



**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 reference: HOHP/PF/15/0063**

**Re: 190 Bannermill Place, Aberdeen AB24 5EG ('the property')**

**The Parties:**

**Christopher McIntyre, 37 Bannermill Place, Aberdeen AB24 5EA ('the homeowner'); and**

**Select Property Management Services (Aberdeen) Limited, incorporated under the Companies' Acts (SC402142) and having its Registered Office at 28 Broad Street, Aberdeen and having a place of business at Factor's Office, Bannermill Place, Aberdeen AB24 5EG ("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 (chair), and Michael Scott (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.**

## **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 25 February 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 by the homeowner received on 7 May 2015, with supporting paperwork, namely a copy letter from the property factor dated 19 October 2012, with its Terms of Business for Factoring Services attached, a copy Invoice from the property factor, dated 18 October 2012 for an additional contribution of £100 to the factors’ float, e-mails from the property factor to the homeowner dated 2 and 19 March 2015, e-mails from the homeowner to the property factor dated 26 March and 29 April 2015, an e-mail from the homeowner to the property factor dated 10 August 2015 and the property factor’s e-mailed reply of the same date (to which is attached correspondence between the property factor and Scott and Company, including an acceptance, dated 1 December 2014, by the property factor of the terms and conditions of Scott and Company’s Debt Recovery and Tracing Services); and an e-mail from the homeowner to HOHP, withdrawing his complaints under Sections 4.1, 4.6 and 7.1 of the Code and restricting his application to his complaint under section 4.7 of the Code . The Committee confirmed that it did not require any further documentation prior to considering the application at a hearing.

## **Summary of Written Representations**

**The Committee had received, in advance of the hearing, written representations made by the homeowner and these are summarised as follows:-** The property factor had failed to provide any evidence that it had tried to recover from non-paying homeowners and had decided to keep the deposits of everyone in the development of which the property forms part. The homeowner contended that this constituted a breach of Section 4.7 of the Code.

**The Committee had not received, in advance of the hearing, any written representation from the property factor.**

## THE HEARING

A hearing took place at The Credo Centre, 14-20 John Street, Aberdeen AB25 1BT on 2 December 2015. Neither the homeowner nor the property factor was present or represented at the hearing. The homeowner had agreed that the application could be determined on the basis of written submissions.

### The Committee make the following findings of fact:

- 1 The homeowner is the owner of the property 190 Bannermill Place, Aberdeen, which is part of a development of 323 residential properties by Persimmon Homes limited at Bannermill, Aberdeen.
- 2 The property factor manages and maintains land on the development ("the land"). 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")
- 3 The property factor manages and maintains the common parts of the development and the owners of the 323 properties in the development contribute towards the maintenance costs of the common parts.
- 4 The property factor's duties arise from a written Statement of Services, a copy of which has been provided by the homeowner.
- 5 The date from which the property factor's duties arose is unknown, but it is not disputed that it was prior to the date of the homeowner's application.
- 6 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.
- 7 The date of Registration of the property factor was 25 February 2013.
- 8 The homeowner has notified the property factor in writing as to why he considers that the property factor has failed to carry out its duties arising under section 14 of the Act. He did this by e-mail on 29 April 2015 .
- 9 The homeowner made an application to The Homeowner Housing Panel ("HOHP") dated 7 May 2015 and received by HOHP on 7 May 2015 under Section 17(1) of the Act. The application was subsequently amended by an e-mail received by HOHP on 20 August 2015. This e-mail confirmed that the extent of the complaint in the application was now limited to an alleged failure to comply with Section 4.7 of the Code.
- 10 The following is a summary of the content of the homeowner's application to HOHP:- The property factor stopped providing factoring services to the homeowners in the development on 30 November 2014. The homeowners waited for several months to get back their deposits and were then told by the property factor that they would have to pay in extra money to cover debts of those homeowners who had not paid their factoring charges, but the property factor provided no evidence that it had tried to recover those debts. The property factor had ignored the

homeowner's e-mails and complaints. The homeowner wished to see evidence that the factor had tried to recover debts from homeowners who had not paid.

- 11 The homeowner's concerns have not been addressed to his satisfaction.
- 12 On 22 September 2015, the President of HOHP referred the application to a Homeowner Housing Committee. This decision was intimated to the parties by letter dated 13 October 2015.
- 13 A copy of the property factor's written Statement of Services was included amongst the supporting paperwork for the homeowner's application to HOHP. It is entitled "Terms of Business for Factoring Services". Section 4 is headed "Debt Recovery" and Section 4.d provides "If having raised court proceedings against the relevant Homeowner and been awarded decree for payment, we are unable to recover from the relevant Homeowner the full amount of the sums due, we reserve the right to recover from the remaining Homeowner (sic) the whole or (as the case may be) the irrecoverable part of the sums due to us by the relevant Homeowner in accordance with and to the extent permitted by the Deed of Conditions. In that case, we shall give notice intimating to the remaining Homeowners details of the steps taken by us to recover payment and that the whole or (as the case may be) the irrecoverable part of the sums due by the relevant Homeowner, will be added to the next instalment of the Management Charge due by the Homeowners following the date upon which we (acting reasonably) consider that the sums due are irrecoverable either in whole or in part."
- 14 Section 4.7 of the Code imposes the following duty on property factors: "You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs."

### **Reasons for the Decision**

The Committee considered the application, with its supporting papers. The Committee concluded that the essence of the complaint was that the property factor had not provided any evidence that it had tried to recover debts from homeowners who had not paid their factoring bills, but had simply retained the deposits which they held for homeowners, when they stopped providing factoring services for the development, and had intimated to homeowners that they would have to pay in extra sums to meet the shortfall.

The homeowner had sent with his application a copy of an e-mail which he had received from the property factor on 10 August 2015. In this e-mail the property factor stated that it had not breached Section 4.7 of the Code. The following are quotations from their e-mail:

"It is very difficult to "demonstrate" to you that we have taken reasonable steps to pursue the debts/arrears for the development as we are governed by the data protection act, this limits the amount of information that we are legally permitted to provide to you.

"I have however attached the instruction agreement that we entered into with Scott and Co. the day after we ceased as agents for the development to recover outstanding sums

due. This clearly demonstrates that we engaged the services of a specialist organisation to collect arrears/outstanding sums due and as such limit the amount of potential debt that would become a development debt.

“As we are governed by the Data protection Act we are unable to provide you with the details of individuals account/arrears details....

“We have pursued the debts historically using solicitors and recently through a recovery agency and ourselves. We chose to use a company whose services are specifically in debt recovery for the final recovery actions. We have taken reasonable steps to recover the debts therefore there is no breach of section 4.7 of the code.”

This e-mail was sent in response to an e-mail from the homeowner sent earlier on the same day in which he said “You have not demonstrated that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners which are jointly liable for such costs. Instead you have kept my deposit to cover these costs.”

The Committee noted that the property factor did not instruct Scott and Company until the day after the expiry of the three months’ notice period which terminated the factoring service and, in its e-mail of 10 August 2015, the property factor indicated that, prior to then, it had used solicitors to pursue debts. The Committee accepted that the property factor was constrained by the Data Protection Act from disclosing details relevant to any individual homeowner who was in arrears, but determined that that did not entitle the property factor to ignore its own Terms of Business, which states that homeowners would be given details of the steps taken by the property factor to recover payment and the requirement of Section 4.7 of the Code to be able to demonstrate that it had taken reasonable steps to recover unpaid charges. In the view of the Committee, the property factor could, without breaching the Data Protection Act by disclosing details of the individuals affected, have told the homeowner the number of court cases it had raised, the number of decrees it had obtained, the total amount of arrears covered by those decrees and the success or otherwise that it had had in recovering the sums due under the decrees.

The Committee determined, therefore, that the property factor had made no attempt to comply with the requirement in its Terms of Business to give details of the steps it had taken to recover arrears and had not demonstrated that it had taken reasonable steps to recover unpaid charges. Accordingly, the property factor had failed to comply with Section 4.7 of the Code of Conduct and the homeowner’s complaint should be upheld.

**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 date on which the decision appealed against is made ... "*

George Clark

Chairperson Signature ...

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Date 2 December 2015