Out of Lockdown; Still Locked Out

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Introduction

- Just over a year since the Coronavirus (Scotland) Act 2020 was enacted
- Two nationwide lockdowns since then, with parts of the country effectively in a Tier-4 “lockdown” for much of the time in between
- Scottish Government sought to make changes to the residential tenancy legislation to avoid large-scale homelessness
- Net effect is that it has become significantly more difficult, and takes significantly longer, for landlords to recover possession
- Focus of this session is where we currently sit with recovery of possession of residential properties
- Update on recent cases relevant to the Private Rented Sector

Coronavirus (Scotland) Acts 2020

- In place since April 2020, initially until September 2020 but has been extended twice.
- Currently in force until September 2021
- First Act introduces sweeping temporary changes to proceedings for eviction from Private Rented Sector (s.2, Sch.1)
- Second Act introduces a new requirement for PRS evictions where rent arrears are at issue (or does it?)

Private Rented Sector – An overview

- Makes temporary changes to the Rent (Scotland) Act 1984, Housing (Scotland) Act 1988 and Private Housing (Tenancies) (Scotland) Act 2016 whilst 2020 Act in force (s.2).
- No mandatory grounds for eviction – all evictions now subject to a reasonableness test (including Short Assured Tenancies) (Sch.1, paras. 1, 3 and 5)
- Extended minimum notice periods (Sch.1, paras 2, 4 and 6)
- BUT Sch.1, para 10
  - If a notice is prepared without regard to paragraphs 1-9 of Sch.1, it is not invalid, but may not be relied upon until the date on which it could have been relied upon had it been correctly completed

Coronavirus Notice Periods (where notice served before 3 October 2020)

- Regulated Tenancies under 1984 Act
  - Other suitable accommodation – 4 weeks
  - Case 2, 6, 8, 9 or 11 – 3 months
  - Case 1, 3-5, 7, 10, 12-21 – 6 months

- Assured Tenancies under the 1988 Act
  - Ground 9 – 2 months
  - Ground 1 or 15 – 3 months
  - Ground 2-8, 10-14, 16 or 17 – 6 months

- Short Assured Tenancies under the 1988 Act
  - 6 months

Coronavirus Notice Periods (where notice served before 3 October 2020)

- Private Residential Tenancies under 2016 Act
  - Relevant period begins on day tenant receives notice to leave (i.e. 2 days after sending)
  - Tenant not occupying as only or principal home – 28 days
  - Landlord, or family member, intends to live in property – 3 months
  - Tenant, or associate, has relevant conviction – 3 months
  - Tenant, or associate, engaged in anti-social conduct – 3 months
  - Landlord not registered – 3 months
  - No HMO licence – 3 months
  - All other grounds – 6 months

Coronavirus Notice Periods (where notice served on or after 3 October 2020)

- Regulated Tenancies under 1984 Act
  - Other suitable accommodation or Case 2 – 4 weeks
  - Case 6, 8, 9 or 11 – 3 months
  - Case 1, 3-5, 7, 10, 12-21 – 6 months

- Assured Tenancies under the 1988 Act
  - Only Ground 15 – 28 days
  - Ground 9 – 2 months
  - Ground 1 – 3 months
  - Ground 2-8, 10-14, 16 or 17 – 6 months

- Short Assured Tenancies under the 1988 Act
  - 6 months

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  - All other grounds – 6 months

Reasonableness

- Historically, landlords typically focused on finding a mandatory ground for eviction
- Now, whilst the 2020 Act is in force, there are no mandatory grounds
- Reasonableness requires a consideration and weighing of all relevant factors
- May include (but not limited to):-
  - Nature, frequency and duration of conduct
  - Effect of conduct on others (not just the landlord or tenant)
  - What the landlord has done
  - Personal circumstances of both parties
  - Proposals for future conduct
  - Effect of eviction

Rent Arrears Evictions

- The No.2 Act imposes a new consideration for “reasonableness” of granting an eviction order
- FTT must consider the extent to which landlords have complied with “pre-action requirements” before raising proceedings
  - Assured Tenancies (Sch.1 para 4)
  - Private Residential Tenancies (Sch.1 para 5)
- Pre-action requirements as prescribed by Scottish Ministers in Regulations

Rent Arrears Evictions

- Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020
  - In force from 30 September 2020
  - Applies to proceedings (AT, SAT and PRT) raised on or after 6 October 2020
  - Word of caution – Westlaw currently suggests that these provisions have been revoked – they have not been

Pre-Action Requirements – Assured Tenancy

3.— Pre-action requirements for assured and short assured tenancies

(1) For the purposes of section 18(3C) of the 1988 Act[1], the Scottish Ministers specify the pre-action requirements set out in paragraphs 2 to 4.

(2) The provision by the landlord to the tenant 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 possession of a house (including the preaction requirements set out in this regulation), and

(d) how the tenant may access information and advice on financial support and debt management.

(3) The making by the landlord of 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.

(4) The reasonable consideration by the landlord of—(a) any steps being taken by the tenant which may affect the ability of the tenant to make payment to the landlord of the rent for which the tenant is in arrears within a reasonable time,

(b) the extent to which the tenant has complied with the terms of any plan agreed to in accordance with paragraph (3), and

(c) any changes to the tenant's circumstances which are likely to impact on the extent to which the tenant complies with the terms of a plan agreed to in accordance with paragraph (3).

Pre-Action Requirements - PRT

4.— Pre-action requirements for private residential tenancies

(1) For the purposes of paragraph 12(3B) of schedule 3 of the 2016 Act[1], the Scottish Ministers specify the pre-action requirements set out in paragraphs 2 to 4.

(2) The provision by the landlord to the tenant 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.

(3) The making by the landlord of 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.

(4) The reasonable consideration by the landlord of—(a) any steps being taken by the tenant which may affect the ability of the tenant to make payment to the landlord of the rent for which the tenant is in arrears within a reasonable time,

(b) the extent to which the tenant has complied with the terms of any plan agreed to in accordance with paragraph (3), and

(c) any changes to the tenant's circumstances which are likely to impact on the extent to which the tenant complies with the terms of a plan agreed to in accordance with paragraph (3).

Case Update

- **Uddin v Henderson, UTS/AP/19/0049**
  - In this case, the landlord had served Notice to Quit on the tenant by sheriff officer
  - Order for possession was granted by the FTT
  - Tenant appealed, arguing that it was incompetent to serve NTQ by sheriff officer
    - S.6 of the Removal Terms (Scotland) Act 1886
  - Competency argument not raised at the FTT, but *pars judicis*
  - Sheriff Miller invited submissions from the Society of Messengers-at-Arms and Sheriff Officers, in addition to the parties
  - Appeal refused

Case Update

- **Uddin v Henderson, UTS/AP/19/0049**
  - Three Questions
    - By what legal authority was the sheriff officer permitted to serve the Notice in question?
    - Did that authority permit him to act as an officer of tribunals?
    - On the basis that he did have the authority to serve the Notice in question, did he serve it in conformity with and in furtherance of the requirements that governed the exercise of that authority?

Case Update

- **Uddin v Henderson, UTS/AP/19/0049**
  - Legal Authority
    - Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991
    - Rule 14 – "…an officer of the court may exercise the following official functions… (c) execute a citation or *serve any document required under any legal process,* in any place in respect of which he holds a commission as an officer of court"
    - "The specific language adopted in rule 14(1)(c) is, as the Society point out and the respondent adopts, expressed in the broadest possible and unqualified terms. I consider that it is important for the issue in this appeal that the generality of the language be respected by giving it its normal and ordinary meaning for that is how the Court of Session wished to express the scope of a sheriff officer's entitlement to act in conformity with and in furtherance of his office. It extends to the service of "any document required under any legal process". It is not in dispute that "any document" includes the Notice in question. The dispute lies in whether the sheriff officer purported to serve the Notice in question "under any legal process". I will come back to this in answering the third question. For the present I hold that the answer to the first question lies in rule 14(1)(c) and that it provides the authority on which the sheriff officer purported to serve the Notice in question." – Paragraph 36

Case Update

- **Uddin v Henderson, UTS/AP/19/0049**
  - Permission to act as officer of Tribunals
    - “The Society (and the respondent) submitted that a sheriff officer is authorised to carry out his official functions in relation to matters over which the Tribunal service have jurisdiction and as such is an officer of tribunals as well as an officer of court because he is deemed to be subject to the supervision of the particular Tribunal before which the case in point is pending and found support for that in the specific provisions for a sheriff officer to perform various acts in the enforcement of the Tribunals' orders, namely, paragraphs 41, 41B, 41D and 41E of Part 1 of Schedule 1 to the 2017 Regulations… I prefer the conclusion of the Society and the respondent. I reach it by interpreting rule 14(1)(c) of the 1991 Act of Sederunt and in particular the phrase "under any legal process". The generality of this phrase means that it does not restrict the official functions of a sheriff officer to any particular court or hierarchy of courts.” – Paragraphs 38-39

Case Update

- **Uddin v Henderson, UTS/AP/19/0049**
  - In conformity and in furtherance of the requirements that govern exercise of authority
    - Interpretation exercise
    - “In light of the submissions I have concluded that the phrase "under any legal process" is broad enough in its scope to include the Notice in question which is a pre-litigation notice and a document required under a legal process.” – Paragraph 45
    - “The immediate context of the concept of a legal process is to my mind within the entire phrase "serve any document required under any legal process". It is too restrictive to try to interpret the two words "legal process" or even the single word "process" and then import that interpretation into the subsection. The double use of the adjective "any" indicates that the scope of the official function is extremely wide and generous. The use of the word process is of critical significance. It connotes a wider power and opportunity to serve a document than would be the case if the rule had prescribed the function was in respect of legal proceedings. Accordingly it is not restricted to legal proceedings whether at the point of service they are intended, have been commenced or have been finalised. ” – Paragraph 48

Case Update

- SW v Chesnutt Skeoch Ltd, 2021 Hous. L.R. 2
  - In this case, the landlords sought a payment order against the tenant for rent arrears and damages.
  - The tenant's defence at first instance was that the tenancy agreement was void because the tenant lacked capacity to enter into it, and sought reduction as a defence. FTT determined that it did not have jurisdiction to hear the reduction case, and proceeded to determine the application without it.
  - The tenant appealed, asserting a new argument that the tenancy was voidable due to facility and circumvention, and separately that the FTT had the power to grant reduction *ope exceptionis*. The UT dismissed the appeal, saying the the facility and circumvention argument would require a separate application for reduction, and the FTT did not have the power to reduce *ope exceptionis*.

Case Update

- SW v Chesnutt Skeoch Ltd, 2021 Hous. L.R. 2
  - The tenant appealed to the Inner House
    - “The FtT had jurisdiction in relation to the landlord's action for rent arrears and damages. It was plainly one "arising from" the agreement, and in terms of s.16 the functions and jurisdiction of the sheriff in relation to such actions were transferred to the FtT. In our opinion they included the power to entertain all of the defences to such actions which were available before the sheriff. For present purposes it is sufficient to say that the ability to consider those defences was either a function or a jurisdiction of the sheriff. We see no reason why a defence seeking reduction *ope exceptionis* of an agreement may not be stated in response to an application before the FtT which is founded upon that agreement. Otherwise, the transfer effected by s.16 would have made it more difficult for a tenant to defend himself before the FtT than before the sheriff. There is nothing to suggest that that formed any part of the objective of the enactment. Indeed, we consider that such a change would be contrary to the legislative intention. Part of the context for introducing s.16 was a widely-held view that the existing system for resolving private rented housing disputes in the sheriff court was unsatisfactory. It was slow, overly adversarial, weighted against tenants, non-specialist, and prone to inconsistency of decision-making between sheriff courts. These were all matters which it was considered would be improved by transferring the disputes to a specialist tribunal. Those existing problems were the mischief which s.16 was intended to remedy. The purpose of transfer of these disputes to the tribunal was to improve those matters for both landlords and tenants (but in particular for tenants). It was no part of that purpose that the grounds for raising an action, or the issues to be taken into account when deciding a case, should change.” – paragraph 29

Questions

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