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Ending private tenancies post-COVID

[The Coronavirus (Recovery and Reform) (Scotland) Act 2022 makes permanent the changes to the grounds of eviction from private tenancies in force during the pandemic. Malcolm Combe provides an overview of where the law is now]

On 29 June 2022, the Scottish Parliament passed the Coronavirus (Recovery and Reform) (Scotland) Bill. This has wide application, with reforms to topics such as education, bankruptcy, diligence, land registration and licensing, to name but a few, plus temporary justice provisions. Also enacted are important changes that apply across the private renting sector in Scotland.

Unlike some of the other provisions, these are decidedly not temporary. In fact, they render into law on an open-ended basis earlier time-limited modifications introduced in response to the pandemic, with implications for eviction proceedings and also pre-action communications where the envisaged eviction action is founded on rent arrears.

There is quite a back story to this. An understanding of the changes ushered in by the Private Housing (Tenancies) (Scotland) Act 2016, then the (ostensibly) temporary changes in the emergency COVID-19 legislation is helpful to appreciate fully how these reforms have come to pass and what they mean.

The pre-pandemic position

The starting position for a new private residential let in Scotland is relatively simple, barring arrangements like a lodger living with a resident landlord, or police and military accommodation, which are not regulated in the same way. Also, leases granted by a local authority or registered social landlord are subject to a different regime, flowing from the Housing (Scotland) Act 2001.

Any new private sector tenancy concerning a person's main residence will be a "private residential tenancy" – the technical term, normally abbreviated to "PRT". This has been the case since 1 December 2017, but earlier statutory regimes may apply for leases entered before that date. For present purposes, it is sufficient to note that the advent of the PRT brought so-called "no fault" evictions to an end, in direct contrast to the possibility of fixed-duration short assured tenancies of six months or more in terms of the Housing (Scotland) Act 1988. Instead of having a set duration (albeit one which might roll on if parties took no steps to terminate), a PRT subsists until either (a) the tenant brings it to an end, on 28 days' notice, or (b) the landlord brings it to an end, on the basis of a recognised eviction ground (sched 3 to the 2016 Act), established before the First-tier Tribunal (Housing & Property Chamber) ("FtT").

The statement regarding "no fault" eviction should be read subject to the point that, as with earlier regimes, some of the 2016 Act grounds can apply even where a tenant has no particular rent arrears and has otherwise complied with the terms of the lease. That is to say, while fixed-term arrangements cannot be made under the 2016 Act, a tenant might still

face eviction where, for example, a landlord wishes to move into the let property to make that their home (eviction ground 4), or wishes to sell the property (eviction ground 1). These "mandatory" grounds contrasted with "discretionary" grounds, where a tribunal was able to consider the overall reasonableness of granting eviction. To some, the very existence of mandatory grounds made the claim that "no fault" evictions were brought to an end sound hollow.

There are rules against a landlord abusing eviction grounds, say by contriving a situation where a ground appears to apply or fooling a tenant into thinking they must leave. The 2016 Act itself provides for a "wrongful-termination order", such that an affected tenant can apply to the FtT for a penalty award of up to six times the monthly rent payable. There have been some issues in practice with this regime (as discussed in Combe and Robson, 2021 Jur Rev 88), and it relies on a suitably savvy tenant pursuing this remedy, but it does at least exist on paper.

Standing that, the 2016 Act – quite deliberately – provided circumstances where mandatory eviction could happen and a tribunal was bound to grant an eviction order when the ground was established on the balance of probabilities. As it transpired, this regime applied for little more than two years.

The pandemic position

Without wishing to be overly glib about a serious public health matter, the COVID-19 pandemic led to many changes, including to Scots law, starting with the Coronavirus (Scotland) Act 2020 and followed by various innovations, amendments and extensions. In housing law terms, these affected private and social renting regimes, homelessness law, and (at times) the enforcement of evictions. Notices to leave served prior to 7 April 2020 were not caught by the new regime (<*Cowan v Somasundaram*> [2021] UT 4).

These changes affected all private renting regimes, making what were envisaged to be temporary changes to the 2016 and earlier Acts. A brief overview follows, with particular focus on the 2016 Act and PRTs.

Schedule 1 to the 2020 Act set out modifications for the private letting regimes. For PRTs, s 51 of the 2016 Act was altered, to remove any mandatory eviction grounds. As usual, the FtT could only make an order if one or more of 18 possible eviction grounds existed, but all eviction grounds were rendered subject to a reasonableness test and as such at a tribunal's discretion.

Next, as a result of the Coronavirus (Scotland) (No 2) Act 2020 and related regulations, additional stipulations were put on private sector landlords for certain eviction proceedings. In terms of the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/304), a landlord seeking to evict on the basis of rent arrears must: provide clear information to the tenant (including the amount of rent arrears, details of rights in relation to eviction, and signposting of information and advice); make reasonable efforts to agree a reasonable plan with the tenant regarding future rent and rent arrears; and consider steps taken by the tenant and any changes of circumstances. These steps are somewhat reminiscent of residential standard security enforcement since the passage of the Home Owner and Debtor Protection (Scotland) Act 2010, and similar notification requirements in the social rented sector.

Finally, the period between a landlord's service of a notice to leave and the raising of an action at the FtT was extended in most circumstances. A landlord would ordinarily need to wait 84 days (28 days in some situations) before raising proceedings. The emergency reforms introduced periods of 28 days, three months, or six months depending on the ground engaged.

As initially drafted, the primary legislation envisaged these measures ending in September 2020. Options to extend were utilised, before the Coronavirus (Extension and Expiry) (Scotland) Act 2021 further extended all measures until 31 March 2022. It provided for a further extension to 30 September 2022, but in the first break to the sequence of blanket extensions the provisions relating to longer notice periods were allowed to lapse and only the modifications to mandatory evictions and pre-action communications for rent arrears continued. (Incidentally, March 2022 was also the end date for COVID-related extended notice periods in the social renting and indeed the commercial context.) This was the situation at the time of the passage of the 2022 Act, which carries forward from 1 October 2022 those measures still in force.

The post-pandemic private renting regime

The connection between emerging from a pandemic and the mitigation of a private landlord's rights to recover possession from a tenant is, it seems fair to say, not an obvious one. That said, arguments can be and have been made that such a reform is justified – see Robbie and van der Sijde, "Assembling a sustainable system: exploring the systemic constitutional approach to property in the context of sustainability" (2020) 66 *Loyola Law Review* 553, especially 609-613 – and the simple fact that the law was once reformed in this way shows that it is functionally possible to do so. The composition of the Scottish Parliament after the 2021 elections also pointed to the likelihood of reform, especially with the SNP/Green administration consulting shortly afterwards on how to make permanent the discretionary grounds of eviction and pre-action requirements, "until such time as future housing legislation is passed and implemented".

It might be noted that that "COVID recovery" consultation "on public services, justice system and other reforms" asked about the suitability of removing mandatory application for all eviction grounds or, as an alternative, all grounds except rent arrears. The latter approach did not prevail.

There is an important way in which this new Act differs in its effect to the legislation that introduced the PRT. When the 2016 Act came into being, it made no substantive changes to tenancies already in existence under the preceding regimes – at least in terms of the rules around eviction and bringing such older tenancies to an end; there were some changes in relation to, for example, succession on a tenant's death. The 2022 Act is of broader application. It changes <*all*> the private renting regimes that can be encountered in Scotland. This effect on previously settled arrangements did lead to some dialogue in the Scottish Parliament, with Conservative MSPs in particular airing concerns. These did not prevail and the bill remained unamended, simply tracking the emergency legislation that preceded it.

The stage 3 debate on 28 June provided further, and in some cases intriguing, opportunities for politicking. Conservative MSPs also expressed disquiet about what changes to eviction rules would mean for future supply of housing, in terms of private landlords' willingness to

make property available for rent. Once again, such concerns did not lead to any substantive changes. From the other end of the political spectrum, a Labour amendment sought to introduce a freeze on private sector rental increases until 2024. Given that the Scottish Green Party had campaigned on rent controls before being elected and forming part of the administration, their rejection of an amendment on that very proposal makes for some interesting reading in the Official Report.

In fairness, there could well have been some tricky questions raised in relation to article 1 of the First Protocol to the European Convention on Human Rights had such an amendment been slipped in at that late stage, but (to veer briefly into amateur political commentary) the optics might not be positive for a party that was so recently in favour of the principle, especially if future legislation is slow in appearing, for whatever reason.

Returning to legal commentary, in a way this statute is not difficult to prepare for: keep doing what you have been doing, because the rules are not actually changing, even if the source is slightly different. A penny, though, for the thoughts of those at the FtT who will have to deal with issues of reasonableness in eviction proceedings without the background context of the pandemic, as some difficult individual decisions may soon be coming before them. Then again, perhaps this is as it should be: when someone is faced with the prospect of losing a home, is it appropriate for such matters to be determined by an automatic or mechanical process?

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