OUTER HOUSE, COURT OF SESSION

[2011] CSOH 55

OPINION OF LORD WOOLMAN

in the cause

JOHN CAMPBELL (Assisted Person)

Pursuer;

A756/2009

against

GLASGOW HOUSING ASSOCIATION LIMITED

Defender:

Pursuer: M Stuart; Drummond Miller, LLP

Defender: R McIlvride; Burness

24 March 2011

Introduction

[1] Since 1 November 2006, Mr Campbell has lived at Flat 1/5, 15 Kirkton Avenue, Glasgow ("the Flat"). It is located in a twenty three storey block of flats in the Knightswood area of the city. The Flat is owned by the Glasgow Housing Association Limited ("the GHA").

[2] The GHA is a registered social landlord and charity. Its principal aim is to provide social housing. Glasgow City Council transferred about 86,000 tenancies to the GHA in March 2003 to enable it to fulfil its role. Many GHA tenants are in straitened financial circumstances. At least two thirds rely on state benefits as their main income.

[3] Shortly after his tenancy began, Mr Campbell fell into rent arrears. In 2008 the GHA raised a summary cause action against him in Glasgow Sheriff Court. The action was one for recovery of heritable property. On 29 September 2009, the GHA was granted a decree of ejection against Mr Campbell ("the Decree"). In this action he seeks to reduce the Decree.

The Pursuer

[4] Mr Campbell is thirty five years of age. He has had a somewhat wretched life. At the age of six, he was referred to a psychiatrist. Mr Campbell claims that was a consequence of being abused. When he was fifteen years old, he was taken into care. At different stages of his adult life, he has been a heroin addict and he is currently on a methadone programme.

[5] For about eighteen years, Mr Campbell was in a relationship with Anne Butler. They met when they were both in care. Subsequently, they lived in various houses and hostels. They have a daughter, who is now eight years old. She herself has been taken into care and Mr Campbell has not seen her for some time.

[6] Mr Campbell's general practitioner, Dr Henderson, stated that Mr Campbell had a long history of anxiety, chronic depression, panic disorder, sleep disturbance and substance abuse. He described Mr Campbell's

lifestyle management as "fairly chaotic". In particular, Mr Campbell displayed a lack of concentration. He was unable to organise dates and would tend to forget things. As well as methadone, at present he is also prescribed diazepam and temazapam

[7] The medical records confirm that Mr Campbell has had a significant history of psychiatric intervention. In 2005, he was diagnosed as suffering from Emotionally Unstable Personality Disorder. The records also disclose that he has a long history of non-attendance at various clinics and that he appears to have given different accounts of his circumstances to different professionals.

[8] Dr Henderson stated that Mr Campbell did not cope well with adverse life events. Mr Campbell himself said that if he was evicted from the Flat, he would "basically just end his life".

The Flat

[9] After his relationship with Ms Butler terminated, Mr Campbell became homeless. For a period he lived in a hostel, but he left there because of violence. He then stayed with a friend for about three months, before obtaining his tenancy of the Flat. Mr Campbell stated that he does not know his neighbours: "I keep myself very much to myself".

[10] According to Mr Campbell, the Flat is in a poor state of repair. He stated that the door was damaged about three years ago when the police used a battering ram on it to try to gain entry. They were looking for a different individual with the same name. Mr Campbell claimed that the letter box is essentially a hole in the door. As a result, items which are "posted" through the door are stolen. He also stated that the kitchen in the Flat is due to be refurbished and that he is entitled to receive a disturbance payment of £300 while the work is being done.

The Accrual of Rental Arrears

[11] When Mr Campbell was still in care, he undertook two youth training scheme courses, one as a chef and the other as a tiler. At a later date, he was employed for three months as a security guard with Rentokil. During the last decade, his income has come wholly from state benefits. He has not worked since about 1999.

[12] When Mr Campbell first moved into the Flat, he received income support and full housing benefit. In consequence, his rent was paid by the Department of Social Security. The situation changed when one of his friends, John Woods, moved into the Flat. Although he agreed to pay Mr Campbell £7.40 per week as a contribution toward the rent and expenses, in the event he did not do so. Mr Woods stayed for about a year.

[13] The change in position affected Mr Campbell's eligibility for benefits. If a non-dependant resides in a property, the tenant ceases to be eligible for full housing benefit. The fact that there was an additional occupant of the Flat was not initially known to the Department of Social Security. Accordingly, for a period Mr Campbell was overpaid in respect of housing benefit.

[14] At about the same time, his other benefits changed. Mr Campbell was found fit for work and taken off Income Support. He first received Job Seeker's Allowance, before being placed on Employment Support Allowance.

[15] In consequence of these benefit changes, Mr Campbell required to repay sums to the Department of Social Security. His financial situation deteriorated and among many other debts, he fell behind with the rent. He entered into an arrangement with the GHA to pay off the arrears. It informed him (a) that he could make the payments in cash at their offices; and (b) that if he made payments elsewhere, for example through a post office, they could take up to seven days to register on the GHA system.

The Summary Cause Action

[16] Mrs Browne, a senior solicitor employed by the GHA, explained that its policy is to give tenants as much support as possible. Eviction is a measure of last resort. In June 2008, however, the GHA raised summary cause proceedings to recover possession of the Flat. The summons concisely states the basis upon which the action was brought:

"... persistent failure to pay rent, poor payment history, failure to adhere to previous arrangements and failure to reply to correspondence in relation to your rent arrears which were £414.70 at 1 February 2008".

[17] The GHA sought unsuccessfully to serve the summons by recorded delivery post on 16 June 2008. It then instructed personal service. The sheriff officer who went to the Flat did not find Mr Campbell at home. Accordingly, he effected service by (i) delivering the summons through the letter-box; and (ii) sending a further copy by first class post.

[18] Mr Campbell instructed a firm of solicitors to act on his behalf. They omitted to lodge defences. On 12 August 2008, the sheriff granted warrant for ejection against him. At the same time, Mr Campbell was also ordered to pay rent arrears of £613.30, together with interest and expenses of £318.90.

[19] On 15 August 2008, Mr Campbell's solicitors lodged a minute seeking to recall the decree. The motion for recall was granted without objection on 9 September 2008. At the same time, the GHA increased the sum sought to £715.65. That reflected the increased amount due by Mr Campbell at that date. He agreed to pay off the arrears at the rate of £15 per week. A proof was assigned to take place on 3 December 2008.

[20] On that date, the proof was discharged on the joint motion of the parties. The reason given in the court minute was that parties had agreed to enter into a fresh payment arrangement. That was because Mr Campbell was unable to maintain payments at the existing rate. A second diet of proof was assigned for 20 February 2009. It was also discharged on joint motion. The minute on that occasion records that the discharge was agreed to enable Mr Campbell to make payments at the reduced rate of £15.00 per fortnight to reduce his rent arrears.

[21] The case next came back before the court on 28 April 2009. On that date the court fixed a peremptory diet to take place on 12 May 2009 and ordained the GHA to intimate the date to Mr Campbell. The GHA instructed a sheriff officer to effect personal service. When he went to the Flat, he was unable to find Mr Campbell. Accordingly, service was again made by delivering a copy of the letter of intimation through the letter box of the Flat. The sheriff officer also sent a further copy by first class post. The letter stated:

"Please note that if you fail to appear or be represented at court ..., decree for recovery of possession of your tenancy together with decree for payment of your rent arrears and court expenses may be granted against you."

[22] Mr Campbell appeared at court on 12 May. A fresh hearing was assigned to take place on 9 June 2009. The solicitor acting on behalf of the GHA was granted leave to increase the sum claimed to £817.09. Mr Campbell agreed to continue paying off his arrears at the rate of £15.00 per week. No hearing took place on 9 June, however, because the matter was continued of consent until 7 July 2009.

[23] On 6 July 2009, two employees of GHA posted a letter through Mr Campbell's letter-box which stated:

"It is imperative that you attend court at this time in order to put your case forward to the Sheriff, as you have left us with no alternative but to request full decree against you.

PLEASE DO NOT IGNORE THIS LETTER".

[24] Mr Campbell did not attend the hearing on 7 July 2009 and the GHA moved for decree of removing. The sheriff, however, refused *in hoc statu* to make such an order. Instead, he assigned a further peremptory

diet to be held on 4 August 2009. The GHA intimated this date to Mr Campbell by means of a letter dated 8 July 2009. It was personally served at the Flat by a sheriff officer, with a copy sent by first class post.

[25] Mr Campbell did appear at court on 4 August 2009. He agreed to pay off the arrears at a new rate of £10.00 per fortnight. The case was continued of consent until 29 September.

[26] Mrs Browne gave evidence about the standard procedure in the Heritable Court. She said that the sheriff states the decision in each case in open court, for example that decree is granted. When a case is continued, the Sheriff Clerk confirms matters by handing a card to the tenant with the date of the next calling of the case. There is a pile of such cards on the Clerk's desk. They have several useful contact telephone numbers for tenants on them.

[27] Mrs Browne recollected this procedure being followed on 4 August 2009. Her account was not disputed by Mr Campbell. In cross-examination, he accepted that the sheriff clerk might have given him a card stating that he had to appear on that date. His position was that if a card had been given to him, he had lost it.

[28] Mr Campbell did not appear at the hearing on 29 September 2009. On that occasion, the GHA's motion for decree was granted. Although it is termed a decree in absence, in my view it is a decree *in foro*. That was also the conclusion reached by Lord Bannatyne when he considered the motion for interim suspension: [2009] CSOH 154.

[29] No appeal was marked against the Decree and it was subsequently extracted. The summary cause rules specify that there can only be one recall of a decree in the course of an individual action. Accordingly, the only procedure now open to Mr Campbell is to challenge the Decree by way of reduction.

Dealings between Mr Campbell and the GHA

[30] The GHA maintains a detailed log of all its contacts, communications and actions in respect of each of its tenants. The log for Mr Campbell begins on 28 November 2006. From that date until October 2009, there is an extensive number of entries recording meetings and discussions with Mr Campbell, unsuccessful attempts to contact him and broken arrangements to pay off the arrears of his rent. It provides both a mirror and a cross-check for the court minutes.

[31] The log entry for 4 June 2008 records that Mr Campbell attended for a joint discussion. It notes that there is a non-dependant charge of £7.40 per week and that Mr Campbell was advised to pay off his arrears at the rate of £30.00 per fortnight from Thursday 12 June 2008. It continues:

"The tenant was advised that it is his responsibility to ensure that the rent charge is paid even although there is a non-debt charge"

[32] On 20 February 2009 the log records that the case had been continued until 28 April 2009 and continues:

"The continuation is to monitor payments by the defender to the pursuer of rent by way of housing benefit plus £15.00 per week to the shortfall in rent and arrears. I would suggest that you write to Mr Campbell setting out the terms, emphasising the importance of payment weekly and in full and that any failure to do so will result in you asking the court to grant us a decree to have him evicted. A face to face meeting may be advantageous to ensure the defender fully understands the terms and potential consequences for him".

The log entry for 28 July 2009 states:

"Called tenant to discuss rent account and case calling next week, tenant advised me he is receiving full [housing benefit] and is struggling to pay the agreed payment of £30.00 [per fortnight]. New arrangement for £10.00 [per fortnight]. First payment will be today 28 July 2009 - monitor".

[33] On the same date, another entry records that the finance section were asked for an update on Mr Campbell's housing benefit prior to the case calling again in court on 4 August. The section was informed that Mr Campbell's position had altered and that in future he would resume receiving full housing benefit with no deductions.

[34] On 5 August it is recorded that at the court hearing the previous day, the case was continued until 29 September for full housing benefit plus £10.00 per fortnight. It then states: "Defender appeared, new date given in writing to him". A further entry on 13 August 2009 records that Mr Campbell "has mental health problems".

[35] In response to a letter dated 8 October sent to him by the GHA, Mr Campbell went to the counter at the GHA office on 15 October 2009 and was told that he had to pay the balance due by him of £713.79 before 27 October 2009, otherwise he would be evicted. After that, he went to see a solicitor.

[36] On 22 October 2009, Mr Campbell's solicitor made a telephone call to the GHA and asked why it had sought decree, as he understood that payments were up to date. The solicitor was informed that there had been a missed payment between 27 August and 24 September 2009.

Payments made by Mr Campbell

[37] Mr Campbell's housing benefit has throughout been paid directly into the GHA's account. At the relevant time, it amounted to about £305 every four weeks. With regard to arrears, Mr Campbell stated that he made payments anywhere that took the housing card, but mainly at the Post Office. The GHA records show that Mr Campbell made payments as follows:

28 June 2009 £15.00

2 July 2009 £15.00

10 July 2009 £15.00

30 July 2009 £10.00

25 August 2009 £10.00

27 August 2009 £10.00

24 September 2009 £10.00

1 October 2009 £10.00

[38] Two points can be noted. First, there was a lengthy gap in mid July. Secondly, the final payment was made two days after the Decree was granted. Mr Campbell explained that he did not attend court on 29 September 2009 because he had been confused. He knew that he had to do something. He did not know, however, whether it was to make a rent payment, or to go to court. He said that he was expecting a letter notifying him of the date of the next court appearance.

[39] In the event, Mr Campbell went to Scotstounhill post office and paid £10.00 at 9.23am that day. That payment is vouched by a post office certificate. It took two days for that payment to appear in the GHA accounts. Mr Campbell thought that he had complied with the arrangement, as he understood that it was enough for him to pay within the fortnight, rather than on the first Monday.

The Motion for Decree

[40] Mrs Browne was present at a number of the hearings in the Sheriff court involving Mr Campbell. She was the solicitor who moved for decree on 29 September 2009. She explained that within the GHA, a number of experienced para-legals employed in the Housing Department sift the material and provide instructions to the Legal Department. The solicitor who deals with the matter in court retains a discretion as to whether or not to follow the instructions. It depends on the circumstances of each case, including the representations made on behalf of the tenant in court.

[41] Mrs Browne was instructed to seek decree, because Mr Campbell had not adhered to the arrangement of 28 July 2009. Those instructions would have been prepared about six days earlier, because the Friday and Monday prior to the hearing were both public holidays in Glasgow and the GHA office was closed.

[42] Mrs Browne did not have an exact memory of what had taken place in court, but explained that she would have followed a standard pattern in presenting the matter to the sheriff. In essence, that would have included a brief history of the case and the personal circumstances of the tenant, so far as she knew them.

[43] Accordingly, Mrs Browne would have informed the court about: (a) Mr Campbell's age; (b) how long he had been in the tenancy; (c) the fact that he held the tenancy in his sole name; (d) that the case had first called in 2008; (e) that decree had been granted and then recalled; (f) that two proofs had been fixed and then discharged with a view to having payments monitored; (g) that the GHA had made efforts to enter into arrangements to pay off the arrears with Mr Campbell, but there was a history of these being broken; and (h) that he had failed to adhere to the latest such arrangement, which was made on 28 July 2009 to pay £10 per fortnight.

Were the Payments Up to Date?

[44] Mr Stuart's first submission was that Mr Campbell was not truly in arrears. Mr McIlvride, who appeared on behalf of the GHA, accepted that if Mr Campbell had not breached the arrangement, then there had been a miscarriage of justice and the decree fell to be reduced.

[45] Mr Stuart argued that there was no agreement that payments had to be made on a particular date. It was enough if the payments were made in the relevant fortnight. Accordingly it did not matter if a payment was made at the end of the period and did not show up in the GHA's records for several days. Mr Campbell had adhered to the arrangement because he had made (a) a payment on 24 September, which only registered on the GHA system on 26 September (because of the two public holidays); and (b) a payment on 29 September itself.

[46] I reject this submission. Whatever calculation is made, there was a missed payment. The first payment made in accordance with the 28 July agreement was due to be paid on 11 August. No payment was received until 30 August. Having regard to the history of the case and the log entry for 28 July 2009, Mr Campbell could have been in no doubt that he had to be careful about making payments promptly at the start of each period.

[47] I also note that in moving for decree, Mrs Browne simply informed the sheriff that Mr Campbell had failed to adhere to the agreement. She did not specify how many payments had been missed. Although she understood from her instructions that there were two missed payments, she suspected that her instructions would not have altered even if Mr Campbell had only missed one payment. That failure would only have been seen as one more incident in a whole history of broken arrangements.

The Legal Framework

[48] The law relating to reduction of decrees has been set out in a number of authorities: *Adair* v *Colville & Sons* 1926 SC (HL) 51; *Zannetos* v *Glenford Holdings Ltd* 1982 SLT 453; *Bain* v *McConnell Ltd* 1991 SLT 691; *Johnstone & Clark (Engineers) Ltd* v *Lockhart* 1995 SLT 440; and *Sullivan* v *Sullivan* unreported 20 March 2003. In my view, those cases yield the following principles:

(a) reduction is a question of judicial discretion;

(b) each case turns on its own individual facts and circumstances;

(c) the remedy is only applied in exceptional circumstances;

(d) the test is higher for decrees *in foro*;

(e) reduction should only be granted where it is necessary to ensure that substantial justice is done; and

(f) the existence of, or failure to use, an alternative remedy is not an absolute bar to reduction.

Exceptional Circumstances

[49] Mr Stuart contended that the exceptional circumstances in this case were that the sheriff had not been made aware of all the material factors. In particular, the sheriff had not been told: (i) of the nature and extent of Mr Campbell's mental health problems; and (ii) that the GHA was going to retain the £300 disturbance payment to which he was otherwise entitled. He also submitted that the court should have been informed about the possibility of recovering the arrears direct from Mr Campbell's benefits.

[50] I begin by observing that each party is responsible for setting out its own position. In this case, Mr Campbell had been represented by solicitors at various stages of the process. He himself had attended numerous hearings and ought to have been aware that he could state his position in court. In my view, one must be careful to place too heavy an onus on the opposing party, even a social landlord such as the GHA, to set out every last point that can be made on behalf of the tenant.

[51] Mr Campbell was aware of the risk that decree would pass against him, standing (a) the earlier decree pronounced against him in these proceedings; (b) what had been said at earlier court hearings; and (c) what he had been told by the GHA at their office and in the various written communications they had sent to him.

[52] There was no evidence that the GHA was aware of the nature and extent of Mr Campbell's mental health problems. Dr Henderson queried whether his condition would have been evident to a layman. In my view, the very brief log entry on 13 August 2009 was not something that the GHA required to put before the Sheriff. Indeed the GHA might have been criticised for making any comment on this matter in the absence of clear medical evidence.

[53] Although Mr Campbell testified that he would apply his disturbance payment for a new kitchen to reduce the arrears, there was no evidence that the GHA knew or ought to have known about this. It was not a matter put in cross examination to Mrs Browne.

[54] In relation to the other matter raised by Mr Stuart - whether there should have been an investigation into the recovery of arrears direct from his benefits, reliance was placed on *Second WRVS* v *Blair* 1987 19 HLR 104; and *Midlothian DC* v *Brown* 1990 SCCR 765. I did not find either case of assistance. Both concerned the situation where a landlord sought recovery of possession of a secure tenancy. They did not address the situation after decree had been granted and reduction was sought. In any event, the whole history of the present action concerned the recovery of the arrears. Mr Campbell and his solicitors had had ample opportunity to focus on this matter if they had sought to do so.

Decision

[55] In my opinion there are no exceptional circumstances and I shall grant absolvitor. I have sympathy for Mr Campbell's predicament, but that is tempered by the knowledge that the relevant authority, in this case

Glasgow City Council, has a duty to house homeless persons. Mrs Browne confirmed that the GHA would refer this case to the Council.