RICS PRESENTATION: 6TH JUNE 2018

PUTTING THE BRAKES ON: DECELERATING THE ACCELERATED POSSESSION PROCEDURE

PROBLEMS WITH AIRBNB-STYLE LETTINGS

Simon Wood
Barrister
Hart Brown

PUTTING THE BRAKES ON:
DECELERATING THE ACCELERATED POSSESSION PROCEDURE

Life used to be wonderfully simple, particularly in respect of the accelerated possession procedure for Assured Shorthold Tenancies.

If the landlord wanted to terminate the tenancy, they served a s.21 Notice on the tenant. Once the two month notice period had expired proceedings could be issued. Provided there was no defence, a request for judgment could be issued and usually within three weeks the court would make the possession order. There was no hearing and the costs were relatively low.

The only possible difficulty was ensuring that the period in the s.21 Notice was expressed correctly so as to comply with the Act.

Even if there were substantial arrears this procedure was far preferable to the alternative procedure under s.8 of the Housing Act as the s.8 procedure would always involve the cost of the hearing and a time delay for the hearing to come on. Furthermore, there was always the risk of the tenant being cute and reducing the rent below the two months limit shortly before or on the date of the hearing and thereby bringing into play the court's discretion whether or not to make the possession order.

However, as I say, that wonderfully simple world has now changed substantially and the accelerated possession procedure is now a potential minefield which landlords have to negotiate very carefully if they wish to regain possession and, most importantly, they need to be aware of all the requirements prior to entering into the tenancy agreement.

The changes were brought into sharp relief in November 2017 when HMCTS introduced the new Claim Form 5B for the procedure. It was only then that the form set out all the requirements that the landlord has to comply with, even though they had been in force for 2 years. The Form provides an excellent checklist of the compliance steps that a landlord needs to satisfy if it is to succeed on an accelerated claim. However, be sure to check for future updates.

Tenancy Deposit Schemes

The first major change was the introduction of the tenancy deposit schemes which occurred in 2007. Since then it has been mandatory for the landlord to join a tenancy deposit scheme on creation of the new assured shorthold tenancy where a deposit is paid by the tenant at the commencement of the tenancy.

Under s.213 of the Housing Act 2004 (as amended) the landlord must now place the deposit in an authorised tenancy deposit scheme and comply with the initial requirements within 30 days of receipt of the deposit. The landlord must also serve the tenant with prescribed information within 30 days of receipt of the deposit. The prescribed information is set out in the The Housing (Tenancy Deposits) Prescribed Information Order 2007.

Under s.215 of the Act, the landlord cannot serve a s.21 Notice where the deposit is not held in a tenancy deposit scheme or the initial requirements have not been complied with.

Those of you with long memories will recall that if the landlord had not complied, the situation could be rectified at any time prior to the service of the s.21 notice. i.e. the landlord could pay the deposit into a scheme and provide the prescribed information. That all changed in 2012 so that the landlord can no longer rectify the position by late compliance.

Now, if the landlord has not complied with the statutory requirements in respect of the deposit, there is still a get-out under s.215(2A) of the Housing Act 2004 whereby the landlord can return the deposit to the tenant. Once the deposit has been returned he can then use the s.21 procedure. Even so, the landlord must take care that the deposit has in fact been returned to the tenant before issuing the s.21 Notice as the following recent cases illustrate.

The first is **Chalmiston Properties Limited v Boudia** (2015) Barnett CC.

On 10.02 the landlord instructed the DPS to return the deposit to the tenant. On 12.02 DPS told the landlord that the deposit had been released by direct credit. Only on 16.02 was the sum credited to the tenant's account. The s.21 Notice was deemed served on the tenant on 14.02.

The tenant was able to successfully argue that the deposit had not been returned prior to service of the notice and so the notice was invalid.

However, note the contrary decision in **Yeomans v Newell** (2016) Canterbury CC. On 22.12.15 the landlord authorised the DPS to return the deposit to the tenant. On 23.12.15 the s.21 Notice was served. The tenant did not in fact receive the received payments until 16.02.16. The court held that the deposit had been returned on 22.12.16 by analogy with payment by cheque.

The general principals of payment by cheque are set out in the case of **Coltrane v Day [2003]** EWCA CIV 342. The principle is that where a cheque is offered in payment, it amounts to a conditional payment of the amount of the cheque which, if accepted, operates as a conditional payment from the time when the cheque was delivered.

Neither of the above cases is binding, but if anyone is faced with this problem, clearly the safest course is to ensure that payment has in fact been credited to the tenant's account before serving the s.21 notice.

My own personal experience of this problem was in a matter where the landlord returned the deposit by cheque to the tenant. The cheque was not cashed but also it was not returned by the tenant. In the circumstances the court accepted that the deposit had been returned.

Prescribed Information

Further obstacles to the accelerated possession procedure were then introduced by the ironically named Deregulation Act 2015. In particular, s.21A and s.21B were added to the Housing Act 1988.

Under s.21A, a s.21 Notice cannot be given if the landlord is in breach of the prescribed requirements.

The prescribed requirements are set out in the Assured Shorthold Tenancy Notices and Prescribed Regulations 2015 (which came into force on 1 October 2015). In particular these regulations required the service of an energy performance certificate ("EPC") and a gas safety certificate ("GSS") on the tenant. The GSS has to be served in accordance with the Gas Safety (Installation and Use) Regulations 1998.

Regulation 36(6) provides:-

(6) Notwithstanding paragraph (5) above, every landlord shall ensure that –

…

(b) 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 that 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. (my emphasis)

On 18 February this year, in the matter of **Caridon Property Ltd v Monty Shooltz** HHJ Luba QC held that the "no fault" eviction procedure for assured shorthold tenancies is not available to landlords at the time when the requirement has not been complied with. He was quite clear in holding that this cannot be rectified as in the case of the tenancy deposit. In his judgement he stated:

> "That seems to me to have been a "once and for all" obligation on a prospective landlord in relation to a prospective tenant. Once opportunity has been missed, there is in my judgement no sense in which it can be rectified. If

the Minister believed that once that "once and for all" cut off should not debar a landlord from serving a Section 21 Notice, it was open to the S0S to simply dis-apply those parts of paragraphs 6 and 7 of Regulation 36 in express terms in what has become Regulation 2(2).

While this judgement is not binding, HHJ Luba QC is a well-respected housing law expert and it is likely to have persuasive effect elsewhere. I have to say that in my view the logic of his reasoning cannot be faulted. It is possible that the matter will be appealed or that the regulations will be amended. However, for the time being, if a landlord did not serve the gas safety certificate before the start of the tenancy, then the landlord will not be able to use the accelerated procedure at all.

Under s.21B the landlord must provide the "How to Rent" document published by the Department for Communities and Local Government. It must be provided by either hard copy or by email if the tenant is content to accept service of notices by email. A s.21 Notice cannot be given at a time when the landlord is in breach. However, the situation is not quite as harsh as with regard to the gas safety certificate, as the notice can be given at any time before the s.21 Notice is served.

Accordingly, before the start of the tenancy a landlord needs to ensure the following:-

1. That the tenant has been served with all the prescribed information, most particularly the gas safety certificate. Recently, I have been recommending to managing agents that the tenant signs a confirmation of receipt of all the necessary documents before the start of the tenancy.

2. The landlord must then ensure compliance with the tenancy deposit scheme within 30 days of receipt of the deposit.

Retaliatory Eviction

A further limit on the procedure introduced by the Deregulation Act 2015 is the landlord being prevented from serving an eviction notice where the tenant has a legitimate complaint about the condition of the property.

Under s. 33 of the Act where the tenant has made a complaint to the landlord and the landlord has not dealt with the complaint, the tenant has then complained to the local authority and the local authority has served an improvement notice or a notice of emergency remedial action on the landlord, the landlord cannot serve a s. 21 notice for six months beginning with the day of service of the original notice, or, where the operation of the notice has been suspended, within six months of the day the suspension ends.

Furthermore, if the landlord fails to respond or does not respond adequately to a written complaint, s.21 notice served after the date of the written complaint and before the issue of the relevant notice by the Local Authority will be invalid.

Future Changes

Further changes can be expected in due course, most notable the ban on letting fees to tenants and a cap on rent deposits under the Tenant Fees Bill which had its first reading on 2 May 2018. The government has accepted a recommendation that a landlord will be unable to use the accelerated possession procedure where it has repaid fees which it unlawfully required the tenant to pay.

Miscellaneous Problems

It is important to ensure compliance with the Civil Procedure Rules in respect of proceedings. I had a recent case where the managing agent had signed the claim form. The district judge made the possession order but that order was appealed on the grounds that the claim form had not been signed by the claimant or a legal representative of the claimant as required by CPR 22. Practice Direction 22PD.3(11) specifically states that an Managing Agent who manages property or investment for the party "cannot sign a statement of truth. It must be signed by the party or by the legal representative of the party".

There is no doubt that we are currently witnessing a significant deterioration in the quality of administration in the county court. This is across the board and relates to all matters not just possession proceedings.

One recent example was a matter where following the issue of the claim, the tenant served a defence. In those circumstances, CPR Rule 55.15(1) provides that on receipt of the defence the court will refer the claim and defence to a judge. Rule 55.16 provides that the judge should then consider the defence and decide whether it is a valid defence, in which case directions should be issued, or whether the possession should be granted. Not having received directions, I asked the court what was happening and was told that they would not refer the matter until I had sent back the request for possession order and costs. This was clearly wrong under the rules and, further, the request for possession specifically states that "the defendant has not filed a defence to my claim and the time for doing so has expired".

The question marks over the courts' efficiency is also relevant with regards to the issue of proceedings as now proceedings have to be issued within 6 months of the s.21 Notice being issued. If the claim is not issued by the court within that period then the claim is will be invalid. Accordingly, it is important to ensure that the proceedings are issued in good time and if you are close to the deadline, it is probably advisable to make an appointment to attend at the relevant court office and have the claim issued then and there.

Conclusion

The changes to the procedure have been substantial over the past 10 years such that the ability of landlords to use the procedure can be severely circumscribed or even, in the case of gas safety certificates, rendered impossible if the landlord has not complied with the statutory requirements before the start of the tenancy. The complications could mean that the landlord is stuck with a tenant for far longer than originally planned for, during which time the tenant could be building up substantial rent arrears and/or causing serious damage to the property. Such arrears or damages are likely to be irrecoverable.

This is bound to have important repercussions on the market as many landlords will simply leave the sector, particularly in combination with the changes to the buy-to-let tax regime. I note that only two weeks ago the Daily Telegraph carried an article making this very point.