

THOMAS · MORE · CHAMBERS

PROPERTY LAW GROUP

AUTUMN SEMINAR SERIES

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6pm to 7pm

**PRIVATE RESIDENTIAL
POSSESSION PROCEEDINGS:
COMMON PITFALLS AND
HOW TO AVOID THEM**



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PRIVATE RESIDENTIAL POSSESSION PROCEEDINGS: COMMON PITFALLS AND HOW TO AVOID THEM

INTRODUCTION

- The focus of this talk is on private sector tenants. However there are a number of other residential possession proceedings in the following areas:

Secure occupiers

Introductory Tenancies

- Almost all new residential tenancies created on or after 15th January 1989 are assured (“AT”) or assured shorthold tenancies (“AST”). Since 28th February 1997 almost all new tenancies are ASTs unless the landlord elects to create an assured tenancy.
- You should be aware of the following legislation:
 - (a) Housing Act 2004
 - (b) Housing Act 1996
 - (c) Housing Act 1988
 - (d) Housing Act 1980
 - (e) Protection from Eviction Act 1977
 - (f) Rent Act 1977

DEFINITIONS

Private Sector Tenants

Assured tenancies (“AT”)

- Assured tenancies are lettings at market rents with security of tenure.
- Housing Act 1988 (“HA 1988”) s1 contains 3 conditions for the creation of an assured tenancy:
 - (a) The dwelling-house must be let as a separate dwelling;
 - (b) The tenant/ each of the joint tenants must be individuals;
 - (c) The tenant or, if there are joint tenants, at least one of them, must occupy the premises as his/her only or principal home.
- A tenancy cannot be an assured tenancy if any of the exceptions listed in HA 1988 Sch 1 applies.

Assured shorthold tenancies (“AST”)

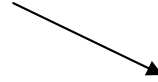
- Assured Shorthold Tenancies (unlike assured tenancies) do not give long-term security and are subject to minimal rent control.

ASSURED TENANCY OR ASSURED SHORTHOLD TENANCY?

Is the tenancy granted before 28 Feb 1997?



Yes



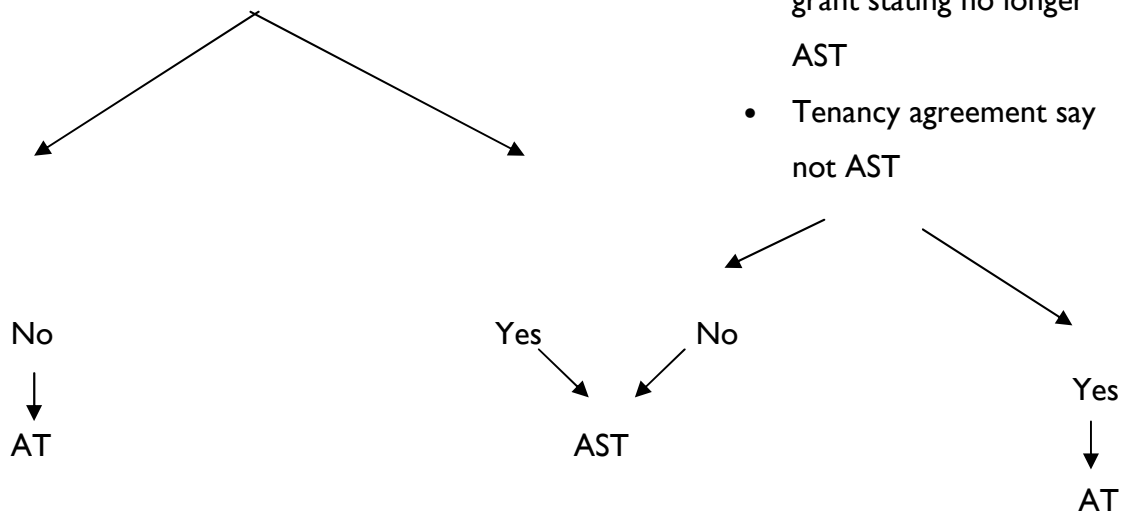
No

Does s.20 HA 1988 apply i.e.

- Fixed term \geq 6 months
- No provision for L/L to terminate within 6 months
- Notice in the proscribed form should be served

Do any of:

- New tenancy pursuant to agrmt before new provisions
- L/L serve notice before entering saying not AST
- L/L serve notice after grant stating no longer AST
- Tenancy agreement say not AST



Residential possession cannot be terminated other than by court order: s.2
Protection from Eviction Act 1977.

TERMINATING AN AST

- Essentially if the AST is for a fixed term, the ability of a landlord to recover possession depends upon whether or not the fixed term has expired.

During the Fixed Term Tenancy

- The L/L cannot rely upon s.21 unless there is a contractual break clause allowing him to recover possession before the expiry of the term: **Gloucestershire HA v Phelps** (10.2.03, Gloucester County Court, May 2003 Legal Action 35).
- The L/L can rely upon the normal grounds for possession against assured tenants but:
 - (a) The tenancy must contain a term allowing the L/L to re-enter or terminate for breach of any covenant in the tenancy or if one of the grounds for possession against ATs exists;
 - (b) The L/L must serve notice of proceedings for possession under s.8 Housing Act 1988; and
 - (c) The L/L must prove the existence of any of the following grounds (2, 8, 10-15) and, if appropriate that it is reasonable for an order to be made.
- The tenant cannot apply for relief from forfeiture.

During a Periodic Term

- All a L/L needs to do is to:

- (a) Prove the fixed term tenancy has come to an end, and no new tenancy has been granted;
 - (b) Give at least 2 months notice in accordance with s.21;
 - (c) Take court proceedings.
- Orders for possession must take effect no later than 14 days after the court order unless exceptional hardship would be caused, in which case the maximum period is 42 days: s.89(1) Housing Act 1980. There is no power other than this to suspend possession proceedings.

CHECKLIST FOR TERMINATING AN AST

- The notice gives at least 2 months' notice;
- If the tenancy is a periodic tenancy the date specified in the notice is 'the last day of a period of the tenancy'.
 - (a) NB This does not apply if served during a fixed term tenancy;
 - (b) It applies to a periodic or statutory periodic AST;
 - (c) E.g. If after expiry of a fixed term, tenants remain in occupation from 4th to 3rd of each month, notice would need to be given
- The notice refers to s.21 Housing Act 1988 (periodic tenancy only)
- The notice period is sufficient to comply with contractual notice or if the rental period is longer than 2 months, for example if it is a quarterly periodic tenancy, in which case 3 months notice has to be given.

- Proceedings have not been commenced prior to the date specified in the notice
- If s.19A Housing Act 1988 applies (i.e. post 28.2.97 and none of the exceptions apply), then any possession order does not take effect earlier than 6 months after the grant of the original tenancy.
- For ASTs granted after s.215 Housing Act 2004 comes into force (not in as yet): If a tenancy deposit has been paid in connection with the AST, no s.21 notice may be given at any time when the deposit is not being held in accordance with an authorised scheme; or the initial requirements of such a scheme have not been complied with: Housing Act 2004 s.215.

TERMINATING ATs

- Where a tenant is in occupation under an assured tenancy a L/L can obtain possession of the premises only by means of an order of the court (s5 HA 1988) and this can be done only by proving one of the grounds under Sch 2 of the HA 1988 is made out.

Periodic Tenancies

- HA 1988 provides that the service of a notice to quit has no effect: a periodic tenancy can be terminated only by an order of the court. A notice to quit served by a tenant upon a landlord however will still be effective to end the tenancy.

Fixed-term Tenancies

- If a contractual fixed-term assured tenancy is brought to an end, other than by order of a court or by surrender, a periodic assured tenancy (called a “statutory periodic tenancy”) will generally come into existence immediately after the fixed-term tenancy has come to an end. This statutory periodic

tenancy, as with an original periodic tenancy, can be terminated only by order of the court.

Possession by the L/L: General points on procedure

Notice

- HA 1988 s8 provides that to bring possession proceedings against an assured tenant a landlord must serve notice in the prescribed form. A HA 1988 s8 notice must specify the ground upon which possession is sought and give particulars of the ground. It must also inform the tenant that proceedings will not begin earlier than a date specified in the notice, and it must inform the tenant that those proceedings will not begin later than 12 months from the date of service of the notice.
- N.B. With the exception of Ground 8 (see below) the court has a discretion to dispense with the requirement of notice before commencing possession proceedings if it considers it “just and equitable” to do so (s8(1)(b))

Grounds for possession

- The Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1988 state that the landlord must “give the full text of each ground which is being relied upon”.

Particulars

- The notice must give the particulars of the grounds relied upon as well as referring to the ground itself.

Length of notice

- A L/L wishing to bring possession proceedings against an assured tenant must normally give two 2 weeks' notice but certain grounds (namely 1, 2, 5, 6, 7, 9 and 16 below) require that at least two months' notice or notice equivalent to the contractual period of the tenancy, whichever is longer, must be given. Proceedings must be commenced within 12 months of service of the notice

Proving grounds for possession

- Once a L/L has successfully served a notice of intention to bring possession proceedings, he must establish that one of the grounds for possession set out in HA 1988 Schedule 2 exists before the court will grant an order for possession. If a L/L can establish a mandatory ground (Grounds 1-8) the court must grant a possession order (s7(3)). If he/she can establish a discretionary ground (Grounds 9-17) the court will grant a possession order only if it considers it reasonable to do so (s7(4)).

- Mandatory grounds for possession

Ground 1: Returning owner-occupier

Ground 2: Mortgagees

Ground 3: Holiday lets

Ground 4: Student lets

Ground 5: Ministers of religion

Ground 6: Demolition, reconstruction or substantial works

Ground 7: Death of the tenant

Ground 8: Serious rent arrears

- Discretionary grounds for possession

Ground 9: Suitable alternative accommodation

Ground 10: Some Rent arrears

- Ground 11: Persistent delay in paying rent
- Ground 12: Breach of any obligation
- Ground 13: Waste or neglect
- Ground 14: Nuisance or annoyance or criminal conviction
- Ground 14A: Violence to occupier
- Ground 15: Deterioration of furniture
- Ground 16: Premises let to employees
- Ground 17: Tenancy induced by false statement

Reasonableness

- A L/L seeking possession on any of the discretionary grounds in HA 1988 Sch 2 as well as proving the ground for possession must satisfy the court it is reasonable to make an order for possession. In considering reasonableness the courts should not focus on the propriety or otherwise of a landlord's policy but rather with "the reasonableness in the particular case of ordering possession". Examples of relevant considerations:
 - (a) The financial position of the parties
 - (b) Hardship to people living with either party
 - (c) The length of time the tenant has lived in the premises
 - (d) Breaches of agreements with the landlord or of previous possession orders
 - (e) The landlord's reasons for wishing to obtain possession
 - (f) The conduct of the parties
 - (g) In rent arrears cases, whether or not the tenant is entitled to welfare benefits and, if so, whether or not they have been paid.

CHECKLIST FOR TERMINATING AN AT

Check whether:

- The tenant received notice of possession from the L/L before they started proceedings. Remember the court can decide to make a possession order even if the landlord did not serve the tenant with a notice beforehand. The tenant may still however be able to argue that it would be unfair for him to be evicted without notice.
- The court paperwork produced by the landlord is defective. e.g. The landlord has served the tenant with a possession notice which is not correct either because the information on it is incorrect or the wrong form has been used or the notice has a ground for possession written on it and the landlord relies on a different ground at court.
- The landlord started court proceedings earlier than they were allowed to by law. Where the landlord is seeking arrears of rent the tenant may be able to avoid paying some or all of this if the landlord owes the tenant money. For example, the tenant has overpaid the rent previously and not received a refund. The landlord has not proved the ground they are relying on.
- A condition has not been satisfied. For example, the landlord has not shown it is reasonable for the court to make a possession order in the case of grounds 9-17.

TERMINATION OF CONTRACTUAL TENANCIES

- Where a L/L is seeking a possession order against unprotected tenants who lack any statutory security of tenure, or Rent Act protected tenants. It does not apply to secure or assured tenants who continue to occupy their homes as their only or principal residence.

- The L/L must prove that the original contractual tenancy has been terminated. If this is not the case, the tenant has a complete defence to the possession proceedings. Where tenants have full Rent Act protection, the effect of termination of a contractual tenancy is to convert the tenancy into a statutory tenancy.
- The most common ways in which a contractual tenancy can be terminated are by:
 - (a) Expiry of a fixed-term tenancy
 - (b) Notice to quit by L/L or tenant
 - (c) Surrender (operation of law or express agreement)
 - (d) Forfeiture
 - (e) Service of a notice of increase of rent (in certain circumstances)

Notice to Quit

- Either party may serve a notice, and there is no need for the other party to agree. However a valid notice must be served i.e. under s.5 Protection from Eviction Act 1977.
 - (a) In writing
 - (b) Not less than 4 weeks notice (i.e. Friday to Friday)
 - (c) In the appropriate form (Landlords) – see Notices to Quit etc Regulations 1988 (SI 2201)

- Common law requirements include:
 - (a) Clarity and Timing: notice to quit should state with certainty when the notice expires;
 - (b) Notice must be at least as much as the rental period of the tenancy e.g. 3 months for a quarterly;
 - (c) Service
- Proceedings may not be commenced until the expiry of the notice to quit.

Forfeiture

- Where premises are let as a dwelling which is subject to forfeiture or re-entry, a court order is required to enforce that right: s.2 Protection from Eviction Act 1977. Let as a dwelling was clarified in ***Pirabkaran v Patel*** [2006] EWCA Civ 685, 26 May 2006.
- If forfeiture on any other ground, a notice must be served pursuant to s.146 LPA 1925 by sending it to the property in question. This allows a tenant to remedy any breach which is capable of remedy, and to allow a tenant to apply for relief from forfeiture.

PROCEDURE

- Part 55 must be used where the claim includes a possession brought by a landlord, mortgagee, licensor, or against trespassers. On the issue of a claim form, the court should fix a date for the first hearing, not less than 29 days from date of issue, but should not be more than 8 weeks.
- Claimants should file and serve all witness statements at least 2 days before the hearing, including evidence of arrears up to the date of the hearing

(where relevant), save that landlord can bring the position up to date at the hearing.

- Possession claims should only be allocated to the small claims track if all the parties agree. If it is the fast track costs regime applies, but the trial costs are in the discretion of the judge, and should not exceed the amount of fast track costs allowable in CPR 46.2.
- Where proceedings are issued under Section 1 of Part 55 and only include possession claim solely on the ground of arrears of rent (but not forfeiture), they may be started online: www.possessionclaim.gov.uk.

ACCELERATED POSSESSION PROCEEDINGS

- This only applies to claims brought under s.21 Housing Act 1988 to recover possession against assured shorthold tenants. The conditions under CPR 55.12 must be complied with:
 - (a) AST entered into on or after 15.1.89
 - (b) Only purpose is to recover possession;
 - (c) Tenancy did not automatically follow an AT which was not an AST;
 - (d) The tenancy is subject to a written agreement or follows a tenancy where there was a written agreement;
 - (e) A s.21(1) or 21(4) Notice has been given.
- The claim must be started in the county court for the district in which the property is situated.

- Common Mistakes by Landlords
 - (a) Agent completes statement of truth on claim form
 - (b) Fail to exhibit either s.20 notice or s.21 notice (court cannot dispense with this)
 - (c) Include claim for rent arrears;
 - (d) s.20 or s.21 notice is defective.

GENERAL POINTS

- Where a tenancy is created by written agreement, it may provide that s.196 of the Law of Property Act 1925 applies, which allows for service if left at the last-known place of abode or business in the UK, or if sent by recorded delivery if it is not returned undelivered. S.196 does not apply unless expressly incorporated.
- “At the end of the tenancy” means after the end of the tenancy
- Serve s.21 notice during a periodic tenancy with a rider (after the date given for expiry of the notice) “the notice may also expire at the end of the period of your tenancy which will end next after the expiration of 2 months from the service upon you of this notice”
- By s.21 of the Housing Act 1988 (as amended) a L/L may get an order for possession:
 - (a) If notice is given before or on the day the tenancy comes to an end if (s.21(1));

- (b) The AST has come to an end; and
 - (c) The L/L has given to the tenant not less than 2 months' notice in writing stating that he requires possession of the dwelling house.
- If a statutory periodic tenancy has arisen (s.21(4)), if:
 - (a) The L/L has given notice in writing stating that after a date specified in the notice being the last day of a period of the tenancy and not earlier than 2 months after the date the notice was given, possession is required by virtue of s.21(4);
 - (b) The date specified is not earlier than the earliest day on which the tenancy could be brought to an end by a notice to quit served on the same day as the notice under (4)(a).

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