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The Scottish response to the Covid-19 pandemic in the private rented sector

Introduction

The repercussions of the Covid-19 pandemic¹ have been huge, with housing issues – particularly for those renting accommodation – being but one of the many affected areas as a result of the necessary 'social distancing' measures to arrest the pandemic having a knock-on effect on income streams. Temporary changes in the residential leasing context have taken place around the world; notably, Leilani Farha, United Nations Special Rapporteur on the right to adequate housing, called for a moratorium on evictions.² This chapter details the response from Scotland, one of the subnational jurisdictions of the United Kingdom of Great Britain and Northern Ireland.

As shall be explained, Scottish residential tenants in the private rented sector have generally been provided with temporary protections against eviction, with the inevitable equivalent restrictions on private landlords such that they might not be able to obtain possession of let properties in the event of a breach of a term of the tenancy through normal channels. That is not the full story though, and an interesting comparison is revealed from within Scotland, namely where students renting bespoke accommodation were offered an escape route to leave a student residential let, with corresponding affected landlords losing such tenants (and an income stream). Before setting out those Covid-19 reforms and the specific rules about residential leasing, an introduction to Scots landlord and tenant law (and Scots law in general) will be offered.

Overview of Landlord and Tenant Law in Scotland

Scotland is a mixed legal system, which draws much of its property law from a Civilian tradition.³ As with Roman law, leases were originally conceptualised as personal contracts,⁴ but a Fifteenth century Act of the old Scottish Parliament protected tenants in possession from eviction in the event that the landlord's interest was transferred to a new, incoming landlord. The Leases Act 1449 is still in force, although its effect has been replaced by the Registration of Leases (Scotland) Act 1857 for leases of more than twenty years' duration and tenants with such leases must register that right at the Land Register so as to bind successor landlords. Accordingly, sitting tenants can remain largely unaffected by a change of landlord, in property law terms, at least. Of course, such tenants must redirect their rent when a change of the

¹ WHO 'Coronavirus disease (COVID-19) pandemic' available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>, accessed 20 May 2021.

² OHCHR "Housing, the front line defence against the COVID-19 outbreak," says UN expert' available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25727&LangID=E>, accessed 20 May 2021.

³ For useful coverage with a South African audience in mind, see further Reinhard Zimmermann, Kenneth Reid, and Daniel Visser (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford University Press 2005).

⁴ Consider Peter Webster 'The Continued Existence of the Contract of Lease' in Andrew J M Steven, Ross G Anderson and John MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (Avizandum Publishing 2017) 119.

landlord's interest is intimated to them, but their tenancy survives and the maxim *emptio tollit locatum* – to the effect that a sale of a thing breaks its earlier hire (or lease) – does not apply.⁵

The law of leases in Scotland⁶ can be divided into three contextual categories: residential; rural; and commercial. Commercial leases are the least regulated sector, with the perceived power balance between the parties meaning that there has been a comparative lack of legislative intervention in this area.⁷ Rural leases are highly regulated by a patchwork of measures encompassing different types of tenure, with crofting tenure in the Highlands and Islands of Scotland being particularly esoteric.⁸ Commercial and rural lets will not be analysed in any great depth here.⁹

For residential leasing, this category can be further subdivided into private and social sectors. The latter is where the state (normally at a municipal level) or an equivalent entity acts as landlord, which might colloquially be called council housing or social housing in the UK.¹⁰ Owing to differing standards of governance of what are known as registered social landlords in Scotland, which are subject to supervision by the Scottish Housing Regulator,¹¹ it would be fair to say these landlords are less likely to be in need of Covid-19-related action than private landlords. Private landlords are subject to a separate registration regime,¹² introduced by Part 8 of the Antisocial Behaviour etc. (Scotland) Act 2004, and must be 'fit and proper' people,¹³ but the level of scrutiny is comparatively less than the social sector. As such, there will be no particular focus on social tenancies in this chapter either.

⁵ Paul J. du Plessis, 'Historical evolution of the maxim "sale breaks hire"' in Cornelius Van Der Merwe and Alain-Laurent Verbeke (eds) *Time-Limited Interests in Land – The Common Core of European Private Law* (Cambridge University Press 2012).

⁶ The most authoritative modern (general) text on leases in Scotland is Robert Rennie with Mike Blair, Stewart Brymer, Frankie McCarthy and Tom Mullen, *Leases* (W. Green 2015). Reference can also be made to Lorna Richardson and Craig Anderson, *McAllister's Scottish Law of Leases*, 5 ed (Bloomsbury Professional 2021) and the leases chapter in Rt Hon. Lord Eassie and Hector L MacQueen (eds), *Gloag and Henderson: The Law of Scotland*, 14 ed (W. Green 2017).

⁷ The key interventions being found in the Tenancy of Shops (Scotland) Act 1949 and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, providing a tenant with a limited opportunity for a re-let of a commercial unit and regulating irritancy proceedings respectively. See further Scottish Law Commission *Discussion Paper on Aspects of Leases: Termination* (Scot Law Com DP No 165, 2018), which considers these provisions and their potential reform.

⁸ See Eilidh I M MacLellan 'Crofting Law' and Hamish Lean 'Agricultural Tenancy Legislation and Public Policy Considerations in Scotland' in Malcolm M Combe, Jayne Glass and Annie Tindley, *Land Reform in Scotland: History Law and Policy* (Edinburgh University Press 2020).

⁹ For completeness, and though it is not the subject of this chapter, there were some Covid-19-related changes made in the commercial and rural sectors. For commercial tenants, they were offered protection in the form of extended periods before irritancy proceedings could be brought for non-payment of rent or other sums due (by way of a temporary amendment of The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 made by the Coronavirus (Scotland) Act 2020, upping the relevant notice period from 14 days to 14 weeks). Rural tenants generally benefit from more security of tenure than commercial tenants so there was less call to legislate to regulate evictions in the agricultural sector, but one change was made to something known as the tenant amnesty for improvements. This amnesty was a time-limited measure brought in by the Land Reform (Scotland) Act 2016, being a specific policy-oriented land reform measure to give certain rural tenants a means to claim compensation for any improvements made to a holding that had not been properly notified to landlords. The amnesty period was initially to run for three years, and it was due to expire on 13 June 2020, but the Land Reform (Scotland) Act 2016 (Supplementary Provision) (Coronavirus) Regulations 2020 (SSI 2020/174) extended the amnesty period for a further six months.

¹⁰ The relevant statute which largely governs the social rented sector is the Housing (Scotland) Act 2001, Part 2. The private rented sector regime will be covered below.

¹¹ <https://www.housingregulator.gov.scot/>.

¹² <https://www.landlordregistrationscotland.gov.uk/>.

¹³ The Antisocial Behaviour etc. (Scotland) Act 2004, s 84(2) and s 84(3)(c).

That leaves the private rented sector. Privately rented accommodation represents an important part of Scotland's housing mix, particularly in urban areas. According to Scottish Government figures from March 2018, across Scotland's local authorities the proportion of dwellings rented privately ranges from 3% in East Renfrewshire (a generally affluent municipal area that is within commuting distance of Scotland's largest city, Glasgow) to 25% in Edinburgh (Scotland's capital city).¹⁴

The private rented sector has been regulated for many years, albeit the strength of that regulation has varied depending on the political leanings of the UK or Scottish governments of the day. To explain the Scotland/UK dynamic and what that has meant for Scottish housing law, from the beginning of the Eighteenth century until the very end of the Twentieth century, Scotland's legislature was shared with the rest of the UK, although Scots law – which had developed into a recognised system before 1707 – remained as Scotland's own legal system after the Union with England and Wales.¹⁵ Whilst many statutes applied across the whole of the UK, Scottish-specific legislation was passed by the UK legislature where appropriate. Housing law was generally one such area, and even though similar policies were often deployed north and south of the Anglo-Scottish border they were enacted through independent acts of parliament.

With the passage of the Scotland Act 1998 and the advent of devolution from the UK parliament to a delegated authority, a specific Scottish legislature was created with law-making power over a wide range of matters, including Scots private law.¹⁶ In 2016, that Scottish Parliament legislated for a new private letting vehicle, giving that vehicle the generic name of 'private residential tenancy' (PRT). This new regime left pre-existing tenancies unchanged, but almost all new private sector lets since 1 December 2017 will now be a PRT. The next section of this chapter will provide an overview of private sector regulation with particular reference to the Private Housing (Tenancies) (Scotland) Act 2016, setting that against the initial response to Covid-19.

Private residential letting in Scotland

In a sense, emergency changes to landlord and tenant law are nothing new. Rent control in the UK private rented sector was born of crisis. The Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 stopped profiteering landlords from raising rents at pressure points of housing supply (perhaps in urban areas around munitions works) after it dawned on the British Empire that the Great War would not be over by Christmas. That legislation also removed a standard reason/excuse for rack renting by restricting any increase to the interest landlords may have been charged by secured lenders (i.e. landlords with mortgages¹⁷ might have argued they were simply passing costs on if there was no mirror action to stop mortgage lenders being greedy). What was initially a war measure became a less temporary measure as a result of a statute passed in 1919.¹⁸

¹⁴ *Housing statistics 2019: key trends summary*, available at <https://www.gov.scot/publications/housing-statistics-scotland-2019-key-trends-summary/pages/5/>.

See also the Scottish Government's *Private sector rent statistics: 2010 – 2019*, available at <https://www.gov.scot/publications/private-sector-rent-statistics-2010-2019/>.

¹⁵ Union with England Act 1707, s XVIII.

¹⁶ The Scotland Act 1998, s 126(4).

¹⁷ The term 'mortgage' is not a technical term of art for an immoveable security in Scots law, but it is found in common parlance and occasionally in more technical settings such as the name of relevant legislation. In contemporary Scotland a device called the standard security is the main security device for immoveable (also known as heritable) property. The usage of the word 'mortgage' in this chapter is for simplicity rather than as a rejection of recognised Scots law terminology.

¹⁸ Information about this and other rent control measures in the UK can be found in a House of Commons Library briefing paper, *A short history of rent control* (Number 6747, 2017)

Early in the response to the Covid-19 pandemic (on 19 March), Patrick Harvie MSP¹⁹ asked a question of the Scottish First Minister, Nicola Sturgeon MSP, at the Scottish Parliament in the hope that there might be a complete ban on evictions of private sector tenants on any basis. As we shall see, such a blanket restriction did not come to pass, but that call serves as a useful departure point for the discussion of Covid-19 emergency measures and the underlying law in Scotland.

In Scotland you cannot remove a recognised residential tenant from their home without an order from a tribunal, namely the First-tier Tribunal for Scotland (Housing and Property Chamber), and there are a finite number of reasons, or 'grounds', where the tribunal may and in some cases must grant an order for possession.²⁰ The rules around eviction will be explained below in the context of the amended Covid-19 regime, but for now, it can be noted that whilst some occupiers might not be protected by these rules (such as lodgers who live with a resident landlord, or workers in tied-accommodation provided by an employer), in most circumstances an individual renting a home as her independent living space on an arm's length basis will be within the realms of private renting regulation and as such a specific regime for eviction will apply.²¹ The most common reason for a landlord seeking possession from a tenant is non-payment of rent, even in non-pandemic times;²² a pandemic that affects the income of those who are less likely to be established on the housing ladder is more likely to reinforce than change the status of rent arrears as the most common ground for eviction, even with the operation of the UK Government's furlough scheme to offset some lost income.²³

The main residential letting vehicle in Scots law – the aforementioned private residential tenancy – allows for eviction where the tenant 'has been in rent arrears for three or more consecutive months'.²⁴ Other eviction grounds also exist, such as the landlord needing the property as her own home, antisocial or criminal behaviour by the tenant, or the tenant not occupying the property. These grounds can be found in Schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016. As we shall see, some of these grounds are mandatory (i.e. if established, a tribunal *must* give the possession sought), but others are discretionary (meaning a tribunal *may* make an order for possession, if satisfied that it is reasonable to do so). It might be worth noting at this stage that Scotland has no direct comparator to the South African Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998,²⁵ meaning that there is no overall 'just and equitable' test to be engaged with or analysis of

<https://commonslibrary.parliament.uk/research-briefings/sn06747/>. A more detailed Scottish analysis is available in Peter Robson and Malcolm M Combe, *Residential Tenancies: Private and Social Renting in Scotland* 4 ed (W. Green 2019), chapters 1 and 2.

¹⁹ Co-leader of the Scottish Green Party (and not part of the governing administration); 'MSP' stands for Member of the Scottish Parliament.

²⁰ See generally Adrian Stalker, *Evictions in Scotland* 2 ed (Edinburgh University Press 2021).

²¹ The present discussion does not consider any other proper process requirements to eject a possessor of immovable property. There has been some discussion of this recently, with particular reference to so-called 'lock change' evictions of [former] asylum seekers: see the discussion in Kenneth G C Reid and George L Gretton *Conveyancing 2019* (Edinburgh University Press 2020) at 135-141.

²² See 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 *Juridical Review* 325.

²³ This furlough scheme operated through the Coronavirus Job Retention Scheme, allowing employees to receive a sum equivalent to 80% of their salary for hours not worked, and the Self-Employment Income Support Scheme, allowing self-employed individuals to claim 80% of average trading profits, capped at a maximum figure. See further <https://www.gov.uk/government/news/government-extends-furlough-to-march-and-increases-self-employed-support>.

²⁴ Private Housing (Tenancies) (Scotland) Act 2016, Schedule 3, Ground 12, in conjunction with s 51.

²⁵ See Anne Pope, 'A Tricky Balancing Act: reflections on recent South African eviction jurisprudence' in Andrew R C Simpson, Douglas Bain, Roderick R M Paisley and Nikola J M Tait (eds), *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller* (2018).

whether alternative accommodation is available to an outgoing tenant as and when an eviction ground is made out. Separately, another point of interest in relation to the Scottish PRT is that its introduction brought with it a related legal device known as the wrongful-termination order. This can be brought to bear against a landlord who has duped a tenant or indeed a tribunal into believing there was a valid ground to bring a PRT to an end when in fact no such ground existed. On application by a former tenant, and assuming this can be established on the balance of probabilities, the landlord can be ordered to pay a penalty sum of up to six times the monthly rent that was payable.²⁶

Tenancies entered into before 1 December 2017 have different regimes, depending on the exact nature of the tenancy. As noted above, the introduction of the private residential tenancy as the main letting vehicle did not automatically change existing tenancies. Similarly, the immediately preceding regime – which provided two letting vehicles called the assured tenancy and short assured tenancy as indicated below – did not automatically convert any older tenancies when it was brought into force. This means it is still possible to meet multiple tenancy forms,²⁷ governed by either the Housing (Scotland) Act 1988 or the Rent (Scotland) Act 1984.

Notably, the relationship of landlord and tenant under a short assured tenancy that has subsisted since the current letting vehicle was introduced – that is to say, it was entered prior to 1 December 2017 and nothing has brought it to an end since – will essentially come to an end at the expiry of a pre-determined period unless the landlord and tenant both wish to extend, whereas the new PRT operates on an open-ended basis (i.e. 'no fault eviction' has been mitigated against). For as long as a tenant with a PRT is suitably well-behaved and wishes to stay in the property and the landlord's circumstances do not change (such that a sale of the property or reclamation of possession is genuinely needed, for example), the tenant can stay put. Short assured tenancies (SATs) were the most common form of private let before the new private residential tenancy came into being. Despite it not being competent to grant new SATs since late 2017, some still exist and the stability of those tenants is worthy of attention. The focus of this chapter, however, is on specific eviction grounds that might bring any residential let to an end at any given time, rather than the unique circumstances of SATs that still exist.

With that backdrop, it is now appropriate to return to Patrick Harvie's request to suspend all eviction grounds, and the governing Scottish National Party's response to that. The Scottish First Minister Nicola Sturgeon responded as follows:²⁸

Aileen Campbell [Cabinet Secretary for Communities & Local Government] set out actions yesterday, but those are not necessarily the end of the road. We continue to look at what more we can do. To put it in context—it is not my intention to be political, or to criticise the United Kingdom Government, I only want to give context to what I am saying—the Prime Minister set out emergency legislation so that landlords will not be able to start proceedings to evict tenants for at least a three month period. We do not need to do that in Scotland, because that is what our current law says. That is why Aileen Campbell set out that we will extend the existing provision to six months.

²⁶ Whilst this does seem like huge disincentive to landlords acting in such a duplicitous manner, and whilst some wrongful-termination orders have been made, there have been a number of cases where a former tenant has been unable to unlock this remedy. For an analysis, see Combe, MM and Robson, P, '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?' 2021 Juridical Review 88.

²⁷ See further <https://www.mygov.scot/types-of-tenancy/>.

²⁸ Meeting of the Parliament, 19 March 2020, Cols 17-18, available at: parliament.scot/parliamentarybusiness/report.aspx?r=12591&mode=pdf.

In any event, as housing tribunals are not sitting right now, no proceedings will be taken forward. However, I repeat that nobody should face eviction because of the crisis that we are living through. What I have just described applies to landlords in the private rented sector. For completeness, I say that the Government will take action if we find that any social landlord is contemplating raising eviction proceedings against anybody in these circumstances. My constituency experience is that we have outstanding social landlords and I would not expect any of them to do that.

There are a few points made in this statement that are useful for context but require some explanation. First, the point that 'housing tribunals are not sitting' at that moment represented a practical if not strictly Scots private law restriction on eviction, in that the relevant forum that must be engaged with prior to an eviction was not at the time sitting owing to the inability to operate in the early stages of adapting to social distancing.²⁹ Second, the point about social landlords – who remain responsible for a relatively small but still important proportion of housing stock – not casually engaging in evictions is noteworthy but for reasons noted above and indeed constraints of space, the social rented sector will not be considered here.³⁰ Finally, the position in England and Wales might be of comparative interest, but the focus of this chapter is Scotland and again constraints of space prevent a full analysis of those measures. It can be noted though that evictions were indeed subject to certain controls as a result of measures in the Coronavirus Act 2020 (by way of section 81 and schedule 29 of that statute), and those measures were extended in August 2020.³¹

The First Minister's statement at the Scottish Parliament followed an open letter to landlords and letting agents from Kevin Stewart, the Scottish Minister for Local Government & Housing, asking landlords to be flexible with tenants in these difficult times and also flagging the planned legislative change regarding the rent arrears ground.³² He also wrote to registered social landlords and local authorities, so as to ensure the social rented sector was not overlooked.³³ These initial non-legislative activities were then followed by promptly-passed legislation, with a second Act making changes relating to student tenancies. The final legislative response to note is the complete suspension of the enforcement of eviction notices that was introduced for public health reasons in the winter of 2020/21, which necessarily relegated some of the more

²⁹ For civil proceedings relating to matters in the private rented sector, these do not begin in the standard Scottish courts but rather go to the Housing and Property Chamber of the First-tier Tribunal for Scotland (the FtT). Details of the initial closure and then adaptation of the FtT can be found online, with the most recent adaptation being at: <https://www.housingandpropertychamber.scot/news/update-7>.

³⁰ Not-for-profit entities and local [municipal] authorities that provide living accommodation in Scotland are regulated by the Scottish Housing Regulator in terms of the Housing (Scotland) Act 2010: see <https://www.housingregulator.gov.scot/about-us/what-we-do/our-role>. That wider regulatory regime goes some way to explaining the Scottish Government's – and this chapter's – focus on the private rented sector.

³¹ The extension measures were handled separately in England and in Wales. The devolved legislature in Wales took steps to extend before England, by the Coronavirus Act 2020 (Assured Tenancies and Assured Shorthold Tenancies, Extension of Notice Periods) (Amendment) (Wales) Regulations 2020 (SI 2020/778 (W.172)). From a human rights law perspective, it is noteworthy that this measure was taken in cognisance of the European Convention on Human Rights and in particular article 1 of the First Protocol which serves to protect peaceful enjoyment of possessions, as reported in this BBC online news article: 'Coronavirus in Wales: Tenants to get six months' notice for evictions' 3 August 2020 www.bbc.co.uk/news/uk-wales-politics-53637416. England followed shortly after, through the Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020 (SI 2020/914). The UK street paper The Big Issue was active in lobbying for this extension.

³² The letter, dated 18 March 2020, is available at: <https://www.gov.scot/publications/coronavirus-letter-from-housing-minister-to-landlords-and-agents/>.

³³ The letter, dated 18 March 2020, is available at <https://www.gov.scot/publications/coronavirus-letter-from-housing-minister-to-rsls-and-local-authorities/>.

elaborate rules that were put in place in the period of this short suspension.³⁴ The general measures will be explained below, before returning to that short-term eviction ban in the conclusion.

The law relating to evictions, and Covid-19 changes

The Coronavirus (Scotland) Act 2020 received Royal Assent – the final step in the passage of a statute in the UK – on 6 April 2020 and came into legal force the following day. It was the first of two Acts passed by the Scottish Parliament to respond to miscellaneous matters affected by the pandemic and it covers much ground, with provisions relating to the protection of debtors; children and vulnerable adults; justice; and land registration.³⁵ It was originally scheduled to be in force until 30 September 2020, but provision was made to extend this to 31 March 2021 and then further extend this to 30 September 2021 without the need for a further statute. These extension options were utilised.³⁶ Legislation was then passed to extend many of the emergency measures for yet another period of six months, in terms of the Coronavirus (Extension and Expiry) (Scotland) Act 2021.

The first substantive provision of the Act – a position that perhaps highlights the societal importance of the reforms to the private rented sector – deals with 'Eviction from dwelling-houses'.³⁷ Section 2 provides that '*Schedule 1 contains temporary modifications to the law in relation to the eviction of private sector tenants and social tenants from dwelling-houses.*'

Schedule 1 sets out modifications for the three private letting regimes that still exist in Scotland. Those governing regimes are: the Rent (Scotland) Act 1984 (this being very rare, as there have been no new tenancies under this statute since 1 January 1989); the Housing (Scotland) Act 1988 (this being relatively rare, as there have been no new assured or short assured tenancies since 30 November 2017); and the now dominant private residential tenancy.

As already noted, PRTs are governed by the Private Housing (Tenancies) (Scotland) Act 2016. The first Scottish Coronavirus Act modifies section 51 of this legislation, such that it removes any chance for the First-tier Tribunal for Scotland (Housing and Property Chamber) (the FtT) to evict someone on a mandatory basis.³⁸ For a landlord to recover possession from a tenant legally, the landlord requires an order from the FtT. The FtT will only make an order if the landlord establishes the existence of one or more of eighteen possible eviction grounds. This contrasts with the regime applicable in non-Covid-19 times where there are two levels of private rented sector eviction ground: a *mandatory* eviction ground, where the FtT *must* grant an order if such a ground is made out by the landlord; and a *discretionary* eviction ground, which the FtT *may* grant an order if a ground is made out (if the FtT thinks it is reasonable to do so). The Coronavirus (Scotland) Act 2020 rendered all evictions that would have been mandatory (for example, owing to criminal conduct by the tenant, or the landlord wishing to

³⁴ By way of the Health Protection (Coronavirus) (Protection from Eviction) (Scotland) Regulations 2020 (SSI 2020/425) then the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 12) Regulations 2021 (SSI 2021/17).

³⁵ Land lawyers might be interested in the changes this legislation made to ensure the registration of title system which prevails in Scotland could embrace the paperless realm Covid-19 occasioned, by way of amendments found in a miscellaneous Schedule 7. Paras 11-14 provide for electronic delivery of a copy of a deed rather than the original itself as part of the registration process (by way of (temporary) amendment to s 21 of the Land Registration etc. (Scotland) Act 2012, and paras 15-19 made changes to a priority device for those dealing with land called an advance notice.

³⁶ See most recently the Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2021 (SSI 2021/152).

³⁷ For information, s 1 does the microbiological needful and defines what is meant by 'coronavirus'.

³⁸ Schedule 1, para 1(2).

sell or refurbish the property)³⁹ subject to a reasonableness test. What was once shrouded in imperative language is now cloaked in discretion.

Another thing the legislation does is extend the period for 'notices to leave' in most circumstances, this period being something that a landlord must normally allow to run before raising proceedings at the FtT to recover possession. Subject to the FtT waiving compliance with this period in exceptional circumstances,⁴⁰ a landlord would ordinarily need to wait 84 days or, in some specific situations, a shorter period of 28 days. At the very least, the Covid-19 emergency measures will give tenants a bit more breathing space. There are now three possible periods a landlord must wait out: 28 days; three months; or six months.⁴¹

Whilst there is theoretically a short period of 28 days, it is now largely disappplied. The first incarnation of the emergency rules almost disappplied it entirely, only retaining the four-week period in relation to the ground about the tenant not occupying the property. In fact, this ground was actually facilitated in comparison to the usual regime, by providing that the period is 28 days in *all* circumstances, whereas in non-Covid-19 times a landlord would only be able to access this shorter period in the first six months of a tenant's occupation. Given the circumstances of the outbreak, this makes sense, as a tenant in these circumstances warrants no particular protection (and in fact is denying someone else what could be a socially isolated home). This initial approach was felt to be too protective of problematic tenants, and as a result the single expedited ground for recovery of possession in the emergency period was added to in October 2020 by the Coronavirus (Scotland) Act 2020 (Eviction from Dwelling-houses) (Notice Periods) Modification Regulations 2020. The amendment allowed landlords faced with antisocial or certain criminal behaviour from a tenant or an associate of a tenant to bring an action after the short 28-day notice period.

The other grounds that could previously be triggered after a shorter period (of 28 rather than 84 days) are subjected to an extended trigger period of either three months or six months. For information, in non-Covid-19 times these shorter period grounds were: (1) tenant in rent arrears for three or more consecutive months; and (2) tenant in breach of a non-rent obligation.

It might be noted that it is not actually the case that these previously short period grounds have simply migrated to the new intermediate time period. Instead, in the emergency regime the three month notice period applies where the landlord or a member of the landlord's family intends to live in the let property or where the landlord or let property is not in compliance with an applicable licensing regime (relating either to the landlord's registration with the relevant local authority as a private landlord, or where the accommodation is in multiple occupation and not appropriately licensed).

Any other eviction ground needs six months' notice. Accordingly, a tenant in rent arrears or in breach of another obligation of the lease should be afforded six months before a landlord can recover possession. It can be noted that the underlying eviction grounds have not changed, meaning that the rent arrears ground for eviction is still that 'the tenant has been in rent arrears for three or more consecutive months'. The effect of the emergency legislation is simply that the landlord has to wait six months to get this before the FtT.

³⁹ In terms of grounds 13 and 3 of Schedule 3 of the 2016 Act.

⁴⁰ Section 54(1) of the 2016 Act provides that a landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant until the expiry of the relevant period set out in a notice to leave. Section 52(4) of the 2016 Act confers a limited discretion on the FtT to 'entertain an application made in breach of section 54 if the Tribunal considers it reasonable to do so', the scope of which is discussed in *Panpher v McDonald* [2019] UT 18.

⁴¹ The Coronavirus (Scotland) Act 2020, Schedule 1, para 2.

That completes the analysis of the predominant PRT letting vehicle. Similar changes are made to the older letting vehicles of assured tenancies and protected tenancies under the 1988 Act and 1984 Act respectively, which will not be set out here.⁴² At this point, it might be worth acknowledging the efforts of the parliamentary draftspeople, who had a massive task to undertake for this law reform exercise, even just in relation to the private rented sector; and this was only Act 1. Act 2 followed shortly after.

The second Covid-19 reforms

The Coronavirus (Scotland) (No. 2) Act 2020 received Royal Assent on 26 May 2020 and came into force on 27 May 2020. It does not have as drastic an effect on the private rented sector as the previous Coronavirus Act, but it does have some important provisions in its Schedule 1 (entitled 'Protection of the Individual'). From a landlord and tenant law perspective, the changes in this schedule make it much easier for a student renting in bespoke student accommodation to bring her tenancy to an end. Those changes will be explained below, after setting out one other landlord and tenant matter affected by this statute.

Schedule 1 of the No.2 Act provides the foundation for a pre-action tickbox that private sector landlords must comply with prior to any eviction proceedings that might happen. Those pre-action requirements themselves required further legislation (by way of regulations), and such regulations have now been passed.⁴³ The foundations laid in the No.2 Act stipulated that such regulations made provision about '*information to be provided by a landlord to a tenant including information about the terms of the tenancy, rent arrears and any other outstanding financial obligation under the tenancy*' and '*steps to be taken by a landlord with a view to seeking to agree arrangements with a tenant for payment of future rent, rent arrears and any other outstanding financial obligation under the tenancy*'. This is exactly what the regulations ask for.⁴⁴ Some might argue such a development is a welcome step, pandemic or no pandemic. There are similar pre-action requirements when heritable (immoveable) securities are enforced by a secured creditor against a residential debtor (in terms of the Conveyancing and Feudal Reform (Scotland) Act 1970, as amended by the Home Owner and Debtor Protection (Scotland) Act 2010).⁴⁵

The primary change to landlord and tenant law by the No.2 Act relates to student accommodation. To explain the context and current regulatory setting,⁴⁶ student-focussed accommodation has been offered for rent by UK educational institutions for many years.

⁴² The Coronavirus (Scotland) Act 2020, Schedule 1, paras 3-6.

⁴³ The Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/304).

⁴⁴ To focus on the PRT requirements (from regulation 4), there is to be provision of clear information relating to (a) the terms of the tenancy agreement, (b) the amount of rent for which the tenant is in arrears, (c) the tenant's rights in relation to proceedings for eviction (including the pre-action requirements set out in this regulation), and (d) how the tenant may access information and advice on financial support and debt management. The landlord must also have made reasonable efforts to agree with the tenant a reasonable plan to make payments to the landlord of (a) future payments of rent, and (b) the rent for which the tenant is in arrears, plus the landlord must have considered the situation of the tenant in an appropriate way.

⁴⁵ See further Mark Higgins, *The Enforcement of Heritable Securities* 2 ed (W. Green 2016) and William M Gordon and Scott Wortley, *Scottish Land Law* 3 ed vol 2 (W. Green 2020) ch 20. Another relevant discussion in the context of the pandemic referring to this legislation is Hector L MacQueen, "Coronavirus Contract Law" in Scotland' in Ewoud Hondius, Marta Santos Silva Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst and Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (2020)

⁴⁶ Some of this coverage is adapted from Peter Robson's annotations to the 2016 Act in W. Green's *Scottish Landlord and Tenant Legislation*, a loose-leaf collection of annotated statutes that is periodically updated of which the author of this chapter is the general editor.

University halls and dormitories and the like have been exempt from the scope of private letting regulation since a provision in the Rent Act 1974 was introduced to prevent security of tenure operating..⁴⁷ This did not, however, apply to standard private sector tenancies of students. Rather, it was limited to certain approved institutions of universities, colleges and a few special bodies like the Royal College of Surgeons.

These bodies continue to operate outside the PRT regime that now prevails in Scotland. They are listed in paragraph 5(2) of Schedule 1 of the 2016 Act. That schedule also lists various other tenancies that are not subject to the 2016 Act (such as holiday lets, agricultural land, social housing, accommodation for asylum seekers and, after a recent amendment to the law, accommodation provided to veterans or care leavers by charities).⁴⁸

During the consultation period about the provision of security of tenure for the PRT system that Scotland was eventually to introduce in the 2016 Act, it was felt that not providing for non-educational landlords of purpose-built student accommodation could lead to difficulties. From the author's experience of working in higher education, it is anecdotally submitted that such private providers of student accommodation have played an important role in Scottish university cities, including when universities themselves have lacked sufficient accommodation for a new (residential) student intake. It would accordingly be unrealistic not to acknowledge them as part of the housing mix used by students. The provision for such landlords was to carve them out of the security of tenure-bearing PRT, making it relatively easier to regain possession of such property from student tenants at a certain time. Whilst security of tenure is a policy that can be (and was) pursued for some residential tenants, the need for such student accommodation providers to programme the availability of their properties and having certainty as to when they would regain possession was preferred in this specific context.

The 2016 Act did this by widening the traditional groups of landlords exempted from private residential sector regulation. A new concept was created called the 'institutional provider of student accommodation'.⁴⁹ Where a landlord lets properties in the same building and these include at least 30 bedrooms and the landlord uses the other properties predominantly for the purpose of housing students, they are exempted from the PRT regime. There is one further requirement though. In addition, planning permission (i.e. zoning approval) must have been granted on the basis that the let property would be used predominantly for housing students.⁵⁰ Any landlord who has a portfolio of individual properties that happen to have student tenants in them will *not* be treated as exempt from the PRT regime, but a landlord with 30 or more properties grouped, examples of which can be seen in all of Scotland's university cities, can be covered by the exemption in Schedule 1 of the 2016 Act.

With the impact of Covid-19, landlords are not so much worried about getting tenants *out* of buildings that, in planning permission and marketing terms, are for student residences. Instead, the self-interested landlord's focus in the current market is keeping tenants *in*. From the perspective of students though, one would imagine that staying near a campus that is closed or operating at reduced capacity is not as attractive a prospect as it might have been. This is before the social aspects of university life are considered; some of their fellow students may have moved away from near campus when public health measures were introduced, and others may not have moved in at the beginning of a new term. Then there is the fact that the

⁴⁷ Section 2(1) of the 1974 Act introduced an amendment to the Rent (Scotland) Act 1971. Similar exemptions have existed in subsequent residential tenancy regimes.

⁴⁸ The Private Housing (Tenancies) (Scotland) Act 2016 (Modification of Schedule 1) Regulations 2019 (SSI 2019/216).

⁴⁹ In terms of the Private Housing (Tenancies) (Scotland) Act 2016, Schedule 1, paras 5(3)(b) and 5(4).

⁵⁰ Per Schedule 1, para 5(3)(a).

attractions and indeed typical part-time employment opportunities of a university city have been curtailed owing to public health measures. All of this could make being held to a contract on even a short- or medium-term basis a less than attractive prospect. That is where the provisions of the No.2 Act come to the fore.

The law now says a *student* (that is to say, a person studying at one of the educational institutions listed in the 2016 Act) who is in a *student residential tenancy* (i.e. not a PRT – a student with a PRT can get out quite quickly under that regime anyway) may '*for a reason relating to coronavirus*' bring to an end that tenancy at some future point no less than four weeks away.⁵¹

What is meant by the phrase '*for a reason relating to coronavirus*' is not defined, although the phrase appears regularly in both Coronavirus Acts. Later in the No.2 Act there is an example given in a different context: '*for a reason relating to coronavirus (such as, but not limited to, inability to work in multiple or linked workplaces)*'.⁵² It is difficult to imagine this coronavirus reason being construed narrowly if a student's university/college is not physically operating, thus offering a student tenant a clear exit from such a tenancy.

The exit door is opened by a student simply serving a notice on her landlord in writing. That notice needs to state when she plans to leave, with that date being at least twenty-eight days in the future.⁵³ As originally drafted, a shorter seven-day notice period applied to students who entered into a student residential tenancy agreement before the coming into force of the new law and occupied the property at any time, with the longer 28-day notice to leave period applying in any other case. The Coronavirus (Extension and Expiry) (Scotland) Act 2021 simplified the law by removing the shorter notice period that applied in those specific circumstances (which seem unlikely to be relevant to many student tenants in 2021), leaving only the 28-day notice period.

What should we make of these changes? In the short-term, it would seem quite a hardship on individual students, who may have lost income they would normally get through part-time work in places like bars, restaurants, sports stadia or cinemas, to continue to pay rent for a place in a city when (for some) they might be able to move back to the family home or maybe even move in with a partner during the ongoing coronavirus restrictions; in fact, it is entirely possible such tenants relocated when it was safe to do (assuming it was safe) before the UK's formal lockdown began in March 2020, given most Scottish universities stopped physical delivery of classes before actual restrictions began. That being said, as time progresses the focus – understandably – may move to the owners of such properties who will be keen to get some kind of income or use from them, perhaps by re-purposing what was student accommodation into another function.

Conclusion

The rapid changes to the Scottish rental market occasioned by the Covid-19 pandemic are striking, albeit the amendments made during World War I show striking changes are not completely unprecedented. One thing to watch in the future will be to what extent changes made as the Covid-19 tide rushed in remain as and when it (hopefully) ebbs back out. That will involve a degree of future-gazing that is difficult to engage with at present. Something that might be considered now, though, is the question of whether the Scottish Government could have gone further at the time to regulate residential tenancies. For example, the Scottish

⁵¹ Schedule 1, para 2.

⁵² Schedule 1, para 7.

⁵³ Schedule 1, para 3.

Green Party was advocating for a complete suspension of evictions. The campaign group Living Rent did likewise.⁵⁴

On 11 December 2020, owing to the serious public health situation across the whole UK, a suspension of evictions except in cases of serious antisocial behaviour became a legal reality in Scotland, with agents who execute tribunal orders in Scotland being banned from enforcing orders for possession.⁵⁵ This suspension was initially for a period of six weeks, but it was extended with the continuing lockdown across the Scottish Mainland.⁵⁶

This overall discussion and indeed the temporary suspension of evictions does prompt a question though: what about the landlords? It might be simplistic to characterise changes in the important and almost socialised sector of residential tenancies as a purely zero-sum game where tenant gains are landlord losses, but as Lord Hope reminded us in his judgment in the UK Supreme Court case of *Salvesen v Riddell* (which concerned a matter of agricultural tenancy law but is nevertheless in point owing to its engagement of Article 1 of the First Protocol to the European Convention on Human Rights, which guarantees peaceful enjoyment of possessions), landlords have rights too.⁵⁷ One can imagine a representative group of landlords or even an individual landlord might be reticent to challenge emergency measures during a pandemic, but at some point this could happen (albeit there is no particular sign that this might happen as a result of the extension of the protections for six months).⁵⁸ There may even be some landlords who have granted a security over a rental property who find themselves in a difficult situation if they are chased by secured lenders to make loan repayments where their cash flow has been curtailed (even though there has been some encouragement of secured lenders to offer mortgage holidays by the UK Government). The aforementioned existing rules about the enforcement of standard securities do afford some protection to residential debtors, but these do not extend to non-resident landlords. Whilst landlords might not always cut the most sympathetic figures to some people, it might be that other factors (including secured lenders) also need to be considered. In passing, it can be noted that the Scottish Government did make some money available to landlords by way of interest-free loans to allow them to bridge any cash flow issues.⁵⁹

By way of conclusion, it can also be noted that an opposition MSP from the Labour Party (Pauline McNeill) has recently introduced legislation on fair rents to the Scottish Parliament. After the Bill faced an early challenge in a legislative scrutiny stage at the Scottish Parliament,⁶⁰ it proceeded into a consultative phase (which closed on 14 December 2020).⁶¹ This proposal was completely independent of Covid-19 emergency measures. No comment on the political manoeuvres around this Bill will be made here, but it does at least show there is still an appetite in some quarters for reform, and this political appetite is still apparent in the

⁵⁴ https://www.livingrent.org/coronavirus_banning_evictions.

⁵⁵ The Health Protection (Coronavirus) (Protection from Eviction) (Scotland) Regulations 2020, regulation 2 (SSI 2020/425).

⁵⁶ The relevant rules were contained in the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344), as amended by the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 12) Regulations 2021 (SSI 2021/17). These rules prevented the enforcement of orders for possession in any local authority area that is at a local level of three or four in terms of Scotland's graduated Coronavirus control measures (with the highest level being four).

⁵⁷ [2013] UKSC 22, para 38.

⁵⁸ By the Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020 (SSI 2020/299).

⁵⁹ <https://www.gov.scot/news/aid-for-private-rental-landlords/>.

⁶⁰ See <https://scottishhousingnews.com/article/holyrood-committee-drops-rent-controls-bill>.

⁶¹ <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/116268.aspx>.

aftermath of the Scottish Parliament elections held in May 2021.⁶² If we have learned nothing else from the response to Covid-19, it has reminded us that reform can happen, and it can happen quickly. As for any other lessons, tragic or troublesome as the pandemic has been for many people, it has presented a chance to think about what the law should be in extreme circumstances and to react accordingly. In years to come, papers will be written about whether these developments were entirely transient or the beginning of something altogether more durable.

⁶² In August 2021, the Scottish Government opened a wide-ranging consultation on "Covid Recovery". This addressed the law around private renting, including proposals to make the pre-action requirements for rent arrears proceedings a permanent fixture and, more profoundly, to retain the discretionary rather than mandatory eviction grounds which were brought by the Covid-19 emergency: see <https://www.gov.scot/publications/covid-recovery-consultation-public-services-justice-system-reforms/>, accessed 15 October 2021. Separately, the draft "Shared Policy Programme" of the political parties who hold sway in the Scottish Parliament also envisages many housing law reforms, including the regulation of winter evictions: see <https://www.gov.scot/publications/scottish-government-and-scottish-green-party-shared-policy-programme/>, accessed 15 October 2021.