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Tenants' rights and the Renting Homes (Wales) Act 2016

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Abstract

Following the devolution of powers by the UK Government to the National Assembly for Wales, the law in Wales has diverged considerably from the law in England on many issues, including housing policy. In Wales, recent housing policy (the Housing (Wales) Act 2014 and the Renting Homes (Wales) Act 2016) has focused on the improvement of housing quality and on the equalisation of the relationship between the housing provider and the housing occupier in order to ensure that those living in rented accommodation have a better awareness of their rights and clearer and more accessible paths to obtain redress. This article introduces the key provisions of the Act and explains the changes it makes to the rental sector in Wales. It aims therefore to outline the main changes made to the law as between England and Wales, and also aims to highlight why an increased consumer protection focus could improve the housing sector but brings with it the risk of stymieing the housing market by increasing costs and decreasing housing availability through over regulation. The paper identifies how lessons from Wales may have implications for the improvement of tenant rights in other national housing markets.

Keywords: Law - Wales – devolution – housing rights – landlord and tenant

Introduction

The devolution of power to UK regions in 1997 has meant that the approaches to housing policy in the four nations (England, Northern Ireland, Scotland and Wales) has diverged considerably (Moore, 2017), as the different regions have identified different priorities (McKee et al, 2017) and different methods for tackling common problems such as homelessness, anti-social behaviour, housing standards, and the entry by younger people into the housing market (McKee et al, 2017). When the Renting Homes (Wales) Act 2016 (“the Act”) comes into force it will mean that the regulation of the domestic rental sector in Wales will be very different from the situation in England.

The aim of the Welsh legislation is to remove many of the complexities affecting both the public and private rental sectors, and ensuring that both the landlord and the tenant have a clearer awareness of their rights and obligations. The legislation also aims to remove many of the unnecessary differences that exist between the public rented sector and the private rented sector to permit greater flexibility in the regulation of public and private sectors as many renters will straddle both types of housing structure.

Moore (2017) indicates that the expansion of the rental market and the fact that people are in rented housing for longer has meant that there is more poor-quality accommodation at the lower end of the sector and poor-quality landlords. In Wales therefore, a significant concern has been to improve renters' awareness of their rights and this is focus of the Act. The aim of this article is therefore to explain the key changes made by that Act, and to identify the

strengths, as well as the inherent weaknesses of the new law. Although the European rental sector has long been more professionalised than the UK (Moore, 2017), the Welsh legislation offers important lessons in terms of equalising the bargaining power of landlord and renter, at a time when a number of safeguards for renters are gradually being eroded elsewhere (Huisman, 2016).

Background and context

The Act was initially conceived as part of the Law Commission's Ninth Programme of Law Reform (Law Commission, 2005) and was intended to provide recommendations for reform of housing rentals across England and Wales. Its 2006 report identified the following problems:

- A lack of clarity for tenants regarding their rights as there is not always an obligation on landlords to provide a written statement of terms (para 1.6).
- Restrictions hindering a landlord's ability to remove non-paying tenants or those who engaged in anti-social behaviour (para 2.31).
- The fact that there was no easy process for moving public sector tenants into accommodation that was more suited to their needs e.g. in terms of disability accessibility, or for freeing up accommodation in order to make it available for tenants with more specific requirements (para 4.71).
- Tenants' rights and obligations were categorised according to abstract concepts of leases and licences (para 1.5) rather than according to the parties' understanding of the rights and obligations they were expected to acquire.

The Government of the United Kingdom declined to adopt the Law Commission's proposals (Department for Communities and Local Government, 2009) in relation to England. However, the Law Commission produced a further report (Law Commission, 2013) on renting homes in Wales which formed the basis for the Renting Homes (Wales) Act 2016.

The Welsh Government declares that Act '*is one of the most significant pieces of legislation to be passed by the National Assembly for Wales*' and in many respects, the Act makes significant improvements to the law as it applies in Wales. It is submitted however, that there are many aspects of the legislation that may be problematic for landlords and contract-holders alike, and a number of indirect consequences that arise from a failure on the part of legal advisers to develop an awareness of the law applicable in Wales. In addition, there is a danger that the extensive regulation of the rental sector in Wales may make many landlords reluctant to continue to operate in the rental sector, while encouraging others to find ways of avoiding the requirements of the Act.

Exploring the benefits of the Act

Clear statement of rights and obligations

The essential aspect of the Act is the creation of a rental agreement called an occupation contract. This is a written statement of the terms governing the relationship between a landlord

and a domestic occupier (who may be either a licensee or a tenant), and is required for an extensive range of domestic, short-term (i.e. of less than 21 years' duration) housing agreements. An immediate, and very clear advantage of the Act is therefore the fact that it sets out very explicitly, in one document, the rights and the responsibilities of the parties (Partington, 2016), while the law in England still permits leases of 3 years or less to exist with no written document. This contributes to the situation described by Kemp (2011) where many renters and accommodation providers are unaware of what type of tenancy they have and the rights that are afforded to them. It is anticipated therefore that the simplification of the law and a written statement of terms will bring much needed clarity to this area of the law. The standardisation of the contracts across the public and private sectors and across all types of rental arrangement will also ensure that parties will have a greater familiarity with the terms and the rights and obligations they provide.

The Act contains a number of mechanisms focused on consumer-protection. Terms in the occupation contract that are fundamental provisions must be identified as such in the contract and some fundamental terms e.g. the provision of a written statement of terms must be included in all occupation contracts and cannot be modified unless they improve the contract-holder's (i.e. the renter's) position. This reform of the law professionalises the rental sector – a sector that until now has been characterised as ad hoc and dominated by amateur individual landlords.

The legislation also incorporates financial penalties for non-compliance, such as the requirement to pay compensation to the contract-holder for breaches of the contract. It is anticipated therefore that the severity of these sanctions will encourage compliance by landlords with the legislation.

Possession claims

Renting in the UK has for a long time been characterised by a lack of security of tenure (Moore, 2017). Although the Act does not change this significantly, there are far clearer rules in place regarding when a landlord is able to take possession of the property. The emphasis is on the landlord being able to prove that the relevant ground(s) for possession have been fulfilled. In addition, the Act provides that compensation is to be paid in the event that a possession order is obtained by a landlord who has concealed or who has misrepresented the material facts. There are also further safeguards against the landlord obtaining a possession order on spurious grounds in the event of a minor breach of contract in that the landlord must be very specific as to the ground upon which the possession order is sought and may not then vary that.

Despite these extensive protections for the contract-holder, the Act also regulates possession claims in a way that benefits the landlord. Firstly, if one or more of the grounds for possession are proved, the court must make a possession order, and the court is given no discretion to decline to make an order. Furthermore, the Act makes it easier for the landlord to enter into possession of properties that have been abandoned, thus ensuring that abandoned properties may be made available more quickly to new renters. From the viewpoint of the

landlord, and the wider social impact, these provisions mean that a dwelling may be restored more easily to the rental market. However, there are some safeguards in the form of the opportunity for reinstatement of the contract, for the contract-holder in order to prevent them from being dispossessed if the justification given is unfounded.

Another advantage of the Act in terms of possession claims is that the legislation provides scope for removing one joint contract-holder while allowing the others to remain. This may be beneficial in situations where one joint contract-holder's conduct is unsatisfactory, but the others are complying with the terms of the agreement, but it represents a different mentality and philosophy prevailing in Wales compared with other western European countries – excluding those who are anti-social (Lewis et al 2017) as opposed to protecting the right to a place to live (Wharton and Craddock, 2011).

Inheriting and transferring an occupation contract

Another important aspect of the legislation from the contract-holder's point of view is that it gives family members and carers the right to succeed an occupation contract on the death of the contract-holder, or the early termination of the contract. This is important, in order to prevent a person from being made homeless because their only place to live was the contract-holder's home. Although a successor will normally be a spouse, civil partner or cohabitant, the Act also makes provision for other family members, and significantly, carers, who have been living with the contract-holder before the contract-holder's death. This is also something that has been introduced into the law in Scotland in the form of the Private Housing (Tenancies) (Scotland) Act 2016 and is a recognition that the (often unpaid) carer will have nowhere else to go when the person for whom they are caring dies. However, the carer's right to remain must be balanced against the landlord's ability to move contract-holders to more suitable accommodation. A curious feature of the Welsh legislation therefore is that although the Act does not elevate security of tenure to the status it enjoys in other parts of Western Europe, both the Welsh and the Scots laws provide greater scope than was hitherto the case for contract rights to be inherited across generations.

Repair

Kemp (2011) demonstrates that a significant problem in the private rental sector is the poor state of repair of many dwellings – an issue that is exacerbated by the insecurity of tenure that prevails in relation to housing in the United Kingdom (Wharton and Craddock 2014). The Act therefore makes specific provisions regarding the condition of the premises. These provisions, combined with the requirements regarding the licencing of private landlords and the housing quality standards imposed on local authorities under the Housing (Wales) Act 2014 aim to ensure that the accommodation is suitable as regards its state of repair, and that the landlord is obliged to undertake the necessary repairs. The accommodation must be suitable for human habitation at the commencement of the contract, and must remain suitable for human habitation for the duration of the contract. Accordingly, in addition to fostering an increased

awareness of rights, the Act provides further forms of redress for those whose accommodation is below the required standard.

Some concerns concerning the Act

Despite the positive changes made by the legislation, there are a number of disadvantages that may mean its apparent advantages are not as significant as would first appear. Some of these weaknesses are inherent in the legislation itself, while other problems may arise from attempts by landlords to avoid their obligations under the Act.

The emphasis on litigation as a forum for redress

One difficulty that arises from the Act is the presumption that litigation is the appropriate forum for remedying breaches. For example, where the landlord fails to provide a written statement of the terms of the contract, the contract-holder's recourse is to apply to the County Court for a declaration of the contract's terms. However, litigation may not be appropriate for many renters because it may be perceived to be an overly formal and costly process (Genn, 1999).

Also, the Act provides that the compensation for procedural failures such as a failure to provide a written statement of terms may be offset against rent. This is problematic because it deprives the contract-holder from something tangible that indicates that the litigation has been worth the cost and effort. Furthermore, there is then the possibility that the contract-holder may be deprived of the compensation because the landlord then increases the rent. The offset provision is also problematic if the contract-holder decides to terminate the contract before the compensation has been recovered. Accordingly, the effectiveness of the redress may be undermined by the mechanisms for obtaining that redress.

Joint contract-holders

Although the Act provides certain advantages for joint contract-holders, such as the ability to exclude one or more joint contract-holders without this affecting the situation of the others, some problems also arise. Joint contract-holders are jointly liable for any breaches of contract, with the consequence that one joint contract-holder may have to bear the burden of responsibility for the conduct of the others. Furthermore, a landlord has no duty to inform the remaining joint-contract holders that one contract-holder has withdrawn from the contract despite the fact that the remaining occupiers' rent may increase as a consequence of the withdrawal.

However, where the departing joint contract-holder transfers his or her obligation to a new contract-holder, the remaining contract-holders must give their consent to the occupation of the dwelling by the transferee. This creates the paradoxical situation whereby the departing contract-holder can validly transfer the occupation contract, but the transfer creates an

entitlement that cannot be enjoyed by the transferee because the remaining contract-holders refuse their consent to the transfer. This is likely to create a situation where parties who cannot easily bear the costs of a dispute will be placed in the inevitable situation of being in a dispute with both their landlord and the former co-occupier.

Supported contracts

Supported contracts are contracts for accommodation with support services for those who for those who are overcoming addiction, require support in finding employment or alternative accommodation, or who require support because of age, illness, or disability. However, a supported-contract holder may be excluded from a dwelling for a specified period because they have used violence, done something which creates ‘*a significant risk of harm to any person,*’ or because they have behaved in a way that prevents another person from benefitting from the support provided because of the accommodation. The absence of a need for these matters to be proved means that this provision is open to abuse by landlords who wish to remove a vexatious contract holder without using the more formal procedures set out in the Act, thus again emphasising that the UK’s approach to the rental sector places security of tenure as a low priority compared with the landlord’s ability to remove problematic tenants. It is also problematic because it confers a right to exclude a contract-holder who is not able to live independently or who requires support. Therefore, while Wales offers an improved model for the management of the ‘good’ tenant, its approach to the ‘bad’ tenant remains problematic.

Condition of the dwelling

The Act provides limits on the requirements for what constitutes the condition of the dwelling. For example, although the dwelling must be fit for human habitation, and the landlord must make structural repairs, there are very few obligations on the landlord in terms of repairs to fixtures and fittings within the dwelling. The result is that the accommodation may be in very poor condition internally, but with little scope for the contract-holder to obtain redress. An additional disadvantage of the legislation is that although the landlord has an obligation to repair, this applies only where the failure to repair has caused damage to an individual or property, such as where the failure to repair a roof causes damage to the interior walls of a flat. Poor housing quality is a widespread problem and the limited obligations of the landlord coupled with the likelihood that redress will have to be sought through the court means that the law in Wales may not ameliorate this situation in a very meaningful way.

The sixteen and seventeen-year-old occupier

Mackie (2016) identifies young people as a particularly disadvantaged group within the housing sector. The Renting Homes (Wales) Bill as originally presented to the National Assembly for Wales (National Assembly for Wales, 2015) made provision for agreements to be made with sixteen and seventeen-year-old occupiers, who have traditionally been excluded

from the legislative framework for rentals. When the Renting Homes (Wales) Bill was introduced, it was felt that there are some situations where a sixteen or seventeen-year-old would benefit from being able to access accommodation without the involvement of their parents or guardians, such as where the young person has had to leave the family home for their own safety (National Assembly for Wales Research Service, 2015). However, the Communities, Equality and Local Government Committee expressed concern regarding the suitability of extending the proposed legislation to sixteen and seventeen-year-olds (National Assembly for Wales, 2015) and therefore the Act provides that although a person under the age of eighteen may be a tenant, their occupation cannot take the form of an occupation contract. A significant lacuna in the legislation therefore is that an Act that was passed specifically in order to improve occupiers' awareness of their rights, fails to protect the very group, who, by virtue of their age and experience, need more significant safeguards of their rights and the assumption of a greater degree of responsibility on the part of landlords for making them aware of those rights.

The indirect consequences of the legislation

In addition to the concerns that emerge from what is specifically contained within the Act, there are also some concerns that the Act will influence the rental sector in ways that the draftspersons did not intend.

Firstly, the duality of Wales's devolution settlement, whereby Wales has a legislature but no separate jurisdiction means that the Act creates a proliferation of domestic rentals rather than a simplification. The broad array of rental arrangements in England still exists, and the consequence is that, although the Act has simplified the structure of domestic rentals within Wales, it has increased the number of possible models for rental arrangements within England and Wales as a jurisdiction. Even within Wales, the fact that many types of rental arrangement are excluded from the scope of the Act means that the simplification envisaged has not been realised. The Law Commission also comments that:

Textbooks often exclude Welsh law entirely, or make reference to the fact that it is different...but do not attempt to spell it out comprehensively (Law Commission 2016, para 1.31).

Legal advisers are often reluctant to advise on Welsh law and there is persistent (and sometimes wilful) lack of awareness of the legislative capacity of the National Assembly for Wales and law as it applies in Wales. The danger is therefore that although the Act has simplified the law, contract-holders may not see the benefit because legal advisers will not be able to advise clients appropriately.

A further consequence of the Act is that there is a danger that landlords will manipulate the exceptions to the Act in order to avoid having to comply with the requirements of the legislation. For example, temporary and holiday accommodation is not governed by the Act. Therefore, if a landlord wished to avoid the requirements of the Act, classing an arrangement

as a temporary expedient or as a holiday let may proliferate, with the result that the occupier is denied the protections offered by the legislation.

Over-regulation may also deter some people from becoming landlords. The Act provides a workable framework for the professional landlord. However, the stringent requirements may be more problematic for the more casual landlord. The danger, as Haffner et al (2008) outline is therefore that there could be fewer rental properties available in the longer term.

Conclusion

Although the Act makes significant improvements to the law on rentals in Wales, and aims to ensure that those living in rented accommodation will have a clearer, and more accessible understanding of their entitlements under the contract and their rights in terms of obtaining redress against an unsatisfactory landlord, the legislation contains a number of omissions whereby the interests of the parties are not adequately protected. Within the UK the Act makes important, but not panaceaic changes to the law. There is an improvement in contract-holders awareness of their rights, and consistency across the sector, but several lacunae in the effectiveness of the enforcement mechanisms, particularly for those who are less able to enforce their rights. Within a wider context, the lessons from Wales are important as the marketisation of the rental sector elsewhere erodes the rights and protections available to renters to the extent that the Welsh model offers, at the very least, some valuable safeguards.

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