

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

Act: Santino

Glasgow 30 April 2015

[1] In my judgment dated 29 January 2015 I raised concerns about requirements 3 and 5 in the property factor enforcement order made by the committee appointed by the Homeowners Housing Panel in terms of section 19 of the Act. I invited parties to address me on the powers I had in relation to the enforcement order and on expenses. That hearing took place before me on 14 April 2015.



[2] In relation to my powers parties were agreed that the property factor enforcement order is part of the Committee's decision open to review. Parties were also agreed that the procedure set out in section 19 allowing parties to make representations to the Committee is frozen by the appeal process and that the fourteen day time limit will commence at the conclusion of this appeal.

[3] Mr Neilly sought to persuade me that as part of my power to review the order I should amend requirements 3 and 5 in line with the criticisms I had raised. Mr Santino's submission was that this went too far. The Committee were best placed to deal with the points raised with the benefit of my comments.

[4] Having considered the alternative submissions I have decided to affirm the decision and remit matters back to the Committee to deal with the requirements of section 19.

[5] I was then addressed on expenses.

[6] Mr Santino sought the expenses of the appeal. The decision of 29 January 2015 had been substantially in the Respondent's favour. The matters dealt with today were mere observations. Even if the criticisms detailed in paragraphs 31 and 32 were treated as successes for the Appellant the award of expenses should only be reduced by 5 to 10 %.

[7] Mr Neilly noted that the 2011 Act is not instructive on the issue of expenses. In those circumstances a distinction has to be drawn between the court's administrative and judicial functions. *McPhail on Sheriff Court Practice* discusses the distinction from paragraph 26-36 onwards. The learned author's conclusion is that if the function is judicial, expenses may be awarded; if the function is administrative they may not. A number of tests are discussed.



Reference was also made to *Arcari v Dumbartonshire County Council* 1948 SC 62. In Mr Neilly's submission the 2011 Act in referring to "the sheriff" rather than "the sheriff court" and in providing that it is a final decision points to the administrative jurisdiction. In such circumstances, as discussed by McPhail in paragraph 26-47 the normal rule is no expenses due to or by. In relation to Mr Santino's point about reduction Mr Neilly submitted that the expenses, if awarded, should be split 3:2 in favour of the Respondent.

[8] In reply Mr Santino noted that the appeal proceeds by way of Summary Application. The Appeals Rules make provision for a party litigant to get expenses whether the matter is judicial or administrative. His submission was that in terms of section 2 of the Sheriff Court Rules the court has complete discretion as to the issue. Mr Santino sought to distinguish *Arcari* from the instant case where summary application procedure can be invoked exclusively on a point of law. This is a legal review of an adjudication by the Committee which took into account the relevant facts and circumstances; contrast the planning appeal in *Arcari* which is completely different. In Mr Santino's view the court here is exercising a judicial function.

Discussion

[9] The issue in relation to expenses is neatly focussed on whether the jurisdiction of the Sheriff under section 22 of the Property Factors (Scotland) Act 2011 ("the Act") is an administrative one or a judicial one.

[10] As Lord President Cooper notes in *Arcari v Dumbartonshire County Council* 1948 SC 62 by reference to *Glasgow Corporation v Glasgow Churches' Council* 1944 SC 97:

"the Sheriff has been employed from the earliest times, and to an increasing extent in recent years, in the discharge of multifarious functions which are more administrative or ministerial than judicial, and many decisions show how difficult it often is to decide whether a given determination by a Sheriff is truly a judicial determination of a Court, issuing in a judgment within the familiar framework of our system of practice and subject to ordinary methods of review, or whether on the other hand the Sheriff is merely discharging a special and particular function confined to him alone. In every case the answer must be found in the provisions of the statute in question."

[11] Section 22 of the Act provides as follows:

- (1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowners housing panel or a homeowner housing committee.
- (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made.
- (3) The decision of the sheriff under this section is final.

[12] Section 22 makes no provision for expenses. The intention of the new legislation in setting up the Homeowners Housing Panel and Committee is declared in the Panel's information guide to be the provision of informal and flexible proceedings when issues arise between homeowners and property factors. The Panel "seeks to deal with proceedings proportionately, considering the complexity of issues and the resources of parties." The information guide states that the Act does not give powers to a Homeowners Housing Committee to award expenses against an unsuccessful applicant. It goes on to warn that "the only risk of expenses being awarded is at the appeal stage in the Sheriff Court."

[13] I consider that the exclusion of appeal is highly significant in this case. Many statutes are not specific in relation to that issue. A number of the cases discuss the distinction between the judicial and administrative jurisdictions in the context of the competency of

appeal to the Court of Session from the sheriff's decision. The reason why that issue focuses the distinction is that the Sheriff's ordinary jurisdiction with all its ordinary methods of procedure would include the right of review by the Court of Session. That test is recognised in the case of *The Provost, Magistrates and Councillors of the Burgh of Tobermory v Capaldi* 1938 SLT (Sh Ct) 38 which refers to Lord Adam's opinion in *Main v Lanarkshire and Dumbartonshire Railway Co* (21 R 323). Where, as here, that right is excluded it strongly supports an administrative rather than judicial function.

[14] In *Ross-shire County Council v Macrae-Gilstrap* 1930 SC 808 the statute provided for an appeal against the sheriff's decision. However the appeal in that case was not properly taken in terms of the statute and the question at issue was whether despite that a right to appeal at common law existed. The nature of the court's jurisdiction was central. The decision of the sheriff concerned rates and schedules for local ferries; a decision in the words of Lord Morison which concerned "only a question of local administration". Lord President Clyde described the appeal to the Sheriff as "an appeal for anybody who thinks himself aggrieved by anything that the county council have done under the powers of the [Local Government Act]". Neither of their Lordships nor Lord Sands considered that a common law right of appeal existed against such a decision. In my view, the description of the decision in that case is very similar to the nature of the function performed here in terms of section 22.

[15] In *Arcari v Dunbartonshire County Council* Lord President Cooper was also considering whether an appeal to the Court of Session was competent. As we have seen he suggests that the answer lies in the terms of the particular statute. Although he suggests that none are decisive he notes four particular features of the planning legislation with which he was dealing. These are: (1) a new jurisdiction previously unknown (2) proceedings which do not originate in the Sheriff Court (3) the tribunal is not the "Sheriff Court" but "the Sheriff" and (4) an express provision is made as to expenses.

[16] Lord President Cooper expands on the first point thus:

"if the jurisdiction exercised by the Sheriff is a jurisdiction which is specially given to him by statute, and in which this Court has not previously had jurisdiction, it may be much more easily implied that the Sheriff's jurisdiction is not only privative, but final, and not subject to review"

[17] Clearly we are dealing here with new legislation. At the date of this judgement the website for the Homeowners Housing Panel suggests that only one decision has previously been appealed to the Sheriff.

[18] The second point was discussed in *David Allen & Sons Bill-Posting Ltd v Corporation of Edinburgh* 1909 SC 70. Lord Low notes "this is not the ordinary procedure of the Sheriff Court but is a special procedure provided by the Act and made imperative for the peculiar purposes of the enactment". Lord Ardwall agrees. He notes that the proceeding was not initiated in the Sheriff Court but was initiated before the Magistrates of the city and "accordingly cannot be viewed as an ordinary process in the Sheriff Court." His conclusion is that the sheriff is acting not in his judicial or legal capacity but truly in his administrative capacity. Lord Low is reinforced in his view that the Sheriff is not acting in a judicial capacity in the ordinary sense where "he is not entitled to interfere except in the one case when he is satisfied that the Corporation have not reasonably exercised their discretion under the Act." He goes on to agree with the learned Sheriff:

"that that is a very delicate and somewhat invidious jurisdiction, but I take it that it was conferred simply because it was thought right that some independent Judge in the responsible position of Sheriff of the county should have the power of correcting the determination of the Corporation and protecting the rights of the owners of property, if the Corporation (which is a body representing very many different and conflicting views and interests) should, perhaps from excess of zeal to preserve the amenity of the city, capriciously or arbitrarily deprive an owner of a valuable right of property. Well that is the kind of jurisdiction which would very naturally be entrusted to a single responsible individual, and in which one would not expect that an appeal would be allowed from Judge to Judge or from tribunal to tribunal; for if it was competent to appeal from the Sheriff-



substitute to the Sheriff, I do not see any grounds on which an appeal could be disallowed from the Sheriff to this Court, and if a question of law could be discovered, from this Court to the House of Lords. It seems to me that this is a matter in which such a multiplication of appeals would be altogether out of place, and would be plainly contrary to the whole scope and purpose of the enactment."

[19] The description of the Sheriff's function in that passage is, in my view, akin to the function given to the Sheriff in terms of the Act. The powers of interference are also based on *Wednesbury* principles; the function is comparable to the power of correction and protection from excess of zeal described. I am also clear that the scope and purpose of the Act is to provide a framework for minimum standards of practice for registered property factors, to ensure compliance with it and to provide a dispute resolution system which is "user friendly." A multiplication of appeals would also be out of place in this case; a point clearly recognised by the Scottish Parliament given the finality clause contained in the Act.

[20] On the basis of all these factors I conclude that the Sheriff in exercising his function under section 22 is performing an administrative jurisdiction. Having come to that view the final relevant factor is that no provision as to expenses is made in the Act. Lord Low notes in *David Allen & Sons Bill-Posting Ltd v Corporation of Edinburgh* 1909 SC 70 that where "the Sheriff sits more in the character of a referee than of judge in the Sheriff Courts then it is necessary to give him special power to award expenses." That also, to my mind, suggests that the Parliament did not intend for there to be such a penalty. Without those special powers, as was recognised by Sheriff Principal Reid QC in *Classic Cinema Ltd v Motherwell District Council* 1977 SLT (Sh Ct) 69, the usual rule governing appeals on an administrative matter is to award no expenses due to or by.

[21] I consider that disposal to be appropriate here. Its inherent fairness is also attractive. When this summary application first called before me I expressed concern about the burden placed on the homeowner to defend the decision of the Panel in an appeal by the property

factor. It is clear that the Homeowners Housing Panel is functus after it issues its decision and that in light of Lord Gill's decision in *Dundee City Council v Dundee Valuation Appeal Committee* (2011) CSIH 73 the Panel has no locus in the appeal. However the burden of expenses for an unsuccessful homeowner also troubles me. The Act is designed to improve services and maintain standards to his benefit. If the homeowner is unsuccessful that will be because of a failure on the Panel's part to reasonably exercise its discretion. To penalise such a homeowner in expenses seems unjust. Such a homeowner has sought to use the "flexible" dispute resolution system under the Act to arbitrate on a dispute about the standard of service from his property factors; a system he is encouraged to use on the basis that there is no risk of cost to him. The nature and scope of the legislation does not still well with a penalty in expenses being imposed at the stage of appeal to the Sheriff.

Decision

[22] I will affirm the decision of the Committee of the Homeowners Housing Panel dated 10 June 2014 and remit matters back to the Committee to deal with the requirements of section 19. I will refuse the respondent's motion for expenses and find no expenses due to or by either party.



Sheriff Alayne E Swanson

30 April 2015