**OUTER HOUSE, COURT OF SESSION**

**[2009] CSOH 154**

OPINION OF LORD BANNATYNE

in the cause

JOHN CAMPBELL

Pursuer;

A756/09

against

GLASGOW HOUSING ASSOCIATION LIMITED

Defenders:

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**Pursuer: Stuart; Drummond Miller, WS**

**Defenders: McIlvride; Burness, LLP**

20 November 2009

**Introduction**

[1] On 29 October 2009 the pursuer moved the Court for interim suspension of a decree granted in his absence on 29 September 2009 at the Sheriff Court, Glasgow for his ejection from his flat at 1/5, 15 Kirkton Avenue, Knightswood, Glasgow, and for interim interdict against such ejection. His action triggered a caveat lodged by the defenders, and they duly appeared by counsel to oppose the motion. After hearing submissions, I made avizandum. On a matter such as this I would normally have given my decision immediately. However, given the way in which submissions developed, I decided to deliver a written opinion. The defenders undertook not to enforce the decree until I had delivered my written opinion.

[2] The relevant facts can be taken from the summons; the productions placed before me and the information placed before me by counsel at the hearing.

[3] Because the positions of the parties are reversed in this action as compared with that in the Sheriff Court, I shall, so as to avoid confusion, refer to the pursuer in the action as "Mr Campbell" and the defenders as "The GHA". Mr Campbell is a tenant of the GHA at the above subjects. He is, and has been for a considerable period, substantially in arrears with payment of his rent. In June 2008 the GHA brought an action against him in the Sheriff Court at Glasgow for payment and ejection. The various stages of the proceedings were heard in the heritable court there. Initially on 27 August 2008 what is described in the court minutes as an undefended decree for ejection and payment of arrears of £613.30 was pronounced. Mr Campbell lodged a minute of recall setting forth the following grounds:

"Reason for failure to appear or be represented:

The defender instructed solicitors Livingstone Brown to return the summons and appear on his behalf at the calling date. Due to an administrative error the summons was not returned on time and decree was granted. This is through no fault of the defender.

Proposed defence/answer:

The defender has resided in the property since 1 November 2006. Until 2007 the defender was in receipt of income support and full housing benefit. The defender is now in receipt of jobseekers allowance and required to make payments to his rent charge. The defender has applied to the Discretionary Housing Payment Fund for help with his payments. The defender has always acted as a responsible tenant. He has no alternative accommodation. The defender has spent the majority of his life in care homes. If eviction were granted he would have to present as homeless."

[4] Said decree was recalled on 9 September 2008, presumably upon one or more of the grounds in the minute. There then followed a number of continuations for Mr Campbell to make payment of arrears and for the fixing of two proofs.

[5] Following said sundry procedure on 4 August 2009 the case was continued until 29 September 2009 to allow Mr Campbell to make payments of rent plus £10 per fortnight towards arrears.

[6] According to the records of the GHA (7/1 of process) the following payments towards arrears were made after 4 August 2009 by Mr Campbell: 25 August £10; 27 August £10; 24 September £10 and 1 October £10.

[7] Mr Campbell was personally present in court on 4 August 2009.

[8] Counsel for the GHA advised me that on 29 September 2009 when the case next called in court Mr Campbell was not present. The GHA moved for decree of ejection and payment of the sum of £817.09. He advised me that the basis for their moving for decree was that Mr Campbell had not adhered to his undertaking to pay the sum of £10 per fortnight towards his arrears given on 4 August 2009. It was the position of the GHA on 29 September 2009 that Mr Campbell was in arrears in terms of said undertaking to the extent of £10 i.e. He had failed to make one payment which he was due to make. Counsel for the GHA accepted that they would not have been in a position to move for decree had Mr Campbell adhered to his undertaking.

[9] I was told by counsel for the GHA that in moving for decree the GHA had regard to the whole history of the court action. I was told that it would have been their practice when moving for decree to advise the court in order to satisfy the test of reasonableness of the following: Mr Campbell's age; whether he had dependents living with him and any special circumstances which related to him of which they were aware. Decree of ejection was granted on the said date by the Sheriff together with decree for payment in the sum of £817.09.

[10] Mr Campbell I noted had initially been represented by solicitors. They withdrew from acting on 12 November 2008. Thereafter he represented himself. He personally appeared at certain hearings but was absent on 29 September 2009.

[11] Counsel for Mr Campbell advised me that Mr Campbell at all material times believed that he had adhered to the undertaking given on 4 August to pay arrears and was not in default. He advised me that at 9.23am on 29 September Mr Campbell had been paying £10 towards his arrears (which meant that he had made the 4 payments he was due to make in terms of his undertaking) and this he believed was the £10 which was shown on the records of the GHA as having been paid on 1 October. He advised me that Mr Campbell was unaware that he was to attend at court on 29 September and that if he did not do so decree could pass against him.

[12] He further told me that the first Mr Campbell became aware that decree had been pronounced on 29 September 2009 was when he received a letter 7/6 of process dated 8 October 2009 from the GHA. This letter arrived outwith the 14 day time limit for the marking of an appeal against the interlocutor of 29 September 2009. In addition he told me that Mr Campbell could not seek to have the decree recalled as a decree had previously been recalled and in terms of the relevant Rules of Court a decree could only be recalled once. When he received this letter Mr Campbell immediately went to the local housing officer of the GHA and on being informed that it was their position that he had failed to make one payment of £10 timeously he went immediately and instructed solicitors. They in turn immediately obtained legal aid and

instructed counsel. A summons was prepared thereafter under severe time constraints. The summons triggered the caveat. In terms of the decree ejection could not take place earlier than 27 October 2009.

**Submissions for Mr Campbell**

[13] On behalf of Mr Campbell, his counsel submitted that in order to obtain interim relief he needed to show a *prima facie* case for reduction of the decree and that the balance of convenience favoured the grant of interim relief. As to the latter, he submitted that in this case, the failure to grant interim relief would leave Mr Campbell homeless and when taken together with the personal circumstances of Mr Campbell, namely: that he had spent most of his life in care homes and in addition if rendered homeless he would be unable to have his daughter come to live with him then clearly the balance of convenience was satisfied.

[14] As to showing that there was a *prima facie* case for reduction of the decree there was a preliminary dispute as to whether this was a decree in absence or a decree *in foro*. Counsel's position regarding this was a short one. He referred me to the extract decree which was 7/5 of process which contained the following: "in absence".

[15] It was his position that given the foregoing the decree was a decree in absence; that was what the decree said it was. It was his position that I could not look behind the terms of the decree.

[16] In that it was a decree in absence he submitted, in reliance on the decision of an Extra Division in *Robertson's Executor* v *Robertson* 1995 S.C. 23, that, in an action to reduce a decree in absence, it is not necessary to aver "exceptional circumstances". Rather it is necessary to look at the whole circumstances of the case. There is no precise test. The weight to be attached to the circumstances will vary from case to case.

[17] He then referred me to *Nunn* v *Nunn* 1997 S.L.T. 182. In this case Lord Macfadyen looked at *Robertson's Executor* v *Robertson* and counsel for Mr Campbell relied on certain specific observations made by him: first it was for the pursuer in a reduction action to aver that the decree in absence was not justified in fact and law and ought not to have been granted; secondly the Court in deciding whether or not to reduce a decree in absence may have regard to the whole circumstances of the case and thirdly an important aspect of the circumstances of the case to which the court must have regard in deciding whether or not to reduce a decree in absence is the explanation proffered for the decree being allowed to pass. (See: pages 183 and 184)

[18] Counsel then referred me to an unreported opinion of Lord Glennie dated 13 February 2007 *Elizabeth Brown* v *Glasgow Housing Authority Limited*. It was his position that factually this case was very much on all fours with the facts in the present case and for that reason alone was instructive. He pointed to the fact that Lord Glennie had granted interim relief in that case. In addition he particularly relied on the following passage in paragraph 17 of the judgment in which Lord Glennie observed as follows in relation to what was said by Lord Macfadyen in *Nunn* v *Nunn*:

"I would respectfully apply what was said in *Nunn* v *Nunn* more generally, in this way: the pursuer, in an action for reduction of a decree in absence, in addition to putting forward an explanation for his non-appearance, must aver circumstances showing that, had he appeared, decree would not (or, at any rate, should not) have passed against him in the form in which it did pass."

[19] Counsel took from the foregoing authorities that he had to show the following to establish a *prima facie* case:

1. Proper explanation for non-appearance.

2. That he had availed himself of all alternative remedies.

3. That there had been no delay in raising the reduction action.

4. That if the pursuer had appeared there were other circumstances which he could have put forward that would have resulted in the decree not being granted.

[20] Applying the foregoing to the circumstances of the present case it was his submission that all of these factors were present.

[21] As regards why Mr Campbell had not been present on 29 September counsel advised me that at that time Mr Campbell was acting on his own behalf. He had been present on 4 August, 2009 but had failed to understand that he was required to be present on 29 September 2009. Counsel advised me that Mr Campbell did not understand that decree could pass against him on 29 September 2009 if he were not present. In addition it was Mr Campbell's position that he had honoured the undertaking to make payments of £10 per fortnight towards his arrears given on 4 August, 2009 and there was therefore no need to appear in Court. He had received no communications from the GHA between 4 August and 29 September 2009 suggesting that he had not made his payments in terms of said undertaking and indicating that they intended to move for decree on 29 September. Counsel thus submitted that there was a cogent explanation as to why Mr Campbell had not been present on 29 September.

[22] As regards alternative remedies Mr Campbell was unable to recall the decree as this was a remedy which was only available once. As set out at an earlier stage agents acting for him had required to have recourse to this remedy as they had failed to timeously lodge defences on his behalf.

[23] As regards an appeal in terms of summary cause Rule of Court 25.1 at the time he became aware of decree having been pronounced he was out of time to lodge an appeal. Thus he submitted that no alternative remedy was available to Mr Campbell. It was not suggested on behalf of the GHA that an alternative remedy was available.

[24] As regards delay in bringing the present action Mr Campbell had immediately contacted his local housing office when he became aware of the decree. He had then followed this up by immediately contacting his former agents. Counsel had been instructed and a summons immediately drafted. It was not suggested by counsel for the GHA that there had been any delay upon which he could found.

[25] Turning lastly to the circumstances upon which he relied as supporting the view that had he been present decree would not have been granted. He referred me to the following: first the way that arrears had arisen. These had arisen due to difficulties with Mr Campbell's housing benefit. It had not been that Mr Campbell did not wish to pay his rent but there were difficulties with the benefit position. That difficulty had been cleared up by 4 August 2009 and he was now on full housing benefit which paid his entire rent thus such problems would not arise in the future. Secondly it was his position that Mr Campbell had obtempered the undertaking to repay the arrears at £10 per fortnight. It was his position that on 29 September at approximately 9.23 Mr Campbell had been paying the last of the four payments of £10 which he should have made between 4 August and 29 September. Thirdly there had been no correspondence from the GHA advising him between 4 August and 29 September that he had failed to meet his said undertaking and that the GHA intended to move for decree. Fourthly in addition there were factors regarding his own circumstances, particularly the fact that he had lived most of his life in homes and that he was seeking to recover his daughter that had he been in a position to put these before the Sheriff they would have persuaded the Sheriff that even if he had not honoured his undertaking by failing to make one payment that it was not reasonable for him to be ejected (see: Section 16(2)(a)(ii) of the Housing (Scotland) Act 2001). Thus counsel submitted that these factors when taken together would have resulted in no decree for ejection having been granted on 29 September.

[26] In addition to the foregoing counsel advanced an argument in terms of waiver. He pointed to the fact that the GHA had accepted rent from Mr Campbell since they had obtained decree on 29 September and accordingly he submitted that they had waived their right to eject Mr Campbell and that a new tenancy had been created.

[27] Lastly it was counsel's alternative position that if I were to hold that the decree pronounced was a decree *in foro* rather than a decree in absence as he had submitted to me it was his position that having regard to the circumstances he had referred me to he had fulfilled the test of showing exceptional circumstances.

**The submissions on behalf of the GHA**
[28] Counsel's broad submissions were that:

1. Mr Campbell had failed to make out a *prima facie* case.

2. In any event it was not well founded that the balance of convenience favoured Mr Campbell.

Expanding upon his first broad submission it was his position that despite what was said in the decree itself, properly understood the decree that had been pronounced was a decree *in foro* and not a decree in absence. In support of the said argument he referred me to Maclaren, *Court of Session Practice* at page 1090 where he defines a decree *in foro* as follows:

"is a decree pronounced in a cause which has been litigated by both parties. Accordingly, where there is once compearance for a defender, and defences are proponed, the decree is a decree *in foro*."

[29] He advised me (and this was not disputed on behalf of Mr Campbell) that a note of defence had been lodged in the Sheriff Court action and that a proof had in fact been fixed on more than one occasion. It was his position that in these circumstances what had been granted by the Sheriff must be a decree *in foro*.

[30] The test to be applied relative to when a decree *in foro* could be reduced was different from when a decree in absence could be reduced. Under reference to *Adair* v *Colville & Sons* 1926 S.C. (H.L.) 51 per the speech of Viscount Dunedin at pages 55 and 56 and the speech of Lord Carson at page 67, he submitted that it was only in exceptional circumstances that such a decree could be reduced. I did not understand his position as to what was the proper test to be applied to be disputed by counsel for Mr Campbell. The essence of counsel for the GHA's position under reference to the said speeches was that exceptional circumstances could only be shown where fraud or something of an equivalent nature existed and that had not been shown in the present case.

[31] He submitted that there were good reasons for this difference in test and these were as set out in *Robertson's Executor* v *Robertson* at 26B-D:

"Counsel for the reclaimer supported all three of the reclaimer's grounds of appeal. In support of the first ground it was submitted that the circumstances in which reduction of a decree in absence might be granted were quite different from those in which reduction of a decree *in foro* (including a decree by default) might be granted. The test to be applied by the court in determining whether or not to allow an action of reduction to proceed was materially different and less demanding in a case such as the present where the decree had been pronounced in absence. The reasons for applying a different test were that (1) a decree in absence was pronounced when there had been no *litis contestatio*; (2) such a decree might be pronounced in circumstances in which the persons called as defenders had no knowledge of the action or decree; (3) a decree in absence was not *res judicata*: *Paterson* v *Paterson; Gibson & Simpson* v *Pearson*; (4) it was accordingly not to be expected that the right to bring an action of reduction of such a decree would be severely circumscribed, although it was reasonable to expect in relation to a decree *in foro*. The grounds of reduction were different for reduction of decrees *in foro* from those appropriate to decrees in absence".

Counsel applying the said test to the circumstances of the present case said that nothing in the arguments put forward on behalf of Mr Campbell came anywhere near to fraud or something of an equivalent nature and on that basis Mr Campbell had failed to establish a *prima facie* case.

[32] In any event it was his position, that if I held that the decree was a decree in absence and that accordingly the lower test was applicable, then Mr Campbell had not set forth a *prima facie* case in terms of

that test either. He pointed to the whole history of the action in the Sheriff Court and submitted that this showed an increase in rent arrears; it in addition showed Mr Campbell being given a number of opportunities to reduce the arrears and failing to conform to the undertakings which he had given on those occasions; and it showed the fixing of more than one proof. He submitted that the Sheriff's decision to eject had to be looked at in the context of what had happened to that point in the Sheriff Court action. Therefore the Sheriff was not simply ejecting on the basis of a single failure to pay £10 towards arrears but making that decision against the whole background of the case. Therefore in those circumstances even if Mr Campbell had been present on 29 September decree would have been passed against him. Counsel accepted that it was a prerequisite of granting decree on that occasion that Mr Campbell had failed to adhere to his undertaking and therefore it was necessary for decree to be granted as at 29 September that he had missed a payment.

[33] Turning to the waiver argument it was his position that this also was not well founded. His argument under this head was as follows: Mr Campbell's tenancy was a Scottish secure tenancy in terms of Housing (Scotland) Act 2001; that in terms of Section 12(1)(a) it could only be brought to an end by an order for recovery in terms of Section 16(2); that in terms of subsection (5) thereof an order under subsection (2) must appoint a date for recovery of possession - and that date has the following effect:

"(a) terminating the tenancy, and

(b) giving the landlord the right to recover possession of the house."

Thus in terms of the foregoing and as set out in the decree of ejection 7/5 of process the tenancy was not terminated until 27 October 2009. The GHA had not accepted rent post that date and there therefore could not be said to be any foundation for an argument based on waiver.

[34] Lastly as regards the balance of convenience it was his position that he accepted that the consequences for Mr Campbell of the ejection decree were serious. However, it was his position that they were not nearly as serious as had been submitted on behalf of Mr Campbell. He advised me that although Mr Campbell would be ejected he would not be homeless in that he would be re-housed, as I understood it, by Glasgow City Council. Counsel accepted that this would not be as good accommodation in that it would be temporary in nature but nevertheless Mr Campbell would not be rendered homeless by this decree. Secondly the GHA, if he continued in the property, would be deprived of rental as they could no longer accept rent from him in that if they did so this would found a basis for a waiver argument. Thirdly if in the end of the day it was established that the decree should be reduced then the GHA were a substantial organisation and could meet any award of damages. Lastly he referred me to *Toynar Limited* v Whitbread & Co Plc 1988 S.L.T. 433 and in particular to the following passage in the opinion of the court at page 434:

"However that may be, in the course of his speech in *NWL Limited* v *Woods* Lord Fraser drew attention to what the practice was in Scotland. At page 1310 he stated:

'In Scotland the practice is otherwise, and the court is in use to have regard to the relative strength of the cases put forward in averment and argument by each party at the interlocutory stage as one of the many factors that may go to make up the balance of convenience. That is certainly in accordance with my own experience as Lord Ordinary, and I believe the practice of other judges in the Court of Session was the same."

It was his position for the reasons already advanced that Mr Campbell's prospects of success were poor. Taking all of these factors together he submitted that I should hold that if satisfied that the pursuer had a *prima facie* case nevertheless the balance of convenience favoured the GHA.

**Discussion**

[35] I start by considering the preliminary issue as to whether the decree pronounced by the Sheriff was a decree in absence or a decree *in foro*.

[36] Counsel for Mr Campbell relied on the phrase in the extract decree which stated "in absence" and submitted briefly that the decree was what it bore to be and that I could not look behind what was an *ex facie* valid decree in absence.

[37] Counsel for Mr Campbell advanced no argument that the definition of a decree *in foro* was other than that advanced by counsel for the GHA. His argument was solely based on what was stated in the decree. It appears to me that on a proper construction of what is said in the decree itself the phrase "in absence" means no more than on the occasion when the decree was pronounced Mr Campbell was not physically present and it is not referring to the technical concept of decree in absence and decree *in foro*.

[38] I find some support for so holding in that when a decree was granted at an earlier stage, namely: 12 August 2008, which properly understood would have been a decree in absence the word used in the Court minutes 7/3 of process to describe the decree is "undefended" and not in absence.

[39] I accordingly do not accept the argument that on the face of it this is a decree in absence. Thus in my view I do not have to look behind an *ex facie* valid decree in absence in order to make a decision as to the type of decree which was pronounced on 29 September by the Sheriff.

[40] In any event, even if I had accepted that the decree was *ex facie* a decree in absence I would have looked behind the wording on the extract and held that nevertheless it was a decree *in foro*. It appears to me that in judging whether it was a decree *in foro* or a decree in absence the court requires to look at the substance of the matter. Substance it seems to me must take precedence in this area over form. The reality of the situation when examined (and in the course of his submissions to me counsel for Mr Campbell in relation to certain aspects of the case asked me by reference to the Court minutes to have regard to what had happened in the course of the Sheriff Court proceedings) shows clearly that the decree was *in foro*. Merely adding the words in absence in the extract decree cannot I believe change the nature of the decree. The nature of the decree is decided by the stage in the court proceedings at which it is granted. The critical question is: has there been compearance for a defender and defences put into process? If that has happened then a decree pronounced will be a decree *in foro*. If on the other hand such a stage in the proceedings has not been reached then the decree pronounced is a decree in absence. It is clear in the present case that there is compearance for a defender and that a note of defence has been lodged (see 7/4 of process). In those circumstances the decree which was pronounced must be a decree *in foro*.

[41] In that I am of the view that the decree was one *in foro* the next question becomes what test should I apply in considering whether Mr Campbell has shown a *prima facie* case. The cases cited to me by counsel for the GHA support the argument that a different test is to be applied as to whether a reduction should be allowed when looking at a decree *in foro* than if the decree were in absence. Those cases in addition support the conclusion that the test is materially different and more demanding.

[42] Viscount Melville in *Adair* v *Colville & Sons* at page 56 says in relation to the test which should be applied when considering a decree *in foro*:

"I shall not attempt, where I think such attempt would end in failure, to define categorically the cases in which reduction is competent. One obvious instance would be where a judgment had been obtained by reason of some fraud practiced on the court".

Lord Carson in the same case at page 67 says that it would only be appropriate to reduce a decree *in foro* where:

"They (the party seeking reduction) are able to establish that there was such a miscarriage of justice as renders the whole proceedings fundamentally null."

He goes on to say that examples of such would be where there was improper conduct on the part of the Tribunal or any fraud practiced upon the court.

[43] Turning therefore to the merits of the motion the question for the court becomes this: has Mr Campbell applying the above test shown a *prima facie* case on the merits?

[44] I have with some considerable hesitation come to the opinion that the answer to that question is yes.

[45] Counsel for the GHA accepted that before the GHA could have moved for decree and before the Sheriff could have granted such on 29 September it was essential that they could advise the Sheriff that Mr Campbell had not conformed with his undertaking granted on 4 August 2009 to make payments towards his arrears of £10 per fortnight.

[46] In this context it is therefore important to see what Mr Campbell did between 4 August and 29 September by way of making the payments required in terms of the said undertaking. The decree which is challenged was pronounced 56 days after that undertaking was given and therefore assuming (as I believe I am entitled to) that the first payment was to be made a fortnight after 4 August then payments were due on the following dates:

18 August

1 September

15 September

and

29 September

[47] Payments of £10 were made according to the records of the GHA 7/1 of process on the following dates:

25 August

27 August

24 September

and

1 October

The position of Mr Campbell is that he was up to date with his payments in terms of his undertaking in that he had made the fourth payment at 9.23 on 29 September. There is I believe some support for that position (and in any event no conclusive countering of that position) in that according to the GHA's records by 1 October a payment of £10 had been received by them (it would appear to me not unreasonable that a payment might take two days to appear in the records of the GHA). In any event this issue cannot be decided at this stage but must await proof. There accordingly is in my view on the information before me at least a *prima facie* case that as at the point that the decree was granted Mr Campbell was not in arrears and that accordingly in proceeding to grant decree that the Sheriff proceeded on the basis of incorrect information. It appears to me that there is at least a *prima facie* case that the Sheriff has been unintentionally misled by the GHA as to whether Mr Campbell was in default in terms of his undertaking at the time that the decree was moved for.

[48] Apart from the entry in the records of the GHA to which I have referred which in my view could support the contention of Mr Campbell that he had made a payment on 29 September and does not in any event conclusively counter his contention, there is additional support for the Sheriff having been unintentionally misled from an entry dated 22 October 2009 in the records of the GHA contained in 7/2 of process which is in the following terms:

"Tenants solicitor called from Livingstone Brown to ask why we had requested decree as their clients claims he has not missed a payment. I checked account and advised that there was a missed payment between 27 August 2009 and 24 September 2009."

[49] What is clear from the records of payments kept by the GHA 7/1 of process is that Mr Campbell did not miss a payment between those dates in that as at 24 September 2009 he had made three payments and in terms of his undertaking by that date he should have made three payments. The fourth payment was not due until 29 September. Thus it seems on the face of it that the GHA has misinformed itself as to the position regarding his compliance with the undertaking and it follows therefrom could have misinformed the Sheriff on 29 September.

[50] Given the foregoing I am of the view that there is a *prima facie* case that when the decree was moved for on 29 September it was done on the basis of incorrect information, namely: that as at that date Mr Campbell had failed to comply with his undertaking of 4 August in that he had failed to make a single payment of £10. I of course accept that in giving such information to the Sheriff the solicitor acting for the GHA was in no sense seeking to intentionally mislead the Sheriff. Rather what may have happened is that because the final payment was made at the last minute by Mr Campbell the fact that he was up to date with his payments had not been transmitted to the solicitor acting for the GHA or there had been a misreading of their own records as appears to have happened on 22 October. This appears to me to be wholly understandable in the whole circumstances of this particular case and taking into account the very large number of cases which the GHA would have to deal with in the course of any particular heritable court in Glasgow. However, no matter how understandable this is, if the Sheriff was not proceeding upon the basis of correct information in relation to what was accepted to be the critical issue, namely: whether the complainer had complied with the undertaking it is my judgment that this would render the whole proceedings fundamentally null. The Sheriff would have proceeded to grant decree where not entitled to do so and this would amount to a fundamental miscarriage of justice. The circumstances would accordingly pass the test I have earlier set out in relation to the issue of reduction of a decree *in foro*.

[51] Further, there is in my opinion a *prima facie* case that any decree pronounced on 29 September based on the failure by Mr Campbell to make his fourth payment towards reduction of his arrears was premature. He had, for the reasons which I have already stated until 29 September to make that fourth payment and thus it seems to me that it would only have been on 30 September that decree could have been taken on such a basis. It would only have been on 30 September that it could in fact have been said that he had failed to make the fourth payment timeously. For this additional reason I am satisfied that Mr Campbell has shown a *prima facie* case for reduction of a decree *in foro*.

[52] Had I held that I was dealing with a decree in absence then the test which I would have applied would have been that set out by Lord Glennie at page 8 paragraph 17 of his opinion in *Brown* v *Glasgow Housing Authority Limited* to which I have earlier made reference in this opinion.

[53] Applying that test to the circumstances of the present case I note firstly that Mr Campbell's position was that he was unaware that he was required to attend at court on 29 September and was not informed by the GHA at any point prior to that that he was in breach of his undertaking. It is disputed that he was unaware he had to attend court on that date that is a matter which cannot be resolved at this stage. Mr Campbell then says that he was not in arrears and I have already set out my views in relation to that particular issue. He goes on to state that had he been present on 29 September he would have been able to put forward his argument that he was not in arrears; or on said occasion he could have tendered the sum of £10 which he was in any event going to pay on that date and would thus have complied with his undertaking. He in addition says that had he been present on that occasion he would have been able to put forward certain arguments in relation to reasonableness having regard to his personal circumstances as set out in his note of defence. In my view having regard to the whole of the said circumstances Mr Campbell could have put forward a reasonably cogent explanation as to why he was not present on 29 September. Having regard to the whole circumstances laid before me I believe that had all that information been before the Sheriff he would not have pronounced a

decree or at least should not have pronounced decree. Rather I believe it much more likely that the Sheriff would have further continued the case to monitor further payments towards the arrears by Mr Campbell. I understand this to be the practice of the said court in such circumstances and was clearly what had happened on previous occasions in the present case. In the whole circumstances applying the materially lower test as set forth by Lord Glennie I am of the view that Mr Campbell could have satisfied this test and thus had I considered that this was a decree in absence I would have held that there was a *prima facie* case.

[54] As regards the separate issue of waiver I reject the arguments put forward on behalf of Mr Campbell. In my view these were misconceived for the reasons advanced by counsel for the GHA. I was satisfied that there could not be said to be any basis for waiver. In my view there was nothing in the actings of the GHA in accepting rental up to 27 October that was inconsistent with their insisting upon their right to proceed to eject. There was nothing in their said actings which could be said to amount to the creation of a new tenancy.

[55] The final issue is the second part of the test which I must apply namely that of balance of convenience. I find this a more finely balanced decision than I had originally considered it. However, in my view the balance of convenience favours Mr Campbell. Although he would not be rendered homeless in the sense of being on the streets should I refuse to grant interim relief he would nevertheless lose his house and in a real sense his world would be turned upside down. I also have regard to the particular factors in his own background namely the fact that he has lived for most of his life in care and that if he does not have his own rented house he would not be in a position to have his daughter reside with him. I judge that these are factors which weigh on his side in considering the balance of convenience. I have had regard to the various factors cited on behalf of the GHA and I of course accept that they could meet any decree for damages and to some extent they would be prejudiced by my granting interim relief in that they could not accept rental. However I believe the factors to which I have earlier referred on Mr Campbell's side of the scales outweigh these and in the whole circumstances I believe that the balance of convenience favours Mr Campbell.

**Disposal**

[56] I shall therefore for the foregoing reasons grant interim interdict and suspension.