



Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011

Hohp ref:HOHP/PF/14/0050 and HOHP/PF/14/0188

Re:

32/1, East Fountainbridge aka Earl Grey Court, Edinburgh,EH3 9BH ('the Property')

The Parties:

Gerrard Murray residing at 32/11 East Fountainbridge, Edinburgh, EH3 9BH ('the homeowner')

Myreside Management Limited, 3 Dalkeith Road Mews, Edinburgh, EH16 5GA ('the factor')

Committee members:

Jacqui Taylor (Chairperson), Helen Barclay (Housing Member).

Decision of the Committee

The Committee, having made such enquiries as it saw fit for the purposes of determining whether the factor has complied with the Code of Conduct for property factors, as required by section 14 of the 2011 Act determined that, in relation to the Homeowner's application, the factor has failed to comply with Sections 2 and 3 of the Code of Conduct.

The decision is unanimous.

Background

1. The factor's date of registration as a property factor is 1st November 2012.

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2. By application dated 24th March 2014 the homeowner applied to the Homeowner Housing Panel ('the Panel') for a determination that the factor had failed to comply with:-

2. 1: The following sections of the Property Factor Code of Conduct:

- Section 1: Written Statement of Services.

Various sections.

- Section 2: Communications and Consultation.

Various sections

- Section 3: Financial Obligations.

Various Sections

2.2: The Property Factor's duties:

Details of the application were provided in a separate letter dated 24th March 2014.

That letter stated, inter alia:

'In its decision dated 13th December 2013 the HOHP Committee found that Myreside's Written Statement of Services/pamphlet fell 'significantly below the standards required by Section 1 of the Code'

The Committee noted that Myreside's Written Statement of Services/pamphlet 'does not set out the terms and service delivery standards in a transparent way, particularly as regards delegated authority and the financial elements of the factoring arrangements.'

In particular the Committee determined that Myreside's Written Statement of Services/pamphlet failed 'to set out the basis of any authority... to act on behalf of all the homeowners', failed to set out 'any level of delegated authority (concerning) financial thresholds for instructing works, and situations in which (they could) act without further consultation.'

It is these failures which, individually and cumulatively, give rise to Complaints 1,3,4,5,7,8,9 and 10.

Complaints 2 and 6 concern, respectively, incorrect arithmetic and failure to exercise the reasonable care required of a factor in the performance of their ordinary duties.

Itemised complaint against Myreside Management Limited.

1. Hart Lifts Call Outs (Misuse) -£360.

Myreside paid two invoices totaling £360, issued by Harts Lifts. The first dated 16th November 2013 was for £146.40. The second dated 25th November 2013 was for £213.60. Both invoices were after Myreside resigned as factor on 30th September 2013.

Myreside did not consult with homeowners or seek permission to make either payment on the homeowners' behalf.

Issues:

- According to sections 1A (a) and (b) of the Code, Myreside are obliged to set out 'the basis of any authority' to act on behalf of homeowners and provide a 'statement of situations in which you may act without further consultation'.
- Section 3 of the Code notes 'transparency is especially important for building trust in financial matters. Homeowners should know ... that no improper payment requests are involved'.

2. Stair Cleaning £48.48.

Before their appointment, Myreside advised the cost as £1.95 per flat per week. Therefore the annual cost should be £4745.52 (£3954.60 plus £790.92 VAT) as a result of £1.95 x 39 flats x 52 weeks.

Myreside have deducted £4794 (£3995 plus VAT) instead of £4745.52 (£3954.60 plus VAT).

Issues:

- Myreside have not explained the discrepancy.
- Myreside's arithmetic is inaccurate.

3. Stair Cleaning Services- inappropriate deduction of £799 paid by way of VAT.

Myreside provide an in-house cleaning service and therefore, stair cleaning costs are effectively bundled with the management fees in that both sets of fees/charges are paid to Myreside in their role as factor.

Before their appointment Myreside advised that 'the cleaning is currently free of VAT but could change next year sometime.'

Myreside never advised that the situation had changed ie that VAT was to be added to the cost of stair cleaning. They claim that the addition of VAT was advised verbally. The claim is inaccurate. More importantly, it is irrelevant since Myreside concede- email of 10th March- 'this was not communicated via email (ie in writing) as is required by the Code of Conduct.

Myreside have none the less added £799 VAT to their invoice for cleaning services.

Issues:

- According to sections 1C (e) and 1B(d) of the Code, Myreside are obliged to set out 'any fee structure and also processes for reviewing and increasing or decreasing this fee' and advise 'how these fees and charges are calculated and notified'.
- According to Section 2.1 of the Code, Myreside must not provide information which is misleading or false.
- According to Section 3 of the Code, homeowners should know what they are paying for.

4. Diverse Cleaning (stains, vomit) £144.

See item 9 below

5. Common Window Cleaning £720.

One year after their appointment as factor Myreside claimed that the monthly window cleaning was not part of the core cleaning service but was a separate chargeable item.

Before their appointment as factor Myreside did not advise the cost of monthly window cleaning.

At the 2013 AGM the Minutes confirmed that the monthly window cleaning would be included in Myreside's standard cleaning specification and its cost.

Issues:

According to Sections 1B(c) and 1B(d) of the Code, Myreside are obliged to set out both 'the core services' provided and 'the types of services and works ... in addition to the core service ... which may therefore incur additional fees and charges .. and how these fees and charges are calculated and notified.

According to section 2.4 of the Code, Myreside are obliged to 'have a procedure to consult with homeowners and seek their written approval before providing work or services which will incur charges or fees.

According to Section 3 of the Code, homeowners should know what it is they are paying for and how the charges are calculated.

6. EON Development Electricity- £159.58 incorrectly paid by way of VAT.

During Myreside's period as factor the EON electricity bills totaled £3299.33- on which VAT of £324.55 (nearly 10%) was paid.

The normal VAT rate on such bills should be 5% ie £164.97.

Issues:

Myreside's Written Statement of Services claim that they 'scrutinise all incoming invoices before payment and 'evaluate site electricity charges'.

Myreside failed to identify and arrange to have corrected the (wrong) VAT rate on the electricity invoices. Accordingly Myreside failed to adhere to the terms of their written Statement of Services and failed to take the ordinary care reasonably expected of a competent and professional factor.

7. *Myreside management fee for admin October to December £720.*

Myreside resigned as factor with effect from 30th September 2013 and their resignation was unanimously accepted by the homeowners.

Myreside deducted £720 for their services as factor for 10 weeks after they ceased as factor.

Issues:

According to sections 1A(a) and (b) of the Code, Myreside are obliged to set out 'the basis of any authority' they have to act on behalf of homeowners and provide 'a statement of ... situations in which you may act without further consultation.'

According to Section 1(c)(e) of the Code, Myreside are obliged to set out 'the management fee charged' for their services.

Section 3 of the Code notes that transparency is especially important for building trust in financial matters. Homeowners should know that no improper payment requests are involved.

Myreside purported to act as factor after their resignation. They did so without any written basis of authority or alternatively, without any written basis of delegated authority or, alternatively, without any written basis of delegated authority that would allow them to continue as factor without further consultation. Accordingly Myreside failed to comply with sections 1A(a) and (b) of the Code.

In not advising that they proposed to charge fees for services after 30th September 2013, Myreside failed to comply with sections 1C(e) of the Code of Conduct.

Despite having no legal status as factor, and without the homeowners' knowledge or consent, Myreside intromitted with the homeowners' funds by deducting monies to pay themselves. Accordingly Myreside failed to comply with Section 3 of the Code of Conduct.

8. *Lighting maintenance- garages, stairs £638.40.*

See item 9 below.

9. Various Communal Repairs £144.

The information in Myreside's final accounts concerning this item- and items 4 and 8- is all that has been provided by them concerning these three related issues. No prior notification was given that such works may be necessary. No schedule of works was provided to the homeowners. No estimates were provided before the works were undertaken. No invoices were provided on completion of the works. No invoices were provided on completion of the works, according to Myreside, the works were undertaken by them for and on behalf of the homeowners collectively. Any works undertaken by Myreside were done without the homeowners' instructions, knowledge or consent. The homeowners were unaware of any detail concerning the claimed works and only came to know of them and the relevant deductions when Myreside presented the annual community accounts in September 2013. Myreside have subsequently admitted- email 24th September 2013- that their 'company ethos' was to approach repairs as the opportunity to enhance their income stream. They have also admitted- email of 25th September 2013- that owners were not advised of this ethos in writing, as required by the Code of Conduct.

Myreside refuse to provide fully itemised invoices for the claimed work- which invoices would properly include such information as the date of the work, the nature of the work, the division of costs between materials and labour and whether VAT was payable and, if so, the VAT noted on the invoice.

Issues:

1. *According to Section 1 A (b) of the Code, Myreside are obliged to set out 'a statement of ... situations in which you may act without further consultation.'*
2. *According to section 1 B (D) of the Code, Myreside are obliged to set out 'the types of services and works ... which may therefore incur additional fees and charges ... and how these fees and charges are calculated and notified.'*
3. *According to Section 2.4 of the Code, Myreside are obliged to 'have a procedure to consult with a group of homeowners and seek their written approval before providing work or services which will incur charges or fees.'*
4. *According to Section 3 of the Code, clarity and transparency in all accounting procedures is essential. In addition, it is necessary that homeowners should know what it is they are paying for and how the charges are calculated.*

10. Common Window Cleaning- £600

Myreside charged £720 per annum on the basis of a monthly cleaning schedule but as can be seen from the cleaning schedule/ worksheet for blocks 30 and 32, the windows were only cleaned every 6 months. The cleaning worksheet for block 28 is believed to have been removed by Myreside- although it is irrelevant since it is inconceivable that the window cleaning rota would be any different for that block.

Issues:

Myreside have been asked to demonstrate that the windows were cleaned every month but were unable or unwilling to do so.'

3. The application had been notified to the factor.
4. By Minute of Decision by the President dated 10th July 2014 the President of the Panel intimated that she had decided to refer the application to a Homeowner Housing Committee ('The Committee').
5. In terms of email dated 17th July 2014 the factor applied for an extension to allow time to make written submissions. In the meantime they provided a background statement which explained that the homeowner had previously been the factor of the development and since Myreside were appointed as factors there has been a significant amount of friction between the parties which culminated in the homeowner submitting his application to HOHP. The factor provided lengthy and detailed submissions dated 11th August 2014. These were discussed in detail at the hearing.
6. Prior to the hearing both parties provided written skeletal arguments.

Hearing

A hearing took place in respect of the application on 23rd October 2014 at George House, 126 George Street, Edinburgh, EH2 4HH.

The Homeowner appeared on his own behalf.

The factor was represented by Peter Goddard, Keith Hunter and Peter Bertaut. Their solicitor, Iain Leslie was also present.

Findings of Fact

1. The homeowner is the proprietor of the property, his title being registered in the Land Register of Scotland under Title Number MID97143. His property forms part of the development at Earl Grey Court, East Fountainbridge, Edinburgh, EH3 9BH.
2. The property is subject to the title conditions contained in the Land Certificate and created in *inter alia* Deed of Conditions by Morningside Homes Limited which was registered on 26th May 2000.

Clause Tenth of the Deed of Conditions sets out the factor's power and authority to act. It states:

'The Property Manager shall have full power and authority to instruct and have executed from time to time such work as he is in his judgment shall consider necessary or desirable for the repair, maintenance or renewal of the block Common parts, Common Areas or any parts or parts thereof providing always that in the case of a major work (being a work the cost of which is estimated by the Property Manager in excess of £2000 or such greater sum as may from time to time be fixed by a meeting of the Proprietors) the property manager shall convene a meeting of the proprietors ... and shall only instruct such major works upon being authorized to do so by a simple majority of the votes cast by the Proprietors at such meeting. Notwithstanding the foregoing provisions in relation to the major works the property manager

shall be entitled forthwith to instruct and have executed such works as he considers necessary for the interim protection or safety of the Dwellinghouses and /or Blocks or any parts or parts of the Development pending the decision of the Proprietors...'

3. Myreside Management Limited were appointed factors on 1st October 2012. At that time there was a Residents Association for the Development. Andrew Lennie was Chair person, Gerrard Murray was Secretary and Neil Tough was Treasurer. In June or July 2013 Gerrard Murray resigned and was not replaced. At the AGM in July 2013 Neil Tough also resigned which resulted in Andrew Lennie being the only office holder.

Myreside Management Limited intimated their resignation as factors at the AGM on 30th September 2013. From that time until 23rd December 2013 they carried on in an administrative role but did not attend to maintenance issues.

4. Myreside Management Limited had provided the homeowner with a written Statement of Service. The terms of the written Statement of Service were the subject of a prior application to the HOHP, case number HOHP/PF/13/0299. The decision was dated 13th December 2013. The decision stated that the written Statement of Services fell significantly below the standards required by section 1 of the Code of Practice.

5. The homeowner is only entitled to claim compensation in respect of the share of charges that pertain to his property. The homeowner explained how the charges that pertain to his property are calculated:

'As there are three blocks in the Development the total charges for the whole Development is divided by three. That gives the figure that relates to one particular block. He also explained that there are a mixture of two and three bedroom flats in each block. Therefore the total floor area of the block is divided by the floor area of an individual property to determine the share of the common charges that pertain to a particular property. The percentage that relates to his property is 10.82%.'

This was confirmed by Peter Goddard.

The parties confirmed that Gerrard Murray owned 2 properties in the Development.

Oral Representations from the parties at the hearing.

1. Hart Lifts Call Out Charge -£360.

Gerrard Murray confirmed that the first Harts Lifts invoice for £146.40 was in fact paid before 30th September 2013 and therefore his complaint only relates to the invoice dated 25th November 2013 for £213.60.

He explained that his complaint was that Myreside paid the invoice for £213.60 after they had resigned as factor on 30th September 2013.

Peter Goddard explained that he had a meeting with Andrew Lennie, (chairman of the Residents Committee) after 30th September 2013 and it was agreed that Myreside would act in an administrative role until a new factor was appointed. The homeowners had failed to appoint a new factor. This omission was a breach of the terms of the Deed of Conditions which states:

'In the event of the office of Property Manager falling vacant the proprietors shall be bound forthwith to appoint another property manager in his place and the proprietors shall not allow the said office of Property Manager to remain unfilled.'

Iain Leslie explained that Myreside were persuaded to continue to act against their better judgement and they were entitled to assume that they had authority to continue to act on behalf of the homeowners.

2. Stair Cleaning £48.48.

The parties both confirmed in their evidence that the quotation for stair cleaning was £3954.60 per annum (£1.95 charge per owner x 52 weeks x 39 flats).

Peter Goddard explained that prior to receiving the deed of conditions for the development he had quoted £1.95 per week per flat. However the deed of conditions states that the charges must be apportioned by the ratio the floor area of the individual flats bears to the floor area of the whole development. He was provided with the chart which detailed the percentages due by each flat. The percentages were calculated to four decimal places. This resulted in a rounding up issue of £40.40 or £0.00199 per flat.

Gerrard Murray's evidence was that this discrepancy was simply an arithmetical error.

3. Stair Cleaning Services- inappropriate deduction of £799 paid by way of VAT.

Peter Goddard explained that in August 2012 the company employed a contract company for stair cleaning services. However they changed their company policy as they recognised that stair cleaning was a very visible service and if it was not done properly the owners would get the wrong impression. Consequently they decided to employ their own staff who were uniformed. This change occurred a month or so after they started factoring the development. The contract cleaners had not been registered for VAT. His company was registered for VAT and consequently VAT was payable.

Gerrard Murray accepted that Myreside had advised that 'cleaning is currently free of VAT but could change next year (2013) sometime'. His complaint is that Myreside did not advise the homeowners in writing that VAT would be due.

4. Diverse Cleaning (stains, vomit) £144.

This was considered under item 9.

5. Common Window Cleaning £720.

Peter Goddard explained that stair cleaning is carried out weekly and common window cleaning is carried out monthly. This development has five floors and there are sixty windows some of which are at a very high level, which would usually require specialist services. However they completed this monthly task in-house. Peter Bertaut confirmed to the Committee that he cleaned the windows himself every month with a member of staff.

Gerrard Murray referred the Committee to the Minutes of the 2013 AGM, which he had sent to the HOHP office. Peter Goddard advised the Committee that he had not received a copy of the Minutes from the HOHP office however he confirmed that he was happy for the Minutes

to be discussed. Gerrard Murray explained that the Minutes showed that a new cleaning specification was agreed at the AGM and that specification included window cleaning.

Peter Goddard confirmed that he was present at the 2013 AGM but never approved the Minutes. Iain Leslie questioned why the words 'window cleaning' had been highlighted. Gerrard Murray confirmed that he had highlighted this section, whilst preparing the papers for the hearing.

Peter Goddard referred the Committee to an email (page 58 of their submissions) which states:

'Hi Gerrard

As discussed our management charge is £100 + Vat per owner pa. The cleaning which would include a once per year carpet shampoo and hot washing of the lift and basement entrance is £1.95 per owner per week. All other contracts would be taken on initially to enable us to compare price and service before we discussed any changes with you.....'

He emphasised that the email does not refer to window cleaning as being included within the £1.95 cleaning charge.

Gerrard Murray confirmed that the standard of window cleaning was good but the previous cleaners had cleaned the windows within the £1.95 charge.

6. EON development Electricity- £159.58 incorrectly paid by way of VAT.

Peter Goddard explained that the fact that the wrong amount of Vat had been paid came to light when the accounts were being changed from Gerrard Murray to Myreside. He explained that Gerrard Murray had paid the wrong amount of Vat on a couple of bills whilst he had acted as factor. Eon took six months to rectify the problem. No refund was paid by Eon but credit notes were issued.

Gerrard Murray accepted that he had paid the wrong amount of VAT on electricity accounts and hadn't noticed the discrepancy as he paid them by direct debit. He referred to the Annual Invoice/ Statement issued by Myreside for the period 1st October 2012 to 30th September 2013 which included the electricity charge of £2662.68 plus Vat of £287.99. The Vat charge was more than 10% but should only have been 5%.

7. Myreside management fee for Admin October to December £720.

Peter Goddard explained that the normal management fee for the period October to December would have been £975 plus Vat. Gerrard Murray explained that the usual fee would have in fact been £750 plus Vat.

Gerrard Murray's concern is that Myreside did not obtain specific authority to make this charge. He explained that the opportunity existed at the meeting on 30th September 2013 but this matter was not addressed at the meeting.

Peter Goddard explained that the onus was on the owners to appoint a new factor, which did not happen until January.

8. Lighting maintenance- garages, stairs £638.40.

This was considered under item 9.

9. Various Communal Repairs £144.

Peter Goddard explained that this charge relates to three lock problems at the property. These repairs were attended to by in house staff. On each occasion they attended within half an hour of being called out. On one of these occasions a key had to be removed

Item 4: Stains, Vomit: £144.

Peter Goddard explained that he had received a call intimating that there was stains and vomit on the stairs. This was attended to promptly and incurred an additional charge as it was out with normal duties.

Item 8: Lighting maintenance:£638.40.

Peter Goddard explained that whilst Gerrard Murray had been factor he had removed light bulbs to save electricity costs. However it had become a health and safety issue and contractors had complained that there was insufficient lighting. Tendering was not appropriate for these urgent items.

Gerrard Murray emphasised that Myreside did not obtain the prior consent of the owners before carrying out these works. He does not consider that the Deed of Conditions authorises Myreside to undertake the works themselves.

10. Common Window Cleaning- £600

Gerrard Murray explained that Myreside charged £720 on the basis of a monthly cleaning schedule. However the windows were only cleaned once every six months, according to the cleaning schedule.

Peter Goddard explained that this was completely untrue. Peter Bertaut did the common stair window cleaning himself monthly. Peter Bertaut confirmed this to the Committee. Peter Goddard advised that it was a 'ridiculous accusation' that the window cleaning was only done twice per annum. He explained that the tick sheet referred to by Gerrard Murray is a weekly sheet.

Summing Up

Iain Leslie explained that Myreside had been subjected to an extraordinary campaign of scrutiny. They had received in excess of 400 emails from Gerrard Murray, more than one per day.

In more than fourteen years trading as property factors this was the first time they felt that they had to resign. There had been no complaints from the other owners.

Peter Goddard emphasized that they did not resign as factor lightly. No one likes to give up a source of income.

Gerrard Murray advised that the suggestion of persecution alluded to by Iain Leslie was fiction. The complaint simply comprises ten instances when the Code of Practice was not followed.

CASE PF/14/0188

1. By application dated 14th November 2014 the homeowner applied to the Panel for a determination that the factor had failed to comply with:-

1. 1: The following sections of the Property Factor Code of Conduct:

- Section 2.1: Communications and Consultation.
- Section 3 (Introduction) and 3.1: Financial Obligations.

1.2: The Property Factor's duties.

The application stated:

'It is the duty of a factor to pay invoices in good time and to avoid any unnecessary charges. Myreside failed to carry out this duty. Accordingly Myreside failed to take the ordinary care reasonably expected of a competent and professional factor.

In addition, the Code of Conduct- sections 2.1,3 and 3.1 requires that a factor should not provide misleading information but should provide clarity and transparency in accounting procedures and also make a clear distinction between homeowners' funds and a property factor's funds.

In setting out the EON electricity invoices in the accounts simply as global sums, Myreside effectively hid the debt collection fees from homeowners. Until very recently Myreside never admitted that these fees had been incurred. Myreside have not offered to reimburse homeowners. In effect, Myreside have used homeowners' funds to pay debts which they alone incurred and for which they alone were responsible.

Finally, Myreside failed to comply with their own Written Statement of Services in which they claim that they 'scrutinise all incoming invoices before payment.' It is my assumption that an implicit aspect of scrutinising 'all incoming invoices before payment' is that these invoices are paid timeously and diligently.

The debt collection fees incurred may be considerable but Myreside refuse to reveal their full extent and refuse also to provide any proper explanation concerning the matter.'

2. The application had been notified to the factor.

3. The President wrote to the parties on 18th November 2014 intimating that she proposed to cojoin the application with case number PF/14/0050. The Committee thereafter issued a Direction to the effect that the two applications would be conjoined. The Direction also required

the factor to produce copies of the electricity accounts and details of payments made in relation to them during the period 1st October to 9th December 2013.

4. The factor produced the copy electricity accounts for the period 21st November 2012 to 26th September 2013 and most, but not all, of the other details requested.

Hearing

A hearing took place in respect of application PF/14/0188 on 28th February 2015 at George House, 126 George Street, Edinburgh, EH2 4HH.

The Homeowner appeared on his own behalf.

The factor was represented by Peter Goddard, Keith Hunter and Peter Bertaut.

Oral Representations from the parties at the hearing.

Gerrard Murray had obtained from Eon copies of electricity accounts dated 26th September 2013 and 20th December 2013. Peter Goddard confirmed that he had no objection to the copies being accepted, even although they were lodged late.

Gerrard Murray explained that the factor had omitted to lodge copies of the Virgin Invoices for the lifts. Peter Goddard advised that the transfer of the Virgin accounts was seamless as the direct debits continued without difficulty.

Gerrard Murray referred the Committee to the email from Steven Palmer of Eon dated 19th February 2015 which confirmed that the total of late payment charges paid by the factor amounted to £112. He explained that in his view the transfer of the Eon electricity accounts to Myreside was shambolic.

Peter Goddard accepted that the total of late payment charges paid by Myreside was £112.

Peter Goddard explained that they had experienced difficulties in transferring the accounts to the name of Myreside. He explained that part of the problem was due to the fact that Gerrard Murray had insisted that the invoices were issued in the names of the proprietors and some of the invoices were sent to the properties. He explained that whilst they had incurred the late payment charges they also received early payment discounts. Further, when they had been scrutinising the payments they had ascertained that Myreside had paid £177.49 from their own funds which had not been charged to the owners. As a result he explained that Mr Murray owes them £7.08 and they owe him £5.60. In his experience small accounting errors happen everywhere.

Peter Goddard questioned why Gerrard Murray was not scrutinising the current factors' accounts with the same degree of scrutiny as their accounts. He advised that it has recently come to their attention that they had incorrectly paid the Virgin lift invoice for 13 months after they had resigned as factors. This error had arisen as they had thought that the direct debit payment to Virgin related to a telephone account.

Gerrard Murray advised the Committee that he was concerned that the factors have still not given a satisfactory explanation as to why the late payment charges were incurred.

Decision of case numbers HOHP/PF/14/0050 and HOHP/PF/14/0188.

1. Hart Lifts Call Out Charge -£213.60

This head of complaint is not upheld.

The parties are agreed that Myreside intimated that they were resigning as at 30th September 2013 but they continued to act in an administrative role until 23rd December 2013.

Section 2(1) of the Property Factors (Scotland) Act 2011 defines a 'Property Factor' as:

'a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes...

(c) a person who, in the course of that person's business, manages or maintains land that is available for use by the owners of two or more adjoining or neighbouring residential properties (but only where the owners of those properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of that land)

In terms of clause Ninth of the Deed of Conditions the Proprietors 'shall be bound forthwith to appoint another property manager in his place and shall not allow the said office of property manager to remain unfilled.

Clause Twelfth of the Deed of Conditions states that the homeowners are obliged to make payment to the Property Manager the proportion of the common charges and contribution to the Cyclical Maintenance Fund which shall be payable.....

The Committee concluded that even although Myreside wished to resign with effect from 30th September 2013, Myreside continued to act as property factor, albeit simply managing administrative matters and not maintenance, until 23rd December 2013. The fact that the homeowners had not appointed a new factor was material. The Deed of Conditions specifically states that the owners shall not allow the position of property manager to remain unfilled. The Committee found that Myreside were factors of the development until 23rd December 2013, notwithstanding their intention to resign on 30th September 2013.

Consequently the Harts Lifts call out charge of £213.60 was paid by Myreside whilst they were still acting as Property Factors. Clause Tenth of the Deed of Conditions gives the property manager the power and authority to instruct repairs etc accordingly Myreside were authorised to make this payment.

Alleged failures to comply with Sections 1 and 2 of the Code of Practice.

Section 1 of the Code of Practice states that the Property Factor must provide a Written Statement of Service and specifies the details that should be included. This matter has already been determined by a previous HOHP Committee in terms of their decision dated 13th December 2013 and therefore will not be considered further.

Section 3 of the Code of Practice states that homeowners should know what they are paying for, how the charges were calculated and that no improper payment requests are involved. This is a requirement to produce transparent accounts. This section of the Code of Practice does not require the Property Factor to obtain prior approval to pay accounts on behalf of the Homeowners.

Therefore the Committee found that the Property Factor has not failed to comply with the factor's duties or Sections 1 and 3 of the Code of Practice in respect of this particular complaint.

2. Stair Cleaning £48.48.

This head of complaint is upheld.

The parties were agreed that the total charge should be £3954.60 plus Vat (£4745.52) per annum. The sum charged in the accounts was £4794.

The Committee accepted that the fact that the percentage allocation to each flat was calculated to four decimal places was cumbersome and could have resulted in a 'rounding up problem'. They also accepted that there was no deliberate over charge on the part of the Property Factor.

However they found that the Property Factor should have reduced the amount of the error by more accurately apportioning the charges to each flat.

The Committee noted that the loss suffered by the homeowner amounts to $\frac{£48.48}{3} \times 10.829\% = £1.75$ for each property.

3. Stair Cleaning Services- inappropriate deduction of £799 paid by way of VAT.

This head of complaint is not upheld.

Gerrard Murray accepted that Myreside had advised that cleaning 'is currently free of VAT but could change next year sometime.'

The Committee found that it would have been good practice for Myreside to advise the homeowners that VAT was now being charged on stair cleaning services but failure to do this was not a breach of the Code of Practice.

Alleged failures to comply with Sections 1, 2.1 and 3 of the Code of Practice.

Section 1.

As previously stated, Section 1 of the Code of Practice states that the Property Factor must provide a Written Statement of Service and specifies the details that should be included. This matter has already been determined by a previous HOHP Committee in terms of their decision dated 13th December 2013 and therefore will not be considered further.

Section 2.1

This section of the Code of Practice states that the property factor must not provide information that is misleading or false. The Committee found that charging VAT was not providing information which is misleading or false. Also the Committee acknowledged that the Written Statement of Services listed Stair Cleaning Services to be one of the main services provided. The Committee considered this to be a core service and noted that Section 2.4 of the Code of Practice requires the factor to have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. No such approval is required for core services.

Section 3

Section 3 of the Code of Practice states that homeowners should know what they are paying for, how the charges were calculated and that no improper payment requests are involved.

As previously stated this is a requirement to produce transparent accounts. This section of the Code of Practice does not require the Property Factor to obtain prior approval to pay accounts on behalf of the Homeowners.

4. Diverse Cleaning (stains, vomit) £144.

This is considered under item 9.

5. Common Window Cleaning £720.

This head of complaint is not upheld.

Alleged failures to comply with Sections 1, 2 and 3 of the Code of Practice.

Section 1

As previously stated, Section 1 of the Code of Practice states that the Property Factor must provide a Written Statement of Service and specifies the details that should be included. This matter has already been determined by a previous HOHP Committee in terms of their decision dated 13th December 2013 and therefore will not be considered further.

Section 2

Gerrard Murray added in his skeletal arguments reference to Section 2.1 of the Code which requires that a factor must not provide misleading or false information.

The Committee had been presented with conflicting evidence. The terms of the undated email from Peter Goddard to Gerrard Murray and the terms of the Minute of the 2013 AGM.

The Committee were concerned that the AGM minute had not been signed or approved and had been subsequently highlighted. The accuracy of the AGM Minute had not been verified.

Peter Goddard had given evidence to the effect that the undated email was sent to Gerrard Murray before Myreside started as factors of the development. This fact had not been challenged by Gerrard Murray.

On balance the Committee preferred the evidence of that email to the effect that it had not been stated that window cleaning was included in the £1.95 cleaning charge.

Section 2.4

This section of the Code, provides that the factor should have a procedure to consult with homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service.

Peter Goddard advised the Committee that the Written Statement of services that he provided to homeowners at the outset was the Statement with two vans on the front. The Committee noted that page three of that Statement listed 'Our Services'. Included in that list was a statement that 'the common windows are cleaned monthly'.

The Committee accepted that window cleaning was a core service and therefore there was no requirement for prior written approval.

Section 3

This section of the Code of Practice states that homeowners should know what they are paying for, how the charges were calculated and that no improper payment requests are involved.

As previously stated this is a requirement to produce transparent accounts. This section of the Code of Practice does not require the Property Factor to obtain prior approval to pay accounts on behalf of the Homeowners.

6. EON development Electricity- £159.58 incorrectly paid by way of VAT.

This head of complaint is upheld.

The Written Statement of Service specifically states that the factor will scrutinise all incoming invoices before payment and evaluate site electricity charges. Peter Goddard's evidence was that the wrong VAT had been paid on the electricity account but a credit note had been issued. However no evidence was produced to prove that the overpayment had been refunded. The VAT overcharge amounted to £159.58 for the whole development. The proportion that pertained to each of Mr Murray's properties was £5.49.

7. Myreside management fee for Admin October to December £720.

This head of complaint is not upheld.

As previously stated, even although Myreside wished to resign with effect from 30th September 2013, as no new property factor had been appointed by the homeowners Myreside continued to act as Property Factor, albeit simply managing administrative matters and not maintenance, until 23rd December 2013. Myreside did not effectively resign as at 30th September 2013. To effectively resign the homeowners would have to appoint a new factor to enable funds, bills and accounts to be transferred. The deed of Conditions expressly states that 'The proprietors shall not allow the office of property manager to remain unfilled.'

Alleged failures to comply with Sections 1 and 3 of the Code of Practice.

Section 1

As previously stated, Section 1 of the Code of Practice states that the Property Factor must provide a Written Statement of Service and specifies the details that should be included. This matter has already been determined by a previous HOHP Committee in terms of their decision dated 13th December 2013 and therefore will not be considered further.

Section 3

Section 3 of the Code of Practice states that homeowners should know what they are paying for, how the charges were calculated and that no improper payment requests are involved.

As previously stated this is a requirement to produce transparent accounts. This section of the Code of Practice does not require the Property Factor to obtain prior approval to pay accounts on behalf of the Homeowners.

8. Lighting maintenance- garages, stairs £638.40.

This is considered under item 9.

9. Various Communal Repairs £144. also:

4. Diverse Cleaning (stains, vomit) £144 and

8. Lighting maintenance- garages, stairs £638.40.

These heads of complaint are not upheld in respect of sections 1 and 2 of the Code.

These heads of complaint are upheld in respect of section 3 of the Code.

Alleged failures to comply with Sections 1, 2 and 3 of the Code of Practice.

As previously stated, Section 1 of the Code of Practice states that the Property Factor must provide a Written Statement of Service and specifies the details that should be included. This matter has already been determined by a previous HOHP Committee in terms of their decision dated 13th December 2013 and therefore will not be considered further.

Section 2.4 of the Code of Practice requires the Property Factor to have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. The Written Statement of Service includes reference to communal repair works, cleaning common areas and changing lamps that are not working. The Committee consider these matters to be part of the core services.

Section 3 of the Code of Practice states that homeowners should know what they are paying for, how the charges were calculated and that no improper payment requests are involved. As previously stated this is a requirement to produce transparent accounts. This section of the Code of Practice does not require the Property Factor to obtain prior approval to pay accounts on behalf of the Homeowners. However no details had been provided as to the repairs carried out, the call out charges involved, the dates and times of the matters involved or the basis of the sums charged. The homeowner had not been given the opportunity to verify that the charges were correct. The Committee accepted the Property Factor's evidence of the work carried out but found that their Expenditure Report did not comply with Section 3 of the Code

as it did not give sufficient detail of the works carried out to enable the homeowner to verify the entries in the accounts.

10 Common Window Cleaning- £600

This head of complaint is not upheld.

The Committee accepted Peter Goddard's explanation that the tick list was a list for detailing weekly tasks and there was no space for completion of monthly tasks. They also accepted Peter Bertaut's evidence that he personally completed the window cleaning monthly.

Case PF/14/0188: Eon late payment Charges- £120

This head of complaint is upheld.

Alleged failures to comply with Sections 2.1, 3 and 3.1 of the Code of Practice.

Section 2.1 of the Code requires that the factor does not provide information that is misleading or false. Section 3 of the Code requires transparency so that homeowners know what they are paying for. Section 3.3 of the Code requires a detailed financial breakdown of charges made, a description of the activities and works carried out which are charged for.

By including the global electricity charge the late payments had been concealed. The accounts were not transparent as insufficient detail had been provided.

Also the figure for the electricity charges included in the accounts was incorrect as it was short by the sum of £177.49, which the factor had paid.

As a result of the inaccuracy the Committee acknowledged that the homeowners had not in fact been charged the late payment fees but the accounts were incorrect.

Property Factor Enforcement Notice

In all of the circumstances narrated above, the Committee finds that the factor has failed in its duty under section 17(1)(b) of the 2011 Act to comply with the requirements of the Code of Conduct in respect of sections 2 and 3.

The Committee acknowledged that the homeowner had subjected the Property Factor to a large amount of correspondence and a high level of scrutiny. Even though the value of the matters in dispute were very small and Myreside had resigned and were no longer factors of the Property the factor had failed to comply with the terms of the Code of Practice. The accounting information was not transparent and errors had been made. The Committee therefore determined to issue a 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:

'(1) The factor is required to repay the homeowner the sum of £14.48 ((£1.75 (stair cleaning)+ £5.49 (VAT on electricity account) x 2). The said sum of £14.48 to be paid from the factor's own funds at no cost to the owners.

(2) The factor must pay the homeowner £50 for the inconvenience he had suffered from their own funds and at no cost to the owners.

The said sums to be paid within 28 days.'

Appeals

The parties' attention is drawn to the terms of section 21 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 homeowner housing committee.

(2) An appeal under subsection (1) must be made within a period of 21 days beginning with the day on which the decision appealed against is made.'

Signed

Date 16th March 2015

Chairperson