

Opinion of Counsel

For ARLA Propertymark

Re: Joint Tenancies under the Private Housing (Tenancies) (Scotland) Act 2016

Introduction; agent's questions

This opinion arises from two emails sent to me by Mr Cowan of Messrs Bannatyne Kirkwood France & Co, dated 13 March and 12 April 2018, in which he raises an issue in relation to section 48 of the 2016 Act ("Tenant's ability to bring tenancy to an end"). In the email of 12 April, he asks two questions:

1. Can one or more than one joint tenant in a PRT¹ give notice [under section 48], and vacate after notice expires, with no further liability under the PRT, or are they effectively trapped in the PRT unless all joint tenants give notice?
2. If they can, what effect, if any, is there on the remaining tenants? [My view is that there could be no effect on them other than they would be liable for a higher proportion of the rent.]

Mr Cowan explains that this issue has significance for private landlords and letting agents. Where one of the joint tenants wishes to leave, some agents have traditionally charged the outgoing tenant a fee for early release from a tenancy. Apparently this is viewed as being, in effect, liquidate damages for breaching the terms of the lease. If, under a PRT a joint tenant can give notice and leave after expiry of same at any time regardless of the position of any other joint tenants and thereby end their own liability under the PRT, then there is no basis for "damages" being sought.

¹ Private Residential Tenancy.

Relevant provisions of the Act; discussion

I have the impression that the issues raised by joint landlords, and joint tenants, were given careful consideration by the drafters of the 2016 Act. The key provisions are section 78(2) and (3),² which state:

(2) In a case where two or more persons jointly are the landlord under a tenancy, references in this Act to the landlord are to all of those persons unless stated otherwise.

(3) In a case where two or more persons jointly are the tenant under a tenancy, references in this Act to the tenant are to all of those persons unless stated otherwise.

As regards joint tenants, there are statements “otherwise” in sections 2(5), 14(5), 16(6), 32(3), 42(5). Typical is section 14(5), which provides that where there are joint tenants, an application to the FTT to draw up the terms of the tenancy may be made by any one of them. The other provisions I have just mentioned are all to similar effect: where the Act allows the “tenant” to do something, then in the case of a joint tenancy, it may be done by only one of the joint tenants. There are also provisions which deal specifically with joint tenants in sections 14(7)(b) and 54(4)(b), which concern the division of sums awarded by the FTT between the joint tenants, and in sections 66(2) and 68(4), which concern succession in the case of joint tenancies.

With these points in mind, we come to section 48:

48 Tenant's ability to bring tenancy to an end

(1) A tenant may bring to an end a tenancy which is a private residential tenancy by giving the landlord a notice which fulfils the requirements described in section 49.

(2) A tenancy comes to an end in accordance with subsection (1) on the day on which the notice states (in whatever terms) that it is to come to an end.

(3) But a tenancy does not come to an end in accordance with subsection (1) if—

(a) before the day mentioned in subsection (2), the tenant makes a request to the landlord to continue the tenancy after that day, and

(b) the landlord agrees to the request.

² Section 78 is the interpretation section.

(4) In subsections (1) and (3), in a case where two or more persons jointly are the landlord under the tenancy, references to the landlord are to any of those persons.

Thus, section 48(4) makes specific reference to joint landlords, but there is no reference elsewhere in the section to joint tenants. Therefore, it follows that the rule in section 78(3) must be applied. This means that, in the case of a joint tenancy, section 48(1) ought to be read as if it said:

In a case where two or more persons jointly are the tenant under a tenancy which is a private residential tenancy, all of those persons may bring the tenancy to an end by giving the landlord a notice which fulfils the requirements described in section 49.³

As there is no other provision in the Act which concerns termination by a tenant, it seems to follow that a PRT which is a joint tenancy cannot be terminated by one of the joint tenants. All of the tenants would need to give notice. Failing consent by all, each joint tenant is “effectively trapped” as Mr Cowan puts it.

This tends to suggest that persons entering into a tenancy, as joint tenants, would be well advised to make a separate agreement, between themselves, that where one wishes to terminate, all must agree to do so, and co-operate in giving notice under section 48(1), failing which the non-co-operating joint tenant(s) will indemnify the others for any loss or liability that they suffer, in consequence of the tenancy continuing.

Accordingly, I would answer Mr Cowan’s first question in the negative, meaning that the second question is not applicable.

³ That would also apply to section 48(3)(a): all of the joint tenants would need to make a request to continue the tenancy.

A problem with section 44

Part 5 of the Act, which concerns termination of PRTs, begins with the following short, and fundamental, provision:

44 No termination by parties except in accordance with this Part

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.

I have no doubt that this section is intended to bring the termination of tenancies, that are PRTs, entirely under the regulation of Act. However, I suspect that the drafters may not have considered a possible issue with the application of section 78(2) and (3) to section 44. As was the case with section 48, there is no specific reference in section 44 to joint tenants. Therefore, it arguably follows that the rule in section 78(3) must be applied, and in the case of joint tenants, the section should be read as follows:

In a case where two or more persons jointly are the tenant under a tenancy which is a private residential tenancy, the tenancy may not be brought to an end by all of those persons, except in accordance with this Part.

If that is correct, it means that the prohibition expressed in section 44 does not apply where only one of the joint tenants wishes to terminate the tenancy. If there is no statutory prohibition, then one of the joint tenants might terminate the tenancy in accordance with a provision in the lease. Alternatively, subject to any contractual provision to the contrary, they might also terminate the tenancy at common law. *Smith v Grayton Estates*⁴ is authority for the proposition that one of the joint tenants may serve a notice to quit preventing tacit relocation, and terminating the tenancy at the next ish. In the absence of the statutory provision, termination of the tenancy at the ish would have the effect that there was no longer any

⁴ 1960 SC 349

“tenancy” for the purposes of section 1, and therefore no PRT.⁵ In that case, the liability of all of the joint tenants under the lease would be at an end.⁶

I think this is quite a clever argument, but I suspect that it tends to undermine the purpose of section 44, and may lead to absurdity. Say the tenancy is terminated by the joint tenant in this way. How does the landlord recover possession? Perhaps the joint tenant giving notice leaves, but the remaining tenants are paying his share of the rent. Does the landlord have a ground for possession in that case?⁷ Can he even seek an order from the FTT under section 51, if there is no longer a PRT in existence? Would he have to seek an order in the sheriff court, on the basis that the remaining tenants have no right or title to remain? If he intends to do so, should he refuse to accept rent from the remaining tenants?

Given these difficulties, I am inclined to think that the argument I have suggested should be rejected. The 2016 Act sets out a self-contained scheme which is intended to regulate the tenancy from creation to termination (whether by eviction order or otherwise), under part 5. Therefore, termination of the PRT by termination of the contract is not possible.

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⁵ Of course, this scenario would require a tenancy with a duration, and the possibility of tacit relocation. If there is no duration, and no provision in the lease under which the tenant might terminate, then the issue I have raised here might be academic.

⁶ I would point out that this argument is not necessarily applicable to joint landlords, because at common law, termination of the tenancy would require the co-operation of all of them, in any event.

⁷ Note that ground 10 “Not occupying let property” would also appear to be subject to section 78(3), such that all of the joint tenants would have to be absent, in order for the ground to apply.