

## **Decision of the Homeowner Housing Committee**

(Hereinafter referred to as "the Committee")

Under Section 19 (1)(a) and (b) of the Property Factors (Scotland) Act 2011

Case Reference Number: HOHP/PF/13/291

**Re : Property at 49 Colbreggan Gardens, Hardgate, Clydebank G81 5PB ("the Property")**

### **The Parties:-**

**Yvonne McDonald, Cairnlea, 39 Cochno Road, Clydebank G81 6PT ("the Applicant")**

**West Dunbartonshire Council, Housing and Community Safety, Housing Environmental and Economic Development Department, Garshake Road, Dumbarton G82 3PU ("the Respondent")**

### **The Committee comprised:-**

Mr David Bartos                      - Chairperson  
Mr Mike Links                        - Surveyor member

### **Background:-**

1. By application received on 24<sup>th</sup> September 2013, the Applicant applied to the Homeowner Housing Panel ("HOHP") for a determination that the Respondent had failed to ensure compliance with the Property Factor Code of Conduct as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act").
2. In her application the Applicant complained that the Respondent had failed to comply with the Code of Conduct in the following respects:
  - (1) Written Statement of Services - Section 1.1a, A, B, C, D, E, and F of the Code
  - (2) Financial Obligations - Section 3.3 of the Code

(3) Carrying Out Repairs and Maintenance - Sections 6.1 and 6.3 of the Code

(4) Complaints Resolution - Sections 7.1 and 7.2 of the Code.

Her application related to the matters which had been raised in her letter to the Respondent dated 25 July 2013. The particular issues raised under section 3.3 of the Code had been raised previously by the Applicant's letter to the Respondent dated 1 May 2013 and in a letter by her to the Respondent dated 3 June 2013. The latter letter had also raised the failure to provide a written statement of services as required by Section 1 of the Code.

3. Following intimation of the Notice of Referral, the Applicant added further written representations. These representations included an allegation that the Respondent had breached its duties as a property factor in terms of the Feu Disposition by Clydebank District Council to Ronald Charles Brown and Margaret Mary Brown registered 10 August 1988 which forms entry No. 2 in the Burdens Section of the Applicant's title number DMB27604 (set out in the Land Certificate for that title number updated to 30 April 2004).
4. In particular the Applicant alleged that the Respondent had no power as factor under clause 6(b) of the Feu Disposition (on page D7 of the Land Certificate) to instruct works for the repair, maintenance and renewal of the common parts estimated to exceed £ 500 without the authorisation of a majority of the proprietors of houses in the block which included the Property.
5. Secondly she alleged that the Respondent had not complied with its duty under clause 6(e) of the Feu Disposition (on page D8 of the Land Certificate) to furnish to proprietors a statement of common charges at the end of each half year period.
6. The Applicant was given an opportunity to intimate the two alleged breaches of the Feu Disposition to the Respondent which she did by letter of 25 November 2013 which was copied to the Committee's clerk by e-mail dated 13 December 2013.
7. Given in particular the difficult issues raised through the Feu Disposition complaints and section 3.3 of the Code and the desire to hear and test the the arguments in more detail, the Committee fixed a hearing to take place at The Europa Building, 450 Argyle Street, Glasgow G2 8LH was fixed for 5 March 2014 at 10.30 a.m. The date and times were intimated to the Applicant, and the Respondent by letter sent on or about 4 February 2014.

## **The Evidence**

8. The evidence before the Committee consisted of:-
- The application form and its appendices, including the document headed "Sold Property Management Service: Factoring Service".
  - Copy letter from the Respondent to the Applicant dated 9 July 2013
  - Copy letter from the Applicant to the Respondent dated 25 July 2013
  - Copy E-mail from the Applicant to the Respondent's Helen Turley dated 12 August 2013
  - Copy Land Certificate for title number DMB27604 covering 49 Colbreggan Gardens, Clydebank G81 5PB updated to 30 April 2004
  - Copy letter from Applicant to Respondent dated 25 November 2013
  - Written representations from the Respondent's Martin Feeney dated 13 December 2013 and (in E-mail form) dated 17 January 2014
  - Written representations from the Applicant dated 14 November 2013
  - Copy style letter dated 18 February 1998 from the Respondent;
  - Copy letter dated 2 April 2004 from the Respondent to Ross Harper (first page only)
  - Written Statement of Services of the Respondent under the Property Factors (Scotland) Act 2011
  - The oral evidence of the Applicant
  - The oral evidence of Martin Feeney

### **The Hearing**

9. The hearing took place on 5 March 2014 within the Europa Building, 450 Argyle Street, Glasgow. The Applicant attended the hearing. During the course of the hearing the Applicant gave evidence and made submissions. The Respondent was represented by Mr Martin Feeney, Section Head of Maintenance and Repairs of the Respondent. Mr Feeney made submissions and gave evidence.
10. At the outset of the hearing the Applicant asked the Committee to amend her application to include the two alleged breaches of the Feu Disposition which had been intimated to the Respondent in November 2013. Mr Feeney had no objection to the application and the Committee allowed the amendment.
11. The Committee also noted that in its written representations the Respondent stated that it had no record of the letter from the Applicant dated 25 July 2013 advising that she would be referring the matters to the HOHP. The Committee heard evidence from the Applicant and Mr Feeney on this matter. The Applicant was clear that she had posted this letter from her work at Ruchazie. The letter had been addressed to the Respondent's Housing Environmental and Economic Development Department at

Garshake Road, Dumbarton. Mr Feeney spoke to the written representation as having been based on a search of the Respondent's Sold Property Service section at 57 Cochno Street, Clydebank, the Customer Complaints Service at Roseberry Place, Clydebank and Helen Turley's Housing and Community Safety section. However he accepted that there was potential for the letter to come in and not arrive at any of these sections. The Committee had no reason to disbelieve or doubt the Applicant's evidence of posting particularly in the light of the fact that it was accepted by Mr Feeney that there was potential for the letter to have been received and not made its way to the sections where the search had taken place.

12. The Applicant said that in July 2011 repairs had been carried out to roofing of the building. Her share had originally been estimated at £ 166 and then she had received a bill for over £ 500 which after complaint from her, the Respondent had then reduced to the level of the original estimate. She needed clarification of the £ 500 limit in clause 6(b) on page D7 of the Land Certificate. The Council were taking the view that £ 500 meant £ 500 per property rather than the whole cost of the work. The 2011 matter had been completed before October 2012 although the corrected invoice had been received only after October 2012. She had no confidence that this would not happen again.
13. She said that sometimes she gets prior notification and estimates but sometimes she doesn't. It was chaotic. She would dispute Mr Feeney's claim that notification was made as a matter of courtesy. On page 3 of the Council's Sold Property Management Service: Factoring Service document, it said that for the factoring fee the Council would among other things advise an owner in writing of the proposed repair, the share of estimated costs and provide a comprehensive job description except for urgent or emergency repairs. To say that the Council simply did this as a matter of courtesy was wrong.
14. The Applicant said that she receives notification of what the factoring fee will be for the coming year. She receives this in the form of an account about March or April. This annual account charged the factoring fee and buildings insurance. She then receives individual invoices examples of which she produced in the appendices to her application. She had not received any half-yearly statement of common charges as described in clause 6(e) on page D8 of the Land Certificate for the Property.
15. Mr Feeney said that the notification of the factoring fee took place every March and that there was no half-yearly statement of common charges as described in clause 6(e). A change had occurred in 1998 when the Respondent had discontinued that practice. He referred to a *pro forma* letter dated 18 February 1998 from the Respondent's Sold Property Officer to an owner occupier intimating that the practice of sending half-yearly invoices for their services would cease and stating that,

"As from April 1998 we will invoice you once a year, and this invoice will take into account all of your yearly service charges."

Mr Feeney said that the Applicant's solicitors had not informed her of the annual practice when she had bought the Property and that the nature of repairs was explained in the invoices. He also referred to the first page of a letter dated 2 April 2004 from the Respondent to solicitors for the sellers of the Property to the Applicant and her husband. This intimated the need to pay a yearly factoring fee of £ 55.57 and a one-off payment of £ 50 as a deposit to the common float fund which is refundable upon the sale of the Property.

16. The Applicant said that she had not been told of the 1998 letter by her solicitor.
17. The Applicant spoke to the examples in the appendices to her application showing, she said, a failure to give notification of the progress of the works carried out by the Respondent and increases in the cost of the works. This took away her ability to manage her business. She needed to make provision for bills and invoices that came in. Thus in October 2012 she had been notified of anticipated replacement of bricks and cleaning of a gutter with an estimated cost to her of £ 7.79 with the work to be completed within 40 days. Yet without further notification she was then sent an invoice dated 25 March 2013 for £ 27.34. Only after requesting a breakdown of work was she informed that in addition to the estimated work, 4 m2 of pointing, not mentioned in the invoice, had been carried out to give rise to the increase in costs.
18. She then received, an invoice dated 23 May 2013 with a charge for £ 40.51 for refitting and renewal of roof slates. No prior notification of the proposed work had been given to her, nor that the work had taken place, until the invoice was received. The work had not taken place, however, and the invoice had been issued in error.
19. As a third example, she had received a letter dated 9 April 2013 from the Respondent informing her of the "raising of" an emergency repair to clear a choked drain at No. 50, the cost of which was intimated by letter of 9 July 2013 as being £ 29.48 albeit without an invoice at that time. She had then received an invoice dated 6 August 2013 for the choked drain but with a different job number and a price of £ 31.10. Upon complaining about this, she was informed by the Sold Property Section that the invoice was wrong and a correct invoice was issued.
20. When she received the letter from the Respondent dated 28 May 2013 regarding her complaint about the Respondent's increase in charging for bricks, she phoned the Respondent's customer call centre. She was advised that the Respondent had no set policy or procedure for notification of common repairs. She was told by persons there that her complaint had been finally resolved and that she required to proceed externally. The letter had referred her to the Scottish Public Services Ombudsman. She

told them about the Homeowner Housing Panel. They were not aware of the Panel.

21. The Committee accepted the Applicant's evidence as credible and reliable. Mr Feeney's evidence was more limited in scope. He also appeared to speak to matters of which he had no apparent personal knowledge such as claiming that the Applicant's solicitors had been made aware of an annual invoice having replaced the former half-yearly practice as set out in the feu disposition, when he had no basis for such an allegation. This casts a question-mark over the reliability of Mr Feeney's evidence in relation to any matters where he did speak to his personal activity and in the event of a conflict between his evidence and that of the Applicant, the Committee preferred that of the Applicant.

### Findings of Fact

22. Having considered all the evidence, the Committee found the following facts to be established:-
- (a) The Property is one of two ground floor flats in a building comprising four flats erected by the former local authority for the Hardgate area of Clydebank.
  - (b) The Applicant is the owner of a one half share of the Property. She has owned that share since 30 April 2004. Her title is registered in the Land Register of Scotland under title number DMB27604. Her title is as set out in a Land Certificate for the Property updated to 30 April 2004. She does not reside at the Property.
  - (c) The Respondent's predecessors Clydebank District Council at one time owned all four flats. By Feu Disposition registered in the Land Register on 10 August 1988 the District Council sold the Property to the Applicant's predecessors Mr and Mrs Brown. The Respondent, as successor to the District Council, continues to own two of the four flats which it rents out to its tenants.
  - (d) The relevant terms of the Feu Disposition are set out in entry number 2 in the Burdens Section of the Land Certificate (pages D3 to D13). In terms of clause 9(a) of the Feu Disposition (page D11) the old District Council was given the role of factor so long as it remained proprietor of any dwellinghouse within the building (described in the Feu Disposition as the "Block"). The old District Council was the first factor and upon its functions being transferred to the Respondent, the Respondent became the factor for the building.
  - (e) In terms of clause 9(c) the factor has a duty to be responsible for the general management and administration of the building. Without prejudice to that generality the factor has the powers conferred on him and has the duty to perform the duties imposed on him by the Feu

Disposition and any other functions assigned to him in relation to the building by the persons entitled to appoint him.

- (f) The Respondent became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 19 December 2012.
- (g) In terms of clause 6(c) of the Feu Disposition the proprietor of each flat in the building is liable jointly with the others for payment of the expenses incurred in the repair, maintenance and renewal of the common parts of the building which include the roof, the outside walls and other elements set out in clause 1(2) of the Feu Disposition in the proportion of one share in respect of one flat.
- (h) By letter of 4 October 2012 the Applicant had been notified of anticipated replacement of bricks and cleaning of a gutter with an estimated cost to her of £ 7.79 with the work to be completed within 40 days. The work was carried out on 19 October 2012 with additional brick repointing work. The Applicant was sent an invoice dated 25 March 2013 for £ 27.34. This was the first indication given that the work had been completed. Only after requesting a breakdown of work was she informed by letter from the Respondent dated 23 April 2013 of the additional repointing work and by letter from the Respondent of 2 May 2013 the extent of the repointing work.
- (i) The Applicant received a letter dated 9 April 2013 from the Respondent informing her of the "raising of" an emergency repair to clear a choked drain at No. 50. The work had already been completed on 4 April 2013. The cost was intimated by the Respondent by letter of 9 July 2013 as being £ 29.48 albeit without an invoice at that time. This was the first indication given of completion of the work. The Respondent issued an invoice dated 6 August 2013 for the choked drain but with a different job number and a price of £ 31.10. Upon complaining about this, the Applicant was informed by the Sold Property Section that the invoice was wrong and a correct invoice was issued on 12 August 2013.
- (j) As a result of the late intimation from the Respondent of the carrying out of said works the Applicant suffered inconvenience in having to clarify the nature of the work carried out.
- (k) The Applicant complained to the Respondent by letters of 1 May and 3 June 2013. The Respondent replied by way of its letter of 28 May 2012 from the Executive Director of their Customer Relations Department. In the letter the Respondent indicated that information on common repairs was to be found in the "factoring book" and that for the "main factoring procedural policy" the Applicant should "refer to [her] conditions of sale". It made no reference to the Feu Disposition or the Applicant's Land Certificate. The letter also informed her of her right to complain to the Scottish Public Services Ombudsman. It made no mention of the Homeowner Housing Panel. She telephoned the

Customer Relations Department with the responses as set out in her evidence.

- (l) The Applicant sent letters to the Respondent dated 25 July and 25 November 2013 notifying the Respondent of the alleged failures to comply with the Code of Conduct and Feu Disposition complained of in the application and amendment thereto.
- (m) The Applicant suffered inconvenience in having to find out why the work and costs had increased, and in obtaining the Respondent's Written Statement of Services. The Written Statement was not sent until about 1<sup>st</sup> October 2013.

## Reasoning

### Section 1 of the Code

- 23. It was accepted that the Applicant was a Homeowner and the Respondent was a registered property factor under the 2011 Act. In her application the Applicant complained that the Respondent had not provided her with a Written Statement of Services as required under section 1 of the Code of Conduct. In her written representations of November 2013 she had accepted that she had received a copy of a Written Statement of Services on or about 1<sup>st</sup> October 2013 after she had submitted the application. Until then she had merely been provided with the "Sold Property Management Service: Factoring Service" document. She provided the Committee with a copy of the Written Statement of Services at the hearing.
- 24. The Respondent's representative accepted that there had been a failure to provide the Written Statement of Services until October 2013.

### Clauses 6(b) and (e) of the Feu Disposition and Section 3.3 of the Code

- 25. The Applicant complains that the Respondent had failed to give her prompt and detailed break-downs of the costs of repairs. In that connection she complained that the Respondent had breached :
  - (1) clause 6(b) of the Feu Disposition (on page D7 of the Land Certificate);
  - (2) clause 6(e) of the Feu Disposition (on page D8 of the Land Certificate);
  - (3) section 3.3 of the Code of Conduct
- 26. The material part of clause 6(b) provides, "The Factor shall have full power and authority to instruct and have executed from time to time such works as he in his judgment shall consider necessary or desirable for the repair, maintenance or renewal of the Common Parts or any part thereof, *provided always that in the event of the Superiors [the Respondent] no longer being the proprietors of any of the dwellinghouses within the said*



Block and in the case of a major work (being a work the cost of which is estimated by the Factor to exceed Five Hundred Pounds or such greater amount as may be determined from time to time by a meeting of the proprietors of all dwellinghouses in the Block) the Factor shall, before instructing the same report the matter to such proprietors and such work shall be undertaken only if it is authorised by a majority of such proprietors . . .". (Committee's emphasis).

27. The complaint was that in February 2011 the Respondent had given the Applicant an estimate of her share of the costs of a roofing repair of £ 116.49 but that by the time that she had received an invoice from the Respondent it had risen to £ 556.98. In the Applicant's submission, clause 6(b) required the Respondent to report the work to the flat proprietors and obtain an authorisation from the majority before carrying out this work. This they had failed to do, although after her complaint in July 2011 the Respondent had reduced her invoice to the originally estimated share. The Applicant accepted that the issue had been resolved before October 2011 although the reduced invoice had not been received until after October 2011.
28. At the hearing the Applicant submitted that on a proper construction (interpretation) of clause 6(b) if the cost of the work, and not merely the share of a flat proprietor, was estimated to be more than £ 500, the factor had a duty to obtain authorisation before carrying out the work without which it had no power to instruct the work. That was the meaning on a natural reading.
29. The submission for the Respondent was that the duty to obtain authorisation upon the estimate exceeding the £ 500 threshold arose only if the Respondent no longer owned a flat in the building. The proviso which required the authorisation applied if two requirements were satisfied, namely (1) that the Respondent no longer owned a flat; and (2) that the estimate exceeded the threshold of £ 500. The reason for the dual requirement was to allow the Council to maintain control of the block so long as it had even one Council tenant.
30. The powers of the Committee do not extend to breaches of the Feu Disposition which took place before the 2011 Act came into force on 1 October 2012. There must at the least be a continuing breach on or after that date. The alleged breach of clause 6(b), namely not obtaining authorisation took place before that date and therefore the Committee has no power to deal with it.
31. However, given that the Committee was presented with clear and concise submissions on the interpretation of clause 6(b) and given that its content requires to be reflected in the Written Statement of Services under the 2011 Act, the Committee makes the following observations. Clause 6(b) gives the Factor full power to instruct and have executed work which it judges necessary or desirable for the repair, maintenance or renewal of the Common Parts (as defined) without financial limit but subject to a

proviso. That proviso provides that the power can only be exercised with the authorisation of a majority of the flat owners where "in the event of [the Council] no longer being proprietors of any [flat] "and in the case of" a work estimated by the factor to cost over £ 500.

32. On the Applicant's interpretation, the word "and" in the phrase "*and in the case of a major work*" is to be read as "or". The fact that "and" rather than "or" is used in the phrase is a strong argument against the Applicant's approach. But furthermore, the consequences of reading "and" as "or" are such that cannot have been meant by the parties to the Feu Disposition. Taking the Applicant's interpretation to its logical conclusion, the authorisation of the majority would be required (a) if the Council ceased to be a proprietor within the building; or (b) if the estimate exceeded the £ 500 threshold. It can hardly have been intended that if the Council ceased to be a proprietor, any repair however small or trivial would require the authorisation of a majority of flat owners. That would be quite unworkable for any factor carrying out his duties and can hardly have been the meaning of the proviso.
33. The purpose of the proviso as given by the Respondent's Representative would also be quite consistent with the Respondent's interpretation of the proviso.
34. The Committee concludes, therefore that the Respondent's interpretation of clause 6(b) is correct. We did not understand Mr Feeney to insist on the £ 500 threshold to apply to a proprietor's share of costs and for the avoidance of doubt our view is that the £ 500 threshold applies to the overall cost of the work before it is shared out between the flat proprietors. Given that it concerns costs to residential proprietors it must be read as inclusive of any VAT. The Written Statement of Services in section 1.1a A b requires a factor to state the financial thresholds for instructing works and situations in which the factor may act without further consultation. Given the inaccuracy of the Written Statement of the Respondent in respect of the £ 500 threshold, it is evident to the Committee that there has been a breach of the Respondent's duty under section 1.1a and that an enforcement order requiring the correction of the Statement requires to be made.
35. Turning to clause 6(e), the Applicant's complaint was that the Respondent was not performing its duty under clause 6(e) of the Feu Disposition. She was looking for the statement described in clause 6(e) for her records. For the Respondent it was submitted that statements of common charges as described in clause 6(e) were given as and when the charges arose. These statements took the form of the notifications and the invoices.
36. Clause 6(e) contains a detailed scheme for the payment by proprietors of flats of their shares of the common charges (as defined in clause 1(3) and (2)) to the property factor, who at present is the Respondent. In summary the scheme involves the factor, within 10 days of the commencement of each "Half Year Period" (i.e. January to June or July to December)

notifying the proprietor of the estimate of the proportion of common charges payable by the proprietor, which the proprietor requires to pay as a "half year deposit". As soon as reasonably practicable after the end of the half year period the factor must prepare a statement of actual common charges incurred and furnish a copy of that to the proprietor who then has to pay to the factor the amount by which the actual charges exceed the estimate already paid. If the estimate already paid exceeds the amount of actual charges incurred, the excess is to be retained by the factor as a payment to be taken into account in calculating the next "half year deposit" payable. There is then provision for any dispute over whether sums are due by the proprietor to be resolved by arbitration but only after the sums had been paid, in effect requiring the proprietor to reclaim the sums in the arbitration. The Committee observes that in respect of claims by the factor for up to £ 5 000 the arbitration clause is likely to be unenforceable in terms of sections 89 to 91 of the Arbitration Act 1996 (which apply to Scotland) and the Unfair Arbitration Agreements (Specified Amounts) Order 1999.

37. The Applicant also submitted that the Respondent had not complied with section 3.3 of the Code of Conduct. Section 3.3 provides,
- "You [the registered property factor] must provide to homeowners, 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."
38. The Respondent's own Written Statement of Services provides,
- "You'll find everything you need to know about your rights and responsibilities as a factored homeowner in what is called the Burdens Section of the Land Certificate in your name . . . it sets out the rules covering the management, maintenance . . . of the shared parts of your building . . . it also sets out in a definitive legal manner the rights and responsibilities of you as an owner and West Dunbartonshire Council as the property manager."
39. The Respondent's representative submitted that the Respondent had exceeded the Code's requirements "by far" in following the same practice as submitted in relation to clause 6(e).
40. The Committee find that the scheme set out in clause 6(e) is clear. Being set out in the Feu Disposition and in the title of the Property it binds all purchasers such as the Applicant and correspondingly factors such as the Respondent. It has not been altered by means of a deed registered in the Land Register. It has not been altered by means of a contract between the Applicant and the Respondent. The Applicant cannot be bound by a letter

circulated to her predecessor a proprietor if she has not been provided with a copy of it and agreed to it. In any event in its Written Statement of Services the Respondent makes it clear beyond doubt that the legal rights and responsibilities of the Applicant are set out in the Burdens Section of the Land Certificate. That is where the Feu Disposition is set out. In these circumstances the Committee reject the submission for the Respondent that clause 6(e) was complied with as and when the Respondent issued invoices and notifications of individual repairs or charges and accept the submission of the Applicant that clause 6(e) was not complied with.

41. The Committee accept that section 3.3 of the Code was not complied with by the Respondent. The Applicant has never been supplied with an annual detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for.
42. It follows from the above that the provisions of section 3 in the Written Statement of Services under the heading "Charging Arrangement" which essentially sets out a practice of the issue of ad hoc invoices is misleading as it does not set out the obligation of the Respondent as set out in clause 6(e) as read with section 3.3 of the Code.
43. The Written Statement requires to be corrected to reflect the Respondent's obligations under clauses 6(b), 6(e) of the Feu Disposition and section 3.3 of the Code and the Respondent requires to fulfil its obligation to the Applicant in respect of both clause 6(e) and section 3.3. A property factor enforcement order will be required for this purpose.

#### **Section 6.1 of the Code**

44. The Applicant complains that the Respondent failed to keep her informed of repairs to the common parts of the building. She submitted that the Respondent should have a notification procedure in place. If during the progress of work there was an increase in costs, the Respondent should be able to send an update on that to her. This had not been done. She referred to examples of such failings.
45. The Respondent's Representative submitted that the Respondent does comply with the Code. He accepted that there had been human error in connection with the erroneous roof slate invoicing. He accepted that the Respondent did not notify any increases in the scope of works carried out from those originally notified before an invoice was issued.
46. The material part of section 6.1 of the Code provides,  
 "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."

47. In not informing the Applicant of the extension of work carried out in October 2012 to include the pointing until April 2012, the Respondent was in breach of section 6.1 of the Code.
48. In not informing the Applicant of the completion of the work in April 2013 until July 2013 the Respondent was in breach of section 6.1 of the Code.

### **Section 6.3 of the Code**

49. The Applicant complained that the Respondent did not show how and why the contractor for the work was appointed as required by section 6.3 of the Code. In her submission she appreciated that in its written representations to the Committee of 13 December 2013 the Respondent stated that the work is carried out by its Direct Labour Organisation ("DLO") who were appointed term contractors for the repair and maintenance of the Respondent's housing stock in June 2007 following a voluntary competitive tendering exercise. However she submitted that the Respondent should invite tenders for large works such as the roof repair in 2011. She was not consulted in that connection.
50. The Respondent's Representative submitted that the DLO had been used to carry out the work complained about by the Applicant. Only if there was an upgrading scheme would tenders be invited for the specific work in question. There was no entitlement on homeowners to have the Respondent obtain a number of estimates for items of work. It was open for a homeowner to obtain an estimate herself and to submit it to the Respondent but this was not encouraged as it "complicated matters". Basically if the public procurement regulations required a tendering process the Respondent as a public authority would do this, but otherwise it would not.
51. Essentially there had been a failure to respond to the Applicant's request of 25 July 2013 but it had been addressed subsequently, in this case in the Respondent's written representations of 13 December 2013. In these circumstances a property factor enforcement order is not appropriate.

### **Sections 7.1 and 7.2 of the Code**

52. The Applicant complained that the Respondent had failed to comply with sections 7.1 and 7.2 of the Code the material parts of which provide,
 

"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. . . .  
 . . . When your in-house procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. The letter should also provide details of how the homeowner may apply to the homeowner housing panel."

53. She referred to her experience with the Respondent's letter of 28 May 2013 and the conversation with the Customer Complaints centre. She accepted that having received the Written Statement of Service in October she was now content with its content in this respect.
54. The Respondent's representative accepted that the Respondent had failed to provide the Applicant with information regarding the Panel. However he claimed that the Respondent had always had a complaints procedure which involved a final decision being confirmed by senior management, in this case Elaine Melrose who had been the author of the letter of 28 May 2013. The complaints procedure had been documented in the "factory book" which was the "Sold Property Management Service: Factoring Service" document supplied to the Applicant.
55. The Committee found the situation here the same as for section 1 of the Code. Through the absence of a Written Statement of Services the Applicant had not been informed of the complaints procedure. She had not been informed of the terms of the Feu Disposition in the Land Certificate and had not been informed of her right to apply to the Homeowner Housing Panel. She required to find out about it herself.

#### **Property Factor Enforcement Order**

56. Having decided that the Respondent has failed to carry out the duties set out in the Feu Disposition and the Code of Conduct, the Committee shall make a property factor enforcement order in terms of the Notice of Proposal accompanying this decision.
57. Given the inconvenience suffered by the Applicant as a result of the breaches of sections 1, 7.1 and 7.2 of the Code of Conduct identified above the Committee proposes to include in the enforcement order an award of £ 125 in compensation with interest from the date that the written statement of services was provided.

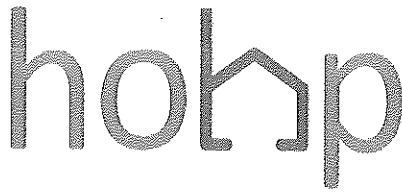
#### **Opportunity to Make Representations and Rights of Appeal**

58. Unfortunately the wording of section 19 of the 2011 Act is not as clear as it might be. This is a decision under section 19(1)(a) and (b). Given that the Committee has decided that it will make a property factor enforcement order, this decision is accompanied by a Notice of Proposal under section 19(2)(a).
59. Both Applicant and Respondent are invited to make representations to the Committee on this decision and the proposal. The parties must make such representations in writing to the Homeowner Housing Panel by no later than 14 days after the notification to them of the Notice of Proposal and this decision.

60. The opportunity to make representations is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.
61. Following the making of representations or the expiry of the period for making them, the Committee will be entitled to review this decision. If it remains satisfied after taking account of any representations that the Respondent has failed to comply with the Feu Disposition or Code of Conduct it must make a property factor enforcement order. Both parties will then have a right to appeal on a point of law against the whole or any part of such final decision and enforcement order.
62. In the meantime and in any event, 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 .....  
David Bartos, Chairperson

.....7 May 2014



## **Notice of Proposal**

of

**the Homeowner Housing Committee**

(Hereinafter referred to as "the Committee")

Under Section 19 (2) (a) of the Property Factors (Scotland) Act 2011

Case Reference Number: HOHP/PF/13/291

**Re : Property at 49 Colbreggan Gardens, Hardgate, Clydebank G81 5PB  
("the Property")**

**The Parties:-**

**Yvonne McDonald, Cairnlea, 39 Cochno Road, Clydebank G81 6PT ("the Applicant")**

**West Dunbartonshire Council, Housing and Community Safety, Housing Environmental and Economic Development Department, Garshake Road, Dumbarton G82 3PU ("the Respondent")**

### **NOTICE TO THE PARTIES**

Whereas in terms of their decision dated 1 May 2014, the Homeowner Housing Committee decided that the Respondent has failed to comply with the Property Factor Code of Conduct and failed to carry out its duties under the Feu Disposition by Clydebank District Council to Ronald Charles Brown and Margaret Mary Brown registered 10 August 1988 all as stated in said decision; the Committee proposes to make a property factor enforcement order in the following terms:



(1) The Respondent shall within 4 weeks of the notification of this Order issue to the Applicant an amended Written Statement of Services under section 1.1a of the Code of Conduct for Property Factors under the Property Factors (Scotland) Act 2011 in which -

(a) on the second page under "Delegated Authority and Financial Thresholds" in lines 2 and 3, the words "(plus VAT) per property" are substituted by "(inclusive of VAT)";

(b) on the third page under "Properties in the Clydebank Area" at the end of the second bullet pointed paragraph, the words from "to you" to the end of the sentence are substituted by, "of such works does not exceed £ 500 inclusive of VAT.";

(c) on the sixth page under "Section 3: Financial & Charging Arrangements" in the penultimate paragraph in line 2 the words from "exceed" to "£ 500 plus VAT per proprietor" are substituted by, "are estimated by us to exceed £ 500 inclusive of VAT";

(d) on the fifth page between the sixth and seventh bullet points is inserted a bullet point as follows:

- Advise you of progress of the works, including estimated timescales for completion of common repairs or maintenance works, unless you have agreed with the other homeowners in the block a cost below which job-specific progress reports are not required;

(e) on the sixth page under "Charging Arrangements":

(i) the first two sentences are substituted by the wording of clause 6(e) of the Feu Disposition by Clydebank District Council in favour of Ronald Charles Brown and Margaret Mary Brown registered in the Land Register of Scotland on 19 August 1988 under title number DMB27604, up to the words "for the subsequent Half Year Period."; and

(ii) the word "It" in the third sentence is substituted by, "The Half Year Period ends on 30 June and 31 December. The statement will";

(iii) a further paragraph is inserted as follows:

"We will provide to you, in writing at least once a year (whether together with the statement 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 we will also supply supporting documentation and invoices or other appropriate

documentation for inspection or copying. We may impose a reasonable charge for copying, subject to notifying you of this charge in advance."

- (2) The Respondent shall comply with condition 6(e) of the said Feu Disposition in respect of the Applicant as soon as it is reasonably practicable to do so after 30 June 2014 and no later than the end of July 2014;
- (3) The Respondent shall shall within one week of the notification of this Order pay to the Applicant the sum of one hundred and twenty-five pounds sterling (£ 125.00) together with interest thereon at the rate of three per cent per year from 1<sup>st</sup> October 2013 until payment.

Both Applicant and Respondent are invited to make representations to the Committee on this Notice of Proposal and the decision accompanying it. The parties must make such representations in writing to the Homeowner Housing Panel by no later than 14 days after the notification to them of this Notice.

Signed .....  ..... 7 May 2014  
David Bartos, Chairperson