



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

Hohp ref: HOHP/PF/13/0044

Re : Property known as Play Area, Rumford Grange, Falkirk, FK2 0EN ("the property")

The parties:-

Mr. David Willson residing at 62, Craig Crescent, Rumford Grange, Falkirk FK2 0EN ("the homeowner")

Newton Property Management having a place of business at 87, Port Dundas Road, Glasgow G4 0HF ("the factors")

Karen Moore (Chairperson)

Helen Barclay (Housing Member)

Charles Reid Thomas (Surveyor Member)

This document should be read in conjunction with the Committee's Decision dated 10 June 2014 under Section 19(1) (a) of the Property Factors (Scotland) Act 2011 ("the Act").

Background

1. Following a Hearing on 14 June 2013, the Committee issued a Decision dated 1 July 2013. The factors appealed that Decision to the Sheriff Court *inter alia* on the ground that it did not comply with Section 19(2) of the Act. The Appeal was upheld on this ground

and the matter was remitted back to the Committee to give the factors the opportunity to make representations on the proposed Property Factor Enforcement Order.

2. The Committee issued a new Decision dated 10 June 2014 ("the Decision") which indicated that the Committee proposed to make a Property Factor Enforcement Order ("PFEO"). Prior to making a PFEO and in terms of Section 19(2) of the Act, the Committee gave the homeowner and the factors ("the parties") a period of fourteen days within which to make representations. The parties made representations to the Committee. Each party's representations were copied to the other party.

Direction of the Committee

3. The Committee, taking account of the parties' representations and in application of Rules 3 and 13 of the Regulations made the following Directions:-

"Direction 1

The Committee direct the Homeowner Housing Panel to provide to the homeowner a copy of the recording of the Hearing which took place on 14 June 2013.

Reason for Direction 1

The Committee have become aware that the factors have had the benefit of a copy of the recording and consider that, in the interests of justice, the homeowner, who was not present at the Hearing of 14 June 2013, should have the same benefit.

Direction 2

The Committee direct that an oral hearing will be held in respect of the representations made by the Parties.

Reason for Direction 2

The Committee are of the opinion that the issues raised by the parties in their representations will be best canvassed at a hearing.

Direction 3

The Committee direct that the hearing will proceed by way of oral submissions presented by or on behalf of the Parties.

Reason for Direction 3

The Committee are of the opinion that the issues raised by the Parties in their representations can be addressed without the need for witnesses or evidence.

Direction 4

The Committee direct that the scope of the hearing will be limited to those parts of the representations which deal with the Committee's proposed PFEO.

Reason for Direction 4

The Committee, having made a determination in terms of Section 19(1) of the Act, it is appropriate that the Committee deal with the representations made to them under Section 19(2)(b) of the Act following notice given under Section 19(2)(a) of the Act.

Direction 5

The Committee direct that, no later than 14 days before the date of the hearing, the factor lodge with the Committee and serve on the homeowner a skeletal argument which summarises the legal points raised by the factor at paragraph 5, sub paragraph 2 of its representation of 23 June 2014 and cites all authorities which will be relied on, identifying any particular passages to be relied upon.

Reason for Direction 5

The Committee are of the opinion that it would be helpful for the Committee to have a full understanding of the legal issues raised by the factor in their representations."

4. The homeowner housing panel ("the panel") complied with Direction 1. The factors complied with Direction 5 and lodged a skeletal argument with the Committee on 27 October 2014 by email, which email was forwarded to the homeowner. The homeowner made representations on the factors' skeletal argument to the Committee and this was forwarded to the factors. The parties made no further written representations to the Committee.

Hearing

5. A Hearing in terms of Section 19 (2) of the Act took place on 13 November 2014 at the Homeowner Housing Panel offices at the Europa Building, 450 Argyle Street, Glasgow. Both parties appeared. The homeowner represented himself. The factors were represented by Mr. Derek MacDonald of the factors' organisation and Mr. Paul Hannah, solicitor, who addressed the Committee on behalf of the factors.
6. At the beginning of the Hearing, the Committee asked the homeowner if the matters regarding the common charges and invoicing raised in his representation of 26 October 2014 were new matters or if they were related to the application to the homeowner housing panel which was before the Committee. The homeowner stated that the matters of his application ("the Application") were still ongoing and the invoicing issues were a continuation and element of his dispute with the factors, but agreed that as the invoicing issue was not directly related to the accounts which he queried as part of the Application, those accounts having been paid by him, the content of his representations of 26 October 2014 could be disregarded. The Committee advised that it was open to the homeowner to raise a further application in respect of the matters raised by him in his representations of 26 October 2014 if he so wished.
7. Mr. Hannah addressed the Committee on the factors' representations dated 23 June 2014 and the skeletal argument dated 27 October 2014 and made further submissions.
8. In respect of the written representations dated 23 June 2014, the factors assert as that the Application has not been signed, it is not compliant with Regulation 5(3) of the Regulations and so should not have been referred to the Committee for consideration by them. The factors raised a point of law in that the president of the panel erred in law by referring the Application to the Committee as the in terms of Sections 18(1) (b) and 18(2)(b) of the Act, the Application was incompetent.
9. The factors raised points of law in that the Committee erred in law by a) making amendments to the original decision and b) failing to intimate to the factor that there were changes.
10. The factors made representations in respect of the scope of the Application, the extent of the written submissions which support the matters complained of, the prior notice given to the factors before the Application was lodged and the weight which the Committee gave to all of the evidence before them.

11. The factors made representations, contrary to the Committee's Findings in Fact in the Decision (the Findings") that the terms of the factors' appointment as specified in the title deed to the property allowed the factors scope to carry out the works which are at the core of the Application.
12. The factors made further representation that, with regard to emergency works, Section 2.4 of the Code of Conduct for Property Factors ("the Code") applied to their actions in terms of their appointment, and so, they had authority to act without seeking further approval.
13. The factors made representations, contrary to the Committee' s Findings, that the factors had responded to the homeowner's enquiries and complaints as quickly and as fully as possible and stated that the Committee had misdirected itself in law in this respect.
14. The factors made representations, contrary to the Committee' s Findings, that the factors had explained to the homeowner why and how they had appointed the contractors.
15. In respect of the factors' written skeletal argument dated 27 October 2014, Mr Hannah submitted that the factors' position is that the issue of whether or not the factor should have provided the homeowner with copies of the quarterly and annual inspection reports ("the Reports") was not a matter that was before the Committee and so should not have been considered by them. Mr Hannah submitted that the homeowner had not at any point asked for the Reports and so, the factors, in terms of Section 17 of the Act had not been afforded an opportunity to respond to a request for the Reports. Accordingly, the matter of providing the Reports, or failing to do so, was not a matter which was before the Committee for consideration. Following on from this, Mr Hannah submitted that, as it was not open for the Committee to make any finding in respect of the Reports, the Committee had misdirected itself in law in determining that the factors ought to have provided the homeowner with copies of the Reports. The factors' argument is that, in the absence of fair notice by the homeowner that he required the Reports, the making of PFE0 to provide the Reports is outwith the Committee's powers.
16. Mr. Hannah's oral submission to the Committee focussed on, inter alia, the following main points:

- (1) The competence of the Application with regard to the Regulations;
- (2) The competence of the Committee's Decision of 10 June 2014 with regard to the Act and to the Regulations;
- (3) The extent of the Committee's powers in dealing with the written information and the oral statements before it at the time of the Hearing on 14 June 2013, the crux of Mr. Hannah's argument being that the Committee went beyond its powers in terms of Section 17 of the Act, and in particular Section 17(3), and
- (4) The extent of the powers of the president of the panel in accepting the Application and referring it to a committee, Mr. Hannah's argument being that the president went beyond her powers in terms of Section 18 of the Act, and in particular Sections 18(1) and (2).

17. Mr. Hannah referred the Committee to Section 18 of the Act which states that:

"18(1) The president of the homeowner housing panel must decide whether to—

- (a) refer an application under section 17(1) to a homeowner housing committee, or*
- (b) reject the application.*

(2) The president may reject an application only if the president considers—

- (a) that it is vexatious or frivolous,*
- (b) that the homeowner has not afforded the property factor a reasonable opportunity to resolve the dispute,*
- (c) where the homeowner has previously made an identical or substantially similar application in relation to the same property, that a reasonable period of time has not elapsed between the applications, or*
- (d) that the dispute to which the application relates has been resolved".*

Mr. Hannah submitted that as the factors had not been afforded a reasonable opportunity to resolve the dispute as required by Section 18(2)(b), the president had erred in law by deciding to refer the Application to a homeowner housing committee. At the close of his submissions, Mr. Hannah submitted that the matter of dispute between the homeowner and the factors fell into the category of vexatious or frivolous in terms of Section 18(2)(a) and so should have been rejected on that ground also. Accordingly, the factors' position is that the president went beyond her powers in terms of Section 18 (2) of the Act.

18. Mr. Hannah referred the Committee to Regulations 5 (3) and 27 of the Regulations.

Regulation 5(3) states that an application must be signed and dated by the homeowner. Regulation 27 states, in summary, that a document which must bear a signature and is transmitted electronically must bear an electronic signature. Mr. Hannah pointed out that

the Application was transmitted electronically but did not bear an electronic signature. Accordingly, the Application did not comply with the Regulations and so should not have been referred to a committee in terms of Section 18 (1) (a) of the Act.

19. With regard to the points of law raised by the factors that the Committee erred in law by a) making amendments to the original decision and b) failing to intimate to the factor that there were changes, Mr. Hannah referred to the Committee's Decision of 10 June 2014 and noted that it differed from the July 2013 decision. Mr. Hannah referred the Committee to Regulation 14 of the Regulations. Regulation 14 states, in summary, that any document issued by a Committee can only be amended by a certificate and that the amended version must be issued to all parties who received the original document. Mr. Hannah stated that the July 2013 decision was not amended by a certificate and so the Decision ought not to have been issued with wording which differed from the July 2013 decision.

20. Mr. Hannah referred the Committee to Section 17 of the Act, and in particular to Section 17(3) which states, with reference to an application to the panel, that :-

"No a such application may be made unless—

(a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factors' duties or, as the case may be, to comply with the section 14 duty, and

(b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern."

Mr. Hannah advised that Committee that the essence of Section 17 of the Act was that the property factor should have both fair notice of an allegation and an opportunity to resolve a dispute before a referral to the panel. Mr. Hannah referred the Committee to the Application and to the email correspondence between the homeowner and the factors which accompanied it, in particular, the email correspondence of 16 January 2013. In an email of that date, the homeowner, complaining that he had not received information requested by him, wrote:-

"I still have not received as asked and promised ... I would be sent the 3 quotes giving detail of costs and breakdown of works requiredOR Can you provide details of the evaluation and how it provided value for the residents. Also can you provide details of the standards factors should follow in tendering for additional work".

Mr. Hannah advised that the factors provided the homeowner with the invoices as requested in the first part of his request and, as the homeowner had requested either,

not both, the quotes or an evaluation, the factors had complied with the homeowner's request. Accordingly, the test set out in Section 17 (3) (b) had not been satisfied and so the Application should not have been accepted by the panel and should not have been referred to a committee for consideration.

21. Mr. Hannah addressed the Committee on that part of the Decision which dealt with its Findings that the factors had failed to comply with Section 2.4 of the Code by failing to have a procedure to consult with owners in respect of additional works. The factors in their written representations also referred to that part of the Decision. Mr. Hannah advised that the homeowner had not raised the matter of consultation as a complaint with the factors before submitting his Application on *inter alia* that ground of complaint. Taken together, the written representations and Mr. Hannah's submission were that the as the factors had not been given prior notice, the test set out in Section 17 (3) (b) had not been satisfied and so the homeowner's application should not have been accepted by the panel and should not have been referred to a committee for consideration. Further, Mr. Hannah added that the Committee did not have sufficient evidence before them at the Hearing on 14 June 2013 to support their Finding. Mr. Hannah submitted that, accordingly, the Committee's decision in that respect was *ultra vires*.

22. Mr. Hannah in his submission and the factors in their written representations referred to that part of the Decision which related to the Committee's finding that Mr. MacDonald's acknowledged at the Hearing on 14 June 2013 that "in hindsight the factors could have provided the homeowner with further and more detailed information than had been provided" and asserted that this finding could not establish a breach of Section 2.4 of the Code. Both Mr. Hannah in his submission and the factors in their written representations commented on Mr. MacDonald's statement at the Hearing on 14 June 2013 that the factors had "fallen foul of not seeing clearly what the clients was requesting" and submitted that this should not have been taken by the Committee as establishing a breach of Section 2.4 of the Code.

23. Mr. Hannah in his submission and the factors in their written representations submitted that the Committee erred in finding that the factors did not provide the homeowner with the quarterly and annual inspection Reports. As outlined in paragraph 16 above, the factors' position is that as the homeowners had not requested these documents, the factors had no prior notice that the homeowner required them and so did not have an opportunity to provide them. The Committee were *ultra vires* in taking the documents

into consideration and so considering possibility the Committee misdirected itself in this regard.

24. Mr. Hannah in his submission and the factors in their written representations submitted that, with regard to instructing works, the factors, in terms of their appointment under the title deeds, have a level of delegated authority. The Committee were referred to Section Sixteenth of the Burdens Section of Title Number STG41975, being the homeowner's title to the Property, a copy of which title forms part of the Application before the Committee. Section Sixteenth deals with the appointment of a property factor and sets out the property factors' powers. Section Sixteenth states *inter alia* that property factor has the power "to order to be executed any repairs, renewals....planting and landscaping as may be considered necessary or desirable for the preservation, cleaning, use or enjoyment (of the common parts) and to maintain same in a good and tidy condition." The factors' position is that Section Sixteenth empowers them to carry out the works which are the core of the Application without recourse to the homeowner.

25. Mr. Hannah in his submission and the factors in their written representations submitted further that, with regard to instructing works, the factors were entitled in terms of Section 2.4 of the Code to act without seeking the homeowner's approval in certain situations such as emergencies. The factors' position is that a proprietor in the development of which the Property forms part had intimated to that the low levels of bark in the play area were a danger to those using the play area.

26. Mr. Hannah in his submission and the factors in their written representations addressed the Committee's determination that the factors had failed to comply with Section 2.5 of the Code by failing to deal with complaints as fully and as quickly as possible. The factors' position is that they responded to each of the homeowner's emails promptly and that they provided the homeowner with all available information on the tender process. The factors' position is that the Committee erred in finding that the factors had failed to comply with Section 2.5 of the Code.

27. Mr. Hannah in his submission and the factors in their written representations addressed the Committee's determination that the factors had failed to comply with Section 6.3 of the Code by failing to show how and why they appointed contractors. The factors' position is that, by letter of 17 January 2013, they wrote to the homeowner explaining both why and how they appointed contractors. The factors' position is that

the Committee erred in finding that the factors had failed to comply with Section 6.3 of the Code.

28. Mr. Hannah submitted that whilst it was clear that the homeowner was not satisfied with the factors' response, this dissatisfaction was not tantamount to breaches of the Code. Mr. Hannah referred the Committee to correspondence between the homeowner and the panel and submitted that from the tone and content of the correspondence sent by the homeowner, the Committee might take the view that the homeowner might never be satisfied. Mr. Hannah submitted that the effect and consequences on the factors of a finding against them and the imposition of a PFEO were serious and, as the factors had gone beyond what could reasonably be expected of them in dealing with the homeowner's complaint, the Committee should reconsider their Findings. Mr. Hannah reminded the Committee that the overriding objective, as set out in Regulation 3, is to deal with proceedings justly.

29. The homeowner addressed the Committee his written representations.

30. The homeowner submitted to the Committee that the matters raised in his Application to the homeowner housing panel remain unresolved and that he continued to hold to the view that the factors had not provided him with a full explanation as to why the work was carried out and how the tender process to select a contractor was carried out. The homeowner submitted that he had still not been given an explanation as to why the work was carried out without prior consultation. The homeowner stated that if he had had this information he would not have pursued his Application to the panel. The homeowner submitted that, in his opinion, the factors were introducing a new matter as they had not previously stated that the works had been carried out as emergency works.

Committee's Decision in terms of Section 19(3) of the Act

31. Following the Hearing on 14 June 2013, the Committee found, in terms of Section 19(1)(a) of the Act, that the factors had failed to comply with Section 2.4 of the Code by failing to have a procedure to consult with homeowners in respect of additional works, that the factors had failed to comply with Section 2.5 of the Code by failing to deal with complaints as fully and as quickly as possible and that the factors failed to comply with Section 6.3 of the Code by failing to show how and why it appointed contractors. The Committee, therefore, in terms of Section 19(1)(b) of the Act, proposed to make a PFEO in the following terms:-

"Within 28 days of the date of the communication to the homeowner of the property factor enforcement order, the factor must:

1. Issue an apology to the homeowner in respect of the factor's failure to deal with his complaints as fully and as quickly as possible.

2. Put in place a procedure to consult with homeowners in respect of additional works and provide the homeowner with a copy.

3. Provide the homeowner with a copy of the quarterly and annual inspection Reports prepared by Active Playground Management Limited."

In terms of Section 19(2)(b) of the Act, the Committee allowed the parties an opportunity to make representations to them.

32. The written representations made to the Committee and the submissions made by the parties at the Hearing on 13 November 2014 were so made in terms of Section 19(2)(b) of the Act and were considered by the Committee in terms of Section 19(3) of the Act.

33. Section 19(3) of the Act states:-

"If the Committee are satisfied, after taking account of any representations made under Section 19(2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the committee must make a property factor enforcement order."

34. The Committee considered each element of the parties' Section 19(2)(b) representations in turn.

35. With regard to Mr. Hannah's argument that the president went beyond her powers in terms of Section 18 of the Act, and in particular Sections 18(1) and (2), the Committee are of the view that these powers rest solely with the president of the homeowner housing panel and that the Committee have no power to interfere with the president's decision making. It was open to the factors to challenge to the president's Section 18 decisions by appeal under Section 22 of the Act. In the course of his submissions, Mr. Hannah explained to the Committee that the factors' Appeal has not yet been fully disposed of by the Sheriff and it may be that factors have already challenged the president's decision to refer the application to a committee by appeal under Section 22 of the Act. If so, that is a matter which should be dealt with by the Sheriff. If not, the Committee are of the view that an appeal should have been lodged with the Sheriff

Clerk within 21 days of the date of notice of the president's decision to refer the application to a committee.

36. With regard to Mr. Hannah's submission that Application was not competent as it did not comply with Regulations 5 (3) and 27 of the Regulations, the Committee are again of the view that these decision making rest with the president of the homeowner housing panel and that the Committee have no power to interfere with the president's decision making. It was open to the factors to raise a competency challenge to the president's decision to refer the application by appeal under Section 22 of the Act. Again, it may be that factors have already done so. If so, that is a matter which should be dealt with by the Sheriff. In any event, competency is an issue which should have been raised as a preliminary matter by the factor at the first hearing. This was not done and the Committee are of the view that factors are now personally barred from raising an issue of competency. Had this been raised, the Committee would have considered the test set out in R v Soneji and Another [2005] 3 WLR 303 in which the court held that the correct approach to an alleged failure to comply with a statutory provision prescribing the doing of some act, in this case, the signing of the application form by the homeowner, was to determine if the purpose of the legislation was that an act done in breach of that statutory provision should be invalid. The Committee might have taken the view that the purpose of signing the application form was to ensure that the application was a genuine one lodged by the applicant. In this case, the application was submitted by the homeowner using his own email address and was augmented and clarified by further correspondence submitted by the homeowner who did not seek to distance himself from or deny the application. The Committee might have taken the view that the lack of signature by the homeowner caused no prejudice to the factor. The Committee might have determined that, in these circumstances, the failure to comply with Regulation 5(3) did not invalidate the application and the proceedings which followed it.

37. With regard to the points of law raised by the factors that the Committee erred in law by a) making amendments to the original decision and b) failing to intimate to the factor that there were changes, contrary to Regulation 14 of the Regulations, the Committee are of the view that their Decision of 10 June 2014 was a new decision and not an amendment of an earlier decision. In any event, there is no statutory form for the certificate referred to in Regulation 14 (1) and, so the Decision of 10 June 2014, being written and signed by the chairman could satisfy the test set out in Regulation 14 (1). The Decision of 10 June 2014 was given to the parties who received the decision

of 1 July, thus satisfying the test set out in Regulation 14 (2). The Committee are of the view that a challenge to the way in which the Committee dealt with this part of the procedure ought to have been by appeal under Section 22 of the Act.

38. With regard to Mr. Hannah's submission that the factors had resolved the homeowner's dispute before the lodging of his Application, and so, the test set out in Section 17 (3) (b) not having been satisfied, the Application should not have been accepted by the panel and should not have been referred to a committee, the Committee are of the view that the decision making powers in respect of sifting and referring applications rest with the president of the homeowner housing panel and with those to whom she delegates these decision making powers and that the Committee have no power to interfere with that decision making. It was open to the factors to challenge to the president's decision to refer the application to a committee by appeal under Section 22 of the Act. Again, it may be that factors have already done so. If so, that is a matter which should be dealt with by the Sheriff. If not, the Committee are of the view that an appeal should have been lodged with the Sheriff Clerk within 21 days of the date of notice of the president's decision to refer the application to a committee.

39. With regard to Mr. Hannah's submission that as the factors had not been given prior notice of a complaint in respect of consultation, the test set out in Section 17 (3) (b) had not been satisfied and the Application should not have been accepted by the panel and should not have been referred to a committee, the Committee are again of the view that these decision making powers in respect of sifting and referring applications rest with the president of the homeowner housing panel and with those to whom she delegates these decision making powers and that the Committee have no power to interfere with that decision making. It was open to the factors to raise a competency challenge to the president's decision to refer the application to a committee by appeal under Section 22 of the Act. Again, it may be that factors have already done so. If so, that is a matter which should be dealt with by the Sheriff. If not, the Committee are of the view that an appeal should have been lodged with the Sheriff Clerk within 21 days of the date of notice of the president's decision to refer the application to a committee. In any event, competency is an issue which should have been raised as a preliminary matter by the factors at the first hearing. This was not done and the Committee are of the view that factors are now personally barred from raising an issue of competency. Had this been raised by the factors at the first hearing, the Committee might have taken the view that the substance of the homeowner's

complaint as outlined in the application was sufficient in its terms to include notice of a complaint in respect of consultation and so the test as set out in Section 17 (3) (b) had been satisfied.

40. Mr. Hannah's submitted that, even if the factors had been given prior notice of a complaint in respect of consultation, the Committee did not have sufficient evidence before them at the Hearing on 14 June 2013 to support their finding that the factors had failed to comply with Section 2.4 of the Code by failing to have a procedure to consult with owners in respect of additional works. The Committee are of the view that there was a sufficiency of evidence to satisfy themselves satisfied that the factors had no formal procedure to consult with owners representations. Mr MacDonald in his submission to the Committee in June 2013 stated that contact between the factors and homeowners in respect of additional works are a matter of discretion and professional judgement. He advised the Committee that there was no formal procedure for additional works. No procedure was provided to the homeowner in response to his requests.
41. With regard to Mr. Hannah's submission that the information before the Committee at the Hearing on 14 June 2013 was insufficient to establish a breach of Section 2.4 of the Code, the Committee are of the view that there was a sufficiency of evidence to establish this breach of the Code. The Committee are of the view this is the very heart of the homeowner's complaint. The homeowner requested information in respect of why the work was carried out, how the tender process to select a contractor was carried out and why the work was carried out without prior consultation. Given the repeated nature of the homeowner's requests it is reasonable to expect that the factors should have realised that the homeowner was seeking a full and detailed explanation. Whilst the Committee accept that the factors responded to the homeowner, it was the Committee's view at the Hearing on 14 June 2013 that the factors had not complied fully with the homeowner's request. The Committee agreed with Mr. MacDonald's acknowledgement the factors could have provided the homeowner with further and more detailed information than had been provided.
42. Mr. Hannah's submitted that as the homeowner had not asked for the quarterly and annual inspection reports ("the Reports"), the Committee were *ultra vires* in taking the Reports into consideration. The Reports came to the Committee's attention in the factors' response to the Committee's Direction of 8 May 2013 and were referred to at the Hearing on 14 June 2013 when Mr. MacDonald offered to submit a report to the

Committee. As the homeowner was not present at that Hearing and had not had an opportunity to review the Reports, they were not submitted. However, it was clear to the Committee that the Reports informed the factors' decision making process in respect of the repair and maintenance of the play area. The key issue of the complaint in the Application before the Committee is a lack of information and detail in respect of the way in which works were instructed to play area. The Reports, as far as the Committee are aware, related to regular inspections on the condition of that play area and serve to inform the factors in respect of the repair and maintenance of the play area. The homeowner requested information on that decision making process and it is reasonable to expect that he should have given a copy of the Reports. The homeowner, in the Committee's view, could not be expected to be aware of the existence of the Reports unless the factors advised him of them. Without this knowledge, he could not have asked for them specifically. The homeowner did, however, ask for information and detail in respect of the way in which works were instructed to play area and it was the Committee's view that the Reports formed part of the information requested by the homeowner. Mr. MacDonald, on behalf of the factors, wrote to the homeowner on 19 February 2103 stating that "I believe this office has provided you with all background information held in respect of the costs incurred regarding this particular common matter and we have also provided you with copies of all relevant documentation." Clearly, this was not the case as the factors had not provided the homeowner with the Reports. Had they done so, the homeowner's complaint might have been resolved. The Committee express surprise that, if the Reports are relevant to the homeowners' complaint and could have resolved his complaint, the factors have not simply provided them to him.

43. Mr. Hannah's submitted that, as the homeowner had requested either quotes or details of the tender evaluation and not both, by providing the quotes, the factors had resolved the homeowner's complaint. The Committee take the view that this is a very narrow interpretation of the homeowner's complaint. The homeowner is a customer of the factors to whom he makes payment for a service. He made his initial requests for information as a customer and not as part of a formal or statutory process. The homeowner cannot be expected to know exactly which documents the factors have in their possession nor can he be expected to know the terminology for these documents. However, the factors know exactly which documents they have in their possession and it is reasonable to expect that factors, in the spirit of the Code, when responding to a repeated request from a homeowner for information on a repair would make available to that homeowner all of the information in their possession. Taking the

correspondence between the homeowner and the factors at its fullest, the Committee do not accept that the homeowner restricted his request to a request for copies of only the three quotes: he sought to find out both why and how the factors instructed the works. The Committee are of the view that the homeowner seeks a full chronology explaining exactly what the factors did in respect of instructing and carrying out the works.

44. Mr. Hannah in his submission and the factors in their written representations submitted that, with regard to instructing works, the factors, in terms of their appointment under the title deeds, have a level of delegated authority to carry out the works which are the heart of the homeowner's application without recourse to the homeowner. The Committee do not dispute this factual position. However, the Committee consider that the factors, in the spirit of the Code, could have made this clear to the homeowner in their dealings with him. There was no explanation by the factors to the homeowner that they relied on the title deeds to exercise their power and authority to carry out the works.

45. Mr. Hannah in his submission and the factors in their written representations submitted further that, with regard to instructing works, the factors were entitled in terms of Section 2.4 of the Code to act without seeking the homeowner's approval in certain situations such as emergencies. The Committee do not dispute this factual position. However, the Committee consider that the factors, in the spirit of the Code, could have made this clear to the homeowner in their dealings with him. There was no explanation by the factors to the homeowner that they relied on Section 2.4 of the Code the title deeds to exercise their power and authority to carry out emergency works.

46. With regard to Mr. Hannah in his submission and the factors in their written representations that, as the factors had responded to each of the homeowner's emails promptly and that they had provided the homeowner with all available information on the tender process, Committee had erred in finding that the factors had failed to comply with Section 2.5 of the Code, the Committee do not agree. The Committee are of the view that the factors did not provide the homeowner with all available information and so did not deal with the homeowner's complaints as fully and as quickly as possible.

47. With regard to Mr. Hannah in his submission and the factors in their written representations that, as the factors by letter of 17 January 2013 had written to the

homeowner explaining both why and how they appointed contractors, the Committee had erred in finding that the factors had failed to comply with Section 6.3 of the Code. The Committee having regard to the representations made under Section 19(2) (b) by and on behalf of the factors, and having reviewed the factors' letter of 17 January 2013 the Committee are now satisfied that the factors did not fail to comply with Section 6.3 of the Code.

48. With regard to Mr. Hannah's submissions that whilst it was clear that the homeowner was not satisfied with the factors' response, this dissatisfaction was not tantamount to breaches of the Code. However, it appears to the Committee that the homeowner's approach is borne out of frustration in his dealings with the factors, his perceived lack of assurance that he has all of the information relating to the works and in dealing with homeowner housing panel process. Notwithstanding the foregoing, the Committee take the view that it is the actions of the property factors and not the levels of homeowner satisfaction which establish breaches of or compliance with the Code. It is on the basis of property factors' actions and not on homeowner satisfaction which the Committee make their decisions.
49. With regard to the homeowner's submission that he continued to hold to the view that the factors had not provided him with a full explanation as to why the work was carried out and how the tender process to select a contractor was carried out, that he had still not been given an explanation as to why the work was carried out without prior consultation and that the factors were raising a new matter by submitting that they carried out the works as an emergency. The Committee take the view that whilst the factors had not provided the homeowner with the fullest information at the outset, they had by the time of the Hearing on 14 June 2013 provided him with details of the three quotes and an explanation of how and why they instructed the works. In their written submissions to the Hearing of 17 November 2014, the factors provided further detail and explanation in respect of how and why they instructed the works. The factors could have and should have provided a fuller explanation to the homeowner when he raised his enquiry with them at the beginning of 2013. The Committee take the view that the factors ought to have provided the homeowner with copies of the Reports. The Committee agree with the homeowner that the factors' position that the works were carried out as emergency works is a new matter, the factors not having advised the homeowner that this was the basis on which they proceeded in any of their correspondence with him.

50. In consideration of all of the foregoing, the Committee, in terms of Section 19(3) determine that for the reasons narrated above the factors failed to comply with Section 2.4 of the Code by failing to have a procedure to consult with owners in respect of additional works and failed to comply with Section 2.5 of the Code by failing to deal with complaints as fully and as quickly as possible.

51. Therefore, in terms of Section 19(3), the Committee being satisfied, after taking account of the representations made under Section 19(2)(b), that the factors have failed to comply with the section 14 duty, the Committee must make a property factor enforcement order.

52. Therefore, the Committee make the following property factor enforcement order:-

Within 28 days of the date of the date of this property factor enforcement order, the factors must:

1. Issue a written statement to the homeowner explaining fully exactly when, how and why they instructed the works referred to in his Application and detailing exactly which powers and authority they used to do so and
2. Provide the homeowner with a copy of the quarterly and annual inspection Reports prepared by Active Playground Management Limited for the period from 1 January 2012 until the 1 January 2013 and referred to in the foregoing Decision.

The property factor should note that failure without reasonable excuse to comply with a property factor enforcement order is a criminal offence in terms of Section 24 of the Act. Additionally, the Scottish Ministers can take any failure into account in respect of the future registration of the property factor on the register of property factors.

53. The decision is unanimous

Appeals

54. The parties' attention is drawn to the terms of Section 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..."

Chairperson Signature .

... Date 25 March 2015.