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

HOHP reference: HOHP/PF/14/0111

Re: 78 Belmont Drive, East Kilbride G75 8HD('the property')

The Parties:

Mrs Anna Goudarzi, 2 Bellflower Grove, East Kilbride G74 4TB ('the homeowner')

South Lanarkshire Council, Housing and Technical Resources, Almada Street, Hamilton ML3 0AA ("the property 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:

George Clark (chair), Richard Burnett (surveyor member) and Scott Campbell (housing member)

Decision

The Committee has jurisdiction to deal with the Application.

The property factor has failed to comply with its duties under section 14 of the 2011 Act.

The Decision is unanimous.

We make the following findings in fact:

1. The homeowner is the owner of the property 78 Belmont Drive, East Kilbride G75 8HD, a self-contained flat within a block of flatted dwellinghouses. The property factor manages and maintains the common parts, which are owned by two or more persons, of the block of which the property forms part and the property factor, therefore, falls within the definition of "property factor" set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 ("the Act")
2. The property factor's duties arise from a written Statement of Services, a copy of which has been provided by the homeowner.
3. The Committee is unable to state the date from which the property factor's duties arose, but neither party is disputing the fact that they arose prior to the date of the application.
4. The property factor was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor.
5. The date of Registration of the property factor was 17 December 2012.
6. The homeowner has notified the property factor in writing as to why she considers that the property factor has failed to carry out its duties arising under section 14 of the Act. She did this by letter on 15 April 2014.
7. The homeowner made an application to The Homeowner Housing Panel ("HOHP") dated 24 July 2014 and received by HOHP on 31 July 2014 under Section 17(1) of the Act.
8. The following is a summary of the content of the hoeowner's application to HOHP:- In the application, the homeowner referred to HOHP a specific incident that had occurred during the South Lanarkshire Council Investment Programme in her area. Within a few days of starting work on the external walls and roof, the front bedroom of the property had encountered heavy water penetration at the side of the window. The water ingress was not controllable. A double bed mattress and a sofa bed were placed at the window to absorb the water, but it still destroyed the carpets and the plywood underneath. The side walls and ceiling required to be replastered and repainted and the window and wall required to be repainted. Mr Andrew Devlin, who was supervising the works on behalf of the council, had attended the property the following morning to inspect the damage. After several days of liability disputes between the council and the contractors, Ailsa Building contractors had agreed that the problem was due to the blockage of gutters with debris when the work was being carried out on the external walls and roof. Mr Devlin had assured the homeowner that the contractors would take full responsibility for the repairing of the bedroom, including replacing the plywood, carpets, window edge, plastering, painting of the walls and ceiling. The homeowner had been given the option by Mr Devlin of pursuing an insurance claim through Gallagher Bassett or of dealing directly with the contractors. She had decided on the

second option, as she thought this would be a more feasible and timely convenient route, because of a previous experience with Gallagher Bassett the previous year, when her claim had been refused after the company considering it for seven months. Mr Devlin then merely gave her the contractors' telephone number on a piece of paper and she had been completely left to her own devices to deal with a firm of building contractors who had no interest in rectifying their mistake. Despite her efforts in contacting and leaving messages, the work was not completed by the contractors and Mr Devlin believed he had completed his duties and it was of no importance to him. Her numerous telephone messages to Mr Devlin then went unnoticed. The homeowner was of the view that Mr Devlin had ignored and neglected his duties under Section 6.9 of the Code, which clearly referred to the factor pursuing contractors to remedy defects in any inadequate work. The homeowner stated in her application that she had been issued with an invoice for £5125.20 for the repair programme, which she was reluctant to pay, as she had not had compensation for the damage to the bedroom of her flat. She had written a letter of complaint to Mr David Lowe, the Head of Property Services at South Lanarkshire Council, asking for reconsideration of her case. In his reply, he had incorrectly stated that the contractors had carried out the work in her flat , which was not true, and he had also wrongly advised her to contact the Scottish Public Services Ombudsman if she was not satisfied. She had completed the SPSO's rather complicated enquiry form and had had to wait a few weeks for a response which was that the Ombudsman was unable to help because factoring fell outwith his jurisdiction. The homeowner stated in her application that Mr Lowe must have been aware that her complaint was essentially a factoring issue. She referred to Section 7.2 of the Code, which stated that a final decision should provide details of HOHP. The council had clearly failed in this duty and, by advising her to contact the Ombudsman, the council had only prolonged matters.

9. Finally, in her application, the homeowner stated that she considered the property factor had failed to comply with Section 6.1 of the Code, as there was no clear procedure in place to inform her of progress of the work and timescales for completion – simply a name and contact number of the contractors on an unofficial piece of paper.

10. The homeowner's concerns have not been addressed to her satisfaction.

11. On 25 February 2015, the President of HOHP referred the application to a Homeowner Housing Committee.

THE HEARING

A hearing took place at Europa Building, 450 Argyle Street, Glasgow on 22 May 2015. The homeowner was not present or represented at the hearing. The property factor was represented at the hearing by Andrew Devlin, its Investment Officer and David Keane, its Factoring Manager.

Introduction

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

The property factor became a Registered Property Factor on 17 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee had available to it and gave consideration to: the application by the homeowner received on 31 July 2014, with supporting paperwork, namely a copy of the written Statement of Services, copies of the homeowner's letter of complaint of 15 April 2014, the reply from South Lanarkshire Council dated 16 May 2014 and a letter from the Scottish Public Services Ombudsman to the homeowner dated 23 July 2014; a copy of an undated letter from the homeowner to the property factor in response to its letter of 16 May 2014; a copy of a letter from the property factor to the homeowner dated 4 September 2014, responding to her letter received on 27 August; a copy of a letter from Gallagher Bassett to the homeowner dated 20 February 2015; and a written statement from the property owner attached to an e-mail sent by her to HOHP on 11 May 2015. The Committee confirmed that it did not require any further documentation prior to considering the application at a hearing.

Summary of Written Representations

The Committee had received, in advance of the hearing, written representations made by the homeowner and these are summarised as follows:-

The homeowner had written to the property factor on 15 April 2014, to express her concern and frustration caused by South Lanarkshire Council. She referred to issues with the roof of the block since 2009. The first incidence of damage caused by water penetration had been in 2009, a similar incident occurred on 6 December 2012, but the issue which had given rise to her application to HOHP occurred in March 2013, when the Council began the Housing

Investment Programme work on the block, the work being supervised by Andrew Devlin. Days after starting the overcoat of the external walls, she had, due to blockage of gutters, experienced a massive amount of water penetration from the edge of the bedroom window. The bedroom carpet and underlay were soaked and there was damage to a laptop. She had reported the matter urgently at the time and an inspector, the architect and the contractor's representative had all inspected the damage the following morning. Mr Devlin had, however, left the homeowner on her own to deal with the situation and had merely provided contact details of the contractors, who, she understood from Mr Devlin, had accepted that it was blockage of the gutters that had caused the issue and that they (the contractors) were responsible for ensuring the gutters were cleared after they carried out the work on the roof and the external walls. The contractors had, however, shown no commitment to repair the damage. The carpets and underlay and the plywood were so wet that they all had to be replaced. The contractors had left the work unfinished after taking a few months even to start it. The homeowner had had to finish off the work herself, as well as paying for the damage to a double bed, curtains and a laptop. Despite many contacts with both the contractors and Mr Devlin, there was no further correspondence from them.

In December 2013, after the completion of the repairs programme, the homeowner had experienced more water damage in the exact location where there had been previous damage (in December 2009 and December 2102) to the kitchen. The ceiling was dent (sic) and the tiles around the window needed replaced once again. With the same response and approach from the council staff the damage had become more extensive. The allegedly called temporary repairs had not stopped the water penetration and the measures they had in place to ensure no further damage was caused had once again failed. In the concluding portion of her letter of 15 April 2014, the homeowner stated that she had now received an invoice for £5125.20 for her share of work carried out under the Capital Repair Programme and an invoice for work carried out in December 2103 (for £27.09) and she was making a clear statement that she would not be paying the council, as she had incurred much higher expenses to correct the council negligence and poor service. She believed that the council had been responsible for all of these costs. The legal advice she had been given was that it was the council's responsibility to ensure her flat was wind and water tight at all times.

The homeowner stated in her written representations that the incident in March 2013 had been reported the day after it occurred and that, at the meeting at the property later that morning, Mr Devlin had presented her with two options. The first one was to make a claim through Gallagher Bassett, who were appointed by the property factor to assess claims. She had declined that option, due to previous experiences with that firm, who had refused compensation in 2013 after six months of dealing with her claim. The second option was to recover the cost directly from the contractors and, as she had tenants in the property at the time, she considered this option to be a quick fix, so she accepted it. She had trusted the advice given by Mr Devlin and was under the impression that he was following council guidelines in advising her of the options. He had, however, only given her a contact

telephone number for Mr Jim Harold, a director of the contractors. Mr Harold had taken no interest in rectifying the damage as, according to his site manager, he did not believe that it had been caused by his staff's negligence. Despite the homeowner making great efforts to contact Mr Harold and leaving several messages for him, the contractors did not complete the work, but Mr Harold had then claimed to the council that the work had been fully undertaken. Mr Devlin, who also was under the impression that the case was no longer his responsibility, had chosen not to communicate with the homeowner and had discarded many messages that she had left with his office.

Following a mediation session, the homeowner had, as advised at that session, completed a Third Party Claim with Gallagher Bassett, the first option that had been presented by Mr Devlin in March 2013, but they had refused to offer compensation as they had been advised by the council that the water penetration was due to water which had entered below the secret gutter at the property over a period of years before the works commenced. Gallagher Bassett did not consider that an incident of this nature could have reasonably have been foreseen, so they did not consider that the council or their contractors could be held legally responsible on this occasion.

The homeowner was of the view that the property factor had failed to comply with Sections 6.1 and 6.9 of the Code of Conduct.

The homeowner then, in her written representations, mentioned briefly the second part of her complaint in relation to Section 7.2 of the Code of Conduct, namely that the property factor had wrongly advised her that if she was not satisfied with the response to her complaint to the council, she should pursue matters with the Scottish Public Services Ombudsman. This had been more fully detailed in her application to HOHP.

The Committee had not received any written representations from the property factor in advance of the hearing.

Summary of Oral Evidence

The representatives of the property factor began by telling the committee that they had understood that they should provide written representations only if they were not attending the hearing, so did not want the Committee to interpret in any other way the failure to provide such representations. The property factor also handed to the committee copies of a number of e-mails which, it was contended, supported the property factor's version of events. The view of the Committee was that, as the homeowner had not had sight of these e-mails, the Committee could not consider them in arriving at its decision, but that copies would be sent to the homeowner with the Committee's decision, so that she had sight of them when considering whether to appeal the decision.

Mr Devlin told the Committee that the water ingress to the homeowner's property happened a few days into an external refurbishment contract to re-roof and re-roughcast the external elevation of the block. The problem had been caused by the release during the building works of water which had been trapped in a secret gutter above the window of the bedroom of the property. The homeowner had reported it to the council's repairs section, but had been advised that this was a private contract and not one being dealt with by the Direct Services section of the council. Mr Devlin had met with the homeowner on the following morning and had inspected and recorded the damage. He had told the homeowner that he would issue a Third Party Claim form, but she had then become erratic, explaining that she had had a bad experience before. Mr Devlin told the Committee that the normal procedure would have involved the homeowner completing the form and sending it to the Risk Assessment Section, who would prepare a report for Mr Devlin's team, who would then send on the report and claim form to the loss adjuster.

Mr Devlin told the Committee that he had never suggested a direct approach to the contractor. The homeowner had demanded the contractor's details and she had been advised at that point that if she chose that route, South Lanarkshire Council would have no further input. She had not been given two options. She had only been given the option of the claim form. South Lanarkshire Council would always process such matters through the official route and there would never, for example, be a three-party meeting.

Mr Devlin said that the property factor had followed up the meeting by issuing the claim form, but it had never been returned. The day after the meeting, however, the homeowner had telephoned him to say that the contractors had not returned her telephone call and he had e-mailed the contractors, who had replied by e-mail to say that they would contact her. Mr Devlin had followed this up the following week and the contractors had said that the homeowner had demanded cash when they had met with her. They had refused, but as a gesture of goodwill, without admitting liability, they had agreed to carry out works to the bedroom of the property. South Lanarkshire Council's clerk of works had also confirmed to Mr Devlin that a painter was at the property.

The chair of the Committee then referred Mr Devlin to the letter of 15 April 2014, sent by the homeowner to Mr Daniel Lowe, Head of Property Services at South Lanarkshire Council. The homeowner had stated in that letter that Mr Devlin had indicated to her in a discussion some days after the incident that the contractors had accepted that the blockage of gutters had caused the water ingress and that it was the contractors' responsibility to ensure the gutters were cleaned after the work they carried out on the roof and the external walls. Mr Devlin told the Committee that he had not had that conversation with the homeowner, so had not said anything to her about the contractors being negligent. At no time had the contractors admitted liability and the project architect had said that there was no negligence and that the damage had not been foreseeable. Mr Devlin stated that, at the outset, there had been a number of telephone conversations with the homeowner in which

she had been fairly demanding, but after the contractors had reported a resolution and then confirmed having completed the works, there had been no further contact from the homeowner for twelve months, until the bills were issued. Mr Devlin did not accept the homeowner's allegation that he did not answer her telephone calls. Any messages for him would have been left with his secretary and there were no "missed" calls or e-mails from the homeowner.

It was not until she complained about the bill she had received in respect of her share of the cost of the external works to the block that the homeowner had contended that the contractors had not done any of the work and that she had had to have it done privately. Mr Devlin told the Committee that he had a statement from the contractors confirming that they had carried out the work as agreed with the homeowner and that nothing had been added to the contractors' bill in respect of this additional work that they had carried out.

Mr Devlin then told the Committee that at a mediation meeting the property factor had finally persuaded the homeowner to submit a claim form with copies of estimates and invoices. She had eventually submitted the claim, but had not provided invoices from her own contractors for any work. The homeowner had not contacted the property factor for twelve months and then had produced no evidence that her own contractors had done the work and Mr Devlin invited the Committee to agree that this tended to support the view that it was the property factor's original contractors who had actually done the work.

The Committee pressed Mr Devlin on whether he had failed to follow up with the homeowner on whether the contractors were proceeding with the work. He responded that his clerk of works had reported seeing a painter at the property, who he knew to be the usual sub-contractor that the contractors used. In addition, the homeowner had been insistent on doing things her way. Had she gone down the claims route, the property factor would have followed up on it and would have complied with Section 6.9 of the Code. It was Mr Devlin's view that, had the homeowner submitted a claim form at the outset, a full inspection would have been carried out by the loss adjuster and no HOHP hearing would have been necessary. He stressed again that the homeowner had been in frequent contactt in the first few days after the incident occurred and that this was in stark contrast to her failure to make any contact for a further twelve months to say that the contractors had failed to commit to their agreement with her. She had also provided no evidence of any tradesmen's bills or materials purchased by her to rectify matters.

Mr Devlin told the Committee that the first thing to do in the event of such an incident is to sort out the water ingress problem, but if it looked as if it might give rise to a claim for damage to goods or for other compensation, the owner is given a claim form to complete and this is passed to the loss adjusters. Mr Devlin confirmed that South Lanarkshire Council are their own insurers. If contractors admit liability, they are instructed to carry out the necessary work expeditiously, but in this case, the scenario was different, as the contractors did not admit liability. The homeowner had refused to go through the Council's insurance

process, so it would not have been appropriate for them to suggest she contact her own insurers. Mr Keane was not, in any event, sure that the homeowner's policy would have covered it. The contractors had, as a goodwill gesture, taken responsibility for making good by arrangement with the homeowner, as the problem had arisen during their work on the block, but they were not prepared to offer the homeowner compensation for stress and anxiety.

In relation to the homeowner's complaint that she had been referred to the Scottish Public Services Ombudsman, rather than HOHP, if she was unhappy about the way the Council had dealt with her complaint, Mr Keane and Mr Devlin told the Committee that it had not been picked up as a factoring issue, because it was about South Lanarkshire Council's failure to answer a complaint. The procedures had now been changed and details of HOHP are given to homeowners where there are any complaints of such a nature as the present one. It had been a learning process for South Lanarkshire Council as property factors. They regretted the fact that the homeowner had been sent on the wrong path to the Ombudsman, but felt that, having dealt with that matter, they were not appearing before the Committee because they had made the wrong decisions.

Reasons for the Decision

The Committee considered the application, with its supporting papers, the written representations of the homeowner and the evidence given by the property factor at the hearing. The Committee noted that the property factor had accepted its mistake in not advising the homeowner in its letter to her of 16 May 2014 that, if she was not satisfied with the way her complaint had been handled, she could refer the matter to HOHP. The Committee accepted the evidence given by the property factor that it had now changed its procedures for dealing with such complaints and decided not to propose making a Property Factor Enforcement Order in relation to any failure to comply with Section 7.2 of the Code.

The Committee considered the complaint by the homeowner that the property factor had not complied with Section 6.1 of the Code which includes an obligation to inform homeowners of the progress of repair work, including estimated timescales for completion, where a homeowner has notified the property factor of matters requiring repair. The Committee took account of the fact that the homeowner had opted not to follow the property factor's procedures in relation to the damage which occurred within the property and accepted that, on the balance of probabilities, it was not the property factor who had suggested dealing with the contractors directly. The Committee's view on the evidence before it was that the more likely explanation was the homeowner's reaction to the prospect of having to lodge a claim with the property factor's loss adjusters. She had had an unhappy experience with them in 2013 and the Committee was not persuaded that the suggestion of dealing directly with the contractors had come from the property factor. Had

the homeowner followed the procedure of lodging a claim with the loss adjusters and had remedial work proceeded as a result, there would have been an obligation on the property factor to inform the homeowner of the progress of the work, with estimated timescales for completion, but the Committee was of the view that, given the decision of the homeowner to deal directly with the contractors, the obligations under Section 6.1 of the Code did not apply and accordingly, the Committee did not uphold the complaint that the property factor had failed to comply with Section 6.1 of the Code.

The Committtee did, however, determine that the property factor had not complied with the requirements of Section 6.9 of the Code, which requires property factors to pursue contractors to remedy the defects in any inadequate work or service provided. The homeowner had alleged that damage to her property was caused by the contractors and that the contractors had been at fault. The property factor's response was to arrange a prompt meeting to inspect the damage and to tell the homeowner that a claim form would be sent out to her. When she reacted in the way she did, by asking for contact details to enable her to deal directly with the contractors, the property factor took no further action, other than to ask the contractors to get in touch with the homeowner when she complained that they had not returned her call. They did follow up a week later in that they contacted the contractors, but they then simply took the contractors' word for it that a programme of works had been agreed with the homeowner and, later, that the work had been completed. The fact that the clerk of works had seen a painter in the property was not sufficient to support the property factor's conclusion that all was now well, nor was the fact that the homeowner had not contacted the property factor herself until the bills were sent out. The view of the Committee is that the obligations under Section 6.9 of the Code must extend to checking either personally or with the homeowner that any remedial work has been carried out. In this case, the property factor had a responsibility to contact the homeowner to confirm that matters had been resolved by agreement with the contractors and that the agreed work had been carried out and that, consequently, the property factor had failed to comply with Section 6.9 of the Code. The Committee proposed to make a Property Factor Enforcement Order in respect of this failure.

The Committee was concerned that the property factor's procedure in relation to claims by homeowners for compensation in cases such as the present one, whereby all disputes would be regarded as insurance claims and be referred to its loss adjusters, might not adequately meet the requirements of Section 6.9 of the Code and felt that the policy and procedures operated by the property factor should be reviewed in the light of the Committee's decision.

PROPOSED PROPERTY FACTOR ENFORCEMENT ORDER

The Committee proposes to make a Property Factor Enforcement Order, as detailed in the accompanying Section 19(2) Notice.

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 ..... Date 22/05/2015