

# **Housing and Property Chamber**

## **First-tier Tribunal for Scotland**

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

**Statement of Decision under Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (contained in Schedule 1 of the Chamber Procedure Regulations 2017 (SSI No 328)) (“the Procedure Rules”) in relation to a request for a review of the Tribunal’s decision under section 43(2) (b) of the Tribunals (Scotland) Act 2014 following a hearing.**

**In connection with**

**Chamber Ref: FTS/HPC/PF/22/3616**

**Parties:**

**Mr William McGibbon, Flat 10, 12 Ravelston Terrace, Edinburgh EH4 3TP (“the Applicant”)**

**Hacking & Paterson Residential Management Services, 103 East London Street, Edinburgh EH7 5BF (“the Respondents”)**

**Tribunal Member:**

**Graham Harding (Legal Member)  
Andrew Murray (Ordinary Member)**

### **DECISION**

The First-tier tribunal for Scotland (Housing and Property Chamber) (‘the tribunal’) having carefully considered the application by the Respondents for a review of its decision finds that the application should be granted in part and the decision amended. The decision of the Tribunal was unanimous.

### **BACKGROUND**

1. Following a review hearing on 25 May 2023 in which the Respondents did not participate, the tribunal amended its original decision issued on 26 January 2023 and on 14 June 2023 issued a review decision and amended decision both dated 10 June 2023. At the same time the tribunal issued a Proposed Property Factor Enforcement Order in the following terms:- “The Respondents must within 30 days of the date of issue of this order reimburse from its own funds all charges imposed on the Applicant since 2018 in respect of winter gritting of the access roads at the development.”

2. By email dated 27 June 2023 the respondents submitted comments on the proposed PFEO together with an application that the tribunal review its amended decision. The Respondents submitted that the Applicant had submitted an application under the August 2021 code of conduct whilst his complaint related to gritting of the access road from 2018 to 2020. The Respondent also submitted that they had not been in breach of Section 2.1 of the Code and that there was no preamble to Section 3 of the code. Finally the Respondents submitted that Rule 6.2 of the Deed of Conditions burdening the development did not bind or catch the Respondents.
3. The tribunal determined that the Respondents' application for review was timeous and requested further submissions from the parties.
4. The Respondents submitted further written representations by email on 20 July 2023. The applicant submitted written representations by email on 15, 18 and 27 July and 8 November 2023.
5. Having considered the written representations submitted by both parties the tribunal is satisfied that it has sufficient information before it to allow it to determine the Respondent's application for a review without the need for a further hearing.

### **Applicability of the 2021 Code of Conduct**

6. The Respondent has submitted that the Applicant's complaint is ill conceived as it has been made on the basis of a breach of 2021 Code but refers to actions on the part of the Respondent prior to 16 August 2021.
7. The Applicant has submitted that this was because the Respondent did not charge the Applicant for gritting services for the years 2020 to 2022 until May 2022. He also submitted that despite agreeing in correspondence to put a decision on contributing to the cost of gritting and other shared costs to a vote by homeowners no such vote was forthcoming.
8. The tribunal in reaching a decision on a homeowner's application can only determine a complaint under one or other Code. It is of course open to a homeowner to make two separate applications where the acts of a factor are the subject of complaint both before and after August 2021. Although the Tribunal may consider in evidence what may or may not have occurred prior to August 2021 it is only the actions of the Respondent post that date that can be the subject of the complaint.
9. That being the case the issue for the tribunal to determine is whether or not after August 2021 the Respondent had the necessary authority from the collective homeowners to agree to meet a one third share of the cost of gritting the access road.

10. There is no doubt that the Respondent had advised the owners that they had agreed to meet this cost but that is not the same as having the necessary authority. In this regard the tribunal is satisfied that its decision as previously stated in the decision of 10 June 2023 is correct. Before the Respondent can legitimately charge homeowners for gritting services, they require to obtain authority from homeowners. However, as the tribunal can only deal with a complaint regarding the Respondent's actions post August 2021 it finds that the decision and proposed PFEO should be amended to reflect this position.

### **Section 2.1 of the Code**

11. The Respondents have submitted that the collective homeowners remain satisfied with the gritting services in place and that there are mechanisms in place to cease or amend a service. They submit that they enjoy excellent communication with owners and have a positive relationship with them. The Respondents also submit that as can be seen from the Homeowners' AGM minutes discussion took place as regards the gritting arrangements. The Respondents' position is that they acted in line with their Written Statement of Services and Authority to Act.
12. The Applicant has referred to online reviews of the Respondents as an indication of their standing however the tribunal does not consider that these are particularly helpful as it must consider the specific facts and circumstances of the complaint. The Applicant referred the tribunal to the need for evidence that the Respondent had followed the rules for making Scheme Decisions and here the tribunal is in agreement with the Applicant. For the reasons given in the decision of 10 June 2023 the tribunal is satisfied that that formal authority from homeowners to agree to meet the gritting charge was needed.

### **Preamble to Section 3 of the Code**

13. As the Respondents have correctly pointed out Section 3 of the August 2021 Code does not have a preamble and therefore any mention of this in the decision of 10 June 2023 is erroneous and will be removed.

### **Deed of Conditions Rule 6.2**

14. The Respondents have submitted that the contract with the Applicant is not based on the Deed of Conditions but on the Terms of Service and Delivery Standards and as a result Rule 6.2 of the Deed of Conditions does not catch the Respondents.
15. In response the Applicant has submitted that the Deed of Conditions is the primary governing document for the development and that as manager is defined in the Deed of Conditions the Respondents were integral to understanding and implementing the rules.

16. The tribunal is satisfied that Rule 6.2 applies to all owners and that where an irregularity occurs in the making of a scheme decision and an objection made that owner is not liable for any costs incurred. The Respondents have charged the Applicant for the gritting cost and are therefore liable to refund the cost.

### **Decision**

17. In all the circumstances the tribunal determines to partially uphold the Respondents' application for review and issues a further amended decision and proposed PFEO.

Graham Harding Legal Member  
9 January 2024