SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2025] SC GLA 1

GLW-SD465-24

JUDGMENT OF SHERIFF S REID

in the cause

DRUMCHAPEL HOUSING CO-OPERATIVE LTD

Pursuer

against

STACEY KELLY

Defender

Pursuer: Ms E. McFadyen, Mellicks, Glasgow
Defender: Mr G. O'Donnell, O'Donnell & Co, Glasgow

Glasgow, 30 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 a residential property known as Flat 2/2, 19 Merryton Avenue, Drumchapel, Glasgow, G15 7PR ("the Subjects").

(2) The defender occupies the Subjects in terms of a Scottish secure tenancy dated 3 October 2016 ("the Agreement"), of which item 1 in the pursuer's first inventory is a true copy.

(4) Her tenancy commenced on 3 October 2016.

(5) She occupies the Subjects with her 13 year old son.

(6) Clause 3.3 of the Agreement states that the defender and her visitors must not use the Subjects, or allow them to be used, for illegal purposes.

(7) Clause 3.4 of the Agreement states that the defender and her visitors must not act "in an antisocial way" or sell drugs.

(8) Between around 6 May 2022 and 20 May 2022, the defender stored controlled drugs (specifically, diamorphine and cannabis) for third parties in a locked safe in a kitchen cupboard within the Subjects, together with drug-related paraphernalia (comprising scales, bags, and a mixing agent consistent with drug dealing); she provided the third parties with keys to the Subjects (and to the common close) to allow them unhindered access thereto; and she permitted the third parties to enter the Subjects, at any time of their choosing, for the purpose of replenishing and removing the drugs within the locked safe and supplying them to others.

(9) The defender so acted in exchange for (i) the cancellation of a debt of £200 owed by her to one of the third parties, and (ii) the weekly payment to the defender of small amounts of cash and, on occasion, the supply to her of a small amount of controlled drugs for her personal use.

(10) The defender had no key or means of access to the locked safe in the kitchen cupboard; she did not know, from time to time, which specific type of drug was being stored in the safe; but she was fully aware, throughout the period from around 6 May 2022 to 20 May 2022, that she was permitting illegal drugs to be stored there for onward supply to others.

(11) On 20 May 2022, during a police search of the Subjects under a warrant, police officers found and seized the following items which were located in a locked safe in a kitchen cupboard there: (i) 340 grams of cannabis in powder form; (ii) 180 grams of cocaine in powder form; (iii) 380 grams of a separate powder (not being a controlled substance in itself, but habile for use as a mixing agent in drug dealing).

(12) The estimated aggregate street value of the controlled drugs found within the Subjects, and seized by the police, was £11,000.

(13) Throughout the period from around 6 May 2022 to 20 May 2022, the defender and her 13 year old son lived in the Subjects, and they were both present there on 22 May 2022 when the police forced entry to carry out the search.

(14) On 9 January 2024, at Glasgow Sheriff Court, the defender pleaded guilty to, and was convicted, of a charge on indictment that on 20 May 2022, at the Subjects, she was concerned in the supply of a controlled drug (namely, diamorphine, a class A drug), contrary to the Misuse of Drugs Act 1971, section 4(3)(b).

(15) On 6 February 2024, in respect of the foregoing conviction, the defender was made subject to a community payback order comprising (i) an offender supervision requirement for a period of 12 months; (ii) an unpaid work requirement, compelling her to carry out 225 hours of unpaid work, to be completed within 12 months; and (iii) a restricted movement requirement, compelling her to remain within her principal residence for a period of 9 months between the hours of 7pm and 7am the following morning.

(16) To date, the defender has refused to identify (to the police and to the court) the identity of the third parties for whom she agreed to store the controlled drugs.

(17) On 15 March 2024 (being a date within 12 months of the day on which the defender was convicted as aforesaid), the pursuer served on the defender a notice of proceedings for recovery of possession of the Subjects; and item 6 in the pursuer's first inventory is a true copy of the said notice.

(18) In around 2010, the defender was diagnosed with low mood and anxiety.

(19) In around 2020, the defender was diagnosed with depression, anxiety and occasional panic symptoms.

(20) Between March 2021 and March 2024 she attended her general practitioner with ongoing (unspecified) mental health issues;

(21) The defender has not breached the Agreement prior to 6 May 2022 or subsequent to 20 May 2022;

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

(1) Between around 6 May 2022 and 20 May 2022, within the Subjects, the defender was concerned in the supply of controlled drugs (namely, diamorphine and cannabis, being class A & B drugs, respectively) to another or others, contrary to the Misuse of Drugs Act 1971, section 4(3)(b).

(2) Between around 6 May 2022 and 20 May 2022, the defender breached clauses 3.3 & 3.5 of the Agreement by using the Subjects for an illegal purpose namely, being concerned there in the supply of controlled drugs to another or others.

(3) Between around 6 May 2022 and 20 May 2022, the defender breached clauses 3.3 & 3.5 of the Agreement by acting in an anti-social manner within the Subjects namely, being concerned there in the supply of controlled drugs to another or others.

(4) 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 a criminal offence, punishable by imprisonment, committed within the Subjects (that is, the conviction referred to in finding-in-fact (14)).

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

(6) The section 14 notice was timeously served in compliance with section 16(2)(aa)(ii) of the 2001 Act (that is, within 12 months of the date of the conviction referred to in finding-in-fact (14)).

(7) The grant of an order for recovery of possession of the Subjects in these proceedings is proportionate, in terms of Article 8, ECHR; it would not constitute a violation of the defender's Convention right thereunder; and it would not be unlawful, in terms of the Human Rights Act 1998, section 6.

(8) *Separatim* the grant of an order for recovery of possession of the Subjects in these proceedings is reasonable, in terms of section 16(2)(a)(ii) of the 2001 Act.

Makes the following FINDING-IN-LAW:

(1) The pursuer being entitled to an order for recovery of possession of the Subjects in terms of the 2001 Act, section 16(2)(aa) *et separatim* section 16(2)(a), decree therefor should be granted as craved;

ACCORDINGLY, Grants decree as craved, whereby, Orders the removal of the defender, her family, sub-tenants and dependants, if any, with her whole goods and possessions, from the Subjects; meantime, Reserves the issue of expenses *sine die*.

NOTE:

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

[2] She held the secure tenancy without incident for almost 6 years. But in May 2022, she committed a serious criminal offence there. For a two week period, she was concerned

in the illegal supply of controlled drugs (diamorphine and cannabis) to another or others. She had agreed to store the drugs for third parties in a locked safe in her kitchen cupboard, together with drug-related paraphernalia. She had given those third parties a key to her flat (and to the common close) to allow them unhindered access to the safe. She permitted them to come in and out, whenever they wished, to access, replenish and remove the drugs for onward supply to others. The defender herself had no means of access to the locked safe; she did not know what specific type of drugs were being stored in it; but she was fully aware, throughout the two week period, that she was permitting illegal drugs to be stored there for onward supply to others.

[3] On 9 January 2024, at Glasgow Sheriff Court, the defender pleaded guilty to, and was convicted, of a charge on indictment that on 20 May 2022 (i.e. on a single day), at the Subjects, she was concerned in the supply of a controlled drug (namely, diamorphine, a class A drug), contrary to the Misuse of Drugs Act 1971, section 4(3)(b). She was made subject to a level 2 community payback order, with a 12 month supervision requirement, 225 hours of unpaid work, and a nine month restricted movement requirement.

[4] A single statutory ground is founded upon to recover possession of the Subjects. This ground is that the defender has been convicted of criminal offence, punishable by imprisonment, committed in, or in the locality of, the Subjects (2001 Act, schedule 2, paragraph 2). It appears in the notice of proceedings that was served on the defender (2001 Act, section 14). There is no dispute that the ground is established.

[5] In reliance upon this single ground, two discrete eviction processes are pursued concurrently. First, the pursuer proceeds under the "normal" eviction process (2001 Act, section 16(2)(a)). The single ground not being in dispute (and the relevant notice of proceedings having been duly served), 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)) – and 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)). Second, the pursuer also proceeds under the so-called "stream-lined" process for eviction (2001 Act, section 16(2)(aa)). This new process applies where the same ground for eviction exists (i.e. the tenancy-related criminal conviction) and the notice of proceedings was served on the tenant within 12 months of the date of the conviction. Neither the existence of the ground nor the timeous service of the notice is disputed. 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. Instead, the grant of decree is subject only to "any other rights" that the tenant may have (section 16(3A), 2001 Act).

[6] So, what "other rights" might the tenant invoke to resist eviction when the court is otherwise enjoined under both processes to grant the order?

[7] In this case, the defender invokes one such right. She claims that her eviction would constitute a violation of her Convention right to respect for her home, contrary to Article 8, ECHR (and the Human Rights Act 1998, section 6).

[8] Having heard evidence at proof on 11 December 2024, I conclude that the grant of an order for recovery of possession would be a proportionate interference with the defender's Convention right under Article 8, ECHR (for the purposes of sections 16(2)(a), 16(2)(aa) & 16(3A) of the 2001 Act) *et separatim* that the grant of decree would be "reasonable" (for the purposes of section 16(2)(a)(ii) of the 2001 Act). I explain my reasoning below.

The evidence

[9] For the pursuer, I heard oral testimony from Marisa McCarthy and Police Constable Max Harris. I also heard evidence from the defender on her own account.

Marisa McCarthy

[10] Ms McCarthy, a senior housing officer employed by the pursuer, spoke to her knowledge of the defender's criminal conviction and interviews with the defender. She described the internal process by which a decision was taken to initiate the stream-lined eviction process. In cross-examination, she confirmed that the defender had not breached the tenancy terms prior or subsequent to the offence. The pursuer had made no enquiries of neighbouring tenants to ascertain their views on the defender's eviction. The witness was questioned on factors in the decision-making process: the defender's mental health; the vulnerability of her son; intimidation of the defender; the availability of alternative options (such as the offer of a short assured tenancy). The witness insisted that the seriousness of the offence was a key factor and that the Scottish Government's Guidance had been followed.

Max Harris

[11] Police Constable Harris described the raid on the defender's home on 20 May 2022, the findings and subsequent investigation. He testified that the defender had admitted that the drugs were being held by her for others, whom she declined to name. She admitted she had gained financially by storing the drugs. She was paid a small amount of cash weekly and occasionally provided with an "equivalent sum" in drugs for her personal use. She had disclosed she was aware that drugs were being stored in the safe, she was adamant that she

had never accessed it, but she conceded that her DNA may be on the outside of the safe as she had "cleaned it". The Police Scotland STOP Unit had provided the witness with an estimated street value of £11,000 for the drugs seized in the search, which was regarded by the Unit as "a large return". He spoke to the effect of drug dealing on local communities. In cross-examination, he inferred she may have been subject to a degree of intimidation not to identify third parties involved in the offence.

Stacey Kelly

[12] Ms Kelly is unemployed, on State benefits, a single mother, and lives with her 13 year old son. She previously worked as a support worker for adults with disabilities. She has held the tenancy since 2016. She testified that in 2022 she had been struggling financially. She borrowed £200 from "a friend" for her son's birthday in February 2022. She agreed to pay it back at £50 per week. She recalled she paid one instalment but was unable to maintain the rest. Her benefits had been interrupted. The third party told her that the debt could be written off if she allowed her house to be used by third parties to store items in the safe. She admitted that she knew that illegal drugs were being stored in the safe, but said she was unaware of the precise contents. She declined to identify the third parties involved, saying that she was scared to do so. She testified that the safe was used to keep drugs for "a couple of weeks", which she described as "a short time". She denied receiving any financial or personal benefit for the arrangement, other than the cancellation of the balance of the £200 debt. She said she felt very vulnerable at the time of the offence, her mental health "wasn't great", she had been scared to say no and felt bullied. Her mental health was still "not good", she had been to counselling, she was "on medication". The unpaid work requirement of the community payback order that was imposed upon her had

been revoked due to her "mental health" and resulting inability to carry work, the offender supervision requirement was extended for a further year, but she had completed her restricted movement requirement satisfactorily. She felt intimidated by the third parties for about a month or two after the police search, until they realised that she had not disclosed their names, and didn't intend to, at which time they "backed off". She spoke of her son's circumstances: he attended a local school; he was involved in local extra-curricular activities; his behaviour can be erratic; he struggles with change; he fidgets a lot; his sleeping is bad; he is loud and hyperactive; he has recently been referred for an ADHD assessment. A "petition" was said to have been signed by four of the neighbours in the block of which her flat forms part (item 4, defender's fourth inventory); she had a close relationship with them; they were supportive of her; they opposed her eviction. She had no connection with the remaining four tenants who had not signed the petition. She said she could not afford a private tenancy. If she were made homeless her mental health would suffer, it would be "very difficult", and her son "would struggle with change". In cross-examination, she complained that no support was given by the pursuer for her mental health issues. She insisted that the third parties had never accessed the home when her son was there. She could not recall when she had borrowed the £200 from the third parties, or when she began to have difficulties repaying it, or whether she took drugs recreationally at the time. She claimed she did not know what the word "recreationally" meant.

Closing submissions

[13] For the pursuer, I was invited to accept the testimony of the pursuer's witnesses, and to reject the defender's testimony so far as inconsistent therewith. The eviction of the defender was said to be proportionate having regard to the legitimacy of the pursuer's aim;

the significant quantity and value of drugs seized; the drug-dealing paraphernalia, which suggested that dealing was being carried on within the house; the defender's knowing involvement; her personal financial gain; the evidence of ongoing intimidation (of the defender) by others, thereby threatening the peace of the neighbourhood; the deleterious effect of drug dealing on the community; and the pursuer's compliance with Scottish Government Guidance on the stream-lined eviction processes. The eviction may adversely affect the defender and her child, but this was outweighed by the legitimacy of the aim. I was invited to attach no weight to neighbours' "petition", as the signatories had not been called to speak to it.

[14] For the defender, I was invited to refuse the order. It was accepted that the pursuer was pursuing a legitimate aim but it was said that eviction would be disproportionate. I was invited to reject Ms McCarthy's evidence: no written report had been lodged or spoken to; she was not the person responsible for making the decision to evict; she was unable to speak directly to the reasoning; at best she offered a second-hand understanding that the gravity of the offence was the key factor. Absent evidence of any assessment by the pursuer of the personal circumstances of the defender and her son (notably, the impact of eviction on their health), the pursuer's decision-making process was said to be flawed, disproportionate and "not Article 8 robust". She was vulnerable due to her "mental health difficulties"; she was susceptible to intimidation at the hands of drug dealers; she never had access to the safe; the third parties did not attend at her house when she or her son were present; this was her first and only criminal conviction; she had otherwise complied with the tenancy terms; less intrusive measures were available (specifically, a probationary tenancy), which had not been properly considered; and her neighbours were supportive of her remaining in occupation. There was said to be significant mitigation. The impact of eviction upon her

and her son would be "dire". Reference was made to *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).

Reasons for Decision

The legal principles

[15] In normal circumstances (i.e. in cases not involving public sector evictions), the onus of establishing that an interference with an ECHR Convention right is justified (and proportionate) rests on the State – that is, upon the public authority that seeks to interfere with the right. In addition, "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. Lastly, normally, 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, a conventional 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]).

[16] In *Manchester City Council* v *Pinnock* [2011] 2 AC 104, the Supreme Court turned this conventional approach to proportionality on its head in public sector repossession cases.

[17] Critically, the onus is reversed in such cases. According to *Pinnock*, 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.

[18] Put more broadly, the Supreme Court in *Pinnock* conceded a *procedural* point of principle inherent in Article 8, ECHR – namely, 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 has no right under domestic law to occupy the property, and even where the legislation purportedly leaves the court no room for discretion. However, as a legal tool to contest the *substantive* merits of a proposed repossession, the principle of proportionality (though now available procedurally to the first-instance court) remains tightly constrained, if not blunted, in its application by the *Pinnock* decision.

[19] Subsequent case law suggests that, in practice, most occupiers in repossession proceedings may not have reaped much *substantive* benefit from the application of the Article 8 Convention right. A proportionality defence (under Article 8, ECHR) is difficult to establish in public sector eviction actions.

[20] *Pinnock* was followed by the Supreme Court in *Hounslow LBC* v *Powell* [2011] 2AC 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 Supreme Court's approach in *Pinnock*

and *Powell* was then adopted by the Inner House of the Court of Session in *South Lanarkshire Council* v *McKenna* 2013 SLT 22.

[21] 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)).
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> (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".
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> (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.
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> (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.

[22] 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.

[23] 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 in such cases public sector landlords "may have to explain why they are not securing alternative accommodation". 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.

[24] 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 *Carroll,* Hamilton Sheriff Court, Sheriff J. Speir, 31 August 2022; and *River Clyde Homes Limited* v *Woods*, Greenock Sheriff Court, Sheriff C G McKay, 1 September 2015).

[25] 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, supra*; *Wheatley Homes Glasgow Ltd*,

supra). 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).

[26] 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 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.

[27] 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.

[28] Logically, therefore, the balancing exercise may be subtly different with an occupier who *does* have security of tenure (as in the present case). To be clear though, *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 this defender's eviction proportionate under Article 8, ECHR?

[29] 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.

[30] 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.

[31] 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, on the evidence in this case, they can also be seen to be ancillary and subordinate aims. 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, there is another "cogent" reason (per *Pinnock*) for seeking recovery of possession in this case. The predominant objective of this repossession action is the removal of a source of nuisance to the neighbourhood. That objective is both intrinsic and manifest in the ground for recovery of possession founded upon by the pursuer (2001 Act, schedule 2, paragraph 2). It is a perfectly legitimate objective. It can be justified for multiple reasons.

Where, as here, the perceived nuisance derives from conduct that is both criminal and inherently anti-social, the underlying justifications of the objective may be (i) to prevent a recurrence of the offending behaviour, (iii) to deter others from engaging in similar behaviour, and (iii) to reassure law-abiding tenants and neighbours that an effective sanction can be imposed for such conduct. The preventative, deterrent and declaratory strands or rationales of the objective are best illustrated in housing policies aimed at evicting persons concerned in the supply of illegal drugs. Therefore, I am satisfied that the objective sought to be achieved in this case is legitimate and sufficiently important to justify interfering with the defender's Article 8 right.

[32] The next question is whether the proposed eviction is a proportionate means of achieving that legitimate aim, with the onus resting squarely on the defender.

[33] In my judgment, the defender has failed to discharge the onus upon her of establishing that it would be disproportionate to order eviction, in terms of Article 8, ECHR. I reach that conclusion for the following reasons.

[34] In the first place, the pursuer's legitimate objective in this case itself carries real weight in the assessment of proportionality. The wretched impact of drug-dealing on neighbourhoods is notorious. The misery it brings to individuals, families, and the wider community is renowned. Tenants should be made aware that if they engage in this vile trade it will not be tolerated by landlords and that there will be adverse consequences for them. The wider community should have confidence that public sector landlords will take their responsibilities seriously, by acting robustly to extirpate this particular social blight from the midst of their neighbourhoods. The eviction of those involved in drug-dealing promotes a safer environment for law-abiding tenants and their families. The objective

sought to be achieved by the pursuer reflects a pressing social need, to which real weight should be attached in the assessment of proportionality.

[35] In contrast, in the second place, the defender's personal circumstances, while deserving of sympathy, are regrettably neither remarkable nor compelling. The medical evidence of her asserted mental health issues was sparse. In her oral testimony, she made fleeting and generalised references to her poor mental health. A brief medical report dated 21 May 2024 purportedly from her general practitioner was lodged in process (item 1, defender's first inventory), but the author did not speak to it, and no independent medical practitioner was called to explain or amplify its terms. Instead, in examination-in-chief the defender merely read parts of it out, albeit without objection. It bears to record that in around 2010, the defender was diagnosed with low mood and anxiety; in around 2020, she was diagnosed with depression, anxiety and occasional panic symptoms; and between March 2021 and March 2024 she attended her general practitioner with ongoing (unspecified) "mental health issues". Parts of the report were unfamiliar to her. The report speaks of a "recent bereavement" for which she was supposedly offered counselling, but in her testimony the defender seemed oblivious to this and could not even recall the name of the deceased. In the event, the pursuer did not dispute the general diagnoses in the report, but that does not greatly assist the defender's *Pinnock* proportionality defence. Regrettably, on the spectrum of mental well-being, the defender's diagnoses, as disclosed in the evidence, are *prima facie* unexceptional and unremarkable, both in nature and severity. The GP's report speaks of "depression", but with no categorisation as to whether this is mild or severe, continuing, time-limited, or event-specific. (Her first diagnosis in 2010 appears to have been ante-natal in nature.) Bland references to "depression", "low mood", or "anxiety" are unilluminating, absent further specification of type and severity or a symptomatic

narration. In any event, there is no evidence of these generalised "mental health issues" having any actual impact (still less, any *significant* impact) upon her daily life, or functioning, or decision-making, or susceptibility to exploitation, or risk of exposure to undue hardship - either now, or in the past, or in the future (in the event that she is evicted).

[36] As Sheriff J. Speir similarly concluded in *North Lanarkshire Council* v *Kelly, supra* (para [42]), I am prepared to accept that this defender has a degree of vulnerability, but I certainly do not have a clear or compelling picture as to (i) the precise nature and significance of that vulnerability, specifically whether it constitutes a recognised and serious mental disorder; (ii) what impact, if any, it currently has upon her daily life, or functioning, or decision-making, or susceptibility to exploitation, or risk of exposure to undue hardship; (iii) what impact it is likely to have upon her in the future (with or without proper treatment), if she is evicted, and (iv) what impact, if any, it had upon her at the time of the offending conduct. (To be clear, this latter issue (numbered (iv)) is not an essential prerequisite by any means. A tenant advancing an Article 8, ECHR defence would certainly not be required to attain the more onerous threshold of proving a causal link between his diagnosed mental disorder and his offending conduct. To do so would tend to collapse the distinction between *Pinnock* proportionality and the separate statutory protection against disability discrimination under section 15 of the Equality Act 2010. However, if such a connection were to be established, it may be a relevant factor in the proportionality balancing exercise.)

[37] Given the weakness of the medical evidence in this case, I am not persuaded that the defender falls within that potentially exceptional category identified by Lord Neuberger in *Pinnock* (para [53]), being occupiers who are "vulnerable as a result of mental illness, physical or learning disability, poor health or frailty". That category should probably be

reserved for those with a more clearly-evidenced vulnerability that is significant both in nature and personal impact. For completeness, I also observe that there is no medical evidence to substantiate any diagnosed mental vulnerability suffered by the defender' son, still less of its type, severity or impact.

[38] *Esto* the evidence is sufficient to bring the defender within the protective embrace of Lord Neuberger's potentially exceptional category, nevertheless the dearth of reliable medical evidence as to the impact of these general "mental health issues" upon her functioning (now, in the past, and in the future), means that she fails to displace the compelling weight to be attached to the pursuer's countervailing legitimate aim in removing her.

[39] As a cross-check, I also observe that no less intrusive or drastic means has been shown by the defender to be available to achieve the pursuer's legitimate aim. The mere existence of such an alternative is by no means determinative, but it would at least be a barometric tool by which the proportionality of the proposed eviction can be cross-checked (*Bank of Mellatt*, [75]). Re-housing the defender would merely transfer the perceived nuisance elsewhere – indeed, not far - to another of the landlord's neighbourhoods. Neither the preventative nor deterrent objectives would be achieved.

[40] For these reasons, I conclude that the defender has failed to discharge the onus upon her of proving that eviction would be disproportionate. The removal of this particular defender, in these particular circumstances, strikes a fair balance between the interests of the wider community and the defender's Article 8, ECHR right. The averred statutory ground of recovery of possession is established, and the procedural prerequisites of the stream-lined eviction process are satisfied (2001 Act, s. 16(2)(aa)). There is no need to consider the separate test of "reasonableness" (2001 Act, s. 16(2)(b)).

[41] *Esto* the section 16(2)(aa) stream-lined eviction process does not apply, decree as craved would still require to be granted in terms of the normal eviction process (under section 16(2)(a)) because on the evidence (i) a statutory ground for recovery has been established (2001 Act, schedule 2, paragraph 2) and (ii) it is "reasonable" to make the order. In this context, reasonableness is to be determined by reference to the non-exhaustive list of factors in section 16(4) of the 2001 Act. Those considerations favour the granting of decree. First, the nature of the impugned conduct is serious drug offending involving concern in the supply of drugs of significant quantity and value over a two week period. Second, the defender's culpability is significant, in that she was well aware that her house was being used to store and supply illegal drugs, she was personally benefiting from that illegal conduct, and she positively facilitated, and thereafter turned a blind eye to, it. Third, there is nothing that the pursuer might have done to secure cessation of that conduct prior to it being discovered, given the inherently clandestine nature of drug dealing. Fourth, drug dealing has corrosive and anti-social consequences for communities generally; the defender's conduct can fairly be assumed to have contributed to that societal blight; and it is therefore in the public interest that such behaviour be dealt with firmly (*South Lanarkshire Council* v *Nugent* 2008 Hous LR 92).

[42] Accordingly, I grant the order for removal as craved. The issue of expenses is reserved meantime.