EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 22
XA112/19

Lord Menzies
Lord Drummond Young
Lord Pentland

OPINION OF LORD MENZIES

in Appeal under section 48 of the Tribunals (Scotland) Act 2014

by

PROVEN PROPERTIES (SCOTLAND) LTD

Appellants

against

A decision of the Upper Tribunal communicated to the appellants on 30 July 2018

_____

Appellants: Kelly; Hughes Dowdall Solicitors, Glasgow

12 May 2020

Introduction

[1] This appeal concerns the proper interpretation of the Property Factors (Scotland) Act 2011, and in particular whether the appellants fall within the definition of "property factor" provided by section 2 of that Act.

[2] The appellants carry on business as property developers. In 2007 they erected a building consisting of 15 residential flats. The following agreed background of matters not in dispute was set out by the Housing and Property Chamber First-tier Tribunal for Scotland

in its decision Letter dated 16 February 2018 (it should be noted that in this extract, the present appellants are referred to as "the respondents"):

> "The development at Charlotte Court, 37 East Princes Street is a building consisting of fifteen flats which were erected in 2007 by Proven Properties (Scotland) Limited. Marketing of them was adversely affected by the recession. The homeowner purchased Flat 7 which is on the second floor. The respondents decided to let the other units and in 2017 another flat was sold. As at the date of the Hearing the respondents own thirteen of the flats and one is currently being marketed for sale. The flats were factored by B and B Estate Agents and Property Managers (B and B) until 19th November 2011 when the respondents took on the management of the building. The respondents arrange for servicing of the lift, payment of the BT account in respect of the emergency call function 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 respondents arranged the common insurance policy for all the flats in the building including that belonging to the homeowner. The respondents sent various accounts to the homeowner since 2011 in respect of a one fifteenth share of the costs 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 respondents have 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 respondents no longer arrange property insurance in respect of the homeowner's flat."

[3] The matter came before the First-tier Tribunal on an application by the owner/occupier ("the homeowner") of one of the flats in the development which had been sold by the appellants. The homeowner was in dispute with the appellants regarding a leaking roof, and made an application to the First-tier Tribunal in terms of section 17 of the 2011 Act for determination of whether the appellants had failed to carry out the property factor's duties and to ensure compliance with the property factor Code of Conduct. The appellants disputed that they were property factors in terms of the 2011 Act, and the First-tier Tribunal considered this point as a preliminary matter. The Tribunal found that the respondents (ie the present appellants) were property factors in terms of the 2011 Act, and that the homeowner's application could proceed to determination on the merits.

[4] The appellants appealed this decision to the Upper Tribunal. In a decision undated, but communicated to the appellants on 30 July 2018, the Upper Tribunal refused this appeal. The appellants have now appealed to this court in terms of section 48 of the Tribunals (Scotland) Act 2014. The homeowner has taken no part in the appeal to this court.

The Property Factors (Scotland) Act 2011

[5] Section 2 of the 2011 Act provides as follows:

> "**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 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)."

[6] Section 9 of the 2011 Act provides as follows:

"**Effect of refusal to enter in register or removal from register**

(1) Subsection (2) applies where the Scottish Ministers–

(a) refuse under section 4(5) an application for entry in the register by a person who is operating as a property factor on the day on which section 3 comes into force,

(b) remove a property factor from the register under section 4(7), or

(c) remove a property factor from the register under section 8(1).

(2) After the relevant date–

(a) no costs incurred by the property factor in respect of work instructed after the relevant date are recoverable,

(b) no charge imposed by the property factor which relates to a period after the relevant date is recoverable,

(c) homeowners may appoint new property factors (or decide to manage their properties without appointing a property factor) in accordance with the

procedures made in relation to such decisions in their title deeds or, as the case may be, the Tenement Management Scheme,

(d) the property factor may not lodge a notice of potential liability for costs under section 13(1) of the Tenements (Scotland) Act 2004 (asp 11) in respect of work instructed after the relevant date.

(3) The Scottish Ministers must, as soon as practicable after the relevant date, give public notice of–

(a) the refusal or removal mentioned in subsection (1)(a), (b) or, as the case may be, (c),

(b) the relevant date, and

(c) the effect of subsection (2)."

The decision of the First-tier Tribunal

[7] The FTT stated that the matter to be determined by it was whether or not the present appellants are property factors. If they were not, the application must fail. The Tribunal set out its reasoning on this issue as follows:

> "The tribunal considered what work was done by Proven Properties (Scotland) Limited and this was not in dispute. It arranged insurance, internal cleaning, maintenance of the landscaped area, lift maintenance, repairs to common parts and payment of utilities bills. The tribunal considered that this was the typical kind of work carried out by a property factor in this type of development. What it had to determine is whether Proven Properties (Scotland) Limited, in doing this work, were doing it as property factors as defined in the 2011 Act.
>
> It is clear that Parliament restricted the class of person to be one who '*in the course of that person's business*' manages common areas etc. The tribunal considered that an owner residing in a tenement and arranging for roof repairs for the tenement and common lighting is unlikely to be caught by the definition in the 2011 Act. The tribunal accepted that Proven Properties (Scotland) Limited are not operating a business of commercial property factors in the traditional sense of being open to being instructed by owners of developments. They are in business as landlords since they have thirteen flats in the development which were or are available to rent. They manage these and, in the course of managing them, require to deal with repairs and maintenance of the common parts of the building.
>
> It was accepted by parties that the respondents do not charge for the work done by them in managing the repairs and maintenance of the development. Mr Cairns seemed to indicate that this was a fatal flaw in the homeowner's case. The tribunal did not agree and considered that the fact that the respondents chose not to charge did not, by itself, remove them from responsibilities under the 2011 Act including registration under Section 3 of the Act. Some Housing Associations and Local

> Authorities registered under the 2011 Act although they make no charge for what they do as property factors.
>
> In determining whether or not the respondents are property factors as defined in the 2011 Act the tribunal had to look at what they actually do. When a repair is needed they respond and arrange for it to be done and this was not disputed by Mr Cairns who also accepted that his clients arranged for payment of utilities bills, lift maintenance, cleaning, landscape maintenance and insurance. The tribunal considered that, as a matter of degree, this differed from an occupier in a tenement carrying out duties to assist in the maintenance of the tenement. The respondent operates a commercial business letting out flats and, as part of this business, they required to ensure that the common parts of the development were properly maintained. In his affidavit Mr Prow accepts that he does the work for which a commercial factor would be paid to do.
>
> Taking into account all matters, the tribunal considered that the choice of the respondents not to make a management charge did not remove it from the obligations of the 2011 Act when balanced against the duties it carried out in arranging for maintenance and repair of the development at Charlotte Court, Helensburgh."

The decision of the Upper Tribunal

[8] The Upper Tribunal considered the following cases – *Havering LBC* v *Stevenson* [1970] 1 WLR 1375, *Davies* v *Sumner* [1984] 1 WLR 1301, *R&B Customs Brokers Co Ltd* v *United Dominions Trust Ltd* [1988] 1 WLR 321, *Stevenson* v *Rogers* [1999] QB 1028 and *Macdonald* v *Pollock* 2013 SC 22. The UT considered that 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 or 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, the UT considered that it was appropriate under the rule in *Pepper* v *Hart* [1993] AC 593 to refer to the Scottish Parliament Official Report recording the discussion of the Local Government and Communities Committee about the definition of a property factor. The UT went on to observe as follows:

> "[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 '[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."

For all these reasons the UT refused the appeal.

Submissions to this court

[9] Counsel for the appellants invited the court to allow the appeal and to find that the appellants are not a property factor within the meaning of section 2 of the 2011 Act. He drew our attention to section 9(2)(c) of the Act, which provided that homeowners may appoint new property factors or decide to manage their properties without appointing a property factor, in accordance with the procedures made in relation to such decisions in their Title Deeds. In the present case the property was built in 2007 and one flat in the development was sold to the respondent. At first, the property was managed by a property factor, but in 2011 that property factor ceased to act. No new property factor was appointed, and the appellants, which owned 14 out of the 15 properties in the development, managed the properties without appointing a property factor. There was no contract whereby the appellants undertook responsibility to be the property factor, nor was there any contract appointing the appellants to be property factors. The appellants have never charged any fee for managing the property. The appellants carry on business as a property developer and builder, not as a property factor. These facts gave rise to a strong inference that any

management works performed by the appellants were not performed in the course of the appellants' business.

[10] The 2011 Act imposes obligations on property factors; it creates a Code of Conduct and an enforcement regime, and several criminal offences (see, generally, sections 3, 7, 12, 20 and 24). It required to be construed as a penal statute. The Act makes it clear that a person who manages the common parts of land owned by two or more other persons and used to any extent for residential purposes, is not necessarily a property factor who is subject to the statutory obligations, scheme of enforcement and criminal sanctions created by the Act – it is only if the person manages the common parts in the course of his business as a property factor. Such management of the common parts as was carried out by the appellants, was carried out as owners of properties in the building, and not as property factors. Both the First-tier Tribunal and the Upper Tribunal erred in law in reaching the opposite conclusion.

Discussion and decision

[11] The only issue before the court in this appeal is whether the appellants are property factors within the meaning given to that term by section 2(1) of the 2011 Act. It is accepted that in the period between 2007 and November 2011, the common parts of the building were managed by property factors, namely B and B Estate Agents and Property Managers. On 19 November 2011 their contract was terminated. No other company or person was thereafter appointed to manage the common parts of the building. Instead, as narrated above, the appellants carried out cleaning and maintenance, arranged for the lift to be serviced, and for payment of the electricity for the common lighting. They did not do so in terms of any contract. They sought recovery of an appropriate share of their costs from other homeowners, but did not charge any factoring or management fee. The question is

whether they were doing this "in the course of that person's business", for the purposes of section 2(1) of the 2011 Act.

[12] That question falls to be answered by applying the ordinary principles of statutory interpretation, by looking at the words of the section in the context of the statute as a whole, and by seeking to determine the legislative intention of the Scottish Parliament. It is only if there is an ambiguity in the wording of the statute and the court is in doubt as to the mischief which the Scottish Parliament intended to rectify by the passing of the 2011 Act that the court would be entitled to look to extraneous materials in terms of the rule in *Pepper* v *Hart* [1993] AC 593.

[13] The mischief which the 2011 Act was intended to rectify appears to me to be tolerably clear, namely the provision of management services by persons who were charging fees to homeowners for such services, whose conduct was not regulated by a Code of Conduct and for whom there was no regulated mechanism for dispute resolution. In order to address this mischief, the Act requires persons who, in the course of their business, manage, or intend to manage, the common parts of land owned by two or more other persons and used to any extent for residential purposes, to apply to the Scottish Ministers for entry in the register. The Scottish Ministers have power to refuse such an application if specified conditions are not met. Once on the register, the person must comply with the Code of Conduct, and is subject to dispute resolution procedures involving the First-tier Tribunal, as set out in the Act. The statutory scheme introduces various criminal offences (see eg section 3(6), section 7(6) and (7), section 12(1) and (5) and section 24(1) and (5)), with penalties ranging from a maximum of level 3 on the standard scale to a maximum of level 5 on the standard scale and/or imprisonment for a period not exceeding 6 months.

[14] It is in this legislative context that the phrase "in the course of that person's business" requires to be interpreted. Homeowners who choose to manage the common parts of their properties themselves, by carrying out routine cleaning and maintenance themselves, are not property factors. This is clear from the provisions of section 9(2)(c), which provide that if the Scottish Ministers refuse an application for entry in the register by a person who is operating as a property factor, or remove a property factor from the register, homeowners may appoint a new property factor or decide to manage their properties without appointing a property factor.

[15] So, the owners of tenement flats, who clean the common stairs themselves, do not thereby become property factors. To suggest otherwise would, in my view, be quite untenable. The fact that they may operate a business does not change this. If a lady in the top flat gives piano lessons, she may consider it appropriate to clean and maintain the common stair, to encourage aspiring pupils to become clients. She does not require to register as a property factor before doing so. The first floor flat may be purchased as an office by a firm of solicitors or accountants. They may likewise decide that the common stairs need to be kept clean and well maintained, otherwise potential clients will not consult them. If a member of their staff cleans and maintains the stairs, they do not become property factors as a result, nor do they become subject to the penal consequences of failing to apply for inclusion in the register.

[16] In the context of the 2011 Act, I consider that the phrase "in the course of that person's business" must be given the more restricted meaning – ie in the course of their business as managers of the common parts of properties, rather than in the course of any business, however far removed its main purpose may be from the management of the

common parts of land owned by other persons and used to any extent for residential purposes.

[17] In construing the 2011 Act I have not derived assistance from the various cases considered by the Upper Tribunal. I do not suggest that any doubt should be cast on them, but only that the phrase "in the course of that person's business" may require to be given a different meaning in a different context. Issues regarding the Sale of Goods Act 1979, or the Trades Descriptions Act 1968, arise in a very different context from the factual circumstances of the present case – not least because they are concerned with a contractual situation. There is no question of a contract in the present case.

[18] In November 2011 the appellants did what was envisaged in section 9(2) of the 2011 Act (albeit in a situation not covered by section 9(1)) – they decided to manage their properties without appointing a property factor. The procedures in their Title Deeds entitled them to do this. The Deed of Conditions registered on 17 September 2008 by the appellants and forming part of the burdens on the subjects defined the common parts, which included *inter alia* the roof, gables, lift, rhones, gutters, staircases, stair lights and the cleaner's cupboard. Clause 3.1 provided *inter alia* as follows:

> "Each of the Units is burdened with an obligation in all time coming upholding and maintaining in good order and repair and from time to time when necessary renewing and restoring, cleaning, repainting and redecorating the Common Parts. ... In the event that the Developers are dissatisfied as to the maintenance, repair and renewal as aforesaid, they may carry out the necessary work and recover the cost thereof from the Owner of each of the Flats, as aforesaid."

[19] I am 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.

[20] I do not consider that there is ambiguity or doubt as to the correct interpretation of section 2 of the 2011 Act, such as would justify our having regard to official reports of the

proceedings of a committee of the Scottish Parliament, nor indeed to other extraneous material. Had I felt the need to do so, I note that the Policy Memorandum prepared on behalf of Patricia Ferguson MSP, the member in charge of the Property Factors (Scotland) Bill, to satisfy Rule 9.3.3A of the Scottish Parliament's Standing Orders, contains the following statement:

> "The Bill's primary objective is to create a statutory framework which would protect Scottish homeowners who contract with property factors."

This appears to me to provide support for my view that the Bill (and the 2011 Act) was directed at persons providing property management to homeowners in terms of a contract, rather than at homeowners in a development who themselves carry out maintenance works, not in implement of any contractual obligation and for no payment. However, as I have indicated, this has not formed a part of my considerations, as I am of the opinion that the proper construction of the Act is sufficiently clear from its own terms as a whole.

[21] The question of law put to the court in this appeal was as follows:

> "Whether the Upper Tribunal erred in holding that the appellant was a 'property factor' within the meaning of section 2 of the Property Factors (Scotland) Act 2011".

For the reasons given above, I would answer that question in the affirmative. I consider that the Upper Tribunal did indeed err in law. Accordingly, in terms of section 49 of the Tribunals (Scotland) Act 2014, I consider that we should quash the decision of the Upper Tribunal, and remake the decision by sustaining the submissions made on behalf of the present appellants, and dismissing the application.

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OPINION OF LORD DRUMMOND YOUNG

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12 May 2020

[22] I agree that the appeal should be allowed for the reasons given by your Lordship in the chair. It follows that the decision of the Upper Tribunal must be quashed and the application by the homeowner dismissed. Nevertheless, the reasoning of the First-tier and Upper Tribunals proceeds on an approach to statutory interpretation that is, I think, over-literal, and I would like to comment briefly on such an approach. I would also like to say something about the form of definition that is used in section 2(1) of the 2011 Act.

[23] The fundamental issue is the meaning of the expression "property factor" as used in the 2011 Act. A lengthy definition of the expression is provided in section 2(1) of the Act. Paragraphs (a) and (c) of that subsection specify the management and maintenance functions that must be performed if a person is to be considered a property factor; those functions are typical of what is involved in the business of property factoring. In both paragraphs it is further stated that the management and maintenance of common parts and adjacent land should be carried out "in the course of that person's business". The 2011 Act does not, however, specify what the "business" referred to should be. As your Lordship in the chair has indicated, many proprietors of tenement property carry on business there, and such businesses can take many different forms. Furthermore, a proprietor who carries on business may, like any other proprietor, undertake the management of the common parts of the property, or adjacent garden ground, without charge.

[24] In my opinion it was not the purpose of the 2011 Act to regulate persons of that sort. Its purpose is rather to regulate persons carrying on business as property factors, and to ensure the proper registration and supervision of such persons. That purpose is clear from the statutory context. The Act imposes significant requirements and duties on property factors. A person who intends to carry on business as a property factor is required by section 3 to apply to Scottish Ministers for registration. The registration requirements are detailed and are relatively stringent. A person who wishes to be registered must include his or her personal details, the name and address of any person directly concerned with the control or governance of that person (which is obviously important if the factor is a company or partnership), and details of any dwelling houses, flats or land in relation to which the person acts or expects to act as a property factor (section 3(2)). A fee for registration may require to be paid (section 3(3) and (4)). If an applicant specifies

information known to be false in a material particular, or knowingly fails to specify information required by section 3(2), he or she is guilty of an offence (section 3(6)). Sections 4 and 5 of the Act provides that the maintenance of a register by Scottish Ministers. Scottish Ministers must be satisfied that the person concerned is a fit and proper person to be a property factor, and if the person has already been registered he or she must demonstrate compliance with the Act and the property factor code of conduct.

[25] The foregoing requirements demonstrate in my opinion that the purpose of the Act is to regulate those who carry on business as property factors and are paid for so acting. The reason for such regulation is clearly that property factors receive client monies and are responsible for spending those monies in a prudent manner, for the benefit of the property owners. Thus an element of trust is involved in arranging contracts for work on common property and handling the finances of such contracts. A professional factor, that is to say a factor who is paid by his clients, may reasonably be the subject of detailed regulation; an obvious analogy exists with solicitors, accountants and financial intermediaries who are paid for their work. The position is otherwise, however, when a person who owns a flat or property within a tenement or housing development organizes activities such as cleaning or maintenance of common parts or the upkeep of garden ground, but does so without payment for the services so rendered, only recovering sums paid to contractors and others for their work. If persons of the latter sort were classified as property factors, a proprietor who wished to assist his or her neighbours by organizing cleaning or maintenance work could not do so without registration. In my opinion that cannot reasonably be considered the purpose of the statute.

[26] Consequently, I am of opinion that the words "in the course of that person's business" refer to business as a property factor only, and not to any other form of business

that a person who organizes work to the common parts of a property may carry on. That means that the scope of the Act is confined to those whom it is obviously intended to regulate, professional property factors who are paid for acting as such. It is not intended to regulate those who undertake property management functions in a tenement on a gratuitous, non-professional basis. If it did so, it would have the anomalous results that both of your Lordships have indicated.

[27] The appellant no doubt carries on the business of letting flats in the property at Charlotte Court, but it does not carry on business as a property factor, as that expression is normally understood. In particular, it is a matter of agreement that the appellant does not charge for any management services that it provides over the common parts of the property or any adjacent ground. For these reasons, I am of opinion that the appellant is not a "property factor" for the purposes of the 2011 Act, and is not subject to regulation under that Act. The First-tier and Upper Tribunals have given the expression "in the course of that person's business" a wholly literal construction, without regard to the context provided by the statute as a whole and without regard to the fundamental purposes of the statute. That in my opinion was an error.

[28] It is perhaps unfortunate that section 2 of the Act does not state explicitly that only those carrying on business as property factors are subject to regulation by the Act. Nevertheless, it is clear from the Act considered as a totality that it was intended only to regulate those in business as property factors, on a professional basis. For that reason I agree that this appeal should be allowed, with the consequences set out by your Lordship in the chair.

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12 May 2020

[29] I adopt with gratitude the summary of the background and of the statutory framework set out by your Lordship in the chair. I agree that, for the reasons your Lordship gives, the appeal should be allowed, the decision of the Upper Tribunal quashed and the application by the homeowner dismissed. I seek to add only some brief observations on the question of what is meant by the term "property factor" in section 2 of the Act.

[30] In my opinion, it is clear that, on the evidence in the present case, the appellants were not property factors for the purposes of section 2 of the 2011 Act ("the Act"). Whilst the

appellants were certainly carrying on a business at the material time, they were not in any realistic sense acting in the course of business as property factors when they made the various arrangements for the proper upkeep and maintenance of the common property. In these circumstances, they were not subject to the provisions of the Act.

[31] The evidence in the case made clear that the appellants' business was that of property developers and dealers in land and buildings and was not the business of property factors. As Mr Prow of the appellants explained in his affidavit, the factual position was that the appellants did their best to do the work which a property factor would otherwise have been paid to do. He stressed that the appellants imposed no charge for the time and effort they devoted to arranging matters such as insurance, internal cleaning, maintenance and repairs of the common parts of the building, and payment of utility bills. It is true that this is the type of work typically carried on by a property factor (in return for payment), but that simply begs the question as to whether the appellants came within the statutory definition of a property factor.

[32] The real question is not whether the appellants did things that a property factor would typically be expected to do or would customarily do; the issue is whether the appellants were, in the course of their business, managing the common parts of land owned by two or more other persons and used to any extent for residential purposes, to quote the language used in section 2(1)(a) of the Act. In my opinion, the appellants were not managing the common parts of the building in the course of their business. No doubt they were conducting a business at the material time and no doubt they were managing the common parts of the building because they considered it sensible and appropriate to do so, but it does not follow that they were doing so in the course of their business. Their business was, as I have explained, one of property developers and dealers in land. It was not the

business of property factors. In my view, the management of the common parts was incidental to the appellants' business. In the circumstances of the present case the management of the common parts of the building cannot, in my opinion, reasonably be regarded as something that was done in the course of the appellants' business.

[33] The flaw in the tribunals' reasoning is that they have treated it as sufficient to engage the provisions of the Act that the appellants were carrying on a business at the time that they were managing the common parts; they have taken insufficient account of the fact that the business was not the business of a property factor.

[34] The point may be tested in this way. It is not unusual for one of the common proprietors in a tenement, who might for example be a dentist or a solicitor or a grocer occupying the ground floor flat, voluntarily to assume responsibility for matters relating to the maintenance and upkeep of the whole property; in effect the same sort of arrangements as the appellants took on in the present case. This is something done for the mutual benefit of all the proprietors; it is obviously a sensible and pragmatic arrangement. But would the mere fact that such a volunteer proprietor happened to be carrying on a business, although not as a property factor, be sufficient to bring him or her within the scope of the Act and to make him or her subject to the regulatory scheme and penalties of the Act? It seems to me that the answer to that question must, on any reasonable construction of the Act, be answered in the negative. The Act requires, amongst other things, registration and the provision of information by property factors and that they satisfy a test of being fit and proper persons. It also subjects property factors to criminal penalties in certain circumstances (see sections 3, 7 and 24). Looking at the scheme and purpose of the Act as a whole, I consider that it cannot have been the intention of Parliament that businesses should be treated as property factors for the purposes of the Act simply because they voluntarily

take on the burden of arranging certain matters that are necessary for the maintenance and upkeep of properties in respect of which they are an owner in common with other proprietors. Such an interpretation would serve to discourage the making of the type of sensible and practical management arrangements to which I have referred.