Decision of the Homeowner Housing Committee

(Hereinafter referred to as "the Committee")

Under Section 19 (1)(a) of the Property Factors (Scotland) Act 2011

Case Reference Number: HOHP/PF/14/0076

Re : Property at 2/2, 256 Crow Road, Glasgow G11 7LA ("the Property")

The Parties:-

Mr Colin Strain and Mrs Eleanor Strain both residing at 2/2, 256 Crow Road, Glasgow G11 7LA ("the Applicants")

Ross & Liddell Limited, 60 St Enoch Square, Glasgow G1 4AW ("the Respondents")

The Committee comprised:-

Mr David Bartos	- Chairperson
Mr Colin Campbell	- Housing member

Decision

The Respondents have failed to exercise reasonable skill and care in arranging insurance for the tenement, including the Property, at 256 Crow Road, Glasgow, which is a failure to carry out property factor's duties as defined in section 17(5) of the Property Factors (Scotland) Act 2011.

The Respondents have failed to comply with section 14(5) of the Property Factors (Scotland) Act 2011 through breach of sections 1.1a B, 2.1, 2.5, 5.2, 5.8, and 7.2 of the Code of Conduct for Property Factors.

The Applicants' complaints of breach of fiduciary duty and of failure to comply with section 14(5) of the 2011 Act through breach of sections 5.6, 5.7, and 7.1 of the said Code are rejected.

Background:-

1. By application received on 13 May 2014, the Applicants applied to the Homeowner Housing Panel ("HOHP") for a determination that the Respondents had failed to ensure compliance with the Property Factor Code of Conduct as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act") and that the Respondents had breached certain other duties allegedly owed to them.

2. The other duties said to have been breached were:

   i. arranging buildings insurance

   ii. a general duty of care.

3. In addition the application alleged that the Respondents had failed to comply with the Code of Conduct in the following respects:

   a. Written Statement of Services - Section 1.1a, B of the Code

   b. Communications and Consultation – Sections 2.1 and 2.5

   c. Insurance - Sections 5.2, 5.6, 5.7, and 5.8 of the Code

   d. Complaints Resolution - Sections 7.1 and 7.2 of the Code.

   The application related to the matters which had been raised in two letters by the Applicants to the Respondents dated 25 April 2014 which had been attached to their e-mail to the Respondents' Stephen Bell of the same date. .

4. The President of the Private Rented Housing Panel decided under section 18(1) of the 2011 Act to refer the application to a Homeowner Housing Committee. That decision was intimated to the Applicants and to the Respondents, by letter of the Panel's Clerk dated 12 June 2014 and entitled "Notice of Referral". The Committee comprised the persons stated above. The intimation of the Notice of Referral to the Respondents included a copy of the Applicants' application to the Panel.

5. Following intimation of the Notice of Referral, both parties lodged written representations. The parties also lodged productions. Those lodged by the Applicants were numbered H1 to H63 and listed in an index. Those lodged by the Respondents were numbered R1 to R23 and listed in an inventory of productions. The Respondents also lodged a list of three witnesses.

6. A hearing was fixed to take place at The Europa Building, 450 Argyle Street, Glasgow G2 8LH on 16 October 2014 at 10.30 a.m. The date and times were intimated to the Applicants, and the Respondents. On 9

October, being the last date for lodging productions the Respondents' solicitors lodged their inventory of productions with the Committee. On 10 October the Applicants applied (1) for the Respondents' productions to be excluded from evidence as having been lodged late; failing which for an adjournment of the hearing on the basis of difficulties in relating the productions to the Respondents' written representations; and (2) for the lodging of a skeleton argument for the Respondents. The Committee refused to exclude the Respondents' productions but granted the adjournment. In order to clarify and narrow down the issues between the parties the Committee issued a direction on 16 October 2014 requiring the lodging of skeleton arguments by both parties, skeleton arguments in response and witness statements by the Respondents. The witness statements were to be lodged by no later than 10 November 2014.

7. Both parties lodged skeleton arguments timeously. No witness statements having been lodged by the specified deadline, on 10 December 2014 the Applicants applied to exclude the prospective evidence of the Respondents' witnesses. The Respondents then lodged an application to allow witness statements to be lodged together with, on 17 December two of the three witness statements, and on 18 December the third witness statement. The Committee allowed the witness statements to be lodged late.

8. In the meantime a hearing was fixed to take place at The Europa Building, 450 Argyle Street, Glasgow G2 8LH on 13 January 2015 at 10.30 a.m. The date and times were intimated to the parties.

The Evidence

9. The evidence before the Committee consisted of:-

- The application form and its attachments
- The Applicants' productions numbered H1 to H63
- The Respondent's productions numbered R1 to R23 (referred to by the Applicants as F1 to F23)
- The oral evidence of Rita Glendinning
- The oral evidence of Stephen Bell
- The oral evidence of Alec Cassidy
- The witness statements of those three witnesses.

The Hearing

10. The hearing took place on 13 January 2015 within the Europa Building, 450 Argyle Street, Glasgow. Both Applicants attended the hearing. A further hearing took place on 20 January 2015. During the course of the hearings the Applicants were represented by the First Applicant. The First Applicant cross-examined the Respondents' witnesses and made submissions. The Respondents were represented by Mr Michael Ritchie of Hardy Macphail, Solicitors, Glasgow. Mr Ritchie made submissions and

presented Ms Glendinning, Mr Bell and Mr Cassidy as witnesses for cross-examination and any re-examination arising therefrom.

11. At the outset of the hearing the First Applicant indicated that he had a hearing difficulty. The Committee was unable to obtain equipment to improve either the First Applicant's hearing of what was being said or to amplify what was being said. Nevertheless in full knowledge of this the First Applicant indicated that he was content to continue. The Chairperson of the Committee indicated that he would endeavour to speak as loudly as possible and to ensure that others would do so but It was emphasized to the First Applicant that he should indicate should he be unable to hear what was being said by anyone at the hearing at any given time.

12. During the course of the hearing, before the lunch interval on the first day it was noticed that neither Mr Ritchie nor the Committee's Mr Campbell had copies of the Applicants' productions numbered H51 to H63. These were copied during the lunch interval and distributed to Mr Ritchie and Mr Campbell. At the reconvening of the hearing after lunch Mr Ritchie indicated that he had no objection to these productions being relied upon by the Applicants. At the close of the second day of the hearing parties agreed that in place of a further hearing they would submit written closing submissions and rebuttals if required, concurrently with an opportunity to seek to make further submission in answer if required. In the event parties submitted written closing submissions and the Applicants also submitted a lengthy 24 page rebuttal of the Respondents' closing submissions.

The Oral Evidence

13. Rita Glendinning is the Respondents' Insurance Manager. Her principal duties are the maintenance of buildings insurance over the properties managed by the Respondents where they have been authorised to arrange it. She confirmed the terms of her witness statement and was cross-examined at length by the First Applicant and re-examined by Mr Ritchie. Her material evidence was as follows:

14. The Respondents manage in excess of 27,000 separate property units. In respect of these she stated in her witness statement that she required to arrange block "policies" of insurance. In cross-examination, however she explained that there was only one block policy of insurance under which all of the properties managed and insured by the Respondents are insured. She could not say what the total sum insured was under the block policy. There was a premium for the block policy as a whole. The premium was then allocated to individual developments. This allocation was carried out by insurance brokers.

15. The Respondents arranged the insurance through instructing brokers whom they appoint. They ask the brokers to go to leading well reputed insurance companies to seek quotations for the block policy. The insurers are given a total sum to be insured, the names of the individual developments to be covered and a note of claims experience over 5 years

for each development. The insurers give a quotation of a premium for the policy as a whole which is then allocated to the individual developments by the brokers.

16. In allocating the *cumulo* premium, the brokers can impose additional terms on some developments and not others and can vary excesses between developments. In some cases developments may have particular exclusions of cover such as restricted roof cover. Such exclusions are decided by the brokers in liaison with the insurers.

17. She stated that the policyholders are the co-proprietors and bondholders. When the policy was issued there would be either a certificate for the development with the names of the owners in their own right or certificates for each owner with that owner's name, address and sum insured for that owner's individual property and his or her share of the common parts. In this latter case each owner can choose the sum insured. The insurance certificates are issued by Respondents on behalf of the insurers following a template obtained from them.

18. Ms Glendinning confirmed that the second scenario applied for the Applicants' tenement. Despite the terms of the insurance certificate from Zurich for 2014/2014 (R16) the policy holders were the co-proprietors and bondholders rather than the First Applicant as an individual. If an insurer repudiated a claim, the Respondents could engage directly with insurer. Equally an owner could make a claim, although there was a distinction between private and common part claims. Each owner was fully protected by the Financial Conduct Authority.

19. When the terms clause (Sixth) of the deed of conditions was put to her, Ms Glendinning confirmed that the owners in the Applicants' tenement were entitled to arrange a common policy on their own. But there was no record of any such request having been made. She explained that the Respondents did not arrange separate policies for separate developments as it was "impossible" to manage. This was on the advice of their brokers which they followed. Brokers are generally reluctant to arrange policies per tenement as for example insurers wish to know about the occupation of a tenement. For example is it owner occupied, tenant occupied, part owner and part tenant ? However with the Respondents' block policy tenancy occupation is automatically covered.

20. She said that if requested she could go to the brokers and ask for a stand-alone quotation for only the one tenement, provided that she had the permission of Mr Cassidy, Respondents' director in charge of insurance.

21. She said that she had listened to owners' requests in arranging the block policy. In particular she had responded to owners' requests to keep premiums down. She accepted that this could result in divergent coverage between owners in the same tenement.

22. If there was a claim Respondents would deal with a common claim with the loss adjusters. Each individual can deal with their own claim also and is fully protected by the Financial Conduct Authority. Respondents hold a full schedule of all properties from across Scotland, individual names insured and sums insured which apply to their properties.

23. She said that the Service Level Agreement reflected what she had said but that "there is a lot of work to do". She hoped that the brokers would give a no claims discount on developments without claims.

24. She indicated that owners could ask for a meeting with Respondents' Property Manager in order to have some input into the terms of the policy applicable to them. She saw the letter from Respondents to the First Applicant of 4 March 2014 as an example of this. If there was a valid claim from an owner under the owner's policy and an equally valid claim on the block policy, she believed that the insurers would sort out the claims between themselves.

25. She was in a position to provide claims information over 5 years to the January before annual renewal to owners such as the Applicants but without individual addresses. She could provide details of the quotation from insurers and the total sum insured for the tenement but not the sums insured for individual properties within it. This was on advice from a compliance company which Respondents used. On questioning from the Committee she admitted that underinsurance was a major concern for Respondents.

26. In re-examination she accepted that Respondents did not have a common policy for the tenement with a total sum insured for the tenement but that they proposed to change this.

27. She explained that every development has its code which is used in the block policy. This is used in the allocation of premiums for tenements. She explained that one tenement would not be prejudiced by the claims history in another tenement.

28. If there was a change of owner, a new insurance certificate would be issued. The Respondents had to update the brokers of all changes every 3 months.

29. In a brief cross-examination, Respondents' Property Manager Stephen Bell had nothing material to add to his witness statement.

30. A director of the Respondents, Alec Cassidy gave evidence under lengthy cross-examination. He had been a director of Respondents for the previous 12 years. He said that while Respondents' records did not contain a formal document narrating their appointment, he had no reason to doubt the validity of their appointment. He was not aware of it ever having been questioned.

31. He explained that the offer in Respondents' solicitors' letter to the Applicants dated 5 September 2014 to arrange a policy restricted to Applicants' tenement had been made on the advice of Respondents' solicitor. Despite what was said in the letter, the Applicants' title deeds did not require Respondents to set the amount insured, but that they did require Respondents to arrange the insurance and collect the premiums unless otherwise determined by the owners. The advice from Respondents' solicitor was that it was not for the owners to choose the insurer and that it was for Respondents to maintain a block policy covering the tenement. Mr Cassidy was of the view that if an owner did not have his individual insurance and suffered damage he might have a claim against Respondents for not maintaining insurance. Unless Respondents had specific instructions from the owners Respondents would "do what is best".

32. If Respondents were approached by an owner seeking a particular insurer for the common policy they would not necessarily agree to insure with them. They would be guided by the broker in responding to such a request. Although Mr Cassidy was asked whether this had been made clear in the written statement of service (Service Level Agreement), he did not answer this question.

33. When asked who the policyholders were under the block policy for the Applicants' tenement, he answered that it was the 8 co-proprietors and their bondholders but that this was part of a larger "umbrella insurance". He confirmed the evidence of Ms Glendinning on the way in which certificates of insurance were issued for each flat in the tenement. The certificates certified differing amounts insured and had a reference number the first four digits of which were the same for each of the 8 certificates and denoted 256 Crow Road.

34. He accepted that it might in theory be possible for home owners to obtain a quote for a common insurance policy in terms of the deed of conditions but insurers would require information of claims experience. That would require information from individual flat owners which could only be divulged with their permission.

35. He confirmed that his understanding was until recently that Respondents did not have to arrange property revaluations. Respondents had not carried out any revaluations to his knowledge. He was aware that according to the guidelines of the Royal Institution of Chartered Surveyors the buildings costs index increased every year. He was clear that Respondents now had to "do something" in relation to revaluations.

36. When asked why Respondents should not take account of homeowners' own individual policies, he expressed the view that in some cases the cover obtained by such individual policies might be higher than under the policy offered by the common policy arranged by Respondents.

37. Finally Mr Cassidy confirmed the situation regarding the complaints procedure in place for the Respondents. He noted that a fresh Service

Level Agreement had been issued since the Applicants' application following another HOHP case. It, together with the individual letter in the appendix to the Agreement was an attempt to comply with the 2011 Act.

38. He accepted that Respondents had failed to keep to their standards for timeous response to complaints as set out in the Service Level Agreements.

39. The Committee found no reason to doubt that the three witnesses were doing their best to assist the Committee. It accepted that the factual events and occurrences to which they spoke had taken place except in so far as contradicted by documentary material such as the certificates of insurance. In contrast, the Committee did not place weight on their expressions of opinion, for example in relation to the effect of the deed of conditions and whether Respondents should be carrying out revaluations. Such opinions were understandably subjective and tended to relate to legal matters which were appropriate for submissions to the Committee.

Findings of Fact

40. Having considered all the evidence, the Committee found the following facts to be established:-

i. The Property is one of eight flats in an early 20th century traditional red sandstone tenement building erected in the Broomhill area of Glasgow;

ii. The Applicants are the co-owners of a one half share each of the Property. They have been such since September 1980. Since then they have resided at the Property;

iii. The Applicants' predecessor Robert Stobo Renfrew at one time owned all eight flats. By Deed of Conditions dated 28 December 1955 and recorded in the General Register of Sasines on 30 December 1955 Mr Renfrew set out a scheme of real burdens with obligations on all of the flat owners which he intended to incorporate into the dispositions or feu dispositions by which he intended to transfer each individual flat into separate ownership. The terms of the Deed of Conditions were incorporated into the dispositions or feu dispositions granted by Mr Renfrew of each flat in the tenement. These included the disposition of the Property to predecessors of the Applicants. Accordingly the title of each flat in the tenement is burdened by the real burdens in the Deed of Conditions with the exception of that relating to feu duty.

iv. The relevant terms of the Deed of Conditions are set out in production H1. In terms of clause (Sixth) (re-numbered in land registered titles as clause (Fifth)), it is provided

"the said tenement and washing house shall be kept insured by the proprietors of the dwelling houses therein against loss or damage by fire, storm damage and property owners third party liability by a Policy or Policies in their joint names for the sum of Ten thousand pounds or such other sum more or less as the proprietors or a majority of them may determine in respect of fire insurance with such insurance company or companies as they may select and each of the said proprietors shall be liable for the insurance premiums in the same proportions as are provided for mutual repairs in Clause Second hereof and the proprietor or proprietors disbursing the said premiums shall be entitled to recover the proportions due from each of the other proprietors and all sums recovered from the Insurance Company in respect of the loss or damage shall be held by the proprietors in their joint names in trust for and shall be applied towards the reinstatement of the same to or in rebuilding the said tenement and said Policy of Insurance endorsed so far as regards his house in favour of any Bondholder interested in the said house primo loco and the said proprietor in reversion."

v. In terms of clause (Eighth) of the deed of conditions (re-numbered in land registered titles as clause (Seventh), it is provided, so far as material

"the proprietor of any one of the said houses shall have power at any time to call a meeting of the proprietors of the said houses to be held at such reasonably convenient time and place as the convenor of the said meeting may determine . . . and at any meeting so convened any of the proprietors of the said tenement may be represented by a mandatory . . . and each proprietor present or his mandatory shall be entitled to one vote for each house owned by such proprietor and it shall be competent at any such meeting by a majority of votes of those present,

(Primo) to order to be executed any common or mutual operations and repairs. . .

(Secundo) to make any regulations which may be considered necessary with regard to the preservation, cleaning and use or enjoyment of such portions of said tenement and pertinents thereof as are of common use and benefit . . .

(Tertio) to appoint a qualified person (hereinafter referred to as the Factor) to take charge of all such matters and things as may be competently dealt with at any such meeting or meetings as aforesaid and if so agreed to delegate to the said Factor the whole rights, and powers or any of them exercisable by a majority vote at such meeting or meetings and the collection and payment of the premiums of fire and other insurances. . .

. . . Declaring that the said Factor, shall . . . be entitled during the continuance of his appointment, to exercise the whole

rights and powers which may competently be exercised at or by a meeting of the proprietors and others convened as aforesaid and excepting any matters relating to the appointment of the Factor, ... Notwithstanding the foregoing provisions regarding the appointment of the Factor, it is hereby provided and declared that I Robert Stobo Renfrew and my heirs will have the sole power to appoint the Factor so long as any of the houses in the said tenement are in my or their ownership."

vi. The Respondents were factors for the tenement in September 1980. The appointment of the Respondents as factors in terms of the Deed of Conditions has never been challenged. At some time before September 1980 the Respondents were appointed as factor through a meeting in accordance with the provisions of the Deed of Conditions. At the meeting the Respondents were delegated to exercise the whole rights and powers of the proprietors in relation to insurance as set out in clause (Sixth).

vii. The Respondents have arranged insurance for the tenement since before 1980 and continue to do so.

viii. The Respondents have issued to homeowners such as the Applicants information brochures entitled "The Journal" including editions dated summer 2010, spring 2011, spring 2012, spring 2013, and spring 2014.

ix. The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 1 November 2012.

x. On or about 19 August 2013 the Respondents issued to the First Applicant a Service Level Agreement dated January 2013 comprising 10 pages and an Appendix comprising a letter to the First Applicant dated 19 August 2013 and a certificate of insurance bearing to have been issued to him on 15 May 2013 for Allianz policy number SP/11068010-1 and under reference number 15300221 with the policyholder named as "Ross & Liddell for and on behalf of the Co Proprietors and Bondholders". The Property and its share of the common parts were the subjects insured in terms of the certificate.

xi. On or about 4 March 2014 the Respondents' Insurance Manager Rita Glendinning sent a letter to homeowners including the First Applicant advising him that it was his responsibility to ensure that the building sum insured represented the full reinstatement costs of the Property including its proportion of the reinstatement costs of the common areas. It also strongly recommended the First Applicant to obtain a professional valuation to ascertain the correct level of insurance. It also advised that the Respondents were obtaining quotations from alternative insurers and that the indications were that a minimum premium would apply for all owners.

xii. The First Applicant responded with his e-mails to Ms Glendinning of 6 March, 16 March and 2 April 2014 and his e-mail to Mr Bell of 27 March 2014. Ms Glendinning responded with her e-mails to the First Applicant of 10 March, and two of 2 April 2014. The First Applicant responded with his e-mail to Ms Glendinning of 3 April 2014. Ms Glendinning responded with her e-mail of 3 April 2014 in which she stated that she believed that she had addressed all issues relating to insurance cover and that any queries relating to title deed requirements would be addressed by Respondents' Property Manager. There was no response to such queries from the Respondents.

xiii. The Applicants submitted formal letters of complaint to the Respondents by e-mail dated 25 April 2014. The Respondents acknowledged receipt of said e-mail but did not respond to the substance of the complaints.

xiv. The Respondents sent a letter dated 29 April 2014 to the First Applicant enclosing a Certificate of Insurance to apply from 15 May 2014, a Demands and Needs Statement, and a Terms of Business statement.

xv. The certificate of insurance for 15 May 2014 to 15 May 2015 bears to have been issued to the First Applicant as the sole insured policyholder for Zurich policy number CW821365/112 and under reference number 15300221 with the Property and its share of common parts of the tenement as the insured property.

xvi. In or about September 2014 the Respondents issued to the First Applicant a fresh Service Level Agreement comprising 10 pages.

xvii. The factual events and occurrences spoken to by Ms Glendinning and Mr Cassidy and narrated above except in so far as contradicted by the certificates of insurance.

Reasoning

Breach of Property Factor's Duties

41. So far as material, a homeowner may apply to the HOHP for determination of whether the property factor has failed to carry out duties in relation to the management of common parts of land or buildings owned by the homeowner or has failed to carry them out to a reasonable standard (2011 Act, s.17(1), (4) and (5)).

42. In his or her application a homeowner must set out his reasons for considering that the property factor has failed to comply with any of those

duties. This requires the homeowner to indicate, at least in general terms, the duties which he considers have not been complied with. In the present case the Applicants set out two duties, namely:

i. arranging buildings insurance;
ii. general duty of care.

Each may be considered in turn.

Breach of duty – arranging buildings insurance

43. In a detailed skeleton argument the Applicants set out founded their allegation of breach of duty in relation to arranging buildings insurance on the following four matters:

(i) the Respondents were arranging homeowners' buildings insurance without evidence of the necessary delegated authority;

(ii) assuming the Respondents had authority to arrange the insurance, the insurance arrangements were not binding on succeeding homeowners as a community;

(iii) assuming the authority to be so binding the Respondents were exceeding the scope of any such authority;

(iv) in any event the Respondents lacked the necessary title and interest to enforce "the extent of the breach in contemplation by the homeowners.".

44. It is to be noted that none of these matters indicates the duty of the Respondents said to have been breached. A factor can arrange buildings insurance for a tenement factored by him without having any duty to do so. It would be unlikely in practice that a factor would do this as a consequence might be an inability to recover reimbursement for payment of the premium. Nevertheless the fact remains that a factor can seek to do such a thing (and other things) of benefit to homeowners without being under any legal obligation to do so.

45. At the close of the final hearing the Committee asked the First Applicant to identify the duty being breached. He suggested that the duty was one not to exercise a power to arrange insurance not delegated to the factor. The Committee is unable to discern any such duty. Section 17(5) of the 2011 Act defines duties in the present context as "duties in relation to the management of the common parts of land owned by the homeowner". Section 17(5) makes no reference to powers of factors and section 17(1) does not give the Committee jurisdiction to determine whether a factor acted in excess of his power under the factoring arrangement.

46. In these circumstances the Committee is constrained to reject the complaint of lack of delegated authority in the first three matters set out above. With regard to the fourth matter, this appears to contemplate the Respondents lacking title and interest to enforce payment of the premiums under their block policy. Again this is a matter for which the Committee lacks jurisdiction under section 17(5) and this complaint is rejected for that reason also.

47. The Committee understands the frustration for homeowners such as the Applicants in being unable to raise these issues before the Committee. However the Scottish Parliament has decided to limit the jurisdiction of the Committee to breaches of duty and not to extend it to questions of whether factors have or have not powers of maintenance, although the lack of a power may affect a decision on whether a duty exists and has been breached. Thus if a homeowner complained that the factor had breached his duty to cut the grass of common ground with reasonable care and attention, it might be open for a factor to present a defence on the basis that no power to cut the grass was delegated to him and therefore no duty to cut the grass arose. That is not, however the situation in the present case.

48. Nevertheless, having regard to the evidence, detailed submissions and arguments made on this matter the Committee thinks it right to express its view on it. In this context the question of authority must be looked at objectively. What the Respondents may or may not have said in the past about the basis of their authority may shed some light on their understanding of the position at the time that they said it but that cannot be binding on the Committee.

49. Turning to matter (i), the complaint is that the Respondents have arranged buildings insurance without necessary authority. As noted already, strictly speaking no authority is necessary. If insurance is obtained without the necessary authority, the policy may turn out to be void and of no benefit to the homeowners and the factor may require to bear the costs of such a policy alone without relief against homeowners. The Committee concludes that no duty has been identified under this matter that has been breached.

50. The Applicants' position on the question of the authority of the Respondents to arrange buildings insurance was not straightforward. In their application no issue was taken with the appointment of the Respondents as factors. However in their skeleton argument the Applicants appeared to question the formal appointment of the Respondents as factors at all (pages 6 and 8). During the cross-examination of Mr Cassidy, Mr Ritchie objected to questioning tending to show that there was no meeting whereby the Respondents had been appointed as factors. The First Applicant, who was carrying out the questioning, was unclear as to whether he was or was not accepting that the Respondents had been validly appointed as factors at all. In these circumstances he was given an opportunity to consult the Second Applicant in order to clarify the Applicants' position. On the Committee reconvening, the First Applicant made it clear that the Applicants were not challenging the Respondents' appointment as factors but merely any right and power that the Respondents claimed to have regarding insurance.

51. Understandably, this was understood by the Respondents' solicitor to be a concession that no issue was taken over appointment. Somewhat surprisingly, in their closing written submissions (page 6 fourth paragraph)

and in their written rebuttal to the Respondents' closing submissions (pages 7 to 10) the Applicants took issue with the Respondents' understanding that appointment was not challenged.

52. The concession having been made, it is reasonable to infer that the Respondents based the presentation of their case thereafter on it. For example Mr Ritchie dropped his argument under section 65 of the Title Conditions (Scotland) Act 2003 at the end of the hearings. In these circumstances the Committee finds that it is not open to the Applicants to challenge the Respondents' appointment as such in this process.

53. With regard to the question of whether the Respondents had authority in connection with the insurance at all, the only basis for authority put forward by either party was the terms of clause (Eighth) of the Deed of Conditions which is set out above. Clause (Eighth) provides two methods for the appointment of a factor for the tenement, namely by a meeting of the proprietors of the flats in the tenement or by the original owner Mr Renfrew while he or "his heirs" owned any of the flats in the tenement.

54. Under the first method the proprietors may appoint a factor to take charge of "all such things as may competently be dealt with any such meeting [of proprietors] and if so agreed to delegate to the said Factor the whole rights, and powers of any of them exercisable by a majority vote at such meeting . . . and the collection and payment of the premiums of fire and other insurances". Clause (Sixth) provided that the proprietors were obliged to maintain insurance of the tenement with such insurance company as the majority of proprietors might select for such sum as they might determine. Clause (Eighth) also provided that the proprietors could at a meeting by a majority of votes of those present order to be executed any common or mutual operations. Such operations clearly cover the arrangement of insurance. It is clear from these provisions that it was open for the proprietors under clause (Eighth) to hold a proprietors' meeting and to delegate to the factor the arranging of the insurance which the proprietors were obliged to maintain under clause (Sixth).

55. It was not contended for any party that the Respondents had been appointed under the second method. The attempt by the Applicants to introduce such evidence in their Closing Submissions comes too late.

56. The difficulty for the Committee on this matter surrounded the lack of evidence as to the holding of a proprietors' meeting whereby the powers delegated to the Respondents were such as to include the arranging of insurance. There was common ground between the Applicants and Mr Cassidy that the Respondents had managed the tenement in excess of 30 years and had arranged insurance over that period. There was no evidence as to any proprietors' meeting whether before 1980 when the Applicants acquired the flat or afterwards whereby the Respondents were appointed factors.

57. It was submitted for the Respondents that given their involvement as factors in excess of 34 years, which included the arrangement of insurance and the collection of premiums, it must be taken that a proprietors' meeting had delegated the proprietors' power to arrange insurance, and to collect and to pay the premiums for it. The Respondents founded on the maxim, *omnia preasumuntur legitime facta donc probetur in contrarium* which means all things are presumed to have been done according to law until the contrary is proved.

58. In between the hearings, the Committee itself had drawn the attention of the parties to the possible application of the maxim *omnia praesumuntur rite et solemniter acta esse* and its meaning in Trayner's Latin Maxims (4th ed) that "All things are presumed to have been done duly and in the usual manner; or all things are presumed to have been solemnly done and with the usual ceremony.".

59. It was submitted for the Applicants that the burden of proof lay on the Respondents to establish with evidence that such a meeting had taken place rather than them being required to prove that it did not take place. Otherwise they would be required to prove that a meeting did not take place and the law did not require a claimant whether before a court or a tribunal to prove a negative. They founded on the remarks of Sheriff Principal Stephen in *Scottish Water v. Dunne Building & Civil Engineering Ltd,* Edinburgh Sheriff Court, 31 July 2012 (unreported) at paragraphs 29 to 34 and paragraph 34 in particular.

60. Ultimately whether a proprietors' meeting authorising the arranging of insurance took place is a question of fact to be determined on the evidence before the Committee and whether the meeting and authorisation can be inferred from the evidence before it.

61. The *Scottish Water* case is relevant in illustrating the scope for a judicial body such as the Committee to infer facts from the evidence before it. In that case the pursuer (claimant) required to prove that a sewer had been blocked through conduct of the defenders that was in breach of their duty of care, or in other words negligent. The pursuer managed to establish that a concrete block which had been used by the defenders in carrying out construction works had been found to block the sewer. There was no evidence as to the exact events in which the block entered the sewer. On that basis the sheriff at first instance found that the pursuer had failed to prove conduct demonstrating lack of care. He observed that the pursuer had to prove that there was no other way in which the block could have entered the sewer except through lack of care. However on appeal the sheriff principal found that the mere entry of the block into the sewer raised an inference that there had been negligent conduct of some kind which was not rebutted by any evidence to the contrary.

62. Thus the pursuer was successful on the basis of an inferred fact without having to prove exactly how the block had entered the sewer. The remark at paragraph 34 as to a pursuer not being required to prove a negative

was made as criticism of the sheriff's observation that the pursuer had to prove that there was no other way in which the block could have entered the sewer except through lack of care. It was not intended as a statement of general application that evidence can never lead to a pursuer (or applicant) requiring to prove a negative.

63. The Latin maxim relied on by the Respondents is, as Trayner points out (page 419), simply another form of the maxim *omnia preasumuntur rite et solemnitur acta esse* mentioned above. Trayner gives as an example of the application of the maxim the situation where under old conveyancing law ownership of land was transferred by the digging of soil and physical delivery of it to the transferee by the transferor, being a ceremony known as "sasine". If there was an instrument of sasine certifying that the ceremony had taken place, it was presumed that the ceremony had taken place and it was for the person claiming it had not to challenge the instrument. This is another example of the court making an inference of fact, namely the carrying out of a ceremony of transfer. The Committee can see no reason why regular arrangement of insurance over a number of decades by a factor cannot carry an inference that a ceremony of appointment and delegation had taken place certainly where the title, as in the present case, provides for such a ceremony.

64. In the present case the duration of the arrangement by the Respondents of the insurance, and the collection of premiums, raises an inference that there was at some time before 1980 a proprietors' meeting whereby the proprietors' powers under clause (Sixth) in connection with insurance were delegated to the Respondents. There was no evidence to the contrary and the Committee finds as a matter of inference that such a meeting took place.

65. Turning to matter (ii), it was contended by the Applicants that any proprietors' meeting could not bind succeeding proprietors as a community. Respondents contended the contrary.

66. The sole submission made by Applicants on this point was based on "custom and practice" being the basis of the Respondents' appointment. Given that the Committee has found that this was not the basis of the Respondents' appointment the submission flies off. The Committee does however make it clear, for the avoidance of doubt, that "custom and practice" is not on its own a legal basis for the creation of rights and duties for factors and homeowners. The Committee is unaware of any legal basis for a factor to be appointed by custom and practice.

67. Matter (iii) concerns the Respondents exceeding the scope of their authority with respect to insurance. Unfortunately the Applicants' submissions in their skeleton argument on this point are difficult to follow. In so far as the Respondents may receive commission on insurance that they arrange, there is nothing to prevent the Respondents from arranging such insurance with commission provided that full disclosure is made to the proprietors. Secondly, the Applicants suggest that delegation under

clause (Eighth) covers collection and payment of premiums but not the arrangement of insurance. The delegation under clause (Eighth) covers everything that could be decided under an owners' meeting. As has already been noted, an owners' meeting could decide all common operations by a majority vote. Given that the arrangement of insurance could be carried out under clause (Sixth) by a majority of owners' votes it would be an odd and strained interpretation to find that a meeting could not delegate the arrangement of insurance. The Committee rejects such an interpretation and holds that a general delegation of the owners' powers and duties of insurance under clause (Sixth) was competent under clause (Eighth).

68. Matter (iv) concerns, it would appear, a possible refusal by the Applicants to pay their share of the premium of the common insurance policy arranged by the Respondents. Questions of title and interest arise if and when a factor raises court proceedings, whether by way of a small claims action or otherwise, to recover monies due by a homeowner. They are matters for the court and not the Committee.

Breach of duty – fiduciary duties

69. The Applicants claim that the Respondents have breached their duties of care and good faith. It is well established that an agent such as the Respondents has both a duty to exercise reasonable care in carrying out the tasks delegated to it and a fiduciary duty to a principal such as the Applicants. The two duties are separate. As most of the Applicants' argument is directed towards the fiduciary duty the Committee begins with it.

70. The fiduciary duty of an agent towards a principal has a number of aspects. These require the agent to act in good faith, not to make a secret profit out of the agency, not to put himself into a position where his duty to the principal and his personal interests may conflict, and not to use the agency for his personal benefit or that of a third party. However if the principal is fully informed of such matters by the agent this prevents any breach (*Imageview Management Ltd v. Jack* [2009] EWCA Civ. 63 at para. 7 per Jacob L.J.).

71. The Applicants submit that the manner in which the Respondents arranged insurance for the tenement in question indicates that they acted in bad faith and that they put their own interests ahead of those of the Applicants and therefore in breach of fiduciary duty. They suggest that the Respondents use of a policy that covers the Respondents' entire insured managed property portfolio beyond the Applicants' tenement has been done for the administrative convenience and commercial interests of the Respondents rather than in the interests of homeowners such as the Applicants. It also appears to be suggested that the Respondents have disregarded clause (Sixth) of the Deed of Conditions in a way which amounts to a lack of good faith in relation to homeowners. For reasons that are unclear the allegation of breach of fiduciary duty has not been

addressed by the Respondents. Nevertheless the Committee must be satisfied of a breach before it can find one to be present.

72. The first question is, have the Respondents acted in bad faith in relation to clause (Sixth) ? The starting point in deciding this issue is whether clause (Sixth) has or has not been adhered to by the Respondents. Only if the clause has not been adhered is it necessary to consider whether the non-adherence was in bad faith so as to amount to a breach of fiduciary duty. This starting point applies equally to the Applicants' allegation of a breach of the Respondents' duty of care in arranging the insurance which is dealt with in more detail below.

73. The position of the Applicants is that clause (Sixth) requires there to be a single free-standing policy applicable solely to the tenement. The position of the Respondents is that this is not a requirement of clause (Sixth) and that it can be complied with by their block policy as described in Rita Glendinning's evidence. Such a policy covers more than just the tenement and extends to the whole property portofolio which is both managed and insured by the Respondents.

74. The Respondents' position does not end there, however. Firstly in their skeletal arguments they accept that there has been non-adherence with clause (Sixth) in that the policy which they have in place allows homeowners who have their own policies to be insured for a "minimum sum" with a "minimum insurance premium". Secondly, and rather surprisingly, in their closing submissions they submit that the Committee cannot have regard to any such matter as it was not raised by the Applicants in their correspondence before the application and in the application itself.

75. The Committee observes that the whole complaint was initiated through the Respondents' letter of 4 March 2014 to the First Applicant drawing his attention to the question of the sum insured to cover the reinstatement of the tenement. This was then followed by correspondence directed to that issue and it was also raised in the application itself. Inherent within that any allocation of sums insured between individual homeowners. These matters are clearly before the Committee and the Respondents have had ample opportunity to respond to them and have done so, both before the hearing and at the hearing without objection. The Committee rejects the Respondents' submission that it cannot have regard to these matters and reiterates its surprise that such submission has been made at all.

76. The policy contemplated by clause (Sixth) is clearly a policy which keeps the tenement insured in the "joint names" of the homeowners for a sum which the majority of homeowners may determine with such insurance company as they may select.

77. It appears to the Committee that there is nothing in clause (Sixth) to prevent homeowners from having a policy which covers the Applicants' tenement and any other tenement so long as it is in their joint names and

for such sum as they may determine and upon which any secured lender's interest may be noted. The duty of each homeowner to insure the tenement under a policy to be held in joint names is intended to give all homeowners an insurable interest in the tenement as a whole, so that should the tenement burn down, the owner of an upper flat is able to claim under the policy for reinstatement of the whole tenement even if a lower flat owner has failed to pay a premium and is uninsured.

78. If there is nothing in clause (Sixth) to prevent homeowners from having the policy cover more than one tenement, if the homeowners have delegated their powers under clause (Sixth) to a factor, it follows that there is nothing to prevent a factor from having a policy cover more than one tenement including that of the Applicants so long as the policy has the insurable interest in the tenement as a whole in the joint names of the homeowners.

79. Looking to the evidence of Ms Glendinning the Committee find that the existence of insurance through the means of a block policy which may cover other tenements or properties is compatible with clause (Sixth), provided that the insurable interest in the Applicants' tenement is in the joint names of the homeowners.

80. However the insurance certificates both for Allianz for 2013/14 and Zurich for 2014/15 do not have as the policyholders the names of the homeowners in the tenement. That of Allianz has as the policyholder "Ross & Liddell for an on behalf of the Co-proprietors and Bondholders". That of Zurich has as policyholder merely "Mr C Strain". None of the other homeowners are named. Furthermore the certificates both give as the insured property "Flat 2/2, 256 Crow Road, 256/258 Crow Road, Glasgow". They do not give the whole tenement. The sums insured are between £ 29 000 and £ 30 000. They do not appear to be for the whole tenement.

81. As foreshadowed by the Respondents' own submission in their skeletal argument, the insurance which the Respondents have secured for the First Applicant (and there is no mention of the Second Applicant) is not in accordance with clause (Sixth). In particular it is not in the joint names of the homeowners in the tenement and does not appear to cover tenement as a whole.

82. With regard to the Respondents' secondary position, the Committee observes that the whole complaint was initiated through the Respondents' letter of 4 March 2014 to the First Applicant drawing his attention to the question of the sum insured to cover the reinstatement of the tenement. This was then followed by correspondence which raised the level of cover as an issue and the supply of information on the sum insured was raised in the application itself. These matters are clearly before the Committee and the Respondents have had ample opportunity to respond to them and have done so, both before the hearing and at the hearing without objection. The Committee rejects the Respondents' submission that it

cannot have regard to these matters and reiterates its surprise that such submission has been made at all.

83. Was this breach carried out in bad faith ? The Committee has no reason to disbelieve Ms Glendinning when she said that individual owners had chosen the sums and that she had listened to owners' concerns. The Committee sees no reason to find that the Respondents' failure to adhere to clause (Sixth) as described above was in bad faith.

84. Turning to the next complaint of breach of fiduciary duty, it was not suggested that the Respondents were making a secret profit from the arrangement of the insurance and it was not disputed that the Applicants were well aware of the commission earned on the arrangement by the Respondents. Rather it was submitted by the Applicants that the Respondents were putting their interests ahead of the Applicants' interests by ceasing to act as "brokers" and becoming "insurance mediators". It appears to be implicit in this submission that at one time the Respondents arranged the insurance directly with the insurers and that at some time this ceased and the insurance began to be arranged via brokers on their behalf. It is alleged that through this change the Respondents freed themselves of the regulatory burden of the Financial Conduct Authority at the expense of the Applicants' rights under such regulation. This, it is said, is putting the factor's interests ahead of homeowners' interests and thus in breach of fiduciary duty.

85. The Applicants did not contend that the Respondents had no power to appoint brokers to arrange the insurance, nor did they suggest that the duty of the Respondents to arrange insurance (assuming the Respondents had authority to do so), required to be carried out by the Respondents personally. Rather the complaint was that the change to brokers amounted to a breach of fiduciary duty.

86. It was unclear to the Committee on when the change, if it had taken place, had taken place. The "Journal" edition from summer 2010 disclosed that the Respondents had appointed a broker Marsh Ltd to assist in the obtaining of insurance. Ms Glendinning confirmed that as far as she was aware the Respondents had always used brokers. On any view, however, if such a change had taken place even as late as 2010 and been a breach of duty, it would not have been a breach of duty over which the Committee would have had jurisdiction under the 2011 Act. That jurisdiction, so far as single events is concerned began on 1 October 2012. This complaint of the delegation to brokers being in breach of fiduciary duty is therefore rejected.

87. In any event the Committee is unable to see how any change from direct arrangement of insurance to the instruction of brokers could have amounted to putting the Respondents' interests ahead of those of the Applicants. Brokers are specialists in the placing of insurance. They have knowledge of specialist insurance markets. They are therefore better placed to organise insurance for commonly owned premises such as a

tenement than a factor itself. Ms Glendinning admitted as much in her evidence. The use of a broker benefits both homeowner and factor. The Committee is unable to see that this involves the Respondents putting their interests ahead of the Applicants' interests. Any alteration of the regulatory situation of the factor benefiting the factor is not something that has been established to the Committee's satisfaction. Ms Glendinning said that the Applicants were still fully protected by the Financial Conduct Authority. There is nothing to suggest that there has been any breach of fiduciary duty as suggested. The complaints of breach of fiduciary duty are rejected entirely.

Breach of duty – duties of care

88. Next it is suggested that the Respondents were in breach of their duty to exercise reasonable skill and care in arranging the insurance. While the exercise of reasonable skill and care is not mentioned expressly by the Applicants in their application, skeleton argument, closing submission, or rebuttal to closing submission, the application does suggest, by means of a rhetorical question at the end of section 7.1 that the Respondents have not exercised reasonable skill and care in following the Deed of Conditions with regard to the common insurance. This can only be a reference to a failure to take reasonable care to comply with clause (Sixth).

89. The Committee has already decided that clause (Sixth) was not adhered to by the Respondents in respect of the failure to have the policy in joint names of the homeowners of the tenement and a failure to have the policy cover the whole tenement. The Respondents have admitted in skeletal argument, in submission and in evidence that they misinterpreted clause (Sixth) in arranging insurance in terms of the certificates of insurance which suffered from the failures noted above. Ms Glendinning also accepted in re-examination that the Respondents did not insure the tenement for its total reinstatement value under their common policy. Mr Cassidy indicated in cross-examination that different homeowners in the tenement had different sums insured.

90. The Committee is unable to ascertain exactly how this regrettable situation has arisen. However the fact that it has arisen raised in the view of the Committee an inference that the Respondents have at various times failed in their duty to exercise reasonable skill and care in ensuring that any insurance certificates procured through the brokers and issued on behalf of the insurers were in joint names and covered the whole tenement, including the whole common parts.

91. In addition given that the Respondents had the full authority of the homeowners in a meeting under clause (Sixth), the Respondents took on the duty, as agents of the homeowners, under clause (Sixth) to keep the tenement (and any washing houses – should they still exist), insured for a sum chosen by them. As agents the Respondents owed a duty to exercise reasonable skill and care in choosing that sum or to put it in the words of s.17(3) of the 2011 Act, to carry out the choice to a reasonable standard

(2011 Act s.17(3)). It seems to the Committee self-evident that the reasonable skill or standard to be expected of the Respondents must be measured in the light of the purpose of the sum insured namely to allow the whole tenement to be reinstated or rebuilt.

92. The Respondents' position has been that they left the selection of the sum to the homeowners. This is made clear in the letter of 4 March 2014. They purported to abdicate their duty to select the sum. Mr Cassidy admitted this in his evidence. In these circumstances the Committee is compelled to find that the Respondents have breached their duty to exercise reasonable care to choose the sum necessary to secure the rebuilding or reinstatement of the tenement. Indeed they have not carried out their duty at all.

Section 1.1a B of the Code

93. The Applicants complain that the Respondents have not provided a transparent statement of the core services. In particular they have not made it clear whether and if so to what extent the arrangement of insurance is part of the core services being provided by the Respondents. The Respondents simply submit that the Service Level Agreement issued by them to the Applicants meets the requirements of section 1.1a B of the Code.

94. The material part of section 1.1a B of the Code provides,

> "You 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. . . . The written statement should set out . . .
> c. the core services that you will provide. . . d. the types of services and works which may be required in the overall maintenance of land in addition to the core service . . ."

There can be no dispute that "land" in this context includes any building.

95. Section 1.1a B makes it clear that a factor must separate the core services from the other services which may be offered in addition to the core service. A purpose of this distinction is to enable a homeowner to know what services are covered by a regular management fee and what services will incur charges over and above the regular management fee.

96. The Respondents have issued two separate documents entitled "Service Level Agreement" ("SL Agreement"). As has already been observed the documents have a main generic element and an appendix which comprises a letter to the First Applicant and a certificate of insurance. The Respondents put these forward as being written statements of services in terms of section 1 of the Code.

97. Nowhere in the documents is there any separation let alone a transparent separation between core and non-core services. In relation to insurance there is no indication for the Applicants whether the arrangement of

insurance for their tenement is or is not part of any core service. While on page 6 the SL Agreements say that the Respondents will put in a "comprehensive common buildings policy" where required by the Deed of Conditions or Title Deed, this requires an examination of the title deeds by the homeowners. These may or may not be to hand. It may take some time and expense to obtain them. Homeowners should not be required to have to find out the information in order to discover whether a service is or is not a core service. That would undermine the whole purpose and spirit of the written statement of services which is to promote transparency and clarity in the arrangement between homeowner and factor. The same observations apply to the use of the words "Where required" in relation to the cover for lifts, engineering policies and other specified insurance coverage.

98. The SL Agreements state that the generic element must be read in conjunction with the appendix. However when one looks to the appendix the position is no clearer. There is no identification of core and non-core services. There is not even a clear statement that the arrangement of insurance will be carried out. It mere states, "We *may* also provide insurance services to your building . . .". (committee's emphasis).

99. In these circumstances the Committee finds that there is a breach of section 1.1a B of the Code.

Section 2.1 of the Code

100. The Applicants complained that the Respondents were in breach of their duty under section 2.1 of the Code which provides,

> "Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:
>
> You must not provide information which is misleading or false.
>
> . . ."

Section 2.1 is said to have been breached in four distinct ways.

Statement on revaluations

101. On or about 4 March 2014 the Respondents issued to the Applicants a letter headed "Is your property well enough insured ?" and accompanying flyer. This letter contained statements as follows:

> "**Your Responsibility:**
>
> As your property manager, we want to remind you that it is **your** responsibility to ensure that your building sum insured represents the full reinstatement costs of your private dwelling including your proportion of the re-instatement costs of the common areas. This means that you have to tell us what the buildings sum insured is to be.
>
> **What should you do ?**

> We would strongly recommend that you obtain a professional valuation so you can ascertain what the correct buildings sum insured should be for your property. . .
>
> **How can we help ?**
> Without undertaking a valuation we cannot confirm what an adequate sum insured would be for your property, hence our recommendation for professional advice. . . ."

102. In the SL Agreements, on page 6 the Respondents state,

> "In accordance with the Property Factors Act and Code of Conduct, we will periodically seek client instructions with regard to the arrangement of building reinstatement valuations, to allow clients to assess the accuracy of the sums insured.

103. The Applicants submit that the letter was misleading in that it suggested that it was entirely up to them to arrange building reinstatement valuations whereas the SL Agreement indicated that the Respondents would periodically seek client instructions with regard to the arrangement of such valuations. The Respondents accept that there have been "some contradictory statements" made by them in relation to buildings insurance. However they do not address the complaint set out above.

104. The committee finds that on a reading of the letter the reader might well be left with the impression that there is no duty owed by the factor to the homeowner in respect of valuations when there is (a) in terms of page 6 of the SL Agreements both the limited duty of request for instructions and also the potential duty to arrange the valuation should instructions be given; (b) in any event a duty to take care to ensure that the sum insured is reasonable to allow reinstatement of the premises; and (c) section 5.8 of the Code of Conduct suggests otherwise. In these circumstances the Committee finds that there has been a breach of section 2.1 of the Code in respect of the said statements in the flyer set out above.

Statement on insurance compliance with deed of conditions

105. Secondly, and more significantly the Applicants complain that section 2.1 was breached through a statement of the Respondents' Ms Glendinning's in her substantive e-mail of 2 April 2014. The statement is,

> "The policy arranged by our brokers does comply with title deed requirements i.e. it allows all owners under your development to be insured under one policy."

106. The Applicants submit that the policy arranged by the Respondents did not comply with clause (Sixth) of the Deed of Conditions. This has already been considered by the Committee in connection with the issue of breach of fiduciary duty.

107. The question is whether the information in this e-mail was misleading or false. The initial part of the sentence is false and misleading in the light of the Committee's findings about the deficiencies in compliance with clause (Sixth). Does the second part of the sentience beginning with "i.e." take away that impression ? This second part of the sentence is accurate and not false, as the policy does allow all owners to be insured under one policy. However it still gives the impression of full compliance with clause (Sixth) when by the Respondents' own admission, with hindsight, is that there was not. The owners were not insured in joint names, were not insured in respect of the whole development or tenement and were insured for varying sums which did not appear to add up to the reinstatement costs for the tenement.

108. A homeowner taking the sentence at face value might be led into thinking that there was compliance when there was not. Therefore taking the passage as a whole the Committee finds that there was a breach of section 2.1 of the Code, albeit one made in good faith.

Statement on website regarding insurance

109. Thirdly the Applicants complain that on their website the Respondents stated that they "can offer Buildings Insurance that can be tailor-make to suit individual needs".

110. The Applicants found on the fact that the Respondents arrange a single block policy to cover all properties in their portfolio where they arrange buildings insurance cover. They also found on the "Journal" from spring 2014 where the Respondents mention that additional cover can be obtained by individual homeowners.

111. The addition of cover to meet the needs of individual homeowners as described in the "Journal" can be described fairly, as tailor-making insurance to suit individual needs. The Committee can find no breach of section 2.1 in this regard.

Statement regarding insurance coverage for common areas

112. Finally under this section, the Applicants complain that in her e-mail of 10 March 2014 to them, Ms Glendinning stated that "Unfortunately such policies do not provide the cover for the common areas."

113. This statement was made with reference to policies covering only the Applicants' private dwelling and not with reference to block common insurance policies such as the one held by the Respondents. It was made to highlight the difference between a common insurance policy and one held by an individual homeowner for his flat.

114. The Committee has seen no evidence that homeowners' individual insurance policies cover *all* of the common parts of the tenement as opposed to merely the homeowner's indivisible share of the common

parts. The Committee is not satisfied that it has been established that Ms Glendinning's statement was false or misleading in the context in which it was made. There was no breach of section 2.1 in this respect.

Section 2. 5 of the Code

115. The Applicants complain of a breach of section 2.5 of the Code which provides,

> "Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:
>
> . . .
>
> 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 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 1 of the Code provides, in section 1.1a,
> "The written statement should set out:
> . . . *D. Communication Arrangements*
> the timescales within which you will respond to enquiries and complaints received by letter or e-mail"

116. The Respondents' SL Agreements, which they put forward as written statements under the Code provide on page 8 as follows:

> "We will respond to written queries within 5 working days of receipt. In the event that a full response cannot be provided within this period we will confirm this in writing and intimate to clients our intended actions and timescale for returning with a full response."

117. Taking the Code and the Respondents' written statements of services together, the Respondents' obligation under section 2.5 was to answer enquiries and complaints as quickly and fully as possible, and to keep homeowners informed if it required additional time to respond beyond 5 working days of receipt of the correspondence from the homeowner.

Response to Applicants' e-mail of 16 March 2014

118. The e-mail of 16 March 2014 from the First Applicant to the Respondents' Ms Glendinning was sent on a Sunday. In terms of section 2.5 as read with the Respondents' written statement a response was due by Friday 21 March 2014. The First Applicant sent a reminder e-mail on 2 April 2014 which intimated a complaint under section 2.5 for failure to respond. Within an hour of receiving the reminder e-mail Ms Glendinning responded with an e-mail acknowledging receipt of the e-mail of 16 March 2014, apologising for the delay and noting that she would respond by close of business on 3 April 2014 if not before. This she followed up with a second

e-mail on 2 April 2014 which sought to respond to the e-mail of 16 March 2014.

119. All in all the response from the Respondents to the e-mail of 16 March took 13 working days. No acknowledgement of receipt or intimation of a likely duration for a response was issued by the Respondents to the Applicants within the 5 working days in their written statement. It too, took 13 working days.

120. In these circumstances the Committee has little hesitation in finding that the Respondents breached section 2.5 of the Code.

Response to Applicants' e-mail of 2 April 2014

121. The First Applicant's e-mail of 2 April 2014 contained more than a reminder and complaint regarding the absence of a response to the e-mail of 16 March. It also contained further observations from the First Applicant and asked three further questions of the Respondents lettered a), b), and c). These were not addressed in Ms Glendinning's substantive e-mail of 2 April 2014.

122. The First Applicant followed up the Respondents' substantive e-mail of 2 April 2014 with an e-mail to them of 3 April 2014. In it he gave Ms Glendinning "the further opportunity to address the other additional points raised in my formal complaint.". This appears to have been a reference to his reminder and complaint e-mail of 2 April 2014. The response of Ms Glendinning was in an e-mail of 3 April to the First Applicant in which she stated that she believed that she had addressed all issues relating to the insurance cover and that any queries relating to HOHP or title deed requirements would be dealt with by the Property Manager who would respond accordingly. There was however no substantive response from the Respondents' Property Manager produced to the Committee. The next significant event was the sending of formal complaints by the Applicants to the Respondents' Property Manager. This took place on 25 April 2014.

123. In these circumstances the Applicants complain that section 2.5 of the Code has been breached. The Respondents submit that the communications on 2 and 3 April 2014 were adequate and also rely on a letter from them to the First Applicant dated 29 April 2014 which enclosed insurance documentation.

124. The letter of 29 April was not an attempt to address the First Applicant's e-mail of 2 April. Rather whether section 2.5 has been breached in relation to the e-mail of 2 April depends on whether as Ms Glendinning stated in her reply of 3 April, all of the questions asked in the e-mail of 2 April had already been dealt with in her substantive e-mail of 2 April. The Committee is unable to see any response to these questions in Ms Glendinning's e-mail of 2 April. For these reasons the Committee concludes that in not providing an answer to these questions the Respondents breached section 2. 5 of the Code.

Response to Applicants' letters of 25 April 2014

125. On 25 April 2014 the Applicants sent two formal letters of complaint to the Respondents. These were sent by e-mail. The first complained about a breach of the Respondents' duties in arranging insurance and exercising due care. The second complained of breaches of the Code. Receipt of these was acknowledged by the Respondents' Property Manager in an e-mail of 29 April 2014 in which he noted that he had forwarded the e-mail with the letters to the parties "who should respond to same". In the event there appears to have been no response from such parties.

126. The Respondents' SL Agreement states at page 9 that in confirming receipt of a complaint the client would be advised of their timetable and procedure for resolving matters. No evidence of notification to the Applicants of a timetable or procedure to be followed has been produced. In paragraph 7.2 of their initial Written Representations the Respondents accepted that there was no response to the "letter" of 25 April 2014. No further submission is made by the Respondents on this complaint by the Applicants.

127. Given the terms of the Respondents' response on 29 April and the provision requiring the advising of a timetable and procedure for resolving the complaints, and the absence of any response from the persons at the Respondents who were delegated to respond on these matters, the Committee finds that the Respondents breached section 2. 5 of the Code in respect of the Applicants' letters of 25 April 2014 also.

Section 5.2 of the Code

53. The Applicants complain of a breach of section 5.2 of the Code which provides,

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

128. The Applicants' complaint relates to information both of the insurance kept in place by the Respondents for the tenement and also of the insurance that the Respondents contemplate introducing upon their annual review of insurance requirements. This is clear from the relevant letter of 25 April 2014.

129. The Respondents submit that section 5.2 has been fully complied with in no less than 9 separate documents dating from between summer 2010

and the most recent SL Agreement. They also submit that section 5.2 was complied with in their e-mails of 10 March and the substantive one of 2 April 2014.

130. Section 5.2 has a number of elements which must be considered in turn. It is however inherent in section 5.2 that the compliance contemplated is in respect of each homeowner. It is not contemplated that there can be compliance through the provision of generalised information which does not clearly apply to the homeowner in question.

131. Firstly a factor must provide each homeowner with clear information showing the (a) basis upon which their share of the insurance premium is calculated and (b) the premium paid. The "premium paid" could mean either the premium to be paid for the common policy or the figure payable by the homeowner representing the homeowner's share of that premium. The purpose of the provision of this information is to enable the homeowner to assess whether the cost of the common policy is reasonable and whether his share of that common cost is calculated correctly. The first purpose is supported by sections 5.6 and 5.7 which require the provision of information concerning the appointment of the insurer and any tendering or selection process. The second purpose is to ensure transparency of the allocation of the share of the overall premium. As the Applicants submitted, knowledge of the overall premium is necessary in order to allow a homeowner to make a value-for-money comparison with alternative providers of a common policy, and this had already been pointed out in case HOHP/PF/13/0051. In the light of this the this Committee is clear that "premium paid" means the premium for the common policy.

132. The SL Agreement issued in August 2013 to the First Applicant states in the certificate of insurance in the appendix merely an "Annual Premium" of £ 86.42 in respect of an "Insured Property" comprising the Applicants' flat. It may be taken that this was not the premium for the common policy but rather the amount payable by the Applicants as their share of the premium of the common policy. No information is given as to the premium for the common policy. No information is given as to the basis upon which the Applicants' share of that premium is calculated. Matters are no more informative in the subsequent SL Agreement nor in the other 8 documents referred to by the Respondents.

133. The letters from the Respondents to the First Applicant dated 10 May and 2 April 2014 do not provide either of the two required pieces of information. The Committee notes that in the letter of 29 April 2014 from the Respondents to the First Applicant there is a certificate of buildings insurance for the period from 15 May 2014 to 15 May 2015. It however also states no more than an "Annual Premium" in respect of the Applicants' flat as the insured property.

134. In these circumstances the Committee is compelled to find that there has been a breach of section 5.2 of the Code in respect of the lack of any

information in respect of the premium for the common policy and the basis upon which the Applicant's share is calculated.

135. Secondly, section 5.2 requires the factor to provide clear information of the sum insured. This must mean the sum insured under the common policy. Otherwise the aim of transparency for homeowners would be thwarted. Homeowners would be uncertain whether the sum insured was adequate for the costs of reinstatement. The question is what must be disclosed when the common policy covers properties other than the tenement in question and quite unrelated to it. Ms Glendinning in cross-examination before the Committee spoke to the Respondents' block policy having a schedule in which each development which they managed was listed individually. In the sense she used the word, the Applicants' tenement would be a "development". In the view of the Committee if the terms of section 5.2 are applied to the policy held by the Respondents, the sum insured in respect of the tenement must be disclosed at the very least. That would fulfil the purpose of this disclosure requirement of section 5.2.

136. The Committee was presented with no evidence of the sum insured in respect of the Applicants' tenement, let alone that this information had been provided to the Applicants. The lack of clarity on this matter demonstrated in the Respondents' letter to the First Applicant of 4 March 2014 is striking. The letter states that the sum insured "may be too low" but no effort is made to state what the sum actually is so that it can be compared with the £ 180,000 figure for similar properties in the area. In all of these circumstances the Committee finds a breach of section 5.2 of the Code in respect of the sum insured.

137. Thirdly section 5.2 requires the provision of clear information of the excesses payable by homeowners such as the Applicants in the event of a claim. This does appear to have been complied with in the SL Agreement of August 2013 and in the Respondents' letter of 29 April 2014. The Committee finds no breach of section 5.2 in respect of the excesses.

138. Thus far the provision of information on existing insurance has been considered. The Committee is conscious that the relevant letter of 25 April 2014 complained about the information in section 5.2 in respect of future contemplated insurance. However section 5.2 is concerned with existing insurance rather than future insurance. This is made clear in the last sentence of section 5.2 which provides for the provision of the terms of the policy. Clearly that cannot be complied with if the policy is not yet in force. A possible remedy for a homeowner in relation to future insurance is to request inspection of documentation relating to any tendering or selection process under section 5.7 of the Code. However there is no indication that any such request has been made by the Applicants.

Sections 5.6 and 5.7 of the Code

139. The Applicants complain of a breach of section 5.6 of the Code which provides, "On request, you must be able to show how and why you appointed the insurance provider. . .".

140. They also complain of a breach of section 5.7 of the Code which provides,

> "If applicable, documentation relating to any tendering or selection process (excluding commercially sensitive information) should be available for inspection, free of charge, by homeowners on request . .".

141. With regard to section 5.6 this requires a factor, upon request, to demonstrate the procedure by which an insurer was appointed and the reasons why the insurer was appointed. It is not concerned with whether the procedure was or was not appropriate or whether the choice of insurer was or was not reasonable. Section 5.6 is merely a vehicle for the provision of information which might allow a view to be taken on those issues.

142. The Applicants submit that the Respondents are using the process of appointment of broker and insurer to conceal what they say is the absence of a contract between themselves as homeowners and the insurers and that this amounts to a breach of both sections 5.6 and 5.7.

143. The Respondents submit that the First Applicant's requests in March and April 2014, before the application to HOHP, did not seek to find out how and why the Respondents appointed their chosen insurance provider but rather related to why the Applicants were obliged to insure under the Respondents' block policy at all. The Respondents also submit, that in any event even if not requested, the information on procedure and reasons for appointment of the insurers was provided in the "Demands and Needs Statement", the "Ross + Liddell Ltd Terms of Business", the spring 2014 edition of "The Journal", and in the letter of 4 March 2014 to the First Applicant.

144. The Respondents are correct that the First Applicant did not request information about how and why the Respondents appointed their chosen insurer. The initial e-mail from the First Applicant of 6 March 2014 was concerned with the level of likely premium that the Respondents had altered the Applicants to in their letter of 4 March. The subsequent e-mails from the First Applicant in March and April were concerned with his query on why the Applicants should have to pay for the common policy when they had arranged their own insurance policy for their flat and a share of the common parts of the tenement. They were also concerned with the level of sum that could be insured for the premium being paid for the common policy. They were not concerned with the procedures by which the then insurers had been appointed nor with the reasons for the appointment of Allianz.

145. In these circumstances, there being no request for such information, the Committee finds that there has been no breach of section 5.6. In any event

the Respondents did provide information about the procedures by which Allianz had been appointed in their e-mail of 10 March and about the procedures for the subsequent appointment of Zurich in their letter of 29 April 2014 and spring 2014 edition of "The Journal".

146. The Committee have seen no evidence of any request by the Applicants for sight of documentation relating to tendering for or selection of the insurer. In these circumstances the Committee finds that there has been no breach of section 5.7 of the Code.

Section 5.8 of the Code

147. The Applicants complain of a breach of section 5.8 of the Code which provides,

> "You must inform homeowners of the frequency with which property revaluations will be undertaken for the purposes of buildings insurance and adjust this frequency if instructed by the appropriate majority of homeowners in the group.".

148. The Applicants found on the provisions of page 6 of the SL Agreements where the Respondents undertake to "periodically" seek client/proprietor instructions with regard to the arrangement of building reinstatement revaluations. The Respondents submit, simply, that they have not received instructions from the majority of homeowners in the tenement to adjust the frequency on which they are to carry out a valuation.

149. The purpose of section 5.8 is to enable homeowners to be confident that a factor who arranges buildings insurance will also arrange, on a regular basis, a revaluation of the buildings in question. This in turn is designed to enable homeowners to ensure that the common insurance policy has a sufficient level of cover for the reinstatement of the tenement should it for example burn down. Section 5.8 makes it clear that it is not sufficient for a such a factor to refuse to carry out regular property revaluations in the absence of instructions from homeowners.

150. However the passage quoted from page 6 of the SL Agreements makes it clear that this is just what the Respondents are seeking to do. Furthermore the passage does not even indicate the frequency with which the Respondents undertake to ask homeowners for instructions. Given the absence of any indicated frequency, any adjustment of such frequency by a majority of homeowners a submitted by the Respondents does not even arise. The Committee finds that on page 6 of the SL Agreements and in the letter of 4 March 2014 to the First Applicant (which appears to have triggered the whole complaint), there has been a breach of section 5.8 of the Code.

Sections 7.1 and 7.2 of the Code

151. The Applicants complain that the Respondents have failed to comply with sections 7.1 and 7.2 of the Code the material parts of which provide,

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

152. The Applicants found on the Complaints Procedure document (production H25) and submit that it does not provide for any timescales for resolution of complaints. In contrast, the Respondents found on the Complaints Procedure document (production R23) dated September 2014 which post-dates the current application to HOHP. That document, unlike the earlier document does have timescales on it.

153. The Committee find that the absence of any mention of timescales on production H25 placed the Respondents in breach of section 7.1 of the Code. However the September 2014 version of the Complaints Procedure does have certain timescales. No issue was raised concerning the adequacy of these timescales during the hearings or in submissions. In these circumstances the Committee is constrained to find that the Respondents are not in breach of section 7.1 in relation to the timescales in the September 2014 Complaints Procedure document. Nevertheless the Committee observes that the timescales contained within that September 2014 document do not cover all stages of the processes set out in that document.

154. With regard to section 7.2 the Applicants complain that there was no exhaustion of their complaints by the Respondents under their complaints procedure and no confirmation of the Respondents' final position by senior management. They also complain that the Respondents did not provide details of how they could apply to the HOHP. The Applicants submit that they had assumed that Ms Glendinning's response into the First Applicant's e-mailed complaint of 2 April 2014 had been copied to her senior management and had been surprised to learn by means of the Respondents' e-mail to HOHP of 1 July that the Respondents' director in charge of insurance, Mr Cassidy had only become aware of the case that morning.

155. From the outset the Respondents have accepted that they did not respond to the Applicants' formal complaint letters of 25 April 2014 and did not advise the Applicants on how to apply to the HOHP. This was confirmed by the Respondents' solicitor at the hearing. In these circumstances the Committee finds the Respondents to have breached section 7.2 in these respects.

156. The Applicants were however aware of the HOHP as evidenced by the threat to apply to the HOHP mentioned by the First Applicant in his e-mail

of 2 April 2014 and in the letter of complaint of 25 April relating to the Code.

Property Factor Enforcement Order

157. Having decided that the Respondents have failed to carry out the duties and breached the Code as set out above, the Committee proposes to make a property factor enforcement order in terms of the Notice of Proposal accompanying this decision.

158. Parts (1) to (5) of the proposed order seek to remedy the deficiencies caused by the failure to take reasonable care to adhere to clause (Sixth) and breach of sections 5.2 and 5.8 of the Code. Part (6) seeks to remedy the breach of section 1.1a B of the Code.

159. Part (7) seeks to provide compensation for the inconvenience caused to the Applicants through breaches of sections 2.1 and 2.5 of the Code. The inconvenience extends from the First Applicant's e-mail of 10 March 2014 to the formal letters of 25 April 2014. The HOHP process is one whether it is intended as a default position that both parties bear their own expenses in the presentation of their cases and therefore the award in respect of inconvenience does not take account of the conduct of the application by the Applicants.

160. The Applicants seek an apology for the breaches of section 2.1 of the Code and compensation for time, trouble and unnecessary expense. Section 20 of the 2011 Act allows a property factor enforcement order to require a factor to execute such action as a committee considers necessary and where appropriate to make such payment to a homeowner as it considers reasonable.

161. The Committee has considered whether it is necessary for the Respondents to make an apology in respect of the breaches of section 2.1 of the Code which have been identified. The breaches have caused inconvenience to the First Applicant in the time and effort taken by him to challenge the misleading assertions made. That is something which it is reasonable to deal with by way of an award of compensation. With regard to the future, this is dealt with in the proposed parts (1) to (5) of the proposed order. In these circumstances it is not considered that an ordered apology would afford any meaningful benefit to the Applicants.

162. Parts (6)(d) and (8) seek to ensure that the breach of section 7.2 is not repeated. In particular the Respondents require to make it clear to homeowners that there is an avenue of complaint to the HOHP in respect of Insurance Services and Surveying and Commercial Services where there has been a breach of the Code of Conduct or other property factor's duties.

Opportunity to Make Representations and Rights of Appeal

163. Unfortunately the wording of section 19(1)(a) of the 2011 Act is not as clear as it might be. This is a decision under section 19(1)(a) and (b). Given that the Committee has decided that it will make a property factor enforcement order, this decision is accompanied by a Notice of Proposal under section 19(2)(a).

164. Both Applicants and Respondents are invited to make representations to the Committee on this decision and the proposal. The parties must make such representations in writing to the Homeowner Housing Panel by no later than 14 days after the notification to them of this Notice.

165. The opportunity to make representations is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.

166. Following the making of representations or the expiry of the period for making them, the Committee will be entitled to review this decision. If it remains satisfied after taking account of any representations that the Respondents have failed to carry out the property factor's duties or complied with the section 14 duty to ensure compliance with the Code of Conduct it must make a property factor enforcement order. Both parties will then have a right to appeal against the whole or any part of such final decision and order.

167. In the meantime, without prejudice to the right of appeal against both the final decision and order, parties are given a right of appeal against this decision to the Sheriff by summary application within 21 days beginning with the date when this decision is "made".

168. Signed ....17 April 2015
David Bartos, Chairperson