

Housing and Property Chamber First-tier Tribunal for Scotland



**First-tier tribunal for Scotland (Housing and Property Chamber)
("the tribunal")**

**DECISION: Property Factors (Scotland) Act 2011 ("the 2011 Act"), Section
19(3)**

Chamber Ref: FTS/HPC/PF/18/0132

**3B Ramsay Garden, Edinburgh, EH1 2NA
("The Property")**

The Parties:-

**Mr M A Christopher Lee and Mrs Catherine Lee, 231 Sackett Street, Brooklyn,
New York, 11231, USA
("the Homeowners")**

**Mr R C Matthew Lee, 3B Ramsay Garden, Edinburgh, EH1 2AB
("The Homeowners' Representative")**

**Factotum Scotland Limited, 63 Dublin Street, Edinburgh, EH3 6NS and 5 Hillside
Crescent Edinburgh EH7 5DY
("the Property Factor")**

**Tribunal Members:
Susanne L M Tanner QC (Legal Member)
Andrew Taylor (Ordinary Member)**

DECISION

- 1. Having considered the parties' representations in terms of Rule 19(2)(b) of the 2011 Act on the proposed Property Factor Enforcement Order, the tribunal made a Property Factor Enforcement Order in terms of Rule 19(3) of the 2011 Act.**
- 2. The decision of the tribunal is unanimous.**

STATEMENT OF REASONS

1. In this decision the tribunal refers to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code of Conduct"; the First-tier Tribunal for Scotland Housing and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended, Schedule 1 as "the 2017 Rules".
2. On 10 December 2018, the tribunal made a decision in terms of Section 19(1) of the 2011 Act that the Property Factor had failed to comply with the Code of Conduct and property factor's duties.

3. Section 20 of the 2011 Act provides:

"(1) A property factor enforcement order is an order requiring the property factor to—

(a) execute such action as the First-tier Tribunal considers necessary,
(b) where appropriate, make such payment to the homeowner as the First-tier Tribunal considers reasonable.

(2) A property factor enforcement order must specify the period within which any action required must be executed or any payment required must be made.

(3) A property factor enforcement order may specify particular steps which the property factor must take."

4. Section 19 of the 2011 Act provides as follows:

"... (2) In any case where the First-tier tribunal proposes to make a property factor enforcement order, it must before doing so—

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

(b) allow parties an opportunity to make representations to it.

(3) If the First-tier tribunal is 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 First-tier Tribunal must make a property factor enforcement order. ..."

5. On 10 December 2018, the tribunal gave notice of the proposed PFEO to the parties. On 18 December 2018, the tribunal gave notice to the parties that they should ensure that any written representations which they wished to make relative to the proposed PFEO under section 19(2)(b) of the 2011 Act reached the tribunal no later than 8 January 2019; and that if no representations were received within

that timescale, then the tribunal would be likely to proceed to make a PFEO without seeking further representations from the parties.

6. On 1 January 2019, the Property Factor submitted an email with an attached document entitled *“Comments on Decision. Application by Factotum Scotland Limited (‘the Property Factor’) to the ... tribunal ... for leave to appeal against the Decision of the tribunal dated 10 December 2018 and intimated by letter dated 18 December 2018.”* The said Comments on Decision / Leave to Appeal document did not contain representations directed towards the terms of the proposed PFEO in terms of Section 19(2)(b).
7. On 3 January 2019, the Homeowners’ Representative submitted an email which included representations on the proposed PFEO, paragraph 3.2.
8. On 17 January 2019, the Property Factor submitted a review request for review of the tribunal’s decision of 10 December 2018. The second point in the review request appeared to contain representations relative to paras 3.2.1 and 3.3 in the PFEO and the tribunal decided to take these representations into account when considering the terms of the PFEO, despite the representations being submitted outwith the stipulated time period for written representations on the terms of the proposed PFEO.
9. Having taken into account the written representations of both parties on the terms of the proposed PFEO, the tribunal is satisfied that the Respondent has failed to ensure compliance with the Code of Conduct and its property factor’s duties, therefore the tribunal must make a PFEO in terms of Section 19(3) of the 2011 Act.
10. The tribunal made the following revisals to the terms of the proposed PFEO:
 - 10.1. Revisal of paragraph 3.2.1 of the PFEO, to take into account the statement of the Property Factor (in the email of 17 January 2019), that the Property Factor never disputed the findings of the survey of Mr Douglas McDonald dated 10 April 2018. The tribunal also took into account the Homeowner’s Representative’s representations about the fact that if another building surveyor is instructed he/she would require to attend for inspection during heavy rainfall. The tribunal wishes to make clear in the terms of the PFEO that as the Property Factor does not dispute Mr McDonald’s recommendations, the tribunal does not require the Property Factor to instruct another building survey report at its own expense unless it wishes to do so. The three competitive quotations for remedying the gutter problem, which must be obtained in terms of the tribunal’s order 3.2.1, can be obtained on the basis of the recommendations in paragraphs 1.1 and 1.4 of Mr McDonald’s report or taking into account any recommendations in another building survey

report instructed by the Property Factor, should it wish to instruct one. The wording of para 3.2.1 of the PFEO has been revised to reflect this.

10.2. Revisal of paragraphs 3.3 and 3.4 of the PFEO to make clear that the Property Factor can decide whether to pay the specified sums directly to the Homeowners or to the Homeowners' Representative. In terms of Section 20(1) of the 2011 Act, the tribunal can "*require the property factor to (a) execute such action as the First-tier Tribunal considers necessary and (b) where appropriate, make such payment to the homeowner as the First-tier Tribunal considers reasonable.*" The Homeowners' Representative has incurred costs on behalf of the Homeowners in relation to the instruction of Douglas McDonald, Building Surveyor. The Homeowners reside abroad and have appointed the Homeowners' Representative in relation to the management of the Property and the progress of the Application to the tribunal, including representing them at the hearings. The tribunal has no information about whether the Homeowners have UK bank accounts. It would assist the Property Factor if the Homeowners or their Representative could confirm to the Property Factor, via the tribunal's administration, the account(s) to which the payments should be remitted. Whether the Property Factor chooses to make payment to the Homeowners or to the Homeowners' Representative, documentary evidence of said payments must be provided to the tribunal.

11. The PFEO is attached to this Decision and should be read in conjunction with it.

12. In terms of Section 21 of the 2011 Act, the tribunal may at any time

(a) vary the order in such manner as it considers reasonable, or

(b) where it considers that the action required by the order is no longer necessary, revoke it ...

and must vary the property factor enforcement order—

(a) so as to extend, or further extend, the period within which any action required by the order must be executed, and

(b) in such other manner as it thinks fit.

where—

(a) the First-tier Tribunal considers, on the submission of the property factor or otherwise, that any action required by a property factor enforcement order has not been, or will not be, executed during the period within which the order requires the work to be executed, and

(b) the First-tier Tribunal —

(i) considers that satisfactory progress has been made in executing the action required, or

(ii) has received a written undertaking from the property factor stating that the action required will be executed by a later date which the First-tier Tribunal considers satisfactory.

Appeals

A homeowner or property factor aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

S Tanner

Susanne L. M. Tanner Q.C.
Legal Member and Chairperson

25 March 2019