hohp

Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

Hohp Ref: HOHP/PF/15/0054

Re:

Property at Flat 2/1, 16 Eastside, Kirkintilloch, G66 1PY ("the Property")

The Parties:-

Miss Alison Barr, 124 Monkland Avenue, Kirkintilloch, Glasgow, G66 3BS ("the Homeowner")

Apex Property Factor, 46 Eastside, Kirkintilloch, Glasgow, G66 1QH ("the Factors")

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

Committee Members:

Maurice O'Carroll (Chairman)
Elaine Munroe (Housing Member)

<u>Decision of the Committee</u>

The Committee has jurisdiction to consider the application brought by the Homeowner.

The Factors have failed to comply with their duties under s 14(5) of the 2011 Act in terms of Sections 2.5, 3.3, 4.1, 4.6, 4.7 and 7.2 of the Code of Conduct for Property Factors.

The decision is unanimous.

Background

1. By application dated 28 April 2015, the Homeowner applied to the Homeowner Housing Panel ("HOHP") for a determination of whether the Factors had failed to comply with various duties as set out in sections 1, 2, 3, 4, and 7 of the Code of Conduct imposed by section 14(5) of the Property Factors (Scotland) Act 2011 ("the Act"). The application was restricted to Code breaches and did not refer to breaches of factor duties arising from any other source.

2. Further specification of the complaints contained within the application in relation to breaches of the Code was sent to HOHP by letter dated 8 October 2015 and

copied to the Factors. The further specification was sent in compliance with a Direction issued by the Committee on 3 September 2015. The letter of 8 October 2015 was comprehensive whilst being succinct and provided a helpful framework for discussion of the substantive issues arising further to the application.

3. The Factors for their part did not comply with parts of the Direction of 3 September 2015 which related to them. The reason given for this was simple oversight, despite a second Direction having been issued on 15 September 2015 in relation to the new hearing date and change of venue which made specific reference to the first Direction and the deadlines contained within it.

4. Prior to the Application being submitted, the Homeowner sent a formal complaint to the Factors via email dated 11 March 2015 in accordance with section 17(3) of the Act. The Homeowner also sent a pro forma notification to the Factors dated 11 May 2015 in which she set out the reasons why she considered that they had failed to comply with their duties under the Code.

5. Notices of referral to the Committee were sent to the parties on 18 June 2015 following a Minute of Decision by the President of HOHP to do so in terms of section 18(1) and (3) of the Act dated 17 June 2015.

6. An oral hearing in relation to the application was originally set down for 24 September 2015 within the offices of the Homeowner Panel, Europa Building 450 Argyle Street, Glasgow. At the request of the Factors, that hearing was postponed to a new hearing which was set down for 21 October 2015 within Wellington House, Wellington Street, Glasgow. During the afternoon of 20 October 2015, the Factors again sought a postponement of the hearing due to the illness of its Director, Mrs Christine Davidson-Bakhshaee, whom it had intended to call as a witness. That request was denied by the Chairman on account of the fact that the Factors had raised a preliminary objection to the validity of the application going to the jurisdiction of the Committee, which could nonetheless be considered at the postponed hearing.

7. At the hearing held on 21 October 2015, the Homeowner attended on her own without representation and gave evidence and submissions to the Committee on her own behalf. The Factors were present at the hearing and were represented by Neil Cowan from their legal department, who also gave evidence to the Committee. Their director, Mrs Davidson-Bakshaee ("the Director") attended despite having been in hospital the previous day and gave evidence on behalf of the Factors.

8. At the outset of the hearing, it was clarified that the Factors no longer acted as property managers in respect of the Property, having been dismissed by the residents within the block containing the Property with effect from 28 February 2015. Three months' notice of dismissal, accepted by the Factors, had been given to them by the residents on 1 December 2014.

Preliminary determination on jurisdiction

9. By letter dated 8 July 2015 and again by letters dated 25 August and 22 September 2015, the Factors contended that the Committee did not have the jurisdiction to hear the application because the Homeowner had failed to exhaust the Factors' internal complaints procedure as set out in their WSoS, contrary to section 18(2)(b) of the Act and Section 7.2 of the Code of Conduct. A separate submission appeared to suggest that the Homeowner was not entitled to bring the application since the contract for services with the Factors had been brought to an end on 28 February 2015. On the latter basis, as the Factors would have it, the Homeowner's only recourse in those circumstances would be to the ordinary courts.

10. Rather than dismiss the application on the basis of these apparently conflicting submissions, the Chairman indicated by letter of 4 September 2015 that these matters ought to be fully argued before the Committee, with adequate notice of those submissions being afforded to the Homeowner. This was the principal purpose of the first Direction with which the Factors did not comply. Before those submissions may be discussed, it is necessary to set out some preliminary findings in fact.

11. The main basis of the complaint made by the Homeowner was that insufficient action had been taken by the Factors to chase up non-payment by other proprietors within the communal block containing the Property. As a result of that, the Factors had invoked the provision within the Written Statement of Services ("WSoS") under the heading "Joint Liabilities" to apportion the debt of the non-paying proprietors to the paying proprietors, including the Homeowner.

12. In their final invoice to the Homeowner dated 27 February 2015 following termination of their factoring services, the Factors included the sum of £298.44 plus VAT (£358.13 in total) being the reapportionment of costs incurred by two non-paying proprietors. The total invoice came to £380.33 which has not been paid by the Homeowner, although she did not dispute the sum of £22.20 attributable to her alone. A letter dated 9 March 2015 sent by the Factors to the Homeowner gave further detail of the overall debt which was stated to be £1,067.10 and £1,021.95 in respect of the proprietors at Ground Floor Right and number 18/20 respectively. The latter debtor is Mr Dinardo, the owner of the chip shop premises beneath the Property.

13. Unknown to the Homeowner, the Factors registered a Notice of Potential Liability ("NOPL") against the Property to secure payment of the outstanding sum so accrued at some point prior to 10 August 2015. She only became aware of the NOPL on the advice of her solicitor when she decided to put the Property up for sale.

14. The Homeowner concluded missives to sell the Property on 16 October 2015, the Friday prior to the hearing. By letter dated 13 August 2015, the Factors informed her solicitors of the appropriate retention amount in respect of the NOPL, in other words, the amount of money which required to be held back from the final sale proceeds in order to satisfy the outstanding factor debt. The amount stated on that date was £580.33, being exactly £200 more than the amount stated in the final invoice sent to the Homeowner at the end of February. The reason for the increased amount was stated by Mr Cowan to be in respect registration dues and associated administrative costs.

15. In the course of his submissions, Mr Cowan accepted that the outstanding charges accrued during the time in which the Factors were providing property management services to the Homeowner. He accepted that a formal email of complaint dated 11 March 2015 was not answered until 30 April 2015, despite a reminder having been sent on 10 April 2015. He accepted that the "Customer Service Standard" as set out in the WSoS to the effect that all communications would be acknowledged within 14 days and responded to within 21 days had not been complied with, despite not being terribly onerous.

16. It was suggested by the Chair that the obligation contained within the complaints handling procedure of the WSoS to exhaust complaints informally before a complaint may be made to HOHP (mirrored by section 7.2 of the Code) had a reciprocal obligation that complaints would be dealt with timeously and in accordance with the Customer Service Standard so that in the event of the latter not being complied with, the Homeowner was effectively absolved from complying with the former. This would perhaps also explain why the President of the HOHP decided not to reject the application in terms of section 18(2)(b) of the Act as she was entitled to do since the Factor had been afforded a reasonable opportunity to resolve the dispute. Mr Cowan accepted, correctly, that the terms of that section (employing the word "may") provided the President with the discretion not to reject the application.

17. However, the above suggestion in relation to exhausting the complaints procedure was denied by Mr Cowan but without reference to any legal authority. The concept of reciprocity of contract was unknown to Mr Cowan. Moreover, the Director added her own submission to the effect that since the contract for property services had ended on 28 February 2015, the Factors were under no obligation to communicate with the Homeowner at all since there was no longer any contractual obligation in terms of the WSoS to do so. The fact that a reply was issued on 30 April 2015 was simply a matter of courtesy. The Homeowner's only remedy in light of the above was to seek redress in the Sheriff Court by means of a small claims action since the contract was at an end.

18. Having heard the parties' submissions, and having been persuaded that a formal determination was necessary prior to the hearing of any evidence, the Committee

adjourned to consider the Respondent's preliminary objection in relation to jurisdiction. It determined as follows:

19. In terms of section 2 of the Act, a property factor is a person who manages the common parts of land owned by two or more persons for residential purposes. It was accepted that the Homeowner was the proprietor of the Property during all of the time in which the Factors acted as such. Accordingly, in terms of section 17 of the Act, a homeowner is entitled to apply to the HOHP to determine whether the property factor has failed to comply with its duties under the Act. Since the Factors had correctly accepted that the outstanding sums they stated were due to them arose during the currency and by virtue of the factoring contract, it follows that they had corresponding factor duties in terms of the Act. It also follows that the Committee has jurisdiction to hear the application.

20. The notion that upon termination of the arrangement for factoring services, all other obligations under the contract and in terms of the Act fly off betrays a fundamental misunderstanding of the applicable law. It also conveniently ignores the fact that the contract and the factoring relationship is the very thing relied upon by the Factors in order to obtain the apportioned sum of £358.13, subsequently increased to £558.13, from the Homeowner. Effectively, the Factors seek to affirm and deny the factoring contract at one and the same time.

21. For the sake of completeness, it should be noted that the Homeowner complied with the mandatory terms of section 17(3) of the Act, given that she notified the Factors in writing why she considered that they were in breach of their obligations under the Act and provided them with an opportunity to carry them out.

22. In relation to any obligation to exhaust internal remedies prior to raising the application, based upon the supplementary submissions of the Director, there was never any intention on the part of the Factors to resolve the dispute. The aim of the Act (to resolve matters informally prior to determination by the HOHP) would in those circumstances never have been fulfilled as the terms of section 18(2)(b) were being deliberately ignored by the Factors in the light of the submission made. Had the Homeowner sought to invoke the internal complaints procedure, the Factors, by their own admission, would not have engaged in that process in any event, standing the erroneous view they took of the factoring contract between the parties. Accordingly, and in the application of section 18(2)(b) of the Act, it was entirely appropriate that the matter be referred to a Committee for determination: the Application was not premature as alleged.

Committee findings - general

Having determined that it had jurisdiction to hear the application, the Committee made the following findings after hearing the evidence of both parties pursuant to Regulation 26(2)(b)(i) of the 2012 Regulations:

23. The Homeowner, is the heritable proprietor of the Property, having purchased it on 1 May 2002. It is a two bedroom flat in a Victorian tenement block consisting of 8 flats and one commercial owner (the chip shop referred to above). There are two residential units on the ground floor and three on the first and second floors. The Homeowner's property is the first flat on the second floor. Communal factoring costs are therefore split 9 ways, although this split is not made clear in any of the invoices produced to the Committee.

24. The Factors were appointed as factors to the tenement block in October 2012. They were registered in terms of the Act on 1 November 2012. Their duties under the Act to comply with the Code arose from that date.

25. The Factors were the property factor responsible for the repair, maintenance and insurance of the common parts of the Development until their dismissal on 28 February 2015, a period of some two and half years.

26. According to the evidence of Mr Cowan, there were difficulties with obtaining payment for communal charges from the proprietor of the flat located ground floor right and also Mr Dinardo from the outset of their time as factors for the block, continuing until the end of their appointment. The charges outstanding in respect of these two proprietors as at the date of their termination as factors have been noted above.

27. The management fee was generally £9.50 per month plus VAT, with the cleaning fee and landscaping charge (by which is meant grass cutting in the shared green) amounting to £3 a month each plus VAT. The standard charges which could be expected were in the region of £15.50 per month or £18.60 with VAT. Other *ad hoc* charges would have arisen in the ordinary course of events, although no examples of these were provided to the Committee.

28. On that basis, the non-payers were in default for the payment of factoring charges for what must have been most, if not all, of the period in which the Factors acted as such for the tenement block, although the Homeowner was never informed of that until the factoring arrangement ended.

29. The Committee found the Homeowner to be a wholly credible and reliable witness who gave her evidence in a straightforward and unexaggerated manner. It had reservations about the reliability of some of the evidence provided by the Factors which are discussed below in relation to the particular findings made.

Findings in relation to the alleged breaches of duty

Section 1 of the Code

30. Section 1 of the Code requires property factors to issue Written Statements of Service ("WSoS") to homeowners which contain a minimum content of information as set out in the ensuing parts of that section. The Committee had sight of the Factors' WSoS contained in an undated document which was

provided to the Homeowner during the time in which they acted as factors. The Homeowner had highlighted the parts of Section 1 which deal with Financial and Charging Arrangements and Communication Arrangements both in her Application and in her section 17(3) notification.

31. Upon questioning by the Committee, however, the Homeowner fairly agreed that the WSoS in fact covered those matters and that it was the substantive content of those parts of Section 1 with which she was concerned. In other words, the Homeowner's issue was not what the Factors stated they would or would not do in the WSoS, but rather what they did in fact do and omit to do in practice. Accordingly, the Homeowner agreed to reserve her evidence in relation to the issues discussed in those part of the Code to the later parts of the Code which discuss the substantive duties on the part of the Factors. In those circumstances and by agreement, the Committee made no finding in relation to section 1 of the Code.

Section 2 of the Code

32. Section 2..5 of the Code requires the Factors to respond to enquiries and complaints received by letter or email within prompt timescales. This is covered by the sections of the WSoS headed "Complaint Handling Procedure" and "Customer Service Standard" referred to above. It is provided in the former that "Complaints will be dealt with as quickly as possible, handled fairly and sensitively and fully investigated." In relation to the latter, the Factors undertook to endeavour to acknowledge communications within 14 working days of receipt and aim to respond fully to enquiries within 21 days.

33. In relation to this heading, the Homeowner gave evidence about a letter dated 29 November 2012 from the Factors concerning a request from Mr Dinardo that he be exempt from paying certain of the communal charges in return for an undertaking not to use the common close for deliveries or access, nor burn refuse in the garden or leave refuse of any kind in the area. It was stated that a majority of owners would require to accede to this request before it could be given effect to. The Homeowner gave evidence that she wrote to the Factors stating that she objected to this course of action and that Mr Dinardo should be required to pay communal charges like everyone else since he was under the same communal roof and nonetheless had access to the common green.

34. The Homeowner also gave evidence that her response to the letter of 29 November 2012 was not acknowledged or indeed replied to so that she was left in the dark as to the outcome of the request. She was left to presume the outcome and did not know if anyone else had objected. This evidence was accepted by the Committee. At the hearing, the Factors confirmed that a majority had not agreed to Mr Dinardo's request and that therefore he was still treated as being liable for a full share of communal expenses. This matter in fact was confirmed for the first time by letter dated 19 May 2015 from the Factors to the Homeowner, some two and a half years after the issue was first raised.

Therefore, the Committee was of the view that a breach of Section 2.5 had occurred.

35. A more recent example of a breach of Section 2.5 occurred in relation to the Homeowner's complaint of 11 March 2015 which referred to the above failure in communication and the failures under the Code forming the main issue in the Application. As was accepted, she received no answer to that email. A reminder was sent on 10 April 2015 to which a belated response was sent via email from Mr Cowan on 30 April 2015, which is to say, nearly three weeks after the reminder and over six weeks since the original complaint. In these circumstances, the Committee had little hesitation in finding that the Factors had breached Section 2.5 of the Code in relation to this matter also.

Section 3 of the Code

36. Section 3.2 of the Code provides that factors must return funds due to homeowners (less any outstanding debts) automatically at the point of settlement of the final bill following change of owner or property factor. The Committee had sight of the receipt dated 5 October 2012 for the float of £50 paid by the Homeowner at the start of the Factors' appointment. The final invoice of 27 February 2015 made no mention of the float, which would constitute a failure in accounting, since ordinarily that would be a sum which would be set against any final sums due upon termination.

37. However, good accounting is not the issue in relation to Section 3.2 of the Code. At the time of the final invoice, the Factors considered that there were outstanding debts which would have excused them from the obligation to automatically refund the Homeowner's float. Had the entire invoice been in respect of the erroneously applied debt from the non-paying owners, then the Committee would have found the Factors to have acted in breach of this section of the Code. However, as noted above, £22.20 at least had been accepted by the Homeowner as being properly due in terms of the final invoice. There was accordingly an outstanding debt, albeit of a very much smaller sum than that claimed by the Factors. It follows that the Factors were not strictly speaking under an obligation to refund the float immediately upon settlement of the final invoice, since it was not settled to any extent at all. Therefore, the Factors did not act in breach of Section 3.2 of the Code.

38. Section 3.3 of the Code requires factors to provide in writing a detailed financial breakdown of charges made at least once a year. The Homeowner gave evidence that the Statement of Account produced on 6 March 2015 was typical of what she used to receive from the Factors, which the Committee accepted. That Statement of Account simply repeated in even less detail what was stated in the final invoice the month prior. The statement provides three entries of sums of £22.20 due to by the Homeowner and an additional entry in relation to the apportioned debt. It does not on any view provide "a detailed financial

breakdown of charges made and a description of the activities and works carried out which are charged for" as required by the Code on an annual basis.

39. However, that was not the source of the Homeowner's complaint. She was more concerned with the fact that at no point in the financial statements that she received, was she informed of the difficulties which the Factors were encountering in obtaining payment for communal charges from Mr Dinardo and the proprietor of the flat on the ground floor. Had the Statement of Account been as detailed as required by Section 3.3, she contended that she would have been so aware. That may or may not have been the case, but the Committee considered that although the Statement of Account fell well short of what was required by Section 3.3, the Applicant's complaint under this heading more properly fell under the discussion in relation to 4.6 of the Code.

40. Accordingly, the Committee found on the facts that the Factors did not comply with Section 3.3 of the Code, but do not propose to order any specific remedy in relation to that breach, given that the source of the Homeowner's complaint is more properly considered under a different heading of this decision.

Section 4 of the Code

41. Section 4.1 of the Code provides that factors must have a clear written procedure for debt recovery which outlines a series of steps which they will follow unless there is a reason not to. *This procedure must be clearly, consistently and reasonably applied* (emphasis added). This provision is a corollary of Section 1C.g. which the Homeowner departed from under direction from the Chair. The section 1 requirement is that the WSoS contains confirmation that factors have a debt recovery procedure which is available on request.

42. The WSoS complies with the Section 1 requirement in that it provides the necessary statement within it in relation to debt recovery. Section 4.1 being the substantive duty, then requires that obligation to be carried out in practice as the words italicised above make clear.

43. The Factors provided their 12 step debt recovery procedure following a request by the Homeowner in her email of 11 March 2015 in their eventual response of 20 April 2015 which the Committee had sight of. They also gave evidence that they had approached the ground floor proprietor and Mr Dinardo in person on the doorstep and by telephone. In relation to the former, the Director stated that she encountered abuse which made her feel unsafe about approaching that debtor again. In relation to Mr Dinardo, the Factors gave evidence that they were constantly assured that the debt would be paid, although it was not. They stated that they did not pursue matters more formally as they did not wish to "alienate good paying clients" and risk creating bad relations with them.

44. The Committee had some difficulty with that evidence. Since by their own admission, the unsatisfactory debt situation had persisted for two and half years,

it had trouble understanding how they could have been described as "good paying clients." Moreover, it was not convinced that the debt recovery procedures had been applied consistently and reasonably, given the amount of time which had been allowed to elapse, especially when those difficulties first arose soon after they took over their duties as factors. The Factors also stated that they would have considered raising small claims actions had it not been for the termination of their contract for services. The Committee did not consider that to be reliable evidence in view of matters having been allowed to persist for over two years.

45. In none of that time were the other proprietors of the block asked if they were agreeable to fund a small claims action being raised. Even prior to that, there was no evidence that during any of that time, the earlier steps 4, 5, 6 or 7, 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, having been undertaken. Those steps plus steps 8, 9 and 10 (issue post summons letter, raise small claims action, register NOPL) in any event required to be exhausted before step 11, apportionment of debt among remaining owners, could be employed according to the Factors' own procedures.

46. Accordingly, the Committee did not accept the evidence of the Factors and found that they had breached Section 4.1 of the Code. Such steps as were taken were not reasonable or systematic and ultimately were insufficient. Step 11 was invoked without most of the necessary prior ones being employed. It was therefore in the view of the Committee not appropriate that the paying proprietors should be left to shoulder the debt of the non-paying ones. This finding will be reflected in the Property Factor Enforcement Order to follow under separate cover.

47. Section 4.6 of the Code requires factors to keep homeowners informed of any debt recovery problems which could have implications for them (subject to the limitations of data protection legislation). The Committee understood from the evidence of both parties that in the early part of the factoring arrangement, the Homeowner paid her monthly invoices in person at the Factors' office as it was very close to the Property. However, this arrangement ceased when the Homeowner moved to a direct debit arrangement.

48. It was stated by the Director that debt recovery procedures were discussed with all the block proprietors at a meeting which took place in October 2012 after the Factors were appointed. She also stated that in the early months when the Homeowner paid her monthly invoices in person, she was made aware of the difficulties the Factors were experiencing in obtaining payment from the non-paying proprietors. This evidence was accepted in part by the Homeowner in that she stated that she was asked to apply some "peer pressure" to those non-payers in order to encourage them to pay their factoring invoices. She went on to

state that she declined to do so because she did not consider it her job to chase other owners to pay their factoring debts.

49. The Director offered to call four other witnesses who were present at the Factors' offices at the material times to speak to those discussions should the Committee wish to reconvene to hear that evidence. However, the Committee does not consider that reconvening the hearing is necessary since there was no dispute that a discussion along the lines noted above took place towards the end of 2012.

50. However, in order to comply with Section 4.6 of the Code, the Committee expected the Factors to have written specifically to the Homeowner to inform her once the non-payment by the debtors had become a serious issue as it undoubtedly must have done between the period from November 2012 to February 2015. This they failed to do. The duty was not discharged by informal conversations in general terms held in the Factors' offices. Section 4.6 requires factors to keep homeowners informed of debt problems which could have implications *for them*. There was no evidence that that was the force of the discussions which took place at the end of 2012. There was no evidence of any further discussions along those lines taking place during 2013 or 2014.

51. In any event, the matter is put beyond doubt by the Factors' letter to the Homeowner dated 19 May 2015. In that letter, it is stated "The termination of our services as Factor meant that we were forced to reapportion the debt before our debt recovery procedures were exhausted. We were not obliged to make you aware of your Fellow Owners' indebtedness prior to this point." The substance of the first sentence has been discussed above in relation to Section 4.1. The second sentence makes it clear that by the Factors' own admission, they deliberately and knowingly did not inform the Homeowner of the indebtedness of the non-paying proprietors. This is therefore a clear admission of a breach of Section 4.6 of the Code. This was no doubt prompted by the same misapprehension as discussed above in relation to the preliminary issue. The Committee therefore found that there had been a breach of Section 4.6 of the Code.

52. 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. This section has to a large extent been covered by the discussion in relation to Section 4.1 of the Code above.

53. The Committee accepted that certain steps had been taken to recover money from the defaulting proprietors by means of face to face conversations and phone calls. However, those steps were not considered to have been reasonable, given the duration of the difficulty in obtaining payments from the debtors. The Committee also noted that it had not been provided with any evidence by the

Factors that they had instituted any of the intermediate steps (4-9) prior to apportioning the debt among the remaining owners under step 11.

54. The Committee did accept the Factors' oral evidence at the hearing that a NOPL had been registered against the defaulting proprietors in terms of step 10, although no documentation was provided to vouch that. However, in terms of the Factors' debt recovery procedures, that was a step to be taken after a small claims action had been raised in terms of step 9, which it was accepted had not been undertaken, or even discussed with homeowners within the tenement block.

55. In the view of the Committee, raising a small claims action is a far more effective means of securing repayment of debt than the registration of a NOPL which only comes into play when the defaulting proprietor wishes to sell their property. A NOPL may therefore lie against a property until its statutory expiry date (or longer if renewed) with nothing being done about it in the absence of a sale, or other prompt such as re-mortgaging. A small claims action provides the compulsitor of the Sheriff Court with associated means of enforcement. Given the length of time in which default occurred, the Committee considered that it was not reasonable for the Factors to have failed to employ the other steps to recover debt before seeking to obtain the funds from paying proprietors. The Committee therefore found that the Factors had breached Section 4.7 of the Code.

56. It follows from the above discussion in relation to Sections 4, that since the Factors apportioned the debtors' liability to the Homeowner and others in breach of their Code duties, that apportionment cannot stand. It also follows that there was no basis for registering a NOPL against the Homeowner since there was no lawful debt to secure in the first place. It then follows from that, that the additional charges of £200 levied by the Factors in the name of unspecified charges and dues also cannot stand. In the PFEO to follow from this decision, the Factors are therefore required to cause to be registered at their own expense a Discharge of that NOPL and to cancel all invoicing in respect of it and the apportionment.

Section 7 of the Code

57. Section 7.2 of the Code provides for an in-house complaints procedure. Where this is exhausted, the final decision should be confirmed by senior management and details of how to apply to the HOHP should be given.

58. As discussed above in relation to the preliminary issue, the in-house complaints procedure was not embarked upon. The Homeowner's direct letter of complaint of 11 March 2015 was not answered until 30 April 2015, two days after her application had been sent to HOHP. At no point was the Homeowner invited to engage in any form of in-house complaints procedure. The Director referred to the letter of 19 May 2015. According to her evidence, the last line contained within the last paragraph of that letter stating "Please do not hesitate to contact us should you require any further information" was not a mere formal salutation, but was instead an invitation to embark upon the Factors' complaints procedure.

59. The Committee was unable to accept that evidence. In any event, the letter of 19 May 2015 came far too late in the day to be considered as a valid response to the complaint of 11 March 2015. That was also true of the letter of response dated 20 April 2015. In addition, in terms of the earlier part of the 19 May letter referred to above and the submissions made to the hearing by the Factors, there was never any intention to comply with any form of in-house complaints procedure. This was because the Factors considered that they were no longer bound to do so after 28 February 2015 when the factoring arrangement came to an end.

60. As the Homeowner submitted, she was unaware of the issue of allocated debt until after this point because the Factors had not told her. So, according to the Factors, the complaint which only surfaced because the contract had come to an end, could not be dealt with in terms of their procedures because the contract had come to an end. Leaving aside the obvious absurdity of that position, it was clear to the Committee that the Factors acted in breach of Section 7.2 of the Code.

61. Finally, the Committee noted that no direct invitation to embark upon an in-house complaints was issued to the Homeowner between 19 May 2015 and the date of the hearing on 21 October 2015, again, because the Factors considered that they were not obliged to do so, as confirmed by them in evidence.

Decision

60. In all of the circumstances narrated above, the Committee finds that the Factors have failed to comply with their property factor duties in terms of s 14(5) of the Act in respect of sections 2.5, 3.3, 4.1, 4.6, 4.7 and 7.2 of the Code.

It has therefore determined to issue a Property Factor Enforcement Notice which will follow separately.

61. **Appeals**

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..."

M O'Carroll

Signed: M O'Carroll
Chairperson

Date: 9 November 2015