SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY

AT HAMILTON

[2022] SC HAM 26

HAM-SD645-19

JUDGMENT OF SHERIFF J SPEIR

in the cause

NORTH LANARKSHIRE COUNCIL

Pursuer

against

LYNSEY KELLY

Defender

Pursuer: D Anderson, Advocate
Defender: Byrne, Advocate

HAMILTON, 10 MARCH 2022

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 pursuer is North Lanarkshire Council. The defender is Lynsey Kelly. The parties are respectively the landlord and tenant of subjects in Bellshill (''the subjects'').

[2] The pursuer seeks recovery of possession under 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—
> (a) that—
> (i) the landlord has a ground for recovery of possession set out in any of paragraphs 1 to 7 of …(schedule 2) and specified in the notice required by section 14, and

(ii) it is reasonable to make the order,

(aa) whether or not paragraph (a) applies, that—

(i) the landlord has a ground for recovery of possession set out in paragraph 2 of that schedule and so specified, and

(ii) the landlord served the notice under section 14(2) before the day which is 12 months after—

(A) the day on which the person was convicted of the offence forming the ground for recovery of possession…

(3) For the purposes of subsection (2)(a)(ii) the court is to have regard, in particular, to—

(a) the nature, frequency and duration of—

…(ii) where the ground for recovery of possession is that set out in paragraph 2 of that schedule, the conduct in respect of which the person in question was convicted,

(b) the extent to which that conduct is or was conduct of, or a consequence of acts or omissions of, persons other than the tenant,

(c) the effect which that conduct has had, is having and is likely to have on any person other than the tenant, and

(d) any action taken by the landlord, before raising the proceedings, with a view to securing the cessation of that conduct.

(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 (or any one of joint tenants), a person residing or lodging in the house with, or subtenant of, the tenant, or a person visiting the house has been convicted of—

(a) using the house or allowing it to be used for immoral or illegal purposes, or

(b) an offence punishable by imprisonment committed in, or in the locality of, the house."

[4] The ground for recovery of possession under section 16(2)(aa) is sometimes known as the "streamlined procedure". Where it applies there is no requirement on the local authority to establish that it is reasonable for the court to make an order. 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 her right to respect for her home, under articles 8(1) and 8(2) European Convention on Human Rights and Fundamental Freedoms (ECHR). I discuss these issues in further detail later on but it is convenient in terms of chronology, and the defender's argument based on retrospectivity, to note that the streamlined procedure provision only came into effect on 1 May 2019.

[5] After sundry procedure, the action called before me for proof on 8 and 11 February 2022, the latter date being a hearing on the evidence. Both parties were represented by counsel: Mr Anderson for the pursuer and Mr Byrne for the defender. By the time of proof, few factual issues remained for determination. A relatively comprehensive joint minute of admissions had been entered into agreeing the essential facts and chronology including the evidence of three police officers, PC James Lynch, PC John Logan and DC Gordon Fleming as contained in their statements and a Statement of Opinion (STOP) Report, respectively. Two witnesses were led in evidence: Mrs Lorraine Anderson for the pursuers and the defender on her own account. The focus of the parties' cases on the facts, as set out in the submissions of their respective counsel, was what weight I should give certain facts and what inferences I should draw therefrom. That exercise required to be informed, however, by the view I reached in relation to the correct legal approach.

Agreed facts

[6] The following material facts were either agreed by joint minute, or accepted in evidence as not in issue.

[7] The pursuer is the landlord and the defender is the tenant of the subjects under a Scottish Secure Tenancy Agreement (SSTA), which commenced on 26 March 2010. Said

subjects comprise a terraced dwelling on two floors with front and back entrances. The living room and kitchen are located on the ground floor with a bathroom/toilet and three bedrooms on the upper level reached by an internal staircase.

[8] On or about 22 November 2017 the defender shared her residency and occupation of the subjects with her son Phil Kelly and her daughter KM. Phil Kelly had his own bedroom, which was located at the top of the internal stairs to the right of the bathroom/toilet. This can been in the photographs comprised in pursuer's productions 2/5-9. The defender's bedroom was along a short landing to the right of Phil's bedroom. KM's bedroom was next door to and shared an internal wall with the defender's bedroom. To access the toilet/bathroom or go down the stairs to the living room or kitchen the defender required to pass Phil Kelly's bedroom.

[9] At or around 14.55 on 22 November 2017 several officers of Police Scotland executed a Misuse of Drugs Act search warrant at the subjects. The officers entered through the front and unlocked rear doors of the subjects In addition to the defender and Phil Kelly a number of other persons were present in the subjects. The defender was found downstairs in the living room with another person. Phil Kelly was found in his bedroom with two other persons. Phil Kelly's bedroom door was open. There was a strong smell of cannabis emanating from the bedroom. Copious amounts of controlled substances were present in plain sight including blocks of cannabis resin on top of a chest of drawers. The full extent of what was discovered and in what location can be seen in pursuer's productions 2/10-63.

[10] The controlled substances comprised 3783g of cannabis resin, 728g of herbal cannabis, 15g of butane honey oil, 8g of cannabis wax, 919ml of cannabis oils, and around 49,000 "Diazepam" pills containing etizolam or "street valium". The estimated value

of the controlled substances recovered was £38.050. £12,602 cash was also found along with a number of mobile telephones.

[11] On 17 August 2018 at Hamilton Sheriff Court Phil Kelly was convicted of the following four charges of being concerned in the supply of a controlled drug, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971 as follows:

> 1. Between 17 November 2017 and 22 November 2017 both dates inclusive (the subjects) Bellshill you Phil Kelly were concerned in the supplying of a controlled drug, namely Cannabis resin, a Class B drug specified in part 2 of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section 4(1) of that Act.
>
> 2. Between 18 August 2015 and 22 November 2017 both dates inclusive at (the subjects) you Phil Kelly were concerned in the supplying of a controlled drug, namely Cannabis resin, a Class B drug specified in part 2 of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section 4(1) of that Act.
>
> 3. Between 17 November 2017 and 22 November 2017 both dates inclusive at (the subjects) you Phil Kelly were concerned in the supplying of a controlled drug, namely Tetrahydrocannabinol, a cannabinol derivative, a Class B drug specified in part 2 of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section 4(1) of that Act.
>
> 4. Between 29 August 2017 and 22 November 2017 both dates inclusive at (the subjects) you Phil Kelly were concerned in the supplying of a controlled drug, namely Etizolam, a Class C drug specified in part 3 of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section 4(1) of that Act.

[12] It is necessary at this juncture to point out that there is an anomaly between what is recorded in paragraph 9 of the joint minute (no. 8 of process) and sub-paragraph 2 of the foregoing paragraph. The paragraph of the joint minute refers to the period of the offence as being "between 18 August 2017 (my emphasis) and 22 November 2017". The foregoing sub-paragraph however reflects the terms of the extract conviction report (pursuer's production 8), which is agreed at paragraph 12 of the joint minute. It also reflects the terms of the indictment (pursuer's production 7) which is also agreed in the joint minute. I proceed on the basis that the terms of the extract conviction are correct and that there is a

typographical error in the joint minute. Accordingly, Phil Kelly was engaged in the supply of illegal drugs for a period in excess of 2 years before he was caught.

[13] On 23 November 2018 at Hamilton Sheriff Court Phil Kelly was sentenced to a period of imprisonment of 2 years and 3 months in cumulo in respect of all four charges.

[14] On 11 June 2019, the pursuer served a Notice of Proceedings for Recovery of Possession on the defender under and in terms of section 14 of the 2001 Act. The grounds on which the notice was served and recovery sought were the facts and circumstances of said convictions and sentence imposed on Phil Kelly. In addition, the notice referred to a contravention of the Electricity Act 1989, section 31, schedule 7, paragraph 11 in relation to the finding by the police on 22 November 2017 that the electricity meter at the subjects had been by-passed to prevent electricity costs [pursuer's production no. 6]. A copy of said notice was also served on Phil Kelly as a qualifying occupier albeit he was still serving the said sentence of imprisonment in HMP Addiewell at this point.

[15] A warrant was issued in respect of the current proceedings on 15 August 2019. The summons was served on the defender on 28 August 2019 and the defender entered appearance on 27 September 2019.

Witness evidence

Lorraine Anderson

[16] Lorraine Anderson is a locality housing manager with the pursuer. She has held that position for a number of years. She gave evidence as to her current role, areas of responsibility and the pursuer's system for housing allocation and management of housing stock. She described the subjects a three-bedroom mid-terrace property set over two levels. The subjects were located in a high demand area and were popular because of the housing

type and proximity to two local primary schools. There was a relatively significant waiting list for such properties. She was aware of the defender's history as tenant of the property. It had been allocated to her in 2010 because of her requiring moving from her former two-bedroom property because of overcrowding. The pursuer had also been the landlord of that property. Lorraine Anderson reviewed the terms of the tenancy agreement between the pursuer and the defender (pursuer's production number 3). In particular, she was referred to clause 1.7 of the agreement. She explained that that was intended to highlight to the tenant what the expected level of behaviour and conduct was in relation to the behaviour of anyone living with the tenant. Clause 2.6 contained the specific prohibition that the house must not be used for illegal or immoral purposes which included but was not limited to "dealing in controlled drugs". Part 3 of the agreement set out the requirement of proper respect for other tenants and neighbours. She explained that it was the pursuer's intention and policy to impose and enforce conditions to ensure that good law-abiding tenants were not adversely affected by other tenants or their co-occupants that were engaged in drug dealing and other anti-social behaviour. In addition to signing of the lease there was completion of a new tenant checklist/settling in visit (production number 4/1) and the commitment to the terms of a good neighbour agreement (5/1). The defender also signed both of these documents on 26 March 2010. The express purpose of the latter agreement was to reinforce the proposition that residents and tenants should consider the impact of their behaviour on their neighbours and to discourage antisocial behaviour. Lorraine Anderson confirmed that she had received an antisocial behaviour report from police Scotland dated 30 November 2018 (pursuer's production 9) on the defender and Phil Kelly. This was a week after Phil Kelly's said conviction on 23 November 2018. Appendix A of that report referred to an incident on 25 September 2018 when an anonymous call had alleged a strong

smell of cannabis coming from the property. Although police attended, there was no smell on their arrival. Appendix C of that report set out the details of the police search and the subsequent conviction of Phil Kelly. This was the first time that Lorraine Anderson had become personally aware of this matter. She instructed that an investigation be carried out and a dossier be put together containing all background information in order to allow a decision to be taken as to whether a court action should be raised for recovery of possession of the subjects and removing of the defender. As part of that investigation the defender had been interviewed twice and Phil Kelly once. The defender had said that while she was aware that her son smoked cannabis and that she allowed him to do so she said she was unaware of any drug dealing or tampering with the electricity meter. That investigation also disclosed that the defender had health issues but none that affected her capacity. The defender was a functioning member of society capable of performing the terms of her tenancy. Lorraine Anderson then explained the process by which a decision was made to raise the present proceedings. She explained that every case was looked at on its own individual circumstances and potential outcomes were discussed and reviewed. Thus for example if the only issue had been one of a smell of cannabis coming from the property because of personal use then possibly a warning may have been issued. But in the present case the amount of the drugs, the period over which the offences took place and the other surrounding circumstances in left no reasonable doubt that what was involved here was the commercial supply of cannabis and other drugs. The subjects were being used for the storage of those drugs. This constituted a clear breach of the tenancy agreement. The defender was living there so she had to be aware of what was happening. Taken all the circumstances into account, the breach of a fundamental term of the lease, the good tenancy agreement, the needs and expectations of the local community of other tenants and

residents, then a decision was taken to proceed to raise a court action for recovery of possession. Lorraine Anderson accepted that there was somewhat of a delay between the original offending and the present day but considered that the pursuer had acted appropriately in terms of the timeline. She considered that began from the date of the conviction rather than the offending. That was at the end of November 2018 at which time she also received the police report. The pursuer had not rushed to judgement but had carried out an investigation and weighed up all the relevant considerations before deciding to raise court proceedings. Some aspects of the subsequent delay were outside the pursuer's control in particular the devolution issues raised in the court action (which were not insisted upon) and the effect of the COVID pandemic on court timetabling. She accepted that the defender would be adversely affected by a court order but she would be entitled to emergency accommodation as a homeless person. The assistance to which she may be entitled to, however, might be restricted if it was determined that the defender's acts and omissions giving rise to the grounds of recovery also constituted intentional homelessness. This was not a matter on which Lorraine Anderson would make a decision, as this would be the responsibility of another team within the pursuer's organisation. The pursuer's view was that the defender required to accept responsibility for such an outcome. She was aware of the obligations on her as tenant. This was her third tenancy with the pursuer and she was well familiar with the terms of the lease. There was no issue or concern that the defender did not know the difference between right or wrong. At the very least, she knew her son took drugs but it was also reasonable to infer that she was aware of his wider drug dealing conduct.

[17] In cross-examination, it was suggested to Lorraine Anderson that she did not know whether the defender knew or allowed her son, Phil Kelly to deal drugs and that her

judgement or ability to police what was going on may have been affected by the medication that she was taken. Lorraine Anderson maintained that it was a reasonable inference in all the circumstances that the defender was aware of what was going on. She disagreed that no useful purpose was served by evicting the defender. There was a cogent need to deliver a robust message to existing tenants and the wider community that such conduct would not be tolerated. The pursuer took drug dealing issues very seriously and wanted to be seen by their tenants as doing so. The pursuer was determined to ensure that tenancy agreements were complied with in particular in relation to the prohibition against antisocial behaviour. While Lorraine Anderson was not unsympathetic to the health issues that the defender had these health issues had apparently existed for a number of years including the periods covered by her two prior tenancies. Lorraine Anderson did not consider it a credible position for the pursuer simply to ignore the fact that there had been a conviction for drug dealing by an occupant of the subjects during the defender's tenancy nor the substantial quantity of drugs found in the subjects. She was robust in her view that the defender had responsibility for whatever went on in the subjects not just for other occupants such as her son but also indeed for any visitor.

[18] I had little difficulty in accepting Lorraine Anderson as a credible and reliable witness. I fully accepted her evidence as to the basis upon which the pursuer had decided to raise the present proceedings in vindication of its rights and responsibilities as a landlord of social housing. I also accepted her evidence that there had been full and careful consideration of all the other relevant circumstances before that decision was progressed.

Defender

[19] The defender is 45 years of age. She confirmed the layout of the subjects. She explained that on 22 November 2017 she had been downstairs in the living room with her friend Gary Ritchie when the police attended. She had been having a cigarette. She only smoked in the living room. She had stopped smoking in her bedroom due to prior incidents whereby she had fallen asleep with lit cigarettes. Her son and daughter asked her not to smoke in bed but to go downstairs to the living room when she wanted cigarettes. She maintained that in November 2017, except when she went downstairs to smoke a cigarette, she spent most of her time in her bedroom. That was because she was drowsy because of the medication that she took and struggled to get out of bed. She said that she was not fully conscious of what she was doing. She only had a vague recollection of the events on 22 November 2017 and the aftermath. She recalls being taken away by the police and spending three days in the police station before being taken to court. Although she was also initially charged with certain offences under the Misuse of Drugs Act, her not guilty plea had been accepted. She maintained throughout her evidence that she did not know that there were any drugs within the subjects. She did not know that her son was involved in the supply of drugs. She said that she did not enter his bedroom and that he had put a lock on his bedroom door. If she wanted to speak to Phil, she would have to knock on his bedroom door. There was one occasion when she had smelled cannabis coming from his bedroom. She had knocked on his bedroom door and told him that he would have to go outside to smoke cannabis because she disapproved of drug taking. Her son had been released from prison in January 2020 and is now residing with his girlfriend in a council property in Holytown. Her daughter continues to reside with her and continues to act as her carer. The defender explained that she has suffered with mental health problems for many years and

said that she had been diagnosed as having a mentally unstable personality disorder. She suffered from hallucinations, low self-esteem, depression, anxiety and also asthma and spondylitis. Her mental health problems stemmed from traumatic events when she was relatively young. She had suffered bouts of suicidal ideation and had attempted suicide in the past. She said she had not been out of her the house except for appointments for 4 years and even then required to be accompanied. She did not say when this four year period was but I took it to be around the time of the events in November 2017. Now, she was able to go out of her house again but would not go out by herself and would be accompanied by her daughter. She could not go out on her own as the outside world scared her.

[20] Mr Byrne briefly took the defender to certain entries in her psychiatric records (defender's production number 6/1/1 of process) in particular to pages 1, 21, 24, 26, 39 and 65. Those entries spanned the period between June 2013 and July 2021 (in reverse order). While those entries did bear to confirm a diagnosis of emotionally unstable personality disorder and the prescription of certain medications it is noteworthy that there is a relatively significant gap between February 2017 and February 2018. Accordingly, there is no entry in the records, which would assist in forming a view as to the defenders condition at the time of the drug offences in November 2017. That said the records do indicate that the defender was fit and able enough to go on a trip to Benidorm in October 2017 (refer 6/1/1/21 - 26). Further, she was able to attend a psychiatric clinic appointment by herself alone on 6 February 2018 (61/1/24). At that time she was assessed as having considerably improved in her mental health. Although the defender was subsequently admitted to hospital in respect of a suicide attempt on 10 February 2018 this appears to have attributed to her having been under the influence of alcohol. On further assessment at that time it was noted *inter alia* that there was "no evidence of mental illness, nor was there any

psychiatric symptoms impacting on this lady's decision making abilities." It is perhaps also of some significance in terms of general credibility that that record notes the defender as advising that "cocaine was previously problematic for her but she has not used the same for 3 months". That tends to time the cessation of her cocaine use to around the same time as the police executed the search warrant in November 2017. In my view it is also redolent of a relaxed approach to the use of illegal drugs and somewhat undermines her evidence of disapproving of her son smoking cannabis in the house.

[21] In cross-examination, the defender maintained that she did not know that her son had drugs on the property though she confirmed that she knew what cannabis smelled like. She also maintained that although the door to her son's bedroom was open when the police attended with their search warrant she says that it was closed whenever she passed.

[22] I sought to clarify with the defender typically how many cigarettes she would smoke at a time when she went downstairs to the living room. She indicated between one and three cigarettes. I also asked how many cigarettes she smoked a day at that time under reference to the entries in her medical records in both February 2017 again in 2021 that she "continues to smoke 30 cigarettes a day". She said that as at November 2017 she had reduced her habit to around 10-12 cigarettes a day but had recently begun to smoke more heavily again.

[23] It is appropriate to note that it was not the defender's position that she was helpless to prevent her son carrying on his drug dealing activities through either fear or her dependency on him as her carer. Her adamant position was that she simply did not know that he son was storing and dealing in significant quantities of drugs.

[24] I did not regard the defender as a credible and reliable witness. In the circumstances, I consider it inconceivable that she was not aware of her son's activities. This is not a large

house. The defender would have had to pass her son's bedroom every time that she used the toilet, went down to the kitchen to get some food or to go to her living room to smoke cigarettes. The police reported a strong smell of cannabis when they were executing the warrant and the defender was aware of what cannabis smelled like. I also regard it to be within judicial knowledge that a significant quantity of cannabis such as was involved here would likely to give off a pungent smell especially if out in the open, as was the case. Having regard to the terms of the defender's medical records, in particular the reference to her trip to Benidorm shortly before the events of November 2017 and her presentation at the clinic shortly thereafter in February 2018, I do not accept her account that she was simply unaware of what was going on because of her mental health problems and the drugs she was taking therefor. As Mr Anderson observed in his submissions there was no opinion evidence offered from a suitably qualified person to support what the defender claimed to be her cognisance of lack thereof of what was happening in close proximity to her in her home.

Submissions

[25] I am grateful to counsel for both parties for their erudite written and oral submissions. I do not propose to rehearse them in detail.

Pursuer

[26] Mr Anderson's principal submission was that the pursuer had a qualifying ground for recovery in terms of the "streamlined procedure" contained in section 16(2)(aa) taken with paragraph 2 of schedule 2 of the 2001 Act. He 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 her home under article 8 ECHR. He contended that it was. Alternatively, it was nonetheless reasonable to make an order for recovery under 16(2)(a).

[27] Dealing first with application of the streamlined procedure Mr Anderson submitted that the general presumption against legislation having a retrospective effect (*L'Office Cherifien Des Phosphates* v. *Yamashita-Shinnon Steamship Co Ltd* 1994 1 AC 486, Lord Mustill at 524 – 525) did not arise in this case. The introduction of section 16(2)(aa) of the 2001 Act in May 2019 did not change the legal character of Phil Kelly's prior offending and subsequent conviction, which gave rise to a statutory ground for recovery of possession. That legal character had not been altered from the date on which the offences took place, to date. The principle behind the presumption against retrospectivity is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner, which is unfair (*Secretary of State for Social Security* v *Tunnicliffe* [1991] 2 All E.R 712, per Staughton LJ). The defender's argument that unfairness arose because it removed the threshold of reasonableness, which would require to be crossed before a recovery of possession order could be made, was flawed. There could be no unfairness where what was in issue was the same criminal conduct. It could not be said that the defender had arranged her affairs on the basis that that criminal conduct gave her some protection that was subsequently removed. There being no unfairness, no question of impermissible retrospectivity can arise (*Motroni* v *PF Kilmarnock* [2022] HCJAC 7 (per Lord Matthews at [8] to [10]).

[28] Mr Anderson submitted that an order for recovery of possession was proportionate having regard to the terms of the defender's rights under Article 8 of the ECHR. Reference was made to *Manchester City Council* v *Pinnock* [2011] 2 A.C 104 at paragraphs 51 to 54;

Main v *Scottish Ministers* 2015 S.C 639 (per Lord Justice Clerk (Carloway) at [35]-[36] and Lord Drummond-Young at [42]- [49]); *Bank Mellat* v *HM Treasury* (No2) [2014] AC 700 per *Lord Reid Thurrock BC* v *West* [2013] H.L.R 5; *Southend-on-Sea BC* v *Armour* [2014] H.L.R 23; *Glasgow City Council* v *Jaconelli* 2011 Hous L.R 17; and *River Clyde Homes* v *Woods* unreported, Sheriff CG McKay, Greenock Sheriff Court, September 2015. The pursuer's legitimate important objectives in the present case justified interference with the defender's protected rights.

[29] In the alternative if recovery was not warranted under section 16(2)(aa) of the 2001 Act it was nonetheless reasonable in the whole circumstances of the case in terms of section 16(2). Reference was made to *East Lothian Council* v *Duffy* 2012 S.L.T (Sh. Ct.) 113 (at paragraph [72]); *Bristol City Council* v *Mousah* (1998) 30 H.L.R 32; *South Lanarkshire Council* v *Nugent* 2008 Hous L.R 92 (at paragraph [39]); and *Glasgow City Council* v *Lockhart* 1997 Hous L.R 99.

[30] Mr Anderson suggested that except perhaps for a shift in onus there was little difference between a defence based on proportionality and a defence based on reasonableness.

Defender

[31] Mr Byrne for defender invited me to refuse the order for recovery of possession on the basis that it would not be lawful: (a) under section 16(2)(aa) either on the basis that said provision did not have retrospective effect and in any event would constitute a disproportionate interference with the defender's home in terms of Article 8 ECHR; and (b) under s16 (2)(a) as the defender's eviction would not be "reasonable".

[32] In relation to the argument based on retroactivity counsel submitted that as the date of the offences founded upon had been committed prior to section 16(2)(aa) coming into force (on 1 May 2019), the subsequent effect of that "criminality" could not conceivably been foreseen. Reference was made to the well know principle of statutory construction and the general presumption against retrospectivity save in relation to procedural matters. It was submitted that the introduction of section 16(2)(aa) altered the rights and duties of tenants and landlords under the tenancy. Reference was made to *Stephen Motroni* v *PF Kilmarnock* [2022] HCJAC 7 (at paragraphs 8-11); *AXA General Insurance Ltd* v *HMA* 2011 UKSC 46 2012 1 AC 868 (per Lord Reed at paragraph 120); and *Wilson* v *First County Trust Ltd* (No 2) [2004] 1 AC 186 (per Lord Rodger at paragraph 188 et seq); *KP and MRK* v *The Secretary of State for the Home Department* [2012] CSIH 38; and Craies on Legislation (12th Edition) (paragraphs 10.3.1, 10.3.4-9,10.3.13-14 and 10.3.16) . The question was one of fairness. It was contended that a retrospective application of section 16(2)(aa) retroactively would be so unfair to the defender that the Scottish Parliament could not have intended for it to be applied in this way as she could not have foreseen that her son's offences could have led to her eviction.

[33] Alternatively if was permissible to apply section 16(2) (aa), the defender's eviction would violate her Article 8 ECHR rights. Reference was made to *Gallagher* v *Castle Vale Trust Ltd* 2001 33 HLR 810 (at 30, 46, 48); *Manchester City Council* v *Pinnock* 2010 UKSC 45 (55 to 64); *Buckland* v *United Kingdom*, no 40060/8 (judgement of 18 September 2012); *Mayor and Burgessess of the London Borough of Hounslow* v *Powell* [2011] UKSC 8; and *South End on Sea* v *Armour* [2014] EWCA Civ 231(at 30). Separately, the proposed justification for the interference is the prevention of disorder and crime. The defender did not commit any such crime and her eviction is not rationally connected to that legitimate aim: *R (T)* v *Chief*

Constable of Greater Manchester Police [2015] AC 49 (per Lord Reed at 141). It was further contended that even if eviction would be proportionate under Article 8, it would constitute unlawful discrimination under section 15 and 35 of the Equality Act 2010: *Akerman-Livingstone* v *Aster Communities Limited* [2015] UKSC 15. In addition, it was argued for the defender that the retrospectivity of the provision made it arbitrary and unforeseeable and consequently was deprived of the quality of law required by Article 8. Reference was made to *Margareta and Roger Andersson* v *Sweden* (1992) 14 EHRR 615 (at §89) and *R (Gillian)* v *Commissioner of Police for the Metropolis* [2006] 2 AC 307 (346E to F).

[34] Consideration of the issue of reasonableness under section 16(2)(a) was unlikely in practice to produce a divergent outcome from an assessment of proportionality as it was an intrinsically practical exercise which invokes the judge's discretion; *Pinnock, supra* (at paragraph 56).

Discussion

Is the pursuer entitled to an order under Section 16(2) (aa)?

[35] The defender's argument in relation to the section being struck at by the general presumption against retroactivity appears to be a novel one. I was not referred to any other Scottish authority in which the point has been considered. In terms of the general proposition both parties were agreed that the position was pithily summarised by the High Court of Justiciary in the appeal of *Motroni* v *PF Kilmarnock* [2022] HCJAC 7 at paragraphs [8]-[10] per Lord Matthews delivering the Opinion of the Court:

> "[8] Canons of statutory construction are tools which may assist a court to ascertain the intention of Parliament. That is the task which faces this court. If the amendment was intended by Parliament to be retrospective, then the sheriff had jurisdiction. If not, then the opposite is true. A statute should not be interpreted as applying retrospectively if it will affect an existing right or obligation unless that is

unavoidable on a plain construction of the language. There is an exception in the case of provisions which are purely procedural, because no person has a vested right in any particular procedure. In this respect the court agrees with Lord Brightman in *Yew Bon Tew* v *Kenderaan Bas Maria* [1983] 1 AC 553 (at 558). However, the words "retrospective" and "procedural" can be misleading. The court should proceed on the basis that, as a generality, a statute is not intended to have retrospective effect. However, care has to be taken when applying such a presumption. The basis of the rule is fairness. Changing the character of a person's acts or omissions after the event is often regarded as unfair. It is assumed that Parliament seldom wishes to act unfairly. The court agrees with the sentiments to this effect expressed by Lord Mustill in *L'Office Cherifien* (at 524-525) citing *Secretary of State for Social Security* v *Tunnicliffe* [1991] 2 All ER 712, Staughton LJ at 724.

[9] How the question of fairness will be answered in relation to a particular provision will depend on several factors. The degree of likelihood that retrospectivity is what Parliament intended will vary from case to case as will the clarity of the language used and the light shed on it by the context in which the provision was enacted. In *L' Office Cherifien* , having explained (at 527) that a rigid application of the distinction between substantive and procedural rights could be misleading, Lord Mustill recommended an approach which, whilst keeping the distinction in view, looked at:

'the practical value and nature of the rights… involved as a step towards an assessment of the unfairness of taking them away after the event.'

[10] Lord Mustill did not suggest that the distinction between procedural and substantive provisions should be abandoned. The extent to which that distinction is helpful, however, will depend on the nature of any rights which have been accrued and the nature of any interference with them. As was said, the ultimate question is one of fairness. Parliament is not to be presumed as intending to act unfairly, but if that is the intention of an Act of Parliament, then effect must be given to it. Of particular importance, is Lord Mustill's reference to the clarity of the language used by Parliament and the light shed on it by consideration of the circumstances in which the legislation was enacted."

[36] From the foregoing, I take the concept of fairness in relation to accrued rights as being the touchstone together with the language of the statutory provision. I do not consider that the introduction of the "streamline procedure" under and in terms of section 16(2)(aa) on 1 May 2018 trespassed on or interfered with any accrued rights that the defender had at that date. I agree with counsel for the pursuer that it is a flawed proposition to characterise the criminal conduct of Phil Kelly prior to that date as an accrued right held by the defender. That provision strikes at convictions not conduct. The conviction in

consequence Phil Kelly's conduct was in August 2018 subsequent to the provision coming into force. To re-purpose an old legal metaphor the presumption against retrospectivity should be considered as a shield not a sword. The defender's argument tends to subvert that proposition and accordingly I reject it.

Does an order for recovery under section 16(2)(aa) constitute a disproportionate interference with the defender's rights under Article 8 of the ECHR?

[37] There was no issue that the defender's rights under Article 8 were engaged. 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."

[38] Similarly counsel for both parties agreed that the correct approach to consideration of this question was set out by the *Supreme Court in Manchester City Council* v *Pinnock* [2011] 2AC 104, albeit that case dealt with English housing legislation rather than the 2001 Act. Lord Neuberger of Abbotsbury MR delivering the judgment of the court stated the following at paragraphs [49]-[54]:

> "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…
>
> 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… to require the local authority routinely, from the outset, to plead and prove that the possession order sought is justified would, in the overwhelming majority of cases, be burdensome and futile. In other words, 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."

[39] Both parties were agreed on the approach that a court required to take when asked to make an order for repossession. The assessment of proportionality required a determination of whether that outcome 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. In many cases, such as the present, that may involve the need to resolve relevant factual disputes.

[40] In this case, I am satisfied that the pursuer is pursuing the legitimate twin objectives of vindication of its property rights and management and allocation of its housing stock. As part of that management exercise it is in my view reasonable and appropriate to consider the

need to protect other tenants and the community from the corrosive and destructive effects of drug dealing, as spoken to in evidence by Lorraine Anderson. That involves consideration of how such conduct might be deterred. The pursuit of those objectives in the present case are clearly causally connected to the criminal conduct and convictions of Phil Kelly. I am satisfied that there was no less intrusive measure available. As Lorraine Anderson said if the complaint had been one of the personal consumption of cannabis then a warning might have been appropriate. The present case however involved serious drug offences. The nature, scale and duration of those offences, which in terms of the libel and conviction extended back to 2015, place a significant weight on the scales of proportionality favouring granting the order for repossession.

[41] There is no dispute that an order for recovery of possession will have a severe effect on the defender. She will lose the home she has enjoyed for the last 12 years, and which she presently shares with her daughter and carer Kelly Marie. She will be entitled to temporary alternative accommodation as a homeless person albeit there is a risk that she may be determined to be intentionally homeless which will affect her ongoing entitlement to local authority housing.

[42] In assessing proportionality in this case, I have accepted what was said at paragraph 64 of *Pinnock* that "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." While I am prepared to accept a degree of vulnerability on the part of the defender, I certainly do not have a particularly clear picture as to how significant that vulnerability is, or was, in the absence of any relevant independent medical evidence. Similarly, I am quite unclear as to what the effect on her was of the medication she was taking from time to time. As I have already indicated I do not accept that at the time of the

police investigation in November 2017, she was as mentally incapacitated as she sought to make out in evidence. I agree with counsel for the pursuer that it is odd that if the defender intended to rely on this aspect, as she appears to do, that it rested on her own somewhat vague description of her condition support by a cursory reference to certain medical records. It would have been of considerably greater assistance to have a full and proper report from an appropriate medical expert or at the very least a report from the defender's general practitioner.

[43] Further and as previously discussed, the issue of the defender's historic medical condition was also put forward in support of the contention that she was unaware of her son's drug dealing. As I have indicated I did not accept the defender's evidence in this respect but in any event this submission appeared to miss the point that in terms of paragraph 2 of schedule 2 of the 2001 Act there is no requirement that the defender has to specifically allow the house to be used for immoral or illegal purposes or for an offence punishable by imprisonment. All that is required that is that person residing or lodging in the house with the tenant has been convicted of such use or offence.

[44] There is also, in my view, something of a dichotomy in the argument advanced for the defender. On one hand, she claimed that she did not know anything about her son's drug dealing activities and on the other that she was unable to exercise control over him. I take the view that I do not require to consider the latter alternative as that was not her position in evidence. The defender was quite clear that she was unaware of her son's activities. She did not say anything to permit the inference that she was aware of what he was doing but that she was powerless to prevent it. Accordingly in forming the view as I have on the evidence, that I did not accept that the defender was telling the truth that she

was unaware of her son's activities, it is a reasonable inference that those activities were carried out with her knowledge and consent rather than somehow against her will.

[45] Counsel for the defender suggested that I should find the English Court of Appeal case of *Gallagher, supra* as highly instructive as to when eviction becomes disproportionate. With respect, I disagree. The conduct in that case, while offensive, involved significantly less criminality. Further, although the appeal against the judge at first instance (the Recorder) was successful it was substantially in relation to the disposal. It was not determined that there should not be an order for repossession but rather that that order should be suspended for two years. Both counsel agreed that while that outcome was available under English law and procedure it was not an option open to me in the current proceedings. For completeness, I should also indicate that I consider that the other Court of Appeal judgment in *South End-on-Sea* v *Armour*, founded on by counsel for the defender, to be readily distinguishable from the present case. The conduct of the tenant in that case was of quite a different character to the serious criminal offences committed here. In addition, the nature of the tenancy ("introductory tenancy") and statutory provisions in relation thereto, under consideration in that case are not comparable to the terms of a SSTA.

If section 16(2)(aa) does not apply is the order for repossession reasonable in terms of section 16(2)?

[46] Both counsel accepted that the observation made at paragraph [56] in Pinnock was applicable as to how this court should consider the issue of reasonableness:

> "… reasonableness involves the trial judge 'tak[ing] into account all the relevant circumstances … in … a broad common-sense way': *Cumming* v *Danson* [1942] 2 All ER 653, 655, per Lord Greene MR. 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."

[47] Accordingly for the same reasons that I have determined that the order for repossession does not involve a disproportionate violation of the defender's rights under Article 8 I consider the making of such an order under section 16(2) to be reasonable. However, if I have erred in relation to the argument advanced on retrospectivity it is appropriate that I separately address this issue.

[48] The question of reasonableness requires to be determined by reference to the non-exhaustive list of factors set out in s.16 (3) of the 2001 Act. Those are: (a) the nature, frequency and duration of the conduct; (b) the extent to which that conduct is or was conduct of, or a consequence of acts or omissions of, persons other than the tenant; (c) the effect which that conduct has had, is having and is likely to have on any person other than the tenant and; (d) any action taken by the landlord, before raising the proceedings, with a view to securing the cessation of that conduct.

[49] In the present case, I consider that the foregoing considerations favour the grant of the repossession order. The nature of the conduct in question is serious drugs offending involving significant quantities of drugs and extending back to 2015. The "STOP" report suggested that the level of drugs and other material recovered under the warrant was indicative of an ongoing operation. Although the defender was not convicted of any offences I have found that she was not being truthful when she claimed that she was unaware of her son's conduct. As I have indicated, I consider it appropriate to draw certain inferences from the fact that she was being untruthful. Drug dealing has corrosive and anti-social consequences for the communities in which it takes place. Lorraine Anderson gave evidence of that but in addition; I also consider it a matter that is within judicial knowledge. Drug dealing is an inherently clandestine activity and there is nothing that the

pursuer might have done to secure the cessation of that conduct prior to it being discovered. Although there was no evidence of complaints by neighbouring tenants as to the drug dealing taking place, it is clear, in my view, that the conduct of Phil Kelly is likely to have a serious detrimental effect upon neighbouring residents. It is in the public interest that drug dealing is dealt with firmly.

[50] In addition I have had regard to the additional relevant matters accepted by Sheriff Principal Lockhart in the case of *South Lanarkshire Council* v *Nugent* at para [39] as relevant considerations in determining reasonableness in the context of an order for repossession being sought based on drug offending:

> "i Public Interest. In this case there was a substantial public interest that this good amenity mixed residential area should not be subjected to drug related conduct.
>
> ii Whether the defender and appellant knew the consequences of his actions — there is no doubt on that issue.
>
> iii The gravity of the offence. In my opinion this was a very serious matter indeed which could have had serious repercussions for the area. The sums involved and the quantity of drugs involved were substantial.
>
> iv Consequences of removal. These are no doubt material as far as the defender and appellant is concerned, but that is something which he might have applied his mind to before embarking on a course of criminal conduct during a period of over three months. The pursuers and respondents' policy regarding drug misuse was clearly explained to him when he took up the tenancy."

[51] In my view the foregoing observations by Sheriff Principal Lockhart against each of the enumerated factors identified by him could apply equally to the defender in the present case, save of course the adjustment required to the last factor to reflect that she permitted the conduct to take place rather directing it personally.

Conclusion

[52] Taking account of the foregoing, in my judgment it is reasonable to grant decree in favour of the pursuer. I have carefully considered the evidence and have taken account of all of the circumstances affecting the interests of both parties. I have taken account of the possible hardship which may befall the defender and the interests of the public. I have been persuaded that it is appropriate to grant the pursuer the remedy sought.