



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

Hohp ref: HOHP/PF/15/0013

Re: 5 Mortimer Drive, Monifieth, Dundee DD5 4JF (the property)

The Parties:

Mr Douglas McBride, 5 Mortimer Drive, Monifieth, Dundee DD5 4JF (the homeowner)

H and H Properties UK Ltd, 71 Blackness Road, Dundee DD1 5PD (the property 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:** Sarah O'Neill (Chairperson), Elaine Munroe (Housing member), Michael Scott (Housing member)

**Decision of the committee**

The committee determines that the property factor has failed to comply with its duties under section 14 of the Property Factors (Scotland) Act 2011 in respect of sections 1, 1.1a D (m), 2.5, 3, 3.3 and 5.2 of the code of conduct for property factors ('the code').

The factor has **not** failed to comply with its duties under section 14 of the Act in respect of sections 2.1, 2.2, 3.4, 3.5a, 5.3, 5.6, 5.7, 6.1, 6.3, 7.1 and 7.2 of the code.

The committee also determines that the property factor has not failed to carry out its property factor's duties as defined in section 17 (5) of the Act.

The committee's decision is unanimous.

**Background**

1. By application dated 5 February 2015, the homeowner applied to the Homeowner Housing Panel ('the panel') to determine whether the property factor had failed to comply with its duties under the Property Factors (Scotland) Act 2011. In his application form, the homeowner complained that the factor had failed to comply with various subsections of sections 1 (written

statement of services); 2 (communications and consultation); 3 (financial obligations); 5 (insurance); 6 (carrying out repairs and maintenance); and 7 (complaints resolution) of the code of conduct for property factors ('the code'). He also complained that the factor had failed to carry out the property factor's duties as defined in section 17(5) of the Act. He enclosed with his application form copies of the following:

- a lengthy covering letter setting out his complaints in more detail.
  - two notification letters to the property factor dated 5 and 13 January 2015, setting out the reasons why he believed it had failed to comply with the code. In the first of these letters, he alleged that there had been a failure to comply with sections 1, 2.1, 2.2, 2.3, 2.4, 2.5, 3.3, 4.4, 4.6, 4.7, 5, 6, 7.1 and 7.2 of the code. In the second letter, he also cited section 3.5a, 3.6a, 4.1, 5.2, 5.6, 5.7, 6.3, 6.6, 6.7, 6.8 and 7.4 of the code.
  - a notification letter to the property factor dated 16 January 2015, setting out the reasons why he believed it had failed to comply with its property factor's duties.
  - Letter from the property factor dated 13 January 2015 and a second letter (undated), both sent in response to the homeowner's various notification letters.
  - The property factor's Written Statement of Services.
  - The Deed of Conditions for the development within which the property is situated.
  - The land certificate in respect of the property.
  - Various correspondence between the homeowner and the factor dated between November 2012 and November 2014.
  - Various documents relating to the homeowner's purchase of the property in 2012.
2. The homeowner then wrote to the panel on 5 March 2015, advising that he wished to 'clarify and update' the sections of the code under which he wished to complain. This letter advised that he now wished to make complaints under the following sections of the code: 1, 1.1a, 2.1, 2.2, 2.5, 3.3, 3.5a, 5.2, 5.3, 5.6, 5.7, 6, 6.1, 6.3, 7, 7.1 and 7.2. He enclosed a copy of a letter of the same date to the property factor, notifying that he wished to complain under these sections of the code. In his letter, he also included further information about some of his complaints following a meeting between homeowners and the property factor on 26 February. He also enclosed a copy of a previous notification letter he had sent to the property factor on 16 January, setting out the reasons why he believed it had failed to comply with its duties under the code, which he had omitted to include with his initial application. This letter cited the same sections of the code as the notification letter of 5 January, with the addition of section 1.1a.



3. On 26 March 2015, the President of the Panel issued a minute of decision to both parties, stating that she considered that in terms of section 18(3) of the Act there was no longer a reasonable prospect of the dispute being resolved at a later date; that she had considered the application paperwork submitted by the homeowner, comprising documents received in the period of 6 February to 26 March 2015; and intimating her decision to refer the application to a panel committee for determination. On 27 March 2015, the President of the panel issued a notice of referral to both parties, requesting written representations by 17 April 2015. No written representations were received from either party.
4. On 11 May, the committee issued a Direction to the parties advising that it would consider the following issues at the hearing on 9 June 2015:
  - Whether the property factor had failed to comply with the sections of the code of conduct for property factors set out in the homeowner's letter to the property factor dated 5 March 2015, namely sections 1, 1.1a, 2.1, 2.2, 2.5, 3.3, 3.5a, 5.2, 5.3, 5.6, 5.7, 6.1, 6.3, 7.1 and 7.2.
  - The alleged failure by the property factor to carry out the property factor's duties as set out in the homeowner's initial application form received on 6 February 2015 together with enclosures, and in the homeowner's letter of notification to the property factor with regard to property factor's duties dated 16 January 2015.

The parties were invited to submit written representations to the committee regarding the direction by 1 June 2015. No representations were submitted by the property factor. A letter dated 22 May was received from the homeowner, advising that, further to the meeting with the property factor on 26 February, he now wished to reintroduce his complaints under sections 6.1, 6.3, 6.5, 6.7, 7 and 7.4, as he felt this was necessary to ensure full and fair consideration at the hearing.

5. On 15 May, a further letter dated 11 May was received from the homeowner advising that, following the meeting with the property factor on 26 February, he now wished to add complaints under sections 3 and 3.4 of the code. He also included further representations with regard to his existing complaints under sections 3.3 and 3.5a of the code. He enclosed a copy of a letter addressed to the property factor dated 28 April 2015, together with a large quantity of further paperwork, including correspondence with the property factor, bank statements, factoring invoices and communal electricity bills.
6. On 27 May, a further letter dated 24 May was received from the homeowner, together with further documentation, in relation to his complaints regarding the property factor's accounts for 2011-12.

7. On 29 May, the committee issued a second direction, notifying the property factor of its intention to treat the homeowner's written submission of 11 May 2015 as a request to amend his application to add complaints under sections 3 and 3.4 of the code. The committee invited the property factor to:

- 1) submit any written representations it may wish to make to the committee on the content of the said submission by the homeowner, including the amendments requested by the homeowner.
- 2) submit any other motion(s) the property factor may wish to make to the committee with regard to the homeowner's submissions and the proposed amendments.
- 3) lodge any documents it wished the committee to consider at the hearing on 9 June 2015 with regard to the homeowner's submissions and the proposed amendments.

to be received by the committee no later than 7 days from the date of receipt of the direction. No written representations were received from either party.

8. On 1 June, a further letter dated 29 May was received from the homeowner, intimating a new complaint under sections 2.1 and 2.2 of the code, again in relation to the accounts for 2011-12, together with enclosed correspondence.

### **The hearing**

9. A hearing took place before the committee on 9 June 2015 at the Dalhousie Building, University of Dundee, Hunter Street, Dundee DD1 5EN. The homeowner appeared and gave evidence on his own behalf. He was accompanied by his wife, Mrs Sheila McBride. He called no witnesses. Four of his current and past neighbours were also present as observers. The factor was represented by Mr Hassan Al-Saffar, Managing Director, Ms Alison McKelvie, Letting Coordinator and George Godsman, Financial Consultant, who all gave evidence on its behalf. The factor also called two witnesses to give evidence on its behalf: Mr Barry Taylor, a sub-contractor from Care Electrical, and Mr Razak Abdul, handyman operative. Mr Taylor gave evidence on behalf of the factor, but in the event Mr Abdul was not called to give evidence.

### **Preliminary issues**

10. The committee considered a number of preliminary issues prior to the hearing. Firstly, the homeowner stated that he had not been made aware that the factor wished to call witnesses to give evidence, and that had he known this, he might have brought his own witnesses. Secondly, the committee asked the homeowner to confirm the capacity in which his wife and four neighbours / former neighbours were attending the hearing. He advised that



they were present as observers and would not be giving evidence as witnesses. The committee also considered whether to 1) accept the homeowner's application to amend his application to include sections 3 and 3.4 of the code; 2) accept the further complaints raised in the homeowner's letter of 22 May; 3) consider the documentation which accompanied the homeowner's letter of 24 May; and 4) accept the homeowner's application to amend his application to include new complaints under sections 2.1 and 2.2 of the code, as set out in his letter of 29 May.

11. After hearing the parties' submissions on these preliminary issues, the committee adjourned to determine these. The committee determined that :

- 1) the property factor would be permitted to call its two witnesses in due course. The property factor had written to the panel on 21 May, with a list of names of those who would be present at the hearing. The five names consisted of those of the three representatives and the two further witnesses mentioned above. The property factor had therefore complied with the requirements of regulation 12 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012, which requires parties to send a list of witnesses no later than 7 days prior to the hearing. On checking with the panel offices, the committee was satisfied that the letter of 21 May had been sent to the homeowner by first class post on 28 May. In any case, the committee took the view that the witnesses' testimony may be helpful to it in reaching its determination.
- 2) the amendment requested by the homeowner to add complaints under sections 3 and 3.4 of the code should be allowed. No written representations had been received from the property factor, and the property factor did not indicate any objection to this at the hearing.
- 3) the further complaints raised by the homeowner in his letter of 22 May could not be heard by the committee, as insufficient notice of these had been given to the property factor and the committee, and the homeowner when asked had indicated that the issues raised were new issues not included in his initial application.
- 4) it would consider the documentation accompanying the homeowner's letter of 24 May, as this appeared to relate to complaints made and notified in the original application, and there was no objection to this from the property factor.
- 5) the further complaints raised by the homeowner in his letter of 29 May could not be heard by the committee, as insufficient notice of these had been given to the property factor and the committee, and these appeared

to be new issues not included in his initial application. The property factor had also objected to the inclusion of these complaints.

The chairperson explained to the homeowner that while the committee would not deal with the complaints discussed at 3) and 5) above, it was open to the homeowner to make a new application to the panel about these matters, should the parties be unable to find a solution themselves.

### Findings in fact

12. The committee finds the following facts to be established:

- a) The homeowner and his wife, Mrs Sheila McBride, are the owners of 5 Mortimer Drive, Monifieth, Dundee DD5 4JF. The property is a ground floor flat within a development known as Milton Mill'. There are 17 flats within the development, comprising three blocks: Blocks A, C and D. The homeowner's property is situated within Block D.
- b) The property is registered in the Land Register for the county of Angus under title number ANG59937. The homeowner and his wife took entry to the property on 29 June 2012.
- c) H and H Properties (UK) Limited is both the developer and the current property factor for the development. It was appointed as 'First Manager' responsible for *'instructing and supervising the repairs, maintenance or renewal of the Common Parts and Development Common Property and for arranging buildings insurance for the Blocks (excluding the Retail Units) and apportioning the costs thereof among the Owners of the Units in accordance with the provisions of these Presents'* under the Deed of Conditions by H and H Properties (UK) Limited registered on 1 September 2011. This appointment was for the period of five years from the date of registration of the said deed or until the developer no longer owns any plot or flat in the development, whichever is the shorter period. The homeowner's land certificate appears to show, however, that the relevant clause (Clause 6) of the Deed was later amended to substitute the word 'longer' where the word 'shorter' had previously appeared.
- d) The property factor's contractual duties in relation to the management and maintenance of the 'common parts' and the 'development common property' within the development are set out in:
  - i. the said Deed of Conditions
  - ii. the property factor's written statement of services applicable to the development, sent to the homeowner in January 2015
- e) H and H Properties (UK) Limited became a registered property factor on 12 November 2012. Its duty under section 14 (5) of the Act to comply with the code arose from that date.



### **The complaints made by the homeowner**

13. The homeowner made a considerable number of complaints about the property factor. Some were not dealt with by the committee for the reasons set out earlier in this decision. The complaints which the committee considered at the hearing are set out below.
14. The chairperson explained that the committee had already read the considerable documentation submitted by the homeowner, and that it was therefore not necessary to go over every point in detail. She asked the homeowner to explain to the committee what his main complaints were. Given the number of complaints before it, the committee went through each complaint in turn, first asking the homeowner to explain the substance of his complaint and then providing an opportunity to the property factor to respond on each point before moving on to the next one.

#### **1. Code complaints**

15. The committee considered the homeowner's complaints under the following sections of the code of conduct: 1, 1.1a, 2.1, 2.2, 2.5, 3, 3.3, 3.4, 3.5a, 5.2, 5.3, 5.6, 5.7, 6.1, 6.3, 7.1 and 7.2.
16. **Section 1** – the homeowner complained that, despite numerous requests to the property factor, he had not received a copy of its written statement of services until 14 January 2015, which was out with the required timescale set out in section 1. As he was an existing homeowner at the time of the factor's registration, the relevant paragraph of section 1 states:

*You must provide the written statement:*

- *to existing homeowners within one year of initial registration as a property factor. However, you must supply the written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies).*
17. **Section 1.1a:** this section sets out the various items which should be set out in a written statement of services (for situations, such as this one, where the land is owned by the group of homeowners). The homeowner's complaint under this heading essentially stemmed from the fact that he had not received the written statement of services until January 2015. He told the committee that as a direct result of the property factor's failure to provide the written statement of services, he had not been supplied with the information set out in section 1.1a. Some of his other code complaints also stem from

this failure to provide the written statement of services an earlier date, as discussed later in this decision.

**Section 2.1:** *You must not provide information which is misleading or false.*

18. The homeowner made two complaints under this section of the code. The first related to an email dated 29 May 2014 from Ms McKelvie to the homeowner regarding the erection of 'residents' only parking signs' within the development, which he and some other homeowners had requested. In this email, she had stated that when the road was adopted by the local authority, these signs would in any case have to be removed as it was illegal to display these. He had then contacted the local council, which had confirmed that this was not the case.
19. Secondly, he complained that the factor had failed to disclose changes to a legal document, which constituted false and misleading information. He stated that the wording of the original Deed of Conditions, which was sent to him via his solicitor prior to his purchase, had later been amended without his knowledge. The original Deed of Conditions, which was registered on 1 September 2011, stated in clause 6 that the developer was appointed as 'first manager' for the development for a period of five years from the date of registration of the Deed or until the developer no longer owns any plot or flat in the development, whichever is the shorter period. The homeowner's land certificate, updated to 11 July 2012, substitutes the word 'longer' where 'shorter' previously appeared. The homeowner argued that this change was beneficial to the developer and detrimental to homeowners, and constituted false and misleading information to homeowners.

**Section 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).*

20. The homeowner made three complaints under this section. The first related to an email from H and H Properties in connection with the painting of his allocated parking space with a disabled symbol, which he argued was intimidating. The second related to a conversation between Mr Al-Saffar and a trading standards officer who had called him on the homeowner's behalf to discuss the delay in the painting of his parking space. The homeowner alleged that Mr Al-Saffar had conducted himself in an abusive and intimidating manner towards the officer, and that he believed that as she was acting on his behalf, this could constitute a breach of section 2.2.
21. The third complaint related to a letter sent to the homeowner by the property factor's solicitor, Joanne Smith of Commercial Legal Centre solicitors, dated 24 November 2014. This was in response to a letter sent by the homeowner



to the property factor advising that he and a number of other homeowners had formed a 'residents' association' (of which he had been appointed secretary) and asking for a variety of documentation. The homeowner alleged that this letter made accusations of actions which he was alleged to have carried out, which were completely untrue and without foundation. He said that he found these to be intimidating, threatening, hurtful and to cast aspersions upon his character. He was further upset because the letter had later been distributed to other homeowners in the development.

**Section 2.5:** *You must respond to enquiries and complaints received by letter or email within prompt timescales. 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 times should be confirmed in the written statement (Section 1 refers).*

22. The homeowner complained that on a number of occasions, the property factor had either failed to respond to his enquiries at all, or that there had been a delay in replying to him. In some instances, he said that he had had to write several times in order to get a response. He also complained that the property factor had not provided its response times to him.

**Section 3:** the homeowner's complaint relates to the opening statement in this section, which states:

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

*The overriding objectives of this section are:*

- *Protection of homeowner's funds*
- *Clarity and transparency in all accounting procedures*
- *Ability to make a clear distinction between homeowners' funds and a property factor's funds*

23. While he had submitted a large amount of paperwork in connection with this section of the code, the main thrust of the homeowner's complaint was that the property factor had produced inaccurate and unclear financial accounts to the homeowners within the development. He told the committee that he had difficulty in understanding these, due to the way they were presented. He said that the accounts provided to homeowners had been inaccurate, and received late. The accounts for the financial year 2011-12 had not been received until January 2013. An account for 2012-13 had not been sent out on time, and, following several requests, had not been received by the homeowner.

24. On 29 October 2014, the homeowner had written to the property factor on behalf of 14 of the 17 owners within the development, requesting full and detailed accounts for the financial years 2011-2012, 2012-13, and 2013-14. He had finally received accounts for 2012-13 in January 2014, but said that these were unclear, confusing and lacking in information. He still had not received the accounts for 2013-14. At a meeting between homeowners and the property factor at the latter's offices on 26 February 2015, Ms McKelvie and Mr Godman admitted that mistakes had been made in the previous accounts, and that they would need to be completely reviewed and re-calculated. They had requested a further month to 'reconstitute' the accounts and send these to homeowners. The homeowner had received these 'reconstituted' accounts, but was still not satisfied that these were accurate.

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

25. This complaint is closely related to the previous complaint under section 3. The homeowner complained that the factor had not provided to him an accurate annual detailed financial breakdown of charges made, or a description of the activities or works carried out for which these charges had been made. He said that he should by now have been sent three sets of accounts, but that he had only received the first two of these, which had arrived late and contained inaccuracies.

**Section 3.4:** *You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).*

26. The substance of this complaint was not set out clearly in the homeowner's letter to the panel of 11 May, but the homeowner indicated at the hearing that it concerned a complaint he had made to the property factor about an overpayment he had made regarding his insurance premium. He had paid £180 for his insurance for the year 2013-14, but the eventual premium charged was only £131.16. Ms McKelvie had confirmed that there remained a credit balance of £48.83 on his account, as the property factor had not known what the exact premium for the year would be in advance. Ms McKelvie had stated in an (undated) letter to the homeowner that the premium would be carried forward into 2014-15, but that this could be refunded earlier if he



wished. The homeowner's complaint was that he had asked for this money to be refunded in January 2015, but it had not yet been refunded to him.

**Section 3.5a:** *[if you are a private sector property factor] homeowner's floating funds must be held in a separate account from your own funds. This can be either one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners.*

27. The homeowner's complaint appeared to be based on an interpretation of the wording of section 3.5a as meaning that a property factor must have a separate account for homeowners' floating funds only, and that any other funds relating to payments made by homeowners in respect of the development should be kept in yet another separate account. He accepted that the property factor had demonstrated to him that it had a separate bank account for funds which it held on behalf of homeowners. Part of his dissatisfaction appeared to stem from the name of the bank account - 'H & H Properties UK Ltd - Milton Mill Owners' Association' - which he felt was misleading and confusing, and wrongly suggested that a formal owners' association for the development had been established.

**Section 5.2:** *You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details may be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this.*

28. The homeowner complained that the insurance charges he was paying to the property factor were unclear, and that the money which he was paying did not match the statements received from the insurance broker. He said that he had been given three different figures for the premium for 2011-12, and that he still did not understand the figures he had been given.

**Section 5.3:** *You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance provider. You must disclose any other charge you make for providing the insurance.*

29. The homeowner complained that there was a discrepancy between the annual sum he paid to the property factor in respect of his insurance premium and the amount paid out by the property factor for the insurance premium. He had reached the conclusion that the discrepancy must be accounted for by some form of undisclosed commission payment taken by the property factor.

**Section 5.6:** *On request, you must be able to show how and why how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes.*

30. The homeowner confirmed to the committee at the hearing that he did not wish to pursue this complaint.

**Section 5.7:** *If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request. If a paper or electronic copy is requested, you may make a reasonable charge for providing this, subject to notifying the homeowner of this charge in advance.*

31. The homeowner confirmed to the committee at the hearing that he did not wish to pursue this complaint.

**Section 6.1:** *You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.*

32. The homeowner's original complaint under this section was a result of the property factor's failure to provide the written statement of services within the stipulated timescale. He argued that as a result of this, he did not know whether the property factor had such procedures in place. He acknowledged, however, that such procedures were now in place, as set out in the written statement.

**Section 6.3:** *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.*

33. The homeowner complained that he had asked for this information in relation to any contractors who had been appointed by the property factor, but had not received this.

**Section 7.1:** *You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.*

**Section 7.2:** *When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with*



*senior management before the applicant is notified in writing. The letter should also provide details of how the homeowner may apply to the homeowner housing panel.*

34. The homeowner's original complaint under these two sections was again a result of the property factor's failure to provide the written statement of services within the stipulated timescale. He argued that as a result of this, he did not know whether the property factor had such procedures in place. He acknowledged that a complaints procedure is now in place, as set out in the written statement of services.

## **2. Duties complaints**

35. The homeowner made a number of complaints about a failure to carry out the property factor's duties, as set out below. He did not clearly state the source of the duties which he was relying on in relation to these in his application, but most of the complaints were about matters which he had already complained about with regard to the code.

### **1. No communication/undue delay-** there were a number of complaints under this broad heading, as follows:

- i. Failure to respond to request for accounts
- ii. Failure to respond to request for written statement of services
- iii. Failure to respond to request for buildings insurance details
- iv. Failure to respond to requests for a retraction regarding a letter from the property factor's solicitor
- v. Failure to repair a security light outside the homeowner's property
- vi. Undue delay in the replacement of a light bulb outside an entrance door.

36. Complaints i –iv above concern similar issues to those complained about under sections 1, 2.5 and 3 of the code, as discussed above in more detail. Complaints v. and vi, however, concerned new issues which were not covered by any of the code complaints.

37. Complaint v concerned a complaint made by the homeowner to the property factor on 26 October 2014 that two security lights outside his flat were not working. He said that one of the lights was fixed fairly promptly, but that the other light had not been fixed. He stated that this light provided security lighting during the night, and that as a disabled and vulnerable person, the fact that it was not operating was causing him stress and concern, and made him feel vulnerable.

38. Complaint vi -the homeowner said that he had first complained that a light bulb outside the entrance to his flat had gone out on 15 January 2014; that the bulb had not been replaced until the end of June 2014; and that there had been no communication from the property factor regarding progress.

**2. Delay in carrying out works to paint disabled symbol on the homeowner's allocated parking space**

**3. Delay in providing and erecting private parking signs**

**4. Altering wording in a legal document at a later date, without notification**

39. Each of these complaints concerns similar issues with regard to these matters to those complained about under sections 2.1 and 2.2 of the code, as discussed in more detail earlier in this decision. Complaint 4 above related to the alleged amendment of the Deed of Conditions by the property factor.

**5. Failure to provide clarity and transparency in all accounting procedures**

40. This complaint essentially covers the same ground as the homeowner's complaint under section 3 of the code, as discussed in more detail earlier in this decision.

41. The homeowner had also included a complaint in his initial application headed 'Unfair charges due to failure of duties'. This related to a statement in Section 4 of the written statement of services that the property factor would charge a management fee of £150 plus VAT per flat property per annum. This complaint appeared to have arisen due to a misunderstanding by the homeowner, who thought that this fee was to be charged over and above the £65 per month monthly maintenance charge which he was paying to the property factor. It was clear from the correspondence that the management fee was in fact included within the £65 per month figure, and the written evidence indicated to the committee that the homeowner had accepted this. He did not raise this complaint at the hearing, and it was not therefore considered by the committee.

## **Statement of reasons for decision**

### **1. Code complaints**

42. **Section 1:** it was not disputed by the property factor's representatives that it had failed to provide the homeowner with a copy of its written statement of



services until January 2015. As the homeowner was an existing homeowner at the time the code of conduct came into force, he should have been provided with this within one year of the property factor's registration i.e. by 12 November 2013. At the hearing, Mr Godsman stated that the delay had been due to personnel issues which had now been rectified. He also stated that although the statement had not been issued earlier, the property factor had carried out its factoring duties throughout. Whatever reasons may have been behind the failure, and while the homeowner now has a copy of the written statement, the committee determines that the property factor failed to comply with section 1 of the code.

43. **Section 1.1a:** while the committee understands the homeowner's frustration at the property factor's failure to provide the written statement timeously, it does not accept his argument that this directly resulted in a breach of section 1.1a. The committee does not consider that section 1.1a can be breached in its entirety, unless a written statement of services is produced which does not contain any of the information set out in that section. With one exception, as discussed below, the committee considers that the homeowner's complaint in this regard is sufficiently addressed by the finding of a failure to comply with section 1.
44. The committee does, however, consider that part of the homeowner's complaint under section 2.5 relates to a matter which falls within section 1.1a, namely section 1.1a D (m). This states that the written statement of services must set out the timescales within which the property factor will respond to enquiries and complaints received by letter or email. As further discussed below with regard to the section 2.5 complaint, the property factor's written statement of services does not include this information. The committee therefore determines that the property factor has failed to comply with section 1.1a D (m).
45. **Section 2.1:** while the committee accepts that the email from Ms McKelvie could be considered false and misleading, it also accepts the property factor's argument that the installation of parking signs is a developer issue, rather than a factoring issue. Such signs are not referred to in the definitions of 'common property' or 'development common property' in the Deed of Conditions or in the written statement of services. There could not therefore be a failure under the code of conduct in this respect.
46. In relation to the homeowner's second complaint under this section, again the committee determined that any changes made to the Deed of Conditions which may have been made by H and H Properties Ltd were not a matter for the committee or the code of conduct. This clearly relates to the company's role as a developer rather than as a property factor, and while there may be

other possible avenues of recourse available to the homeowner, such as the Lands Tribunal for Scotland, this is outwith the panel's jurisdiction.

47. **Section 2.2:** As regards the first two complaints under this section, it is clear from the land certificate for the property that the homeowner's allocated parking space is owned by him, and is not common property. Mr Al-Saffar advised the committee that while he had agreed to paint the parking space (and indeed to swap another more convenient parking space for that originally allocated to the homeowner) as a goodwill gesture, there was no obligation on him as a developer to do so. The committee takes the view that the painting of the homeowner's parking space is a developer issue rather than a factoring issue, and that it cannot therefore consider these complaints.
48. With regard to the third complaint under this section, the committee determines that the letter referred to was not abusive or intimidating. Mr Godsman denied that the letter contained any accusations against the homeowner. He told the committee that the reason the letter was sent out was because the property factor had been receiving complaints from sub-contractors that homeowners had been carrying out works themselves, such as gardening and spraying weed killer in landscaped common areas, which are the responsibility of the property factor under the Deed of Conditions.
49. The committee notes that the letter states that the property factor is responsible for factoring the development, and that the owners have no power to call meetings and make decisions relating to the common parts of the development until the time when the developer's appointment as factor comes to an end in terms of the Deed of Conditions. It states that the factor 'requests' that the homeowner refrain from giving instructions to tradesmen appointed by it, and from encouraging other residents to carry out gardening works on common property. It then states that the factor is under no obligation to accept instructions from the residents' association and that any individual proprietor can raise any repair or maintenance matter requiring attention with the factor.
50. Having carefully considered the terms of the letter, the committee considers that the letter is factual, clearly sets out the legal position and is written in a measured tone. While it accepts that the homeowner was unhappy that the factor then sent the letter to other owners, it notes that his original letter was signed by him as Secretary to the 'Resident's association', and that it may therefore have been copied to other members of the association for their information. The committee does not consider the letter to be abusive or intimidating and therefore does not uphold this complaint.
51. **Section 2.5:** While the property factor's representatives stated at the hearing that it usually responded within the appropriate timescale, they admitted that



on some occasions they had failed to respond, including the homeowner's requests for a written statement of services and for the development accounts. Ms McKelvie admitted that the property factor does not monitor the timescales within which responses are sent out.

52. The committee also noted that the factor's written statement of services does not clearly set out its response times, as required by both section 2.5 and section 1.1a D (m). On questioning the property factor's representatives about this, it became apparent that they were confusing the timescales for repairs set out in Schedule Part 3 to their written statement of services with the requirement to have timescales for responding to enquiries and complaints. The latter are not currently included within the property factor's written statement of services.
53. The committee therefore upholds the homeowner's complaint under this section in respect of both of these failures.
54. **Sections 3 and 3.3:** the committee considered these complaints together, as they are very closely related. Ms McKelvie admitted that there had been delays in sending out accounts to homeowners. She explained that the financial year ran from September to August, and that the advice obtained from the property factor's solicitor was that accounts could be sent out to homeowners up to 12 months after the end of the financial year. She told the committee that there had been various issues with the accounts for the development, which had begun when her predecessor had sent out the accounts for 2011-12 in January 2013. There had been some staffing issues, and after she had come into post in November 2013, it became apparent that the 2011-12 accounts were incorrect. In some instances homeowners had been charged in 2012-13 for work which had been carried out in 2011-12. This meant that they had been charged twice for the same works, and some homeowners had overpaid in the first year.
55. The knock on effect of this was that the next year's accounts were also inaccurate, so she had gone back to the 2011-12 accounts to try to sort out the inaccuracies and reconcile the accounts. The property factor had been trying since that time to try to resolve these issues. All relevant bank statements and invoices had been sent out to homeowners to look at prior to a meeting which had arranged with homeowners on 26 February 2015 to discuss the accounts issues. At that meeting, it had been agreed that a committee of 3-4 homeowners should be established to represent all homeowners at future meetings to try to resolve the issues.
56. Ms McKelvie stated that explanations had been given in respect of the 2011-12 accounts and that she had understood that these had now been agreed by

the committee, of which the homeowner was a member. Members of the committee had come to the factor's offices for a meeting on 9 May, and she had been asked to issue the accounts. She said that she thought the committee had agreed all the accounts, but now it seemed that the homeowner was still unhappy with these. The homeowner advised that he had not attended the 9 May meeting because he thought this might give rise to a conflict of interest, given his outstanding application to the panel.

57. The homeowner told the committee that he had received the accounts for 2012-13 the day before the hearing, and that the homeowners' committee was still considering these. Mr Godsman told the committee that a process was now in place for the 2012-13 accounts, and that the 2013-14 accounts would follow in due course. The property factor had recently invested in new factoring software, and hoped to get the accounts up to date soon and clear the backlog. The committee accepted that the property factor is now trying to resolve the issue with the accounts, and is now working with homeowners in order to achieve this. Mr Godman confirmed to the committee that the property factor will continue to have meetings with homeowners and involve them in the process.
58. It is clear from the evidence, however, that there have been a number of issues with the accounts from the time the accounts for 2011-2012 were first issued in January 2013. The committee considers that these issues should have been resolved much more quickly, particularly as there are only 17 properties within the development. The committee notes that this may be partly due to a lack of staffing and resources, but also that the property factor does not appear to have had adequate accounting systems in place. It is to be hoped that the matter can be resolved soon, and that for future years, the property factor is able to issue clear, accurate accounts to homeowners, which can be easily understood and relied upon.
59. With regard to the homeowner's complaint under section 3, the committee notes that, given the issues with the accounts to date, it has not been clear to homeowners exactly what they are paying for, or how charges are calculated. The property factor has not to date demonstrated clarity in its accounting procedures, although it has clearly tried to be transparent, by providing all of its bank statements and invoices to homeowners, which it is not required to do in terms of the code.
60. As regards the complaint under section 3.3, it is clear that the property factor has not provided annual statements/accounts to homeowners at least once a year since its registration as a property factor. While section 3.3 does not stipulate at what point in the year accounts should be issued, the committee would expect these to be issued shortly after the end of the financial year, and



certainly at around the same time each year. The 2011-12 accounts were sent out more than 4 months after the end of the financial year, as were the 2012-13 accounts. Although there was some consistency here, as these first two sets of accounts were sent out in January, and therefore 'at least once a year', the 2013-14 accounts have not followed in January 2015; or indeed at all to date.

61. Section 3.3 also requires the annual statement/account sent to homeowners to provide a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. The account sent to the homeowner for 2012-13 which was seen by the committee does not clearly set out the charges made and activities and works carried out, although Ms McKelvie told the committee that in future, clearer accounts would be issued. The committee notes, however, that it would not necessarily expect the property factor to provide detailed accounts for the whole development or bank statements for the development bank account, as this is not required by the code.
62. In light of the above, the committee determines that the property factor has failed to comply with sections 3 and 3.3 of the code of conduct.
63. **Section 3.4:** The committee accepted the homeowner's evidence that he had requested a refund of the insurance overpayment but had not received this. Ms McKelvie did not refute this, but told the committee that the refund had not yet been repaid because the accounts for 2012-13 had not yet been finalised, and it was possible that the homeowner may owe more money as a result of this. She did concede, however, that the reason for this should have been communicated to the homeowner, but that this had not happened.
64. Section 3.4, however, actually concerns the existence or otherwise of a procedure for dealing with advance payments made by homeowners. Ms McKelvie stated to the committee that there is a clear process for this, as set out in the written statement of services. This states at Schedule Part 2 that *'each of the homeowners factoring accounts will be reviewed every year, and if the homeowner has paid more than has been spent, then this will be refunded'*.
65. The committee observes that this process is not entirely clear, as it does not state at what point this review and refund process will be undertaken. Section 3.4 does not specify what the 'procedures' in question should include, or when any refund should be provided. As the property factor has such a procedure in place, therefore, the committee determines that the property factor has not failed to comply with this section of the code. The committee is of the view,

however, that any refund should be made soon after the end of the financial year when it becomes apparent that an overpayment has been made.

**66. Section 3.5a:** it was clear from the evidence before the committee that the property factor had a separate bank account for funds held on behalf of homeowners. While the homeowner was unhappy with the title used by the property factor for this account, the committee accepted that this was simply a name used to distinguish this account from the property factor's own funds. The property factor told the committee that it has a separate bank account for homeowners' funds in respect of each of the developments it manages. These accounts were used to hold the deposits paid by homeowners, as well as to administer all other funds held on behalf of homeowners. The committee notes that there is no requirement under section 3.5a to hold floating funds separately from other funds held on behalf of homeowners, but only to hold these separately from the property factor's own funds. The committee therefore determines that the property factor has not failed to comply with this section of the code.

**67. Section 5.2:** It was not clear to the committee from the correspondence between the parties where the figures stated for the insurance premiums came from. Ms McKelvie explained that buildings insurance is paid in advance, and that each year she obtains a quote from the insurer for the development for the coming year. This is the figure which is used to calculate the payments to be made by homeowners for the coming year, but the eventual premium paid usually fluctuates from this figure. This explains the discrepancy between the figures provided, which resulted in confusion for the homeowner. Ms McKelvie confirmed that the new software will make it easier to show the amounts more clearly. The committee hopes that this will indeed be the case in future. The committee determines that the property factor has not provided clear information to the homeowner showing the basis on which his share of the insurance premium was calculated, and the premium paid. The property factor has therefore failed to comply with this section of the code of conduct.

**68. Section 5.3:** Mr Al-Saffar clearly stated that the property factor did not take commission from insurers, as he had made a principled decision not to do so, despite the fact that many other factors did. The homeowner stated that he accepted that the property factor was not receiving any commission from the insurer. The committee observes that this complaint appears to have arisen as a direct result of the complaint under section 5.2, regarding the lack of clarity about the amount of the insurance premiums charged. The committee determines that the property factor has not failed to comply with this section of the code of conduct.



- 69. Section 6.1:** This complaint was a consequence of the property factor's failure to provide the written statement of services promptly. The homeowner now accepts that there is such a procedure in place, as set out in Section 3 of the written statement of services. The committee therefore determines that the property factor has not failed to comply with this section of the code of conduct.
- 70. Section 6.3:** Again, this complaint was partly related to the late production of the written statement of services. Section 2 of the written statement of services sets out a £250 level of delegated authority for repairs, which was accepted by the homeowner. The property factor had advised him in its undated letter in response to his various notification letters in January 2015 that no contractors had been appointed through a tendering process, as the value of any repair works carried out was within the delegated level of authority. Mr Al-Saffar re-iterated this point to the committee at the hearing, stating that no new contracts had gone out to tender for work above this limit since the code of conduct came into force. He said that the company often had contractors on site, given its role as developer, and tended to use firms they had used for a long time, as this was cheaper and quicker.
- 71.** The homeowner did not indicate that he had any particular concerns about any specific contracts, but said that he would wish to see a tendering process for new contractors in future. The committee accepted the property factor's evidence, and noted that the factor's duties under the code arose from 12 November 2012, when it became a registered property factor. The committee considers that it cannot have been the intention that the code should apply retrospectively i.e. the property factor should not be expected to produce documentation relating to work tendered for prior to that date. As there was no suggestion that there had been any contracts put out to tender since that date, the committee determines that the property factor has not failed to comply with this section of the code of conduct.
- 72. Sections 7.1 and 7.2:** These complaints were a consequence of the property factor's failure to provide the written statement of services promptly. The homeowner now accepts that the factor has such a procedure in place, as set out in Section 9 and Schedule Part 4 of the written statement of services. The committee therefore determines that the property factor has not failed to comply with this section of the code of conduct. The committee does observe, however, that the property factor does not appear to have dealt with the homeowner's various emails and formal notification letters as constituting complaints in terms of its complaints procedure. In the committee's view, these expressions of dissatisfaction from the homeowner should have been dealt with as complaints in accordance with the property factor's complaints procedure.

## **2. Duties complaints**

### **1. No communication/undue delay**

73. With regard to complaints i – iv, the committee considered that it has given sufficient consideration to these matters in relation to the related code complaints discussed elsewhere in this decision.

### **vii. Failure to repair a security light outside the homeowner's property**

74. It was clear from the evidence before the committee that this issue was not as straightforward as it might at first appear. The property factor argued that it had tried to resolve this issue, and stated that the light in question was not in fact a security light. Mr Al-Saffar told the committee that when a complaint was received about a repair such as this, Ms McKelvie would forward this on to the appropriate sub-contractor on-site, who was in this case Mr Taylor. At this stage, Mr Taylor was called to give evidence to the committee about this matter. He advised that the lights in question were at the rear of the property, close to the patio door which opened out onto a terrace and communal grassed area. He explained that each of the three blocks had two bollard lights outside the rear, within the terraced areas. These lights were positioned in such a way that the light was dispersed downwards onto the grass. He advised that these were not security lights, but were purely decorative.
75. Mr Taylor explained that the reason the light in question had been out for a period of time was that repairs were needed to the bollard lights, but these had been put on hold. The bulbs originally used were no longer available, so there was a need to replace the fitments, which were expensive. In the meantime, some of the residents had requested that timers be installed into the lights, in order to ensure that they all came on at the same time, rather than the timing being dependent on the position of the light relative to the sun, as they were solar photo-cell operated. Homeowners had been presented with two options: to replace the fitments and put the lights back into their original state, or to repair the lights and install timers. He had met with a committee of homeowners to discuss this, but they had taken some time to reach agreement on the way forward, eventually deciding to leave the lights as they originally were.
76. The homeowner stated that as a vulnerable person, his main exit out in the case of emergency was through the patio door, and he therefore viewed the light as being a security light. Mr Taylor told the committee that there were two floodlights at the front of the building, and that all the other lighting in the block was always on, so that there was never a time when the block was not



properly lit. Mr Al-Saffar added that the homeowner had his own security light which he chose not to use.

77. The question for the committee was whether the property factor had failed to carry out its duty as a property factor with regard to the light. The committee accepts the property factor's evidence that the light in question was not a security light. The committee notes that in terms of Schedule Part 3 of the written statement of services, the indicative repair timescale for a communal light which has gone out is 10 days, but accepts that this was put on hold due to the cost implications of replacement and requests by homeowners for changes to the lighting system. In light of the evidence before it, the committee concludes that, on the balance of probabilities, the property factor had not failed in its duties in this regard.

**Undue delay in the replacement of a light bulb outside an entrance door**

78. Mr Al-Hassar told the committee that the bulb in this communal light, which was outside the homeowner's front door, had gone out on numerous occasions, and that Mr Taylor had replaced it many times. Mr Taylor stated that the light was purely decorative. He advised that the cause of the problem had been identified as the window cleaner inadvertently tipping water into the light fitting. This had now been rectified, and the bulbs had now been replaced with LED bulbs. The homeowner agreed that the light was now working.
79. The committee accepted the property factor's evidence on this point, and concluded that in the circumstances, it had, on the balance of probabilities, carried out its duties to a reasonable standard.

- 2. Delay in carrying out works to paint disabled symbol on the homeowner's allocated parking space**
- 3. Delay in providing and erecting private parking signs**
- 4. Altering wording in a legal document at a later date, without notification**

80. The committee determined that all three of the above complaints relate to developer issues, rather than factoring issues, for the reasons set out earlier in this decision in relation to the code complaints about the same matters. It was therefore unable to consider these complaints.

**5. Failure to provide clarity and transparency in all accounting procedures**

81. The committee considered that this matter had been sufficiently dealt with in relation to the code complaints under sections 3 and 3.3, as discussed above.

### **Observations made by the committee**

82. It was clear from all of the evidence before the committee that there were three key reasons behind many of the homeowner's complaints. Firstly, the property factor's failure to provide the homeowner with its written statement of services within the timescale set out in section 1 of the code then led on to a number of further complaints.
83. Secondly, it was clear to the committee that there was considerable evidence of poor communication and poor accounting practices by the property factor, which should be addressed. The third point is very much related to this - a number of the complaints made by the homeowner actually related to the role of H and H Properties Ltd as a developer, rather than as a property factor. The homeowner appeared to have confused the two roles in relation to some issues. Although Mr Al-Saffar suggested that the homeowner did understand the distinction, it was clear to the committee that he had difficulty in distinguishing between the two roles in some instances. The homeowner stated that no information had been provided to him by the property factor about the different roles. Given that he did not have sight of the written statement of services until January 2015, it is perhaps not surprising that he was not always clear as to where the division between the two roles lies.
84. Moreover, the property factor's representatives confirmed to the committee that, while the company has separate bank accounts for its work as a developer and its factoring work, there is no legal distinction between the two parts of the business. When asked by the committee whether homeowners were provided with information about the respective roles and which were developer and factor issues when purchasing their property, Mr Al-Saffar confirmed that the only such information provided to homeowners was that sent to their solicitor at the time of purchase. When asked how the property factor makes the distinction between the two roles clear, Ms McKelvie told the committee that she tells homeowners when they contact her about an issue whether it is a developer or a factoring issue. She also confirmed that she deals with 'snagging' issues, which relate to the developer role, as well as factoring issues, and that she (as was her predecessor) is the sole point of contact for owners on both sets of issues. The committee considers that this can only serve to reinforce any confusion among homeowners.
85. The committee observes that it would be in the interests of both buyers and H and H Properties Ltd if the latter were to provide clear written information in future to homeowners after they have moved in as to the distinction between developer and factoring issues, and how to take forward any complaints with regard to each of these.



86. It was also apparent to the committee that H and H Properties Limited is, and sees itself as, predominantly a developer. Mr Al-Saffar explained that the company only factors 3 developments, as it acts as property factor for a set period of time until all the properties within a development have been sold, at which point it hands over responsibility to another property factor. Mr Al-Saffar was keen to stress to the committee that his company was a good developer. While that may be the case, the company is also a registered property factor and as such is obliged to comply with the code of conduct and the property factor's duties.

87. The committee notes that those responsible for running the company do not appear to be entirely clear about the nature of some of its factoring duties, or how they might best be fulfilled. It also appears that its factoring function may not always have been adequately resourced. It is vital in the interests of homeowners that registered property factors fully understand and comply with their duties, no matter how big or small they are. If a developer is experiencing difficulty in fulfilling its role as a property factor, it will usually be open to it to appoint, or sub-contract the relevant duties to, another property factor for a development.

### **Proposed Property Factor Enforcement Order**

88. The Committee proposes to make a property factor enforcement order (PFE0) as detailed in the accompanying Section 19(2) (a) notice.

### **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>

Chairperson Signature .

Date... 16/7/15..