



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

HOHP REF: HOHP/PF/15/0039

Property: Flat 27, 31 Simpson Loan, Edinburgh, EH3 9GG.

The Parties:-

James Young, Flat 27, 31 Simpson Loan, Edinburgh, EH3 9GG ("the homeowner")

Quartermile Estates, Estate office, 9 Simpson Loan, Edinburgh, EH3 9GQ ("the property factors")

Committee Members

Simone Sweeney (Chair) Tom Keenan (Housing Member)

Decision

The committee determines;

- (i) That there has been no evidence led of any failure on the part of the property factors to comply with the property factor's duties created by Section 17 of the Act.
- (ii) That the respondent is not in breach of Section 4.6 of the Code of Conduct.
- (iii) That no property factor enforcement order in terms of Section 19 (1) (b) of the Act will be issued.
- (iv) This decision is unanimous.

Background

1. By application of 10th April 2015, the homeowner applied to the Homeowner Housing Panel for a determination on whether or not the respondent had failed to; (i) comply with section 4.6 of the Code of Conduct imposed by Section 14 of the Act and; (ii) carry out the property factor's duties in terms of Section 17 of the Act by, firstly, failing to respond to a request for information.
2. A committee of the Homeowner Housing Panel ("the committee") heard evidence from both parties at George House, Edinburgh on 18th December 2015. The homeowner was not represented. He gave evidence personally. The property factors were legally represented by, specifically Mr Nisbett, solicitor of Brodies solicitors who made submissions to the committee on their behalf.

Submissions of the homeowner

3. The homeowner provided background to the committee for bringing his application. He advised that the property factors had brought debt recovery action against a neighbouring homeowner in 2011. Her name was, Professor Shiekholeslami. The property factors had instructed solicitors in this process. The court action had been successful and decree had been granted in favour of the property factors, with expenses. The homeowner was concerned about the level of legal expenses which the property factors had incurred in this process. A diet of proof had taken place lasting 6 days. Investigations by the homeowner revealed to him that Professor Shiekholeslami had a history of bad debts. In support of his application, the homeowner had produced copies of written judgements against Professor Shiekholeslami from other jurisdictions (Canada and Australia). These were dated, 1998 and 2011. It was the homeowners position that the solicitors acting for the property factors had not made sufficient enquiries to familiarise themselves with these decisions. The homeowner wanted copies of all communications between the property factors and their solicitors from this case to satisfy himself that the solicitors had taken into account the previous conduct of Professor Shiekholeslami. The homeowner believed that this information was important to the debt action and ought to have been made known to the presiding Sheriff at proof. The homeowner advised that there was no reference to this in the Sheriff's judgement (decision?).

He was of the view that had the Sheriff been made aware of these other judgements the proof may have been concluded sooner. Another Sheriff had advised the homeowner that the proof should have lasted no more than half a day. Had the proof been shorter, the legal fees would have been reduced. The homeowner advised that his individual share of the legal costs incurred was £15.

4. The homeowner submitted that he had made requests for this information from the property factors in writing. Letters dated 20th, 28th October 2014 and 21st November 2014 were produced in support of the application. However his request had been refused by the property factors.
5. The homeowner accepted that he and the other homeowners had been placed on notice by the property factors of their intention to take debt recovery action against Professor Shiekholeslami. He confirmed that this formed the subject of discussions at meetings between the property factors and the homeowners. Not only was he present at these meetings, he was a member of the management committee and had been the author of the minutes of the meetings. The homeowner confirmed that he had been in favour of court action being taken against Professor Shiekholeslami. Moreover he confirmed that the issue of legal costs had formed part of these discussions.
6. The homeowner agreed that the property factors act as agents for the homeowners. He accepted that the solicitors had been instructed by the property factors. He accepted that there may be information between a solicitor and client to be legally privileged. He advised that he was not suggesting that the property factors breach their obligations under Data Protection legislation. The purpose of recovering the information was to enable him to take legal advice on what if anything could be done to prevent further costs being incurred in action being taken against the debtor which the homeowners would be expected to meet. The homeowner conceded that he had not yet taken any legal advice and was unaware of what remedies, if any, were available to him, what information, if any, would be required to enable to pursue any remedy how this might be recovered if required, at all.

Submissions for the property factors

7. Mr Nisbett disputed that there had been any breach of section 4.6 of the Code of Conduct or breach of the property factors' duties by his clients. Rather than having breached the terms of

section 4.6, the property factors had engaged with the homeowners to make sure that they were fully informed of the debt recovery problems which they were experiencing with Professor Shiekholeslami and how this may affect them. Mr Nisbett submitted that this was an extremely difficult debtor and empathised with the homeowner's frustrations. Mr Nisbett provided an undertaking on behalf of the property factors that no further action would be taken against the debtor without the consent of the homeowners. There was no intention to proceed with sequestration at this time.

8. Mr Nisbett produced copies of minutes from management committee meetings dated, 9th November 2010; 28th March 2011; 24th October 2011 and 3rd May 2012. Mr Nisbett offered his apologies to the committee for failure to lodge these documents timeously. There being no opposition to them being lodged late and in view of the fact that the homeowner was the author of the documents and familiar with their content and, therefore, there being no prejudice to the homeowner in terms of regulation 12 (3) of the regulations, the committee exercised their discretion in terms of regulation 12 (2) of the regulations and allowed the documents to be received, late.
9. Mr Nisbett referred to the minutes from the meeting of 28th March 2011, specifically paragraph 8.4.1. This paragraph was headed, "*Unpaid service charges.*" The paragraph read, "*CO tabled that there was only one outstanding account across the development and a court date had been set to deal with this. CO and JY agreed that the Deed of condition set out the procedure for payment should an owner default.*" The homeowner accepted that the letters "JY" referred to himself and that he agreed to the procedure which should be followed in the event of someone being in default.
10. Mr Nisbett referred the committee to the minutes from the meeting on 3rd May 2012, specifically, paragraph 5.1. This paragraph headed, "*Non payment of service charge*" referred to the action brought against Professor Shiekholeslami and the associated legal fees being around £25,000 at that time. The minutes suggested that the legal action was not yet concluded. It read, "*The case had not yet been closed due to an ongoing appeal. An inhibition had been put on the sale of property in question and an arrestment put in place, but no funds had yet been recovered.*" The minutes read further,

"HS stated that non-payment of service charges could not be tolerated. JY agreed and said that, in his opinion, Quatermile Estates had acted appropriately on owners' behalf and had done what needed to be done."

11. Next Mr Nisbett turned to a letter from the property factors dated, 24th October 2014, addressed to the homeowner. This letter was already before the committee having been produced by the homeowner in support of his application. The 4th paragraph with the title, *"Legal actions concerning recovery of unpaid service charges"* referred to the action against Professor Shiekholeslami.
12. In Mr Nisbett's submission, the minutes showed that the property factors had kept the homeowners fully informed of the procedure, their intentions and the associated costs and disputed any suggestion by Mr Nisbett that he had not been kept informed.
13. Mr Nisbett submitted that the homeowner was going too far in his request for information. It seemed to him that the homeowner wanted to carry out a review of the conduct of the property factors in their discussions with their solicitors. The requests which the homeowner had made appeared to be very general and included data which was privileged and personal. The property factors would not release any information which would breach Data Protection legislation and this had been explained to the homeowner in writing. Mr Nisbett was not of the view that this fell within the terms of section 4.6 of the Code which is specifically what he alleges that the property factors have failed to meet.
14. The property factors understood that the homeowner was concerned that the debtor was continuing to accrue debt and she continued to be a homeowner at the development and that further court action against the debtor could result in further costs to the homeowner. An assurance was offered by Mr Nisbett that the property factors would take no further action without the consent of the homeowners.
15. In response, the homeowner accepted that the property factors acted as agents for the homeowners and that the firm of solicitors were instructed to act for the property factors. He accepted that information between a solicitor and client was legally privileged and did not expect the property factors to act out-with Data Protection legislation and submitted that if data protections constraints mean that he receives none of the information he has requested then he has to accept that. The homeowner submitted that his particular share of the costs of

the litigation taken against the debtor had been £15. However, nothing which Mr Nisbett had said before the committee had filled him with any faith that the homeowners could not face increased costs in the future which was his greatest concern.

Findings in fact

16. That the homeowner is the heritable proprietor at Flat 27, 31 Simpson Loan, Edinburgh, EH3 9GG ("the property").

17. That the property factors registered as factors on 28th January 2013.

18. That the property factors are responsible for arranging and administering repair and maintenance of the common parts of the property and recovering all associated costs from the homeowners.

19. That, at section 7A of his application to the HOHP, the homeowner had specified paragraph 4.6 as the section of the Code which had been breached by the property factors.

20. That the property factors are bound by the Code of conduct and, in particular, section 4.6 which reads:

"You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to limitations of data protection legislation)."

21. That, at section 7B of his application to the HOHP, the homeowner claimed that the property factors had failed to carry out the duties incumbent upon them in terms of the Act. On a separate sheet, the homeowner specified that the property factors had failed to produce documents requested by him.

22. That the documents requested related to a court action brought by the property factors against another homeowner, namely Professor Shiekholeslami.

23. That, the property factors are responsible for pursuing any debts owing to them by homeowners for unpaid factoring charges.

24. That the property factors have a duty to make the homeowners aware of any problems they experience when pursuing these debts.

25. That homeowner, Professor Shiekholeslami, is the heritable proprietor of a property within the building in which the homeowner resides.

26. That Professor Shiekholeslami accrued debts arising from failing to pay her factoring dues.

27. That this issue was the subject of discussion at meetings between the property factors and the homeowners on, *inter alia*, 28th March 2011, 24th October 2011 and 3rd May 2012.
28. That, copies of the minutes of these meetings were produced by Mr Nesbitt on behalf of the property factors, that there was no opposition to the homeowner to them being produced, late and were received by the committee at the hearing on 18th December 2016.
29. That the homeowner accepted the terms of the minutes and submitted that he had drafted the papers himself.
30. That the homeowner accepted that the property factors had brought to the attention of the homeowners that the property factors had experienced difficulties recovering the sums due from Professor Shiekholeslami and that litigation was to be pursued.
31. That the homeowner supported the property factors bringing litigation against Professor Shiekholeslami.
32. That the property factors instructed solicitors to pursue court action against Professor Shiekholeslami which commenced in early 2011 and concluded after a 6 day proof at Edinburgh Sheriff court in November 2011.
33. That the property factors were the clients of the solicitors.
34. That decree for payment with expenses was granted in favour of the property factors on .
35. That, discussions during a meeting of the homeowners and the property factors on 3rd May 2012 included the issue of the legal fees which would be incurred in the legal action against Professor Shiekholeslami.
36. That part of the homeowner's application to the HOHP at section 7B (on a separate sheet) reads,
"In April 2014, Mike Milligan-the Financial Director of QEL- tabled at a management committee meeting a case summary and a document entitled Sequestration Procedure: Risks and estimate of costs, both produced by S& W; the likely future costs were estimated in the sum of an additional £43,000+VAT. The committee needed time to absorb this information and was assured that it would be approached by the Factor before any future court action."
37. That the cost to the homeowner from the property factors bringing this litigation was a total of £15.

38. That the property factors have taken no further action against Professor Shiekholeslami to enforce the decree.
39. That the homeowners had been kept informed of debt recovery problems involving Professor Shiekholeslami by the property factors.
40. That in the course of these meetings the property factors had made the homeowners aware of any implications for them in terms of costs arising from fees.
41. That the homeowner requested from the property factors copies of their instructions and correspondence between them and the solicitors.
42. That these requests were made in writing by, *inter alia*, letters of 29th September and 21st November 2014 and by emails of 28th October 2014.
43. That the letter of 29th September 2014 reads,
"In light of the above, please provide us with all your letters of instruction to Shepherd & Wedderburn and all associated correspondence."
44. That by email of 28th October 2014 from the homeowner to the property factors reads,
"The ability of the Management Committee, the Q4 South Block Committee or individual residents to pursue these debts is hampered by you not producing the documents requested. I ask you to provide them within seven days."
45. That the letter from the homeowner to the property factors of 21st November 2014 reads,
"We require sight of your instructions and relevant correspondence among other things. We also need the material in order to proceed further in pursuit of the debt."
46. That the property factors did not provide the homeowner with copies of instructions and correspondence between them and their solicitors.
47. That, by email of 24th April 2015 from the property factors to the homeowner, the request was refused. It read,
"I have discussed your request for information with the appointed solicitors for Quartermile Estates Ltd (QEL) for this case. They have advised that the case file cannot be issued to parties other than the client...due to personal information held on the files with regards to the defended. This would be a breach of data protection laws."

48. That this information is confidential and legally privileged and that the property factors were not required to provide the homeowner with copies of instructions and correspondence between them and their solicitors.
49. That by email of 10th April 2015 the homeowner put the property factors on notice that he was submitting an application to the HOHP. The email read, "...I am submitting a complaint to them (HOHP) concerning your withholding of the documents relating to the 2011 court action against Professor Roya Shiekholeslami for non payment of service charges."
50. That the homeowner provided the property factors with information of previous court judgements against Professor Shiekholeslami within other jurisdictions from 1998 and 2011.
51. That the findings of these judgements would not have affected the outcome of the court action against Professor Shiekholeslami.
52. That the committee find no evidence of a breach of section 4.6 of the Code of Conduct by the property factors.
53. That the committee find no evidence of a failure on the part of the property factors to carry out the Property Factor's duties.
54. That no Property Factor Enforcement Order (PFEO) will be made by the committee.

Reasons for decision

55. No evidence was put before the committee by the homeowner of a failure on the part of the property factors to inform homeowners of issues they were experiencing in recovering debt owed by Professor Shiekholeslami. Rather, the evidence from the homeowner was that he had attended meetings in which these issues had formed the discussions between the property factors and the homeowners. The homeowner accepted that the content of the minutes were an accurate reflection of the information which the property factors had shared with the homeowners. In fact he had prepared the minutes himself. The committee was satisfied that the evidence from the homeowner together with content of the minutes showed that the homeowners were aware that Professor Shiekholeslami owed money, that the homeowner supported court action being taken to address this and that the likely costs of court action had been shared with the homeowners.
56. The committee accept that the homeowner had requested information from the property factors which had never been forthcoming. The committee is of the view that the information

requested concerned communications between solicitor and client which is legally privileged; and also personal information regarding Professor Shiekholeslami which cannot be released without the property factors breaching data protection legislation. In the circumstances the committee finds no basis for the information requested to be released to the homeowner.

Appeals

57. The parties' attention is drawn to the terms of section 22 of the Act regarding the right to appeal and the time limits which apply. Section 22 provides that,

"(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."

Simone

.....Chair

AT GLASGOW ON 20th JANUARY 2016