



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

HOHP reference: HOHP/PF/13/0329

Re: Property at Flat 6/1, Coxfield, Gorgie, Edinburgh, EH11 2SY ("the Property")

The Parties:-

Mr Ian Graham, residing at Flat 6/1, Coxfield, Gorgie, Edinburgh, EH11 2SY ("the Homeowner")

And

James Gibb Residential Factors, 4 Atholl Place, Edinburgh, EH3 8HT ("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:

Andrew Cowan (Chairperson)
Ann MacDonald (Housing Member)

Decision of the Committee

The Factor has failed to carry out the property factor's duties in terms of Section 17(i)(a) of the Act and has failed to comply with the Property Factor Code of Conduct as required by Section 14(5) of the Act. The Committee accordingly proposes to make a property enforcement order.

Background

1. By an application dated 11 December 2013, the Homeowner applied to the Homeowner Housing Panel ("the Panel"), to determine whether the Factor had failed to comply with its duties under the Act. In his application, the Homeowner alleged that the Factor had failed to comply with the following sections of the Code of Conduct:-

- 2.1 – communication and consultation;
- 3 – financial obligations; and
- 6.3 and 6.6 – carrying out repairs and maintenance.

The Homeowner further alleged that the Factor had failed to carry out the Property Factors duties as the Factor had not complied with their own written statement of service.

2. By letter dated 25 March 2014, the President of the Panel sent a notice of referral to both parties intimating her decision to refer the application to a Panel Committee for determination. Both parties were thereafter notified by letter from the Panel dated 1 May 2014 that a hearing was to be held on the issues raised on the 27 May 2014;
3. Prior to the hearing date, the Committee received the following documentation:-
 - (i) initial application from the Homeowner dated 11 December 2013, together with supporting documentations and letters;
 - (ii) A copy of the Factor's written statement of services in relation to the communal area of the development in which the property is situated;
 - (iii) further copy letters and invoices lodged by the Homeowner and received by the Committee on 23 December 2013;
 - (iv) Copy Land Certificate (MID68426) in respect of the property;
 - (v) further information received by the Committee on 22 January 2014 from the Homeowner, including a copy of the Regulations of the Residents' Association relevant to the development in which the property is situated;
 - (vi) further information from the Homeowner received by the Committee on 11 February 2014, including further copy letters and invoices;
 - (vii) copy letter lodged by the Homeowner with the Panel on 17 February 2014 whereby the Factor confirms they do not receive any commission fee or payment from Contractors which they use;
 - (viii) further information from the Homeowner received by the Committee on 19 March 2014, including further copy correspondence between the Homeowner and the Factor;
 - (ix) written representations lodged by the Factor in advance of the hearing and received by the Committee on 15 April 2014;

- (x) further set of papers received from the Homeowner received by the Committee on 21 May 2014, including further copy letter between the Factor and various contractors.

All of the above correspondence was copied to each party to ensure that each party had a full set of papers prior to the hearing.

Hearing

- 4. A hearing took place before the Committee at Thistle House, 91 Haymarket Terrace, Edinburgh, EH12 5HD, on 27 May 2014. The Homeowner represented himself. He gave evidence. He was accompanied by Mr Gordon Bailey who was a witness for the Homeowner and, who gave evidence. Mr Bailey owned another flat within the same development as the Homeowner. Mr Bailey is one of the development block volunteer representatives on the Residents' Association. The Factor was represented by Mr Nic Mayall, Operations Director and Mr David McAllister, Property Manager, both of whom gave evidence on behalf of the Factor.

The complaints made by the Homeowner and the approach of the Committee

- 5. The Homeowner raised a number of separate issues in relation to the actions of the Factor. Although the Homeowner identified each issue as a separate matter, they were all interlinked and the Committee agreed with the parties at the start of the hearing that the Committee would consider evidence under three particular headings.

Complaint regarding tender procedures for external paintwork contract

- 6. The first matter which the Homeowner raised was the manner in which the Factor had taken forward the tender for works in relation to an external painting project at the Queenspark (Coxfield) development ("the development") in relation to external painting of both communal parts of the building and parts of the building owned by individual proprietors.

In particular, the Homeowner complained that the Factor had failed to follow a fair, competitive tendering process. As a consequence the Homeowner averred that the Factor was unable to demonstrate they had obtained best value in tendering these works.

In this respect the Homeowner made reference to:-

- (i) the Factor's written statement of services and in particular, clause 2.6 thereof which confirms that the Factors:-

"will only use approved and authorised contractors for any repair work and will always endeavour to obtain the best value for its customers. Multiple quotations will be arranged, where appropriate, by James Gibb, Residential Factors"; and

- (ii) The Code of Conduct for Property Factors - the Homeowner had highlighted in his application those parts of the Code which he considered the Factor had specifically failed to comply with when tendering the external paint work contract.

- (a) The Homeowner made specific reference to Section 2.1 of the Code in relation to communication and consultation which states that:-

"you must not provide information which is misleading or false."

- (b) The Homeowner made reference to Section 3 of the Code (financial obligations) and in particular, the preamble to that section which states that one of the overriding objections of this Section of the Code are "clarity and transparency in all accounting procedures."

- (c) The Homeowner made reference to Section 6.3 of the Code which states that:-

"on request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff."

- (d) The Homeowner also made reference to clause 6.6 of the Code which states that:-

"if applicable, documentation relative to entering any tendering process (excluding any commercially sensitive information), should be available for inspection by Homeowners on request, free of charge. If paper or electronic copies are requested you may make a reasonable charge for providing these, subject to notifying the Homeowner of this charge in advance."

The Homeowner alleged that the Factor had failed to comply with the duties imposed by the terms of their own statement of services and the requirements of the Code in terms of each of these Sections.

The Committee accordingly heard evidence and considered the written evidence which had been made available to allow them to

consider whether there had been any breach of the duties of the Code as claimed by the Homeowner.

7. The representatives of the Factor gave evidence as to the process which was followed in relation to the tendering of the external paintwork contract.

The Representative of the Factor explained that by letter dated 11 January 2013, they had written to all the proprietors of the development inviting them to a meeting to be held on 31 January 2013, at which time they would be seeking authority from the proprietors of the development to proceed with the tendering of works necessary to carry out the external painting project at the development. The minutes of the meeting which was then held on 31 January 2013, confirm the meeting agreed that the communal painting scheme should proceed.

The Factor's Representatives explained that following the AGM they obtained a CDM report. This report is required for health and safety reasons as much of the work for this particular contract was to be carried out at height. The Representatives of the Factor explained that this report ran to hundreds of pages. No copy of the CDM report was made available to the Committee.

The representatives of the Factor further confirmed that they obtained advice and a specification from paint manufacturers as to the exact painting specification which would be required to complete the necessary external works at the development. They further explained that once the paint specification was received by them on 16 April 2013, that specification was immediately distributed to competing painting contractors along with the CDM report.

The Factor's representatives confirmed that they operate an "approved contractors list". Four contractors were selected from this list and invited to tender for the work necessary to carry out the external painting contract. The contractors concerned were requested to tender for the work on a block-by-block basis. Each contractor was invited to give prices not only for the communal works which were required to be carried out, but also a price (per window), should individual owners wish their own external windows to be painted as part of the contract.

The Factor did then subsequently receive four quotes in relation to the external works. The Companies that quoted for the works were:-

- T.W. Scott (Painting Contractors) Limited who tendered for the works by letter dated 15 April 2013;
- Brooker Simpson who tendered for the works by letter dated 17 April 2013;

- D.C. Smith who tendered for the works by letter dated 3 April 2013.
- J Walker.

3 of these quotation letters were available to the Committee. The Factor's representatives confirmed that a fourth quotation had been obtained from the company J Walker. That quotation had been far in excess of the other quotations and had not been considered further. No copy of that particular quotation was made available to the Committee.

The Factor's representatives explained that they met with and reported to representatives of the development Residents' Association at a meeting on 27 May 2013. A copy of the report to that meeting was available to the Committee.

The Factor's representatives explained that following their recommendations made to the representatives of the Residents' Association, they agreed to proceed with the quotation provided by T. W. Scott.

Following that meeting, the Factors discovered they had made an arithmetical error in the figures for the T.W. Scott tender. The Factors had immediately emailed the Residents' Association's representatives to highlight their arithmetical error and asked them to confirm that, notwithstanding the change in the price for the T.W. Scott tender, they were still agreeable to proceeding with that contractor.

The Factor's representatives confirmed that each of the Residents' Association's representatives replied to the Factor to confirm that they still wished to proceed with the T.W. Scott quotation.

The Factor's representatives explained that there were two issues which were taken into consideration when making their recommendation to the Residents' Association's representatives. The first issue was the cost (per owner) of the communal works which were required. The second issuer which was taken into account was the cost (per owner) of having their own private windows painted as part of the contract.

The Factors had reported that T.W. Scott had provided the best price per private window and had included the cost of an industrial hoist to reach the external parts of the building at height in accordance with the CDM requirements. Other contractors quotations were less expensive in relation to the communal works, but had either not included the cost of the industrial hoist or their cost per private flat window exceeded the cost quoted by T.W Scott.

In all the circumstances therefore, the Factors had recommended that T. W. Scott's price (as adjusted following correction of the arithmetical error), should be accepted.

Ultimately, T.W. Scott's quotation was accepted and the works proceeded and were completed by that Company.

The Homeowner was concerned that the Factors could not demonstrate that they had provided best value for the homeowners in this tender process. In particular, he was concerned that the Factors could not demonstrate that they had obtained "like for like" quotations and that as a result the most economic quotation had not been accepted. The Homeowner had written to the Factor and had met with them to try to seek clarification on these issues. The Homeowner remains dissatisfied with the Factor's explanations in this respect. Having heard evidence, the Committee specifically noted that:-

- (i) The Factor had accepted in their evidence that they had not compared each of the quotations against the paint specification which they had issued to each of the contractors. Accordingly, they could not confirm that each of the quotations had been quoted against an equal specification (in relation to the number of coats of paint etc).
- (ii) One of the Companies (D.C. Smith) had not quoted any price for any individual private owners' windows. The Factors accepted that they did not seek to obtain such a price from this Company following receipt of their quotation.
- (iii) D.C. Smith had not included the cost of an industrial hoist and whilst the Factors had made an allowance in their calculations for the inclusion of a such a hoist, they had not checked with this contractor whether they intended to use a hoist or whether they intended to reach the necessary parts of the building by other means;
- (iv) Despite repeated requests from the Homeowner, the Factor has never provided copies of the individual invitations to tender which they issued to the contractors. The Factor did provide a copy of one email which had been sent to a contractor. That email was dated 8 March 2013. The name of the addressee has been redacted. That email was not a formal invitation to tender as it was issued prior to receipt by the Factors of the CDM report and the paint specification. In evidence the Factor confirmed that they did not in fact have records of the individual invitations to tender which had been issued;

Consideration of the evidence

The Committee considered each of the Homeowner's complaints by reference to the Factor's written statement of service to the owners and the Code of Conduct.

Clause 2.6 of the statement of service makes specific reference to the Factor's commitment to obtain "best possible value for its customers.

In doing so, the Committee considered it would be reasonable for the Factor to be able to demonstrate that they have tendered all works on a fair basis and that all those who were approached for quotations were given the same information.

Where there are discrepancies in quotations which are received, the Committee would have expected the Factor to challenge such discrepancies to ensure that quotations were being considered on an equal footing.

In the present case, the Factor has not been able to satisfy the Committee as to the nature and extent of the individual invitations to tender which were issued. The Factor has further been unable to clarify why certain omissions from tenders (lack of cost of industrial hoist or/lack of prices for individual private windows) were not sought through clarification with those tendering for the works.

In these circumstances, the Committee considered that the Factor is not able to demonstrate that they obtained the best possible value for its customers in the tendering of these works. The factor has accordingly failed in its duties in this respect.

Under Section 6.3 of the Code of Conduct, the Factor must "on request be able to show how and why you appointed contractors". Having considered the evidence, the Committee is not satisfied that the Factor are able to show why they chose a particular contractor to carry out the work for the external painting contract.

The Committee considered it is reasonable for the Homeowner's to expect the Factor to ensure that each of the quotations provided had been prepared against the same set of specification and criteria and where there were differences in this respect (e.g. the number of coats of paint, where an industrial hoist had been included in the price and the cost to individual Homeowner's windows), it would be reasonable to expect the Factor to be able to show they had taken reasonable steps to clarify these issues. The Factor was unable to satisfy the Committee that they had taken these reasonable steps in this particular case.

In these circumstances, the Committee are satisfied that the Factor has failed to comply with Section 6.3 of the Code.

The Committee are not satisfied that the Factor has failed in his duty under Section 2.1 of the Code. The Homeowner has complained that the information which has been supplied by the Factor is misleading or false. The Committee do not accept that the information that has been

provided by the Factor is either misleading or false. The representatives of the Residents' Association who considered the quotations for acceptance were aware of the various discrepancies between the individual quotations. They were not misled in this respect and there was no false information supplied in this respect, the arithmetic error being brought to their attention and a further decision sought.

The committee are not satisfied that there is evidence to support the Homeowners claim that the Factor has failed to comply with section 3 of the Code (financial obligations). Whilst the committee have accepted there are concerns in relation to the tendering process these issues are dealt with elsewhere in the code and are not specific accounting procedures in themselves.

Complaint regarding tender procedures for mastic work

8. The second matter which the Homeowner raised was in relation to the Factor's procedures for tendering in relation to mastic work which required to be carried out to the common parts of the development.

The Homeowner complained that the Factor had failed to arrange competitive tendering in relation to these works. He averred that the final value of the works was £5,760 and that the average cost per owner was therefore £61. The Homeowner made reference to the Factor's written statement of service and in particular clause 2.6 thereof, which confirm that "the Factor undertook to obtain the best possible value for its customers".

The Homeowner also made reference to paragraph 4.4.1 of the Factor's statement of service which states that "if the repair cost is considered to be in excess of £50 per property, the Factor would provide quotations for the repair to the Homeowner's Committee for their consideration.

The Homeowner's complaint was that the cost of the work would exceed £50 per property and yet the Factor had not followed its own statement of service by providing the Homeowner's Committee with separate quotations for this work.

The Homeowner also complained that the Factor had not complied with Section 6.3 of the Code of Conduct, in that the Factor could not show why they had appointed a particular contractor to carry out the work.

In their written response to the application, the Factor confirmed that they had received a total of three quotations to carry out the necessary work to the mastic of the common parts of the development. One contract had quoted £220 per mastic joint, a second contractor had

quoted £280 per mastic joint and a third contractor (North Façade) had quoted £80 per mastic joint. At the Residents Association meeting held 31 January 2013, the Factor reported the intention to carry out the necessary works to the mastic joints and that they would be appointing a contractor who had their own hoist as this would be more economic. The Factor reported to the Homeowner's at this meeting that the costs of the necessary work would be approximately around £100 per mastic joint. At a Committee meeting of the Residents Association on 27th May the Factor confirmed the cost would be £80 per joint.

The Factor avers that three quotations were obtained and whilst these were not specifically reported to the Committee of the Residents' Association, they were in fact reported to the full membership/owners at the AGM.

At the Residents Association Committee meeting on 27th May 2013, the Committee were given an update report on these works. The Factor accepts that no individual quotations were exhibited to the Committee, although the Committee did nonetheless accept the Factor's recommendation to proceed to instruct North Façade to carry out this work.

In their own written submissions, the Factor acknowledged that "in hindsight...they wished they had taken more time to detail the choice taken by the Committee." In their words and by way of explanation they state that "the price advantage was so obvious that it did not seem to warrant detailed discussion and was quickly decided by the Committee." They further contend that "the decision taken would not have been altered if more detailed information had been minuted as the choice was a very obvious one."

Consideration of evidence:

Having considered the evidence the Committee considered each of the Homeowner's complaints by reference to the written statement of service and the Code of Conduct. Clause 2.6 of the statement of service makes specific reference to the Factor's requirement to obtain best possible value for its customers. The Committee is of the view that it is reasonable to expect the Factor to be able to demonstrate that they have tendered the work on a fair basis. The Committee accept the Factor's evidence that they did obtain other quotations for this work. However, they are unable to show that these quotations were exhibited to the Residents' Association Committee to allow them to make an informed decision. The Factor's own statement of service confirms that this procedure should be followed (at section 4.4.1 thereof), and the Factor failed to follow their own procedures in this respect. The Factor acknowledged this failure in their own submissions. Having considered the evidence, therefore the Committee are not satisfied that the Factor has complied with the duties imposed under their own statement of service.

The Committee are further not satisfied that the Factor has complied with Section 6.3 of the Code. They have not been able to explain through a clear and documented audit trail, why particular contractors were instructed to complete the work to the mastic at the building.

Finally, the Committee are not satisfied that the Factor has followed clause 6.6 of the Code, in that they have not been able to provide substantive documentation relative to any tendering process in relation to the mastic works. This documentation was requested by the Homeowner, but has not been made available. The Committee understands that it is not available because no such substantive paperwork actually exists.

Complaint regarding communications

The third and final complaint of the Homeowner related to the general duties of communication and consultation which the Factor is required to follow in terms of section 2.1 of the Code.

Consideration of evidence

9. The Committee are satisfied that the Factor has not deliberately sought to mislead the Homeowner or to provide false information there is no evidence that the Factor deliberately tried to mislead.
10. The Committee are of the view, however, that the Factor has failed to communicate well with the Homeowner on this issue, primarily because they have not been able to demonstrate through clear procedures, an audit trail of the tender processes which they followed in either the paintwork contract or the mastic contract. There were also delays in responding to the owners correspondence. It is the Committee's view that the Factor's processes have led to misunderstandings and concerns as raised by the Homeowner.
11. The Committee are of the view that the specific issues concerning the Homeowner's complaints are already referred to in the two substantive parts of his complaint relative to the paintwork and the mastic work tendering

Decision

12. The Factor has failed to comply with its duties under section 14 of the Act in that they have failed to comply with their own written statement of service, as they are unable to demonstrate that they have obtained the best possible value for their customers, in the tendering processes for both external paintwork and mastic works at the development.

In relation to the mastic works, the Factor is unable to show that they followed their own procedures as set out in clause 4.4.1 of their statement of service by providing quotations to the Homeowner's Committee for their consideration.

The Committee also find that the Factor has failed to comply with its duties under section 6.3 and 6.6 of the Code of Conduct. In particular, the Factor has been unable to show how and why they appointed a particular contractor under a competitive tendering exercise, in relation to both the paintwork contract and the mastic contract.

13. As the Committee is satisfied that the Factor has failed to comply with its section 14 duty, the Committee proposes to make a Property Factor Enforcement Order. In terms of Section 19(2) of the Act where the Committee proposes to make such an order, it must before doing so, give notice of its proposal to the Factor and must allow the parties an opportunity to make representation to the Committee.
14. The service of this decision to the parties should be taken as notice for the purposes of Section 19 (2)(a) of the Act and the parties are hereby given notice that they should ensure that any written representations which they wish to make under Section 19 (2)(b) of the Act reached the Panel's office by not later than 14 days after the date of service of this decision upon them. If no representations are received within that timescale, then the Committee may proceed to make a Property Factor Enforcement Order without seeking further representations from the parties. Failure to comply with a Property Factor Enforcement Order without reasonable excuse constitutes an offence under Section 24 of the Act.
15. The Committee proposes to make the following Property Factor Enforcement Order:-
 - (a) within 28 days of the date of communication to the Factor of the Property Factor Enforcement Order, the Factor must make payment to the Homeowner of the sum of £100, being a reasonable assessment of the cost incurred by the Homeowner in pursuing his complaint through the HOHP, to include taking copies of documentation and making same available to all parties etc;
 - (b) within 3 months of the date of communication to the Factor of the Property Factor Enforcement Order, the Factor must agree with the Homeowner's Association Committee procedures for all future communal works which require to be tendered in accordance with section 4.4 of the Factor's written statement of service. Such procedure should indicate amongst other things:-

- (i) the cost limit and process by which they will obtain multiple quotes for works including how they will ensure tenders can be compared on a like for like basis and an audit trail of recording that will be available on request.
- (ii) a format of reporting to the Residents' Association Committee following the conclusion of the process for obtaining quotes and a procedure for recording the Committee's decision and intimating that record to the Committee for future reference.
- (iii) An agreement with the Residents Association Committee on what records of meetings and other decisions made with Residents Association Committee should be circulated to all owners in the development for their information.

Right of Appeal

16. The parties' attention is drawn to the terms of Section 22 of the Act regarding their right to appeal and the time limit for doing so. Section 22 provides:-

- (a) 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 Committee or a Homeowner Housing Committee; and
- (b) 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..."

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Andrew Cowan, Chairperson

7/7/14
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Date



**Notice of proposal to make a Property Factor Enforcement Order made under
Section 19(2)(a) of the Property Factors (Scotland) Act 2011 ("the Act")
following upon a Decision of the Homeowner Housing Committee in an
application under Section 17(1) of the Act**

HOHP reference: HOHP/PF/13/0329

Re: Property at Flat 6/1, Coxfield, Gorgie, Edinburgh, EH11 2SY ("the Property")

The Parties:-

Mr Ian Graham, residing at Flat 6/1, Coxfield, Gorgie, Edinburgh, EH11 2SY ("the Homeowner")

And

James Gibb Residential Factors, 4 Atholl Place, Edinburgh, EH3 8HT ("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:

Andrew Cowan (Chairperson)

Ann MacDonald (Housing Member)

The Committee proposes to make the following Property Factor Enforcement Order:-

- (a) within 28 days of the date of communication to the Factor of the Property Factor Enforcement Order, the Factor must make payment to the Homeowner of the sum of £100, being a reasonable assessment of the cost incurred by the Homeowner in pursuing his complaint through the HOHP, to include taking copies of documentation and making same available to all parties etc;
- (b) within 3 months of the date of communication to the Factor of the Property Factor Enforcement Order, the Factor must agree with the Homeowner's Association Committee procedures for all future communal works which require to be tendered in accordance with section 4.4 of the Factor's written statement of service. Such procedure should indicate amongst other things:-

- (i) the cost limit and process by which they will obtain multiple quotes for works including how they will ensure tenders can be compared on a like for like basis and an audit trail of recording that will be available on request.
- (ii) a format of reporting to the Residents' Association Committee following the conclusion of the process for obtaining quotes and a procedure for recording the Committee's decision and intimating that record to the Committee for future reference.
- (iii) An agreement with the Residents Association Committee on what records of meetings and other decisions made with Residents Association Committee should be circulated to all owners in the development for their information.

The service of this decision to the parties should be taken as notice for the purposes of Section 19 (2)(a) of the Act and the parties are hereby given notice that they should ensure that any written representations which they wish to make under Section 19 (2)(b) of the Act reached the Panel's office by not later than 14 days after the date of service of this decision upon them. If no representations are received within that timescale, then the Committee may proceed to make a Property Factor Enforcement Order without seeking further representations from the parties.

Failure to comply with a Property Factor Enforcement Order without reasonable excuse constitutes an offence under Section 24 of the Act.

Andrew, Cowan

7/7/14
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Date