



# Civil Partnership Act 2004

## 2004 CHAPTER 33

### PART 3

#### CIVIL PARTNERSHIP: SCOTLAND

### CHAPTER 3

#### OCCUPANCY RIGHTS AND TENANCIES

#### *Occupancy rights*

#### **101 Occupancy rights**

- (1) Where, apart from the provisions of this Chapter, one civil partner in a civil partnership is entitled, or permitted by a third party, to occupy a family home of the civil partnership (that civil partner being referred in this Chapter as an “entitled partner”) and the other civil partner is not so entitled or permitted (a “non-entitled partner”), the non-entitled partner has, subject to the provisions of this Chapter, the following rights—
  - (a) if in occupation, a right to continue to occupy the family home;
  - (b) if not in occupation, a right to enter into and occupy the family home.
- (2) The rights conferred by subsection (1) to continue to occupy or, as the case may be, to enter and occupy the family home include, without prejudice to their generality, the right to do so together with any child of the family.
- (3) In subsection (1), an “entitled partner” includes a civil partner who is entitled, or permitted by a third party, to occupy the family home along with an individual who is not the other civil partner only if that individual has waived a right of occupation in favour of the civil partner so entitled or permitted.

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- (4) If the entitled partner refuses to allow the non-entitled partner to exercise the right conferred by subsection (1)(b), the non-entitled partner may exercise that right only with the leave of the Court of Session or the sheriff under section 103(3) or (4).
- (5) A non-entitled partner may renounce in writing the rights mentioned in paragraphs (a) and (b) of subsection (1) only—
  - (a) in a particular family home, or
  - (b) in a particular property which it is intended by the civil partners will become their family home.
- (6) A renunciation under subsection (5) has effect only if, at the time of making the renunciation, the non-entitled partner swears or affirms before a notary public that it is made freely and without coercion of any kind.
- (7) In this Part—
  - “child of the family” means a child under the age of 16 years who has been accepted by both civil partners as a child of the family, and
  - “family” means the civil partners in the civil partnership, together with any child so accepted by them.
- (8) In subsection (6), “notary public” includes any person duly authorised, by the law of the country other than Scotland in which the swearing or affirmation takes place, to administer oaths or receive affirmations in that other country.

## **102 Occupancy: subsidiary and consequential rights**

- (1) For the purpose of securing the occupancy rights of a non-entitled partner, that partner is, in relation to a family home, entitled without the consent of the entitled partner—
  - (a) to make any payment due by the entitled partner in respect of rent, rates, secured loan instalments, interest or other outgoings (not being outgoings on repairs or improvements);
  - (b) to perform any other obligation incumbent on the entitled partner (not being an obligation in respect of non-essential repairs or improvements);
  - (c) to enforce performance of an obligation by a third party which that third party has undertaken to the entitled partner to the extent that the entitled partner may enforce such performance;
  - (d) to carry out such essential repairs as the entitled partner may carry out;
  - (e) to carry out such non-essential repairs or improvements as may be authorised by an order of the court, being such repairs or improvements as the entitled partner may carry out and which the court considers to be appropriate for the reasonable enjoyment of the occupancy rights;
  - (f) to take such other steps, for the purpose of protecting the occupancy rights of the non-entitled partner, as the entitled partner may take to protect the occupancy rights of the entitled partner.
- (2) Any payment made under subsection (1)(a) or any obligation performed under subsection (1)(b) has effect in relation to the rights of a third party as if the payment were made or the obligation were performed by the entitled partner; and the performance of an obligation which has been enforced under subsection (1)(c) has effect as if it had been enforced by the entitled partner.

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- (3) Where there is an entitled and a non-entitled partner, the court, on the application of either of them, may, having regard in particular to the respective financial circumstances of the partners, make an order apportioning expenditure incurred or to be incurred by either partner—
  - (a) without the consent of the other partner, on any of the items mentioned in paragraphs (a) and (d) of subsection (1);
  - (b) with the consent of the other partner, on anything relating to a family home.
- (4) Where both partners are entitled, or permitted by a third party, to occupy a family home—
  - (a) either partner is entitled, without the consent of the other partner, to carry out such non-essential repairs or improvements as may be authorised by an order of the court, being such repairs or improvements as the court considers to be appropriate for the reasonable enjoyment of the occupancy rights;
  - (b) the court, on the application of either partner, may, having regard in particular to the respective financial circumstances of the partners, make an order apportioning expenditure incurred or to be incurred by either partner, with or without the consent of the other partner, on anything relating to the family home.
- (5) Where one partner (“A”) owns or hires, or is acquiring under a hire-purchase or conditional sale agreement, furniture and plenishings in a family home—
  - (a) the other partner may, without the consent of A—
    - (i) make any payment due by A which is necessary, or take any other step which A is entitled to take, to secure the possession or use of any such furniture and plenishings (and any such payment is to have effect in relation to the rights of a third party as if it were made by A), or
    - (ii) carry out such essential repairs to the furniture and plenishings as A is entitled to carry out;
  - (b) the court, on the application of either partner, may, having regard in particular to the respective financial circumstances of the partners, make an order apportioning expenditure incurred or to be incurred by either partner—
    - (i) without the consent of the other partner, in making payments under a hire, hire-purchase or conditional sale agreement, or in paying interest charges in respect of the furniture and plenishings, or in carrying out essential repairs to the furniture and plenishings, or
    - (ii) with the consent of the other partner, on anything relating to the furniture or plenishings.
- (6) An order under subsection (3), (4)(b) or (5)(b) may require one partner to make a payment to the other partner in implementation of the apportionment.
- (7) Any application under subsection (3), (4)(b) or (5)(b) is to be made within 5 years after the date on which any payment in respect of such incurred expenditure was made.
- (8) Where—
  - (a) the entitled partner is a tenant of a family home,
  - (b) possession of it is necessary in order to continue the tenancy, and
  - (c) the entitled partner abandons such possession,the tenancy is continued by such possession by the non-entitled partner.
- (9) In this section “improvements” includes alterations and enlargement.

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### **103 Regulation by court of rights of occupancy of family home**

- (1) Where there is an entitled and a non-entitled partner, or where both partners are entitled, or permitted by a third party, to occupy a family home, either partner may apply to the court for an order—
  - (a) declaring the occupancy rights of the applicant partner;
  - (b) enforcing the occupancy rights of the applicant partner;
  - (c) restricting the occupancy rights of the non-applicant partner;
  - (d) regulating the exercise by either partner of his or her occupancy rights;
  - (e) protecting the occupancy rights of the applicant partner in relation to the other partner.
  
- (2) Where one partner owns or hires, or is acquiring under a hire-purchase or conditional sale agreement, furniture and plenishings in a family home and the other partner has occupancy rights in that home, that other person may apply to the court for an order granting to the applicant the possession or use in the family home of any such furniture and plenishings; but, subject to section 102, an order under this subsection does not prejudice the rights of any third party in relation to the non-performance of any obligation under such hire-purchase or conditional sale agreement.
  
- (3) The court is to grant an application under subsection (1)(a) if it appears to the court that the application relates to a family home; and, on an application under any of paragraphs (b) to (e) of subsection (1) or under subsection (2), the court may make such order relating to the application as appears to it to be just and reasonable having regard to all the circumstances of the case including—
  - (a) the conduct of the partners, whether in relation to each other or otherwise,
  - (b) the respective needs and financial resources of the partners,
  - (c) the needs of any child of the family,
  - (d) the extent (if any) to which—
    - (i) the family home, and
    - (ii) in relation only to an order under subsection (2), any item of furniture and plenishings referred to in that subsection, is used in connection with a trade, business or profession of either partner, and
  - (e) whether the entitled partner offers or has offered to make available to the non-entitled partner any suitable alternative accommodation.
  
- (4) Pending the making of an order under subsection (3), the court, on the application of either partner, may make such interim order as it considers necessary or expedient in relation to—
  - (a) the residence of either partner in the home to which the application relates,
  - (b) the personal effects of either partner or of any child of the family, or
  - (c) the furniture and plenishings,
 but an interim order may be made only if the non-applicant partner has been afforded an opportunity of being heard by or represented before the court.
  
- (5) The court is not to make an order under subsection (3) or (4) if it appears that the effect of the order would be to exclude the non-applicant partner from the family home.
  
- (6) If the court makes an order under subsection (3) or (4) which requires the delivery to one partner of anything which has been left in or removed from the family home, it may also grant a warrant authorising a messenger-at-arms or sheriff officer to enter the family home or other premises occupied by the other partner and to search for and

take possession of the thing required to be delivered, (if need be by opening shut and lockfast places) and to deliver the thing in accordance with the order.

- (7) A warrant granted under subsection (6) is to be executed only after expiry of such period as the court is to specify in the order for delivery.
- (8) Where it appears to the court—
- (a) on the application of a non-entitled partner, that the applicant has suffered a loss of occupancy rights or that the quality of the applicant’s occupation of a family home has been impaired, or
  - (b) on the application of a partner who has been given the possession or use of furniture and plenishings by virtue of an order under subsection (3), that the applicant has suffered a loss of such possession or use or that the quality of the applicant’s possession or use of the furniture and plenishings has been impaired,

in consequence of any act or default on the part of the other partner which was intended to result in such loss or impairment, it may order that other partner to pay to the applicant such compensation as it considers just and reasonable in respect of that loss or impairment.

- (9) A partner may renounce in writing the right to apply under subsection (2) for the possession or use of any item of furniture and plenishings.

#### **104 Exclusion orders**

- (1) Where there is an entitled and non-entitled partner, or where both partners are entitled, or permitted by a third party, to occupy a family home, either partner, whether or not that partner is in occupation at the time of the application, may apply to the court for an order (in this Chapter referred to as “an exclusion order”) suspending the occupancy rights of the other partner (“the non-applicant partner”) in a family home.
- (2) Subject to subsection (3), the court is to make an exclusion order if it appears to it that to do so is necessary for the protection of the applicant or any child of the family from any conduct, or threatened or reasonably apprehended conduct, of the non-applicant partner which is or would be injurious to the physical or mental health of the applicant or child.
- (3) The court is not to make an exclusion order if it appears to it that to do so would be unjustified or unreasonable—
- (a) having regard to all the circumstances of the case including the matters specified in paragraphs (a) to (e) of section 103(3), and
  - (b) where the family home—
    - (i) is, or is part of, an agricultural holding within the meaning of section 1 of the Agricultural Holdings (Scotland) Act 1991 (c. 55), or
    - (ii) is let, or is a home in respect of which possession is given, to the non-applicant partner or to both partners by an employer as an incident of employment,having regard to any requirement that the non-applicant partner, or, as the case may be, both partners must reside in the family home and to the likely consequences of the exclusion of the non-applicant partner from the family home.
- (4) In making an exclusion order the court is, on the application of the applicant partner—

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- (a) to grant a warrant for the summary ejection of the non-applicant partner from the family home unless the non-applicant partner satisfies the court that it is unnecessary for it to grant such a remedy,
  - (b) to grant an interdict prohibiting the non-applicant partner from entering the family home without the express permission of the applicant, and
  - (c) to grant an interdict prohibiting the removal by the non-applicant partner, except with the written consent of the applicant or by a further order of the court, of any furniture and plenishings in the family home unless the non-applicant partner satisfies the court that it is unnecessary for it to grant such a remedy.
- (5) In making an exclusion order the court may—
- (a) grant an interdict prohibiting the non-applicant partner from entering or remaining in a specified area in the vicinity of the family home;
  - (b) where the warrant for the summary ejection of the non-applicant partner has been granted in that partner's absence, give directions as to the preservation of that partner's goods and effects which remain in the family home;
  - (c) on the application of either partner, make the exclusion order or the warrant or interdict mentioned in paragraph (a), (b) or (c) of subsection (4) or paragraph (a) of this subsection subject to such terms and conditions as the court may prescribe;
  - (d) on the application of either partner, make such other order as it considers necessary for the proper enforcement of an order made under subsection (4) or paragraph (a), (b) or (c).
- (6) Pending the making of an exclusion order, the court may, on the application of the applicant partner, make an interim order suspending the occupancy rights of the non-applicant partner in the family home to which the application for the exclusion order relates; and subsections (4) and (5) apply to such an interim order as they apply to an exclusion order.
- (7) But an interim order may be made only if the non-applicant partner has been afforded an opportunity of being heard by or represented before the court.
- (8) Without prejudice to subsections (1) and (6), where both partners are entitled, or permitted by a third party, to occupy a family home, it is incompetent for one partner to bring an action of ejection from the family home against the other partner.

## **105 Duration of orders under sections 103 and 104**

- (1) The court may, on the application of either partner, vary or recall any order made by it under section 103 or 104.
- (2) Subject to subsection (3), any such order, unless previously so varied or recalled, ceases to have effect—
  - (a) on the dissolution of the civil partnership,
  - (b) subject to section 106(1), where there is an entitled and non-entitled partner, on the entitled partner ceasing to be an entitled partner in respect of the family home to which the order relates, or
  - (c) where both partners are entitled, or permitted by a third party, to occupy the family home, on both partners ceasing to be so entitled or permitted.

- (3) Without prejudice to the generality of subsection (2), an order under section 103(3) or (4) which grants the possession or use of furniture and plenishings ceases to have effect if the furniture and plenishings cease to be permitted by a third party to be retained in the family home.

## **106 Continued exercise of occupancy rights after dealing**

- (1) Subject to subsection (3)—
- (a) the continued exercise of the rights conferred on a non-entitled partner by the provisions of this Chapter in respect of a family home are not prejudiced by reason only of any dealing of the entitled partner relating to that home, and
  - (b) a third party is not by reason only of such a dealing entitled to occupy that home or any part of it.
- (2) In this section and section 107—
- “dealing” includes the grant of a heritable security and the creation of a trust but does not include a conveyance under section 80 of the Lands Clauses Consolidation Act 1845 (c. 18);
- “entitled partner” does not include a civil partner who, apart from the provisions of this Chapter—
- (a) is permitted by a third party to occupy a family home, or
  - (b) is entitled to occupy a family home along with an individual who is not the other civil partner whether or not that individual has waived a right of occupation in favour of the civil partner so entitled,
- (“non-entitled partner” being construed accordingly).
- (3) This section does not apply in any case where—
- (a) the non-entitled partner in writing either—
    - (i) consents or has consented to the dealing (any consent being in such form as the Scottish Ministers may, by regulations made by statutory instrument, prescribe), or
    - (ii) renounces or has renounced occupancy rights in relation to the family home or property to which the dealing relates,
  - (b) the court has made an order under section 107 dispensing with the consent of the non-entitled partner to the dealing,
  - (c) the dealing occurred, or implements a binding obligation entered into by the entitled partner, before the registration of the civil partnership,
  - (d) the dealing occurred, or implements a binding obligation entered into, before the commencement of this section,
  - (e) the dealing comprises a sale to a third party who has acted in good faith, if there is produced to the third party by the seller—
    - (i) an affidavit sworn or affirmed by the seller declaring that the subjects of sale are not, or were not at the time of the dealing, a family home in relation to which a civil partner of the seller has or had occupancy rights,
    - (ii) a renunciation of occupancy rights or consent to the dealing which bears to have been properly made or given by the non-entitled partner, or

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- (f) the entitled partner has permanently ceased to be entitled to occupy the family home, and at any time after that a continuous period of 5 years has elapsed during which the non-entitled partner has not occupied the family home.
- (4) For the purposes of subsection (3)(e), the time of the dealing, in the case of the sale of an interest in heritable property, is the date of delivery to the purchaser of the deed transferring title to that interest.

### **107 Dispensation with civil partner’s consent to dealing**

- (1) The court may, on the application of an entitled partner or any other person having an interest, make an order dispensing with the consent of a non-entitled partner to a dealing which has taken place or a proposed dealing, if—
- (a) such consent is unreasonably withheld,
  - (b) such consent cannot be given by reason of physical or mental disability, or
  - (c) the non-entitled partner cannot be found after reasonable steps have been taken to trace that partner.
- (2) For the purposes of subsection (1)(a), a non-entitled partner has unreasonably withheld consent to a dealing which has taken place or a proposed dealing, where it appears to the court either—
- (a) that the non-entitled partner—
    - (i) has led the entitled partner to believe that the non-entitled partner would consent to the dealing, and
    - (ii) would not be prejudiced by any change in the circumstances of the case since the conduct which gave rise to that belief occurred, or
  - (b) that the entitled partner has, having taken all reasonable steps to do so, been unable to obtain an answer to a request for consent.
- (3) The court, in considering whether to make an order under subsection (1), is to have regard to all the circumstances of the case including the matters specified in paragraphs (a) to (e) of section 103(3).
- (4) Where—
- (a) an application is made for an order under this section, and
  - (b) an action is or has been raised by a non-entitled partner to enforce occupancy rights,
- the action is to be sisted until the conclusion of the proceedings on the application.

### **108 Interests of heritable creditors**

- (1) The rights of a third party with an interest in the family home as a creditor under a secured loan in relation to the non-performance of any obligation under the loan are not prejudiced by reason only of the occupancy rights of the non-entitled partner; but where a non-entitled partner has or obtains occupation of a family home and—
- (a) the entitled partner is not in occupation, and
  - (b) there is a third party with such an interest in the family home,
- the court may, on the application of the third party, make an order requiring the non-entitled partner to make any payment due by the entitled partner in respect of the loan.
- (2) This section does not apply to secured loans in respect of which the security was granted prior to the commencement of section 13 of the Law Reform (Miscellaneous



- Provisions) (Scotland) Act 1985 (c. 73) unless the third party in granting the secured loan acted in good faith and there was produced to the third party by the entitled partner—
- (a) an affidavit sworn or affirmed by the entitled partner declaring that there is no non-entitled partner, or
  - (b) a renunciation of occupancy rights or consent to the taking of the loan which bears to have been properly made or given by the non-entitled partner.
- (3) This section does not apply to secured loans in respect of which the security was granted after the commencement of section 13 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73) unless the third party in granting the secured loan acted in good faith and there was produced to the third party by the grantor—
- (a) an affidavit sworn or affirmed by the grantor declaring that the security subjects are not or were not at the time of the granting of the security a family home in relation to which a civil partner of the grantor has or had occupancy rights, or
  - (b) a renunciation of occupancy rights or consent to the granting of the security which bears to have been properly made or given by the non-entitled partner.
- (4) For the purposes of subsections (2) and (3), the time of granting a security, in the case of a heritable security, is the date of delivery of the deed creating the security.

#### **109 Provisions where both civil partners have title**

- (1) Subject to subsection (2), where, apart from the provisions of this Chapter, both civil partners are entitled to occupy a family home—
- (a) the rights in that home of one civil partner are not prejudiced by reason only of any dealing of the other civil partner, and
  - (b) a third party is not by reason only of such a dealing entitled to occupy that home or any part of it.
- (2) Sections 106(3) and 107 and the definition of “dealing” in section 106(2) apply for the purposes of subsection (1) as they apply for the purposes of section 106(1) but subject to the following modifications—
- (a) any reference to the entitled partner and to the non-entitled partner is to be construed as a reference to a civil partner who has entered into, or as the case may be proposes to enter into, a dealing and to the other civil partner respectively, and
  - (b) in paragraph (b) of section 107(4) the reference to occupancy rights is to be construed as a reference to any rights in the family home.

#### **110 Rights of occupancy in relation to division and sale**

Where a civil partner brings an action for the division and sale of a family home owned in common with the other civil partner, the court, after having regard to all the circumstances of the case including—

- (a) the matters specified in paragraphs (a) to (d) of section 103(3), and
  - (b) whether the civil partner bringing the action offers or has offered to make available to the other civil partner any suitable alternative accommodation,
- may refuse to grant decree in that action or may postpone the granting of decree for such period as it considers reasonable in the circumstances or may grant decree subject to such conditions as it may prescribe.

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## 111 Adjudication

- (1) Where a family home as regards which there is an entitled partner and a non-entitled partner is adjudged, the Court of Session, on the application of the non-entitled partner made within 40 days after the date of the decree of adjudication, may—
  - (a) order the reduction of the decree, or
  - (b) make such order as it thinks appropriate to protect the occupancy rights of the non-entitled partner,if satisfied that the purpose of the diligence was wholly or mainly to defeat the occupancy rights of the non-entitled partner.
- (2) Section 106(2) applies in construing “entitled partner” and “non-entitled partner” for the purposes of subsection (1).

### *Transfer of tenancy*

## 112 Transfer of tenancy

- (1) The court may, on the application of a non-entitled partner, make an order transferring the tenancy of a family home to that partner and providing, subject to subsection (12), for the payment by the non-entitled partner to the entitled partner of such compensation as seems to it to be just and reasonable in all the circumstances of the case.
- (2) In an action—
  - (a) for dissolution of a civil partnership, the Court of Session or the sheriff,
  - (b) for declarator of nullity of a civil partnership, the Court of Session,may, on granting decree or within such period as the court may specify on granting decree, make an order granting an application under subsection (1).
- (3) In determining whether to grant an application under subsection (1), the court is to have regard to all the circumstances of the case including the matters specified in paragraphs (a) to (e) of section 103(3) and the suitability of the applicant to become the tenant and the applicant’s capacity to perform the obligations under the lease of the family home.
- (4) The non-entitled partner is to serve a copy of an application under subsection (1) on the landlord and, before making an order under subsection (1), the court is to give the landlord an opportunity of being heard by it.
- (5) On the making of an order granting an application under subsection (1), the tenancy vests in the non-entitled partner without intimation to the landlord, subject to all the liabilities under the lease (other than liability for any arrears of rent for the period before the making of the order).
- (6) The arrears mentioned in subsection (5) are to remain the liability of the original entitled partner.
- (7) The clerk of court is to notify the landlord of the making of an order granting an application under subsection (1).
- (8) It is not competent for a non-entitled partner to apply for an order under subsection (1) where the family home—

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- (a) is let to the entitled partner by the entitled partner’s employer as an incident of employment, and the lease is subject to a requirement that the entitled partner must reside there,
  - (b) is or is part of an agricultural holding,
  - (c) is on, or pertains to—
    - (i) a croft,
    - (ii) the subject of a cottar, or
    - (iii) the holding of a landholder or of a statutory small tenant,
  - (d) is let on a long lease, or
  - (e) is part of the tenancy land of a tenant-at-will.
- (9) In subsection (8)—
- “agricultural holding” has the same meaning as in section 1 of the Agricultural Holdings (Scotland) Act 1991 (c. 55),
  - “cottar” has the same meaning as in section 12(5) of the Crofters (Scotland) Act 1993 (c. 44),
  - “croft” has the same meaning as in that Act of 1993,
  - “holding”, in relation to a landholder and a statutory small tenant, “landholder” and “statutory small tenant” have the same meanings respectively as in sections 2(1), 2(2) and 32(1) of the Small Landholders (Scotland) Act 1911 (c. 49),
  - “long lease” has the same meaning as in section 28(1) of the Land Registration (Scotland) Act 1979 (c. 33), and
  - “tenant-at-will” has the same meaning as in section 20(8) of that Act of 1979.
- (10) Where both civil partners are joint or common tenants of a family home, the court may, on the application of one of the civil partners, make an order vesting the tenancy in that civil partner solely and providing, subject to subsection (12), for the payment by the applicant to the other partner of such compensation as seems just and reasonable in the circumstances of the case.
- (11) Subsections (2) to (9) apply for the purposes of an order under subsection (10) as they apply for the purposes of an order under subsection (1) but subject to the following modifications—
- (a) in subsection (3), for “tenant” there is substituted “sole tenant”;
  - (b) in subsection (4), for “non-entitled” there is substituted “applicant”;
  - (c) in subsection (5), for “non-entitled” there is substituted “applicant”;
  - (d) in subsection (6), for “liability of the original entitled partner” there is substituted “joint and several liability of both partners”;
  - (e) in subsection (8)—
    - (i) for “a non-entitled” there is substituted “an applicant”,
    - (ii) for paragraph (a) there is substituted—
      - “(a) is let to both partners by their employer as an incident of employment, and the lease is subject to a requirement that both partners must reside there;”,
      - and
    - (iii) paragraphs (c) and (e) are omitted.

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- (12) Where the family home is a Scottish secure tenancy within the meaning of the Housing (Scotland) Act 2001 (asp 10), no account is to be taken, in assessing the amount of any compensation to be awarded under subsection (1) or (10), of the loss, by virtue of the transfer of the tenancy of the home, of a right to purchase the home under Part 3 of the Housing (Scotland) Act 1987 (c. 26).