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

hohp Ref: **HOHP/PF/13/0060**

Re: **Property at 4/21 Robertson Gait, Edinburgh, EH11 1HJ ("the Property")**

The Parties:-

MR BARON KWON LUNN TSANG residing at 4/21 Robertson Gait, Edinburgh, EH11 1HJ ("the Homeowner")

LIFE PROPERTY MANAGEMENT LIMITED a company incorporated under the Companies Acts (SC253869) and having their Registered Office at Regent Court, 70 West Regent Street, Glasgow, G2 2QZ (represented by their agent Mr David Young of Messrs Brechin Tindal Oatts, Solicitors, 48 St Vincent Street, Glasgow ("the Factor")

Decision by the Committee of the Homeowner Housing Panel in an application under Section 70 of the Property Factors (Scotland) Act 2011

Committee Members: Ewan K Miller (Chairman); Ann McDonald (Lay Member); and Mike Links (Surveyor Member).

Background

1. By application dated 4 April 2013 the Homeowner applied to the Homeowner Housing Panel ("the Panel") to determine whether the Factor had failed to comply with the duties imposed on the Factor by virtue of the Property Factors (Scotland) Act 2011 ("the Act").

2. The application by the Homeowner alleged failings on the part of the Factor. Firstly, that the Factor had breached the Code of Conduct for property factors ("the Code") and, in particular, Sections 2.1, 2.2, 2.5, 4.3, 4.9, 6.7 and 6.8 of the Code. Secondly, the Homeowner alleged that the Factor had failed to comply with the "property factor's duties" as such term is defined in Section 17(5) of the Act. This allegation related to an alleged breach of fiduciary duty owed by the Factor to the Homeowner.

3. By letter dated 8 May 2013 the President of the Panel intimated to the parties her decision to refer the application to the Homeowner Housing Committee ("the Committee") for determination.

4. Following referral by the President of the Panel to the Committee the Committee made a preliminary direction under paragraphs 13(1) and 13(3)(d)(i) of The Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 requesting that the Factor submit a copy of their debt recovery policy to the Committee and to the Homeowner in advance of the Hearing. The Factor duly did so.

Hearing
A Hearing took place at Thistle House, 91 Haymarket Terrace, Edinburgh, EH12 5HE before the Committee on Tuesday 30 July 2013.

The Homeowner represented himself. He gave evidence and called no witnesses.

The Factor was represented by Mr David Young of Brechin Tindal Oatts, Solicitors. Also present, representing the Factor, were Mr David Reid, Director and Ms Jacqueline Borthwick, Financial Director of the Factors.

Code of Conduct 2.1 – "you must not provide information which is misleading or false"

Submission
The Homeowner alleged that the Factor had breached this section of the Code in two regards.

The first alleged breach arose from a newsletter that had been sent by the Factor to the Homeowner in or around November 2012. This stated that the Factor had merged with a property maintenance company Property Response 24 ("PR24"). The newsletter stated that the Factor "had taken the decision to fully purchase the company (PR24) to demonstrate our commitment to the Property Factors Code of Conduct by ensuring transparency in our relationship with this company".

The Homeowner carried out a search at Companies House against PR24 and noted that there had been no change in the shareholdings or structure of PR24. It had been and remained in the majority ownership of Mr David Reid and Mr Colin Campbell who were also the majority shareholders of the Factor. Accordingly, in the Homeowner's submission, the statement in the newsletter was false and misleading. There had been no change in ownership.

The Factor submitted that the newsletter had the practical effect of advising any reader that there was a relationship between the Factor and PR24. The precise mechanics of any purchase, partnership or connection was not relevant, although Mr Reid did, at the Hearing, concede that the wording in the newsletter did not fully or accurately reflect the true position.

The second complaint under 2.1 of the Code was in relation to correspondence received by the Homeowner from Life Credit Management ("LCM"), which was a debt recovery company. It should be noted that, as with PR24, there is a connection between the Factor and LCM. The majority shareholder in LCM is Mr David Reid who, as stated above, is also one of the majority shareholders in the Factor.

The Homeowner's complaint was that letters dated 1 March, 13 March and 19 March all 2013 received by the Homeowner from LCM were false and misleading. The letter of 19 March 2013 contained a box in the top right-hand corner which stated "NOTICE OF COURT ACTION". Whilst it was apparent from the body of the letter that a court action had not yet been raised, the Homeowner submitted that the wording in this box gave the recipient the false impression that court action had already been raised.

The Homeowner also took issue with the letter of 13 March which stated that "authority had now been granted to proceed immediately with a personal visitation". This, in the submission of the Homeowner, suggested that some court or other formal body had given permission for a visit to the Homeowner to take place. The letter was signed by a Stewart McGregor. Underneath Stewart McGregor's signature were the words "European Corporate Litigation Division". The Homeowner took issue with the word "Litigation" which, he claimed, gave the false impression that Mr McGregor was a solicitor when, in fact, that was not the case.

The Factor submitted that the second complaint by the Homeowner was not against them but rather against LCM. All of the letters which the Homeowner was complaining about had been issued by LCM. Accordingly, the Factor submitted the Committee did not have jurisdiction to determine the matter. Even if the Committee did consider it had jurisdiction, the Factors submitted that the terms of the letters were neither misleading nor false in any event.

Decision
The Committee determined that the Factor had not breached this part of the Code.

The Committee did have a concern regarding the newsletter sent by the Factors to the Homeowner in or around November 2012. That newsletter stated that the Factor "had taken the decision to fully purchase the company to demonstrate our commitment to the Property Factors Code of Conduct by ensuring transparency in our relationship with this company". The words "fully purchased" were false and misleading in the sense that there had been no change in the shareholding or structure of PR24.

Mr Reid, for the Factor, submitted that he ought to have checked the wording of the newsletter and submitted it was simply an error on his part that he had to take responsibility for. It appeared to the Committee that the Factor had realised that with the advent of the Code, they would require to disclose that PR24 was a connected company and that this was a fact that may have been hitherto unknown by homeowners within the development. The Committee determined that it was a reasonable assumption, based on the wording of the newsletter, that the Factor did not wish to disclose that this relationship had been in place for several years and deliberately chose language in the newsletter that was designed to give the impression that the relationship was in some way a new or substantially different relationship and not a pre-existing and unchanged relationship.

However, the Committee noted that the newsletter had been issued in November 2012. The Factor had not been registered as a property factor under the Act until 7 December 2012. In terms of Section 14(5) of the Act it is registered property factors that must comply with the Code. At the time of the issue of the newsletter the Factor was not registered and, accordingly, the obligation on the Factor to comply with the Code was not yet in place. Accordingly, and whilst the Committee had significant reservations regarding the manner in which the Factor had made the notification about the relationship with PR24, the Committee determined it did not have the jurisdiction to determine this aspect of the complaint.

In relation to the three letters issued by LCM the Committee determined that there had been no breach by the Factor.

The Committee accepted the Factors submission that there had been no breach of 2.1 as the letters had been issued not by the Factors but by LCM. The Committee did note that there was a provision in 4.9 of the Code whereby the Factor did, however, have to take some element of responsibility for ensuring that third parties acting on their behalf in debt recovery did not act in an inappropriate manner. However, setting aside any question of jurisdiction, the Committee was, in any event, satisfied that the letters were not misleading or false.

The letters issued by LCM were, undoubtedly, robust in nature but, in the context of writing to a homeowner who was due in excess of £2,500 and had paid limited sums over several years, the Committee did not view them as excessive. The letters were not intimidating or threatening but simply direct and to the point.

The three specific items complained of in the letters by the Homeowner were, in the opinion of the Committee, spurious points. Whilst there was a box in one of the letters that said "Notice of Court Action" it was readily apparent to any reasonable person on reading the letter that no court action had yet been raised and that the phrase complained of merely highlighted that court action was in contemplation.

The sentence "authority had now been granted to proceed immediately with a personal visitation", given that it was written by LCM on behalf of the Factor, could, quite justifiably, be read as meaning that authority had been granted by the Factor to LCM to carry out that personal visitation.

Lastly, the fact that the letter had been signed by a person whose department was stated as being "European Corporate Litigation Division" did not necessarily give the reader the impression that the signatory was a solicitor when, in fact, that was not the case. The phrase simply indicated the department the writer worked in. Even if an assumption was erroneously made that the writer was a solicitor that assumption, of itself, did not make the letter inappropriate.

The Factor had submitted that as the Homeowner was a law student it would have been more apparent to him what the position was than the ordinary man in the street, given his knowledge of legal processes. The Committee did not think it was relevant to take into account the occupation or knowledge of a particular homeowner in assessing whether correspondence breached the Code or not. The Committee thought it appropriate to assess the letters on the basis of what an ordinary and

reasonable homeowner would take from them. The Committee was satisfied that whilst the letters were robust in nature and might benefit from some rewording in places, nonetheless the reasonable homeowner would understand the position as set out.

Accordingly, and setting aside any questions of jurisdiction, the Committee did not view the letters as a breach of 2.1 of the Code nor a breach of 4.9 of the Code.

Code of Conduct 2.2 - "You must not communicate with Homeowners in any way which is abusive or intimidating or which threatens them (apart from reasonable indication that you may take legal action)".

Submission
The Homeowner had not specifically highlighted this section in his original application but reference had been made to it in the submissions of the Factor and the Factor appeared to have no objection at the Hearing to this issue being considered. At the Hearing, the Homeowner did not make any submission to support the allegation that any of the Factor's communications were abusive or intimidating.

The Factor's submission was that the items which had originally been complained about were again issued by LCM rather than the Factor and therefore the Committee did not have jurisdiction. In any event the Factors submission was that the letters were not abusive or intimidating.

Decision
The Committee determined there had been no breach of Part 2.2 of the Code

For the reasons set out above in relation to 2.1 of the Code there was no correspondence which could be said to be abusive or intimidating. The Homeowner did not press this point at the Hearing and the Committee could see no justification for it.

Code of Conduct 2.5 – "You must respond to enquiries and complaints received by letter or email within a prompt timescale. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep Homeowners informed if you require additional time to respond. Your response time should be confirmed in this written statement."

Submission
The nub of the Homeowner's complaint was that he had written to the Factor on 16 March 2013 highlighting issues in relation to the charges levied against him. He had not received a substantive response until 29 April 2013.

The Factor accepted that this response time fell outwith the timescale referred to within their Debt Recovery Policy. The Factor's submission was that the Homeowner's arrears were being dealt with by employees of both LCM and the Factor and each had assumed that the other employee was to deal with a formal response. This, combined with holidays, had led to a delay in a formal response being sent to the Homeowner.

Decision
The Committee determined that there had been no breach of 2.5 of the Code.

The Homeowner did not make any meaningful submission in relation to this at the Hearing. Whilst it was accepted there had been a delay by the Factor in responding, a reasonable explanation as to why this had occurred had been given. The Committee accepted this explanation as genuine. The Committee's willingness to accept this explanation was fortified by the fact that the Factor had subsequently corresponded in a detailed and timely manner with the Homeowner. In particular, the Factor's letters of 29 April and 29 May both 2013 sought to answer in full and in reasonable terms the Homeowner's concerns. It was clear that the Factor had fully considered the matters complained of, made appropriate investigations and set out their reasoning in full. In the circumstances of this particular matter, the Committee was of the view that this aspect of the complaint was not material and, accordingly, determined that there had been no breach.

Code of Conduct 4.3 – "Any charges that you impose relating to late payment must not be unreasonable or excessive."

Submission
Although a ground of complaint in the Homeowner's application to the Panel, little submission was made by the Homeowner as to what additional charges he was objecting to. The Committee noted that two late payment charges of £33 had been added to the Homeowner's account by the Factor. These charges were in accordance with the debt recovery statement of the Factor as provided to the Committee and available on the Factor's website. The correspondence from LCM indicated that further late payment charges had been added to the Homeowner's account of £381.84. The Factors again submitted that the LCM charges fell outwith the jurisdiction of the Committee as the charges had been levied by LCM rather than the Factor. Even if the Committee did consider it had jurisdiction the Factor submitted that the charges were not unreasonable nor excessive. The Factor submitted that the charges imposed by LCM covered the costs incurred in recovery of the debt via correspondence, telephone calls, tracing fees, land register checks, etc. The Factor also submitted that whilst it may be the case that the LCM charges would be added to the Homeowner's account held by the Factor, the LCM charges had not yet been levied. The Factor provided an up to date statement of the Homeowner's account at the Hearing which confirmed this.

Decision
The Committee considered that there had been no breach of Part 4.3 of the Code.

In relation to the two late payment charges levied of £33 these were clearly set out within the Factor's debt recovery policy. It was also clearly set out within the Deed of Conditions relating to the Property that the Factor was obliged to endeavour to recover unpaid expenditure from non-paying proprietors on behalf of the other proprietors within the development and may do so in his own name.

The Deed of Conditions provided that the Factor could only apply unpaid expenditure to other proprietors within the development in such circumstances where, for example, the estate of the non-paying proprietor had been sequestrated or the non-paying proprietor could not be identified or found. In the view of the Committee, given that the whereabouts of the Homeowner was known and he was not sequestrated, the Factors were obliged to seek to recover any unpaid expenditure from the Homeowner as part of their obligation to manage the development. It followed from this that they were also entitled to apply any costs incurred in seeking to recover that unpaid expenditure to the Homeowner rather than bearing the costs themselves or distributing it amongst the other homeowners within the development.

The Committee noted that there were charges from LCM relating to £381.84. The Committee was satisfied that it did have jurisdiction to determine this point. Although the charges stemmed from LCM it was the Factor that took the decision as to whether they should be imposed on to the Homeowner's account. In any event, the Committee was of the view that the same situation applied. The Factors were obliged in terms of the Deed of Conditions to recover unpaid expenditure from the Homeowner. If costs were incurred in the process of chasing the unpaid expenditure then it was again appropriate that this be levied against the Homeowner. Ms Borthwick, as Finance Director of the Factor, explained in detail the debt recovery process that had been gone through and the costs that she understood LCM had incurred in doing so. The Committee found her to be a credible witness and, on the basis of her evidence, accepted that the charges imposed by both the Factor and LCM were reasonable. Accordingly, and notwithstanding any question of jurisdiction, the Committee was satisfied that there was no breach of the Code.

The Committee did note that the Factor's debt recovery policy would benefit from updating to set out more clearly that more significant debts may be put to third part debt collectors and that additional charges could be incurred as a result.

Code of Conduct 4.9 – "When contacting debtors, you or any third party acting on your behalf, must not act in an intimidating manner or threaten (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position."

Submission
The Homeowner did not take issue with the first sentence of 4.9 of the Code but was of the view that the second sentence had been breached. The Homeowner alleged that in a telephone conversation with an employee of LCM it had been asserted to the Homeowner that factors fees, "like council tax were "primary debts" that ranked ahead of ordinary debts". That was not the case and factor's fees were simply ordinary debts that received no preferential ranking

Again, the Factor submitted that the complaint was not against it but against LCM and ought, therefore, to be dismissed. Even if the Committee felt it had jurisdiction it had made its own investigations into this claim and could not find any evidence of this statement having been made.

Decision
The Committee determined that the Factor had not breached this provision of the Code.

The Committee did not accept the Factor's submission that as the alleged phone call had been carried out by LCM that it fell outwith the jurisdiction of the Committee. It was clear from 4.9 of the Code that factors had a responsibility to ensure that third parties acted appropriately when acting on a factor's behalf. Accordingly the Committee was satisfied that it did have jurisdiction.

Having heard the evidence of the Factors and in particular Ms Borthwick, the Committee was satisfied that, on the balance of probabilities, no misrepresentation had been made. Ms Borthwick, appeared to the Committee to be a credible and reliable witness. The Committee was satisfied with her explanation that she had carried out an investigation alongside LCM to ascertain whether any misrepresentation had taken place. She had uncovered no evidence of this. It was difficult for the Committee to make a meaningful decision in this matter where the subject of the complaint was a private phone call between two opposing parties but, on balance, was prepared to accept the Factor's submission.

Code of Conduct 6.7 and 6.8

6.7 **"You must disclose to Homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you."**

6.8 **"You must disclose to Homeowners, in writing, any financial or other interests that you have with any contractors appointed."**

Submission
The Homeowner submitted that there had been a breach of these provisions by the Factor in that they had failed to properly disclose the relationship between themselves and PR24. The newsletter of November 2012 was misleading.

The Factor submitted that the appointment of PR24 had been done prior to the Code coming into force and was, therefore, outwith the jurisdiction of the Committee. If the Committee was to consider it had jurisdiction the Factor submitted that the relationship between the Factor and PR24 had been disclosed and that, in any event, no commission, fee or other payment had been received by the Factors in terms of Code 6.7 and accordingly there was nothing to disclose.

Decision
The Committee found that the Factor had not breached parts 6.7 and 6.8 of the Code.

In relation to part 6.7 of the Code the Committee accepted the Factors submission that no commission, fee or other payment had been received by the Factors from PR24 and therefore there was no arrangement in place that would fall foul of the provisions of 6.7. There was simply nothing for them to disclose. The Committee found the representatives of the Factor to be both credible and reliable in this particular regard and the Committee was prepared to accept their submission.

In relation to part 6.8 of the Code the Committee determined that it did have jurisdiction to deal with this matter. PR24 remained one of the Factor's preferred providers for maintenance works. Given there was this ongoing relationship between PR24 and the Factor there was an obligation on the Factor to make disclosure of its interest in PR24.

Although the Committee was satisfied that they did have jurisdiction they were also satisfied that the Factor had complied with the requirements of part 6.8 of the Code. In the context of part 2.1 of the Code the Committee would, but for the jurisdictional issue, have found the newsletter to be false and misleading and a breach of the Code. In the context of 6.8 however, whilst the newsletter was been misleading in relation to the previous existing history between the two companies it was accurate in setting out current position i.e. that the Factor had an interest in PR24 and this was therefore sufficient for the purposes of 6.8 of the Code.. Although the Factor had notified homeowners of the interest in PR24 in a poor fashion and, in the view of the Committee, in an inappropriate document for that purpose, nonetheless it was clear to homeowners that the Factor had a current interest in PR24.

For the benefit of the Factor, the Committee was of the view that the appropriate place to disclose such an interest would be in the statement of service rather than an informal newsletter. The Committee would think it appropriate for the Factor to amend their statement of service and to properly notify homeowners going forward. This was, however, a matter for the Factor.

Breach of Property Factors Duties

Submission
The Homeowner alleged that the Factor had breached a fiduciary duty owed by the Factor to all homeowners within the development. This was in the context of the fact that the Factor had employed PR24 to carry out stairwell carpet cleaning within the development in July 2012 when the Factor had, at that time, an undisclosed interest in PR24. The fact that PR24 had won the contract to clean the stairwell contracts on a competitive tendering basis was irrelevant as was the fact that the homeowner's benefited from the work being done at the lowest price and had suffered no loss.

The Homeowner submitted that where a fiduciary duty to the proprietors was owed then it was immaterial whether the Factor's conduct as agent resulted in a loss or a gain to the homeowners within the development. The Homeowner relied on the dictum of Lord Russell of Killowen in Regal Hastings –v- Gulliver (1967) 2 A.C. 134 at pages 144-145 in this regard.

The Homeowner accepted that it may be possible for a factor to have an interest in a related company that is appointed to carry out works in a development but only where informed consent has been given by a homeowner. If a full disclosure is not made and no consent is obtained then the remedy is for the repayment of any commissions earned by a factor. Given the only disclosure of the relationship between the Factor and PR24 had come via the newsletter of November 2012 there could, therefore, be no question of informed consent having been granted in July 2012 when the contract was awarded. Such information as had been given post-dated the appointment of PR24.

The Homeowner also relied on the provisions of Bowstead & Reynolds on Agency 18th Edition and the cases of Bristol & West Building Society –v- Mathew [1998] Ch 1 and Aberdeen Railway Company –v- Blaikie Brothers (1854) 1 Macq 461.

The Factor submitted that the complaint against them was in relation to an alleged breach of property factor's duties that occurred prior to the Act coming into force. Accordingly the matter was outwith the jurisdiction of the Committee and ought to be dismissed. Even if the Committee did consider it had jurisdiction to consider the complaint, the Factor submitted that it had not breached any duties to the applicant. The quote provided by PR24 was the most competitive provided and was to the benefit of the proprietors of the development at large and to the applicant. The Factor also made reference to an earlier decision of the HOHP (Dafydd McIntosh –v- Collinswell Land Management Limited) in which it was submitted it was accepted by that Committee that a property factor could employ their own staff without putting work out to tender.

The Factor also submitted that there had not been a breach of any fiduciary duty and indeed that no such duty was owed. The Factor had been appointed by the developers and therefore did not view themselves as an agent of the Homeowner. At best they might be viewed as agents for all the

homeowners within the development as a group. The Factor had liaised with the Homeowners Association and they had been aware of the connection between the Factor and PR24 and had had no objection.

Breach of Property Factor's Duties

Decision
The Committee determined that they did not have jurisdiction to determine the question of whether the Factors had failed to carry out property factor's duties arising as a result of a breach of the fiduciary duty owed to all homeowners within the development.

It became apparent to the Committee during the course of the Hearing that the contract complained of between the Factors and PR24 was not an ongoing contract.

It had appeared, from a first reading of the papers, that PR24 had been contracted in July 2012 to provide an ongoing service in relation to carpet cleaning within the development. However, it was apparent from the submission of the Factors that this was, in fact, a single job that was contracted for. PR24 had been employed to do a single clean of the carpets in the common stairwells. This had been carried out in July 2012. Such work was done on a sporadic basis and, according to the submission of the Factors, would only again be carried out when required. When it was required another tender would be issued and a contractor selected as a result of that process.

Accordingly, it appeared to the Committee that when in July 2012 the cleaning works had been undertaken that particular contract terminated shortly thereafter. The contract was not ongoing and therefore was not in place when both the Act and the Code came into force. Given the breach occurred prior to this and was not ongoing then the Committee did not see that they could have any jurisdiction in the matter.

The Committee did note with interest the submissions of the Homeowner in relation to fiduciary duties owed by agents to a principal, which were not without merit. The Committee would, however, in all likelihood, have accepted the Homeowner's submission that the relationship between the homeowners within the development and the Factor was one of principal and agent.

If it had been established that the relationship between Homeowner and Factor was one of principal and agent then the Committee would have accepted that the fiduciary duty owed to homeowners was a strict one and that a factor would not be allowed to make a secret commission or profit by employing a party to whom he had a connection with or receiving a payment from a third party without first having informed the homeowners of this. This principle of common law would seem to be reflected in the provisions of the Code of Conduct 6.7 and 6.8. Whilst the Factors had notified the homeowners of the relationship between the Factors and PR24 they had done so in a misleading fashion as set out in the comments regarding 2.1 of the Code above. The newsletter post-dated the appointment of PR24 in any event. Notwithstanding that the Factors had carried out a proper tendering exercise and even taking into account the fact that PR24 had been the cheapest quote this did not necessarily mean that there would not have been a breach of the fiduciary duty. The Committee did note that the normal remedy at common law in this situation is a repayment of commission earned. However, on the basis that the Committee did not have jurisdiction, no decision on this point required to be made.

Summary of Decision
The Committee determined that the Factor had not breached any of the sections of the Code of Conduct alleged by the Homeowner nor had they breached the property factor's duties as defined in the Act. Accordingly, no further orders or directions were required by the Committee and the matter was considered to be at an end.

Right of Appeal
The parties attention is drawn to the terms of Section 21 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 the decision of a Homeowner Housing Panel or a Homeowner Housing Committee;

(2) an appeal under sub-section (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made.....".

Ewan Miller

Signed ..... Date 10/10/13
Chairperson