Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

HOHP Ref: **HOHP/PF/13/0054**

Re: **Property at 4 Croft Field, Jedward Terrace, Denholm, TD9 8BQ (collectively "the Property")**

The Parties:-

Mr K.D. Nayler, 4 Croft Field, Jedward Terrace, Denholm TD9 8QB ("the Applicant")

Greenhome Property Management, McCafferty House, 99 Firhill Road, Glasgow, G20 7BE ("the Respondent")

Decision by a Committee of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and the Homeowner Housing Panel (Application and Decisions) Regulations 2012 ("the 2012 Regulations")

Committee Members:

Maurice O'Carroll (Chairman); Sara Hesp (Surveyor Member); John Blackwood (Housing Member)

Decision of the Committee

The Respondent has not failed to carry out its duties as property factor.
The Respondent has complied with the Code of Conduct in terms of s 14 of the Act.

The decision is unanimous.

Background

1. By application dated 4 April 2013, the applicant applied to the Homeowner Housing Panel ("HOHP") under s 17 of the 2011 Act alleging a failure on the part of the Factors to carry out their duties under s 17(1) of the Act and a failure to ensure compliance with the Code of Conduct as required by s 14(5) of the Act.

2. The application was referred to a homeowner housing committee on 24 June 2013 and a hearing was set down to take place at Thistle House, 91 Haymarket Terrace, Edinburgh on 30 August 2013. By letter dated 8 July 2013, the Factors intimated an intended challenge to the jurisdiction of the committee to hear the application.

3. Further, by letter dated 7 August 2013, the Factors indicated that an essential witness, Mr Scott, was unavailable to give evidence at the hearing due to a prior commitment at Stirling Sheriff Court on 30 August 2013.

4. Accordingly, the committee issued a Direction at its own instance dated 13 August 2013 which indicated that the hearing set down for 30 August 2013 would proceed on that date in Edinburgh in order to hear the challenges to its jurisdiction only, with no evidence on the merits being led. That hearing proceeded by way of a preliminary hearing only in light of the foregoing.

5. At the hearing on 30 August 2013 the applicant appeared in person and was unrepresented. For the Respondent, Mrs Julie Mitchell, their Managing Director, appeared, accompanied by Liz Anne McHugh, their business support manager and their solicitor, Wendy Quinn. The Committee heard evidence in relation to the preliminary issues which was given by the Applicant and Mrs Mitchell on behalf of the Respondent.

6. By decision dated 12 September 2013, the Committee determined that it had jurisdiction to hear all of the Applicant's complaints in relation to the Respondent's alleged failures to comply with the Factors' duties and failures to comply with the Code in terms of s 14 of the Act.

7. At paragraph 13 of that decision, the Committee noted that the outstanding issues of complaint could be condensed into the following five categories:

   (i) Failure on the part of the Factors to communicate effectively with the Homeowner
   (ii) Communal gardening issues
   (iii) Television issues
   (iv) Financial management and accountability; and
   (v) Alleged failure to comply with various parts of the Code of Conduct pursuant to issues (i)-(iv) above.

8. A further hearing on the substantive merits was convened on 19 December 2013. The considerable gap between the preliminary hearing and the hearing on the merits was rendered necessary because the Applicant spends much of his time at his second home in Tenerife. He also had certain health issues, some of which required or potentially required hospitalisation, which limited his availability for a subsequent hearing. Accordingly, it was not possible to arrange a hearing date suitable for all parties prior to that date.

9. Prior to the hearing, the Committee issued a Direction dated 26 November 2013, requiring both parties to list their intended witnesses and the documents to which they wished to refer at the hearing. Both parties complied with that Direction. In order to ensure the efficient conduct of proceedings, the documents referred to in the Applicant's list were compiled on his behalf into a paginated folder with dividers by the offices of the HOHP for use at the hearing. The Respondent had already

produced such a document at the preliminary hearing on 30 August 2013 and indicated that it did not wish to add to it further prior to the hearing on the merits.

10. In terms of the complaints to be considered at the hearing, the Committee had issued a Direction dated 13 August 2013 requiring the Applicant to summarise his outstanding issues of complaint by reference to correspondence. The Applicant complied with that Direction by a document attached to an email dated 21 August 2013. That document and the list of topics noted above at paragraph 7 provided the basis for the hearing on 19 December 2013, albeit with certain additional documentation by way of elucidation provided by the Applicant which was also considered by the Committee.

11. At the full hearing, the Applicant appeared without representation and again gave evidence on his own behalf. Evidence on behalf of the Respondent was again given by Mrs Mitchell. Also present for the Respondent were Mrs McHugh and Mr Scott, although neither gave evidence nor played any active part in the proceedings. In relation to Mr Scott, the Committee wishes to note its disappointment regarding his lack of active involvement in the reconvened proceedings. It appeared to it that his non-availability at the preliminary hearing on 30 August 2013 need not have prevented any consideration of the merits of the Applicant's complaints at that time after all: As it turned out, he was not in fact an essential witness, despite submissions to the contrary made by the Respondent prior to that date. However, the Committee did not consider that the Applicant was prejudiced by that undoubted failing on the part of the Respondent and it would have been unlikely in the circumstances that all of the evidence from the parties could have been concluded in full on that date, given that there was also a jurisdiction challenge to determine. A further hearing would therefore have been necessary in any event.

12. At the outset of the hearing, the Chairman indicated that both parties would be entitled to present their evidence with the other party thereafter being entitled to ask questions in clarification. The mode of such questioning was expressly stated as not being in the nature of cross examination as that term is understood in more formal legal proceedings such as in the Sheriff Court. It was also explained that the procedure outlined was to be a guide only and that the informal nature of the proceedings meant that they could be modified in the interests of justice and to best achieve the efficient and expeditious conduct of proceedings.

13. The applicant gave evidence in the morning of hearing lasting approximately two hours. He did so without interruption from the Respondent and with some limited questioning in clarification from the Committee. Shortly prior to lunch, Mrs Mitchell was invited to ask questions of the Applicant. Without any criticism being intended of Mrs Mitchell, it quickly became clear that she had difficulty in distinguishing between providing evidence of her own, making submissions for consideration by the Committee, and asking succinct questions which would assist the Committee in assessing the evidence. In addition, the tenor of discussion following questioning very quickly became argumentative and was not conducive to the orderly and efficient

conduct of proceedings. Accordingly, Mrs Mitchell was invited by the Chairman to re-consider her approach and to simply provide her contrary evidence after the lunch interval and thereafter to revisit any desire to ask questions of the Applicant if she felt that any relevant evidence had still been left out of account. She had at that point asked a total of three questions of a generally non-contentious nature in relation to correspondence sent by the Respondent and whether it had been received by the Applicant and communications between the Applicant and his solicitor in early 2012.

14. After the adjournment for lunch, Mrs Mitchell acceded to the suggestion made by the Chairman and simply gave evidence on behalf of the Respondent. It should be noted, however, that in the course of that evidence, she was frequently questioned by all three members of the Committee in robust terms in relation to the issues arising from sections 14 and 17 of the Act. Her evidence lasted approximately one and a half hours. When she had concluded her evidence, Mrs Mitchell confirmed that she was satisfied that all relevant issues had been canvassed and that she did not, after all, wish to revisit her earlier questioning of the Applicant.

15. The Chairman then proceeded to invite the parties to make closing submissions on the evidence heard if they so wished. At that point, the Applicant indicated that in accordance with what was stated at the outset of the hearing, he had 23 points of clarification in respect of which he wished to question Mrs Mitchell. The Chairman pointed out that he had indeed indicated that parties would be allowed to question opposing witnesses at the end of their evidence but that in view of the circumstances outlined above in paragraph 13, Mrs Mitchell had only been permitted to ask three questions and it would not then be fair to allow him such an extensive right of questioning in what were supposed to be informal proceedings.

16. The Chairman was mindful of the overriding objective set out in Regulation 3 of the 2012 Regulations to deal with the proceedings justly. He was also mindful of the fact that the suggestion of posing 23 points of questioning came very close to the end of proceedings in circumstances where convening the parties had been difficult due to the non-availability of the Applicant as set out in paragraph 8 above. Notwithstanding that, and having pointed out the Respondent's earlier limited right of questioning, the Chairman indicated that the Applicant could ask questions which were genuinely by way of clarification and which would provide new evidence to the Committee, rather than re-visiting issues which had already been considered.

17. Following that indication, the Applicant declined to press his desire to ask further questions, indicating that he was content that all of his evidence had been aired. He then proceeded to present a very brief closing statement to the effect that if he had been provided with all of the information now presented to the Committee at the outset, none of the present proceedings would have been necessary. That statement appeared to underscore the impression given to the Committee that the Applicant was satisfied, at least by the stage of the end of the hearing, that all of the relevant evidence had been led. The Respondent declined to make any form of closing statement. The Chairman then thanked the parties for their evidence and formally

closed the hearing. Directly after the close of proceedings, the Committee retired to consider the evidence led and to make its determination.

Findings in fact and reasons for decision

The Committee makes the following findings in fact and reasons for their decision in terms of Regulation 26 of the 2012 Regulations:

1. The Applicant is the heritable proprietor of the Property, having purchased it at the end of 2011. It is a dwelling which forms part of a larger development comprising a total of 21 units produced by Cruden Homes which has yet to be completed and sold off in its entirety. At the time of the hearing, 14 of the 21 units had been completed with all 14 being in private occupation. The unoccupied parts of the development are referred to as Phase II and remain in the sole control of Crudens who are responsible for its maintenance and upkeep at their own expense.

2. The Respondent was appointed as factor to the development in March 2008 by Cruden Homes following a competitive tendering process. They act as First Managers as that term is defined in the Deed of Community Burdens registered on 24 January 2008 by Cruden Homes which form part of the title deeds to the property. Its duties as factor arise from and are contained within that deed.

3. The Deed sets out the general arrangements for the development including the appointment and replacement of the First Manager who is responsible of the maintenance and repair of the common parts of the development. It defines the Property Common Parts as including all landscaped and other areas including the children's play area, common services such as telephone and television and all other cables and transmitters. Clause 3.9 provides that the Manager shall reconcile the Maintenance Account each year and send each proprietor a full breakdown of payment for that year within three months of the year end. Clause 5 makes provision for a Maintenance Account for the common maintenance of the development and Clause 5.8 requires each proprietor forthwith upon purchase of a plot to deposit with the Manager the sum of £200 by way of float. Clause 5.10 provides that the Manager is entitled to sue in its own name for recovery of Property Common Charges which remain unpaid, together with interest thereon and the whole expenses connected therewith. Finally, Clause 5.11 provides that late payments attract an interest charge of 4% over the base rate.

4. As the term suggests, the float is not intended to be set off against routine expenses, but is held in a separate account by the Respondent for contingencies and is returned to proprietors upon sale of their property after the incoming proprietor makes his or her float contribution.

5. All of the proprietors in Phase I of the development were required to pay a one twenty first share of the common maintenance charges. At the time of the

hearing, Cruden Homes paid 7/21 of those charges in respect of the uncompleted development comprising Phase II.

6. The Respondent's fee for factoring services amounted to a total £36 per annum including VAT. There were no other additional or hidden charges: they did not, for example, charge any commission on top of any external services provided to proprietors within the development, these being supplied at cost price only.

7. The Respondent became a registered property factor in terms of the Act on 1 November 2012 and its duty under s 14(5) of the Act to comply with the Code of Conduct arises from that date. The jurisdiction of the Committee to entertain the complaints in relation to factors' duties arises from the date of the commencement of the Act which was 1 October 2012.

8. The Committee found both witnesses who gave evidence to have generally been credible and reliable.

The outstanding complaints

9. **Failure to communicate**: The report of the preliminary hearing dated 12 September 2013 sets out a history of the correspondence between the parties which was supplemented at the full hearing by the Applicant. The findings in fact in relation to this issue, and the others discussed below, should therefore be read in conjunction with the findings in fact made further to the preliminary hearing.

At the full hearing, the Applicant commenced his evidence with a general historic statement of his involvement with the respondent starting when he first took up occupancy in the property at the end of 2011. He again referred to "demands for money" (unpaid factor fees) which were sent to his property in December 2011. Those demands eventually culminated in him receiving a court summons from the Factors on 8 November 2012 suing for unpaid factor's fees of £398.38 which he settled on 18 December 2012. Prior to that, the Applicant had completed his move into the Property in May 2012 and received further demands for factor's fees at that time. During that month, the residents of the development organised a street party to celebrate the Queen's diamond jubilee which provided him with the opportunity of meeting with fellow residents and discussing concerns in relation to common maintenance issues. That meeting prompted him to write a letter to the Respondent on 25 May 2012 which raised gardening issues among others.

The Applicant acknowledged that he received a letter from the Respondent dated 27 June 2012, which although long, extensive and comprehensive, did not answer his queries in relation to gardening issues and TV reception. He wrote again on 5 July and 18 August 2012 but received no reply from the Respondent. In March 2013, he contacted the HOHP and was informed that pursuant to section 17(3) of the Act, he was required to write to the Respondent to notify

them of their specific failures to carry out the property factor's duties prior to the case going forward. He therefore wrote to the Respondent on 10, 11 and 12 May 2013 and gave it 28 days to respond. They did not do so and the case was referred to the Committee in June 2013. In the interim, the Applicant was in fact sent letters by the Respondent in April, May, June and August of 2013 to his Tenerife address. Those items as it turned out were merely repeated unsigned, computer-generated demands for payment of the factor's dues and all bore a 33p stamp which cost the Applicant £10 to recover as the postage was insufficient. The last of those letters was another final demand threatening court action if the sum requested was not paid.

Following the preliminary hearing, the Applicant sent a letter dated 8 November 2013 in which he put forward a proposal for settlement to which he received no response. In summary, the Applicant considered that he was being pursued for payment and being charged for legal proceedings which ought not to have been raised in the first place. It was not so much the money being charged that was the issue, but the persistent failure to talk to him about what in fact are relatively minor issues. He was not he claimed the only resident who had concerns about factoring services. In fact 25 per cent of the residents shared his concerns, but there had been no feedback from the Respondent for over 18 months. Instead, important documents such as letters before action had not been sent via recorded delivery post, but were instead sent to an empty property and thereafter to Tenerife with incorrect postage.

On behalf of the Respondent, Mrs Mitchell gave evidence that she was made aware of the changeover in ownership of the Property at the end of 2011 as a result of a formal notification made on behalf of the previous owner. At that stage, on 15 November 2011, the Respondent had issued a "welcome pack" to the property. The welcome pack consisted of an introductory sheet with ten individual documents behind it containing the Respondent's written statement of service, their debt recovery procedures, a Q&A section, a breakdown of costs, insurance details, together with the name of the broker, and when accounts fell to be paid. A covering letter of that date was provided by the Respondent with their bundle of documents. The terms of the letter sent to the Applicant dated 15 November 2011 bore to include the welcome pack (which was termed an "information brochure pack" in that letter). The Respondent also produced a copy of a letter dated 16 November 2011 addressed to the Applicant at the Property requesting payment of the half yearly invoice of £140 and payment of the float of £200, together with details for payment them.

In addition to the letters referred to, Mrs Mitchell had spoken to Suzanne McWhinnie of Aberdein Considine (the Applicant's solicitor) on 7 January 2012 who she said confirmed to her that the Applicant was aware of the existence of a factor on the development. Miss McWhinnie also indicated that she was happy to communicate with her client in relation to arrangements in relation to factoring.

Accordingly, Mrs Mitchell had been content that the relevant information had been conveyed to the Applicant and was content to leave matters there.

The Respondent heard nothing further from the solicitor or the Applicant until 25 May 2012, when he raised the various issues in relation to the common maintenance of the development referred to above. The principal property manager, Lesley Scott was absent by reason of illness at that time which was why correspondence had been undertaken by Miss McHugh.

When it became apparent from the Applicant's May correspondence that he had not in fact received the welcome pack referred to above and despite the terms of the letter dated 15 November 2011, he was sent another one in June 2012. Incidentally, the Applicant claimed not to have received the welcome pack on that time either. In addition, a letter dated from the Respondent to the Applicant dated 17 July 2012, which was produced, notes that the Applicant does not appear to have been provided with the relevant information regarding factoring services from his solicitor and also bears to enclose a welcome pack to the Applicant. Again, the Applicant claims not to have received the information pack at that time, stating that the first time he saw the Respondent's Written Statement of Service was after the preliminary hearing held on 30 August 2013.

The Respondent informed the residents of a change in gardening contractor further to the concerns raised regarding the services carried out by the previous contractor. Aside from the detailed letter dated 27 June 2012 referred to above, the Respondent also wrote a letter dated 27 July 2012 to the Applicant which detailed the areas of the development which form Phase II and therefore remain unoccupied. In evidence, the Committee heard that all areas behind the Phase II fence line are not constructed or formed and are therefore unmaintained until such time as Cruden Homes complete that part of the development. For that reason, no homeowners are charged for the maintenance of that part of the development: All owners pay a 1/21 share of all areas formed and adopted as completed by Cruden Homes.

In relation to the postage issue, according to Mrs Mitchell, in the full twelve months to December 2012, there was no mention made to the Respondent of a non-UK address. The first time she became aware of the Applicant's Tenerife address was around the time the court action was eventually initiated. Where the Tenerife address was used in correspondence by the Respondent, that was done by way of courtesy since that was the address given by the Applicant in his letters to them. She regretted the fact that incorrect postage had been placed on the letters referred to above which had been an oversight on the part of the Respondent. She also stated that in relation to formal correspondence, no other property manager she was aware of would send items such as a letter before action by recorded delivery post. To require that would be to place too great a burden on what is a small business with a very limited number of employees.

10. **Gardening issues**: By the time of the hearing, the Applicant maintained that the gardening services provided had been inadequate. However, he agreed that there had been "excellent work" provided by the replacement contractors, RTS, since September 2012 and post 1 October 2012 after the commencement of the Act and therefore within the jurisdiction of the HOHP. He confirmed to the Committee that he was happy with the current gardening services. However, he was of the view that certain of the previous bad workmanship had not been rectified and remained so even after the new contractor had taken over. In particular, there was a dead tree which had not been cleared in the 18 months prior to the hearing.

In response, Mrs Mitchell for the Respondent agreed that the present gardening services provided by RTS were good. Photographs taken in September 2013 of the relevant parts of the landscaping were shown to the Committee which supported that assertion. In relation to the dead tree, she explained that for good arboricultural reasons it required to be removed at an appropriate time in the planting season, which is during the winter.

11. **Television issues:** The Applicant informed the Committee that had found that around 50 per cent of TV stations and none of the radio stations had been receivable by him since June or July 2012 and that remained the case. A Sky engineer who had viewed the problem had informed him that it was the distribution system which was at fault which therefore had nothing to do with them as service provider. As the title deeds prohibited him from attaching his own satellite dish to the Property, the distribution system for the development for which the Respondent has responsibility requires to be checked and rectified.

Mrs Mitchell on behalf of the Respondent pointed to a letter from the Applicant dated 25 May 2012 where he had indicated that the communal aerials were an eyesore, that he wanted to see them removed and moreover did not expect to pay for the communal service in relation to them. Upon questioning from the Committee, she accepted that the Respondent had not caused an expert technical inspection to be carried out. However, she pointed out that in terms of the Applicant's own correspondence it was clear that there was no issue with the signal being received, rather it was one concerned with the connection to the Applicant's property, which was not a communal issue. The problem was with the branching off from the signal receiver and therefore one which the Applicant required to resolve himself. That assertion was supported by the fact that no other householder on the development had any problems with satellite TV reception.

12. **Financial management and accountability:** The Applicant maintained the position stated at the preliminary hearing regarding the financial record keeping and accountability of the Respondent. He stated that he had difficulties in understanding which parts of the development Cruden Homes were responsible for and which fell to the homeowners. He also questioned the basis for the

Respondent's appointment as First Manager and how soon it would be before they could be replaced. He considered that for every £100 charged to the homeowners within the development, £36 went to the Respondent and that gardening charges amounted to in excess of £900 in total per annum. He wished to see a pre-estimate of yearly expenditure to be produced by the Respondent, together with an independent audit at the end of the year to ensure that sums collected were expended properly. He referred to his letters of 9 July 2012, 25 May 2012 and 17 September 2013 which set out the points upon which he sought clarification. In an attempt to assist with the Applicant's understanding of the financial obligations incumbent upon the Respondent as factors, the Applicant was taken through the Maintenance and Payment Provisions of the Deed of Conditions referred to above by the Committee.

The Respondent's total charge by way of factors' fees has been noted above, as has the relationship between Phases I and II of the development and the resultant apportionment of maintenance expenses as between the homeowners on the development and Cruden Homes. Mrs Mitchell referred the Committee to the first invoice and statement of account produced to the Applicant dated 16 November 2011. She also referred to a copy statement of account dated 27 April 2012. Such accounts were sent twice a year in accordance with the written statement of services. The sum of £140 is the amount charged for the maintenance account which was intimated to all homeowners. In relation to the call for a pre-estimate budget, she contended that it was not necessary to provide a detailed budget for a new development where expenditure was so low. In relation to accounting for sums expended, she explained that there was a full accounting at the end of the management year each April and pointed to an example contained within the Respondent's bundle of documents of a detailed print-out which provided such information to all homeowners. Finally, she agreed that no constitutional residents' association had been formed to oversee these matters but indicated that one had been offered in April 2013 but had been declined by the residents as being unnecessary.

13. **Code of Conduct**: In relation to alleged failures to adhere to the Code of Conduct, the Applicant was content to rest upon the submission contained in what had been termed by him as "Complaint Series 9" provided under cover of an email dated 21 August 2013 in preparation for the preliminary hearing. In short, the Applicant contended that the Respondent had failed to adhere to their duties in one form or another under all parts of the Code from sections 1 to 7. The Committee understood from the Applicant that the evidence in relation to the alleged failures to comply with the factors' duties in terms of s 17 of the Act could be applied *mutatis mutandis* to the alleged failures to apply the Code in terms of section 14(5). In other words, no other evidence to support an allegation of failure specifically in terms of the Code was adduced or relied upon in addition to that which had been led in relation to the allegation of a general failure to comply with the factors' duties.

Decision

The Committee made the following determinations at the end of proceedings on 19 December 2013, following the order of issues set out in paragraph 7of the background set out above:

14. **Failure to communicate**: Much of the discussion in the paragraphs below would ordinarily be by way of background only, given that many items of the disputed correspondence precedes the date of the HOHP's jurisdiction, namely 1 October 2012. However, Regulation 28(1) of the 2012 Regulations provides:

"subject to paragraph (2), no application may be made for the determination of whether there was a failure before 1 October 2012 to carry out the property factor's duties." Regulation 28(2) provides that the committee "...may take into account any circumstances occurring before 1 October 2012 in determining whether there has been a continuing failure to act after that date."

As noted in the decision of the Committee following the preliminary hearing, the Applicant contends that the initial failures to communicate with him properly on the part of the Respondent still remained the case as at the date of the hearing and therefore subsisted beyond the commencement date of the Act (in particular, as noted, in relation to the Written Statement of Services contained within the information pack). Accordingly, the Committee had regard to the earlier correspondence regarding factoring issues when considering whether the Respondent was in breach of its duties under s 17 of the Act. It found as follows:

The Committee was placed in a difficult position regarding the alleged failure to communicate adequately, given that it had found both witnesses generally to have been both credible and reliable. Thus, for example, it did not disbelieve the Respondent when it said that it had posted a welcome pack to the Applicant on 15 November 2011 and again in June and July 2012. The address on the copy letters provided is the correct address of the Property and the terms of the letters (at least the November and July ones) themselves clearly bear to include a welcome pack. The Committee found it hard to reconcile that evidence with that of the Applicant, namely that he did not receive the Written Statement of Services which were included in the welcome pack until some time in September 2013, after the preliminary hearing. On balance, it had to accept that the welcome packs referred to were indeed sent by the Respondent to the Applicant on the dates stated by it. Going in the other direction, there were a large number of items of correspondence passing from the Applicant which the Respondent said in evidence it had not received. Again, the Committee had no reason to doubt that such items were in fact sent but that they were not ultimately received.

In addition, despite an apparent assurance to the contrary, it would appear that Ms McWhinnie, the Applicant's solicitor did not explain matters connected with the factoring of the Property to the Applicant as she had undertaken to do in conversation with Mrs Mitchell. Had that been done, a number of the

misunderstandings which emerged on the part of the Applicant might have been avoided.

Accordingly, on the evidence it appeared that there was a great deal of correspondence going in both directions which were unreceived by the intended recipient, as well as some information which was not conveyed as intended. For the purposes of the Committee's determination, it suffices to note, however, that certain crucial items of correspondence which were indeed received by the Applicant/Respondent meet and answer the alleged failure to communicate. In particular, the Committee has in mind the change in gardening contractor in July of 2012 which was prompted by the Applicant's letter of 25 May 2012 (thereby showing that correspondence was not only received but acted upon), the detailed letter addressing the Applicant' concerns sent by the Respondent on 27 June 2012 and the subsequent letter of 27 July 2012.

In relation to the many other items of correspondence sent by the Applicant but not responded to by the Respondent, the Committee noted that the Applicant was prone to submitting excessive and repetitive correspondence. For example, following the preliminary hearing, the Committee issued a third Direction dated 26 November 2013 enjoining the parties to be sparing in their correspondence as the Applicant had submitted over 300 pages of further correspondence to the HOHP (copied to the Respondent) since the date of the preliminary hearing. That level of correspondence was also characteristic of the Applicant prior to the preliminary hearing. To give another example, he sent lengthy letters to the Respondent on three successive days in May 2012 as noted above, whereas one ought to have been sufficient to comply with the s 17(3) duty. The Respondent could not reasonably have been expected to answer each and every aspect of every letter received by it from the Applicant. Its failure to do so therefore did not constitute a failure in terms of its duties as factor.

Having said that, the Committee was of the view that the Respondent could have gone the extra mile to communicate fully with the Applicant by sending such correspondence as it did send to him by email as well as by post. This was particularly in view of the fact that the Applicant provided his email address at the outset of correspondence between the parties in his letter dated 29 December 2011. To have done so would have obviated the difficulty which subsequently arose in respect of the Applicant's Tenerife address. Nonetheless, the Committee considered that the Respondent's communication with the Applicant, although less than perfect, did not amount to a failure in its duties as a factor in terms of section 17 of the Act. Reference is made to the particular items of crucial correspondence referred to in the sixth paragraph of this section.

Finally, in relation to this heading, the Committee strongly recommends that the Respondent put in place an office system whereby both incoming and outgoing mail is clearly logged for later verification purposes if necessary. Again, had such

a system been demonstrably in place, a great deal of discussion at the hearing could have been obviated.

15. **Gardening issues**: The Committee noted that the Applicant was content with the landscaping work carried out on the development. It was satisfied with Mrs Mitchell's explanation that the only significant matter to be dealt with, the dead tree, could only be done during the winter. The Committee is not minded to issue a Property Factor Enforcement Order given its overall findings. However, it does wish it to be noted that the Respondent gave evidence that the dead tree would indeed be removed at the appropriate time. The Committee expects that the Respondent in good faith will adhere to that statement.

Otherwise, the Committee was satisfied that the photographic evidence demonstrated that the landscaped areas of the development are in good order and repair. In relation to Phase II, the Committee was of the view that it is common for uncompleted parts of a development to be relatively unsightly until such time as the last plot is sold off. The areas fenced off as Phase II were not part of the development, the homeowners did not pay for its upkeep, and therefore did not come under the Respondent's duties.

Accordingly, the Committee did not find any failure in duty under this heading.

16. **Television issues**:
The Committee accepted the evidence of Mrs Mitchell that the Respondent had talked to all of the other homeowners in the development and found that they had no difficulties with their television reception. It also accepted that it could know from the Sky engineer's assessment that there were no reception difficulties associated with the communal satellite dish. It was therefore persuaded on the basis of the evidence led that there the communal equipment was in good working order. It also noted that it was stated in the "Important Information" section of the Written Statement of Services under the heading "Communal Repairs" that where repair or maintenance work relates solely to an individual property, the onus (for repair and maintenance) lies with the individual owner.

It therefore found that there was no failure in duty under this heading.

17. **Financial management and accountability**: The Committee found that the statement of accounts and annual accounts produced in evidence were all that could be required of the Respondent. It was of the view that no factor would provide anything more elaborate than that provided to the Applicant. In particular, it agreed with Mrs Mitchell that since the only expenses applicable were gardening, electricity and common insurance, together with their fee, there was no need for it to also produce a pre-estimate of its annual budget for approval by the homeowners in the development. The annual account and reconciliation of expenditure provided to all homeowners showed clearly what was spent under each of the relevant heads.

Accordingly, the Committee found that there was no failure under this heading.

18. **Code of conduct**: As indicated in the discussion of the findings in fact above at paragraph 13, the evidence provided in relation to the s 17 duties were applied to those applicable to the duty to comply with the Code in terms of s 14(5) as they arose after 1 November 2012.

The Committee noted that the Written Statement of Services supplied to the Applicant closely reflected the terms of section 1 of the Code. Accordingly, it was of the view that the Statement provided all of the information required by that section. As noted above, it was also satisfied that the Statement was sent to the Applicant even prior to the Respondent's registration as a factor.

Sections 2 and 3 concerned with communication, consultation and financial obligations have been discussed at length above. The Committee also found that the Code had been complied with.

In terms of section 4: debt recovery, the Committee noted that the Respondent's authority and procedures for recovering unpaid debts was fully explained in the Deed of Conditions and the Written Statement of Services and other details contained within the welcome pack sent to the Applicant. They considered that such procedures were properly operated by the Respondent. It also noted that despite allegations of having been threatened by the Respondent contained within the original application, the Applicant was only in fact ever threatened with legal proceedings which is expressly permitted by section 4.9 of the Code.

There was no breach of the insurance duty under section 5 of the Code as the Respondent had an appropriate policy in place for £5m which properly included play areas within the development.

In terms of section 6: maintenance and carrying out repairs, these have been discussed above in relation to the only issues which arose, namely common landscaping areas and TV reception and the Respondent were found to have complied with their duties.

In terms of section 7, the Committee considered that the Respondent had an adequate complaints resolution procedure in place which it operated appropriately. Reference is made to the discussion above in relation to "Failure to Communicate."

In summary, the Committee found that the Respondent had not failed to comply with its duty to comply with the Code as required by s 14(5) of the Act.

Appeals

19. The parties' attention is drawn to the terms of s 22 of the Act regarding their right to appeal and the time limit for doing so. It provides "(1) An appeal on a point of law only may be made by summary application to the Sheriff against a decision of the president of the Homeowner Housing Panel or a Homeowner Housing Committee; (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made..."

Maurice O'Carroll

Signed **Date** 21 January 2014
Chairperson