SHERIFF APPEAL COURT

2021 SAC (Civ) 9

SAC/2021/DNN-SD27-19

Sheriff Principal D L Murray
Sheriff Principal D C W Pyle
Sheriff T McCartney

OPINION OF THE COURT

Delivered by Sheriff Principal D L Murray

In Appeal by

ARGYLL COMMUNITY HOUSING ASSOCIATION LIMITED

Pursuer/Respondent

Against

DALEY GEORGE AP

Defender/Appellant

Appellant: Stalker Advocate, Civil Legal Assistance Office
Respondent: Anderson Advocate, BTO solicitors

4 February 2021

Background

[1] This is an appeal arising from an action of eviction. The respondent is a social housing landlord and the owner of the subjects in Dunoon ("the subjects"). The appellant occupies the subjects under a Scottish Secure Tenancy Agreement ("SSTA"). By interlocutor of 2 June 2020 the sheriff granted an order for possession in favour of the respondent, under section 16(2)(aa) of the Housing (Scotland) Act 2001 ("the 2001 Act").

[2] In terms of the SSTA, the appellant agreed not to use or allow his house to be used for illegal purposes. That included the use of controlled drugs (paragraph 2.6 of the SSTA). On 21 February 2019 the appellant pled guilty to a charge of being concerned in the supply of cannabis, a Class B drug, specified in Part 2, Schedule 2 of the 2001 Act, to another or others in contravention of section 4(3)(b) of the Misuse of Drugs Act 1971. The offence took place on 15 November 2018 at the subjects. On 18 April 2019 the appellant was sentenced to four months' imprisonment at Dunoon Sheriff Court.

[3] The sheriff narrates the circumstances of the offence. In short the appellant was detained following a drugs search of the subjects, during which 412 grams of cannabis, £1,815 in cash, paraphernalia associated with the distribution of drugs and a tic list of customers were recovered.

[4] Having learned of the conviction and carried out a case review, the respondent served a notice of proceedings for recovery of possession under section 14(4) of the 2001 Act on 18 June 2001 and thereafter raised a summary cause action under section 14(1) on 28 August 2019.

[5] The sheriff found the respondent has a robust anti-social behaviour policy, including drug dealing and supply from any of their properties, or the locality of any of their properties. This is treated as serious anti-social behaviour and the policy details that court action will be taken for recovery of the tenancy. This is with the aim of preventing such behaviour so as to improve the quality of life of its tenants and their neighbours. The reasons behind the respondent's stance in relation to drug dealing and supply either from their properties or from the locality of the respondent's properties are as follows:

(a) tenants and other residents in Argyll and Bute often find drug dealing a nuisance,

distressing and annoying or alarming; (b) during the stock transfer of housing in 2006 feedback received from tenants of Argyll and Bute Council was that they wanted a new association to be pro-active in tackling anti-social behaviour (including drug offending) by its tenants and others connected to the property; (c) the respondent may become stigmatised making it increasingly difficult to let properties; and (d) the respondent often suffers financial loss from police officers damaging doors when exercising search warrants for drugs.

[6] The appellant was aware that the respondent does not tolerate drug offending including drug dealing at the locality of their properties having signed the SSTA and was aware of the respondent's actions against drug offending and in particular, drug-dealing.

[7] The sheriff found that the respondent had regard to Scottish Government guidance entitled the Streamlined Eviction Process - Criminal or Antisocial Behaviour Statutory Guidance for Social Landlords ("the guidance").

[8] The appellant accepts that the ground for recovery of possession was established by the appellant's conviction. The facts as found by the sheriff were not in dispute save for the appellant's challenge to the sheriff's finding in fact 18:

> "The respondents have followed the statutory guidance in terms of the 'streamlined eviction process' in terms of the Housing (Scotland) Act 2014."

Nothing turns on the reference to the 2014 Act which introduced the streamlined eviction process by amending section 14 of the 2001 Act to insert a new subsection (2B):

> "(2B) Where such proceedings are to include a ground for recovery of possession set out in paragraph 2 of schedule 2, the landlord must have regard to any guidance published by the Scottish Ministers before raising such proceedings in relation to recovering possession of the house.

The order for recovery of possession was sought under paragraph 2 of part 1 of schedule 2 of the 2001 Act:

> "the tenant (or any one of joint tenants), a person residing or lodging in the house with, or sub-tenant of, the tenant, or a person visiting the house has been convicted of - (a) using the house or allowing it to be used for immoral or illegal purposes, or (b) an offence punishable by imprisonment committed in or in the locality of the house".

The 2014 Act also amended section 16 of the 2001 Act inserting after section 16(2)(a):

> "(aa) whether or not paragraph (a) applies, that—
> (i) the landlord has a ground for recovery of possession set out in paragraph 2 of that schedule and so specified, and
> (ii) the landlord served the notice under section 14(2) before the day which is 12 months after—
> (A) the day on which the person was convicted of the offence forming the ground for recovery of possession, or
> (B) where that conviction was appealed, the day on which the appeal is dismissed or abandoned,"

and inserted after subsection (3):

> "(3A) Subsection (2) does not affect any other rights that the tenant may have by virtue of any other enactment or rule of law."

[9] The appeal was focused on the argument as submitted to the sheriff that the proceedings were incompetent as the respondent had not complied with the terms of section 14(2B) to have regard to the guidance before raising proceedings.

Submissions of the appellant

[10] Counsel adopted his written submission and invited the court to recall the interlocutor of the sheriff of 2 June 2020. The sheriff was in error in making the order for possession as the respondent had not complied with the statutory obligation to have regard to the guidance. The only relevant evidence in relation to whether the respondent gave proper consideration to the guidance was that of Katie Martin, housing manager with the

respondent. Ms Martin had sworn an affidavit which she adopted at proof. There was no indication in the affidavit or elsewhere that the respondent was aware of the appellant's offending behaviour until it was advised by Police Scotland on 15 November 2018 that a drugs search had been carried out at the property. No evidence was led before the sheriff that the neighbours or anyone else in the locality had complained about the appellant's behaviour, or had been distressed or alarmed by it. The only reference to the guidance was contained in paragraph 24 of Ms Martin's affidavit which stated:

> "ACHA's Board of Management consider that its policy on anti-social behaviour complies with the statutory guidance for social landlords: 'Streamlined eviction process – criminal or anti-social behaviour'".

[11] The appellant's argument was, as it had been before the sheriff, that the respondent had not taken this guidance into account before coming to a decision on pursuing eviction against the defender. Ms Martin's evidence at best only demonstrated the factors that the respondent took into account in terms of its policy, such as the nature and seriousness of the offence, who has been convicted and where the offence was committed. Other factors which appear in the guidance include to what extent it has affected other household members and others in the community, what action, if any, the person convicted is taking to make positive changes, and other steps that could be taken by the landlord or partner agencies to address the criminal behaviour. But no reference was made to the guidance about these factors. There was no basis on the evidence for the sheriff to have made finding in fact 18.

[12] Section 14(2B) lays down an essential prerequisite for raising proceedings under ground 2. The words of the section are unequivocal; to comply the landlord must have regard to the guidance; and do so before raising proceedings.

[13] Paragraph 4.8 of the guidance sets out a range of factors which social landlords should consider before deciding to raise an action for eviction using the streamlined eviction process. The subsequent paragraphs set out more specification of matters relevant to each of these factors. In particular paragraph 4.11 provides:

> "There are however no specific offences where the landlord should invariably seek to use the streamlined eviction process. The nature and severity of the offence is only one of the factors which landlords should consider as part of their assessment of whether eviction action using this process is appropriate and proportionate."

The guidance requires that the decision to use the streamlined process should be appropriate and proportionate in the circumstances of each particular case. The guidance recognises that the new statutory basis for the recovery of possession in terms of section 16(2)(aa) does not replace the existing form of action under section 2(a) for cases in which ground 2 applies. The landlord has an option of proceeding under section 16 (2)(a) or under the streamlined eviction process in terms of section 16(2)(aa). In essence the respondent operated a "zero tolerance" policy to drug dealing in the locality of their properties. That was at odds with the guidance.

[14] Contrary to the submission of the respondent, no logical distinction fell to be drawn between the injunction in section 14(2) on the requirements for notice, noncompliance with which would invalidate proceedings and section 14(2B) that the landlord must have regard to the guidance. A failure to comply with section 14(2B) rendered the proceedings incompetent. The evidence did not demonstrate that the respondent had regard to the guidance and the sheriff was not entitled to make finding in fact 18 that the respondent had "followed" the guidance before raising proceedings. In these circumstances the appeal should be upheld.

[15] Counsel explained that no challenge was made to the finding of the sheriff that there was no breach of Article 8 of the ECHR. It was accepted that in the circumstances the sheriff was entitled to find that the interference with the appellant's Article 8 rights was proportionate.

Submissions for the respondent

[16] Counsel for the respondent also adopted his written submissions and invited the court to adhere to the interlocutor of 2 June in so far as it related to the order for possession. The sheriff did not err in coming to the substantive conclusion that the ground for eviction contained in paragraph 2 of part 1 of Schedule 2 of the 2001 Act was established and there was no other reason not to grant decree. The appeal was opposed on three grounds:

(1) The stated case made clear that the sheriff accepted that the respondent had demonstrated compliance with the guidance.

(2) *Esto* the respondent did not comply with the requirement to consider the guidance under section 14(2B) of the 2001 Act (which is denied) any such failure did not render the proceedings invalid or incompetent;

(3) The onus to establish the irregularity on which the appeal proceeds rests on the defender. As the appellant had not satisfied that onus the argument of alleged irregularity could not be sustained.

[17] The respondent submitted that compliance with the requirements of section 14(2B) can be presumed. The onus to prove a contrary position rested with the appellant. It was for the appellant to lead evidence that the respondent had failed to have regard to the

guidance and thus demonstrate the irregularity founded upon. No such evidence to challenge the guidance had been led. It was accepted as a matter of principle that a private law action such as this case could be defended on a principle of administrative law (*Wandsworth* v *Winder No 1* [1985] AC 461). However in the instant case it was not accepted that it could be defended on the basis of the administrative provision to have regard to the guidance on which the appellant sought to rely. The onus was on the appellant to lead evidence that the respondent had failed to have regard to the guidance, and thus demonstrate the irregularity founded upon. Reference was made to *Davidson, Evidence* paragraph 4.65:

> "It is presumed that things have been properly and validly done, in accordance with any necessary formalities, thus imposing a persuasive burden of proof upon any party who seeks to establish the contrary."

The respondent accepted the only evidence capable of having a bearing on the issue under section 14(2B) was provided by Ms Martin. The evidence before the sheriff demonstrated that the substance of the duty to have regard to the guidance had been complied with and explained fully by the sheriff in his stated case.

[18] The appellant sought to challenge the decision of the sheriff solely on a technical ground arising from what is properly viewed as an administrative law requirement: to have regard to the guidance. No challenge was made to the proportionality of the decision to evict the appellant.

[19] The stated case should satisfy the court that the sheriff was entitled on the evidence to find that the respondent had regard to the guidance. There was no error by the sheriff in making finding in fact 18. The appellant's assertion that finding in fact 18 is flawed because the sheriff has not specified the point in time at which the respondent is said to

have followed the guidance is of no substance. The evidence which the sheriff was entitled to accept was that the respondent had regard to the guidance and there was no evidence which suggested that only happened after intimation to the appellant that the respondent would seek recovery of possession of the subjects.

[20] Nothing in the terms of section 14(2B) can be construed as an express bar on proceedings such that breach renders an action incompetent. This has to be contrasted to the other provisions of section 14 of the 2001 Act. Section 14(2) by way of example provides that proceedings for recovery of possession of the subjects let under a SSTA may not be raised unless notice of proceedings has been served, the proceedings are raised on or after the date specified by the notice and the notice is in force at the time when the proceedings are raised. Absent adherence to this requirement of section 14(2), the proceedings cannot be validly raised. Parliament did not legislate to provide that proceedings may not be raised unless the landlord has regard to statutory guidance. The terms of section 14(2B) require only that a social landlord is to have regard to the terms of the guidance.

[21] In *Simpson* v *Edinburgh Corporation* 1960 SC 313 the court considered the meaning of "have regard to" in the context of a development plan and at page 318 Lord Guest stated:

> "'to have regard to' does not in my view mean 'slavishly to adhere to'. It requires the planning authority to consider the development plan, but it does not oblige them to follow it. I should not have been surprised to find an injunction on the planning authority to follow it implicitly and I do not find anything in the Act to suggest that this was intended. If Parliament had intended the planning authority to adhere to the development plan it would have been simple so to express it."

Section 14(2)(B) was expressed in similar terms. The words used did not require that the guidance had to be followed.

Decision

[22] The sheriff accepted in the stated case that there was no ground of recovery sought on the basis of rent arrears. Parties were content that the court should recall the interlocutor of 2 June 2020 in so far as it relates to rent arrears, that aspect of the claim having been withdrawn by the respondent.

[23] The essence of the appellant's position is that finding in fact 18 fails to address the correct test. It is said that the correct test is "Did the pursuer have regard to the guidance before the proceedings were raised?" The appellant also argues that the sheriff was not on the evidence entitled to make that finding. It could not be established from paragraphs 16 and 17 of Ms Martin's affidavit. The terms of the affidavit indicated that the respondent focused on their own policy in relation to drug dealing, not that they had regard to the guidance.

[24] It is well recognised that such a finding is a matter for the sheriff who has heard the evidence at first instance. In this case the evidence was given by Ms Martin in her affidavit which she adopted and by her parole evidence. There is some force in the criticism that the affidavit does not directly address consideration of the guidance. It would have been preferable that it had done so. We however reject the submission that the sheriff was not entitled to accept her oral evidence which was said to run contrary to and supplement the terms of her affidavit. Ms Martin's evidence must be looked at as a whole. We accept from the sheriff's narrative in the stated case that Ms Martin in her oral evidence confirmed that the respondent complied with the streamlined process. It is clear from the stated case that the sheriff was satisfied on the evidence that the respondent had considered the matters set out in the guidance and it had acted in accordance with the streamlined process. The

evidence discussed in the stated case, to which no adjustment was proposed by the appellant, was sufficient for the making of the finding in fact.

[25] This court is not entitled to interfere with finding in fact 18 based as it is on the sheriff's assessment of the evidence, particularly in the context of an appeal by stated case in a summary cause action where there is no transcript of evidence. As a result the appeal falls to be refused.

[26] In deference to the other arguments presented to us we make the following observations. The terms of section 14(2B) require that a social landlord should have regard to the guidance. But we associate ourselves with the reasoning of Lord Guest in *Edinburgh Corporation* quoted above that those words do not require that the guidance be slavishly followed. The guidance should not be viewed as a checklist. Paragraph 4.8 of the guidance illustrates factors which could be taken into account. The guidance is intended to assist landlords in taking an overview of whether decision to use the streamlined eviction process is proportionate and appropriate in any case.

[27] Section 14(2B) of the 2001 Act is an administrative requirement. It is for the appellant to establish the contravention of the administrative provision in the same way that would be required in an application for judicial review (*Wandsworth* v *Winder (Number 1)* 1985 AC 461 Lord Fraser of Tullybelton at 504D). We accept that the presumption *omnia acta praesumuntur rite et solemniter acta* in favour of the regularity and validity of the acts of public bodies applies. (*Davidson Evidence* paragraphs 4.65 – 4.66.) Thus the burden is on the defender in an action for possession under the streamlined eviction process to demonstrate that a social landlord has not had regard to the guidance. The tenant would be well advised to explain in response to the notice of proceedings and in defence of the

action specific reasons why the landlord having regard to the guidance should not proceed with eviction or why in the particular circumstances the streamlined procedure should not be followed.

[28] In this case the landlord sought to apply the streamlined procedure for the eviction of a tenant convicted of the supply of drugs contrary to section 4(3)(b) of the Misuse of Drugs Act 1971. In our view that accords with the intention of the Scottish Parliament. It is explained in paragraph 1.5 of the guidance that it is intended to help landlords to use the streamlined eviction procedure where there has been a recent conviction punishable by imprisonment for antisocial or criminal behaviour. It can well be understood that seeking to evict those convicted of drug dealing accords with the aim of the Scottish Parliament to empower landlords to take steps to support the local community.

[29] Paragraph 2.7 of the guidance recognises that the new statutory regime does not override other rights and the Equality and Human Rights Commission Guidance for Social Housing Providers referred to in the footnote expressly recognises that landlords who proportionately take measures to address and control such behaviour will not be infringing any human rights. It may be suggested that the guidance seeks to assist landlords in only proceeding in circumstances where proportionality arguments may be satisfied. Argument in respect of the appellant's Article 8 rights was canvassed before the sheriff as was an argument in relation the Equality Act 2010. No appeal was taken on these aspects of the decision and we find no error in the sheriff's findings on these matters. He properly considered the proportionality of the decision to grant an order for possession in the context of interference with the appellant's Article 8 rights and his rights under the Equality Act 2010 after detailed argument. That offers further support for the view that the

appellant's argument that the respondent failed to have regard to the guidance is unmeritorious.

[30] The first question in the stated case: "Did the respondent, on the facts stated, fail to have regard to the Statutory Guidance regarding the 'Streamlined Eviction Process'?" is answered in the negative.

[31] The second question: "Should I have granted decree for payment of rent arrears?" is also answered in the negative. Parties were agreed that the interlocutor of 2 June 2020, in so far as it decerned for payment of £520.29 with interest to be paid by the appellant to the respondent should be recalled, this having been ordered in error given the withdrawal of claim for arrears of rent. Except as so modified we adhere to the sheriff's interlocutor.

[32] Parties were agreed that expenses should follow success and that the case is suitable for the employment of counsel. Accordingly, the respondent having been substantially successful, we shall award expenses in favour of the respondent and sanction the appeal as suitable for the employment of counsel in terms of section 108 of Courts Reform (Scotland) Act 2014. It was recognised that given the appellant is in receipt of legal aid in the event of this outcome it was likely a motion would be made for modification and if opposed arrangements will be made for it to be considered by the court.