Decision of the Homeowner Housing Committee issued under Section 19 of the Property Factors (Scotland) Act 2011 and Regulation 26 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

hohp Ref: **HOHP PF/15/0042**

The Property: **Flat 1/2, 14 Walmer Crescent, Cessnock, Glasgow G51 1AT**

The Parties: –

Dr Jon Hand and Ms Brenda Lillicrap, both residing at the Property ("the homeowners")

and

Ross & Liddell Ltd, Registered under the Companies Acts under Number 097770 and having their Registered Office at 60, St Enoch Square, Glasgow G1 4AW ("the factors")

Committee Members:

David Preston (Convener) and Carolyn Hirst (Housing Member).

Decision:

The Committee found that the factors had failed to comply with paragraphs: 2.1; 5.3; and 5.4 of the Code of Conduct for Property Factors.

1. By application dated 14 April 2015 the homeowners applied to the Homeowners Housing Panel ("the Panel") to determine whether the factors had failed to comply with the Code of Conduct by breaches of parts 2 and 5, sections: 2.1; 5.2; 5.3; and 5.4.

2. The application was accompanied by written representations and the homeowners lodged various documents and copy correspondence in support of their application.

3. By Minute dated 14 August 2015 the President of the Panel intimated her decision to refer the application to the Committee.

4. A hearing was scheduled to take place on a number of dates in 2015. However due to difficulties faced by the parties in preparing for such a hearing, it was re-scheduled and took place on 18 January 2016.

5. In response to the Notice of Referral, the homeowners submitted further written representations dated 3 September 2015 which included representations and productions regarding events which had taken place subsequent to the date of the application. Further, in response to the Committee's Direction dated 17 September 2015, on 5 January 2016 the homeowners submitted further representations and productions, which also related to events post-dating the application. On 12 January 2016 the factors representatives submitted a list of witnesses and the productions upon which the factors intended to rely. The productions lodged by both parties included copy letters and emails which post-dated the application and related to events subsequent to the date of the application.

Hearing

6. A hearing took place at Wellington House, 134/136 Wellington Street, Glasgow, G2 2XL on 18 January 2016. Present at the hearing were: the homeowners, who represented themselves; Mr Brian Fulton, on behalf of the factors, who was represented by Mr Michael Ritchie, Solicitor, Hardy MacPhail, Solicitors, Atlantic Chambers 45 Hope Street Glasgow G2 6AE.

7. Prior to the hearing the parties had lodged bundles of documents to which they referred to the Committee throughout the hearing. In addition, evidence was heard from: the homeowners on their own behalf; Mr Fulton; Ms Rita Glendinning, Insurance Manager; and Mr Stuart Clements Property Manager on behalf of the factors.

8. At the start of the hearing the convener introduced the Committee and outlined the procedure to be followed during the hearing.

Preliminary Matters

9. Mr Ritchie apologised to the Committee for the late lodging of the factor's bundle of documents. He advised that in September 2015, when the Direction which instructed the parties to lodge hard copies of their productions 14 days prior to the date of the hearing had been issued, matters had been in the hands of the factors and when the files were passed to him he was not aware of the Direction. Accordingly he had followed the time limits set out in the Regulations. He advised that he had received the homeowners' productions on the day on which he had sent out those of the factors. The convener indicated that if documents were lodged 14 days prior to the hearing, each party had an opportunity to consider the other party's productions prior to the hearing, although it was noted that as the documents comprised mainly correspondence between the parties in this case, they were both familiar with them.

10. The property comprises the west-most house on the first floor of the tenement 13, 14 and 15 Walmer Crescent (hereinafter referred to as "the tenement"), as described in Land Certificate GLA117858 (factors' production 1).

Homeowners' Complaints:

Delay in handling Insurance Claim and notifying owners of asserted under-insurance (Section 5.4)

11. The homeowners summarised their complaints which they said were set out fully in document 0 lodged by them. The complaint fell into two strands relating to: the factor's delay in handling an insurance claim which led to the imposition of a £10,000 excess on the policy; and the poor quality of information provided by the factors in respect of the property insurance which resulted in the homeowners' property either being grossly under-insured or being insured twice.

12. The homeowners said that the factors were advised of a theft of lead from the roof of the tenement in March 2014 which led to an insurance claim and, apart from a temporary repair being carried out they heard nothing further from the factors for just short of six months.

13. The homeowners maintained that the lack of information demonstrated an unreasonable delay in the handling of the insurance claim which meant either that: the factors did not have an appropriate procedure under Section 5.4 of the Code to ensure the prompt and efficient handling of claims; or if there was such a procedure the factors had failed to implement it effectively or properly.

14. The homeowners said that after they complained about the lack of any action on the claim, the factors explained that the fault had lain with the Loss Adjusters, CLUK who had difficulty in obtaining alternative quotations. The factors had told the homeowners that the matter was out-with their control and the fault lay with CLUK. The factors had advised that this difficulty with CLUK was not an isolated incident and they had advised the insurers that they were no longer prepared to deal with CLUK. The homeowners' position was that the factors had a responsibility towards the proprietors and should have chased the Loss Adjusters for progress and kept them informed.

15. The first time the homeowners heard from the factors about the matter was when they received a letter dated 4 September 2014 (homeowners' production 2) which reported on the actions taken in respect of the insurance claim but also advised them that their property was grossly under-insured.

Information about Insurance Policy

16. The homeowners had believed since they purchased the property in 2003 that the insurance arranged by the factors related to the common parts of the building only and that they had a separate policy to cover their property but they had now been advised that they were only insured for a small fraction of the value of their share of the building. The homeowners said that if they had been told that they were under-insured at the time the theft of lead had been reported they would have been able to sort out the confusion at the same time as the claim was, or was not, being dealt with.

17. The homeowners said that it had not been explained to them until they had been told in July 2015 that some proprietors, including them, had separate insurance policies for their own flats, which was not in accordance with the title deeds. They questioned whether any sensible person would knowingly insure their property with one company and a fraction of the value of the common parts with another. The homeowners alleged that this had resulted from a lack of adequate information from the factors.

18. The homeowners maintained that since their purchase of the property in 2003 all communications from the factors had referred to the "common" insurance policy, which they had understood described an insurance policy which related to the common parts of the tenement. Nothing in any communication had suggested otherwise. The homeowners said that they had regarded the use of the word "common" as having its normal meaning. At the hearing they said that they now understood that insurance was not provided on the basis that they had thought.

19. The factors had been well aware of difficulties in such insurance situations but they failed to give clear information to the homeowners to clarify the position

20. The homeowners initiated a complaint to the factors at the end of which the factors suggested that the lead claim be settled and any shortfall invoiced later. If this had been suggested in September 2014, matters could have moved along.

£10,000 excess

21. In December 2014 the homeowners were advised that a £10,000 excess had been applied to the policy due to the delay in the repairs being carried out. Subsequently they received a variety of explanations from the factors for this having been imposed as listed on Doc 0, at page 7. Included with the insurance renewal papers (homeowners' production 18) was the Certificate of Buildings Insurance in which the £10,000 excess was confirmed "... Pending confirmation that roof has been inspected and all remedial works have been undertaken by September 2015. Once confirmation that works have been completed is received excess can be reviewed..." Eventually, in August 2015, they were told by Mr

Clements that the additional excess was due to repair work which had been identified as being required to the roof due to its general condition.

22. In a letter dated 12 August 2015 (homeowners' production 29) the factors confirmed that the insurers had arranged and paid for a roof inspection by Alexander Anderson Ltd following completion of the lead theft repairs and enclosed copy of the report prepared. The report took the form of an "Estimate, following Risk Assessment". The letter advised that additional estimates had been requested which would be reviewed with a recommendation presented to proprietors. No such recommendation had been presented to the proprietors. There was no detailed specification as to the work required. (The report was said to be accompanied by photographs but these were not produced to the Committee.)

23. The homeowners asked the factors on a number of occasions for a specification of the work required by the insurers for the additional excess of £10,000 to be removed. No specification had been received from the factors, the necessary roof repairs had not been carried out by the date of the hearing and the factors had intimated their resignation as property managers leaving the homeowners, and the other proprietors in the tenement with no clear route.

24. Following the submission of the application to HOHP, matters had progressed. A copy letter from an organisation known as JLT had been received along with a letter from Ross & Liddell dated 13 May 2015 (homeowners' production 18; factor's production 44) which meant nothing to the homeowners or to the other proprietors in the block. They had no idea of who JLT was or on what they had based the stated sum insured of £1,474,404. The letter had been received on 15 May 2015 in respect of the renewal of the insurance policy which was due on 16 May 2015. The homeowners said that it was unreasonable for them to have received such information on the day before the policy was due to be renewed. They did not have time to raise questions about the renewal terms.

25. A meeting took place between the proprietors in the tenement and the property manager, Mr Clements, on 25 June 2015 at which these matters were discussed. Prior to the meeting, the factors had advised by email dated 12 June 2015 (homeowners' production 19; factors' production 25) that their Building Surveying

Department had recommended an insurance value of £3,577,000, which was deemed to be sufficient to cover against all eventualities under the policy. At the meeting, the homeowners provided Mr Clements with a valuation report of approximately £2,700,000 which the proprietors in the tenement had obtained with a considerably lower premium and asked the factors to obtain an insurance quotation based on that valuation. Rather than obtain a quotation, the factors put a policy in place for the homeowners' valuation . The homeowners complained that the factors had failed to follow the instructions of the proprietors in the tenement in that regard. This complaint post-dated the date of the application and the Committee is not able to make a specific finding in relation to it.

26. In response to questions from Mr Ritchie, the homeowners said that their intention in providing the lower valuation to Mr Clements at the meeting on 25 June 2015 had been to enable the factors to obtain a comparable quotation and it was not their intention for the existing insurance to be cancelled. They had not instructed the cancellation of the insurance but had sought a comparative quote.

27. The homeowners further complained that the factors: had not provided any information as to the basis on which their share of the premium had been calculated; and had not provided details of the commission received by them from the insurers in a clear and transparent manner.

Factors' Responses:

28. Mr Ritchie reminded the Committee that the homeowners' application was dated 14 April 2015 and therefore could not relate to any actions of the factors after that date.

Delay in handling claim and under section 5.4 of the Code of Conduct

29. Mr Fulton advised that following the report to them of theft of lead from a valley gutter: temporary repairs were carried out; the required quotation had been obtained; and a claim had been intimated to CLUK, the insurers' Loss Adjusters. Mr Fulton explained that CLUK were employed by the insurance company to investigate and adjust claims. CLUK advised that there was evidence that parts of the building were underinsured and therefore the claim would be subject to

average applying to some of the properties. The factors had written to owners on 4 September 2014 (factors' production 13) to explain the situation and ask for the shortfall from the affected proprietors to allow the works to proceed.

30. Mr Fulton acknowledged that there had undoubtedly been delays in handling the claim but that these had not been the fault of the factors but had been entirely the fault of CLUK, which had been acknowledged by them as per their email dated 16 December 2015 (factor's production 40). This had not been an isolated incident and as a result there had been reorganisation and CLUK were no longer dealt with by the factors.

31. Mr Fulton was satisfied that the factors had procedures in terms of under section 5.4 of the Code for handling claims which had been followed. When the claim had been intimated: contractors were instructed to carry out temporary repairs; quotations were obtained; matters were passed to Loss Adjusters; and matters were finalised. He said that the factors had fulfilled their requirements under that procedure.

32. In response to questions from the homeowners as to why no information had been provided to the homeowners between March and September 2014, despite the terms of their Service Level Agreement, Mr Fulton said that the factors had spoken to some of the owners (at least one) about specific problems and was satisfied that they had provided full information when asked. In particular Mr Clements spoke to at least the people on the top floor who were directly affected by the water ingress.

Provision of Insurance Information: Under-insurance and type of policy

33. In respect of the complaint that the property had been under-insured, Mr Fulton explained that historically, during the 1970s and 1980s, lenders and building societies had required that clients insured properties through them notwithstanding the terms of their titles. In such a situation the sum insured on the common policy would be kept low and clients maintained insurance for their own property through a lender or different insurer, which included a low element for the common parts. As times changed the factors had written to affected owners to advise them of any element of under-insurance on the common policy

and asked for instructions. He referred to a letter from the factors dated 19 February 2014 (factors' production 11) as an example of the information which had been provided.

34. Mr Fulton advised that he was not aware of any factor of having insured only the common parts of the building. When the issue of under-insurance of the property became apparent the factors carried out a review of the title conditions which showed that there should have been a "block" buildings policy for the standard insured perils and for the full re-instatement value of the building.

35. Mr Fulton described the difference between a 'block' policy where a premium for a block is divided amongst the flats on the basis of shares for common charges and a "common" policy where each flat is individually insured with its own premium. The review showed that the homeowners' property was not only under-insured but the insurance for the tenement had not been insured in accordance with the titles.

36. Mr Fulton advised that as a result of the review, the factors decided to put into effect a new policy as proposed in the email from Mr Clements on 12 June 2015 (factor's production 25) in advance of the meeting on 25 June 2015, which would be in accordance with the titles. That email proposed a sum assured of £3,577,000 as suggested by the Internal Building Surveying Department. It advised that the homeowners could either: ask the factors to arrange a formal assessment, for which there would be a charge; or obtain their own valuation which, if passed to the factors could enable an adjustment to the sum insured. The proprietors of the tenement obtained their own valuation in the sum of £2,680,000 and provided this to Mr Clements at the meeting in June 2015 and a policy was arranged for this amount. Mr Fulton said that one reason that they put the policy into effect immediately for that sum was to avoid the factors from exposure to a claim for negligence if the correct insurance was not in place.

37. Ms Glendinning, the factors' insurance manager referred to the letter dated 13 May 2015 (factors' production 44) which she had sent to the homeowners regarding the renewal of insurance for the year 2015/16. She explained that the £10,000 excess had been applied because the repairs resulting from the theft of lead had not been completed in full and also because the general condition of the

roof was poor and defective areas of the roof had been identified. She explained that the excess would only apply to claims where damage had occurred to the defective areas. She said that: if there had been a claim where, for example the roof had been destroyed by fire, it would be met in full; but if a storm caused damage to part of the roof which was defective then the insurers would apply the £10,000 excess and could make a contribution to the cost. Neither she nor Mr Clements were able to explain or identify what areas of the roof had been identified as defective.

38. Ms Glendinning explained that she had enclosed a copy of the letter from their brokers, JLT, with the renewal papers to explain the basis on which the renewal had been made. She advised that she had been involved in the review of insurances and confirmed that there should have been a block policy in place according to the title deeds for this property. She confirmed that the figure of £1,474,404 referred to in the letter from JLT was the total value for the individual properties.

39. Ms Glendinning further referred to the insurance certificates lodged by the factors (factors' productions 41, 42 and 43) and explained that the shares of premium had been calculated according to the titles in the 2015/16 certificate but in the previous years, each flat had its own premium. Neither she nor the other witnesses could demonstrate any information as having been given about the calculation of the shares. The factoring statement lodged by the homeowners was dated 6 May 2015 and referred to the situation before the change of policy and therefore each flat was responsible for its own premium, effectively.

40. Ms Glendinning said that she had felt that the JLT letter had generally been well received as she had received no specific queries or complaints about it.

£10,000 excess

41. Mr Fulton advised that the £10,000 excess had initially been applied to the policy by the insurers as a result of the delay in completing the repairs following the theft. Initially the delay had been through the inaction of CLUK, but latterly the work could not be progressed as the shortfall in funding due to the under-insurance problem had not been paid. Subsequently the reason for the excess

was due to the general condition of the roof in particular, which had come to light as a result of a survey instructed by insurers. He did accept that there had been confusion as to the reason for this imposition since there had been two issues: the delay in having the repairs following on the theft of lead completed; and the condition of the roof.

42. Mr Fulton conceded that the actual reasons for the additional excess had not been made clear by the factors in correspondence. He suggested that in December 2014 the reason might have been the delays to having the necessary repairs, following the theft of lead carried out but that by May 2015 the reason had also been due to the general condition of the roof following the survey.

43. In relation to the necessary repairs which were still required in terms of the insurers' survey, Mr Clements advised that following receipt of the estimate/report from Alexander Anderson Ltd which had been instructed and paid for by the insurers, in August 2015 the factors sought estimates from other contractors. They did not issue a specification of the work and the other contractors were left to examine the roof and estimate for what they found to be necessary. This resulted in different requirements being identified by the different contractors. The factors were therefore unable to carry out a comparison to enable them to make a recommendation.

44. Mr Clements referred his concerns about his inability to make comparisons to Mr Fulton and a Ms Bauld in senior management and did not issue any documentation to the homeowners, apart from the Alexander Anderson Ltd estimate/report. Mr Clements explained that the factors had only received the Alexander Anderson Ltd estimate with some photographs which had been instructed by the insurers. Apart from raising his concerns with senior management, Mr Clements did nothing. He did not attempt to clarify the estimates with the contractors and he did not go back to the insurers to ask for the basis upon which they had obtained the Alexander Anderson Ltd estimate/report.

45. Mr Fulton advised that he had discussed the quotes in the office and it had been agreed that clarification was needed to allow comparisons to be made. There were no comparable estimates available and Mr Fulton conceded: that the factors

had done nothing since the receipt of the two further estimates; and that no progress had been made in having the necessary repairs carried out to the roof to allow the £10,000 excess to be removed.

Committee's Findings and reasons:

46. The Committee was mindful of Mr Ritchie's comment regarding the date of the application. However the Committee noted that: 25 - 33; 36 - 40; 43; 49 & 50 of the productions lodged by him on behalf of the factors all post-dated the application and referred to matters occurring after its date. In addition the witnesses who provided oral evidence on behalf of the factors referred in detail to these events. Accordingly while the Committee has made no findings in respect of the actions or inactions of the factors after the date of the application; it was entitled to have regard to the evidence presented by or on behalf of the factors in respect of such matters.

Delay in handling insurance claim:

47. The Committee found that for a period of six months to have passed without the factors taking any action on their own initiative to either chase CLUK or to keep homeowners informed – even that nothing was happening – was a failure on their part to act in accordance with the Code of Conduct. Section 5.4 of the Code requires the factors to liaise with the insurers to check that claims are being dealt with promptly and correctly.

48. The Committee accepted that the factors had a procedure for handling insurance claims but, having followed that procedure at the outset, they then failed to liaise with the insurers or the Loss Adjusters and failed to keep the homeowners advised of the progress, or the reasons for the lack of progress.

49. Mr Fulton acknowledged that the delay had been unacceptable but laid the blame for this entirely at the hands of CLUK, the Loss Adjusters. As was evident from the email of 16 December 2015 from them (No 40 of the factors' productions) CLUK said that they had experienced difficulty in making and maintaining contact with contractors to obtain the necessary quotes or details to allow the work to proceed.

50. The delay had resulted in the imposition by the insurance company of a £10,000 excess, which, for the reasons given in relation to the factors' failure to take any action on the different estimates obtained, remained in place as at the date of the hearing. That was despite the note on the 2015/16 Insurance Certificate stating that the work was to be completed by September 2015.

51. Mr Fulton and Ms Glendinning appeared to be of the view that it was for the homeowners to chase them up or ask them for information, in which event it would be provided. The purpose behind the legislation and the Code of Conduct was to avoid that sort of situation. Mr Fulton was satisfied that the factors had answered any questions that they were asked and did not see any reason to proactively keep the owners informed, notwithstanding the requirement of section 5.5 of the Code of Conduct to keep homeowners informed of the progress of their claim. The Committee found that the factors had failed to provide relevant information to the homeowners in relation to the progress of the insurance claim, contrary to the provisions of the Code of Conduct.

52. Section 5.5 was not a specific head of complaint by the homeowners in their application and accordingly the Committee is unable to make a formal finding in terms of a PFEO, but it does find this to have been a failure on the part of the factors to comply with section 5.5 of the Code.

Unclear and unreliable communications regarding the nature and extent of the insurance policy (sections 2.1 and 5.2):

Under-insurance

53. In their letter of 4 September 2014 (homeowners' production 2) the factors advised the homeowners that CLUK had undertaken an evaluation of the homeowners' property and advised that it was inadequately covered for their share of the repair costs.

54. The homeowners questioned the evaluation. Their letter of 22 September 2014 (homeowners' production 3) highlighted what turned out to be a major area of misunderstanding between the factors and the homeowners. Since the time they

had purchased the property in 2003 the homeowners had understood that the insurance policy which had been put in place by the factors covered only the common parts of the tenement and that they had a separate insurance policy in respect of what they understood was their own flat.

55. The Committee accepted the homeowners' position in this regard. All correspondence from the homeowners to the factors had made it clear that they had consistently understood that it was only the common parts of the building which were insured through the factors. Similarly, all correspondence received by the homeowners from the factors relating to insurance referred to a "common" policy.

56. Mr Fulton was clear that the factors and factors in general, did not insure simply the common parts. Mr Fulton may well have known that in his capacity and with his experience in both property management and insurance. However the homeowners were not so experienced and could reasonably expect to be guided and advised by professionals appointed by the proprietors of the tenement in such matters.

57. The issue of the type of insurance was confusing even when the factors attempted explanations of the situation at the hearing. As stated, the correspondence throughout referred to a "common" policy and it would appear that what the factors referred to as such a policy had been in place since at least the time at which the homeowners had purchased their flat. This was in the face of the fact that according to the factors the title deeds required that it should be what the factors described as a "block" policy. Indeed Ms Glendinning's email to the homeowners of 18 March 2015 (factors-production 48) referred to the requirement for "a common policy which would include all common areas and private dwellings".

58. The provisions regarding insurance of the tenement are contained in Burden (First) in the Disposition by Samuel James MacKinnon and others in favour of Peter Hatton Spence recorded GRS (Glasgow) 10 April 1964. That provides that the whole of the tenement 13, 14 and 15 Walmer Crescent should be insured by all the proprietors and that the premium should be divided amongst them in accordance with the shares of the charges for maintenance of the common parts.

However the burden also provides that the sum insured should be "... Such a sum as may be fixed by a majority of the proprietors of the houses in said tenement (each proprietor having for this purpose... one vote..." . Accordingly the Committee finds that the factors were wrong to by suggest to the proprietors that it was their responsibility to fix the sum insured. That was a matter for the homeowners together with the other proprietors in the tenement which, on the basis that the factors accepted responsibility for making the insurance provisions, was a matter which fell to the factors and not the individual homeowners.

59. The factors' acknowledged that it was for them to ensure that the insurance in place was as provided for in title deeds. It follows that the fact that the policy which was in place over the tenement was the wrong type of policy could only have been the fault of the factors.

60. The Committee has to recognise that during the 1970/80s, the situation became complicated by the requirement of lenders that insurance be effected through them rather than in accordance with the titles. However that situation no longer applies and has not been the case for a number of years. It was incumbent on the factors to ensure that insurance provisions were in accordance the title deeds. They accepted and acknowledged that position by undertaking a review of the insurance provisions for the property.

61. Mr Fulton and Ms Glendinning advised that, following the review of the property insurance and the titles they had taken steps by writing to the homeowners and other proprietors by letter dated 19 February 2014 (factors' production 11) to advise that properties could be under-insured. However the homeowners considered that the letter took the form of a circular and did not see any reason why it should apply to them.

62. The Committee accepts that the homeowners were advised each year in the Insurance Certificates (factors' productions 41 – 43) of the Building Sum Insured. In line with their understanding that this policy related to their share of the common parts they pointed out in their letter of 11 December 2014 (homeowners' production 11) that they calculated that the insurance value of £39,201 would equate to a total insurance value of the common areas of around £312,000 which they considered to be plausible.

63. The Committee agreed with the homeowners' view of the letter of 19 February 2014. The letter did not refer to the review which had been carried out by the factors, or the reasons for that review. It stated that it was the homeowners' responsibility to ensure that the buildings sum insured represented the full reinstatement costs of the private dwelling. As stated above that was not correct since it was a matter for the majority of owners to determine the insurance value for the whole tenement. The factors were therefore perpetuating the misunderstanding and the application of the wrong type of policy as described by them by not clearly explaining the background and consequences of the situation that had come about in the past.

64. As a separate matter, the issue of under-insurance was drawn to the homeowners' attention in the factors' letter of 4 September 2014 (homeowners' production 2). The homeowners complained that the factors had not advised them of this at the time the claim had been intimated in March 2014, which would have allowed the confusion to have been cleared up earlier and allowed the repair works to have proceeded sooner. The factors maintained in evidence that they had drawn the specific issue of under-insurance to the homeowners' attention at the time when they had become aware of it which was not until CLUK, the Loss Adjusters, reverted to them in August 2014. However the Committee finds that the email from the Loss Adjusters dated 16 December 2015 (factors' production 40) to the homeowners states: "...At the time of intimation, we advised the Property Manager that we were unable to attend and undertake any emergency/temporary works on this occasion *as not all properties within the development were adequately insured..*" [emphasis added]. The Loss Adjusters had therefore told the factors of the under-insurance situation in May 2014 and the factors did not pass that information on to the homeowners for almost six months.

65. The Committee finds that the factors failed to address the issue of underinsurance adequately or timeously and also and separately provided misleading, inaccurate and incorrect information regarding both the under-insurance issue as well as the insurance arrangements for the tenement, which is regarded as a breach of the Code of Conduct section 2.1.

Additional Excess

66. Mr Fulton, on behalf of the factors acknowledged that the reasons for the imposition of the additional excess were unclear from the correspondence and that different reasons had been given at different times. However the reasons do appear to have changed over time but the factors did not take any steps to clarify these reasons with either the Loss Adjusters or the insurers and have passed on their understanding of the reasons which was not always accurate.

67. In regard to the insurers' requirements for repairs to the general condition of the roof, the information provided by the factors to the homeowners was far from clear and to a large extent contributed to further confusion. The evidence did not make it specifically clear as to when the factors first became aware that the insurers effectively imposed a condition on the policy that further repairs to the roof be completed. In any event the Alexander Anderson Ltd report/estimate was dated 31 July 2015. That 'report' contained no specification of the work required and, rather than attempting to clarify the actual work identified, the factors sought further estimates from contractors without providing a specification. As a result the estimates received were based on the individual contractors' observations and differed to the extent that comparisons could not be made and recommendations could not be given as to the acceptance of any of the estimates.

68. The Committee notes that amongst the documents lodged by the factors was correspondence from 2012 and a survey report prepared by Iain McPhie of the factors' survey department dated 14 December 2012 which concluded that "overall the roof of the property is in fair condition, however, defects were noted during our inspection". It may have been useful for some of the information from that report to have been used in preparing specification for work to the roof, or, at least for the factors to have referred the insurers and Loss Adjusters to the conclusions of that report.

69. The Committee accordingly finds that the factors provided inaccurate, inadequate and incorrect information regarding the additional excess which added to the homeowners' confusion and frustration with regard to the whole matter of insurance cover.

70. In any event, the factors conceded at the hearing that they had not progressed the matter of the additional repairs. This was also despite the time limit which had been set by the insurers of which they were fully aware.

Insurance Renewal

71. The related matter of the insurance renewal in May 2015 also resulted in confusion and complication. The renewal documentation issued by the factors on 13 May 2015 (factors' production 44) did not provide any explanation for the enclosures. The accompanying letter from JLT: referred to the insurers as having undertaken a review of the "renewal claims versus premium paid"; and advised that the sum insured would be £1,474,404. None of this made any sense to either the homeowners or, they reported, the co-proprietors and no explanation was provided. Ms Glendinning said that she thought the letter from the brokers had been well received as nobody had come back to her to question its terms. The Committee considers that this was another example of the factors waiting for homeowners to come to them to ask for information rather than providing it.

72. The 13 May 2015 letter from the factors (factors' production 44) contained a paragraph headed "Your certificate will also detail increased excesses/excluded cover imposed by insurers" which was said to relate to developments with "adverse claims experience". Attached to the letter from JLT was what was said to be a breakdown of claims paid over the past 5 years. The breakdown disclosed that the claims history in respect of the tenement consisted of the claim in respect of the theft of lead and nothing else. The homeowners advised at the hearing that the repairs had been carried out in April 2015, before the issue of this letter and yet the excess was said to remain in place. The Committee cannot see that the claims experience in respect of the tenement could be described as "adverse".

73. No clear explanation was therefore given for the additional excess remaining in place on the policy. In addition the factors' surveyor had prepared a condition report on the roof in December 2012, which concluded that and did not seek to challenge the assertions regarding the condition of the roof

74. These events occurred after the date of the application and therefore the Committee makes no formal finding regarding the factors' failures oi this respect.

75. Following the hearing the Committee considered that it might be appropriate to give the parties an opportunity to be heard on the issues which had post-dated the application to draw all matters to a conclusion without the homeowners being required to submit a fresh application if they so wished and accordingly issued the Direction dated 22 January 2016. The factors objected to such a procedure and the Committee has therefore restricted its findings to those matters which were raised in the original application. However as is made clear herein, while no formal findings have been made about those matters, the Committee has taken into account the evidence led by the factors.

76. **Code of Conduct**

Paragraph 2.1: *You must not provide information which is misleading or false.*

In summary, the homeowners argued that the communications from the factors since they had bought their flat had not been sufficient to explain to them that their understanding that they required to insure their own flat while the factors arranged insurance for the common parts of the property. In the event, the sum specified in the homeowners' policy was consistent with what they considered would be the value of the share of the common parts attributable to their flat. As a consequence of this misunderstanding they had insured their flat effectively for 120% of its value.In addition the information provided by the factors about the £10,000 excess and the reasons for it had not been explained effectively and were misleading.

On behalf of the factors, Mr Ritchie argued that nothing in the documentation submitted by the homeowners or in evidence by them demonstrated that the factors had provided anything since the coming into force of the Code of Conduct which gave a false impression of the nature of the policy.
He acknowledged that the factors had under-insured the property and that the policy had not been in accordance with the Deed of Conditions but the factors had not suggested anything else since the Code of Conduct came into force.

Mr Ritchie conceded on behalf of the factors that the communications about the £10,000 excess had been misleading and open to interpretation, for which he apologized on behalf of the factors. They acknowledged this and had been able to see where the confusion had arisen and had taken steps to ensure that there would be no repetition of that.

The Committee did not accept the factors' arguments that to make a decision regarding the nature of the policy, it would have to look for specific misleading information since the Code of Conduct commenced. The transitional provisions of Regulation 28(2) enabled it to take into account any circumstances before 1 October 2012 in determining whether there has been a continuing failure to act after that date. The misunderstanding which had arisen when the homeowners purchased the property in 2003 had persisted beyond 1 October 2012 and it was only as a result of the circumstances surrounding the theft of lead and the application to HOHP that had clarified the situation. In addition, the letter dated 4 September 2014 from the factors to the homeowners (number 2 of homeowners' productions) did not fully explain the basis upon which the share of the excess attributable to the homeowners flat had been calculated which had not consequently clarified the nature of the insurance. In relation to the information about the £10,000 excess, the Committee noted the factors' concession that this had been misleading.

Accordingly the Committee found that the factors had failed to to comply with paragraph 2.1 of the Code of Conduct.

Paragraph 5.2: *You must provide each homeowner with clear information showing the basis upon which the sha is a re of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover, and the terms of the policy…..*

Mr Ritchie, on behalf of of the factors, conceded that the documents submitted to the applicant and to the Committee do not provide the basis on which the insurance premium was calculated. It was accepted that this information should have been provided in the June 2015 invoice which did not specify the full premium or the share (12.5%) applicable to the homeowners' property. He explained that it had been manually produced and did not form part of the factors normal run of invoices.

Accordingly the Committee found that factor was in breach of paragraph 5.2 of the Code of Conduct.

Paragraph 5.3: *you must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment of benefits you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider…*

On behalf of the factors, Mr Ritchie submitted that these details were provided by the factors routinely on the annual Certificate of Buildings Insurance. He suggested that the homeowners were in effect complaining that the information was not provided in the form in which they wanted it, but that it was provided in accordance with the Code of conduct.

The Committee accepted that the factors were not in breach of paragraph 5.3 of the Code of Conduct.

Paragraph 5.4: *If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly.*

In summary, the homeowners submitted that the factors appeared to agree that there had been an unreasonable delay but they denied any responsibility for the delay and the blamed the insurers and/or loss adjusters entirely. The factors had not badgered or pursued the loss adjusters for progress and had not properly represented the homeowners in ensuring that the claim was being dealt with promptly.On behalf of of the factors, Mr Ritchie submitted that there was a procedure in place which complied with the Code of Conduct. It was accepted that the procedures had fallen down due to delays on the part of the loss adjusters.

The Committee found that although there was an appropriate procedure in place, it was inherent in the legislation that any such procedure must be complied with. The factors had failed to "… liaise with the insurer to check that claims are dealt with promptly and correctly…"

Accordingly the Committee found that the factors were in breach of paragraph 5.4 of the Code of Conduct.

PFEO

77. Having decided that the factors had failed to comply with paragraphs: 2.1; 5.2; and 5.4 of the Code of Conduct for Property Factors, in terms of section 19 of the Act, the Committee decided to make a Property Factor Enforcement Order (PFEO) in terms of the attached Notice of Proposed PFEO.

78. In terms of section 19(2) of the Act, before making a PFEO, the Committee must give notice of their proposal to the factor and allow the parties to make representations to it.

Proposed PFEO

79. The Committee is restricted by the terms of the application and the provisions of the Act in the remedies available to it.

80. The Committee notes the homeowners' desired outcomes as outlined at various stages of the process, all of which the Committee was satisfied had been notified to the factors timeously.

81. The Committee also found itself to be constrained by the fact that the factors said at the hearing that they had notified the homeowners of their intention to resign their agency from the middle of January 2016, although they had agreed to extend the period of notice of that intention until mid-February.

82. The Committee considered that a sum of £1000 should be paid by the factors to the homeowners by way of a) compensation for the time, effort and inconvenience of attempting to resolve the ongoing difficulties and misunderstandings arising from the correspondence; and b) in recognition that additional costs were incurred by the homeowners as a result of the confusion in relation to the nature of the insurance policy since the coming into force of the Act.

Right of Appeal:

83. The parties' attention is drawn to the terms of Section 22 of the Act regarding the right to appeal and the time limit for doing so. It provides:

"(1) An appeal on a point of law only may be made by summary application to the Sheriff against the decision of the President of the Homeowner Housing Panel or Homeowner Housing Committee.

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

More information regarding appeals can be found in the information guide produced by the Homeowner Housing Panel. This can be found on the Panel's website.

28-Mar-16

X

CHAIRMAN

Signed by: DAVID MICHAEL PRESTON