

REVIVING TENANTS' RIGHTS? THE PRIVATE HOUSING (TENANCIES) (SCOTLAND) ACT 2016

Background

The Scottish Government has been involved in an almost continuous process of updating and amending the private rented sector in the 21st century. Various significant changes were introduced including, in 2004, the compulsory registration of private landlords along with providing free access to new remedies of those living in unsatisfactory accommodation in 2006 as well as effective recovery rights for those paying deposits in 2012. In addition, from 2009, landlords were required to give their tenants better information about their rights. More broadly, the actual 1988 assured tenancy structure was subject to examination.

The 2009 Report on the operation of the private rented sector in Scotland was a major piece of research which when published ran to some 5 volumes. The Report indicated that the private rented sector had grown significantly since the introduction of the assured and short assured tenancy regimes in the Housing (Scotland) Act 1988. The sector had gone from 5 % of housing to some 11%. The Report observed that the “(t)he tenancy regime appears to be operating satisfactorily.” It specifically noted that

The SAT, which runs for a minimum of six months, is popular with both landlords and tenants. Almost all landlords surveyed as part of the review made use of six-month SATs, as they were seen to offer valuable flexibility in managing properties. Most tenants also did not want longer formal security, with a majority preferring six month tenancies or less ¹

They concluded

The evidence points to a tenancy framework that appears to be working satisfactorily, with many of those who want to stay in the sector for longer periods of time often able to do so. ²

*The overall context within which there was consideration of the private rented sector is to be found in the Scottish Government's Strategy and action Plan for Housing published in February 2011. Entitled **Homes Fit for the 21st Century** this envisaged “ a housing system which provides affordable homes for all “ by 2020 ³. As for the private rented sector, a need was seen for “Government support for the growing number of people priced out of home ownership, struggling to afford market rents but unable to access social housing “⁴. New supply was perceived as key to the achieving meeting the needs of the Scottish people and traditional private renting is not adverted to in this section. What was suggested is that rent-*

¹ para 4.58

² para 4.62

³ Homes Fit for the 21st Century: The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020 (February 2011) (available at <http://www.gov.scot/Publications/2011/02/03132933/0>) at 2 para 3

⁴ loc cit at 4 para 10

to-buy options developed could be expanded. Here individuals rent a home whilst also saving the deposit they need to purchase it.⁵ In addition, the Government planned to support housing associations which wish to provide market rental homes alongside intermediate and social lets through subsidiaries.⁶ Insofar as the traditional small-scale private landlord was concerned one way forward was seen as them renting their stock to social landlords to allow improved standards and security of tenure for tenants.⁷ There was a hope expressed that pension funds and life assurance companies seeking long-term steady returns would invest in the private rented sector.⁸ The major thrust of the section on supply, however, was on the role of private builders and developers as well as Housing Associations and local authorities. As far as enhancing choice and quality the approach was to be tenure neutral, seeking sustainable choices for all rather than encouraging or promoting any one tenure.⁹ In pursuit of this it was envisaged that the development strategy would aim to grow and improve the private rented sector combined with a more focused regulatory system.¹⁰ Achieving a “thriving PRS which provides flexibility and choice for tenants and offers good standards of stock and management quality” would be enhanced by providing tenants with better information of their rights and responsibilities through “an information pack, or an equivalent set of documents, at the start of every tenancy”.¹¹

The next stage in the process of review occurred with the publication by the Scottish Government in May 2013 of **A Place to Stay, A Place to Call Home: A Strategy for the Private Rented Sector in Scotland**.¹² This noted that the vast majority of private lets continued to be let as short assured tenancies.¹³ They noted that the sector had expanded and that many of those with holdings in the sector were small landlords with 5 properties or less.¹⁴ In September 2013 the Scottish Government set up the **Private Rented Sector Tenancy Review Group**. The Review Group’s purpose was to examine how suitable and effective the current private rented sector system was and consider whether changes in the law were needed. The Review Group produced a report for Ministers on 9 May 2014. This explored the nature of the changes which had led small landlords to invest in the market, especially after the financial crisis of 2008 and the subsequent low levels of return on savings. They suggested, however,

⁵ loc cit at 11 para 23

⁶ loc cit at 13 para 34; for instance WESLO Homes, a major registered landlord in West Lothian has a subsidiary WESLO Initiatives which rents out and manages houses at market rents alongside its major holdings of housing at social rents. The proportion is less than 5%

⁷ loc cit at 13 para 35

⁸ loc cit at 14 para 37 but avoiding the complexity of UK Real Estate Investment Trusts

⁹ loc cit at 33 para 100

¹⁰ loc cit at 37 paras 125 and 126

¹¹ loc cit at 38 para 128

¹² available at <http://www.gov.scot/Publications/2013/05/5877/4>

¹³ A Place to Stay, A Place to Call Home: A Strategy for the Private Rented Sector in Scotland (op cit)

¹⁴ see fn 1

that the dominance of the SAT was somewhat unexpected. Looking at the alternatives of assured and short assured tenancies they explained

Part of the reason for this complexity was that, in 1988, it was assumed most landlords would use Assured Tenancies, and not SATs. But at that time private landlords were but a minor policy consideration, given the Assured Tenancy regime was devised to accommodate all new housing association tenancies, as they were then legally to become part of the private sector. That legal status was short-lived, and private landlords were somewhat reticent to test the re-possession grounds in Court (at 5).

This certainly was not the case with those operating in the private sector back in the late 1980s when commentators pointed out that any private landlord entering the market would opt to give themselves the flexibility of the short assured tenancy.¹⁵ There was never any doubt in the minds of those involved in seeking advice on tenancy arrangements that SATs were the route likely to be chosen. Rather the assured tenancy was seen as a “beard”. It provided apparent security to tenants although no limitations on what rent could be charged in the market and thus was not a totally radical departure from previous policy. Whilst the SAT gave no security of tenure beyond the terms, it appeared, at first sight, to provide some protection in terms of rent fixing role of the Rent Assessment Committee. That protection though, was always extremely limited from the outset. It was only available where landlords charged “significantly in excess” of the market rent. Not surprisingly only a handful of people had ever approached the RAC/PRHC in relation to excess rent in SATs. Whatever may have been the expectations of legislators in 1988, by 2014 the Private Rented Sector Tenancy Review Group were clear in their rejection of the AT/SAT divide. The Group’s principal recommendation was

that the current tenancy for the Private Rented Sector, the Short Assured Tenancy and the Assured Tenancy, be replaced by a new private tenancy that covers all future PRS lets’.

The Government accepted this recommendation and produced proposals for a new tenancy system for the private rented sector on 6th October 2014.¹⁶ The stated “overarching aim of the proposed new tenancy” was

to improve security of tenure for tenants, while providing appropriate safeguards for landlords, lenders and investors.

The Initial Proposed Reforms

A single private sector tenancy was proposed for all future lets. Those with older tenancies covered by the Rent (Scotland) Act 1984 i.e. pre-1989 tenancies would not be affected nor would tenancies exempted from the current assured tenancy regime such as tenancies at low rents, holiday lets or resident landlord lets. The rationale was, according to the Government “to improve security of tenure for tenants, while giving suitable safeguards to landlords, lenders

¹⁵ Robson, P (1989) Housing (Scotland) Act 1988 annotations (Edinburgh W Green & Sons)

¹⁶ <http://www.gov.scot/Publications/2014/10/9702/5>

and investors” (para 20) and to provide a system that “strikes a fair balance between the interests of tenants and landlords” (ibid). All this echoes the notion of Richard Crossman back in the 1960s of seeking to remove landlord and tenant relations from being part of political football when he introduced “fair rents”.

A model tenancy agreement with mandatory clauses would be imposed ending the need for a combination of a lease and a tenant information pack. Behind this suggestion lay a desire for “consistency of practice across the sector” and helping to ensure “it provides good-quality and well-managed housing” (para 63) with both parties being in possession of the details of the rights that apply to them and how to enforce them (para 63).

(i) New proposed *mandatory* grounds for recovery of possession

There was a new list of grounds of possession all of which are mandatory. It was not envisaged there would be any discretion residing in the Tribunal.

1. Landlord wants to sell
2. Mortgage lender wants to sell because landlord has broken loan conditions
3. Landlord or family member wants to live in the property
4. Refurbishment
5. Change of use
6. Tenant has failed to pay full rent over 3 months
7. Tenant has displayed antisocial behaviour
8. Tenant has broken any other term of their tenancy agreement

The grounds were not spelled out in detail so that, for instance, which members of the family were to count in ground 3 was not specified. By the same token, what level of refurbishment was planned was not indicated. It was not made clear also whether the landlord had to have more than a notion to sell or whether there required to be any need to realise the capital investment in the property. What was meant by failing to pay full rent over 3 months was similarly unspecified in the Consultation.

(ii) **Model Tenancy Agreement**

A single tenancy document would have to be used in all private sector tenancies and this would state all current statutory requirements, include a section for extra clauses specific to the property and parties and be accompanied by prescribed statutory guidance explaining the provisions in the document

The idea was that having a model tenancy agreement could automatically include the landlord registration requirements, details of the repairing standard, building requirements/standards,

details of parties' rights and how to enforce them and the contents of tenant information pack "expectations"

(iii) Rent Levels

The consultation noted that rents for assured tenancies were set by the market with no appeal procedure. Statutory assured tenants could have rent set by the **prhc** – at market level – when served with an increase notice. This occurred very infrequently.

Short assured tenants could have a ruling on their rent. It could be reduced where it was significantly higher than market rents of comparable properties in the area. The standard applied in 2014 was about 10% above the market level. Again applications were few and far between. Successful applications were very rare

Views were sought on what action the Scottish government should take – if any – and what rent review conditions the new tenancy system should include

The Private Tenancies (Scotland) Bill 2015

The main development from the Consultation document was more details on the reasons for successful eviction. The Government maintained their commitment to the abolition of eviction on notice alone. All eviction henceforth was to be for a specified reason. These involved both mandatory and discretionary grounds. Some were entirely novel such as ground 1 - the Landlord intends to sell. Where a landlord was entitled to sell the property it was to be a mandatory ground if he intended to sell it or at least put it up for sale, within 3 months of the tenant ceasing to occupy it. By the same token it was to be a mandatory eviction ground that the landlord intended to use the property for a purpose other than housing. From the social rented sector came the ground that the tenant was not occupying the let property as the tenant's home provided such non-occupation was not a result of the landlord failing to meet their repairing standard obligations.

There were also new discretionary grounds absent from the assured tenancy regime to cover developments in regulation as where the landlord had ceased to be a registered landlord, had had their HMO licence revoked or where the property was subject to an overcrowding statutory notice

Other grounds were versions of the mandatory grounds in Schedule 5 of the Housing (Scotland) Act 1988 - a lender intends to sell the let property and requires the tenant to leave the property for the purpose of selling with vacant possession. By the same token another familiar mandatory ground was where property was for occupation by a person engaged in the work of a religious denomination as a residence from which those duties were to be performed. Rent arrears was a mandatory ground where the tenant had been in rent arrears for 3 or more consecutive months as was a criminal conviction for using the house for illegal purposes or of an imprisonable offence at or near the property.

Some involved tweaks to Schedule 5 grounds such as where the landlord intends to refurbish carrying out significantly disruptive works where it would be impracticable for the tenant to

continue to occupy the property given the nature of the refurbishment intended by the landlord. Similarly, there was a proposal to expand the mandatory ground for landlords to include family members where either intended to occupy the let property as that person's only or principal home for at least 3 months. In addition to partners the family would cover parents, grandparents, children, grandchildren, brothers and sisters.

There were also discretionary grounds familiar from the previous legislative regimes including where a tenant was no longer an employee and where there was anti-social behaviour. Where there was a breach of tenancy agreement there were two versions – the mandatory and the discretionary. This ground was mandatory if the Tribunal found that the tenant has materially failed to comply with a statutory term of the tenancy i.e. the need for written consent prior to subletting, taking in a lodger/s or assigning the lease to another person as well as granting reasonable access on notice. Other breaches were to be discretionary.

In order to buttress the powers of the Tribunal where information in these new expanded grounds such as landlord intending to sell proved not to be true provision was made for a “wrongful termination order” where either a Tribunal or tenant was misled and the tenant ended up out of the property. An order to pay an amount not exceeding 3 months’ of the amount of rent paid prior to the tenancy ending was to be the sanction against such behaviour.

Rents and rent increases for existing tenants were subject to referral to a Rent Officer whose role was to set an “open market rent”, with appeal to the First-tier Tribunal. There was to be a limit on the frequency of any rent increases to no more than once in any 12 month period. This was to be subject to a possible form of local rent cap. Here local authorities could apply to the Scottish Ministers to designate all or part of an LA area as a “rent pressure zone” and the rents would be restricted by reference to a formula centred on the consumer price index.

The Bill in Parliament

The Infrastructure and Capital Investment Committee took evidence from tenants’ bodies, organisations like Shelter and Living Rent as well as landlords’ organisations. They also heard from the civil servants and the Minister. In broad terms landlords warned against dropping the “no fault” repossession ground and tenants were concerned at the dominance of mandatory grounds. The Infrastructure and Capital Investment Committee agreed that the no-fault ground should be removed and called on the Scottish Government to continue to work with landlords and letting agents during the Bill’s passage through the Parliament to help ensure that the 16 new grounds provided an appropriate and proportionate balance between tenants and landlords. In the Act as passed, there were a number of changes reflecting these concerns. These included limiting the repossession for family members to a discretionary ground and the increase of the wrongful termination order sanction to 6 months’ rent. Other concerns such as three month mandatory repossession ground remained unaltered.

The Private Housing (Tenants)(Scotland) Act 2016

It has become clear in 2017 that the balancing act which this Act seeks to perform between providing a degree of security of tenure to tenants in their homes and recognising the rights of landlords to exercise the property rights they hold in the houses they own has generated

considerable discussion. Some developments such as the Model Tenancy Agreement have been welcomed on all sides. Others are shrouded in mystery with few indicators as to whether “rent pressure zones” will operate as extensively as they have in Ireland in 2017. Tenants, however, are concerned that the nature and extent of the landlords’ mandatory grounds for eviction offer scant protection. Landlords, having enjoyed the option to evict on notice are concerned that this freedom has been lost and are fearful of the constraints of “rent pressure zones”. Given that the goal of most landlords is to maintain a reliable income stream from their properties the loss of the “no fault” ground seems to be more than offset by the availability of the mandatory ground of sale. For tenants, they have some more certainty about their future with a non-specified tenancy duration. In reality, however, the extensive mandatory eviction grounds offer no guarantees. For protection they will have to rely on a market with a satisfactory supply such that any eviction will be only a temporary hiccup and that the pool of similar housing in the area will offset the impact of the landlords’ extensive rights to evict. The main threat to such a supply comes, however, not it is suggested from the terms of this new tenancy regime but rather from other external factors such as changes in the tax regime which are more likely to affect some landlords’ ability to operate their rental businesses at a profit. This combined with the extended – and highly welcome - regulation in Scotland will prove of much greater significance than introducing open-ended tenancies.

3,177 words

2,594 words (minus 483 words in italics)