



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

HOHP Ref: HOHP/PF/15/0138

The Parties

Martin Wylie, residing at 23 Bowbutts Brae, Strachan, Banchory, AB31 6PG ("The applicant")
and

Firstport Property Services Scotland Ltd (formerly Peverel Scotland Ltd), 183 St Vincent Street, Glasgow G2 5QD ("The respondent")

Decision by the Homeowner Housing Panel of an application under Section 16 of the Property Factors (Scotland) Act 2011

The committee, having made such enquiries as it saw fit for the purposes of determining whether the respondent has:

- (a) complied with the property factor's duties created by Section 17 of the Property Factors (Scotland) Act 2011 ("the 2011 Act"); and
- (b) complied with the code of conduct as required by Section 14 of the 2011 Act,

determined that the respondent has breached Sections 1 of the code of conduct for property factors, but has not failed to comply with the Property Factors Duties

Committee Members

Paul Doyle	Chairperson
Mike Links	Surveyor Member

Background

1 By application dated 8 October 2015, the applicant applied to the Homeowner Housing Panel for a determination of his complaint that the respondent has breached the code of conduct imposed by Section 14 of the 2011 Act & that the respondent has failed to comply with the property factor's duties.

2 The application stated that the applicant considered that the respondent failed to comply with the Property Factor's Duties and failed to comply with Sections

1.0
2.1, 2.2, 2.4 & 2.5
3.3
4.4 & 4.6
5.2 & 5.6
6.3, 6.4, 6.5 & 6.9
7.2

of the code of conduct for property factors.

3 By interlocutor dated 21 January 2016, the president of the Homeowner Housing Panel intimated a decision to refer the application to a Homeowner Housing Committee. The Homeowner Housing Panel ("HOHP") served notice of referral on both parties, directing the parties to make any further written representations.

4 On 15 February 2016, the respondent responded to the notice of referral. The respondent enclosed an indexed and paginated bundle of documents with his response. The applicant made no immediate response. The Committee issued the following directions on both parties

"1. The applicant must send a copy of the earlier Property Factors Enforcement Order and the accompanying decision and reasons to HOHP, 450 Argyle Street, Glasgow not later than 31st March 2016.

"2. Both the applicant and the respondent must lodge a paginated and indexed bundle of all of the documents they intend to rely on to be received by HOHP not later than 26th April 2016.

"3. Both the applicant and the respondent must lodge detailed written submissions to be received by HOHP not later than 26th April 2016."

5. On 26 April 2016 the applicant sent a series of emails to HOHP offices in Glasgow. Those emails contained the applicant's written submissions together with documentary evidence and photographs which the appellant wanted to rely on. The applicant has not produced a hard copy nor an indexed and paginated bundle.

6 A hearing was held at the Credo Centre, John Street, Aberdeen on 10 May 2016. The applicant was neither present nor represented. He contacted the HOHP offices (in Glasgow) in advance of the hearing to say he would not come to the hearing, and asked that the committee hear this case in his absence. The respondent was represented by their area manager, James McKay and their business development manager, Brian Douglas.

7. Three witnesses were present for the respondent. The respondent's representative decided to call only one of those witnesses, Gareth Williams, who answered 2 questions from Mr McKay. No oral evidence was offered by the applicant. The committee then reserved their determination.

Findings in Fact

8 The committee finds the following facts to be established:

(a) The applicant (together with his wife) purchased the property at 23 Bowbutts Brae, Strachan, Banchory, on 21 December 2009. That property lies in a development of houses developed by Tulloch Homes (Grampian) Limited. Parts of the larger development of which the applicant's property forms part are owned in common with neighbouring proprietors. The respondent was appointed as property factor to manage *inter alia* the common areas/grounds in the development of dwelling-houses built there by Tulloch Homes (Grampian) Ltd in 2010. The respondent is registered as a property factor in the Property Factors Register.

(b) On 6 September 2013, the applicant made a separate complaint to HOHP against the respondents, who were then known as Peverel Scotland Ltd. After a hearing on 22 July 2014, a separate committee of the HOHP issued a notice of proposed Property Factor Enforcement Order (PFEO) on 20 September 2014. On 20 October 2014 that committee of HOHP issued a PFEO making 6 requirements of the respondent.

(c) The first requirement was that the respondent should

"Within two weeks of service of this PFEO, the Factor will amend their statement of services to clarify:

a. The basis upon which Additional Services are to be charged and calculated.

b. The basis upon which the level of any delegated authority to allow then to act without reference to the owners is to be agreed with owners. Alternatively, statement that no delegated authority will apply"

(d) The second requirement of the PFEO dated 20 October 2014 was

"Within two weeks of the issue of the PFEO to follow hereon, the Factor will provide to the Homeowner full copies and details of; Insurance documentation and landscaping tender information as requested by the Homeowner, all at no charge to the Homeowner."

(e) On 13 December 2015 that earlier committee found that the respondent had complied with the 3rd, 4th, 5th and 6th requirements of the PFEO, but had not complied with the first requirement of the PFEO dated 20 October 2014 and had only partially complied with the second requirements of the PFEO. They referred the respondent to the Scottish Ministers.

(f) The respondent has not amended the statement of services since 2014. The statement of services still bears the name "Peverel Scotland", and not the respondents' current trading name. That statement of services was issued to all proprietors in the development in October 2014. No statement of services has been

circulated by the respondents since then. In January 2015 the respondent balloted all owners seeking a mandate to continue as property factors to the development. After a poorly attended meeting, three proprietors who were supportive of the respondents' motivated the remaining proprietors to participate in the ballot. The respondent receives a majority supportive vote.

(g) A residents' association for the development was formed in 2015. There are 18 households on the development. Only the applicant's household has not joined the residents' association.

(h) The applicant is implacably opposed to the respondent. Between July 2015 and February 2016 the respondent wrote repeatedly to the applicant offering a meeting to discuss the applicant's concerns. The applicant did not accept the respondents' offer.

(i) On 28 May 2015, the respondent wrote to all proprietors, including the applicant, to advise that they would continue in their position as factors because they had a mandate from the majority of proprietors. They enclosed with each letter

- (i) Cost estimates for the coming financial year
- (ii) Service charge invoice to November 2015
- (iii) Statement of actual costs 1st June 2013 to 31 May 2015
- (iv) Statement of actual costs for the period 1st June 2014 to 31 May 2015

(j) The applicant has not paid the factoring and maintenance charges due to the respondent since 2012. The respondent has repeatedly requested payment of outstanding invoices, but has chosen not to resort to litigation.

(k) On 23 July 2015 the respondent wrote to the appellant to address each of the applicant's complaints and explaining *inter alia* the provision for insurance, the respondent's debt collection procedure, the respondent's complaints resolution procedure and the reasoning behind the method of maintenance of landscaped areas.

Reasons for decision

9 (a) The committee dealt with this application during the morning of 10 May 2016. The appellant was neither present nor represented. The appellant had telephoned the Glasgow office of HOHP on 9 May 2016 to say that he would not attend the hearing, but asked that committee members consider this case in his absence. The respondent was represented by their area manager, James McKay who was accompanied by their business development manager, Brian Douglas

(b) As a preliminary matter, the committee checked that all parties had the same paperwork. Mr Mackay confirmed that he had a copy of the papers submitted by the applicant, but that he did not receive those papers until 6 May 2016. The difficulty that both the respondent and the committee have is that those documents appear to contain a written submission from the applicant together with 19 appendices. The documents are not in any recognisable order. Although they appear to start with an index (of sorts), it is not possible to make any sense of the appendices because they are not in any logical order.

(c) The documents produced by the applicant do not comply with directions made by the committee. They were received both by the committee and by the respondent 10 days late. No explanation is given for the confusing manner in which the papers are presented. Despite efforts, committee members cannot navigate their way through what is probably 300 documents, and cannot make sense of the documents. The committee determined that the only practical way to proceed is to take account of the seven-page submission at the start of the bundle, together with the six page submission (which is clearly the applicant's response to the written submission tendered by the respondent on 15th February 2016) and to set the remaining disorganised and confusing documents to the side.

(d) After the committee members were introduced and the procedure was explained, Mr Mackay called one witness, Gareth Williams, to answer two questions from Mr Mackay. Mr Mackay then confirmed that the respondent's position is set out in the opening statement, which forms item number one in the respondent's bundle. He did not want to make any other submissions.

(e) The facts of this case should be in comparatively narrow focus. A separate committee of the Homeowner's Housing Panel has already dealt with a dispute between the same parties which addresses what passed between them up to January 2014. The application in this case is dated 8 October 2015, so that the committee are considering what has passed between the parties in that 21 month period.

(f) As part of the Property Factor Enforcement Order made on 20 October 2014, the respondent was required to amend their statement of services. By February 2015 they had not done so & they were referred to the Scottish ministers. The fifth item in the bundle produced by the respondent was identified by Mr Mackay as the respondent's current statement of services. He agreed that the document is the 2014 version which is still on the headed paper of Peverel Scotland Ltd, and does not show the respondent's current trading name. He agreed that the written statement of services has not been sent to the applicant.

(g) Mr Mackay emphasised that an up-to-date written statement of services has not been sent to the applicant because, following service of the Property Factor Enforcement Order in October 2014, the respondents started a consultation programme with the homeowners in the development to assist in the drafting of the written statement of services, and he told us that that process is not yet complete.

(h) The first sentence of section 1 of the code of conduct for property factors states

"you must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner."

The unchallenged evidence before us is that the respondent, despite previous experience before a committee of the HOHP, and despite a subsequent reference to the Scottish Ministers relating to a breach of section 1 of the code of conduct, does not have a current (& accurate) written statement of services, and has not sent the

homeowner an updated written statement of services. The committee has to find that the respondent has breached section 1 of the code of conduct.

(i) Section 2 of the code of conduct relates to communication and consultation. The applicant claims that the respondent has regularly provided false and misleading information. In his submission which accompanies the application, the applicant complains that the respondent has lied about the length of their appointment, have misled Aberdeenshire planning department and have incorrectly invoiced residents for tree removal; he complains about the quality of communal ground maintenance and says that the respondents have not circulated a programme of works for 2015.

(j) In his letter to HOHP dated 4 November 2015, the applicant deals with his complaint under section 2.1 by saying

“You are correct that this was contained in our 2014 application, however the HOHP made an error.....”

(k) The current application is not an appeal against the decision made in October 2014. The applicant was advised of his right to appeal and the time limits for appeal in October 2014. This committee does not have jurisdiction to revisit matters which have already been determined by a separate committee in 2014. HOHP do not have jurisdiction to treat applications as an attempt to re-litigate matters already determined. This committee does not have jurisdiction to consider the complaint of a breach of section 2.1 of the code of conduct.

(l) The applicant's complaints in relation to 2.2 2.4 and 2.5 of the code of conduct are a rehearsal of the complaints which were before the committee in 2014, however the applicant refines his complaint by saying that throughout the period that this committee considers, the respondent has persisted in the behaviour complained about. The applicant complains that the respondent has incorrectly invoiced residents for removal of trees; that the respondent's do not have a procedure for selecting subcontractors, nor the respondent's circulated a programme of works 2015.

(m) Section 2.2 of the code of conduct provides that the factor *“must not communicate with homeowners in any way which is abusive, or intimidating or which threatens them...”* There is no reliable evidence before the committee of abusive, intimidating or threatening communications. The weight of reliable evidence indicates that the factors have communicated with the applicant and other proprietors in a civil, business-like manner.

(n) Section 2.4 of the code of conduct requires the factor to have a procedure to consult with groups of homeowners and seek written approval for providing work or services which will incur charges or fees in addition to those relating to the core service. In his letter for November 2015 the applicant concedes that his complaint is a repeat of the complaint made in 2014. The weight of reliable evidence is that the respondent has assisted homeowners in establishing a Resident's Association, and then has, throughout 2015, consulted the Resident's Association on exactly the practices and procedures envisaged by section 2.4 of the code. No specific complaint is made of a failure to seek written approval before providing work or services. In his response to the respondent's submission, the applicant dwells on events in 2012 and 2013. The

events of 2012 and 2013 were dealt with in the earlier application and are not matters before this committee.

(o) Section 2.5 of the code of conduct commences with the sentence "*you must respond to enquiries and complaints received by letter or email within prompt timescales*". The documentary evidence placed before the committee makes it abundantly clear that the respondent has responded to each of the applicant's enquiries. The responses may not always be what the applicant wants to hear, but they are business-like, courteous responses. The weight of reliable evidence indicates that the relationship between the parties has deteriorated. The damaged relationship is reflected in some of the requests made by the applicant.

(p) It is clear from the evidence placed before the committee that the majority of homeowners are happy with the services provided by the respondent, and that the methods of communication and consultation employed by the respondent have successfully resulted in the formation of a residents' association. The only proprietor who has not participated in the residents' association is the applicant. It is for the applicant to establish his complaint by leading reliable evidence. There is no reliable evidence of a breach of section 2 of the code of conduct before the committee.

(q) Section 3.3 of the code of conduct commences "*you must provide to homeowners, in writing at least once a year..... Details financial breakdown of charge is made and a description of the activities and works carried out which are charged for.*" On the facts as the committee find them to be, the respondent provided a full financial breakdown of annual charges on 23 July 2015. The applicant's complaint is that he wanted more information than could be gleaned from the annual statement. The weight of reliable evidence indicates that the respondent has offered to provide additional information at a reasonable cost. The applicant does not want to pay for the additional vouching he asks for, but the wording of s 3.3 of the code of conduct authorises the respondent to make such a charge. Instead of ignoring the applicant, the respondent has offered to meet him to give him information free of charge. There is no breach of s3.3 of the code of conduct.

(r) 4.4 of the code of conduct and says

"You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations."

Section 4.6 of code of conduct obliges the respondent to keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them.

(s) A surprising feature of the applicant's complaint of a breach of section 4 of the code of conduct is that it is the applicant who has not paid the factoring fees for the last 3 ½ years. The respondent produces, at documents 15 & 16 of their bundle, letters to both the Residents' Association and to the applicant confirming the existence of outstanding accounts, & the actions that they have taken to recover those accounts. There is no reliable evidence before the committee that the applicant's refusal to pay the factoring

charges has affected service delivery and charges to other proprietors. There is no breach of section 4 of the code of conduct.

(t) Sections 5.2 & 5.6 of the code of conduct cover the provision of information relating to insurance arranged by the respondent. The applicant complains that the respondent has refused to provide insurance documents & playpark health and safety reports. The weight of reliable evidence before the committee indicates that the appellant has not only received details of block insurance policies, but that in July 2015 he was provided with details of policy documents together with an assurance from the respondent's managing director that the policy documents are adequate for the purposes of the development. In addition, the respondent offered to provide copies of schedules of insurance on payment of a modest administration charge which the applicant refuses to meet.

(u) The weight of reliable evidence indicates that the respondent has made all insurance documents available for the appellant to inspect. Document 18 of the respondent's bundle discloses that the respondent has invited the appellant to come to their office to review documents at no charge. That is an offer which the applicant has chosen not to accept. Neither section 5.2 nor section 5.6 of the code of conduct is breached.

(v) Section 6 of the code of conduct relates to carrying out repairs and maintenance. In his application, the applicant complains that the respondent has not issued a planned programme of works – but then simply rehearses the arguments placed before a separate committee in 2014. Despite considering the applicant's various written submissions, it is not possible for the committee to make any findings in fact about the quality of repairs and maintenance carried out by the respondent. The applicant refers to generalised failures which were all matters before the separate committee in 2014. He does not specify when it is alleged the respondent compounded those failures in 2015. As part of the Property Factor Enforcement Order made in October 2014, the respondent was required to remove certain tree branches. They complied with that part of the order.

(w) The applicant fails to lead sufficient reliable evidence of a breach of section 6 of the code of conduct.

(x) section 7.2 of the code of conduct says

“When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.”

In his written submissions the applicant complains that the respondent refused to supply details of how to raise a complaint to their level 2 when asked to do so. The evidence placed before the committee indicates that the respondent did not refuse to provide details of the second stage of the complaints procedure. The evidence indicates that the first stage of complaints procedure was incomplete and that the applicant's desire to proceed to the second state was premature.

(y) In any event, section 7.2 of the code of conduct is engaged only when a complaints procedure is exhausted. Taking the applicant's evidence at its highest, this complaint procedure was not exhausted; the first stage of the complaints procedure had not even been completed. There is no breach of section 7 of the code of conduct.

(z) The committee therefore find that the respondent has breached section 1 of the code of conduct. The applicant complains about almost all of the remainder of the code of conduct, but leads inadequate evidence to support his complaints. The committee can only conclude that there are no breaches of sections 2, 3, 4 5, 6 or 7 of the code of conduct. By analogy, and taking an holistic approach to each strand of evidence in this case, the committee find that the respondent has not breached the property factors duties as set out in section 17 of the 2011 act.

Decision

10. The committee therefore intend to make the following property factor enforcement order (PFEO)

"Within 28 days of the date of service on the respondent of this property factor enforcement order the respondent must

"1. Amend their statement of services to clarify

"(a) The basis upon which Additional Services are to be charged and calculated.

"(b) The basis upon which the level of any delegated authority to allow them to act without reference to the owners is to be agreed with owners.

"2. Intimate a copy of the amended written statement of services to the applicant and all other proprietors on the development."

11. Section 19 of the 2011 Act contains the following:

"(2) In any case where the committee proposes to make a property factor enforcement order, they must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to them.

"(3) If the committee are satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the committee must make a property factor enforcement order.

"(4) Subject to section 22, no matter adjudicated on by the homeowner housing committee may be adjudicated on by another court or tribunal."

12. The intimation of the committee's decision and this proposed PFEO to the parties should be taken as notice for the purposes of s. 19(2)(a) of the 2011 Act, and parties are hereby given notice that they should ensure that any written representations which they wish to make under s.19 (2)(b) of the 2011 Act reach the Homeowner Housing Panel's office not later than 14 days after the date that the Decision and this proposed PFEO is intimated to them. If no representations are received within that 14 day period, then the committee is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Appeals

13. 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 day on which the decision appealed against is made..."

Signed
Chairperson

Date

23/05/2016