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

Ref: HOHP/PF/14/0203

Re: 23 Scotscraig Apartments, Boat Road, Newport-on-Tay, Fife, DD6 8EU ("the Property")

Parties: Mr William Docherty residing at 23 Scotscraig Apartments, Boat Road, Newport-on-Tay, Fife, DD6 8EU ("the Homeowner")

Sheltered Housing Management Ltd, a Company incorporated under the Companies Acts and having their Registered Office at 13 Ward Road, Dundee ("the Factor")

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

Committee members:

Ewan K Miller (Chairperson and Legal Member); Mrs Sara Hesp (Surveyor Member); and Carolyn Hirst (Housing Member).

Background

1. By application dated 13 December 2014, the Homeowner applied to the Homeowner Housing Panel ("the Panel") to determine whether the Factor had failed to comply with the duties imposed upon the Factor by the Act.

2. The application by the Homeowner alleged failings on the part of the Factor in that the Factor had allegedly breached Sections 2.5, 3.1, 3.2 and 3.3 of the Code of Conduct for Property Factors ("the Code").

3. By letter dated 27 February 2015, the President of the Panel intimated her decision to refer the application to a Homeowner Housing Committee ("the Committee") for determination.

Hearing

4. A Hearing of the Committee took place at the offices of the Panel, Europa Building, 450 Argyle Street, Glasgow on 20 April 2015. Both parties had

intimated that the case should be determined by written application alone. Accordingly, neither of the parties were present nor were any witnesses called.

Background to the dispute

5. The Factor has been factors of the larger development known as Scotscraig Apartments, Newport-on-Tay, of which the Property forms part, since shortly after it was built in 1985. Due to dissatisfaction with the service provided by the Factor, a majority of the proprietors within the development had voted for their removal. The Factor was purported to be dismissed around 18 November 2013. The Factor disputed this dismissal but, in any event, a cessation of the Factor's duties was agreed with effect from 30 April 2014, when a new factor took over management of the development.

6. The principal complaint of the Homeowner was in relation to the lack of accounts produced by the Factor from the Factor's point of registration as a Factor in March 2013 to the termination of their position as Factor at the end of April 2014.

Preliminary matters arising

Preliminary Issue 1

7. Shortly prior to the Hearing in April 2015, there was an exchange of correspondence between the Factor's solicitor and the Homeowner. The Factor's solicitor wrote to the Homeowner on 31 March 2015. The letter to the Homeowner was sent on a without prejudice basis and specifically stated that the letter was not to be lodged before the Committee and the Factor's solicitor would object if this was done. Notwithstanding the terms of the letter, the Homeowner lodged the letter with the Committee. The Factor's solicitor objected to this.

8. The Committee considered whether or not this exchange of letters should be considered by the Committee or whether it should be excluded from their deliberations. The Committee was satisfied that the exchange should be excluded from its deliberations. The Factor's solicitor had written to the Homeowner very clearly on a without prejudice basis. On that basis the correspondence should be disregarded. The Committee confirm that the exchange of letters dated 31 March and 3 April 2015 did not form part of the decision making process of the Committee.

Preliminary Issue 2

9. The Factor's solicitor submitted that the Committee did not have jurisdiction to consider the complaint from the Homeowner.

10. The Factor had ceased to be the Factor of the Property on 30 April 2014. The Factor's solicitor submitted that as at the date of the application to the Panel the common parts were managed by a property factor. However, as at the

date of the application, the factor was now Grant & Wilson and not their client. As the Factor had ceased to be the factor of the Property, the Committee could not have jurisdiction over it.

11. The Committee considered this submission but could not agree with it. One of the core components of the Act was to bring in a system of professional regulation for property factors. It is an essential element of any professional regulatory system that the party being regulated can be called to account for their actions. As long as a complaint relates to a period when the Factor was the appointed factor of the development then that will, subject to the normal rules regarding prescription, be sufficient to give a valid ground for complaint and jurisdiction to a Committee. To do otherwise would undermine the whole basis of professional regulation as a factor could simply walk away from any professional issues by resigning from factoring that development. The Factor was the factor of the development at the period the complaint related to. The Factor was still registered as a Factor. The Factor, therefore, was subject to the jurisdiction of the Committee.

12. Section 17(1)(a) of the act states that a homeowner may apply to the Panel for determination of whether a property factor has failed to comply. The Act is not prescriptive in this regard and does not specify that a complaint can only be lodged against an incumbent factor nor does it state that the duties owed to homeowners during the factoring period terminate upon cessation.

13. The Factor's solicitor highlighted that some sections of the Code clearly envisage obligations continuing after termination of the homeowner/factor relationship and highlighted Section 3.1 of the Code in this regard. The Factor's submission was that unless it was explicitly stated that there was a continuing obligation then the obligations to homeowners had ceased for all other sections of the Code. Again the Committee could not agree with this submission. In any event, two of the sections of the Code complained of were 3.1 and 3.2 both of which related to obligations upon a Factor following termination of the homeowner/factor relationship. On that basis, even if the Factor's submission was accepted, then the Committee would have jurisdiction for these sections anyway. In any event, the Committee was satisfied that for all other sections of the Code, the key determining factor was whether, at the point of the conduct complained of, the Factor was the factor of the Property. For breaches that occurred after termination of the relationship then it was relevant to look at the sections of the Code at that stage to see if they envisaged there being obligations on the factor post termination.

14. The Committee was satisfied it had jurisdiction and proceeded to look at the substantive aspects of the complaint.

Section 2.5 of the Code of Conduct

"You must respond to enquiries and complaints received by letter or email within a prompt timescale."

15. The Homeowner's complaint was that the Factor had failed to respond timeously to correspondence issued by the Homeowner on 21 March 2014 and 30 November 2014. The Factor's submission was that they had been involved in litigation against the general body of owners at the development at that point. The applicant's correspondence had been overlooked. The Factor accepted this and apologised for their error. The correspondence had subsequently been answered.

16. The Committee was of the view that there had been a technical breach of this section of the Code. However, the Factor had subsequently dealt with the correspondence and had apologised for their oversight. The Committee did not view this breach as being serious or requiring any further discussion.

Sections 3.1, 3.2 and 3.3 of the Code of Conduct

3.1 If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title or in legislation or a property changes ownership, you must make available to the Homeowner all financial information that relates to their account. This information should be provided within 3 months of termination of the arrangement unless there is a good reason not to.

3.2 Unless the title deeds specify otherwise, you must return any funds due to Homeowners (less any outstanding debts) automatically or at the point of settlement of the final bill following a change of ownership or property factor.

3.3 You must provide to Homeowners, in writing at least once a year (whether it has part of a billing arrangement or otherwise) a detailed financial breakdown of charges made and a description of the activities and works carried to which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the Homeowner of this charge in advance.

17. The Homeowner's submission was that the Factor had failed in relation to 3.1, 3.2 and 3.3 of the Code. The Factor became obliged to comply with the Code on 13 March 2013. They had not ceased factoring the Property until April 2014. At least one set of accounts ought to have been produced during that year showing all the intromissions with monies provided by homeowners within the development to the Factor. In addition a second set of accounts to the termination date of 30 April 2014 should have been made in compliance with 3.1. The Homeowner hadn't received any accounts and had had no information regarding the return of funds that may be due to him, this being a breach of 3.2 of the Code

18. In response the Factor drew attention to the case involving the Factor of *Sheltered Housing Management Ltd –v- Cairns (2003) SLT 578.* This case

highlighted that the Factor operated in a different manner to the way in which most other factoring companies operate. Unlike most factoring services, the Factor did not operate a reserve fund or float in order to cover unexpected expenditure. The Factor had an obligation in the Deed of Conditions to carry out works for a monthly charge. The Factor fixed the monthly charge for the development and did not generally disclose what element, within that monthly charge, related to their fee. The Factor adjusted the overall monthly figure annually to take account of actual and anticipated expenditure. There was no float or sinking fund. Any excess funds simply fell to the Factor. There were, therefore, generally no funds being held by the Factor that would ever be remitted to homeowners within the development. Whilst this is not a particularly transparent method of operation, nonetheless, it was provided for in the Deed of Conditions and was the manner in which the Factor operated.

19. The Committee accepted the decision of Lord Nimmo Smith in *Sheltered Housing Management Ltd –v- Cairns* although it had little impact or no impact on the decision before them. It is relevant to note that the decision of Lord Nimmo Smith predated the introduction of the Code. In the event of a conflict between that decision and the Code then the Code, being a creature of statute, would prevail. The Committee was satisfied that the provisions of the Code applied to the Factor regardless of the case *Sheltered Housing Management Ltd –v- Cairns*.

20. The Committee then considered the various alleged breaches in relation to Section 3 of the Code.

21. In relation to Section 3.1, the Factor submitted that there was no documentation to exhibit to the Homeowner in relation to a homeowners "account". The Factor's submission was, because of the way in which they operated, that there was no account where monies were held on behalf of homeowners. On that basis the Factor submitted that this section of the Code was not applicable to them and that they could not be in breach.

22. The view of the Committee was that regard had to be taken to the purpose of the Code. The narrative at the start of Section 3 of the Code of Conduct on financial obligations states that:-

"while transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The overriding objectives of this section are:

- *protection of homeowners funds*
- *clarity and transparency in all accounting procedures*
- *ability to make a clear distinction between homeowners funds and a property factors funds".*

23. The Committee did not accept the Factor's interpretation that there was no "account" and that Section 3.1 of the Code did not apply to them. It may well be the case that the Factor did not operate a separate account held in the name of the homeowners within the development generally. Factors may operate individual accounts for each development that they factor or they may simply hold all funds for all developments that they factor in one single account and carry out internal accounting processes to identify what works and what expenditure relates to which development. There was, however, no question that the homeowners paid monies to the Factor and, in return, the Factor expended the bulk of these funds to comply with their duties in terms of the Deed of Conditions. The Committee was satisfied that the definition of "account" was broad enough to encapsulate all sums paid to the Factor by homeowners.

24. The Committee was satisfied that the key point of Section 3 of the Code was that it was essential that homeowners were provided with information as to what monies that they had paid to a factor was being spent on and what monies went on the property and what went to a factor. Section 3.1 is explicit in that it requires an accounting to be produced where the homeowner/factor relationship had been terminated. This was the case here and accordingly the Factor was obliged by Section 3.1 of the Code to produce such an accounting. The failure to do so was a clear breach of the Code. This section, as acknowledged by the Factor's solicitor, clearly survived the termination of the homeowner/factor relationship.

25. The Committee considered Section 3.2 of the Code. In the Factor's submission they stated that there was no obligation on them to return funds due to homeowners. Because of the manner in which the Deed of Conditions operated, any excess funds left after the Factor carried out their obligations fell to the Factor as the fee. Whilst the Committee was of the view that this was a somewhat unsatisfactory method of operation, it did appear to be the case that the Factor simply kept any excess provided he complied with his obligations in relation to maintenance. On that basis, whilst the Committee did not accept that Section 3.2 of the Code did not apply to the Factor, nonetheless, because of the manner in which the Deed of Conditions operated, there was no obligation to them to return any funds to homeowners. The funds fell to the Factor. Accordingly there had been no breach of Section 3.2 of the Code.

26. In relation to Section 3.3 of the Code, the Factor submitted that they had not breached this. The Factor submitted that this section of the Code required accounts to be produced in writing at least once a year. The obligations under the Code only came into effect following their registration on 13 March 2013. They contended that they had been dismissed by letter of 18 November 2013. As this period was less than one year there was no obligation on the Factor to produce accounts. The Committee simply could not accept this submission. Whilst a letter of dismissal had been issued to the Factor, the Factor had not accepted this as being valid and had raised interdict proceedings. The Factor had continued to act as the factor until 30 April 2014. Whilst no determination in relation to the Notice of Dismissal had ever occurred, it appeared to the

Committee that both the new factor, the homeowners and the Factor had all agreed that a changeover would take place on 30 April 2014. The Factor had carried out all the duties of a factor up until that period and had been paid by the majority of residents for so doing. On that basis the Committee was satisfied that whilst there had been a debate about the validity of the termination notice of 13 November 2013 in practice the Factor had been in situ until 30 April 2014. On that basis a period in excess of one year had passed and it was therefore incumbent on the Factor to produce accounts.

27. The Committee considered the period for which accounts should be provided for. The Committee was conscious that Section 3.1 of the Code required termination accounts to be produced and Section 3.3 required annual accounts to be produced. The Committee was of the view that given the overall period was only a little in excess of one year that it would fall to the Factor to decide whether to produce an annual account as well as a separate termination account. The Committee, in the circumstances, would have no objection if the Factor simply wished to produce one set of accounts detailing all the relevant transactions in the financial period from 13 March 2013 to 30 April 2014. The Committee would require such accounts to set out clearly all the transactions that had occurred, the amounts paid to the Factor and what sums related to works that had been carried out.

Decision

28. In all of the circumstances narrated above, the Committee found that the Factor had failed to comply with their Property Factor's duties in terms of Section 14(5) of the Act in respect of Sections 3.1 and 3.3 of the Code. It is therefore determined to issue a Property Factor Enforcement Notice in relation to Sections 3.1 and 3.3 which will follow separately.

Appeals

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

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

Chairperson Signature ..... Date 8/7/15