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

Hohp Ref: HOHP/PF/15/0122

Re:

Property at Flat 1/1, 26 Sword Street, Dennistoun, Glasgow G31 1TD ("the Property")

The Parties:-

Mr James Williamson, residing at the Property ("the Homeowner")

and

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD ("the Factors")

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

Committee Members:

Maurice O'Carroll (Chairman)
Sally Wainwright (Housing Member)

Decision of the Committee

The Factors have failed to comply with their duties under s 14(5) of the 2011 Act in terms of Sections 2.5 and 7.2 of the Code of Conduct for Property Factors.

They also failed to comply with their factor duties under s 17(5) of the Act in relation to apportionment of communal charges in terms of their formal Written Statement of Services.

The decision is unanimous.

Background

1. By application dated 27 August 2015, the Homeowner applied to the Homeowner Housing Panel ("HOHP") for a determination of whether the Factors had failed to comply with the duties set out in sections 1, 2 and 7 of the Code of Conduct imposed by section 14(5) of the 2011 Act. A determination as to whether the

Factors had failed to comply with their general duties in terms of section 17(5) of the Act ("the Application") was also requested.

2. On 30 April 2015, the Homeowner sent formal notifications to the Factors in terms of section 17(3) of the Act on *pro forma* letters supplied by HOHP for that purpose. The formal notification in relation to alleged Code breaches was restricted to Sections 2.5 and 7.2 of the Code. These were therefore the only parts of the Code considered by the Committee. The formal notification in relation to the breach of factor duties in terms of section 17(5) of the Act alleged that the Factors had failed to apportion electricity charges correctly in terms of Clause 2C of the Factors' own Written Statement of Service ("WSoS").

3. Notices of referral to the Committee were sent to the parties on or about 28 October 2015. This followed a Minute of Decision to refer the Application to a Homeowner Housing Committee made by the President of the HOHP on 22 October 2015.

4. An oral hearing in relation to the application was held on 15 December 2015 within Wellington House, 134/136 Wellington Street, Glasgow. The Homeowner was present in person and gave evidence to the Committee on his own behalf. The Factors were present at the hearing and were represented by two of their employees, namely Sarah Wilson, Associate Director and Stephanie Haig, senior property manager, both of whom also gave evidence to the Committee.

5. The Application centres around an alleged failure on the part of the Factors to correctly invoice the Homeowner for communal electricity charges and thereafter to rectify the issue once it was brought to their attention.

Committee findings - general

The Committee made the following findings in fact pursuant to Regulation 26(2)(b)(i) of the 2012 Regulations:

6. The Homeowner, is the heritable proprietor of the Property. The Property forms part of a six block development in Dennistoun, Glasgow, known as Eastern Court which was constructed in or around 2007 ("the Development").

7. The blocks in the Development are of varying sizes: Three of them contain six flats, one contains eight flats and two contain twelve flats, making fifty in total. Accordingly, the common charges in relation to maintenance of the common grounds are apportioned in 1/50 shares for each property while other common charges applicable to each close are apportioned in 1/6, 1/8 or 1/12 as appropriate. These are set out in the Written Statement of Services ("WSoS") applicable to the Development effective January 2014. The annual management fee was at that time stated to be £91.30 plus VAT.

8. A deed of conditions in respect of the Development dated 17 August 2005 was recorded in the Land Register by the developers, Carvill (Scotland) Limited ("the Deed of Conditions"). A copy of the Deed of Conditions was provided to the Committee by the Factors.

9. The Factors were the property managers responsible for the repair, maintenance and insurance of the common parts of the Development. They were first appointed to act by the developer on 20 April 2005. They ceased to act as factors with effect from 31 May 2015 following a majority vote by the residents' association to remove them and replace them with new factors.

10. The Factors were registered in terms of the Act on 7 December 2012. Their duties under the Act to comply with the Code arose from that date.

Findings in relation to the alleged breaches of duty

Section 2.5 of the Code

11. Section 2.5 of the Code requires the Factors to respond to enquiries and complaints received by letter or email within prompt timescales. Overall the Factors aim should be to deal with enquiries as quickly and as fully as possible, and to keep homeowners informed if additional time is necessary to respond. This is covered by section 4 of the WSoS headed "Communication Arrangements." It is provided that the Factors will endeavour to work within the following timescales:
(i) to return telephone messages within one working day,
(ii) to acknowledge both electronic and paper correspondence within forty-eight hours, and
(iii) to respond to both electronic and paper correspondence within five working days.

12. The Homeowner gave evidence that the difficulty regarding invoicing for communal electricity commenced on or about 12 March 2007 and remained unresolved between August 2008 and the date of the Application on 27 August 2015, despite assertions to the contrary by the Factors. The source of the problem was that lighting for the communal car parking area was run through the electricity meter at the Homeowner's block alone, rather than being spread among the six blocks forming the Development. The net result was that the Homeowner was left to pay charges of approximately £100 per annum instead of the correct figure which ought to have been in the region of £45 per annum. The communal charges for that reason were comparable to what he paid in respect of the Property in which he lives.

13. The matter had initially been recognised and addressed by a property manager previously employed by the Factors, Mr Jim Cosgrove. Reference was made to an email from him to the Homeowner dated 1 February 2010 in which the issue was fully set out as well as the means for addressing it. In short, the solution arrived at was to combine all of the communal electricity charges for all of the

blocks in the Development, divide them all by 50 and then apportion a share to each block according to the number of units contained within it. This avoided the need to install separate electricity meters for each block in relation to the car park. For the Homeowner's block, the relevant share as re-calculated amounted to a 6/50 share of the total cost.

14. Whilst that solution was acceptable, and was the method adopted from the date of that email, the Homeowner was never refunded the excess payments which had occurred between August 2008 and February 2010. That system worked well up until the time at which the Factors moved offices from Glasgow to their present location in Edinburgh. It appeared to the Committee that there was no record keeping system in place with the Factors which would enable the collective knowledge of the Factors to be transferred to their new place of business. This was confirmed by the Factors in evidence, who accepted that the satisfactory arrangement regarding communal electricity charges was "lost in translation" upon their relocation to Edinburgh.

15. The Homeowner's evidence was that during 2011 and 2012, the communal charges were apportioned using the method described above but then spiked unexpectedly in June 2013, coinciding with the move referred to above. The Homeowner provided graphs which showed the fluctuations in electricity charges over the period referred to. He gave evidence that he complained continually about the situation and provided a copy of an email dated 26 June 2014 in which he copied the email sent by Mr Cosgrove on 1 February 2010 clarifying the problem and solution adopted. A further email by the Homeowner dated 22 August 2014 instituted the second tier internal complaints procedure. It was left to the Homeowner to instigate this despite the Factors being aware of the problem since June 2013.

16. The Factors sent an email dated 11 September 2014 which purported to resolve the issue, some four months after the Homeowner's formal complaint of 26 June 2014. The Homeowner was informed by the Factors that the appropriate credits would appear in future quarterly invoices. He was offered £45 by way of compensation for overpayments, without any calculation being provided to show how this figure was arrived at. The Homeowner considered that £45 was an understatement of the amount of refund which he was due and suggested an alternative figure of £200. The difficulty of ascertaining the correct amount of overpayment was understandable, given that the Homeowner was not permitted access to the communal meter cupboard and comparable bills (redacted to eliminate the risk of revealing personal data) from other blocks were not provided to him. A further email dated 26 September 2014 from the Factors confirmed arrangements to finally allow access to the communal meter cupboard. This was something requested explicitly by the Homeowner in his email of 11 June 2014, three months previously. The Homeowner was himself able to obtain a neighbour's quarterly statement for comparison purposes. The statement in respect of a property at the block next door was provided to the Committee and

appeared to support the notional figure of overpayment suggested by the Homeowner.

17. The second tier complaint procedure did not in fact appear to resolve matters as suggested by the Factor's emails of 11 and 26 November 2014. The issue was discussed in relation to a meeting of the Eastern Court Residents' Association discussed in an email from Stephanie Haig to Mr Lord (Chair of the Association) dated 27 January 2015. Around that time, it had been suggested that a separate electricity meter should be installed, but this was not agreed to by the Association, presumably because a workable solution had already been arrived at some five years previously. A further email dated 1 April 2015 from the Factors to the Homeowner again purported to record matters as being fully resolved. A letter dated 18 February 2015 accepted clerical errors in relation to electricity charges covering the period 22 December 2013 to 28 December 2014 and apologised for them. A copy quarterly invoice dated February 2015 was provided showing credited amounts in respect of communal electricity. The Factors also provided spreadsheets showing individual charges made over this limited period. None of this satisfied the Homeowner's complaint. For its part, the Committee found the spreadsheets to be incomplete in that they did not cover the entire period of the complaint, difficult to decipher and of little assistance in showing the historic progression of charges and the point at which the wrong charges were ascribed to the Homeowner.

18. Subsequent to the termination of the Factor's contract on 1 June 2015, the Homeowner withheld the sum of £200 which he believed to be a fair estimate of the amount he was due by way of repayment of the overpaid communal electricity charges. The Homeowner stated that in fact he had withheld £101 by way of estimated electricity charges and £98 in late payment fees which he considered should not have been charged. The Factors had previously registered a Notice of Potential Liability over his property on 26 March 2015 in respect of that amount and the cost of the registration of the Notice of £132 plus VAT. As at 31 May 2015, the Homeowner had a debit amount of £511.73 on his account which remains unpaid. Miss Wilson undertook at the hearing to provide the Committee with a final account verifying the final total outstanding but did not do so as at the date of the present decision. Nevertheless, the Committee considered that it had sufficient information to enable it to come to a decision.

19. In the view of the Committee, the above history demonstrates that the Homeowner endured a period of approximately 8 years of inconvenience to resolve a problem which was actually relatively straightforward. The renewed difficulty which surfaced in June 2013 was as a result of poor record management by the Factors. They had no system in placed which permitted collective knowledge to be passed over upon change of personnel and a change of office with the direct result that the Homeowner was admittedly overcharged in respect of an issue which was identified and resolved back in 2010. The Committee found it unacceptable that a matter which had been resolved at that stage, again

resurfaced three years later which then persisted until the date of the application. Accordingly, it found that the Factors had failed to respond to the Homeowner's enquiries and complaints within prompt timescales. It further found that in the circumstances the Homeowner should not have been charged late payment fees and consequently a NOPL ought not to have been registered against the Property. It found that the Factors took an inordinate amount of time to arrange for a reading of the communal electricity meter which was a simple matter and could have assisted in resolving the complaint. It therefore finds that the Factors breached section 2.5 of the Code.

20. As part of the Property Factor Enforcement Notice to follow hereon, the Factors are required to clear the Land Register of the NOPL against the Property and to compensate the Homeowner for the over-charging for communal electricity. In respect of the latter, the Committee was not provided with exact figures for the reasons stated above. The Homeowner's unchallenged estimate appeared to the Committee to be a reasonable figure in conjunction with the other evidence heard and has therefore been adopted in the PFEO to follow this decision.

Section 7.2 of the Code

21. At section 4 of the WSoS the Factors' internal complaints procedure is set out under the general heading of Communication Arrangements. In terms of that procedure, homeowners are invited to place their concerns in writing to the property manager responsible. In terms of the WSoS, the property manager will (a) acknowledge that correspondence within 48 hours and (b) seek to correct any problems to the homeowner's satisfaction within 28 business days.

22. In terms of Section 7.2 of the Code, where a complaint has not been resolved despite the complaints procedure having been exhausted, the final decision in relation to that should be confirmed by a senior member of management before the homeowner is informed in writing. This letter from senior management should also provide details of how a homeowner may apply to the HOHP.

23. In this instance, although the terms of the Homeowner's correspondence made it clear that he was complaining, matters were not in fact escalated through the formal complaints procedure until instigated by the Homeowner in August 2014. Best practice would have been for the Factors to escalate matters at their own hand more than a year prior when a fresh complaint was received in June 2013. Notwithstanding the absence of best practice, the history of the complaint as detailed above demonstrates an inordinate delay in resolving the Homeowner's complaint in respect of an issue which had already been addressed in 2010. The Factors submitted by letter dated 18 November 2015 that they sent an email to the Homeowner dated 8 May 2015 informing him that he could apply to the HOHP. In the view of the Committee, this came far too late to comply with the requirements of Section 7.2 of the Code in respect of a complaint which already belatedly escalated to the second tier in August 2014. Accordingly, the Committee found that the Factors had breached Section 7.2 of the Code.

Factors' duties generally

24. The Homeowner notified the Factors that he considered that they were in breach of Clause 2C of their WSoS. That sets out a table showing the apportionment of common charges. In respect of 26 Sword Street, the apportionment of charges for the maintenance of Common Ground is set at 1/50th per property. Common Ground is defined in Section D(iii) as including the Development parking spaces. It is perhaps debateable as to whether that would also include communal electricity charges in relation to that space, as that is not specifically mentioned.

25. Of more assistance is Rule 13.1 of the Deed of Conditions. It provides that maintenance and other costs (which includes the payment to any suppliers of any gas and electricity consumed in the operation and maintenance of the Common Ground) are to be shared equally among the affected plots. This is precisely what was sought by the Homeowner. By having the car parking electricity run solely off the meter at number 26 Sword Street, he and the other proprietors of that block were not paying an equal share of the electricity charges applicable to the Common Ground. Therefore the Factors were in breach of their factor duties to comply with the terms of the Deed of Conditions applicable to the Development.

Decision

26. In all of the circumstances narrated above, the Committee finds that the Factors have failed to comply with their property factor's duties in terms of s 14(5) of the Act in respect of sections 2.5 and 7.2 of the Code as narrated above.

It also finds that the Factors were in breach of their factor duties in terms of section 17(1)(a) of the Act in that they failed to apportion electricity charges correctly to the Homeowner and the other residents within his block. Due to their persistent error to rectify a defect pointed out to them, they billed the Homeowner excessive amounts in relation to communal electricity for an extended period from at least August 2008 until the date of the hearing. The Committee found, however, that the period of that breach was interrupted during the period from 2011 until June 2013 when the Homeowner issued a fresh complaint. The Factors' duties only arose from 1 October 2012 when the 2011 Act came into force. This is accordingly recognised in the Property Factor Enforcement Notice to follow hereon.

It has therefore determined to issue a Property Factor Enforcement Notice which will follow separately.

26. **Appeals**

The parties' attention is drawn to the terms of s 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…"

Signed: M O'Carroll
Chairperson

Date: 28 December 2015