**Decision of the Homeowner Housing Committee**
**In an Application under section 17 of the Property Factors (Scotland) Act 2011**
**by**

**Linda Clink, 30 Oak Loan, Dundee DD5 3UQ ("the Applicant")**

**Greenbelt Group Ltd, McCafferty House, 99 Firhill Road, Glasgow G20 7BE ("the Respondent")**

**Reference No: HOHP/PF/14/0035/0036/0037**

**Re: Land at Ballumbie Castle Estate, Dundee DD5. ("the Property")**

**Committee Members:**

John McHugh (Chairman); David Hughes Hallett and Colin Campbell (Housing Members).

**DECISION**

**The Respondent has failed to carry out its property factor's duties.**

**The Respondent has failed to comply with its duties under section 14 of the 2011 Act.**

The decision is unanimous.

**We make the following findings in fact:**

1 The Applicant is the owner and occupier of a house at 30 Oak Loan, Dundee.
2 30 Oak Loan is located within a development known as the Ballumbie Castle Development (hereinafter "the Development").
3 The Development includes houses constructed by a number of different housebuilders.
4 The Development contains areas of undeveloped land including grass and woodland which are available for the use of the residents of the Development.
5 The Respondent manages these areas and charges owners of properties on the Development, including the Applicant, for its services by way of an Annual Maintenance Charge ("AMC").
6 The Deed of Declaration of Conditions by Stewart Milne Group Ltd registered 24 March 2005 ("the Deed of Conditions") governs the arrangements which apply among the Respondent and homeowners on the Development including the Applicant.
7 The Applicant bought her house in or around 2006 from the developer, Gladedale/Bett and has lived there since.
8 The Respondent employs sub-contractors to perform the ground maintenance works.
9 Until March 2010, for the initial five years of its involvement, the Respondent charged a flat rate of £150 per plot.
10 Since March 2010, the Respondent has charged using the AMC.
11 The Respondent has calculated the AMC using the number of plots on the Development as 234 (between February 2011 and January 2012) or 235 (from February 2012.
12 These numbers were incorrect.
13 The correct number of plots on the Development for the purposes of calculation of the AMC has always been 252.
14 The property factor's duties which apply to the Respondent arise from the Respondent's various Statements of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.
15 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 (1 November 2012).
16 The Applicant has, by her correspondence, including that of 30 June, 6 and 7 November, 7 and 17 December all 2013; and 3 and 4 March 2014, notified the Respondent of the reasons as to why she considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.
17 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

## Hearing

A hearing took place at Caledonian House, Dundee on 14 April 2015.

The Applicant was present at the inspection and was assisted by her mother. She called one witness, Mr George Findlay.

The Respondent was not represented at the hearing and no witnesses were led on its behalf, the Respondent having indicated that it wished to rely solely upon its written representations.

## 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 Respondent became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee issued a total of seven Directions regulating procedure and held procedural hearings on 5 December 2014 and 27 January 2015.

There were originally three separate applications. The Committee in its Direction No.1 directed that they should be heard together and all three are referred to by us as "the Application".

After the second procedural hearing on 27 January 2015, the Committee issued its Direction No.5 which reflected the areas which the parties were agreed remained in dispute and which would require to be resolved by the Committee.

The Committee had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent including those lodged in response to the Committee's Directions. As the Respondent was not represented at the hearing, the Committee took special care to ensure that the Respondent's written representations were properly considered and put to the Applicant as appropriate.

The documents before us included a Deed of Declaration of Conditions by Stewart Milne Group Ltd registered 24 March 2005, which we refer to as "the Deed of Conditions" and the Respondent's various Written Statements of Services.

## REASONS FOR DECISION

## The Legal Basis of the Complaints

### Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Deed of Conditions is relied upon in the Application as a source of the property factor's duties.

### The Code

The Applicant complains of failure to comply with the Code.

On discussion at the hearing, the Applicant was able to focus her complaint upon Sections 1, 2.1, 2.2, 2.4, 2.5, 3.3, 4.1, 4.5, 4.6, 4.7, 4.9, 7.1 and 7.3 of the Code.

The elements of the Code relied upon in the application provide:

*"...**SECTION 1: WRITTEN STATEMENT OF SERVICES***

*You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code.*

*You must provide the written statement:*

- *to any new homeowners within four weeks of agreeing to provide services to them;*
- *to any new homeowner within four weeks of you being made aware of a change of*
- *ownership of a property which you already manage;*
- *to existing homeowners within one year of initial registration as a property factor.*
- *However, you must supply the full written statement before that time if you are*
- *requested to do so by a homeowner (within four weeks of the request) or by the*
- *homeowner housing panel (within the timescale the homeowner housing panel specifies);*

- *to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement....*

***...1.1b Alternative standards for situations where the land is owned by a land maintenance company or a party other than the group of homeowners***

*The written statement should set out:*

***A. Authority to Act***
*a. a statement of the legal basis of the arrangement between you and the homeowner;*
*b. a description of the use and location of the area of land to be maintained, including a map where possible (this information must be kept up-to-date);*

***B. Services Provided***
*c. The services that you will provide. This will include the minimum service delivery standards that can be expected and the target times for taking action in response to requests for both routine and emergency repairs. Any work or services which are a requirement of the property titles should also be stated;*

***C. Financial and Charging Arrangements***
*d. how many properties contribute towards maintenance costs for the area of land maintained;*
*e. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);*
*f. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);*
*g. any arrangements for funds for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);*
*h. any services or works that may incur additional fees and charges, including when or how they may arise (this may take the form of a menu of services) and details of how these fees and charges are calculated and notified;*
*i. how often you will bill homeowners and by what method they will receive their bills;*
*j. how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);*

***D. Communication Arrangements***
*k. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied after completing your in-house complaints handling procedure (see Section 7: Complaints resolution);*
*l. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;*
*m. your procedures and timescales for response when dealing with telephone enquiries;*

***E. Declaration of Interest***
*n. a declaration of any financial or other interests (for example, ownership) in the land to be managed;*
***F. How to End the Arrangement***
*o. clear information on how to change or terminate the service arrangement between you and the homeowner, including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination...*

***Section 2: Communication and Consultation***

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

*... 2.2 You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action)...*

*...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)...*

***...Section 3: Financial Obligations***

*...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…*

***…Section 4: Debt Recovery***

*… 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…*

*4.5 You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.*

*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…*

*…4.9 When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position…*

***…Section 7: Complaints Resolution***

*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…*

*…7.3 Unless explicitly provided for in the property titles or contractual documentation, you must not charge for handling complaints...".*

## The Matters in Dispute

The matters agreed by the parties as being in dispute were set out in Direction No.5 as follows:

(1) The Committee's jurisdiction to consider a complaint regarding the accuracy of the Property Factors Register.

(2) Whether there was an unacceptable delay in the issuing of written statements of services by the Respondent.

(3) The status and effect of the Landscape Maintenance Specification and whether that document is contrary to the terms of the Respondent's written statements of services.

(4) The obligations upon the Respondent to produce a breakdown of its charges and documentary vouching of same.

(5) The extent to which the Respondent has overcharged the Applicant because of its historic practice of dividing its charges among fewer than 252 homeowners.

(6) The remedies sought by the Applicant including any refund.

(7) The standard of service provided by the Respondent including any discrimination by the Respondent in the provision of information to the Applicant.

(8) Failure by the respondent to provide information requested by the Applicant.

We deal with these issues below.

**(1) The Committee's jurisdiction to consider a complaint regarding the accuracy of the Property Factors Register.**

The Applicant had appeared originally to want the Committee to make a finding that the Property Factors Register was inaccurate. The Respondent had produced detailed written submissions arguing that the Committee would have no jurisdiction to make such a finding. At the hearing, the Applicant confirmed that she was not in fact insisting upon this as a separate head of complaint. She simply wanted to be able to refer to relevant inaccuracies in the Register as evidence in relation to the other matters which she complains of. The Committee had no difficulty with her doing that. In the circumstances, the Committee found it unnecessary to make any decision on the question of jurisdiction.

**(2) Whether there was an unacceptable delay in the issuing of written statements of services by the Respondent.**

**(i) The LMS**

By letter of 18 December 2012 the Applicant had asked the Respondent for a copy of a document relating to landscape maintenance.

(This document was later referred to in the Respondent's Written Statement of Services as a Management Plan Specification. This document ultimately came to be recognised as a document bearing the title "Landscape Maintenance Specification and Guidance Notes - July 2012" and we will refer to the document for convenience as "the LMS".)

The Applicant says that she was advised that no such document was in existence. This appears to be a reference to the Respondent's letter to her of 29 January 2013, although the letter is not so clear in its terms; what that letter actually states is that there is no contract with the Residents Association and that a revised site maintenance plan had been enclosed with an earlier letter.

The Applicant advises that she first obtained a copy of the LMS via a Residents Committee meeting on 26 March 2013. The Respondent had left several copies at the meeting for any residents who wished to have one. She described that copy as a "blank copy" in that it was unsigned by the parties to the document. She was unhappy with this and requested a signed version by her letter of 28 March 2013. She repeated her request in her letter of 12 May 2013.

The Applicant considers the LMS to be an integral part of the Written Statement of Services and considers that her request for it should have been treated as a request for a written statement of services and that it should therefore have been provided to her (in terms of the Code) within four weeks of the request.

The Applicant advised that, over the years, she has received a number of written Statements of Services from the Respondent. She had received the first version on or around 19 April 2013, having requested it in her letter of 27 March 2013.

Neither the first version of the Written Statement of Services nor subsequent versions were accompanied by the LMS.

She relies upon paragraph 2.1 of the Code. She considers that the statement that the LMS did not exist was untrue and the Applicant invited us to draw the inference that the document was being deliberately witheld from her and its existence denied by the Respondent. She felt there was bad faith on the part of the Respondent and this incident was only one in a whole history of a refusal to respond adequately to her requests for information.

The Applicant relies upon paragraph 2.5 of the Code in respect of the delay in provision of the LMS. The delay is between her original request for the LMS in December 2012 until her ultimate receipt of versions of the document, the earliest receipt (of the unsigned version) being in March 2013.

The Committee considers that the LMS is not itself a written statement of services nor equivalent to one.

We do not consider that the Applicant was entitled to a signed copy of the LMS. There was no reason to believe that the unsigned version was likely to be different to the signed version. We therefore do not attach any significance to any delay which may be said to have occurred after March 2013 when the unsigned copy had been provided. We do not consider that there has been a breach of paragraph 2.5 of the Code.

We do not consider there to have been a breach of paragraph 2.1 of the Code. That would require the Respondent to have provided information that was misleading or false which we construe to require some element of deliberate misconduct on the part of the Respondent rather than simply providing information which is incorrect. Even if the Respondent's letter of 29 January 2013 was properly construed as a denial of the existence of the LMS (and the wording makes it at least questionable that the letter should be construed in that way), the information given by the Respondent in its letter that the LMS did not exist would have been factually wrong but we do not infer any intention to mislead or to present false information. Accordingly, we find there to have been no breach of paragraph 2.1 of the Code.

We find there to be no breach of property factor's duties.

**(ii) the number of plots**

The Applicant complains that the original version of the Written Statement of Services issued by the Respondent is inaccurate in that it wrongly records the number of plots within the Development. The number was corrected, to 252, in the version issued in August 2014.

The Applicant regards that as a substantial change.

The Applicant relies upon bullet point 4 of the introductory paragraph of Section 1 of the Code which requires provision of an amended statement of services "*at the*

*earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement."*

The "change" of course was not a change of facts at all but simply a change in the content of the Written Statement of Services to reflect the existing reality. The Respondent came to realise (because of the Applicant raising the matter) that the original Written Statement of Services was incorrect and appears to have implemented the revised Statement within a year thereafter, which appears to us to meet with any obligation upon it under the paragraph of the Code quoted above . Accordingly, we do not find there to have been a breach of the highlighted (or any other) section of the Code or of the property factor's duties.

The true complaint may be that the Respondent had simply been wrong in the terms of its original Written Statement of Services. That was as a result of the mistaken way in which it calculated the shares of maintenance charges applicable to plots on the Development which we deal with at (5) below.

**(3) The status and effect of the Landscape Maintenance Specification and whether that document is contrary to the terms of the Respondent's written statements of services.**

The Applicant clarified in her oral submissions that she had no issue with the LMS itself. She thought that its terms should be applied to the maintenance of the Development.

She observes that there appear to be differences between, on the one hand, the standard of maintenance required by the LMS and, on the other, that required by the titles. The latter standard has, according to the Applicant, correctly been reflected by the Respondent in its Routine Maintenance Schedule. The LMS appears to require a higher standard of service in some areas. The Applicant indicated her concern that she and the other homeowners within the Development might be paying for the higher standard.

The Respondent claims that the contractors are voluntarily applying the higher standard without applying a higher cost. The Applicant finds that hard to believe. The Applicant explained at the hearing that she was at the point where she no longer believed what the Respondent tells her. She advised that there was no evidence that she and other homeowners on the Development were not paying for extra services which the Respondent were not entitled to charge for.

The Respondent maintains that the Written Statement of Services sets out the standard of maintenance which is required and that that standard may not be (and, in fact, has not been) adversely affected by the existence of the LMS.

At the hearing, the Applicant mentioned that she considered that the Respondent was not carrying out its services in conformity with the LMS. She referred to the second last page of the LMS under the heading "Non-Routine Maintenance" and stated that she did not consider that the *de minimis* limit there specified had been followed by the Respondent. We note, however, that alleged non-compliance with the LMS is not one of the issues agreed to be determined/part of the Application

and, accordingly, we do not propose to make any finding as to whether the Respondent has complied with the terms of the LMS.

The Applicant believes that the Respondent may be in breach of its duties by charging for works in the LMS which it is not entitled by virtue of the Deed of Conditions to do. She made reference to section 17(4) of the 2011 Act which specifies that failure to carry out property factor's duties may include a failure to carry out the duties to a reasonable standard.

The Committee considers that no breaches of property factor's duties or of the Code have been established. There was no evidence before us that the Respondent has, via the LMS, imposed any charges upon the Applicant or other homeowners which it was not entitled to.

**(4) The obligations upon the Respondent to produce a breakdown of its charges and documentary vouching of same.**

The Applicant is concerned that the Respondent fails to manage the contractors who are appointed to carry out the landscape maintenance work. She has not been happy with the quality of maintenance work.

In particular, she is concerned that the Respondent enters into contracts which involve it paying contractors an agreed annual fee which is paid in 12 equal monthly instalments. Her concern is that that may reward contractors unreasonably in the winter months when there is comparatively little work to be done, but leave them underpaid and disincentivised during the summer months. She considers that this has resulted in poor attendance by contractors during the summer months.

She had heard rumours that maintenance contractors were not being paid on time by the Respondent and that, as a result, the contractors were not performing their obligations.

There had been several changes in the identity of the contractor in recent years and she felt that the same history was repeating.

The Applicant led the evidence of George Findlay, a landscape gardener of Rebel Golf Courses Ltd t/a Ballumbie Castle Golf Club, who held the landscape maintenance contract with the Respondent for the Development in 2011-12. He stated that he had been asked to quote for the contract at the suggestion of the Residents Association. He spoke to the Respondent having paid him late and outwith the payment terms of his contract with the Respondent. He spoke of his attempts to provoke payment as being largely ignored by the Respondent and felt that the morale and motivation of any contractor in such circumstances would be reduced. Mr Findlay perceived that the Respondent was favouring for payment other contractors with whom it had contracts for maintenance at several developments (he had only this one). He spoke to his invoice No.31 dated 30 September 2012 not having been paid by the Respondent until 6 February 2013.

The Applicant advises that she asked the Respondent to see proof that contractors were being paid on time and that the Respondent was not favouring companies to which it was related in terms of the payment terms applied to them versus those applied to others. She asked for copies of inspection reports. The Applicant confirmed that the Respondent answered her requests by providing redacted copies of contractors' invoices on the back of which the Respondent had placed some information which appeared to relate to its internal accounting procedures. She received some inspection reports.

The Applicant relies upon paragraph 3.3 of the Code: "*In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying.*" (our added emphasis).

She considers her request to have been reasonable under paragraph 3.3 of the Code.

She regards the requests as reasonable because of the difficulties which the Respondent was having with its maintenance contractors. She regards the Respondent to have failed to meet its obligations under paragraph 3.3. She regards redacting as inappropriate other than where necessary to protect confidential information relating to other developments.

We consider that the Respondent behaved reasonably by providing access to copy invoices on 15 May 2013. We consider that the duty created by paragraph 3.3 of the Code is limited to what is reasonable in the circumstances of each case. In this case, it seemed reasonable that the Applicant should ask for and be provided with copies of contractors' invoices. She wished to go further and to find out the dates when those invoices were paid to pursue a theory that contractors may be being paid late or inconsistently with one another. In our view, that would not have been reasonable in the circumstances. We have some concerns that the invoices which were made available to the Applicant had been redacted and there is no clear explanation of why that was appropriate. Nonetheless, we accept, as does the Applicant, that there may be some circumstances in which redaction is appropriate and we are not in a position to say on the available evidence that information reasonably requested had been withheld because of the redaction.

The Applicant referred to the Respondent having written off a significant debt in its statutory accounts but this did not seem to the Committee to be relevant.

The Applicant is concerned that on its annual statement to her the Respondent amalgamates routine and non-routine maintenance charges. If that is correct, such a practice would be confusing and might make any request for further information more reasonable. Having examined the annual statements, it was not apparent to us that there is an amalgamation of routine and non-routine matters.

We consider that no breach of the Code nor of the Respondent's property factor's duties has been established.

**(5) The extent to which the Respondent has overcharged the Applicant because of its historic practice of dividing its charges among fewer than 252 homeowners.**

The Applicant had in her original Application form complained that the Respondent was imposing its AMC upon her having calculated it by reference to an incorrect number of plots within the Development. Her concern was that her share (and that of other paying homeowners) was higher than it ought to have been. The correct number was 252. The Respondent had, over the years, used lower figures, and, at the time of the original Application, was insisting upon the figure of 235. By 8 July 2014, the Respondent had acknowledged the correct position (that there are 252 plots) and attempted to rectify the situation. There therefore appears to be no real factual dispute that the Respondent has miscalculated the number of plots and, as a result, the charges calculated relative to that number.

The Applicant regards the Respondent's failure to calculate its charges by reference to the correct number of plots as a breach of its property factor's duties arising under the Deed of Conditions. She considers that this is also a breach of paragraph 2.1 of the Code.

We find that the Respondent is in breach of its property factor duties in that it has failed to apply the AMC on a pro-rata basis among the correct number of plots on the Development as required by the Deed of Conditions. The Deed sets out the relevant requirements in Clause 2.1 of its Schedule Part V. The Respondent has failed to carry out its duties to a reasonable standard having regard to section 17(4) of the 2011 Act.

We do not consider the same facts to constitute a breach of paragraph 2.1 of the Code in that, although incorrect information may have been provided, there is no evidence of an intention to provide false information or to mislead which we consider paragraph 2.1 of the Code to require.

The Applicant invited us to invoke Regulation 28 of the 2012 Regulations in order to consider the Respondent's charging practices in the period before 1 October 2012. Regulation 28(2) allows the Committee to take into account circumstances occurring before 1 October 2012 in determining whether there may have been a continuing failure to carry out the property factor's duties after that date. We have done that and found that the practice of sharing the AMC among fewer than 252 plots has continued since before 1 October 2012. Regulation 28 does not however entitle us to make any formal order in respect of any failures which pre-date 1 October 2012.

The Applicant confirmed that there were three remaining areas of concern falling broadly under heading (5). These were: (i) the charging of an Administration Charge other than on a pro rata basis; (ii) charging for land which was not owned; and (iii) interest had been calculated wrongly.

**(i) the charging of an Administration Charge other than on a pro rata basis**

There appears to be no dispute that the Respondent includes on its annual invoices to homeowners, including the Applicant, an "Admin Charge". The Respondent has explained that this is a flat rate charge applied in the same amount to every plot on the Development. Effectively, it calculates a reasonable figure which it anticipates reflects its management costs for the year having regard to the size and nature of the Development. It appears to be a way in which the Respondent allocates to the Development its fair share of the Respondent's central office costs for the provision of services of benefit to all of the various developments which the Respondent maintains.

The Applicant regards the arrangements applied by the Respondent to its Annual Management Charge to be in breach of the requirements of the Deed of Conditions. She referred, in particular, to the definition of "Annual Management Charge": *"means the pro rata share applicable to each Plot of the total annual costs incurred by [the Respondent] in effecting the Management Operations, together with reasonable estate management remuneration, insurance premiums and charges...for the relevant year, which pro rata share shall in the case of each Plot be calculated by reference to the total number of dwellinghouses collectively constructed or permitted to be constructed upon [various addresses] and with each such dwellinghouse bearing annually a proportion of the said costs, remuneration , premiums and charges...".*

The "Management Operations" are defined as the maintenance of the Development's "Greenbelt Ground".

The Applicant considers that in respect of the Admin Charge that the Respondent has failed to pro rata it at all.

We have some sympathy with the Applicant's position in that the clause of the Deed of Conditions quoted above seems to anticipate that total charges will be added together and then divided by, in this case, 252. While this has evidently been done with outside contractors' invoices to produce an exact share, the methodology has had to be different with the Respondent's central costs. It appears however that the Respondent has charged the same Admin Charge to each plot and that it has based it upon what it has calculated as a fair proportion of the likely use of the benefit of its central resources and the approach seems to us a fair one, not inconsistent with the clause.

Accordingly, we find there to have been no breach of property factor's duties or of the Code.

**(ii) charging was incorrect by including land which was not owned**

The Applicant confirmed that her point (ii) included that charges imposed should take account of the Unaccessed Area Reduction but may not have done. She also suspected that gap planting charges were made which should not have been.

She suspects that, during the initial period of construction of the Development, no charges were imposed in respect of plots which belonged to the house builders, although no evidence of this was presented.

She is concerned that an initial factor fee of £118 plus VAT was charged to and paid by some plot proprietors. This does not appear to have been taken into account in the Respondent's figures. This figure has been referred to elsewhere as a figure of £195 and appears to be an initial sum paid by new homeowners to their house builder, as opposed to the Respondent. That being the case, we consider that such payments should not feature in the calculations with which we are concerned in this Application.

The Applicant's position at the hearing was that she was unable to calculate the correct figure for the AMC as she did not know how many properties the Respondent had divided its charges among previously. She thought that an independent person should have access to all of the records to perform the calculation.

She had performed and lodged a series of very detailed calculations and produced these along with her workings to show the sums which she believed had been wrongly charged to her over the period from 2006 to 2014. At the hearing, the Applicant talked the Committee through the logic of her calculations. Her lodged written calculations showed a refund due to her of £339.43. That figure, she acknowledged, was necessarily based upon certain assumptions on her part as she did not have access to all of the Respondent's information. Since producing those figures she had had regard to further sums which had more recently been acknowledged by the Respondent as being due to be refunded. She had added in gap planting charges which took her total (including interest) to £448.15.

**(iii) interest had been calculated wrongly**

The Applicant believes that the compound interest calculations carried out in the Respondent's reconciliation are incorrect. She has no confidence in the Respondent's figures.

In relation to both points (ii) and (iii) we have been unable to identify a breach of the Code or of the Respondent's property factor's duties. We do not consider the initial factor charge to be relevant for the reasons given above. We do not consider there to be evidence of inappropriate charging for gap planting after 1 October 2012 and the Respondent appears to have addressed problems with gap planting in earlier years.

The issue of the allegedly erroneous interest calculations appears to arise in the course of the Respondent's recent attempts to reconcile any incorrect charging and accordingly we do not consider that that issue falls within the matters contained in the application or with which it was agreed the hearing would deal.

**(6) The remedies sought by the Applicant including any refund.**

We deal with this matter below.

**(7) The standard of service provided by the Respondent including any discrimination by the Respondent in the provision of information to the Applicant.**

The Applicant believes that the Chairman of the Residents Association was provided with information relative to overcharging which she was not provided with. The Respondent advises that it has not denied information to the Applicant which it has provided to other homeowners, whether or not those owners were involved with the Residents Association.

The Applicant complains that she is not allowed to join "walk arounds" of the Development with the Residents Association and the Respondent's site manager. She complains that the Respondent's staff have advised that they could not say when the Site Manager's visits would take place and would not provide his contact details. The Respondent replies that the site manager has met the Applicant on site and that further meetings have been offered. As she is, by choice, not a member of the Residents' Association, the Respondent does not consider it reasonable to include her in "walk arounds" with the Residents Association.

The Applicant complains that the Respondent insisted upon its figure of 235 plots being correct (although it has subsequently been accepted not to have been) and insisted on pursuing debt recovery measures despite the protests of the Applicant that the figure was incorrect. She advises that she telephoned the Respondent in response to a demand letter dated 31 October 2013 and was not allowed to speak to her Case Manager, K Richards, who was the author of that letter. She had only been allowed to speak to a Gerry McQuade. This has been the subject of correspondence among the parties. Being fearful of the threatened debt recovery measures, the Applicant paid the sums demanded on the basis that she would do so without prejudice to her right to argue that the bill had been overstated.

She generally finds the Respondent's customer services staff pleasant, but the debt recovery call was found by her to be unpleasant and intimidating.

She considers that the Respondent's actions constitute a breach of paragraph 2.1 of the Code and the Respondent's insistence on pursuing the debt when it was not properly due as a failure to carry out its property factor's duties to a reasonable standard.

She believes that the Respondent is deliberately trying to frustrate her in the hope that she would go away.

The Applicant alleged that the Respondent's Head of Customer Services, John Beveridge misled the Applicant by advising in his letter of 30 July 2012 that there were no problems with site maintenance at a time when in fact she considered the supervisors reports to show the opposite. We could not draw any relevant conclusion from these documents.

She believed that a Data Protection request had not been dealt with appropriately.

The Applicant relies upon paragraphs 2.1, 2.2 and 2.5 of the Code in these matters and believes that the Respondent has failed to comply with its property factor's duties. We are unable on the available evidence to find that there has been discrimination by the Respondent against the Applicant in the provision of its services to her. Nor did we find any of the matters complained of to demonstrate a failing of sufficient kind to enable us to make a formal finding against the Respondent.

We find no breach of property factor's duties or of the Code.

**(8) Failure by the Respondent to provide information requested by the Applicant.**

By letter of 30 June 2013, the Applicant requested a list of the properties which the Respondent was billing. The Respondent refused this by its letters of 12 August and 1 October 2013. We do not consider that there would be in every case an obligation for a property factor to provide a list of addresses among which charges are being shared. There certainly would be an obligation under paragraph 3.3 of the Code to produce information about how many properties charges are being shared among.

In this case, where there was clearly an issue about how many properties were on the Development, the obvious way to resolve that issue would have been by reference to a list of the plots. Having regard to this, and to the overriding objectives of Section 3 of the Code, which includes: "*Clarity and transparency in all accounting procedures*", we consider that there was an obligation upon the Respondent to provide a list of the relevant plots and that the Respondent's refusal constitutes a breach of the Code. The same facts do not amount to a breach of the Respondent's property factor's duties.

The Applicant also complained that she had asked for information about the level of debt by homeowners on the Development but had been denied this. She pointed out that the Respondent's Customer Choice Policy indicates that customers will be provided with that information to assist them in approaching potential alternative providers. The only letter on this topic appears to be the Applicant's letter of 27 August 2012. That pre dates the coming into force of the Respondent's obligations under the Code and its property factor's duties and we therefore find there to have been no breach of either.

**We now return to:**

**(6) The remedies sought by the Applicant including any refund.**

The Applicant would like the Committee to find that a sum of money should be paid to her by the Respondent. She considers that sums are due to her in respect

of incorrectly imposed charges for gap planting; charges which should have been imposed on third parties imposed upon her; the pro rating exercise not having been performed properly among the correct number of proprietors; refund of a late payment fee and a repayment to take into account the £118 fee which she had paid initially.

She specifically requests a cheque rather than a credit to her account.

We discussed with her a suggestion that an independent person be appointed to perform a larger reconciliation exercise to determine what sums were properly due to be refunded to her in respect of any inappropriate historic charging. The Applicant's position was that she would be content instead with an order that money should be paid to her by the Respondent.

She felt that any sum ordered should take into account her stress and inconvenience. It should also take into account her out of pocket expenses for matters such as travel and photocopying which she estimated as close to £1300. She had spent very considerable amounts of her own time in preparation of her applications and supporting paperwork as well as in attending hearings.

We discussed with her that the sums she seemed to be seeking would be relatively high when compared with awards made by Committees of the HOHP generally. She felt that her pursuit of the application had been to the significant benefit of homeowners on the Development and that there was a strong element of pubic interest which would justify a high award.

The Applicant had received cheques in respect of refunds at various stages but had refused to cash these as she wished the matter fully resolved by her formal applications which she perceived might be prejudiced by acceptance of any cheques.

The Committee had in mind a number of factors when considering the appropriate PFEO. The Committee considers that it is appropriate that the Respondent is ordered to make payment to the Applicant. The Committee further accepted that the appropriate way for that payment to be made was by a payment direct to the Applicant by cheque as opposed to by the crediting of her account with the Respondent.

In considering the appropriate level of payment, the Committee had regard to the incorrect charges which had been made to the Applicant's account by the Respondent over a significant period and to the fact that the Applicant had suffered genuine upset and distress in having to deal with the Respondent's errors. The Committee also gave consideration to the considerable amount of time and energy which the Applicant had expended on the matter as well as her out of pocket expenses. It is not the practice of the HOHP to make formal awards of expenses and each party is generally expected to meet his own costs in preparation and attendance.

We also gave consideration to the efforts of the Respondent to address the concerns of the Applicant over a long period. Although those efforts had been unsuccessful and, indeed, there had been shortcomings in the Respondent's attempts at reconciliation of balances, those efforts appeared genuine. Our award

reflects only those areas where we have found there to have been a breach of property factor's duties and/or the Code and reflects the fact that in some areas we found there to have been no breach.

The Committee considered the possibility of the instruction of an independent person to examine the records of the Development with a view to producing a reconciliation of sums due but decided that that would be a disproportionately expensive exercise.

Having considered the above factors carefully, the Committee has decided that the Respondent should be ordered to pay to the Applicant the total sum of £600. This figure is intended to encompass all of the overcharging identified on the account since 1 October 2012, the Applicant's expenses and injury to her feelings. This sum falls well short of the amount sought by the Applicant. Section 20 of the 2011 Act provides the Committee with a wide discretion as to the terms of any PFEO. In particular, section 20(2) allows us to award such sum as we consider to be reasonable. In all the circumstances of this case, we consider payment of the sum of £600 to be reasonable.

**Observations**

We found the Applicant to have presented her case in a careful and detailed manner. We found her to be a credible and reliable witness.

We found Mr Findlay to have been a credible and largely reliable witness, although in the event, we attached no weight to his evidence.

We were disappointed that the Respondent chose not to attend the hearing. While it was perfectly entitled not to attend and to rely upon its written submissions, we suspect that, had the Respondent been represented, better progress might have been achieved at the hearing. Also, the fixing of the hearing date had been delayed to accommodate the availability of the representatives of the Respondent, which delay could have been avoided had it been known earlier that the Respondent would not be represented. The decision not to attend was only communicated to the office of the HOHP after normal business hours on the Friday preceding the (Tuesday) hearing with the result that the Respondent's intended non-attendance only became known to the Committee and the Applicant the day before the hearing. It would have displayed greater courtesy for the Respondent to have advised of its intention not to attend the hearing sooner.

It was clear to the Committee that relations between the parties are extremely strained. The Applicant has lost trust and faith in the Respondent because of what she perceives as its failure to respond to her requests for information and because of the errors which she has found in the information which it does provide. The Respondent appears to regard the repeated and detailed requests from the

Applicant as unreasonable and vexatious. The parties therefore came to this process with deeply entrenched opposite positions.

## PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

## 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..."

**JOHN M MCHUGH**

**CHAIRMAN**

**DATE: 13 May 2015**