



**Decision of the Homeowner Housing Committee issued under Section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012**

**hohp Ref:** HOHP PF/14/0148

**The Property:** 34 Bell Street, Wishaw ML2 7NU

**The Parties: –**

**Miss Claire McKenna, residing at 9 Burnpark Avenue, Uddingston, G71 7RY ("the homeowner")**

**and**

**Miller Property Management Ltd, registered under the Companies Acts and having its Registered office at 29 Brandon Street, Hamilton, South Lanarkshire, ML3 6DA ("the factors")**

**Committee Members:**

David Preston (Chairman); and Andrew Taylor (Surveyor Member).

**Decision:**

**The Committee found that the Factors had failed: to comply with the Code of Conduct for Property Factors.**

**Background:**

1. By application dated 25 August 2014 the homeowner applied to the Homeowner Housing Panel ("the Panel") to determine whether the factors had failed to

comply with the Code of Conduct and had failed to carry out the Property Factors' duties imposed by the Act.

2. The Homeowner complained that the Factors had breached the Code of Conduct in respect of Sections: 1, B, C and D; 2.1; 2.4; 3.3; 4.1; 4.4; 4.5; 4.7; 4.8; 4.9; 5.2 to 5.8; 6.1; 6.3; and 6.5 to 6.7.
3. The application was accompanied by written representations and the applicant lodged various documents and copy correspondence in support of her application.
4. By Minute dated 20 March 2015 the President of the Panel intimated her decision to refer the application to the Committee.
5. Following service of the Notice of Referral on the parties on 23 March 2015, representations were received from the factor per Anderson Strathern Ltd, Solicitors dated 10 April and 22 May both 2015.

**Hearing:**

6. A hearing took place at the offices of the Homeowners Housing Panel, Europa Building, 450 Argyle Street, Glasgow on 26 August 2015.
7. Present at the hearing were: the homeowner, and Mr Harry Miller was present to represent the factors.
8. In addition to the written evidence submitted by the parties, representations were made by them at the hearing.
9. Copy Land Certificate for title number LAN200196 confirmed that the homeowner had taken entry to the property on 7 August 2008. An extract from the Property Factor Register confirmed that the factor had been registered on 1 November 2012. Mr Miller confirmed that the factors had been appointed by the Developers as Property Managers in terms of the land Certificate on completion of the development.

## **Preliminary Matters**

10. Mr Miller intimated that, as had been pointed out in correspondence from Anderson Strathern, the factors challenged the jurisdiction of HOHP to consider the application. They argued that, under section 19(4) of the Act the matters to be considered under the application had been the subject of proceedings in Hamilton Sheriff Court which had resulted in decree for payment being granted against the homeowner on 28 August 2014. Accordingly they argued that the homeowner had ample opportunity to raise her concerns at that time but had failed to do so. She had not appealed that decision and they regarded the application as an attempt by the homeowner to use the HOHP as a means of an appeal of the Sheriff Court decision.
11. The Committee had regard to the representations from Anderson Strathern in their letter dated 10 April 2015 and to Mr Miller's oral representations. The Committee advised that the motion to dismiss the application was rejected. The court action had been in relation to payment of factors' fees etc. and did not deal with the issues raised by the homeowner in relation to the Code of Conduct, The defences related to that action for payment as opposed to the factors' compliance with the Code of Conduct. The Committee is required under section 19 of the Act to decide whether the factors had failed to carry out their duties or to comply with the Code of Conduct. The Sheriff had not been asked to consider the Code of Conduct for Property Factors in relation to the action for payment. The forum for dealing with such complaints is HOHP.
12. On a separate issue the Committee noted that many of the issues raised by the homeowner related to issues which predated the Act. The Committee advised that consideration of these issues would be given in accordance with the transitional provisions in the Act.



## **Homeowner's Complaints and Factors' Responses under Code of Conduct**

### **Section 1**

13. The homeowner complained that she had owned the property since 2008 and had lived there for six years until around March 2014, when she had moved out of the property, but she had not received a copy of the factors' Written Statement of Service until it had been provided in connection with the present application. At the time of making the application she therefore had not been aware of its provisions.
14. The homeowner reiterated her position as outlined in the application that at the time of her purchase of the property she had been told by a Mr Shilliday, the estate agent, that she would not have factoring fees to pay for the first two years. She said that her solicitor had not given her any information about a factor and that she had no knowledge of the factor. She said that in June 2009 she contacted a phone number which appeared on the cleaning sheet at the bottom of the stairwell in the close, but she had not been aware that it had been the factors' number and she had thought it was still the builders that she was calling. She said that prior to that she had been in the habit of contacting the builders through a number she had been given who had sent a handyman named 'Ronnie' to carry out any required work.
15. Mr Miller advised that the factors accepted that there had been no contact between them and the homeowner until June or July 2009 when they had been told by the builders' solicitors (HBJ Gately Wareing) that the flat had been sold to the homeowner. Mr Miller said that the factors would have expected, as was the normal practice that a purchaser's solicitor would have been in touch at around the date of entry to pay the factors' float and provide contact details. However in the case of number 34, this had not happened and the builders had not told them about the sale until June 2009. The factors had therefore not been aware that the property had been sold. They had no knowledge of any arrangement as described by the homeowner and when they had become

aware that she was the owner of number 34 they had written to her on 17 June 2009 with: a copy of the insurance summary; apportionment of costs; and other information. They wrote again on 30 July 2009, with the breakdown of accounts for the period up to 31 October 2008. That letter explained some of the common property arrangements. The letters are included within Production 8 lodged on behalf of the factors.

16. In response the factors advised that their Written Statement of Services had been sent to all owners along with the annual accounts after commencement of the Act, which would have been with the 2013 accounts.
17. Mr Miller was unable to provide any evidence to confirm that the Statement had been issued to the homeowner in particular. He agreed that the breakdown of accounts letter dated 13 May 2013 (within the factors' Production 6) did not make any reference to the Statement being enclosed. Mr Miller maintained that it would not have been referred to as the letter was a breakdown of accounts.
18. Mr Miller made no comment on the homeowner's contention that she had not received the Written Statement until November 2014.

## Section 2.1

19. The Homeowner considered that the factors had provided false or misleading information as she claimed that she had not received the invoices or correspondence until they had been lodged in the court in connection with the action. She also complained that she had not been consulted about any necessary repairs to the development and that she had not been supplied with any information as to the details of the accounts incurred.
20. Mr Miller made no comment to this allegation, apart from pointing to the dates on the letters and accounts which had been sent to the homeowner at the property address. So far as consultation with owners was concerned he said that there had been no work required or carried out to the property which had exceeded the level of the factors' delegated authority. Further the homeowner had not requested any details of accounts.



## Section 2.4

21. The homeowner stated that she had not been aware of any delegated authority at the time of making the application as she said that she had not received a copy of the Written Statement of Services. She said that she was not aware of any consultation having taken place with owners and had never been advised of any meeting of owners.
22. Mr Miller said that there had not been any work requiring consultation as the delegated authority of £100 per owner had not been exceeded. He explained that there had been a consultation with owners arising from a problem with the car parking spaces and referred the Committee to a letter dated 14 June 2011 to all owners (included in the factors' Production 6) referring to the issue. After the consultation, a majority of the owners instructed the factors to arrange for an allocation of parking spaces to individual flats which they had undertaken. This was referred to in the letter to owners with the Statement of Factoring Charges dated 20 September 2012.

## Section 3

23. The homeowner complained that she had not received accounts on a regular basis and that when they were received they contained no detail in respect of the payments made. She was unable to determine what the accounts incurred had been for.
24. The homeowner was unable to be specific about which letters she had or had not received from the factors. She said that she thought that she had not received any letters before 2012. She maintained that she had not seen any accounts prior to 2012 until they had been produced in connection with the court action and was not aware of what the detail of the payments. She also complained that she had been given no information about the methods of payment.

25. Mr Miller undertook to provide the homeowner with details of the invoices for the previous two years. He referred the Committee to the letters which accompanied the invoices included in Production 6 of their Productions which set out various options for owners to make payment.
26. The Committee asked Mr Miller to explain the sentence in their written statement of services relating to common charges accounts being issued "...quarterly/half yearly and annually, charged in arrears and/or advance..." Mr Miller explained that this depended on the terms of specific titles relating to different properties. He confirmed that the Written Statement of Services was in a generic form and applied to all properties managed by the factors.
27. There was a discussion about the frequency of accounts being issued. The homeowner complained that there was no consistency. Mr Miller explained that this had been caused by the fact that the electricity supply company had changed its accounting process. It was believed that this had been settled down and accounts were now issued in May or June each year. Mr Miller explained that they waited for the electricity accounts to be rendered before issuing the Factoring Charges.

#### Section 4

28. The homeowner said that as she had not been aware of the debt collection procedure at the time of making the application. She felt that such a procedure had not been followed when she had been taken to court. She maintained that there had been no effort by the factors to attempt to resolve the matter. She also complained that she had felt intimidated by Mr Miller at the court. She maintained that he had acted in a threatening manner and had ridiculed the in-court adviser from CAB. She said that she had put forward a payment plan proposal but it had been rejected by the factors.
29. Mr Miller referred the Committee to the correspondence with Strefford Tulips in 2010 and 2011 regarding the arrears. He maintained that they showed that the factors had attempted to assist the homeowner to try and resolve the issue of the alleged arrangement with the builders. Mr Miller categorically denied any



threatening or intimidating behaviour at the court and also denied having insulted the in court adviser. He asserted that they had been in separate rooms and had sat apart in the court. He denied that he had any opportunity to act as had been suggested. He maintained that he had spoken to the in court adviser on another matter.

## Section 5

30. The homeowner complained that she had not received any details of the insurance policy. She had been unaware of a common buildings policy. Mr Shilliday had arranged buildings insurance for her. She had therefore had two policies but had been able to recover some of the extra premiums paid. She said she still did not have details of the insurance or of the basis on which the insurance provider had been selected by the factors. The homeowner also complained that she had been given no explanation about the excess payments as charged on the accounts. She said that after she had been provided with them at court she had gone through them and had been concerned at the varying amounts of the excess payments. She was also concerned that there was said to be a poor claims record in respect of the block, but she was unaware of any claims having been made.

31. Mr Miller referred to the correspondence and accounts issued. He was unable to give any explanation about the additional policy about which they had known nothing. He explained that the insurance is a block policy maintained by the factors in their name which covered the properties managed by them in line with common practice amongst factors. He said that there are only three or four companies which provide such cover. The policy had been with Ecclesiastical Insurance, but a better excess rate had been available through Liverpool Victoria and the policy had been changed to them. There was a discussion about the matter of excess payments as per the accounts. Mr Miller explained that all excess payments were shared according to the titles. Where there is an event which affects only two properties, if it is subject to a claim, the excess payment would be divided amongst all owners. He maintained that his was a normal practice amongst factors, although he was aware of factors who would



charge the excess to the specific affected property unless it was in respect of a common part.

32. Mr Miller questioned why the homeowner would be interested in the excess amounts where these related to claims in respect of other properties in which she had no interest.

33. Mr Miller undertook to provide the homeowner with the details of the insurance policy over the previous two years.

#### Section 6

34. The homeowner complained that she had not been made aware of the progress of any repairs or timescales involved. She had not been informed of the basis of appointment of any contractors.

35. Mr Miller explained that there had been no repairs carried out other than as detailed in the annual accounts as lodged at Production 6. He was happy to provide copy invoices for the previous two years and undertook to do so.

### **Findings and Reasons**

#### Section 1:

36. The Committee found that the factors had failed to comply with Section 1 of the Code of Conduct.

37. Section 1 of the Code of Conduct required the factors to provide homeowners with a Written Statement of Services setting out in a simple and transparent way, the terms and service delivery standards of the arrangement in place between factors and homeowners and to provide a copy to existing homeowners within one year of initial registration under the Act. Such a requirement arose following the commencement of the Act and the registration of the factor, namely 1 November 2012.

38. Mr Miller advised that the Written Statement of Services had been prepared following the implementation of the Act and had been sent to homeowners along with the first annual statement of Factoring Charges issued following that. The Committee noted that the letter dated 13 May 2013 (included within factors' Production 6), which would have been the first such statement following the factors' registration under the Act, did not make reference to a Statement of Services as being enclosed. The factors did not produce any evidence to demonstrate that a copy of the Statement of Services had been provided to the homeowner.
39. Mr Miller contended that there would not be a reference in the letter of 13 May 2013 to the Written Statement of Services as the letter dealt with the accounts. However the Committee noted that the equivalent letter with the charges from November 2010 to April 2012 made reference to the parking spaces issue.
40. In the absence of any evidence to the contrary, the Committee accepted the evidence of the homeowner that she had not received a copy of the Written Statement of Services prior to completing the application. She said that she had not received a copy of the Statement of Services until November 2014 and the Committee accepted that this had been the case.
41. The Committee carefully considered terms of the Written Statement of Services and found difficulty in understanding its terms. The Committee had regard to the preamble to Section 1 of the Code of Conduct which states: "You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms of service delivery standards of the arrangement in place between you and the homeowners."
42. The Committee found that the Written Statement of Services did not set out "in simple terms" many aspects of the arrangements. In particular, at the hearing Mr Miller had been asked to explain the meaning of the sentence under "Fees/Rendering of Accounts" which reads "MPM Ltd issue common charges accounts quarterly/half yearly and annually, charged in arrears and/or advance." Mr Miller explained that the Statement of Services was generic and did not relate specifically to the property or the development of which it formed part.



43. The Committee considered that a number of the issues raised by the homeowner in this case could have been avoided if the Written Statement of Services was, as provided in the preamble, "in simple and transparent" terms and related to the specific development of which the property formed part.

44. In particular:

- 1) The basis of the factors' appointment to this development is not clear from the introduction. It states that they were appointed in accordance with the Deed of Conditions or by the homeowners who had delegated authority to do so through established custom and practice. There is no description of any basis upon which any such delegation of authority was made.
- 2) The Committee was unable to find any statement of a level of delegated authority, i.e. financial thresholds for instructing works, and situations where the factors may act without further consultation. Mr Miller made reference on a number of occasions to such a delegated authority, but did not point the Committee to it in the Written Statement of Services, and the Committee was unable to find it.
- 3) As pointed out during the hearing, the Committee had difficulty in understanding the provision under "Fees/Rendering of Accounts" which reads: "MPM Ltd issue common charges accounts quarterly/half yearly and annually, charged in arrears and/or advance. Accounts include an itemised breakdown of costs incurred and a brief description of common works and services charged in accordance and within the limited cost of less than £100 per flat per repair/contract – or whatever sum, greater or lower, agreed by owners, in their majority. That provision is neither clear nor transparent. It may be the basis for Mr Miller's reference to a delegated authority, but the Committee was not able to give it such a construction. The reference to £100 is in respect of a level of information provided to owners.
- 4) The Written Statement of Services provides no detail of the "proportion, expressed as a percentage, of the management fees and charges for common works and services each owner within the group has".



45. Accordingly the committee found that the Written Statement of Services provided by the factors did not comply with the Code of Conduct.

#### Section 2.1

46. The Committee did not find that the factors had failed to comply with Section 2.1 of the Code of Conduct.

47. The homeowner's complaint about this section was that she had not received invoices of correspondence until these had been lodged in connection with the court action. The Committee could not accept the evidence of the homeowner as credible in this regard.

48. The factors produced letters with details of the annual factoring charges dated:

- 1) 25 January 2010 for the period 1 November 2008 – 31 October 2009;
- 2) 14 December 2010 for the period 1 November 2009 – 31 October 2010;
- 3) 20 September 2012 for the period 1 November 2010 – 30 April 2012;
- 4) 13 May 2013 for the period 2012 – 30 April 2013; and
- 5) 4 June 2014 for the period 2013 – 30 April 2014

These letters were all addressed to "The Residents, MacClay Court, 24 – 34 Bell Street, Wishaw" and the Committee could see no reason why the homeowner would not have received any of these letters whilst she was living at the property.

49. The homeowner maintained that she had been unaware of the identity of the factors. She explained that she had understood that there was no factor and that the property was managed by the developer, Brandon Homes. She said that she had dealt with the developers in respect of repairs and maintenance matters for a period of almost 2 years before she discovered a telephone number for who she now understands to be the factors. She maintained that this had been around August 2010.

50. The Committee had sight of letters from the factors to the homeowner dated 17 June and 30 July, both 2009 which explained and described their position to the homeowner. In addition, the factors' Production 6 included letters to the homeowner dated 15 March 2010. One such letter referred to the homeowner's alleged arrangement with the developers regarding factoring fees and called upon her to produce evidence of such an arrangement.

51. Within Production 6 the factors lodged extract logs of telephone calls from the homeowner or her father on various dates, namely: 22 January, 17 June, and 21 July, all 2009; 19 August and 1 October 2010; and 3 May 2012 in which she or her father had reported maintenance problems. On any view therefore the homeowner was in communication with the factor by telephone from at least 22 January 2009.

52. The Committee considered that any confusion in the homeowner's mind with regard to the management of the development of which her property formed part arose through information or a lack thereof provided by the estate agent or her solicitor but in any event were not and could not have been the responsibility of the factors.

53. The homeowner had been unable to be specific as to the correspondence which she had received from the factors. She said in evidence that she did not believe that she had received any letters before 2012. The Committee did not find that this was consistent with the evidence before it and rejected the homeowner's evidence in this regard.

#### Section 2.4

54. The Committee found that the factors had failed to comply with Section 2.4 of the Code of Conduct.

55. The homeowner complained that she had not been consulted in relation to any repairs and that she was not provided with any invoices or receipts

56. Mr Miller's position was that the factors had a delegated authority for the development to proceed without referral to the homeowners where the cost homeowner did not exceed £100 as provided in the Written Statement Services.

57. As outlined above in paragraph 44(2) the Committee was unable to find any such delegated authority in the Written Statement of Services. The only references to the sum of £100 are:

1) Under "Notes on Services" a section which reads: "MPM Ltd will provide upon request and where necessary details of contractors quotations for estimated costs of work requested, should the cost per homeowner be in excess of £100 – or some other figure agreed by your development."

and

2) under "Fees/Rendering of Accounts" a sentence which reads "Accounts include an itemised breakdown of costs incurred and a brief description of common works and services charged in accordance and within the limited cost of less than £100 per flat per repair/contract – or whatever sum, greater or lower, agreed by owners, in their majority"

The Committee found difficulty in understanding what these sections meant but in any event it did not consider that this provided a level of delegated authority to the factors as they maintained.

### Section 3.3

58. The Committee did not find that the factors had failed to comply with section 3.3 of the Code of Conduct.

59. Reference is made to the letters referred to in paragraph 48 above. These letters provide an adequate breakdown of charges and description of the activities and works carried out. The homeowner did not suggest that she had requested any supporting documentation of invoices.

60. The Committee noted that although the homeowner believed that she had not received any correspondence before 2012, the Committee noted that the



payments through her bank account had started in December 2010 and the correspondence between the factors and Strefford Tulips had taken place between at least August 2010 and March 2011.

61. Accordingly the Committee rejected the evidence of the homeowner in relation to the frequency of accounting to owners.

Section 4:

62. The homeowner accepted that she had been unaware of the debt recovery procedure at the time of making the application. Having subsequently been provided with a copy of the Written Statement of Services, in which it is stated that the debt recovery procedure is available by hardcopy on request, the homeowner does not appear to have requested such a copy and led no evidence as to the basis upon which she had complained that the factors had failed to comply with this section of the Code of Conduct.

63. The Committee accepted the submissions by Mr Miller that the correspondence between them and Strefford Tulips between August 2010 and March 2011 demonstrated that they were attempting to resolve the issue regarding the alleged arrangement between the homeowner and the estate agent and thereby attempting to resolve the dispute between them and the homeowner, which would have avoided the court action.

Sections 5:

64. The Committee found that the factors had failed to comply with section 5 of the Code of Conduct. Section 5.2 provides that the factors "...must provide each homeowner with clear information showing the basis upon which the share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which applied, the name of the company providing insurance company and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this."

65. Mr Miller did not produce any evidence to demonstrate that this provision of the Code of Conduct had been complied with. At the hearing he undertook to produce insurance details for the previous 2 years. Subsequent to the hearing he submitted a letter dated 1 September 2015 which does not provide the information specified in section 5.2. In that letter, Mr Miller criticised the terms of section 5 and suggested that homeowners "may not have sufficient knowledge to recognise that section 5 is not transparent enough to differentiate between brokers, clients, in-house trade estimates and claims." In terms of the Code of Conduct, it is for the factors to explain such intricacies and technicalities to homeowners in a simple and transparent way.
66. The Committee noted the explanation provided by Mr Miller of the basis of the factors' treatment of excesses on insurance claims. He explained that this was a practice adopted by a number of factors. That may well be the case but it is again incumbent on factors to explain in a simple and transparent way the basis upon which such an arrangement is applied.
67. The factors' Written Statement of Services states that MPM Ltd receive commission from insurers and offers to provide details on request. Section 5.3 of the Code of Conduct provides that factors "must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider."
68. The Committee found that the requirement to disclose is not satisfied by the terms of the factors Written Statement of Services and no evidence was produced to the Committee of any such disclosure as having been made. It is incumbent on factors to make disclosure and not for homeowners to seek the information.
69. Reference was made during the hearing to the fact that the insurers were concerned at the level of claims and had consequently increased the premiums and excess charges. The homeowner had requested details of these claims and of the basis upon which those concerns had been raised. The factor had failed to provide the homeowner with such information.

70. Accordingly the Committee found that the factors had failed to comply with section 5 of the Code of Conduct.

**Section 6:**

71. The Committee found that the factors had failed to comply with section 6 of the Code of Conduct.

72. The Committee was satisfied, having seen and heard the evidence provided by the homeowner and Mr Miller, that there had been no substantial repairs carried out at the development which would have required owners to have been kept aware of progress and timescales. The Committee accepted that it was normal practice for routine repairs and maintenance. Consultation would normally only be an issue in major items of repair.

73. Notwithstanding that finding, the homeowner had requested details of the maintenance work which had been carried out between 2012 and 2015 and the factors have failed to provide, subject to any commercially sensitive information, documentation for inspection or to deliver same to the homeowner, subject to a reasonable charge.

**Conclusion and Property Factor Enforcement Order:**

74. Having decided that the factors had failed to comply with the terms of the Code of Conduct for Property Factors, in terms of section 19 of the Act, the Committee decided to make a Property Factor Enforcement Order.

**Right of Appeal:**

75. The parties' attention is drawn to the terms of Section 22 of the Act regarding the 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 the 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>

David Preston

.Chairman

.....14-10-15.....Date