SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

JUDGEMENT OF SHERIFF ALAYNE E SWANSON

in causa

GRANT & WILSON PROPERTY MANAGEMENT LIMITED,

65 Greendyke Street Glasgow G1 5PX

Appellant

against

EMMANUEL EGUBKA, residing at

1/1 183 Craighall Road Glasgow G4 9 TN

Respondent

Act: Neilly Alt: Smith

Glasgow 29 January 2015

[1] The Property Factors (Scotland) Act 2011 ("the Act") introduces a system of registration of property factors and an obligation to comply with a code of conduct prepared by Scottish Ministers setting out the minimum standards to be expected of registered property factors. The Act enables a homeowner to apply to the homeowner housing panel for a determination of whether the homeowner's property factor has failed to comply with the property factor's duties or to ensure compliance with the property factor code of conduct.

[2] It was a matter of agreement between parties that the respondent is the owner of the property at 1/1, 183 Craighall Road, Glasgow G4 9TN. It is agreed that the appellants are the property factors in respect of that property. In February 2014 the respondent made an application to the Home Owners Housing Panel. The appellant responded on 1 April 2014. The committee appointed by the Panel sat on 2 and 19 May 2014 and issued a written decision on 10 June 2014.

[3] The decision was that the appellants had failed to comply with their duties under the Act. Section 22 of the Act provides a right of appeal against a decision of the committee appointed by the homeowner housing panel to the sheriff on a point of law. That is the nature of the summary application with which we are dealing. The appellants contend that the committee erred in law

Submissions

[4] Mr Neilly reviewed the committee's decision. The matters covered in paragraphs 1 to 7 are procedural; paragraphs 8 to 12 contain the findings in fact; paragraphs 13 to 37 contain a discussion of the evidence and the alleged breaches of duty; paragraph 37 (which should be numbered 38) is the decision and paragraph 38 (which should be numbered 39) is the provision about appeal.

[5] This appeal under section 22 of the Act is concerned with the findings in fact. Regulation 26 (2)(b) states that the findings in fact should be a full statement of the facts found by the committee. The clear inference is that paragraphs 8 to 12 and only paragraphs 8 to 12 represent those findings in fact. In Mr Neilly's submission those are not sufficient to support the conclusion. In Mr Neilly's submission the committee erred in law. The

evidence contradicted the decision which they reached. The findings in fact do not support it.

[6] It is not disputed that the respondent's original complaint was made by email dated 14 January 2013. Production 16 is an email from Lorraine Killin dated 21 January 2013, which is a response to the email of 14 January 2013. Production 17 is a letter from Lorraine Killin dated 21 January 2013. Production 18 is a letter from Lorraine Killin dated 8 February 2013. Production 19 is a letter from Clarke Elsby dated 12 February 2013. Those items 16 1 to 19 are clearly a direct response to the respondent's complaint. There is an observation by the committee (which Mr Neilly notes is not a finding in fact) that these items were "for some unknown reason" not received.

[7] The respondent and his wife gave evidence. The respondent's position is that these letters and emails were not received. The committee's comment that these matters were not received for some unknown reason is not supported in any way by the findings in fact. There is no reference in paragraphs 8 to 12 to either the complaint or the response. The committee misdirected themselves in law. Either they made a decision which was not based on a finding in fact or they failed to make a full statement of their findings in fact. In this regard, Mr Neilly relied upon the following: *McPhail on Sheriff Court Practice* Third Edition paragraphs 18.109 and 18.104; *Forbes* v *Forbes* 1965 SLT 109.

[8] The committee vitiated their judgement by their comment about non receipt of these items. There is no indication of what was asked of any of the witnesses and no indication that letters 16 to 19 addressed the complaint. The committee give no consideration to whether by items 16 to 19 the appellants had fulfilled their duty. There is no explanation whether the three-week period covered by items 16 to 19 had any significance. There were no findings about whether the respondent was out of the country, having difficulties receiving post or that the appellants required to send these items by any particular method.

[9] In their written response of 1 April 2013 the appellants responded to all points raised and noted that they had fulfilled their duties and not breached section 2.5 of the code of conduct. The appellants also had a clear pattern of communicating with the respondent by email and post and this had been in existence prior to 2013. This court is entitled to review the decision on the basis that the committee failed to consider the importance of receipt or non-receipt. In this regard Mr Neilly referred to the following: *McPhail on Sheriff Court Practice* Third Edition paragraphs 18.106; *Dunn* v *Dunn's Trustees* 1930 SC 131; *Duncan* v *Wilson* 1940 SC 221. To simply accept the respondent's case that he did not receive number 16 to 19 entirely discredits the appellants with no explanation. For some unknown reason is simply not enough. In support of that proposition Mr Neilly referred to *Morrison* v *Kelly and Sons Ltd* 1970 SC 65

[10] By preferring one witness in the face of verbal and documentary evidence to the contrary the committee fell short of requirements. Because this had a direct bearing on the decision that the appellants had breached their duties it constitutes an error in law. Mr Neilly enumerated the consequences which that had in relation to the decision and enforcement order. He referred to :*McPhail on Sheriff Court Practice* Third Edition paragraphs 18.111; *Thomson* v *Glasgow Corporation* 1962 SC (HL) 36; *Gray* v *Gray* 1968 SC 185; *Forsyth* v *AF Stoddard & Co* 1985 SLT 51; *Berry Petitioner* 1985 SCCR 106;

[11] The committee's statement in paragraph 25 of the decision in terms of being more proactive rather than letting matters drift also led to an error in law. Given the treatment of item 16 to 19 the committee failed to take into account something it should have done. The committee erred in confining themselves to whether 16 to 19 were received. The content of 16 to 19 was not considered and it is very relevant. Given that the committee ignored relevant considerations it is a decision that no reasonable committee could have reached.

[12] Documents 16 to 19 in fact only reiterated conditions which had already been provided to the respondent. There is a finding in fact that he received those terms and conditions. There is no dispute that he received letter number 20, so it is a reasonable inference to make that the respondent is aware of the information contained in items 16 to 19. It is inequitable to say that the appellants have breached their duties when the respondent was not adhering to his. It is inequitable to order the appellants to provide material free of charge.

[13] The committee made no enquiry that would be reasonable and necessary to support its decision. It would have been relevant for the committee to find out if the 131 other owners of the development had been sent the insurance schedule. They could have asked the appellants about this. This is further evidence of the committee's failure to balance the factors appropriately and take relevant considerations into account. The committee is not entitled to decide that there should be an absolute requirement to have a system for owners to pursue matters themselves.

[14] The correspondence between parties provides extensive evidence of the appellants keeping the respondent informed in relation to progress. The committee failed to identify the legal basis compelling the appellants to make over the money as contained in paragraph 5.5 of the enforcement order. The committee has no basis to direct the appellants to pay monies which the respondent says he has no interest in receiving. There is no finding in fact in relation to this part of the decision and no discussion about it within the decision.

[15] Mr Smith's submission was in five parts. Firstly he reviewed the Act, then the Regulations and finally the Code of Conduct. Then he dealt with the error in law and the contention that the committee had misdirected itself. In Mr Smith's submission the matters set out in paragraphs 8 to 12 of the decision are not all of the findings in fact. In his submission the preamble covers everything that follows and therefore what is contained from paragraphs 8 to the conclusion contain the findings in fact. In Mr Smith's submission

we cannot confine ourselves to paragraphs 8 to 12 as the findings in fact are so much more than that. In his view the breaches are not connected to any issue with documents 16 to 19. There is no mention of those documents in paragraphs 23 and 24 of the decision. These documents are a red herring. The only way in which this court could find something in the evidence the committee did not find is if there has been a misdirection in law. Mr Smith referred to the following: *McPhail on Sheriff Court Practice* Third Edition paragraphs 18.02, 18.103, 18.104, 18.107, 18.109; *Forbes* v *Forbes* 1965 SLT 109; *Thomas* v *Thomas* 1947 SC(HL) 45; *Allardice* v *Wallace* 1957 SLT 225; *Duncan* v *Wilson* 1940 SC 221.

[16] In Mr Neilly's submission in reply there is no reasoned connection between the evidence, the findings in fact and the decision. That means the committee has no legitimate ground on which to say there has been a breach of the code of conduct. The appellants established a prima facie case in written evidence and productions that they had communicated and issued the insurance. The committee's observations have to be distinguished from their findings in fact. There is no evidence that the committee considered the content of items 16 to 19 or said what the findings would have been if the respondent had acknowledged receipt. There is no finding that the appellant did not send these documents. That is crucial to supporting the decision. The conclusion is manifestly unjust. No satisfactory reasons are given and that leads to a serious error of law.

Discussion

[17] The Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012/180 (Scottish SI) set out in regulation 26 the required contents of a decision made by a committee appointed by the president of the homeowners panel to determine an application under section 17 of the Act. Regulation 26 provides as follows:

26.— Decision
(1) This regulation applies to any decision of the committee under section 19(1), 21(1) or 23 (1) of the Act.
(2) Any decision of a committee—
(a) must be reached by majority but, where the committee are constituted by two members, the chairman has a second or casting vote; and
(b) must be recorded in writing in a document which—
(i) contains a full statement of the facts found by the committee and the reasons for their decision;
(ii) refers to the right of appeal under section 22 (1) of the Act; and
(iii) is signed by the chairman (or, in the event of absence or incapacity of the chairman, by another member of the committee).
(3) The committee must, as soon as reasonably practicable, make a decision by giving notice of the decision to—
(a) the property factor (or representative);
(b) the homeowner (or representative); and
(c) any other party.
(4) Such a notice must be accompanied by—
(a) the document mentioned in paragraph (2)(b);
(b) any property factor enforcement order; and
(c) any report which the committee considered before making the decision.
(5) The decision of the committee and a statement of reasons will be made publicly available.

[18] In this case the appointed committee issued a written decision on 10 June 2014. The document is in three parts. Paragraphs 1 to 7 are headed "Background" and are found at pages 1 and 2 of the document. Paragraphs 8 to 12 are headed "Committee Findings" and are found at pages 2 and 3. Thereafter there is a lengthy section covering pages 3 to 11 headed "Discussion of evidence and alleged breaches of duty." The two final paragraphs are headed "Decision" and "Appeals." The decision is accompanied by an enforcement order in terms of the Act which covers 3 pages.

[19] The Regulations require that the written decision contains a full statement of the facts found by the committee and the reasons for their decision. Essentially it is the format of the decision which is criticised by the appellants. No format is prescribed in the Regulations. The committee has chosen to head the second section "Committee Findings" and its preamble states that what follows are the findings in fact which the committee made. If the

section had been headed "Admitted Facts" there could have been no complaint. What the committee sets out are a number of matters pertaining to the designation and status of the respondent and the appellant which I understand not to be in dispute. The only finding in fact with any significance is that the appellants' terms of service and delivery of standards was issued to all homeowners following the entry into force of the 2011 Act on 1 October 2012. The committee notes that it was not alleged that the appellants failed to provide the respondent with a copy of that document as required by section 1 of the Code.

[20] In the narrative set out at paragraphs 13 to 15 the committee explains the difficulties which it had in ascertaining the nature of the respondent's complaint. Ultimately the committee addresses a failure in communication, a failure to carry out duties in relation to the provision of communal insurance and a failure to deal with the complaints expediently. That meant it addressed failures to comply with sections 2, 5 and 7 of the Code.

[21] What the Code provides at those sections is as follows:

SECTION 2: COMMUNICATION AND CONSULTATION
Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:
2.1 You must not provide information which is misleading or false.
2.2 You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).
2.3 You must provide homeowners with your contact details, including telephone number. If it is part of the service agreed with homeowners, you must also provide details of arrangements for dealing with out-of-hours emergencies including how to contact out-of-hours contractors.
2.4 You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).
2.5 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 times should be confirmed in the written statement (Section 1 refers).

SECTION 5: INSURANCE

5.1 You must have, and maintain, adequate professional indemnity insurance, unless you are a social sector property factor who can demonstrate equivalent protections through another route.

If your agreement with homeowners includes arranging any type of insurance, the following standards will apply:

5.2 You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this.

5.3 You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance.

5.4 If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so.

5.5 You must keep homeowners informed of the progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves.

5.6 On request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes.

5.7 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request. If a paper or electronic copy is requested, you may make a reasonable charge for providing this, subject to notifying the homeowner of this charge in advance.

SECTION 7: COMPLAINTS RESOLUTION

Section 17 of the Act allows homeowners to make an application to the homeowner

housing panel for a determination of whether their property factor has failed to carry out their factoring duties, or failed to comply with the Code.
To take a complaint to the homeowner housing panel, homeowners must first notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties, or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them.
It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in-house complaints procedure and how they make an application to the homeowner housing panel.
7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.
7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.
7.3 Unless explicitly provided for in the property titles or contractual documentation, you must not charge for handling complaints.
7.4 You must retain (in either electronic or paper form) all correspondence relating to a homeowner's complaint for three years as this information may be required by the homeowner housing panel.
7.5 You must comply with any request from the homeowner housing panel to provide information relating to an application from a homeowner.

[22] The appellants contend that the committee erred in law for a number of reasons surrounding its consideration of documents 16 to 19. These documents are items of correspondence which the appellants say were sent to the respondent and which the respondent says were never received. The appellants criticise the committee for (a) not stating a finding in fact resolving this dispute and (b) going on to consider the implications of the documents not having been received without considering the implications of the alternative.

[23] I consider that the appellants are wrong to give the receipt or otherwise of documents 16 to 19 such prominence. The first failure upheld by the committee has no bearing on those

documents at all. In paragraph 16 the committee discusses the appellant's failure to provide an insurance schedule. It heard evidence from the respondent and from two witnesses representing the appellant. It states that it found the respondent to be credible. It accepted his evidence that the schedule was neither sent in August 2012 nor re-sent after January 2013. The sentence "the first the applicant saw of the relevant insurance schedule was immediately prior to the hearing held on 2 May 2014" in paragraph 16 is a finding in fact. In my view the committee clearly sets out the proved circumstances and the reason for the decision that section 2.1 of the code has been breached.

[24] Paragraph 20 deals with section 2.5 of the code. The facts stated (and again they are not recorded in the section headed findings) are that the respondent requested certain information from the appellants by email dated 27 November 2012 and reminder dated 20 December 2012. The respondent did not have his query resolved. The appellants' position was that a request for clarification as to what information was requested went unanswered. As the committee noted an impasse resulted. This caused the committee to be tempted to "find that both parties were equally intransigent and therefore not to uphold the complaint." However the committee goes on to explain (in paragraphs 23 and 24) why it did not do that. It notes two areas of concern neither of which have anything to do with documents 16 to 19. Its comments about the appellants in paragraph 24 are particularly trenchant.

[25] It is tolerably clear that the committee had formed a view that the appellants had not fulfilled their duties under the Act in their dealings with the respondent. Their failings are clearly explained. There is no doubt about the reasons for the committee's decision.

[26] Firstly, the respondent's request for information remained unresolved a year after it was made. Secondly, the appellants did not consider a request for a letter sent to the insurers to cover a form sent to the insurers. As the committee notes, the aim of the code in relation to communication is set out in the preamble to section 2: "Good communication is the

foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes." The committee notes that ignoring the request for a copy of the insurance claim because it specified "letter" rather than "form" undermines that aim. Thirdly, the appellants required the respondent to fill in a complaints form a year after his complaint was made and was as yet unanswered; in the words of the committee a requirement which "represented nothing less than a time wasting and obstructive device which could only serve to aggravate [his] frustration and at the same time do nothing to resolve his complaint and outstanding enquiries." "The insistence on exact wording regarding requests made and the late production of a complaints form were the very antithesis of [the correct] approach."

[27] It is only after this clear indication of the committee 's views that the missing documents 16 to 19 are mentioned in paragraph 26. The committee notes that it is regrettable that they were not received. However it also comments that it is regrettable that even at the stage of the hearing the appellants failed to comply with the direction to produce the information first sought by the respondent. The appellants aver in 4.2 that " in any event by letter dated 23 January 2014 the appellant had already taken steps to re-iterate the substantive content of items 16 to 19" The committee take the view that the necessary information had not been provided by the time of the hearing. The significance of documents 16 to 19 is therefore questionable. In my view the decision does not, as is asserted by the appellants, rest on any error in relation to those documents.

[28] I do not accept that the paucity of findings in fact set out in paragraphs 8 to 12 vitiates the decision. It is unfortunate that the committee chose to include a section in their decision introduced as findings in fact which in truth sets out nothing of the sort. However, what the Regulations require is that a full statement of the facts and the reasons must be given. The quality standard for that statement of facts and reasons is well- known. To use the words of Lord President Emslie in *Wordie Property Company* v *Secretary of State for Scotland* 1984 SLT 1983: "the decision must, in short, leave the informed reader and the court in no real and

substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it." But as Lord Reed notes in *Uprichard* v *Scottish Ministers* [2013] UKSC 21after noting the test set out in *Wordie Property*: "It is in addition important to maintain a sense of proportion when considering the duty to give reasons, and not to impose on decision-makers a burden which is unreasonable having regard to the purpose intended to be served." The reasons for the decision are explained as I have noted above. In my view the written decision taken as a whole satisfies the *Wordie* test. There is no error of law in relation to the committee's decision that section 2 of the code has been breached.

[29] The committee also had the benefit of hearing the evidence in relation to all of these matters. The law regarding interference with decisions based on evidence is clear. In *Thomas* v *Thomas* 1947 SC (HL) 45 Lord Thankerton states the position plainly. Lord Reed in the more recent case of *McGraddie* v *McGraddie* 2013 UKSC 58 confirms it. A court dealing with an appeal should be slow to interfere with the judgement of the tribunal which had the benefit of hearing and seeing the witnesses. The committee here has made it clear that it accepted the evidence of the respondent and preferred it to that of the appellants. In the appellant's submission the committee should not have done so. That, however, does not constitute an error in law. Unless I am satisfied that the committee has misdirected itself I am not in a position to revisit the evidence. It is not appropriate for me to enquire into what the committee asked, should have asked or might have asked. In my view the committee was entitled to reach the conclusion it did on the basis of the relevant proved circumstances of the case as set out in its full decision, if not the section headed "Findings." Its reasons are satisfactory and given the discussion of the evidence I am not persuaded that the committee did not take proper advantage of having seen and heard the witnesses and examined the documentary evidence.

[30] The committee's decision is also that section 5 of the code has been breached. Section 5.2 requires the appellants to provide each homeowner with clear information showing the

basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case the appellants may impose a reasonable charge for providing this. The appellants gave evidence to the committee that the insurance schedule was on their website. However the committee notes that the obligation in the code is a positive one to provide the homeowner with the relevant clear information. Given the committee's findings that no information had been supplied showing the basis on which his premium was calculated the conclusion that section 5.2 has been breached is inevitable.

[31] The decision in relation to section 5.5 is more problematic. The committee note two matters of concern to them. The first is the appellants' system whereby insurance claims are pursued on behalf of relevant owners. Section 5.5 provides two alternatives. One is to provide homeowners with sufficient information to allow them to pursue the matter themselves. The other is to have a procedure in place for submitting claims on behalf of homeowners (as set out in section 5.4). If the latter approach is adopted there is a requirement to keep homeowners informed of the progress of their claim. Clearly given the failures referred to above the committee were of the view that this obligation had been breached. However it is breached because of the failure to keep the homeowner informed as to progress not as a result of that alternative being adopted. It is not correct to suggest that compliance with section 5.5 can only be achieved by the appellants being required to have a system in place whereby homeowners are able to pursue insurance claims themselves.

[32] The other problem is the requirement for the appellant to make payment to the respondent of the monies received from the insurers. The committee notes at paragraph 33 that the money recovered has correctly been placed in a deposit account by the appellants. It also notes that the respondent states that he has no interest in claiming it. There is also

doubt raised about whether the insurers will seek the return of the money, a matter on which the committee notes it would require further information in order to come to a conclusion. In all of those circumstances it is not appropriate for the money to be handed over to the respondent. It should be kept in the deposit account until matters are resolved with the insurance company. The overriding objective set out in the Regulations is to deal with the proceedings justly. In my view the committee goes too far in this aspect of the decision in dealing with what is in effect a failure in communication.

Decision

[33] I intend to affirm the decision of the committee appointed by the Homeowners Housing Panel. I note that in terms of section 19 of the Act where a committee is satisfied that a property factor has failed in its duties it must make a property factor enforcement order. The section provides for notice of its proposals to be given to the property factor and an opportunity provided for representations to be made in relation to them. I imagine that the marking of this appeal has interrupted that process.

[34] I was not addressed on whether the enforcement order is to be considered part of the decision or on what my powers might be in relation to it particularly in a situation where I am affirming the committee's decision. As I have discussed at paragraphs [31] and [32] my concerns about proposed requirements 3 and 5. I was invited by parties to fix a hearing on expenses. I invite parties to also address me on my powers in relation to the enforcement order at that hearing and to advise me about the factual position in relation to the timescale involved and the representations made, if any. I will continue consideration of the nature of the interlocutor to be pronounced until that date.

Alayne E Swanson

Sheriff Alayne E Swanson

Sheriff of Glasgow and Strathkelvin at Glasgow

29 January 2015