



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

Property Factor Enforcement Order

HOHP reference: HOHP/LM/13/0066

Re: 6/1 Coxfield and play area and land at Coxfield, Edinburgh ('the property')

The Parties:

Mr Ian Graham, 6/1 Coxfield, Edinburgh, EH11 2SY ('the homeowner')

James Gibb Residential Factors, 4 Atholl Place, Edinburgh, EH3 8HT ('the factor')

Committee members:

Sarah O'Neill (Chairperson)

Robert Buchan (Surveyor member)

David Hughes Hallett (Housing member)

Decision of the committee

Background

1. In its decision dated 7 February 2014 ("the decision"), the homeowner housing committee ("the committee") determined that the respondent had failed to comply with its duties under section 14 of the Property Factors (Scotland) Act 2011 ("the Act") in respect of sections 1.1a C (e) and 2.1 of the code of conduct for property factors. The reasons for the committee's determination are set out in full in the decision.

2. In terms of section 19 (2) of the Act, the committee gave notice of its proposed property factor enforcement order (PFEO) as part of the decision, and allowed the parties 14 days to make representations to the committee. In an email dated 11 February, the factor made a number of representations in relation to both the decision of the committee and the proposed PFEO. In a letter dated 25 February, the homeowner made a number of detailed representations in relation to the decision of the committee. Further written representations were received from the homeowner by fax dated 13 March. The committee determines that, as these representations

were received outwith the stated period, these cannot be considered by the committee.

3. The committee has carefully considered the representations which were received from the factor and the homeowner within the stated timescale. The committee determines that the detailed written representations submitted by the homeowner in relation to the decision raise no new points of substance in relation to the issues considered, and that the decision should remain unchanged, subject to the following point of clarification in response to those representations. With regard to the committee's finding in fact at paragraph 8 of the decision, James Gibb Property Management was appointed as property factor for the development on 17 February 2000. The factoring division of that business, James Gibb Residential Factors, was acquired by Strathspey Capital in 2012, and is the current property factor for the development.

4. In the decision, the committee set out the following proposed Property Factor Enforcement Order (PFEO):

Within 28 days of the date of communication to the factor of the property factor enforcement order, the factor must:

1. Issue a formal written apology to the applicant in respect of the respondent's failure to comply with its duties under sections 1.1a C (e) and 2.1 of the code.

2. Amend section 5.1 (management fees) of its written statement of services as follows:

- Provide further information as to the process by which the annual review of the fee will be undertaken and at what date in the year
- State that proper advance notice will be given to homeowners of any forthcoming increase in the fee before it takes effect, how much notice will be given, and how this notice will be communicated.
- Make clear that the management fee is charged quarterly in arrears.

5. The homeowner made one representation which is relevant to the terms of the proposed PFEO. He requested that the committee, should it accept his representations that the property factor had misled the owners at the residents' association meeting on 31 January 2013, and also misled the committee, should 'impose a token award of £100 to me for the extra cost/time in the appeal for aggravating my original complaint in misleading the committee.' The committee has decided not to impose such an award, having determined at paragraph 32 of its original decision that, on the balance of probabilities, there was not sufficient evidence that the factor had misled the owners at the meeting.

6. The factor made a number of representations in relation to paragraph 2 of the proposed PFEO. These representations and the committee's response to these are set out below in relation to each of the three points contained in paragraph 2 of the PFEO.

7. Firstly, the factor argued that paragraph 5.1 of its written statement of services (WSS) sets out that the fee review process is to be undertaken annually, and that the fee is determined by the scope of services provided and the size of the development and may change if the scope is altered. The factor argued that this is compliant with the requirement in section 1.1a C (e) of the code of conduct to set out 'any fee structure and also processes for reviewing and increasing or decreasing this fee'. The factor also argued that there is no requirement in the code of conduct to include the date of review.

7. The committee takes the view that paragraph 5.1 of the WSS does not fully comply with section 1.1a C (e) of the code. Providing that the management fee will be reviewed on an annual basis does not set out the details of the process by which this review will be carried out, but simply states the timescale for doing so. The ordinary meaning of 'process', as defined in the Oxford Online English Dictionary, is: 'a series of actions or steps taken in order to achieve a particular end'. The committee would therefore expect the WSS to include a more detailed explanation of how the fee review process is to be carried out, including the various steps in the process, and when the process will be carried out. The committee does not consider that stating that 'the fee is determined by the scope of services provided and the size of the development and may change if the scope is altered' is sufficient. The committee also considers that stating that the review will be carried out annually is not sufficient, and that the date in the year when this review will take place should also be stated.

8. Secondly, the factor argued that section 1.1a C (e) of the code of conduct does not stipulate that proper advance notice must be given to homeowners of any forthcoming increase in the fee before it takes effect, how much notice will be given, and how this notice will be communicated. It argued therefore that its WSS is compliant with the code on this issue. The committee considers, however, that how and when notice of any increase is to be given to homeowners is a key aspect of any fee review process. In this particular case, when the decision on the review was made, it was already payable, as the fees are charged in arrears. This cannot be in the interests of homeowners, as they are given no advance warning of the increase, and have no opportunity to consider this or raise any concerns about the proposed increase. The fee review process should therefore be structured in such a way that homeowners are notified of the change before the beginning of the period when the new fee will take effect.

9. Thirdly, with regard to making clear that the management fee is charged quarterly in arrears, the factor argued that its invoice dates are detailed in section 5.5 of the written statement of services, and that this is compliant with the code of conduct. Having considered these representations, the committee concludes that detailing the invoice dates is not the same as stating clearly that the management fee is charged quarterly in arrears. The committee takes the view that when a fee will be charged is a fundamental aspect of any fee structure.

10. The committee notes that the introduction to section 1 of the Code of Conduct states that the factor '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 representations made by the factor that, in effect, there is no requirement in the code to say how a fee is charged; to give advance notice of any change; to advise on how notification of any change will be made; or when a review will be carried out, contradict this basic requirement, not just the more specific terms of section 1.1a C (e).

11. Having considered the representations made by the parties, the committee is satisfied that the factor has failed to comply with its section 14 duty. The committee therefore issues a property factor enforcement order in the terms proposed in its original decision, with two amendments. Firstly, the committee requires the factor to send a copy of the amended written statement of services to all owners within the development. Secondly, the committee requires the factor to provide documentary evidence of its compliance with the order.

Property Factor Enforcement Order

The committee therefore makes the following property factor enforcement order:

Within 28 days of the date of communication to the factor of the property factor enforcement order, the factor must:

1. Issue a formal written apology to the applicant in respect of the respondent's failure to comply with its duties under sections 1.1a C (e) and 2.1 of the code.
2. Amend section 5.1 (management fees) of its written statement of services as follows:
 - Provide further information as to the process by which the annual review of the fee will be undertaken, including at what date in the year this will occur
 - State that proper advance notice will be given to homeowners of any forthcoming increase in the fee before it takes effect, how much notice will be given, and how this notice will be communicated.
 - Make clear that the management fee is charged quarterly in arrears

3. Send to all homeowners within the Queenspark (Coxfield) development a copy of the amended written statement of services.

4. Provide documentary evidence to the committee of its compliance with this Property Factor Enforcement Order by sending such evidence to the office of the Homeowner Housing Panel by recorded delivery post.

Failure to comply with a property factor enforcement order without reasonable excuse is an offence under section 24 of the Act.

Right of appeal

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. 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 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.

More information regarding appeals can be found in the information guide produced by the homeowner housing panel. This can be found on the panel's website at:

<http://hohp.scotland.gov.uk/prhp/2649.325.346.html>

Signature . **Sarah O'Neill**

Date... 3/9/19

Chairperson