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 reference: HOHP/PF/16/0053

Re: 13/22 North Bank Street, Edinburgh EH1 2LP ('the property')

The Parties:

Patrick Keady, residing at 13/22 North Bank Street, Edinburgh EH1 2LP ('the homeowner');

and

Ross & Liddell Limited, registered in Scotland No 97770 and having their registered office at 60 St Enoch Square, Glasgow G1 4AW ("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:

George Clark (chair) and Ian Murning (surveyor member)

Decision

The Committee has jurisdiction to deal with the Application.

The property factor has not failed to comply with its duties under section 14 of the 2011 Act.

The Decision is unanimous.

Introduction

In this decision, the Property Factors (Scotland) Act 2011 is referred to as "the 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 Homeowner Housing Panel is referred to as "HOHP".

The property factor became a Registered Property Factor on 26 September 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from 1 November 2012, the date on which the Act came into force.

The Committee had available to it and gave consideration to: the application by the homeowner received on 9 May 2016 with additional documentation from the homeowner, namely an e-mail from the homeowner to HOHP dated 4 June 2016, with photographs attached, a copy guarantee form Icopal Limited dated 19 May 2015, a copy of the property factor's letter of introduction dated 26 February 2015 and of the first 5 pages of the Service Level Agreement enclosed with it, copies of e-mails between the property factor and the previous owner of the property dated 12 and 13 October 2009, copies of e-mail correspondence between the homeowner and the propery factor dated 30 and 31 March 2015, 11 April and 6 and 7 May 2016 and of a letter from the homeowner to the property factor dated 11 April 2016; a letter from the property factor's solicitors to HOHP dated 29 July 2016, enclosing the property factor's written representations, with extensive supporting documentation; and a letter from the homeowner to HOHP, dated 10 August 2016, responding to the property factor's solicitors' application for a Practice Direction, which was enclosed with their letter of 29 July 2016.

Summary of Written Representations

The following is a summary of the content of the homeowner's application to HOHP:- The property factor had failed to comply with Sections 2.4, 5.3, 5.6, 5.8, 5.9, 6.9 and 7.1 of the Code and had failed to carry out the Property Factor's duties. The property factor had arranged roof repairs to be completed in 2013, to prevent water ingress. The homeowner and Mr Chee Tum had purchased the flat on 24 February 2015. Five weeks later, they had reported in person and via e-mail to the property factor that water ingresss had resumed. The property factor had sent out contractors on many occasions, but the problem had progressively worsened. Woodwork in the property had been damaged and the fire-exit door from the property no longer closed. The guarantee from Icopal for the work carried out in 2013 was due to expire in 2033, but Icopal had indicated that they believed the property factor had sent non-approved contractors to undertake remedial work and had, thereby, invalidated the guarantee.

In his letter to HOHP of 10 August 2016, responding to the property factor's solicitors' letter seeking a Practice Direction on the question of jurisdiction (the subject of the Preliminary Matter dealt with below), the homeowner told the Committee that he believed the property factor had confused two separate problems, namely the one reported by him in March 2015, which related to the flat roof on the 10th floor of the building and the quite separate problem relating to the gutters on the 8th floor. By doing so, the property factor had unreasonably delayed in attempting to resolve his concerns.

In its written representations, the property factor confirmed that the first report of water ingress to the property had been received on 24 March 2015. The then property manager, Mr Gavin Mearns, had instructed a roofing contractor, Burns & Watson Ltd, to contact the homeowner within 48 hours to arrange to inspect the damage and provide recommendations for remedial works.

Between June and July 2015, reports were received from another homeowner of leaking gutters at the front and rear elevations of the building. The new property manager, Mr Ross, sought estimates from contractors to repair the gutters and carry out a full inspection with recommendations for any necessary remedial works. Due to the height of the building, traditional access would require extensive scaffolding, so two specialist rope access contractors were approached, in addition to a traditional roofing contractor.

On 20 August 2015, Mr Ross wrote to all owners at Mound Apartments, stating that he intended to instruct RL Access to carry out the work, unless a majority objected by 17 September, but, after reviewing debt at the development, it became clear that advance funding would be required from the owners. This was requested by letter dated 28 September 2015.

On 25 November 2015, the homeowner reported further water ingress to his property. In the first instance, Mr Ross contacted Icopal Limited, who had provided a 20-year Guarantee on the flat roof area as part of remedial works carried out in 2014. Icopal confirmed that they had arranged for their contractor to visit on 4 December. There was no feedback, either from Icopal or from the homeowner following that visit.

In early March 2016, it became apparent to the property factor that the required threshold for advance funding for the gutter repairs and roof inspection would not be achieved and, as a result, the property factor cancelled the proposed work and decided to terminate the factoring arrangement for Mound Apartments. Shortly after receiving the termination letter, the homeowner contacted the property factor to say the water ingress to the property was ongoing. Mr Ross visited the property on 24 March 2016 and saw the location of the leaks. On 11 April 2016, the homeowner e-mailed the property factor with a summary of the discussion at the meeting of 24 March. Mr Ross replied to say that he had notified Icopal that the leaks were ongoing. Icopal responded on 15 April, stating that they could not help with the leaks and that they considered the guarantee to be void. Mr Ross thought that

Icopal had been influenced by a comment in the homeowner's e-mail of 11 April, which stated that "another contractor, Burns &?" had visited the property on half a dozen occasions since the homeowner's original report to Mr Gavin Mearns in March 2015. Mr Ross e-mailed Icopal on 6 May 2016, explaining that any contractors who had been on the roof had been there to estimate for the gutter repairs only and that no work had been carried out to the flat roof. On 6 May, he asked them to reconsider their position and to provide advice on their contractors' visit of December 2015. The homeowner had been advised of developments by e-mail on 6 May. The homeowner e-mailed Mr Ross on 7 May, staing his intention to approach HOHP and, on 9 May, copied to Mr Ross his e-mailed application form to HOHP.

Icopal had responded on 10 May 2016 to the property factor's e-mail of 6 May, and requested details of the contractor who had attended on 4 December 2015. Mr Ross corrected them, again stating that it was Icopal's contractor who had attended, not someone instructed by the property factor. The property factor then, on 10 May, passed the contact number for Icopal's representative to the homeowner, who responded to confirm that the inspection had now been arranged for 13 May. The property factor's management contract ceased on the 14 May, but the property factor noted that, amongst the papers cross-copied by HOHP was confirmation from Icopal that the warranty remained valid.

The property factor did not accept that it had unreasonably delayed the resolution of water ingress to the homeowner's property, having arranged for Icopal to inspect the flat roof, under guarantee, on 2 occasions, whilst simultaneously proposing works including a full roof inspection, to determine any other possible source of the ingress. The failure to achieve the necessary advance funding for those works prejudiced the property factor's ability to resolve the water ingress to the homeowner's property.

THE HEARING

A hearing took place at George House, George Street, Edinburgh on 25 August 2016. The homeowner was present at the hearing and was accompanied by his partner Mr Chee Tum, the co-owner of the property. The property factor was represented at the hearing by its property manager, Mr Scott Ross and also by Mr Michael Ritchie of Messrs Hardy Macphail, solicitors, Glasgow. The Committee dealt first with a Preliminary Matter.

Preliminary Matter

The solicitors for the property factor had, in their letter to HOHP of 29 July 2016, asked the Committee to determine as a preliminary matter whether the Committee had jurisdiction to hear the application. In its written representations, the property factor referred to Section 17 of the Act and in particular to Section 17(3), which provides that no application shall be made to HOHP unless the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the Section 14 duty, and the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concerns.

The property factor contended that the homeowner had not complied with the requirements of Section 17(3) in that the first intimation the property factor received from the homeowner was an e-mail dated 7 May 2016. That was a Saturday and it would not have been read by the property factor until Monday 9 May, the date on which the homeowner's application was received by HOHP. Accordingly, it could not be said that the property factor had refused or unreasonably delayed in attempting to resolve the homeowner's concerns. The property factor also argued that the homeowner had not lodged any complaint in terms of its complaints procedure prior to the e-mail of 7 May 2016, so had not followed the complaints procedure, which requires homeowners to initially submit details in writing to the manager of their property or the head of department of concern and, if not satisfied with the response, to submit full details of the complaint to the company's managing director. The homeowner in this case had not submitted a complaint prior to applying to HOHP and, therefore, by definition, had not escalated the complaint to the managing director. The property factor asked the Committee to determine that it did not have jurisdiction to hear the case.

In support of its argument, the property factor referred the Committee to the decision in the case of William Simpson & Another v First Stop Properties Limited (HOHP/PF/14/0136).

At the hearing, Mr Ritchie told the Committee that the provisions of Section 17(3) are mandatory, so there is a requirement to intimate the complaint, then allow a period for the factor to resolve or attempt to resolve the complaint. The property factor in this case had not had been given that opportunity. Mr Ritchie accepted there had been correspondence between the parties prior to the date of the application, but the homeowner had never utilised the complaints procedure. All contact had been with the property manager. He had expressed dissatisfaction but had never actually made a complaint. Mr Ritchie submitted that before homeowners applied to HOHP, they had to escalate the complaint in terms of their factor's complaints procedure. Mr Ritchie also argued that the intimation in the e-mail of 7 May 2016 made reference to various sections of the Code, but was completely lacking in specification. The matter could easily have been resolved prior to any application to HOHP being made, had the homeowner taken up his issues withe senior management.

In response to the property factor's solicitors' letter to HOHP of 29 July 2015, the homeowner, in his letter to HOHP of 10 August 2016, stated that he and his partner had taken ownership of the property on 24 February 2015. Redecoration work had been completed on 18 March and, on the morning of 26 March he had noticed dampness on the ceiling next to the west facing fire exit vestibule. He had met with Gavin Mearns, then the property manager for the property factor, on that afternoon and had confirmed in an e-mail to him on 30 April 2015 the key points discussed at that meeting. Gavin Mearns had been replaced by Scott Ross in early summer 2015. The homeowner had met with Mr Ross on a number of occasions when the issue of the water ingress from the flat roof at the 10th floor of the tenement was discussed and, following a site visit on 24 March 2016, the homeowner had summarised his points in an e-mail to Mr Ross of 11 April 2016. In that e-mail, the homeowner said "As it is now more than twelve months since we reported the problem to Gavin Mearns, the contractor has visited half a dozen times and the problem has progressively worsened, I request that Ross & Liddell ensure that the following is achieved by 14th May 2016...". The homeowner's application had been a direct result of the failure of the property factors to rectify the water ingress in a timely manner after the homeowner had reported it on 26 March 2015. The homeowner added that he had not been aware that the property factor had a complaints procedure and that the property factor had failed to alert him to the existence of its complaints procedure.

At the hearing, the homeowner told the Committee that he had never received the letter from the property factor dated 26 February 2015 and, as a result, had not received the Service Level Agreement which was enclosed with it. There had been problems with mail in the initial period after the homeowner moved in to the property. The Committee chair pointed out that the papers for the case included a copy of that letter and of part of the Service Level Agreement, but the homeowner said that he had not been the one who had sent in that paperwork. The Committee chair said that he would endeavour to find out the source of that paperwork.

The homeowner stated that he had informed the property factor in writing on three occasions of his concerns, namely 30 March 2015, 11 April 2016 and 7 May 2016 and argued that he had given ample time to the property factor to address his concerns. This correspondence amounted to a complaint and, as he had not seen the Service Level Agreement and had not been alerted to its existence during his discussions and correspondence with the property factor, he did not know of any need to escalate it beyond Mr Ross. The first time that he had become aware of the Service Level Agreement had been in correspondence with HOHP on 24 June 2016.

The property factor responded to this by telling the Committee that the Service Level Agreeement had always been available on the company's website.

The Committee chair told the parties that he proposed that this preliminary point be determined at the end of the hearing, as it was a complex matter. If the property factor's

position was upheld, the Committee would not make any findings on the facts of the case, as it would have no jurisdiction to do so, but the chair proposed that the hearing on the facts should continue, rather than require the parties to reconvene at a later date. Both parties agreed to continue with the hearing on this basis.

Determination on Preliminary Matter

The Committee considered carefully the arguments put forward by both sides. The property factor contended that the Committee did not have jurisdiction to determine the application and relied on the decision of the Homeowner Housing Committee in William Simpson and Another v First Stop Properties Limited (HOHP/PF/14/0136 made on 11 July 2015) in support of that contention. In that case, the homeowner accepted that there had been absolutely no pre-application notification to the property factor, who, therefore, was not afforded the opportunity to resolve the complaint in-house without the need for any HOHP involvement . Consequently, the committee in that case held that it could be distinguished from the case of Burns International Security Services (UK) Limited v Butt ([1983] Industrial Cases Reports at page 547), which supports the view that an overly technical approach to the completion of an application by a lay person to a tribunal should not be taken.

Section 17(3) of the Act provides that,

"No such application shall be made unless-

(a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or as the case may be, to comply with the section 14 duty, and

(b) the propery factor has refused to resolve, or unreasonably delayed in attempting to resolve the homeowner's concern."

In Simpson, the committee's view was that a strict interpretation of Section 17(3) of the Act should be taken and that, as there had been no pre-application notification to the property factor, the application failed the Section 17(3) test. The committee did, however, concede (Para 33 of its Decision), that there could be issues over whether a notification made before the application was sufficient to satisfy Section 17(3). This led the Committee to consider whether the earlier correspondence in the present case amounted to notification.

In this case, the homeowner contends that he was unaware of the property factor's complaints procedure, because he had not received the Service Level Agreement and had not been alerted to its existence during his discussions and correspondence with the property factor prior to his making the application to HOHP, and that, therefore, he did not know that he required to escalate his complaint beyond Mr Ross. He told the Committee that he had informed the property factor in writing of his concerns on 3 occasions, namely 30 March 2015, 11 April and 7 May 2016 and argued that he had given the property factor ample time to address his concerns.

The Committee accepted that it was not until the e-mail of 7 May 2016 was opened by the property factor on 9 May that the property factor was notified of the precise Sections of the Code of Conduct that the homeowner alleged had not been complied with and that this was the date on which the application was received by HOHP, but the view of the Committee was that the homeowner's e-mail to Mr Ross of 11 April 2016 could not reasonably have been interpreted in any way other than as a notification of complaint with a demand for action on the part of the property factor. The e-mail set out the background in some detail, stated that it was more than 12 months since the homeowner had reported the problem to the property factor and that the problem had progressively worsened. The homeowner concluded by requesting that the property factor ensure that a number of steps were taken by 14 May 2016. In the view of the Committee, Mr Ross should have recognised that this e-mail constituted notification of a complaint which related to an alleged breach of the property factor's duties and/or a failure to comply with the Code of Conduct. Mr Ross should then have acted in accordance with the company's complaints procedure. This would have required the property factor to investigate the complaint and arrive at a decision which, when intimated to the homeowner, would have advised him of the next stage of escalation, in the event that he was not satisfied with the decision at the first level.

The Committee therefore determined that the property factor was notified in writing on 11 April 2016 of the homeowner's reasons for considering that the property factor had failed to carry out the property factor's duties and/or to comply with the Section 14 duty (to comply with the Code of Conduct), even though the e-mail did not make reference to specific Sections of the Code of Conduct. This distinguishes the present case from that of Simpson, where the committee held that no notification at all had been made.

The Code of Conduct contains an extremely complex system of numbering and lettering that is very difficult for a lay person, dealing with it for the first time, to navigate. Property factors are, of course, using it as the basis of their day-to-day actings and have to be completely familiar with its content and with the relevant portions of the Act. The Committee's view is that it cannot have been the intention of the legislation that homeowners be placed at such a disadvantage as to have their applications rejected for lack of specification in a case such as this, where the complaint is on a single issue, the facts of which have been known to the property factor for more than a year. To take that strict view would result in many homeowners having to obtain and pay for legal advice on the completion of the application form. It is, of course, essential that the property factor is aware of the circumstances which give rise to the complaint and, in many cases, that would necessitate correct referral to precise Sections of the Code of Conduct, but HOHP is a tribunal, not a court, and the 2012 Regulations contain the overriding objective of dealing with the proceedings justly, which includes the seeking of informality and flexibility in the proceedings and ensuring, so far as possible, that the parties are on an equal footing procedurally. The Committee is in no doubt that the property factor in the present case was well aware of the detail of the complaint and the failure of the property factor to categorise

it as a complaint when the homeowner sent the e-mail of 11 April 2015 should not prevent the homeowner from relying on it as constituting notification under Section 17(3)(a) of the Act.

Accordingly, the Committee determined that the Section 17(3)(a) requirement of notification in writing had, in this particular case, been met by the e-mail sent by the homeowner to the property factor on 11 April 2016.

Summary of Oral Evidence

The chairman told the parties that they could assume that the Committee members had read and were completely familiar with all of the written submissions and the documents which accompanied them. He then invited the homeowner to address the Committee with reference to his complaints under each Section of the Code and in relation to the alleged failure to carry out the Property Factor's duties. When the homeowner concluded his evidence, the representatives of the property factor were invited to respond. For ease of reference, this Summary combines the homeowner's evidence and the response of the property factor under each head of complaint that was specified in the application.

Section 2.4 of the Code states that property factors must have a procedure to consult with groups 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. The Section provides an exception where the property factor has agreed a level of authority to act without seeking further approval in certain situations, such as in emergencies. The homeowner did not offer any evidence specific to this ground of complaint. The property factor told the Committee that letters had gone to all owners at Mound Apartments to seek approval to have work carried out on the gutters and to obtain a report on the roof and had requested advance funding for this. This was not contested by the homeowner at the hearing and teh Committee did not, therefore, consider it further.

Section 5.3 of the Code states that the property factor must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit the property factor receives from the company providing insurance cover and must disclose any other charge it makes for providing the insurance. **This complaint was withdrawn by the homeowner at the hearing.**

Section 5.6 of the Code provides that, on request, the property factor must be able to show how and why it appointed the insurance provider, including any cases where it decided not to obtain multiple quotes. **This complaint was withdrawn by the homeowner at the hearing.**

Section 5.8 of the Code requires the property factor to inform howmeowners of the frequency with which property revaluations will be undertaken for the purposes of buildings insurance. **This complaint was withdrawn by the homeowner at the hearing.**

Section 5.9 of the Code states that on request, the property factor must provide homeowners with clear details of the costs of public liability insurance, how the homeowners' share of the cost was calculated, the terms of the policy and the name of the company providing insurance cover. **This complaint was withdrawn by the homeowner at the hearing.**

Section 6.9 of the Code requires that the property factor must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided and, if appropriate, to obtain a collateral warranty from the contractor. This was at the heart of the homeowner's application and his contention was that the property factor had failed, over a period of more than a year, to resolve the issue of water ingress to the property by actively pursuing Icopal. Further, when documents provided by the property factor to HOHP had been cross-copied to him, he had discovered for the first time that one of the reasons given by Icopal for stating that the warranty was void was that they had not been notified in writing within 48 hours of the ingress being discovered. The only reason that had been given by the property factors in the e-mail to him of 6 May 2016 had related to Icopal's belief that non-approved contractors had carried out work to the flat roof.

The property factor stated that the issue of water ingress had first been raised prior to Mr Ross's appointment as property manager for Mound Apartments, but it had not been included in Mr Mearns' handover notes to Mr Ross. The property factor accepted th athe handover notes should have been better. Mr Ross had not become aware of the issue until late November 2015 and he had acted quickly in contacting Icopal, who subsequently confirmed that an inspection was arranged for 4 December. Nothing further had happened until Mr Ross met with the homeowner on 24 March 2016 and Mr Ross had then exchanged e-mails with Icopal on 6 and 10 May. The property factor took the view that, as the roof inspection would involve steeplejacks, it made sense to "piggy-back" with the repairs to the 8th floor guttering and both pieces of work could then be carried out when the funding was in place. Until this inspection was carried out, the property factor could not determine whether the problem lay with Icopal or otherwise or whether it might be a matter for the insurers. The Property factor believed it had acted reasonably to proceed as they had intended, but, in the event, the advance funding was not forthcoming and the neither the proposed inspection nor the gutter repairs were carried out or instructed before the property factors ceased to manage the building on 14 May 2016.

Section 7.1 of the Code states that the property factor must have a clear written complaints procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which the property factor will follow. This procedure must include how the property factor will deal with complaints against contractors. The

homeowner's complaint related to the fact that he had not received the Service Level Agreement when he moved into the property. The property factor 's response was that, even if that were the case, the Section required the property factor to have a written complaints procedure and this was clearly set out in the Service Level Agreement, so this head of complaint could not be upheld.

In his e-mail to the property factor dated 7 May 2016, the homeowner also intimated complaints that the property factor had failed to carry out its duties under Sections 1A, 1B, 1D, 1E, 1F of the Code, but, as he gave no further specification of these complaints, all of which refer to matters that should be included in the written Statement of Services, and offered no evidence at the hearing with regard to these Sections, the Committee has not considered them further.

Having concluded giving oral evidence, the parties withdrew and the Committee gave careful consideration to all the evidence before it.

The Committee makes the following findings of fact:

- The homeowner is the owner of the property 13/22 North Bank Street, Edinburgh EH1 2LP part of a block of 22 flatted dwellinghouses known as Mound Apartments, with commercial premises at ground floor level.
- The property factor, in the course of its business, manages the common parts of the development of which the Property forms part. The property factor, therefore, falls within the definition of "property factor" set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 ("the Act")
- The property factor's duties arise from a written Service Level Agreement, a copy of part of which has been provided to the Committee.
- The date from which the property factor's duties arose is 1 October 2012, the date on which the Act came into force.
- The property factor 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.
- The date of Registration of the property factor was 26 September 2012.
- The homeowner has notified the property factor in writing as to why he considers that the property factor has failed to carry out its duties arising under section 14 of the Act. This is the Committee's finding in relation to the Preliminary Matter.
- The homeowner made an application to The Homeowner Housing Panel ("HOHP") received by HOHP on 9 May 2016 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.

- On 7 June 2016, a Convener of HOHP with delegated powers decided to refer the application to a Homeowner Housing Committee. This decision was intimated to the parties by letter.

Reasons for the Decision

The Committee considered the application, with its supporting papers, the written representations of the homeowner and the property factor and the evidence given by the parties at the hearing. The Committee made the following findings:

1. The Committee has considered whether the letter from the property factor dated 26 February 2015 was received by the homeowner at that time. If he did receive it prior to making his complaint, the Committee has to conclude that he received the Service Level Agreement, which contained the property factor's complaints procedure. The evidence of the homeowner was that it had not been received, but a copy of the signed letter, together with a copy of the first 5 pages of the Service Level Agreement, was attached to the e-mailed application from the homeowner to HOHP dated 9 May 2016, which was copied to the property factor, so the Committee finds that, by 9 May 2016, the homeowner had these documents and that, on the balance of probabilities, as it is a signed copy of the letter, the homeowner received the documentation by post sometime after 26 February 2015. The letter was signed on behalf of the property factor by Gavin Mearns and the Committee was told at the hearing that Mr Mearns had been replaced by Mr Ross in early summer 2015. The Committee concluded, therefore, that the homeowner received the letter and Service Level Agreement no later than early summer 2015.
2. The Committee noted that only the first 5 pages of the Service Level Agreement were attached to the e-mailed application, but has no reason to believe that the document enclosed with the property factor's letter of 26 February was incomplete, The Committee determined, therefore, on the balance of probabilities, that the homeowner received the entire Service Level Agreement, which included the complaints procedure.
3. The Committee noted in its Determination on the Preliminary Matter, that the failure of the property factor to recognise the homeowner's e-mail of 11 April 2016 as a complaint resulted in the homeowner not receiving a response from the property factor, as the complaints procedure required. Having held, however, that the homeowner had received a copy of the complaints procedure prior to 11 April 2016, the Committee was also of the view that the homeowner knew or ought to have known that it included an escalation procedure which he should have invoked when he did not receive a satisfactory response to his e-mail. Whilst the property factor should have treated that e-mail as a complaint and dealt with it

accordingly, the homeowner did not, in the absence of a response, escalate the matter in accordance with the property factor's complaints procedure and give the property factor the opportunity to provide its final decision in terms of Section 7.2 of the Code.

4. Accordingly, the Committee determined that, whist there had been shortcomings on both sides, on balance it could not hold that the property factor had refused or unreasonably delayed in attempting to resolve the homeowner's concern, as the homeowner, aware of the complaints procedure, had not taken his concerns to a level higher than the person with whom he had day to day dealings . The application did not, therefore, meet the test set out in Section 17(3)(b) of the Act.
5. The Committee was, for the reasons given above, unable to make a finding that the property factor had failed to carry out the property factor's duties or had failed to ensure compliance with the Code of Conduct. The Committee would, however, make the following observations, in the hope that they may be of assistance to the property factor in its endeavours to provide the best service possible to homeowners.
6. The property factor should not have taken a lack of feedback from the homeowner and Icopal following the inspection on 4 December 2015 to mean that the issue of water ingress had been resolved. Indeed, the Committee heard no evidence to suggest the property factor had given any consideration at all to the matter before the homeowner made contact on 26 March 2016. This was a claim on a warranty in respect of work that the property factor had instructed on behalf of homeowners and the property factor had a duty to be proactive in terms of Section 6.9 of the Code of Conduct. The property factor did nothing to follow up on the Icopal inspection, between 4 December 2015 and 26 March 2016, when the homeowner contacted Mr Ross again.
7. The property factor accepted at the hearing that the issue of water ingress to the homeowner's property had not been covered in the handover note from Mr Mearns to Mr Ross. It clearly should have been and the property factor should consider whether staff training in relation to handover notes on changes of personnel is required.
8. Although it appears that Icopal have agreed that the warranty is still valid, the failure by the property factor to notify them within 48 hours of receiving the report from the homeowner of water ingress could have been founded upon by Icopal and the warranty avoided. This would have had very serious financial implications for the homeowner and the other owners at Mound Apartments.
9. The Committee accepts that the property factor was trying to save money by conflating the homeowner's water ingress issue with the matter of gutter repairs on a different floor of the building, but the property factor ought to have been pursuing Icopal independently, as there had been no response from Icopal

following their inspection on 4 December 2015 and, in the intervening period, the problems within the homeowner's property had become considerably worse.

10. For the reasons set out in numbered paragraphs 1-4 above, however, the Committee is unable to find that the property factor has failed to carry out the property factor's duties or to ensure compliance with the Property Factor Code of Conduct (the Section 14 duty).

PROPOSED PROPERTY FACTOR ENFORCEMENT ORDER

The Committee does not propose to make a Property Factor Enforcement Order.

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 date on which the decision appealed against is made ... "

G. Clark

Chairperson Signature .. .. Date 25 August 2016