Decision by a Committee of the Homeowner Housing Panel in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012
hohp Ref: HOHP/PF/15/0110

Property:- 16 Eastside, Flat 1/2, Kirkintilloch, Glasgow G66 1PY ("the Property")
The Parties:-
Mr. Brendan Campbell and Mrs. Margaret Campbell, 98, Loch Road, Kirkintilloch, Glasgow G66 3EA ("the Homeowner")
Apex Property Factor Ltd., having a place of business at 46, Eastside, Kirkintilloch, Glasgow G66 1QH ("the Factor") hereinafter together referred to as "the parties"

Committee Members
Karen Moore (Chairperson)
David Godfrey (Surveyor Member)

Background

1. By an application dated 12 July 2015 and subsequent dates and lodged by Mr. Brendan Campbell on behalf of the Homeowner in terms of Section 17(1) of the Property Factors (Scotland) Act 2011 ("the Application"), the Homeowner applied to the Homeowner Housing Panel ("HOHP") (firstly) for a determination of whether the Factor had failed to comply with the Property Factor Code of Conduct ("the Code") as required by section 14(5) of the Act and, in particular, had failed to comply with section 4 (Debt Recovery) at 4.6 and 4.7, Section 6 (carrying out repairs and maintenance) at 6.9 and Section 7 (Complaints resolution) at 7.1 and (secondly) for a determination of whether the Factor had failed to comply with the property factor's duties in terms of Section 17 of the Act.
2. A Hearing was fixed for 24 February 2016.
3. On 15 January 2016, The Committee issued a Direction in terms of Rule 13 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 ("the Regulations") as follows:-
   "Direction 1
   The Factor is directed to supply to the Committee a copy or print of the Land Certificate or recorded title deed for the Property to show the common parts of the development of which the Property forms part and the apportionment of costs for the common parts.

Reason for Direction 1
The Committee consider it necessary that they are aware of the common parts liability attributed to the Homeowner.
Direction 2
The Factor is directed to supply to the Committee a copy of their Statement of Services and their Standard Debt Recovery Procedures both which are referred to in letter dated 17 March 2015 from the Factor's to the Homeowner.
Reason for Direction 2
The Committee consider it necessary that they are aware of the extent of the Factor's obligations to the Homeowner and the way in which the Factor deals with debt recovery matters.
Direction 3
The Factor is directed to supply to the Committee evidence of their appointment as factors for the Property and to advise the Committee of the date on which the appointment commenced.
Reason for Direction 3
The Committee consider it necessary that they are aware of the nature and duration of the Factor's appointment.
Direction 4
The Factor is directed to advise the Committee of their charges and fees as Factor for the Property.
Reason for Direction 4
The Committee consider it necessary that they are aware of the Factor's charging policy.
Direction 5
The Committee note that, in correspondence to the Homeowner, the Factor relies on the Tenements (Scotland) Act 2004. The Factor is directed to refer to the Committee to the relevant part of that on which the factor relies.
Reason for Direction 5
The Committee consider it necessary that they understand the way in which the Factor applies the Tenements (Scotland) Act 2004.
Direction 6
The Committee note that, in correspondence to the Homeowner, the Factor refers to registering statutory Notices of Potential Liability. The Factor is directed to advise the Committee of any such Notices registered against the Property and any properties in the development of which the Property forms part.
Reason for Direction 6
The Committee consider it necessary that they are aware of the steps taken by the Factor in respect of debt recovery.
Direction 7
The Committee note that, in correspondence to the Homeowner and to the Homeowner Housing Panel, Mr. Neil Cowan is designed on some occasions as writing on behalf of the Legal Department and on others as Maintenance Co-ordinator. The Factor is directed to clarify the role of Mr. Neil Cowan in its organisation.
Reason for Direction 7
The Committee consider it necessary that they understand the role and authority of Mr. Cowan within the Factor's organisation"

4. The Factor complied with the Direction on 10 February and the Factor's responses to the Direction were copied to the Homeowner.
5. In addition, the Factor lodged three Inventories of Productions with the Committee and made written representations to the Committee, all of which were copied to the Homeowner.
6. Mr. Ritchie of Hardy MacPhail, Solicitors, Glasgow, on behalf of the Factor requested an adjournment of the Hearing fixed for 24 February. The Committee, having regard to written representations on behalf of both parties, agreed to adjourn the Hearing to 16 March 2016. Thereafter, the Homeowner requested a further adjournment of the Hearing. The Committee, having regard to written representations on behalf of both parties, agreed to adjourn the Hearing to 31 March 2016.

Hearing.

7. The Hearing took place on 31 March 2016 at Wellington House, Wellington Street, Glasgow. The Homeowner appeared on their own behalf. The Factor was represented by Mr. Ritchie of Hardy MacPhail, solicitors, Glasgow. Mrs. Christine Davidson-Bakshaee, one of the Factor's directors, and Mr. Neil Cowan, administrator within the Factor's organisation attended on behalf of the Factor.

Preliminary Matters.

8. The following three preliminary matters were dealt with by the Committee before the Hearing commenced:-
    i) the jurisdiction of the Committee to hear the application;
    ii) the Factor's objection to the submission by the Homeowner of a decision of a Committee of the HOHP , namely Barr - v- Apex Property Factor reference hohp/pf/15/0054 and
    iii) the Homeowner's request for expenses of the first adjourned Hearing.

Preliminary Matter i)

9. With regard to preliminary matter i), jurisdiction, Mr. Ritchie submitted that the Factor's appointment as factor had ended on 28 February, 2015, having been dismissed by the Homeowner and their co-owners in the block of which the Property forms part ("the Block") by notice dated 1 December 2014. Mr Ritchie referred the Committee to Section 10 (5) of the Act which states:-
10. *"In this Act, "homeowner" means.an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor"*
    and to Section 17 (1) of the Act which states :-
    "(1) 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 as required by section 14(5) (the "section 14 duty")."
11. Mr Ritchie referred the Committee to the date of the Application of 12 July 2015 and submitted that, by virtue of the termination of the Factor's appointment prior to that date, the Homeowner was not a homeowner in terms of the Act at the date of the Application and so was not entitled to make an application in terms of the Act.
12. Mr Ritchie referred the Committee to a decision of a committee of the HOHP namely, Donaldson – v – Walker Sandford Property Management Ltd reference hohp/pf/14/0013 which decision noted that there is no provision in the Act in respect of a former homeowner.
13. The Homeowner advised the Committee that he and his wife are still the owners of the Property and that the Property is self factored by the owners of the Block. Mr

Campbell stated that the issues complained of arose from the Factor's dealings with the Property and the Block during the course of their appointment and that the Homeowners were not aware of the extent of the debt due by co-owners until after the termination of the Factor's appointment.

14. The Committee adjourned to consider the Factor's preliminary objection in relation to jurisdiction and determined as follows:
15. It is not disputed that the Homeowner was the owner of the Property during the Factor's appointment, nor is it disputed that there was a factoring relationship between the parties which ended in February 2015.
16. Section 2 of the Act states:-
    "(1)In this Act, "property factor" means (a)a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes".
17. As this is the very nature of the Factor's business, there is no doubt that the Factor is a property factor for the purposes of the Act and so an application may be made in respect of the Factor. The question for the Committee was "Is the Homeowner entitled to make an application?"
18. The Committee noted that both Section 2 and Section 10 are in the present tense. The Committee took the view that the use of the present tense referred to the duration of a factor's appointment rather than to the date of an application, that is, an applicant to the HOHP required to be in ownership (a homeowner) whilst the factor carried out property management functions.
19. The Committee gave consideration to the Code at Section 3.1 which provides for compliance with the Code after the factoring contract has terminated and took the view that the Act clearly intended the factor/homeowner relationship to continue beyond termination of the factoring contract.
20. The Committee also gave consideration to the Policy Memorandum and Policy Objectives which accompany the Act and noted that a policy objective was to give a forum of redress to homeowner's whose complaint would otherwise be treated by a factor as a failure to pay a debt and so circumvent the homeowner's ability to complain.
21. The Committee took the view that if Mr. Ritchie's interpretation was correct, all that a factor has to do to avoid the compliance with the Act is to terminate its contract with a homeowner who complains and so prevent the homeowner from exercising his/her right to apply to the HOHP, and that, given the purpose and objective of the Act, it is not reasonable or logical to determine that avoidance of compliance with regulatory legislation was the intention of the Scottish Parliament. The Committee had regard to the case, Donaldson – v – Walker Sandford Property Management Ltd reference hohp/pf/14/0013, and noted that, whilst the status of the homeowner was raised, no determination on competence of jurisdiction was made by the committee on that ground as the application was held to be premature on other grounds.
22. The Committee is therefore satisfied that the Homeowner is a homeowner in terms of the Act and the Factor is a property factor in terms of the Act and so the Committee has jurisdiction to hear the Application.

    Preliminary Matter ii)
23. With regard to the second preliminary matter, the Factor's objection to the homeowner's referral to the decision of a committee of the HOHP, Barr – v- Apex

Property Factor reference hohp/pf/15/0054 on the grounds that the Homeowner had not complied with Rule 11(4) of the Regulations which states:-

"Where a party seeks to rely upon a copy of a document as evidence, the committee may require the original document to be produced."

and Rule 12 which states:-

1) *Except as otherwise provided in these Regulations or as specified by the committee, a party must send to the panel no later than 7 days prior to any hearing—*

(a) a list of any documents and copies of the documents that the party wishes to rely upon; and

(b) a list of any witnesses that the party wishes to call to give evidence.

(2) Where a party seeks to rely upon a document not produced in accordance with paragraph (1), the committee may allow the document to be lodged if they are satisfied that there is good reason to do so.

(3) In determining whether to allow a document to be lodged late, the committee will have regard to whether to do so is fair in all the circumstances."

24. The Factor contended that the Homeowner had not complied with the terms of these Rules and so should not be allowed to refer to the case, Barr – v- Apex Property Factor.

    At the outset of the oral proceedings, the Committee had advised the parties of Rule 3 of the Regulations, which state:-

    "3.—(1) the overriding objective of these Regulations is to enable the panel and any committee to deal with the proceedings justly.

    (2) Dealing with the proceedings justly includes—

    (a) dealing with the proceedings in ways which are proportionate to the complexity of the issues and to the resources of the parties;

    (b) seeking informality and flexibility in the proceedings;

    (c)ensuring, so far as practicable, that the parties are on an equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take;

    (d) using the special expertise of the panel and the committees effectively; and

    (e) avoiding delay, so far as compatible with the proper consideration of the issues."

25. The Committee, having regard to Rule 3, took the view that the purpose of Rules 11 and 12 is to comply with natural justice and provide for fair notice between the parties of documentary evidence. The Committee noted that it has a discretionary power in respect of evidence. The Committee noted that in this case, the case referred to by the Homeowner is not documentary evidence in support of their case but is decision of a committee referred to as a precedent. The Committee noted that the Homeowner had given prior notice of this case by email dated 7 February 2016 and the case itself was a finding against the Factor who had been served with the original of it. The Factor was well aware of the case and so there was no prejudice to the Factor by it being referred to by the Homeowner. The Committee also noted that Mr. Ritchie had not given the Homeowner prior notice in terms of the Regulations of the case of Donaldson – v – Walker Sandford Property Management Ltd reference hohp/pf/14/0013 to which he referred.

26. Accordingly, the Committee had no hesitation in rejecting the Factor's objection.

Preliminary Matter iii)

27. With regard to preliminary matter iii), expenses, the Committee determined to deal with this at the close of the Hearing.
28. At the close of the Hearing, Mr. Campbell advised the Committee that the Homeowner did not wish to pursue expenses.
29. Mr. Campbell made a statement to the Committee in a straightforward and clear manner. Mr. Campbell addressed each point raised in the Application.
30. The main basis of the Homeowner's complaint is that the Factor had had acted in a way which was unjust and unwarranted and had breached Section 4 of the Code, Debt Recovery, at Section 4.6 and 4.7 by failing to take sufficient action to collect common charges payments from two of the co-owners in the Block, namely Mr. De Nardo and Ms. Sellers. Mr. Campbell submitted that throughout the factoring contract, the Factor had not made the Homeowner aware of the extent of the debt owed by the two co-owners and that the Homeowner only became aware of the level of debt when they received the final statement issued by the Factor following the termination of the Factor's contract.
31. Mr. Campbell advised the Committee that in his opinion the Factor had not followed its Debt Recovery Procedure in respect of both collecting debts from the co-owners and in its dealings with the Homeowner. Mr. Campbell referred the Committee to the Factor's Standard Debt Recovery Procedures, a copy of which had been submitted by the Factor in response to the Committee's Direction. Mr. Campbell pointed out that the Factor had not followed the twelve steps set out in the procedures, either in its dealings with the Homeowner or in its dealings with Mr. De Nardo and Ms. Sellers. In particular, the Factor had not carried out steps 8 and 9, warning of court action and raising court action but had proceeded to carry out steps 12 and 11, in that order. The Factor had not raised court action against Mr. De Nardo and Ms. Sellers but had apportioned their debts amongst the other owners and had registered a statutory Notice of Potential Liability ("NOPL") against the Property. Mr. Campbell advised the Committee that the Homeowner had only become aware of the NOPL when they had received a copy of their Land Certificate which had been submitted by the Factor in response to the Committee's Direction. Mr. Campbell advised the Committee that the Homeowner had only become aware of the level of debt incurred by Mr. De Nardo and Ms. Sellers on receipt of the Factor's final invoice to the Homeowner dated 27 February 2015.
32. Mr Campbell submitted that the Factor had treated the Homeowner differently to Mr. De Nardo and Ms. Sellers when applying the debt recovery procedures, the latter having been given opportunities to pay whereas a NOPL had been registered against the Property immediately after the final invoice was raised.
33. Mr. Campbell drew attention to a duplication of invoices in the Factor's Statement of account dated 3 December 2015. Mr. Ritchie on behalf of the Factor objected to this line of evidence on the basis that it was not raised in the Application. The Committee adjourned to consider the objection and determined that the matter raised by Mr. Campbell on behalf the Homeowner was a new matter of which the Factor had not been given prior notice and so upheld Mr. Ritchie's objection.
34. With regard to the Factor's breach of Section 7 of the Code at 7.1, Complaints Resolution, Mr. Campbell submitted that the Factor had failed to reply to emails sent to them by Mrs. Campbell and failed to deal with Mrs. Campbell's emails as complaints.

35. Mr. Ritchie on behalf of the Factor objected to this line of argument on the basis that the complaint post-dated the factoring relationship and so the Factor no longer had a duty to the Homeowner in terms of the Code. The Committee determined to hear the line of argument under reservation and deal with the competence issue at the close of the Hearing. This is dealt with at paragraph 74.
36. With regard to the Factor's breach of Section 6 of the Code at 6.9, Carrying out repairs and maintenance, and the Factors failure to carry out the statutory property factor's duties, Mr Campbell explained that this related to guttering work, the cost of which had been refunded to the Homeowner and so this aspect of the Application was no longer being pursued by the Homeowner.
37. In summing up, Mr. Campbell stated that, in his view, the approach taken by the Factor was unjust and unwarranted as the Factor had knowingly allowed a high level of debt to be accrued by Mr. De Nardo and Ms. Sellers without advising the Homeowner and their co-owners in the Block; that the Factor had added to this unfairness by failing to raise court actions against Mr. De Nardo and Ms. Sellers and had simply passed Mr. De Nardo's and Ms. Sellers' debts on to the Homeowner and their co-owners without giving them an opportunity to question this and had not followed their Debt Recovery Procedures.
38. On behalf of the Factor, Mr. Cowan, and to a lesser extent, Mrs. Davidson-Bakshaee gave evidence. Both did so in a straightforward and frank manner.
39. With regard to Section 4 of the Code, Debt Recovery, Mr. Cowan advised that the Factor's Debt Recovery Procedures had been followed but accepted that this had not been communicated to the Homeowner. Mr. Cowan advised the Committee that there had been weekly contact with Mr. De Nardo and Ms. Sellers to try to recover their debts and that a debt collection agency had been instructed. Mr. Cowan advised the Committee that court action had not been raised against Mr. De Nardo and Ms. Sellers because the cost of a court action would have been borne by the other owners of the Block. In Mr. Cowan's opinion, court action is costly, and, even if successful, obtaining a decree does not always result in recovery of the sum due. Mr. Cowan also stated that the Factor would have considered raising court action in future but its contract for services had been terminated.
40. Both Mr. Cowan and Mrs. Davidson- Bakshaee advised the Committee that there had been difficulties with obtaining payment for common charges from Mr. De Nardo and Ms. Sellers from the outset, and that at a meeting with the owners of the Block prior to its appointment, the Factor and the owners had discussed the likelihood of bad debts and the owners had been advised by the Factor that bad debts would be apportioned to all of the owners of the Block. Both Mr. Cowan and Mrs. Davidson-Bakshaee advised the Committee that although they were of the opinion that owners in the Block should have been aware of the debts due by Mr. De Nardo and Ms. Sellers, the owners had not been informed of the extent of these debts until the issue of the final invoice on 27 February 2105.
41. Both Mr. Cowan and Mrs. Davidson-Bakshaee gave evidence that they had on several occasions approached Mr. De Nardo and Ms. Sellers in person and by telephone to attempt to recover the debts owed. Both stated that Mr. De Nardo and Ms. Sellers had been abusive and aggressive. Mr. Cowan stated that Mr. De Nardo had promised that his tenant would pay the cost but that this had not come to fruition. Both Mr. Cowan and Mrs. Davidson-Bakshaee gave evidence that in their opinion the NOPL protected the Homeowner better than a court decree because the NOPL

would eventually result in the debt being paid on the sale of the property against which it is registered. In response to questions by the Committee, Mr. Cowan advised the Committee that the sum secured by the NOPL against the Property was a ninth share of the total sum due by Mr. De Nardo and Ms. Sellers and that there was no intention to hold the Homeowner liable for the full amount on a joint and several basis.

42. In response to questions by the Committee, Mr. Cowan stated that Mr. De Nardo and Ms. Sellers had not made any payments and that the sums accrued were mostly an accumulation of the Factor's monthly charge of £25.80, the sum due by Ms. Sellers being £1,067.10 and by Mr. De Nardo being £1,021.95.
43. Mr. Cowan advised the Committee that the debts due by Mr. De Nardo and Ms. Sellers had been apportioned on 27 February 2015, the day before the Factor's contract with the Homeowner ended, and that the NOPL had been prepared and signed on that same day. The NOPL was then registered by personal presentation in the Land Register on, according to the Land Certificate for the Property, 25 March 2015. Mr. Cowan advised the Committee that the debts were apportioned equally between all nine owners in the Block and not in terms of the rateable value as set out in the title deeds as this method had been agreed by the owners of the Block when appointing the Factor.
44. Mr. Cowan and Mrs. Davidson-Bakshaee advised the Committee that NOPLs had been registered against Mr. De Nardo and Ms. Sellers during the course of the factoring contract and against all of the other properties in the Block after the issue of the final invoice on 27 February 2015.
45. With regard to the Factor's breach of Section 7 of the Code at 7.1, Complaints Resolution, Mr. Cowan's evidence to the Committee was that responses to Mrs. Campbell's emails had been sent by hard copy mail. In response to questions by the Committee, Mrs. Campbell advised that she had not received the letters. Mr. Cowan advised that the letters had not been returned as undelivered. In any event, the key point submitted by Mr. Cowan was that as the factor relationship had been terminated, the Complaints Procedure was not available to the Homeowner. In short, the Code applied only during the course of the factoring contract and not after the end of that contract.

Findings of the Committee

General

46. The Homeowner is the heritable proprietor of the Property which forms part of a tenement block consisting of 8 flats and one commercial property. The Factors registered in terms of the Act on 1 November 2012 and its duties under the Act to comply with the Code arose from that date.
47. The Factors were appointed as factors for the Block in October 2012 and carried out this role until 28 February 2015. The Factor's monthly common charges were a management fee of amounting to £25.80. There were difficulties with obtaining payment for common charges from Mr. De Nardo and Ms. Sellers throughout this time, although the Homeowner was not made aware of this nor was the Homeowner made aware of the extent of the debts due by Mr. De Nardo and Ms. Sellers.
48. On 27 February 2015, the day before the date of the termination of their factoring services, the Factors apportioned the debts due by Mr. De Nardo and Ms. Sellers to all of the properties in the Block and invoiced the Homeowner for the sum of £298.44 plus VAT (£358.13 in total) being their share of these debts. On 27 February 2015,

the Factor prepared and signed a NOPL and on 25 March 2015 registered the NOPL by personal presentation in the Land Register against the Property.

49. The Factor did not raise court action against Mr. De Nardo and Ms. Sellers in respect of the debts due by them. The debts due by Mr. De Nardo and Ms. Sellers are largely the management fee due to the Factors and are not accounts due to contractors. Although no documentary evidence was produced, the Committee accepted that the Factor had registered NOPLs against Mr. De Nardo and Ms. Sellers' properties.

Findings in respect of Section 4 of the Code, Debt Recovery.

50. The Code at 4.6 and 4.7 states:-

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

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

51. The Committee found that, by its own admission, the Factor did not apportion debts due by other homeowners until the day before its factoring contract terminated and did not advise the Homeowner of the debt recovery problems until after the factoring contract had terminated. The debt recovery problems clearly had implications for the Homeowner as the outcome was an unexpected invoice for £505.33 and the registering of the NOPL against the Property.
52. In order to comply with Section 4.6 of the Code which uses the mandatory phrase "you must keep homeowners informed", the Committee were of the view that the Factor should have written specifically to the Homeowner to inform them of the level of debt accrued by Mr. De Nardo and Ms. Sellers but did not do so. Section 4.6 also requires factors to keep homeowners informed of debt problems which could have implications for them. There was no evidence that the Factor outlined the implications to the Homeowner until after the factoring contract had been terminated. In fact, the implication, namely the apportioning of the debts and the registration of the NOPL had already come to fruition by the time the Homeowner was informed.
53. The Committee note that the Factor's letter of 17 March 2015 to the Homeowner states, with reference to Section 4.6 of the Code, that "The Code of Conduct does not specify a timescale for Owners to be notified of other homeowners' debt". It is the Committee's view that, given the full wording and intention of Section 4.6, this is a misleading interpretation of the Code.
54. The Committee had no hesitation in finding that the Factor had not complied with 4.6 of the Code.
55. Section 4.7 of the Code provides that factors must be able to demonstrate that they have taken reasonable steps to recover unpaid charges from defaulting homeowners before charging those remaining homeowners.
56. The Committee found that the Factor, by its own admission, did not follow its own Standard Debt Recovery Procedure and so had not taken reasonable steps to recover unpaid charges prior to charging the remaining owners in the Block. Whilst the Factor might have made calls upon Mr. De Nardo and Ms. Sellers to make payment and might have made a referral to a debt recovery collector in respect of Mr. De Nardo, there was no evidence from the Factor that they had taken steps 4, 5, 6 ,7, 8, 9 and 10 (being respectively the issue of a reminder letter, a seven day

demand letter, referral to a debt collection agency or the issue of court warning letter, issue post summons letter and raise small claims action). The Committee found that the Factor, by its own admission, proceeded directly to step 11 in respect of recovering Mr. De Nardo and Ms. Sellers' debts when apportioning these among the co-owners in the Block.

57. In respect of the Homeowner, the Factor, by its own admission, did not follow its own Standard Debt Recovery Procedures at all and proceeded directly to step 12, the registration of an NOPL.
58. The Committee found that the Factor did not actively pursue Mr. De Nardo and Ms. Sellers debts and did not raise court action. The Committee did not accept the Factor's position that it did not raise court action because the prospect of a successful debt action was in doubt and that the registering of the NOPL protected the Homeowner. The Committee noted that Mr. De Nardo and Ms. Sellers are property owners and so have property assets. Mr De Nardo, as stated by the Factor, rents his property and so presumably has rental income. In the opinion of the Committee, both debtors have assets which could have been attached by a court decree.
59. The Committee did not accept the evidence of the Factor that it had not raised court action in order to protect the Homeowner and their co-owners from additional expense. Mr Cowan indicated to the Committee that the Factor had not made a decision on raising court action before the termination of the factoring contract. The Factor produced no evidence to show that it had consulted with the Homeowner and their co-owners to determine if they would be prepared to fund a court action. Accordingly, the Committee were of the view that the Factor had never intended to raise court actions against Mr. De Nardo and Ms. Sellers but had intended to rely on the NOPLs.
60. Both Mr. Cowan and Mrs. Davidson- Bakshaee advised the Committee that Mr. De Nardo and Ms. Sellers had not made any payments during the 28 month factoring contract. The Committee considered that, as the Factor failed to follow fully its own Standard Debt Recovery Procedure, it had not taken reasonable steps to recover debt before seeking to recover the funds from Homeowner and their co-owners in the Block. The Committee had no hesitation in finding that the Factor had breached Section 4.7 of the Code.
61. With regard to the NOPL, which is dealt with more fully in the following paragraphs, at the Hearing, Mr Campbell put the point to Mr Cowan directly that the NOPL does not protect the Homeowner. The Committee agree with the Homeowner on this point. Mr Cowan advised the Committee that the debts which had been apportioned and which were secured by the NOPL are, in the main, the management fee due to the Factor. It was wholly within the Factor's control to recover these sums and wholly within the Factor's powers to prevent the accumulation of these sums. The Committee is of the view it that the Factor has manipulated the Tenements (Scotland) Act 2004 to its advantage and that the true purpose of the NOPL was to protect the Factor as the Factor suffers most financially from the non payment by Mr. De Nardo and Ms. Sellers.

Findings in respect of Notice of Potential Liability (NOPL)

62. Although the Homeowner did not argue competence in respect of the NOPL, the Homeowner asks the Committee to order the Factor to discharge the NOPL and the NOPL was addressed by both parties during the Hearing. The Committee are

satisfied, therefore, that it is within their remit to give consideration to the statutory basis of the NOPL.

63. The Committee noted that the date on which the NOPL was signed is 27 February, 2015, the day before the factoring contract came to an end, but that the date on which the NOPL was registered against the Homeowner's title was 25 March 2015, being a date after the factoring contract came to an end. The Committee had regard to the terms of the Tenements (Scotland) Act 2004 at Section 13 the relevant part of which states:

"13 (1) A notice of potential liability for costs–

(a) may be registered in relation to a flat only on the application of...

(iii) any manager (within the meaning of the Tenement Management Scheme) of the tenement"

64. The Committee is aware from its own professional knowledge that the effective date of a deed in the Land Register of Scotland is the date of registration and not the date of signing and so the Committee is of the opinion that the Factor that was not an applicant in terms of Section 13 (1) (a) (iii) on the effective date of the NOPL.

65. Accordingly, The Committee took the view that had the Homeowner argued in respect of the competency of the NOPL in terms of Section 13 of the Tenements (Scotland) Act 2004, the Committee would have found that the Factor was not entitled to register the NOPL.

66. With regard to the liability of costs relative to the NOPL, the Committee had regard to the Tenements (Scotland) Act 2004 and the title deeds to the Property.

67. Section 11 of the Tenements (Scotland) Act 2004 sets out the categories of costs in respect of which an NOPL can be registered as follows:

"11. (1) An owner is liable for any relevant costs (other than accumulating relevant costs) arising from a scheme decision from the date when the scheme decision to incur those costs is made.

(2) For the purposes of subsection (1) above, a scheme decision is, in relation to an owner, taken to be made on–

(a) where the decision is made at a meeting, the date of the meeting; or

(b) in any other case, the date on which notice of the making of the decision is given to the owner.

(3) An owner is liable for any relevant costs arising from any emergency work from the date on which the work is instructed...

(5) An owner is liable for any accumulating relevant costs (such as the cost of an insurance premium) on a daily basis.

(6) Except where subsection (1) above applies in relation to the costs, an owner is liable for any relevant costs arising from work instructed by a manager from the date on which the work is instructed.

(7) An owner is liable in accordance with section 10 of this Act for any relevant costs arising from maintenance carried out by virtue of section 8 of this Act from the date on which the maintenance is completed.

(8) An owner is liable for any relevant costs other than those to which subsections (1) to (7) above apply from–

(c) such date; or

(d) the occurrence of such event,

as may be stipulated as the date on, or event in, which the costs become due.
(9) For the purposes of this section and section 12 of this Act, "relevant costs" means, as respects a flat–

(e) the share of any costs for which the owner is liable by virtue of the management scheme which applies as respects the tenement (except where that management scheme is the development management scheme); and

(f) any costs for which the owner is liable by virtue of this Act."

68. The Committee noted from the title deeds to the Property, being Land Certificate number DMB7349 a copy of which was lodged with the Committee in response to the Committee's Direction 1, that the title condition in respect of liability for common charges relates to repair and maintenance of common parts and not to property management or factoring costs.
69. The Committee are of the view that the debts due by Mr. De Nardo and Ms. Sellers by do not fall entirely within the categories of debts prescribed by the Tenements (Scotland) Act 2004 as applicable to a NOPL and are not debts for which there is a joint liability in terms of the title deeds.

Rule 5 of the Tenements (Scotland) Act 2004

70. The Committee gave consideration to the Factor's response to the Committee's Direction 5 which stated that the Factor relied on Rule 5 of the Tenements (Scotland) Act 2004 in respect of recovering a share of the debts due by Mr. De Nardo and Ms. Sellers from the Homeowner. Rule 5 states:-

"Where an owner is liable for a share of any scheme costs but—
(a) a scheme decision has been made determining that the share (or a portion of it) should not be paid by that owner, or
(b)the share cannot be recovered for some other reason such as that—
(i) the estate of that owner has been sequestrated, or
(ii) that owner cannot, by reasonable inquiry, be identified or found,
then that share must be paid by the other owners who are liable for a share of the same costs (the share being divided equally among the flats of those other owners), but where paragraph (b) applies that owner is liable to each of those other owners for the amount paid by each of them."

71. The Factor did not make any submission to support the application of Rule 5. In fact, it was clear to the Committee that both Mr. De Nardo and Ms. Sellers can be identified and found. It appears to the Committee that the Factor erroneously believes that Rule 5 allows the Factor to hold co-owners liable for each other debts regardless of the facts of the matter and the application of the terms of the title deeds.
72. Therefore, the Committee were of the view that the Factor did not have the right or entitlement to apportion the debts due by Mr. De Nardo and Ms. Sellers to the Homeowner and so did not have the right or entitlement to register the NOPL against the Property.

Findings in respect of Section 7 of the Code, Complaints Resolution.

73. The Code at 7.1 states:

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

74. Mr. Cowan's evidence to the Committee was that the complaints procedure applied only to current factoring clients and not to former clients. The Committee gave consideration to the Act and the Code. The Code is statutory code in terms of Section 14 of the Act with the purpose of setting minimum standards of practice for registered property factors, of which the Factor is one. The Committee found nothing in either the Act or the Code to support the Factor's view that the Code was restricted to Factor's in respect of dealing only with current customers. As the Code sets out a standard of customer service and as the Homeowner's enquiries to the Factor dealt with the standard of service, the Committee found it wholly reasonable and logical that the Homeowner should have the benefit of the Factor's complaints procedure.
75. The Committee had regard to the letters sent by the Factor to the Homeowner on 17 March 2015 and 5 May 2015. Both letters end with an invitation to contact the Factor for further discussion. The Committee could not reconcile this invitation to enter into further dialogue with the Factor's position that it no longer had a duty to the Homeowner. Accordingly, the Committee rejected this argument on the part of the Factor.
76. The Committee noted that Mrs Campbell of the Homeowner had emailed the Factor on 12 March 2015 regarding the final invoice. The Committee could not express a view as to why the letters dated 17 March 2015 and 5 May 2015 sent by post by the Factor appeared not to have reached the Homeowner but the Committee would have expected that a response to an email would have been by the same medium. The Committee noted that the Homeowner sent further emails on 22 April 2015 and 17 August 2015, neither of which was acknowledged by the Factor and that no invitation was made to the Homeowner to engage in the Factor's in-house complaints procedure.
77. Accordingly, the Committee found that the Factor had breached Section 7.1 of the Code.

Decision

78. Taking into all of the circumstances narrated above, the Committee finds that the Factor has failed to comply with their property factor duties in terms of s 14(5) of the Act in respect of Sections 4.6, 4.7 and 7.1 of the Code.
79. The Committee therefore determined to issue a Property Factor Enforcement Order (PFEO). Given the terms of the Committee's Findings, as the Factor had no basis to apportion Mr. De Nardo and Ms. Sellers' and had no entitlement to register the NOPL, these matters cannot stand. It follows from that finding that the additional charges levied by the Factor also cannot stand. In the PFEO to follow from this decision, the Factor must therefore discharge the NOPL and cancel all invoicing in respect of it and the apportionment.
80. The Committee noted that the Homeowner did not wish to pursue expenses incurred by them in respect of these proceedings. However, the Committee was of the view that the Homeowner had been unnecessarily inconvenienced and distressed by the Factor's actions and so the Committee determined that it is equitable that the Factor compensates the Homeowner.
81. The decision is unanimous.

Proposed PFEO

82. In accordance with Section 19 (3) of the Act, having been satisfied that the Factor has failed to comply with their property factor duties in terms of s 14(5) of the Act the Committee must make a PFEO. Before making a PFEO, to comply with

Section 19(2) of the Act, the Committee before proposing an order must give notice of the proposal to the Factor and must allow the Parties to give representations to the Committee.

83. The Committee propose to make the following property factor enforcement order:

"No later than [date 21 days from date of Order], the Factor must:

1. *Make payment to the Homeowner of the sum of £250 in recognition of the time spent, distress and inconvenience that the Factor's breaches of the Code have caused to the Homeowner;*
2. *Cancel the final invoice of 27 February 2015 and provide notification of that to the Homeowner;*
3. *Issue a replacement final invoice to the Homeowner showing a final sum due to them being the reimbursement of their float of £50 under deduction of the sum of £22.80 being due in respect of all factoring services provided and outstanding as at 27 February 2015 and make further payment to the Homeowner of the balance of £27.20;*
4. *At its own expense, register a Discharge of the Notice of Potential Liability registered against the Homeowner's Property and*
5. *Provide to the Homeowner Housing Panel documentary evidence of compliance with the above Orders."*

84. The intimation of this decision to the Parties should be taken as notice in terms of Section 19(2)(a) of the Act and the Parties are hereby given notice that should they wish to make any representations in relation to the Committee's proposed property factor enforcement order that they must be lodged with the Homeowner Housing Panel within 14 days of the date of this Decision. If no representations are made, the Committee will proceed to make the order as proposed. If representations are made, they will be considered by the Committee prior to the making of any order.

85. The property factor should note that failure without reasonable excuse to comply with a property factor enforcement order is a criminal offence in terms of Section 24 of the Act. Additionally, the Scottish Ministers can take any failure into account in respect of the future registration of the property factor on the register of property factors.

Appeals

86. 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..."

Karen Moore
Chairperson
1 May 2016