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Published in:
The Conveyancer and Property Lawyer

Publication date:
2020

Citation for published version (APA):
Huws, C. F. (2020). How the Renting Homes (Wales) Act 2016 Changes Our Understanding of Land Law. *The Conveyancer and Property Lawyer*, *2020*(3), 246-260.

How the Renting Homes (Wales) Act 2016 changes our understanding of land law

C.F. Huws[1]

Summary

Through two piece of legislation: Housing (Wales) Act 2014 and the Renting Homes (Wales) Act 2016 this article explores how the underlying philosophies of land law in England and Wales have been changed in subtle, but significant ways.

Abstract

Following the devolution of certain primary legislative powers to the National Assembly for Wales (renamed Senedd Cymru or the Welsh Parliament in 2020) after a referendum in 2011, one of the Welsh Government's priorities has been to improve housing, particularly in the domestic rented sector where there have been concerns about poor quality housing and insufficient safeguards for tenants having been perceived to be significant problems. As a response to these concerns, two key statutes have been enacted; the Housing (Wales) Act 2014 and the Renting Homes (Wales) Act 2016, and it is the latter of these that is the focus of this article. In this article it is contended that this Act not only changes some fundamental principles of land law in England and Wales, but also to the constitution of the United Kingdom more generally.

Keywords

Devolution; landlord and tenant; land law; Welsh law

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Introduction

If the academic lawyer is asked what are the key principles of land law that distinguish it from the law of contracts, he or she is likely to respond with reference to at least some of the following concepts:

- The distinction between proprietary and personal interests
- The distinction between leases and licences
- The significance of the distinction between deeds and contracts
- The role of Equity in giving effect to less formally created obligations

Although these are not universal principles – leases of 3 years or less for example may be entered into without any written formalities[2] they are nevertheless central and recurring concepts in terms of understanding why land law differs from the law of contract. Yet, despite this centrality, these concepts will be changed in important ways when the Renting Homes (Wales) Act 2016 comes into force. This means that although the Act is applicable only to rentals in Wales, its impact is to change our understanding of land law in both England and Wales.

Context

In 2016, the National Assembly for Wales passed the Renting Homes (Wales) Act 2016 (RHWA). This Act makes significant changes to the public and private rental sectors in Wales, and removes much of the complexity and the obscurancy that has evolved through successive legislation into the law that governs the relationship between a person who provides accommodation in return for payment, and the person who occupies that accommodation. Hitherto, the laws of the National Assembly for Wales had focused, in large

2 Law of Property Act 1925 s54(2)).

measure, on public law, as it is this aspect of the law that the Senedd has the most extensive scope to have legislative competence for under the Government of Wales Act 2006. However, this does not preclude the Senedd from passing legislation that affects private law, and this is the case with the Renting Homes (Wales) Act 2016. In earlier work[3] the potential impacts, both positive and negative, of the legislation, on the parties to a rental agreement have been explained.

Prima facie, RHWA does not make any specific changes to the Law of Property Act 1925 or other property legislation currently in force in England and Wales – its objective is to simplify the agreement between the landlord and the person renting, and to make specific provision in relation to the evidence of an agreement. Changes made to the private rented sector are a corollary to the primary objective of reforming the public rental sector. It may even be said that RHWA does not even change the substantive relationship between a landlord and a tenant.

RHWA was passed primarily in order to simplify the rental sector in Wales, and eliminating the different types of public and private sector rental arrangements that have been introduced in different statutes over the past 40 years, as well as those agreements that are not specifically defined in any legislation. The Act also applies to licences in respect of residential properties. The Act creates one type of rental agreement for Wales (albeit some exceptions, contained in Schedule 2) – the occupation contract which is a written statement of the terms applicable to leases and licences across the public and private sectors, The tenant or licensee is referred to as a contract-holder. A number of the contractual provisions may not be modified at all, and others may only be modified if they improve the contract-holder's position.[4]

3 Huws, C.F. (2019) 'Tenants' rights and the Renting Homes (Wales) Act 2016' 15 *International Journal of Housing Policy* DOI: 10.1080/19491247.2018.1540762
4 S.3.

All that *is* changed is how that is evidenced, something that would not seem to suggest a significant alteration to the law. Yet, the consequences of RHWA are far more wide-ranging than would first appear, and although the legislation is applicable in relation to Wales only,[5] its impact on England may be more significant than is initially imagined, in that many of the underpinnings of some essential concepts in land law are changed by this Act.

A central principle of land law in England and Wales is the distinction between personal and proprietary rights, as this characterises the enforceability of obligations affecting land as being either contractual or proprietary, and it is the proprietary characteristic of obligations over land that enable obligations to be enforced by and against successive owners of the land. A second central principle of land law is the recognition of equity's intervention to recognise rights in situations where there has been substantive but not formal compliance with the law's requirements. These are characterised by the following principles:

a. The fact that there is a distinction between proprietary interests and personal interests over land, which means that personal interests are enforceable only between the parties who originally formed an agreement, and are not transferrable, while proprietary interests are enforceable against subsequent owners of the encumbered land.
b. The distinction between a lease and a licence in term of whether the entitlement created is proprietary or personal. A lease is a proprietary interest over land, and if it is for seven years or more, must be registered on the Land Register. A licence on the other hand is not proprietary, and there are no registration requirements. If a lease is for less than 7 years, it will have overriding status for the purposes of paragraph 1 of Schedules 1 and 3 of the Land Registration Act 2002.

5 Government of Wales Act 2006 s.94.

c. The significance of a deed for the purposes of creating and transferring proprietary interests over land, with less formal documents creating only an equitable interest over land.
d. An equitable interest may only be enforced on a personal basis, or against a person who does not give valuable consideration for the acquisition of the estate. However, the principles of estoppel operate to prevent the inequitable deprivation of rights in situations where there has been a detrimental reliance on assurances given.
e. A trespasser is a person who exceeds the permission granted to him to be on the land. Although RHWA does not change this, it may alter our understanding of when the permission is granted.
f. The transferability of rights and obligations under a lease is governed by the law of covenants, allowing subsequent covenantees to sue subsequent covenantors for breaches of the obligations contained in the lease. This means that there is reliance on enforcing the obligations between the original parties under a chain of covenants, and enables a court to issue injunctions for breach of the covenants between subsequent owners of the covenanted land.

All of these aspects have been essential to the underlying philosophy of land law commencing with the 1925 property law reforms, but are either changed by the RHWA or are likely to be problematized because of the changes wrought by RHWA. The following discussion therefore explores how RHWA affects these elements of land law.

Results

Leases or licences

In land law, one of the essential concepts that those being introduced to the subject for the first time is required to learn is the distinction between a lease and a licence, because the distinction is central to the understanding of private rights over land as comprising of rights that are either personal or proprietary. However, the clarity of this distinction is eradicated by RHWA because both leases and licences will be occupation contracts for the purposes of the Act, although the Act does allow the occupation contract to contain terms that characterise the contract as a lease, or to confine the obligations to being in the nature of a licence. However, in terms of understanding how land law transcends the law of contract, the significance of a licence being a personal interest in land, while the lease is a proprietary interest is crucially important because this determines the extent of the duties owed to the occupier by successive owners of the freehold land. As Fox LJ explains in *Ashburn Anstalt v Arnold [1989] Ch 1:*

> *'A mere contractual licence to occupy land is not binding on a purchaser of the land even though he has notice of the licence.'*

This distinction is a central principle of land law, in that it is in this distinction that the differences between the obligations of a landowner as a party to a contract, and the landowner as the creator of obligations that bind successive owners of the land become apparent. The notion of contractual privity limits the scope of liability between licensor and licensee – only they can sue and be sued for breach of the obligation. On the other hand, proprietary interests, enforceable by successive claimants against successive defendants characterises the nature of interests in land. The distinction has significant consequences because:

a. A lessee is entitled to exclusive occupation of the land, and is entitled to exclude the landlord;
b. A lease is a proprietary interest that may be transferred by the leaseholder;

c. A lease is enforceable against subsequent owners of the freehold land;

d. A short lease of less than seven years takes effect as an interest that overrides against the transferee of the freehold land.

RHWA partly removes the distinction between leases and licences, and provides that all rental arrangements that are within the purview of the Act are occupation contracts (section 1). Nevertheless, the status of the rental arrangement as a lease or licence is secondary to the occupation contract, and the explanatory notes to the Act explain:

> *The Act will not change this; a person who rents a home in Wales will rent it under a tenancy or licence* [sic]. *But in many respects that distinction will be less important in practice, because the Act makes virtually no distinction between tenancies and licences.*

The consequence of this is that, although the distinction between leases and licences remains conceptually significant within Wales for the purposes of, for example, determining whether the occupier has the right to exclusive possession against the landlord[6], classifying all rental arrangements as occupation contracts eradicates the clear distinction between the proprietary character of a lease and the contractual character of a licence. For example, an occupation contract will not automatically give or not give the contract-holder the right to exclusive possession, and the Act refers to the scope the contract-holder has to transfer the contract,[7] as well as to the adoption of the contract by the transferee of the freehold title[8]. Therefore, whereas under the law as it applies in England, the manner in which the agreement is described will be indicative (although not conclusive) as to the nature of the agreement intended, this will not be the case in Wales. In the case of *Somma v Hazelhurst [1978] 1 W.L.R. 1014,* Cumming-Brice L.J explains for example:

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6 *Street v Mountford [1985] A.C. 809*
7 S.57.
8 S.12 and s.17.

> *Documents which purport to grant licences will be held to grant tenancies if either one of two sets of circumstances apply. (a) If upon examining the documents in the light of the surrounding circumstances they are found to be in substance documents granting a tenancy, which he called "the construction route." (b) If upon examining the surrounding circumstances the court finds that the documents are a disguise which cloaks the reality of the transaction, which he calls "the disguise route," for such a transaction may disguise the reality of the rights and obligations granted and assumed by the parties without necessarily being fraudulent or attracting the label of a mere sham.*

With the exception of the situation where '*the documents are a disguise which cloak the reality of the transaction'* the proprietary or personal character of the intended transaction leads the parties to decide what type of agreement they wish to create – a lease or a licence. On the other hand, the situation where the type of agreement – the occupation contract – is the starting point, and the status of the agreement as being personal or proprietary is secondary to that, it is less easy to explain that 'a lease does this' and 'a licence does' that. An occupation contract does both of those things depending on whether it is has the characteristics of a lease or the characteristics of a licence. Therefore, the occupation contract is less unequivocal as to whether the parties intend for the contract to be enforceable against transferees of the freehold title, and whether the parties intend that the nature of the possession is exclusive.

Other consequences that affect our more general understanding of land law then ensue from this distinction. The blurring of the distinction between leases and licences problematises our understanding of the role of deeds rather than contracts in the creation of

proprietary interests; changes the role of land registration and the registration of leases, and complicates the overriding status under Schedules 1 and 3 of the Land Registration Act 2002, of leases for less than seven years. Because RHWA refocuses the relationship between the lease and the licence therefore, in the future, further endeavours will be required in order to unpick whether an occupation contract in Wales, and as an adjunct to that, in the jurisdiction of England *and* Wales is a lease or a licence. *Street v Mountford* may still be good law, but it may be one that may have to be relied upon more frequently in order to determine what happens within the Welsh context.

Written evidence of a lease

A further aspect of RHWA that is significant is the changes that are made to the validity of leases for three years or less that are made without the formality of writing. Hitherto, the law of England and Wales has accepted that a lease for three years or less may be created without the need for any written formalities,[9] with that lease being enforceable against purchasers of the land in accordance with the principles relating to interests that override as detailed in Schedules 1 and 3 of the Land Registration Act 2002. The requirement for there to be a written occupation contract for leases lasting 3 years or less in Wales goes beyond the requirements of the legislation applicable in England, where the tenant may request a written statement of terms from the landlord[10] but there is no duty to provide a written statement of terms ab initio. Furthermore, in England, a lease for more than three years that *should have* been made either in writing, and by way of deed will be enforceable as a proto-equitable lease, either as between the parties to it,[11] or between those who acquire the land without giving valuable consideration.[12]

9 Law of Property Act 1925 s.54
10 Housing Act 1988 s20A.
11 *Walsh v Lonsdale* (1882) 21 Ch. D. 9.
12 Land Registration Act 2002 s.29.

Nevertheless, RHWA requires that the contract is made in writing, and this has a number of consequences. Firstly, Wales no longer allows valid legal leases to exist informally – even short leases must be made by an occupation contract. The principle contained in s.54 of the Law of Property Act 1925 that no writing is required no longer has universal application. Furthermore, RHWA represents a further example of how the legal system in England and Wales is less willing to accept the creation of contracts by performance rather than agreement, building on, for example, the exclusion of the doctrine of part performance in relation to sale and purchase contracts.[13] This again demonstrates the wider impact of RHWA that has a wider significance than simply requiring that rental contracts of any length must be made in writing.

Increased reliance on Equity

Because valid legal leases can no longer be created in Wales without writing, it is likely that landlords – and more probably renters, will increasingly have to rely on Equitable principles such as proprietary estoppel and the maxim that: '*Equity looks upon that as done which ought to be done'* in order to defend their rights. It is also probable, although perhaps less equivocally so, that the occupation contract will also give rise to an interest that overrides for the purposes of paragraph 1 of Schedules 1 and 3 of the Land Registration Act 2002 if the landlord sells the freehold title to the land, even though the agreement has not necessarily been made by a deed.

Let us therefore explore why RHWA makes a reliance on Equity more likely in the absence of an occupation contract. The Act specifies how the purported contract-holder may obtain redress from the landlord in respect of a failure to provide a contract.[14] This implies

13 Law of Property (Miscellaneous Provision) Act 1989 s.2(8).
14 S.34.

that performance of the contract may precede the written statement of terms. However, the Act does not specify the status of the contracting parties vis a vis enforcing the rights that the written contract, if provided, would have evidenced. In order to resolve this dilemma therefore, there is a need to consider the more general principles of land law, and the approaches therein to determine the purported contract-holder's ability to enforce an occupation contract that has not been made in writing. In principle, one of two consequences may arise from a failure to provide an occupation contract. One is the approach taken in the Law of Property (Miscellaneous Provisions) Act 1989. Section 2 of this Act provides that, in conveyancing transactions, an oral contract for the sale and purchase of land is not a valid contract, and the Act abolishes part performance of the contract as giving rise to a binding agreement. Therefore, one approach may therefore be to regard an agreement that is not substantiated by a written contract as a 'no agreement' situation.

Yet, this is unlikely to be a satisfactory outcome in the context of RHWA because the Law of Property (Miscellaneous Provisions) Act 1989 applies to contracts where the exchange of consideration will take place at some future time. It is therefore possible for the law in such situations to stipulate that anything less than a written contract will not give rise to a binding agreement, as is the case with contracts for the sale and purchase of land. This means that if the parties wish to make their agreement into one that is binding, they are able to correct their position by creating a written agreement, or to withdraw from the oral agreement without acting to their detriment. This is not the case with occupation contracts. The 2016 Act stipulates[15] that the landlord's obligation is to provide the written statement of the terms within 14 days of the commencement of the occupation of the premises.[16] This means that the purported contract-holder will have performed some aspects of the contractual obligation – the payment of a deposit, where appropriate, and the payment of rent.

15 S.31.
16 S.31.

Furthermore, the purported contract-holder will also be in occupation of the land, and therefore, it would seem that the no-contract position would contradict the principle that Equity looks upon that has done which ought to have been done. Furthermore, the no-contract approach would mean that the landlord could use a strict adherence to the law as a means of depriving the purported contract-holder of his or her rights – again contradicting the underlying principles of Equity.

It would seem logical in Wales therefore that there will be a need to use Equitable principles to recognise that the contract exists in accordance with the terms orally agreed between the parties. The effect of this will be to estop the landlord from depriving the purported contract-holder of the loss he or she has sustained by a detrimental reliance (through payment of rent and quitting any previous accommodation) on the assurance (the oral agreement) that has been given in a context within which anything other than unconscionability is improbable.[17] The likely significance of estoppel in Wales is particularly manifest because in addition to the very specific obligation to provide a written contract under RHWA, the Housing (Wales) Act 2014 requires a landlord to undergo appropriate training in order to become licenced. Furthermore, the landlord is required to comply with a Code of Practice[18] that explains what the landlord's responsibilities are – including the need to provide a written contract.[19] In light of these very specific obligations, and the statutory mechanisms for ensuring that a landlord understands those obligations, it seems difficult to conceive of a situation where the failure to provide a written contract is borne out of anything other than an intention to deprive a purported contract-holder of his expectations and rights

17 *Henry v Henry* [2010] UKPC 3.

18 Welsh Government/Rent Smat Wales (2015) Code of Practice for Landlords and Agents licenced under Part 1 of the Housing (Wales) Act 2014 https://www.rentsmart.gov.wales/Uploads/Docs/Code%20of%20practice%20for%20Landlords%20and%20Agents%20licensed%20under%20Part%201%20of%20the%20Housing%20(Wales)%20Act%202014%20-%20English%20-%20Doc%201.pdf Site accessed August 3rd, 2014.

19 Paragraph 3.4

under the law. In light of the recognition that occupation may precede the occupation contract, a finding that an oral contract is enforceable against the landlord under the principles of estoppel is not likely to be particularly contentious. Nevertheless, its significance vis a vis Wales is to create a situation where there may have to be an increased reliance on landlord and tenant agreements being enforced through arguments based on estoppel rather than on part-performance of the contract. This is likely to be problematic because arguments based on estoppel are likely to require more extensive legal advice (and the costs implications this will entail) and are predicated on the basis that the courts will do the minimum required in order to remedy the wrong sustained.[20] The change to the law effected by the requirement for leases to be made in writing as occupation contracts, as opposed to existing without any need for written terms changes therefore the underpinnings of how land law is believed to work in England and Wales. It represents a move away from an approach whereby performance creates rights that are enforceable in law to one where a greater recourse to Equity is needed.

Interests that override

More problematic however is the question of whether the oral contract is enforceable against the buyers of the land. Under Schedules 1 and 3 of the Land Registration Act 2002, a leasehold estate in land will be an interest that overrides, and here again the fact that the term occupation contract encompasses both the lease and the licence clouds the question of whether the right is capable of overriding at all. If all occupation contracts have overriding status, it will render agreements that were initially created as licences, into something more than was initially agreed, namely, a proprietary interest. On the other hand, if the courts have to unpick whether an occupation contract is a lease or a licence, this may cause uncertainty

20 *Jennings v Rice* [2002] EWCA Civ 159.

because the contract-holder and the transferee of the freehold title must explore the agreement and the substance of the rental arrangement in order to determine whether it is a lease or a licence.

In England, the Localism Act 2011 includes relevant social housing tenancies as being excluded from being interests that override but this only applies in relation to England.[21] This implies that occupation contracts that are validly made (and take effect as leases) *will* constitute interests that override for the purposes of RHWA – in that they are not specifically excluded from the remit of paragraph 1 of either Schedule 1 or Schedule 3 of the Land Registration Act 2002. However, where no written occupation contract has been created, it is uncertain whether an oral contract would be overriding. In England, there is no problem with an oral contract being sufficient to create a legal lease if the lease is for three years or less, and the lease '*take(s) effect in possession [within a] period of three months beginning with the date of the grant.'*[22] In Wales however, if, as is suggested above, the absence of a written occupation contract precludes a lease from being a legal lease, it will take effect in Equity. It is difficult in that situation to conclude that the purchaser who gives valuable consideration has acted unconscionably vis a vis the tenant, and therefore there may be a reluctance to find that the lease is overriding under paragraph 1 of either Schedule 1 or Schedule 3 of the Land Registration Act 2002. Therefore, the need for a written occupation contract creates the situation whereby the assumptions regarding when a lease will override are changed.

This is exacerbated in situations where section 4(1)(d) of the Land Registration Act 2002 applies. Section 4(1)(d) precludes a lease from having overriding status '*if it is to take effect in possession after the end of the period of three months beginning with the date of the*

21 Localsim Act 2011 s1.57.
22 Law of Property Act 1925 s.54.

grant;' This may be problematic in the context of rental arrangements in Wales. The parties may agree to an occupation contract before the contract-holder begins to occupy the dwelling. However, the landlord's only obligation vis a vis the written statement of the contract is that it must be provided '*before the end of the period of 14 days starting with the occupation date*.'

Consequently, it is unclear whether a contract that was agreed before the occupation date will have overriding status in the event that the freehold title to the dwelling is transferred, or whether the rental arrangement is only enforceable from the date of the written statement.

If an unwritten occupation contract does not override under paragraph 1 of Schedules 1 and 3 however, the purported contract-holder may be able to claim that his or her interests are overriding under paragraph 2 of Schedule 1 – although again this is more problematic in the context of Schedule 3. In both Schedules, paragraph 2 relates to the overriding status of the person who is in actual occupation. Given that the purported contract holder will be in actual occupation of the land by the time it becomes clear that no occupation contract has been forthcoming, paragraph 2 offers some protection to the renter. Under Schedule 1, which applies when the interest overrides first registration of the land, an interest in land coupled with actual occupation is sufficient to give rise to an interest that overrides. There may therefore be some situations where the renter's actual occupation be protected under paragraph 2 of Schedule 1. However, given that most land that will be the subject of domestic rentals (which is the sole remit of the 2016 Act) will be registered land, an interest that overrides predicated on a reliance on Schedule 1 is likely to be extremely rare. A more probable situation is that the purported contract holder must establish that his or her interest overrides a registered disposition of the land in accordance with Schedule 3. Here however,

the purported contract-holder must establish that their interest was disclosed to the purchaser when it was reasonable to do so, or that the interest would have '*been obvious on a reasonably careful inspection of the land at the time of the disposition*' – the latter being coupled with a requirement that the person to whom the disposition is made does not have actual knowledge of the purported contract-holder's entitlement. The difficulty here is that the written occupation contract would be a significant piece of evidence in order to prove both that the interest is disclosed when it is reasonable to do so, and that the purchaser had actual knowledge of the existence of the agreement. The absence of a written occupation contract therefore makes the burden of proving the existence of the interest particularly problematic for the purported contract-holder. A law that was intended to apply to buyers of land only in a very narrow range of circumstances, possibly involving a closer than arms' length transaction may therefore need to be relied on more extensively in Wales where the landlord sells the land where there is a renter in actual occupation, but no written occupation contract has been provided.

Tenancies or trespassers

A further difficulty in the situation where the formalities of RHWA are not complied with, is whether the contractless contract-holder may have the status of a trespasser. This issue is resolved in some measure by section 238(2) of RHWA, which provides that:

> *(2) If P accepts such payments from T—*
>
> *(a)knowing that T is a trespasser in relation to the dwelling, or*
>
> *(b)at a time when P ought reasonably to know that T is a trespasser in relation to the dwelling,*

P is to be treated as having made a periodic contract with T immediately after the end of the relevant period.

There is some suggestion from the title to this section that the paying trespasser is furnished with the status of being an implied tenant. The Chapter title refers to '*trespassers, implied tenancies and licences'* while the section title itself refers only to *'implied tenancies and licences.'* The wording of the section itself however, as is seen above refers to the T (the occupier) as a trespasser. This blurring of the distinction between a trespasser and the de facto tenant is highly significant and highly problematic. A trespasser, by definition, is a person who is on the land wrongfully i.e. without authority. On the other hand, a de facto tenant is a person who has the permission of the freehold title holder to be on the land, and moreover has a right to be on the land that is enforceable against the owner of the freehold title and his or her successors in title. The blurring of the distinction between the implied tenant and the trespasser is therefore extremely problematic, in that it undermines the rights that are afforded to a person by virtue of their status as a rent-payer.

Moreover, to classify the contractless contract-holder's status as a trespasser is problematic because of the criminal status of the trespasser following the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Section 144 of the latter Act makes it a criminal offence for a person to be '*in a residential building as a trespasser having entered it as a trespasser'* knowing, or being in a situation where they ought to know that they are a trespasser, and either living in the building, or intending to live there for any period. Under the law of England therefore, the squatter is criminalised, and indeed the situation is replicated in Wales – RHWA does not modify the Legal Aid Sentencing and Punishment of Offenders Act 2012, but it does allow trespassers to become contract holders in situations where the landlord receives payment from them. Therefore, the law in Wales, if complied with according to the expectations of the legislation clarifies that a person's status is not that

of the trespasser because the requirement of an occupation contract provides better evidence than contractual performance that the permission to occupy has been granted. However, in Wales, there is less certainty as to the status of the paying renter as occupier or trespasser where no occupation contract has been provided.

Landlord and Tenant (Covenants) Act 1995

Although it is something that does not relate specifically to the lease-licence distinction, a further issue that arises in relation to occupation contracts is the status of covenants, and their transfer to successive landlords and successive tenants. Given that a licence is a personal obligation, the transfer of duties and obligations when the freehold title (or conversely indeed, the leasehold) is sold is not usually envisaged. The underlying notion of contractual privity means that it is not anticipated that the licensee will be able to transfer the licence. It is more likely that one licence will end when a licensee vacates the premises, and a new licence will be agreed upon when a new licensee moves in. This is the basis upon which the occupation contract is predicated – although this principle also applies to some shorter leases, such as the assured shorthold tenancy that will continue to be applicable in England. Nevertheless, there is an expectation that some forms of occupation contract may be transferred between contract holders under s57 of RHWA. However, where this section is invoked, s52 of RHWA disapplies the requirements of the Landlord and Tenants (Covenants) Act 1995.

For leases created after January 1st, 1996, the Landlord and Tenants (Covenants) Act 1995 governs the passing of the benefit and burden of those covenants from the outgoing landlord to an incoming landlord when the freehold title is transferred, and from the outgoing tenant to the incoming tenant when the lease is transferred. However, RHWA specifically

excludes the application of this Act, with the result that the quasi-proprietary status of covenants, whereby their obligations are transferred between covenantors and covenantees can no longer be assumed to be a fundamental principle of land law. The contract may be transferred from an outgoing contract-holder to an incoming contract holder, but the obligations are not. Furthermore, the removal of the continued liability of the outgoing tenant under the guarantee provisions of the Landlord and Tenants (Covenants) Act 1995 changes the dual nature of proprietary rights in land that may be enforced either in contract or in property law – covenants contained in occupation contracts remain as contractual obligations because they are not transferrable between tenants.

Deeds and contracts

It is a general principle of land law that transfers of land must be made by deed as provided by s52 of the Law of Property Act 1925. Although RHWA permits a transfer of the contract to new contract holders, the Act specifically excludes this needing to be achieved by way of a deed – s52 of RHWA. This is a further illustration of the increasing divergence between Wales and England in relation to the formalities required for a rental agreement. In England, the Law of Property Act 1925 permits '*leases or tenancies or other assurances [that are] not required by law to be made in writing.'* However, where writing is required, the expectation that it will be made by deed is wide-ranging – for example in relation to leases made for more than 3 years and in relation to the transferral of such leases. On the other hand, RHWA curtails the requirement for agreements to be in the form of a deed, there is an increased reliance on the written contract as evidence of the agreement. Therefore, while the law in England emphasises the proprietary character of the lease, with the formality requirements

exceeding the usual requirements for the creation of a valid contract, the Welsh approach moves the short lease far more firmly into the territory of contract than property law.

Estates in land and registration

RHWA also introduces a change in the concept of the estate in England and Wales. Although RHWA does not apply to leases of more than 21 years[23], it is possible that a RHWA occupation contract could be for a term of between 7 and 21 years. Leases of less than 7 year duration do not need to be registered.[24] However, *'a leasehold estate in land for a term which, at the time of the transfer, grant or creation, has more than seven years to run'* constitutes a qualifying estate for the purposes of this section, and must therefore be registered. However, the absence of a deed, combined with the blurring of the distinction between leases and licences as detailed above creates less certainty as to whether the occupation contract has the status of an estate in land, and whether it is therefore registrable. Given the significance of Land Registration in the context of property law, and the centrality of the notion of title by registration, the reshaping of the nature of proprietary and contractual rights as a result of the creation of occupation contracts in Wales raises questions about the role of registration for occupation contracts that are made for more than seven years.

The personal and the proprietary in land law

Land law in England and Wales has tended to emphasise the proprietary characteristics of rights and entitlements as opposed to the contractual, which are felt to be the purview of the law of contract. The status of legal obligations in land therefore emphasises the ways in

23 Schedule 2 paragraph 7(3)(g).
24 Land Registration Act 2002 s4(2).

which they are enforceable against subsequent owners of the encumbered land, and that they are transferrable as between rights holders. The distinction between rights that are enforceable at law and rights that are enforceable in equity, the significance of a deed as opposed to some lesser form of recording of an agreement reached, and the centrality of registration are all central tenets of land law. Yet, this is not the focus of RHWA where there is a shift of emphasis from the proprietary to the personal – the agreement is specified to be a contract, and the Act assumes for the most part that there will be no transfer of obligations between landlords or between tenants. Furthermore, the existing law that characterises rights over land as proprietary operate behind the occupation contract as the primary document. Therefore, RHWA purports to eradicate the different forms of rental agreement and to champion the occupation contract as its central precept – in other words the personal and contractual relationship is foregrounded. That which is lost therefore, and must be searched for with the utilisation of a more detailed analysis of the substance of the transaction is the extent to which the personal and the contractual is in fact proprietary.

Discussion

The Law of Wales, the law of England, and the Law of England and Wales

The notion that there is 'a law of England and Wales' has become a more complex concept since the devolution of powers to the National Assembly for Wales, and in particular since Part IV of the Government of Wales Act 2006 came into force. The Government of Wales Act 2006 gave the National Assembly for Wales primary law-making powers in relation to the matters that are within its legislative competence.[25]

25 Government of Wales Act 2006 s108.

The devolution of powers to Wales means that there are some areas of law that have been legislated for in relation to England only. Many of the provisions of the Localism Act 2011 for example applies to England only. In other areas of law, legislation has been enacted separately in relation to Wales and in relation to England – the Housing Act 2004 in England and RHWA in Wales. However, Wales and England are not separate legal jurisdictions. Therefore, although the law in Wales and the law in England may be different from each other, the law is the law of England and Wales, and changes to legal concepts within one territory changes the law of England and Wales, and not merely 'the law of Wales' or 'the law of England.' Furthermore, changes to one area of the law may impact on other areas of the law. This will be the effect of RHWA when it comes into force, because it makes significant – and hitherto unaddressed changes to essential concepts in property law in England and Wales. For example, the potential disputes that may arise from the fact that an occupation contract may be either a lease or a licence may lead to a re-evaluation of the criteria in *Street v Mountford.* Furthermore, the potential in Wales for an increased reliance on estoppel in situation where a contract holder is in occupation but without a contract, may require a broader interpretation of paragraph 2 of Schedule 3 of the Land Registration Act 2002 than was envisaged when that legislation. The objective of that legislation aimed to restrict the scope and number of interests that have overriding status, but where a contract holder has no written contract, the overriding status of the arrangement as a lease under paragraph 1 of Schedule 3 of the Land Registration Act 2002 may be problematic. Such judicial decisions on the law applicable in Wales will however provide precedents for cases in England as well as Wales, and is therefore likely to have a wider on the law than may be realised.

Furthermore, in addition to the fundamental changes to the rationale of property law, there are also a number of more practical, but nonetheless significant consequences for legal

writers and publishers, educators and advisers. For example, the legislation also has implications for tenants who more from one side of the Welsh border to the other, and also for landlords who let out properties in both territories. The legislation also has implications for the charitable and volunteer sectors, many of whom will be charged with advising tenants, and possibly also landlords. This then leads to a need for those who provide training and education, and who produce and publish resources explaining the law to have an awareness of the implications of devolved legislation, not merely within Wales as one part of a wider legal jurisdiction, but rather, because the impact of legislation enacted in one part of the jurisdiction affects the law operative in the jurisdiction as a whole.

The wider constitutional significance of the Renting Homes (Wales) Act 2016

This then leads to considerations regarding the wider constitutional significance of the Renting Homes (Wales) Act 2016. The Act is significant because, unlike many statutes passed by the Senedd since 1999, which have focused on public law that is more readily confined to one territory within a legal jurisdiction, or to niche areas of private law, RHWA is an Act that will impact private law in a very broad and very significant way. As has been discussed in this article, its impact is not merely on Wales, but also on the shape of property law in both England and Wales. Whereas the devolution settlement to Wales has hitherto been capable of operating without the creation of separate legal jurisdiction, the way in which RHWA has the potential to alter many fundamental assumptions in land law makes the need for Wales and England to be separate legal jurisdictions become a more pressing requirement. The current situation where Wales and England is one legal jurisdiction means that disputes arising from the operation of RHWA in Wales is likely to lead to the widening of the principles of estoppel and actual occupation in a way that changes the law in both Wales and

England. Conversely, the rental frameworks operative in England are likely to inhibit the scope to use estoppel and actual occupation as a means to protect tenants in Wales. Furthermore, the relatively clear distinction between leases and licences post *Street v Mountford* may be problematic with regard to the occupation contract in Wales. Given these very different frameworks for rental arrangements in England and Wales therefore, the single legal jurisdiction allows the legal framework in one territory to affect the operation of the legal framework in the other. However, the creation of separate legal jurisdictions for Wales and for England would alleviate the impact of detrimental cross-influence between the two territories and legal regimes.

Conclusion

The RHWA represents a significant milestone in Wales's devolution journey. It is an Act that has a significant impact on housing and those who provide housing and those who avail of that provision. In terms of the number of people who will be affected by this law, its impact is significant, as it formalises legal relationships that may currently be entered into on a de facto basis and with no formality. Nevertheless, as this article has demonstrated, it has a wider significance both for principles of land law in England and Wales, but also for the inter-relationship between the law in Wales and the law in England, and the feasibility of continuation of that relationship within a single jurisdiction. Renting Homes in Wales – changing the legal system of the United Kingdom.

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