# Opinion of Counsel

## For ARLA Propertymark

## Re: Assured tenancy transitional provisions

*Introduction*

I refer to agents' email of 29 April, which raises an issue in relation to the transitional provisions concerning short assured tenancies ("SATs"), following the coming into force of the Private Housing (Tenancies) (Scotland) Act 2016. The email states:

> The transitional provisions of the 2016 Act are set out in schedule 5 (in particular the amendment of section 32 of the 1988 Act). The wording was such that, at the time, there was a concern that the effect of same was to mean that, when an existing SAT came up for renewal on or after 1/12/17, only where an existing SAT was continued under Tacit Relocation would a SAT remain a SAT rather than, by default, converting to a PRT on renewal. That led to the Scottish Government issuing savings provisions. The original savings provisions (SSI 2017 293) were revoked as at 1st December 2017 and new savings provisions took effect (SSI 2017 346) which are in near identical terms. The issue focusses around the wording of Reg 6(c) of SSI 2017 346 and whether that only links back to SATs that fit the requirements of reg 6(a) and (b).
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> The issues are and assuming the requirements of s32(3) are met:
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> a. How will SATs that are renewed by operation of either a contractual rolling term (eg month to month after the initial term) or by way of a separate contractual extension (for example another 6 months) be treated? and
> b. In particular, do the savings provisions only allow the SAT to be extended on **one** occasion only after 1/12/17 by either a rolling contract or a specific contractual extension?
>
> The Scottish Government guidance is helpfully vague although the SG has confirmed in writing to ARLAPropertymark that any existing SAT will continue indefinitely until brought to an end by either party and not just on one occasion.

I am asked to discuss issues a) and b) in this opinion.

*Transitional provisions - general*

Under section 12(1A) of the 1988 Act, a tenancy created on or after 1 December 2017 cannot be an assured tenancy.[1] Conversely, a tenancy which is an assured tenancy (including a short assured tenancy) under the 1988 Act, cannot be a PRT.[2]

In terms of section 75 of the 2016 Act, schedule 5 makes transitional provisions concerning tenancies which were assured tenancies, on the day when the Act came into force. As discussed below, an attempt was made to clarify schedule 5 paragraph 2, which concerns short assured tenancies, with a further savings provision being made in the commencement order which brought the Act into force. Unfortunately, this seems to have had the opposite effect, and the overall scheme for transition, particularly as regards short assured tenancies, is confused.

The problem relates, in particular, to paragraph 2 of schedule 5, which is headed: "No new short assured tenancies". For present purposes, the significant part of this paragraph is the repeal of various parts of subsection (3) of section 32 to the 1988 Act.[3] For explanatory purposes, this subsection is shown with repealed parts struck out:

> **Short assured tenancies**
> …
> (3) Subject to subsection (4) below, if, at the ish of a short assured tenancy—
> (a) it continues by tacit relocation; *or*
> ~~(b) a new contractual tenancy of the same or substantially the same premises comes into being under which the landlord and the tenant are the same as at that ish,~~
> the continued tenancy ~~or, as the case may be, the new contractual tenancy~~ shall be a short assured tenancy, whether or not it fulfils the conditions in paragraphs (a) and (b) of subsection (1) above.

[1] Subject to the saving provision discussed below.
[2] Under sch 1 para 21(d) of the 2016 Act.
[3] Para 2 of sch 5 also repeals references to new tenancies in s 32(4) of the 1988 Act; however, the saving provision discussed in the main text also applies to this repeal.

Before discussing the effect of the deletions, and the subsequent saving provision, I find it convenient to say something about the effect of section 32(3), as originally enacted.

*Section 32(3)*

Even before it was amended by the 2016 Act, the application of section 32(3) was not straightforward. The apparent aim of the provision was that the parties could prolong a short assured tenancy by tacit relocation, or enter into a new agreement for the same property, and the continued (or new) agreement would still be a short assured tenancy, even if it was for less than 6 months, and without the necessity of the landlord serving another AT5. This is what is meant by the words "whether or not it fulfils the conditions in paragraphs (a) and (b) of subsection (1) above."

That made sense in relation to the new tenancies described by section 32(3)(b). However, one might question whether it was necessary in relation to a tenancy which is continued by tacit relocation. If the term of a short assured tenancy was say, from 1 March to 1 September 2016, then the effect of tacit relocation would be to extend it for another six months, from 1 September 2016 to 1 March 2017.[4] Therefore, on any view, it would still be a tenancy for a term of "not less than six months". Also, there would be no new tenancy created,[5] so there is no need to serve another AT5, in any event: under section 32(2)(b), an AT5 is served before the "creation of the assured tenancy", which in this case would have been before 1 March 2016.

For that reason, it has always been my view that section 32(3)(a) is superfluous. Even without it, a short assured tenancy of the type described above would still have continued to be a short

[4] Because the effect of tacit relocation, in the case of a tenancy for a period of less than one year, is to prolong the tenancy for the same period.

[5] See the discussion of the historical development of tacit relocation in the SLC's recent "Discussion Paper on Aspects of Leases: Termination", from para 2.4, in which the authors summarise the effect of tacit relocation thus: "It appears now to be accepted practice that tacit relocation is a prolongation, or a continuation or extension of the original lease. Under the doctrine of tacit relocation, the lease then continues on the same terms as before, except for duration. If the original lease is for more than one year it continues for a further year and then from year to year until appropriate notice of termination is given. Regardless of the length of its original duration, the extension by tacit relocation is for only a year. If the lease is for less than one year, it continues for the same period as the original lease and so on successively until appropriate notice is given."

assured tenancy, if it continued on 1 September 2016. Service of another AT5 would be inapt in any event, because that would suggest the creation of a new tenancy.

By contrast, section 32(3)(b) is a significant provision, because it enables the parties to make a new agreement, which would also be a short assured assured tenancy, without observing the requirements of section 32(1).

*SATs continuing by express agreement*

Section 32(3) refers to two situations (tacit relocation and new tenancy) in which the same parties may continue their status as landlord and tenant under a short assured tenancy. However, it does not refer to the fairly common practice of including in a lease, which was to be a short assured tenancy, a provision by which the parties contract out of tacit relocation, by a stipulation that following the initial term (which was invariably for the statutory minimum of six months) the tenancy would thereafter continue on a monthly or bi-monthly term.

In my view, that sort of arrangement did not amount to "tacit relocation". That term is not defined in the Act. It therefore requires to be accorded its technical meaning, in Scots Law.[6] The whole point of the agreement I am describing is that parties contract out of tacit relocation, by providing for a shorter term than the original six months.[7]

What, then, was the status of such agreements, in relation to section 32 of the Act?

Let us say that parties entered into an agreement for a term from 1 March to 1 September 2016, and monthly thereafter. When it was continuing, on 1 September, 1 October etc, it was still, in my view, a short assured tenancy, in relation to which the requirements of section 32(1) had been met. I say that for two reasons.

[6] See the previous note.

[7] However, let us say I am wrong in that view, and in the case of an initial six month term, the monthly prolongations thereafter are "tacit relocation". It that case, the lease will relocate and continue to be subject to section 32(3)(a), which is not repealed by schedule 5 of the 2016 Act.

Firstly, the original tenancy was still ongoing. It was not the case that a new tenancy was being created, on the first day of every month after 1 September 2016. Therefore, the requirement for service of an AT5, before the creation of the tenancy, was met before 1 March 2016.

Second, the requirement, under section 32(1)(a), that the tenancy "is for a term of not less than six months" is met by an agreed term from 1 March to 1 September 2016, and monthly thereafter. That is in accord with the decision of the sheriff in *Cavriani v Robinson*,[8] and the decision of Court of Appeal in *Goodman v Evely*.[9] It is also consistent with *Wishaw and District Housing Association Ltd v Neary*,[10] the only case in which section 32 has been considered by the Inner House.[11]

*Section 32(3) as amended, and the saving provision*

As a result of schedule 5 paragraph 2 of the 2016 Act, section 32(3) is now subject to the deletions indicated at page 2 above. It was apparently thought appropriate to remove the references to new tenancies from subsection (3), because new agreements (after 1 December 2017) were to be PRTs under the 2016 Act.

However, the scope of the repeal, and the insertion of section 12(1A), seem to have caused concern as to the status of short assured tenancies as at the date of commencement of the 2016 Act, and whether they would still be able to continue. This prompted the Scottish Ministers to include, in a commencement order bringing the Act into force, a saving provision which sought to limit the effect of paragraph 2 of schedule 5 ("No new short assured tenancies").

[8] 2002 HousLR 67

[9] [2002] HLR 53. The requirement in the English legislation is that the tenancy be "a fixed term tenancy granted for a term certain of not less than six months". In that case the condition was met by a tenancy which was for one year and thereafter month to month.

[10] 2004 SC 463.

[11] In that case, the tenant argued that the existence of a break clause had the effect of preventing the tenancy from being a short assured tenancy, because it was not for a guaranteed minimum period of six months. That argument was rejected by the court. For present purposes, note that the term of the tenancy as to duration stated: "The Association will let and the Tenant take possession of the house under a short assured tenancy commencing 15th day of September on 2001 (the date of entry) until 20th day of March on 2002 *and monthly thereafter*." There was no suggestion, in the decision, that the words "and monthly thereafter" had the effect of removing the tenancy's short assured status.

That, however, was apparently thought to be insufficient, and a new commencement order was prepared, which attempted to clarify the position.[12]

Before considering the saving provision in the commencement order, I should emphasise my view that, absent the saving provision, the deletions made to section 32(3) by schedule 5 of the Act would only affect new agreements made after 1 December 2017. I have so far discussed short assured tenancies in which: (a) the parties enter into a new agreement; (b) the tenancy is continued by tacit relocation; (c) the tenancy continues for a shorter period, under some express provision of the parties' contract. The amendments made by schedule 5 to the 2016 Act only affect the first case. Therefore, if the 2016 Act had come into force on 1 December 2017, without any saving provision, then the continuation of short assured tenancies after that date, in cases (b) and (c), would not, in my view, have been affected. Those tenancies would still continue, and would still be short assured tenancies.

*The saving provision*

The Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No. 3, Amendment, Saving Provision and Revocation) Regulations 2017 includes the following regulation:

> **6. Saving provision**
> Despite the amendments made by section 75 and paragraphs 1, 2 and 3 of schedule 5 of the 2016 Act, sections 12, 32 and 33 of the 1988 Act have effect on and after 1st December 2017 as they had effect immediately before that date but only in relation to—
> (a) a short assured tenancy (within the meaning given in section 32(1) of the 1988 Act) which was created before 1st December 2017 and continues in existence on that date;

[12] There were three commencement in relation to the 2016 Act. No. 1 (SSI 2016/298) brought in a small number of provisions, but only for the purposes of making regulations. No. 2 (SSI 2017/293) was intended to bring the rest of the Act into force. However, that Order was entirely repealed by the Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No. 3, Amendment, Saving Provision and Revocation) Regulations 2017 (SSI 2017/346), which included the saving provision quoted in the main text. This Order was accompanied by a Policy Note, which is quoted below. Order No. 2 contained a very similar saving provision, but which was restricted to the effect of para 2 of sch 5, on ss 32 and 33 of the Act. The provision quoted in the main text is wider in scope, covering the effect of paras 1, 2 and 3 of sch 5, not only on s 32 and 33, but also s 12.

> (b) a new contractual tenancy (within the meaning given in section 32(3)(b) of the 1988 Act) which came into being before 1st December 2017 and continues in existence on that date; and
> (c) a new contractual tenancy (within the meaning given in section 32(3)(b) of the 1988 Act) which comes into being on or after 1st December 2017 at the ish of a short assured tenancy which is a short assured tenancy in a case mentioned in paragraph (a) or (b).

Note that, although I have thusfar been discussing section 32(3), the saving provision applies to all of section 32, and also to sections 12 and 33.

A "saving" provision is "a provision the intention of which is to narrow the effect of the enactment to which it refers so as to preserve some existing legal rule or right from its operation".[13] However, savings provisions are often included in legislation "by way of reassurance, for avoidance of doubt or from abundance of caution".[14]

In attempting to make sense of regulation 6 (which is not easy), it is also necessary to note the following statement, which appeared in the Policy Note which accompanied the Commencement Order:

> The saving provision provides that any short assured tenancy which began before 1st December 2017 can continue to operate after that date, regardless of whether or not that short assured tenancy is continuing by tacit relocation or renewing at regular intervals (under section 32(3)(a) or (b) of the Housing (Scotland) Act 1988, respectively). This saving provision is required in order to meet the Scottish Government's stated aim of introducing a new private residential tenancy for future lets. It was not the Scottish Government's intention that the new tenancy would affect those short assured tenancies which are already in operation on the date of commencement.

So, if there was any doubt as to the interpretation of the transitional and savings provisions, one would have to favour the interpretation which results in existing short assured tenancies retaining their status.

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[13] Bennion, *Statutory Interpretation* 4th ed, section 243.
[14] *Ealing LBC v Race Relations Board* [1972] AC 342, at 36, per Lord Simon of Glaisdale.

For the reasons I have already stated, I do not think that the transitional provision, absent the savings provision, had any effect on the status of short assured tenancies continuing after 1 December 2017. These tenancies are short assured tenancies, which is a form of assured tenancy, which cannot therefore be PRTs, given schedule 1 paragraph 21(d) of the 2016 Act. Therefore, as regards those tenancies, I would say that the saving provision is "by way of reassurance".

What is the effect of the saving provision on new tenancies created after 1 December 2017?

*The parties enter into a new agreement after 1 December 2017*

It is suggested that the effect of the saving provision is that a new contractual tenancy created after 1 December 2017, will be a short assured tenancy under the 1988 Act, subject to the following conditions:

- it must "come into being" at the ish of an existing short assured tenancy;[15]
- it must be "of the same or substantially the same premises";[16]
- the new tenancy must have the same landlord and tenant.[17]

In these circumstances, the effect of the saving provision is that section 12 would apply as it did before the 2016 Act came into force (i.e. without subsection (1A)). So, the new tenancy would be an assured tenancy. Because the effect of section 32(3)(b) of the 1988 on such a tenancy is also preserved by the saving provision, it would also not be necessary for the new

[15] Presumably "at the ish" means that the new tenancy must begin when the old tenancy ends. This would happen where the old tenancy ends, and the new tenancy begins, on the same day. It could also happen where the old tenancy ends on, say the last minute of 1 September, and the new tenancy begins on the first minute of 2 September. Otherwise, a new tenancy which comes into being on a later date is not covered by the saving provision. In that case, the amendment to section 12 by the addition of subsection (1A) would operate, and the tenancy could not be an assured tenancy or a short assured tenancy.

[16] Because in the saving provision, reg 6(c) only applies to "a new contractual tenancy (*within the meaning given in section 32(3)(b) of the 1988 Act*)".

[17] Ditto.

tenancy to be for a period of not less than 6 months, nor would it be necessary for the landlord to serve an AT5.

*Agents' question (a)*

This is:

> How will SATs that are renewed by operation of either a contractual rolling term (eg month to month after the initial term) or by way of a separate contractual extension (for example another 6 months) be treated?

If the effect of the relevant clause is that, at the end of the current contractual duration, the existing tenancy continues or is prolonged, then there is no new tenancy. The tenancy retains its existing short assured status. If this is "tacit relocation", then section 32(3)(a), which was never repealed, applies, and there is no need to serve another AT5. Even if it is not "tacit relocation", the tenancy still fulfils the requirements of section 32(1) for the reasons already stated.

If the effect of the relevant clause is that, at the end of the current contractual duration, a new tenancy immediately comes into operation, then the new tenancy will be an assured tenancy, so long as it is of the same or substantially the same premises, and the landlord and tenant remain the same. In that case section 12(1A) does not apply, because of the saving provision. That assured tenancy will be a short assured tenancy, because section 32(3)(b) will continue to apply, again because of the saving provision. See the previous page.

*Agents' question (b)*

This is:

> Do the savings provisions only allow the SAT to be extended on **one** occasion only after 1/12/17 by either a rolling contract or a specific contractual extension?

Given the views I have expressed, I do not see any reason why that would be the case.

*Concluding remarks*

I hope that answers agents' questions. I have nothing further to add.

**Adrian Stalker**
**Advocates Library**
**Parliament House**
**Edinburgh**
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