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

Hohp ref: HOHP/PF/16/0012

Re: Property at Flat 2/2, 419 Clarkston Road, Glasgow G44 3LL ("the property")

The Parties:-

Mrs Patricia Carroll, Flat 2/2, 419 Clarkston Road, Glasgow G44 3LL ("the Homeowner")

Redpath Bruce Property Management Limited, 103 West Regent Street, Glasgow G2 ("the Factor")

Decision by a Committee of the Homeowner Housing Panel In an Application under Section 17 of the Property Factors (Scotland) Act 2011

Committee Members:

Patricia Anne Pryce (Chairperson); Mike Links (Surveyor Member); Brenda Higgins (Housing Member)

Decision

The Committee, having made such enquiries as it saw fit for the purposes of determining whether the factor has complied with the Code of Conduct for property factors as required by Section 14 of the 2011 Act and complied with the Property

Factor's duties, determines unanimously that, in relation to the Homeowner's Application, the factor has not complied with the property factor's duties and has not complied with the Code of Conduct for property factors.

We make the following findings in fact:

The Applicant is the owner of Flat 2/2, 419 Clarkston Road, Glasgow which is situated in a traditional tenement block of flats consisting of five other residential flats and three shop units.

The Respondent is the factor of the common parts of the block of flats within the property at 419 Clarkston Road, Glasgow.

The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a property factor (7th December 2012).

Following on from the Applicant's application to the HOHP, which comprised of documents received in the period from 5th January to 25th January, both 2016, the Convener with delegated powers under Section 96 of the Housing (Scotland) Act 2014 referred the application to committee on 10th February 2016.

Inspection

The Committee took the decision that it wished to inspect the back court of the tenement at 419 Clarkston Road, Glasgow as the Committee wished to see the physical relationship between the said back court and the rear stairs of the tenement together with the structure of the bakehouse and the saloon buildings which are conjoined buildings located partially within the back court of the said tenement and neighbouring tenement buildings and upon whose roof the back court of the tenement is located and rests. The Committee wished to view the actual physical relationship between these structures which are more particularly described in the title deeds of the Applicant's property in terms of Land Certificate GLA602 which the Applicant produced as part of her present application. Both the Applicant and the Respondent were advised of the time of the inspection which was at 9.30 am on 31 March 2016 with the hearing commencing at 11 am on that same date after the inspection. The Applicant refused to attend the inspection. Mr. Campbell and Mrs. McCall Smith for the Respondent both attended the inspection.

Mr. Campbell provided access to the Committee to the high back court of the tenement at 419 Clarkston Road. The Committee noted that this back court is located on the roof of the conjoined buildings known as and forming the bakehouse and the Saloon. The Committee further noted that the stairs from the back door of the tenement apparently rested against the wall of the Bakehouse and that there was steel work which ran from the stairway to the Bakehouse structure. The Committee noted that the stairs are apparently in a poor state of repair. The Committee also

noted that the roof of the bakehouse upon which the back court of the tenement is located is also in need of repair and that some patchwork repairs had been carried out on the said roof

The Committee also managed to obtain access to the bakehouse and saloon buildings and noted that both buildings (which are conjoined) require substantial remedial works to be carried out. The Committee noted that, while the bakehouse and the saloon were located within the rear court of the tenements, the bakehouse and the saloon are located within Hazel Avenue Lane, to the rear.

Hearing

A hearing took place at Wellington House, 134/136 Wellington Street, Glasgow, G2 2XL on 31 March 2016. The hearing of the evidence was not concluded at that point and the hearing was continued to 25 April 2016 when the hearing was concluded.

The Applicant attended and spoke briefly but was represented by Mr. Michael Damian Madden.

The Respondent was represented by Mr. Robert Campbell who is a Director of the Respondent and Mrs. Rowan McCall Smith who is also a Director of the Respondent.

Introduction

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the Homeowner Housing Panel (Applications and Decisions)(Scotland) Regulations 2012 as "the 2012 Regulations".

The Committee had available to it and gave consideration to: the Application by the Applicant which comprised of all paperwork submitted by the Applicant in the period of 5 January 2016 to 25 January 2016, email by Mr. Madden to the Homeowners Housing Panel ("HOHP" hereinafter) dated 26 February 2016, letter by Mr. Madden to the HOHP dated 28 February 2016 and received by the HOHP on 1 March 2016, letter by Mr. Madden to the HOHP dated 7 March 2016 and received by the HOHP on 7 March 2016, Proof of Delivery re Item KP464530231GB and Proof of Delivery re Item KP464530245GB produced by Mr. Madden to the Committee at the hearing on 31 March 2016 together with letter by the Respondent to the HOHP dated 22 February 2016, letter by the Respondent to the HOHP dated 23 March 2016 together with enclosures contained therein and Inventory of Productions dated 31 March 2016 produced by the Respondent to the Committee at the hearing on 31 March 2016.

Preliminary Issues

1. The Committee on its own initiative issued a Direction dated 19 February 2016 under Regulation 13 of the 2012 Regulations requiring the Applicant to produce certain documents. The Committee confirmed at the hearing that the Applicant had fully complied with this Direction
2. By letter dated 22 February 2016 to the HOHP the Respondent sought to postpone the hearing appointed for 31 March 2016 as "...the letters dated 28th December 2015 have not been received by senior members of staff..". The said letters referred to were the letters sent by Mr. Madden on behalf of the Applicant intimating the alleged breaches of the Code and the Property Factor's Duties which intimation is required in terms of Section 17(3) of the 2011 Act. The Committee noted that the Respondent did not state that the Respondent had not received the letters. The Committee issued a Direction dated 18 March 2016 issued under the 2012 Regulations refusing the Respondent's request for a postponement of the hearing.
3. Mr. Madden raised a preliminary issue whereby he sought leave of the Committee to produce the documents Proof of Delivery re Item KP464530231GB and Proof of Delivery re Item KP464530245GB. Mr. Madden acknowledged that these were late. He advised that it was simply pressure of work which had prevented him from producing these earlier. These documents are confirmation from the Royal Mail that the two letters of intimation of the alleged breaches sent by Mr. Madden on 28th December 2015 were signed for by an employee of the Respondent on 30th December 2015. The Respondent had no objection to these documents being produced. In terms of Regulation 12 of the Regulations, the Committee took the view that it would allow these two documents to be lodged although late as the Committee was of the view that it was fair in all of the circumstances of the case to do so.
4. Mr. Campbell for the Respondent then raised a preliminary matter. He wished to lodge another Inventory of Productions 31 March 2016 which contained eleven documents. Mr. Campbell advised that it was late due to pressure of time, although he did concede that he employed a large number of people who could have assisted in the preparation of the inventory. Mr. Campbell advised that the documents contained therein were all available in advance of the hearing apart from the document relating to the repair of the stair window. He acknowledged that all of these documents could have been made available to both the Committee and the Applicant in advance of the hearing. However, he submitted that all of the documents would assist both the Applicant and the Committee at the hearing as the documents contained helpful information. Further, he advised that the Respondent had held off lodging this inventory as the Respondent had awaited the outcome of the Respondent's request for a postponement of the hearing. The Applicant did not object to the late lodging of this inventory. The Committee decided to have a recess to allow the Applicant, her representative and the Committee to read the

documents contained within the inventory and to consider whether or not these documents should be allowed to be lodged though late.

The Committee reconvened the hearing after the recess. The Committee decided to allow the lodging of the Inventory dated 31 March 2016 despite being lodged so late in the day. The Committee decided to allow the late lodging as the Applicant did not object to this and in terms of Regulation 12 of the Regulations it was fair in all the circumstances to allow the Inventory to be lodged as the documents contained therein could apparently assist the Committee in reaching a decision on the issues before it.

However, the Committee noted its displeasure with the late lodging of such documentation. The Committee also noted that another Committee may well have refused to allow the Inventory to be lodged. The Committee also noted that awaiting the outcome of a request for a postponement was not a reasonable excuse for not preparing for a hearing and strongly urged the Respondent not to repeat this conduct at any future hearings.

The Legal Basis of the Complaints

The Applicant complains under reference to Sections 2.1, 2.4, 2.5, 3.3, 4.1, 4.4, 4.6, 4.7, 5.2, 5.8, 6.1, 6.3, 6.9, 7.1 and 7.2 of the Code and to a breach of the property factor's duties (as defined by Section 17 subsection 5 of the 2011 Act).

The Code

The elements of the Code relied upon in the application is as follows:-

2.1 You must not provide information which is misleading or false.

2.4 You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core 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).

2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully 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).

3.3 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.

4.1 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.

4.4 You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.

4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).

4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.

5.2 You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this.

5.8 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.

6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.

6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.

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

7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

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

The Factual Complaints

These will be addressed in the order of the alleged breach of the Code and the Property Factors' duties:-

1. **Breach of Section 2.1**

Mr Madden confirmed that he had previously been a chartered surveyor before he retired and now worked as a Church Officer. Mr Madden went through the email and letter correspondence between him (on behalf of the Applicant) and the Respondent. In particular, he referred to the email by Grant Craig, employee of the Respondent, dated 11 September 2015. Mr Madden was of the opinion that this email was misleading and false and was at odds with the letter which the Respondent had sent to the Applicant dated 15 October 2014. The earlier letter had advised the Applicant that she would be provided with a design and detailed proposed repair scheme in respect of the rear stairs of the tenement at 419 Clarkston Road. However, in comparison the email from Grant Craig of 11 September 2015 refers to the high back court of the said tenement. Mr Madden's contention was that the Applicant was misled throughout the course of the email correspondence in relation to the works repairs required to the stairs and the high back court of the tenement. In particular, Mr Madden pointed out that it took eight months for the Respondent to come to the conclusion that no works could be carried out to the rear stairs of the tenement without also carrying out the necessary repairs to the Bakehouse and the back court at the same time given the inextricable physical link between the stairs, the back court and the structure of the Bakehouse.

Furthermore, Mr Madden complained that the Applicant did not receive a copy of the report from the structural engineer instructed by the Respondent despite paying her

share of the £675 cost of producing this report. Mr Madden stated that confusion reigned supreme in terms of the emails which were sent to him by the Respondent.

In reply to the foregoing, Mr Campbell stated that he had been a Director of the Respondent for some fifteen to twenty years and had been employed by the Respondent for forty-three years. Mr Campbell helpfully conceded that the email sent by Grant Craig of 11 September 2015 to Mr Madden was misleading. Furthermore, Mr Campbell confirmed that in the Respondent's letter of 23 March 2016 to the Applicant and Mr Madden, a copy of which was also sent to the HOHP, the Respondent accepts breaching Section 2.1 of the Code and apologises for same.

In light of the foregoing, the Committee finds that the Respondent breached Section 2.1 of the Code.

2. Breach of Section 2.4

Mr Madden began to address the Committee in relation to this alleged breach. However, in the course of giving evidence, Mr Madden accepted that the Respondent did have a procedure in place in relation to consulting with homeowners in terms of seeking authority. The Committee advised that Mr Madden could consider his position in relation to whether or not the Applicant wished to insist on this breach.

Mr Madden confirmed to the Committee later in the hearing that, after consideration, the Applicant no longer wished to insist on this breach.

3. Breach of Section 2.5

Mr Madden advised that the Respondent had breached this on more than one occasion. He advised that the hearing was only taking place because the Respondent had failed to respond to the letters and emails which he had sent on behalf of the Applicant. In particular, he referred to the two letters of intimation of the breaches of the Code and the Property Factor's duties he sent on behalf of the Applicant to the Respondent on 28th December 2015 in order to comply with Section 17(3) of the 2011 Act. He confirmed that these letters were both sent recorded delivery and that an employee of the Respondent had signed to confirm receipt of them and he had produced the confirmed tracking of these letters today at the start of the hearing. Despite this, Mr Madden confirmed that he never received a response to these two letters.

Mr Madden also referred to his email to Grant Craig of 15 September 2015 to which he is still awaiting a reply. Mr Madden confirmed that he had received nothing from the Respondent until the Respondent had received intimation of the Applicant's present application. Given that, the Applicant felt that she had no option but to take matters to the next stage and make her application to the HOHP.

Mr Madden confirmed that the Respondent had failed to respond at all and had also breached the Respondent's own written Statement of Service in terms of time scales to respond to correspondence and to reply to complaints.

Mr Campbell once again fully accepted that the Respondent had breached this part of the Code. Mr Campbell advised that there had been a previous procedure within the Respondent's office within which an employee would bulk sign for recorded delivery mail. As a result of that, Mr Campbell and the rest of the senior management team within the office of the Respondent had never seen the letters of 28th December 2015 sent by Mr Madden. However, as a result of the present application, Mr Campbell confirmed that this procedure has now been changed and that all employees will require to sign for each individual piece of recorded delivery mail in order to avoid mail being misplaced.

Mr Campbell also accepted that the Respondent had breached the Code in this regard by failing to respond to Mr Madden's email of 15 September 2015. He confirmed that this was wholly unacceptable. However, he further confirmed that the Respondent had now carried out staff training regarding identifying complaints and responding to them so as to avoid this situation from happening again. Mr Campbell confirmed that the Respondent was appalled by these breaches and had taken steps to ensure that they would not be repeated again.

In light of the above, the Committee finds that the Respondent breached Section 2.5 of the Code.

4. Breach of Section 3.3

Mr Madden advised that the Applicant felt that the bills produced by the Respondent did not accurately reflect the recovery of common charges. Mr Madden advised that the Respondent had charged the wrong amount in respect of the buildings insurance for the property. Mr Madden pointed out that he had raised this issue with the Respondent by email he sent to Grant Craig on 15 July 2015. Mr Madden accepted that the Respondent did rectify the error in terms of this but did not do so until November 2015.

Mr Madden confirmed that the Applicant did receive invoices regularly but that in his view they do not contain a proper financial breakdown and that they do not comply with the Respondent's Statement of Service nor with the title deeds for the property. In particular, Mr Madden pointed out that the Respondent had left the Bakehouse out of the charge for the buildings insurance despite the Bakehouse being included as one of the common owners in this regard within the title deeds.

Mr Madden referred to the title deeds produced as part of the application. In particular, he referred to the Deed of Declarations of Conditions, recorded GRS(Glasgow) 14 July 1966 by Trustees of William McMillan. He directed the Committee to Clause Eighth on Page D13 of the Deed wherein it states "A meeting of the owners constituted as in paragraph Second shall decide from time to time for what sums the tenement shall be insured against fire and other risks and shall

instruct the Factor to keep the tenement insured for such sums in the joint names of all owners of premises in the tenement with a reputable insurance company .....". In terms of the description of the "tenement" this states that it includes the bakehouse. In addition, Mr Madden pointed out that in terms of Clause Second of this Deed located on Page D10, the owner of the bakehouse is included in the description of common owners as referred to within Clause Eighth.

Given the foregoing, Mr Madden was of the opinion that the bakehouse should always have been included in the common buildings insurance for the tenement. Furthermore, he referred to the Certificate of Insurance by LVE dated 15 May 2014 which was also produced as part of the application. Within the property description, the property insured was 415/421 Clarkston Road, Glasgow and 4 Hazel Avenue, Glasgow. Mr Madden confirmed that there was no such address as 4 Hazel Avenue but that the address of the bakehouse was 4 Hazel Avenue Lane. Mr Madden's contention was that the Applicant and the other residential and shop owners of the tenements of 415/421 Clarkston Road were paying the proportion of the insurance charge which should have been paid by the owners of the bakehouse and the saloon and had been doing so for an unknown number of years.

Mr Madden confirmed that the owners of the bakehouse and the saloon had now been included on the common insurance policy from April 2015.

When Mr Madden raised this issue with the Respondent and queried why the owner of the bakehouse had not been included in the common insurance policy before April 2015, the respondent had advised Mr Madden that the Respondent did not know who the owner of the bakehouse was and that the Respondent did not manage the bakehouse property.

Mr Madden complained that the Applicant did not know for how long she had effectively been subsidising the payment of that part of the insurance which should have been paid by the owner of the bakehouse.

Mr Campbell confirmed that the Respondent did not accept that the Respondent had breached this part of the Code. Mr Campbell pointed to the invoices which the Respondent had produced on 31 March 2016 as part of the Inventory of the same date. These invoices appear as Pages 2 – 4 on the Inventory. Mr Campbell showed that the charges on the invoice were clear and that a breakdown in terms of the Applicant's share was clear. He confirmed that the Applicant is invoiced six monthly which exceeds the requirement of annual invoicing in terms of this part of the Code.

Mr Campbell admitted that in terms of the invoice dated 12 June 2015 the Applicant and her fellow owners had been charged too large a percentage in respect of the insurance and that this was rectified with the next invoice issued 19 November 2015 and that the owners received a credit for the overpayment.

Mrs McCall Smith confirmed that the bakehouse had never been included in the common insurance policy until April 2015. She stated that the value of the insurance coverage had to be increased by £156,000 to cover the bakehouse. She confirmed that the owner of the bakehouse paid for this to be included.

Mrs McCall Smith confirmed that the bakehouse had never been included in the common insurance until 2015. When asked why 4 Hazel Avenue was included in the Certificate of Insurance from 2014, she could not provide an explanation for this other than it was a mistake. She advised that this address does not exist as the address of the bakehouse is 4 Hazel Avenue Lane and therefore it would not be covered by insurance. She further confirmed that she had checked with the Respondent's insurance broker who had confirmed that the bakehouse had never been included in the common insurance policy and therefore the owners had not paid for a proportion of the insurance which should have been paid by the bakehouse owner. However, she conceded that she understood the confusion that this had caused.

Mr Madden disagreed with the position set forth by Mrs McCall Smith. His opinion was that the Respondent had stated to him by email of 11 September 2015 that the sum insured included the reinstatement of the rear stairs and the high back deck and that the Respondent had not known who the owner of the bakehouse and saloon was and therefore did not know previous insurance arrangements. Mr Madden further posited that there was no way that the high back court could be insured in isolation without the bakehouse below also being insured. Mr Madden advised that he had raised the issue of insurance with the Respondent by email as described in the foregoing.

Mrs McCall Smith pointed out that it is not unusual for common owners to obtain their own insurance despite the terms of title deeds. Given that, she was adamant that up until 2015, the bakehouse and the saloon were not included in the common insurance policy for the tenements. Furthermore, the total amount insured had to be increased by more than £400,000 to include the bakehouse and the saloon when they were included on the policy in 2015 which would tend to confirm that they had not previously been so included.

Mr Campbell contended that the bakehouse and the saloon were not included in the common insurance position as set out by the title deeds. His position was that as the owners of the bakehouse and the saloon had separate shares in respect of repairs depending on different parts of the properties concerned. He did concede that there appears to be a gap in who in the Respondent's office checks the accuracy of the Certificates of Insurance in respect of common building policies which is borne out by the Certificate of Insurance in respect of present year dated 15 May 2015 apparently still covering an address which does not exist, namely, 4 Hazel Avenue but which now also specifies "including Bakehouse" which, he argued, also suggested that the bakehouse had not been previously covered by the insurance of the common owners as contended by Mr Madden.

Both Mr Madden and Mr Campbell agreed that the Schedule attached to the said Deed is apparently erroneous in terms of purporting to split the Burdens in amounts of one ninth across ten owners, which include the bakehouse.

Mr Madden advised that he believed that the Respondent had failed to show clarity and transparency in all accounting procedures in respect of the invoices, in particular

in relation to the insurance as the Applicant did not know whether or not she had been paying for insurance for the bakehouse.

Mrs McCall Smith was clear that the Respondent had never arranged for insurance for the bakehouse until April 2015 and that the owner of the bakehouse paid for that proportion of the insurance for which the bakehouse was liable. This was confirmed by the increase in the value of the property which had to be insured for £156,000.

The Committee notes that parties became embroiled in a heated discussion around the interpretation of the title deeds in respect of the issue of common insurance. As a matter of course, the Committee preferred Mr Madden's reading of the said Deed insofar as the Committee is of the view that the bakehouse does form part of the tenement and that it is one of the owners who should be included in terms of common insurance.

However, the Committee considered all of the evidence before it, written and oral. While the Committee notes that the issue of common insurance has been unclear and has not been assisted by apparently erroneous Certificates of Insurance and by a lack of clear responses by the respondent to Mr Madden's queries regarding the insurance, Mrs McCall Smith was clear in her evidence that when the bakehouse was added to the common insurance in April 2015, the value of the property insured required to be increased by £156,000. Mr Madden voiced his suspicion that the common owners had effectively been subsidising that proportion of the common insurance which should have been paid by the owner of the bakehouse. Mr Madden advised that he could not comprehend how the roof of the bakehouse which formed the back court could be insured without the structure also being insured. He invited the Committee to agree that logically the bakehouse must have always been insured within the common insurance policy. The Committee had difficulty in accepting this assumption without clear evidence to sustain that position. On balance, the Committee preferred the evidence of Mrs McCall Smith in this regard which was direct and unchallenged evidence that the amount insured required to be increased to take account of the addition of the bakehouse to the common insurance policy.

The Respondent lodged invoices which demonstrated that the Applicant receives a clear financial breakdown of all charges in terms of Section 3.3 of the Code and that on a six monthly basis. The Committee notes that there was an error made by the Respondent in May 2015 in respect of the percentage charged to each owner for the common insurance policy but that this was rectified in the next invoice issued with a credit being issued to all the affected owners. The Committee notes that this was an unfortunate event given the Applicant's already existing confusion surrounding the issue of common insurance but that it was a simple mistake which was rectified by the next invoice issued.

Given all of the foregoing, the Committee finds that the Respondent did not breach Section 3.3 of the Code as the Respondent issues to the Applicant six monthly invoices which contain a clear financial breakdown of all charges.

However, the Committee notes that questions remains in respect of the historical position of the common insurance. The Applicant remains unhappy with this issue.

The Committee would strongly urge the Respondent to consider obtaining written confirmation from the Respondent's insurance broker to confirm that the bakehouse was not included in the common insurance policy until April 2015 and placing beyond doubt that the remaining common owners, including the Applicant, had been paying the proportion of the bakehouse's insurance costs.

5. **Breach of Section 4.1**

Mr Madden advised that he accepted that the Respondent had a clear written debt recovery procedure. However, his position was that, following on from his argument in relation to the alleged breach of Section 3.3 of the Code, the Applicant had been paying for the bakehouse's share of the common insurance for an unknown number of years and that the Respondent had failed to follow its debt recovery procedure as the respondent had not recovered these costs from the owner of the bakehouse. He referred to his email of 15 September 2015 to Grant Craig wherein he puts forward his own interpretation of Mr Craig's email to him of 11 September 2015. In short, Mr Madden was of the opinion that Mr Craig had conceded that there was a problem with the apportionment of the insurance costs and that Mr Craig had accepted that the remaining common owners had been paying for the proportion of the insurance which should have been paid by the bakehouse owner.

Mr Campbell submitted that he had produced the Debt Recovery Procedure for the Respondent in the Inventory of 31 March 2015. He submitted that this was a clear procedure and that it would be followed where necessary but it was not necessary here as the property did not carry debt and the Respondent's position was clear that there was no debt due in respect of the insurance as explained in terms above.

The Committee does not concur with Mr Madden's understanding of the correspondence by Mr Craig. The Committee has previously confirmed its view in relation to the insurance premiums. Given this, the Committee acknowledges that the Respondent has a clear debt recovery procedure and therefor the Respondent did not breach Section 4.1 of the Code.

6. **Breach of Section 4.4**

Following on from Mr Madden's position as regards the issue of historical insurance premiums and the bakehouse, Mr Madden submitted that the Respondent failed to provide the Applicant with a clear statement of how the Respondent intended to recover these insurance costs from the bakehouse owner. He referred to his own email of 19 May 2015 wherein the final paragraph commencing "Finally,..." he highlights to the Respondent that there may be an issue with the mutual repair proportions in terms of the title deeds and he confirms that the Respondent's email in reply of 10 June 2015 does not answer this query.

Mr Campbell's response in relation to this matter was brief and clear. He submitted that as there was no debt on this property there was no need for the Respondent to provide a statement of this nature. All owners were fulfilling their obligations.

Mr Madden reiterated that the bad debt he alluded to was the recovery of insurance costs which the Applicant believed was due.

The Committee has made its position clear above regarding the issue of the insurance. The Committee is of the view that as there was no debt due on the property, the Respondent did not require to issue a statement in terms of Section 4.4 of the Code. Therefore, the Committee finds that the Respondent did not breach Section 4.4 of the Code.

7. Breach of Section 4.6

Mr Madden's submission in relation to this alleged breach of the Code was similar in its terms to the alleged breaches of Section 4.1 and 4.4 of the Code insofar as he contended that this related to the recovery of charges in respect of the common insurance. He referred to his emails to the Respondent of 21 June 2015 and 15 September 2015. He also referred to the reply by the Respondent of 11 September 2015. He submitted that it simply was not good enough that the Respondent did not know who the previous owners of the bakehouse were and that the Respondent did not reply regarding the issue of apportionment. He accepted that this issue had now been addressed but the historical nature of it had not been.

Mr Campbell was succinct in his response and advised that as there was no bad debt on the property there was nothing about which the Respondent had to advise the owners.

The Committee has made its finding above in respect of the issue of the common insurance. Given that there is no debt due on the property, the Committee finds that the Respondent did not breach Section 4.6 of the Code.

8. Breach of Section 4.7

Mr Madden submitted that the Respondent had not taken any steps to recover the insurance costs which he considered were due by the owner of the bakehouse to the other common owners.

Mr Campbell reiterated that there was no debt due, that this was a good building and therefore no steps had required to be taken in terms of this Section of the Code.

The Committee finds that there was no debt due and that the Respondent did not breach Section 4.7 of the Code.

9. Breach of Section 5.2

Mr Madden submitted that there had been a breach of this Section but that it was now rectified. Mr Madden confirmed that the apportionment of insurance had now been sorted but that it had been breached previously by the Respondent. He

referred to his email to Grant Craig of 5 August 2015 wherein he raised this as an issue.

Mr Campbell confirmed that he accepted that the Certificate and Schedule of Insurance had not been received by the Applicant, despite the fact that the Respondent had sent this out to the Applicant. He confirmed that this had been rectified when another copy of these documents was provided to the Applicant.

Mr Campbell helpfully confirmed that the Respondent had breached Section 5.2 of the Code in May 2015 when the Applicant had been asked to pay the wrong proportion of insurance premium in respect of the common insurance policy. However, he confirmed that this had been rectified at the next accounting in November 2015 when the next six monthly invoice was issued to owners and the Applicant received a full credit.

The Committee finds that the Respondent did breach Section 5.2 of the Code by failing to provide the Applicant with a clear and accurate breakdown of her share of the insurance premium. However, the Committee notes that the Respondent rectified this issue in November 2015.

10. Breach of Section 5.8

Mr Madden submitted that the Respondent had never carried out a revaluation of the property and when the bakehouse was added there was no revaluation done either, simply an amount added on in respect of the bakehouse. Mr Madden referred to the Respondent's Statement of Service wherein it advised that it was the owners' responsibility to seek a revaluation.

Mr Campbell advised that the Respondent also includes the issue of revaluation within the Respondent's newsletter to owners and makes it clear that the Respondent will instruct this at the request of owners.

Mr Madden was of the view that the Respondent should be more proactive in getting owners to instruct a revaluation.

Mr Campbell advised that the Respondent had just written a letter advising owners to consider a revaluation.

Mr Campbell added that it is the responsibility of the owners to seek ensure that the property is adequately insured in terms of their title deeds.

Mr Madden submitted that the Respondent's Statement of Service breached the Code as Section 5.8 seeks to be more proactive than the frequency which is stated as being never within the written Statement of Service.

Mr Campbell is of the view that the Statement of Service does not breach this Section of the Code as it is the owners' responsibility. Furthermore, there would be a cost implication in terms of employing a building surveyor. He confirmed that in response to his letter of 31 March 2016 seeking the owners' authority to carry out a revaluation, he had only received three replies.

The Committee considered all of the evidence. Section 5.8 states that where a property factor arranges buildings insurance for homeowners "..You must inform owners of the frequency with which property revaluations will be undertaken for the purposes of building insurance, and adjust this frequency if instructed by the appropriate majority of homeowners in the group". The Committee finds that the Respondent does advise owners of the frequency of carrying out valuations within its Statement of Service which is that they will not do so unless instructed to do so by the owners.

Given this, the Committee is of the view that the Respondent has not breached Section 5.8 of the Code. However, the Committee finds the present practice of the Respondent to be highly unsatisfactory and would strongly urge the Respondent to consider amending its Statement of Service and its practice to reflect a change in practice which would include the Respondent seeking authority from the owners on a regular basis to carry out revaluations.

11. Breach of Section 6.1

Mr Madden helpfully conceded that the Respondent does have procedures in place to allow owners to notify the Respondent of repairs. However, his contention was that the Respondent failed to keep owners informed of the progress of the works or provide estimated timescales for completion. Mr Madden cited the issue of the gutters requiring cleaning. He estimated that he had advised the Respondent of this issue in March 2015 and referred to his email of 19 May 2015 to the respondent but he had to chase this up and the work was not carried out until August 2015. Mr Madden also cited the example of the work required to the windows within the stairwell of the property. The respondent produced an estimate from the contractor dated 30 March 2016 despite this issue being raised a year ago.

Mr Campbell confirmed that the respondent had clear procedures in place but helpfully conceded that these were not followed. In the Respondent's letter of 23 March 2016, the Respondent accepts not following through on the repairs issues as regards both the gutters and the stair windows and fully apologised for these omissions.

Given the foregoing, the Committee finds that the Respondent breached Section 6.1 of the Code. However, the Respondent fully apologised for these omissions and has now rectified these breaches. Mr Campbell confirmed that staff training has taken place to minimise the recurrence of breaches such as these in the future.

12. Breach of Section 6.3

After some consideration, Mr Madden helpfully confirmed that the Applicant did not wish to insist on this breach.

13. Breach of Section 6.9

Mr Madden referred to his earlier submission regarding the cleaning of the gutters and the repair to the stair windows. He advised that the cleaning of the gutters was not done for months. Furthermore, he submitted that the contractor for the window repair was not chased up for a quote.

Mr Campbell did not accept that there had been a breach of the Code in relation to the gutter cleaning as it was the Respondent who had initially failed to instruct this, only instructing it in May 2015 with the work being carried out in August 2015.

Mr Campbell fully accepted that the Respondent had breached this Section of the Code in relation to the proposed repair to the stair windows. The respondent had failed to pursue the contractor for the quote and for this Mr Campbell fully and unreservedly apologised.

The Committee is of the view that the Respondent did not breach this Section of the Code in relation to the cleaning of the gutters. Any delay, which was minor in all the circumstances as this was not an emergency repair, was the fault of the Respondent rather than a contractor.

However, the Committee finds that the Respondent breached Section 6.9 of the Code as the Respondent failed to pursue the contractor in respect of the proposed repairs to the stair windows.

14. Breach of Section 7.1

Mr Madden accepted that there was a written complaints procedure but he contended that the Respondent did not follow this. Mr Madden referred to the various emails he had produced, following which the Respondent failed to implement the complaints procedure. In short, Mr Madden is still awaiting a response to his email to the Respondent of 15 September 2015. Mr Madden submitted that had the Respondent replied to this email and dealt with the complaint appropriately, there was every chance that the hearing would not have required to take place.

Mr Campbell helpfully fully accepted that this part of the Code had been breached by the Respondent. He confirmed that the Respondent had simply failed to reply to Mr Madden's email and to treat it as a complaint. Mr Campbell confirmed that there had been a complete breakdown in communication in the Respondent's office and the senior management were never made aware of the Applicant's complaint until they received notification of the present application.

Mr Campbell confirmed that this fell well short of the usual way the Respondent conducted business. As a result, Mr Campbell advised that staff training has taken place to ensure that all staff know and recognise a complaint. There are now monthly meetings with property managers and their line managers wherein the property managers advise of any potential complaint, whether it has reached the complaint stage or not so that management are aware of any potential issues and can deal with them and ensure that they are not ignored.

Mr Madden accepted what was said but, as a point of note, advised the Respondent that the Statement of Service and the separate Complaint Procedure are inconsistent with one another. Mr Campbell thanked Mr Madden for pointing this out.

The Committee has no hesitation in finding that the Respondent has breached Section 7.1 of the Code in that the Respondent failed to follow its Complaints Procedure at all.

The Committee notes that the Respondent has apologised unreservedly to the Applicant in respect of this matter and that the Respondent has carried out extensive staff training and has amended its procedures to attempt to prevent a repeat of this situation.

Given the apparent inconsistency between the Complaints Procedure and the Statement of Service which the Respondent acknowledged, the Committee would strongly urge the Respondent to rectify this inconsistency.

15. Breach of Section 7.2

Mr Madden submitted that this was breached as the complaints procedure was never implemented by the Respondent.

Mr Campbell fully accepted this.

The Committee finds that the Respondent breached Section 7.2 of the Code as the Complaints Procedure was never implemented resulting in senior management never seeing this complaint until the present application.

16. Failure to carry out the property factor's duties

Mr Madden referred to Sheet 1 which was attached to the application form in respect of the present application where there were six headings under which he sought to demonstrate that the Respondent had failed to carry out these duties. To this end, he referred the Committee to the title deeds produced along with the Statement of service and the Certificate of Insurance.

Under the heading of "general administration of the property", Mr Madden advised that the duties were to be found in both the title deeds and the Statement of Service (SOS) but more particularly within the SOS. He submitted that the Respondent had failed to carry out periodic visits to the property as, if the Respondent had, the rear stairs would never have ended up in a dilapidated state. He submitted that this should have been picked up earlier.

Mr Madden further submitted that the Respondent had refused to meet with the owners in terms of his suggestion which was also a breach of the SOS.

Mr Madden submitted that the SOS had also been breached as the Respondent had not replied to his email of 15 September 2105 as heard earlier in evidence. This was

also established, he advised, by the Respondent's failure to deal with his recorded delivery letters of 28 December 2015.

Mr Madden submitted that the SOS had not been followed as regards the complaints procedure in terms of the earlier submission he had made and that his request to have matters treated as a complaint was ignored which was a breach of these duties.

Mr Madden advised that these duties were also breached as the Respondent had failed to instruct and supervise common repairs such as the gutters and the stair windows in terms of Section 1 of the SOS.

Mr Madden contended that the Respondent had breached the SOS in terms of the appointment and supervision of contractors by allowing a consultant engineer to appoint his own contractor which Mr Madden submitted was out with the scope of the engineer's authority and that Mr Madden did not know if that sub-contractor had the appropriate insurance.

Mr Madden reiterated his views as regards the apportionment and recovery of insurance costs in terms of the title deeds. He viewed the former lack of inclusion of the bakehouse in the common insurance policy as being a breach of the title deeds and therefore a breach of the duties.

Mr Madden submitted that the issues surrounding the recovery of insurance and apportionment were also a breach of the SOS and therefore a breach of these duties.

Mr Madden referred to the Financial Conduct Authority form regarding the issue of insurance and submitted that the Respondent did not comply with this the Respondent did not advise the Applicant how to escalate a complaint to the FCA.

Mr Madden attempted to introduce evidence in relation to a complaint about an insurance commission but the Committee refused to hear this evidence as it had not been previously raised by the Applicant either in a letter of intimation in advance of the application or in the application itself.

Finally, Mr Madden submitted that by failing to implement its own complaints procedure, the Respondent breached its own SOS and therefore failed to carry out its duties.

Mr Campbell replied that he did not accept that the Respondent had breached these duties in terms of periodic inspections. He advised that the Respondent carries out annual inspections of all properties managed by the Respondent. The letter which was sent to the Applicant of 15 October 2014 advising that the rear stairs needed repair was sent as a result of one of these periodic inspections.

Mr Campbell did not accept that the Respondent had failed to meet with the owners. He advised that the Respondent was content to meet the owners but in respect of the repairs required to the rear stairs and the back court, the Respondent was awaiting receipt of further information before meeting with the owners. In order to get that further information, the Respondent required funds from the owners to allow

a disruptive survey to take place which funds had only been provided by five of the owners and therefore there had been no further information to provide to the owners. However, he accepted that he had now written to the owners to offer a meeting in an attempt to resolve confusion surrounding these proposed works and in an attempt to advance matters.

Mr Campbell accepted the breaches in terms of the failure to reply to Mr Madden's email and recorded delivery letters along with the failure to implement the complaints procedure. He also accepted the breach in terms of not instructing the gutter cleaning initially and the failure to chase up the contractor in respect of the estimate for the window repair within the stairwell.

Mr Campbell did not accept that the Respondent had failed in its duties in respect of the appointment and supervision of contractors. He advised that the engineer was properly instructed and had produced a letter confirming the outcome of his initial view of the works together with producing drawings of the works concerned. Furthermore, he did not view the appointment of a sub-contractor to be in breach of the SOS.

As regards the inclusion of the bakehouse in the common insurance policy, Mr Campbell did not accept that there had been a breach of the duties and referred to his previous evidence regarding this point.

Mrs McCall Smith advised that it is not unusual for common owners to opt out of common insurance policies despite the terms of any title deeds and there was nothing a property factor could do to force an owner to be part of such a common policy.

Mr Madden read out a statement by the Applicant which advised of the level of stress and upset that all of the circumstances giving rise to the present application had caused her, in particular, as she has been suffering from poor health.

Mr Campbell stated that the Respondent had dropped the ball the whole way through this case and he wished to emphasise that this is not how the Respondent normally conducts business. As a result, procedures have been changed and staff training carried out to prevent a situation such as before the Committee to ever arise again.

Mrs McCall Smith took the opportunity to apologise fully to the Applicant for all of the mistakes which had been made.

Having heard all of the evidence throughout the two days and considering all of the written evidence produced, the Committee finds the following in respect of the property factor's duties:

1. As regards the administration of the property and periodic inspections in terms of the SOS, on balance, there has been no failure of the Respondent to carry out these duties. The Committee accepts that there are works which require to be done but the Committee accepts the Respondent's evidence that annual inspections are carried out on the property.

2. As regards the refusal to meet with owners, there has been no failure of the Respondent to carry out these duties. The Committee accepts that the Respondent was awaiting further information before it met with owners which information was not forthcoming due to a lack of funding from the owners to allow for a disruptive survey to take place.
3. As regards day to day communications within the SOS, there has been a failure by the Respondent to carry out these duties. The Respondent failed to respond to Mr Madden's email and to the recorded delivery letters sent. However, the Committee notes that these issues have already been dealt with under the relevant breaches of the Code.
4. As regards the complaints procedure within the SOS, there has been a failure by the Respondent to carry out these duties. The Respondent failed to implement its complaints procedure. The Committee notes that this issue has already been dealt with under the relevant breaches of the Code.
5. As regards the instruction and supervision of common repairs and maintenance, there has been a failure by the Respondent to carry out these duties. The Committee notes that these issues have already been dealt with under the relevant breaches of the Code.
6. As regards the appointment and supervision of consultants, there has been no failure to carry out these duties. The Committee does not accept that the appointment of a sub-contractor by a consultant constitutes a breach of these duties.
7. As regards the apportionment and recovery of insurance costs, there was a historical failure to carry out these duties but this has now been rectified.

Observations

The Committee notes that the Respondent conceded a large number of the breaches which have been found to be established. The Committee further notes that the Respondent admits that the conduct in the present case has been addressed by the Respondent through extensive staff training and changes in office procedures in an attempt to ensure that the circumstances which gave rise to the present application never happen again. In short, the Respondent has already carried out a number of changes to prevent the present case from being repeated again in the future. However, the Committee acknowledges and notes that the successive and numerous breaches of the Code and failures to carry out the property factor's duties led to the Applicant suffering real and prolonged distress.

Property Factor Enforcement Order

We propose to make the following property factor enforcement order:

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

1. Make a payment to the Applicant of £500 in recognition of the distress caused to the Applicant by the repeated failures of the Respondent.
2. Provide documentary evidence to the Committee of the Respondent's compliance with the above Property Enforcement Factor Order by sending such evidence to the office of the Homeowner Housing Panel by recorded delivery post.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the committee proposes to make a property factor enforcement order, they must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to them.

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

The intimation of this decision to the parties should be taken as notice for the purposes of section 19(2) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the Homeowner Housing Panel's office by no later than 14 days after the date that this decision is intimated to them,. If no representations are received within that timescale, then the Committee is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a property factor enforcement order may have serious consequences and may constitute an offence.

APPEALS

The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides:

"...(1)An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or a homeowner housing committee.

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

Signed...

Date..... 4th May 2016

Patricia Anne Pryce

Chairperson