Decision of the Homeowner Housing Committee issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011 and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

Ref: HOHP/PF/15/0089

Re: 11 Overdale Gardens, Flat 2/2, Glasgow, G42 9QG ("the Property")

Parties: Mrs Angela Wilson, residing at 11 Overdale Gardens, Flat 2/2, Glasgow, G42 9QG ("the Homeowner")

Hacking & Paterson Management Services, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ("the Factor")

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

Committee members:

Ewan K Miller (Chairperson and Legal Member); Mr David Hughes-Hallett (Housing Member).

Background

1. By application dated 9 June 2015, the Homeowner applied to the Homeowner Housing Panel ("the Panel") to determine whether the Factor had failed to comply with the duties imposed upon the Factor by the Act.

2. The application by the Homeowner alleged failings on the part of the Factor in that the Factor had allegedly breached Sections 1B and C of the Code in respect of the Factor's written statement of services and Sections 2.1, 3.3, 5.2, 5.3, 5.6 and 5.7 of the Code of Conduct for Property Factors ("the Code").

3. By letter dated 7 July 2015, the President of the Panel intimated her decision to refer the application to a Homeowner Housing Committee ("the Committee") for determination.

Hearing

4. A Hearing of the Committee took place at Wellington House, 134/136 Wellington Street, Glasgow, G2 2XL on 16 September 2015. The Homeowner was present and was accompanied by her husband. The Factor was

represented by Mr Watt, one of their Directors. The Clerk to the Committee was Ms Rebecca Forbes.

Background to the dispute

5. The Factor was the factor for the building at 11 Overdale Gardens, Glasgow, of which the Homeowner's flat was one. The Homeowner had complained to the Factor about a number of matters. Some of these related to works carried out at the larger building. However, for the purposes of the hearing, the Homeowner's complaint was restricted to the issue of insurance and, in particular, the alleged failure of the Factor to disclose the payment of insurance commission to them and also the manner in which the administration of the insurance was carried out and the placing of insurance with a broker.

Preliminary matters arising

Preliminary Issue 1

6. Prior to the hearing the Committee had issued a preliminary direction dated 31 August 2015. This narrated dates of the extensive correspondence between the Homeowner and the Factor. Mr Watt highlighted that two or three of the dates were wrong or narrated the incorrect party. The Chairman apologised for these minor errors. The correct dates and references were noted and agreed.

Preliminary Issue 2

7. Mr Watt for the Factor, sought to clarify what documentation fell within the ambit of the Homeowner's application to the Panel. He also sought to clarify what the status of recent paperwork and submissions to the Panel by the Homeowner were. The Committee confirmed that its view was that the application comprised the documentation received by the panel comprising the application and other paperwork up until the date of the decision to refer the dispute to a Committee by the President on 7 July 2015. Documentation submitted after that date was, in the view of the Committee, competent to be received in terms of paragraph 12 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012. This was the basis on which the Committee had accepted further submissions and documentation. The Committee was of the view that this was consistent with the case of Eugene Lopkin v Hacking & Paterson Management Services (Reference HOHP/PF/14/0019).

Substantive Decision

8. Section 2.1 of the Code

   This section of the Code puts an obligation on the Factor not to provide any information which is misleading or false.

The Homeowner set out a variety of reasons as to why she thought the Factor had provided information which was misleading or false:

a. The Homeowner drew the Committee's attention to the Factor's core standards (at bullet point 3 within that document on page 3). This stated that "*Where HPMS place insurance for a common property through a broker or on behalf of homeowners a summary of cover….*". The Homeowner highlighted that as far as she was aware, in fact, the Factor always placed insurance through a broker. Use of the word "Where" suggested that it may the case that insurance was not always placed through a broker and that it was an optional situation. She suggested this was misleading or false as, in practice, all insurance was placed through a broker. The Factor confirmed that all of its insurance arrangements on behalf of homeowners were placed through brokers. The Factor did not view the use of the word "where" as being deliberately misleading or false. It was simply a turn of phrase that, in the context taken by the Homeowner, had led her to believe it was optional

   The Committee considered the point and was satisfied that the statement was not misleading or false. The Committee noted that in the case of Property, going forward, the Factor had accepted that the residents were to arrange their own insurance. Accordingly, whilst the Factor would in future be carrying out the maintenance of the property it would not be carrying out the placing of the insurance for this property and therefore the use of the word "Where" would, in future, be valid. The Factors' manage a large number of properties and it may the case that other properties would undergo similar changes. The use of the word "Where" was perhaps unfortunate but had simply been used in a generical manner to describe what occurred in relation to the placement of insurance. The Committee was satisfied that there was no intention to mislead or make a false statement. Accordingly, the Committee was satisfied that there had been no breach of 2.1 of the Code in this regards.

b. The Homeowner highlighted that the Factor had advised the Homeowner that the Property was first insured via a broker in 2004. The Homeowner had her own information that showed that the Property had first been insured via a broker in 2000.

   The Factors' had accepted that this was the case subsequently. Mr Watt submitted to the Committee that his firm had originally stated to the Homeowner that it was first insured via a broker in 2004 on the basis that was as far back as their records went. The information was, therefore, believed to be accurate by the Factor when the statement was made. He accepted that this was not the case. The Homeowner had maintained records for a significant period of time and thus had this information available to her anyway. The Committee considered the point and did not believe it merited a finding against the Factor. The Factors had answered to the best of their ability and in what they believed to be a truthful manner. For a finding to be made that a statement was false or misleading then it would often be the case that there is a deliberate or negligent act by a

Factor to provide information that is false. That was not the case here. The Committee was satisfied that it would be unduly harsh to have found that there had been a breach of 2.1 of the Code.

c. The Homeowner highlighted that the Factor had stated to her in a letter of 11 July 2014 that the financial arrangement between themselves and the broker was a private arrangement. The Committee was aware from previous cases that this had been Hacking & Paterson's view of their arrangement with their insurance broker. Since that letter had been written by the Factor, other cases before the Panel had indicated to the Factors that that was not the correct interpretation of the position. The payments that the Factors make to the broker are paid from the sums collected by the Factor from the homeowners. Accordingly it is homeowners' funds that are paying for the insurance premium and homeowners have a direct interest in relation to the policy as it relates to their property. The suggestion by the Factor that there was some private arrangement in relation to the Commission was not tenable. However, the Committee was satisfied that at the point of the letter in July 2014 the Factor had a genuine belief that a private arrangement subsisted. Accordingly whilst the Committee was satisfied that the statement was incorrect it was not done with any intent to be false or misleading. Accordingly, the Committee was satisfied that there had been no breach of the Code of Conduct in this regard.

d. The Homeowner drew attention to the fact that the Factor had initially stated that the insurance commission was incorporated within the insurance premium charge and then subsequently stated that it was not incorporated within the insurance premium which is charged to the Homeowner. The Homeowner queried this contradictory information. The Factor subsequently sent the Homeowner an email of 13 January 2015 which confirmed the position. The Homeowner submitted that this contradictory information was false and misleading. The Committee reviewed the correspondence and felt that the Factor had not been particularly clear in the manner in which they had dealt with this. Part of this confusion may have been because of the manner in which the Factor perceived that they received commission under their "private arrangement" with the broker as set out in c above. However the Factors' had acknowledged openly that they had issued contradictory information in their email of 13 January 2015 and apologised for this. The Committee did not think there was any deliberate attempt to mislead and it was simply an error on the part of the Factor. On that basis the Committee was satisfied that there had been no breach of 2.1 of the Code.

e. The Factor had stated that one of the reasons they received commission is because the Factor guaranteed to the insurance broker that they would pay the insurance for the Property regardless of whether all owners within the larger building had made payment of their share or not. The Homeowner questioned this and provided evidence via other brokers that they did not impose an obligation to guarantee payment of the entire premium. Mr Watt for the Factor confirmed that it was indeed the case

that, because of the nature of factoring where there were owners who did not pay, that the insurers, via the brokers, required to know that full payment was being made before the policy would be issued. Hacking & Paterson gave that guarantee and he was happy to stand by what had been stated by his company. He was happy to produce a letter from the brokers confirming the arrangement and undertook to send a copy of this to the Homeowner. The Committee had no reason to doubt Mr Watt in this regard and therefore the Committee did not find there to be a breach of section 2.1 of the Code.

f. The Factor had stated to the Homeowner that any commission or payment they received was in return for policy administration matters that they handled. The Homeowner objected to this as she was of the view that the services the Factor was stating they received payment for via the broker, was for activities that were already covered as part of the terms of the Core Factoring Services within the Factor's Terms of Service. Whilst the Committee understood the Homeowner's concerns, the Committee was of the view that this statement was not a breach of clause 2.1 of the Code. The Factor was entitled to take a commission from the insurance brokers (subject to proper disclosure of the commission) but the fact that the activities carried out in return for the commission were also stated as being part of the service to the homeowner was acceptable. The Homeowner had a particular difficulty with this as the Factor had previously carried out such activities, she believed, without having received commission. As a result she felt that the Factors were making additional sums here that could have been better utilised to reduce the factoring fees paid by the Homeowner and her fellow proprietors within the larger building. Whilst the Committee noted the Homeowner's position, the Factor was entitled to take a commission. It was a commercial decision for the Factor whether to utilise commissions received to lower the sums due by Homeowners in factoring charges or not. Accordingly the statement was not false or misleading and there was no breach of clause 2.1 of the Code.

g. The Factor had stated to the Homeowner that there was no conflict of interest in them receiving a commission and their remit was to obtain the best possible deal on buildings insurance. The Homeowner's issue was that the Factor was receiving a relatively high level of commission when the Homeowner could prove that a cheaper but equivalent insurance policy could be obtained via the same brokers by herself. The Committee could understand the Homeowner's frustration here. There was, to the Committee's mind, no real doubt that the premium being charged via the Factor was higher than could be obtained direct by the Homeowner due, at least partially, to the level of commission being paid by the broker to the Factor. However, there was nothing in the Act or the Code (or indeed the common law) which precluded a Factor from receiving commission. Conflict of interest was always a potential issue in relation to commissions and that was why the common law and the Code both require disclosure of commissions received. Whilst the failure to disclose commission was a relevant issue in terms of this decision, the Committee did not feel it was relevant in respect of a potential breach of clause 2.1. When asked by the

Homeowner, the Factor had confirmed that commission was paid to them. Accordingly the Committee was satisfied that there was no breach of section 2.1 of the Code.

9. Section 3.3 of the Code

Section 3 of the Code generally requires that Homeowners should know what it is that they are paying for, how the charges are calculated, and that no improper payment requests are involved. The Code requires clarity and transparency in all accounting procedures".

The Committee was not of the view that the Factor had not breached Section 3.3 of the Code. The detailed financial breakdown of the general factoring costs appeared to have been made in the normal manner. The Homeowner's complaint related principally to the failure to disclose commissions and how the premium was calculated and that was a matter that was dealt with more appropriately under section 5 of the Code. Accordingly the Committee was satisfied that there had been no breach of section 3 of the Code. The Homeowner herself had, in her written submissions, accepted that this aspect of her complaint may be more relevant to section 5 of the Code rather than section 3

10. Section 5 of the Code

10.1. Section 5.2

The Code requires the Factor to provide each Homeowner with clear information showing the basis upon which their share of the insurance premium was calculated, the sum insured, the premium paid, etc.

The Committee did not perceive that there had been any breach of section 5.2 of the Code. There seemed to be no suggestion that details of insurance premium had not been disclosed. The Factors appear to have provided copies of the policy when requested. The dispute was in relation to the commissions received by the Factor and the relevant section to consider that allegation under was 5.3 of the Code rather than 5.2. Accordingly the Committee was satisfied that there was no breach of 5.2.

10.2. Section 5.3

5.3 of the Code requires Factors to declare to Homeowners in writing any commission received or any other charge that was made for providing insurance.

The Committee noted that the Factor stated in their Terms of Service that where insurance was placed through a broker the Factor would disclose commission received by them upon request. The Homeowner highlighted that clause 5.3 of the Code required disclosure regardless. It was not appropriate that the information had to be requested from the

Factor. She submitted that it should be provided automatically but it had not been. She highlighted the previous decision of the Committee in respect of HOHP/PF/13/232 (Raymond Milne v Hacking & Paterson Management Services Limited) ("the Milne decision").

The Committee noted that the Factor had disclosed the commission of 25% received by them most recently by letter to the Homeowner received by her on 14 July 2015. Mr Watt advised that his company was aware of the Milne decision and his company had now issued clarification to all homeowners across all the properties they factored. The commission payment received by the Factor was now stated annually and disclosed fully when insurance renewal statements were sent out to homeowners. However, whilst the Committee was heartened to hear that the Factors had taken these steps, the fact remained that at the date of the appointment of the Factor and at the time of the complaint by the Homeowner the Factor had not disclosed the commission as required. The Committee was of the view that it was imperative that any commission be disclosed upfront and without any requirement for that disclosure to be made. That was the whole purpose of section 5.3 of the Code. This reflected the common law which required complete disclosure of commission by agents. The law in this area was very clear and was narrated at length in the Milne decision. The Committee had no option but to find a breach of section 5.3 of the Code by the Factor. The Committee adopts the reasoning from the Milne decision case and found that there had been a breach of section 5.3 of the Code by the Factor as a result of their failure to disclose commission payments.

10.3. Section 5.6

This section of the Code requires the Factor, on request, to be able to show how and why they appointed the insurance provider, including any cases where they decided not to obtain multiple quotes.

The Committee did not consider that there had been a breach here. The Factor had been able to show how the insurance provider has been appointed, i.e. they had appointed a broker who carried out a whole market search to obtain quotes from insurers. There was no obligation on the Factor to go to all Homeowners and advise how they had appointed the insurance provider. This was only required to be done when a Homeowner requested such information. When Mrs Wilson had requested such information it had been provided, albeit she did not agree with the methodology used by the Factor. Accordingly the Committee was satisfied. Section 5.6 of the Code did not cover the situation in relation to whether a broker was used and whether there should be a mechanism for ensuring that an appropriate procedure for selection of a broker had been carried out. In any event the Committee was satisfied that the Factor had explained their choice of broker and the methodology used to the Homeowner. This was set out on the third page of their email to the Homeowner of 10 April 2015. The Committee

noted from Mr Watt's submission that they viewed the appointment of the Broker as a business decision for them. The Committee was not satisfied that this was an appropriate rationale for the Factor to exercise when selecting a broker. The Factors act in the Homeowners' interest and this should be the guiding factor in them choosing brokers. Nonetheless the Factor had appeared to only ever have used reputable, well-established insurance brokers who were well known in the marketplace. Accordingly there did not seem to the Committee to be any evidence of them acting inappropriately. The issue, from the Homeowner's perspective, was more that the commission that was being paid to the Factor was very high and impacting on the premium. Again, the key factor to address these concerns was to ensure that full disclosure was made. The Homeowner, and indeed any other party to whom the Factor provided services, would then be aware of the level of commission and could seek to make their own arrangements should they so desire. The Committee was therefore satisfied that there was no breach of the Code in relation to 5.6.

10.4. Section 5.7

This section requires the documentation in relation to any tendering or selection process to be available free of charge to Homeowners on request. There did not appear to have been any formal tendering or selection process in relation to insurance providers (and in any event the issue was around the appointment of the broker rather than the insurer). On that basis the Committee did not see that there had been any breach by the Factor.

11. The Homeowner had also intimated that they believed there had been a breach of Section 1 of the Code of Conduct in relation to providing clear and transparent written statement of services. She had again highlighted the point regarding the use of the word "where" in relation to the placing of common insurance. However this point was covered in relation to 2.1 of the Code of Conduct and so for the reasons narrated in this decision regarding the Code of Conduct 2.1 the same decision would stand in relation to the complaint by the Homeowner in relation to section 1. Again, the Homeowner also complained that there had been a breach of Section 1of the terms of service by the failure to make an upfront disclosure of the commission. Again, however the Committee viewed this as being a specific breach of 5.3 of the Code rather than a general breach to be dealt with under Section 1 of the Code

Decision

12. The Committee accordingly determined that the Factor had breached section 5.3 of the Code. The Committee required to consider how this breach ought to be rectified. The disclosure had now been made and accordingly there was no need for any rectification steps to be taken in that regard.

The Homeowner sought repayment of all commissions received by the Factor in relation to the Property going back to 2000. This may have been relevant had the matter been raised via the courts or as a property factors duties breach under common law. In this case, however, the breach complained of was a breach of the Code of Conduct and the Factor's only became subject to this in 2012. The Committee did note, however, that the Homeowner had been put to a great deal of time and expense in ascertaining the true position by the Factor. The Factor's correspondence had been extremely lengthy, complex and, at times, verbose. The complaints procedure had been elongated unnecessarily all of which had put the Homeowner to inconvenience and lost time. The Committee's initial view was that the Factor should make a payment of £250 to the Homeowner to reflect the commissions received since 2012 and the inconvenience to her. The Committee was of the view that it would be appropriate to serve a PFEO.

Property Factor Enforcement Order ("PFEO")

The Committee then considered the proposed terms of a PFEO.

The Committee proposes to make the following PFEO:-

"Within 28 days of service of the PFEO on the Factor, the Factor must make payment of the sum of £250 to the Homeowner."

A copy of the proposed PFEO is contained in the accompanying notice under Section 19(2)(a) of the Act

Appeals

The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides

"(1) An appeal on a point of law only may be made by summary application to the Sheriff against a decision of the president of the Homeowner Housing Panel or a Homeowner Housing Committee. (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made ... "

Chairperson Signature ...Ewan Miller.....Date..20/1/16...