

HOUSING LAW IN CONTEXT

This text is primarily an introductory legal text. It aims to provide a brief guide to the most salient aspects of the law as it affects housing in Scotland. It does not cover material related to housing where there are already specialist works and where a distinct niche has been established, such as planning and conveyancing. It seeks to provide a modest amount of historical background to those areas where the development of the law and/or politics sheds some light on the current legal position. This is particularly true in relation to the landlord and tenant relationship, where the multiplicity of tenures and different sets of rights require some explanation. The chapters focus principally on those matters which are justiciable and about which those denied their rights have some kind of opportunity to pursue a remedy. These remedies are principally in the court system, including various tribunals. The text looks back principally to the answers which have been given to issues which have been raised in the conflict between individuals and also between individuals and the State. Definitive answers to specific questions which might arise are notoriously difficult to provide. I am constantly amazed by the difficulties people of good will can get themselves into when dealing with housing. The range and nature of the questions which I have been asked over the years, just as in comparisons between fiction and real life, make me very wary of providing extensive “what if” scenarios and likely answers. To this sense of uncertainty I would also add the changes which I have witnessed in the past 40 years of practice in the area through changes in social attitudes and beliefs about the rights of a whole range of individuals and groups. The difference in the way the majority of citizens now treat non-marital and same-sex relationships, ethnic minority citizens and women has been truly astonishing and hugely welcome. There is, though, much more to housing than the formal legal rules, even allowing for my own limited ability to predict unimagined problems¹ and changes over time.

¹ Former US Defense Secretary Donald Rumsfeld was mocked for his suggestion at a press briefing on 12 February 2002 when he opined “There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there

THE LEGAL STRUGGLE

Scottish Housing in 2010 – La Lotta Continua?

The picture in 2010 is one of great activity in a housing landscape that is the product of previous political belief systems. There is new housing legislation dealing with the social rented sector to absorb and more legislation likely in the near future on the private rented regime. Tenure change within Scotland's housing stock showed a shift in owner occupancy from 36 per cent to 67 per cent between 1982 and 2005.² Social renting went from over 50 per cent to 25 per cent.³ Private renting did not undergo any radical change during this period. Scotland has the smallest private rental sector in Western Europe, compared with Germany at 45 per cent, France at just over 20 per cent and such countries as Greece, Belgium, Sweden, Norway, Denmark and Finland at between 10 and 20 per cent.⁴

House building peaked in the early 1970s at over 40,000 houses but has fallen to some 25,000 houses built per year for some time from 1980 to 2005.⁵ The aim of the Scottish Government in 2007 was to reach 35,000 per year,⁶ with a per capita rate of building "far ahead of that for which the UK Government is aiming in England".⁷ Even before the financial crisis of 2008 and the bank collapses triggered by that of Lehman Brothers,⁸ it had not escaped the attention of politicians that Scottish housing faced structural problems. The size of deposit required by first-time buyers had risen from 12 per cent in 2000 to 35 per cent in 2006⁹ and the earnings-to-property price ratio had shifted considerably across much of Scotland. Greater assistance for first-time buyers¹⁰ has been proposed, with the LIFT scheme discussed in *Firm Foundations* – Low-cost Initiative for First Time Buyers.¹¹ The aim of this was to broaden the range of products available to assist people to achieve and sustain home ownership, including

are things that we now know we don't know. But there are also unknown unknowns. These are things we do not know we don't know." I have considerable sympathy with his intellectual plight, although not his politics in general, and his warmongering in particular.

² Scottish Government (2007), Chart 1 at 6.

³ *Ibid* at 36 – although Chart 1 at 6 shows it at 30%.

⁴ *Ibid*, Chart 8 at 27.

⁵ *Ibid*, Chart 4 at 13.

⁶ *Ibid*, Chart 4 at 13.

⁷ *Ibid* at 22.

⁸ On 15 September 2008, the firm filed for Chapter 11 bankruptcy protection following the massive exodus of most of its clients, drastic losses in its stock, and devaluation of its assets by credit rating agencies. It was the largest bankruptcy in US history.

⁹ Scottish Government (2007), Chart 7 at 21.

¹⁰ Making a neat link from the Small Dwellings Acquisition Act 1899 and its rather similar goals – see Chapter 5.

¹¹ Scottish Government (2007), Chart 4 at 13.

a grant of £2,000.¹² A retreat from the owner occupancy solution can be seen in the policy, at the time of writing, recognising the importance of social housing in the future, with the suggestion that “social housing has a positive future ... far from being an anachronism, it is often the affordable and secure alternative to owner occupation”.¹³ Even private renting has received a boost, albeit with a back-handed compliment that it is suitable for a certain expanding market:

“We want to see more homeless households being offered the benefits of private rented accommodation, where that is appropriate^[14] ... it is sensible to explore this option for tenants who may be more suited to private rented accommodation and would benefit from the flexibility and choice provided by the sector.”¹⁵

The most recent overview of the prospects for housing appears in *Housing: Fresh Thinking, New Ideas*, which locates the issues for housing policy in a future troubled by recession.

The Edge of the World of Practice

Rather different concerns and policies are the principal daily work of those administering housing. This process has been professionalised in a way of which Octavia Hill and the Kyrle Society would, I am sure, be proud.¹⁶ Those involved in the day-to-day management of housing in the social rented sector are seldom concerned with the legality of their actions. That is taken for granted and ingrained in the policies and structures of their organisations. Operating housing access policies which do not discriminate on the grounds of ethnicity or disability or sexuality has become a standard part of a properly run housing provider's service, whether in the private or the social sector. As we will see in relation to the role of the Scottish Housing Regulator, the latter has little option but to operate at the highest levels of professionalism or find its organisations subject to “improvement plans” or the imposition of stringent management controls.

At the strategic level, issues such as housing renewal and regeneration are part of the remit of both government and social landlords. From central government too come such issues as the future shape of existing houses and such matters as stock transfer. Putting into effect pro-active policies on homelessness and community care are matters which only tangentially have been part of the world of housing lawyers. They are,

¹² Scottish Government (2007), Chart 4 at 13.

¹³ *Ibid* at 40.

¹⁴ *Ibid* at 28.

¹⁵ *Ibid* at 129.

¹⁶ Robson (1979).

however, a crucial part of the education and daily tasks of housing practitioners. In that respect this book does not deal with these matters as being beyond the normal reach of the lawyer's brief. This is an issue of judgement of immediate relevance and I trust that the failure to address such issues as property management techniques and funding social housing will not be seen as too insular. There are excellent publications and institutions, such as the Scottish Chartered Institute of Housing and the Scottish Federation of Housing Associations, which are able to deal with such matters with far greater authority and clarity than a simple legal functionary could muster. By the same token, rural development and the need for access to employment, schools and other services do not feature significantly in the legal perspective. Nor does the value of having balanced or sustainable communities make any kind of appearance in a study of the legal framework for housing.¹⁷ The relationship of health and housing is a rather trickier issue. There are times where the inadequacy of housing provision has health outcomes which are indeed part of the lawyer's remit.¹⁸ There is, though, a difference between this role and the concerns of housing and health professionals to develop policies which operate in a preventative manner. So much so that, for instance, one impressive collection of essays looking at health and housing and highlights the need for housing opportunities for people with health needs.¹⁹ This is of interest to lawyers in the sense that it may provide evidence of practical problems with legislation's limitations or good practice in some kind of judicial review in the future. For the present, though, it remains outwith our remit, although the lines are blurred and shifting.

If there are differences between "legality", "standard practice" and "best practice", then these are frequently hard to distinguish. Housing practitioners and those who run courses, such as the CIH, are concerned to encourage the latter. From a point of view of strict demarcation of tasks, the law limits itself to the question of "legality", conscious that what amounts to legality is, in fact, often what is simply "standard practice". This kind of approach has sometimes informed decision on the obligations of local authorities to their tenants for repairs where refurbishment is planned.²⁰ Sometimes, as we can see in the discussion of the *Mitchell* case,²¹ the legality line is drawn well short of "standard practice". This is one reason why lawyers infuriate ordinary people by making a distinction between what one must do and what one ought to do: the legal and the moral.

¹⁷ Murie (1985).

¹⁸ *Morrison v Stirling District Council* 1996 Hous LR 6.

¹⁹ Smith, Knill-Jones and McGuckin (eds) (1991).

²⁰ *McLaughlin v Renfrew District Council*, unreported, 4 November 1986.

²¹ *Mitchell v Glasgow City Council* [2009] 1 AC 874.

MAKING SENSE OF THE REALM OF THEORY

There is also considerable interest in relating the narrow concerns of housing lawyers and housing professionals to the wider world of politics and society. How does housing fit into the broader concerns of urban development and the rise of the city? Some of the theory of those who sought to relate housing to broader social and political theory was concerned with concrete political debates of the time. Thus, the contribution of Friedrich Engels in *The Housing Question* is located in his debate with Proudhon on the nature of property. It is centred on his analysis of how capitalism exploits the waged worker and such secondary effects as the shortage of housing.²² Interestingly, it notes the difference between surplus value and workers' relationships to the capitalist and the notion of the fair price payable by tenants. These debates can be mined for the consistency of the conflicts between capital and labour, and owner and tenants, and offer insights to inform political struggle rather than assist day-to-day practice.

The shift of emphasis from the political arena to the academy is reflected in the shift of focus to "urban studies". The "production, consumption and exchange of housing" has been described as being "at the core of urban studies".²³ While housing does indeed play a major role in urban studies, it sits alongside other concerns which are less central in the first two aspects of housing Forest and Williams identify. Issues of social segregation and race, which we have touched on below, are relevant principally in relation to housing exchange. While all social and economic matters are, to an extent, inter-dependent, transport and issues of crime have been traditionally rather less central in housing policy concerns. The key trends and developments which shaped housing in the period since the Second World War, as identified by Forrest and Williams, include the transition from private landlordism to individualised home ownership. In this perspective, mass state provision is seen as an "abnormal" intervention.²⁴ However, the success of home ownership, as is noted below, is by no means assured. It depends on stability and predictability in relation to labour conditions and income. This interdependency between the housing market and the rest of the economy has consequences which have been exposed in the recessions and house price slumps of the early 1990s and from 2008 in the United Kingdom and across the developed world.

Those who wrote about these topics in the 1970s were clearly not used to speaking with simple lawyers. Their language was complex and their concepts not always easy to grasp. David Harvey, in his intriguingly

²² Engels (1872).

²³ Forrest and Williams (2001).

²⁴ Harloe (1995).

titled *Social Justice and the City*,²⁵ explores the contribution of grand theory to how the city can be understood. Rent and landlords' goals are discussed in terms of housing as a means of exchange rather than rooted in the concrete experience of specific tenants.²⁶ Hence, the overarching theoretical formulation he adopts gives us a way of conceptualising the relationship rather than an insight into the struggles of tenants to effect changes in their lives. His insights, like those of Engels, provide us with a link to solutions and struggles of the past, such as 19th-century Paris,²⁷ or contemporary ones such as Baltimore.²⁸ Manuel Castells has worked in a similar vein to Harvey, with theory and the city.²⁹

The politics of these writers is inspirational in the way it links the grand themes of politics with the complexity of studying urban space. In practical terms, resisting the changes brought about by changes in the Rent Acts or securing decent houses for those displaced by short-sighted urban development³⁰ seemed to benefit less from an in-depth understanding of notions of the production of space than the issues raised by those like Alinsky³¹ and Piven and Cloward³² in advocating the importance of agency and political engagement.

A newer breed of writers, however, has put this earlier work in the shade. The approach of the contributors to *Law and the City* and the thrust and style of the essays encountered in this text provide a perspective that is frankly surreal.³³ They look at such issues as law's spatiality and the city's legal dreams. Although mocking such work may sound like the worst kind of anti-intellectualism, it does make one yearn for the days when Howard Becker could pose to sociologists the question "Whose Side are We On?"³⁴ That question remains as relevant today as it did when asked and the answer does not appear clear from the pages of post-modern urban theory.

This, then, is a flavour of the context within which the complex and convoluted regulation of housing in Scotland now operates. If you were designing a system of legal regulation, you probably would not start from here. It is, though, vital to appreciate that the anomalies and weaknesses of the system stem from the struggles of the past and the successes and failures of groups to realise the dream of decent housing for all in a society in which access to jobs, capital and opportunities continues to be

²⁵ Harvey (1973).

²⁶ *Ibid* at 164.

²⁷ Harvey (1985).

²⁸ Harvey (2000).

²⁹ Castells (1977) and (1978).

³⁰ Jacobs (1975).

³¹ Alinsky (1971).

³² Piven and Cloward (1971).

³³ Philippopoulos-Mihalopoulos (2007).

³⁴ Becker (1966).

profoundly unequal and is not likely to get any fairer in the immediate future. However, the point is not to become preoccupied with excessive analysis of how things have reached the state they are in but rather how to change them. Law may from time to time have a role to play in the struggle. Its development and reification certainly provide a valuable key to understanding why the few continue to have so much and the many so little.

