

# Housing and Property Chamber First-tier Tribunal for Scotland

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**Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').**

**Chamber Ref:FTS/HPC/PF/18/0240**

**Muirfield House (Old Building), Gullane, EH31 2EL ('the Property')**

**The Parties:**

**Mrs Ann MacDiarmid Morrison residing at 9, Muirfield House, Gullane, EH31 2EL ('the Homeowner')**

**Hanover Scotland Housing Association Limited (Hanover Scotland) 95 McDonald Road, Edinburgh, EH7 4NS ('the Factor')**

**Tribunal members:**

**Jacqui Taylor (Chairperson) and Andrew Murray (Ordinary Member).**

## **Decision of the Tribunal**

The Tribunal determines that the Factor has failed to comply with the Property Factor's duties.

The decision is unanimous.

## **Background**

1. The Factor's date of registration as a property factor is 7<sup>th</sup> December 2012.
2. By application dated 29<sup>th</sup> January 2018 the Homeowner applied to the First-tier Tribunal (Housing and Property Chamber) for a determination that the Factor had failed to comply with the Property Factor's duties.
3. The application had been notified to the Factor.
4. By Minute of Decision by George Clark Convener of the First-tier Tribunal (Housing and Property Chamber), dated 2<sup>nd</sup> May 2018, he intimated that he had decided to refer the application (which application paperwork comprises documents received in the period 1<sup>st</sup> February 2018 to 24<sup>th</sup> April 2018) to a Tribunal.

5. An oral hearing took place in respect of the application on 17<sup>th</sup> July 2018 at George House, 126 George Street, Edinburgh, EH2 4HH.

The Homeowner appeared on their own behalf. The Factor was represented by Mark Farey, Director of Asset Management; Eddie Johnston, Factoring Manager and Alastair McKendrick, their solicitor.

**Alleged Breach of Property Factor Duties:**

**As a preliminary matter the parties confirmed and agreed the following facts:-**

- The Homeowner purchased her property **9 Muirfield House, Gullane, EH31 2EL** on 30<sup>th</sup> March 2006.
- The title of the Property is registered in the land Register of Scotland under Title Number ELN2175.
- The Property is part of a sheltered housing development of thirty eight properties.
- The Factor has factored the Property since the sheltered housing development was built in 1987.
- The contract between the Factor and the owners of the properties at Muirfield House is the Management Agreement which the Factor provided with their written representations. It covers the period 1<sup>st</sup> April 2017 to 31<sup>st</sup> March 2020.

**The Homeowner's complaint:**

**The Homeowner's written representations:**

The Factor has failed to provide adequate disabled access and dusk to dawn lighting at the conservatory door at Muirfield House. This is also a fire exit and therefore needs disabled access/ egress and adequate lighting. This lighting should be dusk to dawn to ensure that elderly/ disabled residents can access/ egress safely. She explained that whilst these matters have been discussed at the Muirfield House owner's Property Council Budget Meeting she is of the firm view that the Factor has failed to carry out their Property Factors duties as they advised the Owners that such matters are optional, when in fact they are needed in Health and Safety and Equality Grounds.

**The Homeowner's oral representations:**

Mrs Morrison, the Homeowner, advised as follows:-

She believes that the Factor has failed in their duties to provide proper effective external lighting to the sun lounge door and they have also failed to provide an external disabled access ramp at the sun lounge door.

She explained that the warden's flat is located within Muirfield House and the sun lounge is a communal facility which is also located in Muirfield House. The main entrance to Muirfield house is single door which has a security keypad which has to be used to open the door. She does not use this door as she has difficulty using the key pad and the door is too heavy.

When you enter the main door the sun lounge is located to the left. There is no internal door to the sun lounge. There is a separate external door to the sun lounge. The external doors open outwards. There is an external movement sensitive light above the external door. However it does not turn on until you are outside the door and within the range of the light. There is concrete ramp outside the sun lounge door. There is also a mobile wooden ramp located close to the sun lounge door for wheel chair users. She referred the Tribunal to the photograph of the sun lounge which she had provided with her written representations. The photograph showed the wooden ramp propped up against the external wall of the sun lounge.

She explained that a wheel chair user is unable to open the sun lounge door unaided.

She advised that she does not believe that the existing access ramp and external light of the sun lounge complies with the disability regulations.

She confirmed that she had put these matters to a residents meeting in November 2017 but the residents had not agreed to the upgrading works being carried out.

**The Factor's response:**

**The Factor's written representations.**

These matters have previously been discussed at Property Council meetings, but there has not been a sufficient number of owners who were interested in proceeding.

Firstly, regarding the lighting issue, the type of lighting provided depends on whether the conservatory door is classed as a fire exit. In addition to our own Fire Risk Assessment for Muirfield House, we have consulted an independent fire risk assessor about this point.

Both our and the independent assessment have confirmed there is no regulatory requirement for the conservatory door to be classed as a fire exit. However, despite this, if the Property Council vote in favour of asking us to specify and price a lighting upgrade, we will act accordingly. This means that we would then bring forward costed proposals for residents to vote on.

In addition to the lighting, the work may well involve alterations to the door locks and outside paving.

The question of further upgrading of the conservatory door to full disabled access depends on whether such an upgrade is required under the relevant legislation, or, if

irrespective of this, the required number of residents vote in favour to have the work carried out and are prepared to pay for same.

Having reviewed disabled access legislation and taken legal advice we are unable to recommend to residents that such work is required.

We have also checked the Deed of Conditions for the development with regards to the 'grounds for emergency' you refer to. This is covered under clause seventh, paragraph (c) but only relates to when 'the interim protection or safety of the Property' applies. It is not intended to cover an access upgrade and for this reason we are unable to recommend it to owners.

This leaves the other option of residents voluntarily voting in favour of the work. All owners have had the opportunity of endorsing the proposals but, by not backing them have given a collective view that they are not in favour of the work.

### **The Factor's oral representations**

Mark Farey explained that as factors they are guardians of the common charges account. The residents each pay approximately £200 per month into this account and it is used to pay the expenses of the resident warden and the maintenance and repair costs to the common parts of the development. They largely rely on the residents authorizing the expenses incurred. He acknowledged that Appendix 1 of the Management Agreement states that they will seek the authority of the homeowners to carry out common repairs and maintenance in terms of an agreed annual budget. The agreement also reserves the right for the Factor to carry out additional work where they judge it to be in the best interests of the homeowners, without further reference to the homeowners if they consider it to be justifiable on grounds of emergency, for example to help safeguard the health and safety of residents or if the anticipated cost to each homeowner does not exceed £100. He explained that this clause is aimed at giving them authority to proceed without reference to the homeowners in situations such as fire or flood.

With regards to the external light, if it had been broken it would have been repaired. As the existing light is not broken, and replacement of the light would be an improvement, and as such it would only be possible with the prior approval of a majority of the residents.

He explained that the existing external light above the sun lounge external door is a motion sensitive infra red light. If it was changed to a dawn to dusk light it would cost the residents approximately an additional £300 in communal electricity charges per annum.

When asked what the estimated cost of installing the replacement light and disabled access ramp he explained that the actual costs depend on the detail of the works that would be required. The lighting costs depend on whether cabling is already in place and whether or not scaffolding is required. However he thought that the cost of

installing the replacement light could exceed £1000. In connection with the disabled access ramp the costs would depend on whether or not the door would have to be changed and if a different ramp would be necessary, he thought that the cost may exceed £5000. Mark Farey also explained that the external door in the sun lounge is not a fire door. They obtained a Fire Risk Assessment which had been prepared by Scott Paige of T I Five E, dated 29<sup>th</sup> May 2017, which advised that the external sun lounge door is not a fire exit as the distance from the furthest point in the sun lounge to the front door is less than twelve meters. He acknowledged that the report had not been lodged as a production.

In relation to their obligations under the disability regulations Alastair McKendrick explained that in terms of section 114 of The Equality Act 2010 any action must be raised in the Sheriff Court.

Mark Farey further advised that as far as he is aware none of the owners in the development are wheel chair users. In the circumstances he explained that they consider that there is a reasonable provision at Muirfield House for residents who might have disability issues as it is reasonable for disabled people to enter and exit the sun lounge through the front door of Muirfield House. However, ultimately it is for the residents to decide if they wish the lighting to be upgraded and/or a disabled ramp to be installed.

#### **The Tribunal's Decision:**

The Tribunal acknowledged that the potential Factor's duties to improve the external lighting of the Sun lounge and install an external disability ramp at the sun lounge external door stems from three sources, the title deeds, the Management Agreement and statute.

Considering each in turn:-

First, the terms of the title deeds.

The Deed of Conditions for the development is set out in the Burdens section of the Homeowner's Land Certificate ELN 2175. The Deed of conditions was granted by John G McGregor (Developments) Limited and was recorded on 31<sup>st</sup> August 1987.

The preamble of the Deed of Conditions states inter alia that John G McGregor (Developments) Limited are about to convey by Feu Disposition the dwellinghouse that is to be used for the purpose of providing accommodation for a warden, the warden's office, the guest suite and the sun lounge to Hanover (Scotland) Housing Association..... Clause Tenth (b) provides that the proprietors of the dwellinghouses may require title of the warden's accommodation, guest suite and residents sun lounge to be transferred to the Property Council. Notwithstanding the terms of these provisions no evidence was provided to the Tribunal to confirm if title to the Sun Lounge was conveyed to Hanover (Scotland) Housing Association or was subsequently conveyed to the Property Council.

Clause First (10) defines the 'Common parts' as being the whole parts of the development which are used by one or more dwellinghouse other than the wardens accommodation, the guest suite, the residents sun lounge and the garage blocks and specifically includes the lighting equipment for the curtilage and flood lighting equipment (paragraph xix) and the curtilage (paragraph (b)).

This means that the Sun lounge is not part of the defined common parts.

Clause First (12) defines 'Common Charges' as:

- (a) The whole expense incurred ... in the repair, maintenance and renewal of authorised improvements of the common parts.
- (b) A reasonable provision (to be determined by the Factor) for the future costs of repair, maintenance and renewal of the common parts and that part of the warden's accommodation which forms the warden's office, the guest suite and the residents lounge.
- (c) The whole expense incurred from time to time in respect of the repair, maintenance and renewal of the wardens accommodation, the guest suite and the residents sun lounge ...

Clause Seventh (a) states that the common parts shall belong to each of the owners of the dwelling houses to the extent of a one thirty ninth share and

Clause Seventh (c) details the authority of the Factor to instruct common repairs to the common parts:

'The Superiors through the Factor shall have full power and authority to instruct and have executed from time to time such works for the repair, maintenance or renewal of the Common Parts ..... as they in their judgement shall consider necessary to implement their obligations and duties in terms of this deed, provided always that in the case of major work (being a work the cost of which is estimated by the Factor to exceed £6000 or such greater amount as may from time to time be fixed by the Property Council) the Factor shall, before instructing the same, report the matter to the Property Council and such work shall be undertaken only if it is authorised by the Property Council, whose decision shall be final and binding on the superiors and on all the proprietors. Notwithstanding the foregoing provisions the Factor shall be entitled forthwith to instruct and have executed such work which shall include a major work as he considers necessary for the interim protection or safety of the Property or any part thereof or of any person.'

This provision gives the Factor power and authority to carry out the repairs to the common parts as stated. If the cost of the repairs exceeds £6000 they must obtain the prior authorisation of the Property Council. However they are entitled to go ahead and instruct such works without the prior authority of the Property Council if the

Factor considers that the works are required for the interim protection or safety of the Property or any person.

Clause Tenth (a) states that the Factor is responsible for 'the general management and administration of the Property as a sheltered housing scheme and, without prejudice to the foregoing generality, will be responsible for the supervision of the warden and for arranging inter alia the repair, maintenance and renewal of the common parts, the garage common parts and of the wardens' accommodation, the guest suite and residents' sun lounge, the cleaning, redecoration and lighting of the common parts and the garage common parts, the cleaning, redecoration, heating and lighting of the guest suite and the residents' sun lounge....'

As stated, the Sun Lounge does not form part of the common parts of the development, as defined in the Deed of Conditions and Clause Tenth (a) places the Factor is under a duty to repair, maintain, renew, clean, redecorate and light the Sun lounge.

The provisions of the Deed of Conditions regarding obtaining the prior authority of the owners only applies to the common parts and does not apply to the Sun lounge.

In connection with the terms of the Management Agreement Appendix 1 states the Factor will seek the authority of the homeowners to carry out common repairs and maintenance of the common parts in terms of an agreed annual budget. The agreement also reserves the right for the Factor to carry out additional work where they judge it to be in the best interests of the homeowners, without further reference to the homeowners if they consider it to be justifiable on grounds of emergency, for example to help safeguard the health and safety of residents or if the anticipated cost to each homeowner does not exceed £100.

The Management Agreement does not contain any other provision in relation to works to be carried out to the Sun Lounge.

Consequently in terms of both the Deed of Conditions and the Management Agreement the Factor does not need to obtain prior authority of the residents in relation to works to be carried out to the Sun lounge. The Factor is placed under a duty to repair, maintain, renew, clean, redecorate and light the guest suite and the residents' sun lounge.

The Factor is required to carry out these duties reasonably.

The Tribunal accepted the Factor's evidence that the external door in the sun lounge was not a fire exit and was the secondary means of access and egress to and from the sun lounge.

However, both the Factor and Mrs Morrison, in their oral representations, advised that the existing light above the Sun lounge external door is a motion sensitive light with the result that it does not turn on as you open the door from the inside. It only

turns on once you are through the door and within the range of the light. Given that Muirfield House is part of a sheltered housing development and the residents are elderly the Tribunal consider it to be unreasonable to expect residents to exit the Sun lounge external door in darkness. Consequently the Tribunal determine that the Factor has breached their property factors duties to reasonably light the Sun lounge.

Third, the terms of the Equality Act 2010.

Mrs Morrison stated in her application that she considered that the Factor has failed in their duty to install a disabled access ramp. This matter falls within the terms of the Equality Act 2010. In terms of Section 113 of the Equality Act 2010 disability claims under the Equality Act 2010 must be brought in the Sheriff Court. Accordingly it is not competent for the Tribunal to consider if the Factor has failed in their duties under the Equality Act. Consequently the Tribunal are unable to consider if the Factor has failed in their duty to install a disabled access ramp.

### **Property Factor Enforcement Order.**

In all of the circumstances narrated above, the Tribunal finds that the Factor has failed in the Property Factor's duties as stated.

The Tribunal therefore determined to issue a Property Factor Enforcement Order.

Section 19 of the 2011 Act requires the Tribunal to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations to the Tribunal.

The Tribunal proposes to make the following Order:

*'The Factor shall install a dawn to dusk external light to reasonably illuminate the access and egress to and from the Sun lounge external door. The light must be installed by 31<sup>st</sup> October 2018.'*

### **Appeals**

**In terms of section 46 of the Tribunals (Scotland) Act 2014, a party 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.**

Jacqui Taylor

Signed .....

... Date 30th July 2018

Chairperson