Decision of the Homeowner Housing Committee

(Hereinafter referred to as "the Committee")

Under the Property Factors (Scotland) Act 2011

Case Reference Number: HOHP/PF/14/0139

Re : Property at flat 1/1, 9 Rhindmuir Gate, Glasgow G69 6EW ("the Property")

The Parties:-

Mrs Anne Marie Hardie ("the Applicant") Flat 1/1, 9 Rhindmuir Gate, Baillieston, Glasgow G69 6EW (care of her representative Ms Annmarie Kenna, 1/2, 11 Rhindmuir Gate, Glasgow G69 6EW)

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 Committee having no jurisdiction to deal with the application by the Applicant, dismisses it.

Background:-

2. By application dated 14 and received on 16 September 2014, the Applicant applied to the Homeowner Housing Panel ("HOHP") for a determination that the Respondent had failed to ensure compliance with sections 4.1, 4.3, 4.4, 4.6, 4.7, and 4.9 of the Property Factor Code of Conduct as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act") and also sections 2, 6, and 7 although no indication was given of the part of those sections complained about. The Applicant also sought a determination that the Respondent had failed to comply with other property factor's duties owed to the Applicant. She gave a description of the conduct involved in the breach of these other duties.

3. The Applicant also asked for her application to be considered jointly with that of her representative, Annmarie Kenna a fellow homeowner at the Rhindmuir Gate development

Findings of Fact

4. 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 9.

(b) The Applicant has been the owner of the Property since 2 April 2012. Her title is registered in the Land Register of Scotland under title number LAN194281. 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 produced a Statement of Services.

(i) From January 2014 the Applicant received invoices from the Respondents. These included "monthly management fees" and "monthly ground maintenance". The invoices covering June and September also included "communal landlord electricity supply". The invoices did not explain how the sums for these items had been reached. None of the invoices explained the services involved under these headings.

(j) By e-mail of 6 August 2014 to Annmarie Kenna, the Respondents' Mr Laurie referred to the possible termination of their factoring and stated,

> "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 ?"

Ms Kenna 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.

(k) 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. Ms Kenna was appointed Chairman of the Rhindmuir Gate Residents Association. Ms Kenna informed those present, including the Applicant, that there were some difficulties with some owners not paying their debts to the Respondnets but at that stage she was unaware of the extent of the default or the identity of the defaulters. By e-mail of 11 August 2014 to Ms Kenna the 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, Ms Kenna intimated the outcome of the meeting and accepted the Respondents' suggestion.

(l) The Respondents held £ 200 from the Applicant as a float. This was in terms of clause (NINTH) of the Deed of Conditions.

(m) 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. 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 enclosed a statement of account debiting them with 1/16 of a "development bad debt" of £ 9,487.65, amounting to £ 592.98, although in the case of the Applicant it was £ 519.83 for reasons

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

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

(o) On or about 8 December 2014, the Applicant received a further statement from Respondents. This contained three debit entries for unexplained "goods/services" dated 23 September, and 31 October 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. The statement sought payment of £ 85.43 from the Applicant.

(p) The Applicant does not dispute the individual debits in the statement apart from those relating to bad debts. She has not paid the sum sought.

(q) 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.

(r) The Applicant has suffered distress, incluidng insomnia as a result of the Respondents' demands for payment.

5. Following submission of the application the HOHP clerk raised with the Applicant's representative the need for the property factor to be notified why the Applicant considered that the Respondents had failed to comply with the Code or with any other duty owed to them. The Applicant intimated a complaint under sections 3.3, 4.6, 4.7, 4.9, 6.1, and 6.4 of the Code by letter to the Respondents dated 7 October 2014 which was enclosed with a covering letter from the Applicant to the Respondents dated 6 October 2014. The application was not amended to bring in the complaints under sections 3.3, 6.1 and 6.4.

6. During October and November there was various further correspondence passing between the parties which dealt with the Application. This included letters from the Respondents to the Applicant dated 24 November, and 18 and 22 December 2014, from the Applicant's representative to the Respondents dated 1 December 2014 and from the Applicant to the Respondents dated 2 December 2014.

7. The letter from the Respondents to the Applicant dated 24 November 2014 sought to respond to the grounds of complaint contained in the application and repeated in the Applicant's letter of 7 October 2014 and her representative's letter of 28 October 2014. It also dealt with grounds of complaint not contained in the application. It can be seen as forming part of the Respondents' response to the application.

8. 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.

9. Following intimation of the Notice of Referral, the Respondents also intimated further written representations attached to 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 Ms Kenna 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.

10. The Respondents also complained about Ms Kenna acting as representative of the Applicant and five other applicant homeowners a well as herself 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 Ms Kenna could not act as representative for the other applications and on her own behalf in her own application. This complaint has no substance. Before leaving this matter, the Committee having heard Ms Kenna both in presenting her own application and that of her fellow homeowners, observes that she acted in a reasonable manner with propriety and courteousness.

11. 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. Ms Kenna sent two further e-mails to HOHP dated 11 and 16 March 2015 enclosing further productions in response to the direction.

12. The parties also lodged productions. These covered all of the seven applications. The first bundle lodged by Ms Kenna contained an inventory and very helpfully had its pages numbered consecutively from page 1 to page 100. She 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.

13. 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' representative, and the Respondents by letter sent on or about 12 February 2015.

The Evidence

14. 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, the Applicant and Ms Kenna
- The oral evidence of Annmarie Kenna
- Registers Direct Land Register Title copy for LAN194281
- 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, the Applicant and Mr Spence all dated 1 April 2015 and statement issued by the Respondents to Mr Spence dated 27 April 2015.

The Hearing

15. The hearing took place on 19 March 2015 at 10.30 a.m. at the venue fixed for it. The Applicant' representative Ms Kenna 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.

16. The only evidence given was that by Ms Kenna. 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.

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

Jurisdiction

17. At the hearing Ms Kenna's attention was drawn by the Committee to the question of whether the Committee had jurisdiction (power) to deal with

the Application in the light of the provisions of section 17(3) of the Property Factors (Scotland) Act 2011. Section 17(1) provides that,

> "A homeowner may apply to the homeowner housing panel for determination of whether a property factor has failed (a) to carry out the property factor's duties, (b) to ensure compliance with the property factor code of conduct. . .".

Section 17(3) provides that,

> "No such application may be made unless –
> (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or as the case may be, to comply with the section 14 duty, and
> (b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve the homeowner's concern."

The section 14 duty is the factor's duty to ensure compliance with the Code of Conduct for Property Factors.

18. Before it can deal with an application the Committee must have jurisdiction (power) to do so. The Committee has a duty to raise issues concerning its jurisdiction with the parties and at the hearing brought to the attention of the Applicant's representative the issue of a possible lack of jurisdiction to deal with the application due to the lack of intimation of the complaints to the factor before the making of the application. However only the Applicant was represented at the hearing and there was no appearance for the Respondents.

19. At the hearing Ms Kenna indicated that she did not have any submission to make on jurisdiction, other than that she accepted that she had not sent any letter of complaint prior to her application on behalf of any other homeowner in the development. She had begun to act for other homeowners in relation to their complaints, as opposed to the termination of the factor's appointment, only after the end of August 2014. She confirmed that the Respondents had not been notified of any of these other homeowners' complaints prior to submitting the application to the HOHP on their behalf.

20. Given that the Respondents had been absent at the hearing, the Committee raised the issue of jurisdiction in their direction to both parties dated 30 April 2015 which intimated potentially relevant case law and sought written representations on the issue. The Applicant's representative submitted that the Committee did have jurisdiction on the basis of the case law intimated to her. The Respondents made no representation and indicated that they were content to leave the issue of jurisdiction to the discretion of the Committee. Given the importance of section 17(3) in the HOHP scheme, the Committee took the view that it should decide the issue.

21. The purpose of section 17(3) is to ensure that complaints are dealt with in-house by factors and only if the factor has refused or unreasonable delayed in resolving the homeowner's concern can there be an application to the Homeowner Housing Panel of which the Committee is a part. As was observed in paragraph 17 of the Policy Memorandum published when the Act was introduced as a Bill,

> "The [Homeowner Housing Committee] would only consider cases where the parties had been unable to resolve matters through the property factor's internal complaints procedure, thus creating an incentive for factors to resolve disputes amicably.".

In other words the Homeowner Housing Panel was intended to be a last resort.

22. This objective is reflected in Section 7 of the Code of Conduct which states,

> "To take a complaint to the homeowner housing panel, homeowners must *first* notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed in attempting to resolve them." (Committee's emphasis).

23. The first page of the application forms which were supplied to the Applicant's representative in this case echo this statement albeit it without highlighting and on the last page the applicant is required to attach to or enclose with the application form the notification to the factor "for the purposes of section 17(3)(a)" and any written response by the factor to the notification. The need to attach the notification and evidence of refusal or unreasonable delay by the factor is mentioned on the "How we work" page on the HOHP website. The website also contains a flowchart which shows notification and lack of resolution as a step to be taken before an application to HOHP.

24. Section 18(2)(a) of the 2011 Act gives the President of the Homeowner Housing Panel a discretion to reject an application if she considers that "the homeowner has not afforded the property factor a reasonable opportunity to resolve the dispute.". That allows the President to carry out a sift of applications and reject those which appear to be premature in that the factor has not been given a reasonable opportunity to resolve the dispute. However non-rejection by the President at the sift stage, does not have the effect of giving the Committee to whom she refers an unrejected case jurisdiction which it otherwise lacks.

25. The issue of jurisdiction in events similar to those of the current case has been raised in a previous case although not labeled as such. In *Lopkin v Hacking & Paterson Management Services* (HOHP/PF/14/0019) the first notification to the factor occurred two days after the homeowner had submitted his application to the HOHP. The factor gave his final rejection

of the complaint 9 days after the submission of the application. The factor submitted that the application was incompetent on the basis of section 17(3), and by implication, that the committee lacked jurisdiction. The committee observed that "on a narrow interpretation" of section 17(3) the factor's submissions were correct. However the committee stated that a "broader interpretation" might require to be taken.

26. The background to this "broader interpretation" was the awareness of the Committee that "nearly all of the applications" received by HOHP did not upon receipt meet all of the requirements necessary to allow an application to progress and that "a significant majority" of the applications did not comply with the two tests in paragraphs (a) and (b) of section 17(3). It was also said to be common for applications to be unclear about whether the factor's internal complaints procedure had been gone through in full.

27. The committee in *Lopkin* then dealt with the sifting powers of the President under section 18(2)(b) and with the President's powers under section 18(3)(b) to obtain further information to allow her to decide whether or not to reject an application. Finally the committee mentioned the notice of referral to them by the President which "clearly stated" that the application comprised not merely the application form but also subsequent correspondence between the HOHP and the homeowner which had been provided to allow the President to decide whether or not to reject an application.

28. The committee then rejected the factor's submission concluding, "On the broader interpretation of the application process taken by the President the fact that the original application predated the letter of notification and the factor's rejection letter was not fatal to the competency of the matter. The Sub-committee [*sic*] was satisfied that it was appropriate to accept the President' broader interpretation of the legislation rather than the narrow interpretation of section 17(3) favoured by the factor.".

29. *Lopkin* does not express what wording in section 17(3) is being given a broad rather than narrow interpretation. However it would appear that the focus is on the word "application" in the opening words of section 17(3). The reasoning appears to be that the scope of "application" in section 17(3) is not restricted to the initial request to HOHP for a determination in terms of section 17(1) but that it includes all documents provided to HOHP after such initial request and the commencement of the President's sifting process. This approach involves the word "application" having different meanings in section 17(1) and (2) and 18 on the one hand and in section 17(3) on the other hand.

30. That the Scottish Parliament could have intended such a construction or interpretation seems unlikely. Firstly as a matter of syntax section 17(3) states, "No such application" may be made and the use of the word "such"

is a clear reference back to section 17(1) which states "A homeowner may apply to the" HOHP and section 17(2) which provides "An application under subsection (1)" must set out the homeowner's reasons.

31. Secondly, section 18(1) provides that the President must decide whether to refer "an application under section 17(1)" to a committee and section 18(3)(a) that the President must so decide "within 14 days of the panel's receipt of the application concerned". This pre-supposes that an application has already been formed and presented to HOHP. Clearly an application in the sense of section 18(1) and (3)(a) which comes to the President for the sift can hardly contain material that has yet to be obtained during the sift. While that material might allow a president to be able to sift the application, in the wording of section 18(3) Parliament draws a clear distinction between it ("the further information") and the application which it supports.

32. It might be thought that such material could result in the amendment of an application but it is interesting to note that regulation 22(1) of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 expressly prohibits the amendment of an application to refer to any failure by the property factor not referred to in the notification under section 17(3)(a). This is linked to the next point.

33. Thirdly, and not least, the approach in *Lopkin* set out above seems to be at odds with and undermines the very objective behind section 17(3). It allows a factor to be subjected an application to HOHP, its powers and procedures and the potential costs involved without having had the opportunity to resolve the complaint through its own in-house procedure. It makes HOHP the first rather than the last resort. This also results in the incurring of costs by HOHP in having to deal with applications that could have been resolved without any involvement on its part.

34. In *Lopkin* the committee justified its approach on the basis of a number of factors. Regrettably, on closer examination none of them appear persuasive.

    1) It is suggested that without the broad interpretation virtually all applications would be rejected upon first receipt and this would raise a question about access to justice and be contrary to the aims of the Act and the Code. So far as the aims of the Act and Code are concerned, these are for the HOHP to be a last rather than first resort, as already mentioned. With regard to access to justice, to require a complainer to put a complaint to the person complained about is not something which is at odds with the provision of access to justice. It cannot be assumed, and the Scottish Parliament did not assume, that such a complaint cannot be resolved through the in-house procedures that factors are required to have. For that very reason special emphasis was placed on in-house complaints resolution in the Code.

2) It is suggested that the work of the Panel might be increased through the rejection of applications and their subsequent re-submission. Again, this assumes that any in-house complaints procedure will be unsuccessful in resolving a complaint. There is no reason to think that must be the case. It may be that the relevant part of the application form can be highlighted.

3) It is suggested that the broad interpretation (presumably of the word "application") is supported by rule 3 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 which specifies the overriding objective of the Regulations is to enable proceedings to be dealt with justly, including the seeking of informality and flexibility in the proceedings. Firstly rule 3, and its companion rule 4 relate to the interpretation of the Regulations and not the Act. There nothing to indicate that anything other than the ordinary approach to statutory interpretation should apply to the Act. Secondly, the Regulations themselves distinguish between the application (regulation 5) and the attachments to the application (regulation 6). They do not give any support to the view that the attachments whether provided with the application or in response to a request from or on behalf of the President are themselves part of the application. Thirdly, as already noted regulation 22(1) of the Regulations prohibits any amendment to an application to refer to any failure which is not referred to in the section 17(3)(a) notification. This exclusion of any discretion on the part of the Committee is clearly designed to avoid any amendment being made to introduce a complaint not notified before the lodging of the application.

4) Finally it is suggested that the case of *Burns International Security Services (UK) Limited v. Butt* reported at [1983] Industrial Cases Reports at page 547 supports the view that an overly technical approach to the completion of an application form by a lay person should not be taken. The Applicant's representative draws an analogy with the form in the present case. *Burns* involved the question of whether a poorly completed application form to a tribunal had the effect of denying them jurisdiction. However the issue in the present case is not caused by a poorly completed application form. Rather the issue is whether the lack of ***any pre***-application notification to the factor to allow the complaint to be resolved without the need for any HOHP involvement at all denies the committee jurisdiction. The *Burns* case did not deal with that issue as there was no equivalent prohibition as in s.17(3).

There can be issues over whether a notification made before the application was sufficient to satisfy s.17(3) and *Burns* may be relevant for that purpose. However that is not the issue here where there was ***no*** notification by or on behalf of the applicants other than Miss Kenna before the making of their applications.

35. For all of these reasons the Committee is unable to follow the *Lopkin* case and unable to interpret the word "application" in section 17(3) as meaning other than the initial request made by an applicant to HOHP to find a factor in breach of the Code or other property factor's duty.

36. In these circumstances the Committee are unable to interpret the opening words of section 17(3), "No application shall may be made. . ." as having any effect other than denying it jurisdiction (power) to deal with the application if the conditions in section 17(3) are not satisfied. It being admitted that those conditions were not satisfied in the present case the Committee concludes that it has no jurisdiction (power) to deal with this application, which falls to be dismissed.

37. Nevertheless having regard to the detailed submissions that were received by the Committee and the considerable effort put into parties' submissions, the Committee thinks it proper to make observations on the merits of the complaints. The decision on jurisdiction should not detract from the importance of these observations.

Section 3.3 of the Code of Conduct

38. Section 3.3 of the Property Factor Code of Conduct 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."

39. In her application form the Applicant complained about confusion in the billing issued by the Respondents. This was concerned with the interest rate in the Deed of Conditions contradicting that in the written Statement of Services. She confirmed her compliant under section 3.3 of the Code in her letter to the Respondents of 7 October 2014 but no longer insisted on the interest issue. At the hearing her representative noted that for the monthly ground maintenance and monthly communal cleaning there was no indications 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. No annual statements were ever provided. The Respondents' submissions rest on the invoices being sufficiently detailed.

40. 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."

41. The Committee finds that the invoices issued to the Applicant in 2014 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.

42. 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 other 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

43. 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 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."

44. The Applicant stated in the Details of Complaint attached to her application that there was not clear statement of how debts will be recovered. At the hearing her representative stated that from her dealings with other homeowners she understood that no-one had received a copy of the debt recovery procedure. She (the representative) 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.

45. The Committee understands the suspicions that the written procedure did not exist during the Respondents' period of factoring. It is curious that Mr Mowat (one of the defaulters) 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

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

Section 4.4 of the Code

47. Section 4.4 provides,

> "You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowners does not fulfil their obligations."

48. The grounds of complaint with regard to section 4.4 were not given in the application. Not surprisingly there was no response to this complaint by the Respondent. Section 4.4 is concerned with making homeowners aware of what will happen if and when a fellow homeowner defaults in making payment. In contrast section 4.6 is concerned with keeping homeowners informed of actual recovery problems from defaulters. The complaint under section 4.4 is rejected.

Joint and several liability of homeowners

49. The question of whether the owner of one property can be liable to the Respondents in respect of the debts of an owner of another property is relevant to the complaints under sections 4.6 and 4.7 of the Code. Before turning to those complaints it is worth dealing with that question.

50. In their letter of 29 August 2014 the Respondents claimed 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 whom he claims to be jointly and severally liable.

51. The Respondents produced a letter from their solicitors to Ms Kenna 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.

52. 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.

53. 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.

54. 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 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 . . . so liable failing to pay his. . . 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 . . . so failing together with all expenses incurred by such Manager . . . provided that it shall be in the option of the said Manager . . . 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 . . .".

55. 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.

56. 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.

57. 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".

58. 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.

59. 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.

60. 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 any part of the float that remains after accepted debts have been set off against it.

61. 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.

62. 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.

Section 4.6 of the Code

63. 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 stated in her application that the first intimation of any problem with collection of fees was in the letter from the Respondents received by her on 6 September 2014. This appears to be a reference to the letter dated 29 August 2014.

64. In her evidence Ms Kenna said that she had indicated to the meeting on 6 August that there was some difficulty with recovery but at that stage she was unaware of the extent of the default or of the identity of the defaulters. 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.

65. 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.

66. 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.

67. 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

68. 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."

69. The Applicant's representative 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 defaulters, had defaulted on his payment plan.

70. She submitted that the Respondents had written to the defaulters in 2014 and asked for payment in 7 days. She had asked for details of the outcome of any court action against the defaulters but had not received any.

71. The Respondents have purported to answer this complaint by stating that no court action was taken against the defaulters because they were making payments to account. No details of the payments to account have been provided. All that has been produced by the Respondents were updated statements of the outstanding debt issued with fresh invoices to the other homeowners, including the Applicant. No such statements were issued before the other homeowners were charged with the alleged "bad debt" of the defaulters.

72. 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. The fact that upon notification of termination of their factoring the Respondents reacted by charging the outstanding amount to the other homeowners 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.

73. In these circumstances the Committee is clear that the Respondents have not demonstrated the taking of reasonable steps against the defaulting debtors before 29 August 2014, when they charged the other homeowners. Had the other homeowners been jointly liable with the debtors for such charges, the Respondents would have been in clear breach of Section 4.7 of the Code. However given 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 4.9 of the Code

74. Section 4.9 of the Code provides,

> "When contacting debtors, you or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you

knowingly or carelessly misrepresent your authority and/or the correct legal position."

75. The Applicant's representative submitted that the Respondents had acted in a threatening manner. In particular homeowners had been given a very short period of time to pay off the defaulters' debts. She had spoken to them and they were fearful of their financial status. It was also submitted that the Respondents had no authority to chase homeowners for the defaulters' debts when there were payment plans with the defaulters in place which were active and no indication had been given that they had ceased to be so. To suggest that there was authority to collect defaulters' debts was a careless misrepresentation of authority.

76. In their response the Respondents stated that "all of the owners were making payment to their accounts all as per our debt recovery procedures" and that "we did not withdraw any active payment plans from Walker Love [sheriff officers]". They did not believe that they had misrepresented their authority as they had followed professional advice.

77. The first contact made by the Respondents to the Applicant with regard to the defaulters' debt was in their letter of 29 August 2014. In it the Respondents stated,

> "We herein give notice that as laid out in the Deed of Conditions we are charging the remaining 16 owners in the development this debt . . . Your 1/16th share of this is £ 592.98 and we require payment in full from you within 14 days, . . . Please note that we will register a Notice of Potential Liability on your property without further notice if we do not receive your payment in full by the 15th of September 2014 and you will be liable for all costs to do this. If necessary we will also commence legal/collection proceeding against you the costs of which you will also be liable for.".

78. The first question is whether the letter of 29 August was written in an intimidating or threatening manner beyond a reasonable indication that the Respondents might take legal action. The Committee is unable to see any intimidation or threat in the letter other than that the Respondents were contemplating legal action. The question then is whether such indication of legal action was a reasonable indication of legal action.

79. In deciding whether the threat of legal action was reasonable, the context must be taken into account. The context is that up until the letter of 29 August the Applicant was in the habit of making monthly payments of about £ 40 per month which were invoiced on the basis of 14 days for payment with a reminder and a possibility of court-based recover after 30 days. Then suddenly the Applicant was presented with an invoice seeking just under £ 600 within 14 days with no reminder and a threat of legal action.

80. On the face of it it seems most unreasonable for a factor to suddenly without warning present a homeowner with such a large bill under threat of

legal action after 14 days. This is particularly so where the bill was for debts for which there were payment plans in force. Is there anything to alter that impression ? The Committee can see no reason for such a precipitate course of action. The purported basis for recovery was clause NINTH of the Deed of Conditions. Consideration of the wording of that Deed shows that contrary to what was said in the letter entitlement to payment in respect of defaulters' debts if such action was conditional upon a decision to that effect taken at a meeting of the homeowners called by the Respondents. The Respondents must have been aware that there had been no meeting but still insisted on payment. The imminent cessation of the Respondents' factoring cannot have provided justification for demand in the letter. If the debt was due, there was nothing to suggest that it would cease to be due simply because the factoring was about to cease. There was no reason to hurry. In all the circumstances the Committee finds that the threat of legal action was unreasonable and that there was a breach of section 4.9 of the Code.

81. Did the letter also involve the knowing or careless misrepresentation of the legal position by the Respondents ? As noted the Deed of Conditions does not impose liability on the non-defaulting owners in the absence of a decision at a homeowners' meeting. The letter did therefore involve a misrepresentation of the legal position in that respect. Was it knowing or careless ? It is submitted for the Respondents that the representation followed the giving of legal advice to them. The Committee have seen legal advice in the form of a letter from the Respondents' solicitors to Ms Kenna dated 23 September 2014 in which the solicitors state that "All owners are jointly liable in terms of the Deed of Conditions to pay factor's costs". However this post-dated the letter of 29 August and followed subsequent correspondence between Ms Kenna and the Respondents.

82. The Committee finds it difficult to see how the Respondents could claim that that "as laid out in the Deed of Conditions" they were entitled to charge the non-defaulting owners. Any reading of the Deed would demonstrate that no such thing is laid out in it. One would expect factors to be knowledgeable of the Deed as the document under which much of their responsibilities are set out. No evidence has been produced to the Committee that the Respondents consulted their solicitors before sending out the letter of 29 August and the Committee find it difficult to believe that the solicitors would have advised that the Deed of Conditions "laid out" an entitlement to charge without a prior meeting. In these circumstances the Committee is unable to accept the bald submission that the statement of the legal position implemented advice from the Respondents' solicitors. Even if it did, one would have expected the Respondents to have been aware of the requirement of the meeting and a decision to allow charging before entitlement to charging arose. Accordingly the misrepresentation of the legal position in respect of the Deed of Conditions also amounted to a breach of section 4.9 of the Code.

Section 6.1 of the Code

83. 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."

84. The Applicant complained that there was no available telephone line for contacting the Respondents to report matters requiring attention. Phone calls were not answered. There had been no response to a request for information in connection with an NHBC matter.

85. Ms Kenna said in evidence 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.

86. Ms Kenna 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.

87. 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.

88. 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.

89. 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.

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

91. However it does appear that despite the initial response from the Respondents to phone calls, attempts were made by the Respondents to contact Ms Kenna or her partner. 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

92. 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."

93. 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. The Respondents denied this, indicating that a copy had not been given as they did not think that it had been requested.

94. The Programme of Works document was sent to the Applicant with Respondents' submissions in their letter of 24 November 2014. In the circumstances the Committee cannot conclude that the document was not in place while the Respondents were factors. It finds that there was no breach of Section 6.4 of the Code.

Trimming of shrubs and external paintwork and guttering

95. In her application the Applicant complained about shrubs not being trimmed and external paintwork and guttering never having been maintained. This was not insisted on in the letters of 6 and 7 October 2007 to the Respondents and the Committee finds no breach of property factor's duties in those respects.

Property Factor Enforcement Order

96. Given that the application falls to be dismissed no property factor enforcement order is proposed. However the Respondents may wish to take notice of the order proposed in Miss Kenna's case and act accordingly.

Rights of Appeal

97. 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

David Bartos, Chairperson