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/LM/15/0105

Re: Landscaped Areas around Pennyburn Estate, Kilwinning (the property)

The Parties:

Mr Hector Macleod, 26 Treesbank, Kilwinning, North Ayrshire KA13 6LY (the homeowner)

Irvine Housing Association, 42- 46 Bank Street, Irvine KA12 0LP (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: Sarah O'Neill (Chairperson), Elaine Munroe (Housing member)

Decision of the committee

The committee determines that the property factor has not failed to carry out its property factor's duties as defined in section 17 (5) of the Act. The committee also determines that the property factor has not failed to comply with its duties under section 14 of the Act in respect of sections 2.1 and 2.4 of the code of conduct for property factors.

The committee's decision is unanimous.

Background

1. By application received on 9 July 2015, the homeowner applied to the Homeowner Housing Panel ('the panel') to determine whether the property factor had failed to comply with its duties under the Act. In his application form, the homeowner complained that the factor had failed to comply with its duties under section 14 of the Act in respect of section 7 (complaints resolution) of the code of conduct for property factors ('the code'). He also complained that the factor had failed to carry out the property factor's duties as defined in section 17(5) of the Act.

2. He enclosed with his application form copies of the following:

- Various emails between the property factor and himself dated: 19 and 20 August 2010; 29 September 2011; and 11 and 13 February, 11 March, 23 May, and 3 ,6 and 7 July, all 2015.
- A document entitled 'Information for Owner Occupiers' prepared by Touche Ross for Irvine Development Corporation (IDC) relating to the proposed stock transfer of IDC's rented housing stock in 1995.
- An undated document entitled 'Housing Services Guarantee' by Irvine Housing Association (IHA).
- Excerpts from Appendices A, B and C of IHA's 'Modification of Bid' document dated 24 November 1995.
- Two documents prepared by the homeowner with figures relating to IHA's landscape maintenance and factoring costs.

3. On 23 July 2015, the homeowner sent two notification letters to the property factor. The first of these set out the reasons why he believed it had failed to comply with section 2.1 of the code. The second letter set out the reasons why he believed the property factor had not complied with sections 2.4 and 2.5 of the code. On 11 August 2015, an email was received from the homeowner, attaching a letter dated 7 August from Ms Nicola Thom, Interim Managing Director of the property factor in response to his notification letters. On the same date, a further email was received from the homeowner, stating that he wished that email to be treated as his only submission; that his only complaint was under section 2.1 of the code; and asking for his previous submissions to be ignored. He enclosed a copy of a further notification letter to the property factor dated 11 August regarding his section 2.1 complaint.

4. The homeowner again confirmed by email of 22 August that his only complaint was under section 2.1 of the code. On 28 August, a further email, addressed to Ms Thom, was received from him, enclosing her reply of 27 August to his 11 August letter. In that email, he challenged the points made in her letter. She responded on 10 September 2015, stating that the property factor was of the view that there was no further information it could provide him with in respect of the matter, and provided contact details for the panel.

5. On 24 November 2015, the President of the Panel issued a minute of decision to both parties, stating that she considered that in terms of section 18(3) of the Act there was no longer a reasonable prospect of the dispute being resolved at a later date; that she had considered the application paperwork submitted by the homeowner, comprising documents received in the period of 9 July to 14 September 2015; and intimating her decision to refer the application to a panel committee for determination. On 10 December 2015, the President issued a notice of referral to both parties, advising that a hearing would be

held on 4 February 2016, and requesting written representations by 31 December 2015.

6. Written representations were received from the homeowner on 14 December 2015. A letter was received from the property factor's solicitor on 29 December, requesting an extension for the submission of written representations until 8 January 2016, which was agreed by the committee. Written representations were received from the property factor's solicitor on 8 January 2016. The property factor also requested a postponement of the hearing date, as Ms Thom was unable to attend on that date.

7. Prior to the hearing, the committee issued three directions to the parties. In its first direction of 14 January, the committee refused the property factor's postponement request; required the homeowner to confirm whether he wished the committee to consider only his complaint under section 2.1 of the code and to provide further details as to why he believed the property factor has failed to comply with this after 1 November 2012, the date it was registered as a property factor; and required the parties to provide copies of the title deed to the property and of the homeowner's two notification letters dated 23 July 2015. Responses to the direction were received from the homeowner on 14 and 15 January, and from the property factor on 19 January 2016.

8. On 25 January, the committee issued a second direction, advising that it had now decided to postpone the hearing date, and may require further information from the parties. A hearing date of 30 March 2016 was subsequently arranged. On 3 March, a third direction was issued. This required the property factor to submit skeleton arguments summarising the first preliminary point made in its written representations; confirmed that the committee could only consider complaints about a failure to comply with the code where the alleged failure occurred after the date when the property factor was registered; stated that it appeared to the committee that the homeowner's primary complaint was in fact that the property factor had failed to carry out its property factor's duties in terms of section 17(5) of the Act, and gave notice to the parties that it proposed to consider this complaint at the hearing; and required the parties to provide various further documents.

The hearing

9. A hearing took place before the committee on 30 March 2016 at Russell House, King Street, Ayr KA8 0BQ. The homeowner represented himself and gave evidence on his own behalf. The property factor was represented by its solicitor, Ms Fiona McLeod of Harper MacLeod LLP. Ms Nicola Thom, Interim Managing Director of the property factor was also present, and gave evidence on its behalf. Neither party called any other witnesses to give evidence on

their behalf. Mr Phil McQuade, a neighbour of the homeowner, attended the hearing as an observer.

Preliminary issues

10. The property factor had raised two preliminary points in its written representations of 7 January 2016. The first point related to whether the homeowner had notified the property factor of his complaints before his application was made. It was argued that in terms of section 17(3) of the Act, an application cannot be made to the panel unless the homeowner first notifies the property factor in writing as to why s/he considers that the property factor has failed to carry out its property factor's duties or to comply with the section 14 duty. As the homeowner's application form was dated 9 July 2015, but he did not send a notification letter to the property factor until 23 July 2015, his application was incompetent and should be refused.

11. In its third direction, the committee had required the property factor to submit skeleton arguments summarising this preliminary point, and had drawn its attention to a number of relevant authorities. In its response to the direction, the property factor confirmed that it no longer sought to insist on this point. Ms McLeod again confirmed this to the committee at the hearing.

12. The second preliminary point made by the property factor in its written representations was that the homeowner's complaints under the code concerned services and information which commenced prior to 1 November 2012. There was no obligation on the property factor to comply with the code until it had registered, and as it was registered on 1 November 2012, it was under no duty to comply with the code until that date. The homeowner's application should therefore be refused.

13. The committee had clearly stated in both its first and third directions that it could only consider complaints about a failure to comply with the code where the alleged failure occurred after the date when the property factor was registered, i.e. 1 November 2012. It appeared to the committee from the homeowner's written representations that he had put forward an argument as to why he believed the code had been breached after 1 November 2012. The committee therefore decided to hear evidence on his complaints under sections 2.1 and 2.4 of the code.

14. The property factor made a similar preliminary point in its response to the committee's third direction regarding the homeowner's complaint about the property factor's duties. In its direction, the committee said that it appeared that the homeowner's primary complaint was in fact that the property factor has failed to carry out its duties in terms of section 17(5) of the Act. It stated

that his main complaint appeared to be that the property factor had a duty not to charge homeowners for landscape maintenance, as a result of the terms of its 1995 bid to take over the responsibilities of IDC, and that it had failed to adhere to this duty. This was clear from his application form, his written representations and from the correspondence between the parties.

15. It appeared from the correspondence that the homeowner had notified the property factor of this complaint prior to submitting his application form, and that the property factor was aware of and addressed this complaint at various points prior to 14 September 2015. The committee therefore considered this complaint to form part of the homeowner's application, and gave notice to the parties that it proposed to consider this complaint at the hearing, subject to any written representations from the parties.

16. In its response to the direction, the property factor did not dispute the committee's proposal to consider this duties complaint. It did argue, however, that section 17(5) of the Act could only be taken into consideration where the alleged failure to carry out the property factor's duties occurred after 1 October 2012. As the introduction of factoring charges had occurred on 1 October 2010, the homeowner's complaint should be refused.

17. The committee had stated in its third direction that, in terms of regulation 28 of the Homeowner Housing Panel (Application and Decisions) (Scotland) Regulations 2012 ('the 2012 regulations'), it could only consider a failure to carry out the property factor's duties which was alleged to have occurred after 1 October 2012. It may, however, in terms of regulation 28 (2) take into account any circumstances occurring before that date in determining whether there has been a continuing failure to act after that date. While it was clear that the stock transfer bid documentation was more than 20 years old, the committee therefore decided to consider the arguments put forward by the homeowner that there had been a breach prior to 1 October 2012, which had continued after that date.

The homeowner's complaints

18. Before asking the homeowner to outline his complaints to the committee, the committee chairperson again explained to him that it could only consider complaints about a failure to comply with the code where the alleged failure occurred after 1 November 2012. She also explained that, while the committee could take into account circumstances prior to 1 October 2012 in determining whether there had been a continuing failure to carry out the property factor's duties after that date, it could only consider whether such a failure had occurred *after* that date.

1. Duties complaint

19. The homeowner's primary complaint related to an alleged duty on the property factor not to charge homeowners within his development for common landscaping and maintenance works. When IHA had bid for IDC's rented housing stock in 1995, it had undertaken not to charge homeowners for landscaping and maintenance. He argued that the property factor should continue to be bound by this commitment. He believed that the property factor had initially breached this duty not to charge homeowners for landscaping and maintenance when it introduced charges for these works from 2010, and had continued to do so since that date. It had therefore failed to carry out its duties after 1 October 2012.

20. He told the committee that the document entitled 'Information for Owner Occupiers' prepared by Touche Ross for IDC was the only information which owner-occupiers were given during the stock transfer bid process. He pointed out that in its introduction, the document states that *'it provides you with information on the important service areas for you as an owner occupier being offered by each prospective landlord and is based on the service commitments that each landlord has given and will, therefore, require to deliver if they are successful in the ballot.'* Homeowners were told that both bidders, IHA and North Ayrshire Council, had said that they would not impose charges on them for landscaping and maintenance works.

21. At section 5, the document states, in relation to IHA, that '*no service charges will be made to owner occupiers for landscape maintenance of communal areas within housing areas' and that 'the Association has undertaken to continue to provide the same level of ground maintenance as the Corporation.'* The homeowner also pointed to Appendix A of IHA's 'Modification of Bid document' dated 24 November 1995, produced in response to questions raised by IDC about its initial bid of August 1995, which stated in relation to owner occupiers' gardens: *'it has been assumed that IHA will be responsible for meeting such garden maintenance costs'.*

22. The original bid document was supported by a business plan and an operating costs budget, which included 30 year cashflow projections for repairs and maintenance works. At Appendix B of the modification of bid document, it was stated: *'the costs of administering the landscape maintenance services are included in IHA's operating costs budget'.* The homeowner therefore argued that the duty not to charge homeowners should apply until the end of that 30 year period i.e. until 2025 at the very least. In his view, however, the duty should continue indefinitely, unless agreed otherwise with homeowners. He had therefore refused to pay any of the invoices which he had received since 2011.

2. *Code complaints*

23. The homeowner complained firstly that the property factor had failed to comply with section 2.1 of the code, which states: '*You must not provide information which is misleading or false'.*

24. His primary complaint related to a newsletter from the property factor dated April 2011, entitled 'Factoring: Consultation Feedback for Property Owners' which had been sent to homeowners regarding the proposed introduction of factoring charges. This said on page 3 under the heading 'Your Questions Answered': *'Was there a condition in the stock transfer ballot in Pennyburn that prohibited factoring charges being applied? The Association has taken legal advice based on the original stock transfer within Pennyburn. No part of that agreement prevented the introduction of factoring charges'.*

25. The homeowner said that this was false or misleading, as the property factor had undertaken in 1995 not to charge homeowners for landscaping and maintenance. When asked why he considered there had been a breach of section 2.1 after 1 November 2012, he said that, as a result of that undertaking, every invoice issued by the property factor for factoring charges was false and misleading.

26. The homeowner also told the committee that the property factor had failed to comply with section 2.4 of the code, which states:

    You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).

27. He said that he had never been asked for his written approval either before or after the introduction of factoring charges. He believed that he should have been consulted both before the introduction of charges in 2010 and after the property factor was registered on 1 November 2012.

Findings in fact

28. a) The homeowner is the owner of 26 Treesbank, Kilwinning, North Ayrshire KA13 6LY.

b) The homeowner purchased the property from IDC in June 1983.

c) In 1995, IHA made a successful bid for the transfer of IDC's rented housing stock.The transfer took place in 1996.

d) The development known as Treesbank is one of three areas within Pennyburn estate, Kilwinning.

e) IHA is the property factor responsible for managing and maintaining the common landscaped areas within the development. In terms of clause (Twelfth) of the Feu Disposition by IDC in favour of the homeowner and Mrs Rosemary MacColl or Macleod dated 21st June 1983, IDC and its successors in title are entitled to act as factors for the 'feuing area' i.e. Treesbank Square for as long as they own any of the dwellinghouses in the feuing area.

f) It is stated in clause (Seventh) of the said Feu Disposition that the homeowner is responsible along with the other owners in the feuing area for *'the maintenance, repair and where necessary renewal of all carriageways, footpaths (or kerbs thereof) and of all water channels and foul and surface water sewers situated within the feuing areas (except insofar as the same may be taken over by the appropriate Local Authority) and also of all other common or public areas (including areas of soft and hard landscaping situated within the feuing area...including without prejudice to the foresaid generality the replacement of trees and shrubs, the cutting of grass and the sweeping, cleansing and lighting of the feuing area'.* It also states that the homeowner is '*liable for a one thirtieth share of the cost of such maintenance, repair, renewal and others as foresaid and that whether or not the said carriageways and footpaths, kerbs, water channel, foul and surface water sewers and public areas serve his particular Feu.'*

g) Clause (Eleventh) of the said Feu Disposition provides that the factor is entitled *'to collect from the Feuar [i.e the homeowner] the proportion payable by the Feuar of a) the said expenses and charges for work done and services rendered and the remuneration of the factor and b) any other sums for which the Feuar may become liable in terms of or in furtherance of the provision herein contained...'*

h) In 2010, IHA held consultation meetings with owner occupiers in all of the estates which it managed to discuss its proposals to introduce factoring charges. Following this consultation, IHA introduced factoring charges for the common landscaping and maintenance services provided to owners within these estates, including the Pennyburn estate, on 1 October 2010. The first invoices for these charges were issued in April 2011.

i) IHA became a registered property factor on 1 November 2012.

j) The property factor's contractual duties regarding the management and maintenance of common areas within the development are set out in:

i. the said Feu Disposition
ii. the property factor's written statement of services (WSS)
iii. the property factor's factoring policy, which the committee had not seen, which was referred to by IHA's representatives at the hearing.

Statement of reasons for decision

Duties complaint

29. The question before the committee was whether the property factor had failed to carry out its duties in terms of section 17(5) of the Act after 1 October 2012. In considering this, the committee took into account the evidence before it relating to circumstances prior to that date, in determining whether there had been a continuing failure to carry out the property factor's duties after that date, in terms of regulations 28 (2) of the 2012 regulations.

30. Had the homeowner been entitled to vote on the stock transfer, he may have been able to argue that he had voted for IHA on the basis that it would not charge him for landscaping and maintenance. He was not eligible to vote, however, as he was a homeowner at the time, and only tenants of IHA were eligible to vote. In any case, the other bidder, North Ayrshire Council, had also stated that it would not charge homeowners for landscaping and maintenance costs. The committee observes that the inclusion of references to whether charges would be made to homeowners in the bid document appeared to blur the distinction between its two separate roles as a registered social landlord and as a property factor.

31. Ms McLeod told the committee that IHA was entitled to charge homeowners for landscaping and maintenance in terms of their title deeds. With regard to the commitment made in 1995 to apply the existing IDC policy, section 510 of the bid document clearly made provision for a change of approach, should circumstances change. This stated:

'The Association also intends to apply the existing IDC policy and practices to the recovery of costs from owners of property (for example, where there is repairs or maintenance work which is common to both tenants, former tenants who have acquired under RTB and subsequent purchasers). This policy seeks to ensure that such owners are aware of their responsibilities and then to recover the costs of any work undertaken by the Association on their behalf. The policy will be subject to on-going review and will be modified if circumstances dictate this to be necessary. It will be applied consistently but will always take account of the prevailing circumstances.'

32. Ms Thom told the committee that she believed that in 1995, the property factor had no intention to charge homeowners for factoring, but that circumstances had changed since that time. IHA had honoured the commitment made by applying the IDC policy on charging from 1995 until 2010, but this had to be balanced against other commitments made to its tenants. While the bid had been accompanied by a 30 year business plan, this was standard practice.

The business plan was revised each year, but always projected 30 years ahead. It should not therefore be seen as implying a 30 year commitment not to charge homeowners.

33. She explained that IHA carried out an annual review of the tenure of its estates. Since 1995, there had been an increase in the proportion of homeowners as a result of the right to buy. Within the Treesbank development, the proportion of owner occupiers had increased from 55% in 1995 to 71% in 2010. IHA's sole source of income was rents, which were falling due to the rise in owner occupation. Moreover, the level of costs for landscape and maintenance had outstripped IHA's projections. The bid document had shown (at table 5.24) projected costs for landscape and maintenance within the Treesbank development for 2010 as £137733, whereas the actual costs came to £146416.

34. The homeowner had produced his own figures, which he said showed that the actual costs from 2008 onwards were considerably less than the projected allowance. It was not clear to the committee, however, where these figures had been derived from. In any case, this was not directly relevant to the central question of whether IHA had a duty not to charge homeowners for factoring.

35. Ms Thom said that, in the circumstances, IHA was faced with a choice between finding other sources of income and reducing its services. It had to consider what was fair and equitable for the whole community it served, and, as a registered social landlord, was also obliged to meet various regulatory standards, such as ensuring value for money, consistency of services, analysing risk and ensuring that its business plan was viable. At that point, the decision was made to introduce factoring charges, in line with the title deeds and section 510 of the bid document.

36. When asked by the committee about the maintenance obligations in his title deeds, the homeowner said he accepted that he was obliged to pay one thirtieth of the cost of landscaping and maintenance. He believed, however, that this obligation was overridden by the duty not to charge homeowners, which he argued was incumbent on the property factor, given the terms of the transfer bid documentation.

37. The homeowner told the committee he did not believe section 510 of the bid document was intended to apply to landscaping and maintenance, but applied only to common repairs where there were both owners and tenants within the same tenement block. Section 510 refers to review and modification of *'the existing IDC policy'* relating to *'the recovery of costs from owners of property.'* While it refers to an example involving repairs or maintenance work which is

common to tenants, former tenants who have acquired under the right to buy and subsequent purchasers, this is clearly cited as an example. In terms of the homeowner's title deed, the property factor is clearly entitled to collect from homeowners the costs of maintenance, repair and renewal of, among other things, all common or public areas (including areas of soft and hard landscaping) situated within the feuing area. In the committee's view, therefore, section 510 of the bid document applied to the recovery of landscape and maintenance costs. IHA was therefore entitled to introduce charges for such costs, as the prevailing circumstances had changed.

38. Having considered all of the evidence before it, the committee determines that the homeowner has not demonstrated that there was a duty on the property factor not to charge the homeowner for landscaping and maintenance. In fact, he acknowledged that there was a duty on him as a homeowner to pay for his share of common landscaping and maintenance works.

39. While IHA may have made a commitment not to charge owners in its 1995 bid document, no time period was specified for this commitment. The homeowner made the inference that, because the bid documents were supported by 30 year cashflow projections, the commitment should continue until at least 2025. Section 510 of the bid document, however, allowed the property factor to change its policy, should circumstances change.

40. The property factor was entitled in terms of a) section 510 of the bid document and b) the homeowner's title deed to charge the homeowner for his share of landscaping and maintenance works. The committee therefore determines that the property factor has not failed to carry out its duties in terms of section 17(5) of the Act after 1 October 2012.

Code complaints

41. It was clear that both of the homeowner's code complaints stemmed from his primary complaint that the property factor had failed to comply with its duties in terms of section 17(5) of the 2011 Act.

42. ***Section 2.1*** -the homeowner's primary complaint related to the contents of a newsletter from the property factor dated April 2011, which pre-dated the code coming into force. The committee could not therefore consider whether there was a breach of the code in relation to this. He had also complained that the issue of factoring invoices to homeowners after 1 November 2012 comprised false and misleading information, on the basis of its alleged duty not to charge homeowners. For the reason set out earlier in this decision, the committee determines that no such duty has been established by the homeowner. The property factor is therefore entitled to charge the homeowners for landscaping

and maintenance works. The issuing of invoices to him is not therefore false or misleading. The committee therefore determines that the property factor has not failed to comply with section 2.1 of the code of conduct.

43. ***Section 2.4*** - the homeowner told the committee that the property factor had failed to comply with section 2.4 because he had not been asked for his written approval either before or after the introduction of factoring charges. Factoring charges were introduced from 1 October 2010, two years prior to the code of conduct coming into force. While there was in any case evidence that there had been consultation with homeowners, there was no requirement on the property factor to have such a procedure at that time.

44. The homeowner also argued that he should have been consulted about the introduction of charges after 1 November 2012. Section 2.4 requires the property factor to '*have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service.*' Ms Thom told the committee that the property factor does have such a procedure, which is contained in its factoring policy. While the committee had not had sight of this factoring policy, it accepted this evidence. In any case, the requirement relates to the period *before* and not after works or services are provided.

45. Moreover, the requirement to have such a procedure relates only to work or services other than those relating to the core service. It is clear that landscaping and maintenance is a core service, as set out in section 5.1 of the property factor's WSS. The committee therefore determines that the property factor has not failed to comply with section 2.4 of the code.

Right of appeal

46. The parties' attention is drawn to the terms of section 22 of the 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 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.

More information regarding appeals can be found in the information guide produced by the homeowner housing panel. This can be found on the panel's website at:

http://hohp.scotland.gov.uk/prhp/2649.325.346.html

Chairperson Signature ..... Date 26/9/16