

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) in relation to the application by the Factor for permission to appeal their decision under section 37 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).

Decision

The Tribunal, having considered the respondent's application to appeal its Decision dated 30th July 2018 granted permission to appeal to the Upper Tribunal for Scotland.

Background

The Factor applied to the Tribunal for Permission to Appeal the Tribunal's Decision dated 30th July 2018 and issued on 6th August 2018. The Factor's application was received by the Tribunal on 29th August 2018. The application had been intimated to the Homeowner.

The application meets the requirements of Section 2 of the Scottish Tribunals (Time Limits) Regulations 2016 and Section 37 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

Section 2 of the Scottish Tribunals (Time Limits) Regulations 2016 provides that the application for permission to appeal must be received within 30 days of the date the decision was sent to the Homeowner.

The Factor's application for leave to appeal was received timeously.

Section 37 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 states *inter alia* that an application for permission to appeal must state the alleged point or points of law on which the person making the appeal wishes to appeal and state the result the party making the application is seeking and section 46(4) of the Tribunal Act 2014 states that the Tribunal have to be satisfied that there are arguable grounds for the appeal.

Detail of the application.

The Application was in the following terms:

1. On 6 August 2018 the First-tier Tribunal ("the Tribunal") issued a Decision dated 30 July 2018 by e-mail in terms of section 43 of the Tribunals (Scotland) Act 2014 ("the Decision").

2. The Tribunal made the following draft Property Factors Enforcement Order ("PFEQ"):

"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 31st October 2018t

3. On 17 August 2018 the Respondent/ Appellant submitted an application for review of the Decision in accordance with regulation 39 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

4. The Respondent/ Appellant now seeks permission to appeal the Decision in terms of Section 46 of the Tribunals (Scotland) Act 2014.

5. The points of law upon which this appeal is sought are as follows:

(i) The Tribunal erred in law in determining that the lighting external to the sun lounge is not common property. In terms of Clause FIRST (10) of the Deed of Conditions the common parts include "...the lighting equipment for the curtilage and flood lighting equipment (paragraph xix) and the curtilage (paragraph (b))" The lighting external to the sun lounge is accordingly included within the definition of common parts.

(ii) Clause Seventh (c) of the Deed of Conditions provides the Property Factor with authority to instruct repair, maintenance or renewal of the common parts. There is no provision within the Deeds permitting the Property Factor to unilaterally carry out improvement works to the common parts.

(iii) The PFEQ proposed by the Tribunal requires the Property Factor to act ultra vires in breach of the Deed of Conditions by requiring the replacement of the existing light fitting with an improvement.

(iv) Esto the light fitting external to the sun lounge is not a common part Clause TENTH (a) of the Deed of Conditions provides authority for the Property Factor to "arrange repair, maintenance and renewal of the... lighting of the guest suite and residents' sun lounge". The works ordered by the Tribunal in terms of the proposed PFEQ are not repair, maintenance or renewal works. They are improvement works. In light of there being no provision within any documentation relied on by the Tribunal to allow the Applicant to unilaterally undertake improvement works the works cannot be undertaken in that manner by the Respondent/ Appellant in its capacity as Property Factor.

(v) The PFEQ imposes an obligation on the Respondent/ Appellant as Property Factor to unilaterally carry out the works required in terms of that PFEQ where no such

powers are conferred on the Respondent/ Appellant as Property Factor. There would therefore be no mechanism for recovery of costs incurred in carrying out those works. The Decision orders the Respondent/ Appellant to act *ultra vires*.

(vi) *Esto* the proposed works are not improvement works and the Respondent/ Appellant has authority to undertake such works, the Tribunal erred in law in the Decision by applying a subjective test of reasonableness where it stated that "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". *Esto*, the Tribunal can apply such a test, the Tribunal should apply an objective test.

(vii) Further, the PFEO proposed requires a "dawn to dusk external light". Such lighting would be absurd given the nature of the Applicant's complaint.

(viii) The Tribunal failed to have regard to the material before it, and have failed to interpret said material correctly. Further, the Tribunal has miscategorised the works as repair or maintenance or renewal works. Its decision is plainly wrong, perverse and inadequately reasoned.

(ix) The Tribunal having erred in law et separativum having acted irrationally the Decision should be quashed and the PFEO revoked, and the Upper Tribunal should come to a Decision of new, failing which it should be referred back to the First-tier Tribunal for further consideration;

(x) Alternatively, having erred in law by failure to give adequate reasons for its decision, the Decision of the Tribunal should be quashed.

The Tribunal considered the matters raised in the application for permission to appeal. It accepted that the Factor had presented points of law and arguable grounds for appeal detailed in paragraphs (i),(ii),(iii),(iv),(v),(vi),(viii) and (x) above. The grounds detailed in paragraphs (vii) and (ix) are not considered to be arguable grounds for appeal as they are not setting out errors in law.

The Tribunal arrived at its view notwithstanding that the factual evidence of the parties at the hearing was that the external light was attached to the sun lounge. No evidence or representations were made to the Tribunal to the effect that even although the external light was attached to the sun lounge it should be considered to fall within the definition of lighting equipment for the curtilage and flood lighting equipment.

The Tribunal consider it appropriate that the Upper Tribunal for Scotland should have the opportunity to consider the matters canvassed in paragraphs (i),(ii),(iii),(iv),(v),(vi),(viii) and (x) of the application for permission to appeal and granted the appropriate permission.

Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may seek permission to appeal directly from the Upper Tribunal for Scotland on a point of law only. That party must seek permission to appeal within 30 days of the date the decision was sent to them. The request for permission to appeal must be in writing and you may wish to

consult the Scottish Court and Tribunals Service website which includes an application form with information on the details required.

Jacqui Taylor

Signed

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Chairperson Date: 21st September 2018