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/13/0246/0247

Re: Properties at Flat 3/2, 96 Calder Street, Glasgow G42 7RB and Flat 0-1, 53 Clifford Street, Glasgow G51 1QB ("the Property")

The Parties:-

Matthew Maguire, Flat 3-2, 244 Langside Road, Glasgow G42 8XN and currently 4/175 Government Road, Labrador, Gold Coast, Queensland 4215, Australia ("the homeowner") and

Grant and Wilson Property Management Limited, incorporated under the Companies' Acts (SC175382) having its Registered Office at 65 Greendyke Street, Glasgow G1 5PX, ("the property factor")

Decision by a committee of the Homeowner Housing Panel ("HOHP") in an application under Section 17 of the Property Factors (Scotland) act 2011 ("the Act")

Committee Members: George Clark (Chairman) and Carol Jones (surveyor member)

DECISION

The Committee has jurisdiction to deal with the Application.

The property factor has not failed to carry out the property factor's duties and has not failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1. The homeowner is the owner of the property Flat 3/2, 96 Calder Street, Glasgow G42 7RB, which forms part of the tenement 96 Calder Street, Glasgow and of the property Flat 0-1, 53 Clifford Street, Glasgow G51 1QB, which forms part of the tenement 53 Clifford Street, Glasgow.
2. The property factor manages and maintains the common parts, which are owned by two or more persons, of the tenements 96 Calder Street, Glasgow and 53 Clifford Street, Glasgow, and the property factor, therefore, falls within the definition of "property factor" set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 ("the Act")
3. The property factor's duties arise from a written Statement of Services. The homeowner attached to his application a pro forma undated version of a written Statement of Services, entitled "Terms of Service and Delivery of Standards", issued by the property factor. The property factor included, in its written representations to the committee, a pro forma version of a written statement of Services, entitled "Terms of Service and Delivery of Standards" dated May 2014. The application to HOHP was received on 29 July 2013, so pre-dates the written Statement of Services supplied by the property factor. The committee has, however, inspected both versions of the written Statement of Service and, whilst the latter version sets out details of insurance charges, which the earlier version does not, there are no significant differences between the two versions.
4. The Committee is unable to state the date from which the property factor's duties arose, but neither party is disputing the fact that they arose prior to the date of the application.
5. The property factor was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor.
6. The date of Registration of the property factor was 7 December 2012.
7. The homeowner has notified the property factor in writing as to why he considers that the property factor has failed to carry out its duties arising under section 14 of the Act. He did this by e-mail on 14 May 2013.
8. The homeowner made an application to The Homeowner Housing Panel ("HOHP") dated 22 July 2013 and received by HOHP on 29 July 2013 under Section 17(1) of the Act.
9. The homeowner's concerns have not been addressed to his satisfaction.
10. On 18 June 2014, the President of HOHP referred the application to a Homeowner Housing Committee.

HEARING

A hearing took place at Europa Building, 450 Argyle Street, Glasgow on 1 May 2015. The homeowner was not present or represented at the hearing. The property factor was represented at the hearing by Graeme Stewart, its General Property Manager and Amanda Gilmour, an Associate Director of the company.

Introduction

In this decision, the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as "the 2012 Regulations". The Homeowner Housing Panel is referred to as "HOHP".

The property factor became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee had available to it and gave consideration to: a letter from the homeowner, dated 22 July 2013 (received by HOHP on 29 July 2013), to which was attached the application in respect of each property, and a significant bundle of documents lodged with it; additional information from the homeowner, consisting of copies of a large number of e-mails passing between the homeowner and the property factor between the date of the application and the date of the hearing; written representations by the property factor received by HOHP on 24 July 2014; and two files, comprising further submissions by the property factor received by HOHP on 5 December 2014. The Committee confirmed that it did not require any further documentation prior to considering the application at a hearing.

Preliminary Matters

The property factor asked the committee to determine that the first two items set out in the applicant's summary of complaint attached to his application were outwith the jurisdiction of the committee as they referred to matters which pre-dated the coming into force of the 2011 Act on 1 October 2012. The committee considered the matter. The first item was an alleged failure to complete works at 96 Calder Street, covered by an insurance claim in 2009 and the committee held that, in terms of Regulation 28(1) of the 2012 Regulations, it was not able to consider this aspect of the application, as the failure, if established, occurred before 1 October 2012. The second item was a claim that the property factor had failed to properly fix the roof at 96 Calder Street in April 2012. The committee held that any failure in this matter also happened before 1 October 2012 and that it could not be further considered by the committee, but noted that, in terms of

Regulation 28(2) of the 2012 Regulations, it could take into account any circumstances occurring before 1 October 2012 in determining whether there had been a continuing failure to act after that date.

The committee also considered whether to determine the homeowner's applications in respect of 96 Calder Street and 53 Clifford Street separately or together. The correspondence from the homeowner had frequently dealt with both properties together within the same e-mail, the same summary of complaint was attached to both applications and the property factor had not requested separate consideration of each property. There were also many hundreds of e-mails between the homeowner and the property factor and frequently they dealt with matters relevant to both properties. Accordingly, the committee determined that it was appropriate to combine its deliberations and conclusions in a single decision.

Summary of Written Representations

The Committee had received, in advance of the hearing, the written representations made by the parties and these are summarised as follows:-

(a) From the Homeowner

In the application, the homeowner stated that in December 2012, the property factor had instructed repairs to a roof problem which had resulted in water damage to the back bedroom of 96 Calder Street, but had failed in its duties to start an insurance claim in respect of the necessary works. This failure had persisted for a period of five months and the reason given by the property factor for refusing to instigate the claim was that the homeowner had not paid invoices in respect of the factoring services. In May 2013, the property factor had been requested to view the damage to the bedroom, but had delayed doing so, despite e-mails, phone calls and telephone messages, none of which had been responded to, until 12 July 2013. At that point, the property factor had advised the homeowner that it would contact the insurance company and respond within ten days.

The homeowner also stated that the back bedroom at 53 Clifford Street had been flooded by the upstairs neighbour, resulting in damage to the ceiling. The homeowner had advised the property factor of this in April 2013 and had asked the property factor to start an insurance claim. The property factor had refused to do this, because of its outstanding invoices for factoring services. The property factor had been asked in May 2013 to send someone to view the damage, but had ignored e-mails with suggested dates and had delayed viewing the property until July 2013. The homeowner attached a number of e-mails that had been ignored and added that the property factor had also failed to respond to many phone calls that he had made and many answering machine messages that he had left. He also complained that the property factor had failed to identify e-mails sent from its office and had sent blank e-mails with attachments, possibly spam or viruses.

The homeowner raised two further issues regarding the charges made by the property factor, namely that it had charged him for recorded delivery letters that were never received, and had added a number of charges to its invoices, including the addition of a Notice of Potential liability, that had been contested by the homeowner. He also contended that the property factor had agreed in March 2013 to send him free of charge invoices for 96 Calder Street for the period 28/8/2009-1/03/2010 and for Clifford Street from 28/5/2011-29/02/2102, but had, on 19 April 2013, sent invoices for a different property and, in respect of 96 Calder Street, invoices covering only the period November 2010 to February 2013. The property factor had sent the wrong invoices, but was now demanding a fee for supplying the invoices that had been agreed in March 2013.

The homeowner's final complaint was that the property factor had not complied with its own complaints procedure as set out in the written statement of services, in that all of his complaints had been referred to a director in accordance with the policy, but the director had failed to follow up on these complaints and correspondence had come from other representatives of the property factor.

The homeowner had contacted HOHP on 6 December 2014, attaching a copy statement from the property factor which indicated that late payment charges had been applied to his account of 14 November, the sum involved being £18. He had also e-mailed HOHP on 24 February 2015, to advise that a further late payment fee of £18 had been charged in his factoring statement of 13 February. These charges had been applied after the dispute had been accepted for investigation by HOHP and the homeowner contended that they were, therefore, in violation of Section 4.2 of the Code.

The application to the HOHP dated 22 July 2013, referred to the parts of the Code of Conduct which the homeowner believed have been breached. These were stated to be Sections 1.1a.C(k), D(l, m and n), Sections 2.1 and 2.5, Section 4.1, Sections 5.4 and 5.5, Sections 6.3 and 6.9 and sections 7.1 and 7.2.

(b) From the Property Factor

The property factor's Written Representation to HOHP is dated 31 July 2014 and was received on 4 August 2014. The property factor contended that the complaint, insofar as it related to insurance repairs carried out at 96 Calder Street in 2009 and repairs identified in April 2012, again at Calder Street, should be dismissed, as they pre-dated the coming into force of the 2011 Act. The Committee considered the matter and agreed with this view, and so determined as a Preliminary Matter, and the property factor's comments on these issues are not referred to in the following summary of its written representations.

With regard to the complaint by the homeowner that the property factor had failed to initiate insurance claims notified by the homeowner relative to both properties, the property factor accepted that it had initially refused to instruct insurance repairs to 96 Calder Street and 53 Clifford Street due to the homeowner not having paid his insurance premiums. The homeowner's reason for doing so

appeared to relate to an alleged debt due to him by the property factor in connection with a 2009 insurance claim. The property factor had, however, since processed the insurance claims and apologised to the homeowner for the delay in initiating the insurance payment. The property factor had credited the homeowner's account for 96 Calder Street in the sum of £100 in recognition of the delay in the insurance settlement amount being paid. A BACS transfer payment had been made for the insurance amount of £556.25, to the homeowner's bank account, being the insurance settlement figure less an apportioned share of the excess on the policy. The property factor would write directly to the homeowner in this respect.

The property factor then responded to the complaint by the homeowner that the property factor had provided information which was misleading or false in relation to settlement of insurance monies relative to 96 Calder Street. The property factor confirmed that it had originally informed the homeowner that insurance settlement monies would be paid to his account, but had subsequently changed its position to advise that it was retaining those monies against sums owed by the homeowner to the property factor. The property factor accepted that it misled the homeowner, apologised for having done so and confirmed that it would arrange for the monies to be transferred to the homeowner's bank account and would write directly to the homeowner in this respect.

The homeowner had complained that the property factor had delayed arranging inspection of insurance works until July 2013. The property factor responded by saying that the exchange of e-mails produced by the homeowner confirmed that the property factor had responded in good time to requests for inspection once it was given appropriate dates for doing so and produced copy e-mails dated 25 May, 8 June, 1 July, 3 July, 4 July and 11 July, all 2013, in support of its position.

The property factor then responded to the complaint that it unreasonably delayed in responding to e-mails and telephone calls, submitting that there was insufficient specification of the e-mails and telephone calls to which the homeowner was referring. By e-mails dated 4 June 2013 and 2 August 2013, the property factor had addressed issues raised by the homeowner relative to both properties and, in any event, in terms of Section 7.1 of the Code of Conduct, the property factor had a clear complaints procedure set out in Section 7 of its Terms of Service and Delivery of Standards document. The property factor had received no further correspondence in terms of Step 4 of its complaints procedure (referral to a Company Director) so, by the homeowner not having followed the property factor's complaints procedure, it could not be said that the procedure had been exhausted in terms of Section 7.2 of the Code of Conduct.

The homeowner had made two complaints regarding charges made by the property factor. The first related to charging for recorded delivery letters that never arrived and the second the addition of other fees and charges which the homeowner had contested, including charges for Notices of Potential Liability. The property factor's response was that there was insufficient specification of which properties the recorded delivery letters and charges related to and that, in any event, the property factor's debt recovery procedures were set out in Section 4 of its Terms of Service and Delivery of Standards document, which included clear

provision for other charges to be added to owners' accounts, including charges relating to Notices of Potential Liability.

As regards the agreement to provide missing invoices, the property factor stated that Mr Allan McLean of the company sent copy statements on 19 March 2013, the day after a meeting with the homeowner. In the accompanying e-mail, Mr McLean stated that he was enclosing copies of the statements as requested for both Calder Street and Victoria Road and advised that further copies would be charged at £10 plus VAT. The property factor stated that it was unclear whether the homeowner had been or was now seeking copies of the quarterly factoring statements or of the invoices to vouch the charges on these statements. Section 3 of the Terms of Service and Delivery of Standards document shows that the property factors charge different amounts, depending on whether it is for providing copy statements or copy invoices.

In its written representation, the property factor also asked the committee to direct the homeowner to state how much of the current arrears of common charges and repairs he admitted were properly due and payable to the property factor and when he would pay the same, but, at the hearing, the committee advised the representatives of the property factor that it had no powers to make such a direction.

Summary of Oral Evidence

The papers before the committee consisted primarily of many hundreds of e-mails, many of which had portions of earlier e-mails cut and pasted within them. Some of the e-mails were specific to one or other of the matters complained of, but many of them dealt with more than one of the issues. The members of the committee had spent a great deal of time prior to the hearing arranging the correspondence in such a way as to provide them with a "time-line" of events and the committee's approach at the hearing was to consider the individual issues on a chronological basis and to invite the property factor to comment on each. All of the e-mails referred to in the following paragraphs are included in the papers which the committee has seen.

Insurance Claims.

(a) 96 Calder Street

The property factor advised the committee that both properties, Clifford Street and Calder Street, required major work, but that it had not been possible over the years to obtain the consent of the owners to have substantial works carried out. As an example, when roof repair works were carried out at 96 Calder Street in 2012, only two out of eight owners were prepared to agree to the repairs that the property factor considered should be carried out and it was uncertain whether the homeowner was one of them. As a result, it was not possible to sanction repair works costing in excess of £350, the maximum expenditure figure that the property factor could authorise without prior approval. There were significant arrears in respect of the tenements of which the homeowner's properties formed part and

the property factor was, therefore, caught in the dilemma that, if it did not carry out minor repairs, it would be in breach of its obligations under the written statement of services, but if it did instruct repairs, the company ended up carrying further debt, as the owners were in serious arrears.

The Committee had already determined that the homeowner's complaints regarding works carried out at 96 Calder Street and covered by insurance in 2009/10 related to an alleged failure on to carry out the property factor's duties prior to 1 October 2012, so could not be considered by the committee. Similarly, further roofing works carried out in 2012 lay outwith the jurisdiction of the committee

In relation to the insurance claim for works to 96 Calder Street in December 2012 that was the subject of the homeowner's complaint, the property factor told the committee that the homeowner's agents, S&M Property Maintenance, had e-mailed on 19 November 2012 to advise that the problem of water ingress to one of the bedrooms was back again and asked the property factor to contact them to arrange for someone to have a look at the problem. The property factor instructed a roofing company on the following day, and work to unblock the outlet, rod the downpipe and replace slipped slates was carried out on 4 December 2102 at a cost, inclusive of VAT, of £126. On 5 February 2013, the homeowner e-mailed the property factor with contact details for his new letting agents, GDPM, and asked the property factor to deal with them in relation to the insurance claim. On the same day, GDPM e-mailed the property factor, advising them that there was excessive damp staining and spores on the inside wall which would need to be fully treated. The agents asked for two claim forms for the buildings insurance, to enable them to submit two quotations for the required works and stated that this was not a new claim and should have been dealt with along with the exterior works that had already been done. Later that day, the property factors replied to the effect that they were awaiting payment on outstanding factoring fees which included insurance premiums before they could intimate the claim. The agents responded immediately, asking for a copy of the outstanding account and stating that they would arrange for payment in early course. The property factors replied by advising the agents that they charged for copy statements but that the homeowner received them quarterly by e-mail. The agents then expressed the view that it was not acceptable that they were holding the homeowner to ransom in this way.

There had been further e-mails exchanged over the course of the next two weeks and on 15 February, the homeowner had stated in an e-mail that he was refusing to allow the contractors instructed by the property factor into the property, because of the issue he had had with them regarding previous repair works. On 22 February 2013, the property factor e-mailed the agents for the homeowner, advising them that it was for the property factor to submit claim forms to the insurers on behalf of owners and that, in order to submit a claim, quotes were required. As the homeowner had stated he would not allow contractors appointed by the property factor into the property, quotes had to be obtained and submitted to the property factor in order to start a potential claim.

The homeowner then advised the property factor that he was to be in Glasgow and asked for a meeting, which took place on 18 March 2013 at the property factor's office. Amanda Gilmour told the committee that the homeowner had asked for invoices regarding the properties and that she had had to authorise the printing of statements free of charge. Her recollection was that the homeowner had been given everything he had asked for at the meeting. On the following day, 19 March, the homeowner had e-mailed Mr Allan Maclean, the company's senior property manager, confirming the matters that had been discussed at the meeting and stated "Mr Maguire requested copies of all invoices not previously received by him, the specific period of unreceived invoices was discussed and agreed. G&W confirmed these would be provided." Later that day, Mr Maclean had responded to the e-mail, enclosing "copies of the statements you requested for both Calder Street and Victoria Road" and added that any further copy statements required would be charged at £10+VAT each. The homeowner had contended, in an e-mail sent on 21 April, that the property factor had agreed to send missing invoices, without charge and requested invoices for 96 Calder Street from 28/8/2009-1/3/2010 and for 53 Clifford Street from 28/5/2011-29/2/2012. Amanda Gilmour told the committee that neither the e-mail from the homeowner of 19 March, nor the reply from Mr Maclean made any mention of actual properties or dates, so the property factor could not be said to have failed to provide documents that it had agreed to provide free of charge. She added that she would not have sanctioned the provision, free of charge, of a third set of copy statements, namely those specified in the homeowner's e-mail of 21 April.

Returning to the question of the insurance claim, the property factor told the committee that on 24 May 2013 it had offered to the homeowner's agents, GDPM, times on 30 May when they could meet up to inspect both properties 96 Calder Street and 53 Clifford Street, and referred the committee to an e-mail from the homeowner on 29 May in which he said that his agents were unable to meet the following day, but they would be in touch by e-mail to confirm dates and times on the week commencing 3 June. GDPM also e-mailed the property factor on 29 May, to say they were available that week, with the exception of 5 June "if you could please confirm a day/time for your own availability". The property factor referred the committee to its e-mailed response later that afternoon, in which it said "we will be available to attend the property on any date in the week beginning 3rd June. Please arrange a suitable date and time with the tenants and contact us to confirm these details". The property factor reminded the committee that access would have to be arranged with the tenants and that the onus therefore lay on GDPM to set up an appointment and then tell the property factor what had been arranged. The property factor told the committee that it had not received any further proposed dates and times from GDPM following that e-mail. On 16 June 2013, the homeowner had sent in three completed complaint forms in respect of the property factors' service. These had been sent to him on 11 June for completion in accordance with the property factor's complaints procedure. On 28 June, Amanda Gilmour, an Associate Director, had responded to the homeowner, advising him that in order to move matters forward, access to both properties would be required, referred to the property factor's e-mail of 29 May to the homeowner's agents, and asked that a date and time be given, so that a Loss Adjuster and representative of the property factor could attend.

On the following day, GDPM advised by e-mail that they would be unable to meet at either property and provided mobile phone contact numbers for the tenants in each of the properties, so that the property factors could make arrangements directly with the tenants. This e-mail was sent on a Saturday and was opened by the property factor on Monday 1 July. On 2 July, the property factor told the homeowner and his agents that one of the numbers given was not recognised and that voicemail messages had been left at the other three numbers. On 3 July, the property factor e-mailed the homeowner and GDPM again, to say that the Calder Street tenants had told them that they could only give access outwith office hours. Accordingly, the property factor requested that GDPM make the necessary arrangements to meet and provide access to both properties. The property factor repeated this request in a further e-mail sent the next day and on 11 July, it confirmed that arrangements had been made for a meeting with a representative of GDPM at 96 Calder Street early in the morning of the following day.

Following upon the meeting, the property factors intimated a claim to the insurers Royal & Sun Alliance (RSA) and, on 23 July, RSA advised the property factor that they had visited 96 Calder Street with the letting agent. They reported that there was damage to the back bedroom wall and that a small repair of the plaster on brick, then redecoration, was required. They proposed a cash settlement of £600, less the £350 policy excess. On 24 July, RSA stated that they had been asked to review comments relating to a previous claim and subsequent repairs allegedly carried out by the homeowner's own contractors, but could see no evidence of any repairs additional to those carried out by the property factor's contractors and that, if the homeowner wished to pursue a claim, he would require to prove his loss to the property factor.

On 25 September 2013, the property factor advised the homeowner by e-mail of the report and proposed settlement by RSA. On 5 October, a further e-mail to the homeowner confirmed that the settlement figure from RSA had been received and requested the homeowner's bank details. The homeowner responded on 8 October, saying that the property factor had not been authorised to settle, that no quotes had been obtained and asked what the property factor's position would be if the cost of the works exceeded the settlement sum that had been accepted. On 9 October, the property factor confirmed that no quotes had been obtained, and on 10 October, sent a further e-mail, stated that the loss adjuster for RSA had confirmed that, after attending the property to view the damage, he believed the cost of the repair should not exceed £600. In this e-mail, the property factor also advised that it had decided that, as the water ingress had emanated from a common part of the property, the excess of £350 would be apportioned against all 8 apartments in the tenement, at £43.75 per flat. The payment to the homeowner would, therefore, be £556.25 and the property factor again asked for bank details. A further e-mail reminder was sent on 6 November and the homeowner provided his bank details on 18 November.

There followed an exchange of e-mails between the homeowner and the property factor, in which the homeowner demanded clarity as to when the money would be in his account, the property factor having confirmed on 23 November that it had "begun the process of transferred (sic) the relevant funds to the account". On 3 December, however, the property factor told the homeowner that, as he had

failed to pay insurance premiums for the property since November 2009, it had added the insurance claim money to his factoring account to cover a portion of these costs. The homeowner accused the property factor of having provided misleading information by having told him on 23 November that it had begun the process of transfer to his bank account.

At the hearing, the property factor told the committee that, in December 2013, the company had felt that it was morally justified in applying the payment received towards the homeowner's outstanding insurance premiums. He had not paid any of the premiums since 2008. In the light of the homeowner's application, however, it had reviewed the position and, having taken into account the fact that it had put in place a Notice of Potential Liability to secure the homeowner's indebtedness, decided to make over the payment to the homeowner, using the bank details that he had provided on 18 November 2013. Unfortunately, however, in making the transfer, the property factor made an error in that it put a wrong digit in the bank account details. The property factor e-mailed the homeowner on 1 August 2014, advising that it had corrected the mistake and, in recognition of its error, had applied a credit of £100 to the homeowners' factoring account for 96 Calder Street. The property factor told the committee that the homeowner had then complained to HOHP that he had not received the money, and on 12 September, it had asked him to examine his bank statements again. He had confirmed by e-mail on 17 September that the funds transferred on 24 July had reached his account as intended.

(b) 53 Clifford Street

On 24 March 2013, GDPM e-mailed the property factor, asking for an insurance claim form, stating that a leaking washing machine in the flat above had resulted in damage to the ceiling of the property. The property factor replied on 24 March, saying that it would ask two contractors to attend and provide photographs and estimates. A plumber would also attend to confirm that the source of the leak had been fixed. On 16 April, GDPM asked for an update on the insurance claim and the property factor replied, asking GDPM to confirm when the homeowner planned to clear the balance of £1208.87 on his account. The homeowner e-mailed the following day, telling the property factor that all insurance premiums had been paid for Clifford Street and that there was no legal justification for hindering the start of the insurance claim. He added that GDPM would obtain two quotations and that the property factor would not be allowed to carry out the repair works. He asked the property factor to immediately contact the upstairs neighbour to ensure the leak was fixed before the ceiling came down. The property factor wrote to the upstairs owner that day.

On 18 April, the property factor again asked the homeowner if there was any reason that he was withholding the remaining sum due on his factoring account. He replied on 21 April that, until the property factor had fully reimbursed his out of pocket expenses (relative to issues which formed part of the application, but which the committee had determined pre-dated 1 October 2012), no payments would be made. He added "If you have no legal justification for refusing to start the claims please do so immediately". The property factor replied on 25 April that it was not refusing to start an insurance claim and reminded the homeowner that

it was waiting for the required quotes that he was to supply. On 14 May, the homeowner e-mailed to complain that no-one at the property factor's office would take his telephone call and that, as a result of its refusal to start the insurance claims, he had no alternative but to commence the works and he would hold the property factor fully liable for all costs.

On 24 May 2013, Mr Allan Maclean, the property factor's Senior Property Manager, acknowledged receipt of the homeowner's e-mails and asked for certain details of the incident (the date, time, nature of loss etc), which the insurers would require in order to process a claim. The e-mail also asked the homeowner to confirm that a meeting at the property could take place on 30 May, for the purpose of ascertaining the nature and extent of the damage. On 29th May, GDPM provided the details of the incident, but stated that they were not available to meet with the property factor at the property on 30 May. The property factor asked the committee to note that, although the salutation in this e-mail was "Dear Mr McLean", the person with whom GDPM had, up until then, been corresponding with, Allan Maclean was not one of the four people at Grant and Wilson to whom the e-mail was addressed and, whilst an ordinary letter containing that salutation would have found its way to Mr Maclean, it was perfectly reasonable to assume that none of the actual recipients would have picked up on this and forwarded it to him, all assuming that he had received it directly. The significance of this was that it was in the same e-mail that they had told the property factor that they could meet at the property any day the following week, apart from 5 June. GDPM made the same error in an e-mail of 2 July, in which they referred to the e-mail of 29 May and asked the property factor to arrange access. The committee held that this was not a relevant factor in relation to the access question, as one of the addressees at the property factor was Clarke Elsby and he was the person who sent the e-mail later that day, confirming the property factor would be available to attend the property on any day in the week beginning 3 June and asked GDPM to arrange a suitable time with the tenant and to contact the property factor to confirm the details. The committee was, however, of the view that it could not be established that Mr Maclean was aware that GDPM had provided the details of the incident, as they were in an e-mail that he had not received directly and might not have seen.

The subsequent events regarding attempts to make arrangements for a meeting at the property have been narrated above in relation to 96 Calder Street. The tenants at 53 Clifford Street had agreed to allow access and, on 11 July, the property factor reported to the homeowner that it had inspected the property and, on 29 July, asked GDPM if they had the quotes for the work, as they were needed in order to progress the insurance claim. On 19 August, GDPM asked the property factor for a progress report on the insurance claim and, on 22 August, Allan Maclean e-mailed the homeowner and GDPM, stating that the property factor had still not received the information that was required for Clifford Street. When the homeowner asked what information was required, Mr Maclean replied by attaching copies of his previous e-mails and again listed the details of the incident that he awaited. The homeowner then sent an e-mail on 23 August to the property factor, referring to requesting "information that had previously been provided to Grant and Wilson". He wanted to know why the e-mail of 29 May from GDPM, a copy of which was attached to his present e-mail was ignored. This was the e-mail that

had not included Mr Maclean amongst the addressees, and, on 27 August, Mr Maclean told the homeowner and GDPM that he had not been included in that e-mail which was in response to the one that he had sent on 24 May. In any event, on 29 August 2013, Mr Maclean advised the homeowner and GDPM that the information had now been submitted to the insurers. He asked for two competitive estimates for the necessary repairs which would be forwarded to the insurance company upon receipt. On the same day, he submitted the insurance claim form with photographs.

On 16 September, the property factor e-mailed the homeowner again, to ask if he had the two quotes. They were e-mailed to Mr Maclean on 1 October and, on 14 October, the property factor confirmed to the homeowner and GDPM that the claim had been passed to a Technical Special Investigator at RSA. On 20 October, the homeowner asked the property factor for the e-mail address of the Inspector, so that he could contact him directly, as there had been no progress. On the following day, Mr Maclean provided the e-mail address, but the homeowner then asked for his telephone number and the claim reference number, which the property factor provided later that day.

Charging for Recorded delivery letters that had never been received and adding charges, including for a Notice of Potential Liability, which the homeowner was contesting

The property factor told the committee that no such charges had ever been made and that it was not aware of any recorded delivery letters having been sent to the homeowner. The homeowner had not provided in his application or written submissions any details of the charges to which he was referring and there were no entries on his factoring statements which supported his contention. Amanda Gilmour referred the committee to her e-mail to the homeowner of 4 June 2013, from which it appeared that the added charges to which the homeowner referred appeared to relate to the replacement of the entry lock and keeper at 96 Calder Street in April 2013. Her e-mail referred to the response by her colleague Allan Maclean when the homeowner had raised this issue and she cut and pasted that response into her e-mail. The response was that the property factor had received a report from the owner of another flat within the block that there was a problem with the lock on the front door in that it was not closing and that a key had been broken in the bin store lock, The property factor had instructed the repairs, the cost of which came within their authority to instruct repairs, provided the cost did not exceed £350, without having to seek prior approval from the owners.

The Notice of Potential Liability related to 53 Clifford Street and, in her e-mail of 4 June 2013, Amanda Gilmour had referred the homeowner to the Terms of Service and Delivery of Standards document and provided details of the dates on which various steps had been taken in accordance with the Debt Recovery procedure set out in Section 4 of the document.

Failure by the property factor to comply with its own Complaints Procedure

Amanda Gilmour told the committee that the complaints procedure had reached Step 3 of the "Complaints Resolutions" section of the Terms of Business and

Delivery of Standards, namely a response from her, as Associate Director. She had provided that response. The homeowner had not proceeded to Step 4, which would have required him to write again to the company to state that he was dissatisfied with the response from the Associate Director. The homeowner had not done this, so the complaints procedure had not been exhausted, but the company had complied at all times with its complaints procedure.

Failure by the property factor to identify e-mails send from its office and sending of blank e-mails with attachments, possibly spam or viruses

At the hearing, the property factor suggested that this might indicate a problem with the homeowner's e-mail software, but the homeowner had only provided one example of an e-mail without a heading and, when he had queried it, the property factor had immediately responded to say the e-mail was genuine.

Late payment charges

The homeowner had drawn to the attention of HOHP two late payment charges which had been applied to his factoring account after the date on which HOHP had accepted the complaint for investigation. The property factor told the committee that the company had been taken over by James Gibb, Property Factors, on 2 March 2015 and had since gone through a major restructuring process. Amanda Gilmour accepted that it might be that, as a result of that restructuring, late payment charges were applied without her knowledge and she undertook to check the position and that, if late charges had been applied, she would take steps to have them removed.

Breaches of the Code of Conduct

The homeowner had alleged breaches of the following sections of the Code, which requires that the Written Statement should set out:

Section 1.1a.C. Financial and Charging Arrangements
k. how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable.

Section 1.1a.D. Communication Arrangements
l. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your in-house complaints handling procedure.
m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail.
n. your procedures and timescales for response when dealing with telephone enquiries.

Section 2. Communication and Consultation.
2.1. You must not provide information which is misleading or false.
2.5. You must respond to enquiries and complaints received by letter or e-mail within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible. And to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.

Section 4. Debt Recovery

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

2. If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case.

Section 5. Insurance.

4. If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so.

5. You must keep homeowners informed of the progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves.

Section 6. Carrying out Repairs and Maintenance.

3. On request, you must be able to show how and why you appointed contractors, including cases where you decided to carry out a competitive tendering exercise or use in-house staff.

9. You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

Section 7. Complaints Resolution

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

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

The property factor contended at the hearing that the Financial and Charging Arrangements were fully and clearly set out in the Terms of Service and Delivery of Standards document. As regards Communication arrangements, these too were clearly set out in the document, the company website had links to that document and there was further regular communication with homeowners via a quarterly newsletter. In relation to section 2.1, the property factor had accepted that it had provided misleading information about its intention to remit the insurance claims moneys for 96 Calder Street and had, in its written submissions, apologised for that, the explanation for its decision to retain the moneys to set against unpaid insurance premiums having been given at the hearing.

The property factor believed it had complied with Section 2.5 of the Code. The response times were set out in the Terms of Service and Delivery of Standards. The only occasion on which the property factor might have been thought to have failed to meet the standard was the failure to act on the e-mail from GDPM dated 29 May 2013 (the e-mail responding to the request by Allan Maclean for details of the incident which gave rise to the insurance claim at 53 Clifford Street), but the property factor had explained to the committee that this e-mail had not been addressed to Mr Maclean and that, because the salutation had been "Dear Mr

Maclean", it was reasonable to excuse the failure of the actual recipients of the e-mail to spot that it had not in fact been sent to him.

In relation to section 4.1, the property factor told the committee that the Debt Recovery Procedure was clearly set out in Section 4 of the company's Terms of Service and Delivery of Standards and was also available on-line. The procedure for disputed debts was not specifically set out in that Section, but any such dispute would be covered by the Complaints Resolutions procedure detailed in Section 7.

Section 5.4 of the Code was covered by the clear procedures set out in Section 5 of the Terms of Service and Delivery of Standards. It includes a statement that the property factor has in place procedures in processing insurance claims for common and private works, indicates that a hard copy will be supplied if requested and that it can be accessed on the company's website. The homeowner had alleged that the property factor had at one point refused to give him details of the claim number and contact details of the loss adjuster for 53 Clifford Street, but these details had been given when requested. The property factor did not accept that it had not complied with Section 5.5 of the Code.

The property factor expressed the view that the reference in the application to Sections 6.3 and 6.9 of the Code appeared to refer to the issues which had been dismissed by the committee because they pre-dated 1 October 2012.

Finally, in relation to Sections 7.1 and 7.2 of the Code, the property factor explained that its complaints resolution procedures were clearly set out in Section 7 of its Terms of Service and Delivery of Standards. There were five steps in the process. The homeowner had by-passed the Step 4 of the process, following on the response given by the Associate Director, and had proceeded directly to an application to HOHP. The property factor directed the committee to an e-mail of 11 July 2013, in which it had told the homeowner that it was unsure why he should feel that its reply of 4 July would be a final response. The homeowner had stated in an e-mail of 8 June that he considered that the complaints procedure had been exhausted by the e-mail from Amanda Gilmour of 4 June, which he understood to be the property factor's final response to his complaints. The property factor had responded on 11 June, referring to its dispute resolution procedure and sending the homeowner the complaint forms, which the homeowner returned on 16 June. On 4 July, Mr Allan Maclean had sent an e-mail to the homeowner, responding to his e-mail of the previous day and, on 7 July, the homeowner replied to that e-mail, stating that the e-mail of 4 July appeared to be the property factor's final response to all complaints raised. This resulted in the e-mail of 11 July 2013.

Having heard all the evidence set out above, the committee invited the property factor to make any concluding remarks. Amanda Gilmour told the committee that the property factor had found it difficult to deal with some of the issues raised in the complaint and, in particular, had had problems in picking out of e-mail chains, which included many e-mails which had portions of other e-mails cut and pasted into them, the particular points on which the homeowner had alleged failure on the part of the property factor. Many of the allegations were general in nature, with no specific examples to back them up and the homeowner had tended to supply only "one-way" correspondence without including the many replies that had

been sent. The homeowner had arrears of factoring payments amounting to thousands of pounds, which the homeowner was refusing to pay.

REASONS FOR DECISION

The committee considered carefully all the written submissions and the oral evidence provided by the property factor at the hearing. The written submissions included many hundreds of e-mails and the committee's task of analysing the evidence was significantly complicated by the fact that portions of e-mails had been cut and pasted into subsequent e-mails. This made the process of following events chronologically very much more difficult. That said, the committee accepted that e-mail was the only practicable method of communication between the parties, as the homeowner is living in Australia.

Having rejected the first two grounds of complaint in the summary of complaint attached to the application because they related to events prior to 1 October 2012, the first matter for the committee to consider was the complaint that the property factor had failed in its duties to start an insurance claim at 96 Calder Street in December 2012. The homeowner's view was that there had been a delay of five months in starting the insurance claim and a further delay, from May till July 2013 in visiting the property to inspect the damage. The property factor's position was that the repair works to the roof, from which the internal damage to the property emanated had been dealt with expeditiously in December 2012, and that, on 4 February, GDPM, the homeowner's letting agents, contacted them to say there was a problem in the property and asked for a claim form. The property factors admitted that they had at that point stated that the outstanding factoring fees, which included insurance premiums, would have to be settled before they could intimate the claim to the insurers. The committee holds that there was a delay of 11 days at that stage, but by 15 February, the homeowner had informed the property factor that he would not allow contractors instructed by the property factor into the property. This meant that the onus shifted to the homeowner to obtain the necessary quotations for the work and to forward them to the property factor. The committee does not hold the property factor responsible for any delay beyond the 11 day period referred to above and does not regard a delay of 11 days as amounting to an unreasonable period.

The committee also held that the property factor had not unreasonably delayed in sending someone to view the damage between May and July 2013. It had contacted GDPM on 24 May, offering 30 May as the inspection date and it was only on the day prior to the proposed meeting that GDPM advised that they were unable to meet on the 30th, but could be available the following week. The property factor confirmed it could meet at any time in the week beginning 3 June and asked GDPM to arrange a suitable time with the tenants and advise the property factor. GDPM did not respond to the property factor until 29 June, and, instead of confirming that an arrangement had been made with the tenants to give access, as had been requested by the property factor a month earlier, they said that they would not be able to meet at the property and passed on the tenants' mobile phone numbers.

The tenants told the property factor that they could only give access outwith office hours and, on 3 July, the property factor reported that to the homeowner and to GDPM and again requested that GDPM make the necessary arrangements. The meeting at the property took place on 12 July and, by 23 July, the claim had been intimated to RSA and their loss adjuster had visited the property. It was the view of the committee that, for these reasons the property factor was not responsible for the delays that occurred between 24 May and 12 July 2013. The committee did not, therefore, uphold this part of the homeowner's complaint.

The committee then considered the complaint that the property factor had failed in its duty to start an insurance claim at 53 Clifford Street. This matter had begun on 24 March 2013, when GDPM e-mailed the property factor to report damage caused by a leaking washing machine in the flat above. They stated that the leak had been fixed. The property factor responded the following day, saying it would arrange for contractors to attend. There is no evidence of anything further happening until 16 April, when GDPM asked for an update and stated that the problem had become worse. The property factor asked them when the homeowner intended clearing the balance on his factoring account and on 17 April, the homeowner told the property factor that all insurance premiums for 53 Clifford Street had been paid and there was no justification for delaying the start of an insurance claim. He also stated that the property factor would not be allowed to instruct the contractors to carry out the work in the property and that GDPM would arrange for two quotations. On that day, the property factor wrote to the owner of the flat above the property, asking him to carry out any necessary repairs within his property.

On 21 April, the homeowner accused the property factor of refusing to start the insurance claim, but, in its response on 25 April, it said that it was not refusing and reminded the homeowner that he was to provide two quotes for the work. On 24 May, the property factor asked for details of the incident, which the insurers would require and suggested a meeting at the property on 30 May, to assess the damage. The details of the incident were sent on 29 May, when GDPM also advised that they could not make the meeting suggested for the following day, but the committee is unable to hold that the details were received by Mr Allan Maclean, as, whilst his name appeared in the salutation, the e-mail was addressed to others within his company and the view of the committee is that it is reasonable to conclude that his colleagues might not have noticed that Mr Maclean was not one of the recipients, so did not forward it to him. No doubt there was discussion in the office about the meeting the following day not now taking place, but there is no evidence to demonstrate that the details of the incident were relayed to Mr Maclean.

Thereafter, the matter proceeded in the same manner as for 96 Calder Street, with GDPM next contacting the property factor on 29 June to say they were unable to meet at the property and providing mobile phone numbers for the tenants. The property factor reported to the homeowner on 11 July that it had inspected the property. On 19 August, GDPM asked for a progress report and the property factor responded that it was still waiting for the details of the incident that it had requested on 24 May. It was on 27 August, following exchanges of e-mails between the homeowner and the property factor, that it became apparent that Mr Maclean

might not have received the e-mail of 29 May. The property factor confirmed on 29 August that the insurance claim had been made, but reminded the homeowner and GDPM that the two estimates, which the homeowner had stated on 17 April that GDPM were obtaining, were still awaited. The quotations were e-mailed to the property factor on 1 October.

On 20 October, the homeowner asked the property factor for the loss adjuster's e-mail address, which was provided on the following day and, when the homeowner then asked for the loss adjuster's telephone number and the claim number, that information was provided on the same day.

The committee held that there appeared to be little progress between 25 March, when the property factor had said it would arrange for contractors to attend and provide estimates, and the chasing e-mail from GDPM on 16 April, but also that it was not until 16 April that the property factor became aware that the leak from the flat above had either not been fixed or had recurred. GDPM had stated on 24 March that the leak from the washing machine had been fixed. It appears from an e-mail from GDPM on 25 March that the property factor had instructed contractors to attend the property, as GDPM stated in that e-mail that they had "already spoken to a Jim McRae who is looking for access on Wednesday" (27 March). Taking into account the fact that the property factor would have had to wait until the contractor provided estimates and that the Easter holiday weekend was 29 March (Good Friday) to 1 April (Easter Monday), the committee did not consider that the apparent lack of progress could be attributed to unreasonable delay on the part of the property factor. There was, in any event, no evidence as to whether GDPM had arranged with the tenants to give access for the contractor on 27 March.

The committee also held that it was not established that Mr Maclean had, prior to the exchange of e-mails on 27 August, received the details of the incident sent by GDPM on 29 May and that the homeowner had not until 1 October, provided the estimates that were necessary to enable the insurance claim to proceed. For the reasons set out above, the committee did not uphold this element of the homeowner's complaint.

The next part of the complaint related to charging for recorded delivery letters that were not received. The committee held that the homeowner had not provided any specification as to the letters concerned and had not provided any details of the charges that he said had been made. The property factor had stated that no such charges had been made and that it was not aware of any recorded delivery letters having been sent to the homeowner. In the absence of evidence to the contrary, the committee did not uphold this element of the complaint.

The committee then considered the failure, alleged in the application, of the property factor to comply with its own complaints procedure. It looked in detail at the Complaints Resolutions section of the Terms of Service and Delivery of Standards document. The property factor had said at the hearing that the homeowner had not exhausted the procedure before applying to HOHP. The committee noted that Amanda Gilmour, an Associate Director of the company, had responded to the homeowner's complaints on 4 June 2013. The homeowner, in an e-mail of 8 June stated that so far as he could ascertain, the complaints procedure

had now been exhausted and matters would now be referred to HOHP. He repeated this view in an e-mail of 7 July.

The view of the committee was that the homeowner had not followed the complaints procedure, as Step 4 of that process required him to write to the Company Director if he was dissatisfied with the response of the Associate Director. Amanda Gilmour's e-mail of 4 June clearly indicated that she was responding to the complaints as Associate Director, but the homeowner incorrectly assumed that hers was the company's final response, when it was the response at Step 3, not Step 4 of the process. Accordingly, the committee did not uphold this element of the homeowner's complaint.

The next part of the complaint considered by the committee was the alleged failure by the property factor to identify e-mails sent from its office and sending of blank e-mails with attachments, possibly spam or viruses. The committee agreed with the view expressed by the property factor at the hearing that only one example of such an e-mail had been provided by the homeowner and that, when the homeowner had queried it, the property factor had immediately responded to confirm that it was genuine. The committee did not, therefore, uphold this element of the complaint.

The committee then considered the question of late payment charges. It noted that the charges to which the homeowner was referring were applied to the factoring accounts on 14 November 2014 and 13 February 2015, so both were after the date that HOHP had accepted the homeowner's application for investigation. The committee did not accept as an explanation for the late charges the fact that the property factor had been taken over on 2 March 2015, as this was after the application of the charges referred to. The committee was, however, of the view that these charges related to unpaid factoring fees and not to any matter under investigation by HOHP. The homeowner had been refusing to pay factoring fees unless and until the property factor agreed to reimburse him for costs he said he had incurred as a result of the property factor's failure to deal properly with an insurance claim and repairs works in 2009/10 and again in 2012. As the committee had determined that these matters related to alleged failures on the part of the property factor prior to 1 October 2012, the committee held that the property factor had not breached the terms of Section 4.2 of the Code and that it would not uphold this element of the complaint. The committee noted the statement given at the hearing that the property factor would take steps to cancel the charges referred to.

The committee determined that the property factor has not failed to carry out its duties as defined by Section 17(5) of the Act.

The final matter for the committee to determine was whether the property factor had failed to comply with the Code of Conduct, as set out in the application. The committee determined that the written Terms of Service and Delivery of Standards dealt fully with the matters covered by Sections 1.1a.C.k, 1.1a.D.l, m and n. The committee further held that the property factor had responded to enquiries and

complaints within reasonable timescales, particularly in the context of the large volume of e-mails that it received from the homeowner and that no breach of Section 2.5 of the Code had been established. The committee determined that the property factor had a clear written procedure for debt recovery and that the question of disputed debts, covered by Section 4.1 of the Code, was encompassed by the general Complaints Resolutions section of the Terms of Service and Delivery of Standards document. In relation to Sections 5.4 and 5.5, the committee determined that there was a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims were dealt with promptly and effectively, and that the property factor had not been at fault in relation to the insurance claims for 96 Calder Street and 53 Clifford Street, so the property factor had complied with Sections 5.4 and 5.5 of the Code. The committee held that the complaints that the property factor had failed to comply with Sections 6.3 and 6.9 of the Code related to those elements of the complaint that pre-dated 1 October 2012 and that the property factor had complied with Sections 7.1 and 7.2 of the Code and that the homeowner had not proceeded to Step 4 of the Complaints Resolutions section of the property factor's Terms of Service and Delivery of Standards.

Having dealt with all the other Sections of the Code which the homeowner had contended had been breached, the committee was left with one to consider, namely Section 2.1, which states that a property factor "must not provide information that is misleading or false". The property factor had accepted that it had provided misleading information to the homeowner about its intention to remit the insurance claim moneys for 96 Calder Street and, in its written submissions, had apologised to the homeowner and confirmed that it would arrange for the monies to be transferred to the homeowner's bank account. The transfer had taken place. The committee was aware that the background in this case was that there was an ongoing unresolved dispute between the parties dating back to 2010, relating to matters which pre-dated 1 October 2012 and that, as a result, the homeowner had accumulated very substantial arrears of factoring fees and charges, including unpaid insurance premiums which the property factor was having to carry, in order to ensure continued insurance cover. The property factor might justifiably have decided to set the monies received against unpaid insurance premiums, but that was not what it had originally told the property owner. It had, however, reviewed its decision and had apologised and remitted the funds to the homeowner's bank account and the committee determined that, taking this into account and having regard to the background and all the circumstances of the case, it would not be appropriate to make a property factor enforcement order.

The Committee determined that the property factor has not failed to comply with the Section 14 duty to ensure compliance with the Property Factor Code of Conduct.

APPEALS

The parties' attention is drawn to the terms of section 22 of the 2011 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 a 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..."

Signed .

Date 1 May 2015

GEORGE CLARK, Chairperson