SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2025] SC GLA 2

GLW-SD33-22

JUDGMENT OF SHERIFF S REID

in the cause

WHEATLEY HOMES GLASGOW LIMITED

Pursuer

against

YASMIN ABDI SHARIF

Defender

Pursuer: Mr D.D. Anderson, Advocate; Wheatley Group Litigation Services, Glasgow
Defender: Mr K.T. Young, Advocate; Shelter Housing Law Service, Edinburgh

Glasgow 22 January 2025

The sheriff, having resumed consideration of the cause, Makes the following FINDINGS-IN-FACT:

(1) The pursuer is the landlord, and the defender is the tenant, of the residential property known as Flat 18/2, 12 Dobbies Loan Place, Glasgow, G4 0BL ("the Subjects").

(2) The defender occupies the Subjects in terms of a Scottish secure tenancy.

(3) Her tenancy commenced on 28 November 2003.

(4) The defender resides at the Subjects with her two daughters, Lila Hassan (aged 18) and Asha Hassan (aged 21).

(5) The defender was born in Somalia, she lived in a succession of refugee camps due to dislocation caused by civil war there, and she came to London in 2001.

(6) For many years (including during the period from 2017 to 2021), the defender has suffered, and continues to suffer, from a severe and enduring mental illness formally categorised as Unspecified Psychotic Disorder, at times diagnosed as possibly being paranoid schizophrenia; it is a significant mental impairment; it is a life-long condition; it affects her ability to carry out day-to-day activities; when medicated she is exhausted and stays in her home; when not properly medicated, she loses her ability to distinguish delusion from reality.

(7) Between 28 November 2003 and August 2017, the defender resided in the Subjects without any reported breach of her secure tenancy agreement, or any reported incident or third party complaint of anti-social behaviour or criminal conduct.

(8) In around July 2017, the defender stopped taking her prescribed anti-psychotic medication and disengaged from psychiatric support services.

(9) Between August 2017 and July 2021, the pursuer received various complaints regarding the defender's behaviour at, or in the locality of, the Subjects.

(10) On 23 August 2017 at the pursuer's housing office at 40 Charles Street, Glasgow, in the vicinity of the Subjects, the defender behaved in a threatening or abusive manner in that she shouted, swore, uttered threats and behaved in an abusive manner, contrary to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act"); she was convicted of this offence on 26 November 2018; she was ordered to pay a fine of £150; and item 2 in the pursuer's first inventory of productions is a true copy of the extract conviction pertaining thereto.

(11) On 24 August 2018 at 12 Dobbies Loan Place, Glasgow, in the vicinity of the Subjects, the defender assaulted an individual by repeatedly attempting to strike him with a piece of wood; she was convicted of this offence on 27 February 2019; she was admonished; and

item 4 in the pursuer's first inventory is a true copy of the extract conviction pertaining thereto.

(12) On 5 November 2018 at the pursuer's premises at Charles Street, Glasgow, in the vicinity of the Subjects, the defender behaved in a threatening or abusive manner, in that she shouted, swore, uttered threats of violence and acted in an aggressive manner, contrary to section 38(1) of the 2010 Act, all while subject to an extant bail order dated 19 September 2018; she was convicted of this aggravated offence on 22 November 2019; she was admonished; and item 5 in the pursuer's first inventory is a true copy of the extract conviction pertaining thereto.

(13) On 25 April 2019 an interim anti-social behaviour order ("ASBO") was granted by the sheriff at Glasgow against the defender in civil summary application proceedings at the instance of the pursuer, in terms of the Antisocial Behaviour etc., (Scotland) Act 2004, section 9(1); the interim ASBO was initially time-limited, but subsequently became indefinite in duration; it remains in force; in its terms, it prohibits the defender from (i) shouting, swearing or otherwise causing noise within the Subjects or within the vicinity thereof at such a level as to cause alarm, distress, nuisance or annoyance to neighbouring residents going about their lawful business there; (ii) approaching or entering the pursuer's offices or otherwise contacting the pursuer's staff at 40 Charles Street, Glasgow, the concierge station at 2 Taylor Place, Glasgow, or any other office of the pursuer; and (iii) from engaging in threatening, abusive or aggressive behaviour towards any members of the pursuer's staff or contractors, or visitors to neighbouring residences, or persons going about their lawful business there or in the vicinity.

(14) On 19 July 2019 at 2 Taylor Place, Townhead, Glasgow, in the vicinity of the Subjects, the defender behaved in a threatening or abusive manner in that she shouted and swore

while holding a brick, contrary to section 38(1) of the 2010 Act; on 23 July 2019 at St Mungo Place, Glasgow, in the vicinity of the Subjects, the defender assaulted an individual and seized hold of her hair, struck her on the body with a stick, and struck her on the body with her hand, all while subject to the interim ASBO dated 25 April 2019; on 23 July 2019 at St Mungo Place, Glasgow, in the vicinity of the subjects, the defender assaulted an individual and threw a bottle at him causing the bottle to strike him on the head, while the defender was subject to the interim ASBO; on 18 August 2020 at St Mungo's Primary School, Glasgow, in the vicinity of the subjects, the defender had with her, without reasonable excuse or lawful authority, an offensive weapon, namely a hammer, contrary to section 47(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 ("the 1995 Act"), while the defender was subject to the interim ASBO; and on 18 August 2020 at St Mungo's Primary School, Glasgow, within the vicinity of the subjects, the defender behaved in a threatening or abusive manner in that she struck railings with a hammer, shouted and swore, contrary to section 38 of the 2010 Act, while the defender was subject to the interim ASBO; she was convicted of these offences on 24 May 2021; she was made subject to a community payback order (with an offender supervision requirement for a period of 3 years) and a restriction of liberty order for a period of 270 days; and item 6 in the pursuer's first inventory is a true copy of the extract conviction pertaining thereto.

(15) On 1 April 2021, outside Flat 16/2, 12 Dobbies Loan Place, Glasgow, in the vicinity of the Subjects, the defender behaved in a threatening or abusive manner in that she shouted and repeatedly uttered threats of violence towards an individual, contrary to section 38(1) of the 2010 Act, while the defender was subject to a separate bail order dated 19 August 2020; on 1 April 2021, at the common parts outside Flat 16/2, 12 Dobbies Loan Place, Glasgow, in the vicinity of the Subjects, the defender had with her, without reasonable excuse or lawful

authority, an offensive weapon, namely a piece of wood with nails or similar items protruding from it, contrary to section 47(1) of the 1995 Act, while she was subject to an extant bail order dated 19 August 2020; she was convicted of these offences on 29 March 2021; she was made subject to a community payback order (with an offender supervision requirement for a period of one year) and a restriction of liberty order for 10 weeks; and item 14 in the pursuer's third inventory is a true copy of the extract conviction pertaining thereto.

(16) On 25 July 2021 at the ground floor of 12 Dobbies Loan Place, Glasgow, in the vicinity of the Subjects, the defender behaved in a threatening or abusive manner in that she acted in an aggressive manner towards an 86 year old couple, she lunged towards them, and she repeatedly shouted and swore, contrary to section 38 of the 2010 Act, all while she was subject to an extant bail order dated 3 April 2021; on 25 July 2021 the defender breached a special condition of a bail order dated 3 April 2021 by approaching and contacting the same couple, contrary to section 27(1)(b) of the Criminal Procedure (Scotland) Act 1995; she was convicted of these offences on 25 August 2021; she was admonished; and item 10 in the pursuer's first inventory is a true copy of the extract conviction pertaining thereto.

(17) On 23 November 2020 at Dobbies Loan Place, Glasgow, in the vicinity of the subjects, the defender behaved in a threatening and abusive manner in that she uttered threats of violence to an individual, repeatedly struck railings with a metal pipe or similar object, and behaved in an aggressive manner, contrary to section 38(1) of the 2010 Act, all while she was subject to an extant bail order dated 19 August 2020; further, the offence was racially aggravated; she was convicted of the offence on 15 November 2022; she was admonished; and item 24 of the pursuer's sixth inventory is a true copy of the extract conviction pertaining thereto.

(18) On 16 August 2020 at 2 Taylor Place, Glasgow, in the vicinity of the Subjects, the defender behaved in a threatening or abusive manner in that she shouted, swore, acted in an aggressive manner, repeatedly banged on the Perspex screen of the concierge station and place employees there in a state of fear and alarm, contrary to section 38(1) of the 2010 Act, all while the defender was subject to the interim ASBO; she was convicted of the offence on 5 August 2022; she was made subject to a community payback order (with an offender supervision requirement for a period of 6 months); and item 25 in the pursuer's seventh inventory is a true copy of the extract conviction pertaining thereto.

(19) Item 16 in the pursuer's fifth inventory comprises a series of incident report forms compiled by the pursuer's staff; these forms contain contemporaneous records of reports received by the pursuer's staff concerning anti-social behaviour by the defender during the period between August 2017 and July 2021; some of the behaviour recorded therein resulted in criminal prosecution and the convictions detailed above, and some did not result in prosecution or conviction; but, in any event, the behaviour recorded therein did occur during the period in the manner described in the said incident report forms.

(20) In October 2021, the defender re-engaged with psychiatric support services.

(21) On 26 November 2021, the pursuer served upon the defender a notice of proceedings for recovery of possession of the Subjects, of which item 11 in the pursuer's first inventory is a true copy.

(22) In December 2021, the defender was admitted to Stobhill Hospital for a period of 10 days for psychiatric intervention due to a diagnosed relapse into psychosis.

(23) During this period of hospital admission in December 2021, the defender's anti-psychotic medication was reviewed and changed.

(24) Since December 2021, the defender has been receiving regular psychiatric treatment and an adjusted prescribed anti-psychotic medication; the defender has been, and remains, compliant with this adjusted prescribed medication; she has diligently attended monthly psychiatric appointments to monitor her mental health; the defender's recovery from her diagnosed relapse in psychosis has been significant and remarkable; and the medical prognosis for the defender's recovery is good.

(25) Since July 2021, there have been no further incidents of anti-social behaviour or criminal conduct by the defender in, or in the vicinity of, the Subjects.

(26) Since December 2021, there have been no further episodes of florid psychotic relapse suffered by the defender.

(27) The defender's anticipated future engagement with her ongoing psychiatric treatment, and anticipated compliance with her adjusted prescribed medication, is reliably assessed as being good.

(28) The defender's risk of criminal offending is reliably assessed as being low.

(29) The foregoing anti-social and criminal conduct by the defender was directly attributable to a significant deterioration in her mental health (comprising episodes of florid psychosis, auditory hallucination, and delusional beliefs in respect of her neighbours); that conduct was directly referable to her diagnosed, life-long mental disability; and it coincided with a period of non-compliance by the defender with her prescribed antic-psychotic medication and non-engagement with psychiatric support services between around July 2017 and late 2021.

(30) If the defender is evicted from the Subjects, it is likely that her mental health recovery will be significantly disrupted, that the defender will disengage with the settled psychiatric

supports and prescribed medications currently in place, and that she may relapse into further episodes of psychosis.

(31) On 22 May 2023, the pursuer offered to grant to the defender a short Scottish secure tenancy of an alternative property in the local area, but the defender refused the offer.

(32) On around 13 June 2024, the defender was served with a summary complaint against her at the instance of the Procurator Fiscal, Glasgow; in the complaint, it is alleged that she breached the interim ASBO dated 25 April 2019, in that, on two brief occasions between 26 January 2024 and 30 January 2024, she approached the pursuer's concierge station at 2 Taylor Place, Glasgow and enquired of the pursuer's concierge staff there about obtaining a new key to access the communal close serving the Subjects; the concierge staff reminded the defender of the existence of the interim ASBO, she was asked to leave, and the defender duly complied; the first incident lasted about 73 seconds, and the second incident lasted about 20 seconds; the defender has tendered a plea of not guilty to the charge in the summary complaint; and a trial diet has been assigned.

Makes the following FINDINGS-IN-FACT AND IN-LAW:

(1) The pursuer has a ground for recovery of possession of the Subjects in terms of paragraph 2 of schedule 2 to the Housing (Scotland) Act 2001 ("the 2001 Act"), in respect that the defender has been convicted of criminal offences, punishable by imprisonment, committed in the locality of the Subjects.

(2) The pursuer has a ground for recovery of possession of the Subjects in terms of paragraph 7 of schedule 2 to the 2001 Act, in respect that the defender has acted in an anti-social manner in relation to persons residing, and engaged in lawful activity, in the locality.

(3) The pursuer duly served upon the defender a notice of proceedings for recovery of possession of the Subjects, and timeously commenced the present proceedings, in compliance with section 14 of the 2001 Act ("the section 14 notice").

(4) The section 14 notice was timeously served on the defender in compliance with section 16(2)(aa)(ii) of the 2001 Act (that is, within 12 months of the dates of the convictions referred to in findings-in-fact (14), (15) & (16)).

(5) The grant of an order for recovery of possession of the Subjects in these proceedings would be disproportionate, in terms of Article 8, ECHR; it would constitute a violation of the defender's Convention right thereunder; and it would be unlawful, in terms of the Human Rights Act 1998, section 6.

(6) *Separatim* the defender is disabled; the defender's condition is a long-term mental impairment; the present proceedings arise in consequence of the defender's disability; the present proceedings constitute unfavourable treatment of, and unlawful discrimination against, the defender; and the grant of an order for recovery of possession of the Subjects in these proceedings would be disproportionate and unlawful, all in terms of sections 6 & 15 of the Equality Act 2010;

(7) *Separatim* the grant of an order for recovery of possession of the Subjects in these proceedings would not be reasonable, in terms of section 16(2)(a)(ii) of the 2001 Act.

Makes the following FINDINGS-IN-LAW:

(1) The grant of an order for recovery of possession of the Subjects being an unlawful violation of the defender's Convention right under Article 8, ECHR and section 6 of the

Human Rights 1998 Act *et separatim* unlawful in terms of section 15 of the Equality Act 2010, the order as craved should be refused;

ACCORDINGLY, Refuses the pursuer's motion for decree as craved; Grants decree of absolvitor in favour of the defender, whereby, Assoilzies the defender; meantime, Reserves *sine die* the issue of expenses.

NOTE:

[1] The pursuer (a public sector landlord) seeks to evict the defender (a secure tenant) from her home.

[2] The defender has held the secure tenancy for over 21 years. For the first 14 years or so, she lived a quiet life there, with no reported breach, complaint or incident. However, between 2017 and 2021 (a period of nearly 4 years), she engaged in an escalating spate of serious anti-social behaviour in the vicinity of the Subjects, directed at neighbours and the pursuer's staff. Some of this behaviour was prosecuted, resulting in multiple summary criminal convictions. Since August 2021 (that is, a period in excess of three years), there has been no repetition of the behaviour.

[3] The pursuer proceeds under the "normal" eviction process (Housing (Scotland) Act 2001, section 16(2)(a)) and founds upon two statutory grounds for recovery of possession: (i) that the defender has been convicted of criminal offences, punishable by imprisonment, committed in the locality of the Subjects, and (ii) that the defender has pursued a course of anti-social conduct in relation to persons residing or lawfully engaged in the locality (2001 Act, schedule 2, paragraphs 2 & 7). Both grounds of possession are admitted by the

defender. Therefore, the court "must" make an order for recovery of possession, provided it appears to the court that it is "reasonable" to do so (2001 Act, section 16(2)(a)(ii)) – subject to "any other rights" that the tenant may have by virtue of any other enactment or rule of law (2001 Act, section 16(3A)).

[4] In addition, the pursuer proceeds under the so-called "stream-lined" process for eviction (2001 Act, section 16(2)(aa)). This new process (introduced by section 14(2) of the Housing (Scotland) Act 2014) applies *inter alia* where the tenant has incurred a criminal conviction, punishable by imprisonment, for tenancy-related anti-social or criminal behaviour, provided a statutory notice to that effect has been served upon the tenant within 12 months of the date of conviction. Again, this ground of possession (and the timeous service of the relevant statutory notice) are admitted by the defender. Therefore, again, the court "must" grant the order for recovery of possession – but the key difference from the normal eviction process is that, under the "stream-lined" process, there is no requirement for the court to be satisfied that it is "reasonable" to do so. That said, the grant of the order remains subject to "any other rights" that the tenant may have by virtue of any other enactment or rule of law (section 16(3A), 2001 Act).

[5] What "other rights" might the tenant invoke to resist eviction when the court is otherwise enjoined to grant the order?

[6] In this case, the defender claims that her eviction would constitute (i) a violation of her Convention right to respect for her home, contrary to Article 8, ECHR (and the Human Rights Act 1998, section 6); and (ii) unlawful disability discrimination, contrary to the Equality Act 2010, section 15. Specifically, she says that she has a life-long mental disability; that the spree of anti-social and criminal conduct founded upon was an aberration, attributable to a serious but temporary deterioration in her mental health over that period;

that her mental health has significantly improved and stabilised through proper medical intervention; and that the risk of a relapse and recurrence in the offending behaviour is low.

[7] On the evidence, I conclude that both defences are established. Accordingly, I have assoilzied the defender. I explain my reasoning below.

The evidence

[8] Over the course of three days I heard oral testimony from six witnesses for the pursuer and five witnesses for the defender (including the defender herself). To their credit, parties also tendered two substantial joint minutes agreeing large tranches of fact and evidence. I summarise the oral testimony as follows.

Chris Heron

[9] Mr Heron (49) has been employed as the pursuer's environmental warden (or "concierge") for 20 years. He spoke to contemporaneous reports (in item 16, pursuer's fifth inventory of productions), prepared by him and his colleagues, of multiple incidents involving the defender, including verbal assault, aggression, and possession of weapons. In cross-examination, he spoke to reports of the defender "randomly accusing anyone, even the shopkeeper" of inciting people to "annoy her" (item 16L, pursuer's fifth inventory); complaining of persecution and racism at the hands of the concierge staff, all without justification (item 16I, pursuer's fifth inventory); and, generally, of presenting as being "pretty disturbed and irrational".

Denise Black

[10] Ms Black (42), the pursuer's housing officer, spoke of her dealings with the defender following the receipt of complaints from 2019 onwards. In cross-examination, she confirmed she was not aware of any reported anti-social behaviour by the defender since 2021. She had given no thought to referring the defender for mental health assessment. If she had been aware of the defender's allegation (item 16Q, pursuer's fifth inventory) that the pursuer was "in league with the devil" and "associated with terrorists", she may have convened a conference with social workers to discuss options.

Joanne Simpson

[11] Ms Simpson (49), a housing officer with the pursuer for over 20 years, was latterly responsible for investigating complaints of anti-social behaviour. Her employment ended in 2019. In August 2017, she received a complaint of anti-social behaviour by the defender. This was referred to as a "category A case" because it involved a threat to kill a member of the pursuer's staff. She also referred to an incident in 2018 when the defender attempted to assault an elderly neighbour with a plank of wood. The neighbour was said to have been "unbelievably upset, crying, terrified". Ms Simpson's role was to investigate the allegations, offer an opportunity to the alleged perpetrator to explain the position, and identify any supports that could be given (including mental health referrals). She spoke to her contemporaneous notes of interviews/interactions with the defender (item 18, pursuer's fifth inventory). She described the defender's demeanour at the meetings as "unremorseful". Her impression was that the defender "100%" knew what she had been doing. In the course of interviews, the defender denied having any mental health difficulties, though Ms Simpson acknowledged that it was "quite easy to think that [the defender] did have

mental health issues due to her behaviour". Ms Simpson testified that she would "absolutely" have referred the defender to a mental health support agency (such as SAMH) if she had understood the defender to have had mental health problems. In the event, she referred the defender to a separate support organisation (Loretto) for "anger management issues" (not for mental health assessment or support), but the referral was not taken up by the defender. Ms Simpson testified that the pursuer's staff had "a horrendous time" due to the defender's "verbal abuse", assaults and other conduct, all with "absolutely no remorse from [the defender]". She insisted that eviction was still necessary and appropriate due to the seriousness of the conduct and the "long-standing effect" on elderly neighbours (albeit one had since died). She considered it would be "horrendous" for anyone who had experienced the defender's "abuse" to continue having contact with her in the common parts of the building. In cross-examination, Ms Simpson testified that the defender "did not come across as someone who was unwell". Therefore, mental illness was not taken into account by her in her decision-making.

Asharet Sadiq

[12] Mr Sadiq (57), a former police officer with 17 years' service, now employed by the pursuer for nearly 20 years, was tasked with investigating complaints involving the defender. The decision to recover possession had already been taken. His role was to "prepare the legal case" for eviction. This involved going back through the "old cases" looking for missing information. He spoke to an elderly couple (Mr & Mrs McConnell) who had been subjected to abuse by the defender back in 2018; they were "disappointed" with the pursuer; they complained that, despite their reports, the defender continued to reside in the building, she had not been evicted, and "nothing had happened". Mr McConnell had

died in November 2023; Mrs McConnell continues to live there on her own. Another neighbour (Mr McDade), who spoke to an earlier incident in 2020, also complained that the pursuer had been too slow and "should have done more" to remove the defender. Mr McDade had told Mr Sadiq that "the noise and banging was still happening", but that Mr McDade had not reported it to the pursuer as he did not want the defender to re-appear at his door. Mr Sadiq insisted that eviction was still necessary (as at 2024) to avoid neighbours having to "live in fear" of the defender. He confirmed that the defender is not often seen around the neighbourhood; at one point, neighbours thought she had been evicted; and he speculated that she may be remaining within her home. In cross-examination, he confirmed there had been no recurrence of reported abusive or violent behaviour by the defender since 2021. He acknowledged this indicated "an element of success", but considered that the defender could "relapse at any time" and "go back to abusing her two elderly neighbours". She had a "track record" of simply becoming abusive when her requests were refused. In re-examination, he observed that the defender had been invited to alert the pursuer to any "mental health issues", but she had not done so.

James Thomas Pettigrew

[13] Mr Pettigrew (55) is the pursuer's locality housing director. In 2022, he took the decision to seek the defender's eviction. He acknowledged that some time had passed since that decision was taken; he acknowledged that there had been no recurrence of the defender's anti-social behaviour since 2021; he did not recall any suggestion, at the time of his decision, that the defender may have been suffering from mental ill-health; but he considered that eviction remained the appropriate course of action due to the nature and severity of the defender's anti-social behaviour and the "overall impact on the health and

well-being of the neighbours and staff". Receipt of Dr Omer Rashid's medical report had prompted the pursuer (in May 2023) to offer the defender a "probationary tenancy" (a short Scottish secure tenancy) in a different locality to "alleviate the fears of neighbours", but the offer was declined (item 26, pursuer's eighth inventory). In cross-examination, Mr Pettigrew confirmed that, prior to his decision to evict, he was unaware of any discussion (within the pursuer's organisation) as to whether the defender might need psychiatric support. With reference to item 16Q of the pursuer's fifth inventory (an incident report form bearing to record the defender's allegation that the pursuer was "in league with the devil" and "associated with terrorists"), he did not consider this sort of allegation to be unusual. Erratic behaviour did not always indicate a mental health problem. He testified that eviction was being pursued because the pursuer had a duty to protect its staff and residents from such conduct; the pursuer's staff are "very uneasy that this may happen again"; and "the concierge staff and neighbours are unhappy she [the defender] is still living in the same block". The pursuer, he said, had adequately taken account of any mental health issues of the defender by offering her a probationary tenancy. If this offer had been accepted, it would by now have "converted" to a full secure tenancy. The defender's anti-social behaviour may have ceased, but he speculated that this may be attributable to the sanction of the ongoing court action.

Yasmin Sharif

[14] The defender (43) was born in Somalia, left that country due to civil war, travelled to Yemen, lived in various refugee camps there, and arrived in London in 2001. She obtained the tenancy in 2003. She lives there with her two daughters. She claimed to have suffered mental illness since 2008. She had been given medication but it had not been good for her.

Between 2017 and 2021, she was "sick"; she did not remember much; she recalled getting angry every time a letter came to her from the pursuer's housing office with neighbour complaints. She was now on medication that was working for her. She felt calmer. She was not bothering anyone. She had not been in trouble with the police or neighbours since starting her new medication. She has "come to know" that she needs it to "be healthy". She stays at home most days. Her medicine exhausts her. Her daughters look after her. She goes to a community centre once or twice a week and attends her doctor once a month. She testified that eviction would cause her a lot of stress and affect her health condition. She would be sad and worried that she would have to go to another doctor who did not know about her condition. In cross-examination, she denied ever using cannabis. She insisted that statements in her medical records to that effect were untrue; she had been "sick" and suffering "mental illness" when she made them; she "did not know what she was saying". She said she was "constantly worried about eviction". Her children had been born in the Subjects; she was used to the flat; she could not find alternative accommodation with her family in London; and that she was dependent on her daughters to look after her.

Asha Sharif

[15] Asha Sharif (21) is the defender's eldest daughter. She lives in the Subjects with her mother and younger sister. The sisters have lived there all their lives. She is a College student. She intends to pursue an HNC. She works part-time. The period between 2017 and 2021 was "tough"; her mother was "paranoid"; she thought "everyone was against her"; she would become "hostile". These episodes were "a complete contrast" to her mother's "normal" behaviour. Her mother's condition deteriorated during the pandemic when she felt isolated and lost, not least because her younger sister was elsewhere at that time. The

sisters did not know how to help her. She described trying to "de-escalate the situation" during that period but, due to her young age, she was not taken seriously. Her mother's behaviour only improved when she was admitted to Stobhill Hospital and received treatment there. She ascribed the improvement in her mother's behaviour to the medicine she was now taking. She wished that medication had been introduced much sooner. Her younger sister is now at home more often to help the defender. The defender now has a normal daily routine: she goes out early for the groceries before the children are awake; she attends a couple of women's groups; she has rediscovered her faith and humour. She denied that her mother had previously consumed drink or drugs. The family feel very attached to the property. The sisters attended the local primary school and are volunteers in a nearby youth community initiative. The family could not afford to rent privately: her mother does not work; her sister is at University; and Asha works only part-time. In cross-examination she stated that her mother had not taken alcohol or drugs since October 2021 (when she started her current mental health treatment), but she did not know the position prior to that date. In re-examination, she clarified that she had never personally seen her mother taking any drugs or alcohol.

Lila Hassan

[16] Lila Hassan (19), the defender's youngest daughter, lives with her mother and elder sister (though she lived elsewhere during the Covid lockdown). She studies politics at University. Between 2017 and 2021, she was aware her mother had "some issues" but did not understand what was wrong, and did not remember much. She noticed differences in her mother's personality at that time: her mother would get into arguments with neighbours, which had never happened before; she saw her mother talking to herself and

talking to the walls. She was aware her mother was trying out different medicines at this time. In her sixth year at school, she accompanied her mother to a psychiatrist and discovered that her mother had schizophrenia. Once her mother "got her medicine right", her behaviour improved and the problems have not recurred. She has had no arguments with any neighbours since. She described her voluntary work in a local children's community group located close to their home. She had never seen her mother consume alcohol or drugs. In cross-examination, she conceded that she had heard from male siblings that there was a time when her mother had consumed alcohol and drugs. She had never seen this herself. She denied telling her mother's GP that her mother drank "a lot".

Phil Wheat

[17] Mr Wheat (64) is a social worker of 40 years' experience, employed by Glasgow City Council. He qualified in 1987 with a post-graduate Diploma in Criminal Justice Social Work. He adopted the terms of his report (item 3, defender's third inventory). He was the defender's supervising officer under various community payback orders imposed upon her; all have now expired, bar one which will expire later in 2024. He testified that the defender attended "extremely well" in compliance with the orders; she had fully complied with them; no warnings were issued; no criminal charges are outstanding; she is in regular contact with health services; she has engaged well, on an out-patient basis, for treatment of her mental health; her attendance at clinics has been "very good"; she has been compliant with her psychiatric medication; there is no evidence of any drug or alcohol misuse by her; and, in his professional opinion, her period offending conduct was related to her psychiatric ill-health. As part of his professional role, he must assess the likelihood of the defender re-offending. He has assessed that risk as being "low". In cross-examination, he conceded that

establishing a causal link between the defender's offending and her mental health was a matter for a psychiatrist, but he insisted that all the surrounding circumstances drew him to his own conclusion on this matter. He conceded he was unaware of any prior history of drug or alcohol use by the defender. The medical consultants with whom he had liaised over three years had never raised any such concern with him, nor had they identified any such consumption as a material factor in her offending.

Dr Omer Rashid

[18] Dr Rashid (47), a consultant psychiatrist, adopted the terms of his expert report (item 14, defender's fifth inventory). He described the common symptoms of psychosis. He explained why "in all likelihood" the defender was "experiencing symptoms of relapse of psychosis" during the period from 2017 (when she discontinued her then prescribed medication) to 2021 (when she re-engaged with psychiatric services and her prescribed medication was changed). He spoke of his prognosis for her recovery and opined on the likely impact of eviction on her mental health. In cross-examination, he was pressed on the reliability of his assessment of probabilities and possibilities.

Closing submissions

[19] Full written submissions were lodged for both parties, for which I am grateful.

[20] For the pursuer, I was invited to conclude that the legitimate aims of the pursuer, as landlord, outweighed any speculative, weakly-evidenced consequence for the defender, as tenant. The proportionality assessment under Article 8, ECHR was a "largely forward-looking one". Evidence of adverse impact on the defender arising from her eviction was said to be meagre. As for the unlawful discrimination defence, it was submitted that the

evidence did not reliably establish that all the defender's anti-social behaviour and criminal convictions arose as a consequence of her disability. The defender was said to be a proven liar. Drug and alcohol consumption played into the mix. Dr Rashid's conclusions were general, speculative and unreliable. *Esto* all the defender's conduct arose as a consequence of her disability, eviction was lawful because it was a proportionate means of achieving a legitimate aim. Multiple legitimate aims were founded upon: enforcement of property rights; management of housing stock; enforcement of tenancy conditions; protection of residents and others in the locality by removal of a source of anti-social behaviour and criminal conduct; reassurance of the local community by being seen to take effective action. No lesser measure was capable of achieving these aims. The achievement of these aims outweighed any (speculative) consequence to the defender.

[21] For the defender, I was invited to conclude that eviction would violate the defender's Article 8, ECHR right. Eviction would be disproportionate because the anti-social behaviour complained of arose from her psychiatric disability; medical intervention had been successful in eliminating that behaviour; so no legitimate aim was achieved by insisting upon eviction. The only real "aim" of the action was to reassure staff and residents. As for the Equality Act 2010 defence, I was invited to conclude that eviction would constitute unfavourable treatment and unlawful discrimination because, again, the proposed eviction arose in consequence of the defender's disability; the offending behaviour had already been eliminated by successful medical intervention; and a less intrusive alternative to eviction was available, namely the defender's continuing psychiatric treatment. Under both the normal and stream-lined processes, decree should not be granted, by virtue of section 16(3A) of the 2001 Act. For the same reasons, eviction would not be "reasonable" under section 16(2)(a) of the 2001 Act.

Reasons for decision

The Article 8, ECHR defence: A brief history

[22] For many years, UK domestic law (notably in England and Wales, where most of the cases have arisen) has struggled with Article 8, ECHR in the context of public sector repossession proceedings. In part, the difficulty reflects a clash of jurisprudential cultures. In ECHR jurisprudence, a person may have a "home" without having any proprietary right, and may indeed be entitled to respect for his home even if his occupation is unlawful. The European concept is thus more philosophical than proprietorial. By its nature, it is difficult to reconcile with UK domestic property law, which places importance on certainty and clear legal norms, such as freedom of contract, and the traditional primacy afforded to the vindication of a proprietor's right of ownership.

[23] But there is also a practical problem. Repossession actions are voluminous and they are dealt with by a summary procedure. This has given rise to a concern about the potentially disruptive practical implications of allowing a wide-ranging factual inquiry into Article 8 issues, if prolonged and expensive proceedings were to ensue in every case (Reed & Murdoch, Human Rights Law in Scotland (4th ed.), para 6.23).

[24] This philosophical and practical tension bubbled to the surface in a stand-off between the House of Lords and the European Court of Human Rights ("ECtHR") in the first decade of the new millennium. In three successive cases, the House of Lords held that a public sector landlord's contractual and proprietary right to recover possession could not be defeated by a defence based on Article 8, ECHR; and that the availability of the separate remedy of judicial review (of a public authority's decision to seek eviction) was enough to render summary repossession proceedings Convention-complaint (*Harrow London Borough*

Council v *Qazi* [2004] 1 AC 983; *Kay* v *Lambeth London Borough Council* [2006] 2 AC 465; *Doherty* v *Birmingham City Council* [2009] AC 367).

[25] At about the same time, Strasbourg jurisprudence was developing in a different direction. In a countervailing quartet of decisions, the ECtHR concluded that a more stringent scrutiny was required. It held that that, any person at risk of losing his home at the hands of the State should in principle be able to have the proportionality of that measure determined by an independent tribunal by reference to Article 8, ECHR, notwithstanding that, under domestic law, his right of occupation has come to an end (*Connors* v *United Kingdom* (2004) 40 EHRR 33; *Blecic* v *Croatia* (2004) 41 E.H.R.R. 185; *McCann* v *United Kingdom* (2008) 47 EHRR 40; *Kay* v *United Kingdom* (2012) 54 EHHR 30). Critically, the availability of judicial review did not go far enough to make repossession proceedings Convention-compliant.

[26] In *Manchester City Council* v *Pinnock* [2011] 2 AC 104, the Supreme Court finally resolved the decade-long struggle. It conceded both the procedural and the substantive elements of the Article 8, ECHR right, but what is striking is that the concession relates, for the most part, to the *procedural* point of principle. In other words, the Supreme Court accepted that any person at risk of losing his home at the instance of a public sector landlord must be entitled to challenge the proportionality of that decision within the court repossession process itself, even where he had no right under domestic law to occupy the property, and even where the legislation purportedly left the court no room for discretion. Absent the opportunity for a judicial assessment of proportionality, the court repossession process would not be Convention-complaint. However, as a legal tool to contest the *substantive* merits of a proposed repossession, the principle of proportionality, though now

available procedurally, remained tightly constrained, if not blunted, in its application by the *Pinnock* decision.

[27] And so it has proved to be. Subsequent case law suggests that most occupiers in repossession proceedings may not in practice have reaped much substantive benefit from the application of the Convention right. A *Pinnock* proportionality defence (under Article 8, ECHR) is difficult to establish.

The conventional approach to proportionality

[28] To understand *Pinnock* proportionality, it is necessary to consider how proportionality is normally applied in ECHR jurisprudence. Firstly, in normal circumstances (i.e. in cases not involving public sector evictions), the onus of establishing that an interference with a Convention right is justified (and proportionate) rests on the State – that is, upon the public authority that seeks to interfere with the right. Secondly, "a more clearly structured approach" is normally adopted to the assessment of proportionality (in non-repossession cases) *(Bank Mellatt* v *Her Majesty's Treasury (No.2)* [2014] AC 700, [71]-[76] per Lord Reed). This more analytical approach operates by "breaking down the assessment of proportionality into distinct elements". In summary, when assessing proportionality the Court must determine (1) whether the objective of the impugned measure is sufficiently important to justify limiting the Convention right, (2) whether the measure itself is rationally connected to that 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. These four requirements are logically

separate, but in practice they inevitably overlap (*Bank of Mellatt, supra*, [20]). Thirdly, by its nature, the test of proportionality is more searching than a conventional *Wednesbury* review. A "close and penetrating examination of the factual justification for the restriction is needed" if the protection afforded by the Convention right is to remain practical and effective (*R* v *Shayler* [2003] 1 AC 247, [61]). Proportionality is directed at determining not merely whether a decision-making process was flawed (that is, whether a decision-maker misdirected itself, or acted irrationally, or committed some procedural impropriety), but whether a fair balance has been struck overall between the demands of the general interest of the community and the requirement for protection of the individual's fundamental right. So, an assessment of proportionality necessarily requires the court to reach a "value judgment" (*Bank Mellatt*, *supra,* [71]). But it is always a question of degree. The intensity of the review will vary depending upon the nature of the Convention right at stake, and the context in which the interference occurs. So, for example, some Convention rights (such as those conferred by Articles 8 to 11, ECHR) are subject to widely expressed qualifications, whereas others permit of more stringent derogations only. Also, the stronger the "pressing social need" for an interference with a Convention right, the less difficult it may be to justify that interference. Lastly, the limits on judicial competence need to be borne in mind. In certain circumstances and to a certain extent, a domestic legislature or decision-maker may be better placed than the court to determine how particular competing community and individual interests should be balanced (*Axa General Insurance Ltd* v *Lord Advocate* 2012 SC 122, [131]).

What is Pinnock proportionality?

[29] In *Pinnock*, the Supreme Court turned this conventional approach to proportionality on its head.

[30] Critically, the onus was reversed in public sector repossession cases. The onus is now on the person against whom the possession order is sought to challenge the proportionality of the measure; the burden of proof lies on him to show that it is disproportionate; any proportionality defence should initially be considered summarily by the first-instance court and rejected unless it crosses the high threshold of being "seriously arguable"; if an Article 8 defence does proceed to an evidential hearing, the legitimate "twin aims" of public sector landlords to vindicate their property rights and to administer their finite housing stocks should be assumed (as a "given"); those legitimate twin aims are to be treated as "of real weight" in the assessment of proportionality; in the overwhelming majority of cases, there will be no need for the public sector landlord to explain or justify its reasons for seeking possession; and, as a broad statement, the absence of proportionality is likely to be exceptional (*Pinnock,* [52] to [61]). In effect, *Pinnock* creates a series of weighted rebuttable presumptions in favour of the proportionality of repossession by public sector landlords.

[31] *Pinnock* was followed by the Supreme Court in *Hounslow LBC* v *Powell* [2011] 2 AC 186. Both *Pinnock* and *Powell* were then applied in a volley of heavy-hitting Court of Appeal decisions, all emphasising the difficulty of surpassing the "seriously arguable" threshold in (English) public sector repossession procedure. The approach of the Supreme Court in *Pinnock* and *Powell* was adopted by the Inner House of the Court of Session in *South Lanarkshire Council* v *McKenna* 2013 SLT 22.

[32] The basic principles were neatly collated by Etherton LJ in *Thurrock Borough Council* v *West* [2012] EWCA Civ 1435 as follows:

(1) First, it is a defence to a claim by a public sector landlord for possession of a defender's home that repossession is not necessary in a democratic society, in terms of Article 8(2), ECHR. An order for possession in such a case would breach the defender's Article 8 Convention right, and therefore be unlawful (Human Rights Act 1998, section 6(1)).

(2) Second, the proper test is whether the proposed eviction is a proportionate means of achieving a legitimate aim (*Pinnock*, [52]). The Supreme Court has said that it would prefer to express the position in that way rather than use the yardstick of confining an arguable Article 8 defence to "very exceptional cases".

(3) Third, nevertheless, the threshold for establishing an arguable case that a public sector landlord is acting disproportionately (and so in breach of Article 8, ECHR), where repossession would otherwise be lawful, is a high one and will be met in only a small proportion of cases (*Powell*, [35]). The circumstances will have to be exceptional to substantiate such a defence (*Powell,* [92]). In *Birmingham City Council* v *Lloyd* (2012) EWCA Civ 969, [25] Lord Neuberger indicated that in some cases the circumstances might even have to be "extraordinarily exceptional", but it is now acknowledged that references to degrees of exceptionality may unnecessarily complicate matters.

(4) Fourth, the reasons why the threshold is so high lie in the public policy and public benefit inherent in the functions of a public sector housing authority in dealing with its housing stock, a precious and limited public resource. Such landlords hold their housing stock for the benefit of the whole community and they

are best equipped (certainly better equipped than the courts) to make management decisions about the way in which such stock should be administered (*Powell*, [35]). Where a person has no right in domestic law to remain in occupation of his home, the proportionality of evicting the occupier will be supported not merely by the fact that it would serve to vindicate the landlord's ownership rights but also, at least normally, by the fact that it would enable the landlord 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). In many cases, other cogent reasons, such as the need to remove a source of nuisance to neighbours, may support the proportionality of dispossessing the occupiers. Unencumbered property rights (including those enjoyed by a public sector body) are "of real weight" when it comes to proportionality. So, too, is the right – indeed the obligation – of public sector landlords to decide who should occupy their residential property. Therefore, in virtually every case where a residential occupier has no contractual or statutory protection, and the public sector landlord 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.

(5) Fifth, where, aside from Article 8, ECHR, a public sector landlord has a legal right to possession, the landlord can also properly be assumed to be acting in accordance with its duties (in the absence of cogent evidence to the contrary). This will be a strong factor in support of the proportionality of making an order for

possession without the need for any further explanation or justification by the landlord (*Pinnock*, [53]; *Powell*, [37]). It will, of course, always be open to the landlord to adduce evidence of other particularly strong or unusual reasons for wanting possession.

(6) Sixth, an Article 8 defence on the ground of lack of proportionality must be pleaded and sufficiently particularised to show that it reaches the high threshold of being seriously arguably (*Powell*, [33] & [34]).

(7) Seventh, unless there is some good reason not to do so, the court must at the earliest opportunity summarily consider whether the Article 8 defence, as pled, reaches that threshold (*Pinnock*, [61]; *Powell*, [33], [34] & [92]). If the averred defence does not reach that threshold, it should be dismissed. The resources of the court and of the parties should not be further expended on it.

(8) Eighth, even where an Article 8 defence is established, in a case where the occupier would otherwise have no legal right to remain in the property (*a fortiori* where the defender has never been a tenant or licensee), it is difficult to imagine circumstances in which the defence could ever operate to give the occupier an unlimited and unconditional right to remain (which may be the unintended consequence of a simple refusal of possession without any further qualification) (*Pinnock*, [52]). By so adjudicating, the court would have assumed the public sector landlord's function of allocating its housing stock, preferring the right of an unentitled occupier to remain, without any tenancy or contract, over all the other people entitled to rely on the landlord's resources and duties, and without the benefit of any knowledge of the circumstances of those competing potential occupiers.

[33] However, strikingly, no clear guidance was given in *Pinnock* or *Powell* as to the circumstances in which an Article 8, ECHR defence might actually succeed.

[34] Tantalisingly, Lord Neuberger in *Pinnock* (para [64]) observed merely 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", and that the public sector landlords "may have to explain why they are not securing alternative accommodation in such cases". Beyond that, the Supreme Court stated merely that the assessment of proportionality in individual cases was "best left to the good sense and experience of judges sitting in the [first instance] court" (para [57]). That may provide small comfort for the first-instance judge.

[35] Certainly, reported instances of successful proportionality defences are thin on the ground. I am aware of only one English decision in which the Article 8, ECHR defence was successful (*Southend-on-Sea Borough Council* v *Armour* [2012] EWHC 3361; [2014] EWCA Civ 231) and of only two such Scottish cases (*East Kilbride Housing Association* v *Ryan Carroll,* Hamilton Sheriff Court, Sheriff J. Speir, 31 August 2022, unreported; *River Clyde Homes Limited* v *Woods* 2015 WL 5949405, Greenock Sheriff Court, Sheriff C.G. McKay, 1 September 2015).

[36] In the overwhelming majority of reported cases, the proportionality defence has not succeeded (*Corby Borough Council* v *Scott* [2012] EWCA Civ 276*; West Kent Housing Association Ltd* v *Haycraft* [2012] EWCA Civ 276; *Holmes* v *Westminster City Council* [2011] EWHC 2857 (QB); *Birmingham City Council* v *Lloyd* [2012] EWCA Civ 969; *Riverside Housing Group* v *Thomas* [2012] EWHC 266; *Thurrock Borough Council, supra*; *Fareham Borough Council* v *Miller* [2013] EWCA Civ 159; *North Lanarkshire Council* v *Kelly* 2022 Hous. LR 95 (Hamilton Sheriff Court, Sheriff J. Speir, 10 March 2022); *Wheatley Homes Glasgow Ltd* v *Yasmin Shariff*,

Sheriff Paul Reid, 7 August 2023, unreported). To illustrate the point, even a relatively well-evidenced averment that the defendant, if evicted, would likely kill himself did not make eviction disproportionate (*R (on the application of Plant)* v *Somerset County Council* [2016] EWHC 1245).

[37] However, as a final observation, it is worth noting that *Pinnock, Powell* and most of the leading cases are in fact dealing with *unlawful* occupiers, that is, persons who do not have (and, indeed, many who have never had) any right whatsoever to occupy the property, still less any protected security of tenure. *Pinnock* involved a "demoted tenancy", *Powell* an "introductory tenancy" (its statutory predecessor), both being akin to mere "probationary" or short assured tenancies in Scots law (*McKenna*); *Corby* too involved an introductory tenant; *West Kent* and *Riverside Group* were concerned with "starter" tenants; *Holmes* likewise with a non-secure tenant; the occupier in *Birmingham* was a trespasser; in *Thurrock*, the defendant had never held a tenancy or licence of the property, but was merely a grandson of the deceased tenant claiming a right of succession. Therefore, in all these leading cases, the "twin aims" of vindicating the landlords' proprietary rights, and of upholding their managerial powers over a limited housing stock, were compelling and were afforded due primacy. That is why, in *Pinnock,* the conventional "structured" approach to the assessment of proportionality was rejected. As Lord Hope observed, to apply the conventional structured proportionality test to such unlawful occupiers "would largely collapse the distinction between secured and non-secure tenancies." Likewise, Lord Neuberger in *Powell* (para [74]) observed that Parliament had "deliberately created classes of tenants who do not have security of tenure"; and, while some of those tenants had been granted a degree of substantive and procedural protection, Parliament had sought to eliminate, so far as possible, questions of proportionality in such cases for sound policy reasons.

[38] Logically, therefore, the balancing exercise may be subtly different with an occupier who *does* have security of tenure (as in this case). To be clear, *Pinnock* and *Powell* are of universal application across all public sector repossession cases, whether the occupation is lawful or unlawful, secure or non-secure. But the distinction between an occupier who otherwise has security of tenure, and one who does not, remains an important one in the practical application of *Pinnock* proportionality in individual cases, though not necessarily determinative.

Is the defender's eviction proportionate under Article 8, ECHR?

[39] Against that legal background, with the onus firmly on the defender, I have sought to assess the merits of the defender's Article 8, ECHR defence.

[40] The first question is whether the objective sought to be achieved by the action is sufficiently important to justify interfering with the defender's Article 8 right. I accept that a number of legitimate objectives are sought to be achieved here. The "twin aims" of vindicating the pursuer's proprietorial right and enforcing its powers of management over its own housing stock can safely be assumed. However, what emerges strongly from the evidence is that these aims are, in the particular circumstances of this case, ancillary objectives. This is not a case where the pursuer seeks to recover possession from an *unlawful* occupier who, aside from Article 8, either never had a right to possess or whose right has terminated. On the evidence, the primary and predominant objective of this repossession action is the removal of a source of nuisance to neighbours and staff. That objective is both intrinsic and manifest in the two grounds for recovery of possession founded upon by the pursuer (2001 Act, schedule 2, paragraphs 1 & 7). Of course, it is a perfectly legitimate objective in itself (being another "cogent" reason recognised in *Pinnock* and *Powell*), but it is

important to identify it as the predominant aim in this case in order that the proportionality assessment can properly be carried out. It makes no sense to ask whether a given interference with an Article 8 right is proportionate in the abstract. The relevant legitimate objective must first be identified in order to determine what factual issues are then relevant to the proportionality assessment.

[41] The next question is whether the proposed eviction is a proportionate means of achieving these legitimate aims, with the onus resting squarely on the defender. In my judgment, on the evidence the defender has discharged that onus and established that it would be disproportionate to order possession, in terms of Article 8, ECHR, and therefore unlawful (Human Rights Act 1998, section 6). I reach that conclusion for the following reasons.

[42] First, on the evidence, the defender is genuinely "vulnerable as a result of mental illness". She falls within that potentially exceptional category identified by Lord Neuberger in *Pinnock* (para [53]). She suffers from a severe and enduring mental illness formally categorised as Unspecified Psychotic Disorder; it is a significant mental impairment; it is a life-long condition; it has resulted in at least two recorded admissions to a psychiatric hospital for treatment (once in 2008, and again in 2021); it significantly affects her ability to carry out day-to-day activities; when medicated she is exhausted and stays in her home; when not medicated, she loses her ability to distinguish delusion from reality.

[43] Second, I am satisfied on the evidence that the defender's anti-social and criminal conduct was directly attributable to a significant deterioration in her diagnosed, life-long mental disability, coinciding with a temporary and demarcated period of non-compliance with her prescribed medication and non-engagement with psychiatric supports, between around July 2017 and late 2021. Critically, she is not merely vulnerable by reason of some

generalised mental ill-health. (Sadly, of itself, that would be unexceptional.) Rather, the defender suffers from a diagnosed, significant mental disability which, following a relapse, has had a direct causative effect on the anti-social and criminal conduct now complained of. In contrast, in the preceding 14 year period (from 28 November 2003 until around July 2017) prior to her psychotic relapse, the defender occupied the property, as a secure tenant, without breach, incident, or complaint regarding her conduct. In further contrast, in the most proximate period of over three years (from July 2021 to October 2024), the defender has also not engaged in any criminal or anti-social behaviour. This most recent prolonged period of good behaviour itself coincides with, and is referable to, a documented significant recovery in her mental health (described by Dr Rashid, her consultant psychiatrist, as "remarkable"), instigated and sustained by a change in (and regular monitoring of) her prescribed anti-psychotic medication, a resumption in compliance with her prescription, and a re-engagement with monthly psychiatric supports. Viewed in aggregate, the defender's spree of anti-social behaviour can fairly be characterised as unprecedented, out-of-character, and attributable to a relapse in her mental health.

[44] Third, the defender's anticipated future level of compliance and engagement with her prescribed medication and ongoing psychiatric treatment is reliably assessed as being good; and the risk of a recurrence of the criminal offending complained of is reliably assessed as being low. These risk assessments were spoken to by, respectively, Dr Rashid, the defender's consultant psychiatrist, and Phil Wheat, the defender's supervising officer. Both were impressive witnesses, with relevant qualifications, expertise, and direct personal experience of the defender. The significance of the foregoing is that it further undermines the potency of the primary objective sought to be achieved by the pursuer (namely, the

removal of a source of nuisance to prevent a recurrence of offending behaviour, and to protect staff and neighbours).

[45] In summary, it can reasonably be inferred that the defender's anti-social and criminal behaviour has already ceased (by virtue of suitable medical intervention to address her mental health relapse); there has been no repetition of that behaviour for over three years now; the defender's anticipated level of compliance and engagement with her prescribed medication and ongoing psychiatric treatment is reliably assessed as good; the risk of a recurrence in her criminal offending is reliably assessed as low; in a real and practical sense, the nuisance presented by the defender's conduct (itself attributable to a relapse in her fragile mental health) can fairly be said to have ended. In those circumstances, repossession is no longer a convincing or cogent means to achieve the pursuer's primary objective - because the objective has already been achieved by other means. Applying step (2) of Lord Reed's structured approach, the impugned measure (eviction) is not "rationally connected" to the predominant objective (or, at least, not rationally connected with any convincing strength or sufficiency).

[46] That said, I accept that in cases involving criminal or anti-social behaviour the rationale for removing a source of nuisance in a neighbourhood need not be confined merely to preventing a recurrence of the offending conduct. Another legitimate justification may be to deter others from engaging in similar behaviour, and to reassure the rest that an effective sanction can be imposed for such conduct. This deterrent or declaratory rationale for removing the source of a nuisance is best illustrated perhaps in housing policies aimed at evicting those concerned in the supply of drugs. Even if a genuinely contrite or relatively low-level accomplice in drug-dealing within a rented property was thought unlikely to reoffend, the deterrent and reassuring declaratory effect of evicting such offenders is likely

to remain compelling as a means of discouraging and extirpating that social blight from the midst of a neighbourhood. But what conceivable message of deterrence or reassurance would be sent to others by the eviction of this mentally ill defender? If the deterrent message to neighbours and staff is no more than that a vulnerable tenant who has the misfortune, for a temporary period, to fall mentally ill will be evicted, then that justification is unmeritorious and should carry little weight in an assessment of proportionality.

[47] Fourth, I am satisfied on the evidence that, if the defender is evicted from the property, the defender's "remarkable" and "significant" mental health recovery (per Dr Rashid) will be disrupted. Dr Rashid observed that her recovery was dependent on ensuring that there were "not many social stressors" in her life. She had lived in her home for "an extremely long period of time"; she was "emotionally invested" in it; she had a familiarity with the area; "uprooting" her from her home could create "a potential possibility of a relapse". Dr Rashid opined that eviction could also "increase the risk of non-engagement from mental health services", particularly where, as here, she has a history of non-engagement. Besides, according to Dr Rashid, if she were relocated, she may be allocated a different medical team. This was not in her best interests as she had finally developed a good relationship with her current medical team and they were said to be best placed to identify any symptoms of relapse or non-compliance sooner than a new team that was less familiar with her. The significance of this evidence, which I accepted, is that the defender faces the risk of very real harm to her own mental health if the order is granted. While such an impact is not determinative, its potency is increased when balanced against the pursuer's already weakened and undermined predominant objective.

[48] Fifth, on 25 April 2019 an interim anti-social behaviour order ("ASBO") was obtained against the defender in summary application proceedings at the instance of the pursuer in

terms of the Anti-social Behaviour etc., (Scotland) Act 2004. The interim order is not currently limited in duration. It remains in force. In its terms, it prohibits the defender the defender *inter alia* from engaging in the type of anti-social and criminal conduct which forms the basis of the grounds for recovery of possession in this case. Since July 2021, no material breach of the interim order has been established. The significance of this factor is that the existence of the interim ASBO can be seen as a "less intrusive means" by which to achieve the pursuer's legitimate objective (of eliminating a source of nuisance). The mere existence of such an alternative is by no means determinative (*R (Wilson)* v *Wychavon District Council*), but it is at least a barometric tool by which the proportionality of the proposed eviction can be cross-checked (*Bank of Mellatt*, [75]). In circumstances where no further criminal offending or anti-social conduct has occurred for over three years (since July 2021), a fair inference may be drawn that, in conjunction with the defender's sustained medical recovery, the interim ASBO is at least playing a not insignificant part in achieving the desired aim. This inference is borne out by the rather pathetic incidents, in January 2024, when she approached the pursuer's concierge station on two occasions with an innocuous enquiry about obtaining a new common close key fob; she was immediately told to leave by the pursuer's staff, by virtue of the interim ASBO; and she duly complied. The first incident lasted for about a minute; the second for about 20 seconds. If any conclusion is to be drawn from these incidents, it is that the interim ASBO works, and is being honoured by her. If her physical approach to the concierge station were itself to constitute a breach of the order (which has not yet been established), it must be a highly technical breach, and of no materiality.

[49] Taking all of the foregoing into account, I conclude that the defender has discharged the onus upon her of proving that the grant of an order to recover possession of the Subjects

would be disproportionate. The eviction of this particular defender, in these particular circumstances, would not strike a fair balance between the interests of the wider community and the defender's Article 8, ECHR right.

The Equality Act Defence

[50] I turn to the Equality Act defence. This calls for a different analysis. Section 15(1) of the 2010 Act states that a person (A) discriminates against a disabled person (B) if:

> "(a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

[51] Counsel were agreed that the pursuit of these repossession proceedings constitutes unfavourable treatment and that the reason for that unfavourable treatment (i.e. the "something" referred to in section 15) is the defender's anti-social and criminal conduct. The preliminary issue in dispute is whether this conduct was "something arising in consequence of [her] disability" (2010 Act, section 15(1)(a)).

Is there a causal connection with the disability?

[52] Under section 15 of the 2010 Act, the initial onus lies on the tenant (the defender) to demonstrate a causal connection between her offending conduct and her disability. If the tenant discharges that initial onus, the onus then shifts to the landlord (the pursuer) to show that the unfavourable treatment (i.e. the proposed eviction) is a proportionate means of achieving a legitimate aim. Crucially, in this new statutory context, "proportionality" bears a much more rigorous meaning than *Pinnock* proportionality under Article 8, ECHR.

[53] On the evidence, I am satisfied that the defender has discharged the initial onus of demonstrating that the pursuer is treating her unfavourably (by seeking to evict her) because of "something" (a course of anti-social and criminal conduct between 2017 and 2021) "arising in consequence of [her] disability" (2010 Act, section 15(1)(a)). In my judgment, the defender's spate of anti-social behaviour and criminal offending was a consequence of florid psychotic episodes following a relapse in her mental health. I reach that conclusion for the following reasons. First, it is a matter of admission that during the relevant period the defender suffered from "unspecified psychotic illness and delusional beliefs in respect of her neighbours" (paragraph 9, first joint minute of admissions). Her medical records also disclose that at times her mental illness has been thought to be paranoid schizophrenia (defender's fifth inventory, item 14: Dr Rashid's Report dated 8 January 2024, page 5). Second, Dr Rashid's expert opinion was that there was a "high probability" that the defender's anti-social behaviour and criminal offending was a consequence of a relapse in her mental illness. Third, that expert opinion is itself entirely logical, if not irresistible, having regard to the wider factual circumstances. Despite having endured a long history of mental ill-health, the defender had lived at the property for nearly 14 years (since November 2003) without recorded breach, incident or complaint. Out of the blue, in July 2017, she is then documented as having stopped taking her prescribed anti-psychotic medication and disengaged with psychiatric supports (defender's seventh inventory, item 6/16/17 of process: Townhead Health Centre medical records, entry dated 23 June 2017; defender's fifth inventory, item 14: Dr Rashid's Report dated 8 January 2024, pages 3 & 5). Shortly thereafter, in August 2017, the defender embarked upon the unprecedented spree of belligerent and abusive behaviour on which this action is founded. Dr Rashid attached significance to the coincidence in timing. In his oral testimony, as a

generality, he said, a patient who fails to take prescribed anti-psychotic medication has "a high potential to develop psychosis", marked by paranoid delusion and auditory hallucination; and, more specifically, this defender, when not medicated, loses her ability to distinguish delusion from reality. Fourth, according to Dr Rashid, the nature of the behaviour described in the pursuer's incident report forms was consistent with the paranoia of a person, such as the defender, suffering a florid psychotic episode. The reported incidents tended to disclose paranoid, delusional beliefs of a persecutory nature, accompanied by auditory hallucination. Specific reference was also made to the incident report form forming item 16Q in the pursuer's eighth inventory of productions, in which the defender is reported to have claimed that the pursuer's staff were affiliated to the devil and extremist terror groups. Dr Rashid opined that a report of this nature, if he had been made aware of it at the time, would have been treated by him as "a red flag", a "psychiatric emergency", and would have prompted him to instruct a hospital admission of the defender for urgent assessment of her mental health. From an expert witness otherwise prone to under-statement, with no evident propensity for drama, this was a striking disclosure. Fourth, this conclusion (as to the psychiatric cause of the defender's misconduct) is fortified by the facts that, when she re-engaged with mental health services in October 2021, she was noted by Dr Stuart Semple, Specialist Registrar, Forensic Mental Health Services, as experiencing active symptoms of psychosis (defender's fifth inventory, item 14: Dr Rashid's Report dated 8 January 2024, page 3); and that, shortly thereafter, on 8 December 2021, she was admitted to Stobhill Hospital for psychiatric intervention with a documented "relapse in psychotic symptoms" (defender's seventh inventory, item 6/16/9 of process: Townhead Health Centre medical records, entry dated 17 December 2021). Fifth, significantly, it was during this period of hospital admission in December 2021 that the defender's prescribed

anti-psychotic medication was finally adjusted; and, from that point onwards, there has been no recorded relapse, and no recorded incident of anti-social or criminal conduct.

Dr Rashid's opinion was that it was "highly probable" her conduct arose as a consequence of florid psychotic episodes symptomatic of a significant deterioration in her life-long mental disability. In my judgment, that inference is irresistible.

[54] Also relevant in this context is section 136 of the Equality Act 2010 (headed "burden of proof"). It states:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Here, there are facts from which I "could decide" that the proposed eviction is "because of something arising in consequence of [the defender's] disability". So it is for the pursuer, as the alleged discriminator, to prove that it was not. It has failed to do so.

[55] Therefore, the defender having discharged the initial onus upon her, the onus shifts to the pursuer to show that its unfavourable treatment is "a proportionate means of achieving a legitimate aim" (2010 Act, section 15(1)(b)).

What is Akerman-Livingstone proportionality?

[56] According to the Supreme Court in *Akerman-Livingstone* v *Aster Communities Ltd (formerly Flourish Homes Ltd)* [2015] AC 1399), the substantive right to equal treatment protected by section 15 (and section 35) of the Equality Act 2010 is different from, and stronger than, the substantive right which is protected by Article 8, ECHR.

[57] All occupiers have a right to respect for their home under Article 8, ECHR. But Parliament has expressly provided for an *extra* right for people to be protected against direct or indirect discrimination in relation to eviction (known as a right to equal treatment). Parliament has also expressly provided (in sections 13 and 35) for disabled people to have rights in respect of the accommodation which they occupy which are different from and extra to the rights of non-disabled people. People with disabilities are "entitled to have due allowance made for the consequences of their disability" (*Lewisham London Borough Council* v *Malcolm* [2008] AC 1399, para [61], approved in *Akerman-Livingstone)*.

[58] This stronger right to equal treatment operates as follows. In the first place, once the possibility of disability discrimination is made out, the onus of proof is firmly on the landlord to show that an order for possession is a proportionate means of achieving a legitimate aim (section 15(1)(b)). This onus is fortified by the statutory evidential inferences and burdens created by section 136 of the 2010 Act. In the second place, proportionality under the Equality Act (as interpreted by the Supreme Court in *Akerman-Livingstone*) has a much more rigorous meaning than *Pinnock* proportionality under Article 8, ECHR. *Akerman-Livingstone* proportionality involves the conventional "structured approach" (*Bank of Mellatt, supra),* with the onus squarely on the landlord. In short, *Pinnock's* light touch to proportionality does not apply in the context of disability discrimination.

[59] Among other things, it cannot be taken for granted that the landlord's "twin aims" of vindicating proprietorial rights and enforcing powers of management apply at all, or will almost invariably prevail, or will generally be sufficient to outweigh the effect on a disabled person. It simply does not follow that because those twin aims will almost always trump any right to respect for an occupier's home under Article 8, ECHR, they will also trump an occupier's equality rights (*Akerman-Livingstone*, [30].)

Is the defender's eviction proportionate under the Equality Act?

[60] Against that different legal background, with the onus this time squarely on the pursuer (as landlord), I have sought to assess the proportionality of the pursuer's interference with the defender's statutory equality right.

[61] The first question is whether the objective sought to be achieved by the proposed eviction is sufficiently important to justify interfering with the defender's Article 8 right. As explained above, a number of objectives are sought to be achieved here: the vindication of the pursuer's proprietorial rights; the enforcement of the pursuer's powers of management over its housing stock; and the removal of a source of nuisance for the protection and reassurance of staff and neighbours. On the evidence, incontrovertibly, the latter is the predominant objective. The other objectives are, at best, ancillary and subordinate. In principle, I accept that the proven predominant objective may be legitimate, but it potency remains to be seen.

[62] The second question is whether the impugned measure (the proposed eviction) is rationally connected to the proven objective. In principle, I accept that there may a rational connection of sorts, but the potency and sufficiency of that connection is weak. On the evidence, the conduct complained of was directly attributable to a significant deterioration in the defender's mental health, during a demarcated period of non-compliance with her prescribed medication and non-engagement with psychiatric support; the offending conduct has ceased (due to medical intervention to address the relapse); there has been no repetition of that behaviour for over three years now; the defender's anticipated level of compliance and engagement with her prescribed medication and ongoing psychiatric treatment is reliably assessed as good; and the risk of a recurrence in her criminal offending is reliably

assessed as low. In a real and practical sense, the nuisance presented by the defender's conduct can genuinely be said to have ceased. In those circumstances, repossession is no longer a convincing or cogent means to achieve the pursuer's primary objective - because the objective has already been achieved by other means. Applying Lord Reed's structured approach, the impugned measure (eviction) is not "rationally connected" to the predominant objective (or, at least, not rationally connected with any convincing strength or sufficiency).

[63] The third question is whether the chosen measure (eviction) is no more than is necessary to accomplish the objective. This third step in the "structured" approach involves the court determining whether a "less intrusive measure" is available to achieve the legitimate aim. The Supreme Court (in *Bank of Mellatt*) made it clear that first-instance courts should be careful to avoid merely substituting their own opinion for that of the decision-maker. A strict application of the "least restrictive means" test would only ever allow one legislative (or executive) response to an objective that interferes with a right. That would be the wrong approach. It takes little imagination for a judge to "come up with something a little less drastic or a little less restrictive in almost any situation", especially if the judge is "unaware of the relevant practicalities and indifferent to considerations of cost" (*Illinois State Board of Elections* v *Socialist Workers Party* (1979) 440 US 173, 188–189; *Bank Mellatt*, [75]). Therefore, the existence of a "less intrusive measure" is merely "one of the tools of analysis in examining the cogency of the reasons put forward in justification of a measure". It may help in answering the fundamental question whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised, depending perhaps upon the degree of scrutiny required in a particular case, but it is "not necessarily determinative" (*R (Wilson)* v *Wychavon District Council* [2007]

QB 801, [62]). In this case, in my judgment, the pursuer is unable to show that no less drastic or intrusive measures are available to solve the problem. On the contrary, on the evidence, the problem (the removal of a source of nuisance) has, for all practical purposes, already been solved by suitable medical intervention. In tandem with the evidenced successful medical intervention, a further less drastic means is already available to the pursuer to contribute to the accomplishment of the objective - namely, an ASBO. The interim ASBO obtained by the pursuer on 25 April 2019 remains in force. It prohibits the defender *inter alia* from engaging in the type of anti-social and criminal conduct which forms the basis of the grounds for recovery of possession in this case. Over a prolonged period since around July 2021, no material breach of the interim order has been established. I acknowledge that the mere existence of such an alternative measure is by no means determinative; it is merely a tool by which the proportionality of the proposed eviction can be tested; but its existence and evidenced operation in the present case tends to support the inference that there is, in truth, no pressing need for the more drastic measure of eviction.

[64] The fourth question is whether the impact of infringing the defender's equality right is disproportionate to the likely benefit of the impugned measure. Put another way, the landlord must show that the effect of the impugned measure on the occupier is outweighed by the advantage(s) sought to be achieved. Again, on the evidence, the pursuer fails to discharge this onus. In the first place, the potency of the pursuer's objective is weakened by the fact that the nuisance sought to be removed has, in practical terms, already been eliminated. In the second place, I am satisfied on the evidence that, if the defender is evicted from the property, she will be at material risk of disengaging from the settled psychiatric supports and carefully calibrated medications currently in place for her, and of suffering a significant psychotic relapse. Her "remarkable" mental health recovery (per Dr Rashid) will

be at material risk of being disrupted. That personal impact is not determinative, but its potency is increased when balanced against the pursuer's already diminished predominant objective.

[65] For these reasons, the pursuer cannot show that the discriminatory treatment is a proportionate means of achieving a legitimate aim, in terms of the 2010 Act, section 15(1)(b). Therefore, the defender's eviction would constitute unlawful disability discrimination, contrary to section 15 of the 2010 Act.

[66] For completeness, I observe that, since eviction would be "unlawful" (under the Human Rights Act 1998 *et separatim* the Equality Act 2010), it must follow that it would not be "reasonable" to grant an order for possession of the Subjects, for the purposes of section 16(1)(a) of the Housing (Scotland) Act 2001.

[67] Accordingly, I refuse to grant the order as craved. I grant decree of absolvitor in favour of the defender. The issue of expenses is reserved meantime.