



**Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 declining to make a Property Factor Enforcement Order**

**HOHP reference:** HOHP/PF/13/0232

**Re:** 6 Meiklejohn Street, Stirling, FK9 5HQ ('the Property')

**The Parties:**

Raymond Milne residing at 6 Meiklejohn Street, Stirling, FK9 5HQ ('the Homeowner')

Hacking & Paterson Management Services, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ('the Factor')

**Decision by a committee of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011 ('the Act')**

**Committee members:**

Ewan K Miller, Chairperson and Legal Member; and Susan Napier, Surveyor Member

1. On 5 August 2014 the Committee issued its Decision on the merits of the various parts of the Homeowner's application. The same abbreviations and other forms of reference used in that principal Decision are also used in this document.
2. In terms of the Decision the Committee found in favour of the Homeowner in respect of a failure of the Factor to properly disclose insurance commissions to the Homeowner. As a result, also on 5 August 2014, a Notice of Proposal to make a Property Factor Enforcement Order was made. The said proposed PFEO stated:-

*"Within 28 days of service of the PFEO on the factor, the Property Factor must:-*

- 1. Amend the relevant section of its Terms of Service to state the amount or percentage of commission received in respect of policies of insurance organised by it and to reissue the Terms of Service to all homeowners within the development."*

2. *To credit the Homeowner's account with the Property Factor with a sum equivalent to the amount received by the Factor in commission arising from the property owners liability insurance for the development since 1 November 2012 in respect of the Property"*
3. Following upon the issue of the Notice of Proposal the Factor advised the Committee that they had now issued a separate written note regarding insurance arrangements to the Homeowner and the other proprietors within the development. This set out the insurance arrangements and confirmed the policy premium, the share applicable to individual proprietors and confirmed the percentage of the premium received by the Factor in relation to "policy administration matters". The Factor also confirmed that they had made a goodwill payment to the Homeowner of £25 and had credited his account with the sum of £0.18, being the amount of insurance commission received. In light of the above actions the Factor sought clarification on whether the proposed PFEO would now be required given they had, in substance, complied with its terms. The Committee has reviewed the correspondence submitted to it. It has decided that no further steps require to be taken to secure the performance of the actions envisaged in the proposed PFEO.
4. Section 19(3) of the 2011 Act appears, on the face of it, to require that when a PFEO has been proposed it is obligatory that one should be made after representations made under Section 19(2) have been considered by the Committee. In the present case the Committee is satisfied that the actions required in the draft PFEO have, in substance been carried out. Whilst the PFEO required the Terms of Service to be amended, the Factor had given a separate notification which resulted in the same practical effect. The Committee concluded that Section 19(3) should be read subject to the qualification that if the need for the order has passed by the time the Committee comes to decide whether to grant it or not then it is not obliged to do so notwithstanding the issue of a proposed PFEO at an earlier stage. Therefore, in the circumstances set out above, the Committee declined to make any further order in respect that the Homeowner's complaint which was referred to had been resolved and no further remedy was appropriate or necessary under the Act. This decision brings the case to a conclusion insofar as the Committee is concerned.
5. Notwithstanding the conclusion of the case, the Committee would wish to comment on one further matter. When submitting its response to the draft PFEO the Factor made extensive comment on the arrangements they had in place for placing insurance on behalf of Homeowners (which, in the opinion of the Factor, fell within their factoring administration charge) and what the Factor perceived as a separate contractual arrangement where they received commission for handling policy matters on behalf of the broker/insurer. The Factor did not feel that the Committee had fully grasped this point
6. The Committee was, in fact, fully aware of the Factor's argument that there were, in effect, two separate contractual arrangements in place; firstly the placing of insurance by the Factor and secondly a separate contractual arrangement where the Factor received commission from the broker/insurer

out of that premium in relation to carrying out policy administration matters for the broker/insurer. The simple fact of the matter, however, was that the Committee did not accept the distinction made by the Factor. The Committee was of the view that any such distinction was artificial and incorrect. The Factor placed the insurance via the broker and paid the premium on behalf of the homeowners. As a result of payment of the premium via the broker the broker receives a commission from the insurer. The broker then pays the Factor a commission from these monies. The Factor may well assist the broker/insurer in carrying out policy administration matters. This may be a justification for the Factor receiving payment of commission but it does not, of itself, mean the payment of the commission to the factor is a separate contractual matter unconnected with the original placing of the insurance. There is a causal connection between the two. Accordingly, the commission received requires to be disclosed. If the Factor had not placed the insurance then they would not have received the commission. The two events are inextricably linked.

The Committee was quite clear that the purpose of the provisions regarding commission within the Code is to ensure that there is an open and honest disclosure of all commissions received. To try and split the placing of insurance and the subsequent payment of commission into separate component parts to avoid having to disclose the commission was opaque and not in the spirit of the Code. The Committee would again highlight to the Factor the provisions regarding secret profit in the case of *Imageview Management Limited –v- Kelvin Jack [2009] EWCA Civ 63*. The Committee was of the view that the Factor should ensure that it is openly disclosing commissions it receives in respect of the placing of insurance and the policy administration matters it may carry out. If the Factor continues with this artificial distinction in other developments it manages the same issues will arise again. The Committee was of the view that the Factor had not yet fully appreciated that the Code requires more open and transparent arrangements with homeowners and that it requires factors to review and amend practices accordingly.

### **Appeals**

*The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides*

*"(1) An appeal on a point of law only may be made by summary application to the Sheriff against a decision of the president of the Homeowner Housing Panel or a Homeowner Housing Committee. (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made ... "*

E Miller

Chairperson Signature :

Date..... 15/12/14 .....