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A Review of the First Wrongful-Termination Orders Made Under the Private Housing (Tenancies) (Scotland) Act 2016: Do They Sufficiently Protect Those Misled Into Giving Up a Tenancy?

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This article provides the first academic analysis of the emerging First-tier Tribunal (Housing and Property Chamber) jurisprudence on wrongful-termination orders, which are available under the Private Housing (Tenancies) (Scotland) Act 2016 when a landlord has obtained possession of a let property but it later transpires the circumstances did not align with a statutory ground for possession. It argues that tenants are facing significant hurdles in terms of unlocking wrongful-termination orders. It also notes that the interaction of wrongful-termination orders and the alternative route to damages for unlawful eviction of a residential occupier under the Housing (Scotland) Act 1988 requires consideration, to ensure those who have been faced with dubious conduct by a former landlord are not left without any route to recourse.

Introduction

Many aspects of the landlord and tenant relationship are regulated in the residential context, not least the end of the relationship. Where such a legal relationship has been brought to an end in circumstances that were artificially engineered by a landlord (and as such the landlord was not actually entitled to recover possession), Scotland's prevailing private sector residential letting regime provides a means to penalise that landlord. A tenant – or rather a former tenant – can apply to a tribunal for something known as a "wrongful-termination order" in such circumstances. When granted, a WTO requires that the former landlord pay the former tenant a sum of money. This note considers the instances where a WTO has been obtained and suggests there have been other situations where former tenants have been unfortunate to miss out on some form of legal remedy.

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PRTs and WTOs – The Law

The Private Housing (Tenancies) (Scotland) Act 2016 introduced a new letting vehicle in the Scottish private rented sector, called the private residential tenancy (or simply the PRT).[1] Almost all new private sector lets entered into since 1 December 2017 will be a PRT.[2] Owing to a separate but contemporaneous reform, most disputes relating to residential tenancy matters now come before the First-tier Tribunal for Scotland (Housing and Property Chamber) (the FtT).[3]

A key feature of the PRT is that it is essentially open-ended, provided: the tenant wishes to stay; is complying with her obligations; and no eviction ground applies. Like the residential tenancy regimes that preceded it,[4] a tenant with a PRT can only face eviction when the landlord has obtained an order from the FtT,[5] but unlike the short assured tenancy – which was the most popular letting vehicle prior to the introduction of the PRT – there is no provision for eviction on notice at the fixed end point of the tenancy that can be relied on by a landlord. This makes the finite number of reasons, or "grounds", where the FtT may and in some cases must grant an order for possession the only valid route to recover possession from a private residential tenant who wishes to remain there as her home.[6]

Eighteen grounds are provided by the 2016 Act, relating to a variety of matters such as tenant conduct, non-payment of rent, or the landlord requiring the let property for another purpose (including for personal habitation, to provide a home to a family member, or to sell the

[1] The Private Housing (Tenancies) (Scotland) Act 2016, s 1.
[2] Save for the excepted arrangements provided for in s 1(1)(c), listed in Schedule 1 (including licensed premises, agricultural land, holiday lets, and resident landlords). The starting date for the regime flows from the Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No. 3, Amendment, Saving Provision and Revocation) Regulations 2017 (SSI 2017/346).
[3] The transfer of jurisdiction from sheriff courts to the FtT was brought about by the Housing (Scotland) Act 2014, s.16, made operative by the Housing (Scotland) Act 2014 (Commencement No. 7, Amendment and Saving Provision) Order 2017 (SSI 2017/330).
[4] Regulated by either the Housing (Scotland) Act 1988 or the Rent (Scotland) Act 1984. It is not possible in this short note to explain the assured tenancy and short assured tenancy regimes (governed by the 1988 Act), the protected tenancy regime (governed by 1984 Act) or indeed all aspect of the PRT regime, but see further Peter Robson and Malcolm M. Combe, *Residential Tenancies: Private and Social Renting in Scotland* 4th edn (W. Green: Edinburgh, 2019) and, on bringing residential tenancies to an end, Adrian Stalker, *Evictions in Scotland* 2nd edn (Edinburgh University Press: Edinburgh, 2021).
[5] The rules are contained in the 2016 Act, Part 5. That begins with section 44, which provides, "A tenancy which is a private residential tenancy may not be brought to an end by the landlord, the tenant, nor by any agreement between them, except in accordance with this Part."
[6] It is also not possible here to consider the emergency rules first introduced by the Coronavirus (Scotland) Act 2020 here. These rendered all previously mandatory grounds discretionary, as discussed in the Appendix in Stalker, *Evictions in Scotland* (2021) and Malcolm M Combe, "The Scottish response to the Covid-19 pandemic in the private rented sector" in ZT Boggenpoel, E van der Sijde, M Tlale and S Mahomedy (eds), *Property responses to a global pandemic* (forthcoming, Juta).

property with vacant possession).[7] Where a ground has been established – the burden of proof for this falling on the landlord – eviction can follow.[8]

The various grounds for eviction and the FtT's treatment of those are not a concern of this note. Rather, the preceding discussion serves to highlight that PRTs can be tenacious creatures, given that they can survive for as long as the tenant is complying with her obligations and no eviction ground applies. They can even survive the death of the original tenant, with inheritance on one occasion being possible where a bereaved partner, an eligible family member, or a carer was also living in the let property at the time of the original tenant's death.[9] For many landlords, this tenacity for rent-paying tenants will be absolutely fine, coupled as it is with eviction grounds that allow for genuine changes of circumstance to afford recovery of possession and also the ability to increase rent once per year.[10] Thus, if a landlord decides she no longer wishes to be a landlord owing to a desire to sell the property or to occupy the premises personally, there is provision for repossession via an eviction order from the First-tier Tribunal. Less scrupulous landlords might however be tempted to manufacture a situation where recovery of possession is possible or indeed guaranteed, perhaps where landlord and tenant relations have soured slightly (but not enough to trigger an eviction ground), or perhaps when a landlord would like a new tenant in the let property for whatever reason. This is where the wrongful-termination order comes into play.

A WTO can be obtained when the landlord has misled either a tenant or a tribunal (i.e. those hearing an individual case at the FtT) such that the landlord has been able to obtain vacant possession of the previously let property. This would be the case where a tenant was duped into accepting the apparently inevitable after the service of relevant paperwork by a landlord highlighting a ground for possession, whereby the tenant simply leaves the property rather than defend the action at the FtT. Such termination without an eviction order is covered by section 58 of the 2016 Act. A WTO can also be obtained where an order was indeed issued by a tribunal, but where that order was granted owing to the presentation of trumped up or exaggerated evidence, as covered by section 57.

[7] 2016 Act, s 51 and Schedule 3.
[8] See further Peter Robson and Malcolm M. Combe, "The first year of the First-tier: private residential tenancy eviction cases at the Housing and Property Chamber" 2019 Jur. Rev. 325.
[9] 2016 Act, Pt 6.
[10] 2016 Act, Pt 4.

In either situation, on application by a person who was the tenant (or a joint tenant) immediately before the tenancy ended,[11] the FtT *may* make such an order if it finds that some kind of sharp practice has occurred. In terms of section 59, where the FtT chooses to make an order, the resulting WTO requires the person who was the landlord under the tenancy immediately before it ended to pay the former tenant who made the application for the WTO an amount not exceeding six months' rent. As the Bill went through the Scottish Parliament, the initial proposal of a maximum of three months' rent was increased to six months, but otherwise no guidance is provided as to how this figure is to be fixed. This lack of guidance is similar to the sanction that applies when the tenancy deposit regime is breached (normally by not lodging a deposit in a secure scheme),[12] although there the relevant regulations cap the award that can be made to a tenant at a sum equivalent to three times the amount of the tenancy deposit (rather than six months' rent).[13]

WTOs in action

The explanatory notes for the 2016 Act (at paragraph 90) explain that WTOs do not come into play where "*the landlord genuinely intended to use the property in the way that the eviction ground required (even if, for some reason, that intention has not come to fruition).*" The following example is then offered.

> [A] landlord might evict his or her tenant because he or she wants to sell the let property. However, after a year on the open market, the property has not sold and the landlord can no longer afford to maintain the mortgage repayments on it, so is forced to withdraw the property from the open market and re-let it to a different tenant. In such a case, if required, it is likely that the landlord could present a strong case to the Tribunal to demonstrate his or her genuine intent to sell.

That neatly captures the point that a genuine plan might not be fulfilled and in that situation it would be harsh to penalise such a landlord. There may however be situations where the court needs to consider more closely what a landlord actually intended. This is not a point that is

[11] When the legislation was progressing through the Scottish Parliament it was suggested that people other than the tenant might be able to apply on their behalf (for example, local authorities) (see: <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=10251&i=94350&c=1890796&s>). In the end, the process was restricted to tenants.

[12] See generally Robson and Combe, *Residential Tenancies* (2019), Chapter 8.

[13] The Tenancy Deposit Schemes (Scotland) Regulations 2011 (SSI 2011/176), regulation 10. Another slight difference with the deposit scheme is regulation 9 states that any application must be made no later than 3 months after the tenancy has ended, whereas there is no specific time limit for a WTO application.

unique to PRTs, and some guidance about it can be found from aspects of landlord and tenant law in English case law and earlier Scottish private renting regimes.[14]

The purpose of this comment is not to revisit the difficult issue of ascertaining a landlord's subjective intention[15] as borne out by subsequent events.[16] There are however now three examples, where the FtT has found that a landlord did not have a valid ground for recovering possession and as such the tribunal has chosen to make a WTO, which are worthy of some composite analysis. All the cases under discussion here are available on the FtT's website, organised under rule 110.[17]

The first such order bookended a fractious landlord and tenant situation where a PRT had earlier been brought to an end through a contested eviction action,[18] with the initial FtT decision being confirmed on appeal to the Upper Tribunal.[19] Much could be said of those earlier proceedings, where there was a healthy degree of scepticism on the part of the tenant as to whether the landlord, his wife and young daughter truly wanted to return to his studio flat in Drum Street, Edinburgh, in lieu of the three bedroom flat in Sighthill, Edinburgh, where they had been staying. The FtT had accepted the application on the basis of the mandatory ground of possession found in paragraph 4 of Schedule 3 to the 2016 Act, indicating the "bar was set low" by the legislation in terms of what a landlord needed to establish, and the Upper Tribunal adhered to this decision in October 2019.[20]

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[14] Consider *S Franses Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62, which related to whether a landlord had a genuine firm and settled intention to demolish, reconstruct or carry out substantial work on the let property in relation to section 30(1)(f) of the Landlord and Tenant Act 1954; discussed in Stalker, *Evictions in Scotland* 336-341. See also *Charlton v Josephine Marshall Trust* [2020] CSIH 11; 2020 S.C. 297, considered in M Skilling "*Charlton v Josephine Marshall Trust*: repair versus demolition in bonnie Argyll" 2021 Jur. Rev. 34, on a similar point under the Housing (Scotland) Act 1988.

[15] See the comments of Sheriff di Emidio in *Affleck v Bronsdon* [2020] 9 WLUK 489 where he notes "Leases, like all contracts, are interpreted according to what people have said and done, not according to their innermost thoughts" (para 19).

[16] There are now some decisions where intention has been crucial in relation to an event that has not come to pass (or not come to pass promptly) but a WTO has nevertheless not been made, namely: FTS/HPC/PR/20/0894; and FTS/HPC/PR/19/3961. These are highlighted below.

[17] That number being derived from the relevant rules position in the schedule to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328). On the website, matters are organised by type of application. WTOs fall under the miscellaneous "Other Private Tenancy Applications", available after selecting Rule 110 from the drop-down menu at <https://www.housingandpropertychamber.scot/apply-tribunal/other-private-tenancy-applications/other-private-tenancy-applications-decisions>.

[18] *Lopez v Ortega* FTS/HPC/EV/19/0967.

[19] *Ortega v Lopez* [2019] UT 57.

[20] Various grounds were put before the UT, including that there was a failure to consider adequately the suitability of the subjects for the landlord's use, to which it was observed, "There was, however, no requirement specifically to consider suitability. The only issue is the credibility and reliability of the [landlord's] claim to have formed the intention to live there". The UT was also content that there was direct evidence of the landlord

According to the "Findings in Fact" of the WTO proceedings that followed,[21] the eviction took place on 8 January 2020, although the applicant vacated the premises of 7 January 2020. To put it mildly, the flat was not left in a perfect condition – the sheriff officers reported that they found a property that was "damp and dirty with faeces on the wall". Be that as it may, the property was tidied and on 4 February 2020 it was let to a new tenant. This re-letting was despite the owner's vaunted return from Sighthill to Drum Street, with it being noted that the respondent had not lived in the property since at least June 2018 and was living in the Sighthill property for 10 months after obtaining vacant possession of Drum Street. An application for a WTO was duly made in July 2020.

Owing to the granting of an eviction order, section 57 of the 2016 Act was at issue. In all the circumstances, the FtT was satisfied that the tribunal on 24 July 2019 had been misled, and as such the applicant was entitled to a WTO. This was despite the fact neither party had endeared themselves to the FtT as entirely honest, and also despite the state in which the property was left by the applicant. An argument that the state of the property had dampened the landlord's enthusiasm to move to the property was also not accepted. In terms of how much was awarded, account was taken of the impact of the ex-landlord's actions, the duration of his dishonesty, and his continued adherence to that dishonesty, which was counterbalanced by the applicant being in arrears of rental when he vacated the property. A multiplier of three was applied, giving a penalty amount of £1,350.

The second WTO award was made in *Hutchin-Bellur v Matheson*.[22] This featured a landlord who set in motion a plan to recover a property in Glasgow that she had let on a PRT, owing to the landlord's employer relocating her base from Kintyre to Glasgow. A notice to leave was served in early March 2020, on the basis of the mandatory ground that the landlord required the property to be her residence. The Covid-19-related lockdown led to some delays and reworking of plans, until eventually the landlord moved in with her partner to his property in Coatbridge (after her employment relocation finally took place in July 2020). This living arrangement, in what might be thought of as the Greater Glasgow area, apparently suited the landlord and as such she did not need the property in Glasgow after all, but no attempt was made to countermand the notice to leave or generally inform the tenant of this. In

in relation to the planned flit, with the FtT being entitled to accept that the landlord's experience of living in Sighthill had not worked and as such he wished to move back to the property.

[21] *Ortega v Lopez* FTS/HPC/PR/20/1515.

[22] FTS/HPC/PR/20/1947.

July 2020 the tenants told their landlord that they had found somewhere else to live, and the tenancy was brought to an end on 2 September 2020.

On 12 September 2020 the former tenants (with permission) called at the property to collect a plant from the garden. They found that a couple were residing there. Apparently, the landlord had promptly let the property to her partner's daughter on a relatively informal basis, albeit there was still a plan for the landlord to move in herself at some point in 2021 (after her partner's daughter's planned relocation from there to Edinburgh).

As there was no eviction order here, s 58 of the 2016 Act was in play, allowing a WTO to be made if the FtT was satisfied the former tenant was misled, by the person who was the landlord, into ceasing to occupy the let property. The FtT accepted that, had it not been for the notice to leave, they would not have moved out of the let property. The tribunal was not satisfied that this was a situation completely manufactured by the landlord, but nevertheless did note that she simply did not know of the legal implications of the situation she had created and it was not at all satisfactory that she seemed to think she could simply pick and choose who could live there.[23] A WTO was accordingly issued, although it was felt that any penalty should not be at the upper end of the scale, given there was no malice or wilful intent, and notwithstanding any additional costs apparently suffered by the former tenants for engaging professional removers. A multiplier of one was applied, giving an amount of £650.

The third WTO award came in the case of *Mills v Boparai*.[24] This case again involved a notice to leave rather than an eviction order triggering the end of a PRT, meaning section 58 was operative. A notice to leave from July 2020 was served on the tenant on the basis that a family member would be moving into the let property (a discretionary ground for possession).[25] Apparently the rent arrears ground could also have been available to this landlord, but the timeline for this would have been longer. Rather than force matters to go through the tribunal process the tenant left the property on the strength of the notice to leave, meaning the tenancy came to an end in terms of section 50 of the 2016 Act, when the notice expired on 3 October 2020.

A family member of the landlord was apparently waiting in the wings for the property, downsizing as she was from her existing residence. However, neither this family member nor

[23] Tangentially, it might be noted that this level of constraint is striking from a property theory point of view. Blackstone's "sole and despotic dominion" this is not.
[24] FTS/HPC/PR/20/2416.
[25] Ground 5 in Schedule 3 to the 2016 Act.

any other family member actually moved in. The let property was promptly advertised online as being available from 12 October 2020. There was some discussion that the property was not fit for the family member to occupy (and there had indeed been a separate payment action where aspects of the tenant's conduct towards the property had come into play),[26] but any such assertion clearly jarred with the fact the property was advertised for let. Further, the tribunal was not in any event persuaded that the family member had a settled intention to live in the property when the notice to leave had been served. This all contributed to the tribunal finding the tenant had indeed been misled into leaving her home and a WTO was appropriate. A multiplier of three was applied here, owing to the significant inconvenience and disruption occasioned by the forced flit and search for accommodation, but no particular account was taken of the fact she found herself in a lower standard of accommodation. This was attributed to her own financial situation, which deteriorated before the notice to leave was served. With a monthly rental of £500, this gave a figure awarded of £1,500.

The WTOs that got away

Those three cases, with their awards of three times or one times the relevant monthly rent, demonstrate that WTOs can be obtained in some circumstances. Interesting as those cases are, the 18 applications to the FtT that have not led to a WTO raise, perhaps, more important questions about the effectiveness of the legislation as it is currently worded.[27] The "rejection" cases can be usefully divided into three categories: procedural flaws; substantive weighing of the relevant criteria; and "notice to leave" cases.

Procedural Flaws

The tribunal has found procedural issues in six cases, such as the tenancy not being a PRT, the landlord's address not being narrated, or the tenant failing to provide further information requested.[28] These are similar to the kinds of problems which have been noted elsewhere in relation to eviction applications under section 50 and rule 109.[29] As such they are unproblematic in policy terms and point to the need for disaffected tenants to exercise care in approaching the FtT for compensation.

[26] FTS/HPC/CV/20/1743.
[27] See Appendix.
[28] Appendix, Part 1
[29] See Robson and Combe (n 8).

Whilst the failures of such cases may be unproblematic in policy terms, there might be a separate access to justice problem. This is because the Scottish Legal Aid Board will only offer civil legal aid to proceedings relating to private tenancies where the claim is for over £3,000, unless additional information is provided "to show why it is considered reasonable for legal aid to be made available notwithstanding the comparatively low value of the claim". Accordingly, even with the maximum multiplier of six, applications relating to PRTs where the monthly rental was £500 or less might not be able to benefit from legally aided professional support.[30]

Substantive weighing of the issues

A further seven applications were refused as the landlord was found to have had a genuine intention to recover possession when steps were taken to do so. This would embody the kind of change of circumstances envisaged in the Explanatory Notes narrated above.

In one case a landlord had genuinely taken steps to sell the let property, but sale was delayed by the Covid-19 pandemic.[31] In another, no award was made where the landlord's sister had intended to move back in when notice to leave was served and indeed when the tenant eventually moved out, but thereafter circumstances had changed.[32] Two similar but different situations were encountered where refurbishment of property was at issue. One involved the refurbishment of the let property, with the relevant ground being established.[33] The other involved the more controversial situation of the landlord needing somewhere to stay whilst refurbishing where she lived, and recovering possession of the let property to live there.[34] The Tribunal also rejected an application where the owner (the former landlord) had moved in to the let property.[35] Nor was a WTO available where a notice to leave in relation to a religious manse was valid and validly served.[36] Finally there was no WTO where a formally valid notice to leave was served on the basis that the tenant was in breach of his tenancy agreement (owing to the condition of the let property). The former tenant had, perhaps unwisely, chosen

[30] *https://www.slab.org.uk/guidance/actions-in-relation-to-private-sector-tenancies-including-eviction-proceedings-in-the-first-tier-tribunal-for-scotland-housing-and-property-chamber/*. Our thanks to Ben Christman of the Legal Services Agency for drawing this point to our attention.
[31] FTS/HPC/PR/20/0894.
[32] FTS/HPC/PR/19/3961.
[33] FTS/HPC/PR/20/0775, 2016 Act, Sch 3, ground 3.
[34] FTS/HPC/PR/19/1867.
[35] FTS/HPC/20/PR/1833.
[36] FTS/HPC/PR/20/0013.

not to contest the claim.[37] None of these decisions have led to appeals on a point of law to the Upper Tribunal.

No Notice to Leave

The FtT has stressed that WTOs come into play where a PRT has been brought to an end in circumstances that engage either s 57(2) or s 58(2) of the 2016 Act. In terms of s 57, the existence of an eviction order will be a simple matter of public record, but to unlock section 58 requires the service of a document that measures up to a notice to leave (in terms of sections 50 and 62).[38]

Of particular interest here are the five cases where section 58(2) was involved. Some FtTs have chosen to take a (highly?) formalistic approach to interpretation. This has served as a roadblock for some tenants seeking a remedy where they have been led to believe their tenancy is ending and they should quit the premises.

One example comes from the case of *Bargeton v Danzan Properties Limited*.[39] Here the applicants were former tenants who sought compensation for being misled into leaving a property known as Cherrytree Cottage at Dundas Estate, South Queensferry. The process at the FtT began life as an application under rule 69 of the relevant procedural rules,[40] being an application for damages for an unlawful eviction under s36(3) of the Housing (Scotland) Act 1988 (discussed below).

No eviction order had been issued, and nothing precisely in the shape of a notice to leave had been served. That being the case, the applicants explained to the FtT that they were contacted by email and told they would not be able to continue living in the property, with a visit to follow from a managing agent to explain the situation more fully. At that meeting a few days later, it was explained that the landlord would be taking the property back for family use (to offer ancillary accommodation to their family alongside their primary residence (Dundas Castle) at times like Christmas). The tenants were apparently told that there would not be a

[37] FTS/HPC/PR/20/1302.
[38] Section 50 is predicated on there being a notice to leave, in that subsection (1) provides: "(1) A tenancy which is a private residential tenancy comes to an end if (a) the tenant has received a notice to leave from the landlord, and (b)the tenant has ceased to occupy the let property." Section 62(1) then provides that a notice to leave means a notice which: "(a) is in writing, (b) specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-tier Tribunal, (c) states the eviction ground, or grounds, on the basis of which the landlord proposes to seek an eviction order in the event that the tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and (d) fulfils any other requirements prescribed by the Scottish Ministers in regulations."
[39] *Bargeton v Danzan Properties Limited* FTS/HPC/20/PR/2529.
[40] In terms of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

formal notice and instead that they could have six months to find somewhere else to live. Later, steps were taken to access the property to buy furniture for when it was vacated. All of this was not enough to trigger the WTO regime, with it being noted:

> The requirements of the 2016 Act and in particular S 57 and 58 are very particular and to make a competent application under those sections requires the tenant to have left after receiving a notice to leave or an eviction order and the Applicant acknowledges this has not happened here. This Application cannot therefore be accepted.

At the time of writing, a webpage on the Dundas Castle website allows you to book a "cosy cottage" going by the name of "Cherry Tree" (as opposed to the "Cherrytree" reported by the FtT), "available from £450 per night and can sleep a maximum of six people".[41]

An even more striking example is provided in the case of *Carcangiu v Edinburgh Holiday & Party Lets Limited*,[42] where a tenant occupied a property in Edinburgh through a PRT (notwithstanding the best efforts of the landlord to dress that arrangement up as a holiday let, it being recalled that genuine holiday lets are not covered by the 2016 Act). Although no paperwork was served by the landlord to recover possession, after a few months of occupation a series of text messages were sent to the effect that the tenant had no right to occupy owing to a late rental payment, followed by threats that the tenant's room would be opened and cleared (with the tenant's items being binned). The tenant responded by text message that this seemed somewhat irregular, but nevertheless vacated the property, apparently fearing something might happen to his belongings.

The former tenant unsuccessfully applied for a WTO. The tribunal held that no notice to leave had been served and declined to adopt any purposive approach to interpretation of the 2016 Act to deal with the mischief the legislation sought to address.[43] Further, it was

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[41] <https://dundascastle.co.uk/cherry-tree/> [last consulted 10 May 2021]
[42] FTS/HPC/PR/19/4030.
[43] For an example of purposive interpretation that has a certain resonance, consider the Court of Session case of *Armour v Anderson*, in relation to providing protection to cohabitants who had fled domestic abuse: 1994 SC 488 at 494. A more recent example relating to the interpretation of the 2016 Act can be found in the Upper Tribunal case of *Smith v MacDonald* [2021] UT 20. In this appeal from the FtT, Sheriff Fleming was faced with the question of whether a notice to leave served by sheriff officers was nevertheless still deemed to be received by the tenants 48 hours after it was served, owing to the operation of s 62(5). That provides, "…it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent", with this in turn being relevant to when possession can be recovered (because a specified time period then has to be afforded to the tenant in terms of s 54 before proceedings for possession can be raised). It was noted (at paragraph 23), "Adopting a purposive approach to the statute the 28 day period [being the period in question in this case] should commence on the date when the Notice to Leave was received." To not adopt such an approach would have effectively extended the period of notice provided for in the 2016 Act (paragraph 24).

suggested that the tenant had perhaps not actually been misled and so a WTO was not appropriate:

> It appears that he [the former tenant] knew or strongly suspected that the Respondent's [the landlord's] actions were not lawful but did not want to risk losing his possessions by staying at the property and taking advice on his rights. The Legal Member therefore concludes that, had the Applicant been entitled to seek a wrongful termination order under Section 58, he may have been unable to establish that he met the test specified in Section 58(3).[44]

Similar notice to leave issues were evident in *Bucker v Stronach*,[45] where communication using the WhatsApp messenger service from landlords in Norfolk to tenants in Stromness in Orkney did not amount to a notice to leave. The message made clear that the landlord wanted the tenants to leave. They duly did as asked. Less controversial perhaps was the case of *Macindoe v Murricane*, where again an application was refused as the letter sent by the landlord to the tenant was not a valid notice to leave. Here the tenant recognised this flaw but nevertheless left having secured alternative accommodation.[46]

Finally, in the case of *McKenna-Cansfield v Anderson*[47] a series of text messages had been exchanged in relation to the landlord's planned sale of the let property, including one from the landlord that incorrectly explained either party could end the tenancy on 30 days' notice. Whilst that case did result in the now familiar outcome of the application being refused as there was no qualifying notice to leave served, the tribunal (comprising a legal member and an ordinary member) observed that this finding may not preclude an order for unlawful eviction under the Housing (Scotland) Act 1988 being sought.

Alternative means to deal with irregular eviction will be discussed below, but not before a consideration of how useful that observation of the tribunal actually was to the applicant in question. Helpful as that signpost might have been in other circumstances, it appears an application under that legislation *had already been made* by Mrs McKenna-Cansfield in

[44] Paragraph 32. See also FTS/HPC/PR/20/1302, paragraph 15, where it was noted of the former tenant that he knew his rights but nevertheless left as his relationship with his former landlord was fraught, and as such he was not misled, and FTS/HPC/PR/19/2381 (discussed below).
[45] FTS/HPC/PR/20/0437.
[46] FTS/HPC/PR/19/2381. The discussion in this case also tends towards the idea that a tenant who has received documentation that they suspect is not a valid notice to leave but nevertheless departs cannot obtain a WTO.
[47] FTS/HPC/PR/20/2171.

relation to the same property.[48] A different tribunal – made up of a single legal member – rejected that application on the basis that the relevant procedural rule (rule 69) does not relate to private residential tenancies.[49] This rejection seems unfortunate and arguably not in accordance with the relevant procedural rule: the rule itself relates to "a former residential occupier",[50] a term that is wide enough to include tenants with a PRT. Admittedly the rule appears beneath a chapter heading "Procedure in respect of assured tenancy applications" but Stalker suggests – we think correctly – that given the terms of section 36(4A) of the 1988 Act "an application under rule 69 may also be made where the claim arises from, say, a PRT".[51]

There is no indication of any relevant appeal in the published decisions of the Upper Tribunal. Neither is there any indication of another application made under the more generic rule 111 (Application for civil proceedings in relation to a private residential tenancy), which presumably must be available for PRT-related unlawful eviction applications if rule 69 is not.[52] Accordingly, it appears that this particular ousted occupier has fallen between the cracks, unable to reach the remedy provided by the 1988 Act despite an application that should have been accepted by one tribunal and an exhortation by a different tribunal to use that very same 1988 Act.

Other rules relating to unlawful eviction[53]

That interesting but ultimately meaningless steer following on from an unsuccessful WTO application serves to introduce the separate legal provisions that begin at section 36 of the 1988 Act. That section provides that the residential occupier of any premises can raise an action at the FtT against a landlord or any person acting on his behalf who has deprived him of occupation of all or part of the premises. This is exactly what happened in the case of *Baral v Arif*,[54] where an order for £18,000 damages was made. That measure of damages was calculated in accordance with section 37 of the 1988 Act, reflecting the difference in the

[48] FTS/HPC/PR/20/2165.
[49] See also *Sangare v The Church of Scotland* FTS/HPC/PR/20/0014, where the same issue arose.
[50] See the Schedule to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328), rule 69.
[51] Stalker, *Evictions in Scotland* (2021), p. 44.
[52] An application was made under rule 111 in yet another strand to this dispute, where the McKenna-Cansfields recovered the majority of their deposit from their otherwise indefatigable landlord (FTS/HPC/CV/20/2540), but no proceedings in relation the actual recovery of possession are found there.
[53] See generally Robson and Combe, *Residential Tenancies* (2019), Chapter 13 and Stalker, *Evictions in Scotland* (2021) Chapter 2.
[54] FTS/HPC/PR/18/2712. See Scottish Housing News, "First-tier Tribunal for Scotland makes first unlawful eviction decision" <https://www.scottishhousingnews.com/article/first-tier-tribunal-for-scotland-makes-first-unlawful-eviction-decision> (15 January 2020). Important as this precedent might be, this case took some 16 months to resolve.

value of the landlord's interest in the property with vacant possession as opposed to the value with the sitting tenant still in possession.[55]

Of course, it will be useful for tenants to have that alternative route to recompense, but equally it is important that tenants do not somehow fall into the grey zone between the two regimes. It is submitted that a signpost to the 1988 Act could have been offered in other failed WTO cases, not least *Carcangiu v Edinburgh Holiday & Party Lets Limited*.

It can also be observed that the interaction of these two regimes might need further consideration, with the aforementioned application about Cherrytree Cottage made under rule 69 demonstrating this point all too well. Having set out on a 1988 Act path, Mr and Mrs Bargeton were steered towards a WTO application by the legal member who initially received their application. It will be recalled they were then unsuccessful, owing to there being no notice to leave in terms of the 2016 Act. The information available on the website of Housing and Property Chamber indicates no further application was made by the Bargetons under rule 69, although it does provide another example of the WTO and unlawful eviction regimes interacting in a way that left the former tenants with no award on either ground.[56]

Another point that is worth remembering is that the 1988 Act did not replace the underlying common law. This means a claim for common law eviction could also be relevant in some circumstances.[57] Such an application to the FtT might be made under rule 111 of the relevant procedural rules.

Finally, all of this is separate to the protections offered by the criminal law, contained in the Rent (Scotland) Act 1984.[58] The criminal offences there could and should stop the worst excesses of landlordism (for example, simply changing the locks without warning).

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[55] A campaign for reform of this section was launched in 2020 by solicitors at the Legal Services Agency, as detailed here: <http://lsa.org.uk/docs/Unlawful%20evictions%20damages%20law%20reform%20briefing%20-%2011%20August%202020.pdf>.

[56] The aforementioned case of FTS/HPC/PR/19/1867, where an application for a WTO was refused because the landlord had established a genuine plan to move into the let property whilst refurbishing their current residence, featured a separate but associated application through rule 69. This application was rejected as superfluous owing to the separate WTO process: FTS/HPC/PR/19/1814.

[57] On the interaction of the 1988 Act and the common law, see Stalker, *Evictions in Scotland*, pp. 42-44 and Robson and Combe, *Residential Tenancies*, para 13-16. Note also s 36(5) of the 1988 Act, to the effect that "damages shall not be awarded both in respect of [common law] liability and in respect of a liability arising by virtue of this section on account of the same loss."

[58] The offence of unlawful eviction, created by the Protection from Eviction Act 1964, is now found in section 22 of the Rent (Scotland) Act 1984. See further S McPhee, "Multiple Failings on Unlawful Evictions" 2019 SCOLAG (496, February) 24.

Conclusion

In October 2019, a representative of the interest group Living Rent bemoaned both the lack of WTO applications and the lack of success of the applications that had taken place.[59] Whilst a different picture has emerged since then and some successful applications have been made, clearly there are still some issues to consider, not least the fact that landlords might even be able to sidestep the regime through sharp practice and informal communication.

There has been one case of a WTO following on from an eviction order being granted by the FtT, and the process contained in s 57 of the Private Housing (Tenancies) (Scotland) Act 2016 clearly applies when there is such an obvious staging post. The issue however is the other route to a WTO. Section 58(3) of the 2016 Act provides that the prospect of a WTO emerges where the FtT "finds that the former tenant was misled into ceasing to occupy the let property by the person who was the landlord", but s 58 as a whole only applies where a PRT "has been brought to an end in accordance with section 50". Section 50 talks of a "notice to leave", which is defined in section 62 as being in writing as well as needing to meet other formal requirements.

The emerging jurisprudence from the FtT unfortunately seems to suggest a cynical landlord could test the waters by sending correspondence that falls short of a notice to leave to a tenant in the hope that they do not stay the course and wait for a notice that meets the statutory requirements.[60] If this is coupled with the apparently emerging suggestion that a tenant has not been misled where she broadly understands that summary eviction is not possible but nevertheless simply leaves after receiving a notice to leave or something close to one rather than waiting for a tribunal order, this could be the worst of both worlds.

In other areas of law, when someone has been duped into giving up a legal protection the law can react by reinstating that protection.[61] It seems strange that the WTO could have its scope pruned so early in its existence. Whilst the recent attempt by one tribunal to signpost an alternative source of damages for unlawful eviction under the Housing (Scotland) Act 1988 is

[59] STV News, "Authorities 'turning blind eye' to unlawful evictions" 6 October 2019, <https://archive.news.stv.tv/archive/1441362-authorities-turning-blind-eye-to-unlawful-evictions.html>.
[60] This is to say nothing about the potential issues of delict that might need to be considered here, in terms of seeking to deprive someone of a legal remedy that they would otherwise enjoy, which are beyond the scope of this note.
[61] Consider *Goudie v Mulholland* 2000 SC 61, where a lien was reactivated notwithstanding the loss of possession of the item.

to be applauded, it may yet be necessary to revisit WTOs to ensure they offer protection and reparation to those that need it.

The WTO regime can work when an eviction order has been obtained through subterfuge, and it may even be quietly working to address a mischief through its operation in the background in relation to disputes that do not make it to the FtT (by way of landlords offering settlements to former tenants to stop them applying). It would however be a shame if the emerging treatment of the law surrounding WTOs causes confusion and consternation among those who actually apply for wrongful-termination orders, rather than give a new and additional remedy in situations where landlords are using the eviction grounds provided by the 2016 Act in an underhand way.

APPENDIX

REJECTED WTO APPLICATIONS – APRIL 2019 – APRIL 2021

Part A

PROCEDURAL FLAWS

1. FTS/HPC/PR/20/2418: rejected on procedural grounds, landlord's address not provided;
2. FTS/HPC/PR/20/2339: rejected as application related to a short assured tenancy;
3. FTS/HPC/PR/20/0464: rejected for failing to provide information requested about the landlord;
4. FTS/HPC/PR/19/3892: rejected as application related to an assured tenancy under the Housing (Scotland) Act 1988;
5. FTS/HPC/PR/18/3508: application rejected as further unspecified information not provided to the tribunal;
6. FTS/HPC/PR/19/0582: application rejected as it was submitted by a lodger who did not have a PRT.

Part B

SUBSTANTIVE WEIGHING OF THE ISSUES

1. FTS/HPC/20/PR/1833: application refused as owner had moved in to the let property;
2. FTS/HPC/PR/20/0894: application refused as landlord had genuinely taken steps to sell the let property, but sale was delayed by the Covid-19 pandemic and took place after 7 months;
3. FTS/HPC/PR/20/0013: order refused as notice to leave – in relation to a religious manse – was valid and validly served;
4. FTS/HPC/PR/20/1302: application refused as valid notice to leave served relying on the condition of the property which the former tenant chose not to contest, then the former tenant moved into another flat in the block offered by a friend;
5. FTS/HPC/PR/20/0775: application refused as landlord established he had intended to refurbish the property;
6. FTS/HPC/PR/19/3961: application refused as landlord's sister had intended to move back in when notice was served and indeed when tenant had moved out, but circumstances changed when a property sale abroad fell through;
7. FTS/HPC/PR/19/1867: application refused as, on balance of probabilities, the landlord had established that they had genuinely planned to move into the let property whilst refurbishing their current residence. An associated application through rule 65 (which would have engaged the provisions of the 1988 Act) was rejected as superfluous owing to the separate WTO process in FTS/HPC/PR/19/1814.

Part C

NO NOTICE TO LEAVE

1. FTS/HPC/20/PR/2529: rejected as no notice to leave served, despite the applicant being steered towards a WTO application by the legal member;

2. FTS/HPC/PR/20/2171: application refused as no notice to leave served, although tribunal observed this may not preclude an order for unlawful eviction under the Housing (Scotland) Act 1988 being sought. This dispute also involved the landlord being ordered to repay a sum of money that he had sought to withhold at the end of the tenancy (see FTS/HPC/CV/20/2540;
3. FTS/HPC/PR/19/4030: order refused as no notice to leave served although message indicating right to stay had ended;
4. FTS/HPC/PR/20/0437: rejected on the basis that no notice to leave was served;
5. FTS/HPC/PR/19/2381: application refused as the letter sent by the landlord to the tenant was not a valid notice to leave, a point which the tenant had recognised, but the tenant nevertheless left having secured alternative accommodation.