hohp

PROPERTY AT 59/5 HESPERUS BROADWAY, EDINBURGH EH5 1FW

The Parties:-

The homeowner – Mr Mark & Mrs Gillian Coyle ("the applicants")

The property factor – Dunedin Canmore Enterprise t/a Dunedin Canmore Property Management ("the respondent")

DECISION BY A COMMITTEE OF THE HOMEOWNER HOUSING PANEL IN APPLICATIONS UNDER SECTION 17 OF THE PROPERTY FACTORS (SCOTLAND) ACT 2011 ("THE 2011 ACT")

Case reference: HOHP/PF/14/0118

Committee Members

Richard Mill (Legal Chairperson)
Robert Buchan (Surveyor Member)

Decision of the Committee

The committee unanimously determined:-

1. that the respondent has failed in their duty to comply with the following sections of the Code of Conduct for Property Factors ("the Code"):-

   i. 1.1aAa

   The respondent failed to set out the basis of their authority to act.

   ii. 1.1aAb

   The respondent failed to set out, adequately and clearly, a statement of any level of delegated authority and situations in which they may act without further consultation.

   iii. 1.1aCf

   The respondent failed to adequately set out the proportion or fractions used in invoicing.

iv. 2.4

The respondent failed to have a procedure in place to consult with homeowners in order to seek their approval for work or services which would incur charges or fees in addition to those relating to the core service.

v. 2.5

The respondent failed to respond to enquiries and complaints quickly and fully and within a reasonable timeframe. They also failed to set out response times for enquiries and complaints.

vi. 3

The respondent failed to provide clarity and transparency in accounting procedures.

vii. 5.2 and 5.3

The respondent failed to set out the charges, including apportionment of premiums, in respect of insurance.

viii. 7

The respondent failed to adhere to their complaints procedure.

2. that the respondent has failed to comply with their duties in respect of:-

i. their failure to instruct adequate repairs and remedy the problems with the common door to the applicants' block of flats (both the entry buzzer system and closing mechanism) for a continuous period of more than 2 years.

ii. their failure to apportion insurance premiums for the Development, including the applicants' share, in accordance with the Deed of Conditions.

iii. their failure to attend to the adequate maintenance of the common garden area around the applicants' block.

iv. acting outwith their duties, without authority to do so, and outwith their delegated powers by the purchase and installation of metal barriers around designated bin areas on two sites in the underground parking area of the Development.

Procedural Background

The Application to the Homeowner Housing Panel from the applicants was received on 11 August 2014. Following further information being requested, the President referred the Application to a Homeowner Housing Committee by way of Minute of Decision dated 24 November 2014.

The proforma Application received raised alleged complaints both in terms of the Code of Conduct for Property Factors and the respondent's duties.

Inquiries and Hearings

The Oral Hearing was assigned for 6 February 2015 at George House, Edinburgh. Both the applicants appeared personally. The respondent was represented by Chris Lyon, Factoring Services Team Leader and Dorothy McKinney. Dorothy McKinney intimated that she had a lot of knowledge regarding the homeowners concerns and plays a role in supporting the Dunedin Canmore Groups Services Chief Executive Officer, specifically with complaints.

The manner in which the Application and written representations of the applicants had been presented made initial identification of their complaints somewhat difficult to categorise. The papers produced in support of the Application primarily consisted of voluminous correspondence between the parties by email.

The respondent had prepared a detailed written response to the Application with four Appendices.

In advance of the Hearing, by way of letter dated 24 January 2015, the applicants submitted a further bundle of documents (numbered AD1-AD41). These were admitted into evidence.

During the course of the Hearing on 6 February 2015 the applicants produced photographs showing the garden area outside their own block of flats and a set of photographs showing the garden ground outside the blocks which belong to the respondent. These were admitted into evidence.

It became apparent throughout the Hearing on 6 February 2015 that it would be necessary for the committee to have before it a copy of the full Deed of Conditions pertaining to the Development including a plan of the Development. Excerpts of the Deed of Conditions appear as an annex to the respondent's Written Statement of Services but the full version had not been lodged by either of the parties.

In order for this to be produced and to enable the parties to make further relevant representations in relation to issues directly affected by the terms of the Deed of Conditions, the committee continued the Hearing to a subsequent Diet which was assigned for 13 March 2015. A formal Direction was thereafter issued.

Upon receipt of a copy of the Deed of Conditions, and following further correspondence from the applicants, a further Direction was necessary and was issued dated 12 February 2015 requiring further clarification on a number of distinct

points from the respondent, including the specific basis of their appointment (which was not reflected within the Deed of Conditions) together with clarification over the areas of common garden ground within the Development and clarification over a number of issues pertaining to the provision of insurance.

By way of email dated 26 February 2015 the respondent produced a substantial number of further papers in response to the latter Direction issued by the committee. These papers were copied to the applicants and admitted into evidence.

By way of further email dated 6 March 2015 the respondent produced a further substantial set of papers. Again they were copied to the applicants and admitted into evidence.

By way of further email dated 9 March 2015 the respondent produced a further substantial number of papers seeking to clarify their case further. Again all of this was admitted into evidence.

The same individuals attended the second date of Hearing, namely Mr Mark & Mrs Gillian Coyle, the applicants, and Mr Chris Lyon and Ms Dorothy McKinney, representatives for the respondent.

At the conclusion of the committee's inquiries on the second Hearing date on 13 March 2015, both parties made concluding submissions. The applicants' submissions were in written form and added to orally.

Inspection

Following the first Hearing and following the subsequent receipt of additional papers the committee identified that it would be necessary for them to carry out an inspection of the Development in order to better understand certain areas of dispute between the parties. An inspection was arranged by way of Direction to take place prior to the commencement of the second date of the Hearing. The committee were joined and assisted by the representatives of the respondent who were involved in the Hearing process together with Mr Mark Coyle.

Findings in Fact

1. The applicants are the homeowners of 59/5 Hesperus Broadway, Edinburgh EH5 1FW ("the property"). The property is one of a number of flats forming part of the Merlin & Hesperus Development in the north of the City of Edinburgh ("the Development").

2. The Development is a modern housing development. There are 120 flats in total. There are six blocks of flats. The respondent owns two of the blocks of flats which are comprised of units which are deemed to be affordable housing. The respondent's two blocks are detached from one another and the remainder of the Development. The other four blocks are attached to one another in a horseshoe shape on the north side of the Development.

3. The Development was commenced by Gregor Shore Homes who entered administration throughout the duration of the build. Muir Homes took over the Development and completed the building. The respondent advised that Muir Homes, in correspondence with them, have not accepted liability for a number of defects pertaining to the Development.

4. The Deed of Conditions sets out arrangements for, amongst other items, maintenance, repair and renewal of the common parts of the Development, including provision for a property factor. The respondent is the relevant Property Factor for the purposes of the Property Factors (Scotland) Act 2011.

5. The Deed of Conditions prepared for the Development contemplated the appointment of Chares White Ltd as property factor. The respondent however was appointed by a less formal means thereafter by those acting on behalf of the property developer. The respondent was appointed as property factor in or about March 2010.

6. The respondent became a registered Property Factor on 21 November 2012. The respondent's Property Factor registration number is PF000372.

7. The applicants' property has a 1/21 share of responsibility pertaining to the individual block of flats in which the property is situated. The property has a 1/120 share of responsibility for common parts pertaining to the whole Development.

8. The apportionment of the total premium for insuring the common property of the Development and the common property of the stairs and the flatted dwelling houses is calculated according to the total square footage of all the flatted dwelling houses within the stair of which the particular flat forms part and an equal share along with all other proprietors in the Development of the premium for insuring the common property of the Development and the common property of the stair. This is set out within Clause 5.2.4 of the Deed of Conditions. From the time of their appointment the respondent has failed to apportion the insurance in accordance with this rule.

9. The property factor is responsible for arranging insurance for the Development. They do not receive commission in respect of their services. They charged an administration charge of 20% of the total premium until 1 January 2014. From said date the administration charge has been reduced to 10%. This has not been adequately explained to homeowners. This has not been adequately reflected in a clear and transparent manner within the invoicing issued to homeowners, including the applicants.

10. The respondent issued a Written Statement of Factoring Services to all homeowners. The date of the Statement is 1 May 2013. The Written Statement of Services does not itself set out all relevant information. Some relevant information is contained within Appendices to the Written Statement of Services. This is confusing.

11. There is further confusion and lack of clarity as a result of the terms of the said Written Statement of Factoring Services. The basis of the respondent's authority to act is not set out. Reference is made in an Appendix to the anticipated property factor, Charles White Ltd. This is misleading. There is further confusion by virtue of the fact that there are erroneous references to the wrong Appendix within the said Written Statement of Services to the extent of the respondent's delegation of authority in financial terms. The Written Statement of Services did not explain the level of administration charge applied by the respondent to insurance premiums. The Written Statement of Services did not explain the extent of their administration charge which is applied to external suppliers.

12. The applicants were the first owner occupiers within the Development. The second applicant, Mrs Coyle, has historically been actively involved with issues pertaining to the Development and correspondence with the respondent. She was formerly involved with both the residents committee and a separate group called Granton Harbour Action Group.

13. The second applicant agreed with the respondent to purchase six noticeboards for the six blocks within the Development, including the two blocks owned by the respondent so as to enable frequent communications between the respondent and the homeowners. The respondent indicated that they would pay £300 to the Action Group as a gesture relating to the second applicant's provision of the noticeboards. Said payment was never made. This was due to the fact that the Action Group did not have a bank account. The second applicant has never been reimbursed for £220 or thereby which she incurred personally for the purchase of the noticeboards and their installation. During the Hearing the respondent agreed to repay that sum by crediting the applicants' account.

14. The landscape maintenance contract for the Development is held by Greenfingers Civic Trees Ltd. The specification of works includes the maintenance of all shrub beds including that they be hoed at regular intervals. There is no provision within the specification for replacement planting. Replacement planting is a reasonably anticipated requirement of the maintenance contract. The respondent arranges a minimum of six walk rounds with the landscaping company per annum. The shrub beds outside the applicants' block of flats have not been maintained sufficiently and are markedly of a poorer standard than elsewhere in the Development. The garden areas around the two blocks owned by the respondent, which are common property, have had additional landscaping works undertaken. Those areas are fully stocked and maintained.

15. There have been problems with the common door to the applicants' block of flats since they moved in in 2012. Firstly, the door does not always close. Numerous remedial repairs have been undertaken by the respondent which have not been successful. Secondly, the door buzzer entry system is deficient. It was identified that a second-hand obsolete system was installed by the developer. Numerous temporary repairs have been undertaken. A new system is required. There have been inordinate delays by the

respondent to instruct the necessary works in respect of these door difficulties.

16. There are problems with the arrangements for refuse collection within the Development. Prior to full occupation the communal bins were situated on car parking spaces in the Development and were being uplifted by the Local Authority without difficulty. When the Development became fully occupied the placement of the communal bins within the car park area was no longer possible. In accordance with the original plans for the Development, the refuse bins were to be located at a number of different points in the underground car deck; broadly intended to be placed near the foot of each common stair which descends to the underground car deck.

17. The Local Authority refused to uplift the communal bins from these sites due to the fact that the bins would require to be moved more than 10 metres to the refuse lorry which is unable to enter the internal car deck. The respondents explored alternatives. This included the possible re-arrangement of the car park so as to accommodate the bins elsewhere. In the absence of exploring all alternative options or obtaining the consent of homeowners, the respondent purchased replacement bins at a cost of over £4,000 and entered into a contract for the communal bins (normal refuse and recycling) to be mechanically towed on a weekly basis to the main entrance to the Development. The charge to the Development for the towing exercise is £518 every 4 weeks.

18. The respondent also arranged for the installation of metal barriers at two sites around bins in the car deck area. The total cost of the purchase and installation of these barriers (comprising three invoices of £1,898.40, £1,590.00 and £2,068.00) was £5,556.40. The respondent applied their management charge of 12 per cent in an inconsistent manner to the relevant invoices and in the absence of any adequate explanation to the cost of these works. The respondent had no authority to instruct this work. The homeowners, including the applicants, are not obliged to pay for this work.

19. The respondent offered direct assistance to the applicants to establish a residents' committee. Their tenant participation officer assisted in the establishing of the committee and thereafter chaired the first meeting of the residents held on 29 May 2014 at the Royal Forth Yacht Club, Granton, Edinburgh.

20. There is no fire safety plan for the applicants' block of flats. This has been an ongoing problem since 2012. The Fire Brigade has requested that a plan be prepared correlating the lights on the fire alarm board with individual areas within the block. This has not been attended to by the respondent. The respondent has a global contract across their Group with Chubb Security. The respondent accepts that they are responsible for the delay and have undertaken to ensure a fire safety plan is prepared forthwith at their sole cost.

21. The applicants have raised numerous complaints with the respondent. Two of their complaints have been treated as formal complaints; in May and

November 2013. These formal complaints were dealt with by the respondent at the second stage of their formal complaints process. None of the other complaints which the applicants have raised with the respondent have been treated as formal complaints in accordance with the respondent's customer complaints procedure. The respondent failed to deal with the applicants' complaints in an appropriate manner.

22. The applicants cancelled their direct debit in favour of the respondent for a period of 5 months throughout 2013. They hoped that this would trigger action on the part of the respondent to resolve their concerns. It did not. The applicants reinstated their direct debit and made up the arrears. The applicants again cancelled their direct debit in favour of the respondent with effect from May 2014. They have not made payments to the respondent in respect of their factoring charges since said date. The amount outstanding is currently £439.06.

23. The respondent has committed a large amount of time and a number of staff members to seeking to resolve the applicants' complaints. Both technical and professional staff of the respondent have been involved in this process. The respondent prepared an action plan after the second formal complaint made by the applicants and a further plan was developed to address remaining issues from the last complaint together with new and further issues raised by the applicants.

24. Invoices rendered by the respondent to the applicants quarterly are not always clear and easy to follow. Following an earlier review of the invoicing process some remedial matters were remedied including the providing of page numbers to statements. The narrative detail in respect of entries is sufficient but there is a lack of clarity around certain percentages which do not correspond to the 1/21 and 1/120 generally specified for the applicants' block of flats and the Development as a whole. Certain charges are made at 1/42 and 1/81 and there is insufficient explanation for this. The respondent's service charge which is 12 per cent, added to third party supplier invoices is not clear from the invoicing. The rate at which this is charged is not stipulated. Such service charge is not always consistently applied.

25. Communications as a whole by the respondent, both in terms of their interaction with the applicants in respect of their complaints but also in respect of the provision of information at large to the Development both in the Written Statement of Services and otherwise has been poor.

Reasons for Decision

The application before the committee related to a large number of complaints. The paperwork available to the committee was extremely extensive. It was partly made up of lengthy email exchanges, some of which was not in chronological order and some of which was repeated.

The committee were fully familiar with the papers prior to the first Oral Hearing. The committee very much utilised their inquisitorial role in managing the Hearing carefully

exploring all relevant issues and thereafter allowing each of the parties to address the committee upon each relevant issue in turn. The committee identified at the first Hearing that there was not sufficient information to enable them to determine the Application fully and in those circumstances this led to an adjourned Hearing being fixed and subsequently more than one further Direction being issued.

At the end of the continued Hearing the committee was satisfied that they had sufficient information in order to reach a fair determination on the Application and that both parties had been given a full opportunity to present their case to the committee.

The committee found the applicants entirely credible. They were able to provide clear and specific detail in relation to historical and current matters to support their case. The voluminous correspondence, due in part to the length of time that the complaints cover, extends over many sections of the code of conduct. The applicants did not specifically tick the box in the application form for "Written Statement of Services" but this lies at the root of many of the individual complaints and is so fundamental to the overall complaint that the applicant's complaint should not fail just because they failed to tick the appropriate box in the form, which is not a statutory form, whilst they clearly met the requirements of the Act in notifying the Factor of their complaints. Similarly some sections of the Code of practice have been included which appear to have no specific relevance to the complaint.

The committee took the view that the overriding objective and application of the overriding objective, paragraphs 3 and 4 of The Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 enables the committee to consider the application in the most appropriate manner. The committee had regard to a number of broad headline issues as follows:-

1. Authority to Act

   The Code, in terms of provision 1.1aAa requires the Written Statement of Services to set out the basis of the authority to act. The Written Statement of Services issued to the applicants (and other homeowners) does not clarify the authority to act. The lack of clarity arises due to the fact that the Written Statement of Services in turn refers to an Appendix with an excerpt of the Deed of Conditions in which there is reference to another identified property factor, namely Charles White Ltd, and not the respondent.

   The basis of the appointment is inaccurate also. The basis of the appointment is purported to be as a result of the terms of the Deed of Conditions. In fact, following exploration of the matter by the committee the respondent's authority to act arises from an email from those acting on behalf of the developer in March 2010.

   The respondent's inability to express the manner in which they have been appointed and how their authority arises is a breach of paragraph 1.1aAa of the Code.

2. Delegated Authority

Provision 1.1aAb of the Code requires the Written Statement of Services to set out, where applicable, a statement of any level of delegated authority, namely financial thresholds for instructing works and situations in which the property factor may act without further consultation. There is a lack of clarity in the Written Statement of Services previously issued. The Written Statement of Services does not include the information itself but refers to an Appendix. Matters are compounded in that the wrong Appendix is referred to. Ultimately the reference is to a blank unsigned Management Contract proposed to have been entered into between the property factor and homeowners. It does not appear that such a style management contract was ever used. Making reference to the financial thresholds for delegated authority in this manner is wrong.

The Written Statement of Services previously issued contains no reference to the way in which homeowners are consulted for the purposes of providing authority for services which incur charges or fees other than those relating to the core service to be provided by the respondent. The respondent did not have such a procedure in place. This is a breach of 2.4 of the Code. This particular failure may explain some of the further practical difficulties faced by the respondent in managing the Development which has otherwise been explored.

3. Financial and Charging Arrangements

Provision 1.1aCf of the Code requires that there is clarity as to what proportion, expressed as a percentage or fraction, the management fees and charges for common works and services each owner within the group is responsible for. This is not fully explained within the Written Statement of Services. There are differing fractions applicable to the applicants' property. Some proportions are 1/21, some 1/42, some 1/81 and some 1/120. There is a failure to specify the varying fractions, what they relate to and why there are varying fractions.

The invoicing issued by the respondent has not always been clear or consistent in their terms. In addition to the lack of clear apportionments and the basis as to why these apportionments have been applied, it was noted that on occasions an administration charge has been applied to third party suppliers and on other occasions it has not been. On occasions when an administration charge has been applied, there is no corresponding explanation as to the basis upon which it has been charged. It was noted by the respondent that they, in fact, charge 12% but this is not adequately set out anywhere. This has never been explained. This is a breach of Section 3 of the Code in which the overriding objective is to seek to achieve clarity and transparency in all accounting procedures. The homeowners could not possibly know what they are paying for and how the charges are calculated.

4. Insurance

The property factors are responsible for arranging block insurance for the Development. They do not receive commission. Until 1 January 2014 they applied an administration charge of 20%. This was reduced to 10% from 1 January 2014. This has not been explained to homeowners. Section 5.3 of the Code requires that disclosure is made of "any other charge you make for providing insurance". This has not happened. The Written Statement of Services issued (at Section 5.9) makes reference to an administration charge but it does not set out the basis of the charge or percentage rate. It is not sufficient that the applicants or any other homeowner be provided with this information if they ask for this. The Code differentiates between information which must be provided on request and that which must be provided without caveat. This is an example where the Code makes it clear that the information must be provided.

Following production of the Deed of Conditions the committee readily identified that the basis for apportionment of insurance ought to be calculated on a square footage basis. The property factor has not proceeded in this way and instead calculated insurance on a pro rata basis. They admitted their failure and departure from their duties and have commenced a process by which they are to re-evaluate their processes.

The respondent had not identified their simple and basic error until such time as the committee raised it with them. Accordingly, since their appointment in or about March 2010, they have been incorrectly calculating the individual homeowner's insurance premiums for the whole Development. This is a period of 5 years. No explanation was offered for such a substantial failure.

The financial consequences as a result of the respondent's failure are potentially significant. A large number of homeowners have been overcharged. Similarly a large number of homeowners, the applicants included, have been undercharged. The properties in the Development are a mix of one, two and three bedroomed flats with different number and sizes of balcony. It is concerning for the respondent to have previously believed that the proper basis for apportionment of insurance was on the basis of mere equality.

At the time of the second day of Hearing, the respondent's representatives indicated that they had made significant progress in seeking to identify the necessary information in order to calculate the proper apportionments for homeowners in the Development in accordance with the Deed of Conditions. They intimated that it was their intention to ensure that any overpayment of premiums by relevant homeowners would be returned to them. They were unable to give any undertaking in respect of their intentions so far as homeowners, such as the applicants, who have been undercharged.

It did not appear to the committee that it would be proper for the applicants or other relevant homeowners in their position, to now be confronted, purely as a result of the respondent's previous failings, with the proposition that they pay effectively arrears of insurance for a lengthy period in the past. So far as the applicants are concerned they took up occupation in April 2012. Potentially they would be faced with paying 3 years arrears of shortfall in the insurance premiums as a lump sum. This would not be equitable given that this situation is in no way attributable to them and has been queried by them for some lengthy period of time. The homeowners raised the question of insurance apportionment in November and December 2013. This was treated as a formal complaint, included in an Action Plan to monitor the insurance, led to a repayment of insurance premium in February 2014 and all apparently without the respondent bothering to check the Deed of Conditions for the correct apportionment at which time the error should have been discovered.

The committee carefully considered how best to resolve this issue. They concluded that it would be reasonable for the applicants (and any other relevant homeowners in a similar position) to meet the increased premiums for the current insurance year which commenced on 1 January 2015 but that it would not be reasonable to expect them to meet the previous shortfall which they had never been asked for. In the circumstances the committee concluded that the respondent, at their sole cost, should meet the excesses which the applicants ought to have previously paid.

5. Front Common Door

The applicants have raised problems with the front common door since they took up occupation in 2012. This is clearly evidenced. Document AD25 is an email dated 8 January 2013 from Stuart Anderson, Property Officer of the respondent to Mrs Coyle. It specifically indicates that a new control unit is required, that the price would be in excess of £1,000 and that they were contacting the developer with a deadline to complete, otherwise he was to arrange the repair and charge accordingly. This was never undertaken or followed through. Numerous temporary repairs have been undertaken. It is beyond question that the replacement work is required. The anticipated costs appear to be within the delegated authority (which eventually once worked out is under £5,000) and therefore the respondent has a duty to instruct the work.

The closing mechanism of the front common door has equally been an ongoing problem for a lengthy period of time. It does not close all of the time. Again numerous remedial temporary repairs have been undertaken. It is entirely apparent and has been for some time that the door requires to be replaced. Again the cost of this work will

undoubtedly come within the delegated authority and should be undertaken and re-charged without delay.

6. Fife Safety Plan

This has been an ongoing problem again for a period of more than 2 years. The Fire Brigade who have been called to the Development several times due to callouts caused by numerous triggers have constantly flagged up the fact that there is no map of the building which corresponds to the fire lights on the main fire board. Therefore it is impossible for the Fire Brigade to identify with ease the area of the building which has triggered the fire alarm. There are serious potential consequences arising from this. In the course of the Hearing the respondent accepted that there has been delay and that they are indirectly responsible. They advised that Chubb Security have a global contract with the Dunedin Canmore Group. The respondent blames Chubb Security but they ultimately have responsibilities. On the day of the first Hearing the respondent undertook to resolve the matter imminently. Notwithstanding this the matter had still not been resolved at the date of the second Hearing some 5 weeks later.

7. Gardening

The respondent is responsible for the maintenance of the common areas of garden ground in the Development. All garden areas around all of the blocks, including grassed areas and planted areas, are common property. There is an inconsistency in the manner in which the common garden areas were planted originally. This is due to the phased nature of the building work and is also likely due to the original builder having gone into administration. At the beginning of the completion of the works, the planting was superior to the latter stages. The parts which were completed last are simply laid exclusively to grass.

Greenfingers Civil Trees Ltd currently hold the garden maintenance contract. The specification of works (produced at document AD24) does not include provision for the replacement of shrubs and plants on an annual basis. It clearly should. It is foreseeable that in a development of this nature that such work is going to be required. It ought to form a component of the contract. The respondent has failed to adequately ensure that this forms part of the service.

The failure to ensure adequate replacement of shrubs and plants partly explains, it would appear, the reason why the common areas of garden ground around the applicants' block include hard packed areas of earth which are shrub and plant free. Even setting aside the issue of re-planting, the garden contract currently encompasses provision for weeding and hoeing. The respondent claims to have at least six walk rounds per annum with the gardening contractor. If this was happening there would not be hard compacted areas of bare garden ground.

There continued to be a dispute between the parties regarding the reasons for the condition of the ground. The committee preferred the evidence of the applicants. There is a clear e-mail trail from at least April 2013 from the applicants to the respondent complaining of the condition of the garden relative to the rest of the Development and, at the committee's site inspection, nearly two years after the first complaint to the respondent, the shortcoming in the condition of what is not a particularly large area of ground was immediately apparent, particularly compared to the rest of the Development which appears well kept.

The committee were significantly assisted in their assessment of this particular issue by their personal attendance at the Development. It was clear that there has been a failing, which the respondent requires to be held responsible for, regarding the poor condition of the common garden ground around the applicants block.

In the course of the second day of Hearing the respondent's representatives intimated a willingness to make a payment of £500 towards an upgrade of the common area around the applicants block whilst still rejecting that they were responsible for the condition of the relevant garden area. The committee were not impressed with their position. The committee formed the view that as a result of the respondent's failings that the condition of the common garden area around the applicant's block has fallen into a state of disrepair and in those circumstances it is only equitable that the respondent pays, at their sole cost, for an appropriate upgrade.

8. Bins and Bin Barriers

Problems arose with the bin collections in early 2014. The common bins which had previously been situated in the car park could no longer be kept there because sales in the Development were increasing and the car parking spaces required. Instead the bins required to be situated where the plans had originally intended them to be in the underground car deck. However this caused resulting difficulties. Edinburgh Council were not prepared to uplift the bins because of the distance involved between where they were situated and where they would require to be pulled to for emptying.

The original plans appear to have been flawed and of poor design. It appeared to the committee that there was never any likelihood of a bin lorry ever entering the car deck in order to ensure easy uplift of the bins due to the lack of height at the entrance.

The respondent reacted to this difficulty by the incurring of substantial sums of money by way of initial outlays and by the entering into a contract for the payment of further continuing sums.

There was some debate at the Hearing as to whether or not the respondent had authority to take the steps which they did. The committee considered carefully whether or not the steps taken were in accordance with the respondent's duties. Representations for the respondent were focused on the fact that an urgent scenario had arisen whereby a substantial amount of refuse was on the brink of not being uplifted which was going to cause a health and safety and environmental issue and that effectively the situation was an emergency and required immediate resolution.

The respondent's representatives were invited to stipulate the foundation for their authority to act in the way they had by reference to the Deed of Conditions. They were unable to do so. Ultimately the committee concluded that taking such steps in such circumstances was, on balance, the correct and proper thing for the respondent to do with reference to the provision contained within Section 6.1 of the Deed of Conditions which refers to the factor "... who will be responsible for instructing *and supervising* (the committee's emphasis) the common repairs and *maintenance* (again the committee's emphasis) of the common property of the Development and the common property ...".

The costs incurred and those involved going forward are potentially significant. The cost of replacement bins which could then be towed for the purposes of emptying cost over £4,000. The respondents also entered into a contract for the bins to be towed on a weekly basis. The total cost of the towing exercise per annum is calculated at some £6,734.00. The towing costs are ongoing.

The respondent accepted in the course of the first day of Hearing that not all possible alternative means for resolving the bin problem had been considered. In particular no attempt had been made to identify whether or not a private contractor would remove the bins from their originally allocated area in the plans without the requirement for towing. At the time of the continued Hearing the committee were advised that such enquiries had now been made and that those costs would have, in fact, exceeded the costs of the purchase of the bins which could be towed and the towing contract.

It was noted by the committee that the Chief Executive of Dunedin Canmore Group, Mr Ewan Fraser, emailed Mrs Coyle on 12 May 2014 in relation to the issue of the bins (document 16 in the original bundle) stating that so far as the bins are concerned "I agree that it is not acceptable". Reference there is made to him getting more information and returning to her. That never happened. The matter as a whole has not been resolved adequately or clearly.

The respondent did not communicate the urgent nature of resolving the problem or their resolution of it and perhaps that was not initially a surprise. However, no attempt to date has been made by the respondent to effectively communicate the difficulty, the reasons for it,

and possible solutions with the homeowners including the applicants. In particular the respondents have failed to raise the issue in a meeting of homeowners in order to obtain authority to deal with the matter on a longer term basis.

There was clear and ample evidence available to suggest that the respondent, as an organisation as a whole, deemed the remedy put in place to resolve the bin collections to be a temporary one only. As a result, the committee were disappointed to note that the respondent had not effectively communicated this issue to homeowners seeking a longer term solution or alternatively approval of the steps already taken by the respondent.

The second element of work undertaken by the respondent at the time that the new bins were purchased was the provision of a small number of metal barriers around two of the bin sites in the car deck area of the Development. They sought to justify this on the basis that the provision of these barriers was in accordance with the original plans for the Development and were necessary due to health and safety and in order to protect cars (and possibly the public) from the bins being blown by wind.

Following the committee's inspection of the Development they were not satisfied at all that these barriers ought to have been instructed and installed by the respondent. The car deck area is flat. The bins do not freely move. No evidence was provided to the committee to suggest that there had been any incidents of the bins moving causing a dangerous situation or hazard. The suggestion that the barriers instructed were necessary cannot be justified given that there are a number of other sites in the car park where bins are stored which do not have barriers. At the time of the committee's inspection one sited area of the barriers had no bins next to them. Instead they were placed elsewhere causing no issues at all.

There is no basis in the Deed of Conditions for the respondent acting for the purpose of taking these steps or to complete the Development in accordance with the original plans. The barriers were not needed, the respondent did not have the authority to install them and the homeowners, including the applicants, should not be required to pay for them.

9. Complaints Procedure

The respondent has in place a detailed complaints procedure which is extensively set out within a Complaints Procedure Pamphlet. The applicants have made literally dozens of complaints over the last 2 years. Despite the Complaints Procedure defining a complaint as "any expression or dissatisfaction about our action or lack of action" only two of those complaints have been treated as formal complaints. The complaints procedure has not been followed by the respondent in

respect of the other complaints. The respondent failed to provide any adequate explanation for this. It was suggested in the course of the Hearing that it was up to the individual homeowner to stipulate whether something was a formal complaint or not and what level of complaint the homeowner would wish the complaint to be taken to. This seemed to the committee to be ridiculous. On the basis of the email correspondence exchanging it would have been impossible for the applicant to understand whether their complaint was being treated as a formal complaint or not. Given the tone of the correspondence and the nature of the complaints it would be fair for the applicant to assume that it was.

Observations

The committee acknowledge that the respondent and their staff as individuals have over time endeavoured what they consider to have been their best efforts to provide an acceptable level of standard of care to the applicants and other homeowners and have acted in good faith. There was noted to be some minor elements of victimisation of the second applicant in particular and some suggestion that she was effectively a nuisance. The tone and tenor of the second applicant's correspondence with the respondent on occasions perhaps did not assist her in this respect but it is entirely understandable the extent of her frustrations as a result of the failure of the respondent to adequately resolve her legitimate concerns and complaints. No one individual within the respondent's organisation has taken responsibility for the Development.

There is little doubt about the fact that the respondent, at large, has committed a large number of personnel and time in trying to resolve the applicants' complaints. The committee recognise this. However, what has happened is that there has been no direct clear focus and no one apparently taking responsibility within the respondent's organisation for tackling the issues in a direct meaningful way. The applicants have frequently been referred to other individuals and have not had direct clear answers. The identity of one person with responsibility within the respondent's organisation has never been made clear to the applicants. The result is an extraordinary volume of ever more frustrated emails from the applicants to the respondent complaining about ever more issues that never seem to be resolved.

The respondents have been the author of their own misfortune in failing to properly understand the Code of Conduct and the requirement to ensure that it is complied with. They have also made simple basic errors, in particular with reference to the apportionment of the insurance premiums. It is acknowledged that some of the more practical difficulties in managing the Development have occurred as a result of the defects identified with the quality of the build of the Development as a whole. The respondent has failed to have the developer take responsibility for certain aspects of the Development which were either unfinished or defective. The difficulties with the front common door is one example.

It is the responsibility and right of every individual homeowner to raise any incomplete or defective aspects of their heritable property with the seller. It does not appear that the applicants or any other homeowners have progressed matters in that

way. It is perhaps surprising that the respondent who owns a significant share of the overall Development namely a 39/120 share (which relates to their ownership of two of the six blocks) have not commenced this process and pointed it out as an option to the individual homeowners. One might have imagined that they would have taken responsibility for balloting the Development in order to identify whether or not it was worthwhile instructing a solicitor to take these issues up with all homeowners being responsible for a share of the financial burden of doing so. This would have been the reasonable and responsible thing for the respondent to do. The passage of time now will have had a significant effect on the evaporation of any possible claims.

It does not appear to the committee that the respondent made any attempt to explore the possibility of resolution through NHBC. The Written Statement of Services provided by the respondent specifically indicates that they undertake to communicate with a number of others, including NHBC and developers. Although the respondent had no formal duty to do this it is surprising that they took no action in this respect.

The committee raised with the respondent's representatives the impression which they had formed regarding a possible conflict of interest. It appears to the committee that the conflict can arise due to the fact that the respondent's group of companies not only factors the entire Development but also owns a significant portion of it. The representatives of the respondent rejected that suggestion and suggested that the two matters were "entirely separate". Given the nature of the evidence the committee was not satisfied that this is the case.

The committee was left with the impression that some of the actions taken by the respondent in discharging, or seeking to discharge, their duties as Property Factor were influenced, as a matter-of-fact, by virtue of the fact that they are also substantial owners of the Development. The committee would encourage the respondent to consider this issue further and to make such adjustments as they see fit in their practices.

It is likely that it was never intended that the Property Factor operating for the Development would also own a substantial share of the Development. The manner in which votes require to take place for matters outwith the Property Factor's delegated duties and, for the purposes of termination of the Property Factor's authority to act are set out in the Deed of Conditions but it seems to the committee that it is unlikely that it was perceived that the respondent would have such a likely influence by way of potential votes.

Proposed Property Factor Enforcement Order

Section 19(2)(a) of the Property Factors (Scotland) Act 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:-

"Within 12 weeks of this Decision being issued to the parties, the respondent must:-

1. Issue an accurate and comprehensive Written Statement of Services which fully conforms to the Code of Practice for Property Factors, ensuring that all information is contained within the Written Statement itself and not within Appendices unless necessary; in particular ensuring that the following matters which are currently not accurately referred to within the existing Written Statement of Services are remedied, making reference where necessary to the relevant provisions within the Deed of Conditions which sets out the Property Factor's responsibilities and duties.

   i. their authority to act.

   ii. the homeowners' method of terminating the respondent's appointment.

   iii. the extent of their delegated authority, in terms of their responsibilities and also their financial authority, all in relation to their core service.

   iv. the procedure in place for consultation for seeking written approval before providing services or incurring charges or fees in addition to those relating to the core service.

   v. the basis upon which the insurance for individual properties is calculated.

   vi. the basis of charging administration fees to third party supplier invoices.

   vii. setting out with clarity the various fractions (1/20, 1/42, 1/81 and 1/120) which apply to charges within the Development and why.

2. To remedy the respondent's previous failure to apportion buildings insurance for the Development and in particular:-

   i. to accurately calculate the proportion of all homeowners' liability in the Development in accordance with the Deed of Conditions;

   ii.
   - to return any overpaid premiums to those homeowners affected by the respondent's failure to calculate insurance premium proportions from the commencement of their instruction as Property Factor to date;

   - to bear, at their sole cost, due to their initial failing and continuing failing, all extra premiums which would have required to have been paid by those homeowners, including the applicants, who have been undercharged by

virtue of the respondent's failings until the end of the last insurance premium period, namely 31 December 2014.

3. To write in detail to all homeowners within the Development to explain the difficulties in respect of the refuse collections, setting out all possible options for long-term resolution, and to convene a meeting of homeowners to discuss the options available and to obtain a mandate to proceed accordingly.

4. To instruct a reputable landscape gardener to survey, assess and recommend an upgrade to the common garden ground around 59 Hesperus Broadway seeking to ensure that such upgrade works have longevity, the costs involved in the surveying and implementation to be met by the respondents at their sole cost.

5. To instruct a reputable contractor to assess and survey the common door at 59 Hesperus Broadway and the buzzer entry system there and obtain advice regarding replacement of the door and buzzer entry system and to instruct the replacement works required, unless the costs involved exceed the respondent's delegated authority in which instance they will write to all affected homeowners and convene a meeting to discuss and to seek approval for the necessary common repairs to be carried out; all associated costs to be met by the homeowners.

6. To have prepared at their sole cost, a fire safety plan approved by the Scottish Fire & Rescue Service, for the common block 59 Hesperus Broadway and for the plan to be displayed at the site of the fire alarm control panel. The plan should be affixed in a permanent and presentable manner.

7. Prepare a schedule of proposed staff training to ensure that all staff are fully aware of the respondent's obligations:-

   i. to have detailed knowledge of the terms of the Code of Practice and to ensure that they comply with it;

   ii. to comply with their duties arising from the Deed of Conditions;

   iii. to ensure adequate customer relations and to communicate effectively;

   iv. to ensure all staff are fully aware of the respondent's complaints procedure and when to implement this;

   including details of the provider of the training and timescales for the provision of delivery of the training.

8. To make payment to the applicants of:-

i. reimbursement of the standard management charges which the applicants have paid to the respondent since taking up occupation of their property up to 31 March 2015;

ii. the sum previously paid by the applicants to the respondent in respect of the provision and installation of barriers around the bins in the underground parking area;

iii. the sum of £220 representing the outlay paid by the applicants to install noticeboards in all six blocks of the development in terms of the agreement previously reached between the parties;

iv. £500 in recognition of the anxiety, stress and inconvenience caused to them as a result of the respondent's failings;

the respondent being entitled to offset the monies to be paid to the applicants against any other outstanding charges due to be paid by the applicants.

9. Issue a written apology to the applicants for having breached the Code and for having failed in their duties as established by the Committee."

The intimation of this Decision to the parties should be taken as Notice for the purposes of Section 19(2)(a) of the 2011 Act and the parties are hereby given Notice that should they wish to make any written representations in relation to the committee's proposed Order that they must be lodged with the Homeowner Housing Panel within 14 days of the date of this Decision. If no representations are received then the committee will proceed to make the Order proposed. If representations are received they will be considered by the committee prior to the making of any Order.

The property factor should note that failure without reasonable excuse to comply with the Property Factor Enforcement Order is a criminal offence in terms of Section 24 of the 2011 Act. Additionally, Scottish Ministers can take any failure into account in respect of the future registration of the respondent on the Register of Property Factors.

Appeals

In terms of Section 22 of the 2011 Act, any Appeal is on a point of law only and requires to be made by Summary Application to the Sheriff. Any Appeal must be made within 21 days beginning with the day on which the Decision appealed against is made.

2 April 2015