Upper Tribunal for Scotland 

[2019] UT 12
Ref UTS/AP/18/0004

DECISION NOTICE OF SHERIFF ANTHONY DEUTSCH

in the case of

PROVAN PROPERTIES (SCOTLAND) LTD

Appellant

and

MRS CAROLINE CROSSAN

Respondent

FTT Case Reference FTS/HPC/PF/17/0323

DECISION OF THE UPPER TRIBUNAL

The upper tribunal refuses the appeal.

Note

[1] The appeal in this case concerns the proper interpretation of section 2 of the Property Factors (Scotland) Act 2011 ("the 2011 Act"), which defines the meaning of "property factor" for the purposes of that act. Section 2 is in the following terms:

> **"2 Meaning of 'property factor'**
> (1) In this Act, '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.

(2) Despite subsection (1), the following are not property factors for the purposes of this Act—
(a) a person so far as managing or maintaining land on behalf of the Crown that was acquired by virtue of Her Majesty's prerogative rights in relation to unclaimed or ownerless land,
(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,
(c) a person so far as managing or maintaining common parts or land on behalf of another person who is a property factor in relation to the same common parts or land.
(3) The Scottish Ministers may by order modify either or both of subsections (1) and (2).
(4) An order under subsection (3) may make such consequential modifications of any other provision of this Act as may be necessary or appropriate.
(5) An order under subsection (3) is not to be made unless a draft of the statutory instrument containing the order has been laid before, and approved by resolution of, the Scottish Parliament.
(6) In this Part—
'housing association' has the meaning given by section 1 of the Housing Associations Act 1985 (c.69),
'local authority' means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39)."

[2] On the basis of the facts which the tribunal found to be admitted or proved they held that the appellant was a factor in terms of either or both of 2 (1) (a) or (c). It will be seen that both these provisions require that the person who manages or maintains

common parts or land available for use by adjoining or neighbouring residential properties does so "in the course of that person's business". The point of law raised in this appeal is whether upon the facts admitted or proved the tribunal were correct to conclude that the appellant's activities took place in the course of its business.

[3] The tribunal's decision contains the following statement of matters upon which the parties were agreed:

> "The development at Charlotte Court, 37 East Princes Street, is a building consisting of 15 flats which were erected in 2007 by Proven Properties (Scotland) Ltd. Marketing of them was adversely affected by the recession. The homeowner purchased Flat 7 which is on the second floor. The [appellant] decided to let other units and in 2017 another flat was sold. As at the date of the hearing the [appellant] owned 13 of the flats and one is currently marketed for sale. The flats were factored by B and B Estate Agents and Property Managers (B and B) until 19 November 2011 when the [appellant] took on the management of the building. The [appellant] arranges for servicing of the lift, cleaning of the common hallways and stairs, maintenance of the landscaped area, payment of the electricity account for the common lighting and any necessary repairs and maintenance of the common parts of the building. Until the insurance renewal date in 2017 the [appellant] arranged the common insurance policy for all the flats in the building including that belonging to the homeowner. The [appellant] sent various accounts to the homeowner since 2011 in respect of a 1/15 share of the cost of all the matters previously referred to with the exception of matters pertaining to the lift for which a one thirteenth share of costs was sought. The [appellant] has never sought to be paid a factoring or management fee by the homeowner in respect of the work it has carried out in managing the building. The [appellant] no longer arranges property insurance in respect of the homeowner's flat."

[4] In the discussion section of its decision the tribunal records the following findings in fact:

1. The appellant is not operating a business of commercial property factors in the traditional sense of being open to being instructed by owners of developments.
2. The appellant is in business as a landlord in respect of the 13 flats in the development which were or are available for rent.
3. In the course of managing the rented flats the appellant required to deal with repairs and maintenance of the common parts of the building.

[5] The points of law advanced on behalf of the appellant are as follows:

1. The tribunal has misled itself in holding that the [appellant] was acting in the course of business. There was no business relationship between the parties, but only a private relationship deriving from their shared interest in the same property.
2. The tribunal misled itself in holding that the [appellant] was acting in the course of business having regard to the purpose and terms of the legislation.

[6] The phrase "in the course of a business" has been the subject of judicial interpretation upon a number of occasions; some decisions supporting a narrow construction others favouring a wider interpretation. I have identified the following leading cases: *Havering LBC* v *Stevenson* [1970] 1 WLR 1375 , *Davies* v *Sumner* (HL) [1984] 1 WLR 1301 , *R&B Customs Brokers Co Ltd* v *United Dominions Trust Ltd (CA)* [1988] 1 WLR 321 , and *Stevenson* v *Rogers* (CA) [1999] QB 1028.

[7] The first two of these cases addressed the meaning of the phrase as it is employed in section 1 (1) of the Trade Descriptions Act 1968, which created criminal offences in the interest of consumer protection. In that context the phrase was held to require a degree of regularity in an activity such that it formed an integral part of the person's business. In *R&B Customs Brokers Co Ltd* v *United Dominions Trust Ltd* addressed the meaning of "in the course of a business" as it was used in section 12 (1) of the Unfair Contract Terms Act 1977 ("the 1977 Act"). The case was concerned with whether a finance company could exclude an implied term as to fitness for purpose when selling a car for use by one of the directors of the plaintiff company. The Court of Appeal held that the finance company could not do so because the plaintiff company was dealing as a consumer for the purposes of this section as well is for the purposes of section 6 (2) of the 1977 Act. The court adopted a similar approach to that taken in *Havering* and *Davies,* holding that for a contract to be made in the course of business the

transaction had to be an integral part of the business concerned and if it was incidental to the carrying on of that business a degree of regularity had to be shown. Although the appellant's agent makes no reference to authority it is the narrow approach taken in these three cases which it appears is being advanced.

[8] In *Stevenson* the Court of Appeal examined the phrase "in the course of a business" as used in section 14 (2) of the Sale of Goods Act 1979 ("the 1979 Act"). Potter LJ, with whom the other judges agreed, considered the phrase in the context of the 1979 Act and interpreted it broadly on the basis that the aim of the section was to provide increased protection to buyers who purchase goods from a seller who was carrying on business. The court distinguished the earlier cases, including *R&B Customs Brokers Co Ltd*. *Stevenson* was followed in Scotland by the Inner House of the Court of Session in *Macdonald* v *Pollock* 2013 SC 22.

[9] The words of any statutory provision require to be interpreted in the context of the whole act of which the provision forms part. The context in the case law concerned with the Trade Descriptions Act 1968 was that of a criminal statute where in the event of ambiguity a restricted construction was required. While it is true that the 2011 Act does create a new criminal offence of operating as a property factor without registration (section 12), it could not be described as a criminal statute, its purpose is to regulate those who manage the common parts of residential property, to establish minimum standards of practice for those persons and to make provision for the resolution of disputes between homeowners and property managers. To confine the definition of property factor to those persons for whom property management is an integral part of their business or if incidental only something performed regularly, would defeat those purposes. Homeowners, who happen to find themselves in the position of having the

common parts of the development in which they reside managed by a person who does not undertake such responsibilities for any other group of properties, have as much interest in receiving a proper service and having available to them suitable means of dispute resolution as do persons served by a traditional property factor. The phrase "in the course of a business" should therefore be given its wide face value and not be subjected to some implied qualification which might be difficult to apply in practice and which would have the effect of narrowing the seemingly wide scope and apparent purpose of the words.

[10] Because the courts in addressing different statutes have not taken a consistent approach to the question of what is or is not done in the course of a trade of business, it might fairly be said that an ambiguity or real doubt arises about whether the phrase should be taken at face value or read more narrowly. To the extent that is so, it is appropriate under the rule in *Pepper* v *Hart* [1993] AC593 to refer to the Scottish Parliament official report recording the discussion of the Local Government and Communities Committee about the definition of property factor which occurred on 19 and January 2011 (columns 3973 to 3978 are reproduced in the appendix hereto). It is clear from the discussion that the legislature intended to put it beyond doubt that a land owning company such as the appellant engaged in maintenance would be caught by the definition. The amendment to the original bill which introduced section 2 (1) (c) expresses that the intention.

[11] Even if the narrower interpretation was to be applied, upon the facts established by the tribunal, the appellant still falls within the definition of property factor. While management of the development at Charlotte Court, 37 East Princes Street might not be

an integral part of the appellants' business it has been their regular practice to perform that work since 2011 up until the present time.

[12] Presumably on the basis that the appellant makes no charge for its services, it is argued on their behalf that "[t]here was no business relationship between the parties, only a private relationship deriving from their shared interest in the same property." The concepts of "business relationship" and "private relationship" find no place within the provisions of the 2011 Act. Section 2 does not require that the property factor be remunerated. In terms of section 2 (1) (c) it is enough that the management be done as a part of the person's business and that the owners of the adjoining or neighbouring residential properties are required by the terms of their title deeds to pay for the cost of management.

[13] For all of the foregoing reasons I consider that the appeal should be refused.

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within 30 days of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.

Appendix

Col 3973

We have tried to clarify the position in several amendments that are to be discussed today. I hope that that will become clearer as we deal with those amendments. Our amendment 42 covers the specifics of publishing the list.

Amendment 36 agreed to.

Section 1, as amended, agreed to.

Section 2—Meaning of "property factor"

Amendments 37 and 38 moved—[Patricia Ferguson]—and agreed to.

The Convener: Amendment 39, in the name of Patricia Ferguson, is grouped with amendments 1 to 5, 22, 27, 107, 109 and 110. If amendment 39 is agreed to, amendments 1 and 2 will be pre-empted.

Patricia Ferguson: Section 2(1) provides a definition of a property factor in three scenarios, which can be summarised as a traditional factor of flatted dwellings, a council or housing association factor and a land management company factor. At paragraph 62 of its stage 1 report, the committee recognised the need to tighten the drafting

"**to ensure that there is no doubt as to whether a land-owning maintenance company is covered by the Bill's provisions.**"

In consultation with my legal team, I have considered the issue. With the support of Consumer Focus Scotland, we propose a much tighter definition that will add new paragraphs (c) and (d) to section 2(1).
Amendment 39 deals with land-owning maintenance companies. The committee will note that we have anticipated the possibility of a land- owning maintenance company delegating its functions to a third party— proposed new paragraph (d) covers that.

The minister's amendment 1 is helpful and we have incorporated its wording in amendment 39. Amendment 2 is unnecessary, given that we use the concept of owners of related properties, which implies two or more owners and which is defined by the Title Conditions (Scotland) Act 2003. Through amendment 110, I propose that the bill should adopt that definition in its interpretation section.

I support the minister's amendments 4, 5, 22 and 27, which deal with persons or associations that are excluded from being property factors for the purposes of the bill. However, I remain to be convinced that amendment 3 is needed, as section 2(1)(b) deals with local authority or registered social landlord factors generally.

My amendments 107, 109 and 110 propose changes to section 28—the bill's interpretation section—to define the concepts of "facilities", "land" and "related properties", which I believe is

Col 3974

necessary to capture land-owning maintenance companies as clearly and objectively as possible.

I move amendment 39.

Alex Neil: The amendments all relate to the definition of "property factor"; I will speak first about the Government's amendments. There is a high level of consensus between the Government and Patricia Ferguson in what we are trying to achieve—the issue is how best to achieve it.

Amendment 1 relates to section 2(1)(c) and seeks to ensure that land maintenance companies are covered generally by the definition. The first part of the amendment deletes the reference to ownership, given that in some cases land may continue to be owned for a period of time by the developer rather than the land maintenance company.
Amendment 1 also ensures that under section 2(1)(a), only those carrying out a business are caught by the definition at section 2(1)(c).

Amendment 2 provides that the definition at section 2(1)(c) applies only when the land is available for use by the owners of two or more properties. Section 2(1)(c) as currently drafted might cover individuals who grant someone a servitude or access rights and require a payment in exchange so that the land can be maintained. Amendment 2 puts beyond doubt that private arrangements of that nature are not covered.

Amendment 3 is linked to amendment 1, which restricts section 2(1)(c) to those who operate as a factor as part of a business. Amendment 1 could have the effect of taking local authorities and housing associations in land management cases out of the definition, but amendment 3 ensures that they are still covered.

Amendment 4 excludes various bodies and parties from the definition of "property factor". The first exclusion at proposed new paragraph (a) is for the Queen's and Lord Treasurer's Remembrancer, and the second exclusion at proposed new paragraph (b) is for development management schemes. The third exclusion at proposed new paragraph (c) puts it beyond doubt that sub- contractors who are working on behalf of the property factor or land maintenance company will not themselves be caught by the definition of "property factor".

Amendment 5 gives ministers an order-making power to amend the definition of "property factor" that is subject to affirmative resolution. As a result, amendment 27 excludes the power to amend the definition of "property factor"

from powers to make statutory instruments under the bill that are subject to negative resolution procedures.

Amendment 22 relates to the power at section 26 for ministers to delegate functions. The amendment provides that ministers may not

Col 3975

delegate the order-making power to amend the definition of "property factor".

Turning to Patricia Ferguson's amendments, we have a major concern about amendment 39, which refers to "related properties". Amendment 110, which was also lodged by Patricia Ferguson, would provide that "related properties" has the meaning that is given in section 66 of the Title Conditions (Scotland) Act 2003. However, the definition in the 2003 act is lengthy and complex, and serves a particular purpose in relation to manager burdens. It is not clear to what extent some aspects of the definition of "related properties" would be applicable to land as maintained by land maintenance companies.

That is an unnecessary complication, and there may be unintended consequences. We would not want an unduly narrow and technical interpretation of the concept of "property factor" under section 2(1) of the bill that relies on concepts that have been imported from the 2003 act, which has a different legal context. The amendments that I have lodged avoid such complications and seek to ensure that all property factoring arrangements are covered in section 2(1).

11:15

Patricia Ferguson also lodged amendments 107 and 109 in this group. Amendment 109 defines "land", and amendment 107 defines "facilities". We have concerns about those two proposed definitions as they rely on references to "related properties", which, as I have already indicated, produces an uncertain result.

I appreciate why Patricia Ferguson considers that definitions might be helpful under the bill, and the Government is happy to meet her and her advisers to see whether any definition should be added at stage 3.

There might be further unintended consequences from amendment 39's proposed insertion into section 2(1) of new paragraph (d), which refers to persons who are

"instructed to carry out management and maintenance".

That might cast further doubt on whether subcontractors who are engaged by property factors are excluded from the definition. Our amendment 4 seeks to remove any doubt by creating an express exclusion.

I invite the committee to agree to Government amendments 1 to 5, 22 and 27, and to reject

Ms Ferguson's amendments 39, 107, 109 and 110.

Mary Mulligan: I thank the member in charge of the bill and the minister for their comments. As we are all aware, the committee was exercised at stage 1 about the definition of "property factor" and

Col 3976

the desire to include those who had both a land ownership role and a factoring role. The member in charge has gone some way, through amendment 39, to ensuring that we do that, which is helpful.

Having listened to the minister's concerns, I am not convinced that the amendment would have the unintended consequences that he spoke about. However, I hope that there will be an opportunity for further discussion and that the matter can be addressed again at stage 3. The amendment relates to an important point, which the committee wished to ensure was covered in the bill, so I hope that we can get a definition that achieves that.

Malcolm Chisholm (Edinburgh North and Leith) (Lab): The minister will no doubt comment on this when he winds up, but if I understood what he said, his amendment 3 was lodged only in consequence of amendment 1. Does he accept that amendment 3 is not necessary if amendment 39 is agreed to?
That is what Patricia Ferguson said.

Alex Neil: Amendment 3 is obviously linked to amendment 1. If amendment 1 falls, amendment 3 will be redundant.

Patricia Ferguson: In drafting amendment 39, we were careful to refer back to the concerns that the committee raised about clarity and the definition in respect of property managers, recognising that there is more than one model of property manager operating in Scotland—hence the specific nature of the amendment.

I will try to answer some of the minister's concerns, which I appreciate are genuine. I also appreciate his offer of further meetings, the purpose of which would be to come to a consensual agreement on the matter. When it comes to third-party contractors, our specifying that responsibility arises only in respect of the burdens that are placed on owners in their title deeds suggests to me that contractors would be excluded. Furthermore, we mention that

"in the course of the person's business"

they are obliged to manage or maintain land, and that helps to give clarity as to who is caught by that aspect of the provisions.

Indeed, the element to do with the burdens in the title deeds would also help to clarify whether a developer who was acting in lieu of owners at the beginning of a new development would be captured by the provisions. I press amendment 39.

The Convener: The question is, that amendment 39 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Col 3977

For

Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Mulligan, Mary (Linlithgow) (Lab)

Against

Doris, Bob (Glasgow) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Wilson, John (Central Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 39 disagreed to.

Amendment 1 moved—[Alex Neil]—and agreed to.

Amendment 2 moved—[Alex Neil].

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Doris, Bob (Glasgow) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Wilson, John (Central Scotland) (SNP)

Against

Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Mulligan, Mary (Linlithgow) (Lab)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 2 agreed to.

Amendment 3 moved—[Alex Neil].

The Convener: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Doris, Bob (Glasgow) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Wilson, John (Central Scotland) (SNP)

Against

Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Mulligan, Mary (Linlithgow) (Lab)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 3 agreed to.

Amendments 4 and 5 moved—[Alex Neil]—and agreed to.

Col 3978

Section 2, as amended, agreed to.