



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

**hoHP Ref:** HOHP PF/13/0006, HOHP/PF/13/0007 and HOHP/PF/13/0008

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

**The Parties:-**

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

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

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

**Committee Members**

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

**Background**

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

for the property and has reduced its services by withdrawing certain factorial services including cancelling arrangements for cleaning of the common close and window cleaning. This application has been given the case number HOHP PF/13/0006.

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

### **Hearing**

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

### **Preliminary Issue – all three applications**

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

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

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

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

13. With regard to case number HOHP PF/13/0007 the factor has two further preliminary points. The factor claims that the homeowner's complaint relates to work carried out between 12 and 14 February 2008 and as such, even if the factor had obligations under the 2011 Act in respect of this property, there is no continuing failure to act beyond 30 September 2012. The factor also maintains that any dispute between the parties in respect of the installation of the drain on the common ground was resolved in September 2010 as part of a wider agreement between the parties which dealt with other contentious issues between them at that time. Neither of these points, which apply only to case number HOHP PF/13/0007, is dealt with in this Decision.
14. The homeowner disputes that the applications fall foul of Regulation 28(1) in the way suggested by the factor. He argues that the committee is seized of jurisdiction in respect of all three cases.
15. After ascertaining that there was no objection by parties to the preliminary issue being considered first, the committee made inquiries of the parties as to the extent to which the facts relating to the preliminary issue were in dispute. It emerged that there was a substantial amount of common ground between the parties as to the relevant underlying facts.

#### **Factual Background**

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

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

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

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

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

#### **The Terms of the Deed of Conditions**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

**The Factor's Letter of 24 August 2012**

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

"Dear Mr Lynch

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

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

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

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

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

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

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

Yours sincerely"

This letter was copied to "All Proprietors"

**The Factor's Letter of 28 September 2012**

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

"Dear Mr Lynch

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

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

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

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

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

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

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

"Yours sincerely"

This letter was copied to "All Proprietors"

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

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

#### **Evidence led for the Factor**

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

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

32. The factor took over as property factor for the development in about 2006. From the outset there were problems with the homeowner with regard to many different issues. After much voluminous correspondence on 24 August 2010 a meeting took place between the homeowner and his solicitor and representatives of the factor. Following that meeting, on 27 August 2010 the homeowner's solicitors HBJ Gateley Wareing wrote to the factor proffering a cheque in full and final settlement of its outstanding claims against him and noting a number of points as having been agreed at the meeting. Of particular relevance for present purposes they stated at paragraph 4 the following: -

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

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

33. Mr McGonagle accepted that this exchange of correspondence confirmed that the Deed of Conditions provided the basis for the relationship between the homeowner and the factor. After 7 September 2010 the factor proceeded on the basis that it would not reply to correspondence from the homeowner as it took the view that he had agreed to raise these matters with the Residents' Association.
34. The factor had withdrawn from the development as a whole with effect from 15 December 2012. It had found it to be impracticable to continue to serve as factor for the other four blocks in the development.

#### **Evidence led for the Homeowner**

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

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

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

#### **Submissions of the parties**

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

#### **Discussion**

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

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

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

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

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

45. In the regular accounts sent out by the factor to the homeowner some costs were be split in one sixth shares as these pertained to costs associated with the maintenance and repair of the block of which the homeowner's flat formed part (16.67%). Other costs, those relating to the obligations to maintain the common grounds were split in one thirtieth shares (3.333%). Account 374662 is an example of this.

46. The factor's letter of 28 September 2012 gave notice that that part of its factoring service relating to the block would cease from 30 September 2012. The part of the service relating to the common grounds expressly did not cease though some changes in future arrangements were intimated to the homeowner. Notice was given that the method of billing for that service was to be changed but the service relating to maintenance of the common grounds which arises under clause FIFTH was still to be provided. There was no evidence of any change in that arrangement prior to 1 November 2012.

47. Section 2(1) of the 2011 Act defines the term "Property Factor". The definition includes the following provisions amongst others:

"(a) a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes, ...

"(c) a person who, in the course of that person's business, manages or maintains land that is available for use by the owners of two or more adjoining or neighbouring residential properties (but only where the owners of those properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of that land)".

The scope of the services which the factor expressly accepted it would continue to provide in respect of the common grounds after 30 September 2012 fall within the scope of section 2(1)(a) and/or (c).

48. The factor is quite correct to say that it was entitled to resign from its position as factor for the homeowner's property prior to the coming into force of the 2011 Act. The committee conclude that the factor did not do so in an effective way. By its letter of 28 September 2012 the factor succeeded only in intimating the cessation of part of the service. As a result its duties as factor



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

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

#### **Further Procedure**

50. The committee will assign a further date for hearing in order that it can deal with the outstanding aspects of the three applications. The orders that the committee is making are set out below under the heading "Decision of the Committee".
51. With regard to case number HOHP PF/13/0007 there remains a further preliminary issue in that the factor claims that the application ought to be rejected because the homeowner's complaint was resolved as at 2010.

#### **Appeals**

52. The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides: "(1) An appeal on a point of law only may be made by summary application to the Sheriff against a decision of the president of the Homeowner Housing Panel or a Homeowner Housing Committee. "(2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made..."

#### **Decision of the Committee**

53. The Committee directed that all three applications made by the same homeowner relating to the same factor should be heard together in terms of Regulation 9(1) of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012.

54. The Committee has concluded that it has jurisdiction to deal with applications HOHP PF/13/0006, HOHP/PF/13/0007 and HOHP/PF/13/0008 before it because the factor remained property factor for the homeowner's property after the date of its registration as a property factor on 1 November 2012.

55. The Committee having adjourned the hearing in respect of the applications HOHP PF/13/0006, HOHP/PF/13/0007 and HOHP/PF/13/0008, the parties will be given notice of the date for the adjourned hearing.

56. The decision is unanimous.

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