

Covid-19 & possession proceedings in residential leases

Delivered by David Giles & Ian Cain



GOLDSMITH
CHAMBERS

The present residential housing situation

▶ **National Residential Landlords Association:**

“More and more landlords are contacting the National Residential Landlords Association saying their tenants are under the impression they no longer have to pay rent as a result of the pandemic.”

▶ **Ministry of Housing, Communities and Local Government:**

“Tenants should continue to pay rent and abide by all other terms of their tenancy agreement to the best of their ability.”

“Where tenants have difficulty paying rent over this period, we ask that landlords do not issue a notice seeking possession, particularly given that the tenant may be sick or facing other hardship due to COVID-19.”

PD51Z and *Arkin v Marshal*

- ▶ Under CPR PD 51Z(2), all proceedings to enforce an order for possession by a warrant, or a writ of possession, are stayed for 90 days from 27th March 2020.
- ▶ This was amended by PD 51ZA which created an exception for an application for agreed case management directions.
- ▶ Detailed consideration of PD51Y, 51Z and 51ZA can be found in the practice note on our website.

Arkin v Marshal [2020] EWCA Civ 620

- ▶ The validity of PD 51Z and PD 51ZA were considered by the Court of Appeal in a judgement published on the 11th May 2020. The key points are:
 - ▶ Both practice directions were not made *ultra vires* and should be followed
 - ▶ A court does have a discretionary power to lift the stay, but this power is expected to be largely theoretical
 - ▶ The CoA could not think of an example where it would be appropriate to lift the stay and noted that the only exception they could think of would be where the failure to determine the proceedings might itself endanger public health
 - ▶ Per PD51Z(2A) parties can make an application for case management directions which include dates within the 'stay' period, they just cannot be enforced during the currency of that period

Coronavirus Act 2020

- ▶ The Coronavirus Act 2020 [‘CVA 2020’] received Royal Assent on 25 March 2020 and came into force on 26 March 2020.
- ▶ The CVA 2020 was passed as an emergency measure in response to the spread of the 2019 novel coronavirus disease (COVID-19) to protect the public by keeping people in their homes.
- ▶ **Schedule 29** of the CVA 2020 increased the notice period for Section 21 and Section 8 notices up to 3 months, with the potential to increase the notice requirement further.
- ▶ The provisions imposed by the CVA 2020 are not retrospective, so landlords are able to rely on Section 8 or Section 21 notices that were served prior to the 26th March 2020 but these would then be caught up in the 90 day stay.

Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020

- ▶ Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (SI 2020/451)
- ▶ These regulations impose temporary restrictions on enforcement by landlords including the prevention of enforcement agents taking control of goods at residential premises and on highways while the restrictions preventing people from leaving the place in which they live, without a reasonable excuse, are in place.

Back to basics: Residential leases and protection from eviction

- ▶ A residential occupier is a person who occupies premises as a residence by a contract, or by virtue of statute, that entitles them to remain in occupation and restricts the right of any other person to recover possession.
- ▶ Section 1 of the Protection from Eviction 1977 makes it an offence to evict someone from a residential property without a court order.
- ▶ This applies to those who have occupied the premises under a tenancy or a licence (but not to trespassers!).

Back to basics: Section 8 notices

- ▶ **Section 8 of the Housing Act 1988** sets out the procedure for the landlord to terminate an Assured Shorthold Tenancy.
- ▶ It is crucial to note that the court shall not make an order for possession of a dwelling to take effect at a time when it is let on an AST unless the ground for possession is on mandatory Ground 2, Ground 7 (in England only), Ground 7A, Ground 7B or Ground 8 or discretionary grounds 10-15 and 17.

Back to basics: Section 8 notices

- ▶ If possession is sought due to outstanding rent arrears by a tenant, the notice will usually rely on Grounds 8, 10 and 11.
- ▶ **Ground 8** – if at the date of service of the notice and at the date of the possession hearing there is 8 weeks rent outstanding if the rent is paid weekly; 2 months rent is outstanding if rent is paid monthly; quarterly rent is more than 3 months in arrears; or, at least 3 months rent is more than 3 months in arrears if rent is due yearly.
- ▶ **Ground 10** – Some rent lawfully due from the tenant is unpaid on the date on which the proceedings for possession are begun; and was in arrears at the date of the service of the notice under that section relating to those proceedings.
- ▶ **Ground 11** – Whether or not any rent is in arrears on the date on which proceedings for possession are begun, the tenant has persistently delayed paying rent which has become lawfully due.
- ▶ In the above context, rent means rent that is lawfully due under the AST.

Back to basics: Section 8 notices

- ▶ Schedule 2 of the Housing Act 1988 also contains grounds allowing the court to make a discretionary order if any of the other terms of the tenancy agreement are breached (**Ground 12**), the tenant has caused damage to the property (**Ground 13**) or the furnishings within it (**Ground 15**), there is alleged domestic violence between the tenants (**Ground 14**) or the tenancy was granted in conjunction with the tenant's employment (**Ground 16**).
- ▶ Use the Prescribed form – there is a different form for England and Wales!
- ▶ The Section 8 notice must specify the ground/grounds for possession, provide an explanation as to why each ground is relied on, inform the tenant that proceedings will not begin earlier than the date specified within the notice and that proceedings will be brought within 12 months of the date of service.
- ▶ Use the CPR 55 procedure or PCOL (rent arrears only)

Back to basics: Section 21 notices

- ▶ **Section 21 of the Housing Act 1988** - On or after the end of a fixed term AST, the Court can make an order for possession of a property if:
 - ▶ no further AST exists, other than a periodic tenancy, and;
 - ▶ the landlord has given the tenant at least **two months' notice** that it requires possession of the property.
- ▶ If the tenancy agreement is an AST, it is written, and the claim is only for possession and does not include anything else (such as the payment of rent arrears) then the accelerated possession procedure can be used. Otherwise, the standard procedure under CPR 55 can be followed.
- ▶ There are different requirements for S.21 notices depending on whether the property is in England or Wales.

Back to basics: Section 21 notices – England

- ▶ **Housing Act 2004 & Deregulation Act 2015**
 - ▶ Prescribed Form 6A
 - ▶ The tenant has been served with a valid Energy Performance Certificate (EPC) and valid Gas Safety Certificate (GSC) for the property;
 - ▶ The tenant has been served with the prescribed information about the rights and responsibilities of the landlord and tenant under the AST (the How to Rent guide);
 - ▶ The deposit paid by the tenant must have been protected within a Tenancy Deposit Scheme (TDS) and the landlord must comply with the initial requirements of the TDS, including providing prescribed information to the tenant;
 - ▶ The property has a House in Multiple Occupation (HMO) licence, if so required;
 - ▶ A selective licence has been obtained, if required; and
 - ▶ The landlord has returned any payments which cannot be required by them under the **Tenant Fees Act 2019**.
- ▶ **MUST NOT** be a retaliatory eviction

Back to basics: Section 21 notices – Wales

- ▶ **Housing Act 2004 & Housing Wales Act 2016**
 - ▶ No Prescribed Form
 - ▶ The deposit paid by the tenant must have been protected within a Tenancy Deposit Scheme (TDS) and the landlord must comply with the initial requirements of the TDS, including providing prescribed information to the tenant;
 - ▶ The property has a House in Multiple Occupation (HMO) licence, if so required;
 - ▶ A selective licence has been obtained, if required;
 - ▶ They are registered as a landlord and hold the required licence to rent, or they use a licence managing agent to set up the tenancies and manage the property; and
 - ▶ The landlord has returned any payments which cannot be required by them under the **Rent Homes (Fees Etc.) (Wales) Act 2019**.

CPR 55 possession procedure

- ▶ Service of the notice – CPR 6 & check the tenancy agreement
- ▶ Proof of service
- ▶ N5 claim form with N119 particulars of claim
- ▶ Issue in the County Court unless there is a complicated dispute of fact or law
- ▶ CPR 55.7(1) – The tenant does not have to serve an acknowledgement of service.
- ▶ CPR 55.7(4) – The landlord cannot issue an application for a default judgment if the defendant does not file or serve a defence in a claim for possession.
- ▶ Possession in 14 days unless S.89 of the Housing Act 1980 applies (up to 42 days)

What can you do to prepare for the easing of the restrictions?

- ▶ Decide whether you wish to use Section 21 or Section 8.
- ▶ Section 8
 - ▶ Ensure that the notice is in the prescribed form and the grounds are correctly set out and particularised in the notice.
- ▶ Section 21
 - ▶ In England – Follow the Housing Act 2004 & Deregulation Act 2015.
 - ▶ In Wales – Follow the Housing Act 2004 & Housing (Wales) Act 2016.
- ▶ **REMEMBER** – CPR PD 51Z, the Coronavirus Act 2020 and Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (SI 2020/451) (2020 Regulations) apply!

Contact Details

- ▶ Any Questions?
- ▶ THANK YOU

To instruct counsel please contact:

B.Cressey@goldsmithchambers.com

Clerks: Ben Cressey & Alice Martin

Tel: 0207 353 6802

