

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

Hohp/pf/13/0244

4/3, 10 Castlebank Drive, Glasgow, G11 6AD ("the
property")

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 case is one of a group of five cases brought by the homeowner in relation to the same development in Glasgow against the same factor. The parties have agreed in writing that it should be selected as the lead case and the final decision in it should apply to the other four similar cases. There are a further ten cases between the parties relating to a development in Edinburgh that were referred to the same committee. Two lead cases were selected from the Edinburgh group of cases and dealt with at the same hearing on 20 May 2014.
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/13/0285 relating to Flat 1/1, 312 Meadowside Quay Walk, Glasgow,

G11 6AY, Hohp/pf/13/0286 relating to Flat 1/1, 11 Meadowside Quay Square, Glasgow, G11 6BT, Hohp/pf/13/0287 5/2, relating to Flat 11 Meadowside Quay Square, Glasgow, G11 6BT and Hohp/pf/13/0288 relating to Flat 6/3, 11 Meadowside Quay Square, Glasgow, G11 6BT

4. The homeowner represented himself at the hearing. The factor was represented by Mr Neil Watt.
5. This case involves 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".
6. 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.
7. 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.

Preliminary Matters

8. 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.

9. 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 1.6 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.
10. Mr Watt raised a further preliminary objection in relation to this case. He submitted that the homeowner had not complied with section 17(3) in respect of his complaint of failure to carry out factor's duties because he had failed to notify the factor of his intention to bring a complaint to the Panel. He asserted that the homeowner's section 17(3) notification had not mentioned this part of his complaint. The style letter provided on the HOHP website had not been used. He submitted that the complaint about increase in float was not properly before the committee and should be rejected without further ado. The committee declined to reject this part of the application because:-
 - a. The application form stated in terms at section 7B that the complaint related to duties.
 - b. The earlier course of correspondence between the homeowner and the factor relating to the disputed increase had been produced to the President. Reference is made to documents N1/5 to 17.
 - c. The style letters are provided for guidance of parties they are not a compulsory form.
 - d. The factor has misunderstood the nature of the process under section 17 where the president is required to be satisfied that the factor has been given a reasonable opportunity to resolve the homeowner's complaint.

- e. In this case the factor repeatedly declined to resolve the homeowner's complaint.
 - f. The committee was satisfied that on the material produced to her the president had ample justification for considering that the matter should be referred to a committee. There was no reasonable basis on which the committee could re-visit her decision. The whole application had been properly referred to the committee.
11. At the outset of the discussion of the case, 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.
- The disputed increase in float.
12. 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?
13. The committee makes the following findings in fact in respect of the homeowner's complaints in this application.
- 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 the property was registered in the Land Register for Scotland on 7 March 2006 under title number GLA186072. A copy of the Land Certificate updated to 10 October 2013 has been produced. It is document N1/2.
 - d. The property forms part of a development of 321 flats known as Glasgow Harbour.
 - e. The management of common parts of the development is as provided for in Deed of Conditions by Vindex Glasgow Harbour Trustees

registered on 24 November 2004. It is burdens writ number 5 in document N1/2.

- f. The powers of the factor in the development relative to the float are as provided for in the Deed of Conditions.
- g. Clause 8 of the Deed of Conditions is headed "Proprietors' Association". Clause 8.1 states in part:-

"8.1 Immediately after the Developer has handed over the possession of the last Flat within the Development, the Proprietors shall be obliged to join and shall automatically become members of the Proprietors' Association, the purpose of which will be to implement this Deed of Conditions and to preserve the amenity of the Development."

- h. Clause 8.2.1 of the Deed of Conditions states in part:-

"8.2.1 The Committee aforementioned or the Property Manager shall be entitled at any time to convene a meeting of all the Proprietors which meeting shall be held at such reasonably convenient time and place as the convenor of the meeting may determine, of which time and place of meeting not less than fourteen days' notice in writing shall be given by or on behalf of the convenor to all the Proprietors."

- i. Clause 8.2.5 of the Deed of Conditions states in part:-

"8.2.5 It shall be competent at any such meeting, by a majority of the votes of the Proprietors or their proxies present, (i) to order to be executed and thereafter to have executed any repairs or works to the Common Parts, (ii) to make any regulations which may be considered necessary with regard to the preservation, cleaning, use or enjoyment" of the Common Parts, which regulations shall be binding on all those concerned,"

- j. Clause 9 of the Deed of Conditions is headed "Property Manager". Clause 9.1 states in part:-

"9.1 The Proprietors shall at any meeting held in terms of Clause 8.2 hereof have power to appoint a Property Manager who shall take charge of all such matters in relation to the management of the Development as may competently be dealt with at any meeting convened and held as herein provided and to delegate to the Property Manager such rights or powers as may be exercisable by a majority of the Proprietors present or represented at such meeting with responsibility for instructing and administering repairs to and maintenance of the Common Parts and to fix the remuneration payable to the Property Manager for his services (which remuneration shall be payable by the Proprietors to the Property Manager in equal shares) and the duration of the Property Manager's appointment and also to terminate the appointment of the Property Manager provided that another is immediately appointed in his place ... declaring that the first Property Manager shall be ... Hacking and Paterson, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL which appointment shall run from the date of appointment of the said first Property Manager by the Developer until the date falling 3 years after date of the sale of the last Flat by the Developer and shall be renewed annually thereafter unless terminated by a vote of the meeting as hereinbefore provided."

- k. The factor duly took up appointment as provided for in clause 9.1 and has remained in office as factor throughout the period of the homeowner's ownership of the property.
- I. Clause 9.2 of the Deed of Conditions states in part:-

"9.2 The Property Manager shall, ... be entitled during the continuance of his appointment, to exercise the whole rights and powers which may competently be exercised at or by any such meeting ... but excepting any matters relating to the appointment of the Property Manager, the duration of his appointment and his remuneration, provided always that in the case of major work (being a work the cost of which is estimated by the Property Manager to exceed either £100 per Flat or £32,000 in respect of the Development as the case may be ... the Property Manager shall before instructing the same obtain the

authority of the Proprietors at a Development Meeting held in accordance with the terms of Clause 8.2 hereof."

m. Clause 9.3 of the Deed of Conditions states in part:-

"9.3 The Property Manager shall be entitled during the continuance of his appointment to collect from the Proprietors (i) the Flat Common Charge (ii) the premiums necessary for maintaining the insurances provided for in Clause 11 hereof, (iii) any other sums for which the Proprietors may become liable in terms of or in furtherance of the provisions herein contained ..."

n. Clause 9.5 of the Deed of Conditions states:-

"9.5 In order that the Property Manager may have available a fund for the execution of necessary and reasonable repairs, renewals, maintenance and cleaning charges, insurance premiums, management expenses and fees each of the Proprietors will require to pay to the Property Manager on or before their taking entry to any Flat an advance ("the float") the amount of which for each Flat shall be the sum specified and listed as such float in the appropriate section of the Service Charge Schedule or such other sum as may be required for theforesaid purposes. The sums so collected by the Property Manager shall be held by him in trust for behoof of the Proprietors for theforesaid purposes. The float paid over to the Property Manager by each Proprietor as aforesaid shall be returned to the relevant Proprietor following the sale of his Flat but that subject to the Flat Common Charge applicable to that Flat having been fully paid up to date. Any part of the Flat Common Charge remaining outstanding as at the date of sale of the relevant Flat as aforesaid may be deducted from the float applicable to that Flat prior to the float being returned to the relevant Proprietor as aforesaid. For the avoidance of doubt, no interest shall accrue on any float so held by the Property Manager."

- o. The Service Charge Schedule of the Deed of Conditions lists this property as plot 20 and the float is stated to be £600.¹
- p. At the time of his acquisition of the property the homeowner had paid the float as originally provided for in the service Charge Schedule and that sum is still held by the factor in trust as provided for in clause 9.5.
- q. On 12 October 2012 the factor wrote to the homeowner alerting him to the enactment of the Property Factors (Scotland) Act 2011. This letter is document N1/5. It contained the following passages: -

"...our factoring service can only be delivered effectively where all homeowners recognise their ongoing responsibilities and commit to the arrangement. Of prime importance to this arrangement is the availability of sufficient funds to meet the day to day costs of properly maintaining, repairing and, where appropriate, insuring the common property....

"As part of our preparation for the new legislation, serious consideration has been given to the float level at your property and we have taken the decision to increase the float by £200.00 per owner.

"We are confident that taking this action will enable us to continue to offer our core factoring services.

"We would confirm that this increase will be included in your November 2012 Common Charges Account."
- r. On 26 October 2012 the homeowner wrote to the factor. This letter is document N1/6. It contained the following passages: -

"..I dispute the legality of such an imposition of an increase in the float amount of £200 per property and, as such, will be withholding these amounts until sufficient confirmation [of the basis for the increase] is provided by yourselves."
- s. On 5 November 2012 the factor replied. This letter is document N1/7. It quoted the terms of clause 9.5 set out above and stated: -

¹ It was agreed by the parties that the floats for 3 of the other flats in the Glasgow group of cases were listed in the Service Charge Schedule as £600 and for the remaining flat the float was £500. In all cases the disputed increase is £200.

"...this section of the Deed allows us the ability to request from the owners a Property Management Fund sufficient to meet needs. "Notwithstanding this, as mentioned at the recent meeting of owners, the rationale behind the increase in the Property Management Float is due to the critical funding issues currently in place at Glasgow Harbour in that owners ... owe substantial balances resulting in there being insufficient funds to continue servicing various contracts at the Development."

- t. On 8 November 2012 the factor issued its invoice number 3039912 for the period 29 August to 28 November 2012. This included a charge of £200 for the increased float.
- u. The homeowner declined to pay the £200 of additional float demanded by the factor for this property.
- v. On 13 November 2012 the homeowner replied to the factor's letter of 5 November 2012. This letter is document N1/8. He stated the following: -

"I continue to dispute the legality of such an imposition of an increase in the float amount of £200 per property and, as such, will be withholding these amounts until sufficient confirmation [of the basis for the increase] is provided by yourselves."
- w. On 20 November 2012 the factor replied reiterating the position taken in its letter of 5 November. This letter is document N1/9.
- x. On 11 December 2012 the factor wrote to the homeowner. This letter is document N1/11. It contained the following passage: -

"In relation to the outstanding debt the last reconciliation was carried out on 18 October 2012 and this showed an outstanding debit balance of approximately £144,700.10 with expenditure having reached approximately £71,150.00, creating a total deficit of £215,860.00 expended, less the Property Float which meant a deficit balance of £33,960.00"

- y. A majority of owners in the development have paid the increased float amount.
- z. Correspondence continued to pass between the homeowner and the factor. The homeowner has maintained his objection to the increase in float ever since it was first intimated by the factor. The factor has insisted throughout that it is entitled to increase the float.
 - aa. The factor's reason for increasing the float was as stated in documents N1/7 and N1/9 and this was for the purposes set out in clause 9.5.

Summary of parties' submissions

- 14. The factor accepted that it was only if the float could be increased under clause 8.2.5 by a majority vote of proprietors that the factor might under its delegated powers rely on clause 9.5 to increase the float. Mr Watt accepted that the proprietors in the development could have convened a meeting to reverse the factor's decision to increase floats. This had not happened. The majority of owners had paid the increased sum.
- 15. The homeowner made reference to the first sentence of clause 9.5 of the Deed of Conditions. He emphasised the words "on or before their taking entry". He also referred to the schedule which listed the float for each property. He asserted that the amount of the float had to be as set out in the Schedule to the Deed as the Deed set out for any prospective owner the conditions that applied to ownership. It was important that a new owner could ascertain how much the float for any particular property would be and the amount could not be changed without approval of the majority of owners and heritable creditors. It was not open to the factor to require payment of an additional amount of float after a flat had been acquired. Clause 9.5 did not provide expressly for an increase. There were other ways for the factor to raise additional funds when needs such as under clause 9.6 which empowers the factor to raise additional monies. He did accept that clause 8.2.5(iii) gave to a majority of owners to increase the level of float but he did not consider that this gave the factor delegated power to do so under 9.5.

Discussion

16. The Deed of Conditions provides for a detailed scheme for management of common parts. Only those passages of the scheme most relevant to the issue in controversy in this case have been set out in the findings above. The scheme has the following features relevant to this dispute. Clause 8 provides for a Proprietors Association and that all owners are automatically members of it. Clause 8.2.5 sets out the powers of the proprietors which are exercisable on a majority vote at a meeting. In particular Clause 9 deals with the position of the factor within the scheme of the Deed. Under clause 9.1 the powers of the proprietors in a meeting are delegated to the factor. Clause 9.2 states what the factor is entitled to do subject to certain conventional exceptions.
17. The committee considered the words "or such other sum as may be required for theforesaid purposes" allowed the factor to increase the float so long as this was done for the purpose of allowing the factor to have available a fund for the purposes stated in clause 9.5. Although this could have been expressed more clearly in the deed, the committee concluded that the terms of clause 8.2.5 were sufficiently broad to cover an increase in float. Therefore the factor had delegated power to do so. It would have been open to the proprietors to convene a meeting and to reverse the factor's decision but this had not occurred. The committee was satisfied that the factor's decision had been made for the purposes stated in clause 9.5.

Decision

18. The complaint as to failure to carry out the factor's duties is rejected.

Complaint under Code of Conduct paragraph 2.1

19. Section 2 of the Code of Conduct for Property Factors is headed "Communication and Consultation". It contains the following preamble "Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. Paragraph 2.1 of the Code of Conduct provides: "You must not provide information which is misleading or false."
20. The parties were in agreement that, in order for there to be a failure to comply with paragraph 2.1 of the Code, it would be necessary for the factor either to have deliberately attempted to mislead or to lie or to have failed to take reasonable care when providing information to the homeowner. The

committee considers that the parties were correct to construe the terms of paragraph 2.1 in this way. The factor is in an agency relationship with the homeowner. Even aside from the terms of the Code, that relationship would impose similar obligations on the factor as agent.

21. The relevant pieces of correspondence are the factor's letters of 5 and 20 November and 11 December 2012. Each of these letters were written after the Code became applicable to the factor. It was accepted by the homeowner that the information given in these letters (as recorded in the findings above) was factually correct. With regard to the letter of 11 December 2012, he complained that the figures for 18 October 2012 were misleading in the sense that they probably reflected the highest level of deficit in the month. He did not dispute that they were correct for the date given.
22. The committee concluded that there was no failure to comply with paragraph 2.1 of the Code. The information in the letters of which the homeowner complained did reflect the reasons why the factor had made the decision to increase the float.
23. That part of the application that alleges breach of Code paragraph 2.1 has been construed as relating to the information provided to justify the increase in float. The homeowner made reference to some other passages of correspondence which were not relevant to the point at issue. The homeowner accepted that there had not been a failure to exercise reasonable care in these passages. Neither did these relate to the information provided by the factor as justification for increasing the float.

Decision on complaint under Code paragraph 2.1

24. The complaint under paragraph 2.1 of the Code is rejected.

General Observations

25. Notwithstanding the rejection of both parts of the homeowner's complaint, the committee considers that it is appropriate to observe that had the factor engaged in a greater degree of open consultation with the homeowner it might not have been met with this and related complaints for other properties in this group of cases. We refer to the preamble to Section 2 of the Code of Conduct which is quoted in full above. It may be that the factor has been obliged to deal complaints to the Panel that might have been avoided if more

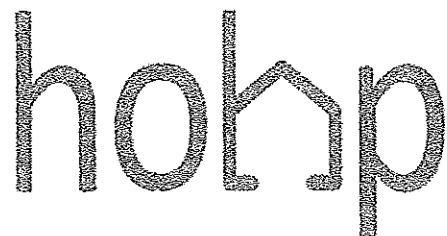
attention had been paid to addressing the concerns of the homeowner and consulting fully with owners prior to imposing the increase."

Appeals

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



**Minute recording agreement of the parties before the
Homeowner Housing Committee issued under the
Homeowner Housing Panel (Applications and Decisions)
(Scotland) Regulations 2012 in respect of identification of a
lead case**

Hohp/pf/13/0244	4/3, 10 Castlebank Drive, Glasgow, G11 6AD
Hohp/pf/13/0285	1/1, 312 Meadowside Quay Walk, Glasgow, G11 6AY
Hohp/pf/13/0286	1/1, 11 Meadowside Quay Square, Glasgow, G11 6BT
• Hohp/pf/13/0287	5/2, 11 Meadowside Quay Square, Glasgow, G11 6BT • <i>✓50d</i>
Hohp/pf/13/0288	6/3, 11 Meadowside Quay Square, Glasgow, G11 6BT

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 five 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 decision parties have met and reached agreement as to the management of these applications.

3. The parties agree that the application relating to 4/3 10 Castlebank Drive Glasgow G11 6AD (hohp ref hohp/pf/13/0244) ("the selected application") shall be treated as the lead application in this group.
4. The homeowner and the factor agree that in respect of the other four applications in this group they be bound by the committee's final decision on the 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 selected application following appeal to the Sheriff.
5. The parties agree that the other four applications in this group shall be sisted by the committee of consent of the parties pending the determination of the selected application. On determination of the proceedings relating to the 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 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.
6. Should the final decision in the 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 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 selected application. It is agreed that the Committee will proceed of consent of the parties to recall the sists and to issue further PFEO's in respect of the sisted applications.

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Homeowner

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For and on behalf of the factor

Glasgow 20 May 2014