

**Decision (No. 5) of the Homeowner Housing Committee
issued under the Homeowner Housing Panel (Applications
and Decisions) (Scotland) Regulations 2012 determining two
applications by the homeowner**

Hohp/pf/13/0268 Flat 3, 2 East Pilton Farm Rigg, Edinburgh, EH5 2GD
Hohp/pf/13/0280 Flat 2, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH

The Parties:-

ALAN HENDERSON, 4/16 Western Harbour Terrace, Edinburgh, EH6 3JQ ("the homeowner")

HACKING & PATERSON MANAGEMENT SERVICES, having a place of business at 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ("the factor")

Committee Members

Pino Di Emidio (Legal)

Ann McDonald (Housing)

1. These cases are two of a group of ten cases brought by the homeowner in relation to the same development in Edinburgh against the same factor. The parties have agreed in writing that they should be selected as the lead cases and the final decision in them should apply to the other eight similar cases. There are a further five cases relating to a development in Glasgow between the parties that were referred to the same committee. A lead case was selected from the Glasgow group of cases and dealt with at the same hearing on 20 May 2014. The parties are to be commended for having co-operated in agreeing lead cases as this has had the benefit of reducing the workload of all concerned at the hearing. A copy of the minute is appended to this decision.

2. All references to statutory sections are to the Property Factors (Scotland) Act 2011 and all references to regulations are to the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 (SSI 2012 No. 180).

3. As agreed by the parties the committee has listed the following cases:
Hohp/pf/13/0276 relating to Flat 5, 2 East Pilton Farm Rigg, Edinburgh, EH5 2GD, Hohp/pf/13/0277 relating to Flat 6, 2 East Pilton Farm Rigg, Edinburgh, EH5 2GD, Hohp/pf/13/0278 relating to Flat 7, 1 East Pilton Farm Rigg, Edinburgh, EH5 2GD, Hohp/pf/13/0279 relating to Flat 5, 47 East Pilton Farm Wynd, Edinburgh, EH5 2GD, Hohp/pf/13/0281 relating to Flat 5, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH, Hohp/pf/13/0282 relating to Flat 6, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH, Hohp/pf/13/0283 relating to Flat 11, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH and Hohp/pf/13/0284 relating to Flat 13, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH.
4. Two lead cases were chosen from the Edinburgh group because the homeowner had acquired some of the properties at an earlier time than he acquired the others and it was thought this might affect the final outcome. For reasons that are set out below, this difference in factual background does not affect the reasoning of the committee in the two lead cases. In this Decision Flat 3, 2 East Pilton Farm Rigg, Edinburgh, EH5 2GD is referred to as "Property 1" and Flat 2, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH is referred to as "Property 2".
5. The homeowner represented himself at the hearing. The factor was represented by Mr Neil Watt.
6. These cases involve a dispute relating to the power of the factor to increase the level of the float which is required to be paid by an owner of flats within the development under their management. Notwithstanding the terms of the titles and the use in correspondence of terms such as "common charges deposit" or "property management fund" the term used in this document for a fund held by the factor during the period of an individual homeowner's ownership of a flat is "float".
7. The homeowner submitted a letter dated 11 April 2014 which helpfully contains a list of most of the documents he had lodged in support of the applications. The numbering from his list is used in this decision. The homeowner divided his list into Note 1 and Note 2. In this decision documents from Note 1 are referred to as N1/1 to 18 and those from list 2 as N2/1 to 15.

8. The homeowner brought two complaints against the factor in each case. There is a complaint of failure to carry out property factor's duties by increasing the float for each property and a separate complaint of failure to comply with the terms of paragraph 2.1 of the Property Factor's Code of Conduct. That paragraph requires that factors do not provide information that is misleading or false. Near to the conclusion of the hearing the homeowner agreed to withdraw that part of his complaint that alleged that the factor had failed to comply with paragraph 2.1 of the Code Conduct in each of these cases. It had become clear during the course of discussion at the hearing that all of the communications about which he wished to complain related to a time before the Code came into force in respect of the factor. That date was 1 November 2012, the date of the factor's entry in the Register of Property Factors. Therefore the committee allowed the homeowner to withdraw his complaint under paragraph 2.1 of the Code in respect of both lead cases.

Preliminary Matters

9. Mr Watt commenced by raising a complaint that a letter submitted by the homeowner dated 6 May 2014 in response to a Direction by the committee (paragraph 25 of Decision (No. 3) of 29 April 2014) was not an adequate reply to the committee's direction. As a result he submitted that the application should be refused. The committee declined to take this course of action. The direction had required greater specification of the homeowner's case. The committee considered that the homeowner, who is not legally qualified or represented, had complied to a sufficient degree having regard to the overriding objective. There was no apparent disadvantage to the factor. In any event the factor's proposed sanction was excessive and inappropriate.
10. Mr Watt also complained that the homeowner had failed in his letter of 11 April 2014 to provide sufficient detail of his case in response to a direction from the committee (Direction 3 contained in paragraph 14 of Decision No.2 dated 7 April 2014). The direction had required greater specification of the homeowner's case in respect of paragraph 2.1 of the Code. As a result Mr Watt submitted that the application should be refused so far as it related to paragraph 2.1 of the Code. The committee declined to take this course of action. The committee considered that the homeowner, who is not legally qualified or represented, had complied to a sufficient degree with the direction

of the committee. There was no apparent disadvantage to the factor. In any event the factor's proposed sanction was excessive and inappropriate.

11. The factor had also raised a preliminary point in earlier correspondence about the effect of the transitional provisions in Regulation 28. Near the conclusion of the hearing Mr Watt conceded that the point was without merit but declined to withdraw the point. The committee has therefore included its ruling on this point in this decision. The factor argued that as the increase in float complained of had been implemented in 2007, then the committee had no jurisdiction to determine the homeowner's complaint in respect of these cases. In the course of discussion the factor conceded that the scheme of the Deed of Conditions required that the float be held until such time as the homeowner sold the property to which it related. As a result, if the float was paid it would still be held by the factor at the present time. The homeowner's complaint that the factor was not entitled to increase the float therefore relates to the period after the registration of the factor and the committee has opted to take account of the background facts as it is entitled to do in terms of Regulation 28(2).
12. Mr Watt also repeated a further preliminary objection relating to the decision of the President of the Homeowner Housing Panel to refer these and related cases to this committee. He repeated the submission set out at paragraph 1 to 1.3 of the factor's letter of 13 February 2014 addressed to the Panel. He asked the committee to remit the cases to the President to consider of new whether they ought to be referred as he submitted that for the detailed reasons set out in writing by the factor on 13 February 2014 the President had erred in referring these cases. The committee had already in earlier decisions declined to take this course of action. The committee adhered to its earlier decision to refuse to remit to the President. No new circumstances had been placed before the committee to suggest that it should re-consider its earlier decision.
13. At the outset of discussion of these cases the committee sought to ascertain the extent of agreed facts. Unless otherwise stated, the findings in fact set out below are all agreed by the parties.
14. The single issue that requires to be determined in relation to the complaint of failure to carry out factor's duties can be set out in two parts.

- a. Did the factor have power to increase the float for each flat in terms of the applicable Deed of Conditions?
 - b. If it did, was that power validly exercised?
15. The committee makes the following findings in fact in respect of the homeowner's remaining complaint in each of these two applications.
- a. The date of the factor's registration in the Register of Property Factors in Scotland is 1 November 2012.
 - b. The factor is a company registered under the Companies Acts without limited liability.
 - c. The homeowner's title to Property 1 was registered in the Land Register for Scotland on 14 February 2006 under title number MID86844. A copy of the Land Certificate updated to 16 October 2013 has been produced as part of the original application.
 - d. Both Property 1 and Property 2 form part of a development of what had been intended to comprise a total of 646 flats. The development has not been fully completed owing to the adverse effects of economic recession. The development is known as "The Strada".
 - e. The homeowner acquired Property 2 after the end of 2007 when the increase in float was put into effect by the factor.
 - f. The management of the common parts of the development is as provided for in the Deed of Conditions by Strada Developments Limited registered on 10 June 2004. It is burdens writ number 6 in the Land Certificate produced for Property 1.
 - g. The provisions of the Deed of Conditions are equally applicable to Property 2.
 - h. The factor was appointed as factor for the development under the Deed of Conditions.
 - i. The powers of the factor in the development relative to the float are as provided for in the Deed of Conditions.

- j. Clause 14 of the Deed of Conditions states in part:-
"Strada shall prior to the occupation of the first Dwellinghouse or Flat within the Development appoint a Factor to have charge of and perform the various functions to be exercised in the care, maintenance and management of the common subjects of the development, including the making of regulations and the placing of service contracts and the appointment of the Property Manager; Declaring however that ... the said appointment shall continue for the period of five years after the date of entry in the sale by Strada of the last house/flat and thereafter the Factor appointed by Strada shall remain in office until removed by a two thirds majority of the proprietors on the development, or by Strada within the said five year period."
- k. Clause 15.1 of the Deed of Conditions states:-
"Immediately after Strada have handed over possession of the last Dwellinghouse or Flat (whichever is the later) within the Development, the Proprietors shall be obliged to join and shall automatically become members of the "Owners' Association" the purpose of which will be to implement the terms of this Deed of Conditions and to preserve the amenity of the Development."
- l. Clause 15.1.3 of the Deed of Conditions states in part:-
"The Owners' Association ... shall have power:- ... (iv) To delegate to the Factor appointed as aforesaid full right, power and authority to take charge of all matters pertaining to the maintenance and preservation of the Common Ground and the employment of labour in connection therewith as said rights, power and authority which could be exercised by a majority vote of the Proprietors at such a meeting; (v) To instruct the collection by the Factor of the annual maintenance charge aforesaid from each Proprietor and the accounting by the Factor for his intromissions; ... (viii) To determine the amount of annual maintenance charge to be charged from time to time; ... DECLARING THAT (One) the Factor shall, unless otherwise determined by a meeting of Proprietors, be entitled from the commencement of his appointment to exercise the

whole rights and powers which may be competently exercised at or by a meeting of Proprietors and others convened as aforesaid;

- m. Clause 16.1 of the Deed of Conditions states:-

"16.1 Each Proprietor shall deposit with the Owners' Association or the Factor the sum of £50 in respect of a Plot and £110 in respect of a Flat or such other sum as may be agreed between the Owners' Association or the Factor and the Proprietors on an annual basis; The Proprietors of Flats are bound to pay a higher deposit than the Proprietors of Plots to enable the Factor's fund to pay for insurance premiums and others in respect of the Blocks and maintenance of the Flat Common Subjects. This sum will be deposited immediately upon acquisition of the Plot or Flat as a contribution to finance the cost of maintenance and preservation of the Common Ground and others (including maintenance of the Flat Common Subjects and the Property Manager's office/ store); The deposit will be returned by the Owners' Association or the Factor under deduction of any outstanding costs or expenses when a Proprietor or his or her representative ceases to own the Plot or Flat;"

- n. The homeowner had paid the float as originally provided for in respect of Property 1, i.e. £110.
- o. In about August 2007 the factor decided to increase the float for each flat in the development to £250, an increase of £140 per flat.
- p. The increase in float was collected from proprietors in 4 equal instalments of £35 commencing in early 2008. The instalments were added to the sums due in the quarterly invoices for each flat.
- q. The homeowner paid the increased amount for Property 1.
- r. After the factor had implemented the increase in float the homeowner purchased six more flats including Property 2.
- s. At the time of acquisition he paid the increased float amount of £250 for Property 2. This was recovered from him at the time of settlement of the purchase of Property by the solicitors acting on his behalf.

- t. On 19 March 2008 in a letter to the factor the homeowner first questioned the increase in float claiming he had not been advised of this decision. Reference is made to the fifth paragraph of document N1/5.
- u. On 24 April 2008 in a letter to the homeowner the factor stated:-

"Within our letter dated 6 August 2007 concerning the property management float, we intimated it is our intention to increase the level of the float from £110.00 to £250.00 per owner, with this difference of £140.00 being spread equally across the 4 common charges accounts issued in November 2007, February, May and August 2008."

Reference is made to the fourth paragraph of Document N1/8.
- v. The homeowner disputed that the factor had the power to increase the float. He withheld from payment of later bills received from the factor for Property 1 and Property 2 a sum equivalent to the amount of the increase, i.e. £140 for each property.
- w. The homeowner continues to dispute that the factor has validly increased the float in respect of Property 1 and Property 2. The factor insists that it had power to do so.
- x. A majority of owners in the development have paid the increased float amount without objection.
- y. The development has not been completed in accordance with the original plan. As a result the Owners' Association envisaged in clause 15 has not come into existence.
- z. An unofficial Owners' Association has been formed and the factor interacts with that association from time to time.

16. There was some dispute as to whether the factor's letter of 6 or 7 August 2007 (the exact date the letter was said to have been written was not clear) which intimated the increase in float was actually received by the homeowner. The committee finds it unnecessary to resolve this issue and has not made a finding in fact in relation to it. The only version produced to the committee is a

"mailmerge" document which is (document N1/4). The homeowner first questioned the increase in float in his letter of 19 March 2008.

Submissions

17. Mr Watt submitted that, in terms of clause 15.1.3(iv), the factor had delegated authority to deal with all matters pertaining to the maintenance and preservation of the common property in the development. This included the power to decide to increase the float. He submitted that the reference to annual maintenance charge in clause 15.1.3(viii) should be read as referring to the float. At no stage in his firm's involvement in this development had a system of advance annual charges been operated. He also referred to clause 16.1 and relied the words "or such other sum as may be agreed". He accepted that if a majority objected then the factor would have to accept that there could be no increase. He accepted that if the unofficial Association voted by majority to reject the increase then the factor would be bound by that decision.
18. The homeowner submitted that float had to be the sum stated in clause 16.1 unless a majority agreed to an increase. That had not happened here. He also highlighted the difficulty that he said had been experienced in contacting all owners of properties within the development. This made it difficult ascertain the views of the majority without co-operation from the factor.

Discussion

19. The relevant provisions of the Deed are not entirely free from difficulty because of the terms of clause 15.1.3(v) and (viii), but the committee has concluded that the factor did have power to increase the float. As a matter of construction, the committee prefer to find the factor's power to do so to flow from the terms of clause 15.1.3(iv) under which full right, power and authority to take charge of all matters pertaining to the maintenance and preservation of the common property in the development is capable of being delegated to the factor. This is a broad scope of delegation and is consistent with the terms of the declaration (one) at the end of clause 15.1.3 which provides that the factor may competently exercise the whole rights and powers that could competently be exercised at or by a meeting of proprietors. As a result, in the absence of valid objection by a majority of proprietors, the factor is entitled at

the present to hold the sum of £250 per flat as float subject to the obligation to account for this to the homeowner on the sale of his property.

20. In the event, nothing turns on the factual difference in the way in which Property 1 and Property 2 were acquired by the homeowner. In both cases the homeowner has withheld a sum equivalent to the amount of the disputed increase in float. On the committee's construction of the relevant terms of the Deed of Conditions, the homeowner ought to pay the factor the disputed amounts of the float subject to the factor's obligation to account for these monies in terms of clause 16.1 when the homeowner's sells either or both of the properties.

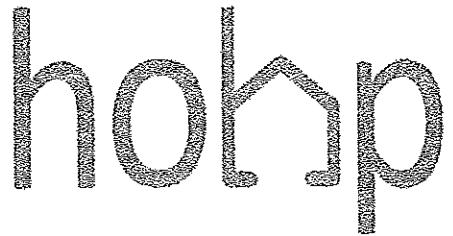
Appeals

21. 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 date on which the decision appealed against is made..."

Pino Di Emidio

Signed
Chairperson

..... Date.....26 May 2014.....



**Minute recording agreement of the parties before the
Homeowner Housing Panel (Applications and Decisions)
(Scotland) Regulations 2012 in respect of identification of lead
cases in respect of the undernoted applications**

Hohp/pf/13/0268	Flat 3, 2 East Pilton Farm Rigg, Edinburgh, EH5 2GD
Hohp/pf/13/0276	Flat 5, 2 East Pilton Farm Rigg, Edinburgh, EH5 2GD
Hohp/pf/13/0277	Flat 6, 2 East Pilton Farm Rigg, Edinburgh, EH5 2GD
Hohp/pf/13/0278	Flat 7, 1 East Pilton Farm Rigg, Edinburgh, EH5 2GD
Hohp/pf/13/0279	Flat 5, 47 East Pilton Farm Wynd, Edinburgh, EH5 2GD
Hohp/pf/13/0280	Flat 2, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH
Hohp/pf/13/0281	Flat 5, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH
Hohp/pf/13/0282	Flat 6, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH
Hohp/pf/13/0283	Flat 11, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH
Hohp/pf/13/0284	Flat 13, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH

The Parties:-

ALAN HENDERSON, 4/16 Western Harbour Terrace, Edinburgh, EH6 3JQ ("the homeowner")

HACKING & PATERSON MANAGEMENT SERVICES, having a place of business at 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ("the factor")

Committee Members

Pino Di Emidio (Legal)
Ann McDonald (Housing)

1. This single document is intended to deal with each of the ten cases listed above in which the homeowner has made similar applications to the Homeowner Housing Panel. All references to statutory sections are to the Property Factors (Scotland) Act 2011 and all references to regulations are to the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 (SSI 2012 No. 180).

2. This agreement applies to the applications listed above. Reference is made to Decision No.2 and Decision No. 3 of the Committee. Following those decisions parties have met and reached agreement as to the management of these applications.

3. The parties agree that the ten applications should be split into two groups.
4. The first group comprises Hohp/pf/13/0268 relating to Flat 3, 2 East Pilton Farm Rigg, Edinburgh, EH5 2GD, Hohp/pf/13/0276 relating to Flat 5, 2 East Pilton Farm Rigg, Edinburgh, EH5 2GD, Hohp/pf/13/0277 relating to Flat 6, 2 East Pilton Farm Rigg, Edinburgh, EH5 2GD, Hohp/pf/13/0278 relating to Flat 7, 1 East Pilton Farm Rigg, Edinburgh, EH5 2GD.
5. The parties agree that the application relating to Flat 3, 2 East Pilton Farm Rigg, Edinburgh, EH5 2GD (hohp ref hohp/pf/13/0268) ("the first selected application") shall be treated as the lead application in the first group.
6. The homeowner and the factor agree that in respect of the other three applications in this group they be bound by the committee's final decision on the first selected application. In the event of an appeal in terms of section 22 of the Act the decision that will be applied will be the final decision on the first selected application following appeal to the Sheriff.
7. The parties agree that the other three applications in this group shall be listed by the committee of consent of the parties pending the determination of the first selected application. On determination of the proceedings relating to the first selected application, or at the conclusion of appeal proceedings following thereon, the decision reached by the Committee or as appropriate the Sheriff, will apply to all listed applications in this group in so far as the ground of complaint in the listed applications and the ground of complaint in the first selected application are in similar terms. The grounds of complaint are as detailed in the homeowner's application form in relation to which Notice of referral was issued on 10 January 2014 in all cases in this group.
8. Should the final decision in the first selected application determine that a Property Factor Enforcement Order ("PFEO") be issued in respect of either ground of complaint, a PFEO in similar terms will apply to all the listed applications in this group in so far as the ground or grounds of complaint in the listed applications are the same as those in the first selected application. It is agreed that the Committee will proceed of consent of the parties to recall the lists and to issue further PFEO's in respect of the listed applications.

9. The second group comprises Hohp/pf/13/0279 relating to Flat 5, 47 East Pilton Farm Wynd, Edinburgh, EH5 2GD, Hohp/pf/13/0280 relating to Flat 2, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH, Hohp/pf/13/0281 relating to Flat 5, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH, Hohp/pf/13/0282 relating to Flat 6, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH, Hohp/pf/13/0283 relating to Flat 11, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH and Hohp/pf/13/0284 relating to Flat 13, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH.
10. The parties agree that the application relating to Flat 2, 14 East Pilton Farm Crescent, Edinburgh, EH5 2GH (hohp ref hohp/pf/13/0280) ("the second selected application") shall be treated as the lead application in the second group.
11. The homeowner and the factor agree that in respect of the other five applications in this group they be bound by the committee's final decision on the second selected application. In the event of an appeal in terms of section 22 of the Act the decision that will be applied will be the final decision on the second selected application following appeal to the Sheriff.
12. The parties agree that the other five applications in this group shall be sisted by the committee of consent of the parties pending the determination of the second selected application. On determination of the proceedings relating to the second selected application, or at the conclusion of appeal proceedings following thereon, the decision reached by the Committee or as appropriate the Sheriff, will apply to all sisted applications in this group in so far as the ground of complaint in the sisted applications and the ground of complaint in the second selected application are in similar terms. The grounds of complaint are as detailed in the homeowner's application form in relation to which Notice of referral was issued on 10 January 2014 in all cases in this group.
13. Should the final decision in the second selected application determine that a Property Factor Enforcement Order ("PFEQ") be issued in respect of either ground of complaint, a PFEQ in similar terms will apply to all the sisted applications in this group in so far as the ground or grounds of complaint in the sisted applications are the same as those in the second selected application. It is agreed that the Committee will proceed of consent of the

parties to recall the lists and to issue further PFEO's in respect of the listed applications.

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Homeowner

For and on behalf of the factor
Glasgow 20 May 2014