

**Decision of the Home Owner Housing Committee
Issued under the Home Owner Housing Panel (Applications and Decisions)
(Scotland) Regulations 2012**

HOHP Ref: HOHP/PF/13/0301

The Parties

Martin Wilson, residing at 83/16 Hopetoun Street, Edinburgh, EH7 4NJ ("the applicant")

And

Charles White Ltd, Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD, ("the respondent")

Decision by the Committee of the Home Owner Housing Panel

In an application made under Section 17 of the Property Factors (Scotland) Act 2011, the committee, having made such enquiries as it saw fit for determining whether the respondent has complied with the code of conduct (as required by Section 14 of the 2011 Act) determined that the respondent has not breached the code of conduct for property factors, nor has the respondent failed to carry out the property factors duties.

Committee Members

Paul Doyle (Chairperson)

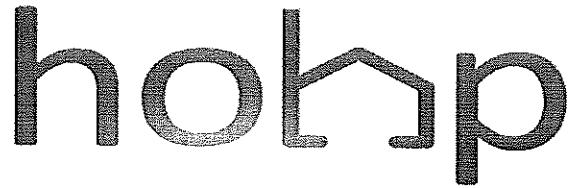
Ian Murning (Surveyor Member)

Helen Barclay (Housing Member)

Background

1 By an application dated 28 October 2013, the applicant applied to the Home Owners Housing Panel for a determination as to whether the respondent had failed to comply with the code of conduct imposed by Section 14 of the 2011 Act.

2 The application stated that the applicant considered that the respondent had failed to comply with Sections 2; 3.1; 3.2; 3.3; 3.5a; 3.6a; 5.4; 5.7; 5.8; 6.1 & 7.3 of the code of conduct, and that the respondent had failed to carry out the Property Factor's duties.

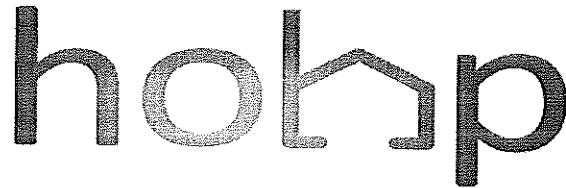


3 By letter dated 16th December 2013 the President of the Homeowner Housing Panel intimated a decision to refer the application to a Homeowner Housing Committee. The Homeowner Housing Panel served Notice of Referral on the parties directing both all parties to make any further written representations by 13th January 2014.

4 Both the appellant and respondent made further written representations. The committee issued a direction in the following terms on 13th March 2014

"The Home Owners Housing Committee, having considered the documentary evidence presented directs the parties to provide written submissions in response to the following detailed directions to HOHP within 14 days of today's date

- 1 *The applicant is to specify the sums that were due to him by the respondent on*
(a) 1 October 2012,
(b) 7 December 2012 and
(c) 16 October 2013 (the date of application)
and to specify the manner in which any sums due to him by Charles White Ltd at each of the foregoing dates were misapplied and the manner of the misapplication
- 2 *The applicant is to specify what insurance claims the applicant made in relation to his dwelling-house between 1 October 2012 and 16 October 2013*
- 3 *The applicant is to specify which repairs the applicant requested the respondent to carry out between 7 December 2012 and 13 October 2013*
- 4 *The respondent is to provide a final account of the sums due to the applicant at*
(a) 1 October 2012,
(b) 7 December 2012 and
(c) 16 October 2013
and to specify whether and when the sums held to the credit of the applicant's account were transferred to the new property factors after 1 October 2012



- 5 *The respondent is to provide a detailed accounting of their intromissions with funds held for, or on behalf of, the applicant in the period from 1 October 2012 to 16 October 2013. "*

Both the applicant and respondent provided further documentary evidence in response to the direction.

5 A hearing was held at George House, 126 George Street, Edinburgh, on 13 May 2014. All parties were timeously notified of the time, date and place of the hearing. The applicant was present & was unrepresented. Mr E Backler, the respondent's managing director, represented the respondent. Both the applicant & Mr Backler answered question from committee members. The committee then reserved their determination.

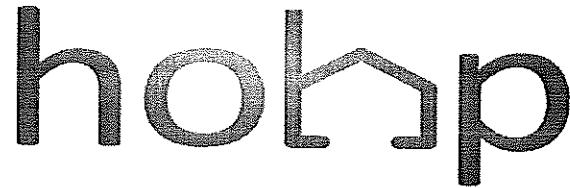
Preliminary Matters

6. The Committee first considered whether it had jurisdiction to hear this matter. The Committee told both the applicant and Mr Backler that the Committee would ask questions to determine what matters were validly before the Committee. Both the applicant and Mr Backler told the Committee that there was a change in property factor in this case. The respondent's last day as property factor was 30 September 2012. The register of property factors discloses that the respondent registered as a property factor on 7 December 2012.

7 It is common ground that the respondent was not the property factor on 1 October 2012. The jurisdiction of the Committee to consider complaints in relations to factors' duties arises from 1 October 2012. The Committee has jurisdiction to consider compliance with the Code of Conduct from the date of the respondent's registration as factors (7 December 2012).

8 Regulation 28(1) of the Home Owner Housing Panel (Application and Decisions) (Scotland) Regulations 2012 provides "*subject to Paragraph (2), no application may be made for determination of whether there was a failure before 1st October 2012 to carry out the property factor's duties*". Regulation 28(2) provides that the Committee "...may take into account any circumstances occurring before 1st October 2012 in determining whether there has been a continuing failure to act after that date".

9 The Committee comes to the conclusion that there cannot be a "...*continuing failure to act...*" because it is an undisputed fact that the respondent was not the property factor after 30 September 2012. The respondent had no locus to act as property factor after 30 September 2012 and could not have "...*a continuing failure to act after that date*". Questions in relation to the property factor's duties in this case are therefore not competently before the Committee.

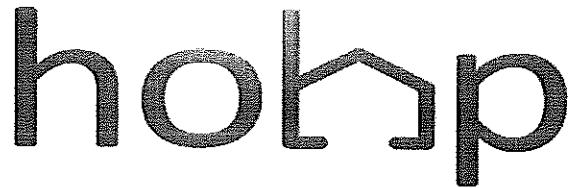


10 The Committee can only consider compliance with the Code of Conduct from the date of the respondent's registration as factors. In this case, that date is 7 December 2012. By that time, the respondent had not been the factor for this applicant since 30 September 2012 (a period of 10 weeks). The committee therefore had to consider whether or not allegations of breaches of the Code of Conduct can be considered.

11 Section 3 of the Code deals with financial obligations. It is the applicant's position that the respondent has breached most of the provisions of Section 3 of the Code. Section 3.1 of the Code obliges a property factor to make available to the homeowner "...all financial information that relates to their account. This information should be provided within 3 months of termination of the arrangement unless there is a good reason not to...". As the contractual relationship between the applicant and the respondent ended on 30 September 2012, the provision of Section 3.1 of the Code of Conduct remained in force until 31 December 2012. The Committee therefore finds that the Committee has jurisdiction to consider allegations of breaches of the Code of Conduct insofar as it might relate to Section 3 of the Code of Conduct. The applicant alleges that the respondent has breached Sections 2 and 7.3 of the Code. His allegations in relation to Sections 2 and 7.3 of the Code are linked directly to an allegation of failure to account timeously and so form part of the consideration of Section 3.1 of the Code of Conduct.

12 The committee explained the decision that jurisdiction in this case was limited to Sections 2, 3 and 7.3 of the Code of Conduct to both the applicant and Mr Backler. The applicant confirmed that he knew that dates had a relevance which created the potential to restrict the matters competently before the committee, but asked whether or not the committee would consider the complaint about the insurance arrangements made by the property factors.

13 The Committee do not have jurisdiction to consider the arrangement of insurance by the property factor and so cannot consider Section 5 of the Code of Conduct - because it is beyond dispute that the property factors' arrangement of insurance for the applicant and his neighbouring proprietors was made in May 2012 and so significantly predates 1 October 2012. It is the applicant's argument that the payment made in May 2012 was for a one year period, and so endured until 30 April 2013. The difficulty with that argument is: (i) even if the payment was made for one year's premium, the payment was made five months before the Home Owner's Housing Panel is empowered to consider property factors' duties; (ii) from 30 September 2012, the respondent was not the property factor and so could do nothing about the insurance arrangements; (iii) from 1 October 2012, it has been open to both the applicant and the new property factors to take steps to arrange alternative insurance and obtain a refund of premium. The respondent has not been the property factor since the relevant date and so cannot competently be accused of breaching property factors' duties or the Code



of Conduct in relation to the costs of insurance since either 1 October 2012 or 7 December 2012.

14 The committee therefore advised parties that the focus in this case would be the respondent's actions between 7 December and 31 December, both 2012.

Findings in Fact

15 (a) The applicant is the heritable proprietor of the flat dwellinghouse known as and forming 83/16 Hopetoun Street, Edinburgh, EH7 4NJ. He moved into that property in 2010. The property is a flat dwellinghouse which forms part of a larger development of townhouses and flat dwellinghouses known as "Hopetoun Village".

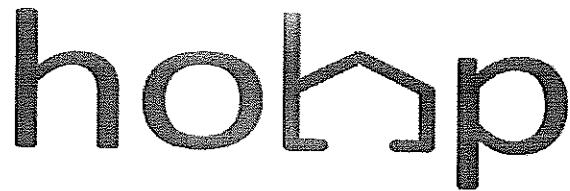
(b) From the date the applicant moved into 83/16 Hopetoun Street, aforesaid, until 30 September 2012, the respondent was the property factor of the larger development known as Hopetoun Village. Each year from the date he moved into the property until 30 September 2012, the applicant paid factoring & maintenance fees to the respondent.

(c) The applicant is the chairman of the Hopetoun Village Residents' Association. Hopetoun Village Residents' Association became dissatisfied with the services offered by the respondent and, on 13 September 2012, told the respondent that they had arranged for a new property factor to assume responsibility for factoring the larger development of which the applicant's house forms part from 1 October 2012. The factoring agreement between the applicant and his neighbouring proprietors on the one hand, and the respondent on the other, terminated on 30 September 2012.

(d) On 7 December 2012, the respondent registered as a property factor in terms of the Property Factors (Scotland) Act 2011.

(e) From 13 September 2012 until the date of hearing, the respondent has been in correspondence with the Hopetoun Village Residents' Association (of which the applicant is the Chair) and the new factors (Trinity Factors Ltd) in an attempt to finalise accounts and hand over funds held on behalf of the individual homeowners within Hopetoun Village Residents' Association. Trinity Factors advised the respondent that they could not accept accounts of individual owners which were in debit. A number of individual owners within Hopetoun Village Residents' Association have not maintained prompt and regular payments to the respondent, so that debit balances are running to thousands of pounds.

(f) Since 13 September 2012, the respondent made significant efforts to obtain payments from homeowners within the Hopetoun Village development, so that all accounts can be brought into credit. A meeting took place between the new factors, the respondent and the Hopetoun Village Residents' Association



(attended by the applicant) on 27 March 2013. At that time, it was agreed that a number of the accounts should be viewed as bad debts and written off.

(g) The respondent maintains a float account, held in trust for individual owners.

(h) In the first week of October 2012, the applicant made a payment of less than £100 to the respondent to bring his account up to date. Because of difficulties in paying the debt online, the applicant found that he had paid three times the amount that was due. The respondent immediately returned the overpayment to the applicant.

(i) Throughout the period that the respondent was the property factor instructed by the applicant, the respondent provided the applicant with statements of account for the applicant's own individual account with the respondent.

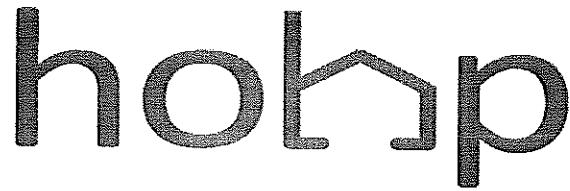
(j) On the termination of the factoring arrangement in September 2012, the respondent charged the applicant (and each other proprietor within the Hopetoun Village development) a £20 administration fee to cover the costs of the work involved in reconciling and closing each individual homeowner's account.

(k) The respondent continues to ingather the funds due from homeowners and maintained a dialogue with both the applicant and the new factors, between September 2012 and March 2013, in an attempt to close off all accounts held for Hopetoun Village Residents' Association. The applicant's account with the respondent is in credit in the sum of £332. That credit balance has been maintained in the applicant's account with the respondent since October 2012. That sum cannot be paid to either the applicant or the new factors because there are sums due to the respondent by the applicant's neighbouring proprietors.

Reasons for Decision

16 The hearing in this case took place at George House, 126 George Street, Edinburgh, on 13 May 2014. The applicant was present (and was unrepresented). The respondent was represented by the respondent's managing director, Mr E Backler. To assist the applicant to present his case, the applicant was asked questions by members of the Committee. Mr Backler was then asked questions by members of the Committee. The applicant was again asked questions by members of the Committee to address matters which arose from Mr Backler's evidence.

17 There is little, if any, significant dispute in the facts in this case. The evidence clearly indicates that the relationship between the appellant and his neighbouring proprietors and the respondent, as property factors, broke down - and as a result, the factoring contract between them was terminated. The



applicant's complaint is that the respondent has failed to properly account for the funds held. The applicant stated that he did not know what state his account with the respondent was in, that he did not know whether it was in credit or in debit and that, by December 2012, his account should have been reconciled and brought to a nil balance.

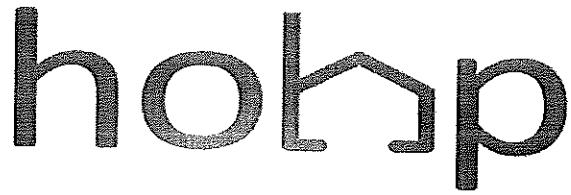
18 Mr Backler explained that because the accounting system for his company and the accounting system of the new factors was different, debit balances could not be transferred, that a number of the accounts for individual neighbouring proprietors were in debit, even though the applicant's account is in credit, and that work has been carried out to recover outstanding funds and write off debit balances so that a final accounting could be given.

19 For the reasons already given, the matters which are competently before us relate to Sections 2, 3 and 7.3 of the Code. Section 7.3 provides that a property factor must not charge for handling complaints. There is no reliable evidence before us that the respondent has charged for handling complaints. There is no reliable evidence that between 7 December and 31 December (both 2012) any charge was made by the respondent for handling the complaint of the applicant.

20 Section 2 of the Code relates to the communication and consultation. There is no evidence that the respondent provided misleading or false information between 7 and 31 December (both 2012). There is no evidence that the communications from the property factor to the applicant were abusive, intimidating or threatening. The specific allegation made by the applicant is that Section 2.5 has been breached and that the respondent has delayed in their responses to communications with the new factor. There is no reliable evidence of a failure to communicate or a delay in responding to communication between 7 December and 31 December, both 2012. The weight of evidence indicates that the respondent has been trying to communicate not just with the applicant and the new factor, but with other homeowners who hold accounts with the respondent. There is no reliable evidence from which we can conclude that there has been a breach of Section 2 of the Code of Conduct.

21 In reality, the focus in this application is on Section 3.1. The overriding objectives set out in Section 3 (financial obligations) are: (i) protection of homeowners' funds; (ii) clarity and transparency of accounting procedures; and (iii) an ability to make a clear distinction between homeowners' funds and the property factor's funds.

22 It is not argued that there is not a distinction between homeowners' funds and the property factor's funds. The weight of evidence placed before us indicates that there is a clear distinction between homeowners' funds and property factor's funds. It is not argued that the homeowners' funds have not been adequately protected. There is no suggestion that the respondent has been



lining its own pockets. It is arguable that the applicant's position is that there has not been clarity and transparency in all accounting procedures; however, the weight of oral and documentary evidence indicates that regular statements have been provided to the applicant. When questioned, Mr Backler was able to immediately state that there was a credit balance on the applicant's account - and specify the credit balance on the applicant's account. We are satisfied that there are clear and transparent accounting procedures. What has happened in this case is that the final accounting cannot be produced because a number of the applicant's neighbours have refused or delayed to pay the sums that are due to the respondent.

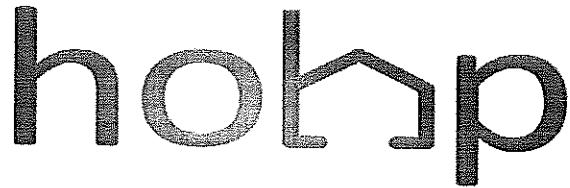
23. The reluctance of some of the applicant's neighbours to pay the sums that they owe the respondent prevents the respondent from reconciling all of the accounts; the accounting procedure cannot be completed by the respondent until the debit balances are addressed. The focus on credit balances provides an incomplete picture. The accounting process demands that both credits and debits are reconciled.

24. Section 3.6a of the Code requires an interest bearing account to be opened in the name of each separate group of homeowners for a sinking or reserve fund. We have reliable evidence from Mr Backler and from the documents produced that such accounts have been opened.

25. Section 3.5a of the Code requires homeowners' floating funds to be held in a separate account from the property factor's funds. The weight of evidence indicates that the respondent has carefully separated homeowners' floating funds from the respondent's own funds. The applicant does not rely on Section 3.4 of the Code.

26. Section 3.3 of the Code obliges the respondent to provide a detailed financial breakdown of charges and a description of activities and works charged for each year. The applicant's complaint was that the respondent provided statements of account and a final figure, but does not provide a detailed calculation leading to the closing balance in each statement. The documentary evidence placed before the Committee indicates that the respondent timeously provided detailed financial breakdowns of charges, with vouching for those charges, and responds to reasonable requests from the homeowner for details and vouching.

27. Section 3.2 of the Code obliges the property factor to return funds due to homeowners automatically at the point of change of property factor. The weight of evidence indicates that that is what the respondent has been trying to do, and continues to try to do in difficult circumstances where, because of the reluctance of some of the applicant's neighbours to make payments which are due, a final accounting has been delayed.



28 Although the Committee consider Section 3.2, 3.3, 3.5a and 3.6 of the Code of Conduct, the Committee does so only for the sake of completeness. The Committee reminds itself that at the date complained of, the respondent was not the property factor and so could not breach those sections of the Code.

29 Section 3.1 of the Code is competently before the Committee because the respondent registered on 7 December 2012 and the duty to make available to the homeowner, financial information relating to his account continued. Section 3.1 specifically states that "*this information should be provided within 3 months of termination of the arrangement unless there is good reason not to...*"

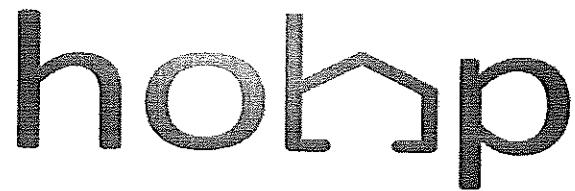
30 The information that the property factor is obliged to provide is qualified in the preceding sections, which obliges the property factor to "*make available to the homeowner all financial information that relates to their account.*" The weight of evidence placed before the committee indicates that the respondent did make financial information available to the applicant and continues to make that information available to the applicant. The obligation created by section 3.1 of the code is to provide financial information. An obligation to reconcile the accounts and make payment within three months is neither contained in nor created by section 3.1 of the code.

31 In reality, this is a case where the applicant is dissatisfied with the factoring service provided by the respondent. The Committee asks itself whether the respondent should have been able to make a final accounting within 3 months of the date of termination of the contract. The Committee is satisfied with the explanation given by Mr Backler - that because of the reluctance of neighbour proprietors to make payments, the respondent has been prevented from making a final accounting and remitting funds to either the applicant or to the new property factors. The committee is satisfied with Mr Backler's explanation that steps continue to be made and that the account of the homeowner is neither being ignored nor neglected.

32 The weight of evidence therefore indicates that the respondents have honoured their obligations in terms of the Code of Conduct and that there is no substance in either of the applications placed before the committee.

DECISION

33. The Committee therefore finds that the Respondent has not breached the Code of Conduct for Property Factors. The committee refuses the application. No Property Factor Enforcement Order will be made in response to this application.



Appeals

23. The parties' attention is drawn to the terms of section 22 of the Property Factors (Scotland) 2011 Act regarding their right to appeal and the time limit 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 day on which the decision appealed against is made..."

Paul Doyle

Signed
Chairperson

Date 22/5/2014