Housing and Property Chamber
First-tier Tribunal for Scotland

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

Statement of Decision on an application made under Section 17 of the Property Factors (Scotland) Act 2011 and Rule 27(1) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017

Chamber Ref: FTS/HPC/PF/21/0629

Re: Property at Blinkbonny Farm Steadings, East of Lindores, Newburgh, Fife KY14 6JE ("the Property")

Parties:
Euan Joseph Bissett and Gemma Sian Bissett, both Loans Cottage, Brighton Road, Cupar, Fife KY11 5DH ("the Applicants")

Acony Bell Properties Limited, incorporated in Scotland (SC276068) and having their registered office at 66 Tay Street, Perth PH2 8RA and a place of business at Kirkwood, St Madoes, Glencarse. Perthshire PH2 7NF ("the Respondents")

Tribunal Members:

George Clark (Legal Member) and David Godfrey (Ordinary Member)

Decision

The First-tier Tribunal for Scotland Housing and Property Chamber ("the Tribunal"), determined that the Respondents are not property factors within the meaning of Section 2(1) of the Property Factors (Scotland) Act 2011 and that, as the Tribunal did not, therefore, have jurisdiction to hear the application, the application must be dismissed under Rule 27(1) Of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

Background

1. By application, dated 16 March 2021, the Applicants applied to the Tribunal for a Property Factor Enforcement Order against the Respondents under Sections 17 and 20 of the Property Factors (Scotland) Act 2011 ("the 2011 Act"). The complaint centred on an Invoice, rendered by the Respondents to the

Applicants in September 2017, which had included an item entitled "Management Fee share as per title deed @£150 per year" and a charge for a share of supply of electricity to the sewage pump and a share of the cost of its maintenance.

2. In the application, the Applicants stated that they had purchased Plot 1 at Blinkbonny Steading, a development of six houses, from Blinkbonny Property Ltd in 2012. In 2014, the remainder of the development was sold to the Respondents. Prior to September 2017, the only communication they had had from the Respondents had been a letter of 30 December 2015 regarding a possible insurance claim for storm damage to the shared septic tank. On 20 September, the Respondents had sent them an Invoice for £900 for maintenance and electricity charges for the tank and also for an annual management fee of £150. They had replied to the Respondents using the email address at the top of the Invoice, seeking clarification of the Invoice, but this had not been provided. On 25 August 2020, the Respondents' solicitors wrote to the Applicants, contending that they had refused to pay the £150 per year maintenance costs for the communal areas and their contribution to the running, maintenance and repair of the septic tank which was shared by the co-proprietors. The Applicants had been engaged in legal correspondence since then but had still had no response to their request for clarification in relation to the items claimed for in the Invoice.

3. The Applicants challenged the entitlement of the Respondents to act as property factors or as Managing Agents and contended that they had no legal authority to do so in terms of the Deed of Conditions affecting the Development of which the Property forms part. The Respondents were not registered property factors and had not provided the Applicants with a written statement of services in line with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors ("the Code of Conduct"). The Applicants alleged that the Respondents had failed to comply with Sections 1, 2.1, 2.2, 2.3, 2.4, 2.5, 3.3, 4.1, 4.4, 4.5, 4.8, 4.9, 6.1, 6.3, and 7.1 of the Code of Conduct and had failed to comply with the property factors' duties.

4. The Applicants provided, with their application, copies of correspondence between their solicitors and the Respondents' then solicitors, from 11 September 2020 to 19 February 2021, copies of a letter from the Respondents to the Applicants of 30 December 2015, the Invoice from the Respondents to the Applicants dated 20 September 2017, the Applicants' emailed response of 5 October 2020, seeking clarification, and a letter from the Respondents' then solicitors to the Applicants dated 26 August 2020. Much of the legal correspondence was concerned with the erection by the Applicants of a garage, a gazebo and fencing, but in their letter of 26 August 2020, the solicitors also said - "We understand that you have refused to pay the £150 per year maintenance costs for the communal areas and your contribution to the running, maintenance and repairs of the septic tank which is shared by the co-proprietors".

5. On 11 June 2021, the Tribunal advised the Parties that a Hearing would be held on 12 August 2021, and the Respondents were invited to make written

representations by 2 July 2021. On 22 June 2021, the Respondents advised the Tribunal that they had appointed a different firm of solicitors to represent them and on 23 June they requested an extension of the deadline for submitting written representations. This was granted by the Tribunal.

6. The Tribunal also noted that the question of whether the Respondents fell within the definition of "property factor" in Section 2 of the 2011 Act was in dispute and that, if the Tribunal decided that they did not fall within that definition, it would have no jurisdiction to determine the application. The Tribunal advised the Parties that it would consider this as a preliminary matter at the Hearing on 12 August 2021 but, in advance, wished to have written submissions on the issue from the Respondents, with the Applicants being thereafter afforded an opportunity to make further written representations. Accordingly, the Tribunal confirmed that the Respondents had until 15 July 2021 to submit written representations in response to the application and decided that they should be specifically directed to provide to the Tribunal written submissions in support of their contention that they do not fall within the definition of "property factor" contained in Section 2 of the Property Factors (Scotland) Act 2011 and, if they intended to rely on the contention that they are property factors or Managing Agents in respect of the development of which the Property forms part, written submissions to support that contention and any documents thereanent on which they intended to rely.

7. On 13 July 2021, the Respondents' solicitors submitted written representations relating both to their contention that the Respondents did not meet the definition of "property factor" in the 2011 Act and in relation to the merits of the application. They updated these representations on 3 August 2021 and the following four paragraphs 8-11 are a summary of the updated submissions.

8. They stated that between 2014 and 2019, when they sold the first of the properties that they had completed, the only two common owners at the development were the Applicants and themselves. Accordingly, they did not fall within the definition of "property factor" in Section 2(1)(a) of the 2011 Act, as they were not managing common parts of land "owned by two or more *other* owners". More fundamentally, however, Section 2(1)(a) of the 2011 Act, defines "property factor" as "a person who, *in the course of that person's business,* manages the common parts of land owned by two or more persons and used to any extent for residential purposes." The Inner House of the Court of Session in an appeal by *Proven Properties (Scotland) Limited* against a Decision of the Upper Tribunal for Scotland ([2020] CSIH 22) had decided that "in the course of that person's business" required to be given the more restricted meaning of "in the course of their business as managers of the common parts". The Inner House Decision was binding on the Tribunal, which, therefore had no jurisdiction to determine the present application.

9. At the time of the Respondents' purchase in 2015, the original developer having become insolvent, the Applicants were the owners of the only completed residential dwelling at the development. They shared ownership of certain parts, such as roadways. The utilities had been installed by the original developer, including a septic tank with a bio-disc that required regular

maintenance. In December 2015, they had invited the Applicants to contact their insurers in relation to meeting their share of the cost of common repairs needed to the bio-disc and motor, but the Applicants had declined to do so. The Respondents had carried out the repairs at their own cost and had thereafter maintained it and met the whole cost of the electricity supply to the bio-disc and the septic tank. The only request they had ever made for payment had been the Invoice of 20 September 2017, covering the cost of maintenance of the bio-disc, including the cost of electricity supply and what was described as a "Management Fee share as per title deed". This had been on the basis that they were under the belief that they were the successors in title to the original developer. Without taking legal advice, the Respondents had taken what they considered to be the correct approach of charging the Applicants a share of the maintenance costs as set out in the title deeds.

10. In terms of the title deeds, the appointment of Managing Agents could not take place until all properties at the development had been completed and sold. The houses had been sold between August 2019 and October 2020 and thereafter the owners had formed a committee. The Respondents had not, therefore, been Managing Agents of the development.

11. The Respondents had not considered that their request for payment in 2017 had been anything other than payment due in terms of the burdens in the title deeds, the Respondents having up until then borne the whole cost of maintenance. The Respondents had not taken any further steps to recover any sums from the Applicants and did not intend doing so. They had not asked the Applicants for their share of any further costs from 2017 onwards.

12. On 22 July 2021, the Applicants responded to the written representations made on behalf of the Respondents on 13 July. They said that they had always understood that the Respondents were acting as factors for the development, although they had never received written confirmation of their appointment. Correspondence issued by the Respondents' then solicitors used the term "Factor" to describe the Respondents' position. This correspondence post-dated the issuing of the Invoice in September 2017. The fact that, in correspondence from the Respondents dated 15 February 2021, they were still demanding payment of overdue fees was further evidence that the Respondents continued to regard themselves as "Factors".

13. On 11 August 2021, the Respondents' solicitors provided further documents to the Tribunal, namely a copy of the Respondents' Companies House file in which the Memorandum and Articles stated the business of the Respondents to be "construction of domestic buildings", a letter, dated 9 July 2021, from the Respondents' accountants, in which they said that to the best of the accountants' knowledge, the Respondents had never received any factoring fees, and a copy of the Respondents' Land Certificate.

The Hearing

14. A Hearing took place by means of a telephone conference call on the morning of 12 August 2021. The Applicants were present, as were Ms Irene Watson and Mr Mark Fairbrother, Directors of the Respondents, who were represented by Miss Jane McNicol of Macnabs LLP, solicitors, Perth. Mrs Jacqueline Taylor, a Legal Member of the Tribunal was present as an observer but took no part in the proceedings.

15. The Legal Chair told the Parties that they could assume the Tribunal had read and was familiar with all the written representations. He advised that the Tribunal proposed dealing first with the preliminary matter of jurisdiction. The Tribunal would hear from the Parties and would then adjourn to consider the matter. If it held that the Respondents were not property factors within the definition contained in Section 2(1) of the 2011 Act, it would not have jurisdiction to hear the application and it would have to be dismissed. If the Tribunal decided that it did have jurisdiction, then, following the adjournment, it would hear the Parties on the merits of the application. The Parties confirmed that they were content with that approach, although Miss McNicol for the Respondents indicated that she might seek to introduce further evidence should the matter proceed to a Hearing on the merits.

16. The Applicants stated that their application covered the period from 2014 to 2021 and that, in 2019, the Respondents sold three of the houses forming part of the development. The Invoice they had received in 2017 specifically referred to management fees. The Applicants had queried the Invoice but had heard nothing for three years, until they put their property on the market. They knew that the Respondents had replaced parts of the bio-disc in 2019, when there were more than two owners in the development. The Respondents had deliberately positioned themselves as factors.

17. Miss McNicol then addressed the Tribunal on the preliminary matter. She stated that the Applicants had focused on the question of how many owners there were. That was a matter of fact for the Tribunal to decide, but between the date of the Respondents' purchase and 2019, there had only been two co-owners, the Applicants and the Respondents. Miss McNicol concentrated, however, on the decision in the *Proven* appeal. For the Tribunal to have jurisdiction, it was necessary to establish that the Respondents had acted in the course of their business as property factors. The Respondents were a property development company, a small family business. Their Memorandum and Articles of the company confirmed that they were in the business of constructing residential dwellings and their sole involvement on site had been as property developers. The Deed of Conditions for the development made all the properties liable for a contribution to the cost of maintaining the common parts. The Respondents had carried out their responsibility as co-owners and developers by maintaining the common areas. They did not fit the description of property factors. The letter from their accountants, submitted to the Tribunal, confirmed that they had never received property factoring fees. The 2017 Invoice, which used the phrase

"Management Fee Share" had been an approach taken by the Respondents without taking legal advice to recover the Applicant's share of costs they had incurred. They had understood from their own reading of the title deeds that each property would pay £150 per annum by way of a float.

18. After an adjournment of thirty minutes, the Legal Chair told the Parties that the Tribunal had determined that it had not found sufficient facts and circumstances to enable it to distinguish the present case from the already cited appeal by *Proven Properties (Scotland) Limited* against a Decision of the Upper Tribunal. The decision in that case was binding on the Tribunal and, accordingly, the Tribunal held that the Respondents had been acting as co-owners and in the course of their business as property developers, not as property factors. The Tribunal, therefore, did not have jurisdiction to hear the application, which must be dismissed.

Findings of Fact

- The Applicants purchased the Property in 2012 from Blinkbonny Property Limited, the original developers.
- The Property formed part of a development of farm steading buildings, converted into six dwellinghouses.
- In 2014, the Respondents purchased the remainder of the development, the original developers having gone into receivership or liquidation.
- The owners of the development are bound by the burdens and conditions contained in a Deed of Declaration of Conditions by Blinkbonny Property Limited registered in the Land Register on 18 May 2012.
- The Deed of Declaration of Conditions provides that the proprietors of each dwelling in the development shall each contribute an equal share toward the expense of the maintenance of the common areas.
- In September 2017, the Respondents issued an Invoice seeking to recover from the Applicants a proportion of sums they had expended on maintenance and repair of the common parts of the development. At that time the only owners of the common parts of the development were the Applicants and the Respondents.
- The Invoice also included an item called "Management Fee share as per title deed @ £150 per year".
- The Respondents have not issued any further Invoices to the Applicants.
- The Deed of Declaration of Conditions appoints Blinkbonny Property Limited as Managing Agents for a period of two years from the date of issue of the final Building Control Completion Certificate issued by the Local Authority in respect of the development. There is no provision that this appointment applies also to any successor in title to Blinkbonny Property Limited.
- The Respondents completed the development in 2020.
- The Memorandum and Articles of Association of the Respondents recorded at Companies House states that the business of the Respondents is the construction of domestic buildings.

Reasons for Decision

19. Rule 27(1) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 states that the First-tier Tribunal must dismiss the whole or part of the proceedings if the First-tier Tribunal does not have jurisdiction in relation to the proceedings or that part of them.

20. In the *Proven* appeal, the Inner House of the Court of Session considered the proper interpretation of the 2011 Act and in particular whether the appellants fell within the definition of "property factor" provided by Section 2 of that Act. Lord Menzies, with whom Lords Drummond Young and Pentland concurred, delivered the lead judgement.

21. The facts in that case were not dissimilar to the present application. At the time of the original Hearing, the appellants still owned thirteen of fifteen flats in a development, and they sought to recover from the respondent a proportionate share of the costs of maintenance of the common parts that they had incurred. When the respondent made an application to the Tribunal for a determination of whether the appellants had failed to ensure compliance with the Code of Conduct, the appellants disputed that they were property factors in terms of the 2011 Act. They had never sought to charge any fees for the work they had undertaken.

22. Section 2(1)(a) of the 2011 Act defines a property factor as "*a person who, in the course of that person's business, manages the common parts of land owned by two or more persons and used to any extent for residential purposes*". In the Inner House decision in the *Proven* appeal, all three judges agreed that the legislative intention of the Scottish Parliament had been to regulate the provision of management services by persons who were charging fees to homeowners, whose conduct was not regulated by a Code of Conduct and for whom there was no regulated mechanism for dispute resolution and that, in this context, "in the course of that person's business" must be given the more restricted meaning of "in the course of their business as managers of the common parts of properties", rather than simply in the course of any business, whatever that business might be. The Court was satisfied that what the appellants did was done not in the capacity of property factors, but as developers and owners of the majority of the properties in the development.

23. The Tribunal decided, on the basis of the evidence before it, that the Respondents in the present application had, from 2014 until 2019, acted in their capacities as developers and as owners of the majority of the properties in the development and as co-owners of the common parts. The issue between the Parties related to an Invoice of 2017, when there were only two co-owners, namely the Applicants and the Respondents. The Respondents had not at any time sought to recover costs after that date, which reinforced the Tribunal's view that they continued to act as developers, not as factors. The documentation from the records at Companies House stated that the business of the Respondents was the construction of domestic buildings.

24. The Tribunal agreed with the reasoning in the *Proven* appeal and accepted that the decision in that case was binding upon it, unless it could be established that the present case could be distinguished from that of *Proven.* The view of the Tribunal was that the only matter to decide was whether the 2017 Invoice constituted a bill for management services provided by the Respondents, there had been no question in *Proven* of any such charge having been made. As in *Proven*, there was no contract whereby the Respondents undertook responsibility to be the property factor, nor was there any contract appointing them.

25. The Tribunal noted the wording of the Invoice and the representations of the Parties and decided, on the balance of probabilities, that the Invoice was poorly worded and that the purpose of the Invoice had been to recover the Applicants' proportion in terms of the Deed of Declaration of Conditions of costs the Respondents had incurred in relation to maintaining the common parts and also what they (mistakenly) understood from their reading of the Deed of Conditions to be an obligation for each owner to provide a sum of £150 per annum to create a float from which future repair costs could be met. Accordingly, the Tribunal decided that the Invoice was for moneys which the Respondents wrongly thought were due annually from each owner and was not a charge being levied for management services provided by the Respondents. This conclusion was supported by the letter of 26 August 2020 from the Respondents' then solicitors to the Applicants in which they stated - "We understand that you have refused to pay the £150 per year maintenance costs for the communal areas and your contribution to the running, maintenance and repairs of the septic tank which is shared by the co-proprietors". The view of the Tribunal was that there was no reason to distinguish the present case from the appeal in *Proven*.

26. The Tribunal, having carefully considered all the evidence before it, decided that, during the period of their co-ownership of Blinkbonny Steading, the Respondents were in business as property developers and not as property factors. The decision of the Inner House in the *Proven* appeal applied directly to the present application and was binding on the Tribunal. The Respondents are not property factors as defined in Section 2(1) of the 2011 Act. Accordingly, the Tribunal does not have jurisdiction to consider the application and the application must be dismissed.

27. As the Tribunal had made this decision, it did not proceed to consider the application on its merits.

28. The Tribunal noted in passing that the Respondents had not registered as property factors. The Code of Conduct applies only to registered property factors so, even if the Tribunal had determined the preliminary matter differently, it could only have considered the application insofar as it related to common law duties of the Respondents.

29. The decision of the Tribunal 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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

George Clark (Legal Member and Chair)

[redacted]

Date:12 August 2021