Decision of the Homeowner Housing Committee

(Hereinafter referred to as "the Committee")

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

Case Reference Number: HOHP/PF/14/0135

Re : Property at Flat 1/2, 11 Rhindmuir Gate, Glasgow G69 6EW ("the Property")

The Parties:-

Mrs Annmarie Kenna (also known as Anne Marie Kenna), Flat 1/2 11 Rhindmuir Gate, Glasgow G69 6EW ("the Applicant")

First Stop Properties Limited, trading as Pfams, 37 Cadzow Street, Hamilton ML3 6EE ("the Respondents")

The Committee comprised:-

David Bartos - Chairperson
David Godfrey - Surveyor member
Brenda Higgins - Housing member

Decision

1. The Respondents have failed to comply with section 14(5) of the Property Factors (Scotland) Act 2011 through breach of sections 2.2, 3.2, 3.3, and 4.6 of the Code of Conduct for Property Factors.

2. The Respondents have failed to exercise reasonable skill and care in cutting grass for the common area as defined in the Deed of Conditions ("the Deed") registered in the Land Register of Scotland for the title to the Property on 20 February 2007 by The Bothwell Development Company Limited, which is a failure to carry out property factor's duties as defined in section 17(5) of the Property Factors (Scotland) Act 2011.

3. The Applicant's other complaints are rejected.

Background:-

4. By application received on 15 September 2014, the Applicant applied to the Homeowner Housing Panel ("HOHP") for a determination that the Respondent 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"). The application alleged breaches of sections 1.1a, c,d,f, 2.1, 2.2, 3.2, 3.3, 4.6, 4.7, 6.1, 6.4, 6.9, 7.1, and 7.2 of the Code. The Applicant also sought a determination that the Respondent had failed to comply with other property factor's duties owed to the Applicant.

Findings of Fact

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

   (a) The Property is a flat which is part of the Rhindmuir Gate development in the Baillieston area of Glasgow. The development comprises five blocks of flats with a terraced house attached to one of the blocks. The blocks are numbered 3 to 11 (odd numbers), Rhindmuir Gate. Within each block there are four flats. The end terraced house is numbered 1 Rhindmuir Gate and adjoins the block at 3 Rhindmuir Gate. There are two car parks, one being adjacent to the blocks numbered 3, 5, and 7 and adjacent to the blocks numbered 9 and 11. The Property is within the block numbered 11.

   (b) The Applicant is the owner of a share of the Property along with Michelle Kenna and has owned that share since 2 April 2007. Her title is registered in the Land Register of Scotland under title number LAN194113. The title includes a share of commonly owned land and commonly owned parts of the block of which it forms part. The commonly owned elements of the Property are set out in the Deed of Conditions mentioned below. The Applicant resides at the Property.

   (c) The Property is burdened by a Deed of Conditions ("the Deed") registered in the Land Register of Scotland on 20 February 2007 by The Bothwell Development Company Limited. The development, including the other flats in the development and the terraced house are also burdened by the Deed. The development, for the purposes of the Deed is outlined in red on the title plans for the various flats and house. It takes in the whole of the cul de sac street known as Rhindmuir Gate which extends southwards to Rhindmuir Road, the verges bounding the tree screen of the M8 motorway to the west, the car parks, the blocks of flats, the house and areas of grass between them.

   (d) The terms of the Deed are set out in the Burdens Section of the Applicant's title at entry number 3. In terms of the Deed, the owner or owners of a flat or the house are described as a "Proprietor" and there are separate definitions of "Common Area" and "Common Parts".

(e) In the Deed, "Common Area" is defined to mean,

"the public open spaces, common or amenity ground or open spaces, common access roads, pavements, footpaths, all car parking spaces and all sewers, drains, pipes, cables, boundary fences . . . and hedges enclosing the same and common lighting and generally all ground within the Development which is not disponed by the Developers for ownership by individual Proprietors or groups of Proprietors."

"Common Parts" are defined to mean,

"in relation to a Block on the Development . . (i) the solum on which each Block is erected; the . . . outside walls, gables, roof and roof space. . . and any chimney vents and stalks of the Block . . . (ii) the drains, sewers, soil and rain water pipes, water supply pipes . . . and all pipes, cables, wires, flues and transmitters and connections so far as used in common by the Proprietors of more than one Flat in a Block; (iii) the entrance vestibule and canopy (if any), hall, stairs, staircase, passages, landings, walls and ceilings enclosing same; the hall . . . and staircase lighting; the hall . . . and staircase carpeting (if any) covering the same; the common electricity meter. . . (iv) the security telephone system regulating access to the Block (if any). . . the door bells and letter boxes at the front entrance of each Block (if any) and any other part of the Block which is used in common by two or more Proprietors including the plot . . .".

(f) Clause (FOURTH) of the Deed provides, among other things

"So far as regards each Flat and the Block of which it forms part having been erected by the Developers: -

Common Parts-Ownership

(1) Each Proprietors of a Flat shall have an equal pro indiviso right of property in common with the other Proprietors of the Flats in the same Block to the Common Parts of the said Block.

Maintenance of Common Parts of a Block

(2) Each Flat shall be held by the Proprietor thereof in all time coming under the obligation jointly with the other Proprietors of Flats in the building in the same Block of upholding and maintaning in good order and repair and from time to time when necessary renewing and restoring the Common Parts of the said Block and of cleaning, repainting and decorating the said Common Parts. All expenses and charges incurred under the foregoing obligation and of other work done or services rendered in respect of the said Common Parts shall be payable by the whole Proprietors of Flats in the same Block in equal proportions. . . ."

(g) Clause (THIRD) of the Deed provides, among other things

"*Common Area*

(1) The Common Area, so far as not occupied by buildings . . . or roadways, access paths, footpaths or parking shall be laid out and maintained as ornamental garden or pleasure ground . . . and shall be maintained as such in a neat and tidy condition and when necessary renewed by all Proprietors in all time coming. . .

Maintenance

(2) The Proprietors of each Block shall jointly maintain all buildings and erections thereon in good order and repair . . .

The End Terraced Dwellinghouse

(3) The proprietor of the end terraced dwellinghouse shall maintain the dwellinghouse and the pedestrian path leading thereto in good condition and repair at their own expense and shall contribute along with the proprietors of Block 1 [3 Rhindmuir Gate] an equal share of the cost of maintenance of the garden ground in front of and behind Block 1 and the end terraced villa."

Clause (FIFTH) (1) provides that in clauses (FIFTH) to (TENTH) "Flat" includes the house adjoining the block at 3 Rhindmuir Gate.

Clause (SEVENTH) provides, among other things,

"*Roads and Services*

. . once so constructed the Proprietors within the Development shall be bound and obliged to maintain unbuilt on and in good order and repair . . . any such roadway, spaces, footpaths [adjoining the same] and car parking spaces . . . unless the same or any of them are taken over for maintenance by any public authority . . . ".

Clause (EIGHT) provides, among other things,

"*Common Area*

In respect that the Common Area has been designated by Developers as amenity ground, roadway or footpath and car parking spaces . . . each and every Flat being under the burden of each individual Proprietor thereof being liable for an equal share, or such other equitable share as may be determined by the Developers or by the Manager of maintaining the same as public open spaces, amenity ground, roadway, footpaths and /or visitor car parking spaces in a neat, tidy and proper condition unless and until the said portions and others or any part of them are conveyed to or are taken over by any public authority or other party or parties and maintenance. . .".

Clause (NINTH) provides, among other things for the appointment and dismissal of a factor described as a "Manager", and the liability of a Proprietor to the Manager for expenses and charges and remuneration incurred by the Manager. Its material provisions are set out in the reasoning below.

(h) The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 9 January 2013. At that time the Respondents were the Manager of the development in terms of the Deed of Conditions. They issued a Statement of Services to the Applicant.

(i) From January 2014 the Applicant received invoices from the Respondents. These included "monthly management fees", "monthly ground maintenance" and "monthly communal cleaning". Other than in September 2014 the invoices did not explain how the sums for these items had been reached. None of the invoices explained the services involved unde these headings.

(j) The Applicant complained about the cleaning of the close in her block to the Respondents. The Respondents informed their cleaning contractors of this and provided them with the Applicant's address. The contractors left a note on the door of the Property. The Applicant was not informed by the Respondents beforehand to expect any contact from the contractor. She felt intimidated and threatened by such a note from the contractor.

(k) By e-mail of 7 May 2014 to the Respondents the Applicant asked whether the latest electricity invoice for the development had been split between 21 properties. Among other things she asked for a copy of that invoice and sought an explanation for the rise in insurance premium. She also complained about the quality of the Respondents' quarterly inspections and the leaving of notes by contractors.

(l) By e-mail of 12 May 2014 Respondents did not reply to the question about the electricity invoice, nor did they provide a copy of the invoice. Instead they stated that their "accounts office" would respond to the Applicant's "accounts queries". They denied there was any lack of transparency in their invoices. Thereafter the Respondents' Stephanie Nisbet sent an e-mail to the Applicant stating that the electricity was "split over the properties".

(m) By e-mail of 25 June 2014 to Respondents, the Applicant complained about among other things the lack of transparency in the bills and breaches of section 1E, 1C, 2.4, 3,3, 5.3, 6.7, and 6.8 of the Property Factor Code of Conduct. She also complained about the lack of response to her insurance query and about the grass cutting. She indicated that a Residents Association was being set up and that she and 11 neighbours would prefer to change factor and that a meeting to consider the way forward would be held in August or September.

(n) The Respondents' director Mr Alistair Laurie replied with an e-mail of 4 July. He asked for details of the intended Residents Association but did not address the question of their continuanation as factors. He asked what further details the Applicant required on the Respondents' invoices.

(o) The Applicant in her e-mail of 6 July 2014 (which may or may not have been received by the Respondents and which was copied to them again on 26 July), enclosed a petition with the signatures of twelve homeowners stating that they wished to terminate the contract with the Respondents. She also explained that the Respondents' invoices should set out the fraction of the whole sum that a homeowner was being asked to pay as required by the Code of Conduct. She complained about the note left on the door of the Property by the Respondents' cleaning contractor.

(p) In his response by e-mail of 6 August 2014 to the Applicant, Respondents' Mr Laurie stated among other things,

> "There is debt of in excess of £ 10,000 currently in the development and once this is paid we will agree to this as it is very obvious that regardless of what we do or say that your mind is made up . . . We wonder if the other Factors would be so "enthusiastic" if they were aware of the debt in the development – are they willing to take on this debt ?"

The Applicant had not been informed of such debt previously. No indication was given in the e-mail that the Respondents would be seeking to recover this debt from other homeowners such as the Applicant or that they had an entitlement to recover the debt in that way.

(q) At a meeting of residents of the development on 9 August 2014 the homeowners of 14 units voted to terminate the Respondents' appointment as factor for the development. The Applicant was appointed Chairman of the Rhindmuir Gate Residents Association. By e-mail of 11 August 2014 to the Applicant, Respondents suggested that they terminate factoring the development on 30 September. In her e-mail of 12 August 2014, on behalf of the Rhindmuir Gate Residents Association, the Applicant intimated the outcome of the meeting and accepted the Respondents' suggestion.

(r) The Respondents held £ 200 from the Applicant as a float. This was in terms of clause (NINTH) of the Deed of Conditions. When the Respondents indicated that they would be terminating their factoring, she informed them that they could use the £ 200 to meet their invoices.

(s) The Applicant received Respondents' invoices covering the period of May to July 2014 in August 2014. With their letter of 29 August 2014 she received a statement. This statement debited her with the invoices for May, June and July. It also debited her with 1/16 of a "development bad debt" of £ 9,487.65, amounting to £ 592.98 and a "schedule of bad debt" listing the debts of the owners of 5 properties allegedly owed to the Respondents. It credited her with "common buildings insurance" sum of £ 164.27 and stated that the amount due by her was £ 557.76.

No prior warning of a claim for a "development bad debt" had been made by the Respondents.

(t) By letter dated 29 August 2014 addressed to each homeowner the Respondents intimated they they would cease to act as factors after 30 September 2014. They also enclosed the said statement, invoice, credit note and in this letter gave notice for the first time that they were charging the owners of 16 properties who had not defaulted in payment with the debts due by the owners of the remaining 5 properties. They sought payment within 14 days under threat of legal proceedings and the registration of a notice of potential liability. They also indicated that they had demanded payment within 7 days from the owners of the 5 properties as set out in the schedule.

(u) The Respondents had not raised proceedings against any of the 5 owners whose debts they were seeking to recover from the Applicant and other non-defaulting homeowers. They had entered into payments plans with these 5 owners. The non-defaulting homeowners were not informed of the payment plans or any decision of the Respondents not to take action against the 5 owners. The Respondents have not provided any details of the payment plans to the non-defaulting homeowners, including the Applicant.

(v) On 31 August 2014 the Applicant sent an e-mail to the Repondents setting out various issues that she required to be resolved The focussed in particular on charging of the outstanding debt onto the 16 non-defaulting owners and enclosed a list of other complaints, including the failure to show apportionment of charges between owners.

(w) On 19 September 2014 the Applicant received a statement from the Respondents. This statement did not begin with the amount due from the previous statement. It included an item being an unspecified credit of £ 35.22 which was dated 28 August and should have been on the previous statement. It also debited her with a 1/16 share of a "bad development debt" reduced to £ 5,416.71 being £ 338.54 and stated that the amount due by her was £ 303.32.

(x) On 20 September 2014 the Applicant responded with an e-mail to the Respondents complaining about among other things a failure to break down the figures shown as bad debts in the statement. There was an e-mailed reply to this from Respondents' Jennifer Laurie after business hours on 23 September. This in turn led to a further e-mail from the Applicant on 24 September and a further reply from Respondents on 25 September by e-mail.

(y) On about 23 September 2014 she received a further statement. This again did not begin with the amount due from the previous statement. It repeated the credit of £ 35.22 and contained three debits, namely £ 46.15 being for unspecified "goods/services", £ 25.00 for unspecified

"goods/services" and £ 312.75 being a 1/17 share of a bad debt. It stated that the amount due was £ 348.68. In their covering letter dated 23 September the Respondents demanded payment by return of either £ 270.20 or £ 302.53 under threat of legal proceedings.

(z) On or about 23 September 2014 she also received a letter from solicitors for the Respondents, Leonards. This letter sought to answer various aspects of the Applicant's application to HOHP which she had made in the meantime.

(aa) On 3 October 2014 she received a letter from Alex M Adamson LLP, debt collectors, stating that they had been instructed to recover an overdue account amounting to £ 277.53 and that unless payment was received in full within 7 days a court action for recovery would be raised. No breakdown of the £ 277.53 was provided. By e-mail of 17 October 2014 Messrs Adamson agreed to take no further action until resolution of the dispute was agreed by all parties.

(bb) On 8 December 2014, the Applicant received a further statement from Respondents. Again this did not begin with any amount due from any previous statement It began with a wholly unexplained debit balance of £ 10.93. This was then followed by three debit entries for unexplained "goods/services" dated 23 September, 31 October and 24 November and a further debit for "amended 1/17th of development debt as per attached sheet" of £ 223.97. The float of £ 200 was credited on 31 October 2014. It stated the "amount due" to be £ 106.43.

(cc) The Applicant does not dispute the individual debits in the statements apart from those relating to bad debts. She accepts the individual credits. If the debits relating to bad debts are ignored, the debt owed to the Respondents at 1 October 2014 was £ 44.24. Setting that off against the float of £ 200 left the Respondents due to pay the Applicant £ 155.76 from the float on that date. After 1 October 2014 the Respondents' debits on 31 October and 24 November left the Respondents due to pay the Applicant £ 117.54 from the float.

(dd) The Applicant has not paid any of the sums demanded from August 2014 onwards by the Respondents.

(ee) On or about 1 April 2015 the Applicant received a further statement from Respondents. Again this did not begin with any amount due from any previous statement. Instead it appeared to supersede the last 5 entries in the 8 December 2014 statement. Four of those entries remained the same but the fifth namely the debit for "amended 1/17th of development debt as per attached sheet" was reduced to £ 91.86. It enclosed a cheque for £ 25.68 payable to the Applicant.

(ff) The Respondents did not raise proceedings against any of the homeowners whose debts they were seeking to recover from the Applicant and other homeowers. They entered into payments plans with the owners whose debts they were seeking to recover from the Applicant and other homeowners.

(gg) There were dead insects left in the Applicant's close which remained after the Respondents ceased factoring on 30 September 2014.

(hh) Grass cutting was one of the Respondents' duties as factors. They sub-contracted this to contractors. During 2014 the contractors did not clear the grass cuttings from the grass. They blew cut grass around the lawns with a blower, leaving a fine layer on the grass. The cut grass also entered the blocks of flats.

(ii) The Applicant suffers from Crohn's disease. The dispute with the Respondents had caused her lost nights of sleep, took away from enjoyment of her life. On some days she could not sleep because of the stress of the caused. She was particularly taken aback at the Respondents' comments about her made in their letters to other homeowners in November 2014.

6. Following submission of the Application the HOHP clerk raised with the Applicant the need for her to notify the property factor of why she considers that the factor had failed to comply with the Code or failed to comply with any other duty of the property factor. The Applicant intimated a complaint under sections 3.3, 4.6, 4.7, 4.9, 6.1, 6.4, 2.2, and 2.5 of the Code by letter to the Respondents dated 8 October 2014. She did not seek to amend her application to include a complaint under sections 2.5 and 4.9. For that reason those sections have not been considered as part of the application.

7. During October and November there was various correspondence passing between the parties which dealt with the Application. This included letters from the Respondents dated 27 October, 6 November, 24 November, 25 November and 27 November 2014 and from the Applicant dated 28 October, 7 November and 1 December 2014. In addition, in response to the potentially defamatory statements contained in the letter of 27 November and the similar letters dated 24 or 25 November sent by the Respondents to other homeowners represented by the Applicant, the Applicant lodged character witness statements and correspondence from Mrs Helen Lindsay, Yvonne Doyle, Gary Spence, and Mr W. Simpson.

8. The letter from the Respondents to the Applicant dated 27 November did seek to respond to the grounds of complaint in the application and can be seen as forming part of the Respondents' response to it.

9. 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 Applicant and to the Respondents on or about 15 December 2014.

10. Following intimation of the Notice of Referral, the Respondents sent a further letter dated 18 December 2014 to the Applicant. They also intimated further written representations in a letter of 30 January 2015 to HOHP and indicated that they wished an oral hearing. In the letter the Respondents objected to the Application and the applications of other homeowners where the Applicant was acting as their representative being dealt with as one complaint. The Committee proceeded to hear all of the applications together. It has however dealt with them separately. The objection was therefore rejected.

11. The Respondents also complained about the Applicant acting as representative of the other applicant homeowners on the basis that this was not "fair". The Respondents did not give any reason as to why this should be unfair and the Committee could see no reason why the Applicant could not act as representative for the other applications. This complaint has no substance. Before leaving this matter, the Committee observes that having heard the Applicant both in presenting her own application and that of her fellow homeowners, acted in a reasonable manner with propriety and courteousness.

12. Following their nomination on or about 12 February 2015, the Committee issued a direction to the parties dated 9 March 2015. Following the direction the Respondents made further submissions by two e-mails dated 17 March and two e-mails dated 18 March 2015. Along with one of the 17 March e-mails were further productions. The Applicant sent two further e-mails to HOHP dated 11 and 16 March 2015. In that of 11 March the Applicant alleged that the Property had been left uninsured by the Respondents during September 2015. That complaint was new and made late in the day and no amendment to the application was sought. In the circumstances the Committee exclude it from their consideration.

13. The parties also lodged productions. The first bundle lodged by the Applicant contained an inventory and very helpfully had its pages numbered consecutively from page 1 to page 100. The Applicant also lodged bundles of documents with handwritten heading sheets, and also with the e-mails of 11 and 16 March 2015 in response to the Direction. The Respondents lodged various bundles of productions also.

14. The Committee fixed a hearing to take place at Europa Building, 450 Argyle Street, Glasgow G2 8LH for 19 March 2015 at 10.30 a.m. The date and times were intimated to the Applicant, and the Respondents by letter sent on or about 12 February 2015.

The Evidence

15. The evidence before the Committee consisted of:-

- The application form and its attachments
- The Applicant's productions with pages numbered 1 to 100
- The Applicant's productions with handwritten header pages
- The e-mails and letters, statements, invoices and credit notes mentioned above
- The letters dated 24 November 2014 from the Respondents to Mrs McConway, Mr Spence, Mr & Mrs Doyle, Mr Wood & Ms Graham, Ms Hardie and Mr & Mrs Simpson
- The oral evidence of the Applicant
- Registers Direct Land Register Title copy for LAN194113 (Flat 1/2, 11 Rhindmuir Gate)
- The statements issued by the Respondents to Ms Hardie and Ms McConway dated 29 August 2014
- The letter dated 26 September 2014 from the Respondents to Mr and Mrs Simpson.
- The statements issued by the Respondents to Miss Kenna, Mr and Mrs Simpson, Ms Hardie, and Mr Spence all dated 1 April 2015 and statement issued by the Respondents to Mr Spence dated 27 April 2015.

The Hearing

16. The hearing took place on 19 March 2015 at 10.30 a.m. at the venue fixed for it. The Applicant attended the hearing. There was no appearance on behalf of the Respondents. On the day prior to the hearing the Respondents indicated to HOHP that no-one on their behalf would be attending and that they were content nevertheless for the hearing to go ahead without the opportunity of responding to any oral representations at the hearing.

17. The only evidence given was that by the Applicant. The Committee found that she gave evidence in a candid fashion, answered the questions from the Committee as best as she could and had no reason to doubt her credibility and reliability. Her evidence, which understandably overlapped with her submissions, is summarised in the reasoning below and was accepted.

18. Following the hearing the Committee issued directions dated 24 April and 30 April 2015 to which they received further written representations and productions.

Reasoning - Section 1.1a - c,d,f of the Code

19. Section 1.1a of the Code provides,

    "You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. . . . The written statement should set out:

    c. the core services that you will provide. This will include target times for taking action in response to requests for both routine and

emergency repairs and frequency of property inspections (if part of the core service);
d. the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified; . . .
. . . f. what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion this should be stated."

20. The Applicant's complaint was that the Statement of Services provided by the Respondents did not give enough detail about what was being done, such as the frequency of close cleaning, what was being cleaned in her close, the cutting of grass and shrubs. She submitted that it would be beneficial to have a programme of works and a schedule of work carried out posted up in the close setting out the work that had been done.

21. In the event, during the course of the hearing the Applicant confirmed that she was not prepared to argue and insist on her complaint under section 1.1a while reserving her position on whether as a matter of fact the statement was accurate. The Committee therefore refuses this ground of complaint. However this should not be taken by the Respondents as an endorsement of the content of the Statement of Services, particularly in the light of the Committee's findings under section 3.3 of the Code.

Section 2.1 of the Code

22. At the hearing the Applicant spoke to what had been said to her on the telephone as misleading. Thus for example she had been told that the close was being cleaned weekly, but then correspondence from the Respondents indicated that it would be done "every fortnight" or "periodically".

23. She had been sent a one page programme of works together with the Respondents' letter of 25 November 2014. However this was after the Respondents had ceased to be factors.

24. This was not mentioned in the application form or in subsequent correspondence from the Applicant to HOHP, which has been copied to the Respondents. The form merely mentioned "false accusations" without specifying them. While the Respondents did not appear at the hearing and so are precluded from objecting to evidence at the hearing on matters raised in the application, the Committee finds that the Respondents had no fair notice of the discrepancy between the frequency as stated in the telephone calls and as stated in the programme of works. In these circumstances it would be unfair on the Respondents to find them in breach of section 2.1 on this basis. Given that no other basis was given for

a breach of section 2.1, the Committee rejects the compliant under section 2.1.

Section 2.2 of the Code

25. Section 2.2 of the Code provides,
    "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).".

26. The Applicant's complaint was that she had felt threatened and intimidated when the Respondents had sent contractors to her front door. At the hearing she explained that in June 2014 her partner Thomas Ritchie had telephoned the Respondents on her behalf to express her dissatisfaction over the cleaning in her close. In particular dead insects had entered the close and not been removed. There was a bobble of insects on the landing. On returning home she had found a note on the door from the cleaner saying that they had been made aware of the complaint and asking her to telephone them. Her door had been the only door in the close with the note. She saw this as evidence that the Respondents had passed on her personal details to the cleaning contractors. Her initial thought was that possibly the cleaning contractor had lost the contract as a result of her complaint and viewed the note as a threat.

27. Fairly, the Applicant indicated that the Respondents had in their Alistair Laurie's e-mail to her of 6 August 2014, stated that they had given the contractors her flat number so that they could contact her to see what was her source of discontent, and that no intimidation had been intended.

28. The Respondents' Jennifer Laurie e-mailed the Applicant on 23 September 2014 claiming that when their staff spoke to the cleaner about the complaint, the cleaner guessed it was the Applicant who had complained and one day when passing the cleaner tried to contact the Applicant and when she was not in left the not on her door. The Respondents submit that they did not send the contractor to the Applicant's door and by implication that the note was not a communication by them.

29. Section 2.2 is concerned with communications by factors to homeowners. The complaint just set out did not involve a direct communication by factor to homeowner. However it appears to the Committee that section 2.2 can also cover indirect communications through the means of agents or representatives. Was the note on the door such a communication from the Respondents ? At first glance it might be seen as a communication from their contractors rather than them. However what the Respondents were seeking to do was to find out from the Applicant the exact nature of her dissatisfaction. In these circumstances the Respondents were in effect using their contractors to find this out and for that purpose they supplied

the Applicant's flat number to the contractors. Therefore the Committee finds that this was a communication from the Respondents.

30. The Committee notes the contradiction between the two e-mails from the Respondents. That of 6 August is closer to the events in question. Furthermore there is no reason why the contractors should have been able to "guess" that the complainer was the Applicant rather than any other owner within No.11. In these circumstances the Committee prefer the version given in the e-mail of 6 August as to how the note came to be present.

31. Was this communication in any way abusive, intimidating or threatening ? This must be assessed objectively by reference to a homeowner in the position of the Applicant reacting reasonably upon receipt of the communication but also taking account of the personal sensitivities of the homeowner if these were known to the factor at the time of communication.

32. The Committee has no evidence that the Respondents were aware of any personal sensitivities of the Applicant. However the posting of the note must also be seen against the background of the Respondents' Statement of Services which provides in paragraph 2 on page 6 that they would respond to telephone calls with a call back and that if a full response could not be provided within the same day they would confirm this by e-mail, telephone or letter with an indicated timescale for a full response. In that light to find a note on the door from contractors without any warning from the Respondents in circumstances where she had an ongoing complaint with the Respondents over service presumably done by the contractors was something which a person in the Applicant's position might reasonably find intimidating or threatening. There was a breach of section 2.2 in this respect.

33. This is not to say that the mere posting of such a note by a contractor on the door of a homeowner will automatically be seen as intimidating or threatening. It will all depend on the circumstances of the individual case.

34. The Applicant also submitted that she had felt intimidated by parts of the last paragraph of the letters of 24 November 2014 which Respondents had sent to Ms Hardie, Mr Spence and Mr Wood and Mrs Graham, neighbours with flats at No.9, Mr and Mrs Simpson of No.1, Mrs McConway of flat 0/2 at No.5, and Mr and Mrs Doyle of flat 1/2 at No.5. These letters post-dated the application and were in effect a response to each said homeowner's application. The Applicant said that she had required to go to the Police as a result of the accusations made against her in those letters. The Committee also notes that a similar accusation was made direct to the Applicant in the last paragraph of a letter from the Respondents dated 27 November 2014. The Committee notes that in an e-mail to HOHP dated 27 November 2014 the Applicant denied the allegation made in the last paragraph of those letters.

35. The Applicant had not sought to amend her application to introduce this complaint. In these circumstances the Respondents had no notice that the matter would be the subject of a complaint to the Committee and therefore no opportunity to respond. For these reasons Committee concludes that as it would be both incompetent and unfair on the Respondents to consider this complaint.

36. Before leaving this matter the Committee makes the following observations: Firstly the Applicant refuted the accusations at the hearing and did so convincingly. Secondly, the provisions of section 2.2 are focussed on the avoidance of threats and intimidation to the recipients of the communication in question. In these circumstances communications by factors to homeowners about other homeowners are not covered by section 2.2. Thirdly, and not least, the Respondents should be aware that such communications can be potentially defamatory (libellous) and can lead to unnecessary conflict which can be damaging both to their business as well as to individual homeowners.

Section 2.5 of the Code

37. The Applicant confirmed that she was not insisting on this complaint.

Section 3.2 of the Code

38. Section 3.2 of the Code provides,

> "Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of the final bill following change of ownership or property factor."

39. The Applicant's submission was that the Respondents had credited the float to her but instead of returning it to her had set off against it other debt which they claimed was outstanding.

40. The Respondents accept that they credited the float to her but claim that they were entitled to set it off against her share of the "development bad debt" mentioned in the statements issued by them. Is such a set off well founded ? The factual circumstances are as set out above.

41. Section 3.2 provides that upon a change of homeownership or property factor, upon the settlement of the final bill, the factor is obliged to return any funds of that homeowner held by the factor which are due to the homeowner less any outstanding debts of the homeowner. This is essentially a milder version of the default position at common law under which a factor must return any deposit or float at the termination of the factoring contract unless he is entitled to set off against that deposit any instantly verifiable ("liquid") outstanding debts due by the homeowner.

42. In the present case the Applicant's claim is for return of £ 155.76 being the balance of float after all debts owed by her and credits given to her are

taken into account other than the alleged debt in respect of a share of a development bad debt.

43. The Applicant may well be due a return of this sum at common law on the basis of unjustified enrichment, given that the existence of and quantum of any development bad debt would not appear to be something that can be set off against a returnable float or deposit. That could be something for the small claims court. However in this application to HOHP she founds not on the common law but on section 3.2, which only obliges return if all debts due have been settled (whether or not liquid).

44. This brings to centre stage the question of whether she is due to pay the Respondents a share of what is described as a development bad debt. The sum that is claimed by Respondents is in fact a claim for payment under what they say is a joint and several obligation of all homeowners to meet all factors' fees and outlays. If such an obligation existed any one homeowner could be liable to the factor for the whole of the factors' fees and outlays, leaving him or her to then claim against the other homeowners for relief in respect of their shares. Clearly this could be potentially very burdensome for a homeowner, although it is possible that a factor cannot sue one homeowner to claim more than the homeowner's share without at the same time also suing all others who are claimed to be jointly and severally liable.

45. The Applicant not being legally qualified had no specific submission to make on this matter at the hearing. However in an e-mail dated 4 May 2015 the Applicant submitted that there was no joint and several liability because clause NINTH of the Deed of Conditions required the prior consent of the homeowners and this had not been sought or given.

46. The Respondents produced a letter from their solicitors to the Applicant dated 23 September 2014 in which the solicitors submitted that all owners were "jointly" liable in terms of the Deed of Conditions to pay factor's costs and that this obligation was repeated in the Tenement Management Scheme created under the Tenements (Scotland) Act 2004 and in particular rule 5 of the Scheme. Subsequently in their e-mail to the Committee of 17 March 2015 Respondents resiled from the submission that the Deed of Conditions imposed joint and several liability. Instead they claimed the joint and several liability arose at common law, regardless of the terms of the Deed of Conditions. However after the hearing through a further letter from their solicitors, this time to HOHP, dated 29 April 2015 the Respondents appeared to submit once again that the Deed of Conditions imposed joint and several liability.

47. A factor is a type of agent. The common law of Scotland provides that unless parties otherwise agree, where more than one person instructs an agent to act on their behalf, each instructing person is jointly and severally liable for any fees and outlays which the agent is entitled to claim (*Walker on Law of Contracts and Related Obligations,* para. 27.8; and *Murdoch v. Hunter* (1815) Faculty Collection, February 15). It is also the case that the

terms of the contract between the agent (factor) and the instructing client can modify or exclude this common law rule.

48. The *Murdoch* case is an example of the exclusion of the common law rule. There four creditors of a bankrupt claimant in Ayr sheriff court agreed with the claimant's solicitor that they would meet the solicitor's expenses in representing the claimant in the sheriff court, each of them bearing "a proportion effeiring to [their] respective debts" owed to them by the bankrupt. The Inner House of the Court of Session decided, by a majority, that the words quoted above displaced the common law rule and that the creditors were not jointly and severally liable to the solicitor for the sheriff court expenses incurred by him. There is no substance in the implicit suggestion from the Respondents' solicitors that the Court of Session found that the creditors were jointly and severally liable to the solicitor for his expenses in the sheriff court.

49. It is accepted that in the present case the Respondents have taken on the role of property factor in terms of clause NINTH of the Deed of Conditions. In the Deed of Conditions the factor is described as the "Manager". The relevant part of clause NINTH provides,

> "It shall be competent at any relevant meeting of the Proprietors or Proprietors of Flats by a majority of the votes of those present, (First) to order to be executed any common or mutual operations and repairs. . . (Fourth) to appoint any one qualified person or firm . . . to have charge and perform the various functions to be exercised in the care, maintenance and management of the subjects owned in common, . . . and (Sixth) to delegate to the Manager the whole rights and powers exercisable by a majority vote at any relevant meetings, . . . and the right to collect from each Proprietor the proportions payable by him, her or them respectively of all common maintenance and other costs and management charges including payment in advance by way of a float from each Proprietor of a minimum of [£200]. . . . towards the cost of maintenance and repair of the Common Parts; it is declared that the Manager, unless otherwise determined at a meeting, shall be entitled during the continuance of is appointment to exercise the whole rights and powers which may be competently exercised at or by a meeting of Proprietors as aforesaid; and it is declared that all expenses and charges incurred for any work done or undertaken or services performed in terms of or in furtherance of the provisions of this clause or otherwise and the remuneration of the said Manager shall be payable by the respective Proprietors whether consenters thereto or not in equal proportions in the same way as if their consent had been obtained and shall be collected by the said Manager . . . and in the event of any Proprietor or Proprietors so liable failing to pay his, her or their proportion of such common maintenance charges and others or such expenses, charges and remunerations within one month of such payment being demanded the said Manager. . . such Proprietor [*sic*]. . shall bear interest at a rate equivalent to five percent per annum above the base lending rate of the Royal Bank of Scotland plc from the date of demand until payment and the Manager or other person or persons

appointed as aforesaid shall (without prejudice to the other rights and remedies of the Proprietors) be entitled to sue for and to recover the same in his own name from the Proprietor or Proprietors so failing together with all expenses incurred by such Manager . . . provided that it shall be in the option of the said Manager . . . before or after taking any action to call a meeting of the Proprietors to decide if and to what extent, such action should be pursued and that in the event of failure to recover such payments and/or the expense of any action then such sums will fall to be paid by the other Proprietors; declaring that so long as the Developers remain the owners of any part of the Development the power to appoint a Manager shall vest in us as Developers alone.".

50. It was submitted by the Respondents' solicitors that clause NINTH simply re-stated the common law position. The majority of the Committee take the view that clause NINTH does not do so. A re-statement of the common law position would simply have provided for each "Proprietor" whose duties are discharged by the Factor to be jointly and severally liable for the expenses of such discharge with the other Proprietors sharing such duties. Instead, with a view to fairness as between Factor and Proprietor, clause NINTH set out an alternative scheme. That scheme is complex and difficult to understand.

51. Firstly the scheme provides that the share of liability of a homeowner to the factor should be no different to their liability without a factor. That is apparent from the words "in equal proportions in the same way as if their consent had been obtained". This is a reference back to the liability for equal share in the absence of a factor as set out in clause FOURTH (Two) and EIGHTH of the Deed. Secondly, the scheme provides for the recovery by the factor from a homeowner of a payment representing that share.

52. Thirdly the scheme enables the factor, before or after taking any recovery action against the homeowner to call a meeting of the homeowners as a whole to decide if and to what extent such recovery action should be pursued. The significance of such a meeting is in relation to the fourth element of the scheme. This provides that "in the event of failure to recover such payments and/or the expense of any action then such sums will fall to be paid by the other Proprietors".

53. This fourth element puts the exclusion of the common law rule of joint and several liability beyond doubt. The liability of the other homeowners is made dependent on a "failure of recovery" from the homeowners principally liable. To reach such "failure" might entail a lengthy process. It might require sequestration (bankruptcy) of the homeowner principally liable. It is in order to give the factor a possibility of relief from having to pursue such a potentially burdensome course, that he is given the option of calling a meeting of homeowners to allow them to decide the extent to which such course must be pursued. An important matter for the factor will be the prejudice to his cash flow from non-payment. If non-payment is significant this may affect his ability to carry out the factoring tasks if there is significant non-payment. An effect on cash flow may be a motive for the

factor to call such a meeting. At such a meeting the homeowners might decide to accept their liability for a fellow homeowner's debt without requiring the factor to achieve "failure of recovery" or take the risk of the factor terminating his appointment.

54. There was no evidence of Respondents having sued any homeowner on the development or of any meeting having been called by Respondents in order to allow the homeowners to decide whether to waive the requirement to sue defaulting homeowners. Instead the Respondents chose, quite freely, to put payment plans into place with the defaulters. There was no evidence of breach of these payments plans. For all the Committee is aware, the plans where the debt has not been repaid may still be force. In these circumstances it cannot be said that there has at any stage been "failure to recover" such debts or payments.

55. It follows from this that in the view of the majority of the Committee there is no basis under which the Applicant can have become liable for the "development bad debt". It also follows that Respondents are liable to repay to the Applicant that part of the float that remains after the accepted debts have been set off against it. They have not returned this sum and are thus in breach of section 3.2 of the Code.

56. One member of the Committee takes the view that rights of recovery of the Respondents under clause NINTH applied only where they were acting as factors under that clause and that once the Respondents received notice that their appointment as factors was to terminate, they were no longer able to register a notice of potential liability against any homeowner. Once this inability to register the notice occurred, the Respondents acquired a right to recover any sums then due and unpaid by the defaulting homeowners from the other homeowners. On this basis the member takes the view that the Applicant became liable for the "development bad debt" and that the Respondents were entitled to set sums owed by them to the Applicant (including any float) against that debt. On this member's view there was no breach of section 3.2 of the Code.

57. The Respondents' submission in respect of the Tenements (Scotland) Act 2004 fails to take account of section 4(7) of that Act which provides that rule 5 of the Tenement Management Scheme within that Act applies only where there is no tenement burden providing for the liability of homeowners in the event of an owner's share of costs being irrecoverable. Given that the provisions of clauses FOURTH, EIGHTH and in particular NINTH of the Deed of Conditions cater for such a situation, rule 5 of the Tenement Management Scheme cannot apply to the Property.

58. The Committee also observes that while the Applicant no longer founds on a breach of section 1 of the Code in relation to the Statement of Services, the Committee's finding indicates that the provisions of paragraph 5 ii and iv on page 4 of the Statement are incorrect.

Section 3.3 of the Code

59. Section 3.3 of the Code provides,

> "You must provide . . . in writing at least once a year (whether as part of billing arrangements or otherwise). . . a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying subject to notifying the homeowner of this charge in advance."

60. The Applicant complained about a lack of clarity in the invoices issued by the Respondents. For the monthly ground maintenance and monthly communal cleaning there was no indicates of dates of visits. This detail used to be provided and then it ceased. There was no specification of the fraction of the overall cost that a homeowner was paying. Other homeowners had been concerned about this. The only invoice with fractions was that of 22 September 2014. Even that invoice should have provided for a quarter share of the communal cleaning of 11 Rhindmuir Gate to reflect the Deed of Conditions. No annual statements were ever provided. In her e-mails of 31 August and 20 September 2014 to Respondents the Applicant also sought detailed breakdowns showing how the debts sought to be recovered were made up. The Respondents' submissions rest on the invoices being sufficiently detailed. With regard to the statement of "bad debts" their solicitors provided a breakdown of the invoices and interest comprised in the alleged bad debt of Mr and Mrs Mowat, but not of the other alleged bad debts for which the Respondents were charging. The unpaid invoices themselves were not provided.

61. The preamble to section 3 of the Code provides,

> "While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is that they are paying for, how the charges were calculated, and that no improper payment requests are involved."

62. The Committee finds that the invoices issued to the Applicant in 2014, with the exception of that of 22 September all failed to contain a detailed financial breakdown of charges. It is quite unclear how the figures in the invoices were reached. The fraction being charged was unclear. All of the invoices failed to identify in any meaningful sense what "Ground Maintenance" was. Given that the figure for this item was the same whether it was for January or August, a homeowner is entitled to wonder what the ground maintenance activities were. Similar criticisms apply to "Communal Cleaning" albeit this may be expected to the largely the same over a year. A number of activities may be subsumed under "Communal Cleaning". What were they ? The Respondents leave the Applicant in the dark. Transparency is lacking. In these circumstances the Committee finds a breach of section 3.3.

63. The same observations apply to the schedules of "bad debts" which the Respondents were seeking to recover. There is no reason why the level of clarity given to a homeowner for his or her own invoices should not apply to invoices of defaulting homeowners which the Respondents are in effect seeking to pass on to that homeowner. In this case the invoices of the defaulting homeowners were not even supplied to the Applicant, and no breakdown of debt was provided in respect of the defaulting homeowners except for Mr & Mrs Mowat. There was thus a breach of section 3.3 in relation to the schedules of bad debts also.

Section 4.1 of the Code

64. Section 4.1 provides,

> "You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts."

65. The Applicant submitted that the Respondents lacked such a procedure, despite their Statement of Services stating on paragraph 2 under "Financial and Charging Arrangements" "We have a debt recovery procedure in place which is available on request.". From her dealings with other homeowners she understood that no-one had received a copy. Having spoken to Mr Mowat who had been one of the Respondent's debtors behind the "bad debt" claim, she understood him to confirm that nothing like a written debt recovery procedure had been sent out. She was first provided with a document headed "Debt Recovery Procedures" in November 2014 after the Respondents' factoring had ceased. There was no submission in response from the Respondents.

66. The Committee understands the Applicant's submission and her suspicions that the written procedure did not exist during the Respondents' period of factoring. It is curious that Mr Mowat had not been informed of the procedure, but in fairness the Code requires it to be given only on request. It may be that he never requested it. In these circumstances the Committee concludes that the evidence is insufficient to allow it to infer on a balance of probabilities that the "Debt Recovery Procedures" document was not in existence at the material time. This complaint is therefore rejected.

Section 4.3 of the Code

67. The Applicant confirmed that this was not being insisted upon.

Section 4.6 of the Code

68. Section 4.6 provides,

"You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation)."

The Applicant said that the first that she heard of any debt recovery problem was in the Respondents' e-mail from Alistair Laurie to her dated 6 August 2014.

69. The Respondents admit that they did not inform the homeowners, including the Applicant, sooner about the debts mentioned in that e-mail. They say that "as all the owners were making payments" and they never intended while remaining factors of asking the other homeowners to pay a share of the debts, they did not take the view that there was as debt recovery problem or even if there was, a problem which could have implications for the other homeowners. The Applicant makes the point that there was never a guarantee that the Respondents would remain as factors.

70. The question of whether a homeowner has a debt recovery problem and if so whether such a problem had implications for homeowners must be assessed objectively. It will not suffice for a factor to say that he did not believe that there was a problem or that it held no implications for homeowners.

71. The level of debt was stated in the e-mail to the Applicant of 6 August to be "in excess of £ 10,000". The schedule of bad debt attached to the statement issued by Respondents to the Applicant at the end of August 2014 discloses total debts to be recovered from homeowners of £ 9,487.65. The Committee was not informed of the terms of the payments plans that the Respondents have alleged were in place with the defaulting homeowners. However clearly whatever had been agreed in the plans was not sufficient to prevent the Respondents from demanding payment from the other homeowners and also from the defaulting homeowners themselves once intimation of the termination of the factoring had been given. The inference from the making of such demands must be that these payments plans were or are wholly unrealistic to allow the Respondents to recover the debt within a reasonable period of time. In these circumstances the Committee finds that there were debt recovery problems of other homeowners.

72. Given the level of the debts and the possibility that they might be irrecoverable within a reasonable timescale from the Respondents' point of view, there was an implication for the homeowners as a whole that either the Respondents might wish to seek payment from the other homeowners pursuant to a meeting under clause NINTH or terminate the factoring or both. That the Respondents chose for a period of time not to seek payment from other homeowners, did not prevent the debt recovery problems from being liable to pose serious implications for other homeowners. In these circumstances the Committee finds that in failing to inform the Applicant of the difficulties in recovering the debts disclosed at

the end of August 2014 before that time, the Respondents breached clause 4.6 of the Code.

Section 4.7 of the Code

73. Section 4.7 of the Code provides, "You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs."

74. The Applicant explained that she felt that the Respondents had done nothing about the debts, one of which was more than 4 years old. Another debt was around £ 4,000 when she learned of it in August 2014. Mr Mowat, one of the debtors, had defaulted on his payment plan.

75. She submitted that the Respondents had written to the debtors and asked for payment in 7 days. She had asked for details of the outcome of any court action against the defaulting debtors, but had not received any.

76. The Respondents have purported to answer this complaint by stating that no court action was taken against the debtors because the debtors were making payments to account. No details of the payments to account have been provided.

77. It appears to the Committee that the only step taken to recover unpaid charges was for the Respondents to enter into payments plans with the debtor homeowners. No information about the payment plans has been supplied. There is nothing to indicate that the terms of the repayment in the plans was or was not reasonable. However the fact that upon notification of termination of their factoring the Respondents reacted by charging the outstanding amount to the other homeowners and re-charging the defaulting homeowners with a fresh demand for payment points to the terms of the plans being unreasonable. No evidence has been given even of a threat of court action, even though some of the debts were many thousands of pounds.

78. In these circumstances the Committee is clear that the Respondents have not demonstrated the taking of reasonable steps against the debtors before 29 August 2014, when they charged the other homeowners. Had the other homeowners been jointly liable with the defaulting homeowners for such charges, the Respondents would have been in clear breach of Section 4.7 of the Code. However given the majority of the Committee take the view that the other homeowners, including the Applicant are not jointly liable, there was no breach of Section 4.7. On the minority view it is felt that the Respondents did try to recover the outstanding sums due by defaulting owners. Payment plans were put in place and recovery was ongoing. However it is clear that one of the owners failed to comply with the agreement and once the Respondents were given notice that their services were no longer required they had to seek recovery from all owners.

Section 6.1 of the Code

79. Section 6.1 of the Code provides,

> "You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required."

80. The Applicant complained that there was no available telephone line for contacting the Respondents to report non-emergency matters requiring attention. She said that when one phoned the telephone number on the Statement of Services, the caller was told that it was "Let's Let" and not Pfams. Let's Let was a business related to the Respondents. When one phoned the "accounts enquiries" number on the invoices one was told that they only handled payments. The Statement of Services did not have any contact number for repairs other than for emergencies.

81. The Applicant had telephoned on a number of occasions in April 2014 to complain about a faulty light at the entrance to her close, the changing of lock of the cupboard in her close and other matters, but after the Respondents' failure to respond she had been forced to send the e-mail dated 7 May 2014 to the Respondents' manager setting out her complaints in writing.

82. She also complained about the delay in the lighting repair being attended to and to the lack of improvement in the grass cutting following a complaint about the lack of uplift of grass cuttings. Despite the Respondents apparently speaking to their contractor, as late as September 2014 the cuttings had been blown around the garden area as evidenced through their entry into the buildings.

83. The Respondents submit that "everyone answers all the phones in each of our offices and would either deal with or pass on any reports of faults or repairs.". They state that they do not have a dedicated number for non-emergency repairs as they were not required to do so. This is supported by the e-mail of their Mr A. Laurie to the Applicant of 12 May 2014 where he refers to having tried to contact the Applicant's partner and left messages. With regard to the individual complaints the Respondents apologised for the delay in the lighting repair.

84. In addition Respondents' Statement of Services provides, on page 6 in relation to "Communication Arrangements",

> "In the majority of cases your call will be dealt with on the same day. If this is not possible we will endeavour to call back by the end of the following day. In the event that a full response cannot be provided within this period, we will confirm this, by telephone, email or letter and intimate our anticipated timescale for returning with a full response.".

The Statement does not have any threshold below which job-specific progress reports are not required.

85. The Committee has heard the oral evidence of the Applicant on the response when phoning the telephone numbers given by the Respondents and has no reason to disbelieve her. It accepts that evidence.

86. However it does appear that despite the initial response from the Respondents to phone calls, attempts were made by the Respondents to contact her or her partner. Repair to the lighting was carried out. The question under section 6.1 is whether the Respondents had a procedure in place to allow notification by homeowners of matters requiring attention. It is not about how effectively that procedure was followed. In the light of the Statement of Services and the lack of any detailed evidence of it not having been followed, the Committee finds no breach of section 6.1 of the Code.

Section 6.4 of the Code

87. Section 6.4 of the Code provides, "If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works."

88. The Applicant submitted that no programme of works had ever been prepared as far as she was aware while the Respondents carried out the factoring. Only in November 2014 after the termination of their appointment had they issued a programme of works. The Respondents denied this, indicating that a copy had not been given as they did not think that it had been required.

89. The Programme of Works document was sent to the Applicant with Respondents' covering letter of 25 November 2014. A complaint about the lack of schedules of work had in fact been made by the Applicant in her e-mail to Respondents of 7 May 2014. It was not answered before the making of the application.

90. It is regrettable that the Respondents did not provide the Programme of Works document in response to the e-mail of 7 May 2014. However the Committee cannot conclude that the document was not in place at that time. It finds that there was no breach of Section 6.4 of the Code.

Section 6.9 of the Code

91. Section 6.9 of the Code provides, "You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.". However it must be implicit that section 6.9 applies only if the factor has been made aware of the defects in service or inadequate work in question.

92. The Applicant explained that she felt that all that the Respondents had done was to notify a complaint to their contractors but then had not monitored whether the remedial work had been carried out. As an example, she gave was the lack of cleaning of dead insects in the close where despite her complaint it had remained until removed by the new factors. This example was not set out in the Application.

93. The Respondents' response is contained in their letter of 27 November 2014, albeit it is stated with reference to section 2.5. They state that they spoke to the contractor and did visits to check the cleanliness of the close which appeared to be "okay".

94. The Committee sees no reason to doubt the Applicant. However it is unable to see any evidence that the Respondents were informed of the dead insects thereby triggering their obligation under section 6.9. It is also unable to assess whether the Respondents' alleged contact made with the contractor and visits related to the dead insects issue or not. Accordingly the Committee finds that the applicability of section 6.9 has not bee established and that in any event a breach of section 6.9 has not been established.

Section 7.1 of the Code

95. Section 7.1 of the Code provides,
"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."

96. The Applicant submitted that the Statement of Services had the only complaints procedure that had been disclosed. It did not deal with the disclosure of homeowners' names, which is something that she would not have expected to happen. The Committee finds that while section 7.1 does seem to require a document separate from the written statement of services required in Section 1, if the requirements of section 7.1 are satisfied within the written statement of services, failure to have a separate document would not amount to a breach of section 7.1.

97. In the Statement of Services the complaints procedure on page 6 is sufficiently wide to allow complaints about disclosure of names to be made. The Committee finds no breach of section 7.1 of the Code.

Section 7.2 of the Code

98. Section 7.2 of the Code provides,
"When your in-house complaints 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.".

99. While breach of section 7.2 is mentioned in the application there was no evidence to show that the final decision was not confirmed by senior management. The involvement of Alastair Laurie, a director of the Respondents tends to suggest otherwise. The Committee find no breach of section 7.2.

Duty to cut grass to a reasonable standard

100. The Applicant complains about a number of breaches of "property factor's duties". In the language of the Property Factors (Scotland) Act 2011 these are duties which are not in the Code of Conduct. The first of these duties is a failure to cut the grass to a reasonable standard. The Applicant complains that the grass cuttings were not removed but rather blown over the estate. This complaint was made in her e-mail to Respondents of 25 June 2014. She spoke to the grass contractors blowing the cut grass around the lawns with a blower, leaving a fine layer on the grass. Other owners had mentioned it. Despite letting the Respondents know the position had not improved.

101. The Respondents in their e-mail to the Applicant of 4 July 2014 wrote that they would look into the matter and speak to the contractors, asking her to keep them informed if she continued to be unhappy with this service. In their e-mail of 6 August to the Applicant, Respondents stated that they had spoken to the gardeners and asked them to be more careful in dealing with grass cuttings, again asking the Applicant to inform them if there was no improvement. There does not appear to have been any further complaint from the Applicant. However shortly afterwards the Respondents' appointment was terminated in any event.

102. The Committee has no reason to doubt the evidence of the Applicant. It is accepted by the Respondents that grass cutting was one of their duties as factors. It is self-evident and appears to be accepted by Respondents that reasonable care in cutting grass requires the grass cuttings to be uplifted and removed rather than blown around the lawn. In these circumstances the Committee finds that the Respondents did breach their duty to cut grass with reasonable care in failing to remove the cuttings.

Duty not to disclose debtors' names without warning

103. The Applicant complains that the Respondents failed to give warning to the defaulting debtor homeowners that their names would be disclosed to the other homeowners. She explained to the Committee that owners thought that a warning of disclosure should have been given. The Committee understands that the Applicant's interest in this aspect of the application is as Chairperson of the Rhindmuir Gate Residents' Association.

104. The Committee is not aware that as a matter of general common law a creditor has a duty to keep the name of his debtor confidential. Is there

anything about the relationship between factor and homeowner to modify the general law ? One would expect to find this in the Statement of Services or Deed of Conditions. Not only is there no modification of the common law but clause NINTH of the Deed of Conditions allows the factor to call a meeting homeowners to decide whether and if so to what extent court action should be pursued against a defaulting homeowner. In these circumstances there was no duty of confidentiality at common law on the Respondents in respect of the names of defaulting homeowners. It follows that there was no duty at common law keep names confidential until a prior warning was issued. There was no breach of factor's duty by the Respondents in this respect.

105. The Applicant has not presented the Committee with a complaint based on the Data Protection Act and so has not considered the impact of that Act in relation to the Applicant.

Property Factor Enforcement Order

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

107. Part (1) of the proposed order seeks to provide compensation to the Applicant for the stress, anxiety and worry that she has suffered as a result of the breaches of sections 2.2, 3.3, and 4.6 of the Code, respectively. Compensation of £ 200 has been assessed in respect of the breach of section 2.2 and £ 350 in respect of the other sections.

108. Part (2) of the proposal seeks to remedy the failure to return the balance of the float that is outstanding. Part (3) seeks to provide compensation for the breach of factor's duty in taking reasonable care to dispose of grass cuttings over the spring and summer of 2014 and has taken account of the payments made over that period for the ground maintenance.

109. The Applicant seeks an apology for the breach of section 2.2 of the Code in relation to the contractor's note. The Committee has considered whether it is necessary for the Respondents to make an apology in that respect. The breach caused distress to the Applicant at the time. Some time has now passed since that incident. The Respondents have ceased factoring. The distress has been taken account of in the award of compensation made in part (1) of the order. In these circumstances it is not considered that an ordered apology for the communication via the contractors would afford any meaningful benefit to the Applicant.

Opportunity for Representations and Rights of Appeal

110. The Applicant 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 the Notice of Proposal and this decision.

111. 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.

112. 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 Respondent has failed to comply with the Code of Conduct it must make a property factor enforcement order. Both parties will then have a right to appeal on a point of law against the whole or any part of such final decision and enforcement order.

113. In the meantime and in any event, the parties are given a right of appeal on a point of law against this decision by means of a summary application to the Sheriff made within 21 days beginning with the date when this decision is "made". All rights of appeal are under section 22(1) of the Act.

Signed ....Date: 11 July 2015
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David Bartos, Chairperson