



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

Reference: HOHP/PF/13/0062

**Property at Flat 105 Whittinghame Court, 1300 Great
Western Road, Glasgow, G12 OBH ("the Property")**

The Parties:

**John McGee, Flat 105 Whittinghame Court, 1300 Great Western Road,
Glasgow, G12 ("the homeowner")**

**Murphy Scoular, 22-24 John Finnie Street, Kilmarnock, KA11 1DD ("the
factor")**

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

Committee Members

**Martin McAllister (Chairperson), Sara Hesp (Surveyor Member) and Scott
Campbell (Housing Member)**

Decision of the Committee

**The Committee, having made such enquiries as it saw fit for the purposes of
determining whether the factor has**

(a) Complied with the property factor's duties in terms of the Property Factors (Scotland) Act 2011 ("the 2011 Act") and

(b) Complied with the Code of Conduct for property factors, as required by Section 14 of the 2011 Act

Determined that, in relation to the Homeowner's Application, the factor has complied with the property factor's duties from 1st October 2012 and complied with the Code of Conduct between 8th February and 2nd April both 2013.

Background

1. The factor's date of registration as a property factor is 8th February 2013.
2. By application dated 2nd April 2013 the homeowner applied to the Homeowner Housing Panel ("the Panel") for a determination that the factor had failed to comply with sections 6.1 (having in place procedure regarding notification of repairs and requirements to communicate with homeowners in connection with work being carried out including timescales and costings) and 6.9 (pursuing contractor to remedy defects in 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 did not ensure that work done to the common parts of the building of which the Property forms part was actually carried out and that the homeowner has been charged for work not done and which he had to do himself. This application has been given the case number HOHP/PF/13/0062.
3. By Notice of Referral dated 16th April 2013 the President of the Panel intimated that she had decided to refer the application to a Homeowner Housing Committee ("the Committee").
4. The Committee issued a Preliminary Direction on 28th May requiring the Homeowner to provide a copy of the relevant Land Certificate or titles by 11th June 2013.
5. The Homeowner provided a copy of the Land Certificate for the Property prior to 11th June 2013.
6. Following service of the Notice of Referral, the factor made representations which are contained in a letter dated 29th April 2013.

Hearing

7. A hearing took place in respect of the application on 19th May 2013 at 5 Atlantic Quay, 150 Broomielaw, Glasgow. The Homeowner appeared on his own behalf and was supported by his friend Ms Anderson who was not a witness. The factor was represented by Mr Brian Murphy, a partner of the firm Murphy Scoular.

Preliminary Issue

8. The Committee indicated to the Homeowner that, in respect of the aspect of his application relating to the factor's failure to comply with the Code, it could only consider any failures between the date of the factor's registration in the register of property factors which was 8th February 2013 and 2nd April 2013 which was the date of the Homeowner's application. The Committee also indicated to the Homeowner that, in respect of allegations of failure to carry out the property factor's duties, it could only consider matters after 1st October 2012. The Committee explained the terms of the transitional arrangements contained in Regulation 28 of The Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012:

"28- (1) Subject to paragraph (2), no application may be made for determination of whether there was failure before 1st 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."

9. The Homeowner indicated that his complaints really were about a period prior to 1st October 2012 although there was correspondence with the factor after that date.
10. The Homeowner was granted a short adjournment to gather his papers together and consider matters. When the Committee reconvened the Homeowner confirmed that he wanted to proceed with his application and the hearing progressed.

Findings in Fact

11. The Committee finds the following facts to be established:-

- (a) The applicant is the heritable proprietor of the property known as Flat 105 Whittinghame Court, 1300 Great Western Road, Glasgow G12 OBH. The property is registered in the Land Register of Scotland under Title Number GLA83149.
- (b) The property forms a fifth floor flat in a block of thirty six flats (the "Block ") which was built around fifty years ago. It is of concrete construction with facing brick and a flat roof. The flats in the Block have balconies.
- (c) The relevant Deed of Conditions recorded in the General Register of Sasines on 9th April 1957 imposes a general duty to maintain the common parts of the block of flats.
- (d) The Disposition in favour of Gertrude Hutchison Strachan or Carmichael recorded in the General Register of Sasines on 5th December 1964 contains relevant burdens. Mrs Carmichael was the first purchaser of the Property from the developer. The Disposition inter alia contains the following provisions which can be found on page D14 of the Land Certificate:
- "(Fourth) the proprietors of a majority of the flatted dwellinghouses in the said building shall be entitled (One) to decide what mutual repairs are necessary for the proper maintenance of the common portions of said building and the said plot of ground and to have the said mutual repairs executed and all the proprietors interested whether consenters or not shall be bound to pay the respective shares of the expense thereof as if their consent had been given; (Two) to recover from the remaining proprietor or proprietors his or their share or shares of the said cost of any necessary expense incurred in so doing.....(Three) to appoint a common factor to manage the said building and pertinents and to fix the remuneration of such factor and such appointment shall be binding on and the remuneration of such factor shall be payable by the said disponent and her foresaid sans the said other proprietors in equal shares..."
- (e) The factor is appointed annually to act at a meeting of proprietors of the Block.
- (f) The factor became a registered property factor on 8th February 2013 and its duty under Section 14(5) of the 2011 Act to comply with the Code arises from that date.
- (g) The Homeowner's application is dated 2nd April 2013.

- (h) The Homeowner seeks repayment of charges for pointing work to common parts of the Block rendered for the charging periods 30th June 2010, 31st March 2011 and 31st March 2012 and comprising £70.50, £40.00 and £10 respectively. The Homeowner has paid these charges which total £120.50.
- (i) The pointing of the Block failed in a number of places as a result of age and exposure to weather. The balcony areas of flats are particularly vulnerable to pointing failure. The structure of the balconies excluding the tiled floors and windows are common to all the proprietors in the Block.
- (j) The proprietors of the Block have determined that re- pointing work be carried out when required. Such work is agreed by a committee of proprietors and does not proceed until approval is given.
- (k) In 2010, 2011 and 2012, work was carried out to remedy the pointing defects. The pointing work was done to common areas adjoining a small number of flats.
- (l) Some pointing work was carried out without estimates being obtained and some work was done subsequent to estimates being obtained but final invoices for such work sometimes exceeded the estimates.
- (m) No pointing work was carried out after 1st October 2012
- (n) No charges in respect of pointing work were applied to the Homeowner's common charges account after 1st October 2012.
- (o) The Homeowner was asked to allow access to a contractor to allow his balcony to be inspected. No such access took place.
- (p) The Homeowner has carried out pointing work to the balcony of his flat.
- (q) The factor provided the Homeowner with a Written Statement of Services on 4th March 2013.
- (r) The Homeowner complained to the factor about being charged for pointing work which he said was not done. The Homeowner wrote to the factor on the matter on 9th December 2012 and the factor responded on 13th December 2013. There was subsequent

correspondence between the factor and the Homeowner on 22nd December 2012, 8th January, 6th February, 11th February and 27th February all 2013.

Reasons for the Decision

12. (a) Mr McGee complains that the factor has failed in the duties imposed by sections 14 and 17 of the 2011 Act. His issues with the factor are focused. He considers that the factor has failed to get estimates for pointing work that has not been done to the balcony of his property as part of the repointing work done to the Block and that, as a consequence, he has had to carry out work himself. He also considers he has been charged for work not done and wants reimbursement of charges amounting to £120.50 paid in 2010, 2011 and 2012.
- (b) In his application Mr McGee stated that the factor is appointed at the proprietors' A.G.M. and that the factor manages the Block in accordance with the title deeds and plans approved by the A.G.M. The application also states that the Proprietors' Committee approved the commencement of the pointing work. In evidence Mr McGee stated that he raised his concerns at the annual general meeting of proprietors and that no one seemed to share them.
- (c) Mr McGee stated in evidence that most of his complaints about the factor related to matters prior to 1st October 2012 and that the period after 1st October 2012 was not the basis of his complaint.
- (d) Mr McGee said that it had been decided that re-pointing work needed to be done and that his flat was part of the scheme of work to be carried out. He said that he had done the work himself because the contractor had not carried it out. His application stated that he considered that the factor had not got estimates when he should have and that no such work was ever executed. It was accepted by him that he had not allowed access to a contractor because he had carried out the pointing work himself and he stated that he now did not want the builder to do work to his balcony because it was too late and he had done the work himself.
- (e) Mr McGee said that he knew pointing work had been carried out on other parts of the building and that a cherry picker had been used. He said that for the work to the balcony of his flat he did not think that a cherry picker would have been needed.

- (f) Mr McGee said that he wanted reimbursed for the charges which he paid for the charging periods of 30th June 2010, 31st March 2011 and 31st March 2012. These amount to £120.50
- (g) Mr McGee's oral evidence was entirely consistent with his application and the documentary evidence he had submitted.
- (h) Mr Murphy had set out the factor's position in the letter of 29th April 2013 and this was supplemented by his oral evidence. He explained that the building is approaching fifty years old and that re-pointing of some brickwork is required from time to time. He said that the Block is H shaped and that, as a consequence of this, some flats are more exposed than others. It is of a concrete construction with facing brick. Balconies are particularly vulnerable to weathering and the approach that the proprietors have approved is that balconies are considered to be common but the tiled floor and windows are the responsibility of the individual proprietor.
- (i) Mr Murphy said that dampness in various properties had been identified in 2009 /2010. He said that pointing work had been done and that this had been effective in resolving the issues for proprietors experiencing dampness problems. Mr Murphy said that Lomond Roofing had been instructed. He said that estimates were not always appropriate because it was often not known what work was needed until an inspection had been carried out using a cherry picker and that, even where there were estimates, more work sometimes had to be done. He said that any pointing works did not proceed unless they were approved by a committee of the proprietors. Mr Murphy stated that he considered that the repointing work had been properly carried out and that it was done in 2010, 2011 and 2012. He accepted that the contractor had carried out no work to the balcony to Mr McGee's flat.
- (j) Mr Murphy said that the contractor had been unable to get access to Mr McGee's flat and that such access had been required because of a downstairs neighbour who had been experiencing dampness in her property and inspection was needed to ascertain the source of the dampness. He said that if Mr McGee had approached him for reimbursement of costs he had incurred in doing work himself then he would certainly have considered it.
- (k) Mr Murphy gave his evidence in a clear way and was able to give useful assistance to the Committee with regard to the construction and condition of the Block.

- (l) The correspondence between the factor and the Homeowner was considered. The letter of 13th November 2012 from the factor to Mr McGee was in relation to arrangements for access. Mr McGee's letter in response raised issues about the pointing and all involving a period prior to 1st October 2012 and it also dealt with issues surrounding access. The factor's letter of 13th December 2012 responded to issues raised by the Homeowner and the factor's letter of 8th January 2013 suggested that the factor meet Mr McGee. The factor's letter of 11th January was in relation to the contractor failing to get access to Mr McGee's flat. The factor's letter of 17th January responded to concerns raised by Mr McGee.
- (m) The position of Mr McGee and Mr Murphy differed in relation to whether Mr McGee had been properly charged for the re-pointing. Mr Murphy said that work was done to common parts of the Block and Mr McGee said that work charged for was not done and, in relation to work carried out, estimates should have been obtained. Whilst accepting that both Mr Murphy and Mr McGee were credible and reliable witnesses and were truthful in stating what they considered the position to be the, Committee was not required to make a judgement on which evidence it preferred on this matter.
- (n) The Committee considered that it could not deal with the substantive part of the Homeowner's application because his concerns about the pointing, whether or not it had been done, whether or not estimates should have been obtained and whether or not he should have been charged arose from circumstances for periods prior to 1st October 2012. There was nothing in correspondence after 1st October 2012 or action or inaction of the factor after that date which supported the Homeowner's view that there had been a failure to carry out the property factor's duties. In respect of the possible failure to comply with the Code of Conduct the Committee could only consider the period from 8th February to 4th April both 2013- the dates between property factor registration and the application by the Homeowner. The Committee had no evidence before it to support the allegation that there had been breach of the property factor's duties for this period. It was noted that the Homeowner appeared to accept at the commencement of the hearing that he did have difficulties with his application because the essence of his complaint predated the commencement of the 2011 Act.
- (o) The Committee examined the terms of Regulation 28 of the Regulations and considered that it required to apply Regulation 28 (1) since the alleged failure to carry out the property factor's duties was prior to 1st October 2012. It did not consider that Regulation 28 (2) was relevant in the particular circumstances of the application before it.

- (p) The Committee found nothing in correspondence between Murphy Scoular and Mr McGee in the period between 8th February 2013 and 2nd April 2013 which indicated that the factor was in breach of Sections 6.1 and 6.9 of the Property Factor's Code of Conduct and Mr McGee led no evidence with regard to alleged breaches of the Code for this period.
- (q) The Committee therefore finds that the Homeowner has not proved that the factor has failed to comply with the Code of Conduct or failed in the Property Factor's Duties. The decision is unanimous.

Decision

The Committee determined that, in relation to the Homeowner's Application, the factor has complied with the property factor's duties from 1st October 2012 and complied with the Code of Conduct between 8th February and 2nd April both 2013.

Appeals

The parties' attention is drawn to the terms of section 21 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides:

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

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

Martin McAllister

Signed, / /

Date.....2.7.June 2013

Chairperson