



**Decision of the Homeowner Housing Committee issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011 and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 HOHP reference: HOHP/PF/15/0117**

**Re: 3/2 12 West Princes Street, Rothesay, Bute PA20 9AF ('the property')**

**The Parties:**

**Mrs Wendy Marshall, 22A Pepler Avenue, Salter Point, Perth 6152, Western Australia ('the homeowner')**

**Bute Factors Ltd, 53 Victoria Street, Rothesay, Isle of Bute, PA20 0AP ('the property factor')**

**The Homeowner Housing Committee: Martin McAllister, legal member and Liz Dickson, housing member.**

**Decision by a Committee of the Homeowner Housing Panel in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 (the 2011 Act).**

**Decision of the Committee**

**The Committee, having made such enquiries as it saw fit for the purposes of determining whether the factor has complied with the Code of Conduct for property factors, as required by Section 14 of the 2011 Act and carried out the property factors duties as defined in Section 17 (5) of the 2011 Act**

**Determines that, in relation to the homeowner's Application, the factor has not complied with the Code of Conduct for property factors in respect of Sections 1Bd, 1DI, 1Dm, 2.4, 2.5 and 7.2 of the Code. The Committee proposes to make a property factor enforcement order.**

**Background**

1. By application dated 9<sup>th</sup> August 2015 the homeowner applied to the Homeowner Housing Panel ("the Panel") for a determination that the property factor had failed to comply with the Code of Conduct for Property Factors (hereinafter referred to as "the Code") and had failed to carry out the property factor's duties in

relation to the property owned by her being the eastmost house on the top floor at 12 West Princes Street, Rothesay, Isle of Bute ("hereinafter referred to as "the property"). The specific matters complained about in relation to breach of the Code were breach of Sections relating to Written Statement of Services, Communications and Consultation, Financial Obligations, Carrying out Repairs and Maintenance and Complaints Resolution. In relation to failure to carry out the Property Factor's duties, the application form made reference to the "factoring contract and title deed." After the application had been lodged the parties attempted to resolve matters without success and the President of the homeowner housing panel decided to refer the matter to a homeowner housing committee (the Committee) on 24<sup>th</sup> September 2015.

2. The property factor made written representations on 26<sup>th</sup> November 2015. The homeowner made representations and lodged documents comprising 110 exhibits in December 2015.

3. A Hearing was fixed for 20<sup>th</sup> January 2016

4. A Notice of Direction was made on 15<sup>th</sup> December adjourning the Hearing and requiring the homeowner to produce a statement succinctly detailing the alleged breaches of the Code of Conduct and the alleged failure to carry out the property factor's duties and requiring the property factor to produce all minutes of the proprietors of the tenement at 10-12 West Princes Street for the years 2014 and 2015.

5. In response to the Direction the property factor provided copies of Minutes of the meetings of the 10-14 West Princes Street Owners' Association.

6. In response the Direction the homeowner referred to what had been previously lodged and what was contained in the application. The homeowner also referred to problems which had been encountered when she visited the property in December 2015 and which related to ongoing damage to the Property.

#### Hearing

7. A Hearing took place in respect of the application on 23<sup>rd</sup> March 2016. The homeowner was not present and was represented by her husband Mr Warren Marshall who joined the Hearing from Australia by telephone conferencing. The property factor was represented by Mr Kerr Livingston and Ms Lesley McDougall. Both gave evidence. Also present were Ms Sharon Biggins, chairperson of the 10-14 West Princes Street Owners Association and a proprietor of a flat in the tenement and Mrs Eileen Brake, a proprietor of a flat in the tenement and her husband Mr James Brake. All three gave evidence

#### Preliminary Matters

8. The homeowner spoke to the Committee by telephone and confirmed that she was content that her husband represent her in all matters relating to the application and Mr Marshall did so during the course of the Hearing.

9. The Committee noted the terms of the application and sought clarification from Mr Marshall with regard to the particular sections of the Code of Conduct which he considered to have been breached. He clarified his position and the particular subsections are referred to later in this Determination.

### The issues

10. The alleged breaches of the Code of Conduct for Property Factors as contained in the application are as follows:

#### Written Statement of Services

Written Statement should set out

1 B d.

the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges( this may take the form of a “menu” of services) and how these fees and charges are calculated and notified

1 C i

any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service)

1 D m

the timescales within which you will respond to enquiries and complaints received by letter or email

1 F p

clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any “cooling off” period, period of notice or penalty charges for early termination

1DI

Your in- house complaints handling procedures (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your in-house complaints handling procedure

1Dm

Your procedures and timescales for response when dealing with telephone enquiries.

## Communication and Consultation

2.1

You must not provide information which is misleading or false

2.4

You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have arranged a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).

2.5

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

## Financial Obligations

3.3

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

## Carrying out Repairs and Maintenance

6.9

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

6.1

You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the

progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job- specific progress reports are not required.

#### Complaints Resolution

##### 7.2

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

##### 7.5

You must comply with any request from the homeowner housing panel to provide information relating to an application from a homeowner.

11. It is useful to set out the background leading to the application and the following is information obtained at the Hearing or from documentation before the Committee which is either accepted by both parties or was not challenged by either party.

The property is a flat on the top floor of the tenement at 10, 12 and 16 West Princes Street, Rothesay. It has been owned by the homeowner since 2012. The property is one of eight in the tenement with two of the properties being commercial properties on the ground floor.

It was determined that major common repairs needed to be carried out to the tenement and Bute Factors Ltd were appointed by a majority of the proprietors. It was identified that there was a possibility of obtaining grant funding to assist with the works. A condition of applying for grant funding was that an owners' association be formed. This was constituted in February 2014. In documentation lodged this Association is referred to variously as 10-12 West Princes Street Owners Association and 10-14 West Princes Street Owners Association but it appears clear that the Association is for the proprietors of the tenement at 10-16 West Princes Street. It is hereinafter referred to as "the Association."

Liability for repairs in the tenement was thought to be on the basis of eight equal shares. It was stated by Sharron Biggins at the hearing that this information was given by another owner and that very little in the way of maintenance or repairs had been carried out in the recent past. However when titles were checked for the purposes of the grant application it was determined that responsibility for repairs was to be determined by the proportion which the rateable value of each property bore to the total rateable value of the tenement. This formula was not followed by the proprietors

when the major common repairs were carried out as the owners agreed that repairs were to be dealt with on the basis that it would be equal shares payable by each of the eight proprietors. There is an annexe to the tenement and there were issues with regard to whether or not work to the annexe constituted common repairs. The homeowner produced a letter from her solicitor expressing the view that it should not be part of the common repairs to be paid by all proprietors. Other proprietors did not agree with this and it was determined not to get another legal opinion because of the cost. Grant funding was obtained. The homeowner was not in receipt of any repair grant funding from Argyll and Bute Council but did share in a grant from Townscape Heritage Initiative. Competitive quotes for the works were obtained in March 2014. The scope of works had to be scaled back from what was originally proposed because the costs were in excess of what the owners could afford and effectively the proprietors had to determine what works could be done from the funds available. During 2014 attempts were made to get grant funding in place and to progress the works. It was shown from the documentation provided that this proved to be a complex process with the amount of funding on offer changing over time. The Owners' Association had decided not to appoint a project manager but did appoint an architect to deal with the project. WH Kirkwood was appointed by the Owners' Association as contractor and works were completed in April 2015.

Following completion of the works there were issues with their quality. There is still water ingress to properties in the tenement. Work is ongoing to establish whether or not this is as a result of faulty work by the contractor, has been caused by storm damage or has another cause.

12. The Committee decided to deal with matters on the basis of considering each matter raised by the applicant in her application. The applicant contended that the property factor had breached the Code in a number of respects.

### 13. Written Statement of services

Mr Marshall made his position quite clear in evidence and that was that he considered that the property factor had not followed the Written Statement of Services. He did not address whether or not the Written Statement of Services issued by the property factor complied with the Code in having included in it the requirements as set out in the Code. The application alleged specific defects:

13.1 In accordance with 1 B d of the Code the property factor is required in the Written Statement of Services to set out "*the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified*"

The Committee had regard to the Written Statement of Services (hereinafter referred to as "the Statement"). The particular section of the Code relates to provisions for works done outwith the core services. The core services are set out at Section B of

the Statement and is referred to as "the basic services." It refers to processes for repairs within non referral and referral limits. At Section C of the Statement the management fee is dealt with but there is no reference to any additional fee or how such a fee would be determined. Neither the homeowner nor the property factor addressed the Committee on this particular sub section.

The Committee considered the requirement as set out in the Code. The Statement did not set out the types of services which might be required in addition to the core services and did not set out how any fees or charges in relation to these additional services may be charged.

13.2 In accordance with 1 C i of the Code the property factor is required in the Statement to set out "*any arrangements for collecting payments from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service)*"

The Committee had regard to the Statement. As previously observed the Statement refers to repairs within non referral and referral limits. In Section C it refers to a process to obtain deposits from proprietors to be used to fund repairs and a process to obtain funds from proprietors when the deposits are exhausted. The Statement refers to a process for taking payments for a specific project and that instructions for the work will not be issued until all contributions are received. Section 3 c of the Statement deals with the process when the property is sold . Neither the homeowner nor the property factor addressed the Committee on this particular subsection.

The Committee considered the requirement as set out in the Code. The Committee considered on balance that the requirement of the Code in this regard were met.

13.3. In accordance with 1 D m of the Code the property factor is required in the Statement to set out "*the timescales within which you will respond to enquiries and complaints received by letter or email.*"

The Committee had regard to the Statement. At Section D of the Statement a timescale for response of ten days is given to any complaint made by a homeowner. Neither the homeowner nor the property factor addressed the Committee on this particular subsection.

The Committee considered the requirement set out in the Code. The Statement gives a timescale with regard to complaints but not for enquiries. In this fairly narrow aspect the Committee determined that the Statement fell short of the requirements of the Code.

13.4 In accordance with 1 Fp of the Code the property factor is required in the Statement to set out "*clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for*

*early termination.*" Neither the homeowner nor the property factor addressed the Committee on this particular subsection.

The Committee had regard to the Statement. Section F is where arrangements are set out for termination. The Statement does not give signposting to appropriate legislation but the Committee considered that taking in its entirety the Statement complied with the Code in this regard.

13.5. The Application indicated that the homeowner considered that the Statement did not comply with Section 1 D of the Code but made a specific reference to Section 1 Dm which has been dealt with previously.

13.6 Section 1Dn refers to procedures and timescales for response when dealing with telephone enquiries. The Statement refers to issues being raised by telephone calls. No evidence was provided in respect of a possible breach of this particular section.

13.7 Section 1DI refers to the requirement for the Statement giving details of the property factor's in-house complaints handling procedure. The Committee considered the terms of the Statement and, in particular, Section 7. It considered that it fell short of compliance with the Code. It states that any homeowner with a complaint should do so in writing. The Statement did not set down any information on the process of the complaint, how long consideration of it would take and whether or not there is an internal appeal procedure. Section 1D of the Statement does set out a timescale for response to a complaint.

13.8 The Committee noted that the Statement made reference to the Homeowners Housing Panel and also the Home Housing Panel. It also noted that nowhere in the Statement was there an address of the homeowner housing panel or an on line reference. The statement gave no information on "how homeowners may make an application to the homeowner housing panel if they remain dissatisfied...." (Section 1DI of the Code). Mr Livingston conceded that the paperwork of the property factor was deficient in this regard and the Committee considered that the property factor had not complied with Section 7.2 of the Code.

#### 14. Communications and Consultation

14.1 The Code at Section 2.1 states that the property factor "must not provide information which is misleading or false."

Mr Marshall stated that he considered that Bute Factors had provided false and/or misleading information. He said that one example was the issue of the annexe to the tenement. He said that he had provided a letter from his solicitors Hannay Fraser which unequivocally stated that the annexe was not part of the tenement to be included in common repairs. He said that this issue remained unresolved and that the property factor's continued insistence that it be included is a misleading statement. Mr Marshall stated that the letter of representation of the property factor dated 26<sup>th</sup> November 2015 was demonstrative of the misleading and untrue statements made by it. The letter

stated that Mr and Mrs Marshall were in Rothesay at the end of 2014 and that given the issues which they had the property factor thought that they would have called at the office to discuss them. Mr Marshall said that this statement was untrue since he had not been in Rothesay at that time but that his wife had. He accepted that there had been no visit by her to the office but that there had been a telephone call followed by an email. Mr Marshall said that he did not consider that either he or his wife ever got a straight answer from the property factor. Mr Marshall said that although his wife got copies of Minutes of the Owners' Association the only copy of the Minutes of one meeting which he referred to as "the Kirkwood Minute" was when it was produced by the property factor to HOHP.

Mr Marshall also gave what he considered to be an example of misleading information which surrounded the property factor charging an additional fee of £2000. He said that three different versions of how this came about had been given. One was that it had been raised by Ms Biggins the chairperson of the Owners' Association, another that it had been raised by Mr Livingston and another that it had been raised by an owner. Mr Marshall referred to the Minutes of the Meeting of the Association of 28<sup>th</sup> April 2015.

Ms Biggins said that she, as chairperson and as an owner had raised the issue of an additional fee to be paid to the property factor. She also said that this had been raised prior to the meeting of 28<sup>th</sup> April 2015 and that Mr Livingston raised the matter as an agenda item at that meeting. Ms Biggins said that this was consistent with what Mr and Mrs Marshall had been told. Mr Brake said that he thought such an additional fee was reasonable and appropriate given the amount of additional work carried out by the property factor.

Mr Livingston stated in his letter of representation dated 26<sup>th</sup> November 2015 that the matter of an additional fee had been raised by Ms Biggins and that all those attending the Owners' Association meeting of April 2015 had agreed that such a fee be paid.

In exhibit 103 the homeowner usefully summarised her position on alleged breaches of the Code. Detailed information is given in other documentation lodged by her. In the document which is exhibit 103 the homeowner states that the property factor was reluctant to provide detailed information of the apportionment of grant money and displayed a lack of transparency with regard to the grant monies provided for the annexe. The homeowner stated that only when contacting Argyle and Bute Council did she receive information on the grant levels approved.

The Committee had before it the Minutes of meetings of the Association held in 2014 and 2015. Ms Biggins and Mr Livingston said that all proprietors got copies of the Minutes. Mr Marshall said that his wife had not got a copy of one set of Minutes which he described as "the Kirkwood Minute" which would appear to be those from 26<sup>th</sup> June 2015. Excluding the Minutes from June 2015 and considering the terms of the others it appears to show that there had been discussion by the proprietors with regard to the

progress of grant applications, the apportionment of liability for repairs and the inclusion of the annexe as part of the programme of common repairs.

14.2 The Code at Section 2.5 states that the property factor “must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.”

The Committee noted that the Statement stated that complaints would be responded to within a ten day time frame and, as previously observed, that it did not state any timescale for dealing with enquiries. Mr Marshall referred the Committee to exhibit 86 which is an email from him to the property factor dated 27<sup>th</sup> May 2015 where he was seeking a response to queries raised. Mr Livingston stated that at that time his colleague Lesley McDougall had been on holiday and that he had been in hospital. Mr Livingston said that the combination of these two matters “shifted things sideways.” Mr Livingston accepted that the property factor had failed to deal with the response in a timeous manner. Mr Marshall referred the Committee to exhibit 91 which is another email from him dated 15<sup>th</sup> June 2015 where he is seeking a response and where he is stating that any response received did not address the concerns raised.

14.3 The Committee noted that Mr Livingston, on behalf of the property factor, accepted that the necessary response to the homeowner had not been provided within the timescale set out in the Statement. The Committee also noted from the considerable volume of documentation lodged by the homeowner that on many occasions the property factor had responded timeously.

The Committee determined that the property factor had not complied with Section 2.5 of the Code.

14.4 The Code at 2.4 states that the factor “ must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations ( such as in emergencies)”

14.5 Mr Marshall stated that this section of the Code made it clear that the property factor required to get authority before incurring charges and “not after the fact.” He said that the property factor should have had procedures in place to get authority from the proprietors prior to making an additional charge for services outwith the core services. Mr Livingston said that the level of work involved in the contract could not have been anticipated. He said that it could not have been foreseen that the contract

could be so complex and time consuming. Mr Brake commented that he was disappointed that, given what he considered was the small amount paid in annual factoring fees, Mr Marshall seemed to want to criticise the property factor. Mr Brake said that he considered the service provided to be exceptional. Mr Marshall maintained that, since public funds were involved, the property factor required to behave in accordance with proper procedures. Ms Biggins said that the £2000 fee paid to the property factor did not come from public funds but had been paid for by the proprietors. She said that the spreadsheet provided by the property factor showed complete transparency. She said that the property factor had resigned because of the barrage of correspondence received from Mr Marshall and that she had to persuade them to withdraw the resignation. The Committee's attention was drawn to the terms of the Minutes of the Meeting of the Owners' Association dated 28<sup>th</sup> April 2015 where the Association approved an additional fee of £2000 being paid to the property factor.

Mr Marshall said that there were serious issues with the governance of the Owners' Association and referred the Committee to exhibit 103. This gives a detailed outline of issues where the homeowner considers that the procedures of the Association have not been in compliance with its constitution and that effectively its actings have gone beyond what is appropriate. The Committee considered that the property factor had not complied with the Code because it failed to consult with the homeowners before services incurring additional charges were provided.

## 15. Financial Obligations

Section 3.3 of the Code states that the property factor must "must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject of notifying the homeowner of this charge in advance."

### 15.1

Mr Marshall said that his wife, as the homeowner, was not given a financial breakdown of what had been paid. He said that the property factor failed to properly account for what was public money. Mr Marshall indicated that, although his wife did not receive grant monies from Argyll and Bute Council , others in the tenement did and he did not consider that the accounting provided by the property factor would pass any audit. Mr Marshall gave an example of an administration charge made of £595 and which he did not consider the homeowners got sufficient information about. Mr Marshall said that all accounts were ambiguous and open to interpretation. Mrs Brake said that she and all the other proprietors had no difficulty in understanding the accounting and, in particular, what the £595 was for. Mr Livingston said that the charge of £595 was deducted by Argyll and Bute Council for administering the grant applications before

grant monies were issued and he said that he considered it quite clear what this was because in the statement issued to all proprietors the figure was under the heading of Argyll and Bute Council.

Mr Marshall referred to a previous decision of a homeowner housing panel committee where it was stressed how important it is that property factors comply with the Code in accounting financially to homeowners ( HOHP-14/0129). Mr Marshall said that he had sent a grid to be completed by the property factor which would show all the financial intromissions but that this was not done. Mr Livingston said that Bute Factors had sent all proprietors a statement in June 2015 which showed the financial position. A copy of this statement was before the Committee. It shows the costs associated with the project, income from the proprietors, income from grant funders and apportionment of liability amongst proprietors.

Mr Livingston said that he took exception to Mr Marshall accusing Bute Factors of financial impropriety. Mr Marshall denied that he had done so but said that the accounting was not transparent. Mr Livingston referred the Committee to exhibit 103 which is an undated letter from the homeowner wherein it is stated "is the A & B Council aware that the grant has been subject to an administration fee?" Mr Livingston considered that this was an allegation that somehow an additional fee had been taken by the property factor.

Ms Biggins said that the schedule sent to all proprietors showing the income and expenditure had been prepared by Mr Livingston and had been accepted by the Association.

Mr Marshall maintained that the property factor had not complied with its written statement of services in properly accounting to the homeowner and said that his wife's position, as stated early in the project, that she would not pay more than £5000 was disregarded by the property factor. The Committee noted the contents of an undated letter (exhibit 31) from Mr and Mrs Marshall to Bute Factors which states the homeowner's position that she would commit to expenditure not exceeding £5000 subject to certain things being done. Although undated the letter accompanies an email to Bute Factors dated 2<sup>nd</sup> July 2014.

Ms Biggins and Mr Livingston stated that there were serious problems during 2014 in ascertaining from Argyll and Bute Council what grants would be available. Ms Biggins said that at one point the grant funding from Argyll and Bute Council had been withdrawn and that she had contacted the local Councillor and, as a result, it had been reinstated. She said that initially the Council had not been prepared to grant fund work to the annexe but, on reinstatement of the grants, this had been included. She said that any grant monies she got for the annexe she had "put into the pot" and drew the Committee's attention to the Statement provided to proprietors. This shows five grants from the Council at £2465 and two grants at £3815. The higher level is in respect of grants to the "annexe properties." The Statement shows that the total sum of grant

from the Council is £19,955 which is allocated equally amongst the seven proprietors in receipt of grant funding from the Council. Mr Livingston stated that the original project had to be scaled back to meet the funding available. The Committee considered that it had no evidence to support the allegation that the property factor had failed to comply with this section of the Code.

16. The Code states at Section 6.9 that the property factor “must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided.”

16.1 Mr Marshall stated that there are defects in the work carried out by WH Kirkwood and that the property factor has not pursued the contractor to put right the faults. He said that, in terms of the conditions of the grants received from Argyll and Bute Council, a retention should have been made. Mr Livingston said that a retention had been made. He said that there was concern about the quality of work undertaken by the contractor. Mr Livingston said that a retention of £6000 had been made but the contractor had threatened to sue the property factor should it not be paid in full. The Committee had sight of a letter from ADLP Solicitors dated 14<sup>th</sup> July 2015 which threatened court action if payment was not made. Ms Biggins and Mr Livingston said that there had been a meeting with the contractor and it had been made clear that court action would ensue if the retention were not released. The Committee was referred to a Minute of the Association dated 26<sup>th</sup> June 2015 at which two representatives of the contractor had been present and two representatives of Bute Factors. This Minute reflects that concerns were raised about workmanship and that the contractor had indicated that, if the outstanding balance were not paid, court action would ensue.

Mr Marshall said that there was water ingress to his wife’s property and Ms Biggins said that there was water ingress to her property. Mr Livingston said that there had been problems in identifying whether or not the defects were as a result of work not done properly, storm damage or for any other reason. He said that the task in inspecting the work had been made more difficult because of the limited availability of a cherry picker on the island and that such a vehicle was needed to carry out an inspection. He said that this had been recently resolved and that he hoped that investigative work could progress. He said that there had been issues in instructing another contractor to carry out repairs because, had this been done, it would have been difficult to pursue WH Kirkwood if it then was proven that their work had been defective. Mr Livingston said that the architect had carried out an inspection of the loft space and that there were plans to take a video when there is significant rain. Ms McDougall said that Mrs Marshall had denied access to her flat to assist in any inspection. Mr Marshall said that such access should not be necessary as the contractor should be able to see from the roof where water is entering the flat and that he had a contractor look at the roof for his insurance claim and that he had been told that the work done had been “dodgy.” Mr Marshall said that he had no written report stating this. He said that his contractor had examined the roof in December 2015/January 2016 and that the property factor should have sufficient information to pursue

matters and that it should have done before now. Ms McDougall said that a local contractor had looked at the roof but had carried out no repairs. She said that he had fitted "soakers" to try and take away some of the water. She said that Mr Marshall's contractor had provided a list of what could be done to the roof but without stating what the cause of the water ingress is. She said that the contract with WH Kirkwood involved an overhaul of the roof and was not renewal of it. Mr Livingston said that if another contractor did work to the roof it would be very difficult to then pursue Kirkwoods if it was then established that there had been defective work. Ms Biggins said that it may be significant that problems with water ingress had occurred some months after completion of the contract and that during that period there had been a significant amount of rain.

16.2 Mr Marshall said that he thought that the architect had failed and that he had signed off work which he should not have. Ms Biggins said that it had been difficult to find an architect willing to take on the work. She said that the architect had not been project managing the work and that there had been no project manager. She said that his brief had been to visit the site occasionally. Mr Livingston said that the architect had not been appointed by the property factor but by the Association and that the architect was an agent of the proprietors of the tenement. He said the architect continues to be involved in the investigative work to establish whether or not the work done by Kirkwoods was defective.

16.3 Section 6.1 of the Code states "You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job- specific progress reports are not required."

Mr Marshall led no evidence on this specific section of the Code and the Committee heard no evidence that supported the allegation that the property factor had not complied with Section 6 of the Code

## 17.Complaints Resolution

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

Mr Livingston accepted that the paperwork of the property factor did not give details of how the homeowner may apply to the homeowner housing panel.

17.3 Section 7.5 of the Code states that "You must comply with any request from the homeowner housing panel to provide information relating to an application from a homeowner." Mr Marshall was unable to assist the Committee in directing it to any example of where he considered that the property factor had failed to provide

information to the homeowner housing panel. The Committee noted that the property factor had complied with the requirements of the Direction issued by the Committee. Mr Marshall seemed to accept that he had included reference to this section in error.

18. Mr Marshall said that the requirements of the title deeds in relation to sharing costs for common repairs had been overlooked. He said that he had not been given reassurance that repair accounts in the future would be dealt with in accordance with the title deeds which states that they require to be dealt with according to a formula based on the rateable values of all properties in the tenement. Mr Livingston said that future repairs would be dealt with in accordance with the requirements of the title deeds and that the only matters dealt with by equal shares were the repairs which were part of the project. He said that the latest statement for common repairs showed that repairs not connected with the project had been dealt with on the basis of consideration of the rateable values of the tenement. Ms Biggins said that it would also be in her interest if future repairs be dealt with in accordance with the rateable value formula. Ms Biggins said that, had the proprietors not adopted the approach that the division of responsibility would be on the basis of one eighth shares then the works would not have been done because the commercial proprietors would not have participated. Mr Marshall referred the Committee to exhibit 31 which was an undated letter from Mr and Mrs Marshall which stated that they would agree to work being done on the basis of shares of an eighth from each proprietor if future repairs were dealt with in accordance with rateable values. This letter also stated that Mr and Mrs Marshall wanted a legal agreement to be drawn up to reflect this. No such document had been put in place.

Mr Marshall said that the situation of his wife's flat is worse than when she bought it and since the work had been done to the tenement. He said that this is very upsetting. He said that when the flat had been purchased there had been no water ingress and that there now is.

Mr Marshall referred the Committee to exhibit 110 which is a response to the letter sent to the HOHP by the property factor on 26<sup>th</sup> November 2015 and which also includes very detailed representations in respect of what Mr Marshall considers to be failures in governance by the Owners' Association. In response to a query with regard to whether or not Mr Marshall considers the governance of the Association to be a matter for the Committee he said that he considered that the property factor, the Owners' Association and the HOHP to be inextricably linked. Mr Marshall said that the Association has not behaved properly.

Ms Biggins responded to Mr Marshall's representations with regard to the Association by stating that if the Association's committee resigned it would be difficult to get work done. She urged Mr Marshall to work with the Committee.

## **Discussion**

This application arises from concerns that the homeowner has in connection with the property factor's actings in administering the common repairs for the tenement and, in particular, what occurred during and following a programme of major works. In arriving at its Determination the Committee had regard to the documents lodged by the parties and also the evidence it heard.

The Committee considered the fact that the proprietors of the tenement had established an owners' association to deal with the project. The existence of such an owners' association appears to have been a condition of Argyll and Bute Council providing grant assistance for the works. Much of the homeowners' concerns as detailed in her written submissions and also in the evidence of Mr Marshall surrounded what were considered to be defects in the actings of the Association, its procedures, its governance and perceived failings of its officers. The Committee had to come to a view as to how it dealt with this in the context of the application and its duty to determine it.

A homeowner's relationship with a property factor is contractual. It appeared to the Committee that the proprietors of 10-16 West Princes Street had together appointed Bute Factors Ltd to carry out certain functions which amounted to factoring. Decisions of the Association were taken by a majority vote. The property factor was the agent of the Association. The Committee did not consider that this removed the responsibility of the property factor to comply with the terms of the Act in general and the Code in particular. However what the Committee had to consider was whether or not the property factor had any responsibility for any failings or defects of the Association. The Association had its own constitution and its own office bearers. The homeowner's position as detailed in the application is that the Association did not perform as it should. The Committee considered that it did not require to come to a view on this. The homeowner is a member of the Association, is free to attend its meetings and to make representations to it. The Committee has no remit to consider whether or not the Association behaved properly in connection with the instruction of common repairs or in relation to such matters as inclusion or exclusion of parts of the tenement in a programme of common works. It did not accept Mr Marshall's representations in this regard. What it required to do is consider whether or not the property factor had complied with the Code and had carried out the property factor's duties.

## **Written Statement of Services**

A property factor is required to issue a written statement of services to each homeowner. In this case one had been issued to Mrs Marshall who stated, in her application, that she considered it to be defective in a number of ways. Mr Marshall was not clear in his representations regarding this section of the Code and the Committee formed the view that he had misunderstood what was required at this part of the application because what he said to the Committee involved possible failures of

complying with the statement of services rather than any omissions or defects in its content. Nevertheless the Committee considered it appropriate to consider the written statement of services and make a determination on whether or not it complied with the Code. As previously stated the Committee considered that the written statement of services was defective.

Section 1Bd of the Code requires the property factor to deal with any additional fees and charges and how any such fees and charges are calculated and notified. In the particular circumstances of this application this omission is particularly significant given the homeowner's concerns about an additional charge that was made.

Section 1Dm of the Code requires the property factor to give a timescale of dealing with enquiries and complaints. The written statement of services gives a timescale of ten days for response to complaints but, in this regard, makes no mention of enquiries.

The Committee considered it unfortunate that the written statement of services referred at one place to the Home Housing Panel and at another place the Homeowners Housing Panel rather than Homeowner Housing Panel. It also considered it appropriate that the document should give contact details for the homeowner housing panel. The Committee considered that the property factor had complied with Sections 1ci and 1Fp of the Code.

The Committee determined that the property factor had not complied with Sections 1Bd, 1Dm of the Code.

#### Communications and Consultation

##### Section 2.1

The Committee considered the evidence in relation to whether or not the property factor had provided false or misleading information. It considered Mr Marshall's reference to the property factor's letter of 26<sup>th</sup> November 2015 regarding Mr and Mrs Marshall's visit to Bute in December 2014 (where only Mrs Marshall had visited) not to be indicative of false or misleading information. It was an error. The fundamental information was correct- Mrs Marshall had been in Rothesay and had not visited the office. It also formed the view that the "conflicting" reasons for the £2000 charge being made not to be indicative of false or misleading information and it accepted the evidence of Mr Livingston and Ms Biggins in this regard.

The Committee also considered the financial information provided by the property factor against the requirements of this section of the Code and did not consider that any such information provided was false or misleading. The proprietors had been kept apprised of applications for funding and the granting of the contract. The statement which proprietors had been sent set out the income and expenditure in an understandable format.

Section 2.4 of the Code requires the property factor to "have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)"

In this case the property factor did do work in excess of the core services. Mr Livingston's position was that it could not have been anticipated that the contract would have involved the amount of work that it did but the Committee considered that it must have been anticipated that there would have been some work in excess of the core services such as liaising with the architect, grant providers and the contractor. The property factor should have foreseen that there may be a requirement for additional work. This takes on more significance when it is considered that the written statement of services is deficient in not making provision for arrangements for additional charges. Having said that the Association sanctioned this payment in respect of the additional services provided. The Committee had some sympathy with the homeowner in her position that such payments should not be "after the event" but nevertheless the homeowner should have anticipated that there might be additional charges. The Committee considered that any reasonable person would anticipate that the extra work being carried out by the property factor would not be covered by its factoring fee. On balance the Committee considered that the property factor should have covered this issue in its arrangements with the homeowners. Provisions should have been in the Statement. At the very least there should have been a clear statement that any work outwith the provision of "basic services" would attract an additional fee. At commencement of its work concerning the contract for the project the property factor could have set out proposals for any additional fee or at the very least a process for calculating any such fee due. The Committee made no judgement as to whether or not the fee was appropriate but it considered that it did not seem excessive for the work done by the property factor.

The Committee Determined that the property factor had not complied with Section 2.4 of the Code.

#### Financial Obligations

The homeowner's position in this regard can be summarised as follows: that she is paying for a share in the repairs to the annexe, that the property factor did not provide appropriate financial information and she is paying more than she had agreed to pay as a ceiling- £5000.

The question of the annexe is a difficult one. The proprietors as a majority considered that the annexe should be included in the scheme of common repairs and that liability for repairs to it should be apportioned equally amongst the proprietors. The

homeowner produced an opinion from a solicitor to the effect that the annexe was not part of the common property. The other proprietors did not agree with this, the possibility of obtaining another legal opinion was rejected because of cost and it was determined that the annexe would be included. The property factor was instructed by the majority of proprietors to deal with matters on that basis.

The Committee was referred to a statement produced by the property factor in June 2015 and which was sent to all proprietors of the tenement. The Committee considered that the statement was clear and was easily understood. It showed the costs, the funds received from grant funders and the proprietors and the apportionment of liability for costs. It is clear from the documents lodged by the homeowner that she had raised various issues over the course of the contract for works, prior to works commencing and after their conclusion. It appeared to the Committee that any enquiries falling to be dealt with by the property factor were dealt with appropriately and that there were others which fell to be responded to by the Association.

The homeowner has stated that she was only prepared to pay £5000 and that she is now required to pay more than that. The Committee considered that the homeowner may or may not have a contractual issue with other proprietors but that it was limited to considering whether or not the property factor was culpable in this regard. It formed the view that there was no culpability on the part of the property factor who was acting as the agent of the proprietors in getting the works done. A majority of proprietors had instructed the works and had accepted the quotation.

#### Carrying out Repairs and Maintenance.

The homeowner considered that the property factor had failed to pursue the contractor to remedy any defects and had not made a retention. The Committee considered the terms of the Minute of the meeting of 26<sup>th</sup> June 2015 where representatives of the property factor were present. It seemed that this evidenced that the property factor had been trying to have the contractor address defective work. It was also clear that a retention had been made but the owners had agreed to its release because of threatened court action. It had not yet been determined what the cause of the water ingress is and the Committee accepted the evidence from Ms McDougall, Mr Livingston and Ms Biggins that work is ongoing to determine if the work is defective or if there is another cause. The Committee also accepted the evidence on the limited nature of the architect's role.

#### Section 7.2 of the Code

Mr Livingston accepted that the property factor's paper work did not conclude information on how a homeowner may apply to the homeowner housing panel and in this regard the Committee considered that the property factor had not complied with Section 7.2 of the Code.

## Summary

This was a difficult project for all involved. There was not agreement amongst proprietors regarding liability for repairs, there seemed to be shifting sands as far as the provision and amount of grant funding, the initial project had to be scaled back to meet funding available, some works considered essential within the condition report were not undertaken due to lack of funding and some properties in the tenement are experiencing water ingress which may or may not be as a result of deficient work. It is clear from the documents lodged by the parties that the property factor had an extremely difficult job and Bute Factors and the proprietors should take credit for the project having been completed despite the difficulties and problems highlighted.

The Committee found no difficulty in establishing that the Written Statement of Services was deficient and did not comply with the Code. It did however form that view that the deficiencies, other than in one respect, did not impact on the application. If the Statement had set out clearly the fact that work done in addition to the core services would attract an additional fee then the issue of the homeowner's unhappiness at the way the £2000 fee was dealt with may have been avoided. The Committee did take notice of the fact that the decision to pay the additional fee was taken by a majority of proprietors and that the cost to each proprietor was £250. As previously stated the Committee considered the amount of the fee not to be unreasonable.

The Committee did not consider that the property factor had provided misleading or false information.

The property factor accepted that complaints/enquiries had, in a small number of occasions, not been dealt with in a timeous manner.

The property factor had failed to get approval in advance for an additional fee.

The Committee considered that the property factor had properly accounted to the homeowner. It considered it significant that it heard evidence from two other proprietors of the tenement who both stated that they were satisfied.

There were issues with the work done by the contractor and these were raised with the contractor. Subsequent to that there is water ingress and the property factor is carrying out investigative work to establish the cause.

The property factor accepted that its correspondence did not give information about how to contact the homeowner housing panel.

In relation to any failure in property factor's duties, the Committee formed the view that the property factor had not failed.

The Committee had regard to the application and what the homeowner had stated to be a resolution:

- (i) "For the property factor to acknowledge that her concerns are not frivolous."

Both Mr Livingston and Ms McDougall gave evidence in such a manner consistent with matters being taken seriously. The copies of correspondence lodged by the homeowner do not demonstrate that the property factor considered that the homeowner's concerns were frivolous.

- (ii) "Honour our agreement to proceed as outlined August 2014."

The Committee interpret this as referring to the capping of expenditure at £5000. It does not consider that it is within the property factor's power to achieve this. This is considered to be a matter amongst the proprietors and the property factor is an agent of the proprietors.

- (iii) "Agree to administer all future work on the basis of title in writing; clearly and explicitly."

The Committee saw no reason for any additional written agreement to be entered into. The title position is clear and the property factor would be failing if it did not follow this for future common repairs. The evidence of Ms Bigigns was also persuasive in this regard.

The Committee considered it appropriate to make a property factor enforcement order to ensure future compliance with the code and to compensate the homeowner for any distress caused by failures of the property factor. In arriving at the level of the compensation the Committee had regard to the difficult nature of the work undertaken by the property factor and the fact that any failings of the property factor did not cause significant prejudice to the homeowner.

In arriving at its Determination of matters the Committee had regard to the Decision Mr Marshall referred to ( HOHP/PF/14/0129) and, in the particular circumstances of the application before it, did not consider that it was relevant.

**The Committee proposes that a property factor enforcement order be made in the following terms:**

- 1. The property factor requires to amend the statement of services issued to homeowners at 10-16 West Princes Street, Rothesay to ensure that it complies with the Code of Conduct for Property Factors.**
- 2. The property factor has to undertake to the homeowner housing panel committee that it will in future respond timeously to enquiries and**

**complaints by homeowners and that its correspondence to homeowners will comply with the terms of the Code.**

- 3. The property factor has to undertake to the homeowner housing panel that it will, in future, obtain authority from homeowners where it is intended to charge an additional fee for services.**
- 4. The property factor will pay compensation of £150 to the homeowner and this will be paid within twenty eight days of the property factor enforcement order.**

### **Appeals**

**The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides:**

**"...(1) An appeal on a point of law only may be made by summary application to the Sheriff against a decision of the President of the Homeowner Housing Panel or a homeowner Housing Committee.**

**(2) An appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made...."**

**Regulation 26 (3) indicates that the decision is made "by giving notice of the decision" to the parties.**

### **Note**

This was a difficult Hearing because of the fact that the homeowner's husband was giving evidence and making representations by telephone from Australia. At times the chairperson had to quite forcefully ask him to stop speaking to allow the Hearing to be conducted in a reasonable manner. This was not a criticism of Mr Marshall but rather a result of the fact that he was speaking to a telephone and was not present with all the attendant advantages such as eye to eye contact and the ability to interpret body language. The Committee was also mindful of the fact that, by the time the Hearing had been concluded, it was midnight in Australia and the whole event must have been tiring for Mr Marshall. The Committee were appreciative of the efforts all participants (particularly Mr Marshall) made to overcome the obstacles created by the manner in which the Hearing had to be conducted.

Chairman of Committee

Date 18th April 2016

Martin J. McAllister