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

hohp Ref: HOHP/PF/13/0328

Re: Property at 39 Fidra Avenue, Burntisland, Fife KY3 0BE ("the Property")

The Parties:-

Mrs Fiona Webster, 39 Fidra Avenue, Burntisland, Fife KY3 0BE ("the homeowner")

Collinswell Land Management Limited, incorporated under the Companies' Acts (SC301684) having a place of business at Collinswell House, Aberdour Road, Burntisland, Fife KY3 0AE ("the property factor")

Decision by a committee of the Homeowner Housing panel in an application under Section 17 of the Property Factors (Scotland) act 2011 ("the Act")

Committee Members: George Clark (Chairman) and Carolyn Hirst (housing member)

DECISION
The Committee has jurisdiction to deal with the Application.
The property factor has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1 The homeowner, along with her husband Michael Webster, is the owner of the Property, which forms part of a development of 339 dwellinghouses within the development at Collinswell Park, Burntisland ("the development"). The Property is within that part of the development known as Waterside, Burntisland and was built by Bett Homes Limited.

2 The property factor manages and maintains land on the development ("the land").

3 The land is available for use by the homeowner and the owners of the other properties in the development and the property factor, therefore, falls within the definition of "property factor" set out in Section 2 (1)(c) of the Property Factors (Scotland) Act 2011 ("the Act")

4 The property factor manages and maintains the common parts of the development and the owners of the 339 properties in the development contribute towards the maintenance costs of the common parts.

5 The property factor's duties arise from a written Statement of Services. The Committee has seen two pro forma versions of a written Statement of Services issued by the property factor relative to the development, but has not seen a signed version of either, and neither is dated. The Committee is unable to verify whether either was sent to the homeowner. One version accompanied the homeowner's application, received on 16 December 2013. The other version makes reference to a meeting on 4 December 2013 and accompanied the property factor's Written Representation to the Committee, received on 13 June 2014 and the view of the Committee is that this is the later of the two documents and is, therefore, the written Statement of Services under consideration by the Committee. The homeowner, however, has no recollection of having received either document. The earlier document states that the Maintenance Schedule is attached and the later document says it is available on request. Both documents have a section on the Complaints Procedure, but only the later one sets out the Debt Management Policy and the process by which the factoring arrangement can be terminated by the homeowners in the development.

6 The Committee is unable to state the date from which the property factor's duties arose, but neither party is disputing the fact that they arose prior to the date of the application.

7 The property factor was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor.

8 The date of Registration of the property factor was 6 March 2013.

9 The homeowner has notified the property factor in writing as to why she considers that the property factor has failed to carry out its duties arising under section 14 of the Act. She did this by letter of 11 December 2013.

10 The homeowner made an application to The Homeowner Housing Panel ("HOHP") dated 12 December 2013 and received by HOHP on 16 December 2013 under Section 17(1) of the Act.

11 The homeowner's concerns have not been addressed to her satisfaction.

12 On 3 June 2014, the President of HOHP referred the application to a Homeowner Housing Committee.

HEARING

A hearing took place at George House, 126 George Street, Edinburgh on 21 August 2014. The homeowner was present at the hearing. The property factor was not present or represented at the hearing.

Introduction

In this decision, the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as "the 2012 Regulations". The Homeowner Housing Panel is referred to as "HOHP".

The property factor became a Registered Property Factor on 6 March 2013 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee had available to it and gave consideration to: the Application dated 12 December 2013 (received by HOHP on 16 December 2013) and documents lodged with it; additional information from the homeowner, consisting of three e-mails dated 13 February and further e-mails dated 9 April, 10 April, 27 May, 17 June and 1 August 2014, which documents included copies of e-mail correspondence between the parties, a copy of the homeowner's Land Certificate and, in one of the e-mails of 13 February 2014, an updated application form; and a Written Representation by the property factor, dated 11 June and received on 13 June 2014. The Committee confirmed that it did not require any further documentation prior to considering the application at a hearing.

Preliminary Matters

The homeowner expressed to the Committee her view that, in the written Statement of Services, one of the directors of the property factor ought to have declared an interest as an owner of property within the development, but the Committee considered that there was no requirement to do so, as the individual and the property factor were separate legal personae.

The homeowner confirmed to the Committee that the alleged failings by the property factor to comply with the Code of Conduct to which the Committee should refer was the amended version sent with her e-mail of 13 February 2014.

Summary of Written Representations

(a) From the Homeowner

In the application, the homeowner referred to a letter that she and her husband had sent to the property factor on 11 December 2013. A copy of this letter was included with the application and attached to it was a table detailing the issues which the homeowner considered were failures to comply with the Code of Conduct. This table was subsequently amended and resubmitted with the homeowner's e-mail of 13 February 2014.

Central to the homeowner's complaint was an issue regarding the initial payment which the homeowner had made when the Property was purchased from Bett Homes Limited. The amount was £240 and, in the State for Settlement showing the total amount due to the builder, this was described as "Factors Fee". The homeowner had understood this to be an advance payment for services yet to be rendered by the property factor and, as a result, had not paid subsequent quarterly invoices from the property factor, each for £43.75, until, by the homeowner's calculation, the initial payment of £240 had been exhausted. This failure to pay invoices had resulted in statements, reminders and final demands for payment by the property factor and the threat of legal action to recover unpaid factoring fees.

On receipt of the first invoice in December 2011, the homeowner had telephoned the property factor, explaining that she and her husband had already paid this money, as it would have been part of the "Factors Fee" of £240 paid to Bett Homes when they bought the Property. The property factor had said that the payment of £240 was a "float", to be held in case the homeowner moved house without paying factoring charges that had become due. In January 2012, the homeowner had written to the property factor, stating that this had not been explained at the time of the purchase, that they had understood that it was for advance factor fees for the first year or so and that they wished the money to be used as such and not as a "float". There had been no response from the property factor, so the homeowner had written again in May 2012. Both letters had been sent by Recorded Delivery. Having received no response to the May letter either, the homeowner had written again in November 2012 and the property factor had replied on 27 November.

In the response, the property factor had said that on purchasing a house within the development every resident had paid £240 to Bett Homes. This was a float to be held by the factors to cover the situation of a resident moving home without paying the bill. This was not an upfront payment of £240. £100 of this payment went to Hacking and Paterson and £140 was transferred to the property factor. The letter continued "We have had previous queries particularly from Bett residents who have been misinformed. All residents pay the same float, however other house builders explained it correctly to purchasers. We have since contacted Betts and cleared this up with them for future purchasers. The invoices and statements you

have received are correct, as the £140 was not payment for the invoices." The homeowner had not responded to this letter as, after writing to the property factor three times, only to receive an unsatisfactory response after 11 months (with what she considered to be threatening and intimidating letters in between this), they did not know what else to say.

In December 2012, the homeowner had begun making quarterly payments in response to invoices, having calculated that the £240 advance payment to Bett Homes for factor fees had run out, but in the same month and in May, October and November 2013, the property factor had sent letters threatening court action. In December 2013, the property factor's solicitors had written threatening court action if the homeowner did not pay the £240 in seven days.

The homeowner's complaint was that simply saying it was a "float", without providing any additional information or statements with reference to this payment, how the money was held, and how the homeowner could get it back if they moved, was not a satisfactory explanation of what had happened to the money they had paid on purchase, which they had been told and understood to be advance payment of factoring fees. The homeowner was of the view that this amounted to a failure to comply with the Code of Conduct, in that, neither in the property factor's letter of 27 November 2012 nor in any subsequent correspondence was further information provided about the "float" or about how it was held and used. No reference to the £240 now claimed by the property factors was included in any of the invoices sent to the homeowner and no information was provided about the process for obtaining this money back on a sale, how much interest would be earned on it and who Hacking and Paterson were and why they had been paid £140 of the initial payment.

The homeowner felt unfairly treated and harassed by the property factor for payment of factor fee money that they had already paid, when the property factor had acknowledged they were misinformed when the initial payment was made to Bett Homes, had failed to comply with the Code of Conduct in relation to a "floating fund", had chased them as "non-payers" despite the fact they had paid quarterly fees since December 2012 when the £240 they had paid Bett Homes for factor fees was used up and had used communication which had gone from non-existent, for 11 months in 2012 to threatening, intimidating and appallingly timed to bully the homeowner into paying the property factor.

The letter of 11 December 2013 concluded with the homeowner stating that the property factor had failed to comply with key parts of the Code of Conduct and that a complaint was being lodged with HOHP.

The application to the HOHP dated 12 December 2013, refers to the parts of the Code of Conduct which the homeowner believes have been breached. These are stated to include Sections 1.1b.C.d,e,f,g and h. Section 1 of the Code of Conduct is, however, split into two alternative parts. Section 1.1a refers to situations where the land is owned by the group of homeowners, whilst Section 1.1b provides alternative standards for situations where the land is owned by a land maintenance

company or a party other than the group of homeowners. In the application, the homeowner has used the numbering in Section 1.1b, but in its Written Representation, the property factor has assumed the references are to Section 1.1a. It is not for the Committee to determine who owns the common parts but the information before the Committee suggests that Section 1.1b applies to the development. Much of the content of Sections 1.1a and 1.1b is the same, but the numbering and lettering is different in places, particularly in part C, which deals with Financial and Charging Arrangements. As a result, it is necessary, when considering the property factor's Written Representation, to cross-refer the answers to the relevant parts of Section 1.1b in places, where the property factor has responded using the numbering and lettering of Section 1.1a. The remaining Sections of the Code of Conduct are common to both situations, where the land is owned by the group of homeowners and where it is owned by a land maintenance company or a party other than the group of homeowners.

The table submitted with the homeowner's e-mail of 13 February 2014 referred to various Sections of the Code of Conduct and listed the homeowner's reasons for believing that the property factor had failed to comply, as follows:-

Section 1.1b.C. Financial and Charging Arrangements
The written statement should set out:

d. how many properties contribute towards maintenance costs for the area maintained. The property owner said that no communication had been received detailing this information or with regard to the proportion of the total costs paid by each household.

e. confirmation that you have a debt recovery procedure which is available on request, and may also be available online. The property owner said that there had been no specific information on the debt recovery procedure.

f. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service). The homeowner acknowledged receipt of an extract from the Deed of Conditions Rule 13 in the property factor's e-mail of 6 February 2014, but stated that this was the first time she had seen this information and that it was not on the property factor's website. It was not sufficient documentation with regard to the use of the £140 received by the property factor and a proper personalised invoice should have been issued showing when it had been paid and what it was for. The homeowner was not happy that in what she clearly believed to be the property factor's Deed of Conditions, no money was to be paid back until the initial deposit had been paid by the new proprietors of the plot.

g. any arrangement for funds for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service). None of this information had been provided.

h. any services or works that may incur additional fees and charges, including when and how they may arise and details of how these fees and charges are calculated and notified. None of this information had been provided.

Section 2.2. You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable

indication that you may take legal action). The homeowner's view was that the letters from the property factor and the factor's solicitors were an indication that they intended to take legal action, but they were not "reasonable" as the homeowner was not a "non payer" and felt very threatened and intimidated by these letters into paying money which they had already paid with no good rationale or explanation from the property factor.

Section 3.3. You must provide to homeowners 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 inspecting or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this in advance. The homeowner received an annual breakdown of factor fees paid, but had still not received any written statements detailing the floating fund of £140.

Section 3.5b. Homeowners' floating funds must be accounted for separately from your own funds whether through coding arrangements or through one or more separate bank accounts. The homeowner had no idea if this was the case as no information had ever been provided regarding this.

Section 4.1. You must have a clear written policy for debt recovery which outlines a series of steps you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts. The homeowner stated that she had not seen a clear debt recovery procedure which outlined the steps, there had been no detail of how disputed debts would be dealt with and it had not been reasonably applied in the homeowner's case.

Section 4.8. You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention. The homeowner was of the view that the property factor had not taken such reasonable steps with regards to the floating fund or provided a satisfactory explanation/resolution given the fact the homeowner was misinformed.

Section 4.9. 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. The homeowner felt that the property factor had misrepresented the legal position in taking legal action for "debts", which the homeowner did not owe. The homeowner had not been informed of the "float" at purchase and received no satisfactory explanation from the property factor before they took legal action against the homeowner.

Amongst the e-mail correspondence submitted with one of the homeowner's three e-mails of 13 February 2014 to HOHP, is an e-mail, also dated 13 February 2014

from Zander Williamson, a director of the property factor, which was sent to the homeowner Mrs Fiona Webster. A few minutes earlier, Mrs Webster had e-mailed him to say that the issues raised in the homeowner's letter of 11 December 2013 had not been satisfactorily addressed and that she had proceeded with the application to HOHP. The e-mail from Mr Williamson (which he presumably intended to send to another person within his organisation, but apparently sent to Mrs Webster by mistake), read "I have talked to this woman she is seriously stupid, it won't matter what you say she is a pain and wants to have a cause."

(b) From the Property Factor

The property factor's Written Representation to HOHP is dated 11 June 2014. It begins by offering an apology to Mrs Webster for the 13 February 2014 e-mail, the text of which is set out above. It acknowledges that the e-mail was insulting and had been sent after a long and frustrating telephone call with someone else and was meant as an internal memo for another member of the property factor's staff to sort out.

The Written Representation then refers to each of the parts of the Code of Conduct that the homeowner listed in the application and addresses them one by one. As a result of the numbering and lettering issue outlined above, arising from the fact that the property factor assumed that the complaints were made under Section 1.1a of the Code of Conduct, rather than Section 1.1b some of the comments are not of relevance, as they refer to paragraphs that do not appear in Section 1.1b. The following summary of the Written Representation in respect of Section 1 of the Code of Conduct does not, therefore, follow the numbering and lettering of Section 1.1b, but covers the main points raised by the homeowner under that section. The numbering and lettering of comments on the remaining sections of the Code of Conduct correspond with those contained in the application.

In relation to the homeowner's complaints about the Financial and Charging Arrangements (**Section 1** of the Code of Conduct), the property factor stated that "These points are not only laid out in our written statement of services but also in the Deed of Conditions the complainant signed on entry to their property. Without signing this document they would not have ownership of their property, at time of purchase, a buyer's solicitor should point out any fees, which are related to the property. On top of this it has been explained on numerous occasions to the complainant what the money they paid is for. The initial £140 paid was for a float; this is in accordance with Rule 13 of the Deed of Conditions. This is a ring-fenced sum and is not used in any other manner."

In response to the homeowner's complaint under **Section 2.2**, the property factor assumed that this referred to the recent solicitor's letters which had been sent out, adding that these were sent out to residents who had failed to pay their fees and had been sent in accordance with the property factor's Debt Management

Policy which had been issued as part of the Written Statement of Services to each resident.

In relation to the complaint under **Section 3.3**, the property factor stated that the breakdown of works was highlighted in the maintenance schedule "which was attached to each missive" and which had been issued on various occasions to each resident, most recently hand delivered. Their company accounts were available online at Companies House and they had not seen the point in charging residents any extra money for providing them in writing when they were so easily accessible online.

The property factor was of the view that **Section 3.5b** of the Code of Conduct only applied to Registered Social Landlords and local authority property factors and they were neither of those. At the hearing, the homeowner acknowledged that the reference in the application to Section 3,5b was a typographical error and that it should have been to Section 3.5, which requires that floating funds must be held in a separate account from the property factor's own funds and in the Written Representation, the property factor commented that each float they received was indicated separately in their accounts.

The property factor's response to the complaint under **Section 4.1** was that a policy for debt recovery was included within their written statement of services. As regards **Section 4.8**, several letters and newsletters had been issued indicating that non-payers would have legal action taken against them to retrieve funds due to the property factors. They had given more than adequate notice to every resident. It was unfair to those who paid to shoulder the burden for those that did not. Finally, responding to the complaint under **Section 4.9**, the property factors did not believe that any legal action which had been taken had crossed any lines to become threatening (apart from reasonable indication that they might take legal action).

The property factor stated that they had tried to find a resolution with the homeowner, Mrs Webster through e-mail correspondence, but, unfortunately their answers, however factual they were, were not satisfactory to her. This was unfortunate as they did not want any resident to feel that their queries had not been answered. In this case the facts stood for themselves with regards to the float, in that the homeowner had been told the wrong information by the housebuilder. It was not the property factor's responsibility to ensure the homeowner knew about the charge. It was in the Deed of Conditions and, when asked, the property factor had given clear information as to what had happened. The homeowner had been incorrectly told the float was an up-front payment for a year's factoring, which as explained to the homeowner, was not the case. The property factor had spoken to the housebuilder on numerous occasions to try and avoid this situation in the future and so far no one else had had this issue. They regretted that the homeowner felt "harassed, threatened and bullied into paying money which we believe we have already paid". The amount referred to had not "already been paid". A float had been paid and this was entirely separate to invoices being issued. That mistaken belief that an up-front payment had been

made and consequently failing to pay factoring invoices had meant that these invoices were overdue and legal action was instigated against the homeowner to recover the money. The property factor had offered the explanation as to what had happened and felt that the homeowner had not accepted the answer.

The property factor expressed a wish to resolve the issue and to make a written apology to the homeowner, Mrs Webster for the e-mail sent to her in error, but they were not prepared to give compensation as they believed they had more than adequately explained what had happened and had themselves spent an excessive amount of time repeating their explanations. They had not singled out the homeowner as a non-payer. They had already explained what happened to the float and had already sent the homeowner a copy of the sheet they received from the housebuilder showing the £140 being received. Providing any further detailed accounts to show where the floats are held would be a data protection breach in respect of the other residents. The homeowner had been told the wrong information by the housebuilder, not by the property factor.

Summary of Oral Evidence

At the hearing, the homeowner, Mrs Webster told the Committee that she had never received a copy of the Written Statement of Services which was attached to the property factor's Written Representation. It contained several clauses which were not in the version which was attached to the application and provided the answer to her complaint under paragraph d of Section 1.1b of the Code of Conduct, in that it stated the number of properties in the development. She accepted the suggestion of the chairman that there was no need for a provision setting out the proportion of the costs paid by each household, as all homeowners in the development paid the same flat fees for factoring services. She also accepted that the reason for no information having been provided under paragraphs g and h of Section 1.1b.C was that there were no specific projects or cyclical maintenance envisaged for the development and no anticipation of services or works that might incur additional fees and charges. She queried, however, whether, by simply stating that the Maintenance Schedule was available on request, the property factors were meeting their obligation to set out in their Written Statement the services that they would provide, including target times for taking action in response to requests for repairs.

The homeowner repeated the statement that Bett Homes had said that the £240 was an advance payment of factoring fees and should not have been seen as an initial deposit. The builders' State for Settlement called it "Factors Fee" and there had been no indication that any part of it would be paid to previous factors, Hacking and Paterson. When she became aware, from an e-mail from the property factor dated 6 February 2014, that only £140 of this money had been passed on by Bett Homes to the property factor, she had contacted Bett Homes, who had by return, refunded the £100 to her. She understood that the owners of the houses on the development built by Stewart Milne Limited and by Wimpey had had their

initial payment returned and wondered whether, as a consequence, the owners of the Bett Homes houses were, in effect cross-subsidising those other owners, if the funds held were being used to fund current works. What she really wanted was a statement, personal to her and her husband, showing that she had paid an initial deposit and that this is held by the property factor. She was concerned that one of the newsletters from the property factor said that they held £21,800 in floats, yet they stated in their Written Statement of Services that they factored 339 houses, Did this mean that they did not hold floats in respect of the Stewart Milne and Wimpey houses? She was not satisfied by the statement, without further explanation, that the money was "ring-fenced" and also commented on the statement in the Written Representation that no one else had had this issue. This was at odds with the e-mail of 6 February 2014, in which the property factors said "we believe other residents who we have spoken to who have had similar queries regarding this issue, have had some luck contacting Betts directly regarding the remaining £100 float and who it was paid to" and "we are still receiving correspondence from confused residents assuming this initial deposit was for a years worth of paid upfront".

In relation to the complaints about other possible breaches of the Code of Conduct, Mrs Webster wanted a letter of personal apology from the property factor for the wholly inappropriate and offensive comments in the e-mail which had been sent to her by mistake. She asked the Committee to consider whether the overall tone of the letters from the property factor was acceptable from a commercial organisation seeking to recover a debt. She took issue with the assertion by the property factor that they had spent an excessive amount of time on the homeowner's complaints. Apart from the letters of October, November and December threatening court action, they had only sent her one letter.

The homeowner stressed that she felt the tone of correspondence from the property factor had been intimidating and she sought an impartial view from the Committee as to whether the tone was reasonable in this particular case, given that the property factor was well aware that the homeowner was querying the whole issue of the "float" and had started paying the factoring invoices as soon as what Mr and Mrs Webster saw as an initial advance payment had been used up.

The homeowner accepted that the property factor's Debt Recovery Policy was in the Written Statement of Services attached to the property factor's Written Representation, answering the complaint under Section 4.9 of the Code of Conduct, but stressed again that she had had no knowledge of the existence of this version of the Written Statement of Services until the Written representation was cross-copied to her.

REASONS FOR DECISION

The Committee determined that the property factor has failed to comply with Sections 1,1.1b.Cf, 2.2 and 3.5a of the Code, as stated in the Application.

Section 1 of the Code states that the property factor "must provide each homeowner with a written statement, setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement". Although the Committee saw two pro forma versions of a written statement of services, the homeowner gave evidence to the effect that she had never received the one which the Committee believe to be the current one. The Committee cannot, therefore, be satisfied that the property factor has met the obligation to provide each homeowner with the required written statement. The Committee accepts that the property factor might argue that the homeowner had at least a copy of the earlier written statement of services, as a copy of it was with the application, but that earlier statement does not meet the requirements of Section 1 of the Code of Conduct, in that it does not state how many properties contribute towards maintenance costs for the area of land maintained, does not include a debt recovery procedure, does not set out the arrangements regarding the floating fund and does not give any information on how to terminate the service arrangement .

The Committee has, however, determined that the current Written Statement of Services is the one attached to the Written Representation by the property factor. It does state the number of properties which contribute towards maintenance costs and it does set out the Debt Management Policy, so meets the requirements of Sections 1.1b.C.d and e, but it does not set out the arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service), as required by paragraph C, sub-paragraph f of Section 1.1b of the Code of Conduct. The property factor referred, both in e-mails to the homeowner and in the Written Representation to "Rule 13" of the Deed of Conditions, which sets out arrangements for the initial payment and the refunding of that payment on the sale of a property in the development, but the Written Statement of Services fails either to set out these provisions at length or to refer the homeowner to the Deed of Conditions. Further, it does not set out the services the property factor will provide, but merely states that the Maintenance Schedule is available on request. The view of the Committee is that the Written Statement of services does not meet the requirement to be simple and transparent.

For the reasons stated in the two preceding paragraphs, the Committee determined that the property factor has failed to comply with Section 1 and Section 1.1b.Cf of the Code.

The Committee did not consider that the property factor had failed to comply with the requirements of Sections 1.1b.Cg and h of the Code, as there was no evidence that the service to be provided included specific projects or cyclical maintenance or that there were any services or works which might incur additional fees or charges.

At the heart of the application by the homeowner is the status of the payment of £240 made at the time of settlement of the purchase of the property. In the housebuilders' State for Settlement, it is described as "Factor Fee" and the homeowner's position is that she was given to understand that this was a payment

in advance for the factoring service and would cover a little over the first year. The homeowner is mistaken in this belief. The payment is a float, which is repayable on a sale. The terms on which it is held and the mechanism for repayment are set out in the Deed of Conditions relative to the development. The property factor, in the Written Representation, indicated that the homeowner would not have had ownership of the property unless they had signed this Deed of Conditions, but that is completely wrong. The Deed of Conditions will have been prepared and registered in the land Register by the housebuilder before any of the houses in the development were sold and individual homeowners would have had no input into its contents and no power to alter it. It would be for each purchaser's solicitor, when examining the title as part of the conveyancing process, to let the purchaser know about burdens and conditions which affected their title, including the factoring arrangements. It is not for the Committee to decide whether in this particular case, the homeowner was sent this information before paying for the property in July 2011, but we would note in passing that Messrs Stewarts solicitors wrote to Mr and Mrs Webster on 24 October 2013, letting them know that their title was now registered and enclosing a copy of the Land Certificate. In that letter, they drew attention to Section D of the Land Certificate, saying that it detailed those burdens and conditions which affect the property and added "I have already drawn these to your attention, but would be more than happy to discuss any queries which you may still have". The property factor would have had no input to the Deed of Conditions.

The portion of the Deed of Conditions relating to the payment of an Initial Deposit is set out as Rule 13 in the Deed of Conditions. It states at that the figure is £140 and that it is repayable, without interest, when the person who makes the deposit ceases to own the property to which it relates. The homeowner was required to pay £240 to Bett Homes, but the excess of £100 was refunded when she raised the matter with Bett Homes. The property factor would have had no knowledge of the figures set out in the State for Settlement for the purchase of the property and received £140 as the initial payment. To be held in accordance with the terms of the Deed of Conditions.

It is clear to the Committee that the homeowner did not understand the status of the payment of £240, but the property factors are not to blame for that. The homeowner's solicitors may or may not have specifically drawn attention to the factoring arrangements and the housebuilders may or may not have made statements that reasonably led the home owner to believe that it was a payment in advance rather than a deposit, but the misunderstanding cannot be attributed to the property factor.

The Committee then considered the complaints under Section 2.2 and 2.5 of the Code. The Committee determined that the correspondence from the property factor and its solicitors relating to possible legal action did not constitute a breach of Section 2.2 of the Code. So far as the property factor was concerned, the homeowner's payments were in arrears and the factor and its solicitors were entitled to indicate that they might take legal action. The Committee was of the view that the correspondence from the property factor on this issue might have

been better handled, given that it should have been clear that the homeowner was under some form of misapprehension as to the status of sums already paid, but was not prepared to hold that it was abusive or intimidating. **The Committee was, however, of the view that the e-mail of 13 February 2014, sent, albeit in error, to the homeowner by Zander Williamson of the property factor, describing the homeowner as "seriously stupid" and as "a pain", was abusive, offensive and wholly inappropriate and constituted a serious breach of the requirements of Section 2.2 of the Code.**

Section 2.5 of the Code requires property factors to "respond to enquiries and complaints received by letter or e-mail within prompt timescales". The Committee reviewed the correspondence that had passed between the homeowner and the property factor and did not find any undue delays in responding to the homeowner's enquiries, although the Committee understood the frustration experienced by the homeowner when the responses did not, in her view, answer properly the queries she had raised. **The Committee determined that there had not been a breach of Section 2.5 of the Code.**

The Committee looked next at the homeowner's complaints relating to Section 3 of the Code. The homeowner had included with the application a copy of the property factor's maintenance schedule, so the Committee was satisfied that she would have been aware of the activities and works carried out which are charged for and, as the charges to the homeowner are a fixed annual amount, no detailed breakdown of charges made was necessary, other than in the context of any proposal to vary the charges for the following year. **Accordingly, the Committee determined that there had been no failure to comply with Section 3.3 of the Code.**

The homeowner had also alleged a breach of section 3.5.b of the Code, but this was clearly an error in the application, as that section only applies to registered Social Landlords and local authority factors. The wording of the documentation accompanying the application and the oral evidence given at the hearing indicated clearly to the Committee that the homeowner intended this particular complaint to be regarded as a breach of Section 3.5.a of the Code and in her latest correspondence dated 1 August 2014, which had been cross-copied to the property factor, the homeowner had corrected her error. The property factor had not had notice of the error. It had not had the opportunity to respond to this specifically by reference to that section, but had commented in its written response to the original application that the float was "a ring-fenced sum". The homeowner was concerned that the amount stated in a newsletter issued by the property factor in December 2013 as being the total amount held as float payments was just under £22,000, which, if correct, was considerably less than £140 in respect of each of the 339 properties within the development. The homeowner queried whether the houses built by Stewart Milne and by Wimpey within the development had actually contributed to the funds held by the property factor and, if they had contributed £140 each, was concerned that the shortfall to which she had alluded might indicate that funds which should have been ring-fenced in terms of Section 3.5.a of the Code had been used for other purposes. **The Committee determined,**

therefore, that the property factor should be ordered to provide the homeowner with written confirmation that it holds her payment of £140 and those of the other owners in the development in a separate account and confirm the number of owners for whom such funds are held, in order to demonstrate compliance with Section 3.5a of the Code.

The homeowner had complained that Section 3.6a of the Code had also not been complied with, but the Committee did not uphold this, as the Section refers to "situations where a sinking or reserve fund is arranged as part of the service to homeowners" and there was no evidence that such a fund had been arranged in relation to the development. **The committee, therefore, determined that there had been no failure to comply in respect of Section 3.6a of the Code.**

Section 4.1 of the Code requires property factors to have a clear written procedure for debt recovery. The Committee found that there were no such provisions in the Written Statement of Services that accompanied the application The Committee had, however, earlier determined that the current Written Statement of Services was the one attached to the property factor's Written Representation and, as it contained the written procedure for debt recovery, **the Committee determined that there had been no failure to comply with section 4.1 of the Code.**

Section 4.8 of the Code provides that property factors must not take legal action against homeowners without taking reasonable steps to resolve the matter and without giving notice of the intention to take such action. The Committee accepted that the homeowner had not understood some elements of the property factor's correspondence, in particular the reference to part of the initial payment of £240 having been passed on to Hacking and Paterson, with only £140 being transferred to the property factor, and had not appreciated the difference between a float and an initial payment, but the property factor had not been answerable for the amount which the housebuilders had taken from each owner at the time of settlement of the purchase transaction. The homeowner had advised the Committee in her oral evidence that when advised by the property factor to take this up with the housebuilders, she had done so and Bett Homes had immediately acknowledged an error and had refunded the sum of £100 to her. **The Committee concluded**, on the basis of the evidence before it, that there was confusion on both sides, but that it could not hold that the property factor had failed to take reasonable steps to resolve the matter and had given reasonable notice of its intention to take legal action and **that there had been no failure to comply with Section 4.8 of the Code.**

The homeowner alleged a failure to comply with Section 4.9 of the Code, which requires that, when contacting debtors, property factors and third parties acting on their behalf must not act in an intimidating manner or threaten debtor homeowners (apart from reasonable indication that they might take legal action). The Committee had already held that there had been one serious breach of Section 2.2 of the Code, namely the abusive e-mail of 13 February 2014, but that, otherwise, the tone of correspondence from the property factor and its solicitors did not constitute a failure to meet the requirements of Section 2.2. For the same

reasons, **the Committee determined that there had not been a failure to comply with Section 4.9 of the Code,** as the correspondence indicating that the property factor might take legal action was reasonable and the remaining correspondence could not be construed as the property factor acting in an intimidating manner or threatening the homeowner. The homeowner had regarded the correspondence regarding legal action as threatening and intimidating, but the view of the Committee was that it was reasonable in the context of pursuing payment of a debt.

Although the Table provided with the homeowner's e-mail of 13 February 2014, did not include issues under Section 7.1 and 7.2 of the Code, they were set out in the application and were, therefore, considered by the Committee. Section 7 deals with complaints resolution. The Committee held that both versions of the Written Statement of Services met the requirements of Sections 7.1 and 7.2 of the Code in that they set out the procedure for making complaints and the timescale within which the property factor aimed to respond to queries and both stated that a failure to resolve a complaint could be made to the Homeowner Housing Panel. **The Committee, therefore, determined that there had been no failure to comply with Sections 7.1 and 7.2 of the Code.**

The Committee, having carefully considered all of the evidence before it, held that the property factor has failed to comply with the Code as required by section 14(5) of the Act and that it proposed to make a Property Factor Enforcement Order.

PROPOSED PROPERTY FACTOR ENFORCEMENT ORDER

The Committee proposes to make a Property Factor Enforcement Order, as detailed in the accompanying Section 19(2) Notice.

APPEALS

The parties' attention is drawn to the terms of section 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 day on which the decision appealed against is made..."

Signed ..... **Date 21 August 2014**

GEORGE CLARK, Chairperson