



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

Hohp Ref: HOHP PF/13/0061

Re: Property at Guest Suite, 2 Millbrae Gardens, Glasgow, G42 9UY ("the property")

The Parties:-

MRS JEAN CONNOLLY, 8/2 Millbrae Gardens, Glasgow, G42 9UY ("the homeowner")

GRANT & WILSON PROPERTY MANAGEMENT LIMITED, 65 Greendyke St, Glasgow, G1 5PX ("the factor")

Committee members:

**Pino Di Emidio (Chairperson)
Susan Napier (surveyor member)
John Blackwood (housing member)**

1. On 10 May 2013 Notice of referral was issued in relation to the homeowner's complaints against the factor on three issues all of them said to be failures to carry out property factor's duties. These are (1) the alleged failure of the factor to install a toilet for the use of the warden (or house manager) serving the development; (2) the alleged failure of the factor to have an annual maintenance programme; and (3) the alleged failure of the factor to ensure that warden call alarm systems are installed in all of the flats in the development. These issues will be dealt with in turn in this decision.
2. On 28 October 2013 the committee carried out an inspection of the Millbrae Gardens sheltered housing development. Later that day the hearing on the homeowner's application was commenced. The hearing was continued to and completed on 1 November both 2013. The homeowner presented her own case. She was supported by her husband Mr Brian Connolly. The factor was

represented by Mr Graham Mitchell. He was assisted by his colleagues Amanda Gilmour and Linda Thomson.

Procedural history.

3. On 12 July 2013 a case management hearing was held. It emerged that the homeowner wished to include two further distinct issues within her complaint against the factor. After receiving written submissions the committee decided that the application would proceed without those two further issues being included within the scope of this case as they had not formed part of the original application. The homeowner did not seek to bring a new complaint which might have been conjoined with this case though that course would have been open to her.
4. A substantial amount of documentation was lodged by the parties in this case. By a Direction (number 10) dated 15 October 2013 the committee directed that the parties should use the numbering system set out in the Appendix to that Direction. Documents lodged by the homeowner were numbered in a sequence commencing with the letter "H" and those lodged by the factor in a sequence commencing with the letter "F".
5. The date of the factor's registration in the Scottish Property Factor Register is 7 December 2012. A written statement was given to the homeowner by the factor in the form of a document entitled "Terms of Service & Delivery of Standards". A copy of this document was produced with the application.

Declaration as to prior involvement of committee member.

6. The committee's direction 8 dated 30 September 2013 stated the following: -
"Notice is given to the parties that one of the members of the ... Committee ..., Ms Susan Napier, was employed from 1979 to 1990 by Hanover (Scotland) Housing Association. In particular from 1983 to 1987 she was employed by their subsidiary Heritage Housing Ltd as a Development Officer. In that capacity she was responsible for purchasing the site at Millbrae and for project managing the design and construction of the development of which the property forms part. Her involvement at Millbrae ended on completion of the construction, as the development was then managed by the housing management team of Hanover (Scotland) Housing Association. While at Hanover (Scotland) Housing Association she was aware of some management difficulties

with the project, but her recollection is that these were not thought serious at that time. She was not involved in dealing with any management issues. Ms Napier left Hanover (Scotland) Housing Association in 1990 to join another Housing Association and had no further involvement with the development at Millbrae of which the property forms part after that time. [She] does not consider that her past involvement in the development which is described above gives rise to any conflict of interest on her part were she to continue to sit as a member of the committee." The parties were required to give notice in writing within 7 days of the date of the direction of any proposals, suggestions or observations that they might have in the light of the information provided to them in the direction. Neither party raised any objection following receipt of this direction.

7. The committee heard evidence from the homeowner and her husband Brian Connolly. The homeowner also produced a written statement from Professor W.F. Deans another proprietor in the development who formed part of the majority in favour of the proposed works which are the focus of the first issue discussed below. The factor led evidence from Graham Mitchell, Amanda Gilmour, Linda Thomson and Robert Paterson. Mr Paterson is one of the proprietors who formed part of the minority opposed to the proposed works which are dealt with in in the first issue below. He also produced a written statement which was considered by the committee. The committee considered that all the witnesses who gave evidence were credible and obviously trying their best to assist the committee. As will be clear from the discussion that follows on material points in large measure the resolution of this case does not require the committee to choose between the accounts of individual witnesses. The oral evidence assisting in understanding the context of the principal dispute.

Background history of factoring in the development

8. There has been a long history of difficulties in relation to the factoring of this sheltered housing development. The following brief outline provides some context to the present dispute. On 1 November 1996 the arbiter's decree-arbitral in the Arbitration between Hanover (Scotland) Housing Association Limited v Mr & Mrs J. Reid and Mr & Mrs J. Reid v Hanover (Scotland) Housing Association Limited was issued (document H1). Hanover were at the time both the feudal superior and the factor of the development. Mr & Mrs J. Reid were proprietors of one of the properties in the development. The arbiter was extremely critical of the factor's approach to dealing with homeowners. Heritage Housing Limited who

- had built the development was a subsidiary of Hanover. Amongst other matters it was stated that Hanover had failed to appreciate that as factor they should have been acting as agents for the proprietors. Difficulties of communication on both sides were highlighted. The difficulties had commenced in the 1980's shortly after the development was created. Hanover challenged the arbiter's decision in proceedings for judicial review in the Court of Session. This challenge was unsuccessful (2002 SCLR 144). Following the dismissal of the petition for judicial review a supplementary deed of conditions was executed which varied some aspects of the original deed of conditions applicable to the development. In particular the arbiter had found that a Property Council should be established to make decisions about the warden's accommodation and the Guest Suite.
9. In about 2003 a majority of proprietors attempted to secure the appointment of the present factor to replace Hanover. Hanover resisted and there followed a further litigation in the Court of Session after some proprietors withheld sums of money claimed by Hanover for factoring services. The case was: *Hanover (Scotland) Housing Association Limited v Mr & Mrs J. Reid* [2006] CSOH 56 (document H2). Hanover were unsuccessful for the reasons stated in the opinion of Lord Reed in the report of that case. In the result Hanover withdrew from its involvement in the development after it lost in the Court of Session and the present factor was able to take up its appointment.
 10. Hanover transferred the title to the warden's accommodation and the Guest Suite into the name of the Trustees for the Millbrae Gardens Owners Association in 2009. The Trustees thereafter sold the former warden's flat and the free sale proceeds were shared by the proprietors of the development.
 11. The factor is well aware of the problems that have occurred in relation to the factoring of this development in the past. Against that background it is perhaps not surprising that in relation to issue 1 the factor should hesitate before taking action that was vehemently opposed by a minority of proprietors in the development.

Issue 1: refusal to install toilet facility for the Warden.

12. *Findings in fact on Issue 1*

- 12.1. The homeowner is the co-proprietor of the ground flat 8/2 Millbrae Gardens Glasgow G42 9UY along with her husband Brian Connolly. Their title is registered in the Land Register of Scotland under Title Number GLA

40081. Document F7 is a copy of the Land Certificate pertaining to the homeowners' flat updated to 13 December 2010.

- 12.2. The homeowner's flat forms part of a sheltered housing development of 36 flats which is factored by the factor. The complex was built in the mid 1980's. The flats are arranged in 2 blocks comprising numbers 2, 4, 6, 8 and 10 Millbrae Court. The development also includes warden's office accommodation and a Guest Suite that is available for use by guests of residents on payment of a modest charge. There are also a number of lock up garages. The warden's accommodation and the Guest Suite are situated within number 2 Millbrae Court.
- 12.3. In about 2003 the Property Council for the development voted to appoint the factor in succession to Hanover (Scotland) Housing Association Limited ("Hanover"). Hanover resisted the attempt to replace them and there followed a litigation in the Court of Session in which Hanover unsuccessfully sought to assert that it remained factor for the development. The decision of the court is dated 6 April 2006. Thereafter the factor was in a position to take on the role of factor without further dispute.
- 12.4. At all material times for the purposes of this decision, the factor's appointment is governed by the Deed of Declaration of Conditions registered in the Land Register of Scotland on 13 August 2010 ("the Deed of Conditions"). This document superseded an earlier deed of conditions and supplementary deed of conditions which had governed the terms of the factor's appointment.
- 12.5. The homeowner also owns a one thirty fifth share in the warden's office accommodation and the Guest Suite in terms of her title.
- 12.6. From its inception one of the 36 flats within the development within number 2 Millbrae Gardens was designated as the warden's flat. The warden's flat was vacant at the time when the factor took over management of the development as the warden then employed did not live in the warden's flat.
- 12.7. In about 2009 a decision was taken by the proprietors in the development to sell what had previously been the warden's flat. As a result

of this decision some re-arrangement of the title provision governing the development was required. The Deed of Conditions of 2010, which governs the appointment of the factor, was entered into by the proprietors to take account of the conversion of what had been the warden's flat into an ordinary flat in the development. The decision to sell what had formerly been the warden's flat was carried out so that the development became one of 36 sheltered housing flats.

12.8. The description of the common parts in the Deed of Conditions includes the following:-

"the whole parts of the Property which are used by or serve more than one dwellinghouse and, without prejudice to the foregoing generality includes :-
 (a) the solum on which the Building is erected and the following parts of the Building, videlicet: - ... (iii) the outside walls and cladding thereto the window frames and window glass of all apartments which are common and of entrance halls, passageways, common stairways, landings and alcoves (but not the window frames and glass in the windows of the dwellinghouses or of the Warden's office accommodation or of the Guest Suite), (iv) all load bearing walls and/or columns whether situated within a dwellinghouse ... or within the Warden's office accommodation or the Guest Suite or not; but where situated within a Dwellinghouse or within a Lock-up or within the Warden's office accommodation or the Guest Suite excluding the screeding, plasterwork and finishes thereof ... (vii) all apartments or areas used for storage, except such apartments or areas as are contained within a Dwellinghouse or within the Warden's office accommodation or the Guest Suite, (viii) the warden alarm system and entry phone system, ... (xix) the carpets and other floor coverings and the furniture and furnishings in the Guest Suite and in the Warden's office accommodation"

12.9. In the Deed of Conditions the Guest Suite is described as follows:

"the accommodation situated on the lower ground floor of the Building and shown marked "Guest Room" on the Lower Ground Floor section of the said Layout Plan"

12.10. Clause (FOURTH) of the Deed of Conditions includes the following provisions: -

"(a) Each dwellinghouse shall be held by the proprietor thereof in all time coming subject to the conditions of this Deed. ... (d) All the dwellinghouses

shall be used and occupied in all time coming as sheltered housing, that is to say, housing specifically designed for the elderly or infirm and incorporating a warden's service. . (k) Notwithstanding that while the Title to the Warden's accommodation, guest suite and lock-up garage is vested in the current Proprietors and their successors in title, the administration, upkeep and maintenance of the Warden's accommodation, guest suite and lock-up garage will be in the authority of the Property Council under Clause SEVENTH (a) hereof."

12.11. Clause (SEVENTH) of the Deed of Conditions includes the following provisions:-

"(a) The Guest Suite shall be used in all time coming only to provide temporary accommodation for guests of a proprietor of a Dwellinghouse on terms and conditions to be laid down from time to time by the Factor in consultation with the Property Council following consultation with the Property Council and for no other purpose whatever except with the prior written consent of the Factor in consultation with the Property Council..."

12.12. Clause (NINTH) of the Deed of Conditions includes the following provisions:-

"(a) ... the Common Parts shall belong to each of the proprietors of a dwellinghouse from time to time to the extent of a one thirty seventh share and to the Proprietors of the Warden's office Accommodation and guest suite to the extent of the remaining one thirty seventh share. (b) The Factor following consultation with the Property Council shall have full power. and authority to instruct and have executed from time to time such works for the repair, maintenance or renewal of the Common Parts or any part thereof; as they in their judgement shall consider necessary to implement their obligations and duties in terms of this Deed, provided always that in the case of works to exceed such sum as shall be determined by the Property Council from time to time the Factor shall, before instructing the same, report the matter to the Property Council and such work shall be undertaken only if it is authorised by the Property Council, whose decision shall be final and binding on all the proprietors. ... (c) The proprietor of each Dwellinghouse shall be liable, jointly with the proprietors of all the other Dwellinghouses for payment of the Common Charges in the proportion of a one thirty sixth part in respect of each dwelling house....(f) In the event of any ... sum due and payable in

terms of this Deed by any proprietor remaining unpaid for a period of sixty days after a demand for payment thereof has been issued by the Factor the Factor shall sue for and recover the same in his own name on behalf of the Property Council and of the remaining proprietors."

12.13. Clause (TWELFTH) of the Deed of Conditions includes the following provisions:-

"The Factor in consultation with the Property Council shall be responsible for the general management and administration of the Property as a sheltered housing scheme and, without prejudice to the foregoing generality, will be responsible for the supervision of the Warden and for arranging inter alia the repair, maintenance and renewal of the Common Parts and of the Warden's office accommodation and the Guest Suite,..."

12.14. Clause (THIRTEENTH) of the Deed of Conditions is in the following terms: -

"(a) The Factor shall be appointed and his appointment may be renewed or terminated following consultation with the Property Council (b) The remuneration of the Factor and the terms and conditions of his appointment shall be determined from time to time following consultation with the Property Council. (c) The Factor shall have the powers conferred on him and perform the duties imposed on him by this Deed following consultation with the Property Council and any other functions assigned to him in relation to the Property following consultation with the Property Council."

12.15. Clause (FIFTEENTH) includes the following provisions: -

"(a) The Property Council shall comprise the proprietors of all the Dwellinghouses provided always where more than one person is included in the term "proprietor" only one of such persons may be a member of the Property Council. (b) Subject as aftermentioned, the Property Council shall have power:- (i) to instruct the Factor to have executed any works of repair or maintenance and any renewals, and also any improvements, of the Common Parts or any part thereof and of the Warden's office accommodation and the Guest Suite... (d) At any meeting of the Property Council ... (iv) all matters shall be determined, where necessary, by a majority of votes, (e) all decisions and regulations regularly made at any such Meeting shall be binding upon each and all of the proprietors whether or not present in person or represented at such meeting and whether or not consentors thereto

unless any of the proprietors shall within thirty days of the making of any such decision or regulation refer the matter to arbitration in accordance with Clause SIXTEENTH of this Deed."

12.16. Clause (SIXTEENTH) of the Deed of Conditions includes the following provisions: -

"(a) All questions, disputes or differences which may arise between or among the Factor, the Property Council and the proprietors or any of them arising directly or indirectly from the provisions of this Deed or generally in relation to the Property or any part thereof shall be referred to the decision of an Arbitrator to be appointed by the Chairman for the time being of the Scottish Branch of the Royal Institution of Chartered Surveyors on the application of any person interested. ... (e) The decision of the Arbitrator shall be final and binding upon all concerned and the application of Section 3 of the Administration of Justice (Scotland) Act 1972 is expressly excluded."

12.17. There are two Plans annexed to the homeowner's Land Certificate. The principal plan shows the development and the location of the homeowner's flat within it. The Supplementary Plan reproduces an earlier title plan and shows the layout of each level of the development including the lower ground floor where the Guest Suite is situated within number 2 Millbrae Gardens. The Guest Suite is shown coloured red on the supplementary plan.

12.18. On 27 September 2011 Glasgow City Council granted a Building Warrant for the following works: - "Domestic – Alteration of existing layout to provide spare toilet in place of store and refurbishment to existing accessible shower room at 2 Millbrae Gardens Glasgow." Document F18 is a copy of the warrant which includes a drawing of the proposed works.

12.19. The area where the proposed toilet is to be installed is entered from the common close at 2 Millbrae Gardens. On the Lower Ground Floor level there is a locked door that gives access to a passageway which leads to three doors. As one enters the passageway from the common close the door to the right leads into the Guest Suite. The door that is straight ahead gives access to the shower and toilet facility that serve the Guest Suite. The door to the left gives access to a walk-in storage cupboard that is currently used to store a variety of items. The proposed toilet is to be installed in the location that is presently used as a cupboard.

- 12.20. The area coloured red on the supplementary title plan covers the area of (a) the Guest Suite; (b) the shower and toilet facility that serve the Guest Suite and (c) the passageway accessed from the common close. The area coloured red does not include the walk-in storage cupboard.
- 12.21. The walk-in storage cupboard where the toilet is proposed to be installed is within the area that is defined as "common parts" in the Deed of Conditions. The works authorised by the building warrant also involve the refurbishment of the shower and toilet facility that serve the Guest Suite which is within the area coloured red on the supplementary title plan.
- 12.22. The proposal to install a toilet facility for the use of the warden would constitute an improvement of the common parts of the development as these are defined in the Deed of Conditions.
- 12.23. On about 5 September 2012 the factor wrote to the proprietors seeking mandates to ascertain whether there was support for the proposal to install the toilet for the warden. Document H28 is a copy of the letter sent to the homeowner and her husband. The result of this first vote in respect of which mandates were sent on 5 September 2012 was 20 in favour, 12 against and 4 did not reply. This vote was treated by the factor as the equivalent of an instruction from the Property Council in terms of clause (FIFTEENTH) of the Deed of Conditions.
- 12.24. On 2 November 2012, after the result of the first vote was known the factor wrote to the proprietors advising that it had received majority agreement to proceed with the installation of the toilet facilities and that the proposal would be instructed. Document H31 is a copy of the letter sent to the homeowner and her husband.
- 12.25. Following discussion of the proposal at the Annual General meeting of the Property Council on 27 November 2012, the factor decided to take advice from its solicitor as to whether the work could be carried out on the basis of a majority vote.
- 12.26. In a letter to proprietors dated 29 January 2013 the factor stated that it had been advised that a majority vote was not sufficient and unanimity was required. Document H36 is a copy of the letter sent to the homeowner and

her husband. The cost of installation of the toilet facility was stated to be £2,500. The factor advised that work would be required to upgrade the shower room in the Guest Suite at a cost of £4,500. A single mandate was used for both proposals. The result of the second vote was 20 in favour, 14 against and 2 did not reply. This vote was also treated by the factor as the equivalent of an instruction from the Property Council in terms of clause (FIFTEENTH) of the Deed of Conditions.

- 12.27. No proprietor who voted against the proposal on either the first or second occasion it was put to a vote of proprietors referred the matter to arbitration in terms of clause (SIXTEENTH) within the period of 30 days allowed by clause (FIFTEENTH)(e).
- 12.28. The factor has declined to carry out the proposed works after taking legal advice and having regard to the second vote that confirmed that there was not unanimity amongst proprietors. It has proceeded on the basis that the proposal could only be implemented if the proprietors were unanimous.
- 12.29. The warden's office accommodation in the development does not contain a toilet facility for use of the warden. The current warden has been employed for many years. She does not reside within the development.
- 12.30. There is a toilet facility in the Guest Suite. The Guest Suite is only occupied from time to time.
- 12.31. After the disposal of what had been the warden's flat in 2010 the warden has made use of the toilet in the Guest Suite when there are no guests accommodated there. When the Guest Suite has been occupied she has had to rely on individual residents in the developments to make the toilet facilities in their flats available to her on request.
- 12.32. The Guest Suite is available to guests of residents at modest cost and it produces an income stream which is collected by the factor.
- 12.33. The homeowner is concerned that the warden does not have access to a toilet that is for her own use. She is concerned that there may be health and safety implications and that it may be difficult to employ a new warden

when the current warden retires unless a toilet for the use of the warden is installed.

12.34. There is no statutory obligation in environmental health or health and safety legislation that requires that the proprietors have to provide a separate toilet facility for the warden.

12.35. As at 5 November 2013 the factor held approximately £2,200 in the sinking fund. The amount in the Guest Suite account was about £2,000 as at the same date.

Summary of Submissions of the parties

13. The homeowner submitted that valid majority votes of the proprietors had been obtained on two separate occasions in consultations organised by the factor. Having regard to clause (FIFTEENTH) of the Deed of Conditions the factor was bound to install the proposed toilet. No party had referred the matter to arbitration within the time limit provided in the Deed of Conditions. It was not necessary for her to go to arbitration where she was one of the majority. The factor had therefore failed to comply with its duty to carry out works approved by a majority of proprietors in accordance with the majority voting provisions of the Deed of Conditions. So far as the location of the proposed toilet was concerned, she inclined to the view that the area presently used as a store was within the Guest Suite but she pointed out that whether the area was taken to be part of the common parts or of the Guest Suite the provisions for majority votes still applied in terms of clause (FIFTEENTH).
14. The factor had taken legal advice before it declined to instruct the installation of the proposed warden's toilet. The factor submitted that the proposed site of the warden's toilet in the storage cupboard is an area that is wholly within the area of the Guest Suite. As such it is excluded from the definition of "common parts" in the Deed of Conditions. Therefore the work that would be required to install the toilet could not be done under the terms of clause (NINTH) which only cover the factor's power to carry out works to the common parts. In any event, the work could not come within the scope of clause (NINTH) as that clause only covers works for repair, maintenance or renewal. The proposed work did not fall into any of these categories.

15. Two arguments were presented by the factor in connection with clause (FIFTEENTH). The factor submitted that the location of the works to install the warden's toilet was within the Guest Suite. Clause (FIFTEENTH) allowed the factor to carry out improvements on a majority vote of the proprietors. The proposed works could not be said to be improvements to the Guest Suite. Therefore this work could not be done under the powers conferred in clause (FIFTEENTH) and the factor was not in breach of any duty by declining to do the work. The second argument was that the homeowner ought to have invoked clause (SIXTEENTH) to refer the matter to arbitration. The homeowner had failed to do so and therefore it was premature to seek to complain under the 2011 Act.

Discussion of issue 1

16. The parties agreed that the Deed of Conditions of 2010 regulates the basis of the factor's appointment in respect of the development. The extent of the factor's duties as factor are to be determined in the first instance from the terms of this deed.

The scheme of the Deed of Conditions

17. The Deed of Conditions sets out a detailed scheme for the management of the development in terms that are often found in developments of this kind. The Deed of Conditions is lengthy and complex. For the sake of brevity, only the most significant provisions for the purposes of this case have been quoted in the findings in fact. There are certain features to be noted from the overall scheme which are relevant to the issues that arise in this case. The definition of "common parts" in the homeowner's title expressly excludes the warden's office accommodation and the Guest Suite as well as the individual dwellinghouses in the development. In addition, it contains specific provisions regarding the Guest Suite. The development is expressly stated to be a sheltered housing development and the on-site presence of a warden during weekdays is envisaged.

18. With the disposal of the flat previously reserved for the warden to a new owner it was no longer available for use by the warden as a matter of course. The homeowner's complaint relates to the factor's refusal to install a separate toilet facility for the warden so that the warden is not dependent either on the guest suite being unoccupied or the goodwill of another proprietor.

19. The committee requires to determine the following matters in its consideration of this issue: - (a) the location of the proposed works within the development; (b) whether the proposed work can be done on a majority vote of proprietors; and (c) whether the work would amount to an "improvement" for the purposes of clause (FIFTEENTH)(b)(i) of the Deed of Conditions.

The location of the proposed works

20. The committee has concluded from its inspection of the site, and its perusal of the title plans and the drawing prepared for the building warrant, that the area where the new toilet would be installed forms part of the common parts and not of the Guest Suite although it is in very close proximity to the Guest Suite. This is a difficult issue mainly because the supplementary title plan shows the lower ground floor area in poor definition. The supplementary plan appears to be a copy of an earlier Sasine title plan. The Guest Suite is shown as a small area coloured pink. Following the inspection, the committee has come to this conclusion having particular regard to the location of the staircase on the supplementary plan. As a cross check the committee also consulted the building warrant drawing which shows the whole area of passageway, staircase and Guest Suite in larger scale than the Supplementary Plan in the Land Certificate. The committee has concluded that the toilet would not be within the area occupied by the Guest Suite although it will be immediately adjacent to it. The arrangements at ground floor level would be that a locked door would lead from the common stair area to an internal passageway from which there would be access to three doors leading to the Guest Suite, the shower facility serving the Guest Suite and the new warden's toilet facility.
21. This factual conclusion is important because clause (FIFTEENTH) of the Deed of Conditions distinguishes the Guest Suite from the common parts. Even though the deed provides that many of the same provisions apply to the Guest Suite, the fact that a clear distinction has been made may affect the meaning of particular provisions. This is significant when considering the terms of clause (FIFTEENTH).
22. The Building Warrant F18 covers two matters. The first is the provision of a spare toilet in place of the existing store cupboard. The second is the refurbishment of the existing accessible shower room. The committee has found that the location of the former is within the common parts as defined in the Deed of Conditions.

The latter is within the area of the Guest Suite as defined in the Deed of Conditions. The factor has refused to carry out any part of the work authorised under the Building Warrant.

Can the work be instructed on a majority vote?

23. Ordinarily as a matter of law where there are a number of co-proprietors any one of them is entitled to veto any particular change to the common parts unless there is express agreement to the contrary.¹ Given that there are a number of proprietors who object to the work being carried out, the factor can only be under a duty to carry out the proposed works if the Deed of Conditions imposes an obligation on him to do so.
24. The factor has proceeded on the basis that the votes of proprietors that it sought were to be treated as equivalent to an instruction from the Property Council. In terms of clause (FIFTEENTH)(d)(iv) the provision for majority voting is stated to apply in relation to votes at meetings of the Property Council. The votes of proprietors established on two separate occasions that there was a clear majority in favour of carrying out the work but not unanimity. The committee has proceeded on the basis that the factor waived the right to insist on a vote being taken at a meeting of the Property Council. This seems to have been a sensible way of proceeding as there is no reason to think that the result would have been materially different if a formal meeting had been convened.
25. The committee agrees with the factor's submission that the proposed work of installation of a new toilet for the warden could not be done under clause (NINTH) of the Deed of Conditions because that clause contemplates only works for repair, maintenance or renewal of the common parts.
26. The committee considers that clause (FIFTEENTH) provides for a departure from the ordinary rule requiring unanimity. As set out at (FIFTEENTH) (b)(i) that departure relates to instructions from the Property Council in relation to "any works of repair or maintenance and any renewals, and also any improvements, of the Common Parts or any part thereof and of ... the Guest Suite". This reinforces the terms of clause (FOURTH)(k) that expressly states that the Guest Suite comes within the Property Council. The proprietors, by virtue of their having agreed to the scheme of the Deed of Conditions, have consented to works that

¹ Gordon & Wortley – Scottish Land Law (3rd ed. 2009) at 15-21.

fall within clause (FIFTEENTH)(b)(i) being done on the basis of a majority vote. Furthermore the factor comes under a duty to carry out any such works once there is a valid majority vote in favour.

Whether the proposed work would amount to an "improvement"

27. The committee considers that the proposed work cannot be described as repair, maintenance or renewal. The remaining category which is subject to majority voting is that of "improvement". Unless the proposed work can be said to constitute an improvement then the factor will only require to carry it out if there is a unanimous decision of the proprietors. The committee considers that an "improvement" in the context of clause (FIFTEENTH) of the Deed of Conditions arises where something new is provided for the benefit of the occupier. This is in contrast to the replacement of something that is already there. The committee considers that this is the plain, ordinary and obvious meaning of the word in this deed.²
28. The committee has concluded that the work to install the new toilet would constitute an improvement of the common parts. If the toilet is installed the warden who has office accommodation upstairs will have a dedicated toilet facility available to her. This is a benefit that is not enjoyed by the common parts as currently set out in the development. The refurbishment of the shower and toilet facility would be an improvement of the Guest Suite.
29. The factor submitted that the area where the whole of the work would be done was within the Guest Suite and not the common parts as defined in the Deed of Conditions. The homeowner also submitted that the area of the proposed work was within the Guest Suite as noted above. Even if the committee is wrong, and the location of the proposed work is wholly within the Guest Suite, clause (FIFTEENTH)(b)(i) expressly extends the provisions for majority voting to include the Guest Suite as set out in the relevant finding above. The factor submits that the proposed work could not be said to amount to improvement of the Guest Suite. The committee does not agree that the proposed work would amount to an innovation that goes beyond the scope of the word "improvements" in clause (FIFTEENTH) so as to require a unanimous decision of proprietors. The new

² The word "improvement" has been construed in this way in a statutory context in *Morcom v Campbell-Johnston* [1956] 1 QB 106 (CA) by Denning LJ at 115. This approach was approved in Scotland in *Stewart's J.F. v Gallagher* 1967 SLT (Notes) 17 (IH) also in a statutory context. These authorities are not binding but they are helpful in confirming the approach that has been taken to the construction of the word in this case.

toilet would increase the facilities available to the warden when she (or he) is on site. If the toilet is treated as part of the Guest Suite that area is improved by the addition of a further toilet. The committee considers that the proposed work would improve the Guest Suite (as opposed to the common parts) because it would enhance the facilities available within the Guest Suite area. Therefore even if the committee's factual finding as to location is wrong, the factor would be failing in its duty by refusing to carry out the works if it is assumed, as submitted by the factor, that the work would be carried out within the Guest Suite.

30. The scheme of the Deed of Conditions also provides in clause (SIXTEENTH) for arbitration on referral by an aggrieved proprietor. This is an important protection for a proprietor who has been outvoted on a matter that would otherwise have required a unanimous vote. That protection is subject to a time limit of 30 days in so far as it applies to decisions made under clause (FIFTEENTH).
31. If the proposed work constitutes an "improvement" it is something that should be done by the factor if there is a majority vote in favour unless the arbitration provisions are invoked by the minority within the stated time limit. The arbitration provision is subject to a tight time limit 30 days which appears at clause (FIFTEENTH)(e). None of the proprietors in the minority sought to refer the matter to arbitration. As a result the decision of the majority became binding on the factor when the time limit expired. Therefore the factor was obliged to do the work and has failed in its duty as factor to this homeowner by refusing to do so.
32. The factor submitted that the homeowner ought to have referred the matter to arbitration. The committee considers that this submission is unfounded. Clause (FIFTEENTH) provides for majority decisions as to improvements. As has been noted this is capable of being subject to a reference to arbitration within 30 days of the decision being made. No such reference was made by a minority proprietor. As a result the factor was under a duty to proceed on the basis that there was a binding majority decision in favour of the work being carried out at the very latest when the 30 day period within which the issue might be referred to arbitration expired. As a member of the majority in favour of the proposal the homeowner was under no obligation to refer the matter to arbitration. The arbitration provision is conceived as a protection for minority proprietors. There is nothing in the Deed of Conditions that suggests that a majority proprietor requires to refer a decision to carry out an improvement to arbitration.

33. The homeowner made submissions as to the meaning of certain title provisions which were based on explanations provided by the solicitors who drafted the deed as to what had been intended when the deed was in preparation. It was pointed out by the chair at the hearing that the general rule is that a formal deed, like the Deed of Conditions in this case, supersedes any earlier informal agreement and it is not competent to refer to these earlier communications and give effect to them.³ The explanations in the solicitors' correspondence which was produced have been of some assistance in understanding the background history of the development. This material does not throw any light on the particular matters for decision that have been discussed above and has not been used to support the interpretation of those parts of the Deed of Conditions that are relevant to the resolution of this issue.
34. The factor's position at the hearing was that it was not bound to carry out the works for the reasons summarised above. The factor made reference in the course of the hearing to potential difficulties in funding the proposed work. In some circumstances it may be that a failure in the part of proprietors to fund works might prevent the factor from carrying out works that were otherwise properly authorised by proprietors. The factor was quite entitled to be concerned about how the work was to be funded given the extent of the dissent amongst proprietors. The factor is not obliged to act as a banker to extend credit to proprietors to fund works within the development. Nevertheless, having regard to the sums held in the sinking fund and as income from the letting out of the Guest Suite, in the present case adequate funds were available to allow the factor to instruct the works without being significantly out of pocket. The factor has substantial powers to recover factorial charges from proprietors under clause (NINTH) of the Deed of Conditions.
35. In so far as the committee has required to consider the proper interpretation of particular title conditions this has been done on the basis that there was no suggestion that the title conditions being relied on were invalid. As noted above, it was a matter of agreement between parties that the factor was bound by the terms of the Deed of Conditions. The committee's decision on Issue 1 relates strictly to the dispute between the homeowner and the factor that has been referred to the committee. In arriving at its conclusion on this issue, and in proposing the draft property factor enforcement order ("PFEO") set out in the

³ McBryde – The Law of Contract in Scotland (3rd ed.2007) paragraphs 8-28 to 8-29.

accompanying notice, the committee does not purport to exercise jurisdiction to over any other persons or to determine the rights of others.

Conclusion on Issue 1

36. This head of complaint upheld. The committee has concluded that the factor has failed to carry out its duty to the homeowner by not proceeding to install the proposed new toilet facility which was voted for by a majority of proprietors. Therefore the committee proposes to make a PFEO. The form of the draft PFEO is contained in the separate notice which is annexed to this Decision.

37. 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 PFEO 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 28 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 PFEO. In normal circumstances the committee would allow a 14 day period for representations. The period allowed has been extended as it is anticipated that the factor may wish to consult other parties.

38. The committee is conscious that the terms of the draft PFEO proposed in the accompanying Notice may be thought to have potentially wider application beyond the interests of the homeowner and the factor who are party to these proceedings. At the hearing the factor did not make any submissions as to whether this committee is prevented from making a PFEO even if it found against the factor on the first issue if such an order would impact on the interests of third parties. There is no power within the procedure regulations of 2012 under which the committee operates for third parties to be convened as parties to any proceedings before a committee. The factor is an agent for all of the proprietors and has submitted that the proposed works could only be carried out if there was unanimity amongst the proprietors in the development. There is now an opportunity for parties to make such further submissions as they think appropriate as to the form of the proposed PFEO. The committee notes that it requires to have regard to the terms of section 19(1)(b) and (3) of the 2011 Act

Issue 2: whether the factor has failed to comply with a duty to have an annual maintenance programme.

39. The homeowner also complains that there is no annual maintenance programme. She stated that the building was looking "very tired" and it is a battle every time maintenance is proposed.

40. Findings in fact on issue 2

- 40.1. Reference is made to findings 12.12 and 12.13 above as to the terms of clauses (NINTH) and (TWELFTH) of the Deed of Conditions. Those findings are incorporated here.
- 40.2. The person responsible for the maintenance of the development within the factor's organisation is Mrs Linda Thomson. She visits the development regularly and observes the state of its repair. On average her visits occur about once a month.
- 40.3. When major items of routine maintenance work are identified as being required they are taken account of in the budget for the next year.
- 40.4. Document H60 is an example of a regular income and expenditure budget drawn up by the factor for the development. It covers the period 01.03.11 to 31.10.11. It includes a detailed schedule of expenditure for the period in question.
- 40.5. Documents F34 and 35 are maintenance schedules for the years 2012 and 2013 respectively which list the factor's activities at the development in tabular form.
- 40.6. Aside from regular inspections by Mrs Thomson the factor relies on notification of any required work by the Warden (House Manager) Mrs Vine or on reports by homeowners in the development.
- 40.7. The factors have provided the proprietors in the development with information about planned maintenance from time to time. Document H61 is an example. It is an extract from the minutes of the Annual General Meeting on 23 November 2011. At that meeting the factors advised that they were obtaining estimates for gutter cleaning and de-mossing of the roof.
- 40.8. Planned items such as internal painting or upgrade of the Door Entry system would be subject to either sanction at an EGM or a mandate procedure.

Summary of the submissions of the parties

41. The homeowner's submissions were to the effect that the work carried out at Millbrae Gardens is predominantly repairs. An Annual Maintenance Programme would be designed to keep the development well maintained and include provision as appropriate for such items as gutter, roof, drains, internal and external painting. Reference was made to document H61.
42. The factor submitted that there was no specific provision in the Deed of Conditions that required there to be an annual maintenance programme. Reference was made to document H60. The factor contended that the measures it took amounted to a system that allowed it to comply with its duties to the homeowner. The system of inspection used for this development was similar to that used by them in other developments. The factor acknowledged that the demise of the quarterly meetings with homeowners had reduced the extent of communication taking place about what the factor was doing in the development.

Discussion of Issue 2

43. The factor was correct to submit that on the evidence there did not appear to be any specific breach of any provision of the Deed of Conditions. The evidence as to the regularity of the visits to the development by Mrs Thomson was uncontradicted. The system of inspection spoken to by the factor's witnesses was sufficient to amount to compliance with the obligations of the factor as these are set out in clauses (NINTH) and (TWELFTH) of the Deed of Conditions. Their actions were also in line with the requirements set out in the factor's Written Statement of Services which was set out in the first section of its Terms of Service & Delivery of Standards document.
44. The committee concluded that the system used by the factor is adequate in the circumstances and there is no breach of duty on its part.

Conclusion on Issue 2.

45. This head of complaint is rejected. The committee finds that there is no failure to comply with the factor's duties in respect of this particular complaint. The system employed by the factor was sufficient for compliance with its duties under the Deed of Conditions.

46. Although this complaint was rejected the committee considers it appropriate to make some observations about the issues giving rise to it. The committee would suggest that the factor should give further thought to improving communication with homeowners in the development.
47. The factor had to discontinue using quarterly meetings as a means of communication because of problems outlined above. It may be that the provision of more information in writing on a regular basis would prevent the impression being given that the factor was merely reacting to events rather than deploying a conscious strategy. It might also consider adopting as a form of good practice a more systematic approach than at present.
48. The committee has considerable sympathy with the factor who has had to deal with a divided community. The difficulties within the community has led to the factor no longer attending as many meetings with homeowners as was previously the case. The factor had good reason for curtailing the use of meetings as a means of communication with the homeowners in the development.
49. Notwithstanding this, this particular complaint might be seen as a signal that some homeowners have gained the impression that there has been drift and a degree of neglect on the part of the factor. Given this difficulty it is important for the factor to use other ways of keeping homeowners up to date with developments in its factorial service. For instance, a regular newsletter might be one method of achieving more effective communication.

Issue 3: the failure to install warden call systems in flats that do not have this system.

Findings in fact on issue 3

- 49.1. The Deed of Conditions does not specify that there should be a warden call alarm system in each flat in the development. There is no provision in the Deed of Conditions that entitles the factor to enter individual flats to install a warden call system.
- 49.2. As at 2007 there was an alarm system serving flats in the development which was becoming obsolete. There was difficulty obtaining necessary parts for repair.

- 49.3. On 27 November 2007 at an Annual General Meeting by a majority of 19 to 2 with 2 abstentions, on the recommendation of the factor, the proprietors voted to install a new warden call pull cord system to be supplied by Initial. This was to replace the existing obsolete system. This is recorded in the minutes which is document H42.
- 49.4. The warden call system consists of a pull cord in each room of the flats in the development and a speech unit in the hall of the flat. Each flat where the system is installed is linked to the main unit in the warden's office. In the event of an emergency the resident could pull a cord to call the warden. If the warden is on duty he/she has a mobile pager to receive calls in any part of the development. When the warden is off duty the call is diverted to a central alarm service administered by Bield Housing Association.
- 49.5. On 30 June 2008 there was further discussion of this issue at a Property Council meeting. The factor stated that it had recommended having a new system installed and described it as a "core facility" that must be there and kept in good working order. This is recorded in the minutes which is document H43.
- 49.6. A number of proprietors objected to the installation of the new system notwithstanding the vote at the meeting of 27 November 2007. On 17 September 2008 the factor wrote to all proprietors regarding the implementation of the proposal to install a new warden call alarm system. An example is document H47. Proprietors were given the opportunity to partake in the upgrade or to have their property put aside and no warden call alarm system included.
- 49.7. On 25 November 2008 the matter was discussed again at a Property Council meeting. The factor stated that as each apartment became vacant the upgrade in the alarm system would go ahead. This is recorded in the minutes which is document H55.
- 49.8. On 23 November 2011 at an Annual General Meeting the issue was discussed again and it was agreed that as each property is sold the new owner would be required to have the alarm system fitted. This is recorded in the minutes which is document H18.

49.9. From time to time on the sale of flats in the development the factor has offered the new owner the opportunity to have an upgraded warden call alarm system installed.

49.10. As at the date of the hearing thirteen flats in the development have the upgraded warden call system installed. Five flats have the benefit of an alternative alarm system administered by Glasgow Council.

49.11. The homeowner and her husband opted not to install the alarm system when it was offered to them on costs grounds.

Summary of the submissions of the parties

50. The third complaint made by the homeowner makes reference to alarms being a "core element". She complains that alarms are only installed in about 50% of the flats in the development. The factor had given an indication that when any flat without an alarm is vacated an alarm would be installed. This had not been done in respect of any flat. The homeowner accepted that the Deed of Conditions did not contain any provision relating to alarm systems but argued that the provision of an alarm system was a core burden that required that the factor put in place a suitable alarm system. Reference was made to the terms of section 54 of Title Conditions (Scotland) Act 2003.
51. The factor submitted that it had no power in terms of the titles to require individual proprietors to install an alarm system. On account of the opposition it had encountered, and in the absence of any power to enforce installation in individual flats, proprietors had been given the option to opt in or out in 2008. It had tried to persuade new proprietors of flats that did not have the system to install the system but with little success. Similar systems are in place throughout other sheltered housing developments which are factored by them.
52. In a supplementary letter dated 6 November 2013 the factor maintained that the Deed of Conditions contained no "core" burden that confers an obligation on them to provide or install the system where it does not exist. Section 54 of the 2003 Act is concerned with the variation or discharge of real burdens not enforcement of existing burdens. There is an existing remedy in clause (SEVENTEENTH) should the homeowner wish to seek to have the burdens applicable in this development amended to ensure that an alarm system is

available in every flat. The Homeowner Housing Panel is not the correct forum or procedure to seek to have existing burdens amended.

Discussion of Issue 3

53. An alarm system in a sheltered housing development provides 24 hour emergency cover either by the warden when on duty or by linking in to a remote central alarm service. In this case Bield provided the emergency cover.
54. There is no provision in the Deed of Conditions that requires alarms to be installed in every flat. As a result the factor is correct to submit that it had no power to force owners to install the system within flats that are their exclusive property. The homeowner's argument proceeds on a misunderstanding of the terms of section 54 of Title Conditions (Scotland) Act 2003. This section contains special provisions in relation to burdens imposed on sheltered housing complexes. By section 54(4) any real burden that regulates the use, maintenance, reinstatement or management of a facility or service which is one that would make a sheltered or retirement housing development particularly suitable for such occupation is referred to as a "core burden". The section provides for enhanced majorities in relation to certain matters.
55. In this case the factor referred to the alarm system as a "core facility" at a Property Council meeting in 2008. It may be that this usage may have inadvertently created a degree of confusion because it chimes with the terms of section 54.
56. The difficulty with the basis of the homeowner's argument is that there is no provision in the Deed of Conditions that imposes a burden of the kind that is covered by section 54. Section 54 has no applicability to the circumstances of this case. The factor does not have power to compel individual owners to install an alarm system that they do not want within flats that are their exclusive property no matter how desirable that might be in the interests of the development as a whole.

Conclusion on Issue 3

57. This head of complaint is rejected. The committee finds that there is no failure to comply with the factor's duties in respect of this particular complaint. The factor

does not have power to impose installation of warden call system equipment on individual proprietors in the development.

General Observations arising from this case.

58. In the course of the hearing some issues arose that make it appropriate for the committee to make some general observations that may be of benefit to others.
59. At one stage the factor indicated that no further steps had been taken to deal with some of the matters that had been referred to the committee. For the avoidance of doubt issues which are the subject of a complaint to the Homeowner Housing Panel do not require to be placed on hold while an application is before a Homeowner Housing committee. If parties find common ground that allows them to resolve disputes without the need for the intervention of a committee then that is be encouraged.
60. If prior to a hearing either party is concerned about lack of fair notice on any issue that party should consider whether to ask the committee to which the case has been referred to issue a Direction under Regulation 13(1). The President of the Homeowner Housing Panel has issued guidance for those wishing to seek direction. This is contained in her Practice Direction Number 1 of March 2013. It is available on the panel's website.
61. Finally the committee wish to record that the hearing was conducted in a respectful and co-operative manner by both parties. A large number of other interested homeowners in the development attended the hearing. There is no doubt that from time to time the factor is faced with a challenging and delicate task as factor of this development. It is to be hoped that the airing of the issues which have been dealt with in this decision will assist all interested parties to work together in future for the benefit of the development as a whole.

Appeals

62. 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..."

P D Emidio

Signed..... Date... 12 March 2014.....
Chairperson



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

Hohp Ref: HOHP PF/13/0061

Re: Property at Guest Suite, 2 Millbrae Gardens, Glasgow, G42 9UY ("the property")

The Parties:-

MRS JEAN CONNOLLY, 8/2 Millbrae Gardens, Glasgow, G42 9UY ("the homeowner")

GRANT & WILSON PROPERTY MANAGEMENT LIMITED, 65 Greendyke St, Glasgow, G1 5PX ("the factor")

Committee members:

**Pino Di Emidio (Chairperson)
Susan Napier (surveyor member)
John Blackwood (housing member)**

Property Factor Enforcement Order issued following a decision by a Committee of the Homeowner Housing Panel dated 25 September 2013 in terms of section 19(3) of the Property Factors (Scotland) Act 2011 (the 2011 Act").

1. In its decision dated 12 March 2014 and issued to the parties on [insert date] 2014 the committee upheld the homeowner's complaint in respect of the first issue raised in case number HOHP/PF/13/0061. It found that the factor had failed to carry out the property factor's duties to the homeowner in certain respects as specified in paragraph 37 of its decision and proposed to make a property factor enforcement order as stated in paragraph 38.
2. The required notice of the terms of the proposed property factor enforcement order as required in terms of section 19(2)(a) of the 2011 Act was given to the parties in paragraph 38 of the decision dated 12 March 2014. [Summary and

discussion of any representations have been received from the parties to be inserted here].

The Property Factor Enforcement Order

3. Therefore the committee makes the following property factor enforcement order in respect of case number HOHP/PF/13/0061.

Within 3 months of the date of communication to the factor of the property factor enforcement order, the factor must complete the alteration to the existing layout at the lower ground floor level at 2 Millbrae Gardens Glasgow to provide a spare toilet in place of a store and to refurbish the existing accessible shower room all conform to building warrant number 11/01782/BW granted by Glasgow City Council on 27 September 2011

Appeals

4. 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..."

Signed... **P D Emidio**Date, 12 March 2014
Chairperson

