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CHANGES TO SECTION 21 NOTICE:

1. Section 21 of the Housing Act 1988 outlines the process by which a landlord can recover possession of a property in circumstances where the contractual term of an assured shorthold tenancy has come to an end.

2. Effective from 1 October 2018 a number of changes have been introduced to the section 21 process.

3. There is, of course, nothing surprising in a landlord being legally entitled to take back possession of his or her property when a tenancy comes to an end; however, a number of the changes to the process for doing so which shall be discussed may raise some eyebrows, and will highlight the importance of the landlord correctly following the statutory steps.

Prescribed Form

4. Under section 21, a landlord is required to give a written notice to the tenant in the prescribed form, namely Form 6A. This form can be found easily online.[1]

5. One of the changes introduced by section 41 of the Deregulation Act 2015 is that Form 6A must be used by all landlords seeking to recover possession at the end of the assured shorthold tenancy. Previously, Form 6A was only mandatory for such tenancies granted on or after 1 October 2015, whereas in respect of earlier tenancies landlords were free to draft their own written notices.

6. Landlords should therefore familiarise themselves with Form 6A. It is suggested that this is one of the less surprising changes made to the section 21 notice procedure insofar as there is clear sense in standardising the position as between landlords and tenants and removing any potential hurdles to the recovery of possession (such as through legal challenges to the validity of a purported "DIY" notice).

7. Form 6A should also minimise the risks to landlords of not complying with the statutory time limits. There are two alternative ways in which these time limits operate depending on the type of tenancy which is extant at the time.

8. On the one hand, under s.21(1) the landlord can serve a notice during the fixed term of the tenancy seeking possession at the end of that term. In order to be valid, the Form 6A must have been given to the tenant at least two months prior to that end

[1] https://www.gov.uk/guidance/assured-tenancy-forms#form-6a (accessed 7 October 2018).

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date. If the landlord fails to account for that notice period, and gives the Form 6A within the final two months of the fixed term tenancy then the tenant is entitled to remain in the property under a statutory periodic tenancy until that time has elapsed.

9. Alternatively, under s.21(4), where the tenancy is a periodic tenancy then the landlord may give a Form 6A stipulating a date for possession which is not less than two months from the date of such service. It is also necessary for the date for possession to be the last day of a period of the tenancy (e.g. if the periodic tenancy runs on a month-by-month basis, then the date stated on the Form 6A must be the last date within the relevant monthly period).

10. In both situations, if the tenant having received a valid and properly calculated section 21 notice then refuses to give up possession, the landlord should (upon taking legal advice) seek a court order for possession. The wording of section 21(1) and 21(4) mandates the court to make such an order.

11. A number of further points should be recognised at this point in light of the changes effective from 1 October 2018.

12. The first is that, under section 21(4D) of the 1998 Act, in the majority of cases 'proceedings for an order for possession […] in relation to a dwelling-house in England may not be begun after the end of the period of six months beginning with the date on which notice was given'. This provision has led to section 21 notices becoming known as having a “use it or lose it” effect. Accordingly, with the introduction of the changes all landlords would be advised to take note of the date on which a section 21 notice was given to the tenant.

13. The second is that there appears to be some uncertainty concerning the appropriate or permitted methods of service of section 21 notices. The first port of call for determining what method of service is permitted should always be the terms of the tenancy agreement itself. The potential uncertainty comes arises in cases where specific provision has not been made. There does not appear to be any provision in the Housing Act 1988 with the effect that service by post is deemed to be effective service. Neither can such service be deemed to be acceptable under section 7 of the Interpretation Act 1978 which only applies 'where an Act authorises or requires any document to be served by post'. Accordingly, it is suggested that a landlord would be best advised to serve a section 21 notice personally and get proof thereof.

Provision of required information and certificates

14. Perhaps more significant for landlords and tenants are the rules relating to the circumstances in which a section 21 notice may not be given.

15. Under the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015, a landlord is required to give tenants: i) a booklet entitled 'How to Rent: the checklist for renting in England'; ii) an energy performance certificate; and iii) a gas safety record. The landlord cannot seek to recover possession under section 21 if in breach of these prescribed requirements.

16. Under the 2015 Regulations it is incumbent upon a landlord to 'give the tenant under that tenancy the information […] as published by the Department for Communities and Local Government, that has effect for the time being.' There does not appear to be any prerequisite on landlords that they will have provided the tenants with the booklet before they entered into possession of the property; rather, it may be acceptable for the booklet simply to be provided at any time before a section 21 notice is served if that notice is to be valid.

17. Whilst a landlord who has already provided a copy of the booklet is not required then to provide updated versions of the information, it may be best practice for a landlord of a tenancy which was granted after 1 October 2015 to give his or her tenants a copy of the most recent published booklet so as to avoid any evidential concerns. This may be done either in hard copy or (if the tenant has agreed) by email.

18. Arguably more concerning for landlords, however, will be the position relating to gas safety certificates.

19. Under regulation 36(6)(b) of the Gas Safety (Installation and Use) Regulations 1998, a landlord is required to ensure that 'a copy of the last record made in respect of each appliance or flue is given to any new tenant of premises to which the record relates before the tenant occupies those premises save that, in respect of a tenant whose right to occupy those premises is for a period not exceeding 28 days, a copy of the record may instead be prominently displayed within those premises.'

20. On the wording of the 1998 Regulations, therefore, it appears that a landlord is required to provide a tenant with the gas safety record prior to the commencement of the tenancy and, when read together with the section 21A of the 1998 Act, that a failure to do so will prevent the landlord from serving a valid section 21 notice.

21. This was exactly the conclusion which was reached in Caridon Property Ltd v Monty Shooltz (unreported http://431bj62hscf91kqmgj258yg6-wpengine.netdna-ssl.com/wp-content/uploads/2018/02/1046840_Caridon-Property-Ltd-v-Monty-Shooltz_Final-Judgment_02.02.18.doc 2 February 2018). HHJ Jan Luba QC, sitting in the County Court at Central London, expressed himself as being mindful of the purpose behind the 1998 Regulation and s.21 regime of ensuring certain safety standards in leasehold properties. Indeed, regulation 36(2) of the 1998 Regulations expressly imposes a duty on a landlord to ensure that any relevant gas fitting and flue is maintained in a safe condition 'so as to prevent the risk of injury to any person in lawful occupation'. Accordingly, it was held that '[t]he “no fault” eviction procedure for assured shorthold tenancies is not available to landlords at a time when […] the requirements [have] not been complied with.'

22. It should be noted, however, that, in light of regulation 1(3) of the 2015 Regulations, this position appears only to be in relation to assured shorthold tenancies which were granted on or after 1 October 2015. This is not altogether surprising: notwithstanding the need to promote safety in the rental sector, it would surely be contrary to the intention of Parliament retrospectively to restrict the use of section 21 notices.

Concluding Remarks

23. Landlords and tenants would be advised to be mindful of the changes outline above, and this advice extends largely irrespective of the date of grant of the assured shorthold tenancy in question.

24. It is clear that the purpose behind the changes brought into effect from 1 October 2018 is to create a more standardised and regularised position and to seek to ensure that landlords act in compliance with the statutory requirements imposed on them.

25. It is not yet known to what extent landlords may fall foul of these amended provisions. Of particular interest going forward will be the court's approach to the matter addressed in Caridon Property which, after all, is not binding precedent being a decision of the County Court.