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

HOHP/PF/13/0242

Re: Property at 94 Cartvale Road, Glasgow, G42 9SW (collectively "the Property")

The Parties:-

Mr James Johnstone, 63 Old Edinburgh Road, Inverness, IV2 3PG ("the Homeowner")

HACKING & PATERSON MANAGEMENT SERVICES, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ("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)
Andrew Taylor (Surveyor Member)

Decision of the Committee

The Factors have not failed in their duty under section 14(5) of the 2011 Act to comply with the terms of the Code of Conduct for Property Factors and therefore require to take no further action in this case.

The decision is unanimous.

Background

1. By application dated 22 July 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 1, 6.1, 6.3 and 6.6 of the Code of Conduct imposed by section 14(5) of the 2011 Act.

2. Notices of referral to the Committee were sent to the parties on 5 September 2014 following a Minute of Decision by the Vice President of HOHP dated 27 August.

3. A hearing in relation to the application was held on 7 January 2015 within Europa House, Argyle Street, Glasgow. The Homeowner appeared alone on his own behalf without representation. The Factors were represented by Mr David Doran,

Director of Hacking and Paterson Management Services since 2010, again without representation.

4. Prior to the hearing, the Committee issued a Direction to the parties dated 17 October 2014 in the following terms: "By letter dated 18 September 2014, the Factors made a request for a Direction in the light of correspondence received by the Homeowner Housing Panel between 24 July 2013 and 22 August 2014. In particular, it is alleged that the terms of the original application dated 22 July 2013 have been either departed from or added to. Accordingly, the Panel has decided to issue the following Direction:

(i) The Homeowner is required to lodge, in type written form, a list of issues to be addressed at the hearing, the date of which to be fixed, which summarises all of the outstanding complaints which he has and which he contends have not been resolved due to the refusal or undue delay on the part of the Factors to do so.

(ii) The list of outstanding issues referred to above which require to be resolved at the hearing, the date of which to be fixed, are to be narrated by specific reference to the items of correspondence intimated to the Factors and lodged with the HOHP which outline those outstanding issues and which the Homeowner intends to rely upon at the hearing.

(iii) Further, the outstanding list of issues referred to above requires to be narrated by reference to specific paragraphs with the Code of Practice and separately, by reference to the Factors' duties generally, if appropriate.

(iv) The Homeowner is also required to supply the Homeowner Housing Panel with a copy of the title deeds to his property, in particular those containing any deed of conditions or other writ bearing upon the Factors' duties."

4. As will have been evident from the terms of the Direction itself, it proceeded upon concerns raised by the Factors in a letter to the HOHP dated 18 September 2014. The source of the concerns was in relation to fair notice of the case they would require to meet at the hearing on 7 January 2015. The Committee had sympathy with those concerns which prompted the Direction. The Direction therefore provided the Homeowner with the opportunity to present his case to the Committee as fully as possible and in its finalised form standing those concerns raised.

5. The Homeowner responded to the Direction with a two page email dated 3 November 2014 which summarised the sections of the Code which he alleged have been breached by the Factors as stated in the application form dated 22 July 2013. He did not provide a list of issues summarising the outstanding list of complaints as required by the Direction or the title deeds to the Property. Nor did the Homeowner make reference to any correspondence lodged with HOHP in

support of the contentions which he wished to raise for discussion at the hearing or with specific reference to the sections of the Code in contention.

6. At the outset of the hearing, the Chairman explained to the Homeowner that he did not consider that the requirements of the Direction had been complied with. The Homeowner explained that he was unfamiliar with HOHP procedure which was accepted by the Chair. However, the terms of the Direction were written in plain terms which were easy to understand and required to be complied with in order to ensure the smooth and efficient functioning of the business of the Committee. The consequence of the failure to comply was that, had items of correspondence been produced as required, they could have been referred to as of right during the course of the hearing. By contrast, in the absence of such compliance, materials could only be referred to under reservation and with the express right of the Factors to object. The Homeowner indicated that he understood the position and was content to proceed upon that basis. In the event, Mr Doran refrained from objecting at any point during the hearing to any evidence which the Homeowner sought to provide.

7. Mr Doran for the Factors produced a bundle of productions for use at the hearing. He also helpfully produced written submissions setting a number of preliminary objections to the application proceeding, which had been intimated to the Homeowner and HOHP prior to the hearing, on 25 November 2014. These related to (i) the failure to comply with the Direction issued by the Committee as discussed above, (ii) a lack of notification of the complaints and a failure to demonstrate that the Factors had unreasonably delayed in attempting to resolve them, (iii) a failure on the part of HOHP to disclose certain correspondence which referred to the possibility of mediation, (iv) the validity of the alleged Code breaches in relation to the date of registration of the Factors and (v) error in reference to the Code, in particular in relation to section 1 thereof. These were considered at the start of the hearing prior to hearing any evidence from the parties. The Chairman decided that while certain of the criticisms had merit, they did not mean that the application required to be rejected out of hand and could not proceed. Certain of the criticisms, however, had a bearing on the decision which the Committee ultimately reached.

Committee Findings

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

8. The Homeowner has been retired since 2001. He was formerly a local authority officer within Highland Council with overall responsibility for direct services. He lives at 63 Old Edinburgh Road, Inverness and is registered as an HMO landlord with Glasgow City Council.

9. The Property is a ground floor main door entry flat within a four floor tenement block. It is divided into four bedsits, two to the left and two to the right off an L-

shaped corridor with a bathroom in between them. The bedsits are let out for £55 a week and have been so rented since October 2012. The bedsit nearest the bathroom has been unlettable for approximately one year due to the state of the property as discussed below.

10. The floors above the Property pertain to number 96 Cartvale Road, which are accessed by a common entry close next door. The communal block comprises 7 flats at number 96 and one flat which comprises the Property. Shares in communal expenses are therefore split 8 ways, although not always equally, as noted below.

11. The Factors provided the Homeowner with a Written Statement of Service ("WSoS") under cover of a letter dated 22 October 2012. No updated Written Statement of Services has been provided to the Homeowner by the Factors since that date, although nothing turned on that fact. The Factors were registered as such on 1 November 2012 in terms of the 2011 Act and their duty to comply with the Code arises from that date.

12. The dispute between the parties arises from a collapsed sub-floor wall beneath the Property in 2008. Works to repair the problem were proposed by the Factors in 2008, 2010 and again in 2012 going into 2013. Initial costs proposed by the Factors were professional fees in respect of the CDM co-ordinator (the Factors themselves) of £850 plus VAT and the structural engineer costs to assess the works which required to be carried out amounting to £1850 plus VAT. On top of that required to be added a surveying fee of 11% of the contract costs plus expenses and VAT and the contract costs themselves which would follow on from the structural engineer's report. The surveyors appointed were Hacking and Paterson Surveyors, a firm related to but separate from the Factors. The structural engineers appointed to carry out the survey of the building works required was to be Alan McCulloch Associates.

13. Although reference is made to events as far back as 2008, this decision is only concerned with the Factor's actings after 1 November 2012, the date of their registration.

14. The appointment of the Factors as Construction Design and Management Co-ordinators and Hacking and Paterson Surveyors was not the subject of a competitive tendering process. By 11 March 2013, all 8 of the common proprietors including the Homeowner had signed mandates agreeing to pay the initial costs as noted above which were at the same level and involving the same professional advisors as had been initially proposed in 2008 (bundle p 69).

15. Following that, the Factors undertook a competitive tendering process in July 2013 which concluded on 12 August 2013, after which it was proposed to appoint Hugh Scott Builders and Slaters Ltd to carry out the substantive contractual work

to repair the collapsed wall in the basement underneath the Property (bundle page 111).

16. For understandable reasons, the Factors were unwilling to commence works of any kind until they were in receipt of funds from all of the relevant homeowners. This proved to be the sticking point preventing the works from getting underway and they had yet to be commenced as at the date of the hearing. As at 18 December 2014, the Homeowner and two other common proprietors had failed to place the Factors in funds in order to allow the repair works to proceed. The amount paid or to be paid by each of the common proprietors (except the Homeowner) was £2,571.55. The Homeowner's share was calculated by Hacking and Paterson Surveyors as being £10,128.96 (bundle p 125).

17. The Factors had arranged a meeting of the respective homeowners to take place at their premises on 15 January 2015 aimed at breaking the impasse and to getting the relevant works underway. The homeowner indicated to the Committee that he would not be attending that meeting as he had business elsewhere that day. It was not possible for him to appoint a proxy or mandatory of any kind to attend in his place.

18. The Committee found the evidence of both witnesses to be wholly credible and reliable.

Discussion of evidence and alleged breaches of duty

Section 1 of the Code

19. Section 1 refers to the content which requires to be included within the Factor's Written Statement of Services. The applicant purported to state that there had been a breach of section 1.1b L (sic). Section 1.1b refers to the content required to be included in alternative situations where the land in question is owned by a land maintenance company or a party other than the group of homeowners. As such, it clearly has no relevance to the present application. There is no further section L as such. On page 8 of the Code at section D I, it is stipulated that Factors require to set out the timescales within which they will respond to enquiries or complaints received by letter or email.

20. Aside from the section referred to not actually existing and not being within the relevant part of the Code, the substantive obligation is nonetheless covered at page 4 of the Factor's Written Statement of Services where it is provided that HPMS will endeavour to respond to enquiries received in writing within 7 working days of receipt. Therefore, the Factors are not in breach of section 1 of the Code.

Section 6.1 of the Code

21. Section 6.1of the Code requires the Factors to have in place procedures which allows homeowners to notify them of matters requiring repair, maintenance or attention. They must inform homeowners of the progress of such work, including

estimated timescales for completion. It is the second part of this section which is the subject-matter of the application.

22. In his summary email dated 3 November 2014, the Homeowner made reference to correspondence dated 19 October 2012. As pointed out by Mr Doran, the obligation on the Factors in terms of s 17(1) of the Act is to ensure compliance with the Code in terms of s 14(5) of the Act. Section 14(5) requires a registered property factor to ensure compliance with the code of conduct for the time being in force. It follows that where a property factor is not registered, it is not under an obligation to comply with the Code of Conduct. As the present application is in terms of the Code only, there can be no obligation on the Factors to comply with it prior to that date (in this case 1 November 2012). Regulation 28 of the 2012 Regulations makes reference to property factors duties generally and not those arising under the Code so does not provide a saving for those obligations. Whilst the Committee agreed with those submissions, some of the Homeowner's evidence at the hearing referred to actings on the part of the Factors which occurred after the date of registration, commencing in April 2013 and beyond. The Committee was therefore able to consider that evidence.

23. The Homeowner gave evidence that he did not receive any of the contract information sent to the potential contractors on 16 July 2013 reproduced at pages 70 to 109 of the bundle. None of the tenderers attended the property to carry out a site inspection which caused him to doubt their competency. The first he knew of progress was when he received the priced bill of quantities attached with the summary of tenders on 12 August 2013 from Hacking and Paterson Surveyors. He pointed out that it is not much the condition of the flat itself that makes it unlettable, rather the anticipation of works to be carried out, with no specific timetable or programme of works to plan against. The letter of 12 August 2013 also provided confirmation for the first time of the Homeowner's contribution of £10,128.96 which also made him feel very aggrieved.

24. In response, Mr Doran pointed out that the mandate signed by the common proprietors was to allow Hacking and Paterson Surveyors to organise the works, rather than Hacking and Paterson who were the Factors. During the time period in question, there were no works for them to report upon in their capacity as factors as the work had yet to be awarded to one of the tenderers. The lack of timetabling was not an issue for them, rather, it was up to Hacking and Paterson Surveyors to provide that information to the interested parties. The question of unequal apportionment of costs as between the Homeowner and the remainder of the block proprietors was equally a matter for the surveyors and not for the Factors. As a matter of opinion, Mr Doran suggested that the differentiation in costs was probably because the collapsed sub-floor wall was beneath the Homeowner's property. It was therefore a matter of the necessary works bearing more heavily on his property alone, being private to him, rather than all eight proprietors equally, as would normally be the case for truly communal works.

25. The Committee was able to see the force of Mr Doran's evidence regarding the work being undertaken by Hacking and Paterson Surveyors. Nonetheless, it considered that it would have been desirable for the Factors to have kept all of the homeowners apprised of the situation and progress in advance of works being physically carried out on site. It considered that the obligation on the Factors to communicate with the Homeowner subsisted despite the involvement of Hacking and Paterson Surveyors. Having said that, it considered that whilst communication with the Homeowner in relation to progressing the proposed works could have been better, it did not consider that failure to have been serious enough to warrant making a finding of a breach under this heading of the Code.

26. In relation to the apportionment of the costs, the Committee did not consider that it was able to venture an opinion as to whether the allocation was appropriate or not in the absence of the title deeds which the Homeowner had failed to produce despite being requested to do so in terms of the Direction noted above. In any event, since the application was in relation to the alleged failures of duty to comply with the Code, it did not consider that the question of apportionment was a matter which was properly raised for consideration by the Committee. It might be a matter in respect of which the Homeowner would seek legal advice and, if so advised, obtain a formal declaration from a Sheriff in the courts, but that is a matter for him. The Committee therefore found there to have been no breach of section 6.1 of the Code.

Section 6.3 and 6.6 of the Code

27. Section 6.3 requires factors to show why they appointed contractors on request. In relation to the Hugh Scott Builders, they were to be appointed following a competitive tendering exercise which was intimated to all of the homeowners, including the applicant, so there could not be said to be a breach of the Code in connection with their proposed appointment. In relation to the other roles (i.e. CDM co-ordinator, surveyor and engineer), the Committee accepted Mr Doran's evidence that they were not required to do so in terms of the Written Statement of Services provided to the Homeowner. Moreover, the Factors were not required to do so in terms of the Code either, given that section 6.3 provides an obligation on factors to show how and why contractors were appointed *on request*. The Committee did not have any evidence that such a request was made at time of the relevant appointments being made. Indeed, these were acquiesced in since at least 2008 as discussed below.

28. Mr Doran further pointed out that the appointment of the Factors as CDM co-ordinators, their associated firm as surveyors and Alan McCulloch as engineers was expedient and made sense as they were all intimately familiar with the property and the works required. McCullochs had previously surveyed the property. Had the Homeowner wished to appoint other, alternative suppliers, he could have done so by first calling a homeowner's meeting and proposing such an alternative but he did not do so. Had an alternative been proposed, however, a cancellation charge would have been payable by all of the homeowners. The

Homeowner was the only proprietor to take issue with the appointment of those service suppliers and was therefore objecting in isolation.

29. Moreover, the Committee noted that at the time of the original mandates in 2008, 2010 and 2012, the Homeowner was content to allow those suppliers to act. His objection appeared to arise after receipt of the letter dated 12 August 2013 which included his allocation of costs. The Committee agreed with Mr Doran's submission that the Homeowner's own evidence did not take issue with the overall cost of the works as such, but rather that the greater burden that fell on him to pay for them as compared to the other communal proprietors. As noted above, that is not a matter for determination by this Committee. Accordingly, the Committee did not find the Factors to have acted in breach of section 6.3 of the Code.

30. The Homeowner agreed with the Chairman that consideration of section 6.6 of the Code followed on from consideration of section 6.3 since the same facts applied. The Committee considered that since the documentation in relation to the tenders had been supplied to the Homeowner and none was requested or required in relation to the service suppliers at the time of their appointment, there was no breach of this section of the Code. The Committee therefore found that section 6.6 of the Code had not been breached by the Factors.

Decision

31. In all of the circumstances narrated above, the Committee finds that the Factors have not failed to comply with their property factor's duties in terms of s 14(5) of the Act. Accordingly, it does not intend to issue a Property Factory Enforcement Order in this case.

The Factors are therefore not required to take any further action in relation to this application.

Appeals

32. 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: 27 January 2015