Decision of the Homeowner Housing Committee issued under Section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

HOHP Ref: HOHP PF/13/0270

The Property: 23 Bowbutts Brae, Strachan, Banchory AB31 6PG

The Parties: –

MR MARTIN WYLIE, residing at 23 Bowbutts Brae, Strachan, Banchory AB31 6PG ("the Homeowner")
and
PEVEREL SCOTLAND LIMITED, 183 St Vincent Street, Glasgow G2 5QD ("the Factor")

Committee Members:

David Preston (Chairman); Susan Shone (Housing Member) and Douglas McIntyre (Housing Member) ("the Committee")

Decision:
The Committee found that the Factor had failed to carry out the property factor's duties.

Background of Application:

1. By application dated 6 September 2013 the Homeowner applied to the Homeowner Housing Panel ("the Panel") to determine whether the Factor had failed to comply with the duties imposed by the Act.

2. The Homeowner complained that the Factor had failed to comply with the Code of Conduct ("the Code") in a number of respects and had failed to carry out the Property Factor's duties.

3. By letter dated 17 December 2013 the President of the Panel intimated her decision to refer the application to the Committee.

4. After an initial consideration of the application the Committee issued a Direction on 31 January 2014 requiring: the factor to lodge a full copy of the Land Certificate pertaining to the property; and both parties to lodge an inventory of all documents upon which they wished to rely together with an indexed copy of those documents, with the offices of HOHP.

5. On 14 February 2014 the Factor lodged an indexed bundle of documents together with a full copy of the Land Certificate. Unfortunately due to an administrative oversight on the part of the administration of HOHP, the bundle was not copied to the Homeowner or the Committee until 28 May 2014.

6. Following a series of correspondence between the Committee and the Homeowner regarding the format in which documentation was required, the Committee issued a further Direction on 15 April 2014, which is referred to for its terms. In consequence of the further Direction on 10 May 2014 the Homeowner lodged a bundle of documents and photographs. However the Committee found great difficulty in accessing relevant information from the documents. Despite the terms of the Direction calling for the production of "documents", the Inventory and productions lodged by the Homeowner on 10 May 2014 comprised some copy correspondence but also included the Homeowner's précis of some items of correspondence and emails which he had annotated. There were also parts of documents and correspondence which had been cut and pasted into a single document. The Committee had regard to these productions but without having sight of complete, unedited documents, the Committee had difficulty in attaching significant weight to such extracts.

Hearing:

7. A hearing took place at the Credo Centre, 14-20, John Street, Aberdeen on 22 July 2014.

8. Present at the hearing were: the Homeowner, who represented himself; Mr Brian Douglas, the Factor's Business Manager for Scotland and Mr Frazer Mackay, Estate Manager representing the Factor.

9. The Committee had been provided with: the application and accompanying papers and photographs; and copies of the respective bundles of documents and photographs lodged by both parties in consequence of the Directions. The Committee had advised the parties in terms of the Direction dated 15 April 2014 that in view of the volume of documentation it would not study all the productions and that it would look at those specific parts to which it was directed by the parties.

10. At the outset the Chairman introduced the Committee and outlined the procedure which the Committee intended to follow. He advised that the Committee would only consider the information relevant to the application insofar as it related to the actions of the Factor. It was not in a position to judge either the progress of work carried out to the development of which the Property formed part, or the standard of work. It would consider the photographs in general terms as demonstrating the situation relative to common areas of the development for which the Factor had management responsibility. The Homeowner suggested that he had been advised by the HOHP administration to reduce the number of productions on which he wished to rely. The Committee was satisfied that he had not been so advised. Reference is made to paragraph 15 of the Committee's Direction dated 15 April 2014.

11. In terms of the transitional provisions at Regulation 28 of the Homeowners Housing Panel (Applications and Decisions) (Scotland) Act, the Panel was not able to make a determination of whether there was a failure before 1 October 2012 to carry out the factor's duties, although it may take into account any circumstances occurring before that date in determining whether there had been a continuing failure to act after that date.

12. Neither party had any preliminary points to raise.

Findings in Fact:

13. The Factors were registered under the Property Factors (Scotland) Act 2011 on 1 November 2012.

14. In terms of the Manager Burdens contained in the Deed of Conditions relative to the development, Tulloch Homes, as Developers, were appointed to be the Manager of the development. The Manager Burdens were stated in the Deed of Conditions to subsist for a period of five years from the date of registration of the Deed of Conditions (21 May 2008) or for so long as the Developers were proprietors of one Plot or part of the Development. During that period, the Manager was entitled to make any decisions in respect of the matters specified in Clause (7)(4) of the Deed of Conditions and any such decision was binding on each Proprietor. The Manager had the power to assign its appointment to a successor as proprietor of the remainder of the development and to appoint the initial factor for a period of three years.

15. By letter of 8 January 2008, the Factor was appointed by Tulloch Homes for the development and by letter dated 9 April 2013; Tulloch Homes confirmed the appointment of the Factor as "Property Manager" following their quotation of March 2010, for a period of three years following completion of the last property. Their responsibility was to oversee the maintenance of the communal areas within the development comprising landscaped areas and a playpark.

16. On 29 December 2009 the Homeowner and his wife became the Registered Proprietors of the Property. They had not been provided with either a Welcome Pack, until they requested same following a meeting of the Residents' Association on 2 March 2011, or a Statement of Service by the Factor until 1 June 2013. As the Act did not come into force until 1 October 2012, the Factor had been under no obligation to issue either a Welcome Pack or a Statement of service at the time the Homeowner moved into the Property. The Statement of Service had been provided within one year of the Factor's registration as required by the Code of Conduct.

17. At that time (December 2009), the development had been partially completed - referred to as Phase 1 - which incorporated landscaped areas. Phase 2 of the development had not been completed and the communal area relative to it had not been passed to the management of the Factor. The owners were not satisfied with the level of maintenance of the areas under the management of the Factor and were concerned about the condition of the areas yet to be passed over.

18. During a series of emails and correspondence between the Factor and Mr Sandy Fettes in February 2011 the Factor was advised by letter dated 9 February 2011 (number 5 of the Factor's bundle) that a Residents' Association had been formed. A meeting of Proprietors and the Factor was held on 2 March 2011 to discuss a number

of concerns the residents had about the management of the development. Thereafter a Residents Association was formed and the Homeowner notified the Factor of his appointment as Chairperson on 22 June 2011 and the Factor subsequently corresponded with him in that capacity. At that meeting, in addition to the issues pertaining to the communal areas in Phase 1, the owners' concerns about Phase 2 were raised. They had been attempting for some time, without any success, to resolve their concerns with the Developers. The Factor, who had no responsibility for Phase 2, nonetheless offered their services to attempt to make progress with the Developer. The owners were very grateful for the offer of such assistance, which they accepted.

19. The Homeowner wrote to the Factor on 22 June 2011 (Item 56 of the Homeowner's bundle) in which he instructed the Factor that the Residents' Association did not want the Factor to accept the handover of further areas of communal land from the Developers until they had been landscaped to the same standard as the rest of the development. The Homeowner complained that the Factor should therefore not have accepted the handover of those areas in June 2012.

20. Between the meeting in March 2011 and June 2012 the Factor chased the Developers to fulfil their obligations to bring the areas up to a reasonable standard before responsibility passed to them on behalf of the owners. The Developers considered that the land was in a satisfactory condition. The Factor pointed out that they (the Factor) actually had no responsibility in respect of the additional areas until they had been handed over, but they had agreed to take matter up with the Developers on behalf of the owners. The Homeowner acknowledged that the Factor had taken this on and stated that the owners had been grateful for this as they had been unable to make any progress with the Developers.

21. The Homeowner's resignation as Chairman of the Residents' Association for personal reasons was intimated to the Factor by email from the Homeowner of 30 June 2011. A copy of this was attached to the Homeowner's application to HOHP amongst the other papers and documents submitted at that time. Thereafter the Residents' Association ceased to exist as a formal body.

22. In the absence of a Residents' Association it fell to the Factor to manage the situation on behalf of the owners. The Factor maintained communication with the owners and wrote to them on 25 May 2012 (No 8 of the Factor's bundle). That letter provided cost estimates for the period 1 June 2012 to 31 May 2013 and advised that all communal

areas had been taken over from the Developers. Thereafter the Factor received feedback from some of the owners which demonstrated that there were differing views amongst them as to levels of satisfaction with the situation.

23. In August 2012 the Factor issued a ballot to the owners to assess the wishes of the majority of owners.

24. On 23 September 2012 a letter which bore to be signed by or on behalf of eleven of the eighteen properties in the development (item 54 of the Homeowner's bundle) instructed the Factor to respond to Mr S Brown as "facilitator in this issue". The Factor interpreted this as instruction that Mr Brown was the representative of the owners in the issues raised in the letter, namely the standard of landscaping and ground maintenance.

25. The Homeowner acknowledged and accepted the terms of the letter of 23 September 2012 but maintained that it had intended to restrict Mr Brown's authority to deal specifically and only with a response to that letter.

26. The Committee agreed with the Factor's interpretation of the letter of 23 September 2012. The "issue" referred to in the letter was the quality of the work and ground maintenance. These were matters in respect of which the Homeowner contended Mr Brown had no authority to act. The Committee found that the Factor acted reasonably in corresponding with Mr Brown in that capacity.

27. Following receipt of that letter, the Factor accordingly corresponded with the residents through Mr Brown as instructed. They reasonably believed him to be the representative of the owners.

28. The Homeowner sent an email to the Factor on 19 June 2013 (Item 4 of the Homeowner's bundle) which did not indicate that Mr Brown no longer had authority to represent the owners, but merely stated that there was no resident's group.

29. The Factor continued to consult and correspond with Mr Brown as owners' representative and believed that information was being passed on by him to the owners. The Homeowner contended that Mr Brown did not pass any information to the owners and that the Factor had failed to report to the owners. The Committee was satisfied that the Factor was not responsible for any failure of Mr Brown to pass on information. They reasonably believed he was doing so. The Committee was not

directed to any evidence to show that the owners as a group had withdrawn authority from Mr Brown to represent them in correspondence with the Factor.

30. From the communications between the Factor and Mr Brown it emerged that the owners were not satisfied that the new areas taken over had been in an acceptable condition. The owners were concerned that the cost of bringing the areas up to an acceptable standard would fall to them, which they considered to be the responsibility of the Developers.

31. The Factor reverted to the Developers to have them carry out further works to the additional areas. Reference was made to email correspondence between the Factor and the Developers (Number 11 of the Factor's bundle). That correspondence included an email dated 15 November 2012 from the Developers which indicated that, in addition to them paying for 24 trees to be planted, they agreed in principle to the Factor's contractor stripping back, preparing and seeding the embankment south of plot 8 with grass-seed, subject to having a quotation for the work approved by the Developers. An email of 7 March 2013 from the Factor to the Developers stated that there had been difficulty in finding a contractor to carry out the work to the embankment and therefore requesting the Developers to carry out the works themselves. A subsequent email of 16 April from the Factor to the Developer stated that a quotation for the embankment works had been obtained, which was approved by the Developers by email dated 29 April 2013.

32. In evidence it emerged that between the emails of 7 March and 16 April 2013, the Factor had agreed to a lesser operation being carried out than had been intended, which did not include the stripping back, preparing and seeding. The Developers considered that the area had been brought to an acceptable standard and in any event had thereafter refused to carry out any further work or give the matter consideration until a separate issue which had been raised by the Homeowner with the planning authority in that regard had been resolved. Details of that separate issue were not provided to the Committee and it had no concern with it. It had not been resolved by the time of the hearing and the Committee heard that therefore the Developers had neither given any further indications nor carried out any further work by the date of the hearing.

33. The Factor acknowledged that they had not informed the owners of the reduction in specification of the work to be carried out at the Developers' expense to the embankment.

Specific Complaints:

34. The Homeowner complained that the Factor had failed to comply with Section 1 of the Code in a number of respects:

35. **1.1a:**

The written statement should set out:

A Authority to Act

a) **a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;**
b) **where applicable, statement any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;**

36. The Statement of Services (number 12 of Factor's bundle) states that the Factor's authority to act and level of delegated authority were as per the appointment by the housebuilder or developer. There was no provision for delegated authority in respect of levels of expenditure and therefore Section 1.1a(A)(b) did not apply in this case.

37. The Committee was satisfied that the Factor had complied with section 1.1a(A) of the Code.

38. **B Services Provided**

c) **the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service);**
d) **the types of service and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified.**

39. The Statement of Services (number 12 of Factors bundle) contains a Schedule of Standard Core Management Services and includes sections relative to: Repairs & Maintenance Requests; Emergency Repairs (out with normal business hours); Major Repairs & Extraordinary Work. It also includes a section entitled Additional Management Services Available which provides that additional fees may be due. However the Statement of Services does not specify the basis upon which such additional fees would be calculated.

40. In their written representations, the Factor referred to the meeting on 2 March 2011 at which the owners were advised of the Factor's role and services provided. In evidence they referred to the welcome pack having been issued to the owners attending and further packs being issued to remaining owners shortly after. The Welcome Pack (number 14 of Factor's bundle) contains an explanation of the charges and service charge breakdown as well as an estimate of annual costs and charges. There is no specific reference in the Statement of Services (number 12 of Factor's bundle) to the Welcome Pack, which in any event did not provide necessary information about the method and basis of calculating the charges for additional services. However the Committee was mindful that in the circumstances of this particular case, the matter of charges for additional services being provided had not arisen in fact.

41. The Committee was satisfied that the Factor had complied with section 1.1a (B). However the terms of the Statement of Services had technically failed to comply with Section1.1a.(B).(d).

42. **C Financial and Charging Arrangements**

e) the management fee charge, including any fee structure and also processes for reviewing and increasing or decreasing this fee;

f) what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within a group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;

g) confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4 Debt recovery);

h) any arrangements relating to payments towards a floating fund, confirming the amount, payment repayment (change of ownership or termination of service);

i) any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);

j) how often you will build homeowners and by what method they will receive their bills;

k) how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

43. The Committee considered that the issues raised in this section of the Code had been dealt by it in relation to its findings in Section 1.1a(B) above.

44. F How to End the Arrangement

p) clear information about how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination.

45. The Statement of Services contained a clear statement on How to end the Arrangement.

46. The Committee was therefore satisfied that the Factor had complied with Section 1.1a(F) of the Code.

47. The Committee was satisfied that the Statement of Service (No 12 of the Factor's bundle) adequately covered the necessary requirements of Section 1 of the Code in all respects, except insofar as the matter of provisions regarding any delegated authority under Section 1.1a.(B)(d) was concerned and that it was issued by the Factor in accordance with the Act.

48. The Homeowner complained that the Factor had failed to comply with Section 2 of the Code in a number of respects:

Section 2.1:

You must not provide information which is misleading or false.

49. The Homeowner contended that it was false or misleading for the Factor to indicate in correspondence with the Local Authority and others that they were working in conjunction with a residents' association or committee. The Factor based their position on their communication with Mr Brown in terms of the letter of 23 September 2012. The Committee accepted that the Factor had acted reasonably in their interpretation of the letter. The Homeowner referred to his email of 19 June 2013 stating that there was no residents group. That fact was well known to and acknowledged by the Factor. Indeed the Residents' Association had ceased to exist before the letter of 23 September 2012 instructing them to respond to Mr Brown and nothing had changed since then. The Committee was not directed to any information to the contrary being provided to the Factor who had no reason to believe that Mr Brown was not in communication with the other owners.

50. The Factor stated that Mr Mackay had, in an email of 7 June 2013 from them to Richard Hughes, inadvertently referred to having obtained the approval of a 'committee', when no such committee actually existed. However he maintained that he had been in communication with Mr Brown as the owners' representative.

51. The Committee accepted the Factor's position and found that they had acted reasonably and in good faith and had not provided information which was deliberately false or misleading. For this to be upheld the Committee considered that at least an element of intent to mislead would require to be established.

52. The Committee considered that the Factor had not failed to comply with Section 2.1 of the Code.

53. **Section 2.4:**

You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core services. Exceptions to this are where you can show that you have agreed a level of delegated

authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergency).

54. The Factor maintained that they had a procedure to consult with homeowners and seek written approval before providing work or services which will incur charges or fees in addition to those relating to core services. The written Statement of Services (Number 12 of Factor's bundle) refers to "a level of delegated authority" and to major repairs and extraordinary works requiring discussion or written communication. In evidence the Factor stated that owners were provided with an advance statement and estimate for the core services and an account was rendered at the end of the period detailing all costs and expenses including any additional sums incurred.

55. The Committee was not satisfied that the situation described to them complied with the requirements of the Code in this regard. However the Committee considered that the only potential additional expense that may have arisen in the present case was in relation to the Homeowner's contention that where the responsibility for works which should have been carried out by the Developers was accepted by the Factor, this would become an additional expense for the owners by being passed on. The Homeowner pointed specifically to the issue of trees interfering with telephone cables.

56. The Factor undertook to resolve this issue at their own expense.

57. The Factor had also acknowledged that they had not kept the owners fully informed about the reduction in specification of the work to be carried out at the expense of the Developers.

58. The Committee accordingly found that the Factor had been in breach of Section 2.4 of the Code.

59. Section 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 possible, and to keep homeowners informed

if you require additional time to respond. Your response times should be confirmed in the written statement.

60. The Committee noted a considerable volume of email correspondence from the Homeowner, often involving multiple emails on the same day. The Committee considered that this provision of the Code requires to be exercised within reasonable parameters, particularly in regard to the on-going nature of the issues involved. The Committee did not consider that any correspondence had been ignored by the Factor who had acted reasonably in all the circumstances.

61. With regard to the Homeowner's specific complaints and enquiries about the Developers' residual responsibilities, the Committee was satisfied that the Factor had gone beyond their obligations.

62. The Committee did not uphold the complaint that the Factor had failed to comply with Section 2.5 of the Code.

63. **The Homeowner complained that the Factor had failed to comply with Section 3.3 of the Code.**

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 charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

64. Throughout the application and in his evidence the Homeowner complained that the Factor had failed to produce "auditable" accounts. The Code, however refers to "a detailed financial breakdown" and makes no reference to "auditable accounts".

65. The Committee found that the Factor did provide a financial breakdown annually (Number 15 of Factor's bundle) as well as details of the cost sharing in the Welcome Pack (Number 14 of the Factor's bundle). However the Committee was satisfied that the Factor had failed to provide, in response to a reasonable request by the Homeowner, on 19 June 2013 (number 4 of the Homeowner's bundle), invoices or

other appropriate supporting documentation in respect of the tenders etc specified therein. Further they did not invite him to inspect the originals, or offer to provide copies for a charge or otherwise.

66. The Committee accordingly found that the Factor had failed to comply with Section 3.3 of the Code.

67. **The Homeowner complained that the Factor had failed to comply with Section 5.2 of the Code.**

You must provide each homeowner with clear information showing the basis upon which the share 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. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this.

68. In his email dated 19 June 2013 (Number 4 of the Homeowner's bundle), the Homeowner requested full copies of the insurance policies which had been effected by the Factor. He had been concerned at the level of premium and wanted to check on the extent of the cover. He had been provided with policy schedules (Item 17 of the Factor's bundle).

69. The Homeowner had obtained a copy of one of the policies direct from the insurers and he continued to have concerns at certain elements of insurance included in the cover as well as certain exceptions to cover. He was concerned that the premiums may cover matters which were not required and / or the policies did not cover matters which should be included. The Committee was not concerned with the detail of the policies.

70. The Code provides that the terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case a reasonable charge may be imposed.

71. The Homeowner was not afforded the opportunity of inspecting the policies at the Factor's office. His request was for "copies of all policies". No such copies were provided and no offer with an indication of associated charge was made.

72. The Factor stated that the cover was provided through their insurance brokers to whom details of the required cover had been given. They had accepted the terms of the cover as provided by their broker. They undertook to refer the Homeowner's concerns at the terms of the policy to the brokers. The Homeowner agreed to provide the Factor with a note of his specific concerns with the policies.

73. The Committee was satisfied that the Factor failed to comply with Section 5.2 of the Code.

74. **The Homeowner complained that the Factor had failed to comply with Section 6 of the Code in a number of respects:**

Section 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.

75. The Committee was unable to identify when the contractors had been appointed. This may have been before the implementation of the Act. However the Committee considered that notwithstanding the date on which the contractors had been appointed, this amounted to an on-going issue in respect of which the Homeowner was entitled to be provided with relevant information, subject to the exclusion of any commercially sensitive information.

76. The Committee noted an extract from an email said to have been from the Factor, dated 25 February, without any specification of year, which was within the bundle of papers lodged by the Homeowner along with his application. That extract contained details of prices from two contractors, together with details of the basis on which the appointment had been made. The Committee calculated that this must have been 2012 in view of the reference in the ensuing extract dated 27 February to "a cut in the week commencing 18.03.12". The Homeowner complained that the Factor had not referred the contract to an open tender but had sought tenders from contractors known to them.

77. The Committee accepted the Factor's position in this regard on the basis that as explained by them, the development was familiar to the contractors. The contractors were known to the Factor. The Code does not specify a minimum number of tenders to be obtained. The Factor's Welcome Pack and conditions state that they will not tender in all cases.

78. The Committee did not find that the Factor had failed to comply with Section 6.3 of the Code.

79. **Section 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.

80. The Welcome Pack for Owners (Item 14 of the Factor's bundle) contained a Ground Maintenance Schedule. In addition, a schedule of frequency was in the course of being agreed between the Factor and Mr Brown in January 2014.

81. The Committee had regard to the maintenance plan for 2013 which had been produced by the Homeowner (Item 53 of the Homeowner's bundle) which appeared to amount to a programme of works prepared by the Factor.

82. The Factor stated that they visited the property on a 6/8 week basis during which they inspected the site as well as looking at the condition of the play park. In addition, as required by the insurers, an annual inspection of the play park was carried out with an inspection report being obtained from a health and safety inspector at a cost of £106 per annum as detailed in the service charge breakdown section of the Owners Welcome Pack (Number 14 in the Factor's bundle).

83. The Homeowner questioned the qualifications of the Factor to effectively inspect the play park. The Factor stated that an annual inspection by a health and safety inspector was sufficient from a health and safety perspective and to satisfy the insurers. The Factor's inspections were merely intended to identify any issues arising between annual inspections.

84. The Committee was satisfied that the qualifications of the Factor to carry out such inspections were irrelevant as formal inspection of the playpark was not part of their duties. They were required to obtain an annual inspection from a Health & Safety inspector, which they did.

85. The Homeowner's email of 19 June 2013 (Item 4 of Homeowner's bundle) requested copies of the annual reports. None had been produced by the Factor and no offer had been made for the Homeowner to inspect same at the Factor's offices. However the Factor was under no obligation in terms of the Code to supply copies of such reports to the Homeowner.

86. Accordingly the Committee found that the Factor had not failed to comply with Section 6.4 of the Code.

87. **Section 6.6:**

If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.

88. The Committee found that the position in relation to this section of the Code was in line with the findings in respect of Section 6.3. The only tendering exercise which was undertaken by the Factors was the appointment of the ground maintenance contractors. The tendering process occurred prior to the date of registration of the Factors and they were under no obligation to adhere to the terms of the Code until that time.

89. Accordingly the Factors had not failed to comply with Section 6.6 of the Code.

90. **Section 6.9**

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

91. The Homeowner had complained over a prolonged period that the maintenance work had not been carried out satisfactorily and the position had not been resolved by the Factor whose contractor was responsible for the shortcomings.

92. The matter of the landscaping, which was the responsibility of the Developers, was a separate matter. However the Homeowner acknowledged that the owners in the development had no success in having the Developers fulfil their obligations in relation to landscaping the Phase 2 area before the handover. They were grateful that the Factor had undertaken to use their offices to pursue the developers. The Factor had made progress in this issue and the Committee was satisfied that they had maintained contact with the owners through Mr Brown. The Factor cannot be responsible for the level of information passed on by him to the other owners.

93. In relation to the specific issue of the standard of the contractor's work in relation to the maintenance of the areas in Phase 1, the Factor's position was that the majority of owners were satisfied on the basis that Mr Brown had confirmed this to them. They were proceeding on the basis of the letter of 23 September 2012 (Item 54 of the Homeowner's bundle), in which respect the Committee found that the Factor acted reasonably. They had responded to correspondence from the Homeowner in a reasonable manner in the light of the situation.

94. The Homeowner produced a large volume of photographs taken at various time and over varying periods of time. He sought to demonstrate through the photographs that the work was unsatisfactory.

95. The Committee did not find the photographs to be particularly helpful in determining the situation. It could not determine at what point in the maintenance schedule these might have been taken. They may have been taken immediately prior to a scheduled cut and have therefore made the situation appear unkempt, which the Homeowner conceded was the case in some instances.

96. The Homeowner contended that the Factor had failed to monitor the performance of the contractors who were adhering to neither the frequency of scheduled maintenance nor the standard.

97. The Committee found that the Factor was entitled to accept the expressions of satisfaction by Mr Brown, who, so far as the Factor was concerned was the

representative appointed by a majority of the owners as confirmed in the letter signed by eleven owners dated 23 September 2012, albeit that there was no formal Resident's Association, which had fallen out of existence on the Homeowner's retirement as Chair.

98. In addition the Committee was satisfied that there were on-going issues in relation to Phase 2 areas in respect of which the Factor was making progress. However that progress had been interrupted by the Developers' position that they would not undertake further work until the outstanding planning dispute had been resolved.

99. The Factor acknowledged that the standard of the areas was less than satisfactory but that they were working to improve the situation.

100. The Committee accordingly found that the Factor had not failed to comply with Section 6.9 of the Code.

101. The Homeowner complained that the Factor had failed to comply with

Section 7.2 of the Code:

When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is informed in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.

102. The Homeowner complained that the Factor had improperly applied their complaints process in that they had referred their complaint to the person about whom the complaint was made.

103. The Written Statement of Services (Number 12 of the Factor's bundle) contains a summary of the complaints procedure and refers to the full procedure on the Factor's website.

104. The Committee found various letters and emails amounting to complaints about the services provided by the Factor. The Committee was not satisfied that the Factor had properly escalated the complaints in accordance with their procedure. In particular

the letter to the Homeowner dated 19 August 2013 which appeared to be the Factor's final decision on the matter contained no information, as required by the Code, of how the homeowner may apply to the homeowners housing panel.

105. Accordingly the Committee found that the Factor had failed to comply with Section 7.2 of the Code.

106. In addition to the alleged breaches of the Code, the Homeowner complained that the Factor had failed to carry out the Property Factor's duties in a number of respects:

107. In considering this aspect of the application the Committee was mindful of Regulation 28 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 which provides that: "subject to paragraph (2), no application may be made for determination of whether there was a failure before 1 October 2012 to carry out the property factor's duties" Paragraph 2 provides that any committee: "may take into account any circumstances occurring before 1 October 2012 in determining whether there has been a continuing failure to act after that date."

108. The Committee also noted that a number of aspects of these complaints mirrored those made under the Code.

109. Factor had failed to maintain the grounds to an adequate standard since taking over the development.

110. The Homeowner produced a large number of photographs showing various parts of the common areas. It was not possible for the Committee to determine the timing of the photographs in relation to the proximity of cutting or maintenance being carried out. No evidence was produced as to that aspect of the photographs. However the photographs did indicate an untidy condition of the undergrowth.

111. Evidence was heard that the Factor visited the development on a regular basis and kept in contact with the contractors. The Committee also heard from the Factor that as far as they were concerned the feedback from Mr Brown, who they reasonably believed to be the representative of the owners in the development, notwithstanding that there was no formal residents' association, was to the effect that there was general satisfaction with the condition of the ground.

112. The Committee also took into account the difficulties faced by the owners and then the Factor in ensuring that the Developers fulfilled their responsibilities in relation to Phase 2. The situation in that regard had come to a halt in view of the Developers' refusal to make any progress pending the resolution of the planning issue which had been raised by the Homeowner.

113. Factor had failed to deal with complaints in accordance with procedures. Factor had allowed the person about whom the complaint had been made to investigate and respond to the complaint.

114. This complaint was a duplication of that raised in respect of the Factor's alleged failure to comply with Section 7.2 of the Code which had already been dealt with.

115. Factor had not issued a development specific pack despite repeated requests to do so.

116. As determined in relation to the alleged failure to comply with Section 1 of the Code, the Committee was satisfied that the Factor had provided the necessary information to the Homeowner within the statutory timescales.

117. Factor had failed to provide sufficient tenders for the work and had refused to supply these despite being requested to do so.

118. This complaint was a duplication of that raised in respect of the Factor's alleged failure to comply with Section 6.6 of the Code which had already been dealt with.

119. Factor accepted grounds on behalf of the owners when the builder had not fully landscaped the grounds against the owners express wishes.

120. The takeover of the additional ground from the Developers occurred before May 2012. The letter from the Factor to the Homeowners dated 25 May 2012 (number 8 of the Factor's bundle) stated that all communal areas of the development had been taken over by that time. The Factor was not subject to the requirements imposed by the Act in respect of factors duties and accordingly the Committee did not make a finding in respect of this complaint.

121. Factor had failed to provide written statements, copies of works claimed to be invoiced for, copies of tenders, copies of development inspection reports, copies of the play park maintenance inspection of reports, copies of insurance policies despite repeated requests for this information with the latest being in 2013.

122. Insofar as this complaint related to the provision of written statements, copies of work claimed to be invoiced, copies of tenders and copies of insurance policies, it was a duplication of that raised in respect of the Factor's alleged failure to comply with Sections 3.3 and 5.2 of the Code which had already been dealt with.

123. In relation to the Factor's alleged failure to provide copies of playpark maintenance inspection reports, the Committee noted that in the extract of the copy of his email of 19 June 2013 (number 4 of the Homeowner's bundle), the Homeowner specifically requested copies of site visit reports detailing the days the site visits occurred and what the findings of said visits were. Although this was not a complete copy of the email as parts of it appeared to have been selected by the Homeowner for inclusion in his documentation the Factor did not challenge the fact that this request had been made. No evidence of a response by the Factor was produced and the Committee found that the Factor had failed to provide the information requested. The Committee considered that the request was a reasonable one and the information should have been provided.

124. Accordingly the Committee found that the Factor had failed in their duty to respond to a reasonable request from the Homeowner to provide copies of inspection reports.

125. Factor failed to ensure the works were completed as per their written programme of works and had failed to ensure the sub-contractor completed the work being paid for.

126. The Committee was satisfied that the Factor had made reasonable enquiries in relation to the owners' satisfaction with the ground maintenance. In the absence of a resident's association after it had disbanded, the Factor had communicated with Mr Brown as the appointed facilitator on behalf of the owners following on the letter of 23 September 2012 (item 54 of Homeowner's bundle). Mr Brown had been nominated by a majority of the owners. While the Homeowner had continued to express his personal dissatisfaction with the situation, the Factor had acted reasonably in accepting instructions from Mr Brown as owners' representative.

127. Factor had systematically failed to investigate the complaints raised concerning the lack of maintenance, denied there was an issue and failed to ensure the sub-contractor fulfilled their obligations.

128. The Committee regarded this complaint as a duplication of the immediately preceding one and accordingly its findings are the same. Any failure by the Factor could only relate to complaints made by the Homeowner in the face of the general satisfaction of the majority of the owners through their communications with Mr Brown. If the Homeowner had obtained support from a majority of Homeowners in relation to his complaints, the Factor would have been required to act on those complaints.

129. Factor had failed to ensure the builder replaced all dead/dying trees on the development.

130. The Committee refers to the findings in respect of the two immediately preceding complaints.

131. Factor failed to ensure that agreed works with the builder were completed in accordance with the agreed timeframe and work scope.

132. The Homeowner acknowledged in the course of the hearing that the owners had experienced great difficulty in ensuring that Tulloch Homes fulfilled their obligations under the planning consent in relation to landscaping. The Factor had "voluntarily" taken matter up on behalf of the owners following the meeting of 2 March 2011, for which the Homeowner and other owners had expressed gratitude. The Factor had continued to pursue Tulloch Homes in this regard, but progress had been halted by Tulloch Homes pending the conclusion of a planning complaint instituted by the Homeowner. The Factor could not therefore be held responsible for a lack of progress thereafter. The Committee was satisfied that the Factor had taken reasonable steps in pursuing Tulloch Homes in regard to their obligations. They had done so in consultation with Mr Brown.

133. Factor had left rubbish on the development since 2010.

134. The Committee found that the Factor could not be held responsible for leaving rubbish on the site. The Factor was responsible for managing the site, not for implementation. Site maintenance was, of necessity, an on-going operation. In any event, any rubbish left by the Developer was part of the ceased negotiations between

the Factor and the Developer. In addition, the substance of this complaint had been dealt with by the Committee as narrated above.

135. Factor had mislead the Aberdeenshire council by stating he was working with the residents association when there was no such association in place.

136. This matter had been dealt with in relation to the complaint under Section 2.1 of the Code, and the Factor acknowledged that Mr Mackay had inadvertently referred to a 'committee' when he should have referred to having been in communication with Mr Brown as representative of the owners.

137. Factor accepted land which they have no right to do as the owners had written to them and expressly stated that land was not to be accepted as it had not been landscaped properly. Factor had ignored the planning consent requirements despite being supplied these from the Homeowner.

138. The Committee considered that this was a repetition of previous complaints in respect of which findings had been made as detailed above.

139. Factor had advised residents, incorrectly that certain areas of the development were never meant to be landscaped, which was not the case.

140. No evidence in support of this complaint was raised by the homeowner and accordingly the Committee made no finding.

141. Factor had systematically overcharged for insurance premiums without providing any support information, despite being requested to do so.

142. This complaint was a duplication of that raised in respect of the Factor's alleged failure to comply with Section 6 of the Code which had already been dealt with.

143. Factor had refused to independently investigate the estate manager and how the development was being managed.

144. This complaint was a duplication of that raised in respect of the Factor's alleged failure to comply with Section 7.2 of the Code which had already been dealt with.

145. Factor had failed to ensure the works were completed as per their written programme of works.

146. This complaint was a duplication previous complaints which have already been dealt with by the Committee.

147. Factor repeatedly refused to supply the requested information, they claim they have supplied information when in fact this is not the case.

148. This complaint was a duplication previous complaints which have already been dealt with by the Committee.

149. Factor had deliberately misled the Homeowner over the insurance premiums which he had been systematically overcharged for. The Factor when requested to supply copies of all insurance policies supplied one cover note only, they did not mention a second policy nor did they supply for requested i.e. the full policy document.

150. This complaint was a duplication previous complaints, which have already been dealt with by the Committee.

151. The Committee found that the Factor had failed to carry out the property factor's duties and to comply with the Code and proposed to make a Property Factor Enforcement Order as detailed in the accompanying Section 19(2)(a) notice.

Appeals:

152. 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..."

David Preston

Signed: **Date:** 20-9-14

Chairperson