

Housing and Property Chamber
First-tier Tribunal for Scotland



**Decision of the of the First-tier Tribunal for Scotland Housing and Property
Chamber**
In an Application under section 17 of the Property Factors (Scotland) Act 2011

by

Charles McDonald, 111 Whitehaugh Park, Peebles EH45 9DB (“the Applicant”)

**Greenbelt Group Limited, McCafferty House, 99 Firhill Road, Glasgow G20 7BE
 (“the Respondent”)**

Chamber Ref: HOHP/PF/16/0135

Re: Whitehaugh Park Estate, Kingsmeadows, Peebles EH45

Tribunal Members:

John McHugh (Chairman) and Robert Buchan (Ordinary (Surveyor) Member)

DECISION

The Respondent has failed to carry out its property factor’s duties.

**The Respondent has 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 Applicant is the owner of a House at 111 Whitehaugh Park, Peebles ("the Property").
- 2 The Property is located within a development known as Whitehaugh Park ("the Development").
- 3 The Development includes 129 houses and associated common areas including parking, paths, play parks, fencing and landscaped and woodland areas ("the Common Areas").
- 4 The Development was constructed in or around the year 2000.
- 5 The Development is a cul de sac which leads off the main road, Kingsmeadow Road. It has at its far end a vehicle turning circle.
- 6 At its eastern boundary is a public track known as the Farmer's Lane.
- 7 Pedestrians are able to use formal and informal footpaths to walk through the Development to access neighbouring streets.
- 8 There are two playparks. The smaller of the two is located towards the western side of the Development and the larger further east.
- 9 The Applicant purchased the property in 2000 from Taywood Homes Ltd, the house builder who constructed the Development.
- 10 The Respondent commenced its work as factor of the common areas of the Development in 2000 and has remained in place since.
- 11 A Deed of Conditions by Taywood Homes Limited recorded 28 May 1997 ("the Deed of Conditions") governs the arrangements which apply among the Respondent and the homeowners within the Development including the Applicant.
- 12 The Deed of Conditions provides for the appointment of the Scottish Greenbelt Company Ltd to manage the common areas of the Development.
- 13 The Respondent is the heritable proprietor of the common areas.
- 14 The property factor's duties which apply to the Respondent arise from the Respondent's Written Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.
- 15 In addition to property factor's duties, the Respondent 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 (1 November 2012).
- 16 The Applicant has, by his correspondence, including that of 24 June 2016 notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act (the Code of Conduct for Property Factors).

- 17 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

1
2 The hearing took place at Peebles Burgh Hall, Peebles on 31 March, 28 April and 16
3 June and at George House, Edinburgh on 14 July 2017.

4
5 The Applicant was present at the first three days of hearing and called as witnesses
6 other residents of the Development, Graeme Millar, Raymond Handyside, Ian
7 Hamilton and Margaret Mills. The Applicant was assisted in part by Mr Tom Hobbs.
8 At the hearing on 14 July 2017, the Applicant was unable to be present and was
9 represented by Mr Millar.

10
11 The Respondent was represented at the hearing by its Operations Director, Janet
12 McQuillan and its solicitor, Ruth Waters of Young & Partners. It called as witnesses
13 its now retired Operations Manager, Fergus Cumming, Peter Lamb of Esk Valley
14 Landscapes, and Gerard Gillespie, a Tree Inspector. Ms McQuillan also gave
15 evidence.

16

17 **Introduction**

18

19 In this decision we refer to the Property Factors (Scotland) Act 2011 as “the 2011
20 Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors
21 as “the Code”; the First-tier Tribunal for Scotland Housing and Property Chamber
22 (Procedure) Regulations 2016 as “the 2016 Regulations” and the First-tier Tribunal
23 for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the
24 2017 Regulations”.

25

26 The Respondent became a Registered Property Factor on 1 November 2012 and its
27 duty under section 14(5) of the 2011 Act to comply with the Code arises from that
28 date.

29

30 The Tribunal had available to it, and gave consideration to, the documents lodged on
31 behalf of the Applicant and the Respondent.

32

33 The documents before us included a Deed of Conditions by Taywood Homes Limited
34 recorded 28 May 1997 which we refer to as “the Deed of Conditions” and the
35 Respondent’s Customer Care Charter and Written Statement of Services Revised 17
36 March 2015 which we refer to as the “Written Statement of Services”.

37

38 **Incidental Matters**

39

40 We have made eight written directions in the course of this matter, being concerned
41 with management of the proceedings and requests by parties in relation to the
42 production of documents.

43

44 A procedural hearing was held in Edinburgh on 23 January 2017.

45

46 A site visit took place on 24 February 2017.

47

48 We heard evidence on 31 March, 28 April and 14 June and 14 July 2017.

49

50 At the hearing on 31 March 2017, the Applicant applied to be allowed to lodge
51 certain documents late. These were written representations prepared by the
52 Applicant and headed “Index B Homeowner’s response to Ruth Waters 11 page
53 reply dated 19/10/2017”; a letter by Mr Handyside dated 24 March 2017 and
54 completed survey forms which the Applicant had distributed and obtained from
55 residents of properties on the Development. The Committee had previously directed
56 (Direction No.2) that no further documents were to be lodged by the parties without
57 the Tribunal’s consent. In addition, all documents were required by the Regulations
58 to be lodged by no later than seven days in advance of the hearing.

59 The Respondent opposed the late receipt of these documents. The Tribunal
60 considered the terms of Regulation 19 of the, then applicable, 2016 Regulations. In
61 the case of the representations, these were only a written version of submissions
62 which the Applicant could make in person and so their receipt appeared
63 unobjectionable. In the case of Mr Handyside's letter, again, he was being called as
64 a witness and could be asked questions about its content in cross-examination. The
65 Tribunal determined that there had been good reason for the late lodging of the
66 documents and that no unfairness would result from their being allowed to be
67 received. Accordingly, the Tribunal decided to allow the documents to be lodged.

68
69 In the case of the completed survey reports, the Respondent was strongly opposed
70 to their late receipt. It was concerned that they might not be a representative sample
71 and that the exercise carried out by the Applicant might not have produced an
72 accurate picture of the views of the majority of homeowners on the Development in
73 the way which was being suggested by the Applicant. We considered that the only
74 real prejudice to the Respondent in allowing the forms to be received would be in
75 being unable to follow up with the residents who had responded individually and
76 perhaps to seek clarification or correction of their apparent views as expressed in the
77 survey forms. We considered that it was unlikely that the Respondent would have
78 been able to perform that exercise and we considered that no substantial prejudice
79 would result to the Respondent if we allowed the survey forms to be received. The
80 other concerns expressed by the Respondent were well founded in terms of the
81 weight of these documents and the Respondent, of course, remained free to make
82 any submissions upon that question.

83
84 At the hearing on 28 April 2017, the Applicant sought to be allowed to introduce a
85 further completed questionnaire. We refused this on the grounds that it had already
86 been determined and agreed by the parties at the hearing on 31 March 2017 that no
87 further documents would be received. The Applicant also asked to be allowed to
88 have Mr Tom Hobbs as his representative. The Respondent did not object. Mr
89 Hobbs is the owner of 117 Whitehaugh Park and possesses expertise in matters
90 related to trees. We allowed him to act as a representative although it was made
91 clear to the Applicant that Mr Hobbs would not be allowed to act as a witness.

92
93 We requested after the final hearing that the parties provide us with written
94 submissions, which they both did. The Applicant's submissions were accompanied
95 by documents described as "Submissions" by Ian Hamilton, Graeme Millar and Tom
96 Hobbs. We have disregarded the content of those documents insofar as they
97 attempted to introduce new matters of evidence.

98

99 **Pre-2012 Events**

100 The Applicant makes extensive reference to events which took place before 2012.
101 Our jurisdiction is determined by the 2011 Act. The section 14 (Code of Conduct)
102 duties only apply to the Respondent from the date of its registration as a property
103 factor (1 November 2012) and we cannot consider any conduct before that date in
104 determining a breach of the Code.

105
106 Where we have identified the existence of a pre-October 2012 complaint as being
107 relevant to a factual head of complaint we have noted that below.

108

109 **REASONS FOR DECISION**

110

111 **The Legal Basis of the Complaints**

112

113 **Property Factor's Duties**

114

115 The Applicant complains of failure to carry out the property factor's duties.

116

117 The Deed of Conditions and the Written Statement of Services are relied upon in the
118 Application as sources of the property factor's duties.

119

120 The Written Statement of Services contains a number of relevant sections under
121 "Routine Maintenance":

122

123 *"Litter Litter will be picked, collected and removed to an off site tipping or recycling
124 facility as required.*

125

126 **Grass** *Prior to all grass cutting operations, all litter and debris will be collected and
127 removed. All growth at and around obstacles, fence lines, shrub beds etc will be cut
128 at the same time as the grass. Where grass abuts a horizontal hard surface, the turf
129 will be cut back to the back of the hard surface. In the event that the grass height
130 falls outside parameters of the Specification, then the contractor will collect and lift all
131 arisings and remove same from the site. All arisings scattered on roads, paths etc
132 shall be removed before leaving site...*

133

134 **...Grass- Amenity (Evenly Dispersed)** *Amenity Grass will be cut at a frequency to
135 be regulated that at no time the height exceeds 65mm. Height to be maintained
136 between 25-65mm. Cuttings to be evenly distributed, not left in clumps or removed
137 from site.*

138

139 **Shrubs** *- Shrub beds will be maintained during each routine maintenance visit.
140 Weeds will be controlled by chemical or mechanical means with all dead vegetation
141 removed. Formative pruning will be carried out for each species at the appropriate
142 time of the year. Perimeter growth will be pruned as and when required. All dead,
143 diseased, dying or damaged plants will be removed at each visit. All grass edges to
144 shrub beds will be re-formed once annually and edgings will be removed off site.*

145

146 **Shrubs – without Mulch** *Shrub beds where there is no covering of bark mulch will
147 be forked once a year...*

148

149 **...Woodland – Young** Young woodland or trees are generally classified between 1-
150 8/10 years...All pernicious weeds such as Rumex, Thistle, Ragwort, Willowherb,
151 Himalayan Balsam will be controlled...

152
153 **...Woodland – Mature** Mature trees and woodlands are classified between 18/20
154 years and above...All pernicious weeds such as Rumex, Thistle, Ragwort,
155 Willowherb, Himalayan Balsam will be controlled... A visual inspection will be made
156 at each visit and any dead, diseased or damaged trees reported to Greenbelt for
157 recording and any necessary action. An annual independent health inspection report
158 will be undertaken and any recommended action will be undertaken as appropriate
159 subject to permissions being granted."

160
161 The Written Statement of Services contains a number of relevant sections under
162 "Non-Routine Maintenance"(which work is chargeable):

163
164 **Fly-Tip Removal** Fly tipping will be identified during the routine supervisory
165 inspections. Tipped material will be removed and costs may be recovered from
166 residents if the perpetrators cannot be found.

167
168 **Vandalism** Any form of vandalism will be identified during the routine supervisory
169 inspections. Any works will be undertaken - the list is not exhaustive - but will
170 include damage to grass, shrubs, woodland, specimen trees, fences, walls, Play
171 Area equipment, Works of art etc and costs may be recovered from residents if the
172 perpetrators cannot be found.

173
174 **Third party damage** Any form of third party damage will be identified within the
175 routine supervisor inspections. Any works required will be undertaken - the list is not
176 exhaustive - but will include damage to grass, shrubs, woodland, specimen trees,
177 fences, walls, Play Area equipment, Works of art etc and costs may be recovered
178 from residents if the perpetrators cannot be found.

179
180 **Dog Foul removal from land** Dog foul will be removed to a licensed site by a
181 suitably qualified contractor and costs will be recovered from residents.

182
183 **Dog Foul Removal from bins** Dog foul from bins will be removed to a licensed site
184 by a suitably qualified contractor and costs will be recovered from residents...

185
186 **...Shrub Replacement** Shrub replacement works identified within the annual
187 snagging inspection will be undertaken by a suitably qualified contractor and costs
188 will be recovered from the residents.

189

190 **Young Woodland Works** *Silvicultural works to young woodland identified within*
191 *the routine supervisory inspections (the list is not exhaustive – but will include*
192 *thinning to promote young woodland development) will be undertaken by a suitably*
193 *qualified contractor and costs will be recovered from the residents.*

194
195 **Arboricultural Works** *Arboricultural works to mature trees and woodlands identified*
196 *within the annual Health and Safety inspection will be undertaken by a suitably*
197 *qualified contractor(subject to the grant of relevant permissions) and costs may be*
198 *recovered from residents.*

199
200 **Play Area Repairs** *Play Area repairs/replacement works require due to wear and*
201 *tear identified during the routine supervisory inspections will be undertaken by a*
202 *suitably qualified contractor and costs will be recovered from the residents.*

203
204 **Fencing Works** *Fencing works will be identified as part of the routine supervisory*
205 *inspections. The condition of the fence will be monitored and any works instructed*
206 *as and when required..."*

207
208 The Deed of Conditions (Clause Eleventh) states that the Respondent must maintain
209 the common parts of the Development "*in accordance with good residential land*
210 *management practice.*"

211

212 **The Code**

213
214 The Applicant complains of failure to comply with Sections 1.1b B.c. and D.I.; 2.1,
215 2.2, 2.5; 3.3; 4.1, 4.3, 4.9; 6.1, 6.4, 6.6, 6.9; and 7.2 of the Code.

216
217 The elements of the Code relied upon in the application provide:

218
219
220 "**...1.1b Alternative standards for situations where the land is owned by a**
221 **land maintenance company or a party other than the group of**
222 **homeowners**

223
224 The written statement should set out:...

225
226 **...B. Services Provided**
227 *c. The services that you will provide. This will include the minimum service*
228 *delivery standards that can be expected and the target times for taking*
229 *action in response to requests for both routine and emergency repairs.*
230 *Any work or services which are a requirement of the property titles should*
231 *also be stated...*

232
233 **D. Communication Arrangements...**
234 *...I. the timescales within which you will respond to enquiries and complaints*
235 *received by letter or e-mail...*

236
237 **...SECTION 2: COMMUNICATION AND CONSULTATION**
238 *Good communication is the foundation for building a positive relationship with*
239 *homeowners, leading to fewer misunderstandings and disputes. In that regard:*

240
241 *2.1 You must not provide information which is misleading or false.*
242
243 *2.2 You must not communicate with homeowners in any way which is abusive or*
244 *intimidating, or which threatens them (apart from reasonable indication that*
245 *you may take legal action)...*

246
247 *...2.5 You must respond to enquiries and complaints received by letter or email*
248 *within prompt timescales. Overall your aim should be to deal with enquiries*
249 *and complaints as quickly and as fully as possible, and to keep homeowners*
250 *informed if you require additional time to respond. Your response times*
251 *should be confirmed in the written statement (Section 1 refers).*

252
253

254 **...SECTION 3: FINANCIAL OBLIGATIONS...**

255
256 *...3.3 You must provide to homeowners, in writing at least once a year (whether as*
257 *part of billing arrangements or otherwise), a detailed financial breakdown of*
258 *charges made and a description of the activities and works carried out which*
259 *are charged for. In response to reasonable requests, you must also supply*
260 *supporting documentation and invoices or other appropriate documentation for*
261 *inspection or copying. You may impose a reasonable charge for copying,*
262 *subject to notifying the homeowner of this charge in advance...*

263
264 **...SECTION 4: DEBT RECOVERY**

265
266 *...4.1 You must have a clear written procedure for debt recovery which outlines a*
267 *series of steps which you will follow unless there is a reason not to. This*
268 *procedure must be clearly, consistently and reasonably applied. It is essential*
269 *that this procedure sets out how you will deal with disputed debts...*

270
271 *...4.3 Any charges that you impose relating to late payment must not be*
272 *unreasonable or excessive...*

273
274 *... 4.9 When contacting debtors you, or any third party acting on your behalf, must*
275 *not act in an intimidating manner or threaten them (apart from reasonable*
276 *indication that you may take legal action). Nor must you knowingly or*
277 *carelessly misrepresent your authority and/or the correct legal position...*

278
279 **...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE**

280
281 This section of the Code covers the use of both in-house staff and external
282 contractors.

283
284 *6.1 You must have in place procedures to allow homeowners to notify you of*
285 *matters requiring repair, maintenance or attention. You must inform*
286 *homeowners of the progress of this work, including estimated timescales for*
287 *completion, unless you have agreed with the group of homeowners a cost*
288 *threshold below which job-specific progress reports are not required...*

289
290 *...6.4 If the core service agreed with homeowners includes periodic property*
291 *inspections and/or a planned programme of cyclical maintenance, then you*
292 *must prepare a programme of works...*

293
294 *...6.6 If applicable, documentation relating to any tendering process (excluding any*
295 *commercially sensitive information) should be available for inspection by*

296 *homeowners on request, free of charge. If paper or electronic copies are*
297 *requested, you may make a reasonable charge for providing these, subject to*
298 *notifying the homeowner of this charge in advance...*

299
300 *...6.9 You must pursue the contractor or supplier to remedy the defects in any*
301 *inadequate work or service provided. If appropriate, you should obtain a*
302 *collateral warranty from the contractor...*

303

304

305 **...SECTION 7: COMPLAINTS RESOLUTION...**

306

307 *...7.2 When your in-house complaints procedure has been exhausted without*
308 *resolving the complaint, the final decision should be confirmed with senior*
309 *management before the homeowner is notified in writing. This letter should*
310 *also provide details of how the homeowner may apply to the homeowner*
311 *housing panel..."*

312

313

314 **The Matters in Dispute**

315
316 The essential factual basis of the application is that the Applicant considers that the
317 Respondent has failed in its duties in respect of the maintenance and management
318 of the common areas of the Development. The Applicant considers that the failures
319 have persisted since 2004 and have continued up until the present day.

320
321 There is no dispute that the Respondent has in general terms been carrying out
322 certain works since the time of its appointment. The complaint is directed towards
323 the quality of the service provided. The Applicant considers that the standard of
324 service provided falls below what he is entitled to receive by virtue of the obligations
325 imposed by the Code, the Deed of Conditions and the Written Statement of Services.

326
327 In illustration of his complaint of a general failure to provide service to the required
328 standard the Applicant has highlighted particular issues which he considers evidence
329 his complaint. These include: failure to deal with playground repairs; failure to empty
330 the bin at the large play park; failure to deal with repairs to fencing at the large play
331 park; failure to deal with moss and edgings at the playparks and paths; failure to
332 repair broken fencing at the car parking bay; failure to manage the woodland; failure
333 to keep repaired fencing at the Farmer's Lane; failure to remove litter and dumped
334 items from the woodland areas; failure to carry out gap planting and to replace dead
335 plants; failure to carry out mulching of beds; inadequate pruning of shrubs;
336 unsuitable planting and inadequate cutting of grass.

337
338 In addition to complaints regarding maintenance, the Applicant complains about
339 correspondence addressed by the Respondent to his mother.

340
341 He also complains about the way in which the Respondent has communicated with
342 him, particularly in responding to his complaints.

343
344 **Witness Evidence**

345 We heard, on the first day of the hearing, the evidence of four witnesses for the
346 Applicant. On the second and third days, we heard the evidence of the Applicant
347 himself and then on the third and fourth days that of the Respondent's witnesses
348 (whose evidence in chief was mainly contained in written statements).

349
350 Raymond Handyside, 24 Whitehaugh Park, spoke to his letter to the Respondent of
351 24 March 2017. He had been Chairman of a Residents Association in 2005.

352
353 The Association had been set up in response to what was then perceived to be poor
354 performance by the Respondent. At that time the Respondent agreed to improve its

355 performance and a refund of fees was paid in 2006. He considered that there had
356 been an improvement in performance since he had raised concerns in 2005 and that
357 had continued until 2008 when there had been a decline which had persisted until
358 recently. As a specific example he spoke of inadequate pruning of bushes. He said
359 that less than 1m of a 2m wide path was available to pedestrians. This was the path
360 with the adjacent small play park which runs out of the Development to the west and
361 which is used by pupils walking to and from school (we shall refer to this path in this
362 decision as "the Meadows Path"). He advised that the problem had only been
363 addressed a few weeks previously. He said that mulching and forking of plant beds
364 and the removal of dead plants had not happened in recent years. The bushes and
365 grass in the area of the large play park looked tawdry and unkempt. Litter remained
366 present for long periods and he felt that the litter picking was not thorough. The
367 grass edgings of some of the paths had not been done.

368

369 Mr Handyside was familiar with the standards imposed upon the Respondent by the
370 Deed of Conditions and the Written Statement of Services and considered that these
371 standards were not met in recent years. He felt that a disproportionate amount of
372 the fees paid by residents to Greenbelt related to administration as opposed to site
373 work. He was aware of moss always being present at the small play park but was
374 uncertain whether that was the Respondent's responsibility. He considered that
375 there had been a "purge" in recent weeks whereby the Respondent had improved
376 the level of its service very noticeably. He rejected any suggestion that recent
377 activity had just been the usual replanting undertaken by the Respondent from time
378 to time, referring to it being obvious that there had been a change in the level of
379 activity with the use of a chipping machine and serious pruning.

380

381 He further rejected any suggestion that the service level reflected the fees paid. He
382 accepted the principle that if less was paid, the service would reduce but his
383 experience in recent years had been the fees increased but the service reduced.
384 The annual fee had been about £107 in 2009 but in 2016 was about £184. Mr
385 Handyside said that being chairman of the Residents Association and dealing with
386 the Respondent had required a lot of effort on his part and that other commitments
387 meant that he had to step down as chairman in 2007.

388

389 Graeme Millar of 109 Whitehaugh Park gave evidence that he became the Chairman
390 of the Residents Association in 2008. He spoke of a decrease in the Respondent's
391 service levels and an increase in cost since then. This was until the last six months
392 or so when he had noticed an improvement in the standard of the Respondent's
393 work.

394

395 Mr Millar advised that he was not an expert in tree planting and that he found it
396 difficult to be specific about his concerns but he felt that general tidiness of the

397 common areas had not been good and there had been inadequate pruning and
398 edging of paths. He thought that the triangle close to his and the Applicant's houses
399 had been ignored by the Respondent. There had been no forking or mulching.
400 Debris and rubbish were present at the strip of land close to the turning circle. The
401 edgings at the turning circle had not been maintained. He thought that there had
402 been a lack of supervision and management of works on site until around six months
403 previously when there seemed to be a sudden improvement. The fence at the
404 farmer's lane was broken for a period of years. Debris was deposited in the
405 woodland adjacent to the main road. The Meadows Path had been encroached
406 upon by bush growth such that it was not possible to walk on it two abreast. Bins
407 were emptied only occasionally.

408
409 There had been recent activity at the area close to Mr Handyside's cul de sac and
410 there had been lots of general recent activity including re-planting.

411
412 Mr Millar advised that he was not entirely sure of what standards the Respondent
413 was required to work to and was unaware of the specifications contained in the
414 Written Statement of Services. Under cross examination Mr Miller admitted that the
415 Residents Association had not been particularly active.

416
417 Ian Hamilton of 121 Whitehaugh Park advised that he had made a historic complaint
418 to Mr Cumming regarding plants missing from the area close to his house and at the
419 turning circle. New plants were planted but not maintained. They had died and
420 nothing more had been done.

421
422 He then lost interest in complaining and instead instructed a contractor at his own
423 expense to tidy up the woodland area behind his house.

424
425 Mr Hamilton was unhappy at how tall the trees have grown in the woodland adjacent
426 to his garden. His house and garden were dark during the Summer. Mr Hamilton
427 consulted with his neighbours who shared his view and complained to the local
428 authority and to the Respondent. He had been advised by the developer when he
429 bought his house that the woodland area would not involve tall trees. He advised that
430 one of his neighbours who is expert in such matters has advised that the trees are
431 the wrong type for the location, are too densely planted, in poor condition and
432 unsafe. They are too close to the houses. A silver birch is presently pressing
433 against Mr Hamilton's house. Mr Hamilton's garden is increasingly affected by the
434 spread of weeds from the woodland area behind his garden. He cannot get near to
435 the back of his fence which he advises is now pure green. He claimed that the weeds
436 are taller than he is.

437

438 He also attributes increased moisture in his garden to damage done to drains by
439 trees. Additional drainage had been installed by him in 2003 but there is now a large
440 puddle forming in his back garden. He refers to a broken tree remaining present
441 since 2013. Rubbish has been present for weeks. He states that weeds and cut
442 branches are dumped in the woodland. His only use of the play park was in 2014
443 when his grandchildren had been present and he observed that the bins were
444 regularly overflowing.

445

446 He looked at other areas of the Development and noticed at the farmer's lane there
447 is a branch broken off and lying on the centre of the road

448

449 Mr Hamilton referred to a "blitz" in 2016. Much more was being done by the
450 Respondent than usual. In November and December 2016, the Respondent started
451 addressing areas of concern to Mr Hamilton. He still has an open complaint (It
452 transpired in the proceedings that the Respondent was not aware that the
453 homeowner regarded the complaint as still outstanding). He advises that the
454 Respondent had promised to deal with overhanging branches in June 2016 but had
455 failed to do so. In the end he became tired of fighting with the Respondent and just
456 paid its bills. All in all, he is not happy with the performance of the Respondent.

457

458 Margaret Mills of 9 Whitehaugh Park has lived there since 2001. The Development
459 was originally in good condition. She advised that the standard of maintenance of
460 the common areas had deteriorated. She knew that Mr Handyside had agreed on
461 behalf of residents that rear fence lines would be cleared to allow re-painting. This
462 only happened once and she has had to do it herself since. She complained of poor
463 service and withheld payment. Her complaints were ignored and she received "red
464 letters" and eventually paid. She said that her neighbours had had the same
465 experience. She spoke of debris in the wooded area close to the bus stop near to
466 the entrance to the Development. During 2016, a charity bag and a bulk load of
467 leaflets had been dumped there. They remained present six months later. Mrs Mills
468 picks up as much litter as she can herself. The Meadows Path is overgrown by
469 shrubs and she had to duck to pass along it (she advises that she is only 5 feet tall).
470 She complained to the Council who cut it back. She had called the Council three
471 times.

472

473 She had observed increased activity in recent times with replanting and tidying of the
474 path at the left hand side as one enters the Development which had previously been
475 a muddy mess. Close to the large play park the trees had been overgrown and the
476 grass not cut to the edges. This had been the case for two or three years. She was
477 very familiar with the area, walking that way three times each day with her dog.

478

479 During winter 2016/17, neither the bin at the small play park nor the large play park
480 had been emptied for two months. Edging of paths was not done.

481
482 She was concerned about tree disease around four years ago. She had telephoned
483 the Respondent's customer care line twice and the Respondent had promised to
484 send someone but no one came and she contacted the Council instead.

485
486 She considers the current state to be very nice. Dead plants have been cleared
487 away and major replanting has been done. There are new shrubs in her cul de sac.
488 She said she has complained for years but there had been no replanting and the
489 area close to the bus stop (the turning circle) had been a disgrace. She had been
490 advised that other neighbours close to the Meadows Path had all complained about
491 its overgrown nature.

492
493 Evidence was also heard from the Applicant himself.

494
495 The Applicant

496 The Applicant advised that he had bought his property jointly with his mother in
497 2000. He had purchased from the developer, Taywood Homes. In 2002, the
498 developer had handed over maintenance of the common areas to the Respondent.
499 The Applicant states that problems began soon afterwards. He wrote and
500 telephoned the Respondent but found them resistant to his representations. They
501 were unhelpful. Calls were not returned.

502
503 A Residents Association was set up with Mr Handyside as its Chairman and the
504 Applicant joined as a Committee Member. The efforts of the Residents Association
505 yielded results and the quality of the Respondent's service improved in the period
506 around 2005-6.

507
508 The problems which were encountered included grass cuttings not being picked up,
509 issues at the farmer's lane and not carrying out edging of paths. The Applicant
510 involved his MP and the Respondent voluntarily reduced its charges. The Residents
511 Association changed Chairman (to Mr Millar) in 2008.

512
513 In the cul de sac containing house numbers 105-113 (which includes the Property)
514 the Applicant was concerned about two areas which he had been told by the
515 developer were to be specimen planting areas. The Applicant says this matches
516 with the Council approved planting plan. The plants in those areas failed. At that
517 stage the Council were still involved and required the Respondent to replant. Re-
518 planting was carried out on 31 August 2007 but was done poorly such that weeds
519 quickly returned and thereafter no pruning took place so as to define the different
520 plants present. During 2008, the Applicant began pursuing the Respondent and

521 contacted the local authority planning office and trading standards as well as his MP
522 and MSP. It transpired that the Council was no longer involved as its role under the
523 planning process was at an end.

524
525 The Applicant met Mr Cumming on 20 May 2011. They walked the site together and
526 the Applicant pointed out the areas of concern. These included specimen planting
527 areas; the turning circle; the play park; the car park fencing and the cul de sac next
528 to Mr Handyside's house. He pointed out the red road sign lying on the ground
529 which had been there for years. It was indicated that the concerns would be
530 addressed and that a second site visit would take place in October 2011. That never
531 happened. The Applicant withheld payment. He believed that he was entitled to
532 receive a basic standard of maintenance (he is not looking for a "Kew Gardens"
533 standard). He expects shrubs to be cut annually, bark mulching as per the planting
534 plan, edging once a year and forking of beds. In 2011 the Applicant was walking
535 around the Development every day and it was obvious to him that these things were
536 not being done.

537
538 He observes that currently each homeowner is paying £186.94 which means that a
539 total of £24,500 per annum is being paid by the homeowners for upkeep of the
540 common areas of the Development.

541
542 He has experienced nothing but hostility from the Respondent from 2011 until 2015.
543 Documents 16 and 88, in the Applicant's opinion, show the hostile attitude of the
544 Respondent.

545
546 The Applicant's mother had reduced mental capacity and so the Applicant had
547 written to the Respondent to ask that all correspondence be sent only to him.

548
549 On 16 December 2016, the Respondent planted the areas close to the Property as
550 woodland. There are around six trees in what was supposed to be a shrub area of
551 around 1 square metre.

552
553 The Applicant felt he had done all he could to resolve matters: he had tried to have a
554 site visit; he had planted a small hedge to screen the Property from the areas and
555 put in some plants of his own to make the areas look better. Grass and weeds are
556 growing. It was these small areas which provoked the Applicant to consider the state
557 of the wider development. He noticed that the area next to No.113 was in poor
558 condition, litter was left lying for very long periods, ornamental trees had died. They
559 had been replaced by alder which have all died with the exception of one which the
560 Applicant considers will die. There is a tree at a 45 degree angle at the visitors
561 parking area (since May 2011) and a similar one next to Mr Millar's house

562 (no.109)(since at least Dec 2015). Trees were fallen and left at angles in the
563 woodland fronting the main road. Amenity trees had died and were never replaced.
564 Broom has grown unchecked and collapsed under its own weight. The turning circle
565 was an eyesore. The Meadows path was overgrown. Moss was left to grow in the
566 play parks for more than a season. Edging of footpaths was not being done
567 annually. Bramble is causing a problem at the bus stop. The Applicant himself had
568 cut back overhanging shrubs on the footpaths which were making it difficult for
569 pedestrians to pass. Plants were being poorly re-planted and would die quickly.
570 Weeds are present and self-seeded trees have become established at the corner of
571 the farmer's lane where the red sign had been. Litter was present there for long
572 periods. Weeds were growing in the area close to Mr Handyside's house. A lot of
573 willow herb was growing. The house owner at No. 132 was having to deal with the
574 weeds himself.

575

576 Maintenance had been poor over the years until activity in January and February
577 2017 in advance of the site visit which was to make the site look better. That activity
578 was an unprecedented level of reactionary works. This followed on from a large
579 squad arriving and carrying out a summer purge in 10 July 2016. On 5 August 2016
580 the Applicant photographed those areas which the squad had not attended to.

581

582 The Applicant had commissioned a report dated 29 January 2016 by an expert
583 gardener, Robert Lawrie which highlights certain deficiencies in the maintenance of
584 the Development. It highlights a lack of adequate maintenance and a "lack of
585 management with little commitment to the overall condition of what was once an
586 ornate and well-manicured development."

587

588 The Applicant considers that the Respondent is being deceitful. That is illustrated by
589 events surrounding the litter bin at the large play area. The Applicant monitored the
590 bin for two periods – Dec 2015 to May 2016 and 5 August 2016 to 24 December
591 2016. He took photographs. He observed that the same rubbish would lie in the bin
592 for months. During the first monitoring period, the bin was not emptied at all. Dog
593 excrement fell out of it. It was never picked up and was left to decompose on the
594 ground.

595

596 The Applicant referred to the Written Statement of Services being at odds with the
597 original specification of the developer and, as an example, highlighted the lack of any
598 reference to cutting back vegetation behind fences to enable maintenance of the
599 fences (fence backs). There is no mention of "fence backs" in the Written Statement
600 of Services.

601

602 The Applicant referred to the severe woodland encroachment not being dealt with.
603 This was having an adverse effect on houses such as Mr Hamilton's row, causing

604 shading, moss and drainage issues. He also questioned whether or not this might
605 constitute a fire hazard given the proximity of some of the trees to some of the
606 houses.

607
608 The Applicant referred to the Farmers Lane where there was doubt as to who was
609 responsible for the fence. If this was in doubt, then how could a contractor know
610 what work to do here.

611
612 The Applicant felt that, given what the homeowners are paying, then there should be
613 an incremental improvement in the Development each year, whereas, in his view
614 and those of other homeowners on the Development, it was the opposite.

615
616 He also felt that there was never any acknowledgement by the Respondent that in
617 some cases the homeowners could be right about what was needed or not being
618 done.

619
620 The Applicant then went on to speak of what he perceived to be poor and hostile
621 responses to correspondence, debt recovery and late payment charges, false
622 information and a lack of a complaints resolution procedure or reference to the
623 Homeowner Housing Panel. This had already been provided in his written evidence
624 and is dealt with in greater detail below.

625
626 We found the Applicant and his witnesses to be credible and reliable.

627
628 The Respondent led the witness evidence of Fergus Cumming; Peter Lamb; Gerard
629 Gillespie and Janet McQuillan.

630
631 Fergus Cumming

632 Mr Cumming was the Respondent's Regional Operations Manager until his
633 retirement in 2016. He had worked for the Respondent since 2007 initially as a
634 Community Manager. He is a Fellow of the Royal Institution of Chartered Surveyors
635 and he holds a BSc in Geology and Topographic Science and an HNC in
636 Horticulture. He now works for the Respondent as an independent consultant.

637
638 His role as Regional Operations Director involved carrying out a monthly visit to all
639 sites managed by the Respondent. He would score the Development on a scoring
640 system of 1-5, a higher the number indicating a better condition of the Development.
641 His rating also took into account contractors' performance relative to the Written
642 Statement of Services.

643

644 Mr Cumming had had contact with Raymond Handyside, the Residents' Association
645 Chairman, in 2008 but had heard nothing of the Residents Association from that
646 point until his retirement.

647
648 He had met with the Applicant on 20 May 2011 and walked around the Development
649 noting areas of concern to the Applicant. The Applicant was unhappy with the untidy
650 nature of the woodlands which Mr Cumming explained was because this was
651 maturing woodland. Some gap planting and minor works were noted as being
652 required and he advised the Applicant that this would take place when appropriate
653 as part of future works. The Applicant was unhappy about the condition of the small
654 area close to his property which he regarded as shrub planting but which Mr
655 Cumming identified from the Landscape Plan as designated woodland. New plants
656 were planted there but did not thrive. Mr Cumming believes that some were
657 removed by third parties. He is aware that, post his retirement, further planting in
658 this area has been carried out.

659
660 The works identified at the 20 May 2011 visit were addressed by the contractors in
661 their November 2011 and March 2012 visits.

662
663 Mr Cumming considered that the Respondent was complying with its obligations set
664 in terms of the Deed of Conditions, the original Respondent's Greenspace
665 Specification and subsequently the Written Statement of Services.

666
667 He had dealt with a complaint by Mr Hamilton about trees planted too close to his
668 house's gable end and had ordered replanting and removal and had asked the
669 contractor to keep an eye on the area in future. At around the same time he had also
670 had overhanging trees cut back from Mrs Mills' garden at her request.

671
672 Mr Cumming advised that Esk Valley Landscapes were the contractor used by the
673 Respondent on the Development since 2010. They were responsible for carrying out
674 the routine and non-routine functions contained in the Written Statement of Services.
675 They did this by way of fortnightly visits in the Summer and monthly visits in the
676 Winter. After each visit, the contractor would submit its report to the Respondent.

677
678 Mr Cumming would prepare his own report after each of his visits to site and would
679 generally score the contractor's performance 3/5 or 4/5 for maintenance and 3/3 for
680 responsiveness, administration and communication. The Development was never
681 scored as poor or unacceptable.

682
683 Mr Cumming recognises that there is broom on the site which, owing to its age, had
684 become difficult to manage and unattractive.

685

686 Pruning would take place at two scheduled visits in March and November and, in
687 addition, shrubs near paths would be faced back in July and as reported by
688 residents.

689
690 The play areas were inspected by a specialist contractor, Active Risk Management
691 Ltd and the woodland areas were inspected by Gerard Gillespie, a tree inspector.

692
693 Mr Cumming accepted that there was a long running issue with wooden fences.
694 Other fences, particularly at the larger play park, were continually being vandalised.

695
696 Fence spars at the large play area were regularly removed by vandals and Mr
697 Cumming was in the habit of nailing them back into place when he visited.

698
699 A fence top rail at the parking bay had been damaged. He thought that a camper
700 van or similar was nudging it and causing the rails to come off. He was aware that
701 the top spar was missing for some time. There had been difficulty finding a matching
702 rounded spar and a flat one had been used instead. Although some repairs had
703 been invoiced for repairs, some had also been carried out that were neither
704 documented nor invoiced.

705
706 There are two parallel fences at the Development's boundary at the Farmer's Lane.
707 It had been difficult to ascertain which fence the Respondent owned and title
708 research had revealed that Greenbelt was responsible for the whole of the innermost
709 fence and the northern half of the outer fence.

710
711 There was a waste bin at the large play park. Mr Cumming admitted that the rubbish
712 bins had been an issue for some time It was being used to deposit dog waste. Mr
713 Cumming had the Council install a separate dog waste bin nearby.

714
715 A specialist contractor was used from 2012 to 2016 to empty the bin because of the
716 presence of the dog waste. After that time, Esk Valley resumed the role. Mr
717 Cumming advised that the specialist contractor did not always issue invoices when it
718 had in fact attended and that any apparent gaps in the records do not necessarily
719 indicate non-attendance.

720
721 Mr Cumming inspected the bin as part of his own routine inspections and rejects the
722 Applicant's evidence that it remained unemptied from December 2015 to May 2016.

723
724 Mr Cumming believes that there have been no significant issues with the local
725 authority or local politicians.

726
727 He describes the young woodland as "a much-misunderstood" area.

728
729 He considers that the Development has been managed in accordance with good
730 residential land practice and as required by the Written Statement of Services.
731
732 Specifically with regards to the various complaints, he admitted that no mulch was
733 put in any of the beds as there is no mention of it in the Written Statement of
734 Services and no requirement for it. When questioned by the Applicant about this
735 there was complete disagreement about whether or not it was required.
736 Mr Cumming advised that forking would only be carried out in formative years of any
737 growth and would not be carried out to established areas.
738
739 Herbicide is applied to the grass areas every two years.
740
741 Weeds such as willow herb would appear from time to time and if it did then the
742 contractor would be asked to remove it.
743
744 Fence backs are not part of the Written Statement of Services. He was happy to
745 accommodate individual requests to clear areas behind fences but pointed out that
746 some homeowners preferred not to have the back of their fences cleared for security
747 reasons.
748
749 Meetings with any residents association were not included in the Written Statement
750 of Services. However, Mr Cumming said that he was happy to meet any of the
751 residents or representatives, as he had at various times, to discuss any management
752 issues. He had not received any customer care enquiries from any of the witnesses
753 up to September 2016 and had received no contact from the residents association.
754
755 The issue of the woodland was raised and Mr Cumming advised that there had been
756 significant resident interference. It was clear that some residents had taken it upon
757 themselves to trim or remove some of the trees because of solar panels or satellite
758 dishes. Greenbelt considers such actions as criminal damage and have involved the
759 police in certain cases.
760
761 The Applicant cross-examined Mr Cumming. Mr Cumming refused to accept the
762 suggestions put to him regarding failings by the Respondent in relation to a host of
763 issues concerning litter, maintenance, weed killer, fences, woodland and shrubs. Mr
764 Cumming advised that he used tick box forms for his inspections and that no
765 photographs would be taken by him unless there was an issue which might prompt
766 one being taken. It was evident there was a general disagreement between Mr
767 Cumming and the Applicant as to the state of the Development.
768

769 Peter Lamb

770 Mr Lamb is the founder of Esk Valley Landscapes. His business specialises in
771 ground maintenance in respect of residential and other developments. His business
772 now consists of three partners, eight full time staff plus a network of sub-contractors.

773
774 Esk Valley Landscapes looks after around 90 sites for the Respondent. It has had
775 the contract in respect of the Development since 2010.

776
777 Mr Lamb himself walks the site approximately once a month to identify any issues.
778 He will himself deal with any immediate issues or alternatively instruct his staff to
779 deal with any issues on their next visit. The regular visits are fortnightly in the
780 Summer and monthly during Winter.

781
782 The regular visits are carried out by a team of three staff who do litter picking, grass
783 cutting and weeding.

784
785 There are two scheduled prunes of the Development. Mr Lamb considers that the
786 shrubs planted at the Development are not well suited to their environment in that
787 they are large, vigorous species which require to be cut back hard in the growing
788 months to avoid obstructing paths. This has the result that they appear unsightly
789 during Winter when they die back. Mr Lamb then mentioned that the report prepared
790 by an independent contractor for the Applicant was carried out in January and was
791 therefore, in his view, a waste of time

792
793 At the regular visits there are also checks made of the woodland areas for fly tipping
794 or health and safety issues.

795
796 Mr Lamb often deals with any small repairs such as fence repairs required without
797 formally recording or charging for these. He has carried out repairs to the large play
798 park fence by nailing back fence posts which have been removed by vandals.

799
800 The car park fence had been damaged for some time as there had been difficulty in
801 finding a half round fence spar to match the existing fence. Flat timber spars were
802 used instead.

803
804 The grass areas have been treated for daisies from time to time.

805
806 He completes reports of his visits which are entered onto the Respondent's system.

807
808 He is familiar with the Written Statement of Services for the Development and what it
809 requires.

810

811 The bin at the large playpark would be emptied regularly by Esk Valley but from
812 2012 this job was transferred to a specialist contractor because of the presence of
813 dog waste. A separate dog waste bin has now been set up by the Council nearby
814 with the result that Esk Valley resumed responsibility for emptying the large play park
815 in 2016. The play areas are inspected by a separate specialist contractor.
816 The other works are completed as per the Written Statement of Services.

817
818 There is an issue with broom planted in the shrub beds which is untidy and is
819 replaced on a phased basis.

820
821 All edgings are done and waste taken off site.

822
823 The woodland on the Development is mature. Mr Gillespie, the tree expert, conducts
824 an annual inspection and identifies any works needing done to the trees which Esk
825 Valley would then provide a quote for. Mr Lamb felt that the willow herb in the
826 woodland is only there because the residents have been cutting the trees and that it
827 would not be a problem if the canopy had been maintained.

828
829 There is normally an annual tidy up of the woodland area facing the main road.

830
831 Fence backs are cut back annually although not in those areas where residents have
832 requested this not be done.

833
834 There is a regular problem with people cutting through the fence at the Farmer's
835 Lane and the fence there was damaged. The cut through provides a route to and
836 from school from the neighbouring estate. After repeated damage, the fence was
837 simply rolled back to allow access.

838
839 Mr Lamb says that there have not been serious problems with fly tipping. Although
840 he has removed some items, he has never had to charge for this.

841
842 He accepts that the area at the vehicle turning circle had been affected by the
843 construction of an adjacent new estate and that that area had not been kept to the
844 same standard as the rest of the Development. It has recently been re-planted.

845
846 There appeared to be some contradictions in Mr Lamb's evidence where he speaks
847 of fly tipping being common which appears hard to reconcile with his other
848 comments.

849
850 When questioned about the apparent "purge" referred to by the homeowners in their
851 evidence, Mr Lamb said that there had been nothing out of the ordinary, that there

852 had been no extra charge made and that at the time, he had not been aware of the
853 application.

854
855 He maintained that the Meadows pathway is monitored but acknowledged that the
856 shrubs there make the maintenance more challenging. He did not appear to be able
857 to refute the evidence of other witnesses as to the overgrown nature of the path.

858

859 Gerard Gillespie

860 Mr Gillespie is a tree consultant. He is independent of the Respondent but holds a
861 contract with it to carry out tree and woodland audits at the Respondent's sites
862 across the UK. He has 40 years' experience of dealing with tree-related matters.

863

864 He would carry out an annual audit of the Development.

865

866 Mr Gillespie was questioned by a Mr Hobbs on behalf of the Applicant. Mr Hobbs
867 lives on the estate. Mr Gillespie advised that the maintenance was proactive rather
868 than reactive and that the objective was "a good stable and healthy tree canopy" and
869 that this was decided by the Respondent.

870

871 Mr Gillespie was asked if there are any inappropriate species in the woodland but
872 replied that it was not his job to amend the selection but to assess for health and
873 stability. He commented on specific areas of concern raised by the Applicant. He
874 considers that a tree near the Applicant's cul de sac identified by him during the site
875 visit as dead is in fact a tree which has been coppiced and which may grow again.
876 In any event he thinks its retention is appropriate having regard to the damage which
877 might be occasioned to neighbouring plants by replacing it.

878

879 As regards trees overhanging onto residents' properties, he feels that even when a
880 neighbouring tree is in contact with a house there is no cause for concern because
881 only small branch tips are involved.

882

883 He regards the tree leaning against another tree at the entrance to the Development
884 not to be an immediate concern and to have been something which he had identified
885 and which he expected the Respondent to deal with on a programmed basis.

886

887 He was not concerned about plant waste being dumped by third parties or about
888 waste from dead trees etc in the woodland. He considers that these contribute to the
889 life of the woodland.

890

891 Mr Gillespie considered the report by Robert Lawrie & Sons, Landscape Gardeners,
892 produced by the Applicant. He rejects their criticisms. He does not accept that any
893 shading caused by trees is necessarily the cause of dampness in residents'

894 properties. He considers that the absence of a root barrier is normal. He considers
895 the woodland to be healthy based on his annual inspection. He disagrees that there
896 is an excessive amount of willow herb.

897
898 His opinion is that the woodland is not excessively dense and that thinning has not
899 yet been required although it is nearing the point where it will become desirable. He
900 advised in cross-examination carried out by Mr Hobbs that thinning would have been
901 intended in 2019 but would be considered for 2017/18.

902
903 Mr Gillespie considers that measures such as early thinning are inconsistent with
904 "good woodland management practice".

905
906 As regards encroachment by shrubs on pathways, Mr Gillespie advises that he had
907 not noticed any but that this was not part of his remit.

908
909 In Mr Gillespie's experience, planting regimes created by developers and approved
910 by the local planning authority often require dense planting of particular species (as
911 is the case with the Development). Often little account is taken of future growth and
912 the position of boundaries.

913
914 He is generally not in favour of practices which involve reducing the natural growth
915 and height of trees unless there is some real danger or difficulty caused. He
916 considers there to be no legal obligation restricting the height of trees or the amount
917 of light which they may deprive a neighbour. He recommends that his clients only
918 engage in pruning where either damage may be done to the fabric or structure of a
919 neighbouring property or where safe movement in a garden is hindered. Where
920 trees prevent neighbours from accessing satellite and television signals, he
921 considers that there is no obligation for the tree owner to take any action and that the
922 matter should be resolved by the neighbouring homeowner.

923
924 As regards dumping of inorganic matter, Mr Gillespie has found there to be relatively
925 little litter and the only substantial item fly tipped of which he was aware was a
926 wheelchair which the Respondent removed.

927
928 He does not accept that the trees at the Development have contributed to
929 waterlogging of neighbouring gardens and considers drainage of the lower lying
930 neighbours' property to be an issue for them.

931
932
933 Janet McQuillan

934 Mrs McQuillan is the Respondent's Operations Director. She had been with the
935 Respondent in a senior role since 2001. She became a qualified craftsman gardener

936 in 1980 and has risen to occupy significant roles in various organisations during her
937 career.

938

939 Her knowledge and experience of horticultural matters is substantial.

940

941 She has responsibility for managing a team of staff and contractors to achieve the
942 management of the Respondent's green spaces in over 500 UK locations.

943

944 Mr Cumming worked for her as a Community Liaison Manager with responsibility for
945 a number of sites including the Development.

946

947 She was responsible for placing the ground maintenance contract for the
948 Development with Esk Valley Landscapes. She regards them as a good contractor
949 who have scored well on the performance measuring exercises carried out by the
950 Respondent.

951

952 She considers that all of the complaints by the Applicant have been responded to
953 appropriately by the Respondent. She also liaised with Trading Standards in relation
954 to the matter.

955

956 She has some familiarity with the site having visited it on several occasions including
957 on 10 June and 15 July 2016. She has reviewed the contacts from customers
958 reporting issues or making enquiries in relation to the Development in the period
959 from 2012-16 and finds the level of customer contacts to be in keeping with the norm
960 and not to evidence any particular issues at this Development.

961

962 Ms McQuillan advised that attempts had been made to plant the small area adjacent
963 to the Applicant's home. The plants there had failed and then woodland planting was
964 carried out there at no cost to residents. The Council were informed of what the
965 Respondent was doing.

966

967 She was aware of repairs not having been carried out at the Farmer's Lane fence
968 which had been caused by uncertainty as to whether those fences were in the
969 ownership of the Respondent.

970

971 She was aware that there was an absence of invoices evidencing the emptying of
972 the large play park bin for a period of about 6 months although she believed the work
973 had been done. She indicated an intention on the Respondent's part to make a
974 refund to all residents as a matter of goodwill.

975

976 Mrs McQuillan denied a claim by the Applicant that the introduction of the 2011 Act
977 has been a "game changer" although she did acknowledge that it had required a

978 huge exercise to prepare for its introduction. There was now a requirement for better
979 recording, "best value" was now being replaced by service level agreements and that
980 she had introduced a bespoke scoring system to help the management of the
981 developments together with real time reporting. These were constantly evolving.

982 Mrs McQuillan said with regard to the Development, that most of the developments
983 have no mulch. With regards to the playground roundabout, it had taken time to get
984 some parts for repair but it was never a danger and was now fully operational.

985
986 With regard to the turning circle, she felt that the choice of plants had been poor and
987 that she would discuss this with the Council.

988
989 Having regard to the complaints about the Code of Conduct, she denied that there
990 had been any intimidation or harassment. She had never seen the power of attorney
991 relating to the Applicant's mother. She denied any misrepresentation of facts. As a
992 gesture of goodwill to the Applicant, she was prepared to arrange for a
993 reimbursement of the late payment charges which had been levied.

994
995 Ms McQuillan considers the Development to have been well managed and in
996 accordance with good residential land management practice. She emphatically
997 denied that there had been any "purge".

998
999 We were struck that it was only after two hours of evidence by Mrs McQuillan that
1000 "the customer" was mentioned and that seemed to match with a perception that the
1001 Respondent's focus was more on meeting the standards of the Written Statement of
1002 Services than addressing the concerns of residents.

1003
1004 We found the Respondent's witnesses generally to be both credible and reliable
1005 although there were certain aspects which we have highlighted elsewhere in this
1006 Decision where, with reason, we did not accept their evidence.

1007

1008 **Decision - Property Factor's Duties**

1009

1010 We have noted below the various subject matters of complaint and our decision in
1011 respect of each.

1012

1013 General Maintenance

1014 The Applicant and the witnesses Messrs Handyside, Millar and Hamilton all spoke to
1015 a "purge" taking place. This appears to be the exercise carried out by Esk Valley
1016 Landscapes on 10 July 2016. The Applicant's witnesses regarded this as a different
1017 exercise from what they had ever seen take place on site previously in terms of the
1018 number of staff and vehicles and the type of work being carried out. The Applicant's
1019 witnesses have generally noticed an improvement in the maintenance of the
1020 Development in recent times and the Applicant associates this with the present
1021 Application. The Respondent's witnesses indicated that there had been no
1022 instruction for a special purge or the like in July 2016 and that the large presence on
1023 site at that time was just a result of operational factors related to the contractor. We
1024 prefer the Applicant's evidence in this regard and we consider that the change of
1025 pace evident in July 2016 is itself indicative of there having been deficiencies with
1026 maintenance on the Development previously.

1027

1028 We note that Mr Lawrie opines in his report that the *"residential development as a*
1029 *whole is lacking adequate maintenance"*.

1030

1031

1032 Playpark Bins

1033 We note that Mr Cumming's inspection reports were extremely brief – a single line or
1034 two being typical. This leads the Applicant to draw the inference that the inspections
1035 were cursory and inadequate.

1036

1037 In relation to the emptying of the large play park bin, we note that this often went
1038 unmentioned in Mr Cumming's inspection reports. During the period from March
1039 2015, it is mentioned only once (3/4 full) in the April report and not mentioned again
1040 until November 2015 when it is described as full. It is again noted as full in
1041 December 2015 and January 2016, and 3/4 full in both February and March. In April
1042 it is *"filling up and resident has put in homemade sarcastic sign"*, full in May and, for
1043 the first time, is recorded in June 2016 as *"empty"*.

1044

1045 The Applicant has produced photographs of the bin showing it to be full on a widely
1046 spread range of dates between December 2015 and May 2016.

1047

1048 We accept the Applicant's evidence and find there to have been a breach of property
1049 factor's duties (although it is acknowledged that the Respondent advised that it has

1050 arranged for a refund to be made in view of its inability to demonstrate that the work
1051 was done).

1052

1053

1054 Pruning

1055 We note the terms of a letter by Patricia Scott, Principal Enforcement Officer of
1056 Scottish Borders Council dated 29 August 2011 in which she notes having taken
1057 photographs which show "*areas where shrubs are overgrown and haven't been cut*
1058 *back*". (We note that this letter pre-dates 2012 but we consider that it offers relevant
1059 background.) We also note that Mr Lawrie in his report observed that paths had
1060 been narrowed by the encroachment of shrubbery and that that may cause difficulty
1061 for those wishing to pass using prams or wheelchairs. He opined that there was an
1062 absence of regular pruning of the shrubs adjacent to the pathways. He also noted
1063 the presence of plant debris on the paths.

1064

1065 The Applicant gave evidence of shrubs overgrowing pathways making passage
1066 difficult and that he had himself had to cut this back. Mr Handyside, Mrs Mills and Mr
1067 Millar also spoke of significant encroachment by shrubs in the Meadows Path area
1068 and we could see from our own site inspection where the vegetation had extended
1069 to.

1070

1071 We find there to have been a breach of property factor's duties.

1072

1073

1074 Fly Tipping

1075 In relation to the dumping/fly tipping in the woodland areas, we accept the
1076 Applicant's evidence and that of his witness, Mrs Mills, that items were left in the
1077 woodland and not removed by the Respondent for long periods. We prefer that to
1078 the Respondent's evidence there was little/no such dumping. We find there to have
1079 been a breach of property factor's duties.

1080

1081

1082 Turning Circle

1083 In relation to the area around the vehicle turning circle (excluding the centre of the
1084 circle which we understand not to be the responsibility of the Respondent) we accept
1085 the evidence of the Applicant that there was overspilling of soil onto the pathways,
1086 that there had been debris present there for periods of months and that the general
1087 appearance of that area was materially worse than the remainder of the
1088 Development. The Applicant has produced images taken by him on 12 December
1089 2015 showing soil overspilling onto the pavement from the shrub beds as well as
1090 bare and untidy sections at the vehicle turning circle. The Respondent's witnesses

1091 accepted that there had been problems in this area. We find there to have been a
1092 breach of property factor's duties.

1093
1094

1095 Playground

1096 As regards playground repairs, we accept that the Respondent had in place a regime
1097 of regular inspections by a specialist playground contractor. A delay in dealing with
1098 a broken roundabout was the result of having to source a particular replacement
1099 part. The surface repairs in a different colour produce a result which is less
1100 aesthetically pleasing than a like for like replacement but we do not regard that as
1101 material. We do not find there to be a breach of property factor's duties in this
1102 respect.

1103
1104 As regards repairs to fencing at the large playpark, the Respondent's evidence was
1105 that ad hoc repairs were carried out by Esk Valley and by Mr Cumming, usually at no
1106 cost to residents. We accept that to be the case and that vandalism of the fence was
1107 a regular problem. The Applicant's evidence was that a resident had replaced the
1108 nails in the fence slats with screws which had reduced vandalism in recent times.
1109 That was a sensible step which might have been adopted by the Respondent but we
1110 do not consider that their actions amount to a breach of property factor's duties.

1111
1112

1113 Fencing

1114 The Applicant complains of a missing fence spar at the parking bay. He advises that
1115 this was missing for many months and a non-matching replacement was then fitted.
1116 While this is undoubtedly a small issue in the context of the Development as a
1117 whole, the residents are entitled to expect reasonable efforts to be made by the
1118 Respondent to carry out fencing repairs within a reasonable time and to make
1119 reasonable efforts to do so on a like for like basis. If it did not do so, then the overall
1120 appearance of the Development would risk becoming affected. In this regard, we
1121 consider the Respondent to have failed in its property factor's duties.

1122
1123 The Applicant complains of a failure to keep repaired fencing at the Farmer's Lane.
1124 It was not disputed that a desire line exists through the fence and that pedestrians
1125 have repeatedly damaged the fence to allow access. We accept the evidence of the
1126 Respondent that repairs have been carried out but are quickly undone by third
1127 parties and we do not find there to have been a breach of property factor's duties in
1128 this respect. The Respondent has accepted a failure to deal with other repairs to the
1129 fences which it states arose from confusion in the title around ownership of the
1130 fences. The Respondent has recently resolved the issue and accepted that it owns
1131 some of the fencing and carried out repairs which it will not charge to residents. It
1132 appears to us that while the Respondent has evidently attempted to put matters right

1133 more recently, it seems to have failed to deal with repairs to the fences over a
1134 number of years because it had failed to appreciate its ownership of them. In this
1135 respect, we find there to have been a breach of property factor's duties.

1136

1137

1138 Grass and Planting Maintenance

1139 The Applicant complains of unsuitable planting and inadequate cutting/treatment of
1140 grass. It is acknowledged by the Respondent that some of the species chosen (by
1141 third parties) for the Developments' planting plan, such as broom, are not ideal for
1142 their location but the Respondent has had to work with what it was given. We do not
1143 accept that any planting carried out by the Respondent has been unsuitable. As
1144 regards grass cutting, the Respondent has produced evidence of regular cutting and
1145 inspection which we accept. As regards treatment of grass, the Applicant considers
1146 that there has been insufficient use of herbicide on grass areas resulting in the
1147 excessive presence of daisies. The grass areas in question are not formal lawns but
1148 simple areas of amenity ground suitable for play by children and we do not consider
1149 there to be any evidence of a failure to treat the grass areas appropriately. We find
1150 no breach of property factor's duties in these respects.

1151

1152

1153 The Applicant complains of a failure to carry out gap planting and to replace dead
1154 plants. We accept the evidence of the Respondent's witnesses in this regard that
1155 gap planting was carried out on a phased basis as appropriate. As regards dead
1156 plants, there was disagreement between the parties as to whether certain plants
1157 were in fact dead or whether they might be capable of growth. There was also
1158 disagreement on the need to remove such plants in terms of the adverse effect that
1159 might have upon neighbouring plants. We accept the Respondent's evidence in this
1160 regard that it had adopted a considered approach to such matters and we do not find
1161 there to have been a breach of property factor's duties.

1162

1163

1164 Moss and Edgings

1165 The Applicant complains of a failure to deal with moss and edgings at the playparks
1166 and paths. The Respondent's witnesses gave evidence that these works were
1167 carried out regularly. There is a degree of subjectivity in relation to the question as
1168 to how often and to what level edgings and moss clearance should be done and on
1169 the available evidence we have not been able to establish a breach of property
1170 factor's duties.

1171

1172 Mulching

1173 The Applicant complains of a failure to carry out mulching of plant beds. The
1174 Respondent accepts that this has not taken place but refers to the obligation under
1175 the original planting plan which was only to mulch after planting and there was no
1176 requirement to mulch thereafter (although we note that there is an obligation to weed
1177 monthly). We accept the Respondent's position in this regards and find there to be
1178 no breach of property factor's duties.

1179

1180

1181 Woodland

1182 In relation to the management of the woodland, we were struck by Mr Gillespie's
1183 attitude to the requirements of the trees relative to those of the residents. The
1184 younger woodlands here which are the source of complaint were planted as amenity
1185 to the Development. While the exact reasons for the planting of the woodland in the
1186 Development are unknown, we accept the evidence that such woodlands are
1187 typically planted to provide screening of the Development from its neighbours and to
1188 create a more pleasant environment for residents. Mr Gillespie's approach seems to
1189 be focused principally upon the needs of the trees rather than the amenity of
1190 residents. So, where the woodland created darkness and dampness in gardens or
1191 blocks television signals, Mr Gillespie does not see that as a reason to attempt to
1192 modify the woodland. Only when there is danger to person or property would he
1193 advocate intervention. The trees are the property of the Respondent and so should
1194 not be interfered with by third parties such as residents. This approach seems
1195 entirely at odds with the residents being the paying customers of the Respondent.
1196 The Respondent itself gains no amenity or benefit from the trees' height or density.

1197

1198 We accept Mr Hamilton's evidence of the real harm caused to his enjoyment of his
1199 home by the intrusion of tree growth.

1200

1201 Mr Lawrie opined in his report of 29 January 2016 that little thought had been given
1202 at the time of planting to the size of the trees at maturity and to the encroachment
1203 upon neighbouring residents that would occur (of course, the Respondent, has not
1204 been responsible for the tree choice). Mr Lawrie considered that thinning and
1205 regular pruning would be appropriate to reduce the impact of the trees upon
1206 neighbouring properties.

1207

1208 Mr Gillespie would not have advocated thinning out of the trees until the 2018/19
1209 season although we note that the Respondent now offers to bring this forward.

1210

1211 It appears to us that the Respondent's approach to management of the woodland
1212 has not been reasonable and that it has failed to carry out its property factor's duties
1213 to a reasonable standard ie in such a way as to give reasonable respect to the

1214 enjoyment by residents of their properties. Accordingly, we find there to be a breach
1215 of property factor's duties.

1216

1217 Complaint was also made in relation to the dumping of the contractor's and
1218 residents' garden waste in woodland areas. We accept Mr Gillespie's evidence that
1219 the spreading of organic waste by contractors in the woodland area is acceptable
1220 practice and that even sometimes careless dumping of garden waste in the
1221 woodland has not presented significant problems. We do not find there to have been
1222 a breach of property factor's duties.

1223

1224 The Applicant complains of a failure to deal with weeds in the woodland and Mr
1225 Lawrie notes the presence of what he considers to be excessive weeds in his report.
1226 However, we prefer the evidence of the Respondent's witnesses in this regard and
1227 accept that appropriate weed treatment has occurred.

1228

1229

1230 Planting Area

1231 In relation to the small planting area adjacent to the Applicant's house, the history is
1232 a confusing one, with the Applicant believing that the area has not been treated
1233 appropriately by the Respondent and the Respondent apparently believing that the
1234 Applicant has himself interfered in this area. It appears to us that the Respondent
1235 has made reasonable efforts to deal with this area and we find no breach of property
1236 factor's duties.

1237

1238 **Decision – The Code**

1239
1240 The Applicant has complained of a breach of section 1 of the Code although we do
1241 not consider there to be any such breach. Section 1 of the Code relates to the
1242 requirement for the Respondent to have in place a suitable Written Statement of
1243 Services and does not relate to compliance with it. It therefore does not appear to
1244 be relevant. We do, however, observe that the Written Statement is produced in
1245 very small print which makes it difficult to read and the Respondent may wish to give
1246 further consideration to using a larger print size when issuing any new versions in
1247 future.

1248
1249 In relation to Code Sections 2.1, 2.2 and 2.5, the Applicant has complained about
1250 correspondence pre-dating the coming into force of the Respondent's Code
1251 obligations which we have therefore ignored. He complains in relation to Code
1252 Section 2.1 about the letter dated 25 January 2016 by the Respondent's Alex
1253 Middleton which suggests that expenses of a referral to the then HOHP would be
1254 sought. Mr Middleton noted, correctly, that the HOHP would not award expenses
1255 but indicated that he would intend to include any such expenses in a subsequent
1256 court action. It would not, in fact, have been possible to recover the costs in such an
1257 action. The Respondent states that Mr Middleton's letter was only intended to be a
1258 reference to the fact that each party would require to bear its own costs but we do
1259 not see how that explains Mr Middleton's stated intention to recover expenses in a
1260 later court action. We consider that Mr Middleton's comments do constitute a breach
1261 of Section 2.1 of the Code. As the expenses would not have been recoverable in a
1262 subsequent court process, then the statement was false and misleading. In making
1263 that comment in the context of a detailed complaint response letter, the Respondent
1264 was under a duty to inform itself as to the position regarding expenses before
1265 including such a comment.

1266
1267 The Applicant further complains in relation to Code Section 2.1 in respect of the
1268 Respondent stating in the same letter that there has been no enforcement action by
1269 the local authority when there had, in fact, been a letter by the Council dated 9
1270 November 2004. That letter required confirmation that remedial work had been
1271 carried out but was not, in the Respondent's submission, "enforcement action". We
1272 have considered the letter. It is written by an assistant Development Control Officer
1273 at the Council. It indicates that unless a response is received within 14 days the
1274 matter would "*be referred to the Council's Enforcement Officer*" There is no evidence
1275 as to what followed. It therefore appears to us that no enforcement action actually
1276 occurred and we find there to have been no breach of Code Section 2.1 in this
1277 respect.

1278

1279 The Applicant complains in relation to Code Section 2.1 regarding various comments
1280 made in correspondence by the Respondent to MPs and MSPs whose assistance he
1281 had sought. The responses to those representatives contained comments to the
1282 effect that the Development was well maintained and that the Applicant's complaints
1283 were not well founded. The Applicant also complains that similar correspondence
1284 was addressed to him. In these instances, it appears to us that the Respondent was
1285 advocating its position (ie that it was right and the Applicant was wrong about the
1286 matters complained of) and we do not consider the correspondence to contain
1287 information which can properly be characterised as misleading or false. We do not
1288 find there to have been a breach of Code Section 2.1 in this respect.

1289
1290 As regards Code Section 2.2, this applies only to correspondence sent to the
1291 homeowner and not to third parties so we have disregarded the content of
1292 correspondence sent to third parties such as the MSP. As regards correspondence
1293 addressed to the Applicant, he had a concern that there was a lack of sensitivity
1294 having regard to the fact that the recipient in some cases would be his elderly and ill
1295 mother. The Applicant complains that the Respondent inappropriately corresponded
1296 with his mother despite having been advised that she was elderly and in ill health
1297 and having been requested to address correspondence to him instead. At the time
1298 the Property was jointly owned by the Applicant and his mother. On 9 May 2011, the
1299 Applicant wrote to the Respondent with a mandate signed by his mother confirming
1300 his ability to deal with the matter on his mother's behalf. On 1 November 2011, the
1301 Applicant's mother wrote directly to the Respondent and so the Respondent replied
1302 to her. There followed, in subsequent years, correspondence addressed to both the
1303 Applicant and his mother on the basis that both were the registered proprietors with
1304 responsibility for payment of the Respondent's invoices. There seems to be no
1305 dispute that a Power of Attorney which the Applicant held was only displayed to the
1306 Respondent much later in the process and, in the circumstances, we consider the
1307 Respondent's course of action to have been reasonable. We do not think that there
1308 was any intention to cause distress and we note that these events pre-date the
1309 Respondent's registration as a Property Factor.

1310
1311 The remaining correspondence has focused upon debt recovery and has constituted
1312 letters of demand and threats of court action. We consider that none of the
1313 Respondent's correspondence has been abusive, intimidating or threatening apart
1314 from reasonable indication that legal action may be taken which is permitted under
1315 the Code.

1316
1317 In relation to Code Section 2.5, the Applicant complains of delays in responses by
1318 the Respondent to his letter of 25 February 2016 (responded to on 8 April 2016) and
1319 his letter of 21 December 2015 (responded to on 13 January 2016). The
1320 Respondent's Written Statement of Services indicates that the Respondent will "aim"

1321 to respond within 20 working days and it has achieved this in respect of the letter of
1322 21 December 2015. It has substantially exceeded its target in relation to the letter of
1323 25 February 2016 and a holding letter of acknowledgement would have been
1324 sensible. However, we do not consider the delay in response to have been
1325 unreasonable having regard to the nature and length of correspondence and the
1326 whole background of substantial dispute between the parties. We do not find a
1327 breach of Code Section 2.5.

1328
1329 The Applicant complains of a delay from his request dated 11 December 2015 for
1330 copies of documents which had been supplied to him by the Respondent on 1
1331 December 2015, the originals having become water damaged. The copy documents
1332 were only provided on 14 April 2016. The Respondent acknowledges this delay and
1333 we find this to be a breach of Code Section 3.3. The Applicant also complains of a
1334 failure to provide supporting documentation such as contractors' invoices in
1335 response to his requests for same. The Respondent acknowledges that the
1336 Applicant is correct and that the delay amounts to a breach of its obligations under
1337 Code Section 3.3 and we find this to be the case.

1338
1339 The Applicant was concerned by the Respondent's approach to debt recovery.
1340 He complains that the Respondent is in breach of its obligation at Code Section 4.1
1341 to have a clear written debt recovery procedure. The Respondent confirms that as
1342 per the Written Statement of Services this is available on its website/on request. We
1343 find there to be no breach of Code Section 4.1.

1344
1345 The Applicant complains that the Respondent ought not to have imposed late
1346 payment charges while his complaint regarding a poor service remained outstanding.
1347 He was intentionally withholding payment until he received the service to which he
1348 believed he was entitled and which he was not receiving. Despite this, he was being
1349 treated by the Respondent as a wilful non-payer without good cause whereas, as he
1350 saw it, he was not obliged to pay until certain works (in particular those identified in
1351 his meeting with Mr Cumming in May 2011) were completed. Code Section 4.3 deals
1352 with unreasonable or excessive charges and we accept that the charges themselves
1353 are not unreasonable or excessive in their nature or amount. The question then
1354 arises as to whether the imposition of those charges at all was unreasonable given
1355 that the Applicant remained unhappy. We do not consider the imposition of the
1356 charges to be unreasonable in circumstances where the Applicant was withholding
1357 substantial payments over a significant time period and where the Respondent
1358 considered that it had addressed these. We have not identified a breach of Code
1359 Sections 4.3.

1360
1361 The Applicant complains that the Respondent's debt recovery communication has
1362 been intimidating and threatening in breach of Code Section 4.9. Having considered

1363 the correspondence, we do not find this to be the case. He further complains about
1364 the misrepresentation by Mr Middleton in his letter of 25 January 2016 that the legal
1365 expenses of the HOHP process would be pursued. We find this to be a careless
1366 misrepresentation as to the true legal position and, accordingly, find there to have
1367 been a breach of Code Section 4.9.

1368
1369 The Applicant complains by reference to Code Section 6.1 in relation to the
1370 Respondent's continued failure to carry out maintenance works. Section 6.1 requires
1371 there to be a notification system for maintenance and repairs and for the Respondent
1372 to inform homeowners as to the progress of the carrying out of such repairs and
1373 maintenance. We find that such a system does exist and that the Applicant was
1374 informed of what works would be done. The Applicant's true complaint is that works
1375 requiring to be done were not, in fact, done and it appears to us that Code Section
1376 6.1 is unsuitable for such a complaint. We find there to have been no breach of
1377 Code Section 6.1.

1378
1379 Code Section 6.4 concerns the obligation upon the Respondent to have a
1380 programme of maintenance works. The Applicant complains of the failure by the
1381 Respondent to carry out the works adequately and the *ad hoc* nature of some of its
1382 responses. Nonetheless, it is clear to us that the Respondent does have a
1383 programme of works as evidenced both by the detailed Written Statement of
1384 services and the evidence of its witnesses, in particular Mr Cumming, Mr Lamb and
1385 Mr Gillespie, as to the regime of inspections and regular scheduled visits to site by
1386 maintenance contractors.

1387
1388 Code Section 6.6 relates only to situations where tendering is carried out. The
1389 Respondent confirms, and the Applicant accepts, that it does not carry out tendering.
1390 Accordingly, we find there to have been no breach of Code Section 6.6.

1391
1392 The Applicant complains under reference to Code Section 6.9 of a failure to pursue
1393 the contractors in relation to the various failings which he perceives have occurred in
1394 relation to the maintenance of the Development. He lists a whole range of
1395 maintenance failings which he considers to exist. We have dealt with these matters
1396 under the heading "Decision-Property Factor's Duties" above. We find there to be a
1397 breach of Code Section 6.9 in respect of the Respondent's failure to pursue the
1398 contractors to address those failings namely, the shrub pruning, bin emptying, fly
1399 tipping, the turning circle area, the parking bay fence spur and woodland
1400 maintenance.

1401
1402 The Applicant complains that, contrary to its obligation to do so under Code Section
1403 7.2, the Respondent failed to inform him of his right to make an application to the
1404 HOHP. The Respondent highlights that this information was included in its letter of

1405 14 April 2016. However, the Applicant rightly states that this letter only follows his
1406 own letter of 11 April 2016 which itself makes reference to the possibility of a
1407 complaint to the HOHP. It appears to us from the language of the Respondent's
1408 letter of 8 April 2016 (which refers to an unwillingness to "respond to the same
1409 issues over and over" and that the matter was now being passed to external legal
1410 advisers for court action) that it was indicating that the complaint process had been
1411 exhausted. We consider it was at that stage that the obligation upon the
1412 Respondent to inform the Applicant of his right to apply to the HOHP arose. We
1413 therefore find there to have been a breach of Code Section 7.2.
1414

1415

1416

Observations

1417 It should be noted that this case was not typical of cases determined in this
1418 jurisdiction. The volume of documentation and oral evidence and the number of
1419 procedural directions involved was exceptional. This arose primarily because of
1420 the high level of detail in the Applicant's presentation and because of his
1421 continued desire to continue to lodge further evidence in the process.

1422 The Applicant has suggested a deliberate effort by the Respondent to attempt to
1423 overwhelm him with the quantity of documentation lodged or for the Respondent
1424 to lie. He has suggested that an inappropriately aggressive approach has been
1425 taken against him by the Respondent and its legal advisers in relation to this
1426 application. We do not accept those suggestions.

1427 The Respondent has provided evidence of complaints regarding the Respondent
1428 in relation to its practices at other sites. We have given no weight to such
1429 evidence as it appears to us to be irrelevant to the matters which we are obliged
1430 to consider in this case.

1431 In reaching our decision we have not required to have regard to the survey
1432 responses produced by the Applicant.

1433 The situation in this case is relatively unusual in that the manager of the common
1434 parts of the estate, in this case, the Respondent, owns the common land and the
1435 residents pay it for the management and maintenance. This work is not to be
1436 done according to the wishes of the residents but, as per the Deed of Conditions,
1437 "*In accordance with good residential land management practice*".

1438
1439 However, it should be obvious that this situation comes under significant strain if
1440 the residents become unhappy with the service provided. It is evident that the
1441 parties' relationship is confused in that the residents as customers of the
1442 Respondent expect their wishes to be taken into account. The Respondent does
1443 attempt to offer customer care but at the same time as the owner of the land
1444 makes decisions which may be consistent with what it considers to be good
1445 practice but which ignore the concerns of the residents. The most obvious
1446 example is the Respondent's insistence on allowing trees in the woodland area
1447 to grow in such a way as to cause material detriment to the residents' enjoyment
1448 of their homes simply because allowing the trees to grow was in accordance with
1449 the Respondent's view as to good woodland management.

1450
1451 In this case, the involvement of the parties began with a new residential
1452 development over 15 years ago and, as can be expected, the various elements
1453 have seen significant change over that time. Some of the plants have thrived,
1454 some have not, some have proven unsuitable for their location or unsuitable for

1455 some of the residents, some are at odds with what the developer may have
1456 promised or envisaged and the use of the adjoining sites has had unforeseen
1457 impacts on the Development. A comment from a previous decision quoted by
1458 the Respondent that "*The man on the street would not expect the factor to be on*
1459 *site at all times. The inherent nature of periodic maintenance and repair is such*
1460 *that areas will slowly degrade in appearance over time and are then brought*
1461 *back up to standard at each routine visit. Plants grow, die and are damaged by*
1462 *weather conditions. It is impossible for the Factor to maintain communal areas to*
1463 *the same standard at all times as might a keen gardener on his own plot.*" is
1464 particularly apt here.

1465
1466 We also accept the evidence from Mr Cumming and Mr Lamb that the works
1467 require judgements to be made including that some works may not necessarily
1468 be undertaken immediately for fear of damaging surrounding plants, that some
1469 apparently dead plants may be left in the hope that they might recover or that it
1470 may simply be easier to attend to the work during the winter months when plants
1471 are dormant and access is easier.

1472
1473 However, it should be self-evident to both parties that it is inappropriate to stick
1474 slavishly to the original specification if there are some plants that are just not
1475 thriving on the site or are prone to grow too rapidly to the detriment either of
1476 adjoining plants or to the residents. Similarly, if there are persistent short cuts or
1477 "desire lines" causing damage to fences or hedges, then there must be some
1478 process to allow an agreed response or remedy. We were struck by a lack of a
1479 proactive approach to some of the issues raised such as the short cuts and the
1480 complaints concerning the bins for example. It does not seem unreasonable to
1481 think that larger or more bins could be provided, or more regular collections
1482 arranged with the residents being made aware of the cost implications of these
1483 decisions.

1484
1485 The residents may not have helped themselves by having no active Association
1486 for some time and the Respondent can reasonably point to this as suggesting
1487 that there is no significant problem here, but it is unusual for the Tribunal to find
1488 so much local interest as evidenced by so many residents appearing at the
1489 hearings, some as witnesses.

1490
1491 It is hard to believe that the Respondent and/or the residents could not set up a
1492 means to highlight what is being done on the Development and to encourage a
1493 meaningful interaction between the parties. As a start, having regard to the basic
1494 principles of the provision of a service - "Say what you do, do what you say and
1495 show that you have done it"- the Respondent might start by revisiting the written
1496 statement of services to address the shortcomings which became apparent

1497 during the hearings. It is to be hoped that the parties will use this whole Tribunal
1498 process as a basis to move forward to a more collective/collaborative
1499 relationship.
1500

1501

1502 **PROPERTY FACTOR ENFORCEMENT ORDER**

1503

1504 We propose to make a property factor enforcement order (“PFEO”). The terms of
1505 the proposed PFEO are set out in the attached document.

1506 Having regard to the failures of the Respondent which we have identified, we have
1507 decided that the Respondent should be ordered to pay to the Applicant the total sum
1508 of £200.

1509 Section 20 of the 2011 Act provides the Committee with a wide discretion as to the
1510 terms of any PFEO. In particular, section 20(2) allows us to award such sum as we
1511 consider to be reasonable. In all the circumstances of this case, we consider
1512 payment of the sum of £200 to be reasonable.

1513 We consider that the further measures we have ordered are appropriate in the
1514 circumstances of the case.

APPEALS

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

J McHugh

JOHN M MCHUGH

CHAIRMAN

DATE: 2 March 2018