Decision of the Homeowner Housing Committee

(Hereinafter referred to as "the Committee")

Under Section 19 (1)(a) of the Property Factors (Scotland) Act 2011

Case Reference Number: HOHP/PF/15/0058

Re : Property at 2/3, 8 Dixon Road, Glasgow G42 8AY ("the Property")

The Parties:-

Andrew Lynn, 2/3, 8 Dixon Road, Glasgow G42 8AY ("the Applicant")

Ross & Liddell Limited, 60 St Enoch Square, Glasgow G1 4AW ("the Respondents")

The Committee comprised:-

Mr David Bartos - Chairperson
Mr Ian Mowatt - Surveyor member

Decision

The Respondents have failed to comply with section 14(5) of the Property Factors (Scotland) Act 2011 through breach of sections 4.1 (as set out below), 5.3 and 5.8 of the Code of Conduct for Property Factors. The Applicant has failed to comply with the Deed of Conditions mentioned below (as read with section 17(4) of the 2011 Act) in failing to take reasonable care to fix the level of insurance necessary for the reinstatement of the tenement of which the Property forms part.

The Applicant's complaints of failure to comply with section 14(5) of the 2011 Act through breach of sections 1.1a B c and, in part as set out below, 4.1 of the said Code, are rejected.

Background:-

1. By application received on 5 May 2015, the Applicant applied to the Homeowner Housing Panel ("HOHP") for a determination that the Respondents had failed to ensure compliance with the Property Factor

Code of Conduct as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act") and that the Respondents had breached certain other duties allegedly owed to him.

2. The application alleged that the Respondents had failed to comply with the Code of Conduct in the following respects:

   a. Written Statement of Services - Section 1.1b, B of the Code

   b. Debt Recovery – Section 4.1

   c. Insurance - Sections 5.2, 5.3, and 5.8 of the Code

   d. Carrying out Repairs and Maintenance - Sections 6.1 and 6.9 of the Code.

3. It also alleged that the Respondents had breached duties owed to the Applicant in respect of:

   i. not carrying out repairs to broken slabs at the back door of the close as agreed;

   ii. arranging buildings insurance not in accordance with the deed of conditions covering the Property.

   The application related to the matters which had been raised in various letters by the Applicant to the Respondents dated 4 March and 14 March 2015. The Respondents' Managing Director, Mrs I. Devenney had responded with her letter to the Applicant dated 27 March 2015. The Applicant sent further letters of complaint dated 2 April 2015 to the Respondents' Mr Clements but there was no further response from the Respondents and his complaints were not resolved to his satisfaction.

4. The President of the HOHP decided under section 18(1) of the 2011 Act to refer the application to a Homeowner Housing Committee. The Committee comprised the persons stated above. The intimation of the Notice of Referral to the Respondents included a copy of the Applicant's application to the Panel.

5. Following intimation of the Notice of Referral, the Applicant lodged written representations. He also lodged productions with an inventory of documents. The Respondents lodged a letter dated 29 July 2015 with representations on some but not all of the complaints. They also provided their copies of their letters to the Applicant. The Applicant also lodged a list of four witnesses.

6. A hearing was fixed to take place at Wellington House, 134/136 Wellington Street, Glasgow G2 2XL on 22 October 2015 at 10.30 a.m. The date and times were intimated to the Applicant, and the Respondents.

7. By letter dated 28 August 2015 the Respondents requested a postponement of the hearing fixed for 22 October on the grounds that their director Mr Fulton was about to depart for annual leave and was not due to return until 15 September 2015. They also requested an extension of the period for lodging (further) written representations. By direction dated 30 September 2015 the Committee refused the request for the postponement and granted the request for an extension of the period for lodging further representations. They extended the period for the lodging of these by the Respondents to 12 October 2015.

8. The Committee also noticed that the Applicant's complaint under section 5.2 of the Code involved an issue raised in another case against the Respondents namely HOHP/PF/14/0076 which the Respondents had appealed to Glasgow sheriff court and which appeal had not yet been decided. In these circumstances, in their direction the Committee directed that the hearing on 22 October would not extend to the complaint under section 5.2.

9. In the event there were no further representations from the Respondents following the issue of the direction.

The Evidence

10. The evidence before the Committee consisted of:-

- The application form and its attachments
- The Applicant's productions
- The Respondents' productions produced in response to the direction and copies of letters sent by them to the Applicant
- The oral evidence of Stuart Clements and the Applicant.

The Hearing

11. The hearing took place on the date and at the time fixed. The Applicant was present. The Respondents were represented by their Property Manager Stuart Clements. Mr Clements made submissions and gave evidence. He was accompanied by the Respondents' director Brian Fulton who was responsible for property management in their Glasgow office.

12. At the outset of the hearing, before any evidence was heard or submissions made on the merits the Committee raised with the parties the question of whether they had any objection to the Committee issuing a decision on all but the complaint under section 5.2 of the Code and in the

future making a decision under that complaint. Neither party had any objection to the further proposed procedure.

13. Secondly, in his list of witnesses the Applicant included Mr Colin Johnstone, of the Respondents who was Property Manager in Glasgow for the Respondents in 2010 to 2013 at the time when the Applicant complained that they had not carried out repairs to broken slabs at the rear close door. At the beginning of the hearing the Applicant disclosed that Mr Johnstone had not been asked to come to give evidence as he had expected that the Respondents would bring him along to give evidence. The Applicant explained that he was unaware that it was in the first place his responsibility to arrange for the attendance of the witnesses from the Respondents on his list. The Committee was informed by the Applicant that Mr Johnstone's presence related not only to the complaint of breach of the Respondents' alleged agreement to carry out repairs but also to their alleged breach of sections 6.1 and 6.9 of the Code. He advised the Committee that he would be prejudiced in the presentation of those complaints by Mr Johnstone's absence. On behalf of the Respondents Mr Clements stated that Mr Johnstone was not in the office and not available to come to the hearing to give evidence.

14. Given that the parties had already agreed that the hearing would not dispose of the whole application and given that the HOHP website did not make it clear that it was a party's responsibility to organise the attendance of witnesses, the Committee decided that the alleged breaches of the factor's duty to carry out repairs and of sections 6.1 and 6.9 of the Code would be postponed to the hearing to be fixed to deal with section 5.2 of the Code. The Committee emphasized to the Applicant that it was his responsibility to ensure the attendance of Mr Johnstone, noting that he should approach Mr Johnstone in the first place to obtain his agreement to attend. Only if there was any difficulty with obtaining that agreement could the Applicant request the Committee to make a witness attendance order.

The Oral Evidence

15. Mr Clements is a Property Manager of the Respondents. His oral evidence is summarised where relevant under each head of complaint discussed below.

16. The Committee found no reason to doubt that Mr Clements was doing their best to assist the Committee in relation to his personal conduct and the Committee accepted his evidence on such matters except in so far as contradicted by any documentary material.

17. The Committee had no reason to doubt the oral evidence of the Applicant which is mentioned, where relevant, below.

Findings of Fact

18. Having considered all the evidence, the Committee found the following facts to be established:-

i. The Property is one of eight flats in an early 20th century traditional red sandstone tenement building in the Crosshill area of Glasgow;

ii. The Applicant is the owner of the Property. He has been owner since 1989.

iii. The Applicant's predecessor Mary Earnshaw at one time owned all flats in the tenement together with the retail premises in the ground floor. By Deed of Conditions recorded in the General Register of Sasines on 27 April 1961 she set out a scheme of real burdens with obligations on all of the flat and shop owners which she intended to incorporate into the dispositions or feu dispositions by which she intended to transfer each individual flat or shop into separate ownership. The terms of the Deed of Conditions were incorporated into the dispositions or feu dispositions granted by Mrs Earnshaw of each flat or shop in the tenement. These included the disposition of the Property to predecessors of the Applicant. Accordingly the title of each flat in the tenement is burdened by the real burdens in the Deed of Conditions.

iv. The relevant terms of the Deed of Conditions are set out in the Land Certificate for the Property which is under title number GLA8454. In terms of the Deed of Conditions (on page D8 of the Land Certificate) there is provision for the appointment of a factor to whom the whole rights and duties exercisable at an owners' meeting are delegated. It is further provided (on page D8):

> "DECLARING that the said Factor shall . . . be entitled during the continuance of his appointment to exercise the whole rights and powers which may competently be exercised at or by a meeting of the proprietors and others convened as aforesaid: DECLARING FURTHER . . . [continuing on page D9 at the foot to D10] . . . that the proprietors for the time being of said respective houses and shops shall be bound to concur in keeping the said tenement and outhouses constantly insured against loss by fire with a well established insurance company to be approved by a majority of the proprietors of said tenement to the extent of £ 6,000 or such other sum less or more as may from time to time be fixed at a meeting of the proprietors convened in manner aforesaid as also against storm and loss arising with property owners' liability which insurances shall be in the joint names of the proprietors of said tenement and holders of securities over the same for their respective rights and interests. . ."

v. The Respondents were factors for the tenement at the time that the Applicant bought the Property in 1989.

vi. The Respondents have arranged insurance for the tenement since before the Applicant's ownership of the Property and continue to do so.

vii. The Respondents have issued to homeowners such as the Applicant information brochures entitled "The Journal" including editions dated spring 2014, and spring 2015.

viii. The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 1 November 2012.

ix. On or about 19 August 2013 the Respondents sent a letter to the Applicant enclosing a Service Level Agreement dated January 2013. The Agreement advised him (on page 6) that where required by the Deed of Conditions the Respondents would put in place a comprehensive common buildings policy on behalf of the owners but that it was his responsibility to ensure that the Property was adequately insured for the full reinstatement value.

x. By letter to the Respondents dated 5 May 2014 the Applicant requested them to cancel the common buildings insurance policy. The Respondents responded with their letter to the Applicant dated 19 May 2014 in which they referred to the Deed of Conditions as quoted above and indicated that as they had no indication of the owners having a common policy, they, the Respondents had put one in place. By letter to the Applicant dated 27 May 2014 the Respondents indicated that the reinstatement value for which they insured the "rebuilding costs" of "your property" had increased each year in line with "index linking" and "the Royal Institute of Chartered Surveyors". This was re-stated later in a further letter from the Respondents dated 2 July 2014 which also referred to the part of the Deed of Conditions quoted above.

xi. The Applicant wrote to the Respondents on or about 30 May 2014 complaining that the sum insured for the Property of just under £ 58,000 was not adequate. By two letters of 5 June 2014 to the Applicant, the Respondents reiterated that the Applicant as owner needed to ensure that the building sum insured represented the full reinstatement cost of the Property including commonly owned areas. In the letter the Respondents offered to arrange a meeting of owners to allow an "overall sum insured" to be approved by a majority.

xii. By letter dated 25 June 2014 to the Applicant the Respondents re-stated that "It is up to each individual owner to provide evidence of a reinstatement value and to ensure their property is fully covered", and advised that the "total sum insured for the building is £ 1,893,260.73".

xiii. In or about May 2014 the Applicant refused to pay the sum of £ 171.56 being his share of the premium due under the insurance policy organised by the Respondents. He received various reminder letters and a reminder notice as set out below.

xiv. By letters to the individual owners of premises in the tenement dated 11 August 2014 the Respondents invited them to attend a meeting at the Property on 28 August 2014 to discuss the application of the common buildings insurance. The meeting took place with the Applicant and the Respondents' Mr Clements in attendance. However no other owner attended.

xv. By letter to the individual owners in the tenement dated 1 September 2014, the Respondents intimated with regard to the common insurance,

> "Due to the lack of attendance we were not in a position to agree any amendment to the current procedure/application. I would reiterate at this time that in order to proceed with any amendments, the majority of proprietors are essential [*sic*]."

xvi. By letter to the Applicant dated 7 November 2014 the Respondents indicated that taking account of the fee of John Campbell, sheriff officers, for issuing a reminder notice, the sue due by the Applicant had increased to £ 186.57 including VAT.

xvii. In his letter to the Applicant dated 3 February 2015, the Respondents' Mr Clements asked for settlement of the sum of £ 186.05 and referred to his earlier correspondence dealing with the Respondents' position on their and owners' responsibilities in relation to the common insurance. By letter of 11 February 2015 to the Applicant, Mr Clements referred to the debt recovery procedure set out on page 8 of the Service Level Agreement and to the complaints procedure set out on pages 9 and 10 of the Service Level Agreement.

xviii. By letter to the Applicant dated 2 March 2015 the Respondents' Mr Clements enclosed a copy of an updated Service Level Agreement dated September 2014 ("the SL Agreement") and asserted that details of the commission received by the Respondents were included in the newsletter issued to all owners in spring 2014. In actual fact the newsletter did not include such details.

xix. The Applicant submitted formal letters of complaint to the Respondents as set out above.

xx. The Respondents sent a letter dated 21 April 2015 to the Applicant enclosing a Certificate of Insurance to apply from 15 May 2015 and the Respondents' Terms of Business statement.

xxi. The certificate of insurance for 15 May 2015 to 15 May 2016 bore to have been issued to the Applicant for Zurich policy number CW821365 for the Property without any mention of the common parts of the tenement as being insured. It stated the sum insured for the buildings as £ 61 089.45.

xxii. In or about May 2015 the Applicant refused to pay the insurance premium due for the insurance from 15 May 2015. This left the amount outstanding to the Respondents at £ 349.85.

xxiii. By letter dated 23 June 2015 to the Applicant the Respondents informed him that they had a duty to ensure that the "property" (677/685 Cathcart Road) was fully insured under a common policy and that as a result they required to alter the "present insurance arrangements". They also indicated that their building surveyors would produce a reinstatement value to be used for insurance purposes but that in the meantime a provisional sum of £ 3 million would be used at a premium of £ 4,500 per annum. The revised cover was to take effect from 30 June 2015 and the letter enclosed a revised certificate of insurance.

xxiv. With the letter of 23 June 2015 to the Applicant the Respondents enclosed a Certificate of Insurance to apply from 30 June 2015 to 15 May 2016. This bore to cover "the development insured in full and known as 677/685 Cathcart Road 8 Dixon Road" under a policy number CW821365 and reference number 10550233 and stated the sum insured as £ 3 million.

xxv. A further certificate in the same terms was enclosed with the Respondents' letter to the Applicant dated 14 July 2015.

xxvi. The sum of £ 3 million is a provisional estimate of reinstatement pending a professional valuation by the Respondents' building surveyors of the reinstatement value of the tenement. The Respondents' surveyors were instructed to produce such a value in July 2015. The Applicant has not been informed of any such value having been reached by the said surveyors.

Reasoning

Section 1.1a B of the Code

19. The Applicant complains that in the written statement of services the Respondents have not provided a transparent statement of the target times for taking action for all of their core services. The application relied on section 1.1b of the Code. At the hearing the Applicant requested this to be amended to section 1.1a. There was no objection to this from the Respondents and the Committee allowed the amendment. The

Respondents submit that the Service Level Agreement issued by them to the Applicant meets the requirements of section 1.1a B of the Code.

20. The material part of section 1.1a B of the Code provides,

> "You provide each homeowner with a written statement setting out in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. . . . The written statement should set out . . .
> 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). . ."

21. The Applicant submitted that "taking action" in the part of the Code just quoted meant the carrying out of the repair in question. The Respondents submitted that "taking action" referred to the instruction of the contractor or tradesman to carry out the repair. They submitted that they could not be expected to give a target time for any particular repair as they could not know in advance of how big the work would be or how long it would take to carry out.

22. The Committee takes the view that the Code cannot have intended to impose on factors a generic target time to have repairs completed when, as the Respondents submitted, the repairs can be of wide scope and dependent on the performance of other third parties. Accordingly the Committee rejects the interpretation of the Applicant and prefers that of the Respondents.

23. Turning to whether there has been a breach of the Code in the present case, the Respondents have put forward the SL Agreement as being the written statement of services in terms of section 1 of the Code.

24. On pages 3 and 4 of the SL Agreement the repairs are stated to fall into three broad categories, namely (1) emergency works; (2) routine repairs; and (3) major repairs. In connection with routine repairs, on page 4 the SL Agreement states,

> "We aim to instruct contractors the same/following working day and arrange for the completion of jobbing repairs as soon as practicable. Our ability to do so is entirely governed by funding made available to us . . and consequently the under noted timescales assume that adequate property liquidity exists.".

Below this paragraph there is a table with maximum response times for routine repairs for certain limited categories of repair.

25. The Applicant's criticism is that the maximum response times do not provide for all possible types of repair and that such an omission results in a breach of the Code as quoted above. As he put it, "Why not put a category of "Others" at the foot of the table ?" The Respondents submitted that given the wide scope of repairs to put some specific time for "Others" could be misleading for homeowners.

26. It must be borne in mind that the Code only requires target times for the instruction of contractors. That is the effect of the interpretation which the Committee has adopted above. The instruction of contractors is a matter within the control of the Respondents (subject to funding). Contrary to the Respondents' submissions there would be nothing misleading for homeowners for the Respondents to give comprehensive target times for instructing work on all matters. Indeed that is what the Code requires a written statement to contain. Accordingly the Respondents' submission is rejected.

27. The Respondents' submission is all the more surprising given that in the first sentence under "Routine Repairs" quoted above, the Respondents do give a comprehensive target time for all routine repairs, namely the same or following working day after being notified of the need for work. This appears to answer the Applicant's complaint. The table below provides "Maximum Response Times" for certain categories of work. In the view of the Committee this table goes beyond the "target times" required by the Code. A "target time" is an intended time but not a guaranteed time such as a "maximum response time".

28. In short the target time for "others" is covered in the first sentence quoted above. In the view of the Committee this is sufficient for compliance with section 1.1a B c of the Code. The Applicant's complaint is therefore rejected.

Section 4.1 of the Code

29. The Applicants complained that the Respondents were in breach of their duty under section 4.1 of the Code which provides,

> "You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts."

Section 4.1 is said to have been breached in three ways.

Lack of clarity

30. On page 8 of the SL Agreement a debt recovery procedure is set out. This outlines a series of steps which the Respondents undertake to follow. It includes the following statements:

> "Accounts are due for immediate settlement. . . If following issue of the account payment remains outstanding we will issue a reminder after 21 days which will include intimation of an administration or interest charge should the account remain unpaid for a further 7 days, resulting in the requirement to issue a second reminder. Continued non payment will result in the

implementation of recovery procedures, for which we will seek all associated costs."

31. The Applicant submits, firstly, that the reference to "recovery procedures" is vague and lacks the clarity required by section 4.1 of the Code. He says that he is left unaware as to what the "recovery procedures" are. The Respondents submitted that the reference had sufficient clarity and that in any event the reminders issued under the procedures made clear to the homeowner what the recovery procedures were to be. In particular the Respondents founded on the terms of the final demand letters that they had sent to the Applicant dated 27 June and 1 December 2014 and 10 July 2015.

32. The purpose of section 4 of the Code is to allow homeowners to be aware of the full implications of non-payment of debts due to the factor. Like the other parts of the Code it is intended to achieve transparency of factors' procedures. Section 4.1 is designed to fulfil that purpose by requiring factors to have a clear written procedure for debt recovery. An owner should be in a position to know what may happen to him if he does not pay a debt. He should not be left having to find out once non-payment has occurred, as suggested by the Respondents. Their submission that the procedure required by section 4.1 can be found in a reminder letter is manifestly ill-founded and is rejected.

33. The Committee finds that on a reading of the part of page 8 quoted above the reader, who may have had no experience of debt or the courts, may well be left unclear as to what "recovery procedures" the Respondents will follow at the end of the reminder process. Accordingly the Committee accepts the Applicant's submission and finds a breach of section 4.1 in this respect.

Failure to follow debt recovery procedure

34. The Applicant complains that the Respondents breached section 4.1 through not following their own procedure set out on page 8 as quoted above. That procedure required two reminders before the further "recovery procedures". In the present case the Respondents had sent a first reminder to him dated 30 May 2014 for £ 171.56. That was compliant with their procedure. Next they sent a letter headed at the top "FINAL DEMAND' dated 27 June 2014. It stated that if the account was not paid or adequate arrangements for payment put in place within 7 days solicitors would be instructed to issue proceedings for recovery. Next, there was no court action but instead a written notice from John Campbell, financial recovery services, dated 11 July 2014. It was headed "NOTICE PRIOR TO COURT PROCEEDINGS" and asked for immediate remittance failing which a solicitor would be instructed to raise court proceedings. This notice contained the statement "THIS IS FINAL".

35. No payment having been made, nor court action having been raised, on 17 November 2014 the Respondents issued a further letter headed

"FIRST REMINDER", this time for £ 186.05. This was followed by another letter headed "FINAL DEMAND" dated 1 December 2014. Again, this was followed by a notice from John Campbell this time dated 22 January 2015.

36. Again, no court proceedings having been raised, the Respondents went through the same process albeit for a balance claimed of £ 349.85 with a first reminder dated 16 June 2015, a "final demand" dated 10 `July 2015 and a notice from John Campbell dated 24 July 2015.

37. The Applicant's second complaint is that there was no "second reminder" in terms of the written procedure. Instead there were two final demands, being one from the Respondents and one from John Campbell. Thirdly, he complains that in so far as the Respondents viewed "recovery procedures" as the raising of court proceedings, no court proceedings had been raised. He explained that he wished the court proceedings to be raised as it would enable him to challenge the charges for insurance as being contrary to the deed of conditions for the Property.

38. The Respondents accepted that the second letter should have been labelled "SECOND REMINDER" in order to make it accord with the written procedure. On the third point they submitted that they had ongoing correspondence with the Applicant and were entitled to try to resolve matters by agreement before going to court.

39. Section 4.1 requires a factor to follow its written procedure for debt recovery "unless there is a reason not to" and to apply the procedure "clearly, consistently and reasonably". In their written procedure the Respondents provide for the sending of two reminders followed by the unspecified "recovery procedures". They accepted that their second letter should not have been labelled "FINAL DEMAND" particularly given the John Campbell notices which are labelled as "final". The Committee finds that in the labelling of the second demand as a "final demand" rather than a "second reminder" when in fact there was a further final demand, the Respondents did not follow their own written procedure and were thus in breach of section 4.1. No reason was given by the Respondents for the mis-labelling in question.

40. Turning to the third complaint it is suggested that the Respondents breached their own procedure which in this connection states, "Continued non payment will result in the implementation of recovery procedures.". The Committee notes that the procedure does not state that a court action will or will not be raised within a particular period of time. Accordingly the Committee concludes that the fact that a court action has not been raised thus far does not amount to failure to follow the written procedure.

41. Has the conduct of the Respondents involved an unclear, inconsistent or unreasonable application of the written debt recovery procedure ? It was suggested for the Applicant that it was unreasonable for the Respondents to repeatedly threaten him with court proceedings in the "final demand" and John Campbell notices and not raise the proceedings. The Committee

is of the view that litigation should always be seen as a final resort. There is nothing unclear or unreasonable in the Respondents' said correspondence which has in effect given the Applicant further opportunities of paying the alleged debt. Nor was there anything inconsistent in the correspondence as each series of letters was sent in response to an increase in the debt in question. This third complaint under section 4.1 is therefore rejected.

Section 5.3 of the Code

42. The Applicant complains of a breach of section 5.3 of the Code which provides,

> "You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance."

43. The Applicant's complaint is that he requested information on a number of occasions as to the amount of commission received by the Respondents but had not been supplied this information. In particular the requests were made by letters dated 17 July (erroneously given as "17.5") 2015 and 15 August both 2015.

44. The Respondents accepted that they had made a mistake in their Mr Clements' letter of 2 March 2015 to the Applicant in stating there that the details of the commission were included in the Respondents' newsletter issued to all owners in spring 2014. They accepted that the details had not been included in that newsletter.

45. Instead the Respondents submitted that the details were included on page 7 of the SL Agreement, on the certificate of buildings insurance issued to the Applicant on 18 April 2015 and on the insurance certificate issued on 9 July 2015 to the Applicant. The Respondents' Mr Clements also gave evidence to the Committee that the commission was 22.5% and that the commission was included within the £ 122.18 premium stated in the earlier certificate.

46. While he did not contest Mr Clements' evidence, the Applicant adhered to his submission that the information should have been provided when he requested it.

47. Page 7 of the SL Agreement provides merely that "Details of commission received will be supplied to you on an annual basis or upon request". It says nothing about the commission actually received by the Respondents. The certificates of insurance merely stated "Our current remuneration from insurers is by way of commission, not fees and will not exceed 22.50% of

gross premiums net of insurance premium tax.". They said nothing about what the actual commission was between 0.1% and 22.5%. In short, there was no compliance with section 5.3 of the Code by the Respondents up to Mr Clements' oral evidence at the hearing.

48. There is no reason why the Respondents could not have supplied the level of commission when the Applicant requested it. In requiring the disclosure of commission section 5.3 does no more than re-state the common law which requires the disclosure by an agent (such as a factor) of earnings made from third parties as a result of the agency. Failure to do so can render a factor liable to account for such undisclosed earnings. In these circumstances the Committee finds that there was a serious breach of section 5.3 of the Code.

Section 5.8 of the Code

49. The Applicant complains of a breach of section 5.8 of the Code which provides,

> "You must inform homeowners of the frequency with which property revaluations will be undertaken for the purposes of buildings insurance and adjust this frequency if instructed by the appropriate majority of homeowners in the group.".

50. The Applicant's submission was that at the time of the application to HOHP there had never been a revaluation at any time during his ownership of the Property. Since the HOHP application he had received a letter from the Respondents dated 23 June 2015 which indicated that the Respondents' building surveyors would carry out a valuation for reinstatement purposes which would be used for the purposes of insurance. However the letter did not indicate the frequency with which further revaluations would be undertaken so there was still a breach of section 5.8.

51. The Respondents indicated to the Committee that they would be undertaking a revaluation at no charge to homeowners in the tenement. They intended to provide further documentation on the frequency of valuations thereafter. It was anticipated to be in 3 to 5 year intervals and the Respondents were prepared to intimate this to all homeowners in the Applicant's tenement.

52. The purpose of section 5.8 is to enable homeowners to be confident that a factor who arranges buildings insurance will also arrange, on a regular basis, a revaluation of the buildings in question. This in turn is designed to enable homeowners to ensure that the common insurance policy has a sufficient level of cover for the reinstatement of the tenement should it for example burn down. Section 5.8 makes it clear that it is not sufficient for a such a factor to refuse to carry out regular property revaluations in the absence of instructions from homeowners.

53. It is accepted by the Respondents that their placing of insurance without organisation of revaluations placed them in breach of section 5.8 of the Code or of their other duties as property factors. As at the hearing there had yet to be the revaluation promised by the Respondents. This breach continues. However the Committee finds that they have still not informed the Applicant and other homeowners of the frequency of revaluation in the future. The Committee are not prepared to see what was said in submission as the informing of the Applicant of the frequency as required by section 5.8. Even if they did, the Committee are of the view that there has been a breach of section 5.8 of the Code.

Breach of Property Factor's Duties

54. So far as material, a homeowner may apply to the HOHP for determination of whether the property factor has failed to carry out duties in relation to the management of common parts of land or buildings owned by the homeowner or has failed to carry them out to a reasonable standard (2011 Act, s.17(1), (4) and (5)).

55. In his or her application a homeowner must set out his reasons for considering that the property factor has failed to comply with any of those duties. This requires the homeowner to indicate, at least in general terms, the duties which he considers have not been complied with. In the present case the Applicant contended that the Respondents had failed to comply with their alleged duty under the Deed of Conditions to arrange adequate buildings insurance.

Breach of duty – arranging buildings insurance

56. The complaint of the Applicant was that the buildings insurance policy organised by the Respondents did not contain an adequate level of insurance, there having been no revaluation during the 25 years of his ownership of the Property. This did not follow the Deed of Conditions. Furthermore, in the Applicant's written representations it was for the owners alone to fix the level of insurance and insurance company and by implication the Respondents were not entitled to arrange the insurance at all.

57. In terms of the Deed of Conditions, as quoted above, the Respondents were delegated as factors to exercise the whole rights and powers which might competently be exercised at or by a meeting of the owners of premises in the tenement. These powers included the arrangement of common insurance for the tenement and the fixing of the sum insured. The Committee find that on a proper interpretation of the words governing the fixing of the sum, namely "or such other sum less or more as may from time to time be fixed" it is implicit that the sum must be at an adequate level to ensure full reinstatement of the tenement in the event of the insured risks materialising.

58. The terms of the Deed of Conditions delegating powers to the factor for the tenement owners were put to the Applicant at the hearing. He accepted that the factors had power to arrange the insurance and to choose the insurance company and the insured value. However he maintained that they had still failed to comply with their duty to ensure the adequate insurance of the tenement. As far as he was aware no revaluation had yet taken place.

59. The Respondents' representative submitted that he was unable to say if the revaluation had taken place. An instruction had been given to their building surveying department in June 2015. The sum of £ 3million had been a provisional sum supplied by their surveying department.

60. As agents for the owners of the tenement, the Respondents owed a duty to exercise reasonable skill and care in choosing that sum to be insured, or to put it in the words of s.17(3) of the 2011 Act, to carry out the choice to a reasonable standard (2011 Act s.17(3)).

61. When the application was submitted to the HOHP the Respondents' position was that they had no power to select the sum and that it required to be selected by a majority of the owners at a meeting. Given the delegation of the owners' powers to them in this regard this was clearly an erroneous position and this was conceded in their letter to the Applicant dated 23 June 2015 and the subsequent issue of fresh insurance certificates.

62. However at the hearing the Respondents' representative was still not in a position to assure the Committee that the sum of £ 3 million was a reasonable reinstatement value. There is nothing to indicate that the Respondents' buildings surveyors have carried out a professional valuation. The Committee finds it difficult to accept that some 3 months after the difficulty was initially identified such a valuation has still not been carried out. In these circumstances the Committee is compelled to find that the Respondents continue to breach their duty to exercise reasonable care to choose the sum necessary to secure the rebuilding or reinstatement of the tenement.

Property Factor Enforcement Order

63. Having decided that the Respondents have failed to carry out the duties and breached the Code as set out above, the Committee proposes to make a property factor enforcement order in terms of the Notice of Proposal accompanying this decision. The Applicant when asked about the remedies that he sought did not indicate any wish for monetary compensation. The Respondents were content to leave the remedy to the Committee.

64. In his application form he sought monetary compensation for taking a day off work to attend the hearing. However the tribunal has no power to find a

party liable for expenses in connection with attendance at a hearing and this request is therefore rejected.

65. Parts (1) to (5) and (6)(b) of the proposed order seek to remedy the deficiencies caused by the failure to take reasonable care to adhere to the Deed of Conditions and breach of sections 5.3 and 5.8 of the Code. Part (6)(a) seeks to remedy the breach of section 4.1 of the Code in failing to specify clearly the final steps of the debt recovery procedure.

66. Part (7) seeks to seek to ensure that the breach of section 4.1 in not following a written debt recovery procedure is not repeated.

Opportunity to Make Representations and Rights of Appeal

67. Unfortunately the wording of section 19(1)(a) of the 2011 Act is not as clear as it might be. This is a decision under section 19(1)(a) and (b). Given that the Committee has decided that it will make a property factor enforcement order, this decision is accompanied by a Notice of Proposal under section 19(2)(a).

68. Both Applicant and Respondents are invited to make representations to the Committee on this decision and the proposal. The parties must make such representations in writing to the Homeowner Housing Panel by no later than 14 days after the notification to them of this Notice.

69. The opportunity to make representations is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.

70. Following the making of representations or the expiry of the period for making them, the Committee will be entitled to review this decision. If it remains satisfied after taking account of any representations that the Respondents have failed to carry out the property factor's duties or complied with the section 14 duty to ensure compliance with the Code of Conduct it must make a property factor enforcement order. Both parties will then have a right to appeal against the whole or any part of such final decision and order.

71. In the meantime, without prejudice to the right of appeal against both the final decision and order, parties are given a right of appeal against this decision to the Sheriff by summary application within 21 days beginning with the date when this decision is "made".

Other proceedings

72. The parties are reminded that subject to an appeal of this decision no matter adjudicated on in this decision may be adjudicated on by any court or other tribunal (section 19(4) of the 2011 Act).

Further procedure

73. This decision does not deal with the complaints under section 5.2, 6.1, 6.9 and the breach of agreement claim in relation to the slabs. The decision in the other case mentioned above is due to be heard at Glasgow sheriff court possibly in January 2016. The Committee intends to monitor progress in that matter and fix a hearing in order to allow these outstanding matters to be resolved as soon as possible.

74. Should either party wish a hearing to be fixed regardless of the outcome in the other case, they are at liberty to apply to the Committee to that effect.

David Bartos

Signed .... 12 November 2015

David Bartos, Chairperson