Decision of the Homeowner Housing Committee

(Hereinafter referred to as "the Committee")

Under the Property Factors (Scotland) Act 2011

Case Reference Number: HOHP/PF/14/0143

Re : Property at 1/2, 9 Rhindmuir Gate, Glasgow G69 6EW ("the Property")

The Parties:-

James Wood ("the Applicant") Flat 1/2, 9 Rhindmuir Gate, Baillieston, Glasgow G69 6EW (care of his representative Ms Annmarie Kenna, 1/2, 11 Rhindmuir Gate, Glasgow G69 6EW)

First Stop Properties Limited, trading as Pfams, 37 Cadzow Street, Hamilton ML3 6EE ("the Respondents")

The Committee comprised:-

David Bartos - Chairperson
David Godfrey - Surveyor member
Brenda Higgins - Housing member

Decision

1. The Committee having no jurisdiction to deal with the application by the Applicant, dismisses it.

Background:-

2. By application dated 14 and received on 17 September 2014, the Applicant applied to the Homeowner Housing Panel ("HOHP") for a determination that the Respondents had failed to comply with property factor's duties owed to the Applicants. The Applicant's application form did not specify any sections of the Property Factor Code of Conduct said to have been breached. However the Respondents in their response to the application were able to identify from the form and the subsequent letter to them of 9 October 2014, allegations of breaches of sections 3.3, 4.6, 4.7, 4.9, 6.1, and 6.4 of the Code. The Applicant also sought a determination that the Respondent had failed to comply with other property factor's duties owed

to the Applicant. He described these other duties as a duty of confidentiality and a duty to protect data.

3. The Applicant also asked for his application to be considered jointly with that of his representative, Annmarie Kenna a fellow homeowner at the Rhindmuir Gate development

Findings of Fact

4. Having considered all the evidence, the Committee found the following facts to be established:-

(a) The Property is a flat which is part of the Rhindmuir Gate development in the Baillieston area of Glasgow. The development comprises five blocks of flats with a terraced house attached to one of the blocks. The blocks are numbered 3 to 11 (odd numbers), Rhindmuir Gate. Within each block there are four flats. The end terraced house is numbered 1 Rhindmuir Gate and adjoins the block at 3 Rhindmuir Gate. There are two car parks, one being adjacent to the blocks numbered 3, 5, and 7 and adjacent to the blocks numbered 9 and 11. The Property is within the block numbered 9.

(b) The Applicant is a co-owner of the Property with Ms Graham and was so at all material times. The title includes a share of commonly owned land and commonly owned parts of the block of which it forms part. The commonly owned elements of the Property are set out in the Deed of Conditions mentioned below. The Applicant resides at the Property.

(c) The Property is burdened by a Deed of Conditions ("the Deed") registered in the Land Register of Scotland on 20 February 2007 by The Bothwell Development Company Limited. The development, including the other flats in the development and the terraced house are also burdened by the Deed. The development, for the purposes of the Deed is outlined in red on the title plans for the various flats and house. It takes in the whole of the cul de sac street known as Rhindmuir Gate which extends southwards to Rhindmuir Road, the verges bounding the tree screen of the M8 motorway to the west, the car parks, the blocks of flats, the house and areas of grass between them.

(d) The terms of the Deed are set out in the Burdens Section of the Applicant's title at entry number 3. In terms of the Deed, the owner or owners of a flat or the house are described as a "Proprietor" and there are separate definitions of "Common Area" and "Common Parts".

(e) In the Deed, "Common Area" is defined to mean,

> "the public open spaces, common or amenity ground or open spaces, common access roads, pavements, footpaths, all car parking spaces and all sewers, drains, pipes, cables, boundary

fences . . . and hedges enclosing the same and common lighting and generally all ground within the Development which is not disponed by the Developers for ownership by individual Proprietors or groups of Proprietors."

"Common Parts" are defined to mean,

"in relation to a Block on the Development . . (i) the solum on which each Block is erected; the . . . outside walls, gables, roof and roof space. . . and any chimney vents and stalks of the Block . . . (ii) the drains, sewers, soil and rain water pipes, water supply pipes . . . and all pipes, cables, wires, flues and transmitters and connections so far as used in common by the Proprietors of more than one Flat in a Block; (iii) the entrance vestibule and canopy (if any), hall, stairs, staircase, passages, landings, walls and ceilings enclosing same; the hall . . . and staircase lighting; the hall . . . and staircase carpeting (if any) covering the same; the common electricity meter. . . (iv) the security telephone system regulating access to the Block (if any). . . the door bells and letter boxes at the front entrance of each Block (if any) and any other part of the Block which is used in common by two or more Proprietors including the plot . . .".

(f) Clause (FOURTH) of the Deed provides, among other things

"So far as regards each Flat and the Block of which it forms part having been erected by the Developers: -

Common Parts-Ownership

(1) Each Proprietors of a Flat shall have an equal pro indiviso right of property in common with the other Proprietors of the Flats in the same Block to the Common Parts of the said Block.

Maintenance of Common Parts of a Block

(2) Each Flat shall be held by the Proprietor thereof in all time coming under the obligation jointly with the other Proprietors of Flats in the building in the same Block of upholding and maintaning in good order and repair and from time to time when necessary renewing and restoring the Common Parts of the said Block and of cleaning, repainting and decorating the said Common Parts. All expenses and charges incurred under the foregoing obligation and of other work done or services rendered in respect of the said Common Parts shall be payable by the whole Proprietors of Flats in the same Block in equal proportions. . . ."

(g) Clause (THIRD) of the Deed provides, among other things

"*Common Area*

(1) The Common Area, so far as not occupied by buildings . . . or roadways, access paths, footpaths or parking shall be laid out and maintained as ornamental garden or pleasure ground . . . and shall be maintained as such in a neat and tidy condition

and when necessary renewed by all Proprietors in all time coming. . .
Maintenance
(2) The Proprietors of each Block shall jointly maintain all buildings and erections thereon in good order and repair . . .
The End Terraced Dwellinghouse
(3) The proprietor of the end terraced dwellinghouse shall maintain the dwellinghouse and the pedestrian path leading thereto in good condition and repair at their own expense and shall contribute along with the proprietors of Block 1 [3 Rhindmuir Gate] an equal share of the cost of maintenance of the garden ground in front of and behind Block 1 and the end terraced villa."

Clause (FIFTH) (1) provides that in clauses (FIFTH) to (TENTH) "Flat" includes the house adjoining the block at 3 Rhindmuir Gate.

Clause (SEVENTH) provides, among other things,
"*Roads and Services*
. . once so constructed the Proprietors within the Development shall be bound and obliged to maintain unbuilt on and in good order and repair . . . any such roadway, spaces, footpaths [adjoining the same] and car parking spaces . . . unless the same or any of them are taken over for maintenance by any public authority . . . ".

Clause (EIGHT) provides, among other things,
"*Common Area*
In respect that the Common Area has been designated by Developers as amenity ground, roadway or footpath and car parking spaces . . . each and every Flat being under the burden of each individual Proprietor thereof being liable for an equal share, or such other equitable share as may be determined by the Developers or by the Manager of maintaining the same as public open spaces, amenity ground, roadway, footpaths and /or visitor car parking spaces in a neat, tidy and proper condition unless and until the said portions and others or any part of them are conveyed to or are taken over by any public authority or other party or parties and maintenance. . .".

Clause (NINTH) provides, among other things for the appointment and dismissal of a factor described as a "Manager", and the liability of a Proprietor to the Manager for expenses and charges and remuneration incurred by the Manager. Its material provisions are set out in the reasoning below.

(h) The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 9 January 2013. At that time the Respondents were the Manager of the development in terms of the Deed of Conditions. They produced a Statement of Services.

(i) From January 2014 the Applicant and his co-owner Ms Graham received invoices from the Respondents. These included "monthly management fees" and "monthly ground maintenance". The invoices covering June and September also included "communal landlord electricity supply". The invoices did not explain how the sums for these items had been reached. None of the invoices explained the services involved under these headings.

(j) By e-mail of 6 August 2014 to Annmarie Kenna, the Respondents' Mr Laurie referred to the possible termination of their factoring and stated,

> "There is debt of in excess of £ 10,000 currently in the development and once this is paid we will agree to this as it is very obvious that regardless of what we do or say that your mind is made up . . . We wonder if the other Factors would be so "enthusiastic" if they were aware of the debt in the development – are they willing to take on this debt ?"

Ms Kenna had not been informed of such debt previously. No indication was given in the e-mail that the Respondents would be seeking to recover this debt from other homeowners or that they had an entitlement to recover the debt in that way.

(k) At a meeting of residents of the development on 9 August 2014 the homeowners of 14 units voted to terminate the Respondents' appointment as factor for the development. Ms Kenna was appointed Chairman of the Rhindmuir Gate Residents Association. Ms Kenna informed those present, including the Applicant, that there were some difficulties with owners not paying their debts to the Respondents but at that stage she was unaware of the extent of the default or the identity of the defaulters. By e-mail of 11 August 2014 to Ms Kenna the Respondents suggested that they terminate factoring the development on 30 September. In her e-mail of 12 August 2014, on behalf of the Rhindmuir Gate Residents Association, Ms Kenna intimated the outcome of the meeting and accepted the Respondents' suggestion.

(l) At the beginning of August 2014 the Respondents, Applicant, and his co-owner had a payment plan for the payment in instalments of debts due by the Applicant and his co-owner to the Respondents. The Applicant and his co-owner were adhering to the plan. Despite this the Respondents wrote to the Applicant seeking payment of the whole amount outstanding within 7 days.

(m) By letter dated 29 August 2014 addressed to each homeowner the Respondents intimated they they would cease to act as factors after 30 September 2014. In this letter gave notice for the first time that they were charging the 16 owners who had not defaulted in payment with the debts due by the remaining 5 owners. They sought payment within 14 days under threat of legal proceedings and the registration of a notice of potential liability. They also enclosed a statement of account debiting them with 1/16 of a "development bad debt" of £ 9,487.65,

amounting to £ 592.98 and a "Schedule of bad debt" identifying a debt owed to them by the Applicant and Ms Graham. No prior warning of a claim for a "development bad debt" covering in part the debt owed by the Applicant, had been made by the Respondents.

(n) The Respondents had not raised proceedings against any of the owners of the 5 properties, including the Applicant ("the defaulters") whose debts they were seeking to recover from the non-defaulting homeowers. They had entered into payment plans with the defaulters including the Applicant. The non-defaulting homeowners were not informed of the payment plans or any decision of the Respondents not to take action against the defaulters. The Respondents have not provided any details of the payment plans to the non-defaulting homeowners.

(o) The Applicant has suffered distress, incluidng insomnia as a result of the Respondents' disclosure of the unpaid debts he has incurred as a result of the default in payment to the Respondents by himself and his co-owner.

5. Following submission of the application the HOHP clerk raised with the Applicant's representative the need for the property factor to be notified why the Applicant considered that the Respondents had failed to comply with the Code or with any other duty owed to them. The Applicant intimated a complaint under sections 3.3, 4.6, 4.7, 4.9, 6.1, and 6.4 of the Code by letter to the Respondents dated 9 October 2014 which was enclosed with a covering letter from the Applicant to the Respondents dated 6 October 2014.

6. During October and November there was further various correspondence passing between the parties which dealt with the Application. This included letters from the Respondents to the Applicant dated 28 October and 24 November, and from the Applicant's representative to the Respondents dated 28 October and 1 December 2014

7. The letter from the Respondents to the Applicant dated 24 November 2014 sought to respond to the grounds of complaint set out in the Applicant's letter of 9 October 2014 and his representative's letter of 28 October. It can be seen as forming part of the Respondents' response to the application.

8. 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 Respondents on or about 15 December 2014.

9. Following intimation of the Notice of Referral, the Respondents also intimated further written representations attached to a letter of 30 January 2015 to HOHP and indicated that they wished an oral hearing. In the letter the Respondents objected to the Application and the applications of other

homeowners where Ms Kenna was acting as their representative being dealt with as one complaint. The Committee proceeded to hear all of the applications together. It has however dealt with them separately. The objection was therefore rejected.

10. The Respondents also complained about Ms Kenna acting as representative of the Applicant and five other applicant homeowners a well as herself on the basis that this was not "fair". The Respondents did not give any reason as to why this should be unfair and the Committee could see no reason why Ms Kenna could not act as representative for the other applications and on her own behalf in her own application. This complaint has no substance. Before leaving this matter, the Committee having heard Ms Kenna both in presenting her own application and that of her fellow homeowners, observes that she acted in a reasonable manner with propriety and courteousness.

11. Following their nomination on or about 12 February 2015, the Committee issued a direction to the parties dated 9 March 2015. Following the direction the Respondents made further submissions by two e-mails dated 17 March and two e-mails dated 18 March 2015. Ms Kenna sent two further e-mails to HOHP dated 11 and 16 March 2015 enclosing further productions in response to the direction.

12. The parties also lodged productions. These covered all of the seven applications. The first bundle lodged by Ms Kenna contained an inventory and very helpfully had its pages numbered consecutively from page 1 to page 100. She also lodged bundles of documents with handwritten heading sheets, and also with the e-mails of 11 and 16 March 2015 in response to the Direction. The Respondents lodged various bundles of productions also.

13. The Committee fixed a hearing to take place at Europa Building, 450 Argyle Street, Glasgow G2 8LH for 19 March 2015 at 10.30 a.m. The date and times were intimated to the Applicant's representative, and the Respondents by letter sent on or about 12 February 2015.

The Evidence

14. The evidence before the Committee consisted of:-

- The application form and its attachments
- The Applicant's representative's productions with pages numbered 1 to 100
- The e-mails and letters, statements, invoices and credit notes mentioned above
- The letters from October, November and December 2014 mentioned above.
- The oral evidence of Annmarie Kenna
- Registers Direct Land Register Title copy for LAN194722 being the title of the Applicant and his co-owner.

- The statements issued by the Respondents to Ms Hardie and Ms McConway dated 29 August 2014
- The letter dated 26 September 2014 from the Respondents to Mr and Mrs Simpson.
- The statements issued by the Respondents to Miss Kenna, Mr and Mrs Simpson, Ms Hardie, and Mr Spence all dated 1 April 2015 and statement issued by the Respondents to Mr Spence dated 27 April 2015.

The Hearing

15. The hearing took place on 19 March 2015 at 10.30 a.m. at the venue fixed for it. The Applicant's representative Ms Kenna attended the hearing. There was no appearance on behalf of the Respondents. On the day prior to the hearing the Respondents indicated to HOHP that no-one on their behalf would be attending and that they were content nevertheless for the hearing to go ahead without the opportunity of responding to any oral representations at the hearing.

16. The only evidence given was that by Ms Kenna. The Committee found that she gave evidence in a candid fashion, answered the questions from the Committee as best as she could and had no reason to doubt her credibility and reliability. Her evidence, which understandably overlapped with her submissions, is summarised in the reasoning below and was accepted.

Jurisdiction

17. At the hearing Ms Kenna's attention was drawn by the Committee to the question of whether the Committee had jurisdiction (power) to deal with the Application in the light of the provisions of section 17(3) of the Property Factors (Scotland) Act 2011. Section 17(1) provides that,

> "A homeowner may apply to the homeowner housing panel for determination of whether a property factor has failed (a) to carry out the property factor's duties, (b) to ensure compliance with the property factor code of conduct. . .".

Section 17(3) provides that,

> "No such application may be made unless –
> (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or as the case may be, to comply with the section 14 duty, and
> (b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve the homeowner's concern."

The "section 14 duty" is the factor's duty to ensure compliance with the Code of Conduct for Property Factors.

18. Before it can deal with an application the Committee must have jurisdiction (power) to do so. The Committee has a duty to raise issues concerning its jurisdiction with the parties and at the hearing brought to the attention of the Applicant's representative the issue of a possible lack of jurisdiction to deal with the application due to the lack of intimation of the complaints to the factor before the making of the application. However only the Applicant was represented at the hearing and there was no appearance for the Respondents.

19. At the hearing Ms Kenna indicated that she did not have any submission to make on jurisdiction, other than that she accepted that she had not sent any letter of complaint prior to her application on behalf of any other homeowner in the development. She had begun to act for other homeowners in relation to their complaints, as opposed to the termination of the factor's appointment, only after the end of August 2014. She confirmed that the Respondents had not been notified of any of these other homeowners' complaints prior to submitting the application to the HOHP on their behalf.

20. Given that the Respondents had been absent at the hearing, the Committee raised the issue of jurisdiction in their direction to both parties dated 30 April 2015 which intimated potentially relevant case law and sought written representations on the issue. The Applicant's representative submitted that the Committee did have jurisdiction on the basis of the case law intimated to her. The Respondents made no representation and indicated that they were content to leave the issue of jurisdiction to the discretion of the Committee. Given the importance of section 17(3) in the HOHP scheme, the Committee took the view that it should decide the issue.

21. The purpose of section 17(3) is to ensure that complaints are dealt with in-house by factors and only if the factor has refused or unreasonable delayed in resolving the homeowner's concern can there be an application to the Homeowner Housing Panel of which the Committee is a part. As was observed in paragraph 17 of the Policy Memorandum published when the Act was introduced as a Bill,

> "The [Homeowner Housing Committee] would only consider cases where the parties had been unable to resolve matters through the property factor's internal complaints procedure, thus creating an incentive for factors to resolve disputes amicably.".

In other words the Homeowner Housing Panel was intended to be a last resort.

22. This objective is reflected in Section 7 of the Code of Conduct which states,

> "To take a complaint to the homeowner housing panel, homeowners must *first* notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns,

or have unreasonably delayed in attempting to resolve them." (Committee's emphasis).

23. The first page of the application forms which were supplied to the Applicant's representative in this case echo this statement albeit it without highlighting and on the last page the applicant is required to attach to or enclose with the application form the notification to the factor "for the purposes of section 17(3)(a)" and any written response by the factor to the notification. The need to attach the notification and evidence of refusal or unreasonable delay by the factor is mentioned on the "How we work" page on the HOHP website. The website also contains a flowchart which shows notification and lack of resolution as a step to be taken before an application to HOHP.

24. Section 18(2)(a) of the 2011 Act gives the President of the Homeowner Housing Panel a discretion to reject an application if she considers that "the homeowner has not afforded the property factor a reasonable opportunity to resolve the dispute.". That allows the President to carry out a sift of applications and reject those which appear to be premature in that the factor has not been given a reasonable opportunity to resolve the dispute. However non-rejection by the President at the sift stage, does not have the effect of giving the Committee to whom she refers an unrejected case jurisdiction which it otherwise lacks.

25. The issue of jurisdiction in events similar to those of the current case has been raised in a previous case although not labeled as such. In *Lopkin v Hacking & Paterson Management Services* (HOHP/PF/14/0019) the first notification to the factor occurred two days after the homeowner had submitted his application to the HOHP. The factor gave his final rejection of the complaint 9 days after the submission of the application. The factor submitted that the application was incompetent on the basis of section 17(3), and by implication, that the committee lacked jurisdiction. The committee observed that "on a narrow interpretation" of section 17(3) the factor's submissions were correct. However the committee stated that a "broader interpretation" might require to be taken.

26. The background to this "broader interpretation" was the awareness of the Committee that "nearly all of the applications" received by HOHP did not upon receipt meet all of the requirements necessary to allow an application to progress and that "a significant majority" of the applications did not comply with the two tests in paragraphs (a) and (b) of section 17(3). It was also said to be common for applications to be unclear about whether the factor's internal complaints procedure had been gone through in full.

27. The committee in *Lopkin* then dealt with the sifting powers of the President under section 18(2)(b) and with the President's powers under section 18(3)(b) to obtain further information to allow her to decide whether or not

to reject an application. Finally the committee mentioned the notice of referral to them by the President which "clearly stated" that the application comprised not merely the application form but also subsequent correspondence between the HOHP and the homeowner which had been provided to allow the President to decide whether or not to reject an application.

28. The committee then rejected the factor's submission concluding, "On the broader interpretation of the application process taken by the President the fact that the original application predated the letter of notification and the factor's rejection letter was not fatal to the competency of the matter. The Sub-committee [*sic*] was satisfied that it was appropriate to accept the President' broader interpretation of the legislation rather than the narrow interpretation of section 17(3) favoured by the factor.".

29. *Lopkin* does not express what wording in section 17(3) is being given a broad rather than narrow interpretation. However it would appear that the focus is on the word "application" in the opening words of section 17(3). The reasoning appears to be that the scope of "application" in section 17(3) is not restricted to the initial request to HOHP for a determination in terms of section 17(1) but that it includes all documents provided to HOHP after such initial request and the commencement of the President's sifting process. This approach involves the word "application" having different meanings in section 17(1) and (2) and 18 on the one hand and in section 17(3) on the other hand.

30. That the Scottish Parliament could have intended such a construction or interpretation seems unlikely. Firstly as a matter of syntax section 17(3) states, "No such application" may be made and the use of the word "such" is a clear reference back to section 17(1) which states "A homeowner may apply to the" HOHP and section 17(2) which provides "An application under subsection (1)" must set out the homeowner's reasons.

31. Secondly, section 18(1) provides that the President must decide whether to refer "an application under section 17(1)" to a committee and section 18(3)(a) that the President must so decide "within 14 days of the panel's receipt of the application concerned". This pre-supposes that an application has already been formed and presented to HOHP. Clearly an application in the sense of section 18(1) and (3)(a) which comes to the President for the sift can hardly contain material that has yet to be obtained during the sift. While that material might allow a president to be able to sift the application, in the wording of section 18(3) Parliament draws a clear distinction between it ("the further information") and the application which it supports.

32. It might be thought that such material could result in the amendment of an application but it is interesting to note that regulation 22(1) of the Homeowner Housing Panel (Applications and Decisions) (Scotland)

Regulations 2012 expressly prohibits the amendment of an application to refer to any failure by the property factor not referred to in the notification under section 17(3)(a). This is linked to the next point.

33. Thirdly, and not least, the approach in *Lopkin* set out above seems to be at odds with and undermines the very objective behind section 17(3). It allows a factor to be subjected an application to HOHP, its powers and procedures and the potential costs involved without having had the opportunity to resolve the complaint through its own in-house procedure. It makes HOHP the first rather than the last resort. This also results in the incurring of costs by HOHP in having to deal with applications that could have been resolved without any involvement on its part.

34. In *Lopkin* the committee justified its approach on the basis of a number of factors. Regrettably, on closer examination none of them appear persuasive.

1) It is suggested that without the broad interpretation virtually all applications would be rejected upon first receipt and this would raise a question about access to justice and be contrary to the aims of the Act and the Code. So far as the aims of the Act and Code are concerned, these are for the HOHP to be a last rather than first resort, as already mentioned. With regard to access to justice, to require a complainer to put a complaint to the person complained about is not something which is at odds with the provision of access to justice. It cannot be assumed, and the Scottish Parliament did not assume, that such a complaint cannot be resolved through the in-house procedures that factors are required to have. For that very reason special emphasis was placed on in-house complaints resolution in the Code.

2) It is suggested that the work of the Panel might be increased through the rejection of applications and their subsequent re-submission. Again, this assumes that any in-house complaints procedure will be unsuccessful in resolving a complaint. There is no reason to think that must be the case. It may be that the relevant part of the application form can be highlighted.

3) It is suggested that the broad interpretation (presumably of the word "application") is supported by rule 3 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 which specifies the overriding objective of the Regulations is to enable proceedings to be dealt with justly, including the seeking of informality and flexibility in the proceedings. Firstly rule 3, and its companion rule 4 relate to the interpretation of the Regulations and not the Act. There nothing to indicate that anything other than the ordinary approach to statutory interpretation should apply to the Act. Secondly, the Regulations themselves distinguish between the application (regulation 5) and the attachments to the application (regulation 6). They do not give any support to the view that the attachments whether provided

with the application or in response to a request from or on behalf of the President are themselves part of the application. Thirdly, as already noted regulation 22(1) of the Regulations prohibits any amendment to an application to refer to any failure which is not referred to in the section 17(3)(a) notification. This exclusion of any discretion on the part of the Committee is clearly designed to avoid any amendment being made to introduce a complaint not notified before the lodging of the application.

4) Finally it is suggested that the case of *Burns International Security Services (UK) Limited v. Butt* reported at [1983] Industrial Cases Reports at page 547 supports the view that an overly technical approach to the completion of an application form by a lay person should not be taken. The Applicant's representative draws an analogy with the form in the present case. *Burns* involved the question of whether a poorly completed application form to a tribunal had the effect of denying them jurisdiction. However the issue in the present case is not caused by a poorly completed application form. Rather the issue is whether the lack of ***any pre***-application notification to the factor to allow the complaint to be resolved without the need for any HOHP involvement at all denies the committee jurisdiction. The *Burns* case did not deal with that issue as there was no equivalent prohibition as in s.17(3).

There can be issues over whether a notification made before the application was sufficient to satisfy s.17(3) and *Burns* may be relevant for that purpose. However that is not the issue here where there was ***no*** notification by or on behalf of the applicants other than Miss Kenna before the making of their applications.

35. For all of these reasons the Committee is unable to follow the *Lopkin* case and unable to interpret the word "application" in section 17(3) as meaning other than the initial request made by an applicant to HOHP to find a factor in breach of the Code or other property factor's duty.

36. In these circumstances the Committee are unable to interpret the opening words of section 17(3), "No application shall may be made. . ." as having any effect other than denying it jurisdiction (power) to deal with the application if the conditions in section 17(3) are not satisfied. It being admitted that those conditions were not satisfied in the present case the Committee concludes that it has no jurisdiction (power) to deal with this application, which falls to be dismissed.

37. Nevertheless having regard to the detailed submissions that were received by the Committee and the considerable effort put into parties' submissions, the Committee thinks it proper to make observations on the merits of the complaints. The decision on jurisdiction should not detract from the importance of these observations.

Section 3.3 of the Code of Conduct

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

39. In his application form the Applicant complained about the lack of clarity in the bills issued by the Respondents. He confirmed this compliant under section 3.3 of the Code in his letter to the Respondents of 9 October 2014. At the hearing his representative noted that for the monthly ground maintenance and monthly communal cleaning there was no indications of dates of visits. This detail used to be provided and then it ceased. There was no specification of the fraction of the overall cost that a homeowner was paying. Other homeowners had been concerned about this. No annual statements were ever provided. The Respondents' submissions rest on the invoices being sufficiently detailed.

40. The preamble to section 3 of the Code provides,
"While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is that they are paying for, how the charges were calculated, and that no improper payment requests are involved."

41. The Committee finds that the invoices issued to the Applicant in 2014 all failed to contain a detailed financial breakdown of charges. It is quite unclear how the figures in the invoices were reached. The fraction being charged was unclear. All of the invoices failed to identify in any meaningful sense what "Ground Maintenance" was. Given that the figure for this item was the same whether it was for January or August, a homeowner is entitled to wonder what the ground maintenance activities were. Similar criticisms apply to "Communal Cleaning" albeit this may be expected to the largely the same over a year. A number of activities may be subsumed under "Communal Cleaning". What were they ? The Respondents leave the Applicant in the dark. Transparency is lacking. In these circumstances the Committee finds a breach of section 3.3.

42. The same observations apply to the schedules of "bad debts" which the Respondents were seeking to recover. There is no reason why the level of clarity given to a homeowner for his or her own invoices should not apply to invoices of other homeowners which the Respondents are in effect seeking to pass on to that homeowner. In this case the invoices of other defaulting homeowners were not even supplied to the Applicant, and no breakdown of debt was provided in respect of the defaulting homeowners

except for Mr & Mrs Mowat. There was thus a breach of section 3.3 in relation to the schedules of bad debts also.

Section 4.6 of the Code

43. Section 4.6 provides,
"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)."

44. In her evidence Ms Kenna said that she had indicated to the meeting on 6 August that there was some difficulty with recovery but at that stage she was unaware of the extent of the default or of the identity of the defaulters. The Respondents admit that they did not inform the homeowners, including the Applicant, sooner about the debts mentioned in that e-mail. They say that "as all the owners were making payments" and they never intended while remaining factors of asking the other homeowners to pay a share of the debts, they did not take the view that there was as debt recovery problem or even if there was, a problem which could have implications for the other homeowners.

45. The question of whether there was a problem and if so whether such a problem had implications for homeowners must be assessed objectively. It will not suffice for a factor to say that he did not believe that there was a problem or that it held implications for homeowners.

46. The level of debt was stated in the e-mail of 6 August to Ms Kenna to be "in excess of £ 10,000". The schedule of bad debt attached to the statement issued by Respondents to the homeowners who had not defaulted in payment at the end of August 2014 discloses a debt of £ 9,487.65. The Committee was not informed of the terms of the payments plans that the Respondents have alleged were in place with the debtor homeowners. However clearly whatever had been agreed in the plans was not sufficient to prevent the Respondents from demanding payment from the other homeowners once intimation of the termination of the factoring had been given. The inference from the making of such a demand must be that these payments plans were or are wholly unrealistic to allow the Respondents to recover the debt within a reasonable period of time. In these circumstances the Committee finds that clearly, there were debt recovery problems of other homeowners.

47. Given the level of the debts and the possibility that they might be irrecoverable within a reasonable timescale from the Respondents' point of view, there was an implication for the homeowners as a whole that either the Respondents might wish to seek payment from the other homeowners pursuant to a meeting under clause NINTH or terminate the factoring or both. That the Respondents chose for a period of time not to seek payment from other homeowners, did not prevent the debt recovery problems from being liable to pose serious implications for other homeowners. In these circumstances the Committee finds that in failing to

inform the Applicant of the difficulties in recovering the debts (other than his own) disclosed at the end of August 2014 before that time, the Respondents breached clause 4.6 of the Code.

Section 4.7 of the Code

48. Section 4.7 of the Code provides, "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."

49. The Applicant's representative explained that she felt that the Respondents had done nothing about the debts, one of which was more than 4 years old. Another debt was around £ 4,000 when she learned of it in August 2014. Mr Mowat, one of the defaulters, had defaulted on his payment plan. The debt recovery document should have been sent to the debtors. The length of time allowed for repayment was not reasonable although she did not know its terms.

50. She submitted that the Respondents had written to the defaulters in September 2014 and asked for payment in 7 days. She had asked for details of the outcome of any court action against the defaulters but had not received any.

51. The Respondents have purported to answer this complaint by stating that no court action was taken against the defaulters because they were making payments to account. No details of the payments to account have been provided. All that has been produced by the Respondents were updated statements of the outstanding debt issued with fresh invoices to the other homeowners, including the Applicant. No such statements were issued before the other homeowners were charged with the alleged "bad debt" of the defaulters.

52. It does not appear to the Committee that the Respondents sought to recover from the Applicant debts due to them by his fellow defaulters. In these circumstances the duty to take reasonable steps to recover from his fellow defaulters as set out in section 4.7 does not arise. This complaint is rejected.

Section 4.9 of the Code

53. Section 4.9 of the Code provides,

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

54. In his application form the Applicant made no complaint of the Respondents having acted in an intimidating or threatening manner when

contacting him. Rather his central complaint was distress caused at what was alleged to be a breach of confidentiality in the disclosure of his earlier default in paying the debt to the Respondents and the extent of that debt. In these circumstances this complaint is rejected.

Section 6.1 of the Code

55. Section 6.1 of the Code provides,

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

56. The Applicant's representative complained that there was no available telephone line for contacting the Respondents to report non-emergency repairs. This was not a complaint evident from the Applicant's application form. No amendment of the application form was sought by the Applicant's representative to incorporate this complaint. It did not form part of the application before the Committee. In any event even if it were to be seen as part of the application, the Committee has not been given sufficient evidence to allow it to find that there was no procedure in place to allow notification by homeowners of matters requiring attention. Section 6.1 is not about how effectively that procedure was followed. For all these reasons this complaint is rejected.

Section 6.4 of the Code

57. Section 6.4 of the Code provides, "If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works."

58. The Applicant's representative submitted that no programme of works had ever been prepared as far as she was aware while the Respondents carried out the factoring. The Respondents denied this, indicating that a copy had not been given as they did not think that it had been requested.

59. For the reasons mentioned in relation to section 4.7, this complaint did not form part of the application which the Committee had to consider. In any event the Programme of Works document was sent to the Applicant with Respondents' submissions in their letter of 24 November 2014. In the circumstances the Committee could not conclude that the document was not in place while the Respondents were factors. It finds that there was no breach of Section 6.4 of the Code and for all these reasons this complaint is rejected.

Breach of confidentiality and data protection

60. In his application the Applicant complained about the Respondents having broken a duty of confidentiality and a data protection duty in disclosing to other homeowners the extent of the debt due by him and his co-owner in their letter to other homeowners of 29 August 2014. He also complained about the lack of a warning to him from the Respondents that they were about to do this.

61. Aside from dealing with complaints of breaches of the Code of Conduct, the Committee's jurisdiction is limited to complaints that a factor has failed to carry out "property factor's duties" as defined in section 17(4)(a) of Property Factors (Scotland) Act 2011. For present purposes this defines "property factor's duties" as "in relation to a homeowner . . . duties in relation to the management of the common parts of land owned by the homeowner.".

62. It is not clear that either the common law duty of confidentiality or the statutory duty in section 4(4) of the Data Protection Act 1998 to comply with the data protection principles set out in that Act are, in relation to the Applicant, "duties in relation to the management of the common parts" owned by him. The Committee has some doubt that on a proper interpretation of the definition of section 17(4)(a), the jurisdiction of Homeowner Housing Committees was intended to extend to deciding whether such duties had been breached.

63. Given that the application is being dismissed in any event and that the Committee has neither raised nor been addressed on this issue of jurisdiction, the Committee does not require and is not in a position to decide this point. Consequently it does not decide whether either or both of these duties have been breached.

64. The Committee observes, merely, that at first glance there does not appear to have been any breach of the common law duty and that the disclosure of the Applicant's debt to other homeowners did appear to involve the "processing" of "personal data" in terms of the Data Protection Act. Whether any such processing involved a failure to comply with data protection principles and a breach of section 4(4) is a matter requiring further analysis, which for the reasons stated above, is unnecessary.

Close cleaning

65. In his application the Applicant complained about the close cleaning of his block not having been done by the Respondents or if done not done well. No further details have been supplied to the Committee and the Committee are unable to find any breach of property factor's duty in this regard.

Property Factor Enforcement Order

66. Given that the application falls to be dismissed no property factor enforcement order is proposed.

Opportunity for Representations and Rights of Appeal

67. 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 ....Date: 11 July 2015

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David Bartos, Chairperson