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THE FIRST YEAR OF THE FIRST-TIER: PRIVATE RESIDENTIAL TENANCY EVICTION CASES AT THE HOUSING AND PROPERTY CHAMBER

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Since its assumption of jurisdiction for private sector lets on 1 December 2016, the First-tier Tribunal of the Housing and Property Chamber (the FTT) has dealt with over 1000 eviction cases in total.¹ Where an eviction order is made by the FTT under one of the legal regimes that governs private letting in Scotland, the landlord will regain possession of the let property from the tenants.

This note is primarily about the operation of the recently introduced private sector regime introduced by the Private Housing (Tenancies) (Scotland) Act 2016, but it is worth first considering the precursor regime to set the scene. The FTT has been involved heavily in dealing with evictions under the assured tenancy legislation – the Housing (Scotland) Act 1988. This is the statute that created the two forms of private tenancy that prevailed in Scotland between 1989 and 2017, namely: the assured tenancy; and the short assured tenancy. Owing to the relatively easier path that a landlord could follow to obtain possession at the end of a let, the short assured tenancy was much more common than the assured tenancy.²

At the end of April 2019 the FTT had dealt with some 500 cases that were governed by the older Housing (Scotland) Act 1988. There is a mixture of automatic and discretionary grounds under Schedule 5 of the 1988 Act available. To operate, evidence needs to be led to make out the relevant ground, and an eviction order would follow either automatically or, in the case of discretionary grounds, where the FTT considers it reasonable to make the order.³ Such grounds for possession are encountered relatively infrequently, however, as the automatic “notice” process in terms of section 33 of the 1988 Act can be used for short assured tenancies.⁴ This requires the landlord simply to bring the tenancy to its end and provide 2 months’ notice to the tenant. The landlord must indicate that she requires the property and provided that the formal requirements are satisfied there is no requirement that

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¹ The transfer of jurisdiction from sheriff courts to the FTT occurred as a result of the Housing (Scotland) Act 2014, s.16.

² It is beyond the scope of this note to give a full exposition of the assured tenancy and short assured tenancy regimes, but see further Peter Robson and Malcolm M. Combe, *Residential Tenancies: Private and Social Renting in Scotland* 4th edn (W. Green: Edinburgh, 2019), Appendix 1. For completeness, it can be noted that an ever older regime for private lets can still be encountered, namely the Rent (Scotland) Act 1984, but the relative infrequency of such lets means that they are not a focus of this note.

³ Housing (Scotland) Act 1988, s.18.

⁴ In the cases determined by the FTT up to the time of writing, a majority of the actions relied on the section 33 notice ground.

the eviction is reasonable or necessary in any way.⁵ From the tenant’s point of view, there are no defences beyond successfully establishing a technical failure such as insufficient notice.

The position in relation to the “private residential tenancy” (PRT) under the Private Housing (Tenancies) (Scotland) Act 2016 is slightly different in that here there is a (once again) a mix of automatic mandatory and discretionary grounds in the FTT’s workload but importantly nothing as simple as the automatic “notice” ground. At least one “reason” is necessary. Since the introduction of the PRT on 1 December 2017 as the only vehicle for a private let of someone’s main residence in all but specifically excepted circumstances under the Private Housing (Tenancies) (Scotland) Act 2016,⁶ over 300 cases involving eviction under that regime have been decided by the FTT.⁷ Rather than provide a full overview of the regime for repossession in the private rented sector, that being a topic more suited to a textbook than a comment,⁸ this brief assessment notes the principal issues of interest at this stage. It highlights the emerging important role of case management discussions, which are provided for in the FTT’s procedural rules as a means to air options and perhaps even bring a dispute to a close.⁹ The coverage in this comment looks at what is in effect the first year of decisions – from April 2018 (when PRT cases started to come before the FTT) to the end of April 2019.¹⁰

1. Reasons for seeking eviction

Schedule 3 to the Private Housing (Tenancies) (Scotland) Act 2016 lists 18 separate reasons entitling a landlord to evict. No eviction order can be issued unless one of the eviction grounds has been established.¹¹ Hitherto, commentators could only speculate on how the FTT would deal with eviction and how long the process would be likely to take. Here we seek to describe the issues which have emerged with the various grounds and provide some pointers for those involved in the process. Although one might infer that as time progresses any imperfections and limitations in the quality of the statements of reasons might diminish it

⁵ It has recently been confirmed that a private landlord is not subject to any additional human rights law controls when recovering possession of someone’s home, per the UK Supreme Court decision of *McDonald v McDonald* [2016] UKSC 28; [2017] A.C. 273 and the subsequent European Court of Human Rights decision in *FJM v United Kingdom (Admissibility)* (76202/16). It had been argued an Article 8 (proportionality) of the ECHR argument could be brought, but the ECtHR ruled that it could not.

⁶ Exceptions are found in Schedule 1 to the 2016 Act. These include student lets from certain recognised landlords, agricultural land, holiday lets, a lease from a resident landlord and (as a result of the Private Housing (Tenancies) (Scotland) Act 2016 (Modification of Schedule 1) Regulations 2019 (SSI 2019/216), accommodation provided to veterans and care leavers by appropriate charities.

⁷ The relevant procedural regime can be found in the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328) (as amended).

⁸ See Robson and Combe, *Residential Tenancies*, paras 10-04 – 10-49.

⁹ As we shall see, a recurring feature for the First-tier Tribunal, as exemplified at various points in this comment, is the usage of case management discussions (in terms of rule 17, found in the Schedule to the 2017 Regulations). In terms of rule 17(3), these enable the FTT to explore how the parties’ dispute may be efficiently resolved, and the FTT is empowered to choose from the full range of options that it has at a hearing, including the ability to make a decision.

¹⁰ Its first case – FTS/HPC/EV/18/0041 (Grangemouth) – was heard in February 2018 but the flow of cases did not commence until April 2018. All the eviction cases share the same prefix of FTS/HPC/EV. For purposes of brevity we have omitted that prefix from subsequent citations, leaving the location and date of decision: hence 18/2721 2 February 2018 (Grangemouth).

¹¹ The Private Housing (Tenancies) (Scotland) Act 2016, s.51. See Robson and Combe, *Residential Tenancies*, para 10-05.

seems to us that the mix of very clear and very cryptic statements has been a consistent feature of FTT work over the period in question.

In the twelve-month period under discussion, nine of the grounds have been used (with the relevant ground indicated in parenthesis).

- (i) Tenant in at least one month rent arrears for a period of three months (12)
- (ii) Breach of tenancy terms (11)
- (iii) Landlord wishes to sell (1)
- (iv) Mortgage arrears for landlord (2)
- (v) Landlord plans to refurbish the property (3)
- (vi) Landlord wishes to occupy the property (4)
- (vii) Family member wishes to occupy the property (5)
- (viii) Tenant has engaged in anti-social behaviour (14)
- (ix) Tenant associating with a person guilty of relevant offence or engaged in relevant antisocial behaviour (15)

The most common ground will be considered first, followed by a consideration of the ground that has on occasion been used when the most common ground would have been more appropriate. The other grounds are then considered in the order they appear in the legislation.

(i) **One month or more rent in arrears for 3 months or more** (ground 12)

This is the major ground found in the first year, which was used in 78 applications out of a total of 105 cases on the website as at 30 April 2019. The level of arrears, as far as the statements of reasons reveal, has been significant, ranging from £1,105.99¹² up to £7,155.¹³ As indicated below, not all statements reveal the exact level of arrears and there are a few which indicate neither the rent nor the arrears. Whilst one might assume that the evicted tenant probably knows the details of their own case, the failure to provide such minimum information means that there is no way of an external observer knowing whether the criteria were met or not. There have been instances of tenants successfully disputing the details of the arrears and for what period they were in existence and in turn applications being rejected.¹⁴

(ii) **Breach of tenancy terms** (ground 11)

A number of applications have mistakenly included this ground to cover rent arrears despite the fact that ground 11 specifically provides these are not included in this ground, which instead targets non-rent obligations. Such incorrectly framed applications have resulted in one Tribunal rejecting an application,¹⁵ while another Tribunal allowed the applicant to amend to correct this.¹⁶

(iii) **Landlord wishes to sell** (ground 1)

¹² 18/2196 19 October 2018 (Alloa).

¹³ See 19/0460 15 April 2019 (Irvine).

¹⁴ 18/2721 3 January 2019 (Glasgow); 18/2528 4 January 2019 (Renfrew).

¹⁵ 18/3503 7 March 2019 (Hamilton).

¹⁶ 18/1752 18 September 2018 (Edinburgh).

In four cases landlords have successfully used this potentially controversial ground with interesting results. In a couple of cases the tenant evinced doubts as to the genuineness of the planned sale. As the Tribunal pointed out, however, “The legislation does not require the landlord to have a specific reason for deciding to sell a rented property”.¹⁷ As long as the landlord displayed some evidence of intention to sell, such as obtaining a Home Report or instructions to an agent, the ground could be satisfied. Where such sale-related steps were absent, however, an application has been unsuccessful;¹⁸ on the other hand, an application has still been successful where documentation has not been obtained due to a misapprehension as to the appropriate time to instruct a home report and engage the services of an estate agent as a precursor to the sale of residential property (with the owner apparently having had the understanding that no such steps could be taken until the tenant was no longer in the property).¹⁹ In another case, the fact that marketing had not been undertaken did not prevent the application being successful.²⁰ A request that the eviction be postponed to allow a tenant with a daughter with special needs to find suitable alternative accommodation met with no success in the granting of this mandatory ground.²¹

(iv) **Mortgage arrears** (ground 2)

The ground in relation to the landlord being in mortgage arrears to such an extent that a heritable creditor is entitled²² and wishes to sell the secured subjects has made one appearance at the FTT. Limited details are available from the statement of reasons, but the order for eviction was duly granted, as the applicant secured lender led undisputed evidence about the state of affairs regarding both the existence of the standard security and the landlord’s default in relation to it.²³

(v) **Landlord plans to refurbish the property** (ground 3)

This featured in the case discussed below in relation to ground 4 and ground 5, but will be outlined briefly here. In this situation, refurbishment of the let property was to be the precursor of a landlord with Alzheimer’s move back into the property (with the support of her daughter, who would move in with her).²⁴ Whilst the nature of the refurbishment was not detailed, the FTT was satisfied the occupant needed to move out for the works to proceed, and evidence regarding the works included documentation from building companies. Ground 3 was accordingly made out, as were (in this particular case) grounds 4 and 5, meaning an order for eviction was granted in respect of all grounds.

¹⁷ 18/2979 26 February 2019 (Perth).

¹⁸ 18/2542 4 February 2019 (Stevenson (sic) – the Ayrshire town is in fact called Stevenston).

¹⁹ 18/2371 25 January 2019 (Lamlash) (albeit in this case, the respondent ultimately did not dispute the notice to leave).

²⁰ 19/0400 12 April (Glasgow): allegedly the result of non-cooperation by the tenants whose eviction was being sought.

²¹ 19/0069 14 March 2019 (Penicuik): the statement of reasons did not indicate when the order was to become effective – the landlord’s solicitor sought the order with the “usual timescales”.

²² In accordance with the Conveyancing and Feudal Reform (Scotland) Act 1970.

²³ 19/0165 11 March 2019 (Glasgow).

²⁴ 18/2358 7 February 2019 (Dechmont).

(vi) **Landlord wishes to occupy the property** (ground 4)

For the first case using this ground, it is not clear what the evidence was that the Tribunal relied on.²⁵ In a later instance a landlord sought to evict in order that she could occupy the property herself. This case – mentioned above in the context of refurbishment (meaning an order would have been made anyway owing to refurbishment works that required the tenant to move out) – also saw the use of ground 4 being combined with a family member moving in.²⁶ The FTT was satisfied with the evidence provided to it to make a decision, that it was fair to do that, and the order for eviction and recovery of possession was granted accordingly.

(vii) **Family member wishes to occupy the property** (ground 5)

Returning once again to the case where the landlord had developed Alzheimer's, the occupation by a family member ground was deployed in this instance. As noted, the property was to be refurbished before the [landlord] mother and her daughter moved in.²⁷

(viii) **Tenant engaged in anti-social behaviour** (ground 14)

In one instance, in addition to the rent arrears issue, the application covered a claim of anti-social behaviour through noisy dogs, music, and a hammer attack. The application was successful on both grounds.²⁸ A tenant who had been arrested twice for breach of the peace and breach of bail conditions in July and October 2018 was evicted in terms of this ground as well as breach of the tenancy terms. The issues centred on shouting and banging on a neighbour's door and refusing to desist. The FTT was satisfied that the tenant's behaviour was likely to cause her neighbours alarm and distress or at least nuisance or annoyance.²⁹

At a case management discussion about another instance of shouting and banging on a neighbour's door, a request for an adjournment was rejected as the aim of the case management discussion was to “establish the parties' positions in relation to the facts”³⁰ rather than allow for the tenant to ensure her representative was present.³¹ The facts established included that the tenant had been charged with breach of the peace over the incident and held in custody for 4 weeks.

²⁵ 18/2929 14 January 2019 (Dundee). Not all statements of reasons make clear how the Tribunal came to be satisfied, which was the case here. The Tribunal merely noted that the ground for possession was ground 4 and stated “it had sufficient evidence to enable a decision to be made and that it was fair to do so”.

²⁶ 18/2358 7 February 2019 (Dechmont). This application had initially proceeded on grounds 3 and 5 only, but the FTT allowed consideration of ground 4 at a later stage of proceedings.

²⁷ 18/2358 7 February 2019 (Dechmont). In this particular case, it was reported that the daughter would then play a care role, but such a role is not a relevant factor in relation to this ground.

²⁸ 18/2627 11 February 2019 (East Kilbride)

²⁹ Ibid at “Reasons for Decision”.

³⁰ First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017/328 rule 17(3)(b).

³¹ 18/2889 12 February 2019 (Milngavie). The tenant had not notified the Tribunal as required under rule 10 that she was to be represented. As the aim of the Case Management Discussion was to establish the facts the Tribunal did not consider there was cause shown to adjourn.

(ix) **Tenant associating with a person guilty of an offence or engaged in anti-social behaviour** (ground 15)

This ground was raised in one application noted above but no details were provided and the eviction was granted on the grounds of rent arrears for 3 months and antisocial behaviour. The Tribunal were not satisfied, in terms of ground 15, that the individual had been identified nor were there details of the conviction specified in the notice to leave.³² (“Notice to leave” is the modern terminology for “notice to quit”.)³³

2. Speed of process

By the time of the decisions made in April 2019 the standard gap from the date of application to the First-tier Tribunal to the date of decision was some two months. There are instances of gaps of five to seven months.³⁴ One Statement indicated that the Tribunal had had to make “requests” for details of the section 11 notice to the local authority – this being a requirement in terms of homelessness legislation whenever a landlord (or secured creditor) takes action that puts a household in risk of homelessness³⁵ – which would have slowed down the process of fixing a date for a case management discussion. In one instance, the landlord indicated that they had been hoping that the tenant would start paying rent.³⁶

Part of the speed of decisions stems from the use of case management discussions. The rules provide that the First-tier Tribunal may order a case management discussion to be held in any place where a hearing may be held.³⁷ The parties must be given reasonable notice of the date, time and place of a case management discussion and any changes to the date, time and place of a case management discussion. The purpose of a case management discussion is to enable the First-tier Tribunal to explore how the parties’ dispute may be efficiently resolved. This includes identifying the issues to be resolved and discussing whether or not a hearing is required. The FTT may do anything at a case management discussion which it may do at a hearing, including making a decision. This is what happens in almost all the cases which have come before the FTTs in relation to eviction under the PRT regime. Very few tenants appear and as we note most of the issues do not involve the Tribunals being required to exercise any discretion. Their principal task, thus far at least, has been to ensure that the correct procedural steps have been followed and that the eviction grounds are established.

3. Success rate

The eviction success rate has been 95%. As noted the vast majority of eviction cases have been for rent arrears. This is a mandatory ground once a month’s rent is in arrears for a period of three months and that has been unproblematic for the FTT. In most arrears cases the tenant

³² 18/2627 11 February 2019 (East Kilbride).

³³ 2016 Act, s.62.

³⁴ 19/0268 12 April 2019 (Dundee); 18/2467 12 April 2019 (Fraserburgh).

³⁵ Homelessness etc (Scotland) Act 2003, s.11(1): “Where a landlord raises proceedings for possession of a dwellinghouse, the landlord must give notice of the raising of the proceedings to the local authority in whose area the dwellinghouse is situated”.

³⁶ 18/2467 12 April 2019 (Fraserburgh).

³⁷ First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017/328 rule 17 and 18.

does not appear at the case management discussion and the decision is taken at that stage, with the FTT indicating that there is no reason not to go ahead and look at the evidence. Occasionally their task is made easier, such as where a tenant emailed the Tribunal indicating he accepted he was in arrears and would be moving out at the end of the month.³⁸

Successfully establishing rent arrears has allowed eviction in cases where the other grounds have been rejected for lack of evidence.³⁹ The reasons for rejection have, to date, almost always been for procedural failures rather than evidential. As noted below, these have included failure to specify the correct ground in the application or indicating when the landlord will be seeking an order from the FTT.

4. Reasons for rejection

There have been 18 unsuccessful applications. Some of these stem from misperception of the relevant legislation. In two early cases, landlords sought to end tenancies under the short assured tenancy regime by using rule 109 of the First-tier Tribunal (Procedure) Regulations 2017/328.⁴⁰ In these instances one tenancy had been in existence for at least 7 years whilst in the other the tenancy came into effect just over 2 months before the PRT regime commenced. For them they should have used rule 66 and the landlords' respective prospects were presumably good. Another case in the first few months involved a section 11 notice to the local authority (about potential homelessness)⁴¹ which referred to an intention to raise proceedings to recover possession under a short assured tenancy.⁴² These appear to have been instances of "teething" troubles of new legislation being introduced and not fully understood (albeit in the last mentioned case there was also a problem with the notice to leave not including a leaving date).

Slightly different problems arose in two other cases, where the landlords should have sought eviction under ground 12 but instead specified ground 11 in the relevant notice to leave. The applications were rejected.⁴³

One breach of tenancy terms application was rejected on the grounds that it was not reasonable to make an order. Here the landlords had received an anonymous call that the tenant had a history of non-payment of rent and, concerned not to imperil their insurance cover, wanted the eviction order to enable them to act quickly should this turn out to be true. The evidence from the applicant's own representative that the tenant was "an excellent tenant" led to the refusal of the order.⁴⁴ Rejection also occurred where there were no details of the rent arrears and no details of any other no-rent breach indicated and ground 11 was

³⁸ 19/0534 3 April 2019 (Dalgety Bay).

³⁹ 18/1307 2 November 2018 (Glasgow) – breach of terms and absence of tenant not established but rent arrears in excess of 3 months.

⁴⁰ 18/0689 18 April 2018 (Cupar) and 19/0761 16 April 2018 (Glasgow).

⁴¹ Homelessness etc (Scotland) Act 2003, s.11(1) (noted above).

⁴² 18/1657 9 August 2018 (Kilmarnock).

⁴³ 18/2914 4 January 2019 (Kirkintilloch) (although according to the landlord's agent, the tenant had moved out anyway); 18/3503 7 March 2019 (Hamilton).

⁴⁴ 18/0737 2 August 2018 (Grangemouth).

used rather than ground 12.⁴⁵ One rent arrears case was unsuccessful where it was not established that the tenant had actually been arrears for the full 3 months.⁴⁶

Specifying an incorrect date before which an application for eviction order would not be made has resulted in one refusal,⁴⁷ but in another case the FTT decided to overlook a date in a notice that had been miscalculated so as to be wrong by a margin of three days. This was, at least in part, because the landlord did not ultimately make their application for eviction for another 3 months.⁴⁸

5. Statements of Reasons

(i) Clarity and transparency

The legislation specifies that when coming to a decision the First-tier Tribunal may or in some cases must provide a statement of reasons.⁴⁹ Interestingly, the rules around private residential tenancy applications make this discretionary rather than mandatory for the FTT in the first instance, but where the FTT opts not to provide a statement of reasons either party may request written reasons within 14 days of the date of issue of the decision, at which point the discretion is removed and reasons must be provided.⁵⁰ Unlike, for instance, the panels operating in the First-tier Tribunal Social Entitlement Chamber,⁵¹ these statements are public documents. Hence, it is possible not only for the parties to discover what the reasons for the decisions are but for the public to have access to these. The authors of the decisions, the judges in the FTT are independent judges in the Scottish Courts and Tribunal Service. The notion of judicial independence is maintained, with no formal template being found. There is, for instance, in the Social Entitlement Chamber no “standard” decision. Some statements are brief and factual whilst others are prolix. Some detail the legislative basis under which the decisions take place whilst others assume that this is of limited interest to the affected parties. It has become clear from our perusal of the statements in the first year of the operation of the Housing and Property Chamber that the same kind of variation in detail is found in its work. Greater clarity and transparency has been achieved in some decisions than in others.

(ii) Satisfactory reasoning

The value of the new system stems partly from the possibility it provides to discern the reasoning behind the FTT decisions. Most statements contain full details of the substantive issues raised and the procedural steps followed. There is, however, not always consistency. Some statements, for instance, do not indicate the level of rent arrears and some do not disclose the actual monthly rent. These might only be of concern to completists, but then

⁴⁵ 18/0946 25 April 2018 (Johnshaven).

⁴⁶ 18/2721 3 January 2019 (Glasgow).

⁴⁷ 18/1302 18 June 2018 (Edinburgh).

⁴⁸ 18/2216 29 November 2018 (Motherwell). It might also be noted that the evidence before the FTT was to the effect that the tenant had already left the property.

⁴⁹ See Rule 26 in the Schedule to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328).

⁵⁰ Per Rule 26(6)-(7).

⁵¹ See The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685).

again statements are occasionally oblique. One merely stated that in terms of ground 4 the Tribunal was satisfied the landlord was going to live in the property themselves.⁵² Another simply stated that the “respondents have received all the paperwork”,⁵³ rather than narrating the steps the landlord required to take.⁵⁴ Incidentally, this succinct approach to paperwork was accompanied by an unfortunate error: the eviction related to rent arrears for three or more consecutive months – which it will be recalled is ground 12 – but the statement indicates that “Ground 8 was established”. Ground 8 involves eviction where a tenant is no longer an employee.

6. Conclusion

It is true that it is too early to reach any firm conclusions about the emerging jurisprudence of the FTT. It is also true – to paraphrase a recent press release posted on the Housing and Property Chamber website⁵⁵ – that the workload of the FTT has been high since it assumed jurisdiction in relation to private residential matters. With that backdrop, it seems fair to note that, in much the same way as we have noticed landlords experiencing some teething problems with the new legislation and the related procedure, the FTT might be taking a little time to settle into its new role. Subject to some slight qualifications, there are some positive signs about the transparency and clarity of reasoning in the published decisions, and the case management discussion do seem to provide a welcome opportunity for parties and indeed the FTT to address matters when they are usefully engaged with. It is to be hoped that the positive aspects identified in this comment continue to be built upon by the FTT, and also that some of the observations made and the data gathered in this comment can be a useful resource for users of the FTT, and perhaps even the members of it.

⁵² 18/2929 14 January 2019 (Dundee).

⁵³ 18/2719 22 February 2019 (Scone, Perth).

⁵⁴ See for instance 18/2703 19 December 2018 (Prestwick).

⁵⁵ ‘Stakeholder Communication: Private Rented Sector Cases and Residential Tenancies’, 9 January 2019 <https://www.housingandpropertychamber.scot/news/stakeholder-communication-private-rented-sector-cases-and-residential-tenancies> (accessed 3 June 2019).