



Decision of the Homeowner Housing Committee issued under Section 19 of the Property Factors (Scotland) Act 2011 (“the Act”) and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

hohp Ref: HOHP PF/16/0018

The Property: 55/4, Bryson road, Edinburgh EH11 1DS

The Parties: –

**Dr Michael Pearson residing at 37 Allan Park Crescent, Craiglockhart,
Edinburgh EH14 1LF (“the homeowner”)**

and

**James Gibb Residential Factors, 4 Atholl Place, Edinburgh, EH3 8HT
 (“the factors”)**

Committee Members: David Preston (Chairman); and Jean Thomson (Housing Member).

Decision:

The Committee found that the Factors had failed: to comply with the Code of Conduct for Property Factors; and to carry out the property factor’s duties.

Background:

1. By application dated 16 February 2016 Dr Pearson applied to the Homeowner Housing Panel (“the Panel”) to determine whether the factors had failed to comply with the Code of Conduct and had failed to carry out the Property Factors’ duties imposed by the Act. In the application Dr Pearson complained that the factors had failed to carry out the property factors’ duties. The application form stated that “the factor (James Gibb) has a legal responsibility to carry out repairs and maintain common parts of the

land owned by ourselves. The common stairwell comes under their responsibility and the attached documents demonstrate the factors' admission of that responsibility. The work was due to be carried out before (or soon after) we acquired the property in August 2014 but the factor has failed to replace the threadbare stair carpet in spite of many requests. The carpet is now a danger to health and safety in the property." Along with the application form, the homeowner submitted photographs of the damaged areas of the stair carpet.

2. Following the submission of the application, Dr Pearson sent further letters containing the following enclosures to HOHP in amplification of his complaints:
 - i. Letter dated 14 March 2016:
 - i. Additional Notice to factors on 9 March 2016;
 - ii. Response to the Notice from factors dated 9 March 2016;
 - iii. Copy Written Statement of Services and Development Schedule;
 - iv. Copy letter from homeowner to factors dated 2 February 2016;
 - v. Copy letter from Catherine McClanachan, home owners solicitor to factors dated 1 February 2016.
 - ii. Letter dated 18 April 2016:
 - i. Letter to factors dated 10 April 2016;
 - ii. Copy circular letter from the factors dated 23 March 2016;
 - iii. Letter dated 2 May 2016:
 - i. Further copy of email from factors dated 9 March 2016;
 - ii. two photographs of the front porch taken on 29 April 2016.
 - iv. The homeowners had also submitted a chain of emails dated between 9 August 2015 and 30 January 2016 and an extract from the survey report which had been carried out on the property prior to their purchase in August 2014.
3. By Minute dated 16 May 2016 the President of the Panel, through the authority delegated by her to a Convener of HOHP, issued a Minute of Decision to both parties, stating that she considered that in terms of section 18(3) of the Act, there was no longer a reasonable prospect of the dispute being resolved at a later date; that she had considered the application paperwork submitted by the homeowner, comprising documents received in the period 19 February 2016 to 4 May 2016 (detailed above); and intimating her decision to refer the application to a panel committee for determination.

4. The letter dated 10 April 2016 referred to various sections of the Code of Conduct for Property Factors (the Code). It referred to alleged failures of the factor in that:
 - i. they had failed to provide target times for taking action in response to requests for routine repairs relating to the replacement of the common stair carpet;
 - ii. they had failed to respond to an email sent on 2 February 2016 requesting a copy of the factors complaints handling procedure;
 - iii. they had failed to: carry out repair and maintenance of the property as agreed; to inform homeowners of estimated timescales for completion; to prepare a programme of works with timescales between 2014 and March 2016; to repair or replace the stairwell covered within the appropriate timeframe; to inspect and repair damage to bathroom ceiling of the property caused by communal flood; to repair the front porch roofing supports within the appropriate timeframe; to provide a replacement key for the new block of the bicycle shed.
 - iv. They had failed to respond formally within a reasonable timescale to all the issues raised in a letter of complaint sent to them on 9 March 2016 by the homeowner.

The letter explained that repeated telephone requests had been made to the factor from September 2014 resulting in letters from the homeowner and his solicitors to inspect and repair the damage done to the bathroom ceiling by communal flooding and carrying out refurbishment of the communal stairwell. The homeowner referred to such letters: dated 1 February 2016 from his solicitor; dated 2 February 2016 from himself; a letter attached to an email from the homeowner sent on 9 March 2016. He referred to the Code (sections 2.5, 6.1, 6.4 and section 7 (introduction) and section 7.1 and the factors' Written Statement of Services, sections 3.2 and 6.2.1 which, he said required the factors to communicate and carry out repairs within agreed timeframes.

Hearing:

5. A hearing took place at George House, 126 George Street, Edinburgh EH2 4HH on 10 August 2016. Present at the hearing were: the applicant, Dr Pearson accompanied by his wife, Mrs Pearson; and Ms Jen Bole on behalf of the factors.
6. The homeowner's application had been accompanied by copy correspondence and paperwork. No productions were lodged by the factors. Ms Bole said that as the

productions from the homeowners covered the correspondence from the factors she had not seen any need for her to lodge them again.

7. In addition to the written evidence submitted by the parties, representations were made by Dr and Mrs Pearson and Ms Bole.
8. Following the initial introductions, the chairman outlined the procedure which it was intended should be followed and explained the function of the Committee.
9. There were no preliminary matters to be considered

Evidence and Representations

Homeowner

10. The homeowner summarised his case. By way of background, he explained that he and his wife had purchased the flat in 2014 for their daughter who was a student at Edinburgh University. The flat had been in good condition when they bought it but they were aware that there had been problems with the stairwell which was to be painted and the carpet replaced. They had understood that these works were in the process of being attended to and expected that they would have been completed by the time of their purchase. Whilst the painting had been completed in or about August 2015, the carpeting had not been progressed and still had not been completed at the time of the hearing. The stair carpet was torn as shown in the photographs which had been submitted with the application and indeed were, at the date of the hearing in a worse condition. The carpet was torn and hanging loose from the stair risers in places and presented a significant trip hazard which he had complained was a serious health and safety issue.
11. Dr & Mrs Pearson had also been made aware by the seller of the flat that there had been a flood which had resulted from a leak in the flat above and that the seller had reported this to the factor with the intention of pursuing an insurance claim. At the time of their purchase, the claim was on-going but liability was repudiated by the insurers and it had been necessary for the homeowners to complete matters themselves.
12. Dr Pearson complained that he and Mrs Pearson had attempted on numerous occasions without success to get progress reports from the factors in relation to the

work. He referred to the correspondence and emails submitted with and since the application in support of his position and said that they had also attempted to speak to the factors by phone, also without success. In any event they had not been able to ascertain any timescales.

13. Dr Pearson complained that despite numerous requests the factor had failed to provide keys for new locks on the bike sheds. As at the date of the hearing no keys had been provided.
14. Dr Pearson complained that following damage to the front porch of the building, the factors had failed to inspect and repair the damage.
15. Dr Pearson said that he had requested a copy of the factors' complaints procedure but this had not been provided to him. He said that he had searched the web where it was said in the factors' Written Statement of Services a copy could be found but a search on the website produced no results, although he said that a copy had appeared on the website the previous night.
16. Dr & Mrs Pearson explained that they had previous experience of property which had not been factored and in such situations accepted that they had to make arrangements with other proprietors with regard to any repairs, maintenance or other problems which arose. They had expected that when they bought the flat which involved factors they would not be required to do such work themselves since they were paying factors to do it. However they had found that the factors in this case had, in their view failed to carry out the work which they expected to be done.

Factor

17. In response, Ms Bole said that prior to Dr & Mrs Pearson's purchase of the property there had been an agreement, in 2014 amongst the proprietors for work to be carried out to the stairwell. It had been agreed that the painter work should proceed first and a replacement carpet carried out thereafter to avoid paint spills on a new carpet. The factors have therefore prioritised the painter work in accordance with those instructions.
18. Ms Bole referred to the letter dated 26 June 2014 to Messrs Blair Cadell, the solicitors acting for the seller which was their response to the standard letter in anticipation of a sale. The letter provided information regarding the proposed work to the stairwell and a

copy of the Block Buildings Insurance Schedule. She said that it was intended that the contract will be instructed around the time of the purchase and letters had been sent out to regarding the colour scheme.

19. Ms Bole advised that both the painting and the carpet replacement were subject to advance funding and funding call was made. She explained that for larger works, beyond routine maintenance, they required to be in funds to the extent of 80% of the cost prior to instructions being issued. If that level is not achieved she explained that the contract would be cancelled and refunds in gathered would be refunded to the owners. So far as the painting was concerned, by use of the sinking fund she said that 75% of the cost had been obtained and therefore that contract went ahead. In relation to the carpeting they had only received 66% of the cost but she advised that the carpets had nonetheless been ordered and they were to be fitted within the next two to three weeks.
20. Ms Bole said that the work to the porch had been complicated because of the way the damage had occurred. Several joiners and roofers had been consulted but some had only looked at parts of the work. A suitable and acceptable contractor had been identified and she advised that there was a possibility that the work would proceed on Saturday 13 August but she said that the work would proceed the following week.
21. Regarding the bike store, Ms Bole said that following a break-in, the original lock had been repaired and therefore the existing keys still operated. She said that further work was required but that they had to wait until the shed had been cleared out before that could proceed.
22. Regarding the insurance claim for water damage, Ms Bole said that the claim had been lodged prior to Dr & Mrs Pearson's purchase. The insurers had appointed a loss adjuster who had recommended that the claim be repudiated which had been done by the insurers. She said that on the block insurance, the factors are a contact point only where the damage is to common parts of the building. When the damage occurs within individual flats, it is for the owners to deal direct with the insurers. She explained that the decision to repudiate is made exclusively by the insurers and the factors are not involved. She said that there was no logic in having an extra step involved of the factors being involved where the damage was to individual properties. She said that the contract was between the insurers and the loss adjusters and that the factors do not receive and are not provided with a copy of the loss adjusters decision or any

report provided by them and therefore the information contained in the email from her to Dr & Mrs Pearson dated 9 March 2016 and as provided to their solicitors was all the information which they had. She referred to an insurance protocol which regulated the way in which insurance claims were handled but she had not produced a copy of the protocol for consideration by the Committee.

23. Ms Bole said that the factors complaints procedure had been available throughout on the web but that it had recently been revised and a fresh version had been posted on the web. She referred to an email she claimed had been sent to the Home Owner February however was unable to provide evidence of this email at the hearing.

Findings and Reasons:

24. The Committee considered all of the evidence to which it had been referred by the parties both written and oral.
25. The Committee was concerned that the factors had not lodged any documentation or copy correspondence in advance of the hearing. During the hearing Ms Bole attempted to locate items of correspondence or other documents to which she wished to refer, but she was unable to locate any such evidence.
26. The Committee also noted that a number of the specific issues to which Dr & Mrs Pearson referred and about which they complained had not been specifically referred to within the terms of the application form. However Ms Bole took no objection to such matters being considered by the Committee and indeed specifically responded to Dr Pearson's amplification of the complaints both within the terms of the letter dated 10 April 2016 and at the hearing. The Committee took the view that if it was not to proceed to consider such complaints they would require to be the subject of a further application and possible hearing which would result in unnecessary inconvenience and expense to the parties as well as to the public purse.
27. In certain respects, the Committee found that Dr & Mrs Pearson's expectations of the factors and what they were required to do went beyond the reality. However the Committee considered that it was incumbent upon the factors to ensure that their clients were properly made aware of the extent of the factors' obligations. That had been one of the intentions of the Act. The Committee noted the terms of the factors' Written Statement of Services which does detail those obligations. However the

Committee was of the view that in certain aspects of this case, Dr & Mrs Pearson had not fully appreciated the situation. It had been a significant failure on the part of the factors to provide explanations of their particular obligations with reference to their Written Statement of Services and in relation to the position regarding insurance claims.

28. The application stated: "the factor... has a legal responsibility to carry out repairs and maintain common parts of the land owned by ourselves". Some of the correspondence suggested that the factors had failed to carry out repairs or undertake work. For clarification the Committee approached matters on the basis that the factors are not expected to physically undertake any work themselves; but is their function to act on behalf of the homeowners in the development to ensure that necessary repairs and maintenance are carried out within reasonable timescales and to keep homeowners informed of progress. The Committee also recognised that factors must ingather sufficient funds to meet the cost of any contracts awarded and that they cannot be expected to proceed to award contracts in circumstances which would require them to incur liability.

29. In respect of the individual matters about which Dr & Mrs Pearson complained, the committee found as follows:

30. Insurance Claim:
 - i. It was clear to the Committee that when Ms Bole explained the situation at the hearing, Dr & Mrs Pearson understood and appreciated the situation. It is unfortunate that this clear and full explanation of the factors position in relation to insurance claims was not properly explained to Dr & Mrs Pearson without the need for an application to HOHP.
 - ii. There was nothing contained in any of the productions before the Committee to indicate that any attempt had been made to provide such an explanation. The only explanation was in the quotation from the factors response to the homeowners' solicitors contained in the email from Ms Bole dated 9 March 2016. However this only advised that the claim had not been accepted by the insurers and gave no reason for that. At the hearing Ms Bole explained that where the damage had been caused by a leak within an individual flat which did not come from a common part, and the consequential loss was caused to an internal part of a flat which was not part of the common property then it fell to the individual proprietors to resolve any claim through the insurers.

- iii. Section 7 of the factors' Written Statement of Services says that details of the claims handling procedures are available on the factors' website. However the Committee was unable to locate any such details and in any event it would have been helpful if the factors had lodged a copy of such details prior to the hearing.
- iv. Ms Bole made reference at the hearing to an insurance protocol which had been followed. A copy of such a protocol was neither provided to the Committee nor, as far as the Committee is aware, to the homeowners.
- v. The Committee accepted that the factors were under no obligation to attend to inspect and repair the damage to the bathroom ceiling as suggested by the homeowners.
- vi. The Committee noted the explanation of the factor that they would only be involved in an insurance claim where this relate to common parts of the building. However the Committee was not satisfied that sufficient explanation, information or assistance about or with the process had been provided to the homeowner in relation to the water damage claim.

31. The Committee found that the factors had failed to communicate effectively with the homeowners to provide satisfactory explanation of the circumstances surrounding the insurance claim.

32. Common Stairwell:

- i. Instructions were given to the factors to proceed with the painting and re-carpeting of the stairwell in 2014. Mrs Pearson asked in an email of 9 August 2015 for news about the carpet fitting. The factors responded on 11 August 2015 to advise that they were chasing up the carpet fitter regarding any alteration to the quotation. Further emails from Mrs Pearson in which information was requested about the re-carpeting were dated: 4, 11 and 17 September; 6 October; and 27 December 2015. The only response to these emails was on 29 December 2015 when the factors advised that they had been "hounding" the contractor for confirmation of any revision to the price.
- ii. The email from Mrs Pearson dated 18 August 2015 referred to the fact that the decoration of the stairwell had been completed by that time which was some eighteen months after the instruction to proceed had been given and approximately one year after the homeowners had been led to believe that the work would be completed, as indicated in the factors' letter dated 26 June 2014 to the Seller's solicitors.

- iii. The Committee was satisfied that the condition of the carpets did give rise to health and safety concerns as the evidence from the photographs lodged showed that the carpet was falling away from the steps and could easily be caught by a heel resulting in a potentially serious fall. The Committee was satisfied that the homeowners had pointed this out to the factors on a number of occasions and by the homeowners' solicitors on 1 February 2016 and the factors had failed to take any steps to remedy the situation, even on a temporary basis.
- iv. It was reported to the Committee that the re-carpeting of the stair had not taken place but the carpets had been ordered. The factors reported that the work was due to be carried out.

33. The Committee found that the length of time taken by the factors to make meaningful progress with the refurbishment of the stairwell was unacceptable. In addition the factors had failed to respond to the reasonable enquiries of the homeowners as to progress.

34. Bike Shed Keys:

- i. The email dated 17 September 2015 from Mrs Pearson to the factors specifically asked for them to be supplied with three keys as soon as possible. The email dated 6 October 2015 said that Mrs Pearson was reluctant to get additional old keys cut as had been indicated a few weeks previously. A further email of 5 December 2015 again requested progress on the locks.
- ii. The circular letter to homeowners from the factors dated 23 March 2016 referred to the proposals in relation to the Bike Store.
- iii. At the hearing the parties confirmed that the locks had not been changed and the factors indicated that the existing locks remained in use and undertook to provide keys for these locks. Ms Bole said that further work was to be carried out which would require the shed to be cleared out.

35. The committee found that the length of time taken by the factors to make meaningful progress with the replacement of bicycle shed locks was unacceptable. The Committee considered that the fact that the locks had not been changed in accordance with the proposals outlined in the circular of 23 March 2016 was unreasonable. In addition the factors had failed to respond to the reasonable enquiries of the homeowners as to progress.

36. Porch:

- i. No evidence was presented to the Committee to demonstrate when the damage to the porch had occurred. However the repair is referred to in correspondence dating back to 9 March 2016. Ms Bole explained the difficulties which had arisen in obtaining suitable contractors to undertake the work required but, apart from the general reference to some unspecified problems relating to the repair in the circular letter dated 23 March 2016 (which indicated that the work would be dealt with shortly) no further information was provided despite a number of requests by the homeowners.

37. The Committee found that the factors failed to inform the homeowners of the progress of this work and to make reasonable progress in having the repairs carried out.

38. Complaints Procedure:

- i. The email from Mrs Pearson dated 5 December 2015 requested that the matter be passed to the Directors of the factors immediately in order to find a speedy resolution to the problem. Ms Bole was unable to demonstrate that any action had been taken on this request.
- ii. A number of requests were made by the homeowners for a copy of the complaints procedure. They said that they had been unable to find it on the website until the night before the hearing. Ms Bole said that it had been on the website throughout but that it had been updated. Ms Bole did not produce any evidence to demonstrate to the Committee when the complaints procedure had been posted to the website. In the absence of such evidence the Committee accepted the evidence of the homeowners that the complaint procedure had not been posted. Ms Bole acknowledged that a specific copy of the complaints procedure had not been forwarded to the homeowners.

39. The Committee found that the factors had failed to respond to the reasonable request of the homeowners for a copy of the complaints procedure or for the matter to be referred to the formal complaints procedure.

Determination:

40. The Committee found that the factors were in breach of Section 2 of the Code. There was evidence of a significant failure to communicate effectively or to respond to

reasonable requests and complaints within prompt timescales from the homeowner over a protracted period of time as provided in Section 2.5.

41. The Committee found that the factors were in breach of Section 5 of the Code. They failed to supply information to enable them to submit claims on their own behalf in respect of the private or internal works as provided in Section 5.4 and failed to provide them with sufficient information to allow them to pursue the matter themselves as provided in Section 5.5
42. The Committee found that the factors were in breach of Section 6 of the Code. They failed to inform homeowners of the progress of the work in relation to: the replacement stair carpet; the necessary work to the bike shed and replacement locks; work required to the entrance porch; and to provide estimated timescales for completion as provided in Section 6.1.

Property Factor Enforcement Order (PFEO):

43. Having determined that the factor had failed to carry out the property factor's duties and to comply with the Code, the Committee was required to decide whether to make a PFEO.
44. The Committee considered that the factor should ensure that a full and detailed explanation of the circumstances in which they will or will not be involved in insurance claims and of the extent of that involvement is contained within their Written Statement of Services. Beyond that there was no effective action which the Committee considered the factor could take to remedy their failings as the homeowner had resolved the water damage issue through his own efforts. The factor had undertaken to attend to the outstanding works to the stairwell and bike shed in the period following the hearing.
45. The Committee considered that the factor should ensure that a hard copy of the updated complaints procedure is issued to all Home Owners.
46. The Committee determined that the homeowner should be compensated for the time, effort and stress occasioned by the factor's continuing failures: to communicate essential information; and provide reasonable assistance in respect of the insurance claims relating to damage within their property; and their failure to provide and maintain realistic and achievable timescales for repairs and maintenance work to be carried out.

47. The Committee took into account the volume of correspondence they had sent to the factor, much of which was not answered to their satisfaction and considered that the sum of £500 would be appropriate.

Right of Appeal:

48. The parties' attention is drawn to the terms of Section 22 of the Act regarding the 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 the President of the Homeowner Housing Panel or 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..."

More information regarding appeals can be found in the information guide produced by the Homeowner Housing Panel. This can be found on the Panel's website at:

<http://hoHP.scotland.gov.uk/prhp/2649.325.346.html>

20-Aug-16

X

CHAIRMAN

Signed by: DAVID MICHAEL PRESTON