

# Housing and Property Chamber

## First-tier Tribunal for Scotland



**Decision 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...*

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.l.; 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   *...1. 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).*

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**