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

Hohp ref: HOHP/PF/14/0144

Re: 100 Hawk Brae, Livingston EH54 6GF (the property)

The Parties:

Miss Patricia Quin, 100 Hawk Brae, Livingston EH54 6GF ('the homeowner')

Be Factored Ltd (formerly Property 2 Ltd), 2a North Kirklands, Eaglesham Road, Glasgow G76 0NT ('the factor')

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

Committee members: Sarah O'Neill (Chairperson), Elizabeth Dickson (Housing member)

Decision of the committee

The committee determines that the factor has failed to comply with its duties under section 14 of the Property Factors (Scotland) Act 2011 in respect of sections 2.1, 4.6 and 5.2 of the code of conduct for property factors ('the code'). The factor has not failed to comply with its duties under section 14 of the Act in respect of section 3.3 of the code.

The committee also determines that the factor has failed to comply with its duties as a property factor as defined in section 17 (5) of the Act.

The committee's decision is unanimous.

Background

1. By application dated 16 September 2014, the homeowner applied to the Homeowner Housing Panel ('the panel') to determine whether the factor had failed to comply with its duties under the Property Factors (Scotland) Act 2011. In her application form, the homeowner complained that the factor had failed to comply with sections 2 (communications and consultation), 3 (financial obligations), 4 (debt recovery), 5 (insurance) and 6 (carrying out repairs and maintenance) of the code of conduct for property factors ('the code'). She also complained that the factor had failed to carry out the property

factor's duties as defined in section 17(5) of the Act. She enclosed with her application form copies of correspondence between the homeowner and the factor dated between 3 July and 5 September 2014, together with numerous invoices and newsletters from the factor.

2. The homeowner then wrote to the panel on 26 September 2014 enclosing a copy of a letter of the same date to the factor, setting out the reasons why she believed it had failed to comply with the code. In this letter, she alleged that there had been a failure to comply with sections 2.1, 3.3, 4.6, 5.2 and 5.6 of the code. She also set out the reasons why she believed the factor had failed to comply with its duties as a property factor, citing Section B (core services), C (financial and charging arrangements) and F (how to end the arrangement) of its written statement of services. She also enclosed with her letter a copy of an invoice from the factor dated 19 September, together with her response to the factor dated 22 September.

3. A further letter received on 21 October 2014 (incorrectly dated 26 September) was received from the homeowner, enclosing two further letters from the factor dated 14 and 15 October, the latter being a response to her notification letter of 26 September. A further letter dated 10 November was received from the homeowner, enclosing a further letter she had sent to the factor dated 6 November. An email was received from the homeowner on 13 November, forwarding email correspondence between the homeowner and the factor dated between 10 -13 November. A further email was received from the homeowner on 28 November, enclosing a letter dated 20 November, and an email dated 28 November, which she had sent to the factor. On 16 December, an email was received from the homeowner, enclosing further correspondence between her and the factor dated 11, 12, 15 and 17 December.

4. On 7 January 2015, a convener, representing the panel in the President's absence, issued a minute of decision to both parties, stating that he considered that in terms of section 18(3) of the Act there was no longer a reasonable prospect of the dispute being resolved at a later date; that he had considered the application paperwork submitted by the homeowner, comprising documents received in the period 18 September to 16 December 2014; and intimating his decision to refer the application to a panel committee for determination. Written representations were received from the homeowner on 13 January 2015, together with a copy of a letter dated 6 January 2015 from the factor in response to her letter of 15 December 2014. Written representations, together with a copy of a letter to the homeowner dated 3 July 2014 and two newsletters dated July and October 2014, were received from the factor on 22 January 2015. Further correspondence was received from the homeowner on 31 January 2015.

5. The committee issued a direction on 11 February 2015, which gave notice to the parties that the committee would consider the following issues at the hearing on 10 March 2015:

    - the complaints set out in the homeowner's application form dated 16 September 2014, with the exception of her complaint in relation to section 6 of the code
    - the complaints set out in the homeowner's letter of notification to the property factor dated 26 September 2014, with the exception of her complaint in relation to section 5.6 of the code

    The direction stated that should the homeowner wish to raise any additional complaints against the factor, this must be done by means of a separate application to the panel. The committee considered that insufficient notification had been given to the factor with regard to the homeowner's complaint under section 6 of the code (carrying out repairs and maintenance), but made clear, for the avoidance of doubt, that it would consider the repair and maintenance matters referred to in her notification letter of 26th September 2014 in relation to the property factor's duties.

    As regards the complaint under section 5.6 of the code of conduct (Insurance) set out in the homeowner's notification letter, the committee considered that this was premature. The homeowner had not asked the factor to provide information as to how and why the factor had appointed the insurance provider prior to that letter, and could not therefore have failed to provide it.

The hearing

6. A hearing took place before the committee at George House, 126 George Street, Edinburgh EH2 4HH on 10 March 2015. The homeowner appeared and gave evidence on her own behalf. She was accompanied by her neighbour, Mrs Dorcas Bainbridge. The factor was represented by Mr Graeme McEwan, Director and Ms Ashleigh Ogilvie, Property Manager, who gave evidence on its behalf.

Preliminary issues

7. The committee asked the homeowner in what capacity Ms Bainbridge was attending the hearing. Both she and Mrs Bainbridge confirmed that the homeowner did not intend to call her as a witness, but advised that she was there as an observer. The factor's representatives indicated that they were happy for her to sit beside the homeowner throughout the hearing, and the committee was also content with this.

Findings in fact

8. The committee finds the following facts to be established:
   - The homeowner is the owner of 100 Hawk Brae, Livingston EH54 6GF. The property is a ground floor flat within a development known as 'Apex Apartments'. There are six blocks of flats within the development, comprising 12 'stairs'. There are 126 flats within the development. The property is registered in the Land Register for the county of West Lothian under title number WLN38753. The homeowner took entry to the property on 27 October 2006.
   - The factor (then known as Property2 Limited) was appointed as property manager responsible for the management and maintenance of the 'common parts of the Blocks' and the 'common parts' (defined as comprising the common amenity ground, the access route and the common services) within the development by the developer under a Deed of Conditions by G Dunbar and Sons (Builders) Limited registered on 23 August 2004.
   - The factor's contractual duties in relation to the management and of the maintenance of the 'common parts of the Blocks' and the 'common parts' of the development are set out in:
     - the said Deed of Conditions
     - the factor's written statement of services applicable to the development, revised December 2013. Note: this makes reference to an information schedule applicable to the specific property, but such a schedule was not produced to the committee and neither party made reference to this.
   - Property2 Limited became a registered property factor on 7 December 2012. Its duty under section 14 (5) of the Act to comply with the code arose from that date. Property2 Limited changed its name to Be Factored Ltd on 29 January 2015.

The complaints made by the homeowner

1. Code complaints

9. The homeowner complained that the factor had failed to comply with the following sections of the code:

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

Section 3.3: *You must provide to homeowners, 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.

Section 4.6: *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).*

Section 5.2: *You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details may be available for inspection on request at no charge, unless a paper of electronic copy is requested, in which case you may impose a reasonable charge for providing this.*

Section 2.1

10. The homeowner made four separate complaints with regard to this section of the code, as set out below.

11. **Complaint 1** –this related to a letter dated 3 July 2014 from Ms Ogilvie to homeowners within the development. This advised that the development was 'suffering hugely from lack of funds for common charges'. The letter stated that the development had current arrears of £19,000; that the total of all float payments was £18,900; and that this did not allow for routine maintenance contracts to remain in place. Owners were therefore requested to pay a 'top up' float of £100, stating that this would remain a float payment, and that in the event that their property was sold, their float payment of £250 would be refundable.

12. The homeowner complained that this letter contained false information about the amount of the float payment. As she had explained in her response of 8 July to the factor, the float payment payable by each owner was £165, as set out in section 10.4 of the Deed of Conditions. The total float payment for the development (which comprised 126 flats) was therefore £20,790. Moreover, this meant that if owners paid a further £100 each, their total float would be £265, rather than £250. She further complained that Ms Ogilvie had incorrectly stated in her letter of 11 July and subsequent correspondence that the factor had the right in terms of clause 13.4 of the Deed of Conditions to increase the amount of the float if required. The homeowner's view was that section 10.4 was in fact the relevant provision, given that section 13.4 refers to the developer, rather than the property manager, and that section 10.4 does not give the factor this right.

13. **Complaint 2** -the homeowner complained that the letter of 3 July incorrectly stated that minimum payments had been made for common electricity within the development. When she queried this, Ms Ogilvie again stated that the factor was active in making payments, but on checking her invoices, the homeowner found that she had not been invoiced for any such payments for more than a year.

14. **Complaint 3 –** the homeowner referred to correspondence from the factor which she said falsely stated that she had not paid the sum of £33.37, which was her share of another owner's unpaid debt which had been apportioned among the other owners. Following several letters from the homeowner, Ms Ogilvie confirmed in a letter of 25 August 2014 that the factor was satisfied that she had in fact paid this money in January 2014.

15. **Complaint 4-** the homeowner complained that an invoice from the factor dated 19 September 2014 showed VAT added to an insurance premium which was incorrect, as insurance premiums are not subject to VAT. She had written to the factor on 22 September 2014 querying this, as the invoice charged VAT on her share of the premium, while the accompanying letter from the insurance broker showed that the overall premium cost stated on the invoice included a charge for insurance premium tax. Ms Ogilvie replied on 14 October acknowledging that insurance premium tax of 6% was payable, but not VAT, as this is not charged on insurance. Amended invoices showing this correction were then sent to all homeowners. The homeowner said that had she not picked this up, owners would have been incorrectly charged VAT, and suggested that this may be a fraudulent VAT claim.

Section 3.3

16. The homeowner complained that the factor had *'failed to provide a detailed financial breakdown of charges and debts on the account that I have requested several times since your letter dated 3 July 2014.'* It was clear to the committee on the basis of both the correspondence and her oral evidence that, rather than information about her own personal accounts, the homeowner was looking for information about the bank account for the whole development, which she said the factor had refused to give her. She argued that as homeowners were jointly and severally liable, she had a right to see the bank account, just as she would if she had a joint account with someone else. She argued that other factors provide this information to owners. She said data protection had been used as an excuse by the factor not to give her this information.

17. The homeowner told the committee that while supporting documentation and invoices had been made available to her and Mrs Bainbridge when they had attended the factor's offices in November 2014, this was in disarray and

difficult to follow. She said that while the invoices were there, some did not match up with the amounts charged to homeowners, as, for example, there were variations in whether VAT was charged.

Section 4.6

18. The homeowner stated that the factor's letter of 3 July 2014, which advised that the debt on the development bank account was £19000, was the first correspondence she had received about the debt since being informed in the factor's May 2013 newsletter that the debt was £9000. Since May 2013, a debt of over £4000 had been apportioned among the other homeowners, leading her to believe that the debt had significantly reduced. She said that since July 2014 she had repeatedly asked for an explanation as to why the debt had increased so dramatically, which the factor had failed to provide.

Section 5.2

19. The homeowner complained that the invoice the factor had sent to her on 19 September 2014 regarding her annual insurance premium was not clear in relation to the amount of the premium, or the basis upon which her share of the insurance premium was calculated. In subsequent correspondence, she expressed confusion as to the correct amount of the premium. She pointed out that the invoice showed a debit of £195.32, together with a credit of £15.96, and that VAT was added to this, producing a total of £215.23. This, however, did not match with the amount shown on the renewal letter from the insurance broker, of £29,532.81(including insurance premium tax) which, when divided by 126 residents, came to £234.39. She had asked the factor to explain these figures, and to explain why both VAT and insurance premium tax had been charged, but said she was still unclear about this.

2. Duties complaints

20. The homeowner complained that the factor had failed to carry out its duties in relation to the following sections of its written statement of services:

B- Core Services

(a) Arrange via contractor the cleaning of all communal areas on a regular basis
(b) Arrange for a contractor periodically or as required to clean the communal windows
(c) Arrange via a contractor for the gardening and landscaping of all common areas

21. The homeowner stated that all of the above services had been cancelled by the factor and that residents had now had to take action to do this work themselves. She told the committee that, following her visit to the factor's

offices in November 2014, she was concerned that the factor was not obtaining the best value for money for the owners in terms of the contractors it had hired. She said that some of the owners had bought their own lawnmower, and that some owners still believed the factor was carrying out the gardening work. She also said that a group of owners who had previously indicated their wish to opt out of a communal cleaning contract had been told that they would need to have insurance, but that the factor had recently written to owners advising them that they would have to do the cleaning themselves.

(d) Arrange to pay utility suppliers for common electricity supplied which serves the common areas

22. The homeowner complained that no payments had been made for the past year (as at 26 September 2014) to the electricity provider in relation to her own particular stair. The homeowner said she realised, having checked through her invoices that she had not been charged for electricity since 2013, and she queried this in her letter of 15 August 2014 to Ms Ogilvie. She told the committee that only after she queried this was she told (in Ms Ogilvie's letter of 25 August) that no invoices for her block (Block A) were being received by the factor. The letter advised that, having enquired with the energy supplier, the invoices for Block A had been sent to the actual block, and that once these were received by the factor, they would be charged out as common charges.

23. The homeowner said that she had asked the factor why she had received bills previously. She said she had asked the factor to carry out a full investigation of the matter, but this had not been done. She had been advised by the factor that, prior to 2013, the electricity accounts for the whole development were charged as one bill and split among all of the flats. She was told that there was no account for her block, and that MPAS (the Meter Point Administration Service) did not have details of the meter or the supplier for the block. It later became apparent that in fact it was only the meter for her stair (comprising 12 flats), one of two in the block, which had never been registered since the development was built.

24. The matter had still not been resolved, and she was concerned that she had been paying for electricity used by others from 2006 - 2013. She said that she had paid over £400 for other owners' electricity, which was now due back to her. She had been in touch directly with Eon, the energy supplier, to try to resolve the matter. Eon had recently confirmed to her that the meter was now registered as at 4 March 2015, but that owners could not be billed for any period prior to that as the meter had not been registered.

25. The homeowner told the committee that she believed the problems which had been experienced were due to the factor's incompetence. She said that the factor had identified the problem 2 years ago, but had done nothing about it, and that the meter would still not be registered but for her actions.

(i) Manage the development bank account

26. The homeowner complained that the development bank account was being 'severely mismanaged', and that she had asked the factor for a detailed breakdown of accounts which had not been forthcoming.

C- Financial and Charging Arrangements

27. **Float payments-** this states that the factor has the right to increase the amount of the float required. The homeowner complained that the factor does not have this right, as the amount of the float is set out in the title deeds and cannot be amended. She also stated that the factor's request to increase the float payment was made in order to offset debt within the development, which was not the purpose of the float payment.

F- How to end the arrangement

28. This provides that on termination of the factoring arrangement, a fee of £55 plus VAT will be charged to each property, to cover the administration costs of finalising the accounts and transferring client account bank balances to the new managing agent. The homeowner complained that this amount was hugely excessive, and asked that this section be retracted. She told the committee that if this was equated to the factor's quarterly management fee of £20, this would represent almost six months of work (although the committee notes that she may have meant to say 9 months). She agreed that the factor should be able to charge a fee for ending the arrangement, but said she believed the amount to be charged was excessive.

Statement of reasons for decision

1. Code complaints

29. **Section 2.1** – the committee upholds all four of the homeowner's complaints under this section, for the following reasons:

30. **Complaint 1** - Ms Ogilvie clearly admitted in both her letter of 11 July 2014 and at the hearing that errors had been made with regard to the amount of the individual float and the overall float for the development. She had apologised to the homeowner in her letter of 11 July, and she pointed out to the committee that owners had been notified of the mistake in the factor's July

2014 newsletter. As regards the provision governing increasing the float amount, the committee considers that the factor was incorrect in its statement about section 13.4 of the Deed of Conditions, but notes that this was due to a misunderstanding by the factor, rather than a deliberate attempt to mislead. This issue is discussed in more detail below in relation to the duties complaint under section C of the written statement of services.

31. **Complaint 2** – the committee determines that, while the letter of 3 July was clearly intended to be a general letter to all owners, and while it may have been true that minimum electricity payments were being made in respect of all other accounts, the weight of evidence supports the conclusion that this was not the case as regards the stair where the homeowner lives. The information in the letter was therefore misleading as regards the homeowner and that particular stair. This issue is considered in more detail below in relation to her complaints about the property factor's duties under section B (e) of the written statement of services.

32. **Complaint 3** – again, Ms Ogilvie had admitted both in correspondence and at the hearing that she had incorrectly stated that the homeowner had not paid the sum concerned, when she had in fact done so. The homeowner had to write to the factor several times before this was acknowledged, and before this was done, she was asked to provide proof that she had paid it, when the factor should have had this information to hand.

33. **Complaint 4-** Ms Ogilvie conceded that there had been a mistake, which had been rectified. She explained that the software used by the factor automatically adds VAT to all charges on invoices. She said that the total amount eventually charged added up to the amount stated on the broker's renewal letter in any case. She said she had apologised, and had advised all other owners within the development of the error via the October 2014 newsletter. The committee notes that the factor appeared to be unclear as to the VAT position here - while Ms Ogilvie had said in correspondence that no VAT was payable on insurance premiums, Mr McEwan told the committee that VAT was payable on building insurance but at a lower percentage than the standard rate. The committee notes that the broker's renewal letter makes no mention of VAT.

34. The committee determines that the factor provided false information to the homeowner as to the applicability of VAT to the insurance premium, even if this was as the result of a system error. The homeowner told the committee that if she had not queried this, she would have paid for this, as would the other homeowners.

35. With regard to these four complaints, the committee notes that, while some of the errors made were fairly minor, and while the factor had apologised as regards complaints 1 and 2, the homeowner has experienced considerable inconvenience as a result of these, and has spent considerable time trying to clarify and resolve these matters.

36. **Section 3.3** – the committee does not uphold the homeowner's complaint. The homeowner clearly has concerns about the factor's management of the bank account for the development, and told the committee that she sought information about this in order to find out why there was such a high level of debt within the development. The committee is of the view, however, that section 3.3 requires the factor to provide a financial breakdown to each homeowner of their own individual charges and what these are for, rather than information about the development bank account. It is clear that the homeowner has been receiving quarterly invoices from the factor. While there is evidence of a number of errors in these, the committee considers that these meet the requirement to provide '*a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for.*'

37. Ms Ogilvie told the committee that the factor does not routinely give information to owners about the bank accounts for developments it manages. She did, however, state that the homeowner could view general information about the development bank account (with sensitive/personal information removed) at the factor's offices, should she wish to. Ms Ogilvie had brought along a file to the hearing, which she said included such information. She said that this file had been left on top of the files of information provided to the homeowner on her visit to the factor's offices in November 2014, but this was disputed by the homeowner.

38. The second part of section 3.3 requires the factor to *'supply supporting documentation and invoices or other appropriate documentation for inspection or copying',* where these are requested. The factor has complied with this, having invited the homeowner into its offices to inspect these, which she did. Mr McEwan advised the committee that the factor would have sent copies of these direct to the homeowner, but would charge for this, according to its written statement of services (as permitted by section 3.3, subject to notifying the homeowner of this charge in advance). The homeowner had chosen to go into their offices to avoid paying this.

39. **Section 4.6** – the committee upholds the homeowner's complaint. Ms Ogilvie advised that the factor had kept owners informed about debt within the development via its quarterly newsletters. Mr McEwan explained that the debt figures are produced on a quarterly basis, and that the outstanding debt can

go up or down depending on how much owners pay after each quarterly invoice. Ms Ogilvie advised that since she had taken over as property manager for the development in February 2014, there had always been a section on debt in the newsletter. The committee had before it copies of the 'Factor File' newsletters for the development dated May, September and December 2013; and January, April; July and October 2014.

40. The May 2013 newsletter advised that the current debt level for the development was £9209.33, stating: *'this is a great improvement from the usual debt at this stage and is continuing to decrease'*. That newsletter stated that £4186.67 of the debt was accounted for by 3 owners; that legal action was ongoing; and that one owner who owed £2000 had had their property repossessed. As there was a Notice of Potential Liability on the property, this money would be recouped when it was sold. There was no mention of debt in subsequent newsletters dated September 2013, December 2013 or January 2014. The April 2014 newsletter stated: *'the development is sitting with a high level of arrears'*, but did not say how much this was. The July 2014 newsletter said that there was a total sum due of £14,701.67; that some accounts were going through the courts; and that there were a total of £5394.07 arrears outstanding on accounts which were in debit. The October 2014 newsletter advised that there was now a total of £17,791.25 outstanding, following the generation of invoices for the annual buildings insurance.

41. The homeowner complained that the factor had not kept her informed about the level of arrears between its newsletter of May 2013 and the factor's letter of 3 July 2014. The committee notes that the factor had in fact mentioned in its April 2014 newsletter that there was a high level of arrears, but did not give any further details. In any event, the committee concludes on the basis of the evidence before it that the factor did not keep owners adequately informed about the debt recovery problems affecting the development between May 2013 and July 2014. Clearly these problems had implications for other owners in several respects, including the termination of service contracts, the impact on the common insurance policy and the possibility that all or some of this debt could be apportioned among them. While it does appear that more recently the factor has been keeping homeowners informed about debt recovery problems, the committee determines that it did not do so for over a year, and that given the levels of debt, homeowners should have been updated on a more regular basis. Accordingly, the factor did not comply with its duties under section 4.6 during that period.

42. **Section 5.2** – the committee notes that in her response to the homeowner of 14 October 2014, Ms Ogilvie attempted to explain the reasons behind the figures in the invoice, but the homeowner clearly still did not understand these, and had queried this again in later correspondence. The committee

determines that the factor did not provide clear information about the amount of the premium in its original invoice of 19 November. The letter of 14 October explains that the reinstatement value of the property was reduced, and that this was the reason for the £15.96 credit shown on the original invoice, but this was not at all clear from the original invoice. The original invoice also incorrectly charged VAT, rather than insurance premium tax. The committee therefore determines that the initial information about the amount of the premium and how this was calculated was not at all clear, and was in fact incorrect. The committee therefore determines that the factor has failed to comply with its duty under section 5.2 of the code.

2. Duties complaints

B- Core Services

Subsections a) b) and c) - cleaning and gardening contracts

43. The committee does not uphold the homeowner's complaints in relation to these sections of the written statement of services. The factor's representatives made it clear that the communal cleaning (including communal windows) and gardening/landscaping contracts for the development had been cancelled due to the lack of funds to pay for these. Mr McEwan stated that the only reason the factor was not providing these services was because it could not pay the contractors.

44. He explained that due to the debt situation, there was no annual contract in place for routine garden maintenance. This meant that the factor had had to ask contractors for costs for one-off visits when funds permitted, which was more expensive. At one point, the grass was so high the factor had paid to have it cut as a goodwill gesture to owners. The factor had to prioritise expenditure in the circumstances, and the common insurance had to be the priority - therefore, cleaning and gardening had low priority.

45. The committee accepted the factor's evidence, and the homeowner told the committee that she understood that the contracts had been cancelled due to a lack of funds. While the committee observes that this may not be the most obvious place to include this information, it notes that at the last paragraph of Section C on the third page of the written statement of services, under the heading 'Development Bank Account Management', it is clearly stated that the factor is only able to provide services from the funds made available to it, and that it has the right to suspend services until there are sufficient funds within the development bank account. The committee does, however, note the homeowner's concerns that there had been insufficient communication to owners about the fact that the contracts had been terminated, and notes the importance of ensuring that owners are kept adequately informed.

Subsection e) - paying utility suppliers for common electricity

46. The committee upholds the homeowner's complaint. Ms Ogilvie told the committee that the problem with the meter had only become apparent after the handover date from the developer, when the last phase of the development had been completed, sometime during 2012. Until then, responsibility for administering the common electricity accounts had lain with the developer, which had created the original accounts, some of which were with Eon, while others were with Scottish Power. At the final handover date, that responsibility was transferred from the developer to the factor. Until that point, all of the bills for the development had been collated and simply split 126 ways. When the factor took over, it had begun to charge owners on a block basis, as it had become apparent that there were individual meters in each block. The bill for Block A was then split equally between the 28 owners.

47. Ms Ogilvie told the committee that the factor had tried to resolve the problem with the unregistered meter. Photographs had been taken of the meters and passed to MPAS, which could not locate the meter as being registered with any specific provider. She advised that the factor was in the process of obtaining a meter number and a distribution number, and said that the matter would take some time to resolve. She said that the reason owners had not been informed about this previously was that the factor did not have sufficient information to do so. Mr McEwan told the committee that owners had been advised on 5 March that the factor would be calling an owners' meeting to discuss the matter. Ms Ogilvie said that the money charged to those owners who had overpaid would be refunded and recovered from those who had underpaid, so far as possible. The committee notes that, as electricity used prior to 4 March 2015 cannot be charged for, the homeowner, and the other homeowners within her stair, will benefit from this, as they will not have to pay for any electricity used between their date of entry in 2006 and that date, even though they had the benefit of the communal electricity during that period.

48. The committee accepted the factor's evidence that until the final phase of the handover, responsibility with regard to administering the electricity accounts lay with the developer. The question is whether the factor fulfilled its duties after the handover date, although it is not clear when in 2012 this took place. The committee notes that it appears from the evidence before it that the homeowner's last invoice to include electricity charges was dated 13 September 2013. This suggests that the factor was aware that there was a problem almost a year before the homeowner raised this with them. The committee takes the view that the factor should have been aware that only 11 bills were being received in respect of the development, when there should have been 12. It was not apparent to the committee that the factor had taken action to pursue this issue until the homeowner had started asking questions

about it. The evidence before the committee suggests that when the homeowner asked about this issue in August 2014, the factor believed incorrectly that the problem was that the supplier had sent the invoices to the block, rather than to the factor. There was no mention of issues with the meter at that stage.

49. The committee considers that it can reasonably be inferred that the factor's duty under its written statement of services to arrange to pay utility suppliers for common electricity supplied includes a duty to ensure that the correct invoices for the common electricity are received and paid. Section 17 (5) of the Act states that a failure to carry out a property factor's duties include reference to a failure to carry them out to a reasonable standard. The committee determines that, given the time which has elapsed since the handover date, it would be reasonable to expect the factor to have taken action to resolve this matter earlier, and that this should not have been left to the homeowner, when the factor was charging fees for providing this service. The homeowner has had to expend considerable time and effort to resolve this matter as a result of the factor's failure to do so.

50. The homeowner also raised concerns that the factor had not kept owners informed about the problem. The committee observes that as the factor has been aware of the issue since 2012, it should have informed the owners as soon as it was aware of the situation. It should also have informed owners what they were doing to address the issue, as this will have a financial impact on them, whether positive or negative. The committee does not accept the factor's argument that there was insufficient information available to inform owners earlier.

Subsection f) - managing the development bank account

51. It was clear that the homeowner's real concern here was the level of debt on the development bank account. All of the evidence before the committee suggests that the real problem here is that many owners within the development are not paying their way. While the committee notes that there is evidence of a considerable number of invoicing and administrative mistakes, it has seen no evidence to support a conclusion that the accounts are being mismanaged. The committee observes that, while there was some evidence that the factor had taken action to pursue debtors, some of the concerns voiced by the homeowner about the debt issue may raise issues relevant to section 4.7 of the code. This relates to taking reasonable steps to recover unpaid charges from homeowners, but no complaint under that section was included within the application before the committee.

C- Financial and Charging Arrangements - float payments

52. There were two aspects to the homeowner's complaint. Firstly, she complained that the factor did not have the right to increase the amount of the float payment, as the amount is set out in the title deeds and cannot be amended. Secondly, she complained that the factor's request to increase the float payment was made in order to offset debt, which was not the purpose of the float payment.

53. On the second point, the committee accepts the factor's argument that the request to increase the float payment was intended to build up the float fund so that services could be resumed within the development. Ms Ogilvie told the committee that a decision had been taken to do this, rather than apportioning the outstanding debt, as this was the fairest solution. The float was refundable, and meant that those owners who pay their way would have the money repaid to them at some future date, rather than penalising them by asking them to pay for debts owed by others. She confirmed, when asked by the committee, that the factor would continue to pursue the outstanding debt.

54. Mr McEwan told the committee that the level of the float was set 12 years ago when the terms of the Deed of Conditions were being discussed with the developer. He said he had recommended at that time that the float should be set at a higher level, but the developer had not done so, given the anticipated profile of the future owners.

55. While the committee understands the factor's rationale for requesting an increased float payment, however, it agrees with the homeowner's view that the factor does not have the right to increase the float under the title deeds. The factor argued that it has the right to increase the level of the float in line with Section 13.4 of the Deed of Conditions. This states: *'There is expressly reserved to the Developers the right to alter or modify in whole or in part the reservations, real burdens, conditions, provisions, limitations, obligations, stipulations and others herein contained…'* It is clear to the committee that this section applies exclusively to the developer, and not to the factor, as property manager.

56. The committee notes that the factor appears to be confused as to which section of the Deed of Conditions is applicable here. Payment of the float is, as the homeowner argued, actually governed by section 10 (4), which states:

'in order that the Property Manager shall have available a fund for the execution of necessary and reasonable repairs, renewals, maintenance and cleaning charges, insurance premiums, management expenses and fees, each of the Proprietors shall pay to the Property Manager on or before their

taking entry to any Flat an advance of One hundred and Sixty five pounds (£165) Sterling in respect thereof or such greater sum as may be required for the foresaid purposes. The sums so collected by the Property Manager (and which shall be collected quarterly in advance) shall be held in trust for behoof of the Proprietors for the foresaid purposes.'

57. Ms Ogilvy's letter of 11 July 2014 to the homeowner appeared to refer to this section by quoting the words *' or such greater sum as may be required for the foresaid'*. but she clearly suggests that this comes from section 13.4. In any case, the committee notes that the wording of section 10.4 is unclear on this point. While it does make reference to *'such greater sum as may be required'* it does not say who may require it, or how they might do this. It also says that the float is to be paid by owners *'on or before their taking entry'* to the property. The committee does not consider that this gives clear authority to the factor to increase the float payments, particularly when the homeowner is already living in the property.

58. The committee notes that, while the Deed of Conditions is unclear, it may in fact be possible for a majority of owners within the development to agree to increase the float payment. Section 9.1 of the Deed of Conditions provides that a majority of proprietors present at a development meeting can 'make any regulations which may be considered necessary with regard to the preservation, cleaning, use of enjoyment of the common parts, which regulations shall be binding on all those concerned. Given that the primary purpose of the floating fund is to pay for repairs, maintenance and other common charges, it could be argued that an agreement to increase it would fall within this provision.

59. The committee observes that in practice, the factor actually *requested* that owners pay the additional float in this instance, rather than *requiring* them to do so. Mr McEwan and Ms Ogilvie stated that the letter of 3 July was a request to owners. The committee considers that there is no reason why the factor should not be able to request an additional float payment from owners. In the end, the additional float was not realised - Ms Ogilvie confirmed that only 2 owners had sent cheques, which had not been cashed.

60. The committee determines that, as the factor has no clear right in terms of the Deed of Conditions to increase the float, the factor cannot state in its written statement of services that it has such a right. As the agent of the homeowners, the factor has a duty towards them to carry out its duties with reasonable care and skill. The committee considers that this duty includes providing accurate information to homeowners about its powers and duties under the Deed of Conditions. If the factor was unsure about this, it could

have sought legal advice to clarify the position. The committee therefore upholds the homeowner's complaint.

F- How to end the arrangement

61. While the homeowner accepted that the factor should be able to pay a fee for ending the factoring arrangement, she argued that a fee of £55 plus VAT was excessive, but she could not say what she would consider to be a reasonable fee. Mr McEwan explained to the committee that the fee was calculated on the basis of the work required by the factor to terminate an owner's account when they sell their property. Ms Ogilvie explained that the fee was not related to the quarterly management fee, but was a standard one-off charge which applied in all developments managed by the factor.

62. The committee notes that it is a requirement of Section 1F of the code that the written statement of services should include clear information on how to change or terminate the service arrangements between the factor and the homeowner, and they have done so. While section 1F refers to a requirement to state 'penalty charges for early termination,' it makes no direct mention of fees, but the committee believes that it is standard practice to charge a fee for this. The committee does not consider that the fee quoted in the written statement of services is excessive. The committee therefore does not uphold the homeowner's complaint.

Observations

63. It is clear that ongoing problems are being experienced by both the factor and homeowners who live within this development, as a result of the ongoing debt issues. Mr McEwan told the committee that the factor wants to provide a service to owners but that while some owners pay their bills, some do not. He said that 75% of properties on the development are rented out, and that there is a real problem with absentee landlords who do not read letters and invoices, and do not pay, which means that services cannot be provided to those owners who do pay their bills.

64. He said that the factor may soon have to terminate its contract with the development, as a result of issues with the common insurance policy. Firstly, there are currently insufficient funds to pay the common insurance annually due to the outstanding debt, which means that the factor is now paying this monthly by means of a credit arrangement. Secondly, Ms Ogilvie advised that it may be difficult to secure a renewal of the premium due to the volume of claims which have been made since the last renewal in September 2014.

65. While the homeowner indicated her desire to terminate the factoring arrangement, should the necessary quorum of owners vote for this in line with the title deeds, she did acknowledge the difficulties arising from the failure of some owners to pay for services. The committee notes that it seems unlikely that a change of property factor alone will solve the problems which currently exist within the development.

66. While the factor faces real obstacles in managing this development, however, the committee has seen considerable evidence of poor administration and invoicing mistakes, some of which were not the subject of complaints made by the homeowner. Mr McEwan acknowledged to the committee that the factor had been 'remiss on certain issues', but the committee observes that there is evidence of wider systemic concerns. The factor observes that in order to avoid future problems, it would be helpful for the factor to take steps to review its administrative and invoicing procedures to minimise the likelihood of errors, and to ensure that its correspondence clearly explains to homeowners how invoices are calculated.

67. It was clear to the committee that the homeowner had little trust in the factor, following the various errors and failure which had occurred. She had refused to pay any further fees to the factor until she was satisfied that all of the outstanding issues had been resolved. It also appears to the committee that if the homeowner had not raised and pursued certain issues, these would have gone unresolved. Many of the homeowner's complaints were about a lack of communication with owners about important issues. The committee observes that, while some issues may be difficult to resolve, it is important to keep homeowners informed and make them aware of potential problems as early as possible.

Proposed Property Factor Enforcement Order

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

Right of appeal

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

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

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

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

Chairperson Signature Date 30/3/15