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

Reference: HOHP/PF/14/0129

Re: Property at 25 the Village, Archerfield, Dirleton, EH39 5HT ("the Property")

The Parties:-

Mr and Mrs van der Linde, 25 the Village, Archerfield, Dirleton, EH39 5HT ("the Homeowners")

Archerfield House Hotel Management Limited, Archerfield House, Golf Green, Dirleton, EH39 5HU ("the Factors")

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

Committee Members:

Maurice O'Carroll (Chairman)
Andrew Taylor (Surveyor Member)

Decision of the Committee

The Factors have failed in their duty under s 14(5) of the 2011 Act to comply with the terms of the Code of Conduct for Property Factors in respect of sections 1 (C.i, C.k, D.l, and E.o), 3 (preamble), 3.3, 3.4, 3.5a, 3.6a, 6.8 and 7.1.

The Factors have failed to carry out their duties as property factors.

The decision is unanimous.

Background

1. By application dated 29 August 2014, the Homeowners applied to the Homeowner Housing Panel ("HOHP") for a determination of whether the Factors have failed to comply with the duties set out in the Code of Conduct at sections 1, 2, 3, 6 and 7 as imposed by section 14(5) of the 2011 Act. They also seek a determination as to whether the Factors have failed to comply with their property factor duties generally in terms of section 19 of the Act.

2. Notices of referral to the Committee were sent to the parties. In response to the notices of referral, both parties indicated that they were content that the application be dealt with by way of written submissions. The Committee was content to proceed upon that basis and considered written submissions dated 8

January 2015 sent in by Messrs Ennova Law on behalf of the Factors and written submissions dated 10 February 2015 sent in by the Homeowners.

3. In addition to the written representations, the Committee had regard to a substantial number of documents and prior correspondence, including the Deed of Conditions relative to the Property and the Factors' Written Statement of Service ("WSoS"). It was also provided with all of the productions lodged in process at Haddington Sheriff Court pursuant to an action for payment at the instance of the Factors against the Homeowners. For the avoidance of doubt, those proceedings played no part in the deliberation of the Committee, although the productions were considered by way of background.

4. A hearing on the written submissions in relation to the application was held on 2 March 2015 within Europa House, Argyle Street, Glasgow.

Committee Findings

The Committee made the following findings in fact pursuant to Regulation 26(2)(b)(i) of the 2012 Regulations:

5. The Homeowners are Mr Nils van der Linde and Mrs Phillippa van der Linde who reside at the Property which they own.

6. The Property is part of a housing and golf development at the Archerfield Estate, Dirleton, East Lothian ("the Development"). The development comprises two golf courses and two residential areas known as the Archerfield Village Development (where the Property is located) and the Fidra Bay Development. A Deed of Conditions was signed on 25 August 2005 and registered under Title Number ELN 5836 by the proprietors of the Development, Caledonian Heritable Limited. In terms of the Deed of Conditions, the plot proprietors in the Archerfield Village Development have an equal *pro indiviso* right of property to the common areas in common with the other plot proprietors in that development

7. The Factor is responsible for managing and maintaining the common areas of the development and the respective owners contribute towards the maintenance cost of those common parts.

8. The Factor was registered as such on 27 January 2014 and its duties in terms of the Code arise from that date. Agents for the Factors indicated in a letter to the Homeowners dated 17 April 2014 that they did not register on 1 October 2012 due to an oversight which explains the recent date of registration. Its general duties as a factor, however, arise from 1 October 2012 and prior to that date if the Committee considers it appropriate in terms of rule 28 of the 2012 Regulations.

9. In terms of the Deed of Conditions applicable to the Property, the Factors are described as the "Facilities Manager" and the name of the company performing that function is given as Archerfield Facilities Management Company Limited

(Company number SC272735). On 1 November 2011 that company changed its name to Archerfield House Hotel Limited which is now the correct designation for the Factors of the Estate. According to a letter sent to the Homeowners by Messrs Warners on 22 November 2013, a new company was set up on that date in order to deal with the golf business at the Development. In terms of Clause 9.1 of the Deed of Conditions, the Facilities Manager (i.e. the Factors) is appointed on behalf of Caledonian Heritable Limited and the Development is to be managed exclusively by that company so appointed.

10. The Committee was provided with an example invoice for management services sent to the Homeowners on October 31 2011. The statement was on a letterhead for Archerfield Links which is stated on the footer of some invoices as being the trading name for Archerfield & Fidra Golf Courses Limited. Later invoices from October 2012 and July 2014 are on Archerfield House letterhead which is stated on the footer of certain other invoices as being the trading name of Archerfield House Hotel Management Limited, the Factors. Certain later invoices for quarterly factoring charges are provided alternately on Archerfield Links and Archerfield House letterhead. For example, an invoice dated 30 April 2014 for £2,781.94 is addressed to the Homeowners on an Archerfield Links headed invoice in respect of arrears, whereas a new invoice for £372,32 dated 27 April 2014 is addressed to the homeowners on an invoice headed Archerfield House. Confusingly, payment instructions on that invoice require that cheques be made payable to Archerfield Links.

11. Separately, supporting invoices further to the Sheriff Court action referred to above were addressed variously to the Factors, Archerfield and Fidra Golf Course, Caledonian Heritable Limited and Archerfield Links. The Committee was provided with the 2012 Annual Report for Archerfield & Fidra Golf Course Limited which showed that the directors of that company were T.A.K. Younger, R.G Arnott, T.F. Laing, K.H.M Doyle and J.M. Glen. It was also provided with the 2013 Annual Report for the Factors which lists the same directors. The granter of the Deed of Conditions is Caledonian Heritable Limited, signed on its behalf by Mr Kevin Doyle, a director thereof.

12. An undated version of the WSoS considered by the Committee was intimated to the Homeowners on or about 17 April 2014 following a specific request from the Homeowners dated 12 February 2014. That was the version of the WSoS which the Committee considered in the course of its deliberations.

13. The Homeowners sent a letter dated 28 September 2014 setting out in detail the reasons why they considered that the Factors had failed to comply with their duties in terms of the Code and their duties generally in compliance with s 17(3) of the 2011 Act. They remained dissatisfied with the response to that letter and consider that the Factors have refused or unreasonably delayed to comply with their duties under the Act.

Discussion of evidence and alleged breaches of duty

Section 1 of the Code

14. Section 1 of the Code requires Factors to provide each homeowner with a WSoS setting out the terms of service and delivery standards in a simple and transparent way. It provides greater specification as to what the WSoS should set out in the ensuing paragraphs.

Part A.a, Authority to Act

15. The legal basis of the arrangement between the factor and the homeowner is set out in the WSoS as being "through established custom and practice." Whilst that is a valid basis under this heading, it is clear that the instrument appointing the Factors in that capacity is the Deed of Conditions referred to above. Indeed, much of the correspondence between the parties makes specific reference to that document when discussing the legitimacy or otherwise of the actings of the Factors. Although, this does not form part of the complaint brought by the Homeowners, the Committee recommends that this matter be corrected at the same time as the other corrections required in respect of the WSoS as more fully discussed below.

Part B.c, Services Provided

16. The core services provided require to be set out on the WSoS. This is done by means of a list of 19 numbered services which the Factors state that they will provide. The Code also states that this section of the WSoS should include target times for taking action in response to requests for both routine and emergency repairs. At page 2 of the WSoS at the 9th bullet point, timescales are provided for the reporting of emergency, routine and larger matters either immediately or within 2 or 3 working days as appropriate.

17. The Homeowner's submission states that there is no correlation between the services listed and the cost breakdown provided [in the quarterly invoice]. It is also stated that the information provided is at such a level that no resident can ascertain the quality of the service provided. Those matters might be relevant to Section 3 of the Code in respect of financial obligations. However, in terms of what is required to be stated with the WSoS itself, the Committee is of the view that it complies with the requirements of part B.c.

18. *Part C.i and C.k, Financial and Charging Arrangements*
Any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service) requires to be stated in the WSoS in terms of part C.i. In terms of part C.k the WSoS is required to state how factors will collect payments, including timescales and methods.

19. The WSoS provides that quarterly invoices for common charges will be issued in January, April, July and October. Thereafter, provisions are made in respect of

outstanding accounts and debt recovery procedures for non-paying homeowners. The WSoS provided by the Factors does not provide any details in respect of cyclical maintenance or specific projects. There was reference in the papers to a fund for road surfacing works. There is also regular cyclical and *ad hoc* maintenance required in respect of the Flo Vac Vacuum Sewerage systems. Neither of these is mentioned, nor is there any provision for the separation of funds in relation to these items. The homeowners on the development have no means of ascertaining where such funds are held and the extent to which they are accruing. There are no repayment arrangements specified which would be triggered by a change of ownership or a termination of the arrangement.

20. In addition, standing the unusual invoicing arrangements noted above, these should be explained to homeowners within the WSoS. In particular, the Committee agrees with the homeowner's submission that the involvement of Archerfield & Fidra Golf Courses Limited ought to be explained, given that while its name appears on certain invoices, it is not a registered factor. The connection between the two companies is not explained in the WSoS.

21. Certain arrangements have been explained by agents acting for the Factors. A letter dated 17 April 2014 explains that there is an inter-company settlement arrangement as between two companies mentioned. However, that explanation is not clear and ought to be apparent from the WSoS. Another letter dated 22 November 2013 explains (i) that payment for the costs of services provided to the development were met by Caledonian Heritable Limited "effectively as agent for the Factors" and (ii) the change in name of the Factors on 1 November 2011, some two years after it occurred.

22. Prior to those letters, there was no means by which the Homeowners could have been aware of the agency or other internal arrangements operated by the Factors. While it is correct to state that there was no particular obligation to inform the Homeowner of either of these matters, it is symptomatic of a lack of transparency in the WSoS which permeates the Factors financial dealings generally as discussed below. It should also be mentioned that such clarification as has been provided has only been as a result of detailed letters of complaint from the Homeowners, whereas it ought to have been apparent from the terms of the WSoS. For these reasons, the WSoS fails to comply with parts C.i and k of Section 1 of the Code.

Part D.I, Communication Arrangements

22. Factors are required to inform homeowners of their in-house complaints handling procedure. The Committee noted that this was intimated to the Homeowners under cover of a letter dated 8 August 2014 after a specific request by the Homeowners. It is regrettable that this important information came so late in the day. In any event, it should be part of the main WSoS unless it is to be incorporated by reference and made available online. Part D.I of the Code has not been complied with.

Part E, Declaration of Interest

23. Part E of Section 1 of the Code requires that the WSoS should contain a declaration of any financial or other interest in the land to be managed or maintained. As noted above, the Factor's internal arrangements as now intimated to the Homeowners demonstrates that certain services such as invoicing and landscape maintenance are provided to the Factors by Caledonian Heritable Limited and Archerfield & Fidra Golf Courses Limited. The coincidence of directorships in relation to each of the three companies has also been noted above. These interests require to be narrated in the WSoS. Part E.o of Section 1 of the Code has not been complied with.

Section 2 of the Code

24. Section 2.1 of the Code states that Factors must not provide information which is misleading or false. In the Homeowner's submissions, five bullet points are listed, some of which have been referred to above and will also be dealt with under other headings. One issue in point is the relationship of the estate manager, Mr Ian Everard and the Factors. In their written submissions, the Factors informed the Committee that Mr Everard is a self-employed consultant who splits his time between the Factors and the separate golf company.

25. It appears that, in common with other internal matters referred to above, that had it not been for the present proceedings before the Homeowner Housing Panel, this particular arrangement would never have been made clear to the Homeowners. A lack of transparency is again the point at issue. Having stated that, the Committee considered that the statements as listed in the Homeowner's submissions, although it agreed with them, demonstrate errors of omission rather than active mis-statements. For this reason, the Committee does not consider there to have been a breach of section 2.1 of the Code.

Section 3 of the Code

26. The overriding objectives as stated in the preamble to Section 3 of the Code are:

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

It is also important for Factors to build trust with homeowners in relation to financial matters. In the Committee's view, none of these objectives is met by the Factors at present. In their submissions, the Homeowners drew the Committee's attention to a single important item of expenditure, namely landscaping and planting. They demonstrated that depending on the schedule of costs provided by the Factors or their agents, these ranged from £54,583 to £74,417 and to £76,330 in the year 2010/11 in respect of an item which one could reasonably expect to be susceptible to accurate quantification. A similar variation was demonstrated in respect of the year following 2011/12. Given that, the Committee had considerable sympathy with the Homeowner's statement that they had lost

faith in the Factor's ability to provide them with dependable information. The Committee also agreed with the Homeowner's contention that the invoices with various addressees lodged further to the court action at the instance of the Factors, referred to above in the findings in fact, underlines the lack of transparency in charging arrangements for services provided by the Factors.

27. By contrast, it disagreed with the contentions in the Factor's submissions that "there is no basis for the suggestions that there is no transparency as to the financial status of residents' funds or distinction between their funds and other business activities." The Homeowners put matters very succinctly in stating that "financial statements should show the total income derived from proprietors' payments and the total costs expended on maintenance and other works." Put another way, it is not enough that homeowners funds are protected, the Factors must demonstrate that to be the case in order to satisfy the overriding objectives of section 3 of the Code. The Factors contend that the statements provided to the Homeowners make matters clear. The Committee disagrees with that assertion.

28. The Committee had regard to a schedule of factoring costs provided by the Factors on 23 September 2014. The split of the Estate Manager's time has been referred to above. This element of expenditure is noted in the 2012/13 schedule as being £59,800. If his time is split between the housing development and the golf course, that would imply an annual remuneration of £119,600 which appears to be extremely generous. Further, a 50% cost in respect of the Ranger service is shown as £18,571.05. The Committee would like to see a justification of that cost, given the contention that it is a burden on the developer, Caledonian Heritable Limited as part of a planning agreement in terms of s 75 of the Town & Country Planning (Scotland) Act 1997 which should therefore not fall upon the residents. The Committee notes that this is not an expense specifically provided for in the Deed of Conditions.

29. The grass cutting costs are recharged from the golf company as, according to the Factor's submissions, that is a sensible and cheaper option to providing those services. This has been referred to above in relation to the WSoS. The Committee expects to see the extent of this, and all other recharged items (including administrative and invoicing services, insurance provision, security, vehicle costs, Flow Vac charges, repairs and landscaping), to be made explicit, clear and transparent in any future financial statements provided to the Homeowners, as well as being referred to in the amended WSoS, which is to be the subject of a Property Factor Enforcement Notice to follow from this decision.

30. Whilst the development must be exclusively managed by the Factors and no one else, in terms of the Deed of Conditions, the Factors do not require exclusively to manage the development and nothing else: It is also open to them to manage the spa and hotel, golf clinic etc. in addition to the development. However, this single direction of exclusivity requires the factors to be all the more transparent in

its financial dealings with the homeowners on the development, to ensure that funds collected from the homeowners are expended solely for the benefit of the homeowners. Again, the matter is put succinctly by the Homeowners in their submissions, with which the Committee agrees: "We have no objection in principle to related companies providing services but we believe that [the Factors] should disclose this information to us and other proprietors in sufficient detail that we may properly understand the relationships between these parties and ascertain whether these parties are providing cost-effective services."

31. Section 3.3 of the Code requires the Factors to provide a detailed financial breakdown of charges made and a description of the activities and works carried out which are provided for. As will be apparent from the foregoing discussion, the Committee considered that the Factors are in breach of this specific part of section 3 of the Code. As matters stand, the financial information is vague and insufficiently precise. Vouching such as timesheets or invoices require to be made available upon request to the Homeowners so that they may verify the extent to which services are being recharged and what the overall costs of such services are.

32. Section 3.4 of the Code requires the Factors to have procedures in place for dealing with payments made in advance by homeowners in cases where the homeowner requires a refund or to transfer his share of the funds such as upon sale of his property. Section 3.5a requires that homeowners' floating funds must be kept in a separate account from the Factors' own funds. Section 3.6a requires that an interest bearing account in the name of each separate group of homeowners must be arranged where a sinking or reserve fund is arranged as part of the service to homeowners. The Committee notes that Clause 9.6.10 of the Deed of Conditions makes provision for a floating fund of £300 from each plot proprietor to be made to the facilities manager. There is no reference to the floating fund in the WSoS or any evidence of specific provision being made in respect of it by the Factors.

33. There is also mention made of a reserve fund for the estate roads in the Homeowner's submissions: On 30 June 2013 an informal residents meeting was held at which the estate manager was asked whether a proportion of management fees were being set aside for large future costs such as the estate road. Residents were informed that the road was expected to last 15-20 years (presumably before requiring re-surfacing) and that funds for that purpose were accruing. If that is correct, then on the face of it there appears to be a breach of not only Sections 3.4 and 3.5a, but also 3.6a of the Code. Whatever, the correct terminology is for the roads provision, whether advance payment, sinking fund or reserve fund, it requires to be separately and transparently identified and appropriate procedures to be put in place in respect of it, including the setting up of a separate bank account. These matters are particularly important given the absence of clarity as to which company actually holds such funds on behalf of the residents of the development.

Section 6 of the Code

34. Section 6.8 of the Code states that Factors must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed. To a large extent, this matter has been covered by the discussion in relation to Section 1 of the Code above. It follows from that finding that the Factors are also in breach of Section 6.8 of the Code also. A further point raised in the Homeowner's submissions but not answered by the Factors is whether R D Anderson Haulage Limited is a subsidiary or sister company of Caledonian Heritable Limited. The Committee has not seen any evidence to support that contention but would like to see the point answered by the Factors. If it is related, then it also follows that that relationship must be disclosed in the WSoS.

35. *Section 7 of the Code*

Section 7.1 of the Code provides that Factors must have a clear written complaints resolution procedure in place which sets out a series of steps which they will follow, accompanied by reasonable timescales. As noted above in relation to the discussion of Section 1 of the Code, this was not provided to the Homeowners until 8 August 2014. The Factors therefore failed in this duty between the dates of 27 January and 8 August 2014 which represents a regrettable delay. The Property Factor Enforcement Order ("PFEO") to follow from this decision will require the complaints procedure to be incorporated into the WSoS as indicated. Further, the information requested further to the complaints resolution procedure was only provided to the Homeowners in response to the present proceedings. In that respect also, there has been a failure to comply with that part of the Code.

36. The Committee notes the perceived lack of authority of the Estates Manager, given that he is not an employee of the Factors. However, the Committee considered that, on the face of it, it is still possible that he may be able to provide redress in respect of any complaints brought by the Homeowners in future.

Factors duties generally

37. Further specification of the Homeowners' complaints is made by reference to the Deed of Conditions itself. In relation to clause 9.5 thereof, the Homeowners point out that there is no clarity as to whether the owners of the Fidra Bay Development, the golf course proprietors, are making advance payments to the Factors or whether they are benefiting from interim payments being made by the Archerfield residents. The Committee considered this to be a valid concern and one which cannot be answered due to the lack of transparency as observed above in relation to the discussions of Sections 1 and 3 of the Code. The Committee upholds the complaint in terms of the Factors' duties generally. The terms of the PFEO are intended to address this additional failure as found.

38. Another concern raised by the Homeowners is that while they are obliged to pay a specific percentage of overall costs for the maintenance of the development in

terms of the Deed of Conditions, that percentage does not take account of new facilities on the estate such as the spa and golf clinic which are apparently not subject to such charges. The contribution is also unaltered despite the enlargement of the Fidra Bay development from 27 to 59 residential units. Amendment of the Deed of Conditions to take account of these matters is beyond the scope and jurisdiction of the HOHP, however, greater clarity and transparency of the charges as presently levied might assist the Homeowners in pursuing this particular grievance in future, if so advised. The complaint is upheld insofar as it relates to the lack of transparency in the Factors' dealings with the Homeowners' funds.

39. The issue of the Factors undertaking activities other than managing the development and the change of name of the Factor have been addressed above. In terms of clause 9.2.3 of the Deed of Conditions, the Factors are obliged to act reasonably and properly at all times. Whether the running of a hotel, spa and golf clinic could be deemed to be acting unreasonably is perhaps a matter for the courts to decide. The Committee however requires the Factors to provide separate, clear and transparent accounting for all of its activities in order to permit the Homeowners to see the totality of the income derived by the Factors from their maintenance fees and how those funds are being expended on their behalf, as distinct from the funds it holds in respect of the other businesses which it manages. Similarly, this complaint is upheld by the Committee to that extent.

40. The general duty on the Factors to provide proper and transparent accounting in respect of the Homeowners' funds arises independently from and in addition to the duties imposed by section 14(5) of the Act in respect of the Code. That duty arose on 1 October 2012. The PFEO will therefore require that the necessary accounting for the Homeowners funds be provided in respect of the years since the Homeowners' complaint was first made, that is to say 2012/13, 2013/14, to date and thereafter.

Decision

41. In all of the circumstances narrated above, the Committee finds that the Factors have failed to comply with their property factor's duties in terms of section 14(5) of the Act in relation to Sections 1 (parts C.i, C.k, D.l, and E.o), 3 (preamble), 3.3, 3.4, 3.5a, 3.6a, 6.8 and 7.1 of the Code.

It also finds that they have failed to comply with their duties as factors generally in terms of section 19(1) of the Act.

The Committee therefore proposes to issue a Property Factor Enforcement Notice in terms of s 19(2) of the Act, which is provided separately.

Appeals

42. The parties' attention is drawn to the terms of s 22 of the 2011 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 a Homeowner Housing Committee; (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made..."

Signed M O'Carroll
Chairperson

Date 19 March 2015