SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2020] SC GLA12

GLW-B2049-19

NOTE BY SHERIFF TONY KELLY

in the case of

KEITH DOCHERTY

Pursuer and Appellant

against

TOLLCROSS HOUSING ASSOCIATION LIMITED

Defenders and Respondents

Act: Party
Alt: Humphries, Solicitor, Shepherd & Wedderburn

Introduction

[1] This matter came before me for a full hearing on the pursuer's summary application to challenge the defenders' refusal to consent to his application to assign the tenancy of the property at 0/2, 1591 London Road, Glasgow, G32 4SH ("the property"). I heard evidence from the pursuer and his daughter, Shannen Docherty. I heard evidence from the defenders' housing officer, Ms Maureen Barnes. I then heard a brief submission from the pursuer and from Mr Humphries in reply. I retired to prepare a note and returned to provide my decision and an *ex tempore* outline of my reasons. I held that the defenders' refusal to consent to the pursuer's application to assign the

tenancy was not reasonable. I ordered the defenders to consent to the application. This is a fuller note outlining the reasons for my decision.

Findings in Fact

[2] I found the following facts admitted or proved:

(1) The pursuer is the tenant of the property at 0/2, 1591 London Road, Glasgow, G32 4SH.

(2) The pursuer, his wife, Robina Docherty and two children Shannen and John Docherty have resided at the property since May 2008

(3) On or around 9 August 2019, Mr Docherty's (the pursuer's) spouse, Robina Docherty left the property and moved to a new home at 22 Tantallon Road, Glasgow.

(4) The pursuer's daughter, Shannen Docherty, and son, John Docherty, both resided at the property 0/2, 1591 London Road, Glasgow, G32 4SH as at 4 September 2019 and as at 6 January 2020.

(5) On 28 August 2019 the pursuer applied to assign the tenancy to his daughter, Shannen Docherty. His application is partially reproduced at 5/6 of process.

(6) By letter dated 4 September 2019 (5/5 of process) the defenders refused to consent to the pursuer's application to assign the tenancy of 0/2, 1591 London Road, Glasgow, G32 4SH.

(7) On or around 30 August 2019, (the pursuer's daughter,) Shannen Docherty, made attempts to change the arrangements for payment of the rent due for the property to be debited from her bank account. This application was refused. She was not given the defenders' housing officer's rationale or justification for refusing this arrangement. All she was told was that this arrangement could not be effected.

(8) In or around September 2019 a friend of (the pursuer's daughter) Shannen Docherty moved into a third bedroom at the property. She continues to reside in the property as at 6 January 2020.

(9) On 27 December 2019 a notice of proceedings for recovery of possession, in terms of section 14(2) of the Housing (Scotland) Act 2001 was served on the pursuer. The ground upon which the defenders stated they may seek to raise proceedings for recovery of possession was that the pursuer was no longer residing at the property and accordingly it was no longer his only principal home. This was said to be in breach of the tenancy agreement.

(10) The property at 0/2, 1591 London Road, Glasgow, G32 4SH at 6 January 2020 was not under occupied.

(11) Notwithstanding what the defenders wrote in the letter of 4 September 2019 to the pursuer, there were other reasons which informed their refusal of the pursuer's application to assign the tenancy. These included that (i) the pursuer had not followed the correct process; and (ii) that not all information had been disclosed to the defenders about the pursuer's family circumstances.

(12) The defenders failed to have regard to factors which prima facie were relevant to their consideration of whether to consent to the pursuer's application or not. These included: (i) they failed to enquire further into what would happen at the property in the event of the assignation being consented to; (ii) they failed to carry out enquires at their own hand about who was occupying the property at 0/2 1591 London Road as at 4 September 2019 until 6 January 2020; (iii) they failed to advise the pursuer of the fruits of any enquiry about who was residing at the property and obtain a response from him;

(iv) they failed to take into account the fact that the pursuer and his family had resided at the property for a significant period of time with no reported anti-social behaviour complaints; (v) they failed to have regard to the proper and timeous settlement of rent obligations by the pursuer over the term of the tenancy; (vi) they failed to have regard to the prospective assignee being in a position to continue to settle the rent timeously; (vii) they failed to have regard to the potential good behaviour of the prospective assignee.

(13) The defenders' refusal of the pursuer's application to assign the tenancy was not reasonable. Therefore, I directed that the landlord consent to the pursuer's application to assign the tenancy at the property.

Evidence

Pursuer

[14] The pursuer was aged 40 years and was employed as a driver with two different employers. He was a tenant of the defenders from around 2007 or 2008. He and his wife, Robina, stayed together at the property with their two children Shannen Docherty and John Docherty. His wife moved out and purchased another property at 22 Tantallon Road, Baillieston, Glasgow. This was due, in part, to difficulties experienced between the pursuer and his spouse. The situation improved. At the time of submitting an application to assign the tenancy – 28 August 2019 – to his children Shannen and John, it was the pursuer's intention to move out to live with Robina Docherty at that address in Baillieston. At the time of submitting the application to assign the tenancy, he was still residing at 0/2, 1591 London Road, Glasgow. The property consists of three bedrooms, a living room and a toilet. He had the tenancy of another property prior to moving to 0/2, 1591 London Road, Glasgow, G32 4SH. The defenders were his landlords

at that property where he previously resided. He did not consider the property at 1561 London Road would be under occupied. It was the intention that his son and daughter would reside there with a friend.

[15] The pursuer experienced a number of difficulties with the housing association. He complained about the state of the back close at 1591 London Road on a number of occasions. He stated that he had "reported" two employees Nicola Muir and Ms Maureen Barnes.

[16] He did not think that the defenders' refusal was reasonable. The property would not be under occupied. He thought that the defenders ought to take into account the housing needs of his children. They would be rendered homeless. There had never been a problem with them paying rent. He wanted to assign the tenancy to his daughter who is more trustworthy than the son. His daughter had made application to transfer the rental direct debit to come from her account. This was refused. She had to pay rent when it was due via a credit or debit card.

Cross-examination

[17] In cross-examination the pursuer confirmed that he had been together with his wife some 20 years, "on and off". He confirmed that he previously resided at another tenancy, rented from the defenders. His wife attended to the purchase of the property at Tantallon Road. The title to that property was taken in her sole name. She attended to all of the arrangements in this regard. The pursuer said that he lived at Tantallon Road from time to time. The notice of proceedings for recovery of possession had been served upon him at the address in Tantallon Road. His son visited the property in Tantallon

Road from time to time. There were two bedrooms at that property. He did not permanently reside there.

[18] His daughter also had stayed there from time to time. He did not know the frequency or duration of his son's stays, saying that it "depended on the money he's got". He thought his son stayed at Tantallon Road perhaps one or two nights per week. He had told the housing association when he attended with them to apply to assign the tenancy that it was his intention to move in with his wife at Tantallon Road. At the time he also told the defenders it was his intention to move out of the property at 1561 London Road but that was not due to happen straight away. He moved sometime in "late September 2019".

[19] The pursuer was taken to the notice of proceedings for recovery of possession which had been lodged in process (5/10). It had been left for him at Tantallon Road. He read the certificate of service confirming it had also been left for his son at that address. He was taken to a letter dated 4 January 2020, produced at 5/13, from sheriff officers addressed to the defenders' solicitors confirming their report of the service. It states that on 27 December 2019 a notice of proceedings for recovery of possession was served upon Mr Docherty's son John by leaving a copy of the notice with him, the pursuer, at Tantallon Road.

[20] The pursuer was then asked about details of his wife's purchase of the property and was taken to the Land Certificate, produced in process at 5/14. He was unable to confirm any information in relation to the purchase of the property. His wife attended to all of this.

[21] The pursuer was then taken to the defenders' first inventory of productions, and, in particular, the agreement between the pursuer and defenders (a Scottish Secure Tenancy Agreement) dated 16 May 2008 (5/1).

[22] The pursuer was taken to his application to assign the tenancy produced at 5/6 of process headed "Assignation Request Form". Page 2 of that form is blank. It transpired that this had been lost from the defenders' records. The pursuer said that he had not confirmed "100%" that he would be moving to Tantallon Road. He said that if the application to assign was refused he would come back.

Shannen Docherty

[23] Ms Docherty is employed in McDonald's in Coatbridge and had been for 2 years. She is aged 23 years. She resided at 0/2, 1591 London Road, Glasgow with her brother who was born 14 September 1990. At the hearing on 6 January 2020 he was aged 29 years. She was aware of the application made by her father. She stayed in the property with her brother. She was aware of the application from paperwork coming through. She was happy staying there. She had been there since 2008 with her parents and her brother. She wanted to stay there.

Cross-examination

[24] A friend had moved into the property in September 2019. The witness was able to provide the friend's name – Fiona. Ms Docherty asked the housing officer about seeking permission for the friend to stay and was told that she (Shannen Docherty) was on the application. Both she and her brother visit her parents at Tantallon Road, sometimes on a weekly basis. Her brother stays there perhaps one or two days per week but this varies. He stays sometimes with his friends too, but his main place of residence

is at 0/2, 1591 London Road. Ms Docherty confirmed that sometimes she stayed with her boyfriend. Her brother was employed as a security guard in Tesco. She did not consider that her father had completely moved out. He still had retained some clothes at 1561 London Road. He came back there from time to time. Her mother did not return to London Road. She thought her father spent more time at Tantallon Road than London Road. She did not consider that her brother spent more time at Tantallon Road than London Road.

Defenders' evidence

Maureen Barnes

[25] Ms Barnes was aged 54 years and employed as a housing manager with the defenders. Her place of work was at 868 Tollcross Road in Glasgow. She had been employed there for a period of around 8 years. Her responsibilities included overseeing the operation of the housing association. She was a manager of approximately 15 people. She was taken to the defenders' first inventory of productions. In the Scottish Secure Tenancy Agreement between the pursuer and the defenders (5/1) at page 11, para 4.10 it is stated:

> "We will not unreasonably refuse permission for an assignation, sub-letting, joint tenancy or taking a lodger. Reasonable grounds for refusing permission include the following:
>
> - we have served a notice on you warning that we may seek eviction on certain grounds because of your conduct;
> - we have obtained an order for your eviction;
> - the rent or deposit you propose charging is unreasonable;
> - the proposed change would lead to the criminal offence of overcrowding;
> - we intend to carry out work in the house which would affect the part of the house connected with the proposed change."

[26] The Scottish Secure Tenancy Agreement was entered into between the pursuer and the defenders on 8 May 2008. On 28 May 2008 the property consisted of three bedrooms. It was styled as a "four apartment" property. There was a garden with a communal back close and a front garden that could be accessed by ground floor tenants. The family was made up of the pursuer and his wife Robina Docherty together with their two children, Shannen and John. They were all at the property.

[27] The witness was then taken to 5/2 of the defenders' first inventory of productions, being the Allocation Policy of the defenders from June 2016. The witness confirmed that this was in force in September 2019. It was due for review but this version of the Allocation Policy had been reviewed in June 2016. The witness was taken to para 5.5 headed "**Further Definition of Housing Need Points**". The witness explained the Allocation Policy involved looking at those in need and assessing those with reference to priority. Those with greater priority were placed in a higher category of need according to the policy. When looking to house prospective tenants, the defenders will look at the circumstances based on the points attributed to them as a result of the policy. At para.5.5.2 under the heading "Under Occupation" the policy states:

> "To comply with the policy principle of making the best use of the housing stock the association seeks to encourage applicants under occupying accommodation intended for larger families to transfer to smaller properties.
>
> Applicants who are under occupying will have the number of bedrooms they need, compared with the number of bedrooms presently available."

[28] The witness said that the general point was the best use of the housing stock. If a property was under occupied they would look to move tenants to a smaller property.

Four apartment properties were in high demand. The defenders would look to make best use of housing stock. The witness explained why the properties were in high demand. There was a long waiting list for such properties. The Allocations Policy, referring to under occupation, would deal with the situation where grown up children move out or one of the parents move on. The housing association would encourage a "transfer to smaller properties".

[29] The witness was then taken to para 5.5 of the Allocations Policy headed "Size/Type of housing required" (there appear to be two paragraphs numbered 5.5) where it states:

> "We will place your application on our waiting list based on the size and type of accommodation you require.
>
> Applicants are, in general, considered for houses that are suitable for their needs and household size. This rule exists to prevent under occupation and overcrowding. This will be worked out based on overcrowding definition in 5.4.1 as follows:
>
> - One bedroom for couples/partners/or single persons/parents.
> - One bedroom for two children of the same sex under the age of 16.
> - One bedroom for two children under the age of 10, regardless of sex.
> - These rules may not apply in certain circumstances if a separate bedroom is required for medical/social or relevant reason.
> - Applicants may apply for housing that is larger than that required, although they may only be considered if other qualifying applicants do not want the particular house in question.
> - If you need to move for medical reasons concerning mobility we will normally only offer ground or first floor properties.
> - If you have access to children we will consider you for an extra bedroom but we will need evidence to support this. You will normally only be considered for one extra bedroom regardless of the number and ages of children you have access to.

- If a property has been adapted for example with a walk-in shower, we will try to identify someone who needs this facility, where possible.
- For sheltered or wheelchair adapted properties we will contact appropriate agencies regarding referrals if we cannot identify anyone suitable from our housing list."

[30] The witness was then taken to 5/3 of the defenders' first inventory of productions, being the defenders' policy in relation to Assignation of Tenancy. This bears the date of approval as 23 May 2016 and was in force as at September 2019. At the introduction (read by the witness) it states:

> "1.1 The purpose of this policy is to set out the terms in which the association will permit tenants to assign tenancies."

[31] Paragraph 5.0 of the notes is headed "**Grounds for refusing an application for Assignation**". The witness was taken to bullet point 5 which reads:

> "Where the association has served on the tenant a notice of intention to raise proceedings for possession, specifying a ground or grounds for recovery of possession."

[32] Ms Barnes confirmed that the application made by the pursuer had been refused. She said that "all of the information had not been disclosed regarding the family circumstances". Information had been received from neighbours who suggested that Mr Docherty was no longer residing there. Ms Barnes continued, stating that "Mr Docherty was not following the process properly…we decided to refuse the application."

[33] Ms Barnes was then taken to 5/6 of the defenders' first inventory of productions being Mr Docherty's application to assign the tenancy. Ms Barnes said that she had seen the original. Page 2 was now lost. She confirmed that it stated in the application at page

2 that Mr Docherty intended to reside at Tantallon Road. She confirmed that Mr Docherty wanted to assign the tenancy to his daughter, Shannen. Questions 6 and 7 were inapplicable (the pursuer had not had any anti-social behaviour order issues and was not related to a committee member or employee of the housing association). The pursuer and Shannen Docherty had signed page 3 of the form.

[34] Number 5/4 of the defenders' first inventory of productions is Ms Barnes' letter dated 30 August 2019:

> "Dear Mr Docherty
>
> **Request to assign your tenancy at 1591 London Rd, 0/2, Tollcross G31 4SH**
>
> I refer to your telephone call to this office today and subsequent visit to our office regarding your request to assign your tenancy to your daughter.
>
> As explained to you by my colleague, Nicola Muir, Housing Officer, we have 28 days to consider your request. As was fully explained to you by Nicola Muir and then by myself there is a process to be followed and until we have concluded that process you remain the tenant of this property and as such continue to be responsible for all aspects of the tenancy, including payment of the rent. Withholding your rent payment will have repercussions for the tenancy.
>
> Your behaviour and attitude toward Nicola Muir, Housing Officer, Jackie Green, Housing Officer and myself when you attended the office was neither helpful nor acceptable.
>
> I strongly advise you to modify your behaviour when speaking to our staff or when visiting this office or we will have no option but to refuse you entry to our office.
>
> Yours sincerely
>
> Maureen Barnes
> Housing Manager".

[35] Ms Barnes was then asked about the background to this letter. In response to questions from the court about the relevance of this line, Mr Humphries said that this communication was "part of the assignation process".

[36] Ms Barnes said that Shannen Docherty had attended to arrange a direct debit from her account to pay the rent. She had been dealt with by Ms Barnes' colleague who had explained the process. That colleague had come to see Ms Barnes. Ms Barnes explained the process to the pursuer (who was present) saying that they needed time to decide upon the application. Ms Barnes said that the pursuer had endeavoured to explain to her (Ms Barnes) that his daughter, Shannen had rights and that he was of the view that the defenders were "stopping her human rights".

[37] In response to questions from the court, Ms Barnes confirmed that generally where the money came from to settle the rent was "neither here nor there". The matter was not gone into with the pursuer and his daughter. They were simply advised that the defenders could not accept the direct debit from the daughter's account. Ms Barnes stated that she refused to attend to this because she thought accepting money from the pursuer's daughter would "muddy the waters".

[38] The pursuer confirmed to Ms Barnes that his son and daughter remained in the property. Ms Barnes was unaware of the potential for a friend moving in at some later stage. No written application had been made for a third party to reside there. In connection with such an application, that "might happen" but it had not been arranged by the time of the application to assign the tenancy.

[39] In response to questions from the court as to what bearing that information would have upon the defenders' decision, she said "that would certainly make things a bit different".

[40] Ms Barnes was of the view that Mr Docherty had moved out of the property. He had not followed procedure "as would be expected".

[41] Ms Barnes went on to explain why in her view the property was under occupied. There was only one, possibly two persons residing and this was a three bedroom property. In the defenders' opinion only Shannen Docherty was living at the property. There was under occupancy of two bedrooms. There was under-utilisation. The property could be made better use of.

[42] In response to questions from the court, Ms Barnes confirmed that if Shannen Docherty and her brother John Docherty were in the property then the under occupancy would be to the extent of only one bedroom. Asked what effect on under occupancy a friend residing in the property would have, Ms Barnes said that the property would not then be under occupied.

[43] No application had been made for the friend to reside there. Ms Barnes said that only Shannen Docherty was residing at 1591 London Road.

[44] The witness was then taken to the defenders' third inventory of productions and details of the notice of proceedings for recovery of possession. The notice confirms that possession of the property was sought on the basis that: ground 1, an obligation of the tenancy had been broken, and ground 5, that the pursuer had "ceased to occupy the house as [his] principal home". The tenancy agreement clause 2.1 was reproduced in full:

> "2.1 You must take entry to the house, occupy and furnish it and use it solely as your only or principal home. You are entitled to have members of your family occupying the house with you as long as this does not lead to overcrowding. You must tell us who will be living with you when you take entry to the house. If we ask you must tell us no is living in the house (sic). You must tell us when there is a change in those who are living in the house".

[45] This appears to have been served by solicitors acting for the defenders on 27 December 2019. There are guidance notes attached.

[46] Ms Barnes confirmed this was served upon the pursuer on 27 December 2019 by depositing the notice "in the tenant's dwelling place at Flat 0/2, 1591 London Road, Glasgow" – 5/10(4). It was also left with his son John Docherty at 22 Tantallon Road – 5/10(5). It was served upon qualifying occupiers both children – 5/11(1) – (4) and upon John Docherty – 5/12(1), (4) and (5).

[47] The service of this notice was instructed on 24 December 2019. At that time Ms Barnes was aware of the court date of 6 January 2020.

Cross Examination

[48] In a brief cross-examination the pursuer raised with Ms Barnes the housing needs of his son and daughter. Ms Barnes said that they would need to apply to the defenders and they would be assessed. Ms Barnes said potentially they could reside with him and his wife.

[49] The circumstances of a neighbour who had made a similar application were raised with Ms Barnes who did not know of the circumstances. She managed some 2,500 houses. Mr Docherty asked about the occupation of another property within the close at 1591 London Road and whether this was under occupied. Ms Barnes could not answer in relation to the circumstances of that property and family residing there. Ms Barnes said that at the time of the application to assign Mr Docherty had moved out of the property. It was put to Ms Barnes that the pursuer did not leave the property until September 2019. Ms Barnes said it was before the application to assign the tenancy.

[50] In connection with his daughter's attendance to arrange a direct debit from her account, no reason had been given, said Mr Docherty, for refusing this. Rent had been paid at the property.

Submissions

Pursuer

[51] In a brief submission the pursuer reminded the court that his son and daughter had been residing in the property since 2008. They were aged 29 and 23. His daughter had a degree. In pointing these matters out, the pursuer was trying to illustrate that there were no difficulties envisaged by the defenders or raised by them in connection with the refusal of the application to assign.

Defender

[52] On behalf of the defenders Mr Humphries, solicitor, sought decree of absolvitor with expenses. In Mr Humphries' contention, relying upon *East Lothian Council* v *Duffy* 2012 SLT (Sh Ct) 113, reasonableness should be looked at as at the date of the hearing *de novo*. He submitted that it was undisputed that there was a Scottish Secure Tenancy Agreement between the pursuer and the defenders for the lease of the property at 0/2, 1591 London Road, Glasgow. This was a three bedroom property which was highly sought after. I was asked to accept the evidence of Mr Docherty that he had moved out at some point in September 2019.

[53] Mr Humphries took me to the refusal letter of 4 September 2019 produced at 5/5 in the defenders' first inventory of productions. This stated that:

> "The association has not given her permission because assigning the tenancy to Ms Docherty would under occupy your property as defined within the Associations (sic) Allocation Policy."

[54] As a result of the proposed assignation, the property would be under occupied. It was the opinion of the defenders that that would be the case. It was therefore reasonable for the defenders not to consent to the application to assign.

[55] Mr Humphries contended the law as at 6 January 2020 provided, in terms of section 32(3)(g) of the Housing (Scotland) Act 2001, that there were reasonable grounds for refusing consent if the result of the assignation would be under occupancy. Mr Humphries submitted that the fact that sub-section (3)(g) referred to under occupancy meant automatically the landlord's refusal to assign was reasonable.

[56] Mr Humphries submitted that the effect of the defenders serving a notice (at 5/10 of process) intimating their intention to commence proceedings against the pursuer then section 32(3)(a) of the 2001 Act had application, again rendering the landlords refusal to consent to the pursuer's application reasonable.

Statutory Provisions

Section 32 of the Housing (Scotland) Act 2001, provides:

> **"32 Assignation, subletting etc.**
> (1) It is a term of every Scottish secure tenancy that the tenant may assign, sublet or otherwise give up to another person possession of the house or any part of it or take in a lodger—
> (a) only with the consent in writing of the landlord,
> (b) in the case of an assignation, only where the house has been the tenant's and the assignee's only or principal home throughout the period of 12 months ending with the date of the application for the landlord's consent to the assignation under paragraph 9 of schedule 5 and
> …
> (1A) For the purposes of an assignation mentioned in subsection (1)(b), a period may be considered in relation to a person only if—
> (a) the person was the tenant of the house throughout that period, or
> (b) at any time before that period began, the landlord was notified by—
> (i) the person, or

(ii) any other person who was the tenant of the house in question when the notice was given,that the house in question was the person's only or principal home.

…

(2) A landlord whose consent is required under subsection (1) may refuse such consent only if it has reasonable grounds for doing so.

(3) There are, in particular, reasonable grounds for refusing such consent if—

(a) a notice under section 14(2) has been served on the tenant specifying a ground set out in any of paragraphs 1 to 7 of schedule 2,

(b) an order for recovery of possession of the house has been made against the tenant under section 16(2),

(c) it appears to the landlord that a payment other than—

(i) a rent which is in its opinion a reasonable rent, or

(ii) a deposit which in its opinion is reasonable, returnable at the termination of the assignation, subletting or other transaction and given as security for the subtenant's obligations for accounts for supplies of gas, electricity, telephone or other domestic supplies and for damage to the house or contents, has been or is to be received by the tenant in consideration of the assignation, subletting or other transaction,

(d) the transaction for which consent is sought would lead to overcrowding of the house in such circumstances as to render the occupier guilty of an offence under section 139 of the 1987 Act,

(e) the landlord proposes to carry out work on the house or on the building of which it forms part so that the proposed work will affect the accommodation likely to be used by the subtenant or other person who would reside in the house as a result of the transaction.

(f) in the case of consent to an assignation by a local authority or a registered social landlord, if the proposed assignee is not a person to whom that local authority or registered social landlord would give a reasonable preference when selecting tenants under section 20(1) of the 1987 Act, or

(g) in the case of consent to an assignation, if the assignation would in the opinion of the landlord, result in the house being under-occupied."

Part 2 of Schedule 5 to the 2001 Act provides:

"PART 2 ASSIGNATION, SUBLETTING, EXCHANGE ETC.

9 A tenant under a Scottish secure tenancy who, in pursuance of section 32(1), wishes to assign, sublet or otherwise give up to another person possession of the house or any part of it or take in a lodger must make a written application to the landlord for the landlord's consent, giving details of the proposed transaction, and in particular of any payment which has been or is to be received by the tenant in consideration of the transaction.

> …
> 11 On an application under paragraph 9 or 10 the landlord may –
> (a) consent, or
> (b) refuse consent, provided that it is not refused unreasonably.
> 12 The landlord must intimate its consent or refusal and, in the case of refusal, the reasons for the refusal, to the tenant in writing within one month of receipt of the application.
> 13 If the landlord fails to comply with paragraph 12, it is to be taken to have consented to the application.
> 14 A tenant who is aggrieved by a refusal may raise proceedings by summary application.
> 15 In such proceedings the court must, unless it considers that the refusal is reasonable, order the landlord to consent to the application."

Decision

[57] The summary application is brought in terms of paragraph 14 of Part 2 to Schedule 5 of the Housing (Scotland) Act 2001. This provides that a tenant may raise a summary application if aggrieved by a refusal to consent to the application to assign. The court's jurisdiction to deal with such an application is to be found at paragraph 15 of Part 2 to Schedule 5 of the 2001 Act which provides:

> "15. In such proceedings the court must, unless it considers that the refusal is reasonable, order the landlord to consent to the application."

[58] I was referred to the decision of Sheriff Braid in *East Lothian Council* v *Duffy* 2012 SLT (Sh Ct) 113. In that case, a local authority landlord sought recovery of possession of a property let to tenants. Those tenants had sublet their home and moved out for a year. The tenants intimated an intention not to return to the property. The local authority raised proceedings and the qualifying occupiers, to whom the tenants had sublet the property, were sisted as parties to the action. Their application to assign the tenancy had earlier been refused, as had their summary application challenging that refusal of consent. Sheriff Braid held that in determining upon the issue before him regarding the

reasonableness of the local authority being granted decree under section 16 of the 2001 Act, he was able to look at the local authority's prior refusal to consent to the application to assign – see para 62.

Reasonableness

[59] Further, the meaning and effect of para 14 and 15 of Part 2 of Schedule 5 to the 2001 Act gives an aggrieved tenant "not so much a right of appeal as a right to have the question of reasonableness considered de novo by the court". The nature and scope of the court's jurisdiction in an application such as this is not to focus upon the decision under attack. As Sheriff Braid goes on to note:

> "The question for the court is not whether no reasonable landlord would have refused to grant consent, but whether the court itself considers that the refusal is reasonable. Thus the focus is not so much (as it would be in an appeal) on the decision itself as on the underlying circumstances.
> …
> (As an aside, para. 15 by its use of the phrase "is reasonable" would tend to suggest that the court must consider reasonableness as at the date of hearing of the summary application, rather than the date of the landlord's original consideration, but I was not addressed on this point.) In considering that question, the court would not be restricted to consideration of the sole ground relied upon by the pursuer, but would have been entitled, indeed bound, to have regard to all relevant factors." (at para 64)

I respectfully agree that this is an authoritative statement of the applicable law.

[60] An indication that the court should decide upon the question of reasonableness at the time it considers it, i.e. at the date of the hearing or the date of its decision, can be gleaned from the legislature's use of the present tense in para 15 of Part 2 of Schedule 5 to the 2001 Act. The court does not look back to the decision made by the defenders and determine whether or not it fell within bands of reasonableness open to the particular decision-maker at that time. The nature of the court's assessment is not akin to an appeal or review but rather it carries out its own assessment having regard to all

relevant factors, not simply those invoked by the defenders at the time it refused consent to the purser's application.

[61] I was given no assistance by parties in connection with the approach of the court in determining upon the question of reasonableness under this provision. Certainly Mr Humphries did not suggest that any review to be carried out looked at reasonableness in the traditional *Wednesbury* sense (*Associated Provincial Picture Houses Limited* v *Wednesbury Corporation* [1948] 1KB 223). All that he submitted was that the issue of reasonableness arose for consideration as at the date of the hearing of the summary application – invoking Sheriff Braid's observations in parenthesis at para 64 in *Duffy* as authority for that proposition.

[62] It appears to me that the jurisdiction enjoyed by the court is unencumbered: it is for the court to assess reasonableness. That is not to say that the assessment of reasonableness takes place in a vacuum or uninformed by relevant factors. The court's approach is to assess reasonableness at its own hand having regard to the whole facts and circumstances. The court's consideration of reasonableness *de novo* is unfettered by gloss or reference to specific considerations.

[63] Section 32(3) of the 2001 Act provides a list of circumstances where reasonable grounds may be made out. These include subsection (3)(a), when a notice of proceedings for recovery of possession have been served upon the tenant, and subsection(3)(g) in connection with an assignation if it would result in the house being under occupied.

[64] Sheriff Braid observes in *Duffy*, in relation to the court's approach to determining upon the reasonableness of a refusal to consent to an application to assign a tenancy,

that the reference in section 32(3) of the 2001 Act to "in particular" means that the factors listed there were not exhaustive, see para 63. I agree with that interpretation.

[65] Mr Humphries submitted that the defenders being able to bring themselves within the ambit of one of the sets of circumstances listed in sub-section 32(3) meant that automatically the decision to refuse to assign by the landlord was a reasonable one. The court had no discretion.

[66] I do not share that view. If that were the case then the scope of the court's assessment of reasonableness would be simply to check that (in the circumstances of the application here) a Notice has been served (in terms of section 32(3)(a)) of the 2001 Act or, in the case of subsection 3(g), whether the landlord had formed an opinion that the subjects would be under occupied.

[67] The nature of the court's assessment of reasonableness is not circumscribed by a consideration of the application of the factors listed in section 32(3). If that were the case then the court would check that a Notice had indeed been served by the defenders in terms of section 14(2) and would then read, as Ms Barnes did in her evidence, the report from the sheriff officers and that would be an end to the matter. Similarly, in connection with subsection 32(3)(g) the court would look to the expression of opinion of the landlord in connection with the issue of under occupancy. Such an approach would deprive the court's own assessment of reasonableness of any meaningful content. That is not, in my view consistent with the terms of paragraph 15 of part 2 to Schedule 5 of the 2001 Act.

Change of law

[68] Section 32(3) of the 2001 Act was amended by the Housing (Scotland) Act 2014. The specific provision of the 2014 Act which did so, section 12(2), was commenced by The Housing (Scotland) Act 2014 (Commencement No. 8, Savings, Transitional and Supplemental Provisions) Order 2018. The appointed day was 1 November 2019, i.e. between the date of refusal (4 September 2019) and the date of the hearing (6 January 2020). On that date section 32(3)(g) of the 2001 Act came into force "like the switching on of a floodlight" (Bennion on Statutory Interpretation, 5th Edition p.325). The amendments brought into force by the Housing (Scotland) Act 2014, and commenced by the 2018 Order, ought to have made their way into a revised agreement between pursuer and defender. It ought to have been brought to the attention of the tenant. Article 9 of the 2018 Order provides:

> "**Supplemental provision**
> **9.** Prior to 1st November 2018, a landlord under a Scottish secure tenancy or a short Scottish secure tenancy must notify the tenant in writing of the changes to their tenancy agreement which will arise from the commencement of Part 2 of the Act."

That does not appear to have been done in connection with Mr Docherty's agreement.

[69] I do not consider anything turns upon the intervening change in the law. As at 4 September 2019, notwithstanding that sub-section 32(3)(g) of the 2001 Act was not in force, it would have been open to the defenders to seek to invoke under occupancy as a reason or factor informing their decision on the pursuer's application.

[70] I accept Ms Barnes' evidence in relation to the context within which the defenders deal with an application to assign. Notwithstanding that she took various definitions from the Defenders' Allocations Policy, that context seemed a reasonable one within which the defenders would operate. The issue of under occupancy would,

generally speaking, be a relevant factor in determining upon applications to assign tenancies. That was justified, in the evidence of Ms Barnes, in order that the best use was made of the housing stock.

Under Occupancy

[71] The factual basis of the defenders' assertion in Ms Barnes' decision letter of 4 September 2019, that the property would be under occupied in the event of assigning the tenancy, was inaccurate. I heard evidence from Shannen Docherty that the property was occupied by her, her brother John and her friend Fiona. As against that, Ms Barnes appears to have been of the view that, as at 4 September 2019, the property was only occupied by Shannen Docherty. If that were the factual premise underpinning the conclusion that the property would be under occupied then that ought to have been communicated to the pursuer. If it had been then he would have been afforded an opportunity to correct that error. Sometime in the course of September 2019, Shannen Docherty's friend, Fiona, moved into the property. The property was not under occupied having regard to the Allocations Policy of the defenders. Ms Barnes stated that that information about a friend being present in the property would have made a difference to the decision-making process. Later on in her evidence she was explicit in saying that the property would not be under occupied in the event of that friend being an occupier there. That seemed unsurprising because in that event the best use was being made of that part of the housing stock.

[72] For Mr Humphries the presence of that friend fell to be disregarded because that had not been formalised by way of application to the defenders. No application had been submitted in terms of section 32(1) of the 2001 Act (which relates not only to

assignation, but also to the consent of the landlord to be given in the event that a lodger is to be taken in). Although not the subject of direct evidence, I was not surprised that the pursuer had not made an application in this regard. He was leaving the property.

[73] Similarly, the prospective assignee, Shannon Docherty, could not have made application until she was the tenant. Prior to that being decided upon, she made application simply to alter the administrative arrangements for payment of the rent. That seems to have led to a robust exchange between the pursuer and representatives of the defender. His daughter was not told of the defenders' reason for refusing to accept such an alteration. It is therefore unsurprising that the prospective assignee, Shannen Docherty, did not revisit the office of the defenders with a view to formalising the presence of the lodger. For present purposes, in my view the absence of that being regularised by way of application to the landlord is not as significant as Mr Humphries submitted that it was. It was contended that, absent the defenders' consent, the matter fell to be disregarded. Ms Barnes, however, was clear in her evidence that the presence of that friend meant that the property was not under occupied. When answering that question she did not seek to qualify her response with reference to the basis of that friend's occupation – whether with or without the consent of the defenders. That makes sense as a matter of logic: the property was fully occupied. In connection with the manner of assessing occupancy used by the defenders – their publicised Allocations Policy – no mention is made of the status of those residing at the property or of their relationship to the tenant. Again that makes sense because on questions of occupancy, the Allocations Policy is concerned with allocation not assignation. Put another way, the best use was being made of the housing stock.

Notice

[74] The defenders served a notice upon Mr Docherty of an intention to initiate proceedings for recovery of possession of the subjects at 0/2, 1591 London Road. Ms Barnes said that the decision to instruct the service of these notices came about on 24 December 2019. The sheriff officers attended to serve the notices upon the tenant and the qualifying occupiers on 27 December 2019. The full hearing in this case was 6 January 2020, some 10 days after the service of the notices with the New Year holiday period intervening. For Mr Humphries none of that mattered. He pointed to the terms of section 32(3)(a) of the 2001 Act. He contended that the service of a notice under section 14(2) of the 2001 Act was the end of the matter. The refusal of consent was thus rendered reasonable. It was in this context that Mr Humphries pressed on me Sheriff Braid's view that the assessment of reasonableness ought to take place in the present not in the past. That meant that the court was able to have regard to the service of the notice which post-dated the defender's refusal to consent.

[75] Section 14(2) of the 2001 Act provides that proceedings for repossession may not be raised unless a notice is served specifying the ground under which decree would be sought (Section 14(4)(a)). The notice here avers that the pursuer has broken the tenancy agreement by him having ceased to occupy the property as his principal home – clause 2.1. It also states that repossession may also be sought under Ground 5 – for an identical reason.

[76] The question as to whether the house is the tenant's only or principal home is dealt with in terms of section 32(1)(b) of the 2001 Act, in connection with an application to assign a tenancy. It provides that the application to assign may be submitted

> "…only where the house has been the tenant's…only or principal home throughout the period of 12 months ending with the date of the application for the landlord's consent to the assignation under paragraph 9 of schedule 5".

A similar qualifying period applies to the prospective assignee's occupation of the house as his or her only or principal home. The pursuer qualifies – there has been no challenge to his occupation of the property for the purposes of his making the application. The service of notice avers that that is no longer the case.

[77] The court in *Duffy* felt able, in proceedings for recovery of possession under section 16 of the 2001 Act, to look at the circumstances surrounding a landlords' refusal to consent to an application to assign made by qualifying occupiers. Similarly, in proceedings looking to review the reasonableness of the landlords' refusal to consent, it is also open to the court to look at the contents of a notice intimating an intention to institute proceedings for recovery of possession. The court may have regard to that factor in determining upon the reasonableness of the defender's refusal to consent to a tenant's application to assign where the service of such a notice was prayed in aid as in some way supporting the reasonableness of that decision.

[78] In connection with the notice of intention to raise proceedings for recovery of possession of heritable property, the defenders say that the pursuer has breached a term of tenancy in that the subjects are not his only or principal home. However, it also arrives at its decision upon the pursuer's application to assign the tenancy on the basis that he will no longer be residing there. The form completed by Mr Docherty seeking the defenders' consent to the assignation (at 5/6, page 2) asks "if you will leave your present home after the assignation where will you move to?" Mr Docherty was straightforward in his evidence and, according to Mrs Barnes, stated on the form that

has been mislaid, that he would be moving from the property to reside with his wife at Tantallon Road. The defenders reach a view in connection with who might be occupying the property absent the pursuer. It then founds upon his absence as a ground for seeking repossession on the basis of a breach of one of the grounds of the tenancy agreement. That it seems to me is a matter of the defenders trying to have their cake and eat it, *par excellence*. It seems unlikely to me – without deciding the matter – that there would be a ready answer to the reasonableness of the decision to make an order or not for recovery of possession in light of these circumstances – section 16(2)(a)(ii) of the Housing (Scotland) Act 2001.

Defenders' Decision Making

[79] The defenders in deciding upon the pursuer's application to assign the tenancy took into account irrelevant factors. They failed to apprise the pursuer of what they were doing in connection with his application and about the proper basis for its decision. Ms Barnes was clear in her oral evidence that the decision of the defenders, communicated to the pursuer by letter of 4 September 2019, was not comprehensive. Rather, according to her oral evidence further factors informed the decision to refuse consent. These were not communicated to the pursuer. In particular she said in her evidence that information had come to the attention of the defenders via neighbours of the pursuer. She said that all of the information about the family circumstances had not been disclosed to the defenders. She was not asked in evidence what in particular this related to. She was not asked what investigations were carried out and by whom. She was not asked how many neighbours had been approached by representatives of the defenders or had volunteered information to the defenders unprompted. It was clear,

however, that that alleged failure to disclose information informed Ms Barnes when making her decision.

[80] Ms Barnes was explicit in her evidence that a reason for refusing the application was because Mr Docherty had not "followed the process properly". She was not asked by the defenders' solicitor precisely what was meant by this. If there was a failure to follow process on the part of the pursuer, that failure was not communicated to the pursuer. He was not advised in any detail about the procedure that he ought to have followed; what he had done wrong with reference to that undisclosed process (or policy outlining that process) and that any failure in this regard would be detrimental to the consideration by the defenders of his application to assign. There is no mention in the defenders' published policy on assignation (5/3 of process) of the duties of an applicant such as the pursuer in connection with any "process" to be followed or any intimation that a failure in this regard will be potentially held against an applicant. I can find no such term in the Scottish Secure Tenancy agreement entered into between the parties on 16 May 2008 (produced at 5/1 of process). In short, the pursuer was not told what his failure was and, further, was not advised that any failure in this regard would lead to the refusal of his application.

[81] Ms Barnes gave evidence about a robust exchange between Mr Docherty and representatives of the defenders that took place at the defenders' office. That must have been on 30 August 2019 as the letter which followed this contretemps is dated then (and produced at 5/4 of process). Before this line of questioning was embarked upon, the court enquired of Mr Humphries as to why this was relevant to the issue before the court. Mr Humphries replied that it was "part of the assignation process". Mr

Docherty's daughter attended at the defenders' offices to make arrangements to transfer the direct debit to pay the rent from her own account rather than that of her father or her mother. This application was refused. Mr Docherty was displeased at this decision and there appeared to have been unpleasantries exchanged within the office at that time. The only indication that this may have infected the approach of Ms Barnes is that the defenders' solicitor indicated that this incident "was part of the assignation process". He elicited the evidence in this regard and directed Ms Barnes to the letter issued to the pursuer of 30 August 2019. It reminded Mr Docherty of his obligations to pay the rent and said that his behaviour and attitude "was neither helpful nor acceptable".

[82] The defenders' decision to refuse the application for the alteration of administrative arrangements in respect of the direct debit payment for rent was because, as Mrs Barnes stated in her evidence, she did not want to "muddy the waters". All that Shannen Docherty and the pursuer were told was that this was not possible. They were aggrieved at this. It would appear that part of their grievance had some basis in that the real reason for refusing that alteration was not made known to them. Their response may have been held against them.

[83] I consider that the issue of reasonableness to be determined by the court as at the hearing of 6 January 2020 is informed by its assessment of the whole facts and circumstances pertaining as at that date.

[84] The communication of refusal to consent to the assignation dated 4 September 2019 was inaccurate. It left unexpressed other factors that informed that decision, namely (a) that the pursuer had not disclosed (to an extent unspecified) all of the information relative to the family circumstances; and (b) that the pursuer had failed to

follow procedures and processes (to an extent unspecified) that apply in connection with such applications.

[85] In so far as the decision was informed by these factors, I consider that the defenders took into account irrelevant factors. It is difficult to see how these various factors could, in terms of the tenancy agreement, at 5/1 of process (paragraph 4.10), the Assignation Policy, at 5/2 of process (paragraph 5), or section 32(3) of the 2001 Act, be relevant in assessing the reasonableness of the defender's consent to the pursuer's application to assign.

[86] In connection with the reason provided for in their letter to the pursuer for refusing his application, namely under occupancy, the defenders moved from a factual premise undisclosed to the pursuer. They either decided that the property would be under occupied in the event of Shannen Docherty living there alone, or in the event of Shannen Docherty living there with her brother John Docherty. I was left in some doubt, even after hearing from Mrs Barnes, what factual basis the letter of refusal proceeded upon. It matters not, neither of these circumstances pertained as at the decision letter of 4 September 2019 or 6 January 2020. At some point in the course of September 2019, Ms Docherty's friend, Fiona moved to occupy the remaining bedroom. In agreement with the evidence of Ms Barnes on this point, this had the effect of meaning, in the event of the assignation being granted, the property as at 6 January 2020 was not under occupied.

[87] Further, in assessing the whole facts and circumstances the defenders failed to take into account relevant factors. They failed to enquire and properly inform themselves as to what was happening or what would happen at the property in the

event of the assignation being granted. I was not told of their enquiries with neighbours and whether these were initiated by the defenders or information was volunteered to them. What is clear, however, is that no enquiry was made of the pursuer and his family – to ascertain their position in relation to the fruits of the defenders' enquires (if that was what happened) and to obtain from the Docherty family members direct who they say was residing at the property. Mrs Barnes said information that someone else was residing in the third bedroom would have made "a big difference" to the decision made. The defenders paid no heed to the pursuer's tenancy of this and a previous property. In regard to each, there was no difficulty in settling the rent and an absence of neighbour complaints on anti-social behaviour issues. The Docherty family's occupation of the property at 1591 London Road since May 2008 was left wholly out of account. The prospective assignee's occupation of the property as her family home since May 2008 was left out of account. Shannen Docherty is in full-time employment as is her brother. The ability of the prospective assignee to continue to meet rent when it becomes due does not appear to be an issue. On the face of it these appeared to be relevant factors. None were taken into account.

Disposal

[88] In all the circumstances, having regard to the foregoing matters which informed my assessment of the reasonableness of the defenders' refusal to consent to the pursuer's assignation, I considered that such refusal was not reasonable. In those circumstances the outcome is mandated by paragraph 15 of Schedule 5 to the Housing (Scotland) Act 2001. I ordered the landlord to consent to the application.

[89] Mr Docherty, although he had incurred costs in instructing a solicitor without the benefit of legal aid, did not seek his expenses. His only desire was to make sure that the application to assign was given effect to and accordingly I made no award of expenses.