Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber in relation to an application made under Section 17(1) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/22/3577, FTS/HPC/PF/22/3578 and FTS/HPC/LM/22/3579

Re: Properties at Chalets 21, 28 and 32, Largiemore Estate, Otter Ferry PA21 2DH ("the Property")

Parties:
The Executors of the late Mrs Barbara Waugh, 31 Dickies Wells, Alva, Clackmannanshire FK12 5JB, owner of Chalet 21, Largiemore Estate, Otter Ferry PA21 2DH; Duncan Munro and Dr Jane Munro, 2/2, 192 Wilton Street, Glasgow G20 6BW, owners of Chalet 32, Largiemore Estate; and Mrs Lesley Ross, West Whitelee Farm, Old Glasgow Road, Stewarton KA3 5JU, owner of Chalet 28, Largiemore Estate ("the Applicants")

Largiemore Estate Limited, incorporated under the Companies Acts (13515472) and having their registered office at Suite 1, 1 Old Court Mews, 311a Chase Road, London N14 6JS ("the Respondents")

Tribunal Members:

George Clark (Legal Member) and Ahsan Khan (Ordinary Member)

Decision
The First-tier Tribunal for Scotland Housing and Property Chamber decided it does not have jurisdiction to determine the applications.

Background

1. By applications, dated 2 October and all in identical terms, the Applicants complained that the Respondents as property factors had failed to comply with the Property Factor's duties. The Applicants' position was that the Respondents are property factors as defined by the Property Factors (Scotland) Act 2011 ("the Act"). The Applicants' properties are purpose-built holiday homes, and the title deeds provide that they are to be used and occupied solely as a private holiday dwellinghouse occupancy not exceeding eleven months in any year. They are subject to Council Tax as residential properties.

2. The Applicants understood that the view of the Respondents was that the Act does not apply, as the properties are holiday homes. The Applicants stated that a holiday home is not an exemption in terms of the Act.

3. Each chalet owner enjoys “rights in common with the other proprietors of the Development and of Largiemore Farmhouse of access and egress by foot and vehicle over the whole roads excluding lay-bys which are for each chalet and pedestrian over the whole pathways thereof, to park vehicles (but not caravans) in the common parking area at the Old Barn, to park boats subject to availability of space in the boat parking area near the foreshore…and to enjoy in common with all other such proprietors all areas of amenity such as grass lawns and all services and facilities provided for chalet”. Each chalet owner is obliged to pay an equal share of the costs and overheads incurred for the maintenance, repair, replacement and renewal of the whole facilities over which these rights are granted.

4. The Applicants stated that they are homeowners in terms of the Act and, therefore, entitled to make the applications.

5. The Applicants’ specific complaints were that certain services provided by the previous owner of the common amenity land (roads, laybys, pathways, parking areas, grass lawns etc.) were discontinued by the Respondents, and that the property factors had failed to comply with the charging framework set out in the title deeds.

6. The Respondents, in written representations received by the Tribunal on 8 July 2024, argued that the Act is not intended to apply to all types of property where there might be a factor. The definitions of “property factor” and “homeowner” refer to the related concepts of land being used as a residential property or for residential purposes. The Oxford English Dictionary defines “residential” as “serving or used as a residence; in which one resides”. The word “reside” is commonly defined as dwelling permanently, namely as someone’s permanent or usual abode. They submitted that the Largiemore Holiday Estate, which is owned and managed by the Respondents, is a commercial holiday park development. The Policy Memorandum for the Bill which became the Act indicates that the legislation is not intended to apply to a development of this nature. It states that the definition of “property factor” does not apply to homeowners who “self-factor”, those who manage property which is not owned in common, and those who manage commercial property.” The terms of the Act are focussed on protecting owners of properties that are used as people’s residences. The Applicants are not “homeowners” within the meaning of Section 10(5) of the Act because the chalet plots are not used for residential purposes, as they are not the Applicants’ residences.

7. In their submissions, the Parties referred to a number of reported cases. These will be considered under the Reasons for Decision section of this Decision.

The Hearing

8. A Hearing took place at Glasgow Tribunals Centre on the morning of 25 June 2024. The Applicants were all represented by Mr. Norrie Moore. The Respondents were represented by Mr Robert Sutherland, Advocate. A number of witnesses were also due to give evidence.

9. At the commencement of the Hearing, the Parties advised the Tribunal that they had agreed the terms of a Joint Minute and that they were also agreed that the Hearing should be restricted to legal argument as to whether or not the Respondents fall within the definition in the Act of "property factor" and whether the Applicants fall within the definition of "homeowner". The Joint Minute had not been signed, but it had been agreed as a factual matrix. Accordingly, at the request of the Parties, no evidence relative to the substance of the applications was led and the Hearing was restricted to the question of whether the Respondents are property factors and/or whether the Applicants are homeowners as, if either question is answered in the negative, the Tribunal has no jurisdiction to determine the applications. The Tribunal's findings of fact are, unless otherwise stated, agreed in the Joint Minute.

10. For The Respondents, Mr Sutherland submitted that the Act had been aimed at a specific type of property and not necessarily at all residential property, as a person has to be acting in the course of a business in order to meet the definition of "property factor". He referred to the Oxford English Dictionary definition of "reside", namely "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place" and "Residence" meaning "to have one's usual dwelling-place or abode". He accepted that there was no decision precisely on this point and that it was necessary to look at analogous situations. Section 2(2)(1A) of the Home Owner and Debtor Protection (Scotland) Act 2010, focused on protecting individual homeowners, refers to "land used to any extent for residential purposes." This phrase was considered in *Westfoot Investments Ltd v European Property Holdings Inc*, 2015 SLT (Sh. Ct) 201 at Paras 23 and 24, where Sheriff Welsh stated his view that "property used to any extent for residential purposes is property used as a home." That decision was the subject of discussion in the Sheriff Appeal Court decision in *Royal Bank of Scotland PLC v Mirza*, 2017 SLT (Sh. Ct) 105, where the Court decided that a home owner did not have the benefit of the 2010 Act in a situation in which he "expressly admitted that he is resident and indeed domiciled at an entirely separate address than that of the security subjects."

11. Mr Sutherland accepted that these cases are not directly in point, but that they provide an analysis of what is a person's "home" and are consistent with the dictionary definition of "residence". The properties in the present applications are not, in his submission, the Applicants' homes.

12. The Tribunal was then referred to the Policy Memorandum relating to the Property Factors (Scotland) Bill. Paragraph 13 states that the definition of "property factor" was not to apply to those who manage property which is not owned in common and that it "only applies to property factors providing services to land, buildings, or parts thereof, used for residential purposes

where the property factor…is a business and the parts are owned in common by two or more persons…and owns or manages or maintains land or buildings, which is available for use by the owners of any adjoining or neighbouring residential properties, where those owners are required by the terms of their title deeds to pay for the cost of the management or maintenance of that land." Mr Sutherland stated that this indicated the restricted nature and focus of what the Act was intended to address, namely property in which people reside as their homes. The nature of the properties on Largiemore Estate is that they are not intended to be somebody's home. The owners are expressly restricted as to the amount of time they can be occupied, namely 11 months in any year, so they cannot be somebody's permanent abode or residence.

13. In their written submissions, the Applicants had referred to the Tribunal's Decision of 29 December 2019 in *Morrison v Loch Tay Highland Loch Park Limited* (FTS/HPC/LM/19/2134), where, in not dissimilar circumstances, the Tribunal determined an application by a chalet owner, but Mr Sutherland submitted that it could be distinguished from the present applications in that, as a matter of fact, the respondents in that case had registered as property factors, and the Tribunal held that, having registered, the company put itself under the obligations of the 2011 Act. In addition, the properties in that case were in full-time occupation as holiday residences. He moved that the applications be dismissed, as the Tribunal does not have jurisdiction.

14. For the Applicants, Mr Moore said that this is a narrow point of law and that the definitions of property factor and homeowner should be determined by reference to the precise terms of the Act. The Respondents own the amenity land. The Applicants have the right to use it and they pay for its maintenance. He referred the Tribunal to the Upper Tier Tribunal decision in *Shields v Blackley* UTS/17/0002 and UT/17/0003, in which it was held that Section 17 of the Act must be constructed purposively in such a way as to give effect to the objectives and policy that underly the provision. Those objectives and policy were not to be found in a Scottish Law Commission Report or explanatory Memoranda officially issued in connection with the bill, because the Act had its genesis as a private member's Bill. The Tribunal was, therefore, entitled to look at the intention of the legislation, which was clearly always intended to include Land Managers. This was also clear from a Scottish Parliament Information Centre ("SPICe") Briefing Note of 29 June 2010 and the Scottish Property Factor Guide to Registration. Copies of both of these documents had been provided to the Tribunal.

15. Mr Moore's contention was that the Act is framed in an inclusive way. The SPICe Briefing Note of 29 June 2010 identified three models of land maintenance, namely local authority ownership, common ownership and land maintenance ownership. The Briefing Note highlighted that, where obligations for land maintenance are built into title deeds, it can be very difficult to change provider and there was very limited protection against price increases or the failure of a company to deliver services, with owners being effectively locked into a contract with a particular land maintenance company. Largiemore Estate falls into the third category, namely a provider of land maintenance

ownership. Only the solum areas of the chalets and the chalets themselves do not belong to them. A Sales Brochure for Largiemore Holiday Estate, provided to the Tribunal by the Applicants, describes it as a "long established profitable lifestyle business" and its "Property Type" in the Land Register is "Residential". Mr Moore told the Tribunal that the Respondent company had come into being for land management of residential property.

16. Mr Moore summarised the Applicants' position by saying that a holiday home is a home, and that the Tribunal should consider the scope of the Act, which was clearly intended to address a situation such as that of the Parties in the present applications, where the Applicants would have great difficulty in changing the factoring arrangement. The Act can only be useful if it is given a wide-ranging definition.

17. In his closing submissions, Mr Sutherland said that the Tribunal must look at the wording of the Act itself. Mr Moore had focused on what he said the Respondent company did, describing it as a land management business, but what was important was whether the chalets can be described as residential or used for residential purposes. The Scottish Parliament could have opted for broader definitions but chose not to.

18. Questioned by the Tribunal, the two Directors of the Respondent company advised that they are both in business as graphic designers and that Largiemore Estate is not their main source of income.

Findings of Fact

i. The Respondents are the owners, under Title Number ARG29330, of land used as a commercial holiday development known as the Largiemore Estate, Otter Ferry, Tighnabruaich.
ii. Largiemore Holiday Estate is situated on land immediately adjacent to Loch Fyne and contains, *inter alia*, 44 chalets, the solum of each being owned by the owner of the chalet on which it is built.
iii. The Largiemore Estate also contains roadways, lay-bys, vehicle parking areas, a boat parking area and landscaped grounds, all of which are in the ownership of the Respondents.
iv. The Applicants each own one of the 44 chalets.
v. Each of the chalets is a purpose-built holiday home.
vi. Each of the Applicants' chalets is subject to the terms of a Deed of Conditions by Loch Fyne Estates Limited recorded in the General Register of Sasines applicable to the County of Argyll on 14 July 1986.
vii. Clause SECUNDO of the Deed of Conditions provides that the chalets and chalet owners "shall have the rights in common with the other proprietors of other parts of the Development and of Largiemore Farmhouse of access and egress by foot and vehicle…And to enjoy in common with all other such proprietors all areas of amenity such as grass lands and all services and facilities provided for chalet proprietors by the Development proprietor…".
viii. Clause SECUNDO (Second) provides that the chalets are "…to be used and occupied solely as a private holiday dwellinghouses which for the purposes

hereof means occupancy not exceeding eleven months in any period of twelve months and for no other purpose whatsoever…".

ix. Clause SECUNDO (Third) provides that "in consideration of the rights of access, parking and enjoyment aforesaid the proprietor shall be bound to pay along with the proprietors of all other chalets on the Development, an equal share (on the basis of one share per chalet on the Development) of the costs and overheads incurred by the Development Proprietor in or about the maintenance, repair, replacement and renewal of the whole facilities over which rights are granted…"

x. The Applicants are liable to pay Council Tax on their respective chalets. The Applicants receive a 50% Purpose Built Holiday Home Discount on their Council Tax liability.

Reasons for Decision

19. These applications have a long and convoluted procedural history, but the Parties ultimately agreed that the Hearing should be limited to the question of whether the Tribunal has jurisdiction to consider them. This, in turn, required the Tribunal to determine whether the chalets in the Development are residential properties and whether the Respondents fall within the definition of "property factor" in Section 2 of the Act.

20. The relevant part of Section 2 is Section 2(1)(c), which provides that "property factor" means:

"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 management or maintenance of that land)"

21. The Tribunal noted that the chalet owners are obliged, in terms of the Deed of Conditions, to pay an equal share along with each of the other chalet owners of maintaining the various facilities over which they are granted rights of access or use. Accordingly, the requirements of the portion of Section 2(1)(c) in parentheses are met.

22. The Tribunal was satisfied that the Respondents manage or maintain land that is available for use by the owners of the chalets. The issue is whether they do so "in the course of that person's business." The Tribunal understands that the two Directors of the Respondent company are, by profession, graphic designers. The Respondent company is, however, a separate legal entity. In the case of *Proven Properties (Scotland) Limited v Upper Tribunal for Scotland (2020 SC455)*, it was held that it was clear from the context of the Act as a whole, which was intended to regulate persons who were charging fees for the provision of management services, that the phrase "in the course of that person's business" was to be given a restricted meaning and referred to business as property factors only. The view of the Tribunal was that the Respondents are not in business as property factors. They own everything at

Largiemore Estate apart from the 44 chalets and their *sola* and are operating a holiday park development, which comprises a farmhouse and outbuildings, grazing land with loose boxes and a tack room, and 44 chalet pitches. As part of that business, they maintain and repair various facilities over which, in terms of a Deed of Conditions, the chalet owners have rights of access or use. The Deed of Conditions and separate Management Contracts (containing provisions to all intents and purposes identical to those in the Deed of Conditions) between the individual chalet owners and the Respondents require the chalet owners to pay the costs of maintaining the facilities over which they have rights. The Respondents are, therefore, recouping their costs from the chalet owners. That situation can be distinguished from that of developers who convey to a third-party land management company the amenity grounds and facilities of a residential development. The Respondents are not, in the opinion of the Tribunal, providing factoring services, and, on that ground alone, the Tribunal has no jurisdiction and the applications must fail.

23. The Tribunal also considered whether the chalets constitute "residential property" in terms of Section 2(1)(c) of the Act. The Tribunal noted that the chalet owners do not have the right to reside in the chalets as their permanent home. The Deed of Conditions expressly prohibits their occupying the chalets for more than 11 months in the year. They pay Council Tax, but receive a 50% Purpose Built Holiday Home Discount, to which they would not be entitled if the chalets were their permanent residences. The Tribunal's view is that the chalets were never meant for permanent occupation. The Respondents' representative went to some length to provide the Tribunal with dictionary definitions of "reside", meaning "dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place" and "residence" meaning "to have one's usual dwelling-place or abode". The Tribunal concurred with the Respondents' view that the terms of the Deed of Conditions were such that the chalet owners could not reside there as their usual dwelling-place or abode. Any reasonable interpretation of the word "residence" would imply at least the potential to use a property as one's permanent abode. This cannot happen as regards the chalets at Largiemore Estate. Accordingly, the Tribunal held that, within the context of this particular development, the chalets are not to be classed as residential property for the purposes of Section 2(1)(c) of the Act and on this ground also, the applications must fail. The Tribunal noted the Registers of Scotland classification of Largiemore Estate as "Residential", but it includes the Farmhouse which either is, or at least is capable of being, used as a permanent residence.

24. The Tribunal's Decision was unanimous.

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.

_____ **3 September 2024**

Legal Member **Date**