SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY
AT HAMILTON

[2025] SC HAM 12

HAM-SD12-22

JUDGMENT OF SHERIFF J SPEIR

in the cause

EAST KILBRIDE HOUSING ASSOCIATION LIMITED

Pursuers

against

T

Defender

Pursuers: Kelly & Co, Solicitors, Glasgow
Defender: E Young; Hamilton CAB

HAMILTON, 31 August 2022

The Sheriff, after proof, refuses the first and second craves for the pursuers; finds no expenses due to or by either party; and *quoad ultra* dismisses the action.

Introduction

[1] This is a summary cause action for recovery of possession in terms of section 14 of the Housing (Scotland) Act 2001 ("the 2001 Act"). The pursuers are East Kilbride Housing Association Limited. The defender is T. The parties are respectively the landlord and tenant of subjects in East Kilbride ("the subjects").

[2] The pursuers seek recovery of possession in terms of section 16 of the 2001 Act which provides *inter alia* that:

> "(2) … in proceedings under section 14 the court must make an order for recovery of possession if it appears to the court—
> …
> (aa) … 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…
> …
> (3A) subsection (2) does not affect any other rights that the tenant may have by virtue of any other enactment or rule of law…
> …
> (5) An order under subsection (2) must appoint a date for recovery of possession and has the effect of—
> (a) terminating the tenancy, and
> (b) giving the landlord the right to recover possession of the house,"

[3] Paragraph 2 of schedule 2 to the 2001 Act provides that:

> "The tenant … 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."

[4] The ground for recovery of possession under section 16(2)(aa) is known as the "streamlined procedure". Where it applies there is no requirement on the housing authority to establish that it is reasonable for the court to make an order in terms of section 16(2)(a). In terms of section (3A), however, there remains a requirement to consider whether such an order impinges on any other rights the tenant may have. In particular, whether such an order constitutes a disproportionate interference with his right to respect for his home, under articles 8(1) and 8(2) European Convention on Human Rights and Fundamental Freedoms (ECHR).

[5] After sundry procedure, the action called before me for proof on 1 July and 5 August 2022, the latter date being a hearing on the evidence. Mr Kelly, solicitor appeared for the pursuers and Ms Young, CAB representative, appeared for the defender. Mr Andrew Young, the Chief Executive of the Association gave evidence for the pursuers. The defender gave evidence as did Noel Talbot, a Drug Treatment and Testing Officer with South Lanarkshire Council.

[6] It is unfortunate that parties representatives were not able to collaborate in advance of the proof in relation to preparation of a joint minute of agreement as it became apparent that many if not all of the material facts were not in dispute.

Outline chronology

[7] The parties are the landlord and tenant, respectively, of the subjects under a Scottish Secure Tenancy Agreement (SSTA), which commenced on 3 June 2002. The subjects are a flat in a block of four. The defender resides there alone but his parents live close by.

[8] In December 2021 the defender was convicted at Hamilton Sheriff Court of a contravention of section 4(3)(b) of the Misuse of Drugs Act 1971 by being concerned in the supply of controlled drugs on 26 November 2020 within at the subjects. The controlled drugs in question were 2181.68g of heroin and 20.81g of cocaine. The drugs had a street value of approximately £41,500. Sentence was deferred until 16 February 2022 for the purposes of obtaining a Criminal Justice Social Work (CJSW) report and Restriction of Liberty Order (ROLO) assessment.

[9] On 6 January 2022, the pursuers' agents, Kelly & Co. solicitors, served a Notice of Proceedings for Recovery of Possession on the defender under and in terms of section 14 of

the 2001 Act ("section 14 notice"). The notice *inter alia* informed the defender that the pursuers might raise proceedings at any time during the period of 6 months beginning on 20 February 2022. The notice specified that ground 2 (paragraph 2 to schedule 2 of the Act) in respect that the defender had 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 … the house.

The notice also set out the facts and circumstances of said conviction.

[10] On 16 February 2022, the defender was sentenced to a Drug Treatment and Testing Order ("DTTO") for a period of 18 months and to a Restriction of Liberty Order ("ROLO") for 12 months during which he required to be subject to electronic tagging in respect of a curfew between 7.00am and 7.30pm.

[11] The summary cause summons for recovery of possession of the subjects was warranted on 1 March 2022 and service made on the defender on 8 March 2022.

Witness evidence

[12] Andrew Young is chief executive of the pursuers. He has held that position for approximately 7½ years. He has worked in social housing for 40 years. He has had no direct dealings with the defender. He had been presented with the case and had made the decision to seek an eviction. In coming to that decision he had been provided with information contained in the "Antisocial Behaviour Disclosure of Information Report" prepared by Police Scotland dated 24 February 2021. That report contained details of the police investigation resulting in the discovery of the controlled drugs on 26 November 2020. Mr Young was also aware of the defender's conviction in respect of that matter as detailed in

the section 14 notice. Mr Young had authorised the service of that notice. In making that decision he had understood that reasonableness and proportionality did not apply to ground 2. He had nonetheless considered Scottish Government guidance. He did not specify what guidance he had considered. He had also considered whether a conversion of the defender's SSTA to a short tenancy would be an appropriate response. He wanted to reassure himself that he was following the proper course. In relation to the possibility of converting the defender's SSTA to a short tenancy he was concerned as to the impact on the defender's neighbours if in fact the defender did not consent to such a conversion. Ultimately he considered that he had little choice other than to seek an eviction. Such a decision was in conformity with the pursuer's robust anti-drug policy. He referred to a file note dated 22 December 2021. Said file note is in very brief terms. In the box marked "Summary" it is recorded "Eviction proceedings raised with Kelly & Co." This is a reference to the pursuer's solicitors. Thereafter in a box marked "Detailed Text" the following is stated: "All guidance and policies have been fully considered and request the case is considered for decree for eviction due to antisocial behaviour." The author of this file note appears to be one of the pursuers' housing officers ("MK"). Mr Young thought it was in response to that request that he authorised proceedings. He was referred to emails from Police Scotland to MK. The first dated 26 January 2022 advised that the defender had been released on 12 January 2022 on standard bail conditions with special conditions to be within his bail address between the hours of 7.00pm and 7.00am and to abstain from drinking and taking Valium. The emails also stated "Next court date 16/2/22". A subsequent email dated 22 February stated "Sentence was 18 month DTTO from 16/2/22 and restriction of Liberty Order for 12 months starting 16/2/22 from 7pm to 7am". Mr Young advised that the terms of that sentence did not change his decision to seek an order for eviction. The recommendation

in that respect also appears to have come from MK from her file note dated 25 February 2022 in which the "Summary" is "Consideration given re the non-custody of the criminal case". In the "Detailed Text" section it states:

> "(Drug treatment and testing order imposed and restriction of liberty order) but still consider in all the circumstances that it is appropriate and reasonable given the seriousness of the offence, effect on neighbours and the neighbourhood, and the Scottish government guidance for the eviction action still to be raised".

Mr Young did not give any evidence of what steps he took upon receipt of this recommendation but the clear inference from his evidence was that he had already made his decision and that was not reviewed despite the terms of the sentence.

[13] In relation to the effect on defender's neighbours there does not appear to have been any information considered by Mr Young subsequent to the defender's said conviction. Mr Young said there had been a "litany" of historic complaints. He gave this as a further alternative reason for considering that a conversion to a short tenancy was inappropriate, as this would not alleviate the fears of neighbours, whom he believed would not understand what a conversion to a short tenancy was. On 10 March 2022, a notice under section 11 of the Homelessness Etc (Scotland) Act 2003 was issued to the Homelessness Strategy Team of South Lanarkshire Council. As far as Mr Young was aware, no issue was taken in relation to the issue of that notice. Mr Kelly then referred Mr Young to a number of productions comprising hardcopy notes and records relating to complaints, many of which were anonymous, by neighbours commencing in 2013 alleging drug dealing, drug taking and other anti-social behaviour by the defender. One complaint also referred to the defender carrying a knife. It was difficult to make full sense of some of these records due to redactions. It was clear that Mr Young was unfamiliar with the detail set out not least because the housing officer at the time had moved on. The anonymous complaints

continued up until September 2021. From the handwriting, a number of the complaints appeared to come from the same person. Although these matters were put to Mr Young in evidence, it did not appear that these had formed the basis of his decision to proceed with the eviction. East Kilbride Housing Association had 562 houses and had a significant waiting list in the region of 6000 applications.

[14] In cross-examination, Mr Young accepted that he had made his decision without actually speaking to the defender. He said that he relied on his staff to give him all the relevant information, in particular the housing manager and housing officer who responsible for the accommodation. He understood that the eviction would have serious consequences for the defender in respect that it would make him homeless and it would likely be difficult for him to obtain another tenancy. Under reference to the prior complaints, including the anonymous ones, there had been nine formal complaints since 2002. In relation to the earlier complaints, a previous notice under section 14 of the 2001 Act had been served on the defender on grounds of antisocial behaviour. Mr Young was unable to offer any explanation as to why no proceedings were raised following the service of that notice. In relation to the other complaints made, Mr Young confirmed that the pursuers had no evidence to substantiate those complaints and that their policy was to rely on any criminal convictions. Mr Young appeared to suggest that the relevance of those complaints in the present case was to "add to the weight of evidence" which to some extent informed his decision. He accepted that the notice that preceded the present action was on a different ground and was and engaged the streamlined procedure. He recognised that the defender's human rights were a relevant consideration but considered that the human rights of the defender's neighbours and other people in the neighbourhood also required to be

taken into account. On being challenged as to whether he had conducted a proper investigation so that he had all the relevant information in order to make a decision Mr Young indicated that he would have relied on his housing manager and/or housing officer to provide all of that information. That would include, where applicable, where a tenant had a significant medical condition. He was asked whether a conversion to a short tenancy was still an option but was unsure.

[15] In re-examination Mr Young was referred to two letters from the pursuers to the defender dated 9 December 2020 and 4 March 2021, respectively. The earlier letter *inter alia* notified the defender that the pursuers had received information about an incident on 27 November 2020 (being the discovery of the illegal drugs) and that depending on further information received "there could be serious consequences for your tenancy". The second letter advises that the pursuers had received further information about the incident and that they were "now considering taking legal action and wish to hear if you have any representation and to discuss the matter further." Mr Young did not know if any such representations had been made but if they had, he would have been expected to be told about them.

[16] In relation to questions from the bench, Mr Young accepted that he was not familiar with the nature of the defender's property or indeed the immediate locale. On being asked to clarify the process by which the defender's SSTA could have been converted into a short tenancy he appeared to confess that he was quite unclear as to how the legislative regime operated and actually attempted to ask his solicitor how he should answer the question.

[17] The defender is 50 years old. He has lived in the subjects for most of his adult life having moved in there in 2002. Before that he had been homeless and then spent 18 months

in a bedsit waiting on his present tenancy. The accommodation was well suited in terms of it being more or less around the corner from his mother and father. He visited them frequently (nearly every day) with a view to seeing what he can do to assist them. The defender was referred to the terms of an email from the DTTO Team, South Lanarkshire Council dated 6 June 2022 enclosing a Criminal Justice Social Work ("CJSW") report prepared for the deferred sentence hearing on 12 January 2022. The defender confirmed that the information in the report as it related to him was true and accurate. In particular he had no previous convictions for violence or threats of violence. His previous offending behaviour was accurately characterised as relating to his alcohol and substance misuse problems and offences committed in order to sustain those habits. He did not have any previous convictions for carrying a weapon. Before the present offence he had no convictions for selling drugs. He had complied with all aspects of the DTTO and the ROLO, or at least was trying his best in order to do so. He was motivated to change his past criminal behaviour. If he was now made homeless he was uncertain as to what the future held for him but thought that the most likely outcome would be that he would end up in a homeless persons hostel. That was unlikely to be beneficial for him as he would be in close contact again with drug users and drug dealers. Staying with his parents was not an option as they did not have a spare bedroom. In addition he had had a lot of problems with his father historically. Those problems were exacerbated now that his father was struggling with dementia. He had only missed one court date since the DTTO was put in place. He put this down to going into a low mood on service of the present proceedings. Since then he had pulled himself together and had got back on track. He was fearful as to his resilience going forward in the event that he was made homeless. In cross-examination the defender indicated that he believed the past complaints made against him had emanated from just the

one neighbour with whom he did not get on. It was impossible to stay with his parents as the only accommodation they had available for him was a box room/walk-in cupboard. While he had stayed overnight with them from time to time it was not option on a permanent basis. That was even more so while he was subject to the ROLO which required a sufficient amount of space for the associated electronic monitoring equipment.

[18] Mr Noel Talbot is a DTTO officer with South Lanarkshire Council. He has 20 years' experience in the field. He has been in his present position since November 2021 having worked before that with the Glasgow Drug Court. Part of his responsibility is to prepare reports on the suitability of offenders for the DTTO programme. In relation to the defender he confirmed that his attendance was good, that he presented well and the assessment stage had been very impressive. Mr Talbot was of the view that the defender was well motivated to make lifestyle changes. He was punctual in making appointments and did not appear to be under the influence of any substances. There had been three reviews to date and the next one was due in mid-August 2022. Test results suggested that the defender had actually made greater progress than might ordinarily be expected at this stage of the order. Test results showed no dependency on illicit substances. The evidenced a large degree of stability. The defender was complying with the programme with the permitted exception of his controlled prescribed medication. Mr Talbot found the defender to be placid and open to direction. He was quite a closed individual. It took some time to get to know him. A good therapeutic relationship had developed between the defender and all of the multidisciplinary team administering the DTTO programme. It was important to recognise that the DTTO had been imposed as a direct alternative to custody. It was not an easy option. It was an 18 month programme. On top of that there was a significant ROLO.

Mr Talbot's view was that the service of these proceedings had presented something of a setback to the defender in terms of his motivation and focus. He had become distracted at times and found it difficult to think of anything else except losing his accommodation. Statistics showed that drug users were most at risk of regressing and overdosing after a period of absence. The reason for the risk was that such individuals had a low tolerance as they had not used for a period of time. Those statistics were based studies carried out on former drug users who had been in prison or had failed to continue with a period of rehabilitation. In 2020 there has been 1,339 such deaths. Such overdoses and deaths were frequently preceded by a significant event which would result in a relapse. Mr Talbot was of the view that the defender becoming homeless would constitute such a life event. This he was aware that the defender had spent a long period of time in his own tenancy. He had not been homeless for over 20 years. If he was made homeless now and had to find temporary accommodation in a hostel then it was well known that such places were rife with illegal substances. In such an environment it was very difficult not to become involved once again in taking drugs. The defender had successfully disengaged from his former drug using peer group. If he was made homeless and was in homeless accommodation such as a hostel in all likelihood he would once again become enmeshed with such a group. An association with active drug users increased the risk of an overdose. Such an outcome would be tragic for the defender as that risk was absent in his present engagement with the DTTO. All of the professionals involved with the defender were happy with his progress.

[19] In cross-examination it was suggested to Mr Talbot that the defender was not entirely drug-free as he was prescribed methadone but Mr Talbot said that was quite normal. Mr Talbot could not comment on the suggestion that the DTTO could still continue

even if the defender had to live somewhere else in the absence of detail as to the nature and extent and security of such accommodation. It was Mr Talbot's belief that the defender had missed a court date because his office had not advised him of it through administrative error. In in re-examination Mr Talbot clarified that the 18 month DTTO order was divided into three distinct stages of each of 6 months duration. The 1st stage focused on drug reduction. The 2nd stage was focused on cranking up expectations. The 3rd stage was focusing on returning to the community. The defender was just about to move into the 2nd phase.

[20] No sharp issues of credibility or reliability arise as the witnesses all gave evidence about different aspects of the case, albeit there was necessarily some crossover between the evidence of the defender and Mr Talbot. I found both of these witnesses to be credible and reliable and in relation to the latter quite compelling. I was less impressed with the evidence of Mr Young. While he took responsibility for the decision to pursue an action of eviction, his evidence as to be basis upon which said decision was made was vague and in some respects contradictory. I accept however that he was doing his best to tell the truth and I formed the impression that the difficulties in his evidence arose from his not being directly engaged in the process leading up to the decision being made.

Submissions

[21] I am grateful to agents for their written and oral submissions. I do not propose to rehearse them in detail. It is useful to record at the outset that both parties were broadly in agreement as to the applicable law. The question for the court was whether application of the streamlined procedure to evict the defender was proportionate having regard to his

rights under article 8 of the European Convention on Human Rights (ECHR). In the course of the his submission Mr Kelly made reference to the relevant provisions of the 2001 Act and the following cases: *South Lanarkshire Council* v *McKenna* 2014 SLT (SH Ct) 51 (Sheriff Principal Scott); 2013 SC 212 (Inner House); *Glasgow City Council* v *Jaconelli*, 2011 Hous.L.R.17 (2011); *City of Bristol* v *Mousah* (1998) 30 H.L.R. 32; *Southend On Sea Borough Council* v *Armour* 2014 HLR 23; *South Lanarkshire Council* v *Nugent* 2008 HousLR 92; *South Lanarkshire Council* v *Gillespie* 2012 HousLR 45; and *South Lanarkshire Council* v *George* 2013 HousLR 49. In response Ms Young referred to the following: *Streamlined Eviction Process-Criminal or Anti-Social Behaviour Statutory Guidance for Social Landlords* (1 May); *Short Scottish Secure Tenancies for Anti-Social Behaviour and Other Miscellaneous Changes to Short Scottish Secure Tenancies Statutory Guidance for Social Landlords; Manchester City Council* v *Pinnock* [2011] 2 A.C. 104; *Mayor and Burgessess of the London Borough of Hounslow* v *Powell* [2011] UKSC 8; and *South End on Sea* v *Armour, supra Argyll Community Housing Association Ltd* v *Daley George AP* 2021 SAC (Civ) 9; *Hjaltland Housing Association Ltd* v *Sukhram* 2018 HLR 100; *Glasgow Housing Association Ltd* v *Hertherington* 2009 SLT (Sh Ct) 64; and *Glasgow City Council* v *Cavanagh* 1999 HLR 7 (1998).

Pursuers

[22] The nub of Mr Kelly's submission was that the "streamlined procedure" contained in section 16(2)(aa) taken with paragraph 2 of schedule 2 of the 2001 Act was specifically intended to deal with convicted drug dealers such as the defender: *Argyll, supra*. It was accepted that despite the mandatory language used in that provision the grant of such an order required to be a proportionate interference with the defender's right to respect for his

home under article 8 ECHR. He contended that it was. To succeed in a "human rights defence" was a high test or threshold: *Jaconelli, supra; McKenna, supra*. That in the present case the high threshold was such that the domestic law "must" grant the eviction. The pursuers were not relying on the alternative ground for recovery under section 16(2)(a) on the basis that if recovery was not proportionate under ECHR it was unlikely to be reasonable. In this sense I understood Mr Kelly to be adopting what was said in para [56] of *Pinnock*, *supra*:

> "It therefore seems highly unlikely, as a practical matter, that it could be reasonable for a court to make an order for possession in circumstances in which it would be disproportionate to do so under article 8."

In considering the issue, it was not open to the court to speculate on whether the defender would be rehoused under the homelessness legislation: *Mousah*. Mr Kelly had objected to a line in the cross-examination of Mr Young on this issue. That objection was taken after Mr Young had said he understood that the position would be difficult for the defender. As there was no further questioning however these was no need to insist on the objection. If an order for eviction were not made it would not be possible now having regard to the passage of time to justify converting the SSTA to a short tenancy. Even if such a conversion route was embarked upon the defender was entitle to make an internal appeal to the pursuers. If that appeal was unsuccessful, the defender could challenge the proposed conversion by way of summary application. A decision to evict would not prevent the DTTO order from continuing. One option open to the defender would be to stay with his parents. The defender could also apply to the court to have the ROLO revoked. The cases of *Nugent, Gillespie* and *George* were referred to as examples where decisions by housing authorities to raise eviction proceedings in cases involving drug dealing had been determined to be reasonable. In his oral submission, Mr Kelly departed from the assertion in his written

submission that the case of *Nugent* contained a point of principle that was binding on me. Consideration also had to be given to the human rights of the other tenants and neighbours in the locality of the subjects. Reference was made to the English Court of Appeal decision in *Armour, supra* for the principles set down to be applied in assessing proportionality.

Defender

[23] Ms Young invited me to refuse the order for recovery of possession on the basis that it would not be lawful, as it constituted a disproportionate interference with the defender's home in terms of article 8 ECHR. In determining the approach to assessing proportionality, she founded on *Pinnock* at paragraphs 51, 55 and 74. This was a seriously arguable case. The defender's eviction would not effectively protect the rights those living in the relevant community, and does not fulfil the purpose of the streamlined eviction process. The pursuers had failed to make reference to any written repossession policy, they appear to have acted upon an unpublished internal procedure, apparently without regard to the defender's specific personal circumstances. Evidence was led that no investigation beyond consultations with housing officers managing the area was conducted, interviews with the defender and relevant neighbouring residents were not carried out and no direct contact between the decision maker and the defender was considered to be appropriate. No specific information was given in evidence as to what background information was consulted and considered. In assessing proportionality, each case must turn on its own fact and circumstances including those subsequent to any conviction on which reliance has been placed. Reference was made to *Glasgow Housing Association Ltd* v *Hetherington, Hjaltland Housing Association Ltd* v *Sukhram, Armour, Powell* and *Pinnock, supra*. It was submitted that

there were relatively few complaints made against the defender when set against the length of his tenancy none of which had progressed by the pursuers. It was appropriate to consider the background to the defender's conviction against his other criminal convictions. There had been no complaints since the defender's said conviction. This was consistent with the evidence contained in the CJSW report and that given by Mr Talbot. There was a significant risk to the defender in terms of his rehabilitation and health if he were made homeless at this point. Eviction was not a proportionate means of achieving a legitimate aim. There were other tools in the tool box. That included the possibility of converting the SSTA into a short tenancy. If that option had been offered to the defender as an alternative to these proceedings he would have accepted it. While that was not canvassed with him in evidence that was her understanding of his position.

Discussion

[24] As a starting point I am of the view that the defender's rights under article 8 are engaged in a determination of this issue. Those rights are:

> **"Article 8 – Right to respect for private and family life**
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[25] I consider that the threshold of "seriously arguable" (per *Pinnock & Powell*) has been met. It is difficult to see how that could be otherwise in this case where what is at stake is the home which the defender has enjoyed for approximately 20 years and the likely consequences for his rehabilitation if he is evicted from it. Accordingly, I reject what

appeared to be Mr Kelly's primary submission that that threshold had not been met and that eviction in a case such as the present was mandatory. In this regard I should say that I do not consider that the decision of Sheriff Principal Taylor in the *Jaconelli* case to be in point. The issue in that case related to the a local authority seeking recovery of possession of heritable subjects which had been made subject to a compulsory purchase order in relation to redevelopment in connection with the preparations for the Glasgow Commonwealth Games in 2014. As a consequence of the compulsory purchase order the defender had no right to continue in possession of the property. That falls to be distinguished from the present case in which different considerations are in play.

[26] It is incontrovertible that the streamline procedure was introduced in order to strengthen the hand of housing authorities to secure more expeditious evictions in cases involving anti-social behaviour or criminal behaviour, in particular drug dealing. It not axiomatic, however, that that will be the outcome in every case as this procedure does not override other rights and the measures to address and control such behaviour require to be proportionate in terms of article 8: *Argyll Community Housing Association Ltd* v *George, supra,* at paras [28] and [29].

[27] The correct approach to consideration of this question was set out by the Supreme Court in *Manchester City Council* v *Pinnock*, albeit that case dealt with English housing legislation rather than the 2001 Act, as developed in *Powell, supra*, and applied in cases such as *Armour, supra*. Lord Neuberger of Abbotsbury MR delivering the judgment of the court stated the following at paras [49] - [55] and [74]:

> "49. Therefore, if our law is to be compatible with article 8, where a court is asked to make an order for recovery of possession of a person's home at the suit of a local authority, the court must have the power to assess the proportionality of making the order, and in making that assessment to resolve any relevant dispute of fact…

Exceptionality

51. It is necessary to address the proposition that it will only be in 'very highly exceptional cases' that it will be appropriate for the court to consider a proportionality argument. Such a proposition undoubtedly derives support from the views expressed by Lord Bingham, and has been referred to with apparent approval by the European court in more than one case. Nevertheless, it seems to us to be both unsafe and unhelpful to invoke exceptionality as a guide. It is unhelpful because, as Baroness Hale of Richmond JSC pointed out in argument, exceptionality is an outcome and not a guide. It is unsafe because, as Lord Walker observed in Doherty v Birmingham City Council [2009] AC 367 , para 122, there may be more cases than the European court or Lord Bingham supposed where article 8 could reasonably be invoked by a residential tenant.

52. … The question is always whether the eviction is a proportionate means of achieving a legitimate aim. Where a person has no right in domestic law to remain in occupation of his home, the proportionality of making an order for possession at the suit of the local authority will be supported not merely by the fact that it would serve to vindicate the authority's ownership rights. It will also, at least normally, be supported by the fact that it would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including, for example, the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisted housing. Furthermore, in many cases (such as this appeal) other cogent reasons, such as the need to remove a source of nuisance to neighbours, may support the proportionality of dispossessing the occupiers.

53. In this connection … the fact that the authority is entitled to possession and should, in the absence of cogent evidence to the contrary, be assumed to be acting in accordance with its duties, will be a strong factor in support of the proportionality of making an order for possession.

54. Unencumbered property rights, even where they are enjoyed by a public body such as a local authority, are of real weight when it comes to proportionality. So, too, is the right—indeed the obligation—of a local authority to decide who should occupy its residential property… Therefore, in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate. However, in some cases there may be factors which would tell the other way.

Second issue: the application of this conclusion in general

> 55. The conclusion that, before making an order for possession, the court must be able to decide not only that the order would be justified under domestic law, but also that it would be proportionate under article 8(2) to make the order, presents no difficulties of principle or practice in relation to secure tenancies. …no order for possession can be made against a secure tenant unless, inter alia, it is reasonable to make the order. Any factor which has to be taken into account, or any dispute of fact which has to be resolved, for the purpose of assessing proportionality under article 8(2), would have to be taken into account or resolved for the purpose of assessing reasonableness...
>
> 64. …'proportionality is more likely to be a relevant issue in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty…
>
> 74. Where it is required in order to give effect to an occupier's article 8 Convention rights, the Court's powers of review can, in an appropriate case, extent to reconsidering for itself the facts found by a local authority, or indeed considering facts which have arisen since the issue of proceedings, by hearing evidence and forming it's own view'."

[28] The assessment of proportionality therefore requires a determination of whether the outcome sought was required in order to meet the objective of a legitimate aim of the local authority as balanced against the impact of that on the tenant, having regard to the right or rights held by them and their particular circumstances, and the availability of alternative less onerous measures. The question is one of "fair balance"*: Powell, supra* per Lord Hope at paragraph 37. In conducting that exercise it may be relevant and appropriate to consider the subsequent behaviour or conduct of the tenant. Further, as was underlined in *Pinnock*, while it might be rare for that assessment to result in an order for eviction being refused that is an outcome not an approach.

[29] To assist social landlords in the application of the streamlined procedure including relevant consideration in conducting this balancing exercise the Scottish Government has provided statutory guidance: *"Streamlined Eviction Process - Criminal or Antisocial behaviour*

(1 May 2019)". In the introduction section of that guidance it is made clear that the introduction of the streamlined procedure was not the only new measure available to social landlords to address antisocial behaviour. The other significant measure was the introduction of a new short Scottish secure tenancy ("short tenancy") for antisocial behaviour (paragraph 1.4). As is clear further on the guide there may be an interplay between these respective responses to antisocial behaviour.

[30] As has already been noted the guidelines specifically acknowledge the terms of section 16(3A) of the 2001 Act which provides that the requirement placed on the court to make an order for repossession under the streamlined procedure does not override any other rights that a tenant has includes any arguments regarding proportionality in terms of article 8 of ECHR

[31] Section 4 of the guidance sets out the factors which landlords should consider a before raising a streamlined eviction action:

> "4.8 There are a range of factors which landlords should consider in deciding whether raising eviction action using the streamlined eviction process is both appropriate and proportionate. Some examples of this could include:
>
> - the nature and seriousness of the offence, including any recurring nature of convictions or cumulative effect of several incidents, or the potential seriousness of a one off offence;
> - who has been convicted of the offence and their connection to the property;
> - where the offence was committed and the connection to the social housing tenancy;
> - whether, and to what extent the offence has affected other household members, neighbours or others in the community, including the impact on neighbours and communities over time and the impact on the stability of the community;
> - what action, if any, the person convicted of the offence is taking to make positive change;
> - impact of eviction on household members;
> - other steps taken/which could be taken by the landlord or partner agencies to address the antisocial or criminal behaviour.

4.9 In some situations it is likely to be very difficult to demonstrate to the court that eviction action is proportionate. An example of this could be where a criminal conviction is given for an isolated offence such as possession of a small amount of illegal drugs and the behaviour of the tenant has caused no harm to neighbours or others in the community. Another example could be where a person has been convicted of a breach of the peace that had little local impact. The nature and seriousness of the offence should be considered, along with any other relevant factors or circumstances.

The Nature and Seriousness of the Criminal Offence

4.10 The type of criminal convictions that allow use of the streamlined eviction process are only those for offences 'punishable by imprisonment committed in, or in the locality of, the house'. There are a range of serious criminal offences punishable by imprisonment which could be committed in social housing or in the locality and which may have a serious impact on others, including neighbours or others in the community. Some examples of this could include: breach of an ASBO, closure order or dispersal order, threatening and abusive behaviour, murder, rape, other violent offences, offences related to domestic abuse, offences related to the use of offensive weapons, and serious drug related offences.

4.11 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

4.15 Sustainable and secure housing is a key factor in preventing re-offending. Landlords have a role to play in helping people to sustain tenancies and prevent re-offending. There will be situations when the person who has received a conviction has changed their behaviour. Some examples of this could be:

- the behaviour has stopped, for example there have been no repeat offences, convictions, disturbances or complaints;
- engagement in training/employment;
- participating in a rehabilitation programme for drug/alcohol dependency or treatment for mental health issues;
- regular and meaningful engagement with support services to change behaviour in a positive way.

These examples may indicate positive change and landlords should consider the impact that eviction action may have on preventing ongoing positive change and the potential for re-offending in such cases. Landlords will however also want to be satisfied that they consider any positive change in behaviour is sufficient and is likely to be maintained in the long term."

[32] In this case, I am satisfied that the pursuers are pursuing the legitimate twin objectives of vindication of their property rights and management and allocation of their

housing stock. I am not persuaded however that they have taken necessary proper regard of the foregoing factors and the defender's circumstances. As Mr Young stated in evidence he approached the issue on the understanding that he did not require to consider proportionality. This was also the basis of the primary submission made on behalf of the pursuers. While Mr Young did indicate that he had regard to other matters in coming to a decision I consider that the criticism of that decision making process by Ms Young as set out in para [23] hereof to be well-founded.

[33] I am fortified in this view having regard to the terms of the file notes to which Mr Young was referred. These are the only contemporaneous documents, except for the section 14 notice, which shed any light on the pursuers' decision making process and factors taken into account. Mr Young stated that he had authorised the commencement of proceedings at about the time of the file note dated 20 December 2021. This appears to indicate that MK had taken legal advice and was requesting authorisation from Mr Young to pursue an action of eviction with the bare assertion that "all guidance and policies have been fully considered". I infer from this that based on that information Mr Young was content to grant the request and consequently the section 14 notice was issued on 6 January 2022. The fact that the defender received a non-custodial sentence and was made subject to the DTTO and ROLO bears to have generated a request for a review by MK on 25 February 2022 but the recommendation by MK and decision by Mr Young remained the same. In that file note reference is made to "the seriousness of the offence, effect on neighbours and the neighbourhood, and the Scottish government guidance". The seriousness of the offence speaks for itself. No further detail is given in relation to how the offence has affected neighbours or neighbourhood, nor what enquiries were made to determine this. Once again

there is no specification of which guidance is being referred to but the language is redolent of it being taken from two of the factors listed in paragraph 4.8 (set out in [28] above). That being so what is conspicuous is any apparent consideration of:

(1) what action, if any, the defender was taking to make positive change; and

(2) what other steps taken could be taken by the pursuers to address the antisocial or criminal behaviour, in particular the conversion of the SSTA to a short tenancy.

[34] It seems clear therefore that no attempt was made to clarify the basis for the court decision to impose a DTTO on the defender nor indeed the progress he has made with it. As I have noted as is noted there was an attempt in re-examination to suggest that the defender had been given an opportunity to make any appropriate representations to the pursuers. Reference was made to two letters sent to him but these letters were dated 9 December 2020 and 4 March 2021: refer para [15]. The obvious point here is that the letters significantly predated the date of the defender's conviction (10 December 2021) and the date of his sentencing (16 February 2022).

[35] Perhaps one of the most unsatisfactory aspects of Mr Young's evidence was his equivocation and uncertainty as to the reasons given for why a short tenancy was not considered as an alternative in this case. He gave two different reasons for this, neither of which was satisfactory and involved speculation. Further as I have noted he appeared quite unfamiliar with how the process of conversion could be instigated. This uncertainty is perhaps all the more surprising standing that there is specific Scottish Government guidance on the process: *Short Scottish Secure Tenancies for Anti-Social Behaviour and Other Miscellaneous Changes to Short Scottish Secure Tenancies Statutory Guidance for Social Landlords* (published

1 May 2019). Perhaps somewhat surprisingly neither this guidance nor that relating to the streamlined eviction process were put to Mr Young in evidence.

[36] In terms of the statutory regime for the streamlined eviction process, a social landlord has a period of 12 months from the date of the conviction in which to serve a section 14 notice, being the necessary first step in such an action. As one of the factors indicated in paragraph 4.8 of the guidance is consideration of what action of any person convicted of the offence is taking to make positive change I would surmise that the that 12 month period was made available in order for such an assessment to be made. That requires to be read with paragraph 4.15 of the guidance. The factors set out there bear to be particularly apposite in relation to the defender in the present case but there was no indication that the pursuers had had regard to them or taken them into account in any way.

[37] As I have already observed it appears plain that the dominant and overriding consideration of the pursuers in deciding to proceed with the streamlined procedure was the seriousness of the defender's conduct resulted in his conviction. While this is of course an important factor, as is clear from the guidance, it does require to be considered alongside any other relevant factor or circumstances. I formed the impression on the evidence that the pursuers' approach in this case ran contrary to the admonition contained in in paragraph 4.11 of the Streamlined Eviction Process Guidance that there was no specific offence which mandated the use of that process without regard to other factors.

[38] One such factor is the possibility of converting an SSTA to a short tenancy. This new remedy for social landlords was introduced at the same time as the streamlined procedure. In terms of section 35 of the 2001 Act a landlord can convert an SSTA to a short tenancy immediately by service on the tenant of the notice within a period of 3 years of the tenant

having acted in an antisocial manner. In terms of section 38 of the 2001 Act, a tenant has the right of appeal to the court by way of summary application against such a proposed conversion. Thus, the option of service of a section 35 notice would appear to remain open to the pursuers until November 2023. On that basis then it is difficult to understand the basis for Mr Kelly's submission that the passage of time meant it would no longer be possible to justify initiating such conversion proceedings. It is of course a matter for the pursuers as to whether or not they would wish to take this course of action. I have already recorded that it was the defender's position that he would have agreed to such a conversion had it been proposed at the outset rather than these proceedings. The fact that such a disposal was not considered, or at least does not appear to have been properly considered, is a significant factor (but not the only one) in my decision to refuse the order for repossession.

[39] My decision to refuse the order for repossession should not in any way be interpreted as condoning the serious crime for which the defender was convicted. Drug dealing is a vile, corrosive and malignant issue in those communities where it takes place. While the defender pled guilty to the offence, in the course of being interviewed for the CJSW report, he explained that his involvement was likely to have been passive in nature. He put the matter in his own words when giving evidence: "I take drugs not sell them". I was prepared to accept this evidence. The CJSW report notes that the defender first started taking illegal drugs in 2001 and while he has previous convictions for possession this was his first conviction for intent to supply. Those circumstances are reflected in the fact that the defender was sentenced to a robust community based disposal rather than imprisonment. The CJSW report also reflects past failed attempts at rehabilitation under his own steam

rather than a holistic and structured rehabilitation programme such as that in place now with the DTTO.

[40] The defender is making very significant progress with that DTTO programme. If he continues with that progress, there is the real prospect of his rehabilitation into society and being deterred from drug use. Such an outcome would not only benefit the defender but society at large and the community in which the defender has lived most of his life. As I have already observed, the defender's present engagement with the DTTO team and progress towards rehabilitation are on all fours with the factors set out in paragraph 4.15 of the guidance. In particular, as I have indicated, I wholly accept the evidence from Mr Talbot as to the very significant risk that the defender's rehabilitation into society will fail if he loses the security of his current accommodation. That would be not only to his own significant detriment but also to society and most likely the local community he is currently part of standing that his parents continue to reside there.

[41] The foregoing factors have persuaded me that an order to evict the defender from the only home he has known in his adult life would be disproportionate to his rights under article 8 of the ECHR.

Conclusion

[42] I shall refuse the pursuer's first crave for recovery of possession. On the basis that was the outcome I reached parties were agreed there should be no award of expenses to or by. Thereafter the action shall be dismissed.

[43] As a footnote, it is appropriate to record that shortly after commencement of the proof I became aware that I had some knowledge of the defender in this case as I had been

the sheriff who had imposed the criminal sentence on him. In that context I also had judicial oversight of his compliance with the DTTO and ROLO. I advised both parties' agents of this fact and requested they consider any motion for my recusal. Both confirmed that they were content I heard the proof subject of course to reaching a decision on the evidence rather than any other factual material which I was aware of or might become aware of in my other judicial capacity. I accordingly proceeded on that basis.