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

HOHP Reference: HOHP/PF/13/0321

RE: Flat 11 Block 8, Tait Wynd, Edinburgh EH15 2RJ

The Parties:-

The homeowner – Victoria Allan ("the applicant")

The property factor – Charles White Ltd ("the respondents")

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

Committee members

Richard Mill (Legal Chairperson)
Charles Reid Thomas (Surveyor Member)
Susan Brown (Housing Member)

Decision of the committee

The committee unanimously determined that the respondent has failed to comply with the Code of Conduct for Property Factors by -

1. Failing to respond to the applicant's correspondence and enquiries within prompt timescales (a breach of Section 2.5 of the Code).

2. Providing information to the applicant which was misleading and false (a breach of Section 2.1 of the Code).

3. Failing to inform the applicant of the progress of work required to be undertaken to common repairs to prevent further water ingress (a breach of Section 6.1 of the Code).

The committee also unanimously determined that the respondent has failed to carry out their duties by -

1. Failing to investigate, survey and instruct necessary common repairs.

Background and earlier procedure

The application to the Homeowner Housing Panel from the homeowner was received on 26 November 2013. Further necessary information was requested from the homeowner prior to the referral of the Application to the committee.

Notices of referral were issued to parties on 13 January 2014. Following receipt of written representations the committee gave consideration to the papers available and proceeded to issue a Direction on 4 February 2014.

In terms of said Direction notice was given to the property factor that the committee, in addition to considering the potential breaches of 2.1, 2.5 and 6.1 of the Code of Practice, all as raised by the homeowner in her Application, that they would also consider potential breaches of Section 6.9 of the Code of Practice. In the circumstances the property factor was afforded a further 14 day period from receipt of said Direction to lodge any further response which they wished to make in this respect. The specific matter which the committee felt that they required to explore and make enquiry into was whether previous works to the common roof instructed by the property factor by Amber Roofing which were *prima facie* defective did not lead them to pursue said Company.

In terms of said Direction the homeowner was also requested to provide further clarification and specification in respect of her having been provided with voluminous papers from the applicant in respect of her claim and considered it was necessary to consider the applicant's case properly and additionally in order to provide the property factor with fair notice that such specification be provided. The said Direction accordingly required the applicant to produce a succinct record of what information she claimed was provided to her which was not responded to timeously or which was false or misleading; specifically from whom and on what dates. She was also required to lodge any specific documentary evidence which existed to support her claims.

This was responded to by the applicant who produced the necessary information in an easy to understand format.

The committee were able to consider the voluminous papers in this case prior to the Oral Hearing. In order to seek clarification regarding the repairs already carried out at the applicant's block of flats a further Direction was issued on 4 March 2014, in advance of the Oral Hearing requiring the property factor to produce a chronological list of all works undertaken, including details of whom instructed the works and all Survey Reports in their possession which had been prepared in respect of these repairs.

The Section 2 issues arising from the Code were clear on the basis of the papers by then produced. The repair issues remained considerably unclear.

In the preparatory phase the committee downloaded a copy of the Land Certificate of the applicant's upstairs neighbour, Flat 14. A comparison was made of the applicant's Title and the Title to the upstairs property. This appeared to disclose that the area of the upstairs property was less than the applicant's property and that the

missing area of Title to the upstairs Flat was the balcony area above the applicant's home. This suggested the upstairs balcony area is common property.

In order to further aid the committee in their findings it was decided that an inspection should take place at the applicant's block on the morning of the Hearing prior to the conduct of the Hearing itself. Both parties were invited to attend.

Inspection and Hearing

The inspection of the relevant property took place by the committee at 10 am on 11 March 2014. The weather conditions were favourable and the committee had no difficulty inspecting all relevant areas. They were able to view the relevant balcony area from ground level and thereafter, having met the applicant and the representative of the respondents, had the opportunity of entering the applicant's property in order to inspect the internal condition of her property but also to have the opportunity of viewing the design detail of the exterior of the building from the applicant's own balcony and compare this with the Title plan.

The Oral Hearing took place after the inspection and commenced at 11 am on 11 March 2014 at Thistle House, Edinburgh. The applicant appeared personally and represented her own interests. The property factor was represented by Scott Ross in his capacity as property manager.

Ultimately the Hearing itself was not a lengthy process. The committee had undertaken considerable preparatory work and had been furnished with voluminous papers, principally by the applicant. The committee took the opportunity of having a round table discussion regarding the relevant matters at issue with both parties, inviting them to make any further representations which they wished.

Findings in Fact

1. The applicant is the homeowner of Flat 11, Block 8, Tait Wynd, Edinburgh EH15 2RJ. The property forms part of the Development commonly referred to as Brunstane Court, Edinburgh ("the Development").

2. A Deed of Conditions was granted by Southern House Developments Ltd, registered 27 March 2008, in respect of the Development. The applicant's property and other properties within the Development are burdened by this Deed of Conditions.

3. The Deed of Conditions sets out the general arrangements for the Development including the terms of the management of the common parts of the Development. The Deed of Conditions also sets out the respondents' duties.

4. The respondent became a registered property factor on 7 December 2012, and accordingly their duty under Section 14(5) of the 2011 Act compliant with the Code arises from that date.

5. The applicant purchased her property in or about July 2012 from Hansteen Ltd who had earlier bought the property (along with other Flats within the Development) from Frame Investments, Administrator of Southern Homes, the original Developer.

6. No formal Written Statement of Services has been provided by the respondent to the applicant. No Written Statement of Services has been requested. Shortly after the applicant purchased her property the respondent's wrote to the applicant by way of letter dated 8 August 2012 providing her with details of their relationship including their terms of service and costs.

7. Water leaks into the applicant's property were detected from when she moved into the property in July 2012. The respondents were advised of the leaks. The leaks appeared to be originating from the balcony of the Flat above the applicant's being Flat 14.

8. The applicant advised Hansteen Ltd whom she had bought the property from regarding the said leaks as well as intimating the position to the respondents. Hansteen Ltd in turn appointed Stewart Milne Builders to inspect, who in turn, appointed Amber Roofing to carry out a survey.

9. Amber Roofing were subsequently instructed by Frame Investments in December 2012. Balcony repairs to Flats 13 and 14 in the applicant's block were carried out. It was immediately apparent that these remedial works had not resolved the leaks to the applicant's property.

10. Due to the ongoing problem with leaks to her property, the applicant continued to pursue resolution through the respondents and in particular had ongoing communications with David Brydon, then employee of the respondents. Mr Brydon failed to respond to numerous items of email correspondence timeously which had been received from the applicant.

11. Mr Brydon, employee of the respondent, provided undertakings to the applicant which had not come to fruition. Such undertakings were misleading. This included the assertion that he would make a claim on the 10 year building insurance warranty provided by Zurich and additionally that he would instruct four independent companies to survey and prepare Reports in respect of ongoing leaks following a residents meeting held on 5 June 2013. These undertakings did not come to fruition. The applicant (and other homeowners) were misled by the provision of this false information.

12. In June 2013, flashing detail repairs above Flat 8/10 was carried out by Amber Roofing. The work were instructed and paid for by the respondents. The cost of the work way £2,376.00.

13. In July 2013, skirting detail repairs on the balcony of Flat 8/14 was sealed by Lenaghen Roofing. The work was instructed by the respondents. No cost was incurred. The contractor advised the respondents that the skirting should be monitored after completion.

14. In August 2013, a 200 metre squared area of flat roof covering was removed by Amber Roofing. This area of roof was over Block 8 and other adjoining Blocks. The work was instructed by Frame Investments.

15. In December 2013, Rebecca Demarco, Flat 14, instructed Site Sealants Ltd to carry out a trace and access test to her property in order to survey and assess the ongoing problem with leaks. They prepared a Report dated 13 January 2014 confirming that both the balcony area outside the Flat above the applicant's property being the top floor Flat, Flat 14, and the main Flat roof of the applicant's block required repairs. The Report and quotation was sent to the respondents.

16. The balcony area outside Flat 14 on the top floor of the applicant's block, above her own property, is common property. It does not belong to the upstairs neighbour nor form part of the upstairs neighbours Title.

17. The respondents, as the appointed Factor, have obligations which arise from the Deed of Conditions. This includes organising common repairs and to instruct such work considered necessary for the interim protection of any sub-subjects of the property or safety of any person.

18. The respondents have failed in their obligations arising from the Deed of Conditions to remedy the defects to common areas of the property which has led to water ingress to the applicant's property.

Reasons for Decision

Only *registered* property factors require to comply with the Code (Section 14(5) of the 2011 Act). Accordingly the committee was only able to scrutinise the respondent's compliance with the Code from the date of registration, namely 7 December 2012.

So far as the property factor requiring to comply with their duties, which are set out within the relevant Deed of Conditions, such obligation arises from the commencement of the Act, namely 1 October 2012 though, Regulation 28 of the Homeowner Housing Panel (Applications & Decisions) (Scotland) Regulations 2012 stipulates that the committee may take into account any circumstances occurring before that date in determining whether or not there has been a continuing failure to act after that date.

Mr Ross, the representative of the property factor at the Oral Hearing, was quite candid in accepting that there had been relevant breaches of both Sections 2.1 and 2.5 of the Code of Conduct. There was ample documentary evidence to support this. Such breaches occurred after the respondents' registration.

There were numerous examples of occasions where the applicant had corresponded with the property factor and received either no response or a response far outwith the timescales which would be expected from a professional organisation. There

were also occasions when the respondents' response to the applicant lacked clarity and direction in resolving the applicant's very genuine concerns.

The specific examples of the respondents' failings, as set out within findings 13 and 14, relate to the specific actions of a former employee of the respondents for which they are responsible. The committee noted more recent, less blatant, breaches by the current staff working in partnership with the applicant. The committee felt that Mr Ross, in particular, in his capacity as property manager has at least attempted to support and resolve the applicant's concerns though he did accept some degree of personal responsibility for continued failings. He appears to continue to have a good working relationship with the applicant.

Breaches of Section 6.1 and 6.9 of the Code were at issue in respect of repairs but the main failing regarding the repairs necessary to prevent further water ingress to the applicant's property related to a breach of the respondents' duties. Those duties are set out within the Deed of Conditions. The failings commenced before the coming into force of the Act but have continued to the current time. The respondents had evidently, again by their own admission, breached section 6.1 of the Code by failing to keep the applicant updated with regard to the progress of necessary common repairs.

The respondents were aware in or about July 2012 that the applicant was suffering water ingress to her property. As is apparent now, such water ingress is as a result of defects, both to the balcony area above the applicant's property but also to the main flat roof of the applicant's block.

The design detail of the applicant's block of Flats is not straightforward. There are numerous balcony type areas, and many of them are inconsistent in their design and structure. There is a significant part of the applicant's property at the rear which is situated underneath the balcony area of the upstairs property. In other words the balcony area upstairs forms a roof over and provides shelter to the applicant's property.

In carrying out preparations and making necessary inquiry prior to the inspection and Oral Hearing, the committee obtained a copy of the Title Plan for the upstairs Flat and compared it with the applicant's Title Plan. It became evident that the upstairs balcony area does not belong to the upstairs proprietor. There is provision made in the plans of the block of Flats to differentiate the balcony area and the balcony above the applicant's property does not form part of the upstairs Title. The committee concluded therefore that this area is common property.

The respondents have persistently failed to identify the true position regarding ownership of the said balcony area. Whilst in certain circumstances it may be quite reasonable for a property factor to make certain assumptions, the respondents in the instant case ought not to have. As expressed earlier the design detail of the relevant block of Flats is not straightforward. Additionally, given that the ownership and responsibility of the relevant area in question has been a material bone of contention for some considerable time, then the respondents ought to have checked the position. The position was easily capable of being checked. Some 18 months have

passed throughout which the respondents failed to properly investigate the true position.

At the Oral Hearing itself, a submission was made by Mr Ross on behalf of the respondents to the effect that the legal advice which the respondents had received suggested that the position remained in doubt and that there was a conflicting source of evidence, namely the Deed of Conditions. This suggestion did not appear to the committee to be correct. The Deed of Conditions does not expressly stipulate that balcony areas are common property but this it does not mean that the balcony area above the applicant's Flat is not common property.

Given the design detail of the entire block and the number of different balconies it is not surprising that "balconies" generally were not incorporated into the definition of common property. It is recognised by the committee that there will be undoubtedly other (open) balconies in the block which are not common but the committee concluded that the balcony above the applicant's property which forms a roof over her property and which is contributing to water ingress is common.

The conclusion of the committee that the balcony above the applicant's property is common should not be seen as setting a precedent in respect of any other balcony in the Development. There are probably in excess of 100 flats in the Development. Unusually the design detail of the flat and and balcony above the applicant's is not repeated anywhere else throughout the entire Development.

Due to the unique design of the balcony area in question the respondents may be excused for having misinterpreted the issue. However what is clear is that the main common roof is equally responsible for causing water ingress and no serious attempts were made to resolve those problems.

It was noted by the committee that the "legal advice" which Mr Ross was seeking to rely upon came in the form of an email a few lines long sent to him by an internal legal advisor (his description) late in the afternoon of the day before the Hearing. This evidenced beyond doubt that the respondents have failed over a very long time to take reasonable and professional steps to identify the issue. The committee did not feel particularly assisted by the written or oral representations made on behalf of the respondents which lacked detail and which at times were conflicting.

The respondents, having failed to identify the nature and extent of the common property were thereafter bound to fail in their obligations to ensure that the common property was adequately maintained and that necessary repairs were carried out. As it transpires, from the terms of the Report prepared by Site Sealants Ltd there are works requiring to be undertaken not only from the balcony area, which the respondents were disputing responsibility for, but also to the main common roof.

Despite the passing of some 18 months the respondents have failed to ever instruct a comprehensive survey report of the problem in order to identify what work was necessary. The committee had, by way of Direction, required the respondents to produce all survey reports in their possession. The only survey report which they were capable of producing was a report by Site Sealants Ltd, which had not been instructed by them but which had been instructed by applicant's upstairs neighbour.

The fact that other interested parties, such as the administrator of the original builder, or their successors had undertaken responsibility for and instructed certain works does not relieve the respondents from their own obligations as the appointed property factor. For the applicant to find herself in a situation where 18 months after bringing the difficulties to the attention of the respondents that they remained unremedied is entirely unsatisfactory. The scope and cost of all relevant work is arguably not too extensive or expensive.

The respondents ought to have checked the relevant Title Plans in the Land Certificates, inspected the building and thereafter instructed a comprehensive survey of the property and have the works carried out. This should have happened in the Summer of 2012. Instead their lack of action and delay has had seriously detrimental consequences for the applicant.

The applicant has required to live with constant water ingress into her property. One of her main living areas has been set out with numerous buckets to collect water. Her ceiling has ugly large watermarks. The water ingress has affected more than the superficial presentation of her property. It could reasonably be expected that such degree of water penetration over such a length of time may well have led to serious decay of certain components of the fabric of the building. The extent of the water ingress at times has led to water escaping from electrical sockets within the applicant's property. There are very obvious safety concerns which arise.

The committee were of the view that the respondents failings, both in respect of their breach of the relevant Subsections of Section 2 of the Code of Conduct together with their material failings in carrying out their duties were towards the higher end of the level of seriousness. Having made their findings, the committee proceeded to consider the appropriate remedy which is set out within the accompanying Proposed Property Factor Enforcement Order.

Mr Ross indicated that should the respondents be required to carry out work they would rely upon the Site Sealants Ltd Report which had been instructed by the owner of Flat 14 as opposed to instructing a fresh additional survey report. This seemed reasonable to the committee and, in order to ensure that no further delay arises, the committee accordingly proposes that upon receipt of the committee's decision the respondent instructs forthwith the said company to carry out the works and recommendations identified within the survey. The survey report confirmed that the cost of the works would be £3,670 + VAT. The work would be covered with a 10 year warranty. Following the work being carried out the respondents would be entitled to seek repayment from relevant owners in the proportions and shares which they are obliged to meet.

The committee took the view that the remedial work required internally to the applicant's property should be made good by the respondents at their sole cost. There should be no need for the applicant to expend further time and effort which may lead to further delay by making an insurance claim in order to have the work carried out.

The committee recorded at the Oral Hearing that Mr Ross provided an oral apology on behalf of the respondents for their failings, but he did not acknowledge the full extent and scale of the respondents' failings at that time. Accordingly the committee require the respondents to provide a comprehensive written apology in the manner proposed within the proposed Order.

It was obvious to the committee that the applicant had suffered extensively for a long period of time and additional to the immediate difficulties within her property, she had required to invest large quantities of time in pursuing the matter with the respondents and ultimately through the Homeowner Housing Panel. The committee formed the view that it was reasonable in these circumstances that she should be awarded a sum of compensation together with receiving a refund of her management charges paid from the notification of the leaks back in July 2012 to date. The level of service provided to the applicant by the respondents throughout this time has fallen far below what could reasonably be expected to be charged by a professional property factor.

Finally, the committee were left in doubt as to whether or not the respondents and their staff have the required training and knowledge necessary to enable them to discharge their responsibilities in terms of the Code of Conduct and their obligations arising from the Deed of Conditions. The committee noted repeated failings by a number of member of the respondents' staff over a lengthy period of time. In the circumstances the committee has proposed that adequate staff training take place to ensure that the respondents are capable of discharging all of their relevant obligations and duties in the future.

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

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Chairperson: Date: 13/03/2014

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The Parties:-

The homeowner – Victoria Allan ("the applicant")

The property factor – Charles White Ltd ("the respondents")

Section 19(2) of the 2011 Act requires the committee to give notice of any proposed property factor enforcement order to the property factor and allow parties an opportunity to make representations to the committee.

The Committee proposes to make the following Order:-

"Upon receipt of the Order the respondent must:-

1. Immediately implement the survey report and recommendations of Site Sealants Ltd by forthwith instructing said company to carry out the work identified within their (undated) report and to ensure that said work is completed within 28 days. The costs of such to be paid for by the respondents, it the first instance, and thereafter the said costs to be recovered from all relevant proprietors in such shares as they are obliged to pay common repairs.

2. Survey, instruct and repair, at their sole cost, any internal redecoration works (including electrical supply services) required to the applicant's property as a result of water ingress, said work to be instructed as soon as reasonably practicable, and if the work cannot be completed within 28 days, then to produce the detailed proposals for such rectification works.

3. Issue a written apology to the applicant for:

   i. failing to respond timeously to communications.

   ii. providing false and misleading information.

iii. for failing to have surveyed the common parts causing water ingress to the applicant's property and their failure to organise necessary repair work.

4. Make a payment to the applicant of £500 in recognition of the anxiety, stress and inconvenience caused to her as a result of their failings.

5. Refund the management charges paid to them by the applicant from July 2012 to date.

6. Prepare a schedule of proposed staff training to ensure that all staff are fully aware of the respondent's obligations in terms of both the Code of Practice and their duties arising from the Deed of Conditions, including details of the provider of the training and timescales for the provision of training.

Evidence of the respondents' compliance requires to be lodged with the committee within 6 weeks."

The committee's Decision of equal date has been issued to parties setting out the committee's Findings and Reasons. This Notice is in terms of Section 19(2) of the 2011 Act and the parties are hereby given Notice that should they wish to make any written representations in relation to the committee's proposed Order that they must be lodged with the Homeowner Housing Panel within 14 days of the date of this Notice (and corresponding Decision). If no representations are received then the committee will proceed to make the Order proposed. If representations are received they will be considered by the committee prior to the making of any Order.

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

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