

SHERIFFDOM OF LoTHIAN AND BORDERS AT LIVINGSTON

[2025] SC LIV 101

LIV-SD188-23

JUDGMENT OF SUMMARY SHERIFF J. MACDONALD, ADVOCATE

in the cause

ALMOND HOUSING ASSOCIATION LIMITED

Pursuers

against

JOHN DOCHERTY

Defender

**Pursuers: Way
Defender: Young**

Livingston 21 October 2025

Interlocutor

The Sheriff, having resumed consideration of the cause:

1. Grants decree as claimed in favour of the Pursuers;
2. Finds the Defender liable to the Pursuers in the expenses of the cause as assessed.

Introduction

[1] The Pursuers seek recovery or possession of heritable property at Morlich Walk, Livingston from the Defender in this summary cause action on the basis that the Pursuers aver that he has no right or title to remain in same.

[2] The Defender originally defended the claim on the principal basis that his physical health met the criteria for the adaptations to the property that had been made for the

previous tenant, his mother. Following the Court remitting this question to a person of skill, this line of defence was not insisted upon at the proof diet.

[3] The Defender at the proof diet relied on a subsidiary position to the effect that a new Scottish Secured Tenancy may be inferred from the facts and circumstances and so submits that he has a right to occupy the property.

[4] The matter called before me as a diet of proof on 19 September 2025. Helpfully however, the material facts of the case were agreed and accordingly the matter proceeded directly to counsels' submissions. At the conclusion of the hearing, I made avizandum.

Relevant facts

[5] The Pursuers are the heritable proprietors of the property at 17 Morlich Walk, Craigshill, Livingston ("the property").

[6] The Defender's mother was a Scottish secure tenant at the property from November 2019 until her death on 16 July 2023. The Defender resided with his mother during this period.

[7] The property is a two bedroomed bungalow. It is adapted to be suitable for people who require to use a wheelchair. It has a ramped access and a wet room bathroom.

[8] When the Defender's mother passed away, the Defender sought to succeed to the tenancy on the basis that he had special needs requiring the type of adaptations provided by the property.

[9] The Defender has continued to occupy the property since the death of his mother.

[10] The Pursuers wrote to the Defender on 9 August 2023. They informed the Defender that he was not a tenant of the property and further was not entitled to remain in the property. The Pursuers offered the Defender alternative accommodation. The Pursuers

informed the Defender that if he did not accept same, court proceedings for his ejection would follow.

[11] Court proceedings for recovery of possession of the property were raised on 9 November 2023.

[12] The rent for the property was £473.57 per month until 1 April 2024. Between 1 April 2024 and 1 April 2025 the rent increased to £501.50 per month. As of 1 April 2025 the rent increased to £525.40 per month.

[13] The Defender rents a garage unit from the Pursuers. He has maintained rent payments to the Pursuers in respect of same.

[14] The Defender made payments to the Pursuers in respect of the property by telephone on 11 December 2023 and 19 January 2024 respectively in the sum each of £473.57.

[15] The Defender made an application for Universal Credit in or around April 2024. He sought to include housing costs in his application.

[16] The Pursuers were contacted on the Defender's behalf by a member of staff at the Citizens' Advice Bureau on 29 April 2024. The Pursuers affirmed that the Defender was not liable for rent at the property. The Pursuers housing officer (Kirsty Rankin) advised that until the question of succession was determined by the Court, any payments made by the Defender were an "occupancy charge, basically the rent but it's not his tenancy. So we class it as a violent profit account..."

[17] The Defender made a payment on 4 June 2024 in the sum of £501 from Universal Credit. The Pursuers had or have no control over amounts paid by Universal Credit or when paid.

[18] Discretionary Housing Payments were made on behalf of the Defender on 20 and 27 June both 2024.

[19] Payments from Universal Credit and Discretionary Housing payments have been made thereafter equivalent to the monthly rent for the property.

[20] Direct debits were set up by the Pursuers for the Defender in respect of the rent for the garage unit and the property on or about 4 November 2024.

[21] There has never been any written tenancy agreement entered into or subscribed by the parties in relation to the property, nor has there been any written agreement entered into by the parties setting out their respective rights and obligations relative to the property.

[22] On 26 September 2023 the Defender telephoned a housing assistant (Robert Melville) of the Pursuers. The Defender informed the Pursuers' employee the following: "I'm wanting to pay the rent... my mum passed away and I'm trying to pay the rent and I've been trying to pay it for a bit...".

[23] The Pursuers' employee called the Defender back 17 minutes later, enquiring "is it the occupancy charge you want to pay?" The Defender repeated that he wished to "pay the rent". The Pursuers' employee reaffirmed that "it's not classed as rent. It's classed as an occupancy charge". The Pursuers advised the Defender that the outstanding balance was £1176. 29.

[24] On 3 October 2023 the Defender telephoned the Pursuers and spoke to an employee thereof (Veronica). He informed her that "I would like to pay some money [£350] to my rent". This payment was not successful. The Defender called back thirteen minutes later and spoke to the Pursuers' housing assistant Mandy Gatti, who informed the Defender that an account would require to be set up to permit the Defender's payment to be accepted.

[25] On 8 March 2024 the Defender telephoned the Pursuers and spoke to employee Jade Kelly. He reported a fault relating to the front door at the property.

[26] On 4 July 2024 the Defender telephoned the Pursuers and spoke to Robert Melville. He again stated that “I want to pay my rent”. A payment of £430.79 in respect of the property was processed by the Pursuers. The Defender further requested that the letterbox at the property be removed and the taps in the kitchen tightened. The Defender called back 28 minutes later and again spoke to Mr Melville. The Defender stated the following: “Right Robert, youse are daeing me in. I get my house rent back? ... Now because you just saying I’m not on the tenancy ... Then give me my rent back.”

[27] Mr Melville responded in the same call that “you’re not paying rent, you’re paying an occupancy”.

[28] On 4 November 2024 the Defender telephoned the Pursuers and spoke to Jonathan Bertram, housing manager. During a lengthy telephone conversation, the Defender informed the Pursuers’ employee that “I need to pay my house rent as well”. Mr Bertram facilitated the setting up of a direct debit arrangement for the garage unit. The Defender then requested a direct debit be set up for the “rent” for the property. Mr Bertram then informed the Defender that the outstanding balance on the Defender’s “violent profit account” was £3579.42.

[29] On 21 February 2025 the Defender telephoned the Pursuers and spoke to Jade Kelly. To inform her that he would not permit the Pursuers’ gas engineers entry to the house. He indicated that he was aware that the Pursuers were “trying to cap my gas”.

Summary of submissions

[30] There was common ground between the parties that the only legal relationship that may be held to exist between the parties on the facts of the present case is a Scottish Secure Tenancy as defined by section 41 of the Housing (Scotland) Act 2001.

[31] It was further common ground that a written agreement would not be necessary to form a Scottish Secure Tenancy. Further, the nomenclature used by the contracting parties may not be of particular materiality where there otherwise was consensus.

[32] Mr Young for the Defender invited me to the conclusion that the circumstances demonstrated that the parties had reached agreement to form a new Scottish Secure Tenancy. He relied upon the terms of the telephone conversations that had occurred between the Defender and the Pursuers. In particular, he highlighted the following:

- a. That the Pursuers had accepted payments from the Defender that equated with the monthly rent for the property.
- b. That the Pursuers use of the phrase “occupancy charge” was synonymous with rent.
- c. That the Pursuers’ reference to “violent profits” was something of an afterthought, only occurring several months into the correspondence between the parties.

[33] For the Pursuers, Mr Way submitted that the parties had not reached *consensus in idem*. On the contrary, the parties he said had been at cross purposes.

[34] Mr Way relied on the following:

- a. That the Pursuers had made abundantly clear from their letter of 9 August 2023 that they did not accept the existence of a tenancy. When viewed as a whole, the communications from the Pursuers made clear that they were not accepting rent payments from the Defender.
- b. That whilst it was possible that a Scottish Secure Tenancy could be created even if one party had tried not to, the circumstances of the present case do not permit such a conclusion. Mr Way founded upon the more belligerent stance

adopted latterly by the Defender in his telephone calls. This he said showed a recognition that he was aware that the Pursuers were not accepting a liability to pay rent.

- c. Whereas there was no financial claim for violent profits in the present case, reference to the existence of violent profits remains relevant to demonstrate the intention of the parties. A measure of violent profits may be equivalent to the contractual rent that may be charged for the property: *Stair Memorial Encyclopaedia*, Volume 15, paragraph 4.33.
- d. Whilst the Pursuers had accepted and acted upon requests by the Defender to undertake repairs to the property, it was submitted that the Pursuers as a social landlord and registered charity could not refuse to perform services in relation to the property. Failure to do so he observed may contravene section 22 of the *Rent (Scotland) Act* and potentially a criminal offence. Accordingly the mere fact of the performance of services was not a factor that favoured the inference of a Scottish Secure Tenancy.

Analysis and decision

Requirements of a tenancy

Under statute

[35] Section 41 of the *Housing (Scotland) Act 2001* (“the 2001 Act”) provides that a “tenancy” means an “agreement under which a house is made available for human habitation, and “lease” and related expressions are to be construed accordingly”.

[36] A Scottish Secure Tenancy is formed in accordance with section 11(1)(b) and (c) of the 2001 Act where the tenant is an individual and the house is the tenant's principal home, and where the landlord is a registered social landlord.

[37] The Pursuers in the present case are a registered social landlord. It is further clear from the facts of the case that the property is the Defender's only place of residence.

[38] It was common ground between the parties that the definition to be found in section 41 of the 2001 Act was sufficiently wide to include any kind of agreement whether written or otherwise.

Leases at common law

[39] By contrast the essential requirements of a lease at common law (Rennie, Leases paragraph 1-14) are:

- i. Identification of the parties;
- ii. Identification of the subjects;
- iii. The rent;
- iv. The duration

[40] The absence however of a fixed term may not be fatal to the existence of a lease if the remaining three elements are present (Rennie, 1-21). The absence of fixed duration may also avoid the requirement that a lease be in writing if for a duration of over a year:

Requirements of Writing (Scotland) Act 1995, section 1(2).

[41] Neither party sought to suggest that there was any arrangement short of a tenancy in place, such as a licence to occupy.

[42] Equally neither party sought to suggest that there was any question of the Pursuers being personally barred from insisting on recovery by dint of the fact that they had accepted

payments from the Defender (see *Pickard v Ritchie* 1986 SLT 466, at 468H-I, Barrowman “Residential Evictions, paragraph 1-41).

[43] In the present case, the first two essential elements at common law are unquestionably present. The parties dispute whether the payments made by the Defender should be classified as rent. The facts of the case exclude any agreement on duration.

[44] The most obvious distinction between the statutory and common law requirements is the absence of specific reference in section 41 of the 2001 Act to “rent”. Nevertheless the approach adopted by the parties to payments made and their purpose helps to inform of their true intentions and whether they had reached consensus in idem.

The actings and communications of the parties

Occupancy of the property

[45] The Defender has consistently occupied the property since the death of his mother in July 2023 and indeed had lived with his mother for a considerable period prior to her death. In my judgment, peaceful occupation of the property may permit an inference of the existence of an agreement between the parties.

[46] In the present case however, I do not consider that the Defender’s occupation has been tolerated by the Pursuers. Within a matter of a few weeks of the death of the tenant in 2023, the Pursuers had written to the Defender setting out clearly that their lack of acceptance of his succession to the tenancy, offering him alternative accommodation, requiring him to vacate the property and threatening court action if he did not. Such a communication in my judgment is wholly inconsistent with the notion of the Pursuers being tolerant of the Defender’s occupancy.

[47] That lack of acceptance on the Pursuers' part continued by the raising of court proceedings for recovery of possession some three months later.

[48] This context in my view is important when turning to the terminology adopted in communications between the parties which I turn to below.

"Rent" v "occupancy charge"

[49] Mr Young for the Defender invited me to the view that the phrase "occupancy charge" was one that is meaningless in law. It is in his submission merely an alternative expression for payment of what ought to be seen as rent. It was the equivalent of the monthly rent amount. The Defender telephoned seeking to pay "rent", and the Pursuers' staff accepted his money.

[50] There is force in that submission. The term "occupancy charge" in my judgment has no legal meaning. What it amounts to requires a consideration of the context. Even if one party tried to assert that no tenancy was formed, it does not prevent the court from deciding otherwise on an objective assessment (*Rennie*, 2-13; *Barrowman*, paragraph 1-40).

[51] By way of illustration in *Mansfield District Council v Langridge* [2008] EWCA Civ 264, the Queens' Bench Division found that a Secure Tenancy under the Housing Act 1985 in England and Wales had been created despite the attempt by the landlord to confer only a licence to occupy within a written agreement. Therefore, even where there had been an express intention articulated by the parties not to create a tenancy, the court disagreed and held one to exist due to the circumstances of the arrangement.

[52] In the present case, the Defender's payments have not been consistent. If this was payment of rent as he avers it was, then he would be in arrears. In particular, several monthly payments were missed during 2023. I accept Mr Way's submission that the

Pursuers had no control let alone a power of veto over the payments made on behalf of the Defender from Universal Credit or by way of Discretionary Housing Payments.

[53] The height of the Defender's argument under this heading is that the Defender has been consistent in his reference to "rent" in his dealings with the Pursuers. For their part however, the Pursuers too have been broadly consistent in disagreeing with the Defender's use of that word, preferring their term "occupancy charge" until later in 2024 where they introduced reference to "violent profits". Whilst I agree with counsel for the Defender that "occupancy charge" is not an entirely helpful phrase, the significance in my view in the Pursuers' drawing a distinction between "rent" and "occupancy charge" in their conversations with the Defender.

"Rent" v "violent profits"

[54] On behalf of the Defender, it was argued that the term "violent profits" had not been used by the Pursuers until well into the discourse that had been ongoing between the parties. Certainly, "violent profits" is a far more specific and relevant term to adopt where a party does not accept the existence of a lease. The Defender says that its introduction came too late and that an agreement, namely a tenancy, had already been formed by the time the first reference to violent profits occurred. Counsel's argument was that - perhaps inadvertently - the Pursuers had created a tenancy with the Defender, and that any attempt made to reclassify the payments should be viewed as an afterthought.

[55] I am not persuaded that is a correct approach. An "occupancy charge" is in my judgement capable of being synonymous with a liability for violent profits. That is especially so where the coincidence between the rent payable and the quantum of violent profits may be equal where possession of the subjects occurs in good faith (Stair Memorial

Encyclopaedia, Volume 15, paragraph 4.33). Mr Way invited me to the view that the Defender's possession of the property had been in good faith. Given the nature of the present dispute, there is force in that submission. The Defender had been living at the property with his mother until her death. It had been his home.

[56] It follows from the above that what might amount to violent profits in the present case may be identical to what the rent for the property might otherwise have been. If therefore an "occupancy charge" is distinct from a rent payment, it seems to me that the most compelling alternative classification in law for an "occupancy charge" is a payment towards violent profits as the Pursuers suggest.

[57] Further, there is material to suggest that that the Defender was aware that the Pursuers were not prepared to accept his proposition that he was paying rent for the property. In the latter stages of the documented telephone discussions, the Defender referred to wanting the money he had paid as rent refunded, and later to expressing fear that the Pursuers would cap his gas supply. Those comments indicate in my view that the Defender was fully cognisant of the differing view adopted by the Pursuers regarding his purported status as tenant and their lack of acceptance of his ongoing occupancy.

The performance of services by the Pursuers

[58] I accept Mr Way's submission that, regardless of the existence of a tenancy, the Pursuers owed statutory duties to maintain the property as registered social landlord. There is in my judgment no moment in the fact that the Pursuers entertained requests for services to be carried out at the property, such as the attendance of gas engineers. It seems to me that the Pursuers would have required to do so even if the property had been lying empty.

Conclusion

[59] The Defender argued that, in keeping with the *Mansfield* case, the Pursuers in this action had permitted a tenancy to form despite their attempts to do otherwise.

[60] In my judgment that argument fails because the Pursuers have in the present case maintained a consistent position from as early as 9 August 2023 that the Defender was not entitled to occupy the property. Whilst the Defender has sought to remain in occupation, the Pursuers took relatively swift court action to seek recovery. On several occasions where the Defender, in the face of a clearly articulated position by the property's heritable proprietors to the contrary, sought to pay rent for the property, the Pursuers have countered by challenging the use of the word "rent" and substituting their own phrase. It is important to view the approach taken by the Pursuers as a whole. Set in the context of communicating clearly at an early stage that the Defender had no right or title to occupy, backed up with court proceedings for recovery, the payments accepted by the Pursuers thereafter from the Defender cannot be construed in my judgement as rental payments.

[61] The above circumstances demonstrate in my judgment that the parties have not reached consensus in idem regarding an agreement to make this property available for habitation by the Defender.

[62] It follows from the above that the Defender has neither right nor title to occupy the property. The Pursuers accordingly are entitled to decree as claimed.

Expenses

[63] It was common ground between counsel that expenses should follow success. I accordingly find the Defender liable to the Pursuers in the expenses of the cause as assessed.