Decision of the Homeowner Housing Committee issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011 and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

Hohp ref: HOHP/PF/16/0025

Re: 0/1, 5 Firpark Close, Glasgow G31 2HQ ('the property')

The Parties:

Mrs Morag Shaw, 25 Greenhead Road, Lennoxtown G66 7DQ ('the homeowner')

Newton Property Management, 87 Port Dundas Road, Glasgow G4 0SF ('the property factor')

Decision by a committee of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

Committee members: Sarah O'Neill (Chairperson), Carol Jones (Surveyor member)

Decision of the committee

The committee determines that the property factor has failed to comply with its duties under section 14 of the Act in respect of sections 1.1a B.d, 1.1a F.p and 2.5 of the code of conduct for property factors ('the code')

The committee also determines that the property factor has not failed to comply with its duties under sections 1.1a B.c, C.i and E.o, 2.4, 3.3 and 6.4 of the code.

The committee also makes a number of observations about the property factor's communication with the homeowner, including the format of its written statement of services.

The committee's decision is unanimous.

Background

1. By application received on 3 March 2016, the homeowner applied to the Homeowner Housing Panel ('the panel') to determine whether the property factor had failed to comply with its duties under the Act. In her application form, the homeowner complained that the property factor had failed to comply with its duties under section 14 of the Act in respect of various

sections of the code. She also complained that the property factor had failed to carry out the property factor's duties as defined in section 17(5) of the Act.

2. She enclosed with her application form four additional pages setting out her detailed complaints, together with various other supporting information, including a copy of the property factor's written statement of services, a copy of the Deed of Conditions for the development, and copy email and postal correspondence between the homeowner and the property factor.

3. On 22 March 2016, the homeowner wrote to the property factor stating: *'It seems that I did not supply you with enough information about the complaints I was making to the HOHP, so I am enclosing a copy of Page 7 the HOHP application form, and my supplementary information.'* (i.e. the further pages attached to the form, setting out the details of her complaints).

4. On 4 May, a letter was received from the homeowner, enclosing email correspondence from the property factor in response to her letter of 22 March, and indicating that she did not consider her complaints to be resolved.

5. On 7 June 2016, the Convener with delegated powers under section 96 of the Housing (Scotland) Act 2014 and section 16(8) of the Act issued a minute of decision to both parties, stating that he considered that in terms of section 18(3) of the Act there was no longer a reasonable prospect of the dispute being resolved at a later date; that he had considered the application paperwork submitted by the homeowner, comprising documents received in the period of 3 March to 1 June 2016; and intimating his decision to refer the application to a panel committee for determination.

6. On 20 June 2016, the President issued a notice of referral and hearing to both parties, advising that a hearing would be held on 18 August 2016, and requesting written representations by 11 July 2016.

7. Written representations were received from the homeowner on 24 June. Further correspondence, attaching photographs of the development, was received from the homeowner on 6 July. On 11 July, written representations were received from the property factor.

The committee's directions

8. Prior to the hearing, the committee issued a total of four directions to the parties. In its first direction of 25 July, the committee noted that in both its response to the homeowner's notification letter and its written representations, the property factor appeared to take the view that most of

the homeowner's complaints did not require a response, as they did not form part of her initial complaint about the replacement of the common entrance lock at the property. The committee took the view that the homeowner's letter of 22 March was intended to provide notification of her complaints to the property factor in terms of section 17(3) of the Act; pointed out that the minute of decision of 7 June and the notice of referral and hearing sent to the parties made clear that the homeowner's 'application' included all paperwork received up until 1 June 2016; and referred to various authorities relevant to determining when an application is made. The parties were invited to submit written representations by 11 August. The homeowner was also directed to clarify 1) her specific complaints under certain sections of the code, and 2) the nature of her specific complaints about the property factor's duties.

9. A response was received from the homeowner on 9 August. On the same date, an application by a party to a committee to give Directions in terms of Regulation 13 (1) of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 was received from the property factor. In this application, the property factor requested an extension of time to respond to the complaints set out in the homeowner's application. This was requested on the basis that the property factor had not been made aware of most of the complaints in her application until it received her letter of 22 March 2016; that this letter and enclosures appeared merely to advise the property factor of the complaints; and were not worded in a way that made it clear she wished it to respond.

10. Following this, the committee issued a second direction on 31 August, again noting its view that the homeowner's letter of 22 March was intended to provide notification of her complaints. The committee stated that it considered there was an argument that the property factor should have recognised that this was her intention, and responded at that stage to the complaints raised. It took the view, however, that the wording of the homeowner's letter did not make this entirely clear. The committee therefore postponed the hearing fixed for 18 August, and extended the period for written representations to 29 September, to allow the property factor a further opportunity to address all of the homeowner's complaints. The direction stated that the committee expected the property factor to send a full written response to the homeowner regarding each of her complaints by that date.

11. Also in its second direction, the committee, having considered the homeowner's response to its first direction, set out in detail which of the homeowner's complaints it would consider at the hearing. Some of her complaints had not been notified prior to 22 March 2016; some related to

matters which had occurred prior to the property factor's registration on 1 November 2012 and could not therefore be considered; others were not sufficiently specific; and most of the complaints which she had set out as duties complaints were actually covered by her complaints under the code. The committee gave notice to the parties that it would consider the following complaints under the code at the hearing: 1.1a (B.c, B.d, C.i, E.o and F.p); 2.4 and 2.5; 3.3 and 3.4; 3.5a and 3.6a, 4.1 and 4.4; 5.1, 5.3 and 5.8; 6.4, 6.7, 6.8 and 6.9; and 7.1.

12. A date of 7 November was subsequently fixed for the postponed hearing. The property factor sent the homeowner a detailed written response to her complaints on 20 September. A letter was received from the property factor on 22 September, expressing its view that, as the homeowner had not yet confirmed whether its letter of 20 September had satisfied her complaint, it was inappropriate that the committee had confirmed a date for a hearing.

13. On 7 October, the homeowner sent to the panel an electronic copy of the property factor's letter of 20 September, with her comments attached. On 10 October, the committee issued a third direction to the parties. This stated that as the homeowner's application remained before the committee, a new hearing date had been fixed should the parties be unable to resolve the matter between themselves. It noted that, should the matter be resolved, it would be open to the homeowner to withdraw her application and in that event, the hearing could be cancelled.

14. The homeowner was therefore directed to confirm by 19 October whether she was satisfied with the property factor's response of 20 September, and whether she wished her application to be considered by the committee at a hearing. On 11 October, an email was received from the homeowner, stating that it could be said that her original complaint had been resolved; that she doubted whether her other complaints could be resolved; that 'on paper', the property factor had probably provided the requisite services; but that the issue in question was the reasonableness of homeowners' expectations as to those services. She asked for the committee's opinion as to whether resolving those issues was within its scope.

15. The committee issued a fourth direction on 26 October. This stated that the committee's role was to make a determination, on the basis of all the evidence before it, as to whether the property factor had complied with its duties under the code in relation to the homeowner's complaints. While it was open to the committee to make observations on other matters in its final decision, should it consider this appropriate, it could not make a formal determination on these.

16. The direction required the homeowner to confirm by 3 November whether she wished to proceed with the hearing on 7 November, and if so, which complaints she wished the committee to consider at the hearing. It also required the property factor to provide to the committee details of its planned programme of cyclical maintenance, in relation to the homeowner's complaint under section 6.4 of the code.

17. By email of 1 November, the homeowner confirmed that she wished to proceed with the hearing, and wished the committee to consider all of the complaints set out in its second direction, aside from that under section 5.1 of the code. On 2 November, a response was received from the property factor, enclosing details of its planned programme of cyclical maintenance for the homeowner's development.

The hearing

18. A hearing took place before the committee on 7 November 2016 at Wellington House, 134-136 Wellington Street, Glasgow G2 2XL. The homeowner represented herself and gave evidence on her own behalf. The property factor was represented by Martin Henderson, Executive Director and Derek MacDonald, Director, who gave evidence on its behalf. Neither party called any other witnesses to give evidence on their behalf.

Findings in fact

19. The committee makes the following findings in fact:

a) The homeowner is the owner of the property, which she lets out as a rental property.
b) The property is situated within a development known as the Parade Park Development, Alexandra Parade, Glasgow. There are around 230 flats within the development.
c) Newton Property Management was appointed by the developer as the property factor for the development under the terms of the Deed of Conditions by Bellway Homes Limited dated 30 June 2005, and has been the property factor since the development was built.
d) Newton Property Management became a registered property factor on 1 November 2012. Its duty to comply with the code therefore took effect from that date.
e) The property factor's contractual duties regarding the management and maintenance of common areas within the development are set out in:
   i. the said Deed of Conditions
   ii. its written statement of services.

The homeowner's complaints

20. The homeowner's initial complaint concerned the handling of a complaint she had made to the property factor about an incorrect charge for replacement of the lock and keys for the common entrance door at the property. She had received an invoice for this repair in May 2014, and disputed that the work had been done. Following protracted correspondence with the property factor about this for almost two years, the property factor eventually confirmed that the repair had in fact been carried out at a different address, and that the homeowner had been incorrectly billed for this.

21. In her application to the panel, the homeowner made a considerable number of complaints about alleged failures to comply with the code and also some complaints about alleged failures to carry out the property factor's duties. For the reasons set out at paragraph 11 of this decision, the committee took the view that it could not consider some of these complaints. The complaints which it decided it would consider were those under sections 1.1a (B.c, B.d, C.i, E.o and F.p); 2.4 and 2.5; 3.3 and 3.4; 3.5a and 3.6a, 4.1 and 4.4; 5.1, 5.3 and 5.8; 6.4, 6.7, 6.8 and 6.9; and 7.1 of the code.

22. The homeowner indicated in her response to direction 4 that she wished the committee to consider all of these complaints at the hearing, aside from that under section 5.1. At the hearing, the committee began to consider each of her complaints in turn. The committee heard evidence in relation to her complaints under sections 1.1a B.c, B.d, C.i, E.o and F.p; 2.4; 2.5; 3.3 and 6.4 of the code. During the hearing, the homeowner indicated that she did not wish to pursue her remaining complaints. The committee adjourned briefly to allow her time to consider whether she was certain about this. Following the adjournment, the homeowner confirmed to the committee that she did not wish to pursue any of her remaining complaints. The complaints which were considered by the committee at the hearing are set out below.

23. **Section 1.1a** sets out the required content of the property factor's written statement of services (WSS), in the situation where the common property is owned by the group of homeowners. The homeowner complained that the property factor had failed to comply with various subsections of section 1.1a, as set out below.

24. The committee had before it several different versions of the property factor's WSS. The homeowner had submitted two versions, one dated 1/10/2012 and a second version, which she said had been sent to her by email in February 2014. The property factor had also submitted an undated copy of the WSS with its written representations received on 11 July 2016. This appeared to be in the same terms as the February 2014 version

submitted by the homeowner. The committee referred throughout to the February 2014 version, which appeared to be the version which was current at the time the homeowner made her application. The homeowner had also added her own numbering to the paragraphs in the text, which made it easier for both the committee and the parties to identify which specific paragraphs were being referred to.

25. **Section 1.1a B.c**, which states that the WSS should set out: *'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).'*

26. The homeowner complained that the WSS did not give sufficient detail of the core services provided, and in particular the frequency of property inspections. She pointed to a paragraph of the WSS (which she had numbered 30) which stated: *'The Property Manager will visit the property at his discretion, but no undertaking is given or inferred for a schedule or regular visit'*. She felt that was insufficient, and did not state the frequency of inspections to be carried out.

27. **Section 1.1a B.d**, which states that the WSS should set out: *'the types of services and works which may be required in the overall maintenance of the land in addition to the core services, and which may then incur additional fees and charges (this may take the form of a 'menu' of services) and how these fees and charges are calculated and notified.'*

28. The homeowner's complaint under this section related to a paragraph on the first page of the WSS regarding services supplementary to the core services (which she had numbered 21). The 2012 version off the WSS included among the examples of larger works/extraordinary repairs a reference to *'underwriting individual repair costs greater than £350 plus VAT per repair'*. She believed that this referred to a fee for an insurance policy to underwrite any shortfall, should some owners fail to pay up. Her complaint was that the WSS did not explain how this fee was calculated and notified, in accordance with this section.

29. **Section 1.1a C.i**, which states that the WSS should set out: *'any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service).'*

30. The homeowner's complaint under this section of the code was that the WSS did not make clear how the balance of the float to be returned to a departing owner would be apportioned, in the event of outstanding debt

across the development in respect of specific projects or cyclical maintenance. Her concern was that it was not stated whether the debt would be charged to the departing owner or the incoming owner.

31. **Section 1.1a E.o**, which states that the WSS should set out: '*a declaration of any financial or other interests (for example, as a homeowner or lettings agent) in the land to be managed or maintained.*'

32. The homeowner complained that she could find no declaration of interest, but that the absence of such a declaration did not confirm that there was no interest. She believed that there should be a declaration of no interest, if that was the case.

33. **Section 1.1a F.p**, which states that the WSS should set out: '*clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any 'cooling off' period, period of notice or penalty charges for early termination'.*

34. The homeowner made reference to a paragraph (which she had numbered 28) on page 2 of the WSS which states: *'The appointment of the Property Manager may be terminated by the Owners or the Property Manager upon giving not less than three months' prior notice in writing. Each property will have variable voting rights and requirements to terminate the management contract. In order to obtain the voting requirements and specific conditions required to exercise the right of termination, homeowners may contact NPM's office and this information will be provided free of charge by return. Decisions by the homeowners as to appointment of a Property Manager or termination of his office or as to the authorisation or approval of repairs or maintenance or as to the type and amount of insurance cover shall be made in accordance with any procedure specified in the relevant Title Deeds or, if such a procedure is not specified in the Title Deeds or is not in fact operated, by a majority in number of the homeowners of premises in the property, whose decision shall be binding upon all the homeowners.'*

35. The homeowner's complaint was that this paragraph did not appear to signpost homeowners to the appropriate legislation, and that it did not mention the presence or absence of any fees or cooling off periods, but simply advised that owners should contact the property factor's office to request information regarding the specific requirements and conditions.

36. **Section 2.4**, which states: '*You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to*

the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).'

37. The homeowner complained that while the WSS did refer to the instruction of exceptional works (the paragraph which she had numbered 5), it did not describe the process by which owners will be notified of such works and their approval confirmed.

38. **Section 2.5**, which states: '*You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers).'*

39. The homeowner complained that the property factor had delayed in resolving her complaint about the incorrect charge which had been applied to her account for the replacement of a common entrance lock and key which had never taken place. She had received an invoice from the property factor in May 2014, which included a charge of £57.06 for her share of this repair. She had contacted the property factor shortly after receiving the invoice to query the repair, stating that the lock at the property did not appear to have been changed, and that her original keys still fitted the lock.

40. She had continued to correspond with the property factor regarding this issue, and had notified it that that she had spoken to other owners in the block who were also unaware of any lock change, and that all residents were still using their original keys. The homeowner told the committee that, while the property factor had *responded* promptly to her emails, it had failed to investigate the matter adequately until she had initiated the application process with the panel. The matter had never been adequately explained or rectified, and almost two years after the invoice was first received, the property factor had continued to pursue her for the cost of the repair.

41. On 15 February 2016, the homeowner wrote to Mr Henderson stating that she intended to make a formal complaint to the panel about the matter. On 25 February 2016, Mr Henderson replied to her stating: *'Given the length of time this matter has dragged on, and in a gesture of good will, I propose that we write off the sum of £57.06 and 'draw a line under this."* The homeowner replied, rejecting the gesture of good will, on the basis that the repair had never taken place, and she should never have been charged for it in the first

place. She said that she wanted to know how the charge had arisen, and why the contractors had charged for work that had not been done.

42. In his response of 29 February, Mr Henderson stated that the fact was that the work had been done, that timesheets had been requested from the contractor detailing their operatives' time and work at the property, and that these would be forwarded to her. He said that the other residents in the block had accepted that the works had been done, and expressed the view that the homeowner's tenant was accusing the contactor of carrying out 'phantom' repairs.

43. When the timesheets were received, it became apparent that the work had actually been carried out at a different property at 5 Firpark Court, not Firpark Close.

44. Section 3.3, which states: '*You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.*'

45. The homeowner's complaint was that she was not provided with a sufficiently detailed financial breakdown of charges by the property factor, other than her quarterly invoices. She was particularly concerned about the lack of clear information on how communal electricity supplies were charged for. She said that in the past, she had been charged for one-sixth of the cost of electricity for her block, which comprised six flats. This had changed with the introduction of smart metering. She said that her invoices now showed costs for 11 different supplies, which were each divided by 60. She felt that the billing was unnecessarily complicated and difficult to understand.

46. **Section 6.4**, which states: '*If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.*'

47. The homeowner did not dispute that a programme of works for planned cyclical maintenance had been produced by the property factor in response to the committee's fourth direction, but complained that this programme of works had not been provided to owners. She also complained that while the interior of the blocks had been painted every 3-4 years in accordance with

the title deeds, the exteriors had never been painted, despite this also being a requirement in the title deeds.

Statement of reasons for decision

48. It was clear to the committee that at the heart of the homeowner's complaints lay her dissatisfaction with the way in which her complaint about the charge for the lock replacement had been handled. Because this had gone on so long, and she had continued to receive invoices for the work, she felt the property factor had not believed her, or taken her complaint seriously. By her own admission, she had then made a considerable number of additional complaints about other issues, essentially because she was so unhappy about how her complaint had been handled.

49. She had complained to the property factor in general terms on various occasions about the standard of the grounds maintenance within the development. She included this issue in her application, and included numerous photographs of the development. It was not clear from these, however, exactly what duties she believed had not been fulfilled by the property factor, nor what the source of those duties were. The committee was therefore unable to consider this complaint and others, for the reasons set out at paragraph 11, but there were clearly a number of other matters she was unhappy about.

50. The property factor had taken the view that the homeowner's initial complaint had been resolved, and felt that some of her other complaints were simply her observations or statements of opinion about the content of its WSS, or about other matters. As the committee noted in its first direction, a homeowner is entitled to apply to the panel in terms of section 17 (1) of the 2011 Act for a determination of whether a property factor has failed to carry out the property factor's duties and/or to comply with the code of conduct. There is no requirement that the complaints made should concern related issues.

51. As discussed earlier in this decision, the committee took the view that, while the homeowner's letter of 22 March was not worded as clearly as it might have been, this was intended to provide notification to the property factor. The committee took the view that the property factor had had an adequate opportunity to address all of her complaints. The committee had allowed it additional time to address these, for the avoidance of doubt. The committee considered that there had therefore been no prejudice to the property factor. While Mr MacDonald expressed some disquiet to the committee about this at the hearing, he stated that he accepted that due process had been followed.

52. The committee considered each of the homeowner's complaints in turn, and the statement of its reasons for its decision on each of these complaints is set out below.

53. **Section 1.1a B.c** - Mr MacDonald told the committee that a distinction should be drawn between visits by the property factor itself and those undertaken by external contractors appointed by it. He pointed out that the frequency of visits for matters for which external contractors were appointed was set out in the schedule of cyclical maintenance provided. Otherwise, the position was as set out in the WSS i.e. while the property manager may visit the property, it was the responsibility of owners to let the property factor know if there was any work which required to be done.

54. The committee notes that there is a heading on page 1 of the WSS (between paragraphs 2 and 3 as numbered by the homeowner) which states '*NPM will provide the following core services, subject to their relevance from time to time in any given property*'. The committee infers that the paragraphs following it, and before the heading setting out works supplementary to the core services (paragraphs 3 to 20 as numbered by the homeowner) set out the core services provided by the property factor. There is no mention in these paragraphs of property inspections forming part of the core service. The relevant section of the code requires the frequency of inspections to be set out *where these are part of the core service*. Where they are not, there is no requirement to do so.

55. The committee concludes on the basis of the evidence before it that property inspections do not form part of the core service provided by the property factor. The committee therefore determines that the property factor has not failed to comply with its duties under this section of the code.

56. **Section 1.1a B.d** - it was clear from the homeowner's evidence that she had misunderstood what the reference to 'underwriting' repair costs was intended to mean. She had thought that the 'underwriting fee' applied to all homeowners. Mr Henderson confirmed to the committee that, as stated in the property factor's response of 20 September to the homeowner, the reference in the WSS was not to a fee for an insurance policy from a third party, but was a guarantee to contractors and owners that the property factor would meet the contractor's invoice in full.

57. Where the cost of a repair was in excess of £350 plus VAT per homeowner, the property factor's procedure was to write to all homeowners and seek their consent to proceed with the works. The property factor also offered homeowners a facility whereby it would fund upfront the owner's share of the works in exchange for an additional management fee, referred to as the

underwriting fee. The committee's understanding of his oral evidence was that, where a homeowner paid their share of the works in full, however, no management fee was charged to them. He told the committee that all of this would be explained in the letter sent to homeowners regarding the proposed works.

58. The homeowner confirmed that she was content with this explanation as to how the fee operated, but said that she felt this was not clear enough from the terms of the WSS. The committee notes that the February 2014 version of the WSS does further clarify the nature and level of the underwriting fee, stating: *'All such extraordinary works will be advised in writing and will be subject to an additional management fee of 10% of the net contract value which is referred to as an underwriting fee. Underwriting fees will not apply where all proprietors provide instruction and payment in advance of the contractor being instructed.'*

59. The committee considers that, while this amended wording provides improved information about the process, it is still not entirely clear as to how and when the underwriting fee is charged. Firstly, it states that all such extraordinary works *will* be subject to an underwriting fee, and then goes on to contradict this by saying that these fees will not apply *'where all proprietors provide instruction and payment in advance.'* Secondly, the reference to all proprietors providing instruction in advance suggests that the only circumstances in which the fee would not be applied is where *all* owners agree to the works in advance, even though majority consent only is required to go ahead with the works. Finally, this sentence also suggests that the only situation in which underwriting fees will not be charged is where all owners pay for the works upfront. This does not tally with what the committee understood Mr Henderson to say, which was that only those homeowners who did not pay upfront would be subject to the fee.

60. The committee considers, therefore, that the relevant paragraph of the WSS does not set out sufficiently clearly when, in what circumstances, and to whom, this fee would be applied. The committee therefore determines that the property factor has failed to comply with its duty in respect of this section of the code.

61. **Section 1.1a C.i** -it was not clear to the committee how the homeowner's stated complaint actually related to this section. Her complaint appeared to be related to how the float funds would be administered in the hypothetical situation where a homeowner left while works were underway, and to her complaints under sections 3.5a and 3.6a of the code, which were not considered by the committee in the end. The committee determined that on

the basis of the evidence before it, the property factor had not been shown to have failed to comply with its duties under this section of the code.

62. ***Section 1.1a E.o*** - while the committee understood why the homeowner would find it helpful if property factors were required to declare that they have no financial or other interests in the land, it is clear from the terms of this section that there is a requirement only to declare any interests which exist. The committee notes that, in its response of 20 September to the homeowner, the property factor stated: *'for avoidance of doubt, Newton has no financial or ownership interest in your development.'*

63. The committee therefore determines that the property factor has complied with its duties under this section of the code.

64. **Section 1.1a F.p.** - Mr Henderson told the committee that not all of the information required by this section was included in the WSS, which is generic across all of the properties factored by the property factor. If a homeowner asked for this information, however, they would be provided with this in relation to their own particular development. Mr MacDonald said that this approach was similar to that followed by other property factors. He said that the property factor did not wish to over-complicate the position, as the situation would vary according to the title deeds for each development. He also stated that this matter may require to be taken to a development's owners' committee, and that the information which required to be provided would vary according to their requirements.

65. The homeowner pointed out that, if homeowners were sufficiently unhappy with the services provided by their property factor, they may not wish to go to the property factor for further information. The information should therefore be provided in the WSS.

66. The committee agrees with the homeowner. The code clearly sets out what information should be included, regardless of what common practice may be among property managers. While the committee accepts that, to some extent, the process to be followed will depend on what is stated in the title deeds, matters such as any 'cooling off' period (should there be one), period of notice (which is stated in the WSS here as being three months) or penalty charges for early termination are matters which are most likely to be stipulated by the property factor, rather than the title deeds.

67. The committee does not accept the property factor's argument that the information to be provided will vary according to the relevant title deeds. While it is true that the provisions for appointing or dismissing a property manager, where these are set out in the title deeds, may vary, the general

situation could be set out in the WSS. This is essentially that the title deeds may set out a procedure for dismissing a property factor, but that where they do not, the tenement management scheme under the Tenements (Scotland) Act 2004 (the 'relevant legislation') applies, whereby a simple majority can agree to dismiss the property factor. Even where there is provision in the title deeds about dismissal, these provisions can be overridden by a two-thirds majority of owners. While there are some exceptions to this general position (recently built developments, sheltered housing and buildings factored by a local authority or registered social landlord), these could be mentioned in the WSS if appropriate.

68. The committee therefore determines that the property factor has failed to comply with its duty in respect of this section of the code.

69. **Section 2.4 - i**n its letter of 20 September, the property factor pointed out that, while the code requires property factors to have a procedure to consult with homeowners and seek their written approval as set out in section 2.4, the code does not state that this procedure must be set out in the WSS. It also confirmed that it did have such a procedure. The homeowner confirmed to the committee that she was happy with the property factor's response on this issue.

70. The committee notes that the property factor had explained its procedure in relation to this matter under its consideration of the complaint under s1.1a B.c of the code. It therefore determines that the property factor has complied with its duties under this section of the code.

71. **Section 2.5** – it was clear from the evidence before the committee that it had taken almost two years for the homeowner's complaint to be appropriately dealt with by the property factor. While there was a question as to whether the property manager had followed its own complaints procedure in terms of section 7.1 of the code, the committee was unable to make a formal determination on this, as the homeowner had not provided adequate notification of her initial complaints under section 7. The committee had stated in its second direction that it would consider a complaint under section 7.1 specifically in relation to whether the procedure commented on how complaints against contractors would be handled, as it considered this had been adequately notified. In the end, the homeowner decided not to pursue this complaint at the hearing.

72. The committee accepted the homeowner's evidence that the matter had not been investigated properly until Mr Henderson became involved. This was supported by the correspondence before the committee. It was clear from the wording of his letter of 25 February 2016 that Mr Henderson was aware

that the complaint had been ongoing for some time. Yet he had simply offered to write off the cost of the repair (which the homeowner correctly pointed out that she had never been due to pay in the first place) without investigating the matter further. It was only when the homeowner rejected his 'goodwill' offer that the contractor's time sheets were requested. Yet it also appeared from Mr Henderson's letter of 29 February that he did not believe the homeowner's version of events.

73. Eventually it became apparent that the homeowner had been right all along that the works had not been done at her property. There is an obvious question as to why the timesheets were not requested from the contractor much sooner, as the matter could have been resolved at a much earlier stage. The property factor was unable to offer an adequate explanation of this. Section 2.5 states that the property factor's aim should be *'to deal with enquiries and complaints as quickly and as fully as possible'.* It is clear that this was not done when the complaint was first made, and the committee notes that the homeowner suggested in her original email querying the repair that perhaps the work had been done at another building. While the property factor appears to believe that writing off the original charge, providing her with a further refund of the original £57 charge, and offering a further £150 as a gesture of goodwill (which the homeowner did not accept and which was later withdrawn) was sufficient to resolve the matter, the homeowner did not consider this to provide an adequate resolution to her complaint.

74. The committee determines that the property factor has failed to comply with its duty under this section of the code. The committee also notes that, if the homeowner was not liable to pay this charge, neither were the other homeowners in the block, and it hopes that the incorrect charge was also refunded to them. This was not clear from the evidence before the committee.

75. **Section 3.3** – With regard to the homeowner's general complaint that her quarterly invoices did not provide a sufficiently detailed financial breakdown of charges, Mr MacDonald told the committee that the property factor used the same software package as 90% of property factors, and that this was therefore the industry standard. Mr Henderson added that an explanatory note would usually be appended to the invoice, should it include anything which was not a routine charge.

76. The committee accepts that the level of detail included in the invoices sent to the homeowner is on a par with that produced by most property factors, as this is the experience of its members. It also had sight of at least one

invoice (from August 2014) on the case file which was accompanied by a detailed explanatory note.

77. On the specific matter of the common electricity charges, Mr MacDonald explained that there were in fact 10 communal meters, one in each close (each of which contains 6 flats). Until a few years ago, the charges had been apportioned among each individual close. It had then become apparent that the supplies in some of the closes were linked to the courtyard lights, while others were not. As a result, the charges for all of the meters were now aggregated and divided among all 60 flats, to ensure that they were fairly distributed. Mr Henderson said that notes had gone out to homeowners with their common charge accounts explaining this when the apportionment had changed. The homeowner accepted this, and confirmed that she was satisfied with the property factor's explanation regarding the charges.

78. On the basis of all the evidence before it, the committee determines that the property factor has not failed to comply with its duties under this section of the code.

79. **Section 6.4** – the committee notes that the obligation to prepare a programme of works under this section only applies where periodic property inspections and/or a planned programme of cyclical maintenance are included as part of the core service provided by the property factor. As discussed above in relation to the homeowner's complaint under section 1.1a B.d, the committee concludes that property inspections are not part of the core service provided.

80. It is unclear from the WSS, however, whether a planned programme of cyclical maintenance is part of the core service provided. The homeowner argued in her application that, while this was unclear, it could be inferred from the title deeds that this did form part of the core service. The Deed of Conditions does provide at clause [Eighth] that homeowners are jointly bound to uphold and maintain in good order and repair all common parts, and that the administration of such maintenance, restoration or repair shall be conducted by the property manager.

81. The WSS does not make any specific reference to such maintenance works, but states (at paragraph 8) that *'the Property Manager may at his discretion take appropriate action to deal with any matters of common or mutual nature which are discovered in terms of the Deed of Conditions'*. While the committee agrees with the homeowner that this is not very clear, it notes that the property factor has in fact produced a programme of cyclical maintenance, which it provided to the committee in response to its fourth direction.

82. The committee therefore determines that, as the property factor has prepared a programme of cyclical maintenance works, it has complied with its duties under this section of the code. The committee observes, however, that the programme of cyclical maintenance provides very little detail, and suggests that the property factor may wish to consider providing further details about the maintenance services to be provided, perhaps in consultation with homeowners. While section 6.4 does not oblige the property factor to provide a copy of this programme to homeowners, the committee also observes that it would be sensible to do this.

83. The homeowner's related complaint regarding the external painting of the block could not appropriately be considered under this section of the code. While she had included a duties complaint about this matter in her original application form, the committee stated in its second direction that it would not consider this complaint, as it had not been adequately notified to the property factor. The committee observes, however, that there is an obligation on homeowners under clause [Eighth] of the Deed of Conditions to paint all common parts and the external paintwork of the block every four years. While the obligation to do so rests on homeowners and not the property factor itself, the homeowner was concerned that the property factor had never proposed that the exterior should be painted.

84. Painting of the exterior is not included in the programme of cyclical maintenance. Mr MacDonald told the committee that this was because the exterior of the block was not designed to be painted, and that the manufacturer recommended that it should instead be cleaned. Discussions were currently underway with the owners' committee about having it cleaned. While the committee was unable to consider this complaint further, it was clearly a matter of some concern to the homeowner, and the committee hopes that it can addressed to her satisfaction.

Observations by the committee

85. It was clear from her evidence that much of the homeowner's dissatisfaction which had led to some of her complaints concerned the services provided by property factors in general. She owns a number of properties in other developments, and told the committee that many of the issues she had raised could apply to any other property factor. The committee was, however, only able to consider her complaints as they applied to this property manager.

86. That said, many of her complaints resulted from her concern that she was not being listened to, and in particular her exasperation about how her complaint regarding the lock issue had been dealt with. Had the property

factor dealt with the complaint adequately and promptly from the start, the homeowner's application may never have been made.

87. The committee observes that many of her complaints could have been dealt with by fairly simple explanations by the property factor about its procedures at an earlier stage. The homeowner accepted a number of these explanations from the property factor at the hearing. The committee considers that poor communication by the property factor was at the heart of much of the homeowner's dissatisfaction.

88. In particular, the committee considers that the property factor's WSS would benefit from a fundamental review. The format in which the WSS is presented makes it very difficult to follow and understand. The font size is very small and difficult to read. The committee asked for the WSS to be blown up to A3 size in advance of the hearing as a result. The WSS includes no sub-headings, and the paragraphs are not numbered, making it very difficult to read. While the homeowner did not make a specific complaint about this, the fact that she felt the need to number them and that the property factor's representatives actually referred to paragraphs according to her numbering, suggests that there is an issue here. The committee notes that while the code does not set out specific formatting requirements for the WSS, section 1 does state that it should set out the terms and service delivery standards of the arrangement between the property factor and homeowner 'in a simple and transparent way'.

89. Finally, the committee considers that the property factor's letter to the homeowner of 15 August 2016, which was copied to the committee, was inappropriate in the context of ongoing tribunal proceedings. While the letter was framed as a further attempt to resolve the matter, and to save the homeowner further stress, it also pointed out that any appeal proceedings would involve the two parties, rather than the panel itself, and stated that, if the property factor believed there to be an error of law in any decision made by the committee, it would appeal the decision to the sheriff. Whatever the intention behind the letter may have been, the committee observes that this could be interpreted as an attempt to persuade the homeowner to withdraw her application.

Proposed Property Factor Enforcement Order

90. The Committee proposes to make a property factor enforcement order (PFEO) as detailed in the accompanying Section 19(2) (a) notice.

Right of appeal

91. 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 homeowner housing committee.

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

Sarah O'Neill

Chairperson Signature .

Date 29/11/16