

Housing and Property Chamber First-tier Tribunal for Scotland



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

Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/18/1186

121 Ricketts Court, Edzell Woods, Brechin, Aberdeenshire DD9 7XW
("the Property")

The Parties:-

Mr Nsikan Udo and Mrs Abigail Udo, 121 Ricketts Court, Edzell Woods,
Aberdeenshire DD9 7XJ
("the Homeowners")

Edzell Woods Community Trust Limited, c/o Karen Traill, 52 Dennis Drive,
Edzell Woods, Brechin, Aberdeenshire DD9 7XJ
(represented by their agent Shiells, Solicitors, 31A St Davids Street, Brechin
Angus DD9 6EG
("the Factor")

Tribunal Members:

Graham Harding (Legal Member)
Helen Barclay (Ordinary Member)

DECISION

The Tribunal does not have jurisdiction to deal with this application which is accordingly dismissed.

The decision is unanimous

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Factor is not a Registered Property Factor.

1. By application dated 22 May 2018 the Homeowners applied to the Tribunal complaining that the Factors had failed to carry out their property factor duties by refusing to repair a broken lamp post in the Homeowners street and had

further failed to secure a shared storage area. They also complained that road signs and roads have not been maintained.

2. Following correspondence between the Homeowners and the Tribunal in which the Tribunal queried whether the Factors were in fact property factors as defined by the 2011 Act a Convenor with delegated powers decided to refer the application to a Tribunal for a decision.
3. Following intimation to the Factor, the Factor's representatives Shiells Solicitors, Brechin submitted to the Tribunal written submissions raising *inter alia* a preliminary issue that the Factor was not a property factor under Section 2(1) of the 2011 Act.
4. The Homeowners also submitted further written submissions.

Hearing

5. An oral hearing took place on 27 August 2018 at Dundee Carers Centre, Seagate House, 132-134 Seagate Dundee. The Homeowners did not attend. Mr Michael Boyd attended for the Factor and was represented by Mr Stephen Middleton, Solicitor of Shiells Solicitors, Brechin.
6. The Tribunal indicated that it would deal with the preliminary issue of jurisdiction first and only deal with the substantive complaint if it was satisfied that it had jurisdiction on the basis that the Factor was a property factor in terms of the 2011 Act.

Summary of submissions

7. For the Factor Mr Middleton referred to his written submissions. He explained that the properties at Edzell Woods had been sold following the departure of the U.S. Air Force from their base at Edzell in the 1990s. When the properties, which had formerly been the living quarters of the base staff, were sold they had been subject to a Deed of Conditions by R J Hodge (Highland) Limited and Welbeck Homes Highland Limited registered in the Land Register of Scotland on 14 December 1999. The common property in the development as defined in the Deed of Conditions is owned in common by each proprietor. A company called Edzell Woods Management Limited was appointed as property manager of the development. According to Mr Middleton that company failed to fulfil its obligations and ceased to have any involvement with Edzell Woods in about 2002.
8. Subsequently management of the common property was undertaken by a group of proprietors on an informal basis calling themselves Edzell Woods Owners Group. It would have been the intention of the group to remain on a more informal basis had it not been for the Scottish Environmental Protection Agency (SEPA) insisting that in order to hold a licence for the sewage treatment plant serving the development the group had to be formed into a limited company.

9. As a result, Edzell Woods Owners Group (Management) Limited was incorporated on 9 April 2009. This company later changed its name to Edzell Woods Community Trust Limited ("EWCT") on 17 June 2015.
10. Mr Middleton went on to say that an application was then made to the Lands Tribunal to substitute EWCT as property manager and this was granted on 30 May 2016.
11. According to Mr Middleton EWCT was not engaged in a business as property factor. It is not a commercial enterprise providing a service for profit. There is a service charge collected by an agent from each proprietor and this is applied to meet the cost of maintaining and repairing the common parts of the development. Any surplus is used for the benefit of the development. No dividends are paid to the members who are the all the proprietors in the development. None of the directors or officers who are also all proprietors receive any salary or other payment for their services which are entirely voluntary.
12. In Mr Middleton's submission, although EWCT was a limited company this was solely out of necessity to comply with SEPA and it was in reality a group of homeowners who were self-factoring and therefore not subject to the 2011 Act.
13. The homeowners' position in their representations that were before the Tribunal at the hearing was that as the Factor was a limited company and collected a service charge from each proprietor for the maintenance of the development it fitted the description of a property factor in terms of the 2011 Act.
14. The Homeowners submitted late written representations that were not put before the Tribunal until after the hearing. However, in the interests of justice the Tribunal have considered these submissions and taken account of them in this decision.
15. The Homeowners submit that it is irrelevant that the operators of EWCT are not paid or that it does not make a profit. They are still a property factor subject to the 2011 Act. The homeowners go on to suggest that if the Factor is a purely voluntary organisation then the residents should not be asked to pay a service charge but rather make a donation. EWCT should be obliged to show what efforts it has made to raise funds to develop or manage the common areas.
16. The Homeowners also queried whether EWCT was a charity and if it was not nor a property factor what was it?
17. The Homeowners also raised further matters that were not relevant to the preliminary issue of jurisdiction.

The Tribunal make the following findings in fact:

18. The Homeowners are the owners of the Property.
19. The Property is a house within the Edzell Woods (hereinafter "the Development").
20. The Factor has not performed the role of property factor of the Development within the meaning of Section 2(1) of the 2011 Act.
21. The Tribunal therefore does not have jurisdiction to consider the Homeowners substantive complaint.

Reasons for Decision

22. It was apparent to the Tribunal that the Factor was not operating a business in the recognised sense that would mean it would be subject to the terms of the 2011 Act.
23. The 2011 Act made specific provision at Section 2(2)(b) to exclude from the provisions of the Act an owners' association managing the common parts in terms of a development management scheme within the meaning of the Title Conditions (Scotland) Act 2003.
24. The EWCT was set up as an owners self-factoring scheme to replace the original factors who had failed to fulfil their obligations. Due to the requirements of SEPA it became necessary for the group to be incorporated but that did not change the nature of the organisation into a business. It remained a voluntary organisation run by the owners for the owners.
25. The Deed of Conditions was varied to allow EWCT to manage the development. And in the Tribunal's view that would be on the basis of the owners appointing an owners' group to manage the development.
26. Many self-factoring owners' associations will levy an annual charge on owners to meet the annual maintenance costs and then may collect further ad hoc payments to meet additional expenditure throughout the year. It seemed to the Tribunal therefore that the fact that the Factor collected a service charge from owners did not in any way suggest that it was operating a business.
27. The Factor is a non-profit-making organisation that uses all of the funds received from owners after administration costs to meet the expenditure for maintaining and carrying out improvements to the development. No dividend is paid to its members or salary or other payment to its directors or officers. All their work is done on a voluntary basis.
28. Given that the Factor is not registered with the Scottish Ministers as a property factor and it clearly has never considered itself to be a property factor as defined by Section 2(1) of the 2011 Act. the Tribunal was satisfied that in all the circumstances it was an owners' association that was managing the development and therefore not subject to the jurisdiction of the Tribunal.

29. The Tribunal therefore dismissed the application.

30. The decision was unanimous.

Appeals

A homeowner or property factor 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.

Graham Harding

Legal Member and Chair

3 SEPTEMBER 2018 Date