

# 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) in relation to the application by the Homeowner to review their decision under section 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.**

**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).**

### **Background**

1. The Tribunal issued a Determination dated 30<sup>th</sup> July 2018 which found that the Factor had failed to comply with the property Factor's duties and advised that they proposed to make a Property Factor Enforcement Order.
2. The Tribunal issued a Notice of Proposal under section 19(2)(a) of the Property Factors (Scotland) Act 2011 of the proposed Property Factor Enforcement Order and directed the parties to ensure that any written representations which they wished to make under section 19(2)(b) of the Act reached the Housing and Property Chamber's office no later than 14 days after the date the Decision and Notice are intimated to them.
3. The Tribunal received a request from the Factor's solicitors, T C Young, Solicitors, Edinburgh which was issued on 6<sup>th</sup> August 2018 which requested the Tribunal to review their Decision dated 30<sup>th</sup> July 2018 ('Request for Review'). The Request for Review stated:

### **'INTRODUCTION**

1. *The Factor requests that the First-tier Tribunal ("The Tribunal") reviews its Decision dated 30<sup>th</sup> July 2018 and Issued by e-mail on 6<sup>th</sup> August 2018 in terms of section 43 of the Tribunals (Scotland) Act 2014.*

2. *It is the Factors position that the Decision is wrong and should be reviewed.*

3. *The Factor proposes that the Tribunal's Decision Is set aside in accordance with section 44(1)(b) of the Tribunals (Scotland) Act 2014 and thereafter make no PFEO in accordance with the powers conferred up on it in terms of section 44(2) of the Tribunals (Scotland) Act 2014.*

#### **BACKGROUND**

4. *The Applicant sought, Inter alia, to have proper and effective lighting installed to the area external to the Sun lounge at Muirfield House, Gullane. The Applicant further stated that she does not feel that, Inter alia, the external lighting complies with the disability regulations.*

5. *The Factor confirmed that the question of Installing alternative lighting to what is currently installed had been raised at Property Council meetings, with no sufficient basis of Interest to allow them to proceed to carry out such works.*

6. *The Tribunals written Decision is referred to for the sake of brevity along with the documentation produced by the Parties In advance of the oral hearing on 17 July 2018.*

7. *The Sun lounge is not a common part in terms of the title deeds and their definition of "Common parts".*

8. *Following an Oral Hearing on 17<sup>th</sup> July 2018, the Tribunal issued a Written Decision in terms of which they made a Property Factor Enforcement Order (PFEO) which states:*

*'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 3rd October 2018.'*

#### **BASIS FOR REVIEW**

9. *The works that the Applicant wishes to be undertaken are not repair works. They are improvement works. There is no provision within the documentation referred to by the Tribunal in their Decision permitting the Factor to allow them to unilaterally carry out such works without the appropriate power in place to do so.*

10. *The Tribunal references Clause Tenth (a) of the Deed of Conditions for the development. The Factor has complied with its duties in terms of the said Clause Tenth (a) of the Deed of Conditions. It has been appropriately lit throughout. In any event this Clause permits the Factor to repair, maintain, renew, clean, redecorate and light the Sun lounge. They have done so. The lighting of the Sun lounge has not been raised as an issue by the Applicant, rather the Applicant has stated that there is, in her view, inadequate lighting to the area external of the Sun lounge. Clause Tenth (a) therefore Is not applicable.*

11. *Appendix 1 of the Management Agreement provides that the Factor will seek authority to carry out common repairs or maintenance of the common parts and reserves the right to the Factor to carry out additional work where they judge It to be In the best interest of the homeowners. The*

*Factor does not - by virtue of this provision with the Management Agreement - have a duty to install alternative lighting in accordance with the terms of the PFEO in the Tribunal's written Decision dated 30<sup>th</sup> July 2018. Such work would be an improvement. Further, as the Tribunal have noted the majority of homeowners have expressed the wish to retain the existing lighting.*

12. *The Tribunal's Decision and PFEO therein would provide for the Factor acting out with the scope and duties of a Factor. There is no mechanism for recovery of cost of works undertaken by the Factor from the Homeowner and other homeowners within the factored development. The Factor cannot therefore unilaterally undertake such improvement works envisaged within the PFEO and that PFEO would order the Factor to act ultra vires.'*

## **The Tribunal's response to the Request for Review.**

### **Background**

#### **Paragraph 4 of the Request for Review.**

The Homeowners' application form states:

'The Factor has not provided adequate lighting at the entrance to the sunlounge' Also, the Homeowner's letter of notification to the Factor dated 22<sup>nd</sup> April 2018 states, inter alia, The duties I believe you have failed in are to provide adequate dusk to dawn lighting at the conservatory door at Muirfield house. The lighting should be dusk to dawn to ensure that elderly/ disabled residents can access/ egress safely.'

Paragraph 4 of the Request for Review states 'the Applicant sought inter alia to have proper and effective lighting installed to the area external to the sun lounge.'

The Tribunal do not consider this interpretation of the Homeowner's application to be accurate as it does not correspond with the detail of either the Homeowner's application form or the Homeowner's letter of notification to the Factor.

### **Basis for Review**

#### **Paragraph 9 of the Request for Review.**

Paragraph 9 explains that the Factor's position is that the works to the Sun Lounge lighting sought by the Homeowner are improvements and the Factor is not unilaterally entitled to carry out improvements.

Clause Tenth (a) of the Deed of conditions states:

'The Superiors through the Factor shall be 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 Warden's accommodation, the Guest Suite and Resident's Sun Lounge, the cleaning redecoration and lighting of the Guest Suite and Residents Sun Lounge .....

This provision places a duty on the Factor to reasonably light the Sun Lounge. The provision does restrict the obligation to internal lighting and consequently the obligation includes an obligation to reasonably light the exterior of the Sun Lounge.

The Tribunal in their Decision stated that the Factor is required to carry out the duty to light the Sun Lounge reasonably. The Tribunal accepted that evidence of both the Homeowner and the Factor at the hearing 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. In their Decision the Tribunal explained that as Muirfield House is part of a sheltered housing development and the residents are elderly they considered it to be unreasonable to expect residents to exit the sunlounge external door in darkness.

The Tribunal determined that the Factor had breached their property factors duty to reasonably light the Sun Lounge. The duty on the Factor is to reasonably light the Sun Lounge. The fact that the existing light will have to be replaced and a better light be installed in its place does not relieve the Factor from the duty that is placed on them. The fact that an improvement will be carried out to the light is immaterial.

The Tribunal accepts that the Deed of Conditions sets out the procedure for the Factor to follow, in terms of prior authorisation, when repairs and maintenance works are required to the common parts of the development. However the Deed of Conditions does not contain any such provisions in relation to works required to the Sun Lounge, which does not fall within the definition of the common parts of the development. The Factor is entitled to carry out works to the Sun Lounge without reference to the owners.

This interpretation of the Deed of Conditions is supported by the provisions of clause Thirteenth of the Deed of Conditions which details the powers of the Property Council. The Property Council can make regulations for repairs, improvements etc to be carried out to the Common Parts, Garage Common Parts.... And Sun Lounge. However the Property Council are not entitled to (1) order works to be done which the Factor considers to be unnecessary (2) prevent the execution of any works upon the .... Sun Lounge... which the Factor considers necessary for the performance of their obligations or duties to one or more of the proprietors and the expense thereof forms part of the common charges.

#### **Paragraph 10 of the Request for Review.**

*Paragraph 10 states: 'The Tribunal references Clause Tenth (a) of the Deed of Conditions for the development. The Factor has complied with its duties in terms of the said Clause Tenth (a) of the Deed of Conditions. It has been appropriately lit throughout. In any event this Clause permits the Factor to repair, maintain, renew, clean, redecorate and light the Sun lounge. They have done so. The lighting of the Sun lounge has not been raised as an issue by the Applicant, rather the Applicant has stated that there is, in her view, inadequate lighting to the area external of the Sun lounge. Clause Tenth (a) therefore is not applicable.'*

These points have been addressed under Paragraphs 4 and 9 above.

#### **Paragraph 11 of the Request for Review.**

The Tribunal acknowledge that the Factor's Written Statement of Services does not explicitly cover works required to the communal parts of the development that fall outwith the definition of the Common Parts ie the Sun Lounge etc. The absence of specific provisions in respect of the Sun Lounge within the Written statement of Services does not render the Tribunal's decision incorrect. The Tribunal's Decision is

that the Factor has failed to comply with the property factor duties contained in the specified clauses of the Deed of Conditions.

**Paragraph 12 of the Request for Review.**

The Tribunal do not accept that the proposed PFEO would result in the Factor acting outwith the scope and duties of a Factor.

Clause First of the Deed of Conditions is the definition section.

Paragraph (1) defines 'Property' as being the subjects edged red on the plan ie the whole development.

Paragraph (6) defines 'Residents Sun Lounge' as meaning the sun lounge at the south side of the Muirfield house and shall include (a) the window frames and glass of the sun lounge, the lighting equipment and all radiators, pipes, ventilation ducts and others situated therein and serving exclusively the said sun lounge .....

Paragraph (12) defines common charges and states that it includes inter alia:-

(c) the whole expense incurred from time to time in respect of the insurance, repair, maintenance ( including redecoration) and renewal of the Warden's accommodation, the Guest Suite and of the Residents' Sun Lounge.

(k) any other expenses, howsoever arising, in relation to the Property which should properly be borne by all the proprietors of the Dwellinghouses.

Clause Tenth (a) of the Deed of conditions states:

'The Superiors through the Factor shall be 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 Warden's accommodation, the Guest Suite and Resident's Sun Lounge, the cleaning redecoration and lighting of the Guest Suite and Residents Sun Lounge .....

Clause Tenth (a) places the Factor under an obligation to repair maintain and renew and light the Sun Lounge.

The Definition of Common Charges includes the cost of renewing/ repairing and maintaining the lighting of the Sun Lounge. Even if it is considered that the new external light ordered by the Proposed PFEO falls outwith this definition paragraph (k) would allow the Factor to incorporate the cost within the Common Charges.

The Tribunal are satisfied that the Deed of Conditions places the Factor under a duty repair renew and maintain and light the Sun Lounge. The expenses incurred by the Factor in exercising this duty form part of the common charges due by the individual owners. Consequently the Factor would not be acting ultra vires if they implemented the terms of the proposed PFEO.

**Decision of the Tribunal in response to the Homeowner's application to Review its Decision and the Property Factor Enforcement Order.**

Section 39 (2) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 sets out the requirements of an application for review. The application must be in writing; it must be copied to all the other parties; it

must be made within 14 days of the date the written reasons were sent to the parties and it must set out why a review of the decision is necessary.

The Tribunal determined that the regulations had been met in relation to the application to review the Tribunals Decision.

**The Tribunal refuses the Application for Review as they consider it to be without merit, for the reasons stated.**

### **Appeals**

**In terms of section The Scottish Tribunals (Time Limits) Regulations 2016 SSI 2016 No 231 a party aggrieved by the decision of the tribunal to refuse to grant leave to appeal may appeal to the Upper Tribunal for Scotland for leave to appeal within 30 days of the date the decision was sent to them.**

Jacqui Taylor

Signed ....

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Chairperson Date: 29<sup>th</sup> August 2018