



SHERIFF APPEAL COURT

**[2017] SAC (Civ) 13
GLA-B1673-13**

Sheriff Arthurson QC
Sheriff Principal Scott QC
Sheriff Principal Dunlop QC

OPINION OF THE COURT

delivered by SHERIFF ARTHURSON QC

in appeal by

ROYAL BANK OF SCOTLAND PLC

Pursuers

against

JOHAR MIRZA

Defender

**Pursuers and Respondents: Foyle, solicitor; Shoosmiths LLP
Defender and Appellant: Houston, solicitor; Brown & Co Legal LLP**

6 April 2017

[1] This is an appeal by the defender against the decision of a sheriff in Glasgow to pronounce decree against him on 21 July 2016 in a summary application by the pursuers as heritable creditors under section 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970 and section 5 of the Heritable Securities (Scotland) Act 1894. The sheriff granted warrant to the heritable creditor to enter into possession and sell the subjects, ordained the defender and now appellant to vacate them and granted warrant for the summary ejection of the defender.

[2] The sheriff heard submissions on 4 April 2016 on an agreed factual position. Having become aware of the decision of Sheriff Welsh in *Westfoot Investments Ltd* 2015 SLT (Sh Ct) 201, he appointed parties to a continued hearing on 17 May 2016 to address him further on the applicability of the protective regime introduced by the Homeowner and Debtor Protection (Scotland) Act 2010. We propose dealing in short compass with the matter arising of interest in this appeal, as the submissions of parties were developed before us, namely the interpretation of the phrase “land used to any extent for residential purposes” where it occurs in section 20(2A) of the 1970 Act.

[3] The principal question upon which parties joined issue before the sheriff and before this court concerned the interpretation of this provision. Put short, if a standard security is used to secure a debt over land as so defined, then it follows that the protective regime referred to above is engaged and a debtor and others are subject to the protections introduced by the 2010 Act. The question for the sheriff was therefore whether the subjects here constituted land used to any extent for residential purposes. Following, by brief adoption, the interpretation and reasoning of Sheriff Welsh in *Westfoot Investments* on the terms of this clause, the sheriff in the court below held that the intention of the provision was plainly to protect debtors for whom the security subjects were their home. The sheriff then applied this interpretation to circumstances in which the defender did not claim that he occupied the subjects at the time of service or expiry of the calling up notice, and held that regulation 3 of the Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010 did not apply to him. He proceeded to sustain the pursuers’ pleas-in-law and grant decree.

[4] Having heard the submissions of parties today and carefully considered the notes of argument prepared for this hearing, we find ourselves in broad agreement with the

reasoning and disposal in the court below. The kernel of the reasoning of the sheriff in *Westfoot Investments* on this point is located in paragraph 24 of his judgment, where he states: “However, property used for residential purposes, is property used as a home. But whose home? ...it must be a home used either by the grantor of the standard security or the maker of the obligation secured”. We would put the matter in a slightly different way. The mischief addressed by the 2010 Act and 2010 Order is to give greater protection to such occupiers of security subjects. However, when one has regard to the scope and nature of the protective regime that is enacted, it is clear that not every occupier has the benefit of that regime. Since section 24(1B) is the process by which the protective regime is initiated, it follows that one requires to construe the applicability of the regime having regard to those persons intended to benefit by it. This generates an internal consistency within this part of the Act, as amended. The clause “land used to any extent for residential purposes” admits in our view of a rather different and antecedent question to that posed by the sheriff in *Westfoot Investments*. That question is simply this: “Were the subjects, to any extent, used for residential purposes?” This must always be a question of fact. In our view the word “residential” qualifies the purpose rather than the property referred to in the clause. It follows that in certain circumstances security subjects may be occupied or unoccupied and yet remain residential in the sense that we have described. Factual presence in a property may not be a determinative factor. Temporary absence can and should be accommodated within the definition. The examples of a resident in a hospital or a hospice were helpfully raised in the discussion before us.

[5] In the circumstances of this case, we consider that we cannot accept the appellant’s contention that the protective regime contained in the 2010 Act applies. A literal interpretation of the provision as contended for on behalf of the appellant does not in our

view fit the overarching scheme of the relevant part of the 1970 Act, as amended by the 2010 Act. This is particularly so in a case such as the present in which the defender and appellant has expressly admitted in his pleadings that he is resident and indeed domiciled at an entirely separate address than that of the security subjects. An apparently unauthorised and unspecified historical tenancy takes the appellant no further we conclude, as, in the circumstances of this case, the protective regime involves the debtor alone as the party who can come to court and resist decree being taken.

[6] In these circumstances, we hold that the sheriff has not erred in finding that the protective regime of the 2010 Act was not engaged on behalf of the defender and appellant. We accordingly propose to refuse this appeal and adhere to the interlocutor of the sheriff dated 21 June 2016.