

Briefing on reform of the law on damages for unlawful eviction

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- This briefing explains that the law on unlawful evictions in Scotland is poorly enforced and ineffective. Tenants are left without adequate protection from this crime, and victims have limited remedies available to secure compensation.
- It argues that the State is failing to carry out its duties under international human rights law to protect against unlawful evictions.
- The method used to value the damages which a tenant who has been unlawfully evicted can seek from their landlord requires reform. At present the valuation of damages set out in Section 37 of the Housing (Scotland) Act 1988 is the difference between the landlord's interest in the property with and without a sitting tenant. This requires expensive expert evidence from a surveyor and can lead to a nil valuation.
- This briefing proposes the valuation should be changed to a multiple of monthly rent - set at a maximum of 36 times the monthly rent, and a minimum of six times. A proposed amendment to the 1988 Act is set out at the end of this briefing.
- The proposed reform would provide an effective deterrent, improve access to justice and secure appropriate compensation for victims of unlawful evictions.

1. Background

Residential occupiers in Scotland can usually be evicted from their homes only by order of the Sheriff Court or the First-tier Tribunal for Scotland (Housing and Property Chamber). Evicting an occupier without having first obtained such an order has been a criminal offence for more than half a century.

Despite this long-standing, robust legal protection, “the crime of unlawful eviction is virtually ignored in Scotland”,¹ which has led Jonathan Mitchell QC to comment that in the private housing sector in Scotland, “illegal eviction may well be at least as common as eviction through the courts”.²

Unlawful eviction has also long been a civil wrong, for which the occupier may seek damages.³ Claims for damages are rare, and awards yet more so.

2. Criminal law on unlawful evictions

2.1 Criminal offence

The offence of unlawful eviction was first created by the Protection from Eviction Act 1964. The relevant provisions are now found in section 22 of the Rent (Scotland) Act 1984, which provides

¹ Barrie, L. and Paterson, L. (2010). Only a civil matter?. *Journal of the Law Society of Scotland*. [online] Available at: <http://www.journalonline.co.uk/Magazine/55-11/1008870.aspx> [Accessed 30 November 2018].

² Mitchell, J. *Eviction and Rent Arrears A guide to the law in Scotland* (Shelter Scotland, 2003), page 5, para 2.4.

³ See, for example: *Brash v Munro & Hall* (1903) 11 SLT 231.

that “if any person unlawfully deprives the residential occupier of any premises of his occupation of the premises or any part thereof or attempts to do so he shall be guilty of an offence”. These provisions extend to most types of residential tenancy in Scotland, including assured-, short assured-, and private residential tenancies, and crucially protect occupiers other than tenants.

2.2 Enforcement

Anecdotal evidence suggests that unlawfully evicted occupiers who approach the police continue to be told that unlawful eviction is a civil matter.⁴ This has been documented for more than a decade, and is routinely encountered by housing law practitioners.

We submitted freedom of information requests to both Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS), to identify the number of complaints of unlawful eviction, referrals for prosecution, and convictions.

Police Scotland was unable to confirm the number of complaints received. COPFS released partially redacted data, but these provide that it received 153 complaints in the five years to 31 March 2018. It proceeded against between 56 and 59 people in that time, being an average of around 11 per year. Such proceedings resulted in a minimum of three and a maximum of 12 convictions, being a conviction rate of between 5% and 21%.

The average conviction rate in Scotland has remained relatively stable in recent years, at around 86%. This varies between offences – ranging from 39% for rape and attempted rape, to 92% for shoplifting. That the conviction rate for unlawful eviction falls far below that of notoriously challenging sexual offences cases, is cause for serious concern.

Unlawful eviction charges reported to COPFS					
	2013/14	2014/15	2015/16	2016/17	2017/18
Local Authority	*	0	0	5	0
Police Scotland	*	32	46	19	21
Total	35	32	46	19	21

* indicates that COPFS refused disclosure of exact numbers, from which we can infer that the number is between one and four, or would allow calculation of a number which is between one and four.

Outcomes (where prosecution pursued)					
	2013/14	2014/15	2015/16	2016/17	2017/18
Convicted	*	*	*	0	0
Not Convicted	6	*	9	0	0
Ongoing	0	0	*	0	*
No Further Action	*	6	10	5	0
Total	13	12	25	5	*

⁴ L Barrie, ‘It’s a civil matter ...’ a summary report on the unlawful eviction of private sector tenants’ (Govan Law Centre, 2008). Shelter Scotland. Shelter Scotland, ‘Illegal eviction: know your rights campaign briefing’ (Shelter Scotland, 2014).

3. Civil law on unlawful evictions

3.1 Civil damages

Police often fail to investigate reports of unlawful eviction. Local authorities, as the principal regulators of landlords, often fail to take action to remove perpetrators from the market. This leaves victims with little option for justice, but to pursue civil damages.

In addition to the common law, there is a statutory scheme of damages for unlawful eviction contained in section 37 of the Housing (Scotland) Act 1988. The value of such an award is to be calculated as the difference between the landlord's interest in the property with and without a sitting tenant.

During the passage of the 1988 Act through Parliament, the justification given for this method of valuing damages was that it would address the large profits which could be made by a landlord unlawfully evicting their tenant to convert the building into flats for sale. There are a number of problems with this valuation method, not least that landlords may seek to unlawfully evict tenants for several other reasons, including rent arrears, anti-social behaviour, landlord-tenant disputes such as disrepair problems or a landlord or family member wanting to move into the tenancy.

The measure of damages introduced by the 1988 Act was originally a hefty penalty, carefully designed to weed out Rachmanism. It has, however, reduced in potency over time by the dilution of tenants' rights, upward trends in the property market, and an expansion of the private rented sector. For modern tenancies in larger cities, damages will often be nil.

Besides the fundamental problems that the valuation can often result in nil statutory damages being due to the tenant and bear little relation to the harm which has been caused by an unlawful eviction, obtaining a valuation creates additional difficulty for tenants. In order to obtain an objective, authoritative valuation which is necessary to pursue a claim for statutory damages, a tenant must instruct a chartered surveyor to prepare a report. These reports cost several hundred pounds on average, a significant initial outlay which can create a barrier to access to justice for those tenants who are ineligible for legal aid.

The formulation in the 1988 Act is archaic, impractical, and inaccessible; it presents a very real barrier to access to justice and has a limited deterrent effect.

3.2 Civil litigation

The First-tier Tribunal has made an award of damages for unlawful eviction just once in its, admittedly limited, history.⁵ In all other cases, applications for statutory damages have been rejected – either on procedural grounds, or due to specification of damages.⁶ Even before the

⁵ *Baral v Arif and Arif* FTS/HPC/PR/18/2712. The First-tier Tribunal was established on 1 December 2016.

⁶ *Seni v Bardill* FTS/HPC/PR/19/0094 failed because the party litigant applicant failed to substantiate their valuation of the claim; *Adderley v Mearns* FTS/HPC/PR/19/1442 was not admitted because it was "frivolous"; *Ramirez-Stich v Strachan and Strachan* FTS/HPC/PR/18/1506 failed because a surveyor's report produced a nil valuation; *Fraser v Calveley* FTS/HPC/PR/18/0005 failed because the applicant claimed common law damages under the rule for statutory damages; etc.

sheriff courts, cases have been rare, and damages even rarer; the total value of awards in reported cases is £71,000 across four cases.⁷

As mentioned above, a claim for damages as measured by the 1988 Act requires the leading of a surveyor's report. This is entirely at odds with the nature of tribunals, and particularly the overriding objective – to deal with the proceedings justly, including dealing with proceedings in a manner which is proportionate to the complexity of the issues and resources of the parties.

4. International human rights law on unlawful evictions

'Forced evictions' (a broad term which encompasses unlawful evictions in Scots law)⁸ threaten the enjoyment of the right to adequate housing and of respect for a person's home, but may also result in a violation of other associated human rights, including "civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family... and the right to the peaceful enjoyment of possessions".⁹

Moreover, the United Kingdom is party to several international human rights instruments aimed at specific groups.¹⁰ As these may be considered particularly vulnerable to the threat of unlawful eviction, international human rights law demands an additional layer of protection.

4.1 ICESCR 1966 and ICCPR 1966

The human right to adequate housing is recognised in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights 1966. It has been interpreted as requiring protection against forced evictions which have long been recognised as constituting a "gross violation of human rights".¹¹ Security of tenure has been acknowledged as a core element contained within the scope of the right to adequate housing.¹²

An additional right is enshrined in Article 17 of the International Covenant on Civil and Political Rights 1966 which provides that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

⁷ £15,000 in *Mackay v Leask* 1996 Hous. L.R. 94; £33,000 in *Scott v Thomson* 2002 Hous. L.R. 114; £7500 in *Anderson v Cluny Investment Service Ltd* 2004 Hous. LR 102; and £16,000 in *Baral v Arif and Arif* FTS/HPC/PR/18/2712

⁸ Defined as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection", UN CESCR, 'General Comment 7' (1997), para 3.

⁹ UN CESCR, 'General Comment 7' (1997), para 4.

¹⁰ Convention on the Elimination of All Forms of Racial Discrimination, Art.5(e)(iii); Convention on the Elimination of All Forms of Discrimination Against Women, Art. 14(2); Convention on the Rights of the Child, Art. 27; Convention Relating to the Status of Refugees, Art. 21.

¹¹ UNCHR, Resolution 1993/77, paragraph 1.

¹² UN CESCR, 'General Comment No. 4. The Human Right to Adequate Housing' (1991).

4.2 ECHR – Article 8 and A1P1

Article 8 of the European Convention on Human Rights establishes the right to respect for private and family life, home and correspondence. The term ‘home’ does not depend on formal legal ownership of residential property. Rather, factual occupation and sufficiently continuous links are the relevant deciding factors.¹³ Interpretation of the term has extended to instances in which the right to occupy the property has finished¹⁴ or those in which the lease is not in the individual’s name.¹⁵

Article 1 of Protocol 1 (A1P1) establishes the right to property and the entitlement to peaceful enjoyment of possessions. The term ‘possessions’ refers to corporeal and incorporeal property - such as a lease.¹⁶ Where an individual enters into a tenancy, they acquire the entitlement to occupy the relevant property and this entitlement falls within the scope of A1P1.

Article 8 and A1P1 are often claimed concurrently in cases of dispossession or eviction. A1P1 provides protection for tenants in relation to their legal entitlement to occupy and establishes the need for both remedial and enforcement measures to ensure this. Where the individual’s legal entitlement has come to an end, their right to occupy may still be guaranteed by Article 8, under which greater emphasis is placed upon the individual’s identity and self-determination in relation to their right not to be dispossessed.

4.3 Legal obligations applicable to unlawful evictions

States have three key positive duties to protect against unlawful evictions. First, states must ensure that the law is enforced against third parties who carry out unlawful evictions.¹⁷ Second, they must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish unlawful evictions carried out by private persons or bodies.¹⁸ Third, States should review relevant legislation and policies to ensure they are compatible with their obligations and repeal or amend any legislation or policies which are inconsistent with their obligations.¹⁹

In Scotland the law is frequently not enforced against third parties who carry out unlawful evictions and the legislative and policy measures in place are inadequate for the effective prevention of unlawful evictions and punishment of offenders. The relevant legislation and policies require reform to align with international human rights standards.

5. Proposal for reform

Our proposal is a simplified measure of statutory damages for unlawful eviction: a multiple of the monthly rent payable for the property. We recommend that this is set at a maximum of 36 times the monthly rent, and a minimum of six times. Our proposed modification of Section 37 of the Housing (Scotland) Act 1988 is set out in the appendix below.

¹³ *Winterstein and Others v France*, 2701/07 (17 October 2013) at 141.

¹⁴ *McCann v the United Kingdom*, 19009/04 (13 July 2008) at 50.

¹⁵ *Prokopovich v Russia*, 58255/00 (18 January 2005) at 36.

¹⁶ *Stretch v the United Kingdom*, 44277/98 (6 November 2001) at H3.

¹⁷ UN CESCR, ‘General Comment 7’ (1997), para 8.

¹⁸ UN CESCR, ‘General Comment 7’ (1997), para 9. *Bărbulescu v. Romania*, 61496/08 (5 September 2017) at 108. ECHR Article 13 (right to an effective remedy).

¹⁹ UN CESCR, ‘General Comment 7’ (1997), para 9.

This proposal would address the two main problems caused by the current valuation method. First, it would remove the possibility of there being any nil award of damages due to a tenant who has been a victim of an unlawful eviction. This would provide a significant deterrent to landlords and their agents when considering such actions, and would ensure an adequate level of compensation to victims. Second, it would remove the need for a victim to instruct a surveyor's report and the barrier to access to justice which this can present.

Models for damages of this nature can already be found on the statute book. Where a tenant pays a security deposit but the landlord fails to lodge it with an approved escrow-like scheme, the tribunal may award the tenant a sum not exceeding three times the deposit.²⁰ Similarly, where a landlord misleads a tenant into giving up possession, or misleads the tribunal into granting an eviction order – such as by falsely claiming that they intend to sell the property – the tribunal may make a wrongful termination order, including payment to the tenant of a sum not exceeding six times the monthly rent.²¹

Any scheme of damages should reflect the gravity of unlawful eviction, serve as a robust deterrent to landlords, and adequately compensate occupiers for the loss of their home. We recognise that awards at the levels proposed may, at first, appear excessive. However, this level is entirely consistent with awards in decided cases using the formulation prescribed in the 1988 Act. In *Mackay v Leask*,²² an unlawfully evicted tenant was awarded 46 times the monthly rent. In *Anderson v Cluny Investment Service Ltd*,²³ the award was 30 times.

²⁰ Tenancy Deposit Schemes (Scotland) Regulations 2011, ss 9 and 10.

²¹ Private Housing (Tenancies) (Scotland) Act 2016, ss 57, 58, and 59.

²² 1996 Hous LR 94.

²³ 2004 SLT (Sh Ct) 37.

Appendix – proposed modification of Section 37 of the Housing (Scotland) Act 1988

In section 37 of the Housing (Scotland) Act 1988 (the measure of damages)—

(a) Subsections (1), (2), (3), (4), and (5) are repealed;

(b) In place of the repealed subsections, there shall be inserted the following subsections—

“1A The damages referred to in section 36(3) above shall be an amount not less than six months’ rent and not exceeding thirty six months’ rent.

2A In subsection (1A) “rent” means-

(a) the amount that was payable in rent under the tenancy immediately before the residential occupier ceased to occupy the premises in question as his or her residence, or

(b) in a case where two or more persons were joint tenants, the amount mentioned in paragraph (a) divided by the number of persons who were at that time joint tenants under the tenancy.”