

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Reference: FTS/HPC/LM/23/0589 & FTS/HPC/LM/23/0590

Property address: Milton Hill Estate, Milton, Dumbarton, G82 2TS ("the Property")

The Parties

Mr David Caldwell, 27 Milton Hill, Milton, Dumbarton, G82 2TS ("the Applicant")

The Proprietors of Milton Hill Estate, c/o 26 Milton Hill, Milton, Dumbarton, G82 2TS ("the Respondent")

Tribunal Members

Ms H Forbes (Legal Member)

Mrs M Lyden (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") determined that the Respondent does not fall within the definition of 'property factor' as provided by section 2(1) of the Property Factors (Scotland) Act 2011 ("the Act"). The application is dismissed. The decision is unanimous.

Background

1. By applications received in the period between 24th February and 11th April 2023, the Applicant applied to the Tribunal for a determination on whether the Respondent had failed to carry out property factor duties in terms of section 17(1)(a) of the Property Factors (Scotland) Act 2011 ("the 2011 Act"). Details of the alleged failures were outlined in the Applicant's application and associated documents.

2. Written representations and productions were lodged on behalf of the Respondent on 6th, 18th and 21st June 2023, including an opinion by Professor Robert Rennie and a note from Sheriff Fraser.
3. A Case Management Discussion (“CMD”) took place by telephone conference on 19th July 2023. Mr Daniel Macaulay attended on behalf of the Respondent. The Applicant was not in attendance. Mr Macaulay reiterated his challenge that the Tribunal does not have jurisdiction in this case, as the Respondent is acting in their capacity as a homeowners’ association in terms of a Deed of Conditions registered in respect of the development on 20th May 1964. As a homeowners’ association, they are exempt from registration under the 2011 Act. The Tribunal continued the CMD to allow further notification to be made by post on the Applicant, as it was concerned that email notification upon the Applicant had not been successful, given his non-attendance. The Tribunal issued a Direction to the Applicant.
4. By letter dated 14th August 2023, the Applicant made representations and informed the Tribunal that he had not received notification of the CMD.
5. By letter dated 27th September 2023, the Applicant made further representations.
6. A Case Management Discussion (“CMD”) took place by telephone conference on 11th October 2023. The Applicant was in attendance. There was no attendance by the Respondent. The Tribunal explained that it has jurisdiction to consider, as a preliminary point, whether a body providing factoring services is a property factor, and, thereafter, to consider whether the property factor has complied with the aforementioned obligations.
7. The Applicant explained the background to the development and the application. There was some discussion about the 1964 Deed of Condition. The Applicant indicated he was content for the Tribunal to accept the Deed of Conditions, although he is aware of other Deeds of Conditions which are in existence. In addition, the 1964 Deed is not replicated in his Title Deed. The Applicant is concerned that the Respondent was not properly appointed in terms of the Deed of Conditions. The Respondent appears to be providing factoring services, but it is not clear on what authority the Respondent is acting.
8. Shortly after commencing, the Tribunal was informed that Mr Macaulay was attempting to join on behalf of the Respondent, and was experiencing technical issues. Having attempted to assist Mr Macaulay to join with no success, the Tribunal decided to continue with the CMD, given that the Respondent’s position had previously been put to the Tribunal at the last CMD as well as in written representations.
9. Responding to questions from the Tribunal regarding the opinion of Professor Rennie, as lodged by the Respondent, the Applicant said he was not aware of what questions had been asked of the Professor. The Tribunal pointed out that the questions asked are included in the opinion, and stated that, in the

absence of any contradictory evidence or another legal opinion, the Tribunal would be likely to give some considerable weight to Professor Rennie's opinion that the Deed of Conditions was well drawn and binds all proprietors, and that the real burdens have become community burdens. The Applicant reiterated his concern that the Respondent was not appointed properly in accordance with the Deed of Conditions. Discussing Sheriff Fraser's note, the Applicant said it was drawn up from memory some years after the court case to which it refers. There have been subsequent court actions between Mr Macaulay and other homeowners, whereby Mr Macaulay has attempted to recover monies.

- 10.** The Tribunal decided to set matters down for a preliminary hearing to determine whether or not the Respondent falls within the definition of 'property factor', as provided by section 2 of the Act. The Tribunal issued a Direction to the Respondent in the following terms:

The Respondent is required to provide within 28 days:

- (i) *The identity, including addresses and contact details, of all current office bearers of the committee of the Milton Hill Estate Proprietors;*
- (ii) *An indication of Mr Macaulay's position as an office bearer of the committee of the Milton Hill Estate Proprietors, including details of the date of his appointment as office bearer;*
- (iii) *Written authorisation from the Respondent nominating Mr Macaulay or any other committee member as the Respondent's representative in defending this application;*
- (iv) *Any existing constitution of the Milton Hill Estate Proprietors;*
- (v) *All minutes of Annual or Extraordinary Meetings of the Milton Hill Estate Proprietors, including minutes showing when the current office bearers were appointed.*

- 11.** By email dated 23rd October 2023, the Respondent lodged a response to the Direction, including minutes of meetings of the Respondent.

- 12.** By letter dated 6th November 2023, the Applicant lodged written representations. The Applicant stated that he could not 'attend any meeting' until the Respondent provides the information they have been instructed to supply by the Tribunal. The Applicant stated 'please cancel the meeting until the information requested is supplied.'

- 13.** By email dated 6th December 2023, the Respondent lodged minutes of a meeting on 27th November 2023 and authorisation of Mr Macaulay as representative for the Respondent.

14. By letter dated 8th January 2024, the Applicant lodged written representations, and asked that the meeting be cancelled as previously requested.

15. On 11th January 2024 the Applicant was informed as follows:

The hearing scheduled to take place on 18th January 2024 will proceed unless the Tribunal grants an application from either party to postpone the hearing. If you wish to make an application to adjourn or postpone, please ensure that it meets with the requirements of Rule 28 of the Procedural Rules, which requires you to

- (i) if practicable, notify the other party;*
- (ii) show good reason why an adjournment or postponement is necessary;*
- (iii) produce evidence of any fact or matter relied on in support of the application for an adjournment or postponement.*

If either party chooses not to attend the scheduled hearing, the hearing will proceed on the evidence before the Tribunal.

Parties may wish to consider the Court of Session decision [2020] CSIH 22 XA112/19. The facts in themselves are not necessarily relevant to this application, however, the decision makes it clear that the Tribunal has jurisdiction to consider whether a body or person falls within the definition of property factor as stated in the legislation.

16. On 18th January 2024, the Tribunal was notified that a late submission dated 17th January 2024 had been made by the representative for the Respondent. The Respondent's representative also enclosed minutes of a meeting held by the Respondent on 27 November 2023.

The Hearing

17. A hearing took place by telephone conference on 18th January 2024. The Respondent was in attendance, and was represented by Mr Carmichael, Solicitor. The Applicant was not in attendance.

18. The Tribunal considered the terms of Rule 29. The Tribunal determined that the requirements of Rule 24 had been satisfied, and it was appropriate to proceed with the application in the absence of the Applicant.

Preliminary Issues

19. The Tribunal considered the late lodging of submissions and decided not to accept the late document from the Respondent as it had not been lodged timeously, and had not been served upon the Applicant. The minutes of the meeting of 27th November 2023 had already been lodged by the Respondent. Mr Carmichael said he was satisfied he could make the submission orally.

20. The Tribunal considered whether to dismiss the application due to the Applicant's failure to attend. Mr Carmichael submitted that it would be

appropriate and preferable to the Respondent if the application proceeded. The Tribunal adjourned to consider matters and decided to hear the submissions of the Respondent's representative.

The Respondent's position

Jurisdiction of the Tribunal

- 21.** Under section 17(1) of the 2011 Act, a homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed a) to carry out the property factor's duties; or (b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the "section 14 duty"). Under section 17(2) an application under subsection (1) must set out the homeowner's reasons for considering 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. Under section 19(1) The First-tier Tribunal must, in relation to a homeowner's application referred to it under section 18(1)(a), decide (a) whether 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, and (b) if so, whether to make a property factor enforcement order.
- 22.** It is clear that the Applicant's complaint centres on two main issues: a) that the Respondents are not registered property factors; and b) that the Respondents have pursued him in court for unpaid common maintenance costs. Those are not competent bases for bringing an application under section 17 of the 2011 Act. Further, the extent of the Tribunal's powers in ruling on a section 17 application is set out at section 19 of the 2011 Act. There is nothing within the 2011 Act that grants the Tribunal the power to make a ruling on whether an owner's association is a property factor or not. Therefore, there is no provision within the 2011 that allows the Tribunal to decide whether the Respondent's ought to be registered as a property factor.
- 23.** That point is addressed on the Tribunal's own website. Within the frequently asked questions section, the following information is provided:

"Do the Housing and Property Chamber have a role in deciding if an individual or body is a property factor within the definition of the Act?"

No, the role of the Housing and Property Chamber is not to determine eligibility for registration of property factors or to validate the registration of property factors. These matters are issues for the Scottish Property Factors Registration Team and the Housing and Property Chamber will accept the determination of registration reached and proceed accordingly. This has the effect that in some instances applications to the Housing and Property Chamber may require to be listed (frozen) until the issue of registration is decided and a decision is made as to whether an individual or body is a property factor in relation to the property or land. In these instances the Housing and Property Chamber will liaise with the Registration Team and advise them of receipt of an application to the Housing and Property Chamber."

- 24.** It is therefore surprising that the Tribunal has fixed a preliminary hearing to decide on precisely that issue. It is respectfully submitted, on behalf of the Respondents, that it is not competent for the Tribunal to make such a determination.
- 25.** The Tribunal asked Mr Carmichael if he was aware of the Inner House decision previously referred to, the citation of which had been circulated to the parties, which considered an appeal against a decision of the First-tier Tribunal that a party fell within the definition of 'property factor' as defined in the Act. The Tribunal said this tended to indicate that the Tribunal had jurisdiction in this matter. Mr Carmichael said he was not aware of the decision.
- Definition of Property Factor**
- 26.** In any event, the Respondents are not property factors as defined within the 2011 Act. Under section 2 (1) of the Act, a "property factor" means:-
- (a) *a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes,*
- (b) *a local authority or housing association which manages the common parts of land used to any extent for residential purposes and owned—*
- (i) *by two or more other persons, or*
- (ii) *by the local authority or housing association and one or more other person,*
- (c) *a person who, in the course of that person's business, manages or maintains land which is available for use by the owners of any two or more adjoining or neighbouring residential properties (but only where the owners of those properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of that land), and*
- (d) *a local authority or housing association which manages or maintains land which is available for use*
- by :-*
- (i) *the owners of any two or more adjoining or neighbouring residential properties,*
or
- (ii) *the local authority or housing association and the owners of any one or more such properties but only where the owners of those properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of that land."*

27. The Respondents do not operate a business. They do not charge the proprietors factoring fees. The definition of 'property factor' under the Act therefore does not apply to the Respondents.

28. Further, Section 2 (2) provides that:-

...the following are not property factors for the purposes of this Act—

...“(b) an owners' association established by the development management scheme (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) so far as managing or maintaining common parts or land in accordance with the scheme,”
Section 71 (3) of the 2003 Act provides that “*In this Act, “the development management scheme” means such scheme of rules for the management of land as is set out in an order made, in consequence of this section, under section 104 of the Scotland Act 1998 (c.46) (power to make provision consequential on legislation of, or scrutinised by, the Scottish Parliament) or, in relation to a particular development, that scheme as applied to the development.”*

29. Those provisions, when read together, mean that an owners' association established by a scheme of rules for the management of land on a particular development, are not property factors under the 2011 Act. The Respondents quite clearly fit that description. The Respondents are an owners' association established by the scheme of rules set out in the 1964 Deed of Conditions for the management of land on the Milton Hill Estate. Accordingly, the Respondents are not property factors. They have the right to self-factor and do not require to be registered under the 2011 Act. They are not bound by the provisions of the 2011 Act.

30. For the avoidance of doubt, the charges which the Respondents have sought and continue to seek from the Applicant and all other proprietors are common maintenance charges payable by the Applicant under the terms of the 1964 Deed of Conditions. The binding nature of the Deed of Conditions on all of the proprietors has been opined upon by Professor Robert Rennie. Professor Rennie's opinion has already been provided to the Tribunal. The Applicant has other means and other forums for challenging the Deed of Conditions, the maintenance charges, and the legitimacy and/or the general functioning of the owner's association. There are a set of coherent rules and a democratic process under the 1964 Deed of Conditions, which the Applicant refuses to adhere to. All to the detriment of the other proprietors of the Estate. Notwithstanding that the owners' association has in fact been set up properly and appointed to self-factor the estate in accordance with the Deed of Conditions, as per Sheriff Fraser's 2016 ruling, it is respectfully submitted that the Tribunal does not have the jurisdiction to decide on that issue either. A decision on whether a committee has been set up properly under and in terms of a conveyancing deed is not within the jurisdiction of the Tribunal. Following pressure from the Applicant, the Tribunal has directed that the owners' association provide names and email addresses of all its 'office bearers'. It is

unclear why this direction was necessary. If it were to address ‘accountability’ for the decisions of the owners, the 1964 Deed of Conditions allows a process in which decisions of the owners, as a collective, can be challenged and discussed at a meeting. Any proprietor can democratically call a meeting and ask the relevant questions on the operation of the association and its maintenance management of the estate. The Tribunal is not the correct forum for the Applicant to raise any of these issues. The Applicant’s claim form and written representations inaccurately state the owners’ association have no constitution or legal basis to exist. He accuses Mr Macaulay of fraudulently manufacturing documents including deed of conditions and meeting minutes. He has accused Mr Macaulay of potentially committing criminal offences.

- 31.** The Respondents have now been put to the expense of having to engage a lawyer to represent them in these proceedings. The Applicant indicates in his written representations that he is now refusing to attend any hearing fixed by the Tribunal. It is submitted that the Applicant has incompetently and unreasonably brought this case before the Tribunal. He has also been entirely unreasonable in his conduct of the case. It is submitted that this is rare case in which expenses ought to be granted in favour of the Respondents.
- 32.** It is submitted that the Application ought to be rejected and the case summarily dismissed with expenses in favour of the Respondents.
- 33.** Responding to questions from the Tribunal as to whether the Respondents had to instruct a solicitor, Mr Carmichael said this was necessary as the Applicant had made accusations of criminal activity. The Applicant has continued with the application despite the representations of the Respondent, and applied pressure to the Tribunal to intervene. He has also refused to attend. If he had gone through the proper process set out in the Deed of Conditions, the Respondent would not have been put to additional expense.
- 34.** Responding to questions from the Tribunal regarding the Applicant’s understanding of the role of the homeowners’ association, Mr Macaulay said the Applicant has been involved in previous court cases. He is resentful because he has to pay 3.5% of the common charges as he has a small piece of grass which he wished to cut himself. All the other homeowners are happy with the homeowners’ association. The meetings are always quorate and minuted. There is a newsletter and correspondence is sent by email to all but the Applicant, who refuses to receive correspondence by email.

Decision of the Tribunal

- 35.** The Tribunal considered it has jurisdiction to decide whether a party falls within the definition of ‘property factor’ as set out in section 2(1) of the Act. The Tribunal is not bound by guidance on the Housing and Property Chamber’s website and there is nothing within the Act that prohibits the Tribunal from considering this matter.
- 36.** The Tribunal accepts Professor Rennie’s opinion that the Deed of Conditions is well drawn and binds all proprietors, and that the real burdens have

become community burdens. The Tribunal is satisfied that the Deed of Conditions allows homeowners to self-factor. Having carefully considered the documents lodged by the Respondent, which comprised minutes of meetings of the homeowners, the Tribunal is satisfied that the Respondent is complying with the Deed of Conditions.

- 37.** The Tribunal was concerned at the suggestions made on behalf of the Respondent that the Tribunal had been pressured by the Applicant to issue the Direction, or that it was not appropriate for the Tribunal to issue the Direction. Without the documents provided as a result of the Direction, the Tribunal could not be certain that the Respondent was currently self-factoring and acting in accordance with the Deed of Conditions. The fact that Sheriff Fraser had stated in a 2016 note referring to a 2013 case that the homeowners' association had been set up properly, does not mean that it continues to function properly to this day in accordance with the Deed of Conditions, hence the necessity for a Direction.
- 38.** The Tribunal made no award of expenses in this case. Although there were aspects of the Applicant's behaviour that was concerning, particularly the tone and content of his communications with the Tribunal, his lack of understanding of the role and remit of the Tribunal, and his refusal to attend the hearing, the Tribunal did not consider that his application was vexatious or that he had put the Respondent to unnecessary or unreasonable expense. The Applicant was entitled to make the application to the Tribunal. The Respondent was not bound to instruct legal representation. It was their choice to do so.

Decision

- 39.** The Respondent does not fall within the definition of 'property factor' as provided by section 2(1) of the Act. The application is dismissed.

Right of Appeal

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.



Legal Member and Chairperson
29th January 2024