Decision of the Homeowner Housing Committee issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011 and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

Hohp ref: HOHP/LF/14/0124

Re: The Birches, Wishaw ML27QS (the property)

The Parties:

Mr Raymond Rafferty, 3 Swallow Road, The Birches, Wishaw ML27QS (the homeowner)

Ross and Liddell, 60 St. Enoch Square, Glasgow G1 4AW (the factor)

Decision by a committee of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

Committee members: Sarah O'Neill (Chairperson), Jean Thomson (Housing member)

Decision of the committee

The committee determines that the factor has not failed to comply with 1) its duties as a property factor as defined in section 17 (5) of the Act or 2) its duties under section 14 of the Act in respect of sections 1, 2.1 and 2.2 of the code of conduct for property factors ('the code').

The factor has failed to comply with its duties under section 14 of the Property Factors (Scotland) Act 2011 in respect of section 7.1 of the code

The committee's decision is unanimous.

Background

1. By application dated 21 August 2014, the homeowner applied to the Homeowner Housing Panel ('the panel') to determine whether the factor had failed to comply with its duties under the Property Factors (Scotland) Act 2011. In his application form, the homeowner complained that the factor had failed to carry out the property factor's duties as defined in section 17(5) of the Act. He enclosed with his application form copies of numerous emails and written correspondence between the factor and himself dated between July 2013 and August 2014.

2. The homeowner then wrote to the panel on 19 September 2014 enclosing further letters from the factor to the homeowner dated 19 and 20 August and 16 September. He also enclosed five separate written notification letters all dated 16 September and sent by him to the factor setting out the reasons why he believed it had failed to comply with the code. In the letters, he alleged that there had been a failure to comply with sections 1 (written statement of services), 2 (communications and consultation), 4 (debt recovery), 5 (insurance) 6 (carrying out repairs and maintenance) and 7 (complaints resolution) of the code.

3. A letter dated 16 October 2014 was then received from the homeowner, enclosing a response dated 15 October from the factor to his various written notifications. A further letter dated 13 November was received from the homeowner, enclosing further correspondence from the factor.

4. On 19 November 2014, the President of the panel issued a notice of decision to both parties, stating that she considered that in terms of section 18(3) of the Act there was no longer a reasonable prospect of the dispute being resolved at a later date; that she had considered the application paperwork submitted by the homeowner, comprising documents received in the period 22 August to 17 November 2014; and intimating her decision to refer the application to a panel committee for determination. No written representations were received from the homeowner. Written representations, together with copies of various correspondence dated between September 2010 and November 2014, were received from the factor on 2 December 2014.

5. Further correspondence was later received from the homeowner in response to the factor's written representations on 24 December 2014. A response to his letter was received from the factor on 19 January 2015, and a further letter from the homeowner was received on 23 January 2015.

6. The committee issued a direction on 23 January 2015 to the parties, which:

   1) gave notice to the parties that the committee would consider the following issues at the hearing fixed for 18 February 2015:

   - The alleged failure by the factor to carry out the property factor's duties, as set out in the homeowner's application form and subsequent correspondence until 17 November 2014.
   - Whether the factor had failed to comply with the following sections of the code of conduct for property factors:
     - Section 1- duty to provide a written statement of services
     - Sections 2.1 and 2.2
     - Section 7.1

The reason for this was that it was not clear to the committee, with regard to the other sections of the code set in the homeowner's various notification letters (i.e. Sections 4, 5 and 6), which specific paragraphs of these sections his complaints related to.

2) required the factor to provide to the committee within 14 days of receipt of the direction:

- Confirmation of the process and/or criteria by which the factor makes decisions about whether to: 1) issue mandates to homeowners seeking their written approval for repairs or maintenance of common areas or 2) carry out such repairs and maintenance without seeking the approval of homeowners
- Confirmation of the process and or criteria by which the factor makes decisions about whether repairs are 'routine' or 'extraordinary', further to the information set out on page 2 of its written representations dated 2 December 2014.

7. A response to the direction was received from the factor on 2 February 2015. Further correspondence was received from the homeowner on 2 and 4 February 2015.

The hearing

8. A hearing took place before the committee at the panel's offices, Europa Building, 450 Argyle Street, Glasgow on 18 February 2015. The homeowner did not appear and was not represented. The factor was represented by Mr Brian Fulton, Director and Eoghan Watt, Property Manager, who gave evidence on its behalf.

Preliminary issues

9. The committee considered whether the hearing should go ahead in the absence of the homeowner. The committee was satisfied that, in terms of regulation 23 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 ('the regulations'), the requirements of regulation 17 (1) regarding the giving of notice of a hearing had been complied with. The homeowner had confirmed in writing on two separate occasions that he did not intend to attend the hearing. The committee therefore decided to proceed to make a decision on the basis of the oral representations made by the factor at the hearing and the written representations submitted by both parties.

Findings in fact

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

- The homeowner is the owner of 3 Swallow Road, Wishaw ML2 7QS.The property is registered in the Land Register for the county of Lanark under title number LAN113956.
- The property is situated within a development known as the Birches, Wishaw, which was built around 1995. The homeowner and his wife took entry to the property on 22 December 1995. There are 58 properties situated within the development.
- Ross and Liddell was appointed as managing agent responsible for the maintenance of the 'open amenity areas' within the development by the developer under the Deed of Conditions applicable to the development by the Miller Group Limited registered on 24 November 1995.
- The 'toddler's play area' within the development forms part of the said 'open amenity areas' in terms of the said Deed of Conditions, which states at Clause (Eleven) that this area 'will not be built upon but will remain as a play area'; that the proprietors within the development possess a right of common property as regards the open amenity areas; and that the proprietors are 'each responsible for an equal share of the cost of the maintenance of the open amenity areas and all play equipment thereon.'
- The factor's contractual duties in relation to maintenance of the 'open amenity areas' of the development are set out in:
    - the said Deed of Conditions
    - the factor's generic written statement of services (titled 'Service Level Agreement'), together with 'Schedule of Management Information' dated 17 August 2013 applicable to the management of the property.
- The factor became a registered property factor on 13 August 2013. Its duty under section 14 (5) of the Act to comply with the code arose from that date.

The complaints made by the homeowner

Duties complaint

11. The homeowner's primary complaint, as set out in his initial application form, was that the factor had failed to comply with its duties as a property factor with regard to the play park within the development. He complained that the factor had failed to uphold the terms and conditions of the title deeds by not repairing the play park equipment, but putting the matter to a vote. His argument was that the factor was bound by the title deeds to carry out the repairs, and had no right to ask owners for their agreement. He said that the equipment should have been repaired in 2010 at the initial cost of £19 per household, and that the factor's failure to instruct these repairs had resulted in the play park falling into 'a state of total disrepair,' such that it now required £6000 worth of maintenance. He complained that the factor had charged

homeowners for insurance which was null and void, and for unnecessary signage and inspections. He further complained that the factor had recently been canvassing homeowners to vote on the complete removal of the play park equipment, which was in breach of the title deeds.

Code complaints

12. **Section 1** – the homeowner complained in his written notification to the factor dated 16 September 2014 that it had failed to provide him with its written statement of services within the timescales set out in section 1. As he was an existing homeowner at the time of the factor's registration, the relevant paragraph of section 1 states:

You must provide the written statement:

- *to existing homeowners within one year of initial registration as a property factor. However, you must supply the written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies).*

The homeowner stated that he was only provided with a copy of the written statement when he asked for a copy due to his ongoing complaint.

13. **Sections 2.1 and 2.2-** the homeowner complained in his written notification to the factor dated 16 September 2014 that a letter he had received from them dated 30 April 2014 with the heading 'Highlighting Debt' was wrongly worded, and 'was understood by most homeowners to be intimidating and threatening'. He said that the letter failed to communicate that irrecoverable debt can only be spread amongst other homeowners if the debtor had been 'made bankrupt etc.' He said that the letter had caused great concern to some elderly homeowners. The homeowner referred only to section 2 in his notification letter, and the committee concluded on the basis of this letter that his complaint related to sections 2.1 and 2.2 of the code, which state:

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

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

14. **Section 7.1-** in his written notification to the factor dated 16 September 2014, the homeowner complained that the factor's complaints procedure does not give timescales for resolving complaints. He also complained that the factor had failed to comply with its own procedures by not acknowledging most of his letters of complaint and responding to advise him of timescales and procedures for resolving his complaints. The homeowner referred only to

section 7 in his notification letter, and the committee concluded on the basis of this letter that his complaint related to section 7.1 of the code, which states:

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

Statement of reasons for decision

Duties complaint

15. The first issue which the committee had to consider related to when the alleged failure to comply with the property factor's duties took place. The homeowner's complaint related primarily to matters which occurred from 2010 onwards, although he also stated that the factor should have been carrying out routine maintenance of the play park equipment between 1995 and 2010. In terms of regulation 28 of the regulations, the committee only has power to consider a complaint about a failure occurring after 1 October 2012. The committee could not therefore make a determination about any failure prior to that date.

16. Regulation 28 (2) provides, however, that the committee may take into account any circumstances occurring before 1 October 2012 in determining whether there has been a continuing failure to act after that date. Therefore the question to be considered by the committee was whether the factor had failed to comply with its duties after 1 October 2012, while having regard to events prior to that date.

17. In establishing what the factor's 'duties' comprised, the committee considered the terms of 1) the Deed of Conditions for the development and 2) the factor's generic 'Service Level Agreement' and 'Schedule of Management Information' for the property, which taken together, essentially constitute its written statement of services.

18. Clause (Fourteen) of the Deed of Conditions sets out the powers of the 'managing agents' i.e. the factor, as regards the development. These include the power 'to order and arrange to be executed any maintenance of the open amenity areas as they in their judgement shall consider necessary to implement their obligations and duties in terms hereof including.....the payment of wages of gardeners or others in keeping up or laying out the open amenity areas and of the cost of play equipment (if any)'. The factor also has powers to: 'exercise the whole rights and powers which may be competently exercised at any meeting of proprietors property convened'; decide on ,take out and maintain the common insurance policy/policies required to be taken

out by proprietors; collect annually from the proprietors an equal share from all proprietors of the costs of insurance and maintenance of the open amenity areas; sue proprietors for unpaid debts where necessary; and, failing recovery of this money, recover it from the other proprietors.

19. The 'service level agreement' 'states that the factor offers a full management service or grounds maintenance only service. The 'Schedule of Management Information' for the property states that the factor provides a grounds maintenance service, comprising the following:
    - To arrange the maintenance of the common grounds and manage the contractual obligations that arise.
    - We visit the property on a regular basis and where necessary, attend Committee meetings and report to the association Annual General Meeting.

    The service level agreement divides repairs into three categories: emergency works, routine repairs and major repairs.

20. The homeowner's primary argument was essentially that the repairs to the play park equipment were routine repairs, which should have been carried out on an ongoing basis from 1995 onwards. The factor's position, however, was that these were major repairs and as such, required the agreement of a majority of owners in line with the title deeds, and funding from the owners prior to instructing the works. In his written response of 30 January 2015 to the committee's direction, Mr Fulton stated that routine expenditure covered 'grass cutting and other associated grounds works, POL insurance, play park inspection, play park insurance, and our management fee'. Such routine expenditure was generally covered by the float for the development, as provided for in the title deeds.

21. In the factor's written representations of December 2014, Mr Fulton stated that the current float is £87 per owner, and that running expenditure per owner for the previous 4 years had varied between £96 and £112 per owner. Owners were invoiced annually in arrears, and in these circumstances the factor did not have access to funds, which was why the factor had sought both homeowners' instructions to incur the expenditure and funding to enable the works to proceed. The 'service level agreement' states that where major repairs are required, competitive estimates will be sought; that clients will be advised of the costs of instructing any major repairs; and that in the event that repair costs exceed the available funding, clients may be asked to provide additional funding to cover the shortfall.

22. It was clear from the written evidence before the committee that the factor had written to homeowners on numerous occasions about the repair of the play

park equipment between 2010 and 2014. Mr Watt explained that the factor carries out on-site inspections at the development 4 times a year. The committee notes that this is in line with its service level agreement, which states that an inspection will be carried out by a property manager a minimum of twice a year. He explained that the play park was also inspected twice a year by an external company, Dunlop Play Services, which produced a report to the factor, including a risk weighting, the relevant sections of which were sent to the owners on each occasion.

23. Mr Watt explained to the committee at the hearing that the play park within the development was a large site, and the play park equipment within it consisted solely of a 'kiddie cabin' (consisting of steps up to a small 'house' and a slide down) and a seat. He said that the park was not used by residents, as there was a better play park close to the development, and the park was being used by youths playing football and had been vandalised. This was the reason why many owners were reluctant to pay for the repairs. He explained that the 'kiddie cabin' is made of wood, and in 2010 the third party inspection identified that some of the timber required replacement, due to gradual deterioration over time. He advised that repairs had not been considered necessary by Dunlop Play Services until 2010. He stated that prior to that time, the state of the equipment had been classed as a low risk.

24. The inspection report dated 22 August 2010 before the committee classified the 'kiddie cabin' as medium risk. It also identified various recommended actions, including replacing rotting timber and corroded metal, sealing rubber at the edges, replacing plugs and building up the ground around the impact absorbing surfacing. A quote dated 13 September 2010 from Plato Scotland was obtained for a price of £3045.60 including VAT, a cost of £52 per property. On 15 September 2010, the factor wrote to all homeowners within the development enclosing that quote, together with a mandate seeking their agreement to carry out the works. A reminder was sent on 1 October 2010, and on 30 November 2010, the factor wrote to homeowners advising that due to a lack of response from proprietors, the proposed work would not proceed.

25. Following a further third party inspection of the play park, the factor again wrote to homeowners on 16 March 2011, advising that there were a number of urgent repairs required to the play park equipment. On 27 April 2011, the factor again wrote to homeowners, enclosing an estimate for the necessary repairs amounting to £3265.20 including VAT, and again enclosing a mandate. Following a further reminder sent on 13 May 2011, the factor again wrote to homeowners on 10 June 2011, advising that due to a lack of response/agreement, the work would not proceed. On 19 September 2011, following a further third party inspection, Mr Watt again wrote to homeowners

pointing out that they were liable to maintain the play park equipment and asking for comments.

26. On 13 April 2012, Mr Watt again wrote to proprietors, following a further inspection, to advise that the 'kiddie cabin' timbers were in an advanced state of rot, causing the platform to collapse, and that repairs costing £311 were required in order to make this safe. Given the liability of the homeowners for any third party injuries, he stated that the work would be instructed unless a majority disagreed within 14 days. This work was carried out, and Mr Watt confirmed to the committee that given the sums involved, this was paid from the float funds. Mr Watt again wrote to homeowners on 17 September 2012 following a further play park inspection, recommending that repairs be carried out. On 2 April 2013, he wrote to homeowners advising that some had asked whether the play park equipment could be replaced, rather than repaired, and enclosing an indicative quote of £20,000 for replacement.

27. In July/August 2013, work was undertaken to close the entrance to the play park and erect a 'playground closed' sign for safety reasons. The cost of this work was £348 including VAT. On 25 July 2013, Mr Watt wrote to homeowners advising that the play park repairs would not proceed due to lack of agreement by owners, and that those who had paid their share of the cost would be reimbursed. On 20 May 2014, Mr Watt wrote to homeowners recommending that the play park equipment be removed, due to its condition and the possible liabilities arising from this, and enclosing three estimates for the work. On 11 June 2014, he again wrote to homeowners, stating that the insurer had advised that owners must make the necessary improvements within 30 days or it would remove liability and material damage cover from the play area. He therefore recommended that proprietors agreed to the removal of the play equipment. On 16 July, he again wrote to proprietors with an estimate from Plato Scotland for £5286 for repairing the play equipment.

28. A residents' meeting was held on 11 September 2014 to discuss the play park, which 28 owners attended, constituting a quorum in terms of clause (Eleven) of the Deed of Conditions. Of those in attendance, 27 voted in favour of removing the play park and seeking planning consent for this. When asked by the committee why the factor had not called a meeting about the matter earlier, Mr Watt said the factor had taken an incremental approach, by writing out about the repairs first, then reminding owners about the liability insurance. He said that the proposals had kept changing, partly at the behest of some homeowners, from repair to replacement to removal. It had eventually got to the stage where a final decision was necessary.

29. On balance, on the basis of the evidence before it, the committee determined that the factor had not failed to comply with its duties as a property factor after

1 October 2012. While the factor has powers under the Deed of Conditions to arrange for maintenance and repairs within the common areas, including the play equipment, these are powers rather than duties. Ultimately, the duty to keep the common areas maintained falls on the owners, and while the factor acts as their agent, it can only carry out repairs where it has sufficient funds to do so, as set out in its 'service level agreement'.

30. The factor had written repeatedly to homeowners since 2010, asking for their agreement to the repairs and for funds to enable these to be instructed. The factor had demonstrated that since 2010, the cost of repairs was at such a level that this could not be covered by the float for the development. Even in 2010, the evidence from the factor shows that the cost per household was £52. The homeowner referred several times in the correspondence to a cost of less than £20 per household at the time the repairs issue was first raised, and stated in his letter of 23 December 2014 that Mr Watt and Mr Frew had recently agreed with him on this in conversation. He provided no evidence to substantiate this figure, however. When asked by the committee, Mr Watt suggested that this sum may have related to the costs for putting up signs in the park and/or closing it off, although the committee notes that in both cases the total sum was around £300, which would represent a much smaller amount to each homeowner.

31. The committee can only consider whether the factor has failed to comply with its duties as a property factor after 1 October 2012. It observes, however, that the August 2010 inspection report makes reference to severe corrosion to the metalwork and that the timber is in an advanced state of rot. The factor stated that repairs were not considered necessary until that point, and there was little evidence before the committee as to the situation prior to that date. The committee observes, however, that this does raise the question of whether repairs might have been appropriate at some earlier date, and whether the cost of doing so then might have come to less than £3000. The committee also observes that no agreed authority level for repairs is set out either within the Deed of Conditions or the service level agreement, and considers that had this been the case, such a situation might be avoided in future.

32. The committee also observes that it might have been helpful for the factor to have held a proprietors' meeting at an earlier stage, rather than continuing to send out correspondence about the play park issues. At the hearing, Mr Watt said that the factor had tried to encourage proprietors within the development to form a proprietors' association, but that this had been unsuccessful. The homeowner stated that the meeting held in September 2014 was the first proprietors' meeting which had been called since the development was built in 1995. The committee notes that Clause (Twelve) of the Deed of Conditions provides that each proprietor within the development shall be a member of the

Proprietor's Association to be formed for the purposes of dealing with all matter of common interest affecting the proprietors, including the maintenance, insurance and use of the open amenity areas. It also states that the first meeting of the Association shall be convened by the developer or the Managing Agents and held at an appropriate time to be determined by the developer or the Managing Agents. There is no requirement for this meeting to be held by any particular date, but the committee does observe that it might be expected that this would have taken place at an earlier date than almost 20 years after the development was built.

33. The committee does not uphold the homeowner's complaint that the factor charged homeowners for insurance which was null and void. Under clause (Four) of the Deed of Conditions, the proprietors are obliged to keep the open amenity areas (including the play equipment) insured by way of a common insurance policy against all risks normally covered by a Property Owners and Public Liability Insurance Policy. In terms of clause (Fourteen) of the Deed of Conditions, its service level agreement and the accompanying schedule, the factor maintains such a policy and collects premiums from homeowners. The evidence suggests that his policy is still in place, albeit with an endorsement relating to an excess of £2500 (formerly £10000) in respect of the play park and equipment pending repair or removal, which owners were advised of in October 2014.

34. Neither does the committee uphold the homeowner's complaint that the factor had charged owners for unnecessary signage and inspections. The homeowner's complaint provides little detail about this complaint, but the committee considers on the basis of the evidence that the erection of the 'playground closed' sign was necessary for safety reasons. With regard to inspections, it is not clear whether this referred to the inspections undertaken by the factor or the third party inspections. If the former, carrying out such inspections forms part of the factor's duties under its 'service level agreement'. If the latter, the committee considers that continuing to request such inspections was reasonable, at least until the play park was closed off.

35. Finally, the homeowner complained that the complete removal of the play park equipment was in breach of the title deeds, and that the factor should not have been asking homeowners to vote on this. In terms of clause (Thirteen), the factor is bound to act in accordance with instructions of the proprietors, provided such instructions do not conflict with the obligations contained in the Deed of Conditions. The committee notes that the Deed of Conditions states at Clause (Eleven) that the play area will not be built upon, but will remain as a play area. It further notes, however, that while there is reference to the co-proprietors' responsibilities for the maintenance of play equipment, Clause (Fourteen) refers to the maintenance of play equipment *'(if any)'*. This implies

that the developer did not necessarily envisage play equipment being present within the play area. Planning permission was obtained from North Lanarkshire Council on 15 January 2015 for the removal of the play equipment. This provides that the land formerly occupied by the play equipment is to be grass seeded, and within 3 months of this, 'the padlock shall be removed from the gates to this play space so that it remains available for informal use.' This suggests that the space may continue to be used as a play area.

36. The committee therefore determines that in seeking an owners' vote on the removal of the play equipment, and subsequently seeking planning permission from the local authority, the factor was not in breach of its duties under the title deeds. Given the condition of the play equipment, it was a health and safety risk, and increased owners' liability in the event of any injury resulting from the equipment. In these circumstances, in arranging for the removal of the play equipment the factor was in fact acting in the best interests of the proprietors.

Code complaints

37. **Section 1** – the committee does not uphold the homeowner's complaint. As the property factor was registered on 13 August 2013, it had a duty to provide the homeowner with a copy of its written statement of services by 13 August 2014. The homeowner did send an email to the factor's Managing Director on 18 August 2014, requesting a copy of the written statement of services, which he stated he had not received so far, in order to take his application to the panel. The Managing Director responded the same day, attaching a copy of the 'service level agreement' to her email. The factor enclosed with its written representations a copy of a letter addressed to the homeowner and his wife headed 'Schedule of Management Information Applicable to 3 Swallow Road' dated 17 August 2013, which makes reference to 'the enclosed Service Level Agreement'. Mr Watt and Mr Fulton stated at the hearing that these documents had been sent to the homeowner on that date.

38. In his letter dated 23 December 2014, the homeowner stated that neither he, nor his immediate neighbours, had received a copy of the written statement prior to his complaint, and that he considered it 'suspicious this copy sent to you has suddenly appeared and is dated 17th August 2013'. He queried why the factor had not sent a copy of this letter to him when he later requested the written statement. On the basis of the evidence available to it, and in the absence of the oral evidence of the homeowner, the committee determines that the factor has not failed to comply with its duty to send the written statement of services to the homeowner within a year of its registration as a property factor.

39. **Sections 2.1 and 2.2** – the committee does not uphold the homeowner's complaint. At the hearing, Mr Fulton advised that the letter of 30 April 2014 was intended to be informative, and to meet the factor's obligation under section 4.6 of the code of conduct i.e. to keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them. He stated that the terms of the letter had been agreed with the factor's legal advisers, and that in his experience such letters usually had a positive result in persuading debtors to pay up. This was the only such letter which had been sent to all homeowners, and that a separate letter had been specifically sent to the debtor in question. When asked by the committee whether any complaints or concerns had been received from homeowners about the letter, he said he had no recollection of any such complaints. Mr Watt confirmed that he had received no correspondence from the homeowner about this matter prior to his notification letter of 16 September 2014.

40. On the basis of all the evidence available to it, the committee does not consider that the letter contains false or misleading information. Contrary to the homeowner's assertion, the letter does state that the factor would take all appropriate steps to recover unpaid sums from defaulting owners, including registration of a Notice of Potential Liability, and that recovery would only be sought from all owners as a last resort. The committee also determines that the letter is not abusive or intimidating, but sets out the position with regard to ongoing debt within the development, and the steps which would be taken to recover that debt if necessary.

41. The committee observes, however, that the wording and structure of the letter might have been improved upon. The first paragraph states: 'We refer to our on-going management of your development and write to advise that, under the terms of the Property Factors Act, we are required to keep proprietors updated with regard to any ongoing debt issues within their development, *which may ultimately result in irrecoverable debt being spread amongst all proprietors.*' The committee considers that it might have been advisable to omit the words in italics (the committee's emphasis) from the opening paragraph -this is not a necessary part of complying with the obligation under section 4.6 of the code, and there is reference to this matter later in the letter.

42. **Section 7.1** – the committee had before it three different versions of the factor's complaints procedure. The homeowner had submitted with his application a copy of the factor's 'service level agreement' dated May 2014, which included information about its complaints procedure, and also stated that further details of the complaints procedure were available on its website. He also submitted an undated copy of the complaints procedure itself. The factor also submitted with its written representations a copy of an updated

'service level agreement' dated September 2014, which incorporated its complaints procedure.

43. The homeowner's first complaint was that the factor's complaints procedure does not give timescales for resolving complaints. Section 7.1 requires the factor to 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.'* The committee concluded that this infers that there is a requirement to include timescales for each step of the process. The committee noted that neither of the first two documents included such timescales. Given that the homeowner's complaint letters to the factor were dated between June and August 2014, the only conclusion which the committee could reach is that the complaints procedure which was in existence at the time he made his complaints was that set out in these two documents.

44. Mr Fulton advised the committee at the hearing that the September 2014 version of the service level agreement was updated during August and issued in early September. The committee therefore determines that at the time of the homeowners' complaints to the factor, its complaints procedure did not specify timescales. It was apparent that the factor had since taken steps, firstly to clarify its complaints procedure by incorporating this within the service level agreement and secondly, to include timescales for dealing with complaints. The September version states: 'it is our aim to respond fully to your complaint within 21 working days'. While not entirely clear, it appears from the wording and structure of the document that this relates to the first stage of the procedure, which is dealt with by the property manager or appropriate head of department.

45. There are, however, two further stages of the complaints procedure - firstly, to the appropriate Service Director, and then, if the homeowner remains unhappy, to the Managing Director. The procedure does not provide timescales for either of these stages of the process to be completed. When questioned about this, Mr Fulton and Mr Watt were hesitant in their answers. Mr Fulton indicated that in these circumstances, the factor's general timescales for replying to correspondence would apply. At the time of the homeowner's complaints to the factor, there were no clear timescales stated. This was later addressed to some extent in the September 2014 version, but this still does not provide timescales for the two later stages of the process.

46. The homeowner also complained that the factor had failed to comply with its own procedures by not acknowledging most of his letters of complaint and responding to advise him of timescales and procedures for resolving his complaints. The homeowner submitted four letters of complaint to the factor

with his application. These were dated 16 June, 18 July, 8 and 18 August 2014. In the letter of 16 June, addressed to Mr Watt, and copied to Mr W. Frew, Senior Property Manager, he referred to it as a 'letter of complaint'. A response dated 25 June was sent by Mr Watt. The homeowner was unhappy with the terms of this response and wrote to Mr Frew, copying the letter to Stephen Bell, Associate, on 4 July, again setting out his concerns and stating that he was unhappy with the response to his complaint. The homeowner stated in his application that no reply was received, but in an email to the homeowner dated 23 July 2014, Mr Frew said he had not received this letter.

47. The homeowner then wrote on 18 July to Mr Bell, who was named in the complaints procedure as the appropriate contact for second stage complaints, copying the letter to Mrs Irene Devenney, Managing Director. The homeowner stated in his application that no reply was received to that letter. He then wrote a letter of complaint to Mrs Devenney, who was also named in the complaints procedure as the last stage contact, on 8 August. Mrs Devenney responded to this letter on 12 August. Following a reply from the homeowner dated 18 August, Mrs Devenney also wrote to him to 20 August 2014.

48. It appears from his application and enclosed correspondence that the homeowner believed that his letter dated 16 June was a letter of complaint. It also appears that, despite being in the process of updating its complaints procedure at the time, the factor did not treat this letter as a complaint. In none of the correspondence mentioned was there any acknowledgement that the homeowner had made a complaint, and there was no reference to the next stage of the procedure, should he be unhappy with the response.

49. The first occasion on which the homeowner's complaints appear to have been treated as such was a letter from Mr Fulton dated 15 October 2014, which states that it is a response to his formal complaint. This responds to the various points raised in the homeowner's written notification letters of 16 September. At the end of the letter, details are given of the homeowner housing panel. This suggests that the factor's in-house complaints procedure has been exhausted in terms of section 7.2 of the code, which also requires the final decision to be have been confirmed with senior management before notifying the homeowner.

50. The factor did not therefore comply with its own complaints procedure, as the final stage complaint should have been dealt with by the Managing Director. When asked by the committee when a complaint became a 'formal complaint', Mr Fulton appeared to be unclear, suggesting that it was when the factor decided that it is no longer a matter of correspondence. He said that he felt his answers were unlikely to resolve the homeowner's complaints, so he took

the view that the complaints procedure had been exhausted, and referred the homeowner to the panel.

51. It was clear from the written representations and oral evidence before the committee that the factor was unclear about how its complaints procedure was intended to operate, and that it did not deal with a matter which was clearly labelled as a complaint by the homeowner according to that procedure. Given this, and the lack of clear timescales for each stage of the process under the written procedure, the committee determines that the factor has failed to comply with its duties under section 7.1 of the code.

52. The committee observes that, while it is not an explicit requirement of section 7.1, it would be good practice by the factor when dealing with future complaints to set out clearly in any complaints correspondence the stage at which the complaint is currently being considered, and to provide details about the next stage of the procedure, should the homeowner be unhappy with the response.

Proposed Property Factor Enforcement Order

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

Right of appeal

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

(1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or homeowner housing committee.
(2) An appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made.

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

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

Chairperson Signature : Sarah O'Neill Date 12/3/15