

SHERIFFDOM OF NORTH STRATHCLYDE  
AT GREENOCK

Case No. SD 122/14

Citation

JUDGMENT

of

Sheriff C G McKay

in the cause

River Clyde Homes Limited

Pursuers

against

Linda Woods

Defender

Act: Caldwell  
Alt: Houston

Greenock 11<sup>th</sup> September 2015.

The Sheriff, having resumed consideration of the cause, finds in fact:

- 1) The pursuers are a registered society under the Co-operative and Community Benefit Societies Act 2014. They are heritable proprietors of a flat known as and forming 44 Grieve Road, Greenock (hereinafter referred to as "the flat"). They are registered social housing providers.
- 2) The defender resides at 44 Grieve Road. She is a tenant of the pursuers under a tenancy agreement ("the agreement") between the parties dated 10 January 2014. Pursuers' production item 5/1/1 of process is a copy of the agreement. The pursuer has resided there since 10 January 2014, a period of some 19 months to the date of the proof hearing.
- 3) The defender is in receipt of Employment and Support Allowance at the rate of £213 per fortnight. She has been assessed as unfit for work due to mental health difficulties.

- 4) The tenancy is a Short Scottish Secure Tenancy ("SSST") created in terms of Section 34 of the Housing (Scotland) Act 2001 ("the Act"). The pursuers served notice on the defender prior to the commencement of this tenancy in terms of section 34(2) of the Act in respect that the defender had, within the 3 years prior to the date of service of said notice, been the subject of an order for recovery of possession of another tenancy by reason of anti-social behaviour. Item 5/1/2 of the pursuers' productions is a copy of said notice.
- 5) The duration of the tenancy was 6 months to terminate on 13 July 2014 unless otherwise terminated at an earlier date.
- 6) The pursuers served notice to quit on the defender dated 14 April 2014. They also served notice in terms of section 36 of the Act on the defender dated 24 April 2014 of their intention to raise proceedings for recovery of possession of the flat. Item 5/1/3 of the pursuers' productions contains copies of both said notices. The pursuers did not commence proceedings until 13 November 2014. Along with the said notices the pursuers' solicitors also enclosed a covering letter to the defender dated 14 April 2014. Item 5/1/3 of the pursuers' productions also contains a copy of that letter.
- 7) The letter, as well as referring to the enclosed notices, stated:

"The property was allocated to you with support from Inverclyde Homelessness Service due to your urgent need for re-housing following a domestic assault involving your former partner, Andrew Cowdell. During the sign up to the tenancy various matters were discussed with you including concern over the possibility of renewed relations with Mr Cowdell which may result in your return to his property at 23 Wellpark Buildings, Greenock or co-habitation in the property being allocated to you. It would now appear that you have resumed your relationship with Mr Cowdell and that he has been residing with you within the subjects since mid-March. In that regard, we are informed that your address was specified for the purpose of bail conditions imposed on Mr Cowdell within Greenock Sheriff Court on 17 March 2014.

For the reasons set out above, a decision has been made to terminate your tenancy with effect from 13 July, 2014."

- 8) The pursuers seek an order for possession of the flat in terms of section 36(5) of the Act.

9) The agreement, in paragraph 3, provides, amongst other matters, that the defender, as the tenant of the pursuers in the flat, must act with respect for others and must not

"harass or act in an anti social manner to, or pursue a course of anti social conduct against, any person in the neighbourhood."

10) The defender has not acted in an anti social manner towards any persons within the "neighbourhood" nor within the flat. She is not in breach of paragraph 3 of her tenancy agreement.

11) The defender has a history of anti social behaviour and abuse of alcohol prior to her current tenancy. She was evicted by Oak Tree Housing Association from her tenancy of 102 Wellington Street, Greenock for anti social behaviour in the 3 years prior to the commencement of her current tenancy. The anti social behaviour involved a Mr Andrew Cowdell, then her partner who was residing with her. Both were abusing alcohol.

12) Both the defender and Andrew Cowdell have a history of involvement both together and separately in anti social behaviour within their respective tenancies over the last 8 years. Andrew Cowdell is currently subject to monitoring of his behaviour by the pursuers in his current tenancy with them in Wellpark Buildings, Greenock.

13) After eviction from 102 Wellington Street the defender resided at 99 Dempster Street, Greenock with Andrew Cowdell for a time. She was evicted from that property. In 2013 she was residing with Andrew Cowdell in his tenancy at 23 Wellpark Buildings, Greenock. Andrew Cowdell's landlords were the pursuers. In September 2013 she left Andrew Cowdell because of sustained domestic violence and abuse by him towards her. She was scared of what he might do to her. She had also been in contact with the police domestic violence team at this time.

14) On leaving Andrew Cowdell's flat in Wellpark Buildings she presented to Inverclyde Council as homeless and was assessed by them as unintentionally

homeless by reason of domestic abuse and allocated temporary homeless accommodation.

15) Inverclyde Council referred the defender to the pursuers for accommodation.

The pursuers, through their employee, Patricia Purdie, were aware of this history of domestic abuse as well as the defender's and Andrew Cowdell's history of anti social behaviour. The pursuers were prepared to allocate the flat at 44 Grieve Road to the defender.

16) The defender, at this time, was also subject to a bail condition not to approach or enter Andrew Cowdell's property at Wellpark Buildings. The reason for this bail order or the nature of the complaint in respect of which it was made was not established in evidence.

17) Prior to the defender entering into the agreement with the pursuers, the pursuers, through their employee, Patricia Purdie, were concerned about the resumption by the defender of her relationship with Andrew Cowdell and the impact of such a resumption on the defender's behaviour. In particular they were concerned it would lead to their behaviour becoming a nuisance to the community.

18) On 10 January 2014 the defender attended a meeting at the offices of the pursuers in Greenock to sign her tenancy agreement. Present at the meeting were the witnesses Caroline Brown, Patricia Purdie and Murray Sim. A Lee Barros was also present in connection only with the formalities of signature of the tenancy agreement and a related document. Lee Barros left after this was done but the meeting continued thereafter. Caroline Brown also left during the course of the meeting.

19) At the meeting it was made clear to the defender that she was not to allow Andrew Cowdell to reside with her at the flat. Patricia Purdie emphasised to the defender the provisions of the agreement prohibiting the residence of other parties in the flat without the permission of the pursuers. She also emphasised that the consequence of a failure by the defender to comply with

the conditions relating to anti social behaviour and the residence within the flat of another person without permission could be the loss of the tenancy. The defender acknowledged her understanding of these conditions and the consequence of failure and undertook to comply with them and the conditions of the agreement. She was instructed to read the agreement carefully.

- 20) Whilst there was considerable emphasis on the importance of the defender not resuming her relationship with Andrew Cowdell this was in the context of compliance with the conditions of the agreement for the flat. The defender was advised by Patricia Purdie against the resumption of any relationship with Andrew Cowdell because of the risk of anti social behaviour. It was not made clear to her that a resumption of the relationship in itself or anti social behaviour elsewhere than in the flat or the neighbourhood of the flat could lead to the loss of her tenancy other than in the context of her permitting Andrew Cowdell to live with her.
- 21) None of the assurances sought in relation to the resumption of a relationship with Andrew Cowdell or anti social behaviour elsewhere than in the flat or the neighbourhood of the flat were incorporated as conditions or terms of the agreement.
- 22) On 17 March 2014 Andrew Cowdell was made subject to a bail order at Greenock Sheriff Court wherein his address was given as 44 Grieve Road, Greenock. The bail order also contained a condition requiring Andrew Cowdell to remain within that address between the hours of 7pm and 7am. The defender was not asked nor did she consent to the use of her address by Andrew Cowdell as a residence for bail purposes.
- 23) Andrew Cowdell arrived at the defender's flat on 17 March. He was under the influence of alcohol. The defender refused him entry. Andrew Cowdell left the building.



- 24) Thereafter the defender attended at the office of Andrew Cowdell's solicitors and informed them Andrew Cowdell did not have permission to use her address as his bail address. On or about 8 April 2014, as a result of an application by Andrew Cowdell, his bail address was varied from 44 Grieve Road to another address.
- 25) In or about March 2014, when resident at the flat, the defender was provided with a panic alarm by Police Scotland to enable her to summon urgent police assistance in the event Andrew Cowdell approached or attacked her. She still has that panic alarm.
- 26) It was not established in evidence that Andrew Cowdell lived within the flat. It was not established in evidence that she was in breach of any condition of the agreement in that respect.
- 27) The defender resumed her relationship with Andrew Cowdell about the middle of 2014. The resumption did not involve Andrew Cowdell living at the flat. She visited him at his property in Wellpark Buildings from time to time and occasionally stayed there overnight. She was continuing to abuse alcohol at this time. She no longer associates with Andrew Cowdell.
- 28) On 28 July 2014 at Wellpark Buildings, Greenock the defender behaved in a threatening or abusive manner contrary to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act"). She pled guilty to that charge at Greenock Sheriff Court on 31 July 2014 when sentence was deferred to 26 November 2014 for her to be of good behaviour. On 26 November the defender was admonished. The incident complained of involved Andrew Cowdell at his property. Items 5/2/5 and 5/2/6 of the pursuers' productions are copies of the relevant complaint and extract conviction.
- 29) On 24 April 2015 the defender and Andrew Cowdell were both arrested at the tenancy of Andrew Cowdell at Wellpark Buildings. The nature of the conduct said to be a contravention of the 2010 Act was not established in

evidence. No criminal proceedings have been taken against the defender in respect of this matter.

- 30) On 29 April 2015 the defender was arrested at 13 Wellpark Buildings for a contravention of the 2010 Act. The nature of the conduct complained of was not established in evidence. No criminal proceedings have been taken against the defender in respect of this matter.
- 31) As at the proof diet on 30 June 2015 the defender had no outstanding criminal prosecutions.
- 32) The defender has abused alcohol for a number of years. This has been a significant factor in her history of anti social behaviour. She is vulnerable to domestic abuse at the hands of Andrew Cowdell.
- 33) The defender has, since November 2013, been addressing her problem with alcohol. She has engaged in meetings with her project worker Gayle McQueen since that time. She has attended a "drop-in" centre twice a week for counselling in relation to alcohol abuse. She has engaged positively with her project worker on a one-to-one basis every week. She is a person vulnerable to domestic abuse at the hands of Andrew Cowdell. She has, in the period of her association with Gayle McQueen, attempted suicide on 3 separate occasions. She has been referred by her medical general practitioner for psychiatric assessment. At the date of proof the defender was in the process of being assessed for use of antabuse, a drug designed to combat alcohol abuse. When abusing alcohol she is vulnerable to manipulation and violent abuse by Andrew Cowdell. When sober she has no contact with Andrew Cowdell.
- 34) Over the period of 4 to 5 months up to the diet of proof on 30 June 2015 the defender has demonstrated a marked improvement in her ability to avoid abuse of alcohol. She intends to continue her involvement with Gayle McQueen as her project worker on a voluntary basis.
- 35) The defender is not in breach of the agreement.



Finds in law that it would be disproportionate to grant decree for recovery of possession in favour of the pursuers and accordingly dismisses the cause; finds no expenses due to or by either party; and decerns.



Sheriff

NOTE

- 1) In this summary cause the pursuers, a registered social landlord, seek to recover possession of a property, 44 Grieve Road, Greenock, which they had let to the defender on a Short Scottish Secure Tenancy ("SSST") in terms of Section 34 of the Housing (Scotland) Act 2001 ("the 2001 Act"). The defender, their tenant, opposes this action on the ground that the eviction order would be disproportionate and an unnecessary interference with her rights under Article 8(2) of the European Convention on Human Rights ("ECHR"). The recovery action is in terms of section 36(5) of the Housing (Scotland) Act 2001 ("the Act"). This section affords the court no basis upon which to reject the application on the ground that it is unreasonable to grant the order in all the circumstances but requires the court to grant the order provided the landlords comply with certain statutory formalities. There is no discretion in the court's exercise of its function. It was accepted in this case that the pursuers, as landlords, had complied with the statutory requirements.
- 2) At the first diet of a proof in this case, 7 April 2015, parties addressed me on whether or not the defender was entitled to lead evidence in her challenge to the pursuers' claim for recovery. I issued a judgment on that matter on 15 April 2015





which is not meantime reported other than in Green's Housing Law Reports at 2015 Hous. L.R. 34. The judgment is still open to appeal within the time limit for this decision. I allowed parties to lead evidence if so advised. Both chose to do so.

- 3) On 30 June I took the view the defender should lead in the proof as it was for her to demonstrate that the remedy sought was disproportionate. The defender gave evidence and called 2 witnesses. These were Ms Caroline A Brown, a Homeless Assessment and Support Officer, an employee of Inverclyde Council for some 10 years. She was the defender's key worker from November 2013. The other witness was a Ms Gayle J McQueen, a project worker with Action for Children, a charitable organisation working with children up to adulthood but, in the case of this witness, mainly with adult women in the criminal justice system who were subject to statutory orders. She had worked with the defender from November 2014 as part of a statutory order and continued to do so on a voluntary basis. The basis for this statutory order was not explored in evidence. The defender concluded her proof on that day and the cause was continued to 24 August for the pursuers to call witnesses if so advised.
  
- 4) On 24 August the defender sought to re-open her proof and to lodge a medical report from her general medical practitioner. The pursuers objected and, having heard parties' agents, I refused the defender's motion. The defender's solicitor explained she wished to rely on the terms of the report to support her own evidence about her mental health and vulnerability. She did not seek to rely on the opinion expressed in the report about the possible effect upon her of an eviction from her home and that paragraph could be deleted if necessary before the report was lodged. The report was being offered at this late stage as it had taken some time since the last diet to obtain a written response from the doctor. I accepted the pursuers' submission that the evidence came too late; that it would



add little, if anything, to the defender's case and, in any event, the general practitioner had not been cited to speak to the report which the pursuers were unwilling to agree. In concluding it would add little to the defender's case I took into account the fact that the defender did not intend to rely upon her mental health difficulties – there had been no evidence about any specific mental health difficulties - in her submissions about the issue of proportionality. This matter had been earlier canvassed at the previous diet when the pursuers objected to any attempt to introduce such evidence on the grounds of lack of notice. Whilst the defender might have sought an adjournment to allow amendment and such enquiry as was thought fit by the pursuers, she instead accepted that she would not be seeking to rely upon such mental health difficulties in her submissions on why eviction was disproportionate.

- 5) On 24 August the pursuers led evidence from 2 witnesses. These were Ms Patricia Purdie, an employee of the pursuers responsible for enforcing their tenancy agreements particularly in relation to anti social behaviour. She had worked with Inverclyde Council prior to the transfer of their social housing stock to the pursuer and had worked in the social housing sector for some 28 years. The second witness was Mr Murray Sim, an Investigations Officer with Inverclyde Council in their anti social behaviour team ("ASIST").
- 6) The evidence was not recorded other than by me. It concluded on 24 August. I then heard submissions and made *avizandum*.
- 7) The issue of the European Law concept of "proportionality" in housing law has been the subject of two recent decisions of the UK Supreme Court and has also been considered by the Inner House and the Sheriff Principal at Glasgow. The two Supreme Court cases to which my attention was drawn, are:  
*Manchester City Council v Pinnock* [2010] UKSC 45 and [2011] UKSC 6

*London Borough of Hounslow v Powell (and 2 other appeals, Hall and Frisby)* [2011] UKSC 8

In addition, parties also referred to the Inner House case,

*South Lanarkshire Council v McKenna* [2012] CSIH 78; 2013 SC 312; 2013 SLT 22; 2013 SCLR 384

in which the two Supreme Court cases were considered.

*McKenna* was earlier the subject of an appeal to the Sheriff Principal at Glasgow whose decision is reported at 2014 SLT (Sh. Ct.) 51. In the course of the appeal the Sheriff Principal referred certain questions in relation to a devolution issue to the Inner House whose decision is as above reported.

Finally the defender referred me in the course of final submissions to a decision of the English Court of Appeal,

*Southend-on-Sea BC v Armour* [2014] EWCA Civ 231; [2014] H.L.R. 23.

Reference was also made to the Housing (Scotland) Act 2001, Stalker on Evictions in Scotland (pages 105 to 121) and Guidance from the Scottish Government on the Short Scottish Secure Tenancies provisions of the 2001 Act, paragraphs 121 to 164. This last item can be found at [www.gov.scot/Publications/2002/08/sst/3](http://www.gov.scot/Publications/2002/08/sst/3).

In addition, although I was not referred to these cases, I have had regard to *Main v Scottish Ministers* (per the Lord Justice Clerk) 2015 SLT 349; [2015] CSIH 41 and *Mellat v HM Treasury (No. 2)* [2014] AC 700. (per Lord Reed) to which reference was made in *Main*. I did not consider it necessary to put the cause out for further submissions on these cases as I had regard to them only in relation to the assessment of proportionality.

8) Article 8 of the ECHR provides:

**" 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.

- 9) Sections 34 to 36 of the Housing (Scotland) Act 2001 are the relevant provisions so far as the creation of an SSST is concerned and also set out the requirements for an action for recovery of possession. The effect of the Supreme Court decisions in *Pinnock* and *Powell* – referred to by the Inner House in *McKenna* – is that these provisions, despite the requirement on a court to grant the order sought provided only that the pursuer has complied with them, are compatible with the Human Rights Act 1998 subject only to the issue of proportionality.

#### The pleadings and evidence

- 10) I have included a substantial part of the written pleadings in this Note as they generally reflect the evidence given about the matters covered. In the summary cause summons as originally lodged and served by the pursuers they averred the compliance with the statutory requirements for recovery of possession of a property subject to an SSST. There was a covering letter from the pursuers' solicitors with the Notice to quit in which they said:

"The property was allocated to you with support from Inverclyde Homelessness Service due to your urgent need for re-housing following a domestic assault involving your former partner, Andrew Cowdell. During the sign up to the tenancy various matters were discussed with you including concern over the possibility of renewed relations with Mr Cowdell which may result in your return to his property at 23 Wellpark Buildings, Greenock or co-habitation in the property being allocated to you. It would now appear that you have resumed your relationship with Mr Cowdell and that he has been residing with you within the subjects since mid-March. In that regard, we are informed that your address was specified for the purpose of bail conditions imposed on Mr Cowdell within Greenock Sheriff Court on 17 March 2014.

For the reasons set out above, a decision has been made to terminate your tenancy with effect from 13 July, 2014."

The "covering letter" is part of Item 5/1/3 of the pursuers' productions. The adjusted pleadings upon which the proof and submissions proceeded were much more detailed and deal with events subsequent to the notice to quit.

- 11) In answer to the pursuers' initial averments in the summons as served on her simply seeking the order for recovery the defender averred:

"Admitted under explanation that eviction from her home would be an interference with the Defender's rights under Article 8(2) of the European Convention on Human Rights. Before granting decree for recovery of possession, the Court is required to consider whether or not such an interference would be proportional and necessary. The Defender has not breached her tenancy agreement with the Pursuers, namely by committing antisocial behaviour. *Esto*, there has been a breach of the tenancy agreement by the Defender, such a breach is not of sufficient severity to establish the necessity of an order and the Pursuers' actions remain disproportionate. The Defender's Short Scottish Secure Tenancy ("SSST") would have been subject to conversion to a full Scottish Secure Tenancy ("SST") under section 37 Housing (Scotland) Act 2001 ("the 2001 Act"), had a notice in terms of section 36(2) of the 2001 Act not been served by the Pursuers. The Defender's SST (*sic*) - (presumably SSST) - is probationary in nature. The Pursuers aver that they are entitled to seek recovery of possession on the basis that the Defender's tenancy has been brought to an end. That is insufficient in the case of a tenancy that is probationary in nature. The decision to seek recovery of possession must be reasoned and necessary, in pursuit of a legitimate aim. The lack of any further anti-social behaviour on the part of the Defender renders eviction unnecessary."

- 12) The defender then made some averments about "services":

"Furthermore, the Pursuers were required under section 35(7) of the 2001 Act to provide, or ensure provision of, housing support services to enable conversion of the tenancy to an SST. Such services have not been provided. In the event that there had been further anti-social behaviour on the part of the Defender during the probationary tenancy, it is not apparent that such behaviour could not have been addressed or prevented by the provision of such services to her. It cannot be said that eviction is necessary or proportionate."

In my earlier judgment I had said these averments were too unspecific to be taken into account in assessing proportionality and were subject to the same criticism as made by the Sheriff Principal in *McKenna* at paragraphs 36 and 37.

The defender did not seek to rely on this aspect of her defence in submissions.

- 13) The pursuers responded:

"Insofar as the Defender relies on the issue of proportionality as a Defence it is averred that the decision to terminate the tenancy was justified by reason of the Defender's conduct. Explained and averred that the Defender had been evicted from a previous tenancy by Oak Tree Housing Association on the grounds of anti-social behaviour. She subsequently took up residence with Andrew Cowdell at 23 Wellpark Buildings, Greenock being a property

subject to a Tenancy Agreement between Mr Cowdell and the Pursuers. In late 2013 the Defender presented at Inverclyde Homelessness Centre seeking housing as a result of complaints of domestic abuse involving Mr Cowdell. She was identified as being at risk of domestic abuse by him. The Pursuers were persuaded to offer the Defender a Short Scottish Secured Tenancy. On 10th January, 2014, the Defender attended a sign up meeting accompanied by Murray Simm of the Assist Team and Caroline Brown of Inverclyde Council Homeless Team. It was emphasised to the Defender that the tenancy was being allocated to her to assist her in ending her relationship with Mr Cowdell. It was emphasised that she should not return to reside with Mr Cowdell at 23 Wellpark Buildings, Greenock or allow Mr Cowdell to frequent or reside with her in her new tenancy at 44 Grieve Road, Greenock. The Defender gave her assurance that she would not do so. The Defender has broken the assurances given by her. She has allowed Andrew Cowdell to reside with her at the subjects. Explained and averred that on 17th March, 2014 Mr Cowdell appeared within Greenock Sheriff Court on criminal charges involving theft. He was released on bail conditions specifying his address as 44 Grieve Road with a curfew that he remain at his bail address from 7.00 pm until 7.00 am the following morning. On 18th March, 2014 the Pursuers delivered a letter to Mr Cowdell at the Defender's address regarding his failure to occupy his tenancy address at 23 Wellpark Buildings as his sole or principal home. The Defender issued a reply to confirm his intention to resume occupation of his tenancy address. His bail conditions were subsequently varied with effect from 8th April, 2014. Believed and averred that the Defender has continued to associate with Mr Cowdell. Further explained that the Defender was remanded in custody as a result of a charge that on 28th July, 2014 at Wellpark Buildings she behaved in a threatening and abusive manner by repeatedly shouting and swearing and repeatedly bank (*sic*) on a door at the locus. She appeared from custody on 31st July, 2014. She pled guilty to the charge. Sentence was deferred until 26th November, 2014 when she was admonished and the charges dismissed. A Certified copy Complaint and extract Conviction are produced herewith. Believed and averred that the Defender continues to associate with Mr Cowdell. The Pursuers have received reports of anti-social behaviour involving the Defender and Mr Cowdell at his property at 13 Wellpark Buildings. Specifically, on 24th April, 2015 at or about 18:35 hours Mr Cowdell contacted emergency services requesting Police assistance. Police attended at 13 Wellpark Buildings where they met with Mr Cowdell and a female identified as being the Defender. Both made allegations against the other. They were initially detained by Police and latterly arrested in respect of contravention of Section 38(1) of the Criminal Justice & Licensing (Scotland) Act 2010. Further, on or about 29<sup>th</sup> April, 2015 at 12:25 hours a report was made to Police Scotland regarding an ongoing disturbance at the property of Mr Cowdell. Police attended his property. On arrival Mr Cowdell and the Defender were both heavily under the influence of alcohol and/or drugs. The Defender was requested to leave the address by the Police. She refused to do so and was thereafter verbally abusive to Officers in attendance. She was arrested for a contravention of Section 38 of the Criminal Justice & Licensing (Scotland) Act 2010. There have been ongoing complaints regarding the Defender's conduct while associating with Andrew Cowdell. In all the circumstances the Pursuers are justified in their decision to seek a recovery of possession."

14) In answer, the defender averred:



"Admitted that the Defender had been evicted from a previous tenancy by Oak Tree Housing Association on the grounds of anti-social behaviour. Admitted that she subsequently took up residence with Andrew Cowdell at 23 Wellpark Buildings, Greenock, being a property subject to a Tenancy Agreement between Mr Cowdell and the Pursuers. Admitted that in late 2013 the Defender presented at Inverclyde Homeless Centre seeking housing as a result of complaints of domestic abuse involving Mr Cowdell. Admitted she was identified as being at risk of domestic abuse by him. Admitted that the Pursuers were persuaded to offer the Defender a Scottish Secure Tenancy. Admitted that on 10<sup>th</sup> January 2014, the Defender attended a sign up meeting accompanied by Murray Simm of the Assist Team and Caroline Brown of Inverclyde Council Homeless Team. Admitted it was emphasised to the Defender that the tenancy was being allocated to her to assist her ending her relationship with Mr Cowdell. Admitted that on 17<sup>th</sup> March 2014 Mr Cowdell appeared within Greenock Sheriff Court under explanation that the criminal charges are unknown. Admitted that he was released on bail conditions specifying his address at 44 Grieve Road with a curfew that he remain at his bail address from 7pm until 7am the following morning. Admitted that his bail conditions were subsequently varied with effect from 8<sup>th</sup> April 2014. Admitted that the Defender was remanded in custody as a result of a charge that on 20<sup>th</sup> July 2014 at Wellpark Buildings she behaved in a threatening and abusive manner by repeatedly shouting and swearing and repeatedly banging on a door at the locus. Admitted that she appeared from custody on 31<sup>st</sup> July 2014. Admitted that she pled guilty to the charge Admitted sentence was deferred until 26<sup>th</sup> November 2014 when she was admonished. Quoad ultra denied. Explained and averred that, at the sign up meeting of 10 January 2014, it was emphasised to the Defender that there should not be any incidents of antisocial behaviour concerning Mr Cowdell at 44 Grieve Road, Greenock. Mr Cowdell was not prohibited from attending the subjects by way of condition of the tenancy contract between the parties. The Defender has not broken any condition of the tenancy contract by Mr Cowdell attending the subjects. Esto, there has been a breach of the tenancy contract by the Defender it would remain disproportionate to grant an order for recovery of possession as previously averred. Any breach of the tenancy contract has been minor. The said Mr Cowdell was released on bail to the subjects without the consent of the Defender. Following this, the Defender attended at the criminal agents representing the Mr Cowdell to advise that she did not wish him to reside with her. The Defender did not do this immediately out of fear of Mr Cowdell. The criminal agent representing Mr Cowdell enrolled a bail review application at Greenock Sheriff Court, which was subsequently granted. The Defender is in a vulnerable position having suffered domestic violence perpetrated by Mr Cowdell. After he was released on bail to the subjects, the police issued the Defender with a panic button should he attend her property again. The police carry out regular visits to check on the Defender's well being. Whilst the Defender was convicted of a breach of the peace, the locus of this offence was neither the subjects nor in the locality of the subjects. When assessing proportionality, this conviction is irrelevant. With reference to the further averments by the Pursuers, admitted that specifically, on 24<sup>th</sup> April, 2015 at or about 18:35 hours Mr Cowdell contacted emergency services requesting Police assistance. Admitted that Police attended at 13 Wellpark Buildings where they met with Mr Cowdell and a female identified as being the Defender. admitted that both made allegations against the other. Admitted that they were initially detained by Police and latterly arrested in respect of contravention of Section 38(1) of the Criminal Justice & Licensing (Scotland) Act 2010. Admitted that further, on or about 29<sup>th</sup> April, 2015 at 12:25 hours a report was made to Police Scotland regarding an ongoing disturbance at the property of Mr Cowdell. Admitted

that Police attended his property. Admitted that on arrival Mr Cowdell and the Defender were both heavily under the influence of alcohol and/or drugs. Admitted that the Defender was requested to leave the address by the Police. Admitted that she refused to do so and was thereafter verbally abusive to Officers in attendance. Admitted that she was arrested for a contravention of Section 38 of the Criminal Justice & Licensing (Scotland) Act 2010. Not known and not admitted that the Pursuers have received reports of anti-social behaviour involving the Defender and Mr Cowdell at his property at 13 Wellpark Buildings. Not known and not admitted that there have been ongoing complaints regarding the Defender's conduct while associating with Andrew Cowdell. Quoad ultra denied. Explained and averred that the Defender was not prosecuted in relation to the incidents averred by the Pursuers. These matters are at an end. The Defender is vulnerable to Mr Andrew Cowdell, especially if she is using alcohol. The Defender is taking steps to address her alcohol misuse. The eviction of the Defender is not necessary and is therefore disproportionate."

- 15) As will be seen many of the pursuers' averments were admitted. Thus the defender accepted, as she did in evidence, that she had a history of anti social behaviour associated with alcohol abuse and her relationship with Andrew Cowdell. That relationship was one in which she was subjected to such violent domestic abuse that when she had left him in September 2013 and been rehoused by the pursuers she was given a panic alarm in March 2014 to summon the police urgently if he caused her any difficulty. The pursuers' employee, Patricia Purdie, accepted in her evidence that the pursuers were aware of the violent relationship, a matter which caused them concern for the defender as a tenant.
- 16) There were some areas of dispute in the evidence upon which I require to form a view both as to whether they occurred as a matter of fact and, if so, what is their influence in the issue of proportionality. These were (one) What was the nature and content of the assurances given by the defender to the pursuers in the "sign up" meeting on 10 January 2014; (two) did Andrew Cowdell "live" (the term used in the agreement) with the defender in the flat and if so was that a breach of the condition of her tenancy.; and (three) did the anti social incidents admitted by the defender from March 2014 to April 2015 amount to breaches of her agreement or even reasons justifying the pursuers' seeking to recover possession





in terms of section 36(5). Before doing that it is appropriate to record the submissions made by parties at conclusion of the proof.

Submissions

- 17) For the pursuers Mr Caldwell reminded me that it was accepted the pursuers had complied with all statutory formalities to recover possession by an order under section 36(5) of the Act. The sole issue was whether or not it was proportional to grant the order. It was a low hurdle for the landlord in such a tenancy to persuade the court of the justification for such an order whereas the tenant had to overcome a much higher bar. Only exceptional cases could meet the proportionality test. He referred to paragraphs 51 to 54 of *Pinnock* on the issue of exceptionality and to 61 to 64 inclusive on the issue of proportionality. There was no reliance by the defender in this case on her mental health or the other factors mentioned in paragraph 64. He also drew my attention to the terms of paragraphs 33 to 41 inclusive of *Powell*. He submitted that the pursuers were entitled to rely upon the accepted legitimate aims of vindication of their property right and management of their housing stock. Under reference to paragraphs 89 to 93 inclusive of *Powell* and in particular the last paragraph he emphasised that the pursuers required only to have a reasonable basis for their belief to seek an order for recovery of possession. He submitted the pursuers as landlords did not need to look to a breach of the tenancy agreement but simply to conduct which would justify a reasonable landlord in terminating the tenancy. This required in this case a consideration of the evidence and the findings in fact which might be made.

- 18) So far as the evidence was concerned Mr Caldwell submitted I should accept Patricia Purdie as a reliable and credible witness. She had made clear to the defender at the sign-up meeting of 10 January 2014 the risk of loss of her tenancy if she failed to comply with her assurances that she would not allow Andrew

Cowdell to live with her or if she behaved in an anti social manner. He also submitted that Patricia Purdie had made clear to the defender that the same risk would arise if she resumed her relationship Andrew Cowdell elsewhere which resulted in anti social behaviour at his tenancy. He accepted this went beyond the terms of the agreement but it contravened the conditions upon which the tenancy had been granted to the defender. He accepted that Patricia Purdie was not entirely supported in her assertions about the consequences for the defender's tenancy by others present at the meeting but the defender accepted she had been well warned of the consequences of allowing Andrew Cowdell to reside with her or of any anti social behaviour. He accepted that Murray Sim did not remember any specific warnings to the defender about anti social behaviour at Andrew Cowdell's property. He invited me to prefer the evidence of Patricia Purdie. The defender knew full well she would be in breach of her agreement if she allowed Andrew Cowdell to reside with her at the flat.

- 19) In relation to the assessment of the defender's credibility the pursuers invited me to consider her conduct over the years. She maintained she had not resumed her relationship with Andrew Cowdell but this did not square with the evidence of Caroline Brown. Caroline Brown had a note in her records which she read to the court that the defender had told her she had resumed her relationship with Andrew Cowdell. This did not establish that he was living with her at the flat but it did directly contradict her own evidence. Then Mr Caldwell drew my attention to the terms of the handwritten reply - bearing to be signed by Andrew Cowdell on the defender's own evidence - to the letter addressed to him at the flat by the pursuers and hand delivered to the flat. This reply was written on the back of that letter and returned to the pursuers. It formed item 5/3/8 of the pursuers' productions. Its plain implication was that Andrew Cowdell was residing at the flat. It said he would return "back" (Mr Caldwell's emphasis) to his own tenancy on 2 April 2014. Furthermore the defender's behaviour in the

period of her residence at the flat included a conviction for Section 38 of the 2010 Act in July 2014 and 2 subsequent incidents of anti social behaviour - admitted as such in the defender's pleadings – in April 2015.

20) In all these circumstances the pursuers were justified and remained justified, notwithstanding the proportionality defender relied upon by the defender, in seeking and now insisting in their action for recovery of possession of the flat.

21) **In response for the defender** Mr Houston accepted it was for the defender to demonstrate that the remedy sought in her particular circumstances was disproportionate to the accepted legitimate aims of the pursuers. It was not for the pursuers to show that their remedy was proportionate. He also accepted that there was a high threshold for the defender to overcome. The case of *Pinnick* concerned what the relevant English Housing Act called a "demoted" tenancy, that is, a tenancy demoted by reason of anti social behaviour on the part of the tenant and its equivalent in Scotland was the SSST which could be regarded as a demotion from the SST. The cases of *Hall & Frisby* – heard and reported as part of *Powell* – concerned tenants on "introductory tenancies". These were more or less equivalent of SSSTs as was accepted in *McKenna* before the Inner House. Under reference to paragraphs 89 to 91 of *Powell* he submitted SSSTs should be considered as "probationary tenancies", a term used by the Supreme Court when deducing the purpose of introductory tenancies in England. They had decided on this approach having considered parliamentary papers in relation to the English Housing Act 1996. On that basis I was invited to consider the Scottish Government Guidance on SSSTs and in particular paragraph 136 where the term "probationary" appeared 3 times. There was thus a presumption in favour of the succession from an SSST to and SST. Further that assumption was accompanied by an obligation on the relevant local authority to provide "support". Thus, it was submitted, in the light of an SSST being considered "probationary" when

considering proportionality the whole issue revolved around whether the individual tenant had been satisfactory or unsatisfactory. No issue was taken with the acknowledged legitimate aims as discussed in paragraph 53 of *Pinnick*. However, in the present case no other management aims were pled. The only expansion of legitimate aims were the behavioural grounds relied upon by the pursuers.

22) What was it the defender, as a tenant of the pursuers, had breached if not a condition of the tenancy contract? The pursuers referred to breach of assurances given by the defender; to warnings given to the defender; to advice, stipulations and covenants. The issues were what force were these to have and what subject matters were covered.

23) The defender accepted she was told there was to be no more anti social behaviour and, in particular, none involving Andrew Cowdell. It was not made clear she was being asked to give a binding assurance she would have no more involvement with Andrew Cowdell. She also accepted that her behaviour at Wellpark Buildings was discussed but only in the context of domestic violence which had occurred, not future behaviour which could lead to the loss of her tenancy. Caroline Brown's recollection of the meeting on 10 January was fairly vague and she did leave before its conclusion but she did not contradict the defender's recollection that the warning was she could lose her tenancy for anti social behaviour at her property. Mr Sim's recollection was that she was warned not to allow Andrew Cordell to reside at her flat but not about her behaviour at Wellpark Buildings. This threw doubt on Patricia Purdie's evidence about warnings concerning behaviour elsewhere than at the flat.

24) As to the consequences for the defender if she failed to heed the warnings he submitted that only anti social behaviour at the flat would lead to termination

whereas other warnings were that she would put her tenancy "at risk". This was supported by Mr Sim who talked about the defender being "strongly advised" about matters other than anti social behaviour at the flat. It was not made clear that anything other than anti social behaviour at the flat would lead to termination. It was also unacceptable to seek termination where assurances were being sought about matters other than those expressly covered by the agreement. These "assurances" were not incorporated within the agreement. The defender as a tenant in the SSST was being set up to succeed but was immediately placed at a disadvantage if the terms on which this was to be tested were not expressed in writing. Thus the incidents which the defender admitted at Wellpark Buildings should be disregarded as being elsewhere than at the flat or its neighbourhood. There must be some connection between the location of the anti social behaviour and the subjects of the tenancy. In addition no criminal proceedings were taken in respect of the April 2015 incidents. It was also passing strange that Andrew Cowdell, also involved in these incidents, was not subject to the same treatment as the defender so far as recovery of possession was concerned.

- 25) Apart from anti social behaviour the other main issue was whether Andrew Cowdell resided with the defender at the flat at any time. Patricia Purdie acted on assumptions arising from the terms of a bail order in the name of Andrew Cowdell. There was no direct evidence that Andrew Cowdell was living in the flat and so no direct evidence to contradict the defender's assertion he was not. The pursuers took no steps to satisfy themselves about this matter beyond delivering a letter to Andrew Cowdell at the flat. There was no check with the police even to see if Andrew Cowdell complying with his bail conditions. In assessing the nature of any resumption of the relationship the court should also take account of the evidence of Caroline Brown and Gayle McQueen as to the defender's vulnerability to Andrew Cowdell. There was a statutory obligation

for tenants in SSSTs to be supported so it was to be expected there might be "hiccups" along the way.

26) Finally Mr Houston referred to the English Appeal Court case of *Armour* and, in particular, paragraph 30. The court should place great weight on the lack of anti social behaviour in the flat or its neighbourhood over a period of some 18 months and on the defender's efforts to address her alcohol addiction albeit more recent. There was also a failure by the pursuers to investigate the issue of whether Andrew Cowdell residing at the flat where they intended to rely upon that as the sole reason for the defender's eviction.

27) In a brief response for the pursuers Mr Caldwell emphasised that it was a pattern of behaviour on the part of the defender which justified the pursuers' action. So far as "introductory tenancies" were concerned he referred me to the observations of the Sheriff Principal in *McKenna* at paragraphs 28 to 40 but particularly 39.

### Discussion

28) The only basis upon which the defender challenges the pursuers' right to recover possession is that it is disproportionate to the accepted legitimate aims of the pursuers in vindicating their property rights and managing the letting of their properties for her to be evicted from her home in all the circumstances.

29) In so doing she has chosen not to rely upon any issues with her mental health. There is no doubt that the defender would have been entitled to advance difficulties with her mental health as a factor to be taken into account in the court's assessment of the proportionality of the remedy sought to the legitimate policy aims (paragraph 64 of *Pinnock*) but she did not do so. I have only taken into account her admitted problem of alcohol abuse and her vulnerability to

domestic abuse. How that resulted in or impacted upon her mental health difficulties was not explored in evidence. I have also taken into account that she has attempted suicide on three occasions. This was spoken to by Gayle McQueen and I have accepted that evidence. This might tend to suggest mental health problems. I have taken the attempts into account only in reinforcing my view that she is a vulnerable person open to manipulation especially by Andrew Cowdell and more so if she is abusing alcohol.

30) At the outset of Patricia Purdie's evidence the defender took objection to evidence relating to the defender's previous tenancy with Inverclyde Council. I heard evidence under reservation of that objection. In my view the evidence taken from Ms Purdie introduced little, if anything new, about the defender's difficulties in her earlier tenancies about which the defender had already spoken and other than setting a background which the pursuers said was necessary to consider the defender's present conduct was of little relevance to the ultimate decision. I repel the objection.

31) Certain factual issues require to be resolved. The defender denies she allowed Andrew Cowdell to reside at the flat. I accept her evidence she was not approached for consent to his providing her address as his bail address. He undoubtedly did so but I have found she did not consent to this. It was suggested that it is routine for the police or court officials to check bail addresses offered by accused persons when seeking bail. There was no evidence about this. It is certainly a matter within judicial knowledge. In my experience whilst it may have been true at some time in the past it is no longer the case. So absent evidence about the particular case of Andrew Cowdell I am not prepared to find the defender was approached about this. I do not consider any implication about Andrew Cowdell's residence can be drawn from the fact that he gave the defender's address as his residence. There was no evidence about why he could

not have given his own address and whilst I might be able to think of reasons that is quite insufficient as a basis for rejecting the defender's evidence.

32) Then the defender says Andrew Cowdell turned up at her door following his release from custody. She says he was drunk and she refused him entry. There did not appear to be any incident arising from this which merited some contact with the landlord about anti social behaviour. I accept the defender's evidence she refused him entry on that occasion.

33) More difficult is the question of whether subsequently Andrew Cowdell stayed in the flat for a period of time and, if so, did that amount to a breach of the agreement. The defender told me she got the letter (item 5/3/1) from the pursuers addressed to Andrew Cowdell at the flat. She said she took it to him at his flat and that she wrote the reply to his dictation which he signed and she returned by hand to the pursuers' offices. As the pursuers pointed out the reply did not state that Andrew Cowdell was not residing at the flat nor did it say where he was residing at the time of its signature by him. Indeed, as the pursuers also pointed out, the reply talked about Andrew Cowdell residing "back" at his property from 2 April.

34) At the same time the defender also says she called upon Andrew Cowdell's lawyers to have his bail address amended which did in fact occur on or about 8 April, 2014. I accept she did that. All of this might suggest by implication that Andrew Cowdell was residing at the flat at some time in the period 26 March to 8 April. Assuming that to be the case it is also the case that there do not appear to have been any incidents of anti social behaviour at the flat or neighbourhood in that period.



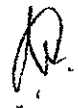


35) The letter to Andrew Cowdell is addressed to him "c/o Woods, 44 Grieve Road".

It reminds him he must occupy his own tenancy at 23 Wellpark Buildings and tell the pursuers, as his landlords, if he intends to go away for more than 4 weeks. There does not appear to have been a letter to the defender at the same time reminding her of the term of the agreement that the flat is for her sole occupation. Rather the pursuers seem simply to have chosen to send her the notice to quit with a covering letter from their solicitors in the terms earlier quoted relying upon her apparent breach of the agreement. I say "apparent" because at this point no one from the landlords has actually attempted to verify it as a fact.

36) Furthermore I am not satisfied Andrew Cowdell was "living" in the flat. It seems to me that "living" implies more than a mere temporary connection with a property. A casual visitor or a person residing at an address for a very short period of time is not, in my view, necessarily "living" there. There needs to be "the existence of sufficient and continuous links with a specific place" to justify that place being regarded as a "home" (*Paulic v Croatia* ECHR 22 October 2009 cited in *Powell* at paragraph 33). Furthermore, the landlords did not trouble to ask the defender "who was living in the house" which is what they say they may do in terms of the agreement at paragraph 2.1. More importantly, even if Andrew Cowdell could be taken to be living there from 18 March, the defender, in my view, took steps quickly to change the situation without being asked to do so by the pursuers who had evinced such concerns for any resumption of a relationship with Andrew Cowdell.

37) However, in my view the pursuers, considering the low threshold landlords are required to overcome in having their approach seen as proportionate, - including being under no obligation to prove anything unless challenged - there were



sufficient circumstances, **at the time** (my emphasis) they issued notice to quit to justify that approach.

38) The other important factual issue is what happened at the meeting of 10 January 2014. I accept the evidence of Patricia Purdie and Murray Sim that it was made clear to the defender that allowing Andrew Cowdell to live with her at the flat could lead to the loss of her tenancy though, in my view, that was on the basis it would be likely to lead to anti social behaviour. It did not in fact do so in whatever period he was staying there. I also accept their evidence that the defender was likewise warned about the effect of anti social behaviour in the flat or its neighbourhood. I am not satisfied that she was warned of a like consequence or indeed any particular consequence in relation to her tenancy of anti social behaviour elsewhere than in the flat or its neighbourhood. It seems to me the conflict between the evidence of Patricia Purdie and Murray Sim on this point makes it very uncertain she was so warned.

39) The remaining findings in fact seem to me to reflect the admitted averments of the pursuers and the evidence of the defender which I otherwise accept. I also found Caroline Brown and Gayle McQueen credible and reliable witnesses. In particular I accept the evidence of the defender about her efforts to address her alcohol abuse supported as it was by the evidence of Gayle McQueen. The only real conflict of evidence was between Patricia Purdie and Murray Sim as to the exact terms of the meeting and the warnings given to the defender. That affected the reliability of Patricia Purdie's recollection and I have taken that into account in my findings in fact.

#### Proportionality

40) Proportionality needs to be addressed in the light of the facts found established. In considering this issue I have had regard to the various authorities to which I

was referred. There is a great deal said in these decisions about how to assess the proportionality of a proposed remedy such as the pursuers seek here. It would be inappropriate to quote all at length. I have also had regard to the opinion of the Lord Justice Clerk (Carloway) in *Main v Scottish Ministers* in which he considers and, it seems to me, adopts the approach to proportionality as it was analysed by Lord Reed in his dissenting judgment in *Mellat v HM Treasury (No.*

2). In *Main* at paragraph 35 the Lord Justice Clerk observed:

"In his dissenting opinion in *Mellat v HM Treasury (No. 2)* [2014] AC 700, Lord Reed analysed (paragraphs 71 *et seq*) the essential elements in an assessment of proportionality. He emphasised the differences between the margin of appreciation afforded to national legislatures by the European Court and that allowed by national courts using their own individual domestic standards. Having looked at the development of Lord Clyde's three limb test in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (at 80), notably in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, Lord Reed returned to its origins in *R v Oakes* [1986] 1 SCR 103 and continued:

"74. The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *De Freitas*, and the fourth reflects the additional observation made in *Huang* ... In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, paragraph 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four)."



41) I am concerned here only with the fourth criterion. It is also quite clear from *Powell* and *Pinnick* that the personal circumstances are relevant factors in assessing the balance between the legitimate objectives of the remedy and its consequences for the individual. *Powell* (paragraph 41) makes clear that it is against the two legitimate aims of social landlords identified at paragraph 52 in *Pinnick* that:

"the court must weigh up any factual objections that may be raised by the defendant and what she has to say about her personal circumstances."

42) The defender referred me to the English Court of Appeal case of *Southend-on-sea v Armour*. There the Court of Appeal approved the approach of the Recorder at first instance (her decision had already been supported in the English High Court and appealed again). She not only took account of the personal circumstances of the tenant but did so at the date of the hearing which was some 11 months later. That period was specifically approved in *Pinnock* at paragraph 74. It is also an approach that enables the landlords to rely on later circumstances affecting the tenant as they have done in this case. The Court of Appeal also emphasised that the decision was one very much within the discretion of the judge of first instance. The whole report in *Armour* is of relevance to this case as there are some similarities such as the passage of time since notice to quit and the fact that in *Armour* the Recorder decided the landlords had reason to recover possession at the time of the notice to quit but not subsequently.

43) I have already said that as at the date of issue of the notice to quit the pursuers would have been entitled to succeed in their action. What circumstances are there which might now suggest the remedy is disproportionate to the pursuers' achievement of their legitimate objectives. Firstly there is the fact that the defender has not since that time – and indeed from the outset of her tenancy –

been the subject of any complaints by neighbours of anti social behaviour whether immediate or in the "neighbourhood". That is a period of 18 months. That is a factor to which I attach considerable weight in favour of the defender. Secondly, the defender was rehoused specifically because she was homeless due to violent domestic abuse. Such was the risk of that she was provided with a panic alarm which she apparently has had no occasion to use. Thirdly, on the evidence I have accepted from her witnesses she is a vulnerable individual due in part to her manipulation by the man, Andrew Cowdell and in part due to her abuse of alcohol. Fourthly, she has taken steps to address her abuse of alcohol with some success over the last 6 months or so. It is no easy task to bring an alcohol addiction under control but I accept her evidence she is doing her best to do so. I am helped to that view not only from her appearance in court but also the evidence of the witness Gayle McQueen. Fifthly, it was not suggested she has allowed Andrew Cowdell to live with her other than the brief period after he gave her address as his bail address. I am satisfied she has not done so. Lastly, I am satisfied that eviction now would significantly exacerbate her vulnerability at a time when she appears to be successfully tackling her alcohol addiction and expose her to a real risk of harm.

- 44) There have been negative elements in her general behaviour over this same period. In particular she has one conviction in July 2014 for which she was admonished some 4 months later. That conviction is now 14 months old. However, there have been the 2 incidents in April 2015 at Andrew Cowdell's property for which she was arrested. On the other hand from the terms of the police reports upon which the pursuers relied the police officers attending each incident heard no disturbance themselves and, whilst the defender managed to get herself arrested for her own behaviour towards the police on one of the occasions, in neither have there been any criminal proceedings. These incidents, in my view, are very much at the lower end of the scale of criminal behaviour.

Even on the basis, as the pursuers urged, that I take account of them in considering the issue of proportionality, they do not in my view support depriving the defender for the reasons I have earlier said of her home and rendering her once again homeless.

45) The second negative element is her continued association with Andrew Cowdell. She accepted herself that she had resumed that but then ceased. He is clearly a very negative influence on her but I take account of the evidence of Gayle McQueen that she is a vulnerable individual in relation to Andrew Cowdell and more likely to resort to him when abusing alcohol. She is addressing that latter problem and, again, when sober, I accept her evidence that she does not now associate with him. Her evidence about this is supported by the evidence of Gayle McQueen.

46) In his submission Mr Houston for the defender urged me to look at the SSST as a "probationary" tenancy in the same way as the English Courts. In England the term "probationary" is used in relation to introductory and demoted tenancies but not in the Scottish Act. It was not a term favoured or used by Patricia Purdie. On the other hand, as Mr Houston pointed out, the Scottish Government, in its guidance on such tenancies specifically uses the term. It occurs in paragraphs 135 and 136 of the Guidance. In addition in *McKenna* at paragraph 5 of the Inner House judgment it was recognised that there are:

"striking similarities between the short Scottish secure tenancies under the 2001 Act and the demoted tenancy under the 1996 English legislation"

albeit the court also recognised some procedural differences. It is clear from the Scottish Government Guidance that the purpose of an SSST is to test the tenant's willingness to avoid anti social behaviour. In so far as the defender's behaviour in the flat and its neighbourhood is concerned it has been without criticism for 18 months. That seems to me to be a major, and, in my view, an overwhelming

factor in her favour. Whilst many may well improve their behaviour in these circumstances and so it might not be regarded as an exceptional feature, exceptionality is not a test but an outcome.

"The question is not whether the circumstances are exceptional because as the Supreme Court pointed out in *Pinnock* exceptionality is an outcome rather than a test. Where, as here, the tenant under an introductory tenancy gets off to a shaky start, but mends his ways for almost all of the one year period, I consider that that improvement in behaviour is capable of being a factor in deciding whether it is disproportionate for the landlord to continue to insist on recovering possession. What weight to give it is a question for the trial judge." (*Southend-on-Sea BC v Armour* at paragraph 30)

47) In all these circumstances I have come to the view that it would be disproportionate to grant the remedy sought and so have dismissed the action.

48) It was observed in the Supreme Court cases that these actions would fall to be dealt with by County Court judges who would most likely be dealing with many such cases on the one day. In Scotland these actions call before the sheriff in what, in my experience, is a busy court. Those appearing will need to be fully instructed if they intend to rely on proportionality as a defence since it is quite clear the Supreme Court expect such decisions to be taken in a summary fashion at the first calling. It is for the defender to raise the issue and if he does not then summary decree for recovery will be the inevitable outcome. The sheriff will require to decide whether or not there is "a seriously arguable" case for allowing a defence of proportionality to be introduced. In the case of the unrepresented tenant – who will be unlikely to be aware of the defence - seeking to resist the action the sheriff, as a public authority in terms of Article 8, may well be under a duty to consider the issue of proportionality. The views expressed in the Supreme Court make it clear that factors such as mental health, vulnerability, disability, physical or mental, frailty, are all relevant to a defence based on proportionality. In addition if the material factual matrix of any case is seriously disputed it is likely there will be have to be a hearing to establish the facts since

that will be the first time an "independent tribunal", a court, will have the opportunity to determine the facts. The new review entitlement to be introduced by the Housing (Scotland) Act 2014 seems to contemplate a procedure akin to the English provision which simply involves the landlord reconsidering its decision albeit by different and higher ranking officials with in their organisation. That does not seem to me to be "an independent tribunal".

49) As to expenses, parties submitted they should follow success, or, in the case of the pursuers, if they were unsuccessful the finding should none due to or by either party. In my view this was an action by the pursuers, justified at its outset but the defender, because of the length of time taken to commence proceedings and to obtain a hearing, has managed to introduce factors not available to her at the beginning. In addition, the pursuers are a not for profit organisation managing a very large number of tenancies in the Inverclyde area. In my view the appropriate award is to find no expenses due to or by either party.



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