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

hohp Ref: **HOHP/PF/14/0120**

Re: **Property at Flat 3/1, 2 Moray Court, Rutherglen, Glasgow, G73 1BF (collectively "the Property")**

The Parties:-

Mr Martin McDonald, residing at the Property ("the Homeowner")

Rutherglen & Cambuslang Housing Association, 16 Farmeloan Road, Rutherglen, Glasgow, G73 1DL ("the Factors")

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

Committee Members:

Maurice O'Carroll (Chairman)
Sally Wainwright (Housing Member)

Decision of the Committee

The Factors have failed to comply with their duties under s 14(5) of the 2011 Act in terms of Sections 2.5, 3.3 and 7of the Code of Conduct for Property Factors.

The decision is unanimous.

Background

1. By application dated 14 August 2014, the Homeowner applied to the Homeowner Housing Panel ("HOHP") for a determination of whether the Factors had failed to comply with the duties set out in sections 2, 3 and 7 of the Code of Conduct imposed by section 14(5) of the 2011 Act.

2. Notices of referral to the Committee was sent to the parties on 17 September 2014 following a Minute of Decision by the President of HOHP dated 16 September. In response to the notice of referral, the Homeowner declined to submit written representations. His application and formal letter of complaint to the Factors dated 15 June 2104 however provided a clear indication of his complaint. The Factors submitted written representations dated 20 October 2014.

Both parties indicated that they were content to have the application determined on the basis of written representations and the paperwork already submitted to the Homeowner Housing Panel. The Committee was content to consider the application on that basis, given that the points at issue were in fairly short compass. Essentially, the Homeowner's complaint amounted to an allegation of failure on the part of the Factor's to identify what his common service charges amounted to and thereafter, a failure to deal with his complaint effectively.

3. A hearing in relation to the application was held on 5 December 2014 within George House, George Street, Edinburgh. Prior to the hearing, the Committee issued a Direction to the Factors dated 14 November 2014 in the following terms: "The papers refer to factoring fee, Shared Owners Service Charge, Shared Owners Management Charge and rent.
The Factors are directed to briefly summarise:
1.1. The amount of the charges
1.2. What services etc. each of these charges covers
1.3. Which document gives them the authority to make the charges
1.4. The equivalent charges being made to full owners or in the case of rent, full tenants."

4. A timeous response to the Direction was received from the Factors on 27 November 2014. However, the Committee was of the view that the Direction had not been fully complied with. In particular, whereas point 1.2 of the Direction required to Factors to state what services *each* of the charges covered, it was supplied with a composite list of services contained within 9 bullet points, which were not divided up according to the particular heading to which they related. To confuse matters further, the answer referred variously to "housing management and maintenance", "services and service charge" and to "management and services charges" which served to confuse the charges under respective headings rather than to clarify them. This had important consequences regarding the Committee's views as to the transparency of the charges at the heart of the application which are discussed more fully below. Further, the answer to the Direction failed to provide the appropriate comparators of full tenants and full owners as required by point 1.4 of the Direction.

Committee Findings

The Committee made the following findings in fact pursuant to Regulation 26(2)(b)(i) of the 2012 Regulations:

5. The Homeowner is what is termed a sharing owner of the Property. The Property comprises part of a development known as Moray Court. Moray Court consists of 4 blocks numbered 2, 4, 6 and 8 with 8 units in each, 32 in total. The Homeowner took entry to the Property on 12 November 1998 with a 50% share of the Property. The remaining 50% share is held by the Rutherglen and Cambuslang Housing Association who are also the Factors of the development known as Moray Court, Rutherglen. The Homeowner therefore has a hybrid

interest in the Property, comprising 50% of it which he owns pro-indiviso, with the remaining 50% of it as tenant of the Association. It is this hybrid occupancy which has given rise to confusion, culminating in the present application.

6. According to the Factors, their authority to make charges of the Homeowner, arises from two sources only, namely the Deed of Conditions applicable to the Property and what is termed a Shared Ownership Occupancy Agreement ("SOOA"). The Committee was provided with unsigned and undated copies of each of these documents which bear to have been provided in 1998, presumably on the date of entry. There is no stand-alone tenancy agreement in respect of the rental portion of the Property occupied by the Homeowner. The rental element of the hybrid occupancy appears to be covered by the SOOA. This is borne out by Clause 2 of that document which inter alia provides for a rental period of 20 years from the date of entry and for payment of the Specified Rent which is set by the Association in accordance with Part II of the Schedule.

7. Part II provides that the Specified Rent comprises three elements which are a Basic Rent calculated by the Association (currently £113.87 per month), a Management Charge (shown as nil) and a Service Charge originally set at £420 per annum. In terms of a letter from the Factors dated 21 January 2014, that charge became £495.72 and rose to £507.12 per annum in the financial year, April 2014/2015. Clause Six(b) of the SOOA obliges the Association to undertake the Services described in Part III of the Schedule. In each of the copies of the SOOA provided to the Committee, Part III of the Schedule is left blank. The Committee was, however, provided with a table specifying how the original Service Charge of £420 was made up. Although undated and not stated in its terms to be specifically in reference to Part III of the Schedule, it was the only document provided to the Committee relating to service charges amounting to £420. It comprises a management fee of £55 and further charges in respect of a cyclical float (£45), buildings insurance (£60), door entry maintenance (£10), close/stair window cleaning and lighting (£165), central heating maintenance (£25), ground maintenance (£40) and roof and gutter maintenance (£20).

8. It is the Deed of Conditions which appoints the Association as Factor (Interpretation Clause, point Seven). Schedule III to the Deed of Conditions specifies the common parts of the development at Moray Court and the obligations to maintain. In terms of Clause 3(B) thereof, the Factors have full authority to carry out all necessary works to maintain and repair the common parts as they consider desirable. Sub-clause (C) provides that the Factors will arrange for the cleaning of the common parts each block and the maintenance of the common amenity ground with each proprietor paying a 1/8 or 1/32 part thereof in accordance with the Schedule of Common Charges annexed to the Deed of Conditions (depending on whether the charges relate to a block or the development as a whole).

9. The Factors provided the Homeowner with a Written Statement of Service ("WSoS") under cover of a letter dated 23 September 2013. The Factors were registered as such on 23 November 2012 in terms of the 2011 Act. At page 1 of the WSoS, it is stated that the Association acts as factor within the block of flats of which the Property forms part on the basis of custom and practice. This statement is not entirely accurate standing the terms of the Deed of Conditions noted above. At page 2, it is noted that the Factors charge a management fee of £70 per annum for carrying out its core services and those listed within that clause. There are 7 bullet points listing services within the clause. Invoicing in terms of the WSoS is bi-annual in May and November each year.

10. The first query raised by the Homeowner was by email dated 22 November 2013 when he asked Elizabeth Pillans, Factoring Officer, why he had been charged a Management Fee of £35. That error was subsequently corrected (although the breakdown requested was never provided beyond a composite list of services) and the Homeowner was refunded £12.50. As the Management fee relating to factoring services is bi-annual, the error and the terms of the WSoS suggests that full owners are charged £70 in total whereas the Homeowner is charged £45 plus a further sum in terms of SOOA of £55 producing a total of £100 as confirmed in the answer to the Direction. On the face of it, it therefore appears that the Homeowner is charged £30 per annum in excess of what is paid by full owners. The Committee was not provided with an equivalent figure for full tenants, despite having requested this. The earliest statement referred to by the Homeowner showing the revised management fee is 1 April 2012 which suggests that the Homeowner has been overcharged a total of £90 over three years as at the date of the present decision in December 2014.

11. The Committee notes that in their written representations dated 20 October 2014, the Factors state that £100 is charged to fully factored owners. However, no evidence vouching that submission has been provided to the Committee despite having been requested. The evidence before it suggests that there is a differential in charging as between shared owners and full owners as noted above. In any event, even if that is not the case, there is insufficient transparency in the information provided for the Committee to conclude that no differentiation exists between shared owners, full owners and full tenants.

12. The fourth page of the WSoS lists chargeable repairs which include annual charges for external gutter inspection/cleaning and general roof inspections and also roof anchor bolt inspection. Planned maintenance repairs which are chargeable are listed at the foot of the page in 9 bullet points and include replacement of major components in the stair head windows and the front and back doors of the close. Page 7 deals with the requirement for insurance to be effected over the Property and common parts and makes provision for payment of the insurance premium in two equal payments as part of a the bi-annual invoice. The Schedule to the WSoS provides 13 points of service that will be provided to the Homeowner. The second part of the Schedule provides that the

Homeowner will be charged a 1/8 share of all communal repairs carried out, consistent with the Schedule of Common Charges within the Deed of Conditions.

Discussion of evidence and alleged breaches of duty

Section 3.3 of the Code

13. This section formed the main concern of the Homeowner. Section 3.3 of the Code provides that Factors must provide to homeowners in writing at least once a year, a *detailed* breakdown of charges made and a description of the activities and works carried out which are charged for. As can be seen from the narration above, there is considerable overlap between the charges specified in the SOOA on the one hand and the Deed of Conditions and WSoS on the other hand. To take two examples, both documents refer to roof repairs and insurance. It might reasonably be thought that these items are included in the list of charges covered by the Service Charge added onto the basic rent in terms of the SOOA, but they are also included as chargeable items within the WSoS further to the Deed of Conditions. More specifically, the Factor's response to the Direction dated 26 November 2014 stated that the management and service charge includes roof, gutter and roof anchor bolt inspections. However, these items are specifically referred to in the WSoS as rechargeable repairs. There therefore appears to be an element of double counting.

14. The preamble to section 3 of the Code provides that Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved. The overriding objectives of the section are stated as including clarity and transparency in accounting procedures. The Committee having spent a considerable amount of time trying to ascertain the basis of the Factors' charges considered that the standard of clarity and transparency required by the Code had not been met by the Factors. This was despite the specific terms of the Direction issued to the Factors as discussed above and the queries made of them by the Homeowner. The Committee therefore finds that the Factors have failed to comply with section 3.3 of the Code.

15. To rectify the failure identified, the Committee requires the Factors to provide the Homeowner as shared owner with a revised WSoS. Given the hybrid nature of the occupancy at issue, it would be desirable for the Factors to provide the Homeowner with a single document which specifies in one place what services are provided under which head (whether as shared owner or as tenant) and what he is being charged for those services. The statement should provide clarity as to what range of services are being provided, what the charges are for them and what the Homeowner is receiving for his money. That is to say, the services and the charges made for them require to be disaggregated as sought by the Committee in its Direction and the Homeowner in his correspondence.

16. The Committee further requires the Factors to produce a written statement confirming that they have reviewed all charges made since 1 April 2012 to the

Homeowner as shared owner and to confirm that the Homeowner is not paying an amount in excess of that applied to a full owner or full tenant for the services he receives. The charges should be on an equivalent basis in terms of the unit which the Homeowner occupies. In other words, the statement requires to produce equivalent comparators in similar sized flats which are occupied by both full owners and full tenants to demonstrate that there is no differentiation in the charges applied to each for the services received. In the absence of evidence demonstrating that the Homeowner has not been overcharged for services rendered, the Committee proposes to order a refund of £90 overcharged in the Property Factor Enforcement Order to follow from this decision.

17. It is noted that the first instance of overcharging dates from April 2012, prior to the entry into force of the 2011 Act and the date of registration of the Factors. Regulation 28 (1) of the Homeowner Housing Panel (Application and Decisions)(Scotland) Regulations 2012 ("the 2012 Regulations") provides "subject to paragraph (2), no application may be made for the determination of whether there was a failure before 1 October 2012 to carry out the property factor's duties." Regulation 28(2) provides that the committee "...may take into account any circumstances occurring before 1 October 2012 in determining whether there has been a continuing failure to act after that date." In terms of section 14(5) of the Act, the Factors' duties include a duty to comply with the Code.

17. The phrase "may take into account" indicates that it is a matter of discretion on the part of the Committee, the extent to which they choose to take into account matters occurring before the commencement date of the 2012 Regulations of 1 October 2012 in determining whether they find that there is a failure to comply with factors' duties after that date. The Committee considers that the apparent differentiation in charging the Homeowner for factoring services is a continuing matter which existed prior to 1 October 2012. It therefore proposes to include the earlier instance within the Property Factor Enforcement Notice to follow from this decision.

Section 2.5 of the Code

18. Section 2.5 of the Code requires the Factors to respond to enquiries and complaints received by letter or email within prompt timescales. The Committee notes that the Homeowner's complaint regarding the Management Fee applied to his bi-annual invoice was first made on 22 November 2013. That email was received by Ms Pillans but not answered satisfactorily as noted above. Thereafter, the Homeowner fruitlessly continued to seek clarification and disaggregation of charges as discussed above over a lengthy period of time involving frequent reminders well into 2014.

19. The Committee notes the correspondence from the Factors dated 2 and 7 October 2014 to the effect that the Homeowner's formal complaint dated 15 June 2014 was not received due to an error in the Factor's spam filter. However, the

fault for that particular delay does not excuse the failure to respond to the complaint made from November 2013 and in any event the delay thereby caused was not of the Homeowner's making. It is also inexplicable given that the Homeowner sent his emails from his own email address and earlier emails had successfully reached Ms Pillans, the Factor's representative, prior to June 2014. The Committee considers that the Factors failed to respond to the complaint received within a reasonable timescale.

20. The Committee therefore finds that the Factors have breached section 2.5 of the Code and will make an order for compensation for the inconvenience thereby caused in the Property Factor Enforcement Notice to follow from this decision.

Section 7 of the Code

21. For the sake of completeness, it follows from the discussion of section 2.5 of the Code above that the Factors have failed to resolve the Homeowner's concerns within a reasonable period of time. The Committee therefore finds that the Factors have breached section 7 of the Code, although no additional sanction will be made in respect of this breach within the Property Factor Enforcement Notice to follow from this decision.

Decision

22. In all of the circumstances narrated above, the Committee finds that the Factors have failed to comply with their property factor's duties in terms of s 14(5) of the Act in respect of sections 2.5, 3.3 and 7 of the Code.

It has therefore determined to issue a Property Factor Enforcement Notice which will follow separately.

Appeals

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

Signed M O'Carroll
Chairperson

Date 9 December 2014