SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2017] SC GLA 59

B1766/16

JUDGMENT OF SHERIFF NEIL J MACKINNON, Esquire, Advocate

in the cause

APEX PROPERTY FACTOR LIMITED

Pursuers

against

BC and MC

Defenders

Act: Ritchie
Alt: Murray

GLASGOW, 31 May 2017. The Sheriff, having resumed consideration of the cause, Repels the pleas-in-law for the pursuers; Refuses the appeal; Reserves meantime all questions of expenses and Appoints parties to be heard thereon on 21 June 2017 at 9.30 am.

NOTE:

[1] This is an appeal under and in terms of Property Factors (Scotland) Act 2011, section 22. The matter came before me for a hearing which proceeded on submissions. Mr Ritchie, Solicitor appeared for the pursuers and Ms Murray, Solicitor appeared for the defenders.

[2] The appeal concerns a decision to make a Property Factors Enforcement Order under the said Act. Mr Ritchie, in presenting the appeal for the pursuers, sought first to

meet a point on time bar tabled by the defenders, the contention for the defenders being that the decision complained of was, truly, made on 20 June 2016. Mr Ritchie submitted that, properly understood, the legislative framework and in particular Regulation 26(2) of the Homeowners Housing Panel (Application and Decision) (Scotland) Regulations 2012 demonstrated that a decision was "made" only when notice was given to the parties mentioned in said provision.

[3] Mr Ritchie then turned to the substantive aspects of the appeal. At the time of the application to the Homeowner Housing Committee there was no longer a relationship of factor *quoad* the defenders. The pursuers' appointment was terminated as of 28 February 2015, prior to the application to the HOHP on 17 July 2015. Having regard to the terms of section 17 of the 2011 Act, together with section 10(5)(a) of the Statute, an application was competent only if, as at the date of the application, the homeowner was the owner of land used for residential purposes and in respect of which the common parts were managed by a property factor.

[4] Reference was made to the case of *Donaldson* v *Walker Sandford Property Management Ltd* (HOHP/PF/14/0013). There was no longer any jurisdiction to entertain the matter. Reference was made to *Shields* v *Apex Property Management* (FTS/HPC/PF/16/1011) and *Blackley* v *Hacking & Paterson* (FTS/HPC/PF/17/0055), decisions respectively of 23 and 28 February 2017.

[5] Accordingly, the decision sought to be impugned was vitiated by an error of law. The decision should be quashed.

[6] It was further submitted that the Committee erred in taking the view that the pursuers breached the Code of Conduct for Property Factors.

[7] To the extent that the Committee founded on paragraph 4.6 of said Code they fell into error. Paragraph 4.6 provides:

> "4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them…"

In the events which happened, albeit that the pursuers advised the homeowners of certain debt recovery problems after the termination of the pursuers' appointment, the Code was specific in its reference to "could have implications for them". However, debt recovery problems only had an implication as at the date of termination of the pursuers' appointment. The pursuers had no intention of implementing debt spreading in terms of the Tenements (Scotland) Act 2004 prior to this date.

[8] In respect that paragraph 4.7 was founded on, this provides:

> "4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs".

This requirement had to be interpreted subject to circumstances. The pursuers' appointment had been terminated. They had registered a notice of prospective liability against the defaulting owners' title. Notwithstanding that the pursuers did not follow their own standard debt recovery procedure, that did not infer a breach of paragraph 4.7.

[9] Reliance was placed by the Committee also on paragraph 7.1 of the Code which provides:

> "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".

The complaints made by the defenders had been made after the pursuers' appointment *qua* factors had been terminated. Only a homeowner may make a competent application. Reference was made to section 17 of the 2011 Act.

[10] Even if the court were persuaded that the Committee could competently make an order, there were discrete parts of the order which would in any event fall to be quashed.

[11] The award of £250 was made notwithstanding that this was not sought by the defenders, who explicitly stated they did not wish to pursue recovery of expenses. Accordingly, this element of the order was made incompetently.

[12] In the event that the court found in favour of the pursuers on the issue of entitlement to determine that there had been a breach of paragraphs 4.6 and 4.7 of the Code, the second and third elements of the order could be challenged.

[13] Further, it was submitted that the requirement to register a discharge of the Notice of Potential Liability (NOPL) was an incompetent element of the order. The registration of the NOPL was not referred to in the application. The issue was not raised until the hearing before the Committee.

[14] For the defenders, Ms Murray invited me to refuse the appeal. The appeal was time barred, the decision having been made on 20 June rather than 23 June. The present appeal was lodged beyond the statutory limitation period.

[15] Turning to the substantive issues in the appeal, Ms Murray submitted that the Committee did have jurisdiction to entertain the application, notwithstanding the termination of the pursuers' appointment. The Committee had found assistance in the

terms of the Code of Practice and the ongoing requirement to comply with financial obligations. The pursuers conceded that the authorities relied on were not all in point.

[16] Were the pursuers' contention sound, they could evade the jurisdiction of the panel by the simple expedient of resigning. The defenders were homeowners within the meaning of the legislative provisions.

[17] In respect of paragraph 4.6 of the Code of Conduct, the panel carried out a fact finding exercise. It was not for the court to review matters. The pursuers would need to show that there was no evidence to support the view taken.

[18] In respect of paragraph 4.7, the pursuers were aware that debts were accruing, and did not follow their own debt recovery procedures. Instead of following those procedures, they apportioned the debts amongst the co-proprietors.

[19] In respect of paragraph 7.1, the relationship of factor/homeowner subsisted and accordingly the defenders were entitled to the benefits of the complaints procedure.

[20] To the extent that the pursuers were critical of the terms of the order made, said criticisms were not well-founded. The sum of £250 was in recognition of time spent, together with distress and inconvenience.

[21] The Committee could competently grant the various discrete elements of the order. It was *pars iudicis* for the Committee to have regard to the issue of competency.

[22] Further and in any event, all as set out in page 7 of the Record, a personal bar arose from the circumstances in particular where the pursuers exercised or purported to exercise the powers of a Property Factor notwithstanding that they claimed no longer to be a Property Factor.

Discussion and decision

[23] The defenders contend, first, that the summary application is time barred, on the

view that, truly, the decision complained of is dated 20 June 2016. The pursuers contend, by contrast that the order was only issued to the parties by letter of 23 June 2016. In my view the contention of the pursuers is well-founded. The Homeowners Housing Panel (Application and Decision) (Scotland) Regulations 2012 provide *inter alia*:

> "26(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…) (c) any other party".

Thus, the mechanism or mode whereby a decision is "made" is prescribed by the legislation. Not until the giving of notice can a decision truly be regarded as "made". In my view, accordingly, the appeal is timeous.

[24] The pursuers contend that the Committee had no jurisdiction to determine the defenders' application. The essential point founded on is that the proprietors had terminated the pursuers' appointment *qua* factors on 28 February 2015. The pursuers pray in aid the statutory definition of homeowner. Accordingly, with the application being submitted on 17 July 2015, this was 4½ months from that date. The defenders contend that the Property Factor need not be in post at the time of any application; were it otherwise, the Property Factor could frustrate the intention of the legislation by the simple expedient of resigning immediately the property owner complied with his obligation of intimation in writing in respect of his dissatisfaction.

[25] It is evident from the earlier decision of 1 May 2016 that the issue about jurisdiction featured in the discussion before the Committee (paragraph 14 *et seq).* In my view the reasoning employed by the Committee is cogent and compelling. Standing the use of the present tense particularly in section 2 and 10 of the statute, the essential requirement was that an applicant to the HOHP required to be in ownership (a

homeowner) whilst the factor carried out a property management function. That view is further supported by a consideration of the Code of Conduct for Property Factors at section 3.1, making provision for compliance with the Code beyond the termination of a factoring contract.

[26] It was further contended for the pursuers that the decision complained of was in any event flawed. The determination of the Committee did not comprehend a determination that there had been any breaches of Property Factors duties. Section 17 of the 2011 Act permitted an application to be made to the HOHP if the Property Factor failed (a) to carry out the property factor's duties or (b) to ensure compliance with the Code of Conduct and (c) the property factor refused to resolve or unreasonably delayed in attempting to resolve the homeowners concerns.

[27] One of the findings related to breach of paragraph 4.6 of the Code of Conduct. This contains the obligation to keep homeowners informed of any debt recovery problems of the homeowners which could have implications for them. Mr Ritchie contended that, in respect that the Code of Conduct referred to homeowners being advised when debt recovery problems "could have implications" for them, these implications only arose at the date of determination of the pursuers' appointment. The defenders' contention is that this court does not have power to review the decision. The pursuers require to show there was no evidence to support the decision of the panel. The level of debt identified would ultimately have had an effect on the defenders.

[28] The relevant passages in the document (at 5/9 of process) appear from paragraph 51 *et seq*. The approach taken to this aspect of matters is readily intelligible. There was no evidence that the pursuers had taken steps to outline the implications for the defenders of the level of debt accrued by the named individuals mentioned in

paragraph 52, or at all events until after the factoring contract had been terminated. I was not satisfied that this reasoning inferred an error of law. There had been an implication for the defenders in respect that there had been an apportioning of the debts by the time the defenders were informed of these matters.

[29] For the pursuers it was also contended that the findings at paragraphs 55 to 60 were insufficient to determine that there had been a breach of paragraph 4.7 of the Code of Conduct. This provision stipulated for "reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs…". Mr Ritchie submitted that standing the steps taken including the registration of a notice of prospective liability under the Tenements (Scotland) Act 2004 against the defaulting owner's title, there was not a sufficient basis for the determination made.

[30] For the defenders it was submitted that the pursuers had not followed their own standard debt recovery procedure. The pursuers were well aware that the management charges were being accrued. They never considered court action against the defaulting owners but, rather, apportioned the debts.

[31] The determination is intelligible and its reasoning in my view is compelling. Even apart from the circumstance that the pursuers proceeded directly to the later stages of the standard debt recovery procedure, the defaulting homeowners had assets with which to meet a court decree, so an approach which, in effect, points up the reasonableness of pursuing those homeowners (rather than proceeding directly to apportioning the debts amongst co-owners) is entirely intelligible and in my view did not infer an error of law.

[32] For the pursuers, it was also contended that the decision complained of was flawed insofar as it founded on paragraph 7.1 of the Code of Conduct. This provides for a written complaints resolution procedure. The relevant complaints were made on 17 March and 5 May 2015, after the pursuers' appointment *qua* factor had been terminated. There was accordingly, no longer, it was contended, a factor/homeowner relationship. For the defenders it was contended that the reasoning of the Committee should be upheld.

[33] That reasoning appears at paragraphs 73 to 77 of the determination. The Committee took the view that there was nothing in the statute nor in the Code to support the contention that the Code was restricted to factors' dealings with current customers only.

[34] On this aspect of matters I considered the reasoning in the determination to be sound. The soundness of that view is in my opinion demonstrated by the circumstance that, as the Committee observed, the pursuers corresponded (beyond the date of determination of appointment) on the basis that they invited parties to contact them for further discussions.

[35] A number of discrete issues were also raised as grounds of challenge, in respect of the terms of the Enforcement Order itself. It was contended that, notwithstanding that the defenders did not seek recovery of expenses, the Committee decided to make an order in that regard nevertheless. For the defenders it was explained that the Committee proceeded on the basis that the defenders had spent time and sustained distress and inconvenience caused by the breach of the Code.

[36] In considering whether to make an order the Committee is empowered, per section 20(i) of the 2011 Act, to make an order requiring the Property Factor to "(b)

where appropriate, make such payment to the homeowner as the Committee considers reasonable". Thus, the matter of payment is at large for the Committee subject to the limitations inherent in carrying through the objectives of the legislation, irrespective of whether a party positively moves for a particular payment. Accordingly, it does not appear to me that the Committee fell into error on this aspect of matters.

[37] A separate point was focused in respect of that part of the order whereby cancellation of the final invoice was provided for together with the provision of a replacement final invoice. It was accepted that those elements of the order (viz parts (ii) and (iii) could be successfully challenged only in the event that the court accepted the submissions anent paragraphs 4.6 and 4.7 of the Code of Conduct. As I did not accept those submissions, all as outlined, *supra*, it follows that these grounds of challenge cannot succeed.

[38] It was further contended that that part of the order enjoining the pursuers to register a Discharge of the notice of potential liability registered against the homeowners' property was, in effect, *ultra vires*. Registration of the NOPL had not been referred to in the application. The matter, it was submitted, had not been raised until the hearing before the Committee. It was accordingly contended that it was incompetent for the Committee to make a determination in relation to this aspect of matters. Article 12 of the condescendence focuses the contention that section 11 of the Tenements (Scotland) Act 2004 entitles the pursuers to register said notice.

[39] For the defenders it was submitted that the Committee had been addressed on the matter of the discharge. It was *pars iudicis* to raise an issue of competency.

[40] In Article 12 of condescendence the pursuers contend that the Committee's interpretation of the provisions of the Tenements (Scotland) Act 2004 was incorrect, and

that notwithstanding that the pursuers' appointment *qua* factor had been terminated, they were entitled in terms of section 11 to register the notice of potential liability. The submission set out in Mr Ritchie's speech developed the legal basis of challenge, the proposition being that an application to the HOHP could only be made if homeowners notified the Property Factor in writing of a failure to carry out property factors' duties or to comply with the Property Factors Code of Conduct; the issue of the discharge had not been raised prior to the hearing before the Committee.

[41] The preliminary issue on this ground of challenge is focused in Article 11, being to the effect that the Committee had no jurisdiction to entertain the matter absent a reference to this issue in the application to the HOHP following a notification to the factor in writing of a failure to carry out duties/comply with the Code of Conduct. On this jurisdictional aspect of matters, I consider that, provided that there had been an initial application to the panel raising a competent issue, the Committee would have a compendious power vested by virtue of section 20 of the 2011 Act which provides *inter alia*:

> "A property factor enforcement order is an order requiring the property factor to…(a) execute such action as the homeowner housing committee considers necessary…"

Thus, it may be thought that the Committee has power to make an order which facilitates the practical working out of a remedy.

[42] The pursuers contend (Article 12) that if it was competent to make an order, then there was an error of law. That is on the view that the Committee determined that the pursuers could not register a notice of potential liability as registration took place after termination of the pursuers' appointment *qua* factor. As discussed, *supra,* I consider that obligations arising from the existence of the factor/homeowner relationship may subsist

beyond termination. The wording of the decision shows that the view was expressed that, had the defenders argued in respect of the competency the Committee would have been of the opinion that the factor was not an applicant in terms of section 13(1) on the effective date of the NOPL.

[43] However, the detailed reasoning (paragraph 66 *et seq*) discloses that the committee considered that the debts due by the individuals named at paragraph 69 did not fall entirely within the categories of debt prescribed by the Tenements (Scotland) Act 2004 as applicable to a NOPL, and were not debts for which there was a joint liability in terms of the Title Deeds.

[44] Furthermore, it is evident that the Committee took the view (paragraph 72) that the pursuers did not have right or title to apportion the debts due to the named individuals. Accordingly, in my view, the decision complained of does not fall to be treated as vitiated by an error of law on the grounds contended for. On the view I have taken I find it unnecessary to take a view on the issue of personal bar.

[45] On the whole matter I shall refuse the appeal. I have reserved all questions of expenses meantime.