

## **Decision of the Homeowner Housing Committee**

(Hereinafter referred to as "the Committee")

Under Section 19 (1)(a) and (b) of the Property Factors (Scotland) Act 2011

Case Reference Number: HOHP/PF/13/0075

**Re : Property at 39 Meadowside Road, Cupar, Fife KY15 5DD ("the Property")**

### **The Parties:-**

**Philip Defew, Cairnlea, Foodie End, Foodie Ash, Cupar, Fife KY15 4PP ("the Applicant")**

**Kingdom Housing Association Limited, Saltire Centre, Pentland Court, Glenrothes, Fife KY6 2DA ("the Respondent")**

### **The Committee comprised:-**

David Bartos           - Chairperson  
Mike Links             - Surveyor member  
Sally Wainwright     - Housing member

### **Background:-**

1. By application received on 17<sup>th</sup> May 2013, the Applicant applied to the Homeowner Housing Panel ("HOHP") for a determination that the Respondent had failed to ensure compliance with the Property Factor Code of Conduct as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act") and that he was being incorrectly charged.

### **Findings of Fact**

2. Having considered all the evidence, the Committee found the following facts to be established:-
  - (a) The Property is a house which is part of the Oakvale/Meadowside Road development in Cupar, Fife. There are no blocks of flats in this development.

- (b) The Applicant is the owner of a share of the Property along with Mrs Lesley Defew and Lindsey Helen Defew. He has owned that share since 2 May 2006. His title is registered in the Land Register of Scotland under title number FFE24147. His title is as set out in a Land Certificate for the Property updated to 2 May 2006. He does not reside at the Property.
- (c) The Property is burdened by a Deed of Conditions ("the Deed") registered in the Land Register of Scotland on 7 November 1997. Its terms are set out in the Burdens Section of the Land Certificate on pages D3 to D14. In the Deed, the Respondent is referred to as "The Association". In the Deed clause (TENTH) provides, among other things,
- "Each proprietor shall be bound to pay an equal share along with the other proprietors on the estate . . . of the expenses of maintaining and keeping tidy the whole areas of ground, grassed or otherwise, as form part of the Site on which [*sic*] the Dwellinghouse forms part."

Clause (THIRTEENTH) provides, among other things,

"In order to promote the proper management and maintenance of the Site, it is hereby provided that Managing Agents will be appointed to be responsible for instructing and supervising common repairs . . . the apportionment of common charges among the proprietors and for all other purposes, functions and duties delegated in terms of these presents. In addition the Managing Agents will have the power to make any regulations which they consider necessary to enforce any of the provisions of these presents . . . all of which regulations, decisions and determinations shall be binding upon all proprietors.

It is hereby declared and provided that the Association shall be Managing Agents for so long as they retain ownership of a majority of the dwellinghouses on the Site."

It is then provided that any dwellinghouse under the Association's Shared Ownership Scheme is deemed to be owned by the Association.

Clause (FOURTEENTH) provides, among other things,

"After the Association have ceased to own a majority of dwellinghouses on the Site then notice thereof shall be given to the then proprietors of the Dwellinghouses. Thereafter any proprietor or proprietors (other than any proprietor under the . . . Share Ownership Scheme) shall be entitled at any time to convene a meeting on fourteen days' notice, of all the proprietors of the said dwellinghouses to be held at such reasonably convenient time and place with a view to establishing an Owners Association . . . the purpose of which

will be to carry out the terms of these presents and to determine the future management of the Site."

Clause (FOURTEENTH) then provides for appointment of a committee of the Owners' Association whose functions include the appointment and supervision of Managing Agents.

- (d) The Site is shown by the more extensive edging on the title plan for FFE24346. It contains 20 dwellinghouses on both Meadowside Road and Oakvale as shown within that edging. It does not include numbers 1a and 1b Oakvale. As at 1 September 2012 the Respondent had an interest under the shared ownership scheme in 10 of the 20 dwellinghouses within the Site all as shown coloured yellow and red on the list of dwellinghouses provided by the Respondent as appendix 1 enclosed with its letter of 13 February 2014.
- (e) Adjacent to the Property is the house at 1 Oakvale. From the northern edge of 1 Oakvale there is a strip of grass on the northern edge of Oakvale running eastwards to 1 Elm Grove with a further small square of grass to the north of the parking space connected to Oakvale but adjacent to 1 Elm Grove. The strip of grass is available for use by the Applicant.
- (f) The grass was cut by the Respondent whose charges up to March 2012 over four years had varied from £ 21.72 to £28.68.
- (g) No notice has been given to the proprietors of dwellinghouses within the Site that the Respondent has ceased to have an interest in a majority of the dwellinghouses. No steps have been taken to convene a meeting of proprietors with a view to establishing an Owner's Association.
- (h) The Respondent became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 7 December 2012.
- (i) The Applicant had asked the Respondent for correspondence to be sent to his home address. On or about 21 August 2012 the Respondent sent out a letter addressed to "The Owner, 39 Meadowside Road" notifying the intention of the Respondent to meet with owners to discuss factoring services and to be formally appointed as factor for the development for a period of 5 years. The letter enclosed terms and conditions for the factoring service proposed by the Respondent. The letter did not reach the Applicant.
- (j) On Monday 10 September 2012 the Respondent's Alison Paterson attended at the Respondent's offices in Glenrothes to chair the meeting. No owners attended. Charlotte McIntosh of the Respondent took minutes. No discussion as to terms and conditions took place. A formal vote took place. One owner had sent a proxy vote for the appointment of the Respondent as factor. Ms Paterson cast 11 votes

for the Respondent on the basis of the Respondent having an interest in the ownership of 11 of 22 dwellinghouses purportedly on the Site. Her vote included a vote for 1a Oakvale in which the Respondent had an interest but which was not on the Site. Ms Paterson took it that this vote constituted the Respondent's appointment as factor for the next 5 years.

- (k) The Respondent sent a letter dated 13 September 2012 to "The Owner, 39 Meadowside Road" notifying the appointment of the Respondent as factor by virtue of the meeting together with the written statement of services. Again this was not sent to his home address.
  - (l) The Applicant was made aware of the meeting on 10 September 2012 through a letter sent by the Respondent in response to his complaint about the £ 150 float that he had been charged following the meeting. He objected to the float as set out earlier in this Notice of Proposal.
  - (m) The Respondent eventually issued to the Applicant a document headed "Written Statement of Services - Subjects covered by these services are Meadowside Place/Oakvale, Cupar".
  - (n) The Respondent has carried out grass cutting and other services as set out in the landscape contractors's schedule for Oakvale/Meadowside Road, Cupar enclosed with the Respondent's letter to the Applicant of 2 July 2013.
  - (o) The Applicant has gained the benefit from those services which is estimated at £ 20 per annum.
  - (p) The £ 150 float was paid by his wife under threat of debt collection from the Respondent.
3. The Applicant's complaint began in early October 2012 after he had been made aware of the Respondent's intention to charge a float of £ 150. The Applicant complained about this with a series of e-mails to the Respondent in October 2012. The essence of the complaint was that the Respondent's annual charges to the Applicant in the four years up to 31 March 2012 had varied from £ 21.72 to £28.68 and he was now being asked to pay a float which was disproportionately high and for which the Respondent lacked authority. By e-mail of 15 October 2013 to the Applicant the Respondent's Alison Paterson claimed that the authority to charge the float lay in clause (Thirteenth) of the title deeds for the Property. The Applicant's wife paid the float.
4. In about March 2013 the Respondent issued to the Applicant an invoice for account No. 388 dated 19 February 2013. This sought payment of £ 69.38 made up from -

- an "Annual development landscaping charge" of £ 17.50 (including VAT)
- a "Development landscaping administration charge (5%)" of £ 0.88
- an "Annual Management Charge" of £ 51.00

All of these were charges for the year from 31 March 2013. Receipt of this invoice resulted in a telephone conversation between the Applicant and the Respondent's representative on 9 April and a further (undated) letter from the Applicant that was received by the Respondent on 11 April 2013. In the letter the Applicant complained of the level of these charges in comparison with those he had received for the previous years. By letter of 2 May 2013 to the Applicant, the Respondent's Director of Housing and Care Norah Smith replied. In her letter she stated,

"The 5% landscape administration fee relates solely to the administration linked with this service, the management fee covers overhead and staffing costs accrued in running the factoring service as a whole."

5. In his application to the HOHP the Applicant complained that the Respondent had failed to comply with the Code of Conduct in the following respect:

Financial Obligations - Section 3 C (e) [*sic*] of the Code

He also complained about a failure by the Respondent to comply with other factor's duties but did not specify what these were. The Committee refuse that latter complaint relating to other factor's duties.

6. Following submission of the Application the HOHP clerk raised with the Applicant the need for an applicant to notify the property factor of why he considers that the factor has failed to comply with the Code or failed to comply with any other duty of the property factor. The Applicant intimated a complaint under s.1.1a C (e) of the Code by letter to the Respondent dated 2 July 2013. In this letter he highlighted the absence in the Written Statement of Services of any process used for reviewing and increasing or decreased in the management fee charged, including the float of £ 150.
7. The President of the Private Rented Housing Panel decided under section 18(1) of the 2011 Act to refer the application to a Homeowner Housing Committee. That decision was intimated to the Applicant and to the Respondent, by letter of the Panel's Clerk dated 19 August 2013 and entitled "Notice of Referral". The intimation of the Notice of Referral to the Respondent included a copy of the Applicant's application to the Panel including attachments to it.
8. Following intimation of the Notice of Referral, the Applicant intimated by means of an undated form and received by the Panel on 23 August 2013 that he wished to have the application dealt with at an oral hearing. By e-mail dated 1 September 2013 the Respondent's solicitor Christine Stuart

of T.C Young, solicitors responded to the HOHP. In the e-mail she sought to have matters dealt with without an oral hearing. The e-mail also contained written representations on behalf of the Respondent.

9. Following their nomination on or about 15 January 2014, and in the light of the written representations from the Respondent's solicitor, the Committee issued a direction to the parties dated 3 February 2014 which was intimated to them on or about 4 February 2014. In the direction the Committee allowed both parties to make written representations on whether the Committee had power to declare any regulation made under clause 13 on page D12 of the Land Certificate for FFE24147 invalid in respect of the Applicant. The direction also required the parties to produce to HOHP and thus the Committee various relevant documents in so far as held by them to assist with the determination of the application and consideration of the Respondent's written representations.
10. By letter dated 6 February 2014 the Applicant provided a further written representations and a copy of an e-mail sent by him to the Respondents Ms Paterson of 8 May 2013 complaining about a letter and "e-mail letters" still being sent to the Property rather than to the Applicant's home address which had apparently been provided to the Respondent.
11. By letter dated 13 February 2014 the Respondent provided a further written submission together with further documentation contained in appendices to the written submission.
12. Given that the Applicant had requested an oral hearing and the difficult issues raised through his application the Committee fixed a hearing to take place at Thistle House, 95 Haymarket Terrace, Edinburgh EH12 5HD for 19 March 2014 at 10.30 a.m. The date and times were intimated to the Applicant, and the Respondent's solicitors by letter sent on or about 7 February 2014.

### **The Evidence**

13. The evidence before the Committee consisted of:-
  - The application form
  - Copy E-mailed letter from the Respondent to the Applicant dated 9 October 2012
  - Copy E-mails between the Applicant and the Respondent dated 10 October, 15 October, 17 October, 31 October and 31 October all 2013
  - Account statement No. 388 of the Applicant and Mrs Defew with the Respondent covering the period from 4 April 2006 to 25 April 2012
  - Copy invoice dated 19 February 2013 for account number 388 from the Respondent for the Property

- Copy letter from the Applicant to the Respondent (undated) referring to telephone conversation of 9 April
- Copy letter from the Respondent's Norah Smith dated 2 May 2013
- Copy E-mail from the Respondent's Marjory Sneddon to the Applicant dated 2 May 2013
- Copy E-mail from the Applicant to the Respondent's Alison dated 8 May 2013
- Copy Land Certificate for title number FFE24147 covering the Property updated to 2 May 2006 (without the title plan)
- Copy black and white title plan from Land Certificate for title number FFE24346 showing edging around 1 Oak Vale and edging around larger site
- Copy letter from Applicant to HOHP dated 14 June 2013
- Copy letter from the Respondent's Alison Paterson to the Applicant dated 2 July 2013 enclosing copy landscape contractor's schedule for Oakvale/Meadowside Road
- Copy letter from the Applicant to the Respondent's Alison Paterson dated 2 July 2013
- Copy E-mail from the Respondent's Alison Paterson to the Applicant printed on 4 July 2013
- Copy E-mail from the Applicant to HOHP dated 30 July 2013
- Copy letter from the Respondent to HOHP dated 13 February 2014 with documents in appendices 1 to 10
- Written representations from the Applicant dated 6 February 2014
- Copy style letter dated 21 August 2012 from the Respondent;
- Copy terms and conditions for a factoring service from the Respondent;
- Copy letter dated 13 September 2012 from the Respondent to "The Owner, 39 Meadowside Road, Cupar"
- Written Statement of Services of the Respondent under the Property Factors (Scotland) Act 2011
- Copy letter from the Respondent to the Applicant dated 24 February 2014 enclosing invoice for account number 388 dated 1 April 2014
- Fife Council plan of Cupar showing Meadowside Road, Oak Vale and Elm Grove
- Respondent's plan of "Oakvale, Cupar KY15 5BD" showing named "grass" areas
- Account statement No. 388 of the Applicant and Mrs Defew with the Respondent covering the period 1 April 2013
- The oral evidence of the Applicant
- The oral evidence of Alison Paterson

### **The Hearing**

14. The hearing took place on 19 March 2014 at 10.30 a.m. at the venue fixed for it. The Applicant attended the hearing. During the course of the hearing the Applicant gave evidence and made submissions. The Respondent was

represented by Christine Stuart, Solicitor, of T.C Young, solicitors who made submissions. Alison Paterson, Area Manager of the Respondent gave evidence.

15. Ms Paterson spoke to the change in the Respondent's charging policy in 2012. The change was triggered by the imminent coming into force of the 2011 Act and the need to comply with the Code of Conduct under the Act. Until then the Respondent had charged as a social landlord to every property in its stock that received a service regardless of whether the property was owned by the Respondent or a private homeowner such as the Applicant. The then proposed Code of Conduct caused the Respondent to change its policy. From October 2012 when the 2011 Act and Code came into force the policy of the Respondent was to separate its factoring service from its landlord service and to charge the costs of the former service to the owners who received the factoring service. The aim was to eliminate any cross-subsidy between the landlord and factoring elements of the Respondent's operations.
16. This involved the creation of a management fee for homeowners. It was designed to reflect the full cost of managing the factoring service including staff and associated administrative costs but not including the cost of the "core services". For 2013 to 2014 it was divided between the properties receiving a factoring service and charged as a flat rate regardless of the core services received by the homeowner. As part of a review in February 2014 the Respondent had created four bands of management fee depending on the extent of core services provided. This had been intimated to the Applicant and his wife who had been charged a reduced management fee of £ 29. 86 for the year 2014/2015.
17. She said that a float had been created to provide a level of security to "owners" because the Respondent had to meet its costs even if there were non-payments. She estimated there to be about 20% non-payments. Ms Paterson later corrected herself to say that the float required to be in place to ensure the financial security of "the factoring business".
18. There had been an administrative change within the Respondent from October 2012 whereby the factoring service was now administered separately from the landlord service.
19. It was put to Ms Paterson that the management fee did not include a "development landscaping administration charge" of 5% which had been charged to the Applicant separately, despite what she had said about the management fee encompassing all of the administration. Her initial position was that this would have been charged to "everyone". However she later indicated that it should have been put into the gross cost of the landscaping service.
20. She was also unable to explain how this charging practice linked in with the provisions of the written statement of services relating to the management fee. She was unable to explain the different types of



management fee set out in the written statement. She was unable to give an example of what would fall within the head of the "additional fee" towards the end of the "Management Fee" part of the written statement.

21. Initially she claimed that the written statement set out the processes for review of the management fee but then accepted that these were not set out because "we did not believe such finite detail necessary."
22. Ms Paterson also said that she believed that the 2011 Act made it a requirement for the Respondent to be re-appointed as factor, which is why the meeting of 10 September 2012 was held. She believed their appointment to be based on the vote at that meeting.
23. Ms Paterson sought to justify charging the Applicant for 2013/14 for the electricity costs of lighting a car parking space at the end of Oakvale which had been brought to her attention.
24. The Applicant accepted that grass cutting and other work had taken place as per the schedule of the Respondent's landscape contractors enclosed with the Respondent's letter of 2 July 2013. He had no difficulty with paying for that service. He did object to the lighting charge where he received no benefit. He had no objection to paying £ 20 per annum. He saw the float as a loan. It had been paid by his wife under threat of debt collection from the Respondent. In his view it should be repaid but he was not interested in compensation for the hours he had spent on the matter.
25. The Committee accepted the evidence of the Applicant as credible and reliable. Ms Paterson was candid in giving her evidence. However on a number of occasions she had to back track on it or accept that she was mistaken. An example of this related to the 5% administration fee specific to the landscaping contract where she initially claimed that it was covered by the written statement but then conceded that the Respondent had not given notice of it in the written statement. The Committee accept Ms Paterson's evidence as to the historical background and aims of the Respondent as credible but are unable to accept as reliable her evidence as to how and why the charges for the Applicant were calculated and set out in the invoices sent to him and how they tied in to those set out in the written statement.

## Reasoning

26. The complaint of the Applicant was that the Respondent was in breach of its duty under section 1.1a C (e) of the Code. That provides,
 

"You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. . . The written statement should set out . . . the

management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee.”

27. In particular the complaint was that the management fee in the written statement had no regard to the amount of work carried out and there was no process set out for the reviewing and increasing or decreasing the management fee. This was made clear in the Applicant's letter of 4 July 2013. Issue was also taken with the float in the same context.
28. In her written submission e-mailed on 1 September 2013 the Respondent's solicitor did not address the complaint other than to refer to the written statement of services itself and its wording on the second page under the heading "Management Fee".
29. The essence of a written statement of services under section 1 of the Code is that it should reflect the arrangement in place between the factor and the homeowner. For example if an arrangement does not include any management fee then one would not expect the written statement to have a management fee.
30. A basic difficulty for the Committee in dealing with the Applicant's complaint is in identifying any arrangement currently in existence between the Applicant and the Respondent that could be reflected in the Code.
31. When the Applicant became a co-owner of the Property he became bound to implement the duties imposed on the owners of the Property in terms of the Deed of Conditions from 1997 which were later put into the Land Certificate for the Property showing the Applicant's ownership. These duties included a duty to pay the expenses of maintaining and keeping tidy grassed areas of ground within the Site but not within any individual dwellinghouse. This is the duty in clause (Tenth). In terms of clause (Thirteenth), the Applicant also accepted that the Respondent was the managing agent with the responsibility to maintain such ground and with power to make regulations to enforce clause (Tenth) but only so long as the Respondent retained ownership of a majority of the dwellinghouses on the Site.
32. By August 2012 the Respondent had ceased to retain an interest in a majority of the dwellinghouses on the Site. By the time of the hearing before the Committee the Respondent had ceased to retain an interest in a further dwellinghouse and had an interest as owner in only a minority of the dwellinghouses on the Site.
33. That being the case the Committee are driven to conclude that once the Respondent ceased to own a majority of the dwellinghouses it was the duty of Respondent to give notice of this to all of the proprietors in terms of clause (Fourteenth) to allow them to convene a meeting to set up an Owners' Association. That Association would then have been in a position to appoint a committee which would have been entitled to appoint a managing agent, who might or might not be the Respondent.

34. It was suggested to us by the Respondent's solicitor that clause (Fourteenth) did not require the Respondent to give the notice of the loss of its majority ownership. However given that it would be the Respondent who would be best placed to know that it had ceased to have majority ownership, and that clause (Fourteenth) would otherwise be rendered unworkable without such a notice, the Committee find that it was an implied term of clause (Fourteenth) that the Respondent gives the notice to the proprietors within a reasonable period of time.
35. No such notice having been given and no Owners' Association having been created which could have re-appointed the Respondent, the Committee is driven to the view that in so far as it is based on the Deed of Conditions in the Land Certificate, the authority of the Respondent to charge the Applicant for any services has ceased. There is therefore no arrangement in place between the Respondent and the Applicant based on the Deed of Conditions which can be reflected in the written statement.
36. As an alternative it was suggested in evidence by Ms Paterson that there was a new arrangement in the form of the terms and conditions approved by the vote on 10 September 2012. The difficulty with this suggestion is that there is no legal basis for such a vote to impose any legally binding arrangement or duty on the Applicant, without his consent. The vote was one arranged unilaterally by the Respondent without any statutory authority such as would exist for a vote under the Tenement Management Scheme in relation to tenements. The vote was incapable of binding any person who did not consent to being bound by the result. This would have been the case even if the notice of the meeting and the terms and conditions had been sent to the Applicant which they were not. The Committee concludes that the vote on 10 September did not introduce any new arrangement binding the Applicant to the Respondent in law.
37. The Committee raised with the Respondent's solicitor whether there might be any contractual or other basis for an arrangement to exist between the Respondent and the Applicant. However her position to the Committee was that there was no contractual arrangement between the Respondent and Applicant other than in terms of the Deed of Conditions in the Applicant's title. She also accepted that the Respondent had no entitlement to charge the Applicant unless there was authority to do so in terms of the Deed of Conditions. As explained above the view of the Committee is that such basis or authority for charging ceased upon the Respondent ceasing to have an interest in a majority of dwellinghouses. The Respondent's solicitor did not seek to base the Respondent's authority to charge on "custom and practice". In any event the Committee is unaware of any legal basis for a factor to be entitled to act on behalf of another person and charge them on the basis of "custom and practice".
38. In these circumstances, there does not appear to be any subsisting arrangement between the Respondent and Applicant which entitled to charging of the fees set out under the head "Management Fee" in the

written statement. The Respondent's solicitor did not It follows that the Respondent has failed to comply with the Code of Conduct in failing to comply with section 1.1a C e.

39. As will have been apparent a failure to comply with section 1.1a C e is symptomatic of a flaw that affects the whole written statement provided by the Respondent, namely the current absence of any arrangement between the Respondent and Applicant in connection with the grass cutting, or any other service.
40. Under section 20(1) of the 2011 Act, if the property factor has failed to comply with the Code of Conduct under section 14, the Committee has power to order a property factor to execute such action as it considers necessary.
41. The absence of the arrangement affects not merely the "Management Fee" section of the written statement but all aspects of the statement. In any event the "Management Fee" section of the statement cannot be divorced from the written statement as a whole. In these circumstances it is necessary that the written statement as a whole should be withdrawn in relation to the Applicant as set out in the Notice of Proposal accompanying this decision. One of the Committee took the view for reasons set out below that the Respondent as a registered property factor, had a duty to issue a substitute written statement to the Applicant even in the absence of any arrangement with him or authority from him to act on his behalf.
42. On the basis of the above reasoning it is also clear to the Committee that the Respondent has sought to charge the Applicant on the basis of a non-existent arrangement wrongly reflected in the written statement of services. The Committee therefore proposes to include in the order provisions designed to ensure that such charging does not continue and that any unjustified enrichment that the Respondent or his wife has had at the expense of the Applicant is reversed. In these circumstances the Committee propose the financial remedies set out in the Notice of Proposal. Given that the return of the float was in effect sought in the application to HOHP, interest is given from the date of receipt of the application.
43. Even if there had been an arrangement on which the written statement could be founded (which there is not), in the opinion of the Committee the "Financial and Charging Arrangements" in the written statement are far from transparent. They appear to be aimed at blocks of flats which do not exist on the Site. On close examination they disclose intimation of the following :
  - (1) a management fee for the provision of "core services" which include those bullet-pointed below and given the identification of core services in the immediately preceding paragraph, those in Part 1 of the Schedule to the Written Statement;

- (2) a "Management Fee" of 12% of the cost of "additional services" carried out;
  - (3) an "additional fee" in relation to "additional work beyond [the Association's] routine management duties" in accordance with the amount of time spent by the Association on the matter in question;
  - (4) (for owners of a block) a share of maintenance and repairs in relation to a block in accordance with title deeds and schedule 2;
  - (5) a factor's float payable of £ 150
44. No statement of the processes for reviewing and increasing or decreasing the management fee (whichever it is), is given. This is not a mere detail as suggested by Ms Paterson. It is an important safeguard to ensure that homeowners are kept informed as to how such charges may increase. On the whole the Committee find the "Management Fee" part of the written statement to be unacceptably confusing and contrary to both the letter and spirit of Section 1.1a C e. of the Code.
45. Ms Paterson, in her evidence also appeared to seek to justify the charging for electricity for lighting of a private car parking space at the end of Oakvale even though this nowhere appears as a core service to homeowners such as those in Oakvale who do not own a flat in a block. In passing, such a charge, appears to the Committee to be unjustifiable in terms of the written statement, and even under clause (Tenth) of the Deed of Conditions.

### **Decision and Notice of Proposal**

46. Unfortunately the wording of section 19 of the 2011 Act is not as clear as it might be. This is a decision under section 19(1)(a) and (b). Given that the Committee has decided that it will make a property factor enforcement order, this decision is accompanied by a Notice of Proposal under section 19(2)(a).

### **Dissenting opinion**

47. The decision of the Committee as to the terms of the Notice of Proposal is by unanimous except that the Housing Member takes the view that an additional clause should be added to the property factor enforcement order as follows:
- "The Respondent shall, within a period of 2 months from notification of the Order, issue a new Statement of Service to the Applicant, as required under section 1 of the Code of Conduct for Property Factors. This Statement should fully and accurately reflect the factoring service which is provided to the Applicant, and in the interests of simplicity and transparency it should not include matters which do not apply to the Applicant's property."
48. The reasoning of the Housing member dissenting member is that the Respondent is acting as a property factor in providing a grass cutting

service. The absence of any formal agreement which would allow the Respondent to charge the Applicant for its factoring services (as detailed above) does not exclude the Respondent from its general duties under the 2011 Act.

49. In the view of the Housing member as the Respondent falls within the definition of "property factor" in section 2(1)(d) of the Act, by virtue of its provision of a grass cutting service and by virtue of the Applicant being bound by clause TENTH of the Deed of Conditions to pay a share of the cost of maintaining that ground, therefore the Respondent has a duty under section 14(5) of the Act to comply with the Code of Conduct and issue a written statement of services. This duty applies even though there is no agreement between the Respondent and the Applicant for the provision of factoring services.
50. In support of this view the Housing member founds on section 1.1a A (a) footnote 3 of the Code of Conduct which in her view makes it clear that no agreement regarding authority to act is required for a factor to fall within the requirements of the Code. The reference in the footnotes to Section 1.1a A to operation as factor by "custom and practice" supports the view that no agreement to act is required for the duty under section 14(5) to comply with the Code to arise.
51. Given that the Respondent has continued in fact to provide a grass cutting service, in the view of the Housing member the Respondent is obliged to comply with the Code and provide a written statement of service to the Applicant under section 1 of the Code. Therefore in her view the Notice of Proposal should include the additional clause mentioned.

### **Opportunity for Representations and Rights of Appeal**

52. The Applicant and Respondent are invited to make representations to the Committee on this decision and the proposal. The parties must make such representations in writing to the Homeowner Housing Panel by no later than 14 days after the notification to them of the Notice of Proposal and this decision.
53. The opportunity to make representations is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.
54. Following the making of representations or the expiry of the period for making them, the Committee will be entitled to review this decision. If it remains satisfied after taking account of any representations that the Respondent has failed to comply with the Code of Conduct it must make a property factor enforcement order. Both parties will then have a right to

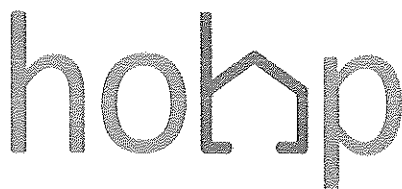
appeal on a point of law against the whole or any part of such final decision and enforcement order.

55. In the meantime and in any event, the parties are given a right of appeal on a point of law against this decision by means of a summary application to the Sheriff made within 21 days beginning with the date when this decision is "made". All rights of appeal are under section 22(1) of the Act.

Signed .....  
.....

.....Date: 13 May 2014

David Bartos, Chairperson



## **Notice of Proposal**

of

**the Homeowner Housing Committee**

(Hereinafter referred to as "the Committee")

Under Section 19 (2) (a) of the Property Factors (Scotland) Act 2011

Case Reference Number: HOHP/PF/13/0075

**Re : Property at 39 Meadowside Road, Cupar, Fife KY15 5DD ("the Property")**

**The Parties:-**

**Philip Defew, Cairnlea, Foodie End, Foodie Ash, Cupar, Fife KY15 4PP ("the Applicant")**

**Kingdom Housing Association Limited, Saltire Centre, Pentland Court, Glenrothes, Fife KY6 2DA ("the Respondent")**

### **NOTICE TO THE PARTIES**

Whereas in terms of their decision dated 1 May 2014, the Homeowner Housing Committee decided that the Respondent has failed to comply with the Property Factor Code of Conduct all as stated in said decision; the Committee proposes to make a property factor enforcement order in the following terms:

The Committee proposes to make a property factor enforcement order in the following terms:

The Respondent shall, within 2 weeks of the notification of this Order :

- (1) notify the Applicant in writing of the withdrawal of the Written Statement of Services covering "Meadowside Place/Oakvale, Cupar" with retrospective effect from 10 September 2012, such notification to be made forthwith;



- (2) withdraw and cancel the invoice issued to the Applicant dated 1 April 2014;
- (3) in respect of the invoice issued to the Applicant dated 19 February 2013 issue a credit note to the Applicant and Mrs Lesley Defew to the value of £ 49.38 and credit the Applicant's account No. 388 with that sum; and shall credit that account with any interest that may have accrued on the sum of £ 69.38;
- (4) pay to the Applicant's wife Mrs Lesley Defew the sum of one hundred and fifty pounds sterling (£ 150.00) together with interest thereon at the rate of three per cent per year from 17<sup>th</sup> May 2013 until payment.

Both Applicant and Respondent are invited to make representations to the Committee on this Notice of Proposal and the decision accompanying it. The parties must make such representations in writing to the Homeowner Housing Panel by no later than 14 days after the notification to them of this Notice.

Signed ....

..... 13 May 2014

David Bartos, Chairperson