



Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

hohp Ref: HOHP PF/13/0006, HOHP/PF/13/0007 and HOHP/PF/13/0008

Re: Property at 24 Ladywood, Milngavie, Glasgow, G62 8BE ("the property")

The Parties:-

PATRICK JOSEPH LYNCH, 24 Ladywood, Milngavie, Glasgow, G62 8BE ("the homeowner")

WALKER SANDFORD PROPERTY MANAGEMENT LTD, St Georges Building, 5 St Vincent Place, Glasgow, G1 2DH ("the factor")

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

Committee Members

Pino Di Emidio (Chairperson)

Andrew Taylor (Surveyor Member)

Ahsan Khan (Housing Member)

Introduction

1. Reference is made to the committee's earlier decision dated 28 May 2013 which is available on the HOHP website. That decision determined a preliminary issue that had arisen in relation to all three applications which had been heard on 16 May 2013.

2. In particular paragraphs 1 to 15 of that decision set out the nature of the applications that have been remitted to the committee for determination and also the factual background to the present applications. Except where expressly stated, the present decision has been written on the basis that all of the facts and analysis in the decision of 28 May 2013 continue to apply to these cases. This

decision should be read with a copy of the decision of 28 May 2013 to hand. To that end a copy of the earlier decision is to be found in the Appendix.

3. The committee fixed 2 July 2013 for the final hearing in this case. Owing to the unavailability of a representative of the factor, the committee decided to use the slot to hold a hearing designed to manage the conduct of the rest of the case. Following the management hearing on 2 July 2013, the committee issued a further direction and thereafter fixed new hearing dates for 19 and 20 August 2013.
4. On 19 and 20 August 2013 the committee held a hearing in Glasgow in respect of all outstanding matters. The homeowner appeared on his own behalf and gave evidence as well as making submissions to the committee. The factor was represented by Mr Paul McGonagle and Mr J. Turner both of whom gave evidence.
5. The parties had lodged extensive documentation in the case. The homeowner's principal documents were contained in a pink folder containing 19 separate tabbed items. In this decision these are named "HO Tab 1" etc. The factor's productions are in a blue folder and two further lever arch files. The items in the blue folder are referred to as "PF Tab 1" etc. The contents of the lever arch files are referred to as "PF F1 Tab 1" etc. A number of late documentary productions were produced at the hearing on both sides and were allowed in evidence on cause shown. The homeowner's late documentary productions are referred to as "HO EP 1" etc. and the factor's late documentary productions as "PF EP 1" etc.
6. The homeowner helpfully provided in advance of the hearing, three documents which summarised his evidence and submissions in respect of the three applications. These documents were each headed as "Statement of Relevant Facts by Homeowner" by him. They have been treated as productions. The statement relating to case number HOHP PF/13/0006 is HO EP 1. The statement relating to case number HOHP PF/13/0007 is HO EP 2. The statement relating to case number HOHP PF/13/0008 is HO EP 3. Each document contained an analysis of his evidence and argument mainly by cross reference to the productions that he had lodged. At the hearing the homeowner's evidence in chief and submissions in large measure took the form of his being led through each document by the chairperson. The discussion of his evidence and

submissions below has been truncated but it should be noted that he spoke to all three documents listed in this paragraph.

7. At the hearing the committee dealt first with the outstanding preliminary issue, it then dealt with case number HOHP PF/13/0007, followed by case number HOHP PF/13/0008 and then case number HOHP PF/13/0006. The same order will be followed in this written statement of reasons for decision.

Agreed Facts

8. The committee has proceeded on the basis of the agreed factual background which was established at the hearing on 16 May 2013. We refer in particular to paragraphs 16, 17 and 18 of our decision of 28 May 2013. The parties were agreed that the factor's appointment was in terms of the Deed of Conditions by Bovis Homes Scotland Limited recorded G.R.S (Dumbarton) 13 May 1974 (hereinafter referred to as "the Deed of Conditions").
9. The first matter considered was the question of whether any dispute between the parties in respect of the installation of the drain on the common ground was resolved in September 2010 as part of a wider agreement between the parties which dealt with other contentious issues between them at that time. The committee heard evidence and submissions on this issue on the first morning of the hearing. The committee reserved its decision and the parties were advised that the committee would determine this remaining preliminary issue as part of its overall determination of the case.
10. The committee notes that contrary to what was stated in paragraph 13 of its earlier decision the factor has sought to rely on this preliminary point not only in respect of case number HOHP PF/13/0007 but also in relation to case number HOHP PF/13/0008.

Findings in fact in respect of outstanding preliminary issue

11. The committee makes the following findings in fact in relation to the preliminary issue.
 - 11.1. In about November 2006 the factor had taken over the management of the common parts of the development of which the homeowner's property forms a part from another factor.

- 11.2. The factor was appointed by majority vote of the owners in accordance with the scheme set out in the Deed of Conditions.
- 11.3. The homeowner disputed its appointment for more than one year after the factor took over factoring the development. There was extensive correspondence from the homeowner in which he disputed the appointment.
- 11.4. The homeowner disputed the initial invoices from the factor as he did not accept its appointment was valid. Despite this the homeowner would respond to other correspondence from time to time and did make some payments.
- 11.5. The factor issued monthly invoices to the owners in the development including the homeowner.
- 11.6. There was a residents' association within the development that functioned as an advisory body on issues affecting those living in the development. The association held annual meetings that were attended by a representative of the factor.
- 11.7. The homeowner took exception to a letter from the factor written by Mr McGonagle dated 15 August 2008 to another resident in the development who lived at 9 Ladywood and was the secretary of the residents' committee at that time. By letter dated 7 February 2009 the homeowner wrote to the factor taking exception to what had been said by the factor on 15 August 2008. He threatened legal action. The homeowner's letter of 7 February 2009 is within PF F1.
- 11.8. As at 24 August 2010 the running balance claimed by the factor from the homeowner stood at a figure in excess of £5000.00. On 15 July 2010 the factor had issued an invoice, number 312417 claiming a total of £5,345.18 from the homeowner. On 25 June 2010 the homeowner had responded maintaining that he was due to pay only £100.82 of the amount claimed. His letter to the factor and an amended version of invoice 312417 are within PF F2.
- 11.9. The factor agreed to a meeting with the homeowner to discuss the homeowner's ongoing concerns. That meeting took place on 24 August 2010. The meeting was attended by the homeowner, his solicitor Mr Simon

Catto, and Mr Paul Walker and Mr James Turner as representatives of the factor. Mr McGonagle of the factor did not attend because of the homeowner's complaint about the letter of 15 August 2008 described at finding 11.7 above.

11.10. At the meeting on 24 August 2010 the parties discussed a number of matters and agreed to resolve a number of their differences. The parties did not discuss the homeowner's grievance about the common drain or his grievance about the state of maintenance of the common grounds up to the date of the meeting.

11.11. As a direct result of the meeting, on 27 August 2010 the homeowner's solicitors HBJ Gateley Wareing wrote to the factor setting out the terms of the agreement. This letter is PF F1 Tab 4 item 5. The terms of the agreement were stated as follows:

"I refer to our meeting on Tuesday 24 August 2010. I believe we reached agreement in principle at that meeting and am setting out the terms of that agreement below. By accepting the enclosed cheque, you will be accepting that the terms of that agreement are as follow:-

"1. I am enclosing with this letter our client's cheque in the sum of £716.56. That payment is made in full and final settlement of all claims you may have against our client as at 24 August 2010. For the avoidance of doubt, and without prejudice to the foregoing generality, you are irrevocably waiving any claim for either interest or administration fees claimed for the period up to and including 24 August 2010.

"2. Immediately upon receipt of that sum, you will contact the residents' committee to advise them that [the homeowner] has paid all outstanding sums due to you and that no further sums are presently due to you from him.

"3. Our client agrees irrevocably to waive any claim for damages he may have against you both in respect of the letter of 15 August 2008 and under the Protection from Harassment Act 1997.

4. Both you and our client agree that the relationship between the parties is

governed by the Deed of Conditions and that the parties will exercise good faith in attempting to resolve any further dispute that may arise in the future. For the avoidance of doubt, [the homeowner] will direct queries he may have in relation to the instruction of specific works to the Residents' Committee in the first instance."

11.12. The factor replied by letter dated 7 September 2010. This letter is PF F1 Tab 4 item 6 which stated the following:

"We refer to your letter dated 27th August 2010.

"We confirm receipt of a cheque in the sum of £716.56. As agreed this cleared fund is to be considered as full and final settlement of Mr Lynch's account with Walker Sandford of all previously lodged charges to 24th August 2010.

"The members of the Residents' Committee have been informed in writing that Mr Lynch's account is now up to date and that no further sums are due for the period prior to 24th August 2010."

11.13. The agreement that was entered into in discussion on 24 August 2010 was formalised by the exchange of letters dated 27 August 2010 and 7 September 2010. The parties implemented that agreement in full.

11.14. After the exchange of letters dated 27 August 2010 and 7 September 2010 the homeowner continued to complain to the factor about the installation of the common drain. He raised the matter in his letter to the factor on 26 November 2010 (HO Tab 17 enc L). This was followed up by a reminder dated 21 January 2011 (HO Tab 17 enc M). The factor wrote in response on 27 January 2011 (HO Tab 17 enc N). The homeowner maintained his objection in his letter of 2 February 2011 (HO Tab 17 enc P). The factor took no further action on his complaint.

11.15. The agreement did not resolve the homeowner's grievance about the installation of the common drain or his grievance about the state of maintenance of the common grounds up to the date of the meeting.

Discussion: outstanding preliminary issue

12. The committee heard evidence from both Mr McGonagle and Mr Turner of the factor. Mr McGonagle set out the history of the difficulties that had arisen

between the homeowner and the factor in the period up to the meeting on 24 August 2010. He explained that the homeowner was making only partial payment of monthly invoices. In about April 2010 Mr McGonagle had written to Mr David Robson of the residents' committee setting out the factor's view of the position taken by the homeowner. The homeowner had taken exception to what had been said to the extent that he had threatened to bring legal proceedings against the factor to recover damages for injury to his reputation. Mr McGonagle thought the homeowner's correspondence was confusing to read. It contained a web of traps aimed at tripping them up. He referred to PF F2 Tab 6 for numerous examples of the homeowner's correspondence. The dense cross referencing system employed by the homeowner made it impossible for the factor to piece together what was being said to it. The factor would regularly find the homeowner claiming that it had agreed something because it had not expressly disputed it. An example was to be found in the homeowner's letter of 12 July 2010 with its enclosures which is within PF F2.

13. Mr Turner has a qualification in building surveying though he does not have chartered status. He represented the factor at the meeting on 24 August 2010 along with Mr Walker. The factor wished to draw a line under the past difficulties and start again. It agreed at the meeting to write off a substantial amount of the charges that it had been claiming to be due by the homeowner. His account balance was returned to zero. This was not normal practice.
14. The key aspect of the agreement from the factor's point of view was paragraph 4 of the letter of 27 August 2010. The factor had found the volume of correspondence from the homeowner to be too much for its administrative resources. The factor thought he had agreed to refrain from engaging in such correspondence with them. It thought he now recognised that he was one of thirty co-proprietors. The Ladywood Residents Association Committee had one representative from each block. It functioned as a consultative body for the better administration of the development. There was no agenda for the meeting of 24 August 2010 and it was not minuted. The factor wished the homeowner to take any further grievances to the committee in the first instance. A lot of the charges that the factor agreed to abate were items that had been added owing to late payment by the homeowner. In the meeting of 24 August 2010 the homeowner and his solicitor had an opportunity for a private discussion and they then suggested the sum that was to be paid by him in settlement. After the agreement

of August/September 2010 the correspondence from the homeowner tailed off for some months but then resumed at as high a level as before. The factor decided to ignore the homeowner's correspondence and advised him that it would do so.

15. Perhaps somewhat surprisingly, given the position taken by the factor in these proceedings, Mr Turner's clear evidence was that neither the homeowner's grievance about the installation of the common drain nor his grievance about the state of maintenance of the common grounds were discussed at the meeting. The homeowner's correspondence to the factor after the August/September 2010 agreement continued to raise his objection to the installation of the common drain.
16. The homeowner's evidence on this issue focussed on the terms of the letter of 27 August 2010. As to the extent of charges written off he made reference to the invoice of 15 July 2010. An amended copy is one of the enclosures to the homeowner's letter of 25 July 2010 within PF F2 Tab 6. This showed the sum being claimed by the factor had risen to £5345.10 of which the homeowner accepted that he was due only £100.82. From his point of view the crucial aspect of the agreement was that the factor withdrew all its demands for money other than the amount he agreed to pay them. The homeowner's grievance about the installation of the common drain and his grievance about the state of maintenance of the common grounds were not part of the agreement.
17. The terms of the letter of 27 August 2010 are very important to the resolution of the outstanding preliminary issue. The homeowner's solicitor expressly states in the first paragraph that the four listed points are "the terms of the agreement". This would tend to suggest that the four corners of the agreement relate only to the four points listed. On the other hand there is a possible alternative interpretation because at point 4 there is reference to "any further dispute". This might be thought to suggest that all outstanding matters as at the date of the meeting on 24 August 2010 had been resolved by the agreement reached that day whether or not they were set out in the four listed points in the letter of 27 August 2010. The committee has come to the former view, that is, that the agreement covered only the four listed points. This interpretation is more consistent with both the evidence of Mr Turner as to what was actually discussed at the meeting and also the later correspondence from the homeowner expressing his continuing concern about the common drain.

Decision on the outstanding preliminary issue

18. The committee finds, without difficulty, that the compromise agreement entered into between the homeowner and the factor following upon the meeting on 24 August 2010 did not cover the matters which have been referred to this committee in applications HOHP PF/13/0007 and HOHP PF/13/0008. That was the evidence of the factor's own witness. It is reinforced by the homeowner's later correspondence which maintained his objection to the installation of the common drain. The factor did not suggest in reply to the correspondence received from the homeowner after 24 August 2010 which raised the question of the common drain that this complaint had already been resolved between them. Therefore the factor's contentions that the homeowner's complaints about the installation of the common drain and the state of repair of the common grounds were resolved in the agreement of the parties of August/September 2010 are rejected.

Additional correspondence received from the homeowner and reply by factor

19. After the conclusion of the hearing on 20 August 2013, the clerk to the committee received two further letters from the homeowner dated 23 and 27 August 2013 respectively. The committee issued a further Direction No. 4 which stated that the correspondence would be considered and afforded the factor an opportunity to respond. The factor took the opportunity to make further representations in response in terms of its letter dated 4 September 2013. All of these documents were taken into account though the committee ultimately came to the view that none of them altered materially the respective positions of the parties as disclosed at the hearing. These documents have been added to the list of extra documents for each party. They are HO EP 8 and 9 and PF EP 11.

Findings in fact in respect of application HOHP PF/13/0007

20. The committee makes the following additional findings in fact in relation to application HOHP PF/13/0007.

20.1. The factor inspected the development on 12 and 14 February 2007.

The potential need for a new drainage channel was noted in a report prepared for internal use following those inspections. An extract is PF EP 3.

20.2. In about April 2007 the attention of the factor was drawn by one of the co-proprietors to a problem of standing water in an area of common ground within the development.

- 20.3. In about July 2007 in the course of a routine inspection of the development Mr McGonagle of the factor observed the problem. The factor considered that the problem would be resolved by the installation of a field drain. Action was taken to obtain quotations.
- 20.4. On 20 November 2007 the factor wrote to the homeowner and to the other proprietors in the development regarding the proposed installation of a field drain within the common ground, giving details of two quotes it had obtained and seeking approval of the proprietors for the instruction of works. HO Tab 17 enc B is a copy of the letter. There was enclosed with that letter a form of mandate which is HO Tab 17 enc C.
- 20.5. A majority of the proprietors within the development voted to have the works carried out by AMPM Works Limited. This firm had provided a quote on 30 July 2007 for the sum of £1250 (PF F1 Tab 2 item 2). The returned mandates are at PF F1 Tab 2 items 5 to 9. The result was Yes: 23; No: 4; No reply: 3.
- 20.6. The homeowner disputed the factor's entitlement to instruct the works from the time they were first proposed.
- 20.7. The works were carried out on the instruction of the factor in about February 2008. The area where the drain was installed was to the south west of the development and is shown by a dotted red line on the copy title plan PF EP 2. The problem which had led to the instruction of the works was cured.
- 20.8. The homeowner maintained his objection to the installation of the field drain. See finding in fact 11.14 above.
- 20.9. There has been no reported difficulty in relation to the performance of the common drain since it was installed.

Discussion of application HOHP PF/13/0007

21. The homeowner's complaints in this application proceeded under both the Code of Conduct and as a failure to carry out duties. They are summarised at paragraph 3 of the committee's decision of 28 May 2013. In summary, he maintained that the factor ought to have obtained the permission of all the

proprietors. He sought the removal of the field drain and the reinstatement of the common ground. He has asserted that the application was not struck off by Regulation 28(1) of the 2012 Regulation. He submitted that the factor's failure to comply with his requests to remove the field drain constituted a continuing failure to act by the factor after 1 October 2012. At the hearing he spoke to the points made and the productions listed in his document HO EP 2.

22. The homeowner has continued to dispute the factor's authority to instruct the works for installation of the common drain since the work was first proposed. His opposition was misconceived having regard to the terms of clause THIRTEENTH (Tertio) of the Deed of Conditions in terms of which there was delegated to the factor "full right power and authority to take charge of all matters pertaining to the maintenance and preservation of the common property." The area where the field drain was installed was part of the common ground as defined in clause FIFTH. The factor carried out its duty when it organised and instructed the works. The homeowner had no proper basis for, in effect, asserting that he had a veto in respect of the works when they were proposed having regard to the terms of the Deed of Conditions.
23. The homeowner also took issue with the process by which the factor sought to ascertain the views of co-proprietors in the development. Clause ELEVENTH of the Deed of Conditions provided that the proprietors at a meeting could make decisions as the nature and extent of common repairs and for such decisions to be final and binding on all proprietors. Detailed provision as to the powers of proprietors at a meeting was set out in clause THIRTEENTH. That clause at (Tertio) provided for delegation of the powers of proprietors at a meeting to the factor. The factor could have simply gone ahead and instructed the works. There was no express provision for conducting a postal ballot, but this was in accordance with good practice as it was a form of consultation that allowed the proprietors to express a view on the proposed works to the factor before a decision to go ahead was made. The homeowner's opposition was misconceived.
24. The homeowner's correspondence repeatedly took issue with the status of the residents' committee. Mr McGonagle explained in his evidence that this committee was used by the factor as a consultative body in order to provide information to the proprietors and to ascertain the views of those proprietors who participated in it. The residents' committee did not purport to exercise the

executive function of a formal meeting of proprietors as provided for in terms of the Deed of Conditions. Mr McGonagle regularly attended these meetings and provided advice and information to those present. The committee considers this was an entirely proper way of proceeding. As Mr McGonagle pointed out, if the homeowner had been aggrieved at the result of the postal ballot it would have been open to him to seek to call a meeting as provided for under clause THIRTEENTH of the Deed of Conditions in order to overrule the postal vote. He did not attempt to call such a meeting.

25. The homeowner also questioned whether the field drain had been installed properly. The evidence of the factor was that the problem had been solved by these works. There had been no further complaints. The homeowner demanded an expert report in order that he could be satisfied that the work had been properly. He had no such entitlement in terms of the Deed of Conditions which he agreed governed his relationship with the factor.
26. The committee's conclusion is that the factor was carrying out its duty when it instructed the installation of the common drain in 2008. Therefore there can be no question of a continuing failure to act by the factor after 1 October 2012 in respect of this application. The committee considers that the carrying out of the works in March 2008 was a single act that happened at a discreet point in time in the past. If the works had been done in breach of the homeowner's property rights because he was entitled to a veto, this is a matter that he ought to have sought to rectify by bringing proceedings in the ordinary courts. As a result the committee rejects the homeowner's complaint of a continuing failure to carry out property factor's duties. It also follows that the committee considers that paragraph 6.1 of the Code of Conduct did not apply to the matter complained of by the homeowner.
27. Had the homeowner been successful in relation to this application, there would have arisen the question of what remedy could have been provided by this committee. The homeowner made supplementary submissions on this point in his letter dated 23 August 2013 which is HO EP 8. For the reasons set out below, the committee found that the factor had ceased to act as property factor for the development as a whole as at 15 December 2012. It follows that it would not have been possible to make an order for reinstatement which would have had practical effect, even if the committee had been so minded.

Decision on application HOHP PF/13/0007

28. The committee rejects the homeowner's complaint in terms of this application. It finds that:
- 28.1. Paragraph 6.1 of the Code of Conduct did not apply to the matter complained of by the homeowner.
 - 28.2. The factor was entitled to instruct the installation of the field drain.
 - 28.3. The field drain has resolved the problem it was designed to cure.
 - 28.4. There was no continuing failure to carry out property factor's duties by the factor after 1 October 2012 in respect of this application.

Findings in fact in respect of application HOHP PF/13/0008

29. The committee makes the following findings in fact in relation to application HOHP PF/13/0008.
- 29.1. The application relates to the whole of the common ground within the development defined in clause FIFTH of the Deed of Conditions as excepting only the solum of the flats and lockups and any Electricity Sub Station Sites. It is the area shown within red lines in the title plan for title number DMB14683 which is part of PF F1 Tab 1. The common ground including the access roadways is shown on the copy title plan that is PF EP 1 and also the areas discussed in the next finding in fact.
 - 29.2. There are three areas of ground on the east side of the development which are shown outlined by dotted lines and coloured green on the copy title plan that is PF EP 1. These three areas lie adjacent to the east side of the access road known as Ladywood that leads off Moor Road, Milngavie. The three areas of ground are of a concrete grid or lattice construction with small pockets within which grass grows. There are also four further areas to the west of the access road immediately in front of the blocks which constitute numbers 1-6, 7-12 and 13-18 Ladywood which are constructed in a similar way to the areas on the east side of the access road ("the gridded areas").
 - 29.3. PF EP 7 is a set of 15 photographs taken at the development on behalf of the factor on 26 November 2011. They show a number of views of various parts of the exterior of the development including the common grounds as described in the legend beside each photograph. In particular PF EP 7 photo 3 shows a view looking southwards from the north east corner of

the development of the roadway known as Ladywood. The three areas of ground coloured green on PF EP 1 are on the right hand side of the photograph. The north most of the three areas is closest to the photographer.

29.4. Clause (TENTH) of the Deed of Conditions contains the following provision: "... each proprietor shall be prohibited from using himself, selling or disposing of any lockup pertaining to his flat separately therefrom or from using it for any purpose other than for the parking of a private car..."

29.5. Clause FOURTEENTH of the Deed of Conditions contains the following provision: "(Two) The parking of motor cars, cycles, caravans or any other vehicle of any nature shall not be permitted on the accessways or on any other paths, borders or amenity areas at any time except that parking will be permitted for private cars in the parking areas if provided."

29.6. In the course of the time since the factor began to manage the development in 2006 the gridded areas were used for parking by residents in the development. The factor proceeded on the basis that these were areas provided for parking within the development in terms of clause FOURTEENTH (Two) of the Deed of Conditions.

29.7. Since he acquired his flat in about 1997 the homeowner has been in the habit of parking his motor car within his lock up garage which is provided as part of his exclusive property in the development. He has avoided parking on the gridded areas. He has taken the view that the Deed of Conditions prohibited parking of motor cars on any part of the common ground within the development.

29.8. Other proprietors in the development have not adopted the same practice as the homeowner. The homeowner has repeatedly expressed his concern at the way in which other proprietors have parked on parts of the commons grounds and in particular on the gridded areas.

29.9. The homeowner has made his view known to the other proprietors and to the factor. On 20 February 2008 he wrote to the factor stating his position. He enclosed two plans. Plan A showed the common grounds outlined and hatched in green and the areas where the homeowner complained of allegedly unauthorised parking outlined in red. The red outlines included the gridded areas. His Plan B showed outlined in blue the

gridded areas referred to in finding 29.2 and described as "damaged areas due to improper parking". His letter and its enclosures are HO Tab 19 enc D.

29.10. On 25 October 2009 the homeowner again raised the question of the state of the common grounds with the factor. His letter is HO Tab 19 enc H.

29.11. On 30 November 2010 the homeowner wrote to the Secretary of the Ladywood Residents Association Committee setting out his view that it was only permitted to park cars in the lockups each of which would accommodate only one car. A copy to the homeowner's letter of 30 November 2010 with its enclosures is to be found at HO Tab 19 enc T.

29.12. Other residents did not agree with the homeowner's interpretation of the Deed of Conditions. Many residents in the development have more than one car. No other residents made the same complaint as the homeowner about parking in the development. The residents' committee took no action to seek to prevent the residents from parking within the area of the common ground.

29.13. During the time when the factor managed the development up to 15 December 2012 a gardener was engaged to maintain the grass areas in the common grounds. The gardener used weedkiller on the gridded areas.

29.14. As at 25 April 2012 the gridded areas had deteriorated to the extent that the concrete had filled with soil and sunk into the ground. It was unsightly and prone to become muddy in wet weather.

29.15. The Ladywood Residents' Association held its Annual General Meeting on 28 April 2012. Document PF EP 9 is a copy of the draft Minutes of that Meeting. Item 10 records discussions of several proposals for improvements to the maintenance of the gridded areas. The problem of deterioration of the gridded areas was discussed and it was agreed that the factor would investigate possible solutions.

29.16. In the period 2008-2010 building works were carried out at 1-18 Ladywood on the instructions of the co-proprietors. Fitzpatrick Building Surveyors, Glasgow, were project managers under the building contract for those works which caused some damage to the common grounds. As at 25

July 2012 the building contract had not been concluded as various matters including defects and snagging remained outstanding. On about 15 July 2012 the homeowner wrote to Fitzpatrick Building Surveyors expressing concerns about the state of the common grounds. In reply on 25 July 2012 Fitzpatrick Building Surveyors offered to meet with him on site to discuss his concerns. The letter of 25 July 2012 is PF F1 Tab 4 item 4.

29.17. The factor resigned from the management of the whole development with effect from 15 December 2012. As at 15 December 2012 the condition of the gridded areas had not changed materially from their condition as at 25 April 2012. No further steps had been taken by that date to alter or improve the gridded areas.

Discussion of application HOHP PF/13/0008

30. The homeowner's complaints in this application also proceeded under both the Code of Conduct and as a failure to carry out property factor's duties. They are summarised at paragraph 4 of the committee's decision of 28 May 2013. He wished the factor to take action to prevent any parking within the development. At the hearing he spoke to the points made and the productions listed in his document HO EP 3. He maintained his view that parking was prohibited throughout the common grounds including the gridded areas. He referred to clauses FIFTH, TENTH and FOURTEENTH (Two) of the Deed of Conditions. He reiterated his view that the scheme for the development set out in the Deed of Conditions did not provide for parking in any other areas than the lockups provided for each proprietor.
31. The factor submitted that the homeowner has misinterpreted the Deed of Conditions. Clause FOURTEENTH (Two) expressly provided for the existence of designated parking areas and the gridded areas were such areas. They had been used for this purpose throughout the time that it had managed the development. No other proprietor appears to have approached the question of permissible parking in the development in the way that the homeowner did. In any event, the factor's duties did not extend to enforcing a regime at the development whereby the proprietors would be prevented from parking anywhere within the common grounds other than their respective lockups.

32. The committee considers that the factor's interpretation of Clause FOURTEENTH (Two) is correct. The gridded areas are parking areas provided for that purpose envisaged in clause FOURTEENTH (Two) and have been used as such by residents for many years.
33. The gridded areas had deteriorated over the years. The state of the gridded areas was obviously a cause of some concern to the extent that it was discussed at the residents' association AGM on 25 April 2012. It was inevitable that the gridded areas would deteriorate to some extent over the years since the development was built. The factor was delegated to consider how the gridded areas could be improved. The factor's resignation had prevented further proposals for improvement, as opposed to routine maintenance, from being considered by the proprietors.
34. The principal evidence as to the state of the common grounds was provided by the photographs taken by the factor in 2011. There was no evidence to suggest any significant change in the condition of the common ground in the period from 1 October 2012 to 15 December 2012. There was evidence that the state of the common ground had also been affected by building works at 1-18 Ladywood in respect of which the building contract had not yet been concluded as at 25 July 2012.
35. Any failure of duty on the part of the factor to maintain the common ground would have been a continuing failure from day to day until rectified. For the reasons stated in more detail in relation to application number HOHP PF/13/0006 the committee has concluded that the factor resigned with effect from 15 December 2012. As a result that is the last date on which there could have been a failure on the part of the factor.
36. The committee concludes that the factor did not fail to carry out any of its duties under the Deed of Conditions in respect of the complaint made in this application. The factor's duty in respect of the common grounds was to undertake their maintenance and preservation which involved maintaining the common ground in a clean and tidy condition. See clause (FIFTH) and (THIRTEENTH) (Tertio) of the Deed of Conditions.
37. Further the committee finds that the factor has not failed to comply with paragraphs 6.1 and 6.4 of the Code of Conduct. The homeowner's complaint did

not relate to the failure to have in place procedures for notification of matters requiring repair, maintenance or attention. There was no evidence that the core service agreed with the homeowner included periodic property inspections. Reference is made to the committee's earlier decision of 28 May 2013. The factor had purported (though erroneously) to resign with effect from 30 September 2012 so there was no question of his having agreed with the homeowner either inspections or a programme of the kind referred to in paragraph 6.4.

38. With regard to Regulation 28(2) of the 2012 Regulations, had it decided that there had been a failure to carry out the property factor's duty by the factor the committee would have been willing to exercise its discretion in favour of the homeowner by taking into account the circumstances occurring before 1st October 2012 in determining whether there had been a continuing failure to act. Without a proper understanding of the events before 1st October 2012, and in particular the discussion at the residents' association AGM of 25 April 2012, it would be very difficult to come to a conclusion as to whether there had been a continuing failure to act on the part of the factor.

Decision on application HOHP PF/13/0008

39. The committee rejects the homeowner's complaints in terms of this application. It concludes that there was no failure to comply with paragraphs 6.1 and 6.4 of the Code of Conduct and no failure to carry out property factor's duties by the factor.

Findings in fact in respect of application HOHP PF/13/0006

40. The committee makes the following findings in fact in relation to application HOHP PF/13/0006.

40.1. The common insurance for the block 19-24 Ladywood for the year 1 August 2012 to 31 July 2013 was arranged by the factor through the brokerage of Marsh.

40.2. The premium for the common insurance due by the homeowner for the previous year to 31 July 2012 had been charged to him as a lump sum as shown on the factor's invoice to him number 340079 of 28 June 2011. A copy is among the set of copy invoices at PF Tab 4.

40.3. The factor had arranged for the insurance premium for the year to 31 July 2013 to be paid in ten equal monthly instalments. The total premium payable by the homeowner was £333.08. The first instalment was charged to him on 15 July 2012 and is shown in the factor's invoice number 371306 a copy is within PF Tab 4.

40.4. On 24 August 2012 the factor wrote to the homeowner intimating its intention to withdraw certain aspects of its factorial service in respect of the block 19-24 Ladywood from 30 September 2012. Its letter is quoted in full at paragraph 26 of our decision of 28 May 2013. It is PF Tab 3.

40.5. On 28 September 2012 the factor wrote to the homeowner advising that it would no longer act as managing agent for the owners at 19-24 Ladywood. Its letter is quoted in full at paragraph 27 of our decision of 28 May 2013. A copy is to be found at HO Tab 11 enc E. The factor sent its final invoice number 376442 to the homeowner with the letter of 28 September 2012. A copy is at HO Tab 13 enc K. As stated in the covering letter the remainder of the premium, that is, monthly instalments 5 to 10 had been applied to the final account.

40.6. On 21 November 2012 the factor wrote again to the homeowner making reference to the final account which was invoice number 376442. It stated:

"Given the lack of payment of this invoice issued 52 days ago we have written to the broker to advise them that as we are not in receipt of the insurance premiums they should contact you, their client, directly in this respect.

"They should be contacted directly with regards to any insurance queries you may have."

The factor's letter is HO Tab 13 enc L. The factor enclosed an amended version of invoice number 376442 clearly marked as such. The homeowner was given credits for instalments 5 to 10 of the insurance premium in the amended version of invoice number 376442. The marked amended version of invoice number 376442 is HO Tab 13 enc M.

- 40.7. The common insurance for the block 19-24 Ladywood for the year 1 August 2012 to 31 July 2013 that was arranged by the factor remained in force throughout that period.
- 40.8. The factor did withdraw the services of close cleaning (once a week) and window cleaning (once a month) from block 19-24 Ladywood after 30 September 2012. The proprietors in the block then shared the cleaning of the close and the windows amongst them until the new factor was appointed with effect from 17 December 2012.
- 40.9. The factor decided to resign from its appointment as factor for the remainder of the development with effect from 15 December 2012. It intimated this decision to the proprietors other than the homeowner on 1 November 2012. PF EP 6 is a copy of the letter to one of the co-proprietors intimating and explaining the factor's decision to resign. This letter was not sent to the homeowner though he did hear from his neighbours that the factor was resigning from management of the development as a whole.
- 40.10. On 5 December 2012 the homeowner received a letter notifying him of a meeting of proprietors that had been arranged to take place on 17 December 2012 at 1-6 Ladywood at 7 pm. A copy is part of PF EP 10. The homeowner was aware that the meeting was taking place but he maintained that the meeting was irregular. He did not attend and participate in the decision making process.
- 40.11. On 17 December 2012 the proprietors resolved at a quorate meeting properly called for the purpose to appoint Newton Property Management Limited of 87 Port Dundas Road, Glasgow as the new factor for the development. The appointment of the new factor was intimated to the homeowner by a letter that he received no later than 28 December 2012.
- 40.12. The homeowner disputed the appointment of the new factor. Despite this, he gave the new factor permission to arrange the common insurance on his behalf for the year commencing 1 August 2013.
- 40.13. As at 20 August 2013, the homeowner had not been required to pay the balance of the unpaid common insurance premium pertaining to his flat for the year to 31 July 2013.

40.14. In the period from 1 October to 15 December 2012 the homeowner suffered some uncertainty, concern and inconvenience owing to the factor's withdrawal of the cleaning aspects of the factoring service. He also suffered some uncertainty, concern and inconvenience in the period from 21 November 2012 to 15 December 2012 because of the factor's action in crediting back instalments 5 to 10 of the share of common insurance premium due by the homeowner in the amended version of invoice number 376442.

Discussion of application HOHP PF/13/0006

41. The homeowner's complaints in this application also proceeded under both the Code of Conduct and as a failure to carry out duties. They are summarised at paragraph 2 of the committee's decision of 28 May 2013. At the hearing he spoke to the points made and the productions listed in his document HO EP 1. He withdrew his complaint in respect of paragraph 1 of the Code of Conduct that the factor had failed to provide a written statement of services. This means that the committee has to determine only the remaining complaints, that is, the alleged failure to comply with paragraph 5.2 of the Code and the alleged failure to carry out the factor's duties.
42. The homeowner's stance in refusing to recognise the appointment of the new factor with effect from 17 December 2012 was misconceived. Newton Property Management Limited had been appointed in accordance with the provisions of the Deed of Conditions. The absurdity of the homeowner's position is demonstrated by his having given consent to Newton to arrange the common insurance for the block within which his flat is situated. His stance whereby he sought to maintain that Newton were able to act as factors for one purpose and not others is inconsistent with the position he took before this committee that the factor (i.e. Walker Sandford) could not seek to resign from providing part of its factorial service as at 30 September 2012. He has caused confusion as is noted in Newton's letter of 5 August 2013 which is PF EP 8.
43. The homeowner's complaint with regard to common insurance is only accepted in part by the committee. The factor told him in its letter of 28 September 2012 that it would no longer act as his factor as from 1 October 2012. There was no suggestion that the common insurance cover was being cancelled as a result of that purported resignation. This committee has found in its decision of 28 May

2013 that the factor failed effectively to resign as factor for the block 19-24 Ladywood as at 30 September 2012. This finding was made retrospectively. After 28 September 2012, the homeowner knew that the factor was no longer prepared be his agent but he had no reason to be concerned that his common insurance cover was in any way affected. The homeowner did have cause to experience some concern on account of the action of the factor as set out in its letter of 21 November 2012 because by issuing its amended invoice the factor was refusing to collect premiums that it ought to be collecting as part of its duty as factor for the block in which the homeowner resides. Even at that date the factor did not take any steps that affected the continuation of the homeowner's common insurance cover. The homeowner could have contacted the brokers had he had concerns about his common insurance. In fact, his common insurance remained in place and he was not prejudiced in that regard by the factor's action of withdrawing its management service as at 1 October 2012. The factor's action on 21 November 2012 in crediting back monthly instalments 5 to 10 of the premium for common insurance meant that they failed to collect monies that ought properly to have been collected by them from the homeowner. This was a failure to carry out property factor's duties after 1 October 2012. As the agent of the homeowner the factor ought to have continued to collect the premiums up to its effective date of resignation from the development as at 15 December 2012.

44. The factor's later effective resignation from its management of the development as a whole after the 2011 Act came into force did not affect the continuation of the homeowner's common insurance cover. As a result the committee does not consider that there has been any failure to provide information by the factor that could constitute either a failure to comply with paragraph 5.2 of the Code of Conduct or a failure to carry out property factor's duties.
45. The next issue is the withdrawal of the services of stair cleaning and window cleaning. The committee's earlier decision was that the factor had continued to act as factor after 30 September 2012 even though it had deliberately chosen to withdraw the cleaning services in respect of the block in which the homeowner's flat is situated. The committee finds that there was a failure to carry out property factor's duties in this respect but only up to the date of its resignation on 15 December 2012. The homeowner was occasioned some uncertainty, concern and inconvenience by the factor's failures to carry out property factor's duty which have been found to have occurred in respect of this application. With regard to

cleaning he had to undertake some cleaning alongside his co-proprietors in his block until the new factor was appointed. On the other hand he did not incur charges for cleaning through the factor.

46. The committee proposes to make a property factor enforcement order awarding a modest amount of compensation to the homeowner in respect of the uncertainty, concern and inconvenience he sustained owing to the factor's failures to carry out property factor's duties both in relation to the factor's failure to collect premiums in the period 21 November 2012 to 15 December 2012 and its failure to provide cleaning services to the homeowner's block in the period 1 October 2012 to 15 December 2012. The details of the proposed draft order are set out below. The committee has not reduced the amount of proposed compensation to take account of any perceived issue of contribution on the part of the homeowner. The factor's failures arise from deliberate decisions by the factor which amount to breaches of its duties as agent for the homeowner so no question of reduction arises (W.W. McBryde – The Law of Contract in Scotland (3rd ed 2007) at 22-36).
47. In the course of his evidence the homeowner made clear that he did not wish to receive an apology from the factor in the event that the committee found in his favour in respect of any aspect of his applications. The committee would otherwise also have considered the inclusion in its proposed draft property factor enforcement order of a written apology to him in respect of the limited failures of property factor's duties which have been found to have occurred under this application.

Decision on application HOHP PF/13/0006

48. The committee rejects the homeowner's complaint under the Code of Conduct in terms of this application so far as it remains for determination by the committee. It concludes that there was no failure to comply with paragraphs 5.2 of the Code of Conduct. With respect of the property factor's duties the committee upholds the homeowner's complaint so far as it relates to the alleged failure to invoice him properly for common insurance but only in respect of the period 21 November 2012 to 1512. Otherwise this part of his complaint with regard to invoicing for common insurance is rejected The committee upholds his complaint so far as it relates to withdrawal of the common close and window cleaning services but only in respect of a failure to carry out property factor's duties by the factor for the period 1 October 2012 to 15 December 2012.

49. With reference to section 19(2)(a) of the 2011 Act the committee hereby gives notice to the factor that it proposes to make a property factor enforcement order in the terms set out below. As required by section 19(2) (b) of the 2011 Act, the committee allows the parties a period of 14 days from the date of this decision within which to make representations with regard to the terms of the proposed order. As required by section 19(3) of the 2011 Act any such representations will be taken into account before the committee proceeds to reach a final decision as to the terms of any property factor enforcement order.

50. The committee proposes to make a property factor enforcement order in the following terms:

"Within 28 days of the communication to the factor of the property factor enforcement order, the factor must pay to the homeowner the sum of £25.00 in respect of the uncertainty, concern and inconvenience suffered by the homeowner as a result of the factor's failure to carry out property factor's duties by virtue of (1) its failure to collect the due instalments of the homeowner's common insurance premiums between 21 November 2012 and 15 December 2012 and (2) its withdrawal of weekly close cleaning and monthly window cleaning services in the period from 1 October 2012 to 15 December 2012."

Observations in respect of these applications

51. This has been a time consuming and complex case. As there have been a number of matters that have had to be considered that may be of more general application the committee has thought it appropriate to make a number of observations.

Length of hearing

52. About one half of the total hearing time of three days expended on this case has been spent on considering detailed evidence and submissions relating to two separate preliminary objections by the factor which proved to be without foundation. For instance, on the issue of the compromise agreement it was rather surprising to find that the factor's evidence was that neither the issue of common drain or of common ground was dealt with in the negotiations that led to the agreement in August 2010. Given that evidence the objection was bound to fail.

Communication difficulties in factor's dealing with the homeowner

53. The provision of more information to the homeowner might have lessened the problems that the factor encountered over the years. A lack of transparency in some of the communications emanating from the factor contributed to the deterioration in relations between the parties. For instance, Mr Turner gave evidence to the committee that the location of the disputed field drain which was installed in 2008 was shown by the red dotted line marked by him on to copy title plan PF EP 2. This appeared to be the first time the homeowner had been informed of the exact location of the field drain.
54. The factor also persisted in seeking to impose charges on the homeowner which were not provided for in the Deed of Conditions. Each monthly invoice sought to incorporate additional terms into the contract between the homeowner and factor. Every month the homeowner objected and the factor ultimately had to concede that it could not impose such additional terms on him. It must have been obvious to the factor from a very early stage in its relationship that the homeowner was simply not going to allow the imposition of additional terms onerous to him. Its massive financial concession on this point in the August/September 2010 settlement was its belated recognition of this. However relationships had been poisoned long before that time by the misguided attempt repeatedly to impose additional terms on the homeowner.

Tone of correspondence from homeowner

55. The homeowner's conduct and the tone and content of his correspondence was often unreasonable. The factor's response was not always well thought through. It may be that the factor could benefit from considering the adoption of the kind of procedure often found in the public sector and in housing associations to deal with unreasonable correspondence. An example of the kind of procedure we have in mind is to be found at http://www.spso.org.uk/files/2011_01_UAP_Policy.pdf. The factor's decision to ignore the homeowner's correspondence, had it been carried out after the Code of Conduct came to be applicable to the factor, would have opened up the possibility of a complaint to the Homeowner Housing Panel for failure to respond timely to correspondence.

Persistent unreasonable stance of homeowner

56. The homeowner's insistence that he had to approve very many aspects of the work of the factor was not only not in accordance with the terms of the title, it was

unreasonable and occasioned much extra work. His refusal to accept the plain terms of the title deeds on issues such as the appointment of this factor (and indeed its successors) was unreasonable. There is no doubt that he was quite capable of understanding the meaning of the Deed of Conditions but adopted an intransigent attitude that flew in the face of the reality of the situation. This has also caused a great deal of inconvenience to many other proprietors.

57. As a co-proprietor he was quite entitled to express his view on issues relevant to the management of the common property. He was not entitled to impose his views where the scheme for management of the development did not give him a veto. He appeared to think that he was entitled to assert his property rights in isolation from the other proprietors in his block and the development notwithstanding the terms of the titles. This was intransigent and misguided.

Volume of documentary material lodged for these proceedings

58. The hearing was prolonged by the volume of material produced by the factor and by the additional and ongoing correspondence from the homeowner. It was unpaginated and not inventoried. A very large amount of it was not referred to at all at any stage but all of it had to be read by committee members in advance of the hearing. Much of it represented wasted effort. A significant number of documents appeared in more than one place in the bundles. Ultimately the issues in dispute between the parties were in relatively short compass but a disproportionate amount of effort was required to identify what they were. In the course of its preparations the committee considered whether it should issue a direction requiring all of the material that was unpaginated and not inventoried to be re-lodged with an inventory and properly paginated. We decided not to do so on this occasion but the factor should understand for future reference that voluminous productions for a hearing require to be lodged in a form that allows them to be accessed in a user friendly fashion in the course of the hearing (and indeed any later appeal). This means that each production should be numbered consecutively, there should be an index at the front of the bundle and the individual pages should be paginated.

Appeals

59. 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..."

60. The decision is unanimous.

Pino Di Emidio

Signed.....Date, 25 September 2013
Chairperson

APPENDIX

Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

hohp Ref: HOHP/PF/13/0006, HOHP/PF/13/0007 and HOHP/PF/13/0008

Re: Property at 24 Ladywood, Milngavie, Glasgow, G62 8BE ("the property")

The Parties:-

PATRICK JOSEPH LYNCH, 24 Ladywood, Milngavie, Glasgow, G62 8BE ("the homeowner")

WALKER SANDFORD PROPERTY MANAGEMENT LTD, St Georges Building, 5 St Vincent Place, Glasgow, G1 2DH ("the factor")

Decision by a Committee of the Homeowner Housing Panel in respect of three applications under section 17 of the Property Factors (Scotland) Act 2011 (the "2011 Act").

Committee Members

Pino Di Emidio (Chairperson)
Andrew Taylor (Surveyor member)
Ahsan Khan (Housing Member)

Background

1. The factor's date of registration as a property factor is 1 November 2012.
2. By application dated 10 December 2012 the homeowner applied to the Homeowner Housing Panel for a determination that the factor had failed to comply with sections 1 (written statement of services) and 5.2 (provision of information relating to common insurance) of the Property Factor Code of Conduct as required by section 14(5) of the 2011 Act. The homeowner alleges that the factor has also failed to carry out the property factor's duties imposed by section 17(5) of the 2011 Act in that it is alleged that the factor has not carried out its duty to invoice the homeowner for insurance premiums for the property and has reduced its services by withdrawing certain factorial services including cancelling arrangements for cleaning of the common close

and window cleaning. This application has been given the case number HOHP PF/13/0006.

3. By application dated 12 December 2012 the homeowner applied to the Homeowner Housing Panel for a determination that the factor had failed to comply with section 6.1 (procedures for notification of matters requiring repair, maintenance or attention) of the Property Factor Code of Conduct as required by section 14(5) of the 2011 Act. The homeowner alleges that the factor has also failed to carry out the property factor's duties imposed by section 17(5) of the 2011 Act in that it is alleged that the factor caused a drain to be built without proper legal authority on the common ground within the development of which the property forms a part contrary to the terms of the title and has not carried out remedial works to effect removal of the common drain. This application has been given the case number HOHP PF/13/0007.
4. By application dated 18 December 2012 the homeowner applied to the Homeowner Housing Panel for a determination that the factor had failed to comply with sections 6.1 (procedures for notification of matters requiring repair, maintenance or attention) and 6.4 (preparation of a planned programme of work) of the Property Factor Code of Conduct as required by section 14(5) of the 2011 Act. The homeowner alleges that the factor has also failed to carry out the property factor's duties imposed by section 17(5) of the 2011 Act in that it is alleged that the factor failed to maintain the common ground within the development of which the property forms a part contrary to the terms of the title. This application has been given the case number HOHP PF/13/0008.
5. By separate letters each dated 31 January 2013 the President of the Homeowner Housing Panel intimated her decision to refer cases numbers HOHP PF/13/0006, HOHP PF/13/0007 and HOHP PF/13/0008 to a Homeowner Housing Panel Committee.
6. Following service of the notices of referral, both parties made further written representations to the Committee.

Hearing

7. A hearing took place in respect of each of the above three cases on 16 May 2013 at the Homeowner Housing Panel offices at Europa House, 450 Argyle Street, Glasgow. The Homeowner appeared on his own behalf. The factor was represented by Mr Paul Walker, Mr James Turner and Mr Paul McGonagle all of whom work within the factor's organisation.
8. At the outset of the hearing, there being no objection, the committee directed under Regulation 9(1) of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 ("the 2012 Regulations) that all three applications should be heard together.

Preliminary Issue – all three applications

9. The factor has taken a preliminary objection in identical terms to the effect that the committee does not have jurisdiction in respect of each application. The committee decided that it would deal with that objection first.
10. The factor invokes Regulation 28 of the 2012 Regulations. This is a transitional provision that provides:

"(1) Subject to paragraph (2), no application may be made for determination of whether there was a failure before 1 October 2012 to carry out the property factor's duties.

"(2) The president and any committee may take into account any circumstances occurring before 1st October 2012 in determining whether there has been a continuing failure to act after that date."
11. Regulation 28(1) ensures that the 2011 Act does not have retrospective effect but Regulation 28(2) allows circumstances occurring before it came into force to be taken into account in determining whether there has been a continuing failure to act after the Act came into force and became applicable to the actions of a particular property factor.
12. The factor accepts that it was the property factor for the homeowner's property but the factor asserts that it ceased to manage that property prior to the coming into force of the 2012 Act on 1st October 2012 because it withdrew its factorial service with effect from 30 September 2012. With regard to case

number HOHP PF/13/0006 the factor claims that there was no continuing factorial service of any kind after 30 September 2012. Therefore the factor argues that this committee does not have jurisdiction to determine the application in terms of Regulation 28(1). The same objection is taken in respect of case number HOHP PF/13/0007 and case number HOHP PF/13/0008.

13. With regard to case number HOHP PF/13/0007 the factor has two further preliminary points. The factor claims that the homeowner's complaint relates to work carried out between 12 and 14 February 2008 and as such, even if the factor had obligations under the 2011 Act in respect of this property, there is no continuing failure to act beyond 30 September 2012. The factor also maintains that any dispute between the parties in respect of the installation of the drain on the common ground was resolved in September 2010 as part of a wider agreement between the parties which dealt with other contentious issues between them at that time. Neither of these points, which apply only to case number HOHP PF/13/0007, is dealt with in this Decision.

14. The homeowner disputes that the applications fall foul of Regulation 28(1) in the way suggested by the factor. He argues that the committee is seized of jurisdiction in respect of all three cases.

15. After ascertaining that there was no objection by parties to the preliminary issue being considered first, the committee made inquiries of the parties as to the extent to which the facts relating to the preliminary issue were in dispute. It emerged that there was a substantial amount of common ground between the parties as to the relevant underlying facts.

Factual Background

16. The homeowner's property forms part of a development of 30 flats which were constructed in five block of flats. The flats are 1-30 Ladywood. Each of the five blocks contains six flats. The homeowner's flat is within the block comprising 19-24 Ladywood. The homeowner's title to the flat at 24 Ladywood has been registered in the Land Register of Scotland under Title number DMB14683.

17. A full copy of the Land Certificate, including a colour version of the title plan, has been produced to the committee. In the Property Section A the subjects are described as follows

"Subjects (I) FLAT 24, LADYWOOD, MOOR ROAD, MILNGAVIE, GLASGOW G62 8AT being the westmost flat on the second floor above the ground floor of the block 1924 LADYWOOD and (II) the garage tinted pink on the Title Plan, all within the land edged red on the said plan, together with an equal share pro indiviso along with the proprietors of the other flats contained within the said land edged red in and to the said land but excepting always therefrom (a) the solum of all blocks of flats and gardens relating thereto, (b) the solum of all lockups and (c) the solum of any electricity Sub-Station."

The parties agreed that the land edged red referred to in this passage comprises an area that includes the area on which all five blocks of flats in the development have been built.

18. The parties confirmed that the basis of the factor's appointment in respect of the property was to be found in the Deed of Conditions by Bovis Homes Scotland Limited recorded G.R.S (Dumbarton) 13 May 1974. The Deed of Conditions is reproduced as entry number 6 in the Burdens Section of the Land Certificate. At the start of the text of the Deed of Conditions in the Land Certificate (page 11 of the copy provided to the committee) it is stated that the plot or area of ground edged red on the Title Plan is referred to as "the said plot or area of ground" or "the subjects". It is declared that "a "block" means the buildings comprising of all flats which open off and have entrance by a common entrance and stairway)." As noted above, the homeowner's property is within the block 19-24 Ladywood.

The Terms of the Deed of Conditions

19. The Deed of Conditions narrates that the grantors of it as proprietors were about to erect blocks of flatted dwelling houses on the subjects. The Deed seeks to regulate various aspects of the ownership of the flats. The scheme for management of the common parts set out in the Deed of Conditions is detailed. For present purposes the relevant provisions are the following clauses.

20. Clause FIFTH relates to the ground within the development that remained unbuilt on and imposes an obligation on all thirty proprietors to bear the cost of maintenance of that ground which is declared to be common ground equally.

"FIFTH The said plot or area of ground with the exception of the solum of the flats and lockups and any Electricity Sub Station Sites is hereby declared to be common ground and each proprietor shall have an equal interest therein; Such areas (including parking areas if any) shall remain open and unbuilt on in all time coming and shall be maintained in a clean and tidy condition to the satisfaction of us or our foresaids, the cost of maintenance thereon being borne equally amongst all the proprietors having right thereto;"

A declaration that is not relevant for present purposes has been omitted from the end of the text of clause FIFTH.

21. Clause NINTH relates to the individual blocks of flats in the development. It provides that each proprietor has a right of common property in the parts declared to be common within each block and imposes an obligation on each of the six proprietors within a block to pay an equal share of maintenance in the block.

"NINTH Each proprietor shall possess right of common property with each and every other proprietor in the block of which his flat forms part in and to (a) the solum on which the said block is erected, (b) the foundations, outside walls and roof of the said block and the hatchways leading to the roof, (c) the entrance door and steps (if any) leading thereto, the common entrance hall and passages, the stairways, landings and passageways leading to the upper floors and roof, the elevators and equivalent where installed, the walls and railings enclosing the said common entrance hall and the windows therein, (d) the common sewers, drains, soil and rain water pipes, water, gas and other pipes, rhones and conductors electric mains, cables, wires and other transmitters and pipes and the common television aerial or aerials aftermentioned (with equipment relative thereto) and all other parts and pertinents of the said block of ground (if any) pertaining thereto which are common and mutual to the proprietors thereof; Each proprietor in the block shall contribute an equal share towards the expense of maintenance of the

foregoing in the block of which his flat forms part one -share being payable in respect of each flat owned."

Some further provisions that are not relevant for present purposes have been omitted from the end of the text of clause NINTH as reproduced here.

22. Clause TWELFTH provides for the appointment of a factor who is to be responsible for the instructing and supervising of the common repairs and maintenance of the whole common parts of the subjects and for apportioning the costs among the proprietors. .

"TWELFTH There shall be appointed a Factor who will be responsible for instructing and supervising the common repairs and maintenance of the whole common parts of the subjects and for apportioning the cost thereof among the several proprietors in accordance with the provisions of these presents. The Factor shall be appointed by us for a period of two years and thereafter by a majority of the proprietors (counting one vote for each flat at a meeting convened as aforesaid)."

23. The scheme set out in the Deed of Conditions also contains in clause THIRTEENTH provisions relating to the power of a meeting of proprietors. The factor relied heavily on the terms of this clause in its submissions. It is in the following terms.

"THIRTEENTH After we have ceased to be a proprietor of the last flat the proprietors of any two of the flats shall have power to call a meeting of the whole proprietors to be held at such reasonably convenient time (excepting Saturdays and Sundays and Public Holidays) and place as the convenors of said meeting may determine, and of which time and place of meeting at least seven days' notice in writing shall be given by or on behalf of the convenors of said meeting to the other proprietors, and at any meeting so convened any of the proprietors may be represented by a mandatory. The proprietor or proprietors of any five or more of the flats or the mandatory or mandatories present of such proprietor or proprietors shall be a quorum and the proprietors present or their mandatories shall be entitled to one vote for each dwelling owned by him or his principal but only with regard to decisions relative to common property in which he has an interest hereunder;

DECLARING that in the event of any of said flats being owned by two or more persons only one of such owners shall be entitled to vote, and in no case may more than one vote be allowed in respect of a single flat; And it shall be competent for us or our foresaids while we are still proprietors of any flat or at any such meeting by a majority of the votes of those present (said votes to be computed as aforesaid); (Primo) To order to be executed any common or mutual operations, maintenance and repairs, decoration et cetera to the said common property. (Secundo) To make any regulations in conformity with these presents which may be considered necessary with regard to the preservation cleaning, use or enjoyment of the said common property. (Tertio) 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 property and the employment of labour thereon. (Quarto) To instruct the collection by the Factor of the annual maintenance charge aftermentioned from each proprietor and the accounting by the Factor for his intromissions therewith. (Quinto) To instruct the employment by the Factor of a gardener or gardeners, cleaner or cleaners and other staff as required for the maintenance and preservation of the common property. (Sexto) To determine the amount of the annual maintenance charge from time to time. DECLARING that the said Factor shall unless otherwise determined by a meeting of the proprietors, be entitled during the continuance of his appointment to exercise the whole rights and powers which may competently be exercised at or by a meeting of proprietors and others convened as aforesaid; DECLARING that all expenses and charges incurred for any work undertaken or services performed in terms or in furtherance of the provisions herein contained and the remuneration of the Factor shall be payable by the proprietors of the said flats (each proprietor paying an equal share of said remuneration) whether consentors thereto or not in the same way as if their consent had been obtained, and in the event of non-payment within one calendar month the Factor shall be entitled to sue for recovery of the same in his own name, together with all expenses incurred by him."

The committee note that the semi colon which appears before the word "(Primo)" appears to have been inserted in error.

24. Clause FOURTEENTH is even lengthier. Amongst other provisions it contains a declaration that "the Factor's decision in regard to the apportionment of

common charges shall be final." Sub clause (Seven) provides that "the flats are to be insured against loss by fire, from damage, riot and civil commotion for a total sum of not less than the reinstatement value of the flats"

25. The parties also agreed that the factor had written to the homeowner by letter dated 24 August 2012 and by letter dated 28 September 2012. Both of these letters had been received by the homeowner. They are both of significance to the factor's argument in relation to the preliminary issue.

The Factor's Letter of 24 August 2012

26. The factor wrote to the homeowner in the following terms on 24 August 2012.

"Dear Mr Lynch

"FLAT/24 LADYWOOD, MOOR ROAD MILNGAVIE, G62 8BE

"We write in connection with our management services provided for your property.

"It is with regret we wish to advise you that we are having to withdraw those services from 30th September 2012. The decision has not been taken lightly but the actions of certain proprietors within the stairwell has made it impossible to continue providing a management service within the current framework.

"We are of the opinion that the management of this one stairwell could be a full time job due to the levels of adverse and repetitive communication received and would be best served by a legal firm.

"We will instruct the services for the stairwell such as window and stairwell cleaning to be ceased by that date. The common buildings insurance policy is dealt with by Marsh and they will write to you in this respect.

"The common grounds maintenance will continue on an estate basis at present and we will render one account in the names of the owners collectively for the applicable share. We would recommend that you engage another managing agent or appoint one owner to deal with this account on behalf of the stairwell. If this is not dealt with we will consult with the current management committee as to how they wish to proceed.

"Please do not hesitate to contact our office if we can be of any further assistance.

Yours sincerely"

This letter was copied to "All Proprietors"

The Factor's Letter of 28 September 2012

27. The factor wrote to the homeowner in the following terms on 28 September 2012.

"Dear Mr Lynch

"FLAT/24 LADYWOOD, MOOR ROAD MILNGAVIE, G62 8BE

"We write with regards to the cessation of factoring service at your property, 19-24 Ladywood, Milngavie, G62 8BE.

"As outlined in our previous correspondence of 24 August, Walker Sandford will no longer act as managing agent for the owners at 19-24 Ladywood as of the 30th September 2012. Please find enclosed final account in relation to the factoring.

"The services for close cleaning and window cleaning have been cancelled. The insurance for the year is currently held with the brokerage of Marsh. The remainder of this premium has been applied to your final account. Payments received will be forwarded to Marsh in settlement of the premium. Walker Sandford will no longer be in a position to provide payment to any such company for payments which individual owners have not made. Should payment of the premium not be made then it will be left in the hands of the insurance broker to apply their own company policy with regards non-payment of premium. This may include the removal of any individual from the policy who has not paid the relevant premiums.

"The owners of 19-24 Ladywood will still have a common obligation to the property as a whole including the common grounds. The common grounds maintenance will continue on an estate basis at present and we will render one account in the names of the owners collectively for the applicable share. We would recommend that you engage another managing agent or appoint one owner to deal with this account on behalf of the stairwell. If this is not dealt with we will consult with the current management committee as to how they wish to proceed.

"The matter of issues common to the development may be best addressed by means of an EGM allowing all owners to participate in the debate and decision making process.

"As we are no longer engaged by the owners we will no longer be in a position to engage in lengthy or repetitive correspondence. We will of course be happy to provide any relevant information to any incoming agent.

"Yours sincerely"

This letter was copied to "All Proprietors"

The factor enclosed an account numbered 376442 for the period up to 30 September 2012 and a document containing insurance details.

28. In his initial submissions to the committee Mr Walker made a suggestion that the relationship between the homeowner and the factor was also to some extent governed by custom and practice. This suggestion had not been made in the detailed written representations submitted in advance of the hearing. It was withdrawn shortly after it was first floated.
29. Although there was substantial common ground as to the facts relevant to the preliminary issue under consideration by the committee the parties wished to lead evidence and were allowed to do so. The factor was invited to present its evidence and make its submissions on the preliminary issue first.

Evidence led for the Factor

30. Mr McGonagle gave evidence for the factor. He is 36 years of age and has been employed by the factor as a property manager for about 11 years. He confirmed that the factor's position was that it had withdrawn its services from block 19-24 Ladywood which includes the homeowner's property as at 30 September 2012. The factor's account that was enclosed with that letter was numbered 376442. It sought to collect monthly instalments of common insurance premiums in advance. He explained that an adjusted version of the final account no 376442 which had been sent with the factor's letter of 28 September 2012 had been issued 52 days later on 21 November 2012. This was because the original version of account 376442 had not been paid. The factor had decided to re-issue account 376442 on the basis that the advance monthly instalments were now excluded and the homeowner was informed that the brokers were being told that the factor had not received payment of these premiums. The factor had had no other communication with the homeowner.
31. At one stage in his evidence Mr McGonagle appeared to suggest that the scope of the factor's appointment was not based on the terms of the Deed of Conditions alone but was supplemented by additional standard terms and conditions that were listed on the reverse of accounts from the factor to the homeowner in the period during which it was his factor. He accepted that the

factor had not provided a copy of the standard terms and conditions he had in mind to the committee. After some probing this suggestion was withdrawn.

32. The factor took over as property factor for the development in about 2006.

From the outset there were problems with the homeowner with regard to many different issues. After much voluminous correspondence on 24 August 2010 a meeting took place between the homeowner and his solicitor and representatives of the factor. Following that meeting, on 27 August 2010 the homeowner's solicitors HBJ Gateley Wareing wrote to the factor proffering a cheque in full and final settlement of its outstanding claims against him and noting a number of points as having been agreed at the meeting. Of particular relevance for present purposes they stated at paragraph 4 the following: -

"Both you and our client agree that the relationship between the parties is governed by the Deed of Conditions and that the parties will exercise good faith in attempting to resolve any further dispute which may arise in the future. For the avoidance of doubt, Mr Lynch will direct any queries he may have in relation to the instruction of specific works to the Residents' Committee in the first instance."

On 7 September 2010 the factor replied to the homeowner's solicitors and accepted the terms set out in their letter of 27 August 2010.

33. Mr McGonagle accepted that this exchange of correspondence confirmed that the Deed of Conditions provided the basis for the relationship between the homeowner and the factor. After 7 September 2010 the factor proceeded on the basis that it would not reply to correspondence from the homeowner as it took the view that he had agreed to raise these matters with the Residents' Association.

34. The factor had withdrawn from the development as a whole with effect from 15 December 2012. It had found it to be impracticable to continue to serve as factor for the other four blocks in the development.

Evidence led for the Homeowner

35. The homeowner gave evidence on his own behalf. He is 83 years of age and a retired civil engineer who retains his professional registration. He maintained his position that the factor had not effectively resigned as at 30

September 2012. It had not used the word "resign" in either the letter of 24 August 2012 or that of 28 September 2012. In cross examination he confirmed the terms of the letter of 27 August 2010 and in particular that part relating to raising matters of concern with the Residents' Association.

36. Mr McGonagle's evidence provided some further detail as to the way in which the factor had proceeded in its dealings with the homeowner. Beyond that the oral evidence heard by the committee did not add much to the committee's understanding of the dispute on the preliminary issue in the three cases under consideration.

Submissions of the parties

37. The parties provided written representations in advance of the hearing and made oral submissions after the hearing of evidence. Their submissions are dealt with in detail in the discussion that follows.

Discussion

38. The real issue in dispute on the factor's preliminary objection in all three cases centres on the effect of the factor's actions in purporting to resign with effect from 30 September 2012. That matter turns on the interpretation to be put on the primary facts which are largely agreed.
39. The factor submitted that it was entitled to resign as property factor if it so wished. By its letter of 24 August 2012 the factor had given more than 30 days' notice of its intention to resign as factor to the homeowner and the other proprietors in the block 19-24 Ladywood. The factor had given the matter careful consideration. The factor had been aware that the 2011 Act was coming into force. The factor was concerned at its ability to fulfil its obligations in relation to the homeowner on account of the volume of correspondence that it had received from him from the start of its involvement in the development. From the factor's consideration of the Deed of Conditions it was satisfied that it was entitled to resign from its appointment as factor for a single block as distinct from the whole development.
40. The factor founded heavily on the first two sentences of clause THIRTEETH of the Deed of Conditions (reproduced above). The factor maintained that meetings of proprietors were to be organised by individual blocks. So in the

case of 19-24 Ladywood any two proprietors could call a meeting and five was a quorum for taking decisions. The factor also referred to sub clause (Tertio) and to the first declaration that follows sub clause (Sexto). (Tertio) provides that the proprietors may delegate to the factor full power and authority to take charge of all matters pertaining to the maintenance and preservation of the common property. The declaration following (Sexto) entitles the factor during the continuance of appointment to exercise the whole powers competently to be exercised by the proprietors in a meeting. The factor submitted that this related to the proprietors in a single block. Therefore each block could have its separate property factor. There did not require to be a single property factor for the whole development of five blocks. The factor emphasised that a property factor is an agent for proprietors. The terms of the fourth paragraph of the letter of 28 September 2012 which dealt with the common grounds did not mean that it continued to operate as property factor for the block 19-24 Ladywood. The factor had made it clear that it would no longer send individual accounts to each of the proprietors of the block 19-24 Ladywood. The description of "Subjects" in the Property Section (reproduced above) did encompass within the area edged red all of the development on which the five blocks are built but this did not detract from its submission. Likewise clause FIFTH of the Deed of Conditions (reproduced above) did not undermine the submission.

41. The homeowner's submission was to the effect that the factor's letter of 28 September 2012 did not amount to a full withdrawal or cessation of the factor's services. The factor expressly stated in the fourth paragraph of its letter that it would continue to provide that part of the service that pertained to the fulfilment of the homeowner's obligation to contribute to the cost of maintenance of the common grounds under clause FIFTH of the Deed of Conditions. The common parts comprised the common property defined in clause NINTH and the common grounds dealt with in clause FIFTH. The factor had continued to provide a part of the factorial service provided for in the Deed of Conditions after 30 September 2012. He took issue with the factor's interpretation of clause THIRTEENTH. In the first sentence it was provided that the proprietors of any two of the flats had power to call a meeting of the whole proprietors. In the second sentence it is provided that at a meeting of proprietors a proprietor is entitled to one vote for each dwelling owned "but only with regard to decisions relative to common property in which

he has an interest". These provisions make clear that meetings were to relate to the whole development but where a decision related only to one block only those proprietors with an interest could vote. The factor had not effectively resigned as at 30 September 2012.

42. The committee consider that the scheme of the Deed of Conditions has to be understood from consideration of all the relevant provisions of the Land Certificate. The homeowner is well founded in his submission as to the operation of clauses FIFTH and NINTH. The common property dealt with in clause NINTH of the Deed of Conditions pertains to the block within which a particular flat is located and imposes an obligation of repair and maintenance on the proprietors in the block. The common grounds are dealt with in clause FIFTH. This clause imposed an obligation all the proprietors of the thirty flats in the development.
43. There are other parts of the Deed of Conditions that support the interpretation adopted by the committee. The Property Section of the Land Certificate expressly defines the "Subjects" as the area within the red lines on the Title Plan, that is, the whole of the area on which all five blocks in the development have been built. The preamble to the terms of the Deed of Conditions as set out in Burden Detail Entry Number 6 in the Land Certificate narrates that the grantors were proprietors of the whole area edged red on the Title Plan and it is clear that subjects refers to that whole area. The definition of "block" (reproduced above) also tends to suggest the Deed of Conditions is to be read as providing a scheme for the whole of the development. The committee does not agree that clause THIRTEENTH provides that there can be a separate factor for each block. The homeowner was well founded when he drew attention to that part of the second sentence of clause THIRTEENTH that provides that a proprietor at a meeting has a vote only with regard to decision relative to common property in which he has an interest under the Deed. There would be no need for any such provision if the factor's submission is correct.
44. Prior to writing their letter of 28 September 2012 the factor provided a service that encompassed both the obligations imposed by clause FIFTH and clause NINTH.

45. In the regular accounts sent out by the factor to the homeowner some costs were be split in one sixth shares as these pertained to costs associated with the maintenance and repair of the block of which the homeowner's flat formed part (16.67%). Other costs, those relating to the obligations to maintain the common grounds were split in one thirtieth shares (3.333%). Account 374662 is an example of this.
46. The factor's letter of 28 September 2012 gave notice that that part of its factoring service relating to the block would cease from 30 September 2012. The part of the service relating to the common grounds expressly did not cease though some changes in future arrangements were intimated to the homeowner. Notice was given that the method of billing for that service was to be changed but the service relating to maintenance of the common grounds which arises under clause FIFTH was still to be provided. There was no evidence of any change in that arrangement prior to 1 November 2012.
47. Section 2(1) of the 2011 Act defines the term "Property Factor". The definition includes the following provisions amongst others:
- "(a) a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes, ...
- "(c) a person who, in the course of that person's business, manages or maintains land that is available for use by the owners of two or more adjoining or neighbouring residential properties (but only where the owners of those properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of that land)".
- The scope of the services which the factor expressly accepted it would continue to provide in respect of the common grounds after 30 September 2012 fall within the scope of section 2(1)(a) and/or (c).
48. The factor is quite correct to say that it was entitled to resign from its position as factor for the homeowner's property prior to the coming into force of the 2011 Act. The committee conclude that the factor did not do so in an effective way. By its letter of 28 September 2012 the factor succeeded only in intimating the cessation of part of the service. As a result its duties as factor

to the homeowner did not cease as at 30 September 2012. The committee consider that it is entitled to take into account circumstances occurring before 1st October 2012 in its consideration of the three applications presently before it in determining whether there has been a continuing failure to act after the date of the factor's registration.

49. In summary, the committee has come to the conclusion that the factor's argument that there is no jurisdiction is misconceived. Although the factor withdrew some aspects of the factorial service from the homeowner with effect from 30 September 2012, it continued to provide to the homeowner that part of its factorial service that pertained to the common grounds. Therefore the factor continued to act as factor after that date even though it had deliberately chosen to withdraw that part of the service that pertained to the block comprising numbers 19 to 24 Ladywood. As a result this committee is not precluded from exercising jurisdiction by Regulation 28(1) of the 2012 Regulations.

Further Procedure

50. The committee will assign a further date for hearing in order that it can deal with the outstanding aspects of the three applications. The orders that the committee is making are set out below under the heading "Decision of the Committee".

51. With regard to case number HOHP PF/13/0007 there remains a further preliminary issue in that the factor claims that the application ought to be rejected because the homeowner's complaint was resolved as at 2010.

Appeals

52. 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..."

Decision of the Committee

53. The Committee directed that all three applications made by the same homeowner relating to the same factor should be heard together in terms of Regulation 9(1) of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012.
54. The Committee has concluded that it has jurisdiction to deal with applications HOHP PF/13/0006, HOHP/PF/13/0007 and HOHP/PF/13/0008 before it because the factor remained property factor for the homeowner's property after the date of its registration as a property factor on 1 November 2012.
55. The Committee having adjourned the hearing in respect of the applications HOHP PF/13/0006, HOHP/PF/13/0007 and HOHP/PF/13/0008, the parties will be given notice of the date for the adjourned hearing.
56. The decision is unanimous.

Signed...Pino Di Emidio.....Date...28 May 2013.....
Chairperson