Lumsden v Scottish Special Housing Association

No 67
Extra Division
20 February 1984
Sheriff Principal of South Strathclyde, Dumfries and Galloway
25 May 1984

The cause called before the Extra Division of the Court of Session, comprising Lord Robson, Lord Gemmell and Lord Chalmers, for a hearing. At advising, on 25 May 1984, the opinion of the court was delivered by Lord Robson.

Opinion of the Court

The essential facts of the case are not in dispute. In this summary cause action for recovery of possession of heritable property, the pursuers are the owners of the dwelling-house at 24 Cairnduff Place, Stewarton, of which the defender is the tenant. The Scottish Special Housing Association raised a summary cause action against Norman Lumsden for recovery of possession of a dwelling-house let by them to him. The defender lodged defences. After proof, the sheriff *granted* decree. The defender appealed. On 20 February 1984, the sheriff principal *refused* the appeal. The defender has now appealed to the Court of Session.

The missives of let governing the tenancy are dated 28 July and 19 August 1982. The tenancy is a secure tenancy in terms of s. 10 of the Tenants' Rights, Etc. (Scotland) Act 1980. The sheriff has held, and it is not disputed, that the defender was in prison – for an offence the details of which are not known in the current proceedings - from 22 November 1982 until 29 March 1983. He has further held established circumstances which indicate that, while the defender was in prison, his wife, who resides at the said house, was guilty of conduct which amounted to a serious nuisance and annoyance to the neighbours. Mrs Lumsden has alcohol and drug related problems. It is not disputed by the defender that, while he was in prison, his

wife caused such nuisance and annoyance; and the sheriff has found that this disturbance to the neighbours stopped after the defender came out of prison and returned to his home.

The Tenancy Contract and Tenancy regime under the Tenants' Rights Etc (Scotland) Act 1980

The tenancy agreement that pertained to the property at 24 Cairnduff Place lays out the obligations of the tenant in clear terms. Condition 12 of the missives of let states:

> "The tenant shall not himself nor shall he permit any person to either (a) cause any nuisance in the dwelling-house or in any common parts areas or facilities or (b) cause any nuisance by the presence in the dwelling-house or any common parts areas or facilities of any animal, bird, or pet".

This raises the question of 'permission' in the circumstances of this case. It is not clear to us how Mr Lumsden, incarcerated as he was during the period when the nuisance took place at his house, could be said to have "permitted" the actions complained of. Specifically, we do not find helpful Sheriff Principal Caplan's suggestion that if Mr Lumsden wished to be in a position to exercise supervision he must keep himself out of prison. We must assess the situation as it is, not as it might be in a perfect world. Clearly the landlords, the Scottish Special Housing Association, took the same view and looked at this situation pragmatically.

This may also explain why, in this cause, they did not seek to rely on breach of the specific terms of this tenancy agreement, but instead invoked the legislative framework within which this tenancy operated, namely the Tenants' Rights Etc (Scotland) Act 1980. Prior to the introduction of this Act, tenants with tenancies not covered by the Rent (Scotland) Act 1971 – that is, tenants of public sector landlords - were limited in their rights of security of tenure to the terms of their tenancy. Thus, in these simple contractual tenancies, there was no right to

stay beyond the term of the tenancy once a valid and timeous notice to quit had been served. In addition to repossessing the dwelling-house because of some failure to meet the rental obligations or other terms of the tenancy, local authority and other public sector landlords could regain possession on notice at the natural termination date or *ish* of the tenancy. Tenancies were typically monthly, so tenants had, in effect, no useful security of tenure beyond their initial contractual term. The Tenants' Rights, Etc (Scotland) Act 1980 was designed to provide a remedy, by introducing security of tenure to local authority tenants.

Nonetheless, there remain a number of situations in which a local authority landlord may repossess a property. Security of tenure depends on the tenant paying the rent as well as behaving and treating the property in an appropriate manner. Indeed, Schedule 2 of the 1980 Act sets out the circumstances in, and processes by, which a landlord may seek repossession. It stipulates that a landlord may seek the approval of a sheriff to evict, for example, for breach of the terms of the tenancy, absence from the property for a period of 6 months, or obtaining the tenancy by misrepresentation.

As far as anti-social behaviour is concerned, para. 7 of Schedule. 2, Pt. I sets out the following ground on which the court may order recovery of possession:

> 7. The tenant of the dwelling-house (or any one of joint tenants) or any person residing or lodging with him or any subtenant of his has been guilty of conduct in or in the vicinity of the dwelling-house which is a nuisance or annoyance.

It should also be noted that, whenever a possession order is sought in terms of Schedule 2, the sheriff must be satisfied that it is reasonable in all the circumstances to grant this. We will return to that particular matter later.

This appeal highlights issues in relation to which we have a number of concerns. These are issues that have broader implications for residential tenancies in Scots law. Although we are loath to criticise the drafters of the 1980 Act, it seems to us that a number of assumptions have been made which the special circumstances of this case highlight. One such set of assumptions centres on the notion of dependence within marital relationships. Despite its intentions, the plain wording of the statute fails to provide clear protection to the landlords, and more regretfully to the neighbours, as we make clear below.

Paragraph 7 deals with four possible categories of persons whose anti-social behaviour we must examine. Firstly, there is the tenant. It is clear that the Scottish Special Housing Association have the right to take proceedings against Mr Lumsden under Schedule 2, but there is no suggestion that the behaviour of this tenant – Mr Lumsden – amounted to nuisance or annoyance at the premises in this case. Indeed, as the sheriff noted, the nuisance and annoyance stopped after the defender came out of prison and returned to his home. Second, there is the joint tenant, but there is no suggestion here that Mrs Lumsden *was* a joint tenant of the Scottish Special Housing Association. Third, the behaviour of any subtenant is to be considered when looking at conduct which is a nuisance or annoyance in terms of paragraph 7. Although there is provision in the Tenants' Rights Etc (Scotland) Act 1980 to include "any person residing or lodging with him [the tenant] or any subtenant", there are no subtenants involved in the current scenario. The category of lodger – that is, someone paying in cash or in kind in exchange for the right to occupy a room in a property – is not relevant either.

"Residing with"

The final category of persons whose behaviour may lead to eviction is anyone "residing with" the tenant, and the meaning of this term is crucial in the context of the Lumsdens' case. Here, however, there seems to be a direct conflict between the plain wording of paragraph 7 and what might be regarded as the mischief that the legislation seeks to address. While the tenant was clearly not living with his wife during his period of imprisonment, when her anti-social behaviour took place, the Sheriff Principal took the view that he was, nonetheless, "residing with" her for the purposes of Paragraph 7. His conclusion was based on a conception of tenants having responsibility not only for their own actions but for those of members of the 'household'. He approached the question from the point of view of control and then conjoined this with the notion of residence and when a person can be considered to be resident in a property. Whilst we can appreciate the attractions of this approach, we are not satisfied that this is the correct way to deal with the interpretation of the statute. Amongst other things, in its assumption that women are mere appendages under the control of their husbands, it reflects outmoded ways of looking at social relationships within families.

For the Sheriff Principal, the question of what is meant in the Act by "residing" elided into a discussion about control and how it can be exercised effectively. He pointed out that some tenants might be working away from home and doing jobs which involved them being away for long periods of time. For those living away from home for work, control was difficult:

> In the case of an oil platform worker or a commercial traveller there must be long periods when he could not be expected to exercise immediate control over his family (*SSHA v Lumsden* 1984 SLT (Sh Ct) 71 at 73)

A tenant who is ill in hospital was also deemed to raise similar difficulties. Nonetheless, in such circumstances, the Sheriff insisted that, in relation to those family members who continued to reside at the property during such absences, "it is difficult to believe that they are not to be regarded as "residing with" him for the purposes of this statute" *(SSHA v Lumsden* 1984 SLT (Sh Ct) 71 at 73). The question turned, in his view, on the notion of the household, and the status of the wife was presumed to be one of dependence. Her occupation of the house was, thus, conceived as a secondary form of right. Indeed, as Sheriff Principal Caplan put it – "there is no suggestion that she lived in the relevant house other than as a member of the defender's household and as a wife intent upon cohabiting with her husband whenever he had the necessary liberty" (*SSHA v Lumsden* 1984 SLT (Sh Ct) 71 at 73).

In the case of the Lumsdens, the defender's wife cohabited with him both before and after his imprisonment. It was regarded as significant by Sheriff Principal Caplan that the appellant's solicitor had difficulty specifying at what point of time the defender's wife would otherwise be deemed to have ceased to "reside with" her husband. He noted alternative scenarios which made this a matter of difficult judgment:

> One can readily envisage a situation where a man is remanded for seven days or sentenced to 12 months' imprisonment and then released seven days later on bail pending appeal. At what point would a couple in such a situation cease to "reside together" for the purposes of tenant's statutory rights? (*SSHA v Lumsden* 1984 SLT (Sh Ct) 71 at 73).

In Sheriff Principal Caplan's view, this would occur only when the quality of the wife's right to occupy changed, and in a case such as this that would mean that her continuing occupancy would require to be not as a wife with the aim of cohabiting in family with her spouse but as a result of some other right or title. As a result, he reached the conclusion that:

> In my view the said Act intends to have regard to the circumstances giving rise to the occupancy of the persons residing in the tenant's house. If the tenant's wife is living in the house because she is a member of the tenant's household, then, in my view, she is "residing with" him for the purposes of para. 7 albeit that there may be material periods when the tenant is not physically present in the house (*SSHA v Lumsden* 1984 SLT (Sh Ct) 71 at 73).

Whilst we are cognisant of the strength of these arguments, we have a number of concerns.

The Approach of the courts under the Rent Acts to "residing with"

The first takes us to the heart of the right of tenants in the rental sector to remain beyond the term of their lease contract, which has been in existence since the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915. We are attracted to the argument put before us by counsel for the respondents that we should adopt the approach taken by the Court of Appeal in *Haskins v Lewis* [1931] 2 KB 1. There, Scrutton LJ observed that the fundamental problem in the early years of the 1915 statute was the bewilderment caused by conferment on tenants of a right to remain by the Rent Acts:

> The reason for that bewilderment comes, I think from this, that when the Acts were drafted – and I think this applies practically to all the Acts that have so far been passed – those who drafted them and those who passed them had not made up their minds what was the nature of the privilege they were conferring on the tenant (*Haskins v Lewis* [1931] 2 KB 1 at 9).

As he went on to point out:

> The Acts have been passed without those framing them having any clear idea whether they were conferring property on the tenant or whether they were conferring a privilege of personal occupation, and the Courts have very slowly – and I do not think they have finished yet – been trying to frame a consistent theory of what must happen (*Haskins v Lewis* [1931] 2 KB 1 at 9).

This search for the fundamental principle underpinning the legislation also seems to us to have been encapsulated in the comments of Lord Romer in the same case, that 'the principal

object of the Rent Restriction Acts was to protect a person residing in a dwelling-house from being turned out of his home' (*Haskins v Lewis* [1931] 2 KB 1 at 18).

With this in mind, we do not feel we should shrink from saying that the legislature, in passing the Tenants' Rights etc (Scotland) Act 1980, was not imagining that someone would be evicted for the actions of others, which he had no power to control. In order to take the view that the tenant was in a position to control the actions of his wife, Sheriff Principal Caplan is forced to rely on the notion of the household and the position of Mr Lumsden as its head. This risks embodying a status which is not in accordance with modern understandings of family relationships. It is plain, in our view, that linking the question of 'residing with' to an outdated notion of households within which the husband has control over, and corresponding responsibility in relation to, his wife – as Sheriff Principal Caplan seeks to do – is not a sound basis upon which to proceed. Mr Lumsden cannot be seen to have been "residing with" Mrs Lumsden at the time of the complained of incidents on the basis of that reasoning, and if no other ground could be made out, the possession order should have been refused.

Counsel for the Scottish Special Housing Authority have, however, urged us to consider whether "residing with" could be approached in a different way, either by using the same landlord and tenant cases relating to the operation of the Rent Acts that the Sheriff Principal turned to, or by reliance on case law arising under the Housing (Homeless Persons) Act 1977.

We now turn to consider these possibilities. The meaning and parameters of "residing with" have been discussed more often in the context of whether or not the quality of that residence is real and permanent. Individual fact situations militate against principles that are very broad in application. It is, nonetheless, instructive to examine what issues have emerged in litigation

on the question of what "residing with" has been taken to mean. The assistance which can be found in earlier decided cases on "residence" seems, to us, to be somewhat limited as a result of the rather different sets of circumstances and can, in our view, be distinguished. The Court of Appeal decision in 1952 of *Edmunds v Jones* [1957] 1 W.L.R. 1118 (Note), which we were directed to by Counsel, demonstrates that tenancy succession cases need to be viewed with a degree of caution. Here, a tenant occupied a house with her daughter. The daughter lived in 2 rooms and shared the kitchen with her mother. The daughter's claim to succeed to the tenancy was unsuccessful as the Court of Appeal considered that she had a tenancy of a separate part of the house, and had no right to go to any other part of the premises beyond her two rooms and the shared kitchen. The decision, then, is of limited assistance in this case.

This can be contrasted with a case that Sheriff Principal Caplan has referred to – *Collier v Stoneman* [1957 1 W.L.R. 1108 – which concerned whether or not the extent and quality of a granddaughter's presence in a house was to be regarded as residence with her family for the purposes of succession to a tenancy under the Rent Acts. Mrs Collier lived in a single room within a 2 room flat tenanted by her grandmother, Mrs Langshaw, from Mr Stoneman. When Mrs Langshaw died, her granddaughter sought to succeed the tenancy on the ground that the room she had occupied with her family meant that she had been residing with the tenant. The Court of Appeal overturned the county court's granting of a possession order to the landlord, determining that Mrs Collier and her husband were residing with Mrs Collier's grandmother.

The outcome in these cases centred very much on the kind of occupancy which a member of a person's family would be likely to have had. Despite all the evidence that the Colliers and Mrs Langshaw lived separate lives and shared little in their daily living arrangements, the Court of Appeal suggested there was a vital distinction between the cases of *Edmunds* and

Collier. Though the notion of "the household" was not discussed at length in either case, consideration of whether someone could be said to be a member of the household of another was apparently key, and in *Collier* it was suggested that "a member of a tenant's family living in the tenant's house otherwise than as sub-tenant answers this general description" (*Collier v Stoneman* 1957 1 W.L.R. 1108 at 1115.

This distinction between the *Edmunds* and *Collier* cases is thus very fine, and lies in the specifics of the two residences, reflecting the view from the Master of the Rolls, Sir Raymond Evershed, that "the words 'residing with' must be given their ordinary popular significance" (*Edmunds v Jones* [1957] 1 W.L.R. 1118 at 1119). Given that Sheriff Principal Caplan indicated in the present case – incorrectly - that the comments of Sir Raymond Evershed were made in the case of *Neale v Del Soto* (1945] 1 All E.R 144) - a case in which he did not sit - we feel compelled to reflect on whether he was fully aware of the very narrow distinction between the situations in *Collier* and *Edmunds*. The case of *Neale v Del Soto,* in fact, centred not on the question of the nature or quality of residence but rather on whether or not two rooms in a seven-roomed house were let as a "separate dwelling" for the purposes of the Rent Acts. As such, contrary to the Sheriff Principal's suggestion, this was not a case that was concerned with the issue, and interpretation, of the crucial phrase "residing with".

The significant feature of the Master of the Rolls' remarks in *Edmunds* is the qualifier as to the fact and degree of residence, which we suggest offers us a more satisfactory solution to the current situation. It is a matter of fact and degree whether or not in any particular instance the occupancy is as "a residence". Hence, we are not convinced that the approach of the Sheriff Principal in this case is appropriate. Paragraph 7 of Schedule 2 of the 1980 Act requires the recalcitrant person to be "residing with" the tenant. During the period when the

nuisance activities took place, Mrs Lumsden was not "living with" Mr Lumsden, and it seems to us that there is no difference between "residing with" and "living with" someone.

As a close reading of the material shows, these cases illustrate a whole range of quite special facts from which it is difficult to draw clear principles. Where there have been disputed claims about residence, these have centred around the quality of the residence, principally in relation to the protection of the Rent Acts and, more recently, Homeless Persons legislation. One case, however, parallels the problems of the Lumsdens quite closely and we note with interest how the courts dealt with this as an instance of "non-occupation". *Brown v Brash* [1948] 2 K.B. 247 involved a "non-occupying" tenant in a repossession dispute. Mr Brown was the tenant of a property from 1941. He remained as a statutory tenant after receiving a notice to quit in September 1945, which expired on Christmas Day 1945. In the period between the service of the notice and its coming into effect, Mr Brown received a two-year prison sentence for stealing tea – six tons of it. His long-term partner and their two children lived in the property for a few months, leaving in March 1946. The landlord successfully claimed possession on the ground that the property had been abandoned and entered into possession in January 1947. On his release from prison later that month, Mr Brown, sought a possession order to let him back in the premises, and succeeded in the county court. The landlords appealed. The Court of Appeal looked to the goals of the Rent Acts in seeking to protect tenants against eviction by their landlords, as expressed in the leading case of *Skinner v Geary* [1931 2 K.B. 546. In that case, the Court of Appeal had explained:

> …the fundamental principle of the Act …is to protect a resident in the dwelling-house, not to protect a person who is not a resident in a dwelling-house but is making money sub-letting it…. (*Skinner v Geary* [1931 2 K.B. 546 at 559).

In *Brown***,** that principle was recognised, whilst noting that short periods of non-occupation did not affect a tenant's right to remain, provided there was both an intention to return and

some outward expression of this intention. Here, as Asquith L.J. expressed it, there was a "situation not foreseen or provided for by the Rent Restriction Acts" (*Brown v Brash* [1948] 2 K.B. 247 at 253). On the one hand, it was suggested that by leaving his partner and furniture, Mr Brown manifested an intention to return and an outward expression of that intention. The landlords contended, however, that the facts demonstrated no such intention. The Court of Appeal were of the view that if one accepted the principle of intention to return then this could sterilise housing accommodation rather than economise it, the latter of which was the intention of the legislation. A jail term of ten or fifteen years would certainly have this unfortunate effect. Thus, whilst noting that short breaks did not affect the principle of protecting the "occupying" as opposed to "non-occupying" tenant, the Court of Appeal accepted the matter was one for a pragmatic response. The question, in other words, was "one of fact and of degree" (*Brown v Brash* [1948] 2 K.B. 247 at 254), as we have indicated above.

How then does a person who is imprisoned assert possession? This could be done through a caretaker or furniture. When these are absent, as occurred with Mr Brown from March 1946 when his partner quit the premises, the protection disappears. Mr Brown was unable to assert possession by visible acts and thereby forfeited his rights. Likewise, Mr Lumsden put himself in a position whereby he was unable to control the activities at his house in Stewarton. These positions of lack of control seem to us to be parallel. The consequences may end up being somewhat different, but this depends on the specific mix of fact and degree.

The context, then, is important in the present case. In looking at whether or not Mrs Lumsden's behaviour is caught by paragraph 7 of Schedule 2 of the 1980 Act, we must acknowledge that there was no doubt that her actions were anti-social. But, on our reading of the fundamental goals of the legislation, these actions did not implicate Mr Lumsden, and this

approach is supported by the rationale of the court in *Brown***.** On this reading, we therefore uphold Mr Lumsden's appeal. Whilst we can appreciate that this might produce an unfortunate result for the landlords, it seems to us that a long-term remedy lies in their hands. Paragraph 7 of the 1980 Act talks of joint tenancies. It might be wiser for landlords to consider whether offering joint tenancies would not be a more satisfactory way of dealing with such potential problems. The appropriateness of such an approach would, of course, depend on whether or not the spouse or partner was likely to be able to meet the obligations as to rent. Nonetheless, where the issue of responsibility for nuisance or annoyance is concerned, this offers an effective response to any suggestion that, were such a scenario to occur in the future, the landlord would otherwise be permanently barred from taking action.

Protection Against Homelessness

It behoves us at this point, for clarification in the future, to consider issues which are not strictly germane to the summary cause action sought here by the Scottish Special Housing Association. As noted already, Mr Lumsden's tenancy agreement requires that he not "permit any person to cause any nuisance" in the dwelling-house or in the common parts, areas or facilities". The meaning we have to take from this clause is that the tenant's permission involves him in an activity. That is, the tenant is allowing a form of nuisance which he, and potentially the non-tenant transgressor, knows are not approved of by the landlord. This would, of course, include encouraging anti-social behaviour. A tenant might, for instance, permit his or her children to throw stones or shout out insults and verbal abuse at passers-by without rebuke. There is a measure of active connivance here, but in the absence of that, one would surely require something to indicate that the actions were *permitted*. It seems to us that it stretches language to suggest that, by mere fact of the actions taking place, the tenant is permitting them. Assessments may well turn on the facts of a particular case and it is true that

evidence may not be easily available to indicate that anti-social action is permitted by the tenant. This, however, merely points to a weakness in the wording of the clause, which landlords might want to address. Indeed, while we cannot know, it may be that this is the reason why the present action of repossession by the Housing Association relied on the wording of para 7, Schedule 2 of the 1980 Act rather than breach of the terms of the tenancy.

Although the issue was not initially raised by counsel for the defender, it seems to us that the court is bound, when looking at the interpretation of Schedule 2, to also consider the full test which requires to be addressed. The sheriff must be satisfied that, irrespective of whether or not any of the grounds are met, it is "reasonable in all the circumstances to grant the eviction order". This does not seem to have been canvassed before the Sheriff or Sheriff Principal. Had we not already moved to uphold the appeal on the question of the interpretation of the words "residing with", we would have been inclined to remit this matter to the Sheriff Court for detailed argument on the reasonableness of turning Mr Lumsden out of his home as result of actions over which he had no effective control. It behoves any decision-maker working with a statute to expressly consider all the elements of the test found in the statute and not focus solely on one aspect.

It has also been suggested to us by counsel for the Scottish Special Housing Association that a rather different light is shed on these matters by consideration of a similar kind of issue – namely that of inter-spousal conduct in relation to the legislation relating to homelessness. Here courts in the recent past in England have apparently adopted the notion of "deemed acquiescence" which, it is suggested, could be relevant in this instance. In *R v North Devon District Council ex p Lewis* ([1981] WLR 328), a Mrs Julie Lewis had formed an association

with a Mr Hopkins in February 1979. In August 1979, Mr Hopkins took employment as a farm labourer with tied accommodation to enable him to perform his duties. He occupied this accommodation with Mrs Lewis and one of her children. He was, however, not happy with his job and gave in his notice in November 1979. As a result, the family were rendered homeless and sought assistance from the local authority. Mr Hopkins was, in terms of the legislation, "intentionally homeless" since he had "given up accommodation which it would have been reasonable for him to continue to occupy" in terms of section 17 of the Housing (Homeless Persons) Act 1977. The position of Mrs Lewis was at first glance rather different. She had not done anything to render herself deliberately homeless. A successful application by her, however, in terms of the aforementioned Housing (Homeless Persons) Act 1977, would have meant that any accommodation made available would also be available for "any other person who might reasonably be expected to reside with (her)" (section 16). This would have had the effect that Mr Hopkins could have avoided the consequences of his own deliberate actions, since the couple were still together as a unit for the purposes of the homelessness legislation. The local authority took the view in this case that they did not owe a duty to provide permanent accommodation to Mrs Lewis since she "acquiesced" in her partner's decision to terminate his employment, knowing that their accommodation was tied to that employment (*R v North Devon District Council ex p Lewis* [1981] WLR 328) at 333).

In evaluating this argument, Mr Justice Woolf pointed out that there were "no express words which provide that where a man and woman are living together, if one of the couple becomes homeless intentionally the other should be treated as being homeless intentionally" (*R v North Devon District Council ex p Lewis* [1981] WLR 328 at 333). The automatic taint of intentionality could not, in his opinion, be sustained. Though he acknowledged that the effect of this would be that Mr Hopkins would benefit from Mrs Lewis' entitlement to be housed,

although he personally was "undeserving" (*R v North Devon District Council ex p Lewis* ([1981] WLR 328 at 333), he maintained that a "family unit" approach was appropriate. Since the Act required an applicant to be in "priority need," in terms of section 2 of the Housing (Homeless Persons) Act 1977, consideration of the family as whole was relevant. But this did not preclude the possibility of a wife being "party to the decision" in a way that demonstrated intentionality in relation to the family's housing predicament. Indeed, Mr Justice Woolf contrasted a situation where a husband squandered the rent on alcohol with the wife's acquiescence, where it would be proper to regard them both as intentionally homeless, with a situation where she had done all she could to prevent him using the money in this way.

A year later, Mr Justice Woolf was given the opportunity to see this bifurcation between "acquiescence" and "non-acquiescence" in an action with a rather closer fact scenario to that which is presently before us. In *R v Swansea City Council ex p John* (1983) 9 H.L.R 55, this notion of the actions of one party having an impact on the rights of another in relation to the Housing (Homeless Persons) Act 1977 was again raised. Ms John had cohabited with Mr Owen, who was an alcoholic, for some 18 years. She was the tenant of the property. When drunk, Mr Owen caused nuisance and annoyance to the neighbours. In due course, the local authority made out a case for possession of their dwelling in the county court. Although it was argued that there was nothing Ms John could do to prevent the order for possession being made other than evicting the man with whom she had lived as man and wife for many years, his Lordship was not swayed. He was content with the council's decision that Ms John could be said to have acquiesced in the anti-social conduct of her partner by not taking action to terminate his right to stay in the accommodation. She had the ultimate sanction as tenant and could have evicted her partner but had chosen not to. In the present case, there has been no suggestion that the Scottish Special Housing Association made such an offer to Mr Lumsden.

This concept of a family unit with a (usually male) head is core to these decisions under the Housing (Homeless Persons) Act 1977. While occupancy arrangements in the various cases were different, their treatment was uniform. But the case before us concerns statutory rights under very different legislation. Moreover, we do not feel that the doctrine of "spousal acquiescence" provides an approach befitting an era of formal equality between the sexes. On its face, it may construct a doctrine that is no more than a common sense approach, but in fact and in practice, it enshrines a deeply discriminatory approach to legal rights. The Report of the Scottish Housing Advisory Committee in 1980 indicated that the practice of granting tenancies to the husband in the family was almost universal. The relegation of the wife, in most instances, to a mere appendage of her husband, is not something we would wish to encourage, nor vice-versa. We are, of course, cognisant of the fact that in reaching our decision today, we are protecting the rights of a husband rather than those of a wife. But, in our experience, and as the homelessness cases indicate, this is somewhat unusual.

Decision

We are fortified in our decision to uphold the appeal of Mr Lumsden by the fact that we are sure that what might be perceived as unfortunate consequences of this finding for landlords can be effectively addressed by them in their tenancy arrangements in the future. We would also hope that consideration be given by the legislature to providing a direct opportunity for those at present denied a voice in possession cases to have the opportunity to be heard.