



DECISION BY SHERIFF ANTHONY DEUTSCH

ON AN APPEAL

in the case of

MRS ANNE McCORMICK (“THE HOMEOWNER”)

and

WEST DUNBARTONSHIRE COUNCIL (“THE PROPERTY FACTOR”)

### **Introduction**

[1] The property factor appeals against a proposed property factor enforcement order dated 15 November 2017 on the grounds that the tribunal had no jurisdiction to make such an order because of a contention that at the material time the property factor was not a property factor of the home owner.

[2] The basis upon which the tribunal held that it had jurisdiction was that, upon the facts it found established, the property factor was a property factor within the meaning of section 2 (1) (b) (ii) of the Property Factors (Scotland) Act 2011 (“the 2011 Act”). The statutory definition of “property factor” includes a local authority which manages the common parts of land used to any extent for residential purposes and owned by the local authority and one or more other person.

[3] It is not in dispute that the home owner is the proprietor of an end terrace house at 11 East Barns Street Clydebank and that the property factor is the owner of

the adjoining property at 9 East Barns Street. Although the application was restricted to the issue of whether there had been a breach of section 2.5 of the Property Factor Code of Conduct (“the code”), underlying the homeowner’s complaint is her grievance regarding the removal by the property factors of trees which she contends formed a mutual boundary between 9 and 11 East Barns Street. The tribunal found as a fact that the trees in question were owned in common, however, that finding does not form the basis for its conclusion that the property factor was a property factor. Rather the decision rests upon the property factor’s acceptance that by virtue of a title condition it arranged common buildings insurance for the house, which action the tribunal considered constituted management and thus brought the property factor within the terms of section 2 (1) (b) (ii) of the 2011 Act. The tribunal also attached significance to the fact that the property factor had provided the homeowner with a written statement of services.

[4] On 4 December 2017 the property factor sought permission from the tribunal to appeal to the upper tribunal. Permission was granted on 3 January 2018. After considering the homeowner’s response and further comments from the property factor, I determined that the appeal should be decided without a hearing.

### **Grounds of appeal**

[5] The grounds upon which the property factor appeals are as follows:

1. The appellant claims that the trees in dispute were not common property but in the ownership of the appellant. Accordingly, the jurisdiction of the tribunal had been engaged when it should not have been and any dispute should rightly be heard by the sheriff court or by the public sector

ombudsman.

2. The appellant made a preliminary plea to jurisdiction which was refused.

The tribunal made findings in fact in relation to the appellant's preliminary plea which were not supported by the evidence.

3. The tribunal made findings in fact in relation to the ownership of the trees which were not supported by the evidence.
4. The tribunal has erred in law because the substance of the property factor's complaint has to be one relating to an issue that involves the home owner acting as a property factor and consequently the tribunal should not have dealt with the matter.
5. The tribunal has misdirected itself in law, as it is stated in the decision but to some extent the ownership of the trees was irrelevant. The appellant considers that the location and status of the trees is critical to whether the jurisdiction of the tribunal is engaged.
6. The tribunal erred in making a finding on jurisdiction without the property factor proving her case on the matter, and following the appellant having been a submission that the trees were in its sole ownership.
7. The tribunal should not have made a property factor enforcement order on the evidence before it and it lacks jurisdiction to make any order.

## **Discussion**

[6] What is most noticeable about the foregoing grounds is that they do not expressly address the basis upon which the tribunal held that the property factor was

a property factor in relation to the home owner; it was the property factor's concession that by virtue of a title condition it arranged common buildings insurance for the house.

[7] In terms of section 2 (1) (b) (ii) of the 2011 Act the definition of "property factor" includes a local authority which manages the common parts of land used to any extent for residential purposes and owned by the local authority and one or more other person. The tribunal held that arranging common buildings insurance amounted to management of land. Standing the fact that section 5 of the code regulates the arrangement of buildings insurance by property factors it is difficult to see how they could have reached any other conclusion. Although of less significance, I consider that the tribunal were also entitled to regard the provision of a written statement of services to her as an indication that the property factor was a property factor in relation to this particular home owner.

[8] The tribunal's jurisdiction is conferred by section 17 and 19 of the 2011 Act. That jurisdiction in the first instance is to determine one or other or both of two things; whether (a) the property factor has failed to carry out its duties or (b) failed to comply with the section 14 duty i.e. the obligation upon a registered property factor to ensure compliance with the code. The decision of the tribunal to make an enforcement order arises out of its determination that the property factor breached the separate section 14 duty.

[9] The terms of section 14 (5) of the 2011 Act make it clear that the obligation to comply with the section 14 duty applies regardless of whether the property factor had acted as such when it removed the trees.

(5) A registered property factor must ensure compliance with the

property factor code of conduct for the time being in force.

Consideration of the content the code makes it apparent that no other interpretation would make sense. A registered property factor whatever the circumstances must not communicate with homeowners in any way which is abusive or intimidating, or threatens them. Similarly he must respond promptly to enquiries and complaints. He must not take legal action without taking reasonable steps to resolve matters or without notice. Where he has arranged insurance he must give information about that insurance. These duties are all aimed at setting minimum standards of practice for registered property factors generally (section 14 (1)).

[10] It is only a homeowner who may make an application to the tribunal in terms of section 17 (1). A homeowner is defined by section 10 (5) as follows:

In this Act, "*homeowner*" means—

- (a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or
- (b) an owner of residential property adjoining or neighbouring land which is—
  - (i) managed or maintained by a property factor, and
  - (ii) available for use by the owner.

It is a necessary component of this definition that the homeowner's property be managed by a property factor. At least to the extent of arranging for common insurance for the home owners property, the property factor accepts that to be the case. The home owner's complaint was about a breach of section 2.5 of the code which states

"You must respond to enquiries and complaints received by letter or

email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response time should be confirmed in the written statement.”

[11] Neither the above definition nor this section of the code contains any express requirement that the property which gives rise to any enquiry or complaint should actually be subject to management by the property factor; to imply that condition would not be consistent with the legislative intention of setting minimum standards of practice for all registered property factors (section 14 (1)). The only requirement is that the property factor who is the subject of complaint did in fact manage or maintain common property pertinent to the homeowner’s property. Figuring certain likely practical scenarios confirms that view.

[12] A familiar event in tenement life is for a flat proprietor to be faced with unexplained water ingress. For that person the first port of call is likely to be the property factor. It would defeat the purpose of the code if there could be no sanction imposed upon a property factor who blithely ignored the homeowners enquiries, because it later emerged that the source of the water came from a pipe or drain which was not communal.

[13] Similarly a homeowner within a modern housing development with concerns regarding the blighting effect of neglect of an adjacent area of ground which appears to be communal would be expected to take that up with the property factor for the estate. It would be absurd if the factor could choose to ignore enquiries about the matter without being in breach of the code because to his knowledge the ground in question is private and not subject to his management.

[14] Summarising to this point, for the foregoing reasons I have concluded that

the tribunal were entitled to hold that the property factor was a property factor in relation to the home owner because it carried out management of common parts relating to 11 East Barns Street Clydebank to the extent that it arranged for common

insurance. As the home owner's property factor, the property factor was bound to comply with section 2.5 the code regardless of whether the property which was the subject of her enquiry or complaint was as a matter of fact managed by the property factor in that capacity. Possibly through a recognition that to have done so would not raise a point of law, the property factor has no esto position to the effect that, upon the hypothesis that tribunal did have jurisdiction, nonetheless it was not entitled to hold that there had been a breach of the code.

[15] For completeness I now turn to address each of the grounds of appeal in the order they are presented at paragraph [5] above.

#### **Ground one**

[16]As previously explained, although the tribunal concluded as a matter of fact that the trees in dispute formed a mutual boundary and as such were common property, that was not the basis upon which it held that it had jurisdiction.

#### **Ground two**

[17] The factual matter which gave rise to the tribunal's finding that it had jurisdiction was the subject of a concession which accordingly did not require to be supported by evidence.

#### *Ground three*

[18] The property factor's contention that the tribunal made findings in fact in relation to the ownership of the trees, which were not supported by the evidence, is more fully explained in paragraphs 4, 5, 6 and 8 of the request for permission to appeal.



Essentially what the property factor seeks to do is to have the upper tribunal reach a different conclusion about the facts to be inferred from the material which was before the tribunal. That would not be appropriate in an appeal which is restricted only to points of law. I consider that the tribunal had sufficient evidence before it in the shape of the land certificate and the letter of 24 August 2016 to reach the factual conclusion which it did. Although the home owner did not appear at the hearing the tribunal would have been entitled to have regard to the terms of the first paragraph of her letter of 21 August 2016 to the Council as evidence from her that the trees and associated hedge were mutual.

[19] In addition to urging a different interpretation of the material, which was before the tribunal, the property factor also seeks to challenge the finding in fact in relation to the trees from the standpoint of conventional notions about where in any litigation the burden of proof may lie. The thinking appears to be that because the home owner did not offer any evidence at the hearing she has not discharged the burden of proof which would normally rest with the pursuer in ordinary civil litigation and that accordingly she has failed to prove her position in relation to the mutual boundary. That is a mistaken approach. It is at odds with the provisions of the Tribunals (Scotland) act 2014 (“the 2014 Act”) and the First-tier Tribunal for Scotland Housing

and Property Chamber (Procedure) Regulations 2017/328 (Scottish SI) (“the Regulations”) which apply retrospectively and replace broadly similar regulations which applied when the homeowner first brought her case.

[20] The Regulations reflect the principle established by the section 12 of the 2014 Act that proceedings before Scottish Tribunals be accessible and fair and handled quickly and effectively. Regulation 2 sets out the overriding objectives of the First-tier Tribunal which in terms of regulation 3 the tribunal must seek to give effect to.

## **2.— The overriding objective**

- (1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.
- (2) Dealing with the proceedings justly includes—
  - (a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;
  - (b) seeking informality and flexibility in proceedings;
  - (c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take;
  - (d) using the special expertise of the First-tier Tribunal effectively; and
  - (e) avoiding delay, so far as compatible with the proper consideration of the issues.

[21] Strict conformity with complex rules in regard to burden of proof does not sit easily with the requirements of regulation 2 (2) (a) to (d). Moreover the notion that a burden of proof rests upon one or other party is impossible to reconcile with a clear

intention expressed within the regulations that the tribunal adopt a much more inquisitorial approach than the usual adversarial tradition of the ordinary civil courts. That intention emerges from the terms of regulation 17, which allows the tribunal to make such enquiries as it thinks fit for the purpose of exercising its functions including inquiry into matters other than those to which the application relates. Inquiries include the instruction of reports (regulation 17 (3) (c)). In terms of regulation 18 the tribunal may upon its own motion require the attendance of witnesses and may call for the production of documents.

#### **Ground four**

[22] The substance of the property factor's complaint was that there had been a breach of the code. As explained above a property factor may be the subject of a complaint in relation to a breach of the code simply because he has in fact managed or maintain common property relating to land belonging to the homeowner.

#### **Ground five**

[23] The tribunal were correct in their conclusion that the status of the trees as part of the common boundary was irrelevant to the issue of whether, in relation to a

legitimate enquiry/complaint from a homeowner for whom the property factor was to any extent a property factor, there had been a breach of the code.

#### **Ground six**

[24] The factual basis for the tribunal's conclusion that it had jurisdiction was based upon a concession. The tribunal's finding in fact that the trees formed part of the mutual boundary was one which they were entitled to make upon the material before them. That finding would separately have entitled them to hold that they had jurisdiction.

#### **Ground seven**

[25] Upon the footing, which I consider to be established, that the tribunal had jurisdiction to make an enforcement order, its rationale for doing so (as set out on pages 6 and 7 of its decision) being an exercise of discretion in relation to issues of fact is not susceptible to challenge in an appeal under section 22 of the 2011 Act.

#### **Conclusion**

[26] For the foregoing reasons I consider this appeal to be without merit and have refused it.