



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/15/0021

Re: 4/1 Hawthornden Place, Edinburgh EH7 4RG (the property)

The Parties:

Ms Claire Kirbitson, 21 Brunstane Road, Edinburgh EH15 2EZ (the homeowner)

Life Property Management Limited, Regent Court, 70 West Regent Street, Glasgow G2 2QZ (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), Ian Mowatt (Surveyor member)

Decision of the committee

The committee determines that the property factor has not failed to carry out its property factor's duties as defined in section 17 (5) of the Act.

The committee determines that the property factor has failed to comply with its duties under section 14 of the Property Factors (Scotland) Act 2011 in respect of section 6.1 of the code of conduct for property factors ('the code'). It has not, however, failed to comply with sections 2.5, 3.3 or 6.3 of the code.

The committee's decision is unanimous.

Background

1. By application dated 24 February 2015, 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 Property Factors (Scotland) Act 2011. In her application form, the homeowner complained that the factor had failed to comply with subsections 2.5 (communications and consultation); 3.3 (financial obligations); and 6.1 and 6.3 (carrying out repairs and maintenance) of the code of conduct for property factors ('the code'). She also complained that the factor had failed to carry out the property factor's duties as defined in section 17(5) of the Act. The form was signed on her

behalf by her father, Mr John Kirbitson, who was acting as her representative. He enclosed with her application form copies of the following:

- a covering letter, together with several further pages setting out her complaints in more detail.
 - a notification letter from Mr Kirbitson to the property factor dated 16 February 2015, setting out the reasons why he believed it had failed to comply with its property factor's duties as defined in section 17 (5) of the Act.
 - a letter to Mr Kirbitson from the property factor dated 20 February 2015, acknowledging receipt of the notification letter of 16 February
 - letters from the property factor to Mr Kirbitson dated 23 November 2012, 10 December 2014 and 12 January 2015
 - letters from Mr Kirbitson to the property factor dated 1 and 30 December 2014 and 20 January 2015.
 - The property factor's Written Statement of Services.
2. Mr Kirbitson then wrote to the panel on 23 March 2015, enclosing two further notification letters, both (incorrectly) dated 16 February, one relating to sections 2.5, 3.3, 6.1 and 6.3 of the code of conduct, and the second to the property factor's duties. He also enclosed a copy of the property factor's response of 24 February to his letters of 20 January and 16 February.
 3. Mr Kirbitson again wrote to the panel by letter incorrectly dated 23 March and received on 27 April 2015. He enclosed: a letter from the property factor dated 31 March 2015, in response to his notification letters; a further letter from the property factor dated 18 March; his reply to the latter dated 10 April 2015; and an acknowledgement letter from the property factor dated 13 April 2015. He wrote again to the panel on 9 May, enclosing a copy letter from the property factor dated 1 May 2015, together with his reply of 9 May 2015.
 4. On 27 May 2015, the President of the Panel issued a minute of decision to both parties, stating that she 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 she had considered the application paperwork submitted by the homeowner, comprising documents received in the period of 26 February to 12 May 2015; and intimating her decision to refer the application to a panel committee for determination. On 28 May 2015, the President issued a notice of referral to both parties, requesting written representations by 22 June 2015. Written representations were received from the property factor on 17 June, together with 23 numbered appendices in support of these, which were referred to in the written representations. No further written representations were received from the homeowner.

5. On 6 July, the committee issued a Direction to the parties, directing the homeowner to provide within 14 days of receipt of the direction a copy of either the land certificate or the Deed of Conditions relating to the property. A copy of the land certificate was received from Mr Kirbitson on 14 July 2015.
6. It was clear from the correspondence that Mr Kirbitson had been corresponding with the property factor on the homeowner's behalf with regard to the matters complained about. Mr Kirbitson also owns a number of other properties within the same development as the homeowner's property, which he lets out through his property management company.

The hearing

7. A hearing took place before the committee on 4 August 2015 at George House, 126 George Street, Edinburgh EH2 4HH. The homeowner was represented by her father Mr John Kirbitson, but was also present and gave evidence on her own behalf. She was also accompanied by her mother, Mrs Angela Kirbitson, who also gave evidence to the committee. The property factor was represented by Mr David Reid, Director, Mr Alasdair Wallace, Regional Estates Manager (who is responsible for managing the development), and Ms Jacqueline Borthwick, Head of Finance, who all gave evidence on its behalf. Neither party called any witnesses to give evidence on their behalf.

Preliminary issues

8. Mrs Kirbitson asked the committee whether it was able to consider new information which it had not previously seen. After some discussion with the parties, it became apparent that there had been further developments with regard to the homeowner's main complaint. Further correspondence between the parties, which had been exchanged since June 2015, was not before the committee. The committee took the view that having sight of this correspondence, insofar as it related to the complaints before the committee, would be helpful to it. The property factor's representatives, who were familiar with the correspondence referred to, indicated that they did not object to this. The further correspondence referred to comprised: letters from the homeowner's representative to the property factor dated 22 June, 1 and 6 July; letters from the property factor to the homeowners' representative dated 10 and 14 July; and an email from David Hood to Mr Wallace dated 27 July.

Findings in fact

9. The committee finds the following facts to be established:

- a) The homeowner is the owner of 4/1 Hawthornden Place, Edinburgh EH7 4RG. The property is a ground floor flat within a development comprising 6 blocks within 2 separate buildings. There are 80 flats within the development. The homeowner's property is situated within Block 4, which is part of the same building as blocks 5 and 6.
- b) The property is registered in the Land Register for the county of Midlothian under title number MID12568. The homeowner took entry to the property on 31 October 2003.
- c) Life Property Management Limited is the property factor for the development. It was appointed by the Hawthornden Place Residents' Association, in line with the procedure set out in the Deed of Conditions for the development.
- d) The property factor's contractual duties in relation to the management and maintenance of the 'common parts' and the 'development common property' within the development are set out in:
 - i. Deed of Conditions by Teague Homes (Scotland) Limited recorded in the General Register of Sasines for the County of Midlothian on 2 May 1989.
 - ii. the property factor's written statement of services.
- e) Clause (Twelfth) of the Deed of Conditions provides that the appointed property factor for the development is *'responsible for instructing and supervising the common repairs and maintenance of the common property and for apportioning the cost thereof among the Proprietors in accordance with the provisions of these presents.'* The same clause provides that the proprietors of any twelve flats (including at least four owners at numbers 1,2 and 3 and at least four owners at numbers 4,5 and 6) shall have power to call a meeting of the proprietors; that sixteen owners or their mandatories constitute a quorum; and that a majority of those present at a meeting can, among other things: 1) *'order to be executed any common or mutual operations, maintenance and repairs, decoration et cetera to the common property'* 2) *'make any regulations in conformity with these presents which may be considered necessary with regard to the preservation, cleaning, use and enjoyment of the common areas'* and 3) *delegate to the factor 'full right, power and authority to take charge of all matters pertaining to the maintenance and preservation of the common property and the employment of labour thereanent'*.
- f) Life Property Management Limited became a registered property factor on 12 December 2012. Its duty under section 14 (5) of the Act to comply with the code arose from that date.

The complaints before the committee

Duties complaint 1- dampness

- 10. The homeowner's main complaint related to a longstanding, serious problem with dampness and condensation within block 4. It was clear from the

homeowner's oral evidence that her overriding concern was the length of time that it had taken the property factor to resolve the communal repair issues which had caused the problems within her property, and which were still ongoing at the date of the hearing. The second strand of her complaint related to her concerns about inadequate work done by contractors and the property factor's alleged failure to supervise and inspect this adequately, and ensure that the work was done properly.

11. The homeowner told the committee that in recent years, the dampness problem had become more serious. The property had been let out, but in 2013 the most recent tenant had moved out, due to health issues exacerbated by the dampness. It was not currently possible to let the property out, other than on a short term basis, and the homeowner had arranged a number of short term lets in order to cover her mortgage costs. She said that the property was not saleable, and she believed that it would be unethical to sell it in its current state. It was very stressful trying to keep the property clean and in a reasonable state due to the ongoing problems. She felt that the property factor had failed to recognise this and had not accorded the issue sufficient priority. She said the matter had caused a lot of stress for the whole family, and that they felt they had no alternative but to make an application to the panel.

The history of the problem

12. Mr Kirbitson told the committee that the dampness issues had been apparent since the homeowner purchased the property in 2003. He said that he had first raised concerns about this with the property factor when it took over responsibility for factoring the development in 2004. He said that the dampness had long been treated as a condensation problem, but that he had always believed it was due to structural issues within the development. The problems were not present only within the homeowner's flat- there was also dampness within the communal stair area and on the walls within the communal entrance. The adjacent flat, 4/2, suffered similar problems, and he believed that the conditions in that property were even worse. He said that, while there had historically been a dampness problem in some of the properties on lower floors in all of the blocks, the property factor had now acknowledged that the problems in Block 2 were due to something else.
13. Mr Reid stated that Mr Kirbitson had first raised concerns about the dampness in 2008. At that time, the property factor had engaged contractors to look at the problem, and works has been carried out to the foundations, which the property factor believed had resolved the matter. Mr Kirbitson had been advised that there were historic condensation problems in the ground floor apartments in the development, due to its construction and location. The homeowner told the committee that he believed the problem to be communal,

however. While he had taken steps to address the problem, such as installing insulation and making changes to the flooring, the mould, dampness and high humidity problems had persisted.

14. Mr Reid stated that the next contact from Mr Kirbitson about the issue was in July 2010. The property factor had submitted email evidence that it had raised this with the chairperson of the residents' committee for the development. His response was that the matter had been discussed at length over the years, and that it was for the individual homeowner to address, rather than being a communal matter.
15. There was agreement between the parties that Mr Kirbitson raised the issue again at the residents' committee AGM on 15 November 2012. It was agreed at that meeting that David Hood, a specialist surveyor, would be contracted to assess dampness issues in the ground floor flats in block 4. A survey was carried out on 8 December 2012, and the interim survey findings were communicated to Mr Kirbitson and other members of the residents' committee on 21 December 2012.
16. The survey found that there was mould on the walls and underneath a rug in the homeowner's flat; that the chipboard flooring fixings were corroding; that the tenant was using the de-humidifier constantly; and the windows were running constantly with condensation. The report found that there was a possible drainage issue beneath the floor in the homeowner's flat and possibly also Flat 2. It recommended that: drainage drawings be obtained from the Council; the bedroom floor in the homeowner's flat should be opened up; and a CCTV drainage survey should be carried out.
17. On 5 February 2013, a further meeting of the residents' committee was held, when it was noted that Mr Hood would contact the Council to obtain further information, to investigate the matter further. The property factor's written representations state that David Hood then requested that sections of floor in the homeowner's property be lifted in order to check underneath; that from 5 February to 24 November 2013, both David Hood and the factor attempted to contact Mr Kirbitson to gain access to the property to inspect under the floor; and that no contact was made by him during that period. While he was unsure of the relevant dates, Mr Kirbitson conceded at the hearing that there was a period when he was not in touch with the property factor, due to a difference of opinion between him and homeowner about the matter,
18. Mr Kirbitson then raised concerns that the property factor had not dealt with the problem at the next residents' committee AGM on 26 November 2013. Mr Kirbitson confirmed to the committee that he had stated at that meeting that access hatches had been in place at the time of the survey (which the

surveyor had been unaware of); that he had checked underneath the flooring; and that this area was dry. Mr Wallace wrote to him on 28 November, stating that, based on his confirmation that the area under the floor was dry, there was no issue with the underground drainage leaking, and suggesting that instructing a further call out would be an unnecessary expense. He mentioned that the owner of another flat in the block had installed a 'PIV' (Positive Input Ventilation) unit, and that this had resolved their condensation problem. He said that the dampness issue had been investigated at least twice since 2006, and that no evidence of a communal issue had been found. He went on to say that if Mr Kirbitson could provide information to the contrary, the matter would be taken forward, but that no further action would be taken until instructed otherwise by the residents' committee or the homeowners collectively.

19. Mr Kirbitson contacted Mr Wallace on 2 February 2014, advising that he had identified an area where he suspected dampness was present, and that there had been a dehumidifier running constantly for a month, which was removing a gallon of water every four days. He asked Mr Wallace to arrange for David Hood to meet with him at the flat. Mr Wallace contacted David Hood the following day, and followed this up with Mr Hood on 26 February and 14 March.
20. An inspection was carried out on 11 April 2014. On that date, David Hood sent an email to Mr Wallace, confirming that the problem appeared to be emanating from the main service riser in a cupboard in the stairwell; that the water supply pipe was running with condensation; that the sub floor was the main receptor of this dampness/running water; and that there was a high level of water ingress, which would be a significant contributor to the condensation problem. He said that there was a need to begin eliminating possible causes of the problem. He recommended that the entire supply pipe be inspected for leaks/weeping joints, and that the insulation around the pipe should be replaced.
21. The property factor stated in its written representations that a site inspection had then been carried out on 20 May 2014, but this did not appear to have been communicated to Mr Kirbitson. The outcome of the 11 April inspection was also not communicated to Mr Kirbitson, who sent an email direct to David Hood on 7 July, advising that he had had no response from the property factor, and asking for a note of his findings and recommendations. DH sent an outline of these to Mr Kirbitson on 8 July. On 18 July, Mr Wallace confirmed to Mr Kirbitson that the mains riser cupboard had been checked for leaks and none were found; that the mains pipe in the cupboard at ground floor level was wet with condensation; and that works had been instructed to reinsulate the pipe and ventilate the cupboard doors.

22. The property factor then told the committee that at its monthly site inspection on 15 August 2014, it had been identified that the wrong pipe had been lagged and the contractor was asked to put this right. The contractor was reminded to complete the works on 19 September 2014, and the correct pipe was re-insulated in November 2014. At the next residents' committee AGM on 24 November 2014, Mr Kirbitson said that he felt the insulation work done was substandard. It was agreed that a site meeting should be arranged, involving David Hood, the contractor, the property factor and Mr Kirbitson. This was arranged for 9 December 2014.
23. There was disagreement between the parties as to what happened following the site meeting. Mr Reid stated that at the meeting it was agreed by all parties that there could be a plumbing issue in one of the first floor flats which was causing the pipe to run with condensation, and that access to these flats should be arranged to assess the plumbing. He said that it had been agreed that once this has been done, the re-lagging of the pipe would be completed.
24. This was disputed by Mr Kirbitson, who said that the suggestion of checking the other flats was raised by the plumbing contractor at the site inspection. He felt this suggestion had then diverted attention from the attempts to locate the cause of the excess water on the pipe in the cupboard, which he felt should have been the priority. Mr Reid told the committee that he had not been aware of Mr Kirbitson's concerns, but Mr Kirbitson pointed to a letter which he had sent to Mr Reid dated 20 January 2015 raising these points, which was before the committee. In that letter, he made clear that he had no issue with the other flats being checked, but that he was concerned that gaining access to flats could delay matters for months.
25. The property factor then had difficulty in arranging access for the contractor to all of the first floor flats. In February 2015, the homeowner submitted her application to the panel. The assessment of all flats was completed on 21 April 2015 - this found one issue in flat 2 which was repaired. The re-lagging of the pipe was instructed on 30 April. This had now been done, but the homeowner told the committee that again this had not been done properly, as the contractor had lagged over the existing lagging. Meanwhile, investigations were continuing into the source of the suspected leak, and Scottish Water was now involved. Mr Kirbitson told the committee that recent developments had given him hope that the matter might at last be resolved.

The relevant duties

26. In his notification letters to the property factor, Mr Kirbitson made specific reference to 'section 12 page D7 of title deeds' and to section 5 of its written statement of services (WSS), as the sources of the relevant duties. The

committee had before it a copy of the land certificate for the property, which did not contain a 'section 12 page D7'. The homeowner confirmed to the committee that this was in fact a reference to Clause (Twelfth) of the Deed of Conditions, which states that the factor is '*responsible for instructing and supervising the common repairs and maintenance of the common property*'. She did not believe that the property factor had carried out these duties to an adequate standard. Mr Kirbitson stated that the property factor had failed to take action quickly enough to resolve the problem, and he felt that he had to take action himself as a result, such as contacting the surveyor directly. He also complained that the CCTV drainage survey recommended by David Hood in his December 2012 report had never been carried out.

27. Section 5 of the WSS submitted to the committee by the homeowner (it became apparent later in the hearing that this had since been superseded by an updated WSS, as mentioned later in this decision) sets out details of the property factor's procedures for carrying out repairs and maintenance. When asked by the committee which specific part of section 5 she wished to complain under, the homeowner confirmed that the relevant section was section 5(e), which sets out the procedure for checking the standard of contractors' work, and to remedy any defects of inadequate works or services provided.
28. Section 5 (e) states: '*Estate managers inspect developments monthly and sign off all works. Many of our contractors have long established relationships with LPM, therefore if standards are not met, funds are available to be withheld until corrective work is complete.*' While the updated WSS uses slightly different wording, the substance is similar, making reference to monthly inspections, and stating that where a complaint is made by a homeowner about a contractor, they will be afforded the opportunity to correct the problem. It states that if this is not achieved, the property factor may instruct an alternative contractor to resolve the issue and deduct the cost incurred or refuse to pay the original contractor's invoice.
29. Mr Kirbitson said that he did not consider that the property factor had the necessary technical expertise in building construction to properly supervise contractors. He questioned how the property factor could therefore be in a position to carry out its property factor's duties adequately. The homeowner said that the property factor had not adequately inspected the works carried out by the contractors. The wrong pipe had been lagged initially, and it was some months before the correct pipe had been lagged, but this had not been done to an adequate standard. She said that when it had been re-done, this had still not been done correctly. She told the committee that she was not convinced that the property factor carries out monthly development

inspections, as stated in its WSS. She felt that there was a lack of clarity as to how works were implemented and assessed.

30. Mr Reid told the committee that the property factor did carry out monthly site inspections, producing a detailed site visit report. He believed it was one of only two property factors in Scotland to carry out such monthly site visits. He added that the property factor called in appropriate experts where there was a problem which required this. He told the committee that the contractor in question had not been paid, and that the money had been retained until it was done correctly.

Duties complaint 2- roof

31. The homeowner also made a second complaint with regard to the property factor's duties. This related to an on-going problem with the common roof of blocks 4, 5 and 6. The 2 main roofs (the first in blocks 1, 2 and 3 and the second in blocks 4, 5 and 6) had been completely replaced in 2009. The homeowner complained that since that time, there had been an ongoing problem with defects in the roof which she believed was due to the use of poor quality contractors and a lack of supervision by the property factor. It was clear from the correspondence before the committee that some of these issues related to another flat in block 6 which is owned by Mr Kirbitson, rather than the homeowner's property. He told the committee that there were problems with squirrels and pigeons entering the roof space, which he believed was partly due to the contractor's failure to replace the soffits when replacing the roof. He said that, to his knowledge, there had not been an issue with vermin in the property prior to the replacement of the roof in 2009.
32. Mr Reid said that the residents' committee had chosen its own contractors for the roof replacement works, and had overseen the tender process. He said that the property factor had advised the committee that it should consider appointing a clerk of works to oversee the work, given the size of the contract and the sums involved, but the committee chose instead to engage a quantity surveyor, who instructed the property factor as to when the funds should be released to the contractor. He told the committee that the soffits and fascias had not been replaced, on the surveyor's advice, and had therefore not been included in the contract specification. He said that the property factor had kept back a retention sum for a year after the works were done.
33. He also said that there had in fact been issues with vermin in the roof prior to 2009. Following the roof replacement, defects in the gutters had been identified and addressed. In 2012, the roof was inspected by David Hood, who raised no questions about its construction. Independent contractors had concluded that the problems were caused by storm damage. In 2013, the

property factor had engaged various experts to look at the gap issues, which had been identified and addressed. More recently, further gaps had been identified, and a contractor was due to inspect this on 11 August 2015.

Code complaints

34. The homeowner had complained about breaches of sections 2.5, 3.3, 6.1 and 6.3 of the code in her application form, and Mr Kirbitson had also included these sections in his notification letters to the property factor. The homeowner had not, however, submitted any clear evidence to support these complaints, and the property factor had not directly addressed these in its written representations. The committee was therefore reliant primarily on the oral submissions of the parties at the hearing as regards these complaints.

Section 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).*

35. The homeowner's main complaint was that when her father wrote to the property factor, he usually received a standard response saying that he would receive a reply within 10 days, and that it was quite often a month or more before he received an adequate response. Mr Kirbitson said that it was difficult to reach Mr Wallace on the telephone, as he was rarely in the office. He complained that the responses received were vague and did not always directly answer his query. The homeowner told the committee that there seems to be an endless stream of correspondence back and forth without any action being taken. When asked by the committee to provide specific examples of such instances, neither the homeowner nor Mr Kirbitson did so.
36. Mr Reid said that the property factor worked hard to be available to homeowners, and that he believed it was the only property factor in Scotland to offer a 24 hour emergency control centre. He said that if an email was sent and the recipient was out, the homeowner would receive an out of office reply, and a response would be sent within 7 days. He said that it was not always possible to ensure that a response to a letter was sent within 14 days, as a complex issue, such as the one before the committee, may take longer than this to resolve. It was important however, to ensure that communication was maintained with the homeowner, and the purpose of the standard acknowledgement letter referred to by Mr Kirbitson was to make the homeowner aware that their letter had been received.

37. The committee chairperson observed that the WSS before the committee did not appear to include response times for dealing with enquiries, as required by sections 1.1a D and 2.5 of the code. It then became apparent that the photocopied WSS before the committee had been superseded by a more detailed version in pamphlet form, which the property factor produced at the hearing. Mr Reid told the committee that the original WSS, which had been sent to homeowners in October 2012, had been adapted and improved in the light of experience. He said that the new WSS had been sent out initially to all homeowners around 2 years ago, and was now sent out yearly with invoices. Both the homeowner and Mr Kirbitson told the committee they did not recall having seen this document before. Ms Borthwick indicated that, as the homeowner's preference was for correspondence to be sent by email, the WSS would have been sent by this means. A brief discussion followed between the parties as to whether the property factor held the correct contact details for the homeowner and her father.

Section 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.*

38. It was not entirely clear to the committee what the homeowner's complaint was in relation to this section of the code. Mr and Mrs Kirbitson told the committee that the annual statements they had received were not specific enough. They said that these did not include sufficient detail - for example, they might include an entry headed 'electrician', but would give no further detail as to the work done. Mr Kirbitson said that he expected to see a greater level of detail about costs on invoices, as he received from the factors responsible for managing other developments where he owned properties. Mrs Kirbitson said that she wanted to know what she was paying for, and that she had requested accounts by email for the past 2 years, but had not received these.
39. Ms. Borthwick told the committee that she had searched the property factor's records and had found only one formal request from Mr Kirbitson regarding an invoice, dated 25 October 2013. She produced a copy of this letter, together with her response of 1 November 2013. Mr Kirbitson's letter, which appeared to relate to a property at 1/12 Hawthornden Place, requested further information on various charges included in an invoice for the period 1 September 2013- 28 February 2014. With her response, Ms Borthwick had

attached a copy of the 'estimated service charge budget' for the development for 1 November 2013 to 31 October 2014, together with guidance notes which provided an explanation of each cost heading. She confirmed that these notes were routinely sent out with copies of the budget.

40. Mr Reid explained to the committee that the annual budget was agreed in advance with the residents' committee, before being sent out, together with the explanatory notes referred to above. This was emailed to all owners, and other owners in the development had received these. He suggested that there may be a problem with the email address held for the homeowner. He also explained that the invoice sent out to homeowners was based on the estimated budget for each year, and that any adjustments were made at the end of the year. He said that the property factor operated on the basis of arrears billing, while he believed that the other developments where Mr Kirbitson had properties operated an advance billing system.

Section 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.*

41. Mr Kirbitson told the committee that the factor had not kept the homeowner informed about the progress of work, in relation to both the dampness and the roof issues, and had not provided estimated timescales for completion. This complaint covered similar ground to the first duties complaint.
42. Mr Reid told the committee that the property factor had kept the homeowner informed as to progress so far as possible, providing timescales as to the different stages of the investigation, updates as to when contractors would be coming out, when meetings with contractors would be held, and so on. He said that the property factor was unable to specify a date for conclusion of the works when it did not yet know what the problem was. He said that to some extent, this was outwith the factor's control, as it was relying on other parties.

Section 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.*

43. Mr Kirbitson told the committee that the property factor did not re-tender contracts, and that the same contractors were reinstated year after year. The homeowner's concerns related in particular to the stair cleaning and grounds

maintenance on the development. Mr Kirbitson stated that he had raised this with the property factor on a number of occasions.

44. Mr Reid told the committee that, when the property factor took over in 2004, it took a number of competitive tenders for the stair cleaning and grounds maintenance to the residents' committee AGM. One of the homeowners had tendered for the work, and was awarded the contract by the committee. There had been two complaints about this contractor, and the property factor had gone back to the committee to propose putting the contract out to competitive tender again, most recently in 2013. At that meeting, however, the consensus was to stay with the same contractor, and the property factor was obliged in terms of the title deeds to act according to the wishes of the majority of owners. Mr Wallace pointed out that the owners have the opportunity at every AGM to raise issues about contracts. He indicated that the property factor would put this issue on the agenda for the 2015 AGM.

Statement of reasons for decision

Duties complaint 1- dampness

45. The issue before the committee was not whether the dampness problem had been resolved, but whether the property factor had carried out its duties in terms of the title deeds and its WSS to 1) instruct and supervise common repairs, and 2) check the standard of contractors' work, and remedy any inadequate works or services provided. This was not a straightforward issue to determine, as this had clearly been a complex and difficult problem to resolve, with a long history, and investigations into the cause of the dampness problem were still ongoing at the time of the hearing.
46. While there was evidence before the committee that the homeowner's complaints went back as far as 2008, and possibly 2004, the committee was only able to consider whether the factor had failed to carry out its duties after 1 October 2012, when the Act came into force. It therefore focused its attention on events which had occurred after that date, starting with the residents' committee AGM on 15 November 2012, when Mr Kirbitson raised the issue again.
47. Turning firstly to the question of whether the property factor had carried out its duty to instruct and supervise common repairs, the committee concludes that it may be inferred from this that common repairs will be instructed and carried out within a reasonable time frame. Section 17 (5) of the Act also states that references to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard. It is clear from the evidence that the property factor had instructed investigations into the

dampness issues on several occasions, and had generally taken action promptly when the homeowner/ her father raised concerns about this.

48. Having considered all of the evidence before it, the committee noted that there were a number of occasions when there appeared to have been delays in progressing the works, namely:

- between 5 February and 24 November 2013. The evidence suggests that this was due to a lack of contact by Mr Kirbitson, and the committee accepted the property factor's evidence that both it and David Hood had made attempts to contact Mr Kirbitson during that period. The committee notes that his delay might have been avoided had the surveyor been aware at the December 2012 inspection that there were hatches fitted in the floor.
- between 2 February and 11 April 2014. The committee accepted that the property factor had chased up the surveyor several times about contacting Mr Kirbitson, but had difficulty in getting hold of him. Mr Wallace explained to the committee that, despite this, the property factor had been keen to stick with Mr Hood, given his past involvement and knowledge of the issue, which the committee accepted as reasonable.
- between 11 April and 18 July 2014. The surveyor's inspection was carried out on 11 April, but Mr Kirbitson was not kept informed about the findings of this. He eventually contacted Mr Hood direct on 7 July to ask about this. The property factor stated in its written representations that it had carried out a site assessment on 20 May, and it contacted Mr Kirbitson on 18 July to advise that checks had been done, and work instructed. The committee considers that there was a delay in informing Mr Kirbitson about the outcome of the inspection, and considers that this matter is more appropriately dealt with in relation to the homeowner's complaint under section 6.1 of the code, as discussed later in this decision.
- between 15 August-November 2014. Mr Kirbitson said that he had originally brought the error in lagging the wrong pipe to the property factor's attention, before this was noted at the 15 August site inspection. The committee accepted Mr Reid's evidence that while inspections were carried out monthly, in between these, the factor relied on homeowners alerting them to problems. There was a question, however, as to whether the delay between August and the re-lagging in November was reasonable. The committee accepted Mr Reid's evidence that between 15 August and 19 September, there was a dispute between the property factor and the contractor as to whether the work had been properly. The committee accepted that while there had been a delay in the work being carried out, the property factor had chased up the contractor, and had withheld payment until the work was done properly.

- between December 2014 and April 2015. The pipe was not re-lagged, while the contractor attempted to access the other flats. The committee accepted Mr Kirbitson's evidence that he had expressed concerns that the re-lagging was to be delayed while the investigations were carried out. The committee notes that the parties differed in their understanding of what had been agreed, but it also notes that lagging of the pipe was just one recommendation made by the surveyor, who had suggested the need to eliminate possible causes one by one. The investigation of the first floor flats had not uncovered the cause of the leak, but had eliminated this. It also appeared that the lagging had ultimately not resolved the problem.
49. The homeowner also complained that the property factor had failed in its duties in not instructing a CCTV drainage survey, as recommended by the surveyor in his December 2012 report. The property factor had taken the decision, when Mr Kirbitson confirmed in November 2013 that it was dry underneath the floors, that there was no issue with the underground drainage leaking, and that carrying out such a survey would be an unnecessary expense. The committee considers that this was a reasonable conclusion to reach in the circumstances, and notes that the surveyor himself did not appear to have raised this survey again as being necessary.
50. The second question before the committee was whether the property factor had failed in its duties under the title deeds to adequately supervise the repairs and under the WSS to check the standard of contractors' work, and remedy any inadequate works or services provided. The committee took the view that, while there had been problems with inadequate work being carried out, the property factor had checked the work at its site inspections, and had taken action to require the contractor to remedy the problem. The works had been re-done, but the homeowner stated that they had still not been carried out properly. Mr Reid told the committee that the contractor had not been paid, and would not be paid, until the works had been carried out adequately. This is in line with the property factor's WSS.
51. The committee has considerable sympathy with the homeowner as to the problems she continues to experience as a result of the dampness, and the time it has taken to resolve these. It does not consider, however, that the property factor has failed in its duties either to instruct and supervise common repairs, or check the standard of contractors' work, and remedy any inadequate works or services provided. While there have been delays at some points along the way, and with hindsight a number of blind alleys have been pursued, the surveyor had identified that there was a need to follow a process of elimination, which is what has been done. This has clearly been a complex issue, and it has evidently been very difficult to ascertain the cause of the problem. The committee considers that the

property factor has carried out its duties to a reasonable standard. Mr Reid told the committee that the property factor also wished the problem to be resolved as soon as possible, and the committee accepted this.

Duties complaint 2- roof

52. While there were some references to the roof issues in the correspondence before the committee, this had been produced primarily with regard to the dampness complaint. The homeowner had provided the committee with little written evidence with regard to the roof repairs. The committee was unable to consider the complaints with regard to the original installation of the new roof in 2009, as this predated the obligation of the factor to comply with its duties under section 17(5) of the Act, which arose from 1 October 2012. It also appeared from the evidence that Mr Kirbitson's complaints related primarily to another property owned by him, rather than the homeowner's property. While the committee had sympathy with Mr Kirbitson as regards the vermin issues, it appeared to the committee that the property factor had taken appropriate action in response to complaints received from him about the roof after that date. The committee determined that there was no evidence before it to support a finding that the property factor had failed in its duties as regards the roof. The committee does not therefore uphold the homeowner's complaint about this issue.

Code complaints

53. **Section 2.5:** the committee noted that the homeowner had not made reference to any specific examples where she believed that there had been a breach of section 2.5. Her complaint was a more general one, that she and her father felt that many of the property factor's responses were vague in their nature. On the basis of the correspondence before it, the committee did not accept the homeowner's contention that the property factor's responses were often vague. Mr Kirbitson appeared to be suggesting that all matters raised should be dealt with very quickly. While the committee has sympathy with the homeowner and her father as regards the length of time it has taken to resolve the dampness issue, it is clear that there are complex repairs issues here, which were not amenable to a quick resolution. The committee therefore accepted the property factor's evidence that some complex enquiries could not be adequately responded to within 14 days.
54. On the basis of the evidence before it, the committee takes the view that the property factor has endeavoured to respond to Mr Kirbitson's correspondence promptly, within the timescales set out in its written statement of services (WSS). These are: 48 working hours for telephone enquiries; 7 working days for email enquiries; and 14 days for written

responses, unless the property factor has confirmed otherwise. The WSS also states that letters should be acknowledged within 3 working days. The committee notes that section 2.5 states: *'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.'*

55. While the committee accepts that the homeowner and her father did not appear to be aware of the amended WSS, it considers the timescales in the WSS to be reasonable. Mr Kirbitson was also unhappy about the standard acknowledgement letters that he received. While the committee notes that the property factor should aim to respond as quickly as possible in each case, it accepts that where a query cannot be dealt with straightaway, it is good practice to send such an acknowledgement, to inform the homeowner that their letter has been received.
56. On the basis of the evidence before it, the committee therefore determines that the property factor has not failed to comply with section 2.5 of the code.

Section 3.3:

57. It appears to the committee that the complaints outlined by Mr Kirbitson at the hearing did not clearly relate to the homeowner's property. Rather, they seemed to concern other properties owned by him within the development, which were not the subject of the application before the committee. It was also apparent that some of his concerns related to the differences between the billing system used by the property factor and the system used by the factors for his properties within other developments.
58. While there appeared to be some issues about whether and how the homeowner was contacted by the property factor, there was no clear evidence before the committee which would support a finding that there had been a breach of section 3.3. The committee therefore determines that the property factor has not failed to comply with its duties under section 3.3 of the code.
59. **Section 6.1:** The committee concluded that, while the property factor had generally kept the homeowner informed about the progress of work in relation to the dampness issue, it had failed to do so following the surveyor's inspection on 11 April 2015. It had not communicated the surveyor's findings, and Mr Kirbitson had eventually contacted David Hood direct. The committee considers that, given the history of the matter and Mr Kirbitson's clear interest in the outcome of this, this should have been communicated to him soon afterwards- this could have been done simply by forwarding Mr Hood's email to Mr Wallace. The committee therefore determined that the property factor had failed to comply with its duties under this section of the code.

60. **Section 6.3:** On the basis of the evidence before it with regard to the tendering of the contract for stair cleaning and grounds maintenance, the committee determined that the property factor had not failed to comply with its duties under this section. It accepted the property factor's evidence that it had offered to re-tender the works, but that it had been instructed by a majority of those attending the AGM not to do so. The committee notes that the WSS provides that all contracts are tendered every 2 years.

Observations made by the committee

61. It appeared to the committee that there may be issues arising as to communication between the property factor and the homeowner, specifically as regards whether she had received a copy of the updated WSS and the factor's invoices, by email or otherwise. The parties appeared to have some discussion about this at the hearing, and the committee observes that resolution of this issue may help to address some of the code issues complained about.

Proposed Property Factor Enforcement Order

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

Right of appeal

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.

More information regarding appeals can be found in the information guide produced by the homeowner housing panel. This can be found on the panel's website at:

<http://hohp.scotland.gov.uk/prhp/2649.325.346.html>

Chairperson Signature .

Date.....10/9/15.....