

- (b) There is a deed of conditions for the development. It makes no provision for a Bannermill Residents' Association but provides for the appointment of a factor to manage the common parts of the development and collect monies for such purpose.
- (c) The Respondent was appointed to manage the common parts of the Bannermill development with effect from 1 July 2011. It was founded by its director Ms Carline Stevens to carry on such management as a business. At the time of appointment the Respondent provided the Applicant with a seven paragraph document headed "Terms and Conditions".
- (d) There is no Bannermill Residents' Association. In or about 2011 a group of homeowners had come together as a result of dissatisfaction with the then factor for the development, Trinity. Following the appointment of the Respondent, certain members of the group had formed a committee to liaise with Ms Stevens. The committee members were not elected by the homeowners as a whole. Matthew Henderson was invited to become a member. In the summer of 2013 the committee approved a constitution for a Residents' Association. They asked for the Respondent to intimate it to all homeowners. It is unclear whether the Respondent has done this.
- (e) Nevertheless some homeowners, believed that there was a such an association. They understood that there was a bank account of such an association which was operated on behalf of it by the Respondent.
- (f) The Respondent became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on or about 25 February 2013 under the number PF000207.
- (g) On or about 20 October 2012 the Respondent issued a letter to all homeowners enclosing -
- a pro forma document headed "Select Property Management Services (Aberdeen) Ltd - Terms of Business for Factoring Services". Section 1 of this pro forma document stated,

"These are the standard Terms of Business applicable to work to be carried out by Select . . . These Terms of Business supplement the Written Mandate of Appointment which incorporates these terms. In the event of any inconsistency between the Written Mandate of Appointment and these Terms of Business, the Written Mandate of Appointment will prevail. . .".

The pro forma document also included a written statement of services.
- (h) At all material times from November 2013 and during the course of her application the Applicant has been represented by Mr Graham.

- (i) At all material times the Respondent has been represented by its director and Property Manager, Ms Carline Stevens. Until the termination of the factoring contract on 30 November 2014 Ms Stevens was based at the Factor's Office at Bannermill Place, Aberdeen. This was at the Bannermill development.
- (j) A number of flat owners in the development and owners' representatives, including Mr Graham, Dr Elizabeth Adam, Mr Matthew Henderson, Miss J. Thomson and Mr Robert Hepburn, formed a "Bannermill Owners Action Group". The Group signed and hand-delivered a letter dated 22 December 2013 to Ms Stevens. This letter sought "full written responses" to each of the signatories to a number of financial questions. These questions included a request for the provision of a copy of the annual Statement of Accounts that the Respondent had prepared for the development since 1 July 2011. A response was sought by 9 January 2014.
- (k) By e-mail dated 13 February 2014 timed at 17.24 hrs Ms Stevens responded to the Group's letter of 22 December 2013. This e-mail was subsequently referred to as the "group communication".
- (l) On 26 February 2014 the Group sent an e-mail to Ms Stevens. In it they asked her to confirm when her accountant would have finished the preparation of the development's accounts and confirmation that the full copy and not just the balance sheet would be forwarded as soon as they were available. They also asked for a meeting with Ms Stevens between 15 and 31 March 2014.
- (m) On 11 March 2014 the Group again e-mailed Ms Stevens asking for an indication of when the accounts would be ready and repeating the request for a meeting. By e-mail of 12 March 2014 to the Group Ms Stevens indicated that she would be chasing the accountants that day to see when the accounts could be expected to be finalised.
- (n) No response to the e-mail of 11 March having been received, on 19 March 2014 the Group e-mailed Ms Stevens again asking for an indication of when the accounts would be received and of the identity of the firm preparing them. They also asked for copies of the Bannermill Residents Association bank statements from 1 January 2013.
- (o) Action Group members Mr Hepburn and Mr Alastair Graham met with Ms Stevens at her office on 26 March 2014. What took place at that meeting is set out in Mr Graham's letter to Mr Hepburn dated 6 September 2014. In particular Ms Stevens advised that the accounts were not available as they were still with her accountant for preparation. She was unable to explain why she had written in her e-mail of 15 November 2013 that they had been attached.

- (p) The Group wrote a letter of formal complaint dated 31 March 2014 which was hand-delivered to the Respondent. It founded on a failure to respond to the Group's communications of 22 December, 26 February and 19 March. The letter was also e-mailed to Ms Stevens.
- (q) In the letter of formal complaint the Group alleged a breach of "Property Factor duties" as set out in section 17(5) of the Property Factors (Scotland) Act 2011, but founded on the terms of sections 2.1 and 2.5 of the Code of Conduct for Property Factors. They asked for a detailed response to the letter of complaint by 10 working days from its date.
- (r) By e-mail of 14 April 2014 to the Group, Ms Stevens acknowledged receipt of letter of 31 March and stated that she would give her responses on Monday 28 April 2014 upon her return to Aberdeen. However no further response was received.
- (s) On 15 November 2013 Ms Stevens had sent an e-mail to the Applicant purporting to enclose a Statement of Accounts without enclosing them and also stating that the accounts were being currently reviewed by an accountant.
- (t) The other facts set out in decision HOHP/PF/14/0098.
3. On 16 June 2014 the Applicant, together with the other members of the Action Group each lodged applications to the HOHP complaining about the matters raised in their formal letter of complaint. All were represented by Mr Graham.
4. By application received on 11 July 2014, the Applicant, through her other representative Mr Hepburn made a further application to the Homeowner Housing Panel ("HOHP") for additional determination that the Respondent had breached the Property Factor Code of Conduct (application number HOHP/PF/14/0098).
5. In the present application to the HOHP the Applicant complained that the Respondent had failed to comply with the Code of Conduct for Property Factors in the following respects:
- Communication and Consultation - Section 2.1 of the Code
- Communication and Consultation – Section 2.5 of the Code
6. The President of the Private Rented Housing Panel decided under section 18(1) of the 2011 Act to refer the application to a Homeowner Housing Committee. That decision was intimated to the Applicant and to the Respondent. The intimation of the Notice of Referral to the Respondent included a copy of the Applicant's application to the Panel including attachments to it.

7. Following intimation of the Notice of Referral, Mr Graham intimated that he wished to have the application dealt with at an oral hearing. By e-mail dated 6 November 2014 with attached letter of 5 November 2014 and other enclosures the Respondent's Property Manager Ms Stevens responded to the HOHP. The letter also contained written representations on behalf of the Respondent.
8. Given that the Applicant had requested an oral hearing and the difficult issues raised through her application a hearing was fixed to take place at The Credo Centre, 14-20 John Street, Aberdeen AB25 1BT for 19 December 2014 at 10.30 a.m. The date and times were intimated to the Applicant, and the Respondent's Ms Stevens.
9. Given the overlap of the complaint in the present case with the other applications from Action Group members and with the separate application presented on behalf of the Applicant by Mr Hepburn (ref HOHP/PF/14/0098), the hearing was also fixed to hear those applications.
10. Following their nomination the Committee issued a direction to the parties dated 21 November 2014. It required the Applicant to provide any letter of resignation as factor that had been received from the Respondent and certain documents and information relating to her representation by Mr Hepburn and by Mr Graham. It required the Respondent to produce the annual accounts which had allegedly been prepared by accountants in connection with the development, failing which a letter from the accountants providing information on when the accounts had been instructed, the date by which their completion could be expected and the reason for the delay in completion. In the direction the Committee required compliance with it by both parties by 28 November 2014.
11. By e-mail of 27 November 2014, Ms Stevens asked for an extension of the date for compliance by the Respondent with the direction. The reason was that the termination of the factoring on 30 November and removal of paperwork from the Respondent's office at the development meant that there was insufficient time for compliance. The Committee agree to extend the time for compliance by the Respondent to 4 December 2014. There has been no compliance by the Respondent with the Direction.
12. By e-mail dated 17 December 2014 Ms Stevens on behalf of the Respondent provided a further written submission together with further documentation attached to the e-mail. This submission did not address the matters in the Direction. Instead it made a claim that there had been a campaign to discredit Ms Stevens by the members of the Action Group, including Mr Hepburn, in particular. It added nothing material to her previous written representations. The lodging of the attached documentation was objected to at the hearing.
13. In her e-mail of 17 December Ms Stevens indicated that she would not attend the oral hearing that had been fixed. She also indicated that "other

information" would follow. No such information has been received by the Panel from the Respondent.

The Hearing

14. The hearing took place on 19 December 2014 at 10.30 a.m. at the venue fixed for it. The Applicant's representatives Mr Graham and Mr Hepburn attended the hearing. During the course of the hearing evidence was given by Mr Hepburn and Mr Matthew Henderson. Mr Hepburn and Mr Graham made submissions in relation to the applications where they were representatives. There was no appearance by any person on behalf of the Respondent.
15. There were a number of preliminary matters decided by the Committee. Firstly there were objections from Mr Hepburn and Mr Graham to the Committee having regard to certain documents attached to Ms Stevens' e-mail of 17 December 2014. These were based on the regulation that except as specified by the Committee a party must send to the Homeowner Housing Panel a list of any documents and copies of any documents that it wishes to rely upon no later than 7 days prior to any hearing (Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012, reg. 12).
16. Mr Graham objected to the statement from Joann Murray dated 4 December 2014. This related to a meeting of homeowners on 16 September 2014 which had been arranged by the Action Group in connection with the appointment of a new factor. It also contained some *ad hominem* remarks about Mr Hepburn and other members of the Group. It did not contain anything material to the issues in any of the applications before the Committee.
17. The Committee is entitled to allow a document to be lodged late if it is satisfied that there is good reason to do so. In addition the Committee must have regard to whether it is fair to allow it to be lodged late in all the circumstances. Given the immateriality of the statement the Committee were unable to see how fairness required the lodging of the statement. On the other hand it could see how the lodging of irrelevant material such as this could result in unfairness to the Applicants given the potential consequent wish of members of the Group to defend the attack on their reputations. In these circumstances the Committee could see no good reason to allow Ms Murray's statement to be lodged late. It upheld Mr Graham's objection.
18. Mr Hepburn objected to both the statement from Ms Murray and also an e-mail from Sheila Reid to Ms Stevens dated 7 December 2014 being lodged. His submission on Ms Murray's statement mirrored that of Mr Graham and the Committee upheld it. With regard to the e-mail from Ms Reid, this was concerned with operation of the Steering Group for the appointment of a new factor and its relations with the Respondent's Ms

Stevens. The Committee found this to be immaterial to the issues that it required to decide. In those circumstances fairness did not require the lodging of the e-mail and the Committee could see no good reason for its lodging late. It upheld the objection.

19. At the hearing Mr Graham made a motion himself for late lodging of the Land Certificate for 207 Links Road. He explained that the purpose of this was to allow him to found on the real burden on page D13 in his argument. In response to a query from the Committee he explained that it was intended to support the allegations of a breach of the Code and not to create a new ground of application based on breach of property factor's duties in the Land Certificate. Mr Graham explained the omission to lodge was down to oversight and apologised to the Committee. There was no opposition from Mr Hepburn to this motion.
20. The Committee noted the purpose of the motion. It was aware, however that neither the motion nor reliance on the document had been intimated to the Respondent who was not present. If the document was lodged the Respondent would not have an opportunity to respond to any submission on its relevance. It was not suggested by Mr Graham that the Land Certificate was in any way essential to his submissions and that he would be materially prejudiced through not being able to rely on it. In these circumstances and weighing up fairness to both Applicants and Respondent the Committee concluded that there was no good reason to allow this document to be allowed to be lodged late. The Committee refused the motion for these reasons.
21. Mr Graham indicated that he did not intend to lead any witnesses at the hearing. Mr Hepburn led himself in evidence and Mr Matthew J. Henderson.
22. Mr Hepburn indicated that during the last couple of months after the Respondent had resigned as factor, in the autumn of 2014, potential replacement factors who had spoken to the Respondent had disclosed that the Respondent had said that the accounts were a "mess" and that over £ 70,000 of owners' invoices had not been collected. This information had been gathered from Mr Henderson and Parkhill Property Management.
23. He explained that the Select report referred to in question BB8 was the minutes of the 18 July 2013 AGM. He noted that a meeting had taken place between him, Mr Graham and Ms Stevens in March 2014 as recorded in Mr Graham's letter to him of 8 September 2014. Mr Graham had come as a note-taker for the meeting and taken contemporaneous notes which he had used for the letter to him. As far as he, Mr Hepburn, was concerned Mr Graham's letter of 8 September 2014 was fully accurate.
24. With regard to the Bannermill Residents' Association Mr Hepburn explained that he, Mr Graham, Mr Henderson, Dr Adam, and Julie

Thompson had all understood until recently that the Bannermill development was managed financially through the Bannermill Residents Association who had an account with Santander bank. This assumption had been accompanied by an assumption that payments would be made by Residents Association cheques. It had been based on the Welcome Pack which the Respondent had supplied to owners on appointment. Only recently had they become aware that there was no proper association with a bank account. Rather it appeared to be an account which Ms Stevens had opened herself with herself as the sole signatory.

25. There was no Bannermill Residents Association as such and there was not provision for it in the Deed of Conditions. The Deed did provide for a factor and that the factor would administer monies. In the early days there had been a Bannermill Residents Association Committee with Mr Graham and Mr Henderson as members but it had become inactive. He was unaware of any constitution.
26. He explained that he did not understand why Ms Stevens was so wary of giving the balance on the Residents Association account. The insurance premium for the block insurance was not paid by cheque, standing order or direct debit from that account but from a bank account in the name of Select Property Management Services. This he discovered from a visit on 23 September 2014 to the insurance broker.
27. He had been approached by White Gardening Services who since about August or September 2011 had been providing gardening services. He had been told that the gardeners had not been paid since June 2014 and that they were considering claiming against the owners. The gardeners had always invoiced Select and paid by Select.
28. From Steering Group member Joann Murray he had been informed that owners paid money into the Association's account but that this was only a holding account from which money was transferred into another account to pay the bills. He had been so informed at a public meeting or shortly after 6 November 2014. Apparently Ms Murray had been so informed by Ms Stevens in a telephone conversation a few days earlier.
29. Mr Matthew Henderson gave evidence. While he had not been on the Applicant's list of witnesses, Mr Graham had no objection to him giving evidence. He stated that he had spoken to a man from Parkhill Property Management who were interested in taking on the factoring. He was told that the accounts of Select were "in a mess" and that for commercial reasons he could not divulge more. He did not mention any figures.
30. With regard to the Association back in 2010 a group of 11 owners had come together with a view to replacing the then factor with someone new. In May/June 2011 they had decided to appoint a new company whose owner Ms Stevens had been employed by the then factor Trinity. Following the appointment of Select, the group had formed a committee which then

met with Ms Stevens. Select had been formed in June 2011 and took charge on 1 July 2011.

31. Ms Stevens also had a letting business but as far as he was aware the Bannermill development was Select's sole factoring business. He had been invited to join the committee in 2012. He had been asked to develop a constitution. Eventually the constitution was approved by the committee on 29 August 2013. They asked the factor to notify all owners of the constitution in advance of a public meeting on 14 November 2013 to allow it to be approved. About 25 persons turned up on that occasion but Ms Stevens had failed to confirm the extent of notification despite having been requested to do so.
32. The Committee had no difficulty in accepting the evidence of all of the witnesses as credible and reliable.

Reasons

33. The complaint of the Applicant was that the Respondent was in breach of its duty under sections 2.1 and 2.5 of the Code which provide,
- "Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:
- 2.1 You must not provide information which is misleading or false.
- ...
- 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 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)."

Section 1 of the Code provides, in section 1.1a,

"The written statement should set out:

... *D. Communication Arrangements*

m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail"

34. In October 2012, the Respondent issued to the homeowners in the development including the Applicant a document headed "Terms of Business for Factoring Services" which included within it a "Written Statement of Services.". This written statement provided in section D as follows:
- "b. In relation to any enquiries received by letter or email, we will endeavour to respond within 10 business days of receipt of the correspondence from the relevant Homeowner."
35. While the written statement included only an undertaking to "endeavour" to respond within 10 business days, there was no complaint of a breach of section 1.1a Dm of the Code.

36. Taking the Code and the Respondent's written statement of services together the Respondent's obligation under section 2.5 was to answer enquiries and complaints as quickly and fully as possible, and to keep homeowners informed if it required additional time to respond beyond 10 business days of receipt of the correspondence from the homeowner.

Communication and Consultation

37. The Applicant's complaint of breaches of sections 2.1 and 2.5 of the Code relate to the Respondent's responses or alleged failures to respond to a number of the questions posed in the 22 December 2013 letter. Each question or request that the Applicant relies upon has to be considered in turn in order to assess whether there has been a breach of section 2.1 or 2.5 of the Code.

Question 1

38. Question 1 was, "Can you please provide a copy of each of the annual Statements of Account Select has prepared for the Bannermill development since 1 July 2011 ?".
It continued, "Additionally, can you advise whether such Statements of Account have been independently prepared/audited and if so by whom and to what level ?"
39. The responses to these questions have been set out above in the findings of fact. The Committee finds it astonishing that the accounts have not been produced even to this date. It deprecates the failure of the Respondent to comply with the Committee's direction of 21 November 2014.
40. A factor is an agent of its principals (clients) who are the homeowners who have appointed the factor to act on their behalf. It has always been the common law of Scotland that an agent must account to its principal for its financial dealings with the principal's assets, which of course include the principal's money. This common law duty is covered by section 17(5) of the Property Factors (Scotland) Act 2011, albeit that no complaint was made of a breach of it in this application. Added to that, financial transparency is one of the principal objects of the 2011 Act. It is reflected in section 3 of the Code. On any view the failure to produce accounts as requested, amounts to a serious breach of section 2.5 of the Code.
41. Has there been any false or misleading information provided by the Respondent in response to question 1 ? It was submitted by Mr Graham that this had taken place in the giving of excuses for the non-production of accounts when on a balance of probabilities the accounts did not exist. The excuses were those given in the group communication e-mail of 13 February (finding in fact (k)), the e-mail of 12 March (finding in fact (n)) and at the meeting of 26 March (finding in fact (p)).

42. One would have expected that by the time of the Committee's direction in November 2014 the accounts would have been available. After all, on one view the accountants had been reviewing or verifying them since November 2013. In the direction the Committee directed the Respondent in the absence of the accounts themselves, to produce a letter from the accountants verifying what they had done in relation to the accounts. No such letter was produced. The Respondent has simply ignored the direction.
43. In these circumstances the Committee is unable to take at face value the truthfulness of these excuses. It finds them to have been false and misleading. In this respect there was a breach of section 2.1 of the Code.

Request 2 c

44. Request 2 c was, "Please provide copies, or allow us to see copies, of the last three, presumably monthly, Bank Statements".
45. In the group communication of 13 February 2014, the Respondent replied, "Under the data protection act regulations I cannot provide you with copies of the bank statements due to the personal information held within them i.e. clients names and corresponding property address."
46. In their e-mail to the Respondent of 26 February 2014 the Group responded by asking for a copy of the bank statements from 1 January 2013 with personal details redacted. A reminder was sent on 19 March and on 31 March both 2014. No substantive response was ever received. There was therefore a breach of section 2.5 of the Code.
47. Has there been any false or misleading information provided by the Respondent in response to request 2 c ? Again the focus is on the excuse given in the group communication. In their direction the Committee asked the Respondent to indicate the specific provisions of the Data Protection Act being relied upon. There was no response to that direction. The Committee has considered carefully whether the response in the group communication can be seen as false or misleading. In the circumstances the Committee concludes that a breach of section 2.1 of the Code in response to request 2 c has not been established.

Remedies

48. Under section 20(1) of the 2011 Act, if the property factor has failed to comply with the Code of Conduct under section 14, the Committee has power to order a property factor to execute such action as it considers necessary.
49. The Applicant insists on the remedies in appendix 4 to the application which are numbered 1, 2, 3, 4, and remedy No.5 if the Committee does not grant remedy No.1. Mr Graham indicated that remedies 6 and 7 were

no longer insisted upon following the resignation of the Respondent from the factoring for the development.

50. The Committee proposes to make a property factor enforcement order reflecting remedies numbered 1, 2, and 3 but without requiring the accounts to have been formally audited. Audited accounts were not requested until the making of the application to the Panel and the Committee is unaware of any obligation on the Respondent to produce audited accounts. In these circumstances it would be inappropriate to order that audited accounts be produced. The fact that the accounts are to be verified or produced by an independent firm of accounts should suffice. This is something that the Respondent indicated was being done in Ms Stevens' group communication.
51. Remedy No.4 seeks a meeting between the Respondent, the Respondent's accountant and the members of the Action Group to allow for answers to reasonable questions that the Group may have as a result of those accounts and the Residents Association bank statements. The Committee can see the benefit of such a meeting taking place. There are however difficulties. Firstly the Committee has no jurisdiction over the Respondent's accountant. Secondly there is no guarantee that any director of the Respondent who attends such a meeting will be able to answer the questions. The Committee has no power to order Ms Stevens to attend either as a director or in her own personal capacity.
52. In these circumstances the Committee took the view that there would be no real benefit in such a meeting and therefore decided not to include such a remedy in the proposed order.
53. Details of the proposed order are contained in the Notice of Proposal accompanying this decision.

Decision and Notice of Proposal

54. The decision of the Committee is that there has been a breach of section 2.5 of the Code as set out in paragraphs 39 and 45 above and a breach of section 2.1 of the Code as set out in paragraphs 41 and 42. It rejects any breach of section 2.1 of the Code in relation to request 2 c in the Action Group's letter to the Respondent of 22 December 2013. A property factor enforcement order requires to be made.
55. Unfortunately the wording of section 19 of the 2011 Act is not as clear as it might be. This is a decision under section 19(1)(a) and (b). Given that the Committee has decided that it will make a property factor enforcement order, this decision is accompanied by a Notice of Proposal under section 19(2)(a).

Opportunity for Representations and Rights of Appeal

- 56. The Applicant and Respondent are invited to make representations to the Committee on this decision and the proposal. The parties must make such representations in writing to the Homeowner Housing Panel by no later than 14 days after the notification to them of the Notice of Proposal and this decision.
- 57. The opportunity to make representations is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.
- 58. Following the making of representations or the expiry of the period for making them, the Committee will be entitled to review this decision. If it remains satisfied after taking account of any representations that the Respondent has failed to comply with the Code of Conduct it must make a property factor enforcement order. Both parties will then have a right to appeal on a point of law against the whole or any part of such final decision and enforcement order.
- 59. In the meantime and in any event, the parties are given a right of appeal on a point of law against this decision by means of a summary application to the Sheriff made within 21 days beginning with the date when this decision is "made". All rights of appeal are under section 22(1) of the Act.

Signed ...
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.....Date: 13 March 2015

David Bartos, Chairperson