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

HOHP Reference: HOHP/PF/13/0001, HOHP/PF/13/00010 and HOHP/PF/13/00011

Re: Property at 50, 52 and 54 Leven Road, Royale Court, Hamilton, ML3 7WS (collectively described as "the Property")

The Parties:-

COLIN PARK residing at 2 Denbeath Court, Ferniegair, Hamilton, ML3 7TR ("the Homeowner")

HACKING & PATERSON MANAGEMENT SERVICES, Property Factors, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ("the Factor")

Decision by the Committee of the Homeowner Housing Panel in an application under Section 17 of the Property Factors (Scotland) Act 2011

Committee Members
Ewan Miller (Chairman); Mary Lyden (Housing Member); and Carolyn Hirst (Housing Member).

Background

1. By applications dated 21 December 2012 and 14 January 2013 the Homeowner applied to the Homeowner Housing Panel ("the Panel") to determine whether the Factor had failed to comply with the duties imposed upon the Factor by the Property Factors (Scotland) Act 2011 ("the Act").

2. The three applications by the Homeowner were, in essence, identical in form and substance. Accordingly, the Committee determined, as they were entitled to do, to conjoin the applications and hear them together in terms of paragraph 9 of the Homeowner Housing Panel (Applications & Decisions) (Scotland) Regulations 2012 ("the Regulations").

3. The applications by the Homeowner alleged failings on the part of the Factor. Firstly, that the Factor had breached the Code of Conduct for Property Factors ("the Code") and, in particular, Section 2.1 on Communication and Consultation which provides that "you must not

provide information which is misleading or false". Secondly, the Homeowner alleged that the Factor had failed to comply with the property factor's duties as defined in Section 17(5) of the Act. The allegation related to an alleged failure on the part of the Factor to adhere to a Deed of Conditions by Persimmon Homes Limited dated 6 November 2007 ("the Deed of Conditions") in place over the Property and which burdened the title to the Property and the other dwellings within the development within which the Property was located. The Deed of Conditions set an initial deposit ("float") of £100 which the Factor had made a decision to increase this to £200.

4. By letter dated 21 January 2013 the President of the Panel intimated her decision to refer the application to a Homeowner Housing Committee.

5. Following referral by the President of the Panel of the application to the Homeowner Housing Committee, the Factor, by letter dated 19 March 2013 and formal applications dated 18 April 2013, made formal application to the Committee requesting preliminary directions under paragraphs 13(1) and 13(3)(d)(i) of the Regulations. Copies of the requests and the directions issued in response by the Committee are annexed hereto.

Hearing

A hearing took place at the offices of the Panel, Europa Building, 450 Argyle Street, Glasgow on 2 May 2013 before the Committee.

The Homeowner represented himself. He gave evidence and called no witnesses.

The Factor was represented by Mr David Lennox, one of their Directors. He gave evidence on their behalf. He called no witnesses.

Preliminary Jurisdictional Issue

As set out in the Factor's request for a preliminary direction dated 19 March 2013 and the subsequent preliminary direction issued by the Committee dated 12 April 2013, an issue arose in relation to whether the Committee had jurisdiction to hear the Homeowner's complaint against the Factor.

In summary, the Factor's contention was that the complaint by the Homeowner should not have been referred to the Committee by the President of the Panel. The Factor's argument, as led by Mr Lennox at the Hearing, was that the test set out in Section 17(3)(b) of the Act had not been met. The President of the Panel therefore had not had the power to refer the matter to the Committee.

Section 17(1) of the Act gives the right to a homeowner to apply to the Panel for a determination of whether a property factor has failed (a) to carry out the property factor's duties as later defined in Section 17 and/or (b) to comply with the Code.

Sub-section (2) states that any application under Section 17(1) must set out the homeowner's reasons for considering that the property factor had failed to carry out the property factor's duties or to comply with the Code.

Sub-section (3) goes on to state that no such application may be made to the Panel unless (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with duty under Section 14 (being the obligation to comply with the Code); and (b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.

It had been accepted by the Factor in prior communications with a Mr Watt, another Director of the Factor, that the Homeowner had complied with the requirement in 17(3)(a) i.e. that the Homeowner had notified the Factor in writing as to what the Homeowner considered the Factor's failings were. It was the Factor's contention, however, that the test in 17(3)(b) had not been met. The Factor took the view that they had not refused to resolve the Homeowner's concern and accordingly the Committee did not have any jurisdiction as the President of the Panel had no power to refer the case to a Committee.

The essence of the Factor's argument was that they had not "refused to resolve" the Homeowner's concern. In the submission of the Factor, they had responded to all the issues raised by the Homeowner in a thorough and professional manner and within the timescales set out in their complaints handling procedure. Accordingly, they were of the view that the application could not proceed as they had not refused to resolve the concern.

The Committee accepted that the Factor had complied with their internal complaints handling procedure. The Committee was also satisfied that they had responded within the appropriate timescales and in a professional manner.

The issue, from the Committee's perspective, was that complying with a complaints handling procedure and responding in an appropriate fashion did not, of itself, mean that a factor was not refusing to resolve a homeowner's concern.

It appeared to the Committee that the Factor had fundamentally misunderstood the words "refused to resolve" in the context of Section 17 of the Act and how that interacted with a complaints handling procedure. The processing of a complaint can be appropriately dealt with within the framework set out in a complaints handling procedure but, unless the outcome of that procedure is that the underlying substance of the complaint is addressed and dealt with to the satisfaction of the homeowner, then it is highly unlikely that the concern of the homeowner will have been resolved. The test of "refused to resolve" is not whether the complaints handling procedure has been followed but rather whether a factor is refusing to resolve the underlying concern of a homeowner that was the cause of the complaint in the first place

The following question was put to the Homeowner by the Committee during the course of the Hearing – "Had the concerns he had raised been resolved by the Factor in their responses to his complaint?" The Homeowner replied that they had not. Mr Lennox conceded that whilst the complaints handling procedure had

been followed they did not view the Homeowner's complaint as justified and, therefore, had not and did not intend to take any further steps to rectify any of the concerns the Homeowner had raised.

Accordingly, whilst the sub-committee was satisfied that the Homeowner's complaint had generally been dealt with in an appropriate manner within the complaints handling procedure, nonetheless, the underlying dispute between the Homeowner and the Factor had not been resolved. It was clear that the Factor did not intend to do anything further to try to resolve the dispute. The Committee did note that the Factor had failed, at the end of the complaints process, to make it clear to the Homeowner that the complaints process had been exhausted and to signpost the Homeowner to the Panel. The Committee also found it somewhat surprising that the Factor's instructed solicitors to recover the alleged debt whilst the Homeowner's genuine grievance was still, as far as the Homeowner was concerned, a live issue with the Factor.

Accordingly the Committee had no difficulty in determining that the Factor had refused to resolve the Homeowner's concern. It would be a ludicrous situation if, simply by going through the mechanics of a complaint handling procedure, property factors were then able to defeat the prospect of any complaint coming before a Committee under the terms of Section 17(3)(b) by arguing that because they had listened to the homeowner's concern they cannot be held to have refused to resolve the concern. The relevant issue is the outcome of the complaints handling procedure and whether, as a result of this, the homeowner's concern has been resolved. The Factors argument that the correct processing of a concern through the complaints handling process meant that a factor had not "refused to resolve" was an untenable one.

The Committee also noted that in referring the matter to a Committee the President of the Panel had little discretion. Section 18(2) of the Act sets out the only circumstances in which the President may reject an application. These are (a) that the application is vexatious or frivolous; (b) that the homeowner has not afforded the property factor a reasonable opportunity to resolve the dispute; (c) where the homeowner has previously made an identical or substantially similar application in relation to the same property, that a reasonable period of time has not elapsed between the applications; or (d) that the dispute to which the application relates has been resolved.

It was accepted by the parties and by the Committee that none of the four circumstances in Section 18(2) were applicable to the Homeowner's application.

The Committee was of the view that it is not the role of the President of the Panel to determine applications. The role of the President, in relation to applications received, is to determine whether there is prima facie evidence that there is a dispute that meets the test in Section 17. The Committee was in no doubt that, on the face of the papers received by the President of the Panel, it did appear that the Factor had refused to resolve the Homeowner's concerns. Accordingly, and barring none of the circumstances highlighted in Section 18(2) being present, the President had acted appropriately in referring the application to the Committee. Having heard the Factor's position on whether they had refused to resolve the actual substance of the complaint or not, the Committee was satisfied that the Factor had indeed refused to resolve the complaint.

A subsidiary point had arisen in relation to the question of "refused to resolve". This was not discussed in any detail at the Hearing but from the Factor's written submissions it was noted that they had highlighted that paragraph 5(f) of the Regulations (dealing with the details required in an application to the Panel) state that a homeowner's reasons for considering that the property factor has failed to resolve a homeowner's concern must be stated. The Factor had noted that the wording was different in that the Regulations state "failed to resolve" whereas Section 17(3)(b) states "refused to resolve". The Committee did not attach any particular weight or significance to this point. The purpose of the Regulations was to flesh out the practical steps that needed to be taken by a homeowner to bring forward a complaint to the Panel. Whilst it might have been helpful for the wording between the Regulations and the Act to match, the Committee was satisfied that it was sufficient that in an application to the Panel a homeowner sets out the reasons for the concern arising. The fundamental test to be applied is that set out in Section 17(3) and the Committee was satisfied that the test had been applied correctly.

Decision in relation the Preliminary Jurisdictional Issue

The Committee is satisfied that (a) the President of the Panel did have the authority to refer the application to a Committee in terms of Section 17(3) and that the Committee had jurisdiction to determine whether or not the Factor has failed in the duties set out in Section 17(1) of the Act and (b) the Factor had refused to resolve the Homeowner's concern and the test set out in Section 17(3) had been met.

The Committee, having satisfied itself on the preliminary issue of jurisdiction then proceeded to hear the remainder of the parties submissions on the substantive issues before it.

Homeowner's Submission

The Homeowner's submission was straightforward. The Homeowner was of the view that the Factor was bound to comply with the Deed of Conditions in their provision of factoring services to the homeowners.

The Deed of Conditions set out the provisions regarding the removal of any factor by the homeowners within the development of which the Property formed part. Rule 18 of the Deed of Conditions specified that a meeting would not be quorate unless 33% of the proprietors entitled to attend were present. Rule 20 of the Deed of Conditions specified that, at a quorate meeting, the proprietors could determine, by a simple majority, to dismiss the factor. The Homeowner's submission was that the obligations in the Deed of Conditions contrasted with that set out in the Terms of Service and Delivery Standards ("the Terms of Service") issued by Hacking & Paterson to the proprietors within the development on 22 October 2012. This stated that a majority of homeowners or the factors may terminate the property factoring arrangement upon 3 months' prior written notice or earlier by agreement. The Deed of Conditions and the Terms of Service conflicted in that the Terms of Service did not highlight that to be quorate 33% of proprietors would need to be present and then make a majority decision. The Terms of Service simply stated it was a majority. Further,

the 3 months' prior written notice provided for in the Terms of Service was not replicated in the Deed of Conditions.

The second issue raised by the Homeowner was in relation to the float required. The Deed of Conditions specified at Rule 23.2 that the float was £100 or such other sum as may be fixed in accordance with Rule 20.1(i) of the Deed of Conditions. Rule 21.1 of the Deed of Conditions gave power to the proprietors within the development to fix the level of the float. In contrast, the Terms of Service produced by the Factor reserved power to review and vary the float to the Factor rather than being a decision of the homeowners within the development. The Homeowner's submission was that he was bound by the terms of the Deed of Conditions and so was the Factor. The Factor had been appointed by the original developer of the development in accordance with the terms of the Deed of Conditions. Therefore, the Factor, in providing services to the homeowners within the development, also required to act in accordance with the Deed of Conditions.

Factor's Submissions

The Factor's submission was that they were not bound by the Deed of Conditions as the Factor was not a party to the Deed of Conditions and therefore could not be bound by it.

The Factor submitted that their contractual arrangements with the homeowners in the development were as set out in the Terms of Service of 22 October 2012. This, in the Factor's submission, set out the contractual arrangement that existed by custom and practice. The Factor's submission was that they had been acting on this basis with homeowners in the development throughout their relationship with them. This has been formalised, as a result of the Act and the Code coming into force, by the issuing of the Terms of Service which simply reaffirmed the pre-existing basis of their authority existing by custom and practice.

The Factor's submission was that if they did not have the flexibility set out in the Terms of Service then they would be severely restricted in their ability to properly carry out factoring duties in accordance with the principles of good estate management.

The Factor highlighted that unless the float level was increased the factoring account would operate in deficit. The Factor was of the view that it was not for them to subsidise the factoring account and that if appropriate float levels were not retained in developments generally then eventually the housing stock would start to suffer. Accordingly the Factor was firmly of the view that they were acting in an appropriate and moral fashion in seeking to increase the float level to ensure sufficient funds were held by them at all times.

Issue to be resolved

The Committee was of the view that the issue to be resolved could succinctly be described as determining the basis on which the Factor had authority to act on behalf of the homeowners within the development.

The Factor either derived their authority from their appointment under the Deed of Conditions by the original developer or from pre-existing custom and practice, as now set out in the Terms of Service.

If the Deed of Conditions was the basis for the authority to act then the Factor would have breached the requirements of the Act and the Code. If, however, custom and practice prevailed as the basis of the Factor's authority to act, then they would have complied with their obligations.

In coming to its decision the Committee paid particular attention to a letter of 4 January 2008 issued by the Factor. This was a standard letter that was issued to all proprietors of the development upon them purchasing the property from the original developer Persimmon Homes Limited ("Persimmon").

The second paragraph of this letter states "in terms of the Deed of Conditions, the legal document which forms part of the title deeds for your property, we were appointed by Persimmon Homes to instruct and administer the maintenance and repair of the common amenity areas in the development and the common parts of the apartment buildings".

The sixth paragraph states "Upon completion of the development, there will be 30 dwellinghouses. In terms of your title deeds, the co-owners contribute equally towards the maintenance of the common amenity areas throughout the development and therefore, all maintenance charges in respect of these amenity areas will be apportioned on an equal one thirtieth share basis. Maintenance costs in respect of the structure of the apartment buildings are apportioned equally between all of the flat owners in the block. Similarly, costs relevant to the common stairways are apportioned on an equal share basis between all the flat owners sharing the stairway."

The seventh paragraph states that "Within the Deed of Conditions there is provision for the block of flats being insured through a common buildings insurance policy. Cover is arranged for each flat from the respective owners' date of purchase."

This introductory letter also provided some details regarding the works that would be carried out such as grass cutting, maintenance, stairway cleaning etc. It appeared to the Committee that the works highlighted all matched with the requirements of the Deed of Conditions.

Mr Lennox highlighted in his submission that the eighth paragraph of the said letter highlighted that works were invoiced quarterly in arrears whereas the Deed of Conditions specified it would be invoiced quarterly in advance. This highlighted, in his submission, that the Factor operated by their own custom and practice and did not regard the Deed of Conditions as governing their relationship with the homeowners within the development. This appeared to the Committee to be the only documentation of pre-Terms of Service information ever disseminated to homeowners which might show that the Factor did not view his authority to act as stemming from the Deed of Conditions. In any event, this was not an outright confirmation from the Factor to homeowners that the Factor did not view the Deed of Conditions as governing the service they provided and would require homeowners to make significant assumptions in leaping to this

conclusion. The Committee was of the view that this paragraph did not lend any weight to an argument that custom and practice applied as the basis for the authority to act. No other written evidence in relation to the basis of pre-Terms of Service of custom and practice was put before the Committee other than this single paragraph in the introductory letter. All of the other actions by the Factor, from the date of appointment until the introduction of the Terms of Service, appeared to the Committee to be in accordance with the Deed of Conditions rather than some separate form of custom and practice and no reasonable-minded observer of the Factor's acting could come to any other conclusion.

Mr Lennox was questioned by the Committee in relation to whether the Factor recognised any part of the Deed of Conditions e.g. in relation to the recovery of debts. Mr Lennox confirmed that the Factor recognised certain parts of the Deed of Conditions. The Committee did not take the view, in the absence of any evidence that this approach had been agreed with homeowners, that the Factor could dip in and out of the Deed of Conditions and rely only on those parts that suited them.

Mr Lennox was questioned by the Committee on the subject of the float. The Terms of Service stated that the Factor reviewed the float from time to time to ensure sufficient funds were held to meet the cost of works. The Committee noted that the original float obtained was £100, being the amount set down in the Deed of Conditions. The float had not changed in the intervening period until the Factors advised the Homeowner of the increase to £200 in their letter of 9 October 2012. Mr Lennox submitted that the Factor, in line with their custom and practice, had reviewed the float requirements for the development on a regular basis and had done so since their appointment in 2007. Mr Lennox was questioned about these reviews. He claimed that the reviews had happened at the offices of the Factor. Only directors/employees of the Factor were present. No notification of the review was intimated to homeowners within the development. No minutes of the review meetings were kept. No notification of the outcome of the review of the float level was given to the homeowners. In short, these meetings were held entirely in private and without any dissemination of the information discussed within them to homeowners. Notwithstanding this, the Factor sought to suggest that these "review meetings" created evidence of their custom and practice that then defined their contractual relationship with homeowners and indeed bound the homeowners. The Committee found the Factor's submissions in relation to these meetings to be lacking in any credibility.

In the submission of the Factor, a letter, marked as "Date as Postmark" but understood to have been received by the Homeowner in late June, showed evidence of the intention to review the float prior to the issue of the Terms of Service. The letter was an update to homeowners on the implementation of the Act and Code. The relevant paragraph of that letter, from the Factor's perspective, stated "*It is worth mentioning at this stage that the Code assumes a mutuality of obligation and factoring services can only be delivered effectively where all homeowners recognise their on-going responsibilities and commit to the arrangement. This of course includes necessary funding allied to timely payment of common charges, which is crucial to the success of any factoring regime*". The Committee could not conceive of any coherent or rational interpretation of this paragraph that would lead any homeowner, applying

ordinary usage of the English language, to realise it meant a review of the float was to take place.

The Committee noted that the Factor subsequently wrote to the Homeowner on 9 October 2012 to advise of the review of the float level to £200. The Committee noted that this was issued just 13 days before the issue to the homeowners of the Terms of Service to the homeowners. The Terms of Service was, in the view of the Committee, the first material indication that the homeowners had received since the appointment of the Factors that the Factors did not view themselves as governed by the Deed of Conditions.

The Homeowner wrote to the Factor by letter dated 9 November 2012 to highlight that in terms of the Deed of Conditions that it was for the homeowners to set any review of the float under Rule 20.1(i) of the Deed of Conditions. The Factor replied by letter dated 20 November 2012 to state that in the absence of an owners association or a meeting held in accordance with the Deed of Conditions the Factor had the ability to periodically review the float. The terms of this letter would seem to suggest that the Factor accepted that some precedence should be given to the Deed of Conditions. The Committee noted that in terms of Rule 17.2 of the Deed of Conditions the Factor had the power to call a meeting of residents for the purpose of deciding such matters as the level of the float. The Committee was of the view that the correct course of action would have been for the Factor to call such a meeting and it was for the homeowners within the development to determine the level of float at that meeting in accordance with the Deed of Conditions.

The Committee questioned Mr Lennox on the terms of the Factor's appointment under the Deed of Conditions. Mr Lennox did not dispute that Persimmon had used their powers under the Deed of Conditions to appoint the Factor. Mr Lennox was unable to provide the Committee with any further information or correspondence regarding the basis of the discussion the Factor had had with Persimmon prior to or at the time of their appointment. Mr Lennox advised that all correspondence in this regard had been destroyed as his company did not keep records for this length of time. The Committee noted this explanation. The Committee noted that, generally speaking and in relation to all developments not just this one, such documentation was relevant in that it would comprise the basic information and agreement from which factors derived their authority to act. The Committee would encourage the Factor to retain appointment documentation in future, whether it be under a deed of conditions or via a subsequent appointment by homeowners as this would always be a fundamental part of being able to show the basis on which they had authority to act.

The Committee, having heard from both parties, considered the basis upon which the Factor derived their authority to act in relation to this development. The Committee gave consideration to the general concept of custom and practice and its thoughts are set out below. However, for the purpose of determining this particular case the Committee needed only to determine whether custom and practice had supplanted the terms of the Deed of Conditions in relation to the provisions regarding (a) the variation of the float and (b) the termination of the arrangement with the Factor.

The Committee was of the view that in order for the Factor to have the right to vary the float on the basis of custom and practice it would require some prior course of acting over a sufficient period of time that clearly demonstrated that the Factor had implied authority to act on this basis, that the homeowners knew that this was the basis on which the Factor was acting and that this was accepted by the homeowners. The Committee saw no evidence of a course of acting at variance with the Deed of Conditions. On the contrary, the Factor appeared to have acted generally in accordance with the Deed of Conditions and, indeed, the Factor had confirmed during the course of the hearing that they did sometimes rely on the terms of the Deed of Conditions.

The Committee determined the following:-

- The Factor was appointed by Persimmon in 2007 by Persimmon using their rights under the Deed of Conditions.

- The Factor wrote to the Homeowner on 4 January 2008. There was nothing in this letter to indicate that the basis for the authority on which the Factor was appointed and intended to act was anything other than the Deed of Conditions.

- From the Factor's appointment in 2007 until the issuing of the letter on 9 October 2012 and the subsequent issue of the Terms of Service on 22 October 2012, there was nothing done by the Factor which would suggest that the basis for reviewing/setting the float was not as set out in the Deed of Conditions.

- That even if the review meetings took place, the contents of these meetings were never disseminated to the homeowners and created no element of delegated or implied authority to the Factor by virtue of custom and practice. It was not possible to create customs and practices binding on other parties where one of the parties to be bound had no knowledge of the acting of the other party and no way of finding out about these actings.

- There was no course of acting by either party prior to October 2012 which suggested that the Factor had implied authority through custom and practice to review the float level.

- The Factor was content to utilise the provisions of the Deed of Conditions when it suited their purposes i.e. in relation to debt collection.

- The basis of the Factor's authority to act was in accordance with their appointment by Persimmon under the Deed of Conditions

- The Factor had no implied authority on the basis of custom and practice to vary the float in the Terms of Service.

- No evidence was produced by either party that suggested that prior to the issue of the Terms of Service that the provisions of the Deed of Conditions relating to the termination of the factoring arrangement had been changed by custom and practice to that set out in the Terms of Service.

- The Factor had no implied authority on the basis of custom and practice to provide for a different termination provision other than that set out in the Deed of Conditions.

Decision

Accordingly, the Committee determined that the Terms of Service breached Section 2.1 of the Code which requires that a factor must not provide information which is misleading or false. The provisions of the Terms of Service, as provided to the Homeowner, insofar as they related to the variation of floats and the termination arrangements with the factor, were misleading and did not reflect the correct arrangement which was that set out in the Deed of Conditions. The Committee would wish it to be noted that they did not perceive that the Factor had set out to deliberately misrepresent the position to homeowners. The Committee accepted that the Factor had a genuine belief that implied authority on the basis of custom and practice was the foundation for their relationship with the Homeowner in relation to these two aspects. Nonetheless, despite this belief, the Terms of Service was misleading and a breach of Section 2.1 of the Code

The Committee also determined that in varying the float and demanding payment of the increased float amount from the Homeowner without having the requisite authority to do so, the Factor had breached the requirement upon them to comply with the property factor's duties as set out in the Act. Again the Committee accepted that the Factor had acted under a genuine belief that they had authority to do so. Again, however, this was still a breach of the Act and the property factor's duties in particular.

Observations

Before turning to the question of whether a Property Factor Enforcement Order was appropriate, the Committee was of the view that it would be helpful to set out its view on some of the ancillary issues which arose during the Hearing on the preparation of Statements of Service, the basis on which factors gain authority to act in general and on custom and practice in particular.

The Committee noted during the hearing that the Factor had, in essence, prepared a single Statement of Service, which applied to all of their developments. Mr Lennox had stated that the Factor had a variety of "styles" but, upon clarification, it transpired that on issuing their standard Statement of Service some owners had been in touch with the Factor looking to have changes made. These amended statements were the differing "styles" used. In essence, the approach of the Factor had been to prepare a single Statement of Service that applied to all the developments managed by them – a "one size fits all" approach. The Committee accepted that elements of a Statement of Services may be the same across all developments managed by a factor e.g. the complaints resolution procedures or communication details. However the

requirements of the Code were such that it was highly likely that most developments would require their own unique statements that reflected the particular services that were being supplied, the details of the insurance arrangements, the various shares of maintenance applicable within the development, the basis of the authority to act etc. The Committee would encourage the Factor to reconsider their approach to the preparation of their Terms of Service to ensure that compliance with the Code is achieved.

The Committee also noted that the Factor appeared to be of the view that custom and practice was the basis of their authority to act in all developments they managed. The Committee was of the view that it was highly unlikely that this was the case and would urge the Factor to reconsider their approach. In modern/new developments, such as the one the Property was located in, it was likely that the basis of their authority stemmed from their appointment under the Deed of Conditions and the Factor would require to conduct the factoring in accordance with the terms set out in the Deed of Conditions. In developments where they had been appointed by homeowners at a later date, it was likely their authority would stem from the decision of the homeowners to appoint them. The specific contractual arrangements between the Factor and the homeowner would be set out in the documentation between them and, again, may well require cognisance of the terms of the title deeds relating to the property to be taken.

The Committee accepted that there may be some situations where custom and practice was the basis of a factor's authority to act. This was most likely to be the case where a factor managed a traditional tenement block, had done so for many years and no formal appointment paperwork had ever been in place. In those circumstances, the acting of a factor over a lengthy period (and the acceptance of homeowners of these actings) may give rise to the basis of a contractual relationship and a factor's authority to act.

The Committee noted that the concept of custom and practice was given little prominence within the Code or the Act. The concept of custom and practice is given one minor reference in a footnote to the Code only. Custom and practice is a relatively common concept in the field of employment contracts but the Committee could find little in the way of legal precedent to establish a definition of what custom and practice was in the context of property factoring in Scotland. It is outwith the scope of this decision to determine a legal basis for the operation of custom and practice within the factoring industry in Scotland. As an observation, a generally accepted basis for terms to be imposed into a contract and implied authority given by virtue of custom and practice are that the custom must be certain, notorious (in the sense of being well known within the particular market or locality) and reasonable. To prove contractual terms by virtue of custom and practice may prove a difficult task. If, traditionally, factors have determined and communicated their relationship with homeowners in a manner similar to the acting of the Factor in relation to the "review meetings" for the float, then the Committee would perceive that factors would face a difficult position in establishing contractual terms with homeowners on the basis of custom and practice. The Committee also noted it might be possible that factors may encounter difficulties in relation to new proprietors moving in to a development factored on the basis of custom and practice, particularly where the factoring service conflicted with the terms of the title deeds for the development.

A new proprietor may well question the legal basis on which they would be bound by custom and practice.

In light of (a) the potential difficulties in proving contractual terms by custom and practice, (b) the aim of the Code in providing clarity in the relationship between factor and homeowner (c) the binding nature of title deeds on homeowners (bearing in mind that a factor is generally acting as an agent of a homeowner) and (d) the need for the statement of authority to act to be an accurate reflection of the existing arrangement, the Committee was of the view that custom and practice as a basis of the authority to act was not an ideal situation. The Committee would urge factors to consider whether a relationship with homeowners on a custom and practice basis was tenable in the longer term.

The Committee was of the view that there may have been a misunderstanding on the part of the Factor as to the basis on which they should prepare their Statement of Services. A Statement of Services should set out the contractual arrangement between the parties as it actually is and not on the basis of how a factor would like that contractual arrangement to be. The Committee would accept that the requirements of the Code may have introduced new requirements upon factors that are simply not set out in title deeds, other property legislation, pre-Code contractual arrangements or in the acting of the parties in the past. Examples of this may be a formal complaints handling process or having a proper procurement policy in place. In these specific circumstances the Committee would accept that a factor would have no option other than to set out their intended practice. Other than that, however, any Statement of Services should set out the correct contractual arrangement and basis of the authority to act that existed at the time the Act and Code came into force. The Committee did also note that the Terms of Service produced by the Factor did not have a particularly logical flow in relation to the ordering of the various parts of it nor was it constructed in an easy to read fashion. The Factor may wish to consider this for future preparation of their terms.

The Committee was of the view that other factors may find themselves in a similar position to the Factors in seeking to do what they thought was best for a group of homeowners. The Committee noted and accepted that, in this particular case, the Factor was firmly of the view that an appropriate float level was £200. The Committee did not question that £200 was an appropriate level. The Committee accepted that the float levels currently held by the Factor meant that the account might run in deficit on occasion. The Committee accepted that it was not the responsibility of the Factor to fund the deficit. The Committee accepted the Factor did not personally benefit from the float held. The Committee accepted the Factor's submission that if sufficient floats were not held then the physical condition of housing stock would deteriorate and that this could be detrimental. Notwithstanding the above, the simple fact of the matter was that the decision to amend the level of float was not one that rested with the Factor, albeit that their view that the float should be increased accorded with principles of good estate management. That decision was one that rested with the homeowners within the development. The correct course of action was for the decision to be taken by the homeowners at a properly convened meeting as set out in the Deed of Conditions. If the homeowners did not wish to raise the float level then, whilst that may be an unwise decision by the homeowners, it was one

the Factor would require to abide by or consider whether they wished to continue to factor the development. The Committee noted that the Homeowner had never stated he was not prepared to pay the increased float. His objection was that the correct procedure had not been followed and, in this regard, the Committee concurred with him.

Property Factor Enforcement Order

The Committee then considered whether it wished to propose to make a Property Factor Enforcement Order (PFEO).

The Committee proposes the following PFEO:-

"Within 28 days of service of the PFEO on the Factor, the Factor must:

1. Issue a written apology to the Homeowner in respect of the Factor's breaches of both Part 2.1 of the Code and the breaches of the property factor's duties within the Act.

2. Make a payment to the Homeowner of £200 in recognition of the inconvenience caused to the Homeowner.

3. Ensure that the Homeowners account with the Factors is adjusted by the removal of the 3 x £100 debits previously added to the Homeowners account on 28 November 2012 as a result of the increase in the float. Further, to remove any administrative charges or penalties added to the Homeowners account arising from the non-payment by the Homeowner of the increased float level

4. Amend the relevant sections of the Terms of Service to reflect the correct position, as set out in this decision, in relation to the float and the termination of the factoring arrangements.

5. Provide documentary evidence to the Committee of the Factor's compliance with the PFEO by sending such evidence to the office of the Panel by recorded delivery post"

Section 19 of the Act provides as follows:-

"....(2) in any case where the committee proposes to make a property factor enforcement order, they must before doing so -

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to them.

(3) If the Committee are satisfied, after taking account of any representations made under subsection (2)(b) that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the committee must make a property factor enforcement order..."

The service of this decision to the parties should be taken as notice for the purposes of section 19(2)(a) and the parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the Panel's office by no later than 14 days after the date of service of this decision upon them. If no representations are received within that timescale, then the Committee may proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and constitute a criminal offence.

Right of Appeal

The parties' attention is drawn to the terms of Section 21 of the 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.."

E Miller ..... 18/6/13.....

Chairman Date