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/14/0055

Re: 15/5 Hermand Terrace, Edinburgh EH11 1QZ (the property)

The Parties:

Mr Bruce Inglis, 15/5 Hermand Terrace, Edinburgh EH11 1QZ (the homeowner)

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD (the factor)

Decision by a committee of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

Committee members: Sarah O'Neill (Chairperson), Jean Thomson (Housing member)

Decision of the committee

The factor has failed to comply with its duties under section 14 of the Property Factors (Scotland) Act 2011 in respect of sections 2.5, 4.6, 7.1 and 7.2 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 3 (opening statement), 3.2 and 4.7 of the code.

The committee's decision is unanimous.

Background

1. By application received on 14 April 2014, the homeowner applied to the Homeowner Housing Panel ('the panel') to determine whether the 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 sections 2.5 (communications and consultation), 3 (opening statement) and 3.2 (financial obligations) and 7.1 and 7.2 (complaints resolution) of the code. The homeowner 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 various email

correspondence between the factor and himself dated between 13 August 2013 and 11 April 2014.

2. The homeowner then wrote to the panel on 24 June 2014 enclosing various documents, including his written notification to the factor dated 17 June 2014 setting out the reasons why he believed it had failed to comply with the code. In addition to the sections of the code outlined in his initial application form, he alleged that there had been a failure to comply with sections 4.6 and 4.7 (debt recovery). Further email correspondence dated 2, 9 and 29 July 2014 was later received from the homeowner.

3. On 20 August 2014, the President of the panel issued a notice 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 14 April- 29 July 2014; and intimating her decision to refer the application to a panel committee for determination. Written representations were received from the homeowner on 29 August 2014. Written representations, together with copies of various email and written correspondence between the factor and the homeowner, were received from the property factor on 9 September 2014.

4. The committee issued a direction on 2 October 2014 to the parties, requiring both parties to provide to the committee within 14 days of receipt of the direction the following documents:

- A copy of the Deed of Conditions relating to the development within which the property is situated.

- A copy of any relevant documentation relating to the dismissal of Charles White Limited as property factor for the development within which the property is situated.

The direction also required the factor to provide to the committee within 14 days written representations in relation to the homeowner's complaints regarding sections 4.6 and 4.7 of the code, as set out in his letter of notification dated 17 June 2014. A reply was received from the factor on 6 October, providing the information required.

The hearing

5. A hearing took place before the committee at George House, 126 George Street, Edinburgh EH2 4HH on 28 October 2014. The homeowner

represented himself. He gave evidence and called no witnesses. The factor was represented by Sarah Wilson, Managed Development Team Leader, who gave evidence on its behalf.

Preliminary issues

6. The committee noted that there was some confusion within the paperwork as to when the factor's appointment had been terminated, with a variety of different dates referred to in the documentation before it. Ms Wilson explained that the factor was responsible for the management of the 'external common areas' shared by the 'Colour Square development ', within which the homeowner's property is situated, and the adjacent 'Printworks Development' until 31 May 2013. The property factor was also responsible for management of the common internal areas of the Colour Square development, until its appointment was terminated by the homeowners as at 30 June 2013.

6. The committee noted that the homeowner's complaints all appeared to relate to issues occurring after 30 June 2013. The chairperson advised that this may raise questions as to whether the committee could consider all of the complaints, but that it did not intend to make a decision about this at this stage, and wished to hear the parties' evidence before doing so.

7. The chairperson noted that although the factor's letter to the homeowner of 2 September 2013 referred to an enclosed copy of its final invoice for services up until 30 June 2013, the committee had not seen a copy of the invoice itself. Ms Wilson produced a copy of the invoice for the committee.

Findings in fact

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

- The homeowner is the owner of 15/5 Hermand Terrace, Edinburgh EH11 1QZ.
- The property is situated within a development known as the 'Colour Square Development', which shares common parts with the adjacent 'Printworks Development'. There are two Deeds of Conditions relating to the development. The first, by Heritage Homes (Slateford) Limited and Southplace (Scotland) Limited, registered on 5 September 2002, applies to both developments. A subsequent Deed of Conditions by Heritage Homes (Slateford) Limited, registered on 18 December 2002, applies only to the Colour Square development.
- Charles White Limited was appointed as property factor for the common external areas of both developments by the developer in terms of the September 2002 Deed of Conditions. It was responsible for the management of the 'external common areas' of both developments until 31

May 2013. As at that date, its appointment was terminated by the owners within the two developments, following a unanimous vote at a quorate meeting in line with clause 5.4.4 of the said Deed of Conditions.

- The factor was also responsible for management of the common parts internal to the Colour Square development (the 'internal common areas'), until this appointment was terminated by the homeowners as at 30 June 2013.
- The factor wrote to the homeowner on 2 September 2013, enclosing a final invoice dated 25 July 2013. This showed a credit balance of £139.38 on his account. It later issued several further invoices debiting and crediting various items against this balance, following queries about these from the homeowner.
- On 2 September 2014, the factor wrote to the homeowner with a 'financials update', setting out the total credits and debits on the bank account for the development, and advising that it was unable to pay out the money due to owners with a credit balance until those with a debit balance settled their debts. A statement was enclosed, showing a cheque payment to the homeowner of £91.97 made on 29 August 2014, and an outstanding credit balance of £60.00.
- The factor's contractual duties in relation to the external and internal common areas of the development are set out in:
    - the two Deeds of Conditions referred to above
    - the factor's Written Statement of Services for the Colour Square development dated October 2012.
- The factor became a registered property factor on 7 December 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

9. The homeowner's complaints, which are set out below, relate to a number of issues which arose following the dismissal of the factor. He alleged that it had completely mishandled its dealings with him since that time.

10. **Complaint 1** – the factor has failed to comply with its duties under section 2.5 of the code, which states:

    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)

The homeowner complained that his emails to the factor were regularly not acknowledged, and that he had to chase up replies on several occasions. This complaint relates to ongoing email correspondence with the factor from August 2013 onwards. He told the committee that he felt the factor had been high handed and arrogant in its dealings with him, and that it had not apologised for its failure/delays in responding to his emails.

Complaint 2 – the factor has failed to comply with its duties under section 3 (opening statement,) which states:

Homeowners should know what it is they are paying for, how the charges were calculated, and that no improper payment requests are involved.

and section 3.2 of the code, which states:

Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.

11. The homeowner's main complaint relates to section 3.2. He complained that, despite the fact that he has an outstanding credit balance, the factor has not paid back the money it owes him. The factor had advised him that it was entitled to do this in terms of the December 2002 Deed of Conditions, as other owners within the development have not paid their final bills, and all owners are jointly and severally liable to pay for common maintenance and other costs. The homeowner contested this, stating at the hearing that he had lived in the development for over 10 years, but had never been made aware of the factor's alleged right to keep money due to homeowners under the Deed of Conditions. He felt that it was not ethical or fair to withhold money which is rightly due simply because someone else has not paid their debts.

12. He further argued at the hearing that in any case, the factor had ceased to be factor for the property, and that it could therefore no longer rely on the Deed of Conditions, and had no right to hold onto this money. While he acknowledged that most of the money has now been returned to him, he believed that was only as a result of his having constantly chased up the factor. He wanted the rest of the money owed to be paid back to him.

13. With regard to the opening paragraph of section 3, the homeowner complained that there had been a number of instances where incorrect invoices had been sent out, the wrong homeowners charged, and there had been a failure to credit accounts correctly. In particular, he pointed to two incorrect charges included in the final invoice sent to him on 2 September 2013. The first was a charge for pump maintenance and service, which he had queried by email with Ms Wilson several times between August and

November, before she acknowledged on 6 November 2013 that this had been incorrectly charged, and said that a credit would be applied to his account. This was followed by a further exchange of emails several months later, when it became apparent that the credit had not in fact been applied to his account, despite reassurances from Ms Wilson. The matter was finally rectified in April 2014. The second charge was for an incorrect electricity invoice, which again involved money eventually being credited to the homeowner's account some months and several emails after he had first complained about it. The homeowner stated at the hearing that he had no confidence in the factor as a result of these invoicing mistakes, and the time and effort it had taken for him to have these rectified.

14. **Complaint 3** - the factor has failed to comply with its duties under sections 4.6 and 4.7 of the code, which state:

    4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).

    4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.

15. The homeowner complained that the factor had failed to proactively keep him informed about the debt recovery problems of other homeowners, and had only provided him with information about how much was owed and what was being done to recover it after he had asked for this. He said the factor had eventually sent him information about this in its letter of 2 September 2014, 15 months after the factoring arrangements were terminated, and that the factor had advised him it did not intend to update him again until September 2015. He felt that this information should have been provided at an earlier stage and at more regular intervals, perhaps every couple of months.

16. He also complained that the factor had not demonstrated that it had taken reasonable steps to recover unpaid charges from these homeowners. Again, he said it had taken the factor 15 months to provide information about this, and questioned whether its approach of issuing Notices of Potential Liability constituted 'reasonable steps', as these were worthless unless the owners planned to sell their homes.

17. **Complaint 4** - the factor has failed to comply with its duties under sections 7.1 and 7.2 of the code, which state:

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.

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.

18. The homeowner complained that, despite heading his email of 5 November 2014 to Ms Wilson "Formal Complaint', and copying this and subsequent emails to both the factor's Managing Director and its Executive Director, his complaints had never been referred to the factor's formal complaints procedure, and senior managers had failed to take action in relation to his complaint. Rather, Ms. Wilson had continued to deal with him directly throughout. He stated at the hearing that he was unhappy about this, and would have expected any formal complaints procedure to include a review by a different, more senior, member of staff. He felt that no independent view had been taken of his complaint.

19. **Property factor's duties**: the homeowner also complained in his application form that the factor had failed to carry out its duties as defined in section 17(5) of the Act. He stated that the factor had a fundamental duty to pay any valid debts promptly, to respond promptly to correspondence, and to take due care when processing charges for customers, and that it had failed in all these respects. He did not refer to the source of these duties, and did not send a written notification to the factor setting out the reasons why he considered it had failed in its duties. The committee therefore concluded that it was unable to consider this complaint, but noted that all of the issues which the homeowner had raised in relation to duties were essentially covered by his complaints under the code.

The representations made by the factor

20. **Complaint 1** –Ms Wilson said that she had apologised several times in writing for any delays in responding to the homeowner's emails. She said that the factor had an automatic acknowledgement system which should have generated replies to his emails. She said that it had taken some time to try to resolve his queries, and that she had nothing further to say on this matter.

21. **Complaint 2** – the factor's position was that it had no intention not to pay any owner with a credit balance the funds due to them, but that some owners had not paid their final account. Accordingly, the development bank account was

in debit, so those in credit could not be paid until the factor had recouped the money owed by those who had not paid their account, in line with the December 2002 Deed of Conditions. Ms Wilson said that, while she understood the homeowner's frustrations, the factor had no choice but to take legal action against the debtors before it could give the money owed back to the other homeowners, as this was required under the Deed of Conditions.

22. The factor stated that all owners within the Colour Square and Printworks developments had been advised that this was the situation. Ms Wilson stressed that throughout the period since the arrangement was terminated, the factor had been working to recover the money owed, in order to pay this back to the other homeowners. Some of the money owed had now been recovered, and this had been paid back to those who were in credit. The homeowner had some money refunded to him in August 2014.

23. With regard to the homeowner's assertion that he had not been told prior to September 2013 about this issue, Ms Wilson pointed out that the factor's Written Statement of Services, which was sent to owners prior to the letter of 2 September 2013, sets this out clearly.

24. The committee noted that the final bill sent to the homeowner on 2 Sept 2013 was in fact dated 25/07/14. When asked about this, Ms Wilson advised that the reason for this was that she had been off sick for a month and, as she was the only person with the background knowledge about the accounts, she wanted to make sure they were correct before they were sent out.

25. **Complaint 3:** - Ms Wilson stressed that the factor took debt recovery very seriously. It had continued to pursue homeowners who were in debt, and to refund the money recovered to those homeowners who were owed money.

26. Ms Wilson stated that the debt recovery process was set out clearly in the Written Statement of Services. The committee noted that this set out at part 3E three possible methods of debt collection, but that it was not clear in what order of hierarchy these were employed. When asked by the committee to explain how the firm's debt recovery processes operate, Ms Wilson advised that, where there is a debt of more than £200, the factor will first register a Notice of Potential Liability against the property. It will then raise a small claims action in the sheriff court to recover the money owed. She advised that so far as she was aware, the factor had never taken sequestration proceedings against an owner, as this was a drawn out, complex process, which required a fairly high level of debt to have accrued.

27. The factor had to date registered a Notice of Potential Liability (NOPL) against 9 properties within the development in respect of outstanding debts. Ms

Wilson told the committee that in some cases NOPLs do work well, and that the factor has recovered some money owed as a result of these. As regards keeping homeowners informed about the debt recovery problems of other homeowners, she told the committee that the queries raised by individual homeowners were dealt with at the time they telephoned or emailed asking for information.

28. Ms Wilson acknowledged that her letter to homeowners of 2 September 2014 was the first notification sent to them about debt recovery issues. She said that this letter provided a clear breakdown of the sums due. She had been unable to provide such information in her letter of 2 September 2013, which accompanied the final invoice, as she did not know then that some owners would not pay.

29. When asked by the committee, Ms Wilson was unable to provide clear information about the number of cases which had been taken to court, saying that some small claims actions had been raised before termination of the factoring arrangements, and some after. She said that the level of debt had significantly reduced by September 2014, and that the money recovered had been repaid to owners, with the result that no owner was now owed more than £60. She confirmed that the overall amount due to the factor from homeowners was as set out in her letter to the homeowner of 2 September 2014.. She said she hoped to be able to refund the balance outstanding to the homeowner by September 2015. She would update owners about the debt situation in September 2015, informing them sooner if anything changes before then.

30. The committee noted that clause THIRD of the December 2012 Deed of Conditions provides that the factor has the option of calling a meeting of the proprietors to decide if and to what extent legal action to recover unpaid debt from homeowners should be pursued, and asked Ms Wilson whether it had done so. She replied that it had tried to do this many years ago in relation to the Printworks development, but had been unable to arrange such a meeting. She said that in any case, by the time the debt issues had arisen here, Charles White Limited was no longer the property factor.

31. **Complaint 4**:- Ms Wilson told the committee that the factor had recognised the homeowner's correspondence as a formal complaint from his email of 5 November, which was headed 'formal complaint', onwards. She stated that she had copied David Hutton (Executive Director) and Edwin Backler (Managing Director) in to her responses, and that they were aware of the homeowner's complaints. She recognised that the homeowner was unhappy that only she had dealt with his complaint throughout.

32. When questioned by the committee, she said that when the homeowner remained unhappy, she had escalated his complaint to the second tier of resolution set out in the Written Statement of Services, and that she had clearly stated in her letter of 29 July 2013 that Mr Backler had requested her to respond to the homeowner on his behalf. When asked by the committee whether the factor's complaints procedure had now come to an end, she replied that it had not yet been exhausted because the matter of the £60 credit balance was still outstanding.

Statement of reasons for decision

33. The first issue which the committee had to consider, before making a decision on the homeowner's individual complaints, was whether it could consider them at all. The factoring arrangements for the external common areas and the internal common areas of the development had been terminated as at 31 May and 30 June 2013 respectively, but the homeowner's complaints all related to matters which had occurred after those dates. The question then arose as to whether and when the factor's duties under the code had come to an end in relation to the development. In considering this question, the committee looked to sections 3.1 and 3.2 of the code. These are the only sections of the code which make specific reference to duties which arise following the termination of factoring arrangements.

34. Section 3.1 provides that where a homeowner terminates the arrangement with a factor, the factor must make available to the homeowner all financial information that relates to their account. It further states: *'this information should be provided within three months of termination of the arrangement unless there is a good reason not to….'*

35. Section 3.2 provides that (unless the title deeds specify otherwise) *the property factor must return any funds due to homeowners automatically at the point of settlement of final bill following the change of ownership.* Taken together, these subsections suggest that the factor's relationship with the homeowner might be expected to be at an end around 3 months after the end of the factoring arrangement, or shortly thereafter, once the final bill has been settled. In this case, however, it was not clear to the committee that the relationship between the factor and the homeowner had in fact ended entirely.

36. The factor had issued what it referred to as a 'final invoice' on 2 September 2013. This set out the various charges debited from the homeowner's account between 2 April and 31 May 2013, and credited against this the repayment of the homeowner's float of £225, resulting in a credit balance of £139.38. Whether this invoice was issued in compliance with section 3.1 is not at issue here, as the homeowner did not raise a complaint under this section, although

the committee noted that while the invoice refers to a period ending on 31 May 2013, it includes a management fee up to 01/07/2013. The committee therefore concluded that the invoice actually related to the period to 30 June 2013, when the factoring arrangements in respect of the internal common areas came to an end.

37. While the letter of 2 September 2013 enclosed what purported to be its 'final invoice', the factor had not returned the credit balance due to the homeowner on that date. The covering letter advised that the developmental bank account was not in funds to pay the monies owed to the homeowner until owners in deficit had settled their accounts. This clearly implied that there was an intention to repay the money owed to the homeowner once those owners had paid, and Ms Wilson confirmed this to the committee. It might have been assumed at that point that the outstanding accounts would be paid fairly soon, and the credit balances then returned. While most of the money outstanding has now been repaid to the homeowner, however, the letter and financial statement sent to him a year later on 2 September 2014 made clear that some owners had still not paid their debts, and stated *'it is regrettable that we are unable to make the final credit settlement to you until such times as your neighbours have settled their outstanding balances'.*

38. There was before the committee a significant volume of correspondence between the parties which was dated after August 2013. At no point during the course of this correspondence, or in its written or oral representations to the committee, did the factor make the argument that it was no longer the property factor as regards the subject matter of the homeowner's complaints. It has continued to: write to homeowners, updating them on the financial and debt recovery situation; pursue debtors on their behalf; and repay money to them which had been recovered from those debtors.

39. The factor has also registered Notices of Potential Liability (NOPL) against 9 properties within the development, after the 'final invoice' was issued. In terms of section 13 of the Tenements (Scotland) Act 2004, a NOPL may only be registered by the owner of a flat, the owner of another flat in the same tenement or a manager of the tenement. The factor would have fallen into the latter category, and only in that capacity would it have been entitled to register a NOPL against an owner within the development, in security of 'relevant costs' (i.e. their share of common management and maintenance costs) under section 11 (9) of that Act.

40. It is clear that the factor is no longer providing day to day factoring services for the development in respect of repairs and maintenance etc. The committee concluded, however, that the weight of evidence supported a finding that it had continued to act as an agent for the owners in a limited capacity, in

relation to final accounting and debt recovery, and was still doing so. On this basis, the committee determined that it could consider the homeowner's complaints about matters occurring after the termination of the factoring arrangements insofar as these related directly to that limited role.

41. **Complaint 1**: The homeowner's complaint about the factor's alleged failure to comply with section 2.5 of the code related primarily to emails about 1) mistakes in the 'final invoice' received on 2 September 2013, and 2) the reasons why the factor had not reimbursed him in respect of his credit balance. The committee therefore decided that it could determine this complaint. There was clear written evidence before the committee to support the homeowner's complaint. The factor's Written Statement of Services clearly states (at Part 4 on page 15) that it will endeavour to acknowledge both electronic and paper correspondence within 48 hours, and will respond to such correspondence within five working days.

42. The correspondence shows that on a number of occasions, the factor failed to respond to the homeowner promptly. For example, he sent Ms. Wilson an email querying an entry on his invoice for pump maintenance and service on 13 August, and having had no response, wrote to her again on 17 October, more than two months later, about the same issues. Having had no response to either that email, or a later email of 15 October querying an entry relating to an energy bill, he again wrote to her on 5 November requesting a response. Only after sending these later emails did he receive a response to his queries dated 6 November.

43. While it may be the case that the factor has a system which issues an automatic acknowledgement to any emails received, acknowledging emails and responding to them are two different things, as is recognised in the Written Statement of Services. It is clear from the correspondence that in some instances, months went past without any response being sent to the homeowner. While Ms Wilson said that it took some time to gather the information required in order to provide an accurate response, there was no evidence before the committee that the homeowner had been kept informed that additional time was required to respond. The committee therefore determines that the factor has failed to comply with its duties under section 2.5 of the code.

44. **Complaint 2: -** the committee had no difficulty in determining that it could consider the homeowner's complaint in relation to section 3.2 of the code. This section is clearly intended to relate to a period after a change of factor, and was in any case clearly related to the factor's limited ongoing role, as described above. This section requires the factor to return any funds due to homeowners automatically at the point of settlement of final bill following a

change of property factor, unless the title deeds provide otherwise. There is an argument to be made here that the title deeds provide otherwise, as Clause THIRD of the December 2002 Deed of Conditions states:

..in the event of any Proprietor or Proprietors so liable failing to pay his, hers or their proportion of such common maintenance charges, ground burdens, insurance premiums or such expenses, charges or remuneration within one month of such payment being demanded the said Property Manager or other person or persons appointed as foresaid shall (without prejudice to the other rights and remedies of the other Proprietors) be entitled to sue for and recover the same in his own name from the Proprietor or Proprietors... and that in the event of failure to recover such payments and/or the expenses of any action the remaining Proprietors shall be bound pro rata as aforesaid to reimburse the Property Manager ...for any payment or expenses that may have been paid by him'.

45. The factor argued in both its correspondence with the homeowner and its representations to the committee that, under this provision, it was obliged to take legal action to pursue the defaulting owners to recover monies due by them, before it could repay those with credit balances. It also argued that in terms of this clause, all owners within the development were jointly and severally liable for any common charges. While this provision appears to entitle the factor for the development to recover the cost of unpaid common and maintenance charges from the other homeowners where it has sued the defaulting owners and failed to recover the money, there is a question here as to whether Charles White Limited can still rely on this provision. This provision applies to the Property Manager for the development, and since 1 July 2013, this has been Dunedin Canmore, the new factor.

46. The committee also noted that the reason the homeowner had a credit balance was that the factor had repaid his float of £225. The December 2012 Deed of Conditions provides that this float is to be held in trust by the property manager, and that it shall be returned to the owner on the sale of the property, provided that the purchaser has made a float payment. There is no mention of the float being repaid on a change of factor. The committee queried this with Ms Wilson, who said that, although this was not in line with the Deed of Conditions, it had been agreed with the incoming factor that the float payments were to be repaid. When asked by the committee whether he had paid a new float payment to the incoming factor, the homeowner was unsure about this. There was therefore some doubt as to whether the float payment constituted 'funds due' in terms of section 3.2.

47. In any case, the weight of evidence showed that the factor had been working for some time to try and return the funds due to homeowners, and was

continuing to do so. The majority of the money due in terms of the 'final invoice' had now been returned to the homeowner. Even if the credit balance was found to constitute 'funds due', these are only due to be repaid at the 'point of settlement of final bill'. The committee concluded that the weight of evidence before it supported a conclusion that the' point of settlement of final bill' had not yet been reached. The 'final invoice' itself did not settle the outstanding credit balance, and there remained an outstanding credit balance as at the hearing date. While the word 'bill' suggests that money is due by the homeowner to the factor rather than vice versa, the committee notes the factor's reference in its letter of 2 September 2014 to a 'final credit settlement', which has not yet occurred until all owners have paid their outstanding balances.

48. The committee therefore concludes that the point of settlement of final bill has not yet taken place, and that the factor has not failed to comply with its duty under section 3.2 of the code.

49. The homeowner also complained that the factor had failed to comply with the spirit of section 3, in particular its opening paragraph, which states: *Homeowners should know what it is they are paying for, how the charges were calculated, and that no improper payment requests are involved.* The basis of this complaint appears to be the incorrectly charged items on invoices and failure to apply credits after these had been pointed out, which also formed the basis of his complaint under section 2.5. The committee therefore determined that it could consider this complaint.

50. The homeowner was clearly irritated by what he felt was the 'slapdash' approach of the factor to these issues. He said that he had no confidence in the factor as a result of these mistakes. While the committee accepts that the rectification of these mistakes was not handled well by the factor, the evidence before it does not support a conclusion that the factor has failed in its duties here. The committee considers that, while mistakes were made, the amount and nature of the charges which had been applied to the homeowner's account were clear. The homeowner was able to challenge these charges *because* they were clearly stated, bringing to his attention the fact that they had been incorrectly applied. The committee determines that the factor was in fact clear and transparent, albeit incorrect, in its accounting procedures, and that it was clear what the homeowner was being asked to pay for, and how the charges were calculated. The committee therefore determines that the factor has not failed to comply with section 3 (opening paragraph) of the code.

51. **Complaint 3:** - the committee concluded that it could determine the homeowner's complaints in relation to sections 4.6 and 4.7 of the code, as

these clearly relate to the factor's limited ongoing role in relation to financial accounting and debt recovery. On the basis of the evidence before it, the committee concluded that the homeowner's complaints relate only to debt recovery problems arising after the termination of the factoring arrangements. The debt recovery problems of those who had not paid their outstanding final balances clearly had implications for the other homeowners, as required by section 4.6, as they would not receive the money due to them until the debtors had paid.

52. The 'final invoice' was sent out on 2 September 2013, and in terms of the Written Statement of Services (Section 3E), an owner's unpaid account is forwarded to debt recovery specialists 42 days after the date of invoice. On that basis, the debt recovery problems relating to the final invoices should have become apparent around mid-October 2013. Yet Ms Wilson told the committee that the first occasion when the factor had proactively provided information to owners about the outstanding level of debt on the developmental bank account was her letter of 2 September 2014, some 10 months after that time. While she said that information had been provided before that time, to homeowners who had asked for this, the clear inference of section 4.6 is that this information should be provided proactively.

53. Section 4.6 does not specify how frequently homeowners should be kept informed. The factor appears to have decided to provide annual updates, with the second and most recent update having been issued in September 2014, and the next update due a year later. While the committee has some sympathy with the factor, which is trying to repay owners and is no longer receiving fees from those owners, it has nevertheless continued to perform the role of agent in relation to debt recovery. The committee determines that given the ongoing debt situation, and the implications for homeowners, that they should have been updated more regularly than once a year. The committee therefore determines that the factor has failed to comply with section 4.6 of the code.

54. The homeowner also complained that the factor had not demonstrated that it had taken reasonable steps to recover unpaid charges from the defaulting homeowners in terms of section 4.7 of the code. The factor's response to this was to point to its letter of 2 September 2014, which sets out the total debits due by owners, and states that NOPLs have been registered against 9 properties. The committee notes that the homeowner asked Ms Wilson in his email of 6 February 2014 what steps the factor was taking to pursue the debtors. In her reply of 13 February, Ms Wilson advised that debtors were being pursued through debt recovery specialists on an individual basis, and that the factor had commenced placing NOPLs on the properties of those who had not paid.

55. The committee notes that Ms Wilson's letter of 2 September 2014 appears to have been the first time homeowners were proactively informed as to the methods of debt recovery employed, and that no information is provided about any other methods of debt recovery which have been employed, such as small claims actions or sequestration, which are both referred to in the written statement of services. The question is therefore whether Ms Wilson's email of 13 February and letter of 2 September demonstrated that 'reasonable steps' had been taken to recover the money owed. The committee also notes that Ms Wilson was unable to provide clear information about the numbers of small claims cases which had been raised.

56. The committee has some sympathy with the homeowner's view that issuing Notices of Potential Liability does not constitute 'reasonable steps', on the basis that the money can only be realised when the owners sell their homes. It notes, however, that Ms Wilson did state that some money had been recovered through this route. While the committee considers that it would have been helpful to provide more detailed information on any other forms of debt recovery pursued, it concludes on the basis of the evidence before it that, on the balance or probabilities, the factor has shown that reasonable steps were taken. The committee therefore determines that the factor has not failed to comply with its duties under section 4.7 of the code.

57. **Complaint 4:** - the committee concluded that it could consider the homeowner's complaints under sections 7.1 and 7.2 of the code, as the complaint he had made to the factor related directly to matters arising from its final invoice and to debt recovery issues. It was clear that the homeowner's main grievance was the fact that Ms Wilson had dealt with his complaint throughout, and that it did not appear to have been escalated at any point to a more senior manager for an independent view, despite his use of the words 'formal complaint' in the subject heading of his emails from 5 November 2013 onwards.

58. The committee noted that the factor does have a written complaints resolution procedure, which is included under the heading 'Communication arrangements' on page 16 of its written statement of services. It can also be accessed on the factor's website through the 'customer feedback info' link. It states that concerns should be made in writing to the relevant Property Manager, who will a) acknowledge this within 48 hours and b) seek to correct any problems to the homeowner's satisfaction within 28 business days. It goes on to say '*if for any reason the first tier of satisfaction is unsatisfactory or does not meet your requirements, we have in place a second tier of resolution to whom you may appeal. The Head of the Department will act as a neutral party and will endeavour to look upon the situation objectively*'. No details are given as to how or when the homeowner will know that the first tier complaint

process is at an end; how they may appeal to the second tier of resolution; how the second tier process operates or how long it takes; or who the 'Head of Department' is.

59. It was clear from the written representations and oral evidence before the committee that neither the homeowner nor the factor was clear about how the complaints procedure was intended to operate, or what stage it had reached. Ms Wilson told the committee that she recognised the homeowner's email of 5 November 2013 as a complaint, and had dealt with all subsequent correspondence from him as a complaint. There was, however, no evidence before the committee to demonstrate that this had been communicated to the homeowner, or that he had understood this to be the case.

60. Neither was it clear to the committee at which point the first tier of the complaints procedure had been exhausted. On 29 July 2014, Ms Wilson wrote to the homeowner in response to his written notification of 17 June, addressed to Edwin Backler. In that letter, she said that she had been requested to respond on Mr Backler's behalf. In her evidence, Ms Wilson identified this as the point at which the complaint was escalated. The letter made no reference, however, to the outcome of the first tier complaint; nor did it state that this letter was the outcome of the second tier of the process.

61. The homeowner was, not surprisingly, unclear about what stage the complaints process had reached, and was unhappy that his complaint did not appear at any stage to have been escalated to a senior manager. It was of even greater concern to the committee that Ms Wilson herself seemed confused as to whether the factor's complaint process had in fact been concluded. The committee therefore determines that the factor's complaints procedure is not 'clear' and does not set out a clear series of steps which it will follow, as required by section 7.1.

62. With regard to the homeowner's complaint under Section 7.2, there was no evidence before the committee that the homeowner was notified in writing when the in-house complaints procedure was exhausted without resolving the complaint. As noted above, Ms Wilson herself was unclear as to whether the complaints procedure had been exhausted. On the basis of the correspondence before the committee, and the representations of both parties, the letter from Ms Wilson dated 29 July 2014 appears to be the last correspondence from the factor in response to the complaint. This letter actually refers the homeowner to the complaints procedure, as though he has not already embarked upon the procedure. While the complaints procedure itself makes reference to the Homeowner Housing Panel, the letter makes no reference to the panel, as required by section 7.2.

63. The committee therefore determines that the factor has failed to comply with its duties under sections 7.1 and 7.2 of the code.

Proposed Property Factor Enforcement Order

64. The Committee proposes to make a property factor enforcement order (PFEO) 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

Sarah O'Neill

Chairperson Signature . Date 15/11/19