



**Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011**

**Hohp ref:HOHP/LM/15/0069**

**12 Brixwold Rise, Bonnyrigg, EH19 3FG being the subjects registered in the Land Register of Scotland under Title Number MID132812 ('the Property')**

**The Parties:**

**Ms Lea Taylor residing at 12 Brixwold Rise, Bonnyrigg, EH19 3FG ('the Homeowner')**

**James Gibb Residential Factors, 4 Atholl Place, Edinburgh, EH3 8HT ('the Factor')**

**Committee members:**

**Jacqui Taylor (Chairperson) and Elizabeth Dickson (Housing Member).**

**Decision of the Committee**

The Committee determines that the Factor has (1) failed to comply with Sections 2.5, 3.3 and 6.1 of the Code of Conduct, in breach of section 14 of the Property Factors (Scotland) Act 2011 and (2) has not failed to carry out its Property Factor's duties.

The decision is unanimous.

**Background**

1. The Factor's date of registration as a property factor is 23<sup>rd</sup> November 2012.
2. By application dated 12<sup>th</sup> May 2015 the Homeowner applied to the Homeowner Housing Panel ('the Panel') for a determination that the Factor had failed to comply with:-

**2. 1:** The following sections of the Property Factor Code of Conduct ('The Code'):

- Section 1: Written Statement of Services.

Sections D 1, D M and F

- Section 2: Communications and Consultation.

Sections 2.2 and 2.5

- Section 3: Financial Obligations.

Sections 3.3

- Section 4: Debt Recovery.

Sections 4.1, 4.2, 4.3, 4.4, 4.5, 4.8 and 4.9

- Section 6: Carrying Out Repairs and Maintenance.

Sections 6.1, 6.3, 6.4, 6.7, 6.8 and 6.9

- Section 7: Complaints Resolution.

Sections 7.1

**2.2:** The Property Factor's duties.

**3.** The application had been notified to the Factor.

**4.** By Minute of Decision by the President dated 3<sup>rd</sup> February 2016 the President of the Panel intimated that she had decided to refer the application (which application paperwork comprises documents received in the period 18<sup>th</sup> May 2015 to 11<sup>th</sup> November 2015) to a Homeowner Housing Committee ('The Committee').

The Homeowner had sent the HOHP office a letter dated 16th August 2015 which stated that the Homeowner no longer wanted to pursue the complaint regarding the alleged breach of paragraph 1F of the code of practice.

**5.** The Factor returned the completed HOHP response form indicating that they did want the application to be considered at an oral hearing and they provided written representations.

The Homeowner also returned the completed the HOHP response form indicating that she did want the application to be considered at an oral hearing and she provided written representations.

The Committee agreed that the application should proceed on the basis of an oral hearing.

**6.** The Homeowner provided a copy of the title deeds for her property 12 Brixwold Rise, Bonnyrigg, EH19 3FG being Land Certificate Title Number MID132812.

The Homeowner also provided written representations with her application. She advised:

*'I have lived on this estate since 2005 and until 2011/2012 had no issues with the Property Factors or the level of service provided.*

*I have had various ongoing issues since and to date now feel the need to seek some support as I feel James Gibb have never dealt with my issues raised professionally and have allowed my account to get into arrears and are now becoming heavy handed by demanding the arrears to be paid.*

*This all started when Midlothian Council were the contractors and they failed to service the contract. James Gibb allowed this to happen and eventually the contract was terminated and Greenfingers were appointed.*

*It was apparent James Gibb assumed MDC were delivering the service, however this was not the case. It took some time for James Gibb to sort this out in the meantime they were still invoicing the residents. I was unhappy with this and I guess this is how the lack of confidence has come about.*

*Greenfingers also did not commence works to the best of their ability. They failed to turn up, deal with the shrubbery, weed control and to their best managed basic grass cutting.*

*In view of how the account was managed previously I fully explained to James Gibb Property Factors I would pay my share of the fees if they could provide me with a basic idea of the works done for that quarter. James Gibb Property Factors have never been able to provide me with this very basic information. Therefore, as explained, I did not pay. The Property Manager accepted this for all this time until I submitted a complaint (April 2015). I have since had a letter demanding the full outstanding amount, including a stage 2 arrears letter and numerous emails demanding the amount to be paid in full.*

*Due to the lack of interest from the Property Manager I requested in December 2014 I deal with someone else at James Gibb Property Factors, however I have been informed this cannot be arranged.*

*I feel bullied, stuck and with no way to progress/improve this situation. I have never been a non payer but feel on this occasion I am unable to make progress due to the lack of interest of making improvements by the factors involved in this estate.*

*I know of other residents that are non paying for similar reasons.'*

The Factors provided written representations, they advised:

*'The Castle Dene development comprises an area of some 16 hectares originally maintained by Greenbelt Limited. No factor was appointed by the developers following completion in circa 1996/7. Residents dispensed with the services of Greenbelt Limited, engaging Midlothian Council in a private contractor capacity to maintain the common areas. Factors were approached and appointed in 2008 conditional on the retention of the service of Midlothian Council as contractor.*

*Ms Taylor references issues dating from 2011/2012, a period when the factors were Aspect Residential. The property manager at the time had noted the poor state of maintenance and*

*been in contact with the Midlothian council, also meeting them on site to address areas of concern.*

*The process was ongoing and communication with the Midlothian Council continued, verbally, in writing and meetings with their representatives: latter included attendance by development proprietors.*

*A proposal to remove the contractor and put the contract to tender in 2012 was opposed by a number of proprietors. This resulted in a tendering process, which included the existing contractor, circulated as a development ballot and general meeting. The result was to retain the services of Midlothian Council.*

*On site services did not improve, nor were proprietors billed in lieu of any invoice being submitted by the contractor: funds having already been withheld from them.*

*The contractor was changed in 2013 with the replacement carrying out significant additional works to bring areas up to a maintainable standard at no additional cost to the proprietors. An initial bill sent to the proprietors to replenish funds was issued, noting that some funds would require to be paid to Midlothian Council, subject to their provision of requested details. This invoice allowed for a restricted period only and following an eventual negotiated settlement with Midlothian Council, the balance of charges was refunded.*

*Proprietors were provided with periodic updates during this time and several of these are provided as productions to highlight the forgoing sequence.*

*Additionally there has been ongoing communication directly with Ms Taylor during this time and information requested has been provided as far as same exists.*

*We are always prepared to address specific issues raised by our clients and where appropriate allocate a sum as being in dispute. In this instance there has been a period of sustained non-payment of all charges which is unacceptable in consideration of the regular attendance on site of the contractor.'*

7. A hearing took place in respect of the application on 26<sup>th</sup> April 2016 at George House, 126 George Street, Edinburgh, EH2 4HH.

The Homeowner appeared on her own behalf.

The Factor was represented by Jeni Bole, Property Manager and Nic Mayall, Managing Director.

Details of the parties' further representations and the Committee's decisions are as follows:

#### **Section 1: Written Statement of Services**

**Section 1 of The Code states that the Property Factor must provide a Written Statement of Service and specifies the details that should be included.**

#### **D. Communication Arrangements**

**I) Your in-house complaints procedure (which may be available online) and how homeowners may make an application to the homeowner housing panel if they remain**

**dissatisfied following completion of your in-house complaints handling procedure (see Section 7: Complaints resolution).**

**M) The timescales within which you will respond to enquiries and complaints received by letter or email.'**

The Homeowner advised the Committee that she accepts that the Factor's Written Statement of Service includes details of the In-house complaints procedure and details the timescales within which the Factor will respond to complaints.

**Section 2: Communications and Consultation.**

**2.2 'You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that they may take legal action).'**

**The Homeowner's complaint:** The Homeowner advised the Committee that she considered that the Factor had sent her two emails that she considered to be abusive, intimidating and threatening.

The first is an email from Jeni Boyle to the Homeowner dated 19<sup>th</sup> March 2015. Lea explained that on the morning of 19<sup>th</sup> March 2015 she had seen men in a Greenfingers van who were all on their mobile phones. She sent an email to Jeni Boyle asking what time Greenfingers contractors should start, in terms of their contract. She explained that Jeni replied advising that there was no set start time under the contract. The Homeowner acknowledged that there was some correspondence missing from this email trail that she had submitted in evidence but the particular email that she considers does not comply with this section of the Code states:

*'I have no opinion on what is an innocuous observation nor can see any relevance in raising this. Your account balance currently exceeds £400 and until such time that contribution is made to general estate maintenance I am not prepared to correspond further.'*

The Homeowner explained that she considered this to be intimidating.

The second is an email from Nic Mayall to the Homeowner 21<sup>st</sup> July 2015. That email states:

*'Thank you for your email. Whilst we appreciate the points you raise in both documents we would advise that we do not agree with your assertions and have sought to provide answers to all previous queries. Your outstanding balance remains payable and we do not consider that you have any valid dispute and will therefore pursue recovery of all sums due.'*

The Homeowner explained that she considers this email to be intimidating as Nic Mayall states that the Factor will pursue the debt without reasonably addressing her complaint.

**The Factor's response:**

In relation to the email of 19<sup>th</sup> March 2015 Nic Mayall explained that a specific answer was given to the Homeowner's question. He did not consider the response to be intimidating.

In relation to the email of 21<sup>st</sup> July 2015 Nic Mayall explained that he did not consider this email to be abusive or intimidating. It simply stated a factual position.

**2.5 'You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers).'**

**The Homeowner's Complaint:** The Homeowner sent Nic Mayall an email dated 30<sup>th</sup> March 2015. He replied advising that he would look to respond in full within the next 14 days after considering all information provided. She did not receive a substantive response until she received an email from Nic Mayall dated 30<sup>th</sup> April 2016.

**The Factor's response:** Nic Mayall explained that there was a delay in his reply to the Homeowner due to the many issues to be investigated. However he did explain that in his email of 30<sup>th</sup> May 2015 her apologized for any delay in coming back to her.

### **Section 3: Financial Obligation.**

**3.3 'You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection and copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.'**

**The Homeowner's complaint:** The Homeowner explained that she received quarterly invoices from the Factor but the invoices simply state that the charge is for 'Communal Landscape Maintenance'. No further details are provided. She has been aware that the contractors have not always been on site when they should be and she does not think this description in the invoices is sufficient to enable her to verify that the works she is being charged for were actually done. She explained that she hasn't paid the Factor's invoices where she has not been provided with evidence that the works were carried out.

#### **Factor's response:**

##### **The Factor's written representations stated:**

'The Homeowner is issued maintenance bills on a quarterly rotation. Each bill details all charges expended in the preceding three months. All bills detail the quarterly expenditure expressed as a total together with how each charge is allocated and the client's individual share. Individual statements of account noting bills issued and payments made are issued on request at any time. James Gibb Residential Factors assumed the factorial duties on 1<sup>st</sup> April 2014 and they produced bills that had been issued.'

##### **The Factor's oral representations:**

Jeni Bole explained that she had extensive negotiations with Midlothian Council. She had secured a significant reduction to their account as they had not carried out works that they had invoiced. The homeowners were advised of the position in their newsletter dated February 2015. The recent contractors, in particular Greenfingers, invoice the Factors on the basis of a specification. No other details are provided. There are 222 houses in the development which extends over an area of 16 hectares. The common areas are located throughout the

development. She suggested that the Homeowner may not always be aware when contractors are working in different parts of the development because it is particularly extensive.

## **SECTION 4: DEBT RECOVERY**

**4.1 ‘You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.’**

**The Homeowner’s complaint:** The Homeowner acknowledged that the Factor’s written statement of service includes their debt recovery procedure. However, she explained that her complaint is that she had received a stage 2 debt recovery letter dated 21<sup>st</sup> April 2015 whilst she was in dispute with the Factor regarding the detail of the unpaid invoices that she had requested.

**Factor’s response:** Nic Mayall explained that their accounts administrator first wrote to the Homeowner requesting payment of the outstanding account in the sum of £428.29 on 20<sup>th</sup> March 2016. The Homeowner’s first email detailing her complaint was dated 30<sup>th</sup> March 2015.

**4.2 ‘If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case.’**

**The Homeowner’s Complaint:** The Homeowner explained that a late payment charge was applied to her account on 20<sup>th</sup> April 2015. This is detailed in the Factor’s account dated June 2015.

**The Factor’s response:** Jeni Bole and Nic Mayall made no comment.

**4.3 ‘Any charges that you impose relating to late payment must not be unreasonable or excessive.’**

**The Homeowner’s Complaint:** The Homeowner explained that she considered that it was unreasonable of the Factor to impose the late payment charge of £20 plus Vat as she had not been provided with the details of the works carried out that had been charged for in the invoices that she had not paid, as previously explained.

**The Factor’s response:** Jeni Bole and Nic Mayall explained that they did not consider the charge of £20 plus Vat to be unreasonable.

**4.4 ‘You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.’**

**The Homeowner’s Complaint:** The Homeowner explained that she received a copy of the most recent Written Statement of Services when the Factor sent their written representations in response to her HOHP application. She acknowledged that section 5 .9 of the Written Statement of Services explains how charges and service delivery will be affected if homeowners do not pay their accounts.

**The Factor's response:** Jeni Bole and Nic Mayall made no comment.

**4.5 'You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.'**

**The Homeowner's Complaint:** The Homeowner explained that she had received no written reminders other than the quarterly invoices. No separate reminder had been received.

**The Factor's response:** Nic Mayall advised that the quarterly invoices clearly show that account balance and no further correspondence is required.

Copies of the quarterly invoices sent to the Homeowner had been provided to the Committee.

**4.8 'You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.'**

**The Homeowner's Complaint:** The Homeowner confirmed that she had not been served with a court action for the arrears on her account.

**The Factor's response:** Nic Mayall confirmed that no court action had been raised against the Homeowner.

**4.9 'When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position.'**

**4.9 The Homeowner's Complaint:** The Homeowner explained that she considers the timing of the debt recovery correspondence to be intimidating as the correspondence started after she raised the complaint.

**The Factor's response:** Nic Mayall explained that the first outstanding account reminder letter was sent on 20<sup>th</sup> March 2015, which is before the date of the Homeowner's complaint email of 30<sup>th</sup> March 2015.

## **SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE**

**6.1 'You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have already agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.'**

**The Homeowner's Complaint:** The Homeowner explained that she was not provided with progress reports or updates in relation to matters of concern that she had raised with the Factor namely ineffective weed control in 2013; grass cutting that had not been completed properly in 2014 and litter picking being carried out on the periphery of the estate in 2014-2015.

**The Factor's response:** Jenni Bole explained that when the Homeowner phoned to raise the various matters of concern she was advised that they would be referred to the contractors.

**6.3 'On request you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in- house staff.'**

**The Homeowner's Complaint:** The Homeowner acknowledged that she had not specifically asked the Factor how and why the contractors were appointed.

**The Factor's response:** Jeni Bole explained that the contractors Greenfingers had agreed to hold their charges from the previous year and therefore the Factors continued to employ them.

**6.4 'If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.'**

**The Homeowner's Complaint:** The Homeowner acknowledged that there was a specification for Landscape Maintenance. However she was not aware of any site inspections being carried out by the Factors or meetings with the Homeowners to discuss issues.

**The Factor's response:** Jeni Bole acknowledged that the Written Statement of Service states that routine property inspections will be made by the property manager at least twelve times annually. She explained that in practice the inspections are carried out more regularly during the summer months.

The Factor had provided the Committee with a copy of the specification for landscape maintenance, in response to the Committee's Direction.

**6.7 You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.**

**The Homeowner's Complaint:** The Homeowner explained that she had not received details of any commission etc the Factor receives from the contractors.

**The Factor's response:** Jeni Bole explained that the reason no such details have been provided is that the Factor does not receive any commission, fee or other payment or benefit from a contractor. This was explained in their response to the Direction.

**6.8 You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.**

**The Homeowner's Complaint:** The Homeowner explained that she had not received details of any financial or other interests the Factor has with any contractors.

**The Factor's response:** Jeni Bole explained that the reason no such details have been provided is that the Factor does not have any financial or other interests with any contractors. This was also explained in their response to the Direction.

**6.9 'You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.'**

**The Homeowner's Complaint:** The Homeowner explained that she did not believe that the Factor had pursued defects in the service provided by the contractors, especially during the Midlothian District Council Contract.

**The Factor's response:** Jeni Bole explained that she had extensive negotiations with Midlothian District Council to secure a reduction in their charges. Their invoice was originally £45,000 and this was successfully reduced to £8638. She also confirmed that issues with Greenfingers had also been successfully pursued.

## **SECTION 7: COMPLAINTS RESOLUTION**

**7.1 'You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.'**

**The Homeowner's Complaint:** The Homeowner explained that the Written Statement of Service was provided to her after she had submitted her application to HOHP. She accepted that the Statement included details of the Factor's complaints procedure.

**The Factor's response:** Jeni Bole and Nic Mayall made no comment.

### **Failure To Carry Out Factor's Duties.**

The Homeowner's letter of notification to the Factor stated that the Factor had failed in their duty to carry out the items detailed in the Factor's specification of works. In particular she had stated:

1. On various occasions she had contacted the Factor to express concerns that the litter in the internal part of the estate was not being addressed.
2. The sweeping and collection of fallen leaves from landscaped areas has not been a regular completed task.
3. The Trees and shrubs have not been regularly inspected for vandalism, storm damage and rabbit damage. For example the trees down by the burn had not been routinely maintained resulting in the residents being charged for a tree surgeon to rectify the situation. Also the shrubs had not been maintained properly. She provided a photograph of an overgrown shrub outside her property and she explained that this demonstrated that the shrubs had not been properly maintained. She also acknowledged that she was unaware that the pavements and roads were not part of the maintenance contract.
4. The grass cutting had not been properly completed. She had contacted the Factor when the grass had not been cut properly and was a foot long. She also contacted the Factor regarding over grown shrubberies and hedges which she explained had been neglected until recently.
5. Herbicide has not been applied regularly.

6. She had been charged for the replacement chute just off Baird's Way because the chute had been vandalised. She advised that if regular inspections had been carried out this additional cost would have been avoided.

She explained that she has lived on the estate since 2005 and between 2005 and 2010 there were no issues regarding the standard of works being done throughout the estate. Between 2010 and 2013 Midlothian Council had been allowed to continue their contract even although no works were being carried out. This indicates poor management during this time. Greenfingers were appointed in 2013 and she did not consider that they were doing all the matters that are detailed in the specification. She phoned and sent emails to the Factors explaining this. However matters have improved since March 2015.

In her oral representations she advised the Committee that she does not routinely walk around the development looking for problems. However on the occasions when she had walked around the paths of the development she often found them to be overgrown. She works part time and has pointed out the problems that she has been aware of.

Jeni Bole and Nic Mayall advised that they do not consider that they have failed in their duties as suggested by the Homeowner. Greenfingers are good contractors. They do not consider that there has been a wholesale failure to deliver. Jeni Bole explained that shortly after Greenfingers had been appointed there were some issues as some areas of the development had been missed. However she spent time with the contractor on site and these areas were satisfactorily addressed. The development is a large area and they suspect that the Homeowner may not be aware when the contractors are on site and all the works that they do.

1 and 2. Jeni Bole explained that the fact that the Homeowner did not see the contractors collecting litter on the internal part of the estate or the leaves does not mean that the contractors did not attend to this later.

3. Jenni Bole explained that the trees down by the burn that had caused a problem were in fact part of the neighbouring development.

4. In relation to the complaint about the grass cutting Jeni Bole explained that there had been an issue in April 2014, at the beginning of the growing season, when the grass had not been properly cut. However she had met the contractor on site to explain the problem and he brought the grass cutting up to scratch on his next visit.

5. In relation to the application of the herbicide Jenni Bole explained that it had once been applied shortly before a down pour of rain but was reapplied on the next visit.

6. Jenni Bole explained that the maintenance of the play park off Baird's Way is not part of the maintenance contract.

Jeni Bole also explained that not all the paths within the development are part of the development common property and typically the pavements and roadways are maintained by the Council. The contractors had been provided with a plan showing the common parts of the development.

In connection with the photograph provided by the Homeowner she explained that this was a photograph of one overgrown shrub and it does not demonstrate that the shrubs are not routinely maintained.

## **DECISION**

**Section 1 of The Code states that the Property Factor must provide a Written Statement of Service and specifies the details that should be included.**

### **D. Communication Arrangements**

**I) 'your in-house complaints procedure (which may be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your in-house complaints handling procedure (see Section 7: Complaints resolution).'**

**M) 'the timescales within which you will respond to enquiries and complaints received by letter or email.'**

#### **Decision**

This complaint is not upheld. The Factor's Written Statement of Service at paragraph 6.2 sets out in detail their complaints procedure.

Paragraph 6.2.2 of the Written Statement of Service explains 'on initial receipt of a complaint, acknowledgement of its receipt will be made by James Gibb residential factors within 5 working days. Within 8 weeks of receipt of the complaint the homeowner will receive a letter detailing the results of the internal investigation or, if the investigation is incomplete after 8 weeks, a letter explaining why a final response is not yet available will be sent to the homeowner. This letter will also advise a likely resolution date.'

### **Section 2: Communications and Consultation.**

**2.2 'You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that they may take legal action).'**

#### **Decision**

This head of complaint is not upheld. The Committee do not consider the emails dated 19<sup>th</sup> March 2015 and 21<sup>st</sup> July 2015, referred to by the Homeowner, to be abusive, intimidating or threatening. The emails factually stated the Factor's position in relation to the ongoing dispute with the Homeowner. The emails were not frightening and they were not intended to scare the Homeowner.

**2.5 'You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers).'**

## **Decision**

This head of complaint is upheld. Nic Mayall sent the Homeowner an email dated 2<sup>nd</sup> April 2015, in response to the Homeowner's email dated 30<sup>th</sup> March 2015, advising that he would respond in full within 14 days. However he did not reply until 30<sup>th</sup> April 2015 and had not advised the Homeowner that he would require additional time to respond. However the Committee acknowledged that Nic Mayall did apologize to the Homeowner for his delay in replying to her. Accordingly whilst this section of the Code has technically been breached by the Factor the Committee do not consider that the Homeowner has been materially prejudiced by the delay in responding fully to the Homeowner's email of 30<sup>th</sup> March 2015.

## **Section 3: Financial Obligation.**

**3.3 'You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection and copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.'**

## **Decision**

This head of complaint is upheld. Section 3 of the Code of Conduct explains that transparency is important in the full range of services and it is especially important in building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.' The Homeowner asked the Factor on many occasions for a breakdown of the work actually carried out, in particular in her emails dated 6<sup>th</sup> May 2014, 19<sup>th</sup> December 2014, 21<sup>st</sup> December 2014. The Committee acknowledge that Nic Mayall in his email to the Homeowner dated 30<sup>th</sup> April 2015 explains that '*her bills include three entries, each of which is a 12<sup>th</sup> share of the annual garden maintenance sum based on the overall annual specification.*' However this response does not provide the Homeowner with a description of the works actually carried out during the invoice period. In addition it does not give her the details required to satisfy her that works have actually been done in compliance with the contract specification and that no improper payment requests are involved. The Committee are aware that the maintenance works are part of a cyclical maintenance contract and the Factor may not have to hand what actual work was carried out at each visit. However on request from an owner the Factor should be able access basic information of each visit from the contractor.

## **SECTION 4: DEBT RECOVERY**

**4.1 'You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.'**

### **Decision**

This head of complaint is not upheld. Paragraph 5.9 of the Written Statement of Service details the Factor's Debt Recovery procedure, as required by section 4.1 of the Code of Conduct. The Committee noted that the Factor's first reminder letter was dated 20<sup>th</sup> March 2015, before the date of the Homeowner's complaint email dated 30<sup>th</sup> March 2015.

**4.2 'If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case.'**

### **Decision**

This head of complaint is not upheld. The Factor wrote to the Homeowner on 21<sup>st</sup> April 2015 advising that an administration charge of £20 plus Vat had been added to her account and would appear on her next quarterly invoice. This charge predated the date of the Homeowner's application to the HOHP, which application was dated 12<sup>th</sup> May 2015.

**4.3 'Any charges that you impose relating to late payment must not be unreasonable or excessive.'**

### **Decision**

This head of complaint is not upheld. The Committee did not consider the late payment charge of £20 plus Vat to be unreasonable or excessive.

**4.4 'You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.'**

### **Decision**

This head of complaint is not upheld. This head of complaint is not upheld. Paragraph 5.9 of the Written Statement of Service details how charges and service delivery will be affected if homeowners do not pay their accounts.

**4.5 'You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.'**

### **Decision**

This head of complaint not upheld. The Factor had provided copies of the quarterly invoices sent to the Homeowner. The invoices clearly showed the outstanding balances.

**4.8 'You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.'**

### **Decision**

This head of complaint is not upheld. The Committee accepted the parties' evidence to the effect that no legal proceedings had been raised in relation to the Homeowner's arrears.

**4.9 'When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position.'**

**Decision**

This head of complaint is not upheld. The Committee acknowledged that the debt recovery correspondence from the Factor started with their letter dated 20<sup>th</sup> March 2015. This letter was sent before the date of the Homeowner's complaint email dated 30<sup>th</sup> March 2015. They did not consider the letter from the Factor dated 20<sup>th</sup> March 2015 to be intimidating or threatening. The letter was a reminder letter advising the Homeowner that account was outstanding and requesting payment.

**SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE**

**6.1 'You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have already agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.'**

**Decision**

This head of complaint is upheld. The Committee accepted the evidence of Jenni Bole to the effect that when the Homeowner phoned to raise matters of concern she was advised that these matters would be referred to the contractors. However the Factor did not give the Homeowner any further feedback on the progress of the works concerned, as required by the Code. No evidence was provided to the effect that there is in place an agreement of a cost threshold below which job-specific progress reports are not required.

**6.3 'On request you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.'**

**Decision**

This head of complaint is not upheld. The Committee noted that the Homeowner had not specifically requested that the Factor to show how and why they appointed contractors.

**6.4 'If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.'**

**Decision**

This head of complaint is not upheld. The Committee acknowledged that the Factor had in place a Specification for Landscape Maintenance, which complied with this section of the Code.

**6.7 ‘You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.’**

**Decision**

This head of complaint is not upheld. The Committee accepted the evidence of Jeni Bole to the effect that the Factor does not receive any commission, fee or other payment or benefit from a contractor.

**6.8 ‘You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.’**

**Decision**

This head of complaint is not upheld. The Committee accepted Jeni Bole’s evidence to the effect that the Factor does not have any financial or other interests with any contractors they have appointed.

**6.9 ‘You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.’**

**Decision**

This head of complaint is not upheld. The Committee acknowledged that the Factor had negotiated a substantial reduction in the account from Midlothian Council. They accepted the evidence of Jeni Bole to the effect that she had pursued Greenfingers regarding matters issues that had been raised with them.

## **SECTION 7: COMPLAINTS RESOLUTION**

**7.1 ‘You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.’**

**Decision**

This head of complaint is not upheld. Paragraph 6.2 of the Written Statement of Service details the Factor’s Complaints Procedure.

### **Failure To Carry Out Factor’s Duties**

**Decision**

This head of complaint is not upheld. The Committee acknowledge that the Homeowner witnessed some works that had not been satisfactorily completed but they did not consider her evidence to be sufficiently detailed to demonstrate that the contractor had routinely failed to deliver the service required. The Homeowner explained that she works and does not

routinely inspect the development to find defective maintenance issues in relation to the common areas and the Committee are aware of the Homeowner's misunderstanding that the pavements and roadways were not in fact part of the maintenance contract. The Committee accepts the evidence of Jeni Bole and Nic Mayall to the effect that the contractor is a competent contractor and ongoing matters were brought to their attention and they were rectified. This is borne out by the fact that the Homeowner has confirmed that the since March 2015 the appearance of the estate has improved and she has been satisfied that the contractors have completed the required Landscape maintenance works since that time.

### **Property Factor Enforcement Notice**

In all of the circumstances narrated above, the Committee finds that the Factor has failed in its duty under section 17(1)(b) of the 2011 Act to comply with the requirements of the Code of Conduct in respect of sections 2.5, 3.3 and 6.1.

The Homeowner had already experienced Midlothian District Council not having carried out the required works over a number of years. Given this particular past difficulty the Factor could easily have made enquiries of the contractor to ascertain the particular works that had been carried out and this information could have been relayed to the Homeowner to allay her fears that no works had been carried out. The Code emphasizes the need for transparency in the full range of services provided. The Factor was not being sufficiently transparent by failing to provide the evidence the Homeowner requested to demonstrate that the works that were invoiced had actually been carried out by the contractors.

The Committee therefore determined to issue a Property Factor Enforcement Order.

Section 19 of the 2011 Act requires the Committee to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations to the Committee.

The Committee proposes to make the following Order:

*'The factor must pay the homeowner £ 150 for the inconvenience she had suffered from their own funds and at no cost to the owners.'*

*'The said sums to be paid within 28 days.'*

### **Appeals**

The parties' attention is drawn to the terms of section 21 of the 2011 Act regarding their right to appeal and the time limit for doing so.

It provides:

(1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or homeowner housing committee.

(2) An appeal under subsection (1) must be made within a period of 21 days beginning with the day on which the decision appealed against is made.'

Signed ..... ... Date 9<sup>th</sup> May 2016

### **Chairperson**