had not been before us previously. We are able, under Regulation 12 of the 2012 Regulations, to consider documents which have been produced to us less than seven days prior to the hearing where we are satisfied that there is good reason to do so. We must also give consideration to fairness to the parties.

We consider that there was no good reason why the documents could not have been lodged with us sooner and that there was a risk of prejudice to the Respondent if the documents were allowed to be lodged. Therefore, we have decided not to allow the documents tendered to be relied upon and we have had no regard to them in reaching our decision.

In accordance with the wishes of both parties expressed previously by them in correspondence to the HOHP office, we have given no regard to emails dated 18 January 2013 which had been lodged by the Applicants at an earlier stage of the proceedings.

REASONS FOR DECISION

The Legal Basis of the Complaints

The Applicants complain under reference to Sections 1A a.; 1D m.; 2.1; 2.5; 3.3; 4.1; 4.5; 4.7; 4.9; 5.2 and 5.3 of the Code. They also complain of a failure to carry out the property factor's duties.

Property Factor's Duties

The Statement of Services contains headings beneath which are paragraphs contained in unnumbered bullet points. The Applicants rely upon the following bullet points:

"HPMS act as property factor to homeowners deriving delegated authority to do so through established custom and practice...

Where HPMS place insurance for common property through a broker on behalf of homeowners a summary of cover, including specific policy details can be provided upon request. Confirmation of any commission or payment received by HPMS, in relation to policy administration matters handled by HPMS on behalf of insurers, will also be provided on request...

HPMS will endeavour to respond to enquiries received in writing (including electronically) within 7 working days of receipt. If more time is required to respond the homeowner will be notified within that period."

The Code

The elements of the Code relied upon in the application provide:

"1...The written statement should set out:
A. Authority to Act
a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group...

D. Communication Arrangements...
m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;...

2.1 You must not provide information which is misleading or false...

2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement...

3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance...

4.1 You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts...

4.5 You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding...

4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs...

4.9 When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position...

5.3 You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance."

The Factual Complaints

The factual matters underlying the complaint are:

1 Deficiencies in the Statement of Services including its reference to the basis of the Respondent's appointment, the debt recovery procedure and arrangements concerning insurance commission;

2 The debt recovery procedure followed by the Respondent against the applicants;

3 Failure to keep an accurate record of the sums due by the Applicants including charging VAT at an inappropriate rate;

4 Failure to respond to communications timeously;

5 The increase in the Applicants' contribution to the float of £200;

6 Failure to provide Financial Information;

7 The Applicants also made reference to issues with the building structure including cladding and water ingress and the arrangements which apply to addressing those issues. The Applicants accepted at the hearing that they had not given sufficient notification of those issues to the Respondent to enable us to deal with them. The Applicants therefore withdrew these aspects of their Application and we accepted that withdrawal. Accordingly, we make no findings on these matters.

We deal with these issues below.

1 The Statement of Services

Appointment

The Applicants complain that the Statement of Services fails to comply with the Code in respect that it states, at p2: *"HPMS act as property factor to homeowners deriving delegated authority to do so through established custom and practice."*

The Applicant complains that this statement is inaccurate in that the Respondent is in fact appointed under the Deed of Conditions.

The Deed of Conditions specifies, at Clause 9.1, that *"the first Property Manager ...shall be Hacking & Paterson, 1 Newton Terrace, Charing Cross, Glasgow G3 7PL which appointment shall run from the date of appointment of the said first Property Manager by the Developer until the date falling 3 years after date of the sale of the last Flat by the Developer and shall be renewed annually thereafter unless terminated by a vote of the meeting [of the proprietors of the flats within the development]."*

The Applicants advised at the hearing that the last flat had been sold by the developers more than 3 years ago and that the Respondent had remained in place as Property Manager of the Development since.

It accordingly appears to us that the Statement of Services is inaccurate in that it fails to comply with Section 1A a. of the Code by providing an accurate statement of the Respondent's authority to act. The Statement of Services fails to mention the Deed of Conditions and incorrectly refers to custom and practice.

Debt Recovery Procedure

The Applicants complain that the Statement of Services fails to comply with the Code in respect of its debt recovery procedure. They made no submissions on this point and indicated at the hearing that it was to be withdrawn and we accepted that withdrawal.

Insurance Commission

The Applicants complain that the Statement of Services fails to comply with the Section 5.3 of the Code in respect that it states at p3, in the third bullet point under the heading *"Our Core Standards"*, that *"Confirmation of any commission or*

payment received by HPMS, in relation to policy administration matters handled by HPMS on behalf of insurers, will also be provided on request."

The Code requires disclosure of any commission and if the Respondent were to proceed in accordance with the Statement of Services and only disclose the receipt of commission on request, then it would be likely to be in breach of Section 5.3. However, we consider that there are no provisions within section 1 of the Code, which relates to the content of a written statement of Services, which apply to the current situation. We have no evidence before us that the Respondent has acted contrary to Clause 5.3. The Applicants sought to put before us at the hearing evidence from a third party that undisclosed insurance commissions had been received by the Respondent. At the hearing, we declined to deal with this point having regard to the fact that no notification of this complaint had been given by the Applicants to the Respondent as required by section 17(3) of the 2011 Act.

2&3 Debt Recovery Procedure and Failure to Keep an Accurate Record of sums due

We deal with these questions together as they are closely related.

The Applicants complain that the Respondent has acted in breach of Code Sections 4.1, 4.5, 4.7 and 4.9

Debt Recovery Procedure
The Applicants are unhappy at the way the Respondent has pursued them in respect of sums in dispute.

The Applicants complain that the debt recovery procedure of the Respondent fails to detail how disputed debts are to be dealt with. A copy of the debt recovery procedure had not been lodged by either party although the Applicants sought to do so at the hearing. We find that, although there is reference to Code Section 4.1 in the letter of 10 June 2013, there was no evidence of the Applicants having given notification of this head of complaint to the Respondent as required by section 17(3) of the 2011 Act. We therefore make no finding on this matter.

Monitoring Payments
The Applicants complain that by letter dated 28 March 2013 the Respondent advised the Applicants that their account was in arrears by £903.15. The Applicants had sent to the Respondent a cheque in the sum of £623.35 with their letter of 6 March 2013. They indicated that the cheque had cleared from their account on 14 March 2013. The remaining balance was intentionally unpaid as it was in dispute at the time.

The Respondent in its letter of 15 May indicated that the payment of £623.35 was yet to be updated on its system on 28 March 2013. It apologised to the Applicants.

We would have expected the Respondent to check the up to date position in relation to the Applicants' account before writing to them in this regard on 28 March 2013. Had they done so, they would have been able to identify the payment which had been enclosed with the letter of 6 March 2013. We find that the

Respondent failed in this regard to meet its obligation under Section 4.5 of the Code to ensure regular monitoring of payments from the Applicants.

The Applicant further complains in respect of this matter by reference to Section 2.1 of the Code that the information supplied was misleading or false. We consider that complaint to be well founded and find that the Respondent's letter misled the Applicants as to the true position regarding the state of their account.

Failure to Pursue Recovery of Debts Due

The Applicants submitted that the Respondent had failed in its duty under Section 4.7 of the Code to pursue sums due from other proprietors in the development (with the result that homeowners such as the Applicants were being asked to cover the shortfall by paying increased float contributions). The Applicants produced no evidence of any actual failings by the Respondent to pursue debts due. They relied solely upon a figure contained in a letter by the Respondent dated 23 November 2012 which specified a sum of £276,000 as being outstanding in respect of common charges for the whole development at that time. That letter was itself only produced at the date of the hearing. Although we decided not to accept written evidence presented on the day in any event, our view is that we would not regard reference to a particular sum being outstanding in isolation from other information to provide us with sufficient evidence of any failure on the part of the Respondent. Accordingly, we do not find that any failure has been demonstrated in relation to Section 4.7 of the Code.

Intimidating/Threatening Behaviour/Misrepresentation

The Applicants complain by reference to Section 4.9 of the Code. The Applicants were concerned to receive two letters from the Respondent's solicitors dated 10 and 21 January 2013. These threatened, among other things, court action, in the event that the Applicants failed to pay the sum of £237.50 said to be due by them to the Respondent.

This amount consisted of the disputed increase in the float of £200 and an administrative fee of £37.50 which the Applicants were withholding on the grounds of failure by the Respondent to provide information requested. The Applicants had communicated this to the Respondent by their letters of 6 and 10 December 2012.

In circumstances where the Applicants had explained to the Respondent that charges were not being paid because of a substantial dispute (in this case because of a dispute regarding the entitlement to increase the float contribution and because of a dispute concerning failure to provide requested information), we consider that it was intimidating to the Applicants for the Respondent to instruct solicitors to threaten action without the Respondent having first having taken reasonable steps to address the Applicants' concerns. We therefore find that the Respondent has acted contrary to Section 4.9 of the Code.

Value Added Tax

The Applicants complain that the Respondent has on its invoices 3101304; 3040017; 2833220; 2775351; 2713523; 2648853 and 2583882 charged for electricity at the standard rate of 20%.

Section 29A of and schedule 7A to the Value Added Tax Act 1994 allow for electricity supplied for domestic use to be charged at the reduced rate of 5%.

The Applicants complain by reference to Section 2.1 of the Code that the information contained on the invoices was misleading or false in that VAT was charged at 20% rather than 5%.

The Respondent has offered explanations in its letters of 15 and 22 May 2013. It acknowledges that a mistake has been made and that electricity has been charged at 20% when it ought to have been charged at 5%. The Respondent indicates that it has made arrangements for the suppliers to provide the appropriate credits on future electricity accounts. It seems surprising that in the course of its professional activities the Respondent would not be alive to the issue of reduced rated VAT and we would reasonably have expected the Respondent to have identified that an inappropriate rate was being charged to the proprietors of the development before passing on charges at the same rate to proprietors such as the Applicants. The matter only seems to have come to the Respondent's attention as a result of the questioning carried out by the Applicants.

We find that the information supplied by the Respondent to the Applicants in relation to VAT, in particular the repeated issuing of invoices with an incorrect VAT rate, was misleading, contrary to Section 2.1 of the Code.

Glasgow Harbour Charges

Invoice 3101304 dated 7 February 2013 contains a charge of £72.82 plus VAT but a corresponding credit fails to credit back the VAT. The Respondent attempts to explain this in its letter of 22 May 2013 although the explanation provided appears to justify the Applicants' concern that they have been overcharged by the VAT on £72.82 (ie £14.56). We consider that the letter of 22 May 2013 was unclear and, in so far as it purports to provide an answer to the Applicant's query, it is misleading, contrary to Section 2.1 of the Code.

Although the Applicants did comment upon invoices 2975739 and 307099 in their letter of 10 June 2013, the Applicants did not lead evidence on these matters and we accordingly make no formal findings as regards the applicability of Section 2.1 of the Code to these invoices.

4 Failure to Respond Timeously

The Applicants complain about certain delayed responses and complete failures to respond. They do so by reference both to Section 2.5 of the Code and the Statement of Services. The relevant section of the latter is found in the second bullet point on page 4 where the Respondent indicates that it will endeavour to respond to written enquiries within seven working days or will at least inform a homeowner within the same period if it requires a longer period within which to respond.

The Applicants complain that they have never had a response to their letters of 6 and 10 December 2012 in so far as those letters requested a breakdown of certain invoiced Building Repair/Maintenance costs. We find that the Respondent has

failed to offer a response to these requests and is in breach of both Section 2.5 of the Code and of its duties arising under the Statement of Services.

The Applicants also complain of the Respondent's failure to deal with enquiries regarding invoice 297573 which enquiries were contained in their letter of 19 November. As that letter is not before us (it was one of the documents sought to be lodged at the hearing but which we have refused to allow to be lodged), we do not consider that we are able to make a finding that there has been any failing by the Respondent in this respect.

5 Float

The Applicants complain about an increase in the float applicable to the Property. The decision to increase the Applicant's float contribution was intimated by the Respondent to the Applicants in its letter of 12 October 2012. This letter intimated an increase of £200.

The Deed of Conditions, at Clause 9.5, makes provision for a float to be held by the Respondent to enable it to deal with common maintenance matters and for each flat in the development to be liable to contribute a share. A schedule to the Deed of Conditions sets out the applicable contribution to the float for each property in the development. In the case of the Property, this is £700. The increase would take this to £900.

The Applicants complained to the Respondent about the increase by letter dated 6 December 2012 (their original complaint was by letter dated 19 November 2012 although we have not had regard to that letter). On 27 December 2012 the Applicants sent to their solicitors a cheque for £200 made payable to the Respondent. By letters of 10 December 2012 and 14 January 2013, the Applicants intimated their position in relation to the increased float and sought confirmation in their letters of 27 February and 1 April 2013 as to the legal basis for imposition of the increase.

The Applicants have engaged in detailed correspondence with the Respondent on the increase in the float. By letter of 15 March 2013, the Respondent indicated that the increase was not a legal matter but a requirement for them to be able to carry out their core factoring services at the development. On 10 April 2013 it applied similar language in its letter but referred to the Deed of Conditions, although it is unclear from that letter whether the Respondent sought to claim that a right to increase the float was available to it from the Deed of Conditions.

The Applicants feel that an increase in their float contribution is not justified. Their position is that their account is kept up to date, their account is never in excess of £700 in arrears and that they should not be asked to subsidise the non-payment of charges by other proprietors (which they attribute to poor debt recovery performance on the part of the Respondent).

By letter dated 15 May 2013, the Respondent wrote to the Applicants on a number of topics. One of these was the increase in the float, dealt with at paragraph d).

That letter referred to the introduction of the 2011 Act; the Deed of Conditions; the increase being the terms by which the Respondent was able to provide a factoring service at the development; and to a meeting of residents. It fails to state clearly the basis for the increase. This is despite the fact that, by this stage, the parties had been engaged in correspondence on the topic of the float increase for several months.

The Respondent's letter of 15 May 2013 appeared to us to conflate a number of issues. It failed to offer a proper and adequate explanation of the basis upon which the Respondent purported to be able to insist upon an increase in the float. The reference to the 2011 Act, in particular, seems irrelevant and it is reasonable to infer that the Respondent expected the Applicant to make some connection between the entitlement to impose the increase and the legislation. Accordingly, we find the letter of 15 May to be misleading contrary to Section 2.1 of the Code.

While similar comments might have been made about the Respondent's letter of 12 October, about which the Applicants also complain, that letter was issued at a time prior to the Respondent being under a duty under section 14(5) to comply with the Code and, accordingly, we have no jurisdiction to make a finding in relation to the content of this letter.

6 Failure to provide Financial Information

The Applicants complain that the breakdown of financial information provided by the Respondent is insufficiently detailed. They observe that large sums are contained under general headings in the quarterly invoices provided by the Respondent. The Applicants complain under reference to Section 3.3 of the Code. That contains an obligation for a detailed breakdown to be provided annually.

Having regard to the fact that the Code only took effect on the Respondent from November 2012, we are of the view that it would be premature to make a finding that there had been a failure to provide a detailed breakdown as at the present date. We would observe however that the invoices and statements produced by the Respondent contain some large sums which are not broken down beyond general headings.

Observations

We found Mr Sewnauth to have presented the case on behalf of his wife and himself as Applicants in a detailed manner. We found him to be a credible and reliable witness.

The Respondent chose, as it was entitled to do, not to be represented at the hearing. It relied instead upon its written submission dated 18 July 2013. That consists almost entirely of bare denials of the complaints contained in the Application dated 9 May 2013. It states that all matters detailed in the Applicants' letter of 27 April 2013 have been answered in full "in subsequent correspondence", without specifically identifying this correspondence.

The Committee, in the absence of the Respondent, ensured that the matters contained in the Respondent's submission were put to the Applicant at the hearing and fully considered. The Committee found the Respondent's approach of producing so little detail in its written response and choosing not to appear at the hearing to be unhelpful to it in addressing the matters at issue.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make the following property factor enforcement order:

Within 60 days of the date of the communication to the Respondent of the property factor enforcement order, the Respondent must:

1 *Issue to the Applicants and to all of the other homeowners in the Glasgow Harbour development factored by the Respondent an accurate Written Statement of Services which refers to the correct basis of the Respondent's authority to act.*

2 *Issue a written apology to the Applicants in respect of: the Respondent's failure to properly record in its letter of 28 March 2013 the payment made by the Applicants; the instruction by the Respondent of solicitors to pursue recovery of sums known to be in dispute; the provision of invoices to the Applicants which showed incorrect rates of VAT relating to power supplied; the failure to provide a breakdown of financial information requested by the Applicants and the failure to communicate clearly the basis upon which an increase in the float contribution was sought.*

3 *Make a payment to the Applicants of £100 in recognition of the expense and inconvenience caused to them as a result of the Respondents' failings.*

4 *Make a payment to the Applicants of £14.56 in repayment of the VAT charged in Invoice 3101304 dated 7 February 2013 but which was not re-credited.*

5 *Provide to the Applicants a detailed breakdown of the charges for Building Repair/Maintenance of £14,348.98 referred to in the Applicants' letter of 6 December 2012.*

6 *Ensure that all sums overcharged in respect of VAT in respect of power supplies have been applied to the credit of the homeowners' accounts.*

7 *Provide to the Applicants a clear explanation of the basis of the Respondent's entitlement to impose the increase in the float contribution of £200.*

8 *Provide documentary evidence to the Committee of the Respondent's compliance with the above Property Factor Enforcement Order by sending such evidence to the office of the Homeowner Housing Panel by recorded delivery post.*

Section 19 of the 2011 Act provides as follows:

"...(2)In any case where the committee proposes to make a property factor enforcement order, they must before doing so--

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to them.

(3)If the committee are satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the committee must make a property factor enforcement order..."

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

Failure to comply with a property factor enforcement order may have serious consequences and may constitute an offence.

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..."

JOHN M MCHUGH

CHAIRMAN

20/09/13.