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**COVID-19 AND possession proceedings in residential leases**

**PRACTICE NOTE**

***Ian Cain of Goldsmith Chambers has drafted a briefing note for civil litigation solicitors to summarise the present situation regarding possession proceedings in residential leases as a result of the Covid-19 pandemic, and what solicitors can do to prepare for the lifting of the current restrictions.***

**THE PRESENT SITUATION IN LIGHT OF COVID-19**

1. According to a press release from the National Residential Landlords Association on [3rd April 2020](https://www.landlords.org.uk/news-campaigns/news/rent-payments-must-be-maintained-where-possible-say-landlords),

“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”.

1. This increase in enquiries comes despite the ‘Coronavirus (COVID-19) Guidance for Landlords and Tenants’ published by the Ministry of Housing, Communities and Local Government [‘MHCLG’] in [March 2020](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876500/Consolidated_Landlord_and_Tenant_Guidance_COVID_and_the_PRS_v4.2.pdf) stating that:

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

1. 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. Additionally, CPR PD 51Z(2) caused all proceedings seeking to enforce an order for possession by a warrant or a writ of possession to be stayed for 90 days from 27th March 2020. CPR PD 51Z(2A) has clarified that the restrictions imposed by CPR PD 51Z(2) do not apply to claims against trespassers, applications for interim possession or applications for agreed case management directions.
2. For further information on the amendments to the Civil Procedure Rules caused by the Covid-19 pandemic, please see [‘COVID-19 & Civil Procedure Rules Practice Directions 51Y, 51Z & 51ZA’](http://www.goldsmithchambers.com/covid-19-civil-procedure-rules-practice-directions-51y-51z-51za/) by Oliver Newman.
3. Therefore, the number of residential property tenants refusing, or unable, to pay their rent during the Covid-19 pandemic is potentially rising whilst landlords are prevented from obtaining possession of their properties due to the barriers caused by CPR PD 51Z and the CVA 2020. Once the restrictions are lifted, there could be a wave of possession claims flowing through the court system.
4. This practice note is intended to remind litigation solicitors of the basics of issuing possession claims in residential leases and highlight the practical steps that can be undertaken by solicitors and their landlord clients to prepare for the easing of restrictions and obtain possession as quickly as possible.

**Back to basics: residential leases and protection from eviction**

1. Most residential occupiers will have the benefit of the Protection from Eviction Act 1977 [‘the PEA 1977’]. A residential occupier is defined by Section 1 of the PEA 1977 as 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 PEA 1977 makes it an offence to evict someone from a residential property without a court order and it applies to those who have occupied the premises under a tenancy or a licence (not to trespassers).
2. Although there are some exceptions, the safest way to proceed when dealing with a property that is either wholly or partly used for residential purposes is to seek an order for possession from the court, to ensure that possession is obtained lawfully. If the occupier does not give up possession in accordance with the court order, the Claimant must apply for a warrant or writ of possession, so that a court appointed bailiff or enforcement officer can enforce the order.
3. Various types of residential tenancies are regulated by statute and can only be ended in a specified way, most of which can be found under the Housing Act 1988 [‘the HA 1988’]. CPR 55 outlines the Court procedure for obtaining possession of property occupied for residential purposes.

**Section 8 notices**

1. Section 8 of the HA 1988 sets out the procedure for the landlord to terminate an Assured Shorthold Tenancy [‘AST’]. 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. Other than where the ground for possession is 7B, the terms of the tenancy must make provision for the tenancy to be brought to an end on the ground relied upon (whether that provision takes the form of a provision for re-entry, for forfeiture, for determination by notice or otherwise). In addition, many of the grounds are dependant on notice having been given to the tenant. The form of such a notice seeking possession is outlined in paragraph 14 below.
2. 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, a mandatory ground, states that 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. In the above context, rent means rent that is lawfully due under the AST.
3. Grounds 10 and 11 allow the Court to make a discretionary order for possession if the tenant if there is “some rent lawfully due” under the terms of the AST or the tenant has “persistently delayed paying rent” which is lawfully due under the terms of the AST at the date of service of the possession proceedings. As all of the grounds can be pleaded in the alternative, Ground 8 is usually also pleaded with Grounds 10 and 11 in case the tenant reduces the rent arrears prior to the date of the hearing.
4. Schedule 2 of the HA 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).
5. Before the landlord can apply to the court for possession of the property during the fixed term, the landlord must serve a notice seeking on the tenant under Section 8 of the HA 1988 in the prescribed form. In England, the Section 8 form is prescribed by the Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015 (SI 2015/620) and in Wales, it is prescribed by the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997 (SI 1997/194). 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.
6. If the tenant refuses to leave the property when the minimum notice period given in the Section 8 notice expires, the landlord may apply for a Court order for possession. If the landlord's claim is based on a mandatory ground and is successful, the court must make an order for possession. The court may only postpone the order for possession for a maximum of 14 days or up to six weeks in cases of exceptional hardship under Section 89 of the Housing Act 1980. If a discretionary ground is proven, the court can make an outright order for possession, stay or suspend an order for possession for any period the court deems fit or postpone the date for possession for any such period that the court thinks fit.
7. Most County Court hearing centres operate a system to allow Claimants to start possession proceedings online through the Possession Claims Online (PCOL) website. A possession claim can only be started online when the Claimant is the landlord and the ground for possession is the non-payment of rent or the Claimant is a mortgagee and the ground for possession is a default in payment under the terms of a mortgage. The [PCOL website](https://www.possessionclaim.gov.uk/pcol/) currently makes it clear that:

“PCOL can still be used to issue claims, however no action will be taken to progress the claim for a period of three months”.

1. If the PCOL system is not applicable to the claim for possession (usually as possession is not sought due to non-payment of rent) then the standard possession procedure would apply as outlined below.

**Section 21 notices**

1. 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 under Section 21 of the HA 1988 (now amended by the CVA 2020 to 3 months).
2. The grounds for obtaining possession of a property let on an AST set out in Schedule 2 to the HA 1988 are only relevant to the possession procedure under Section 8 of the HA 1988 and not the procedure under Section 21 of the HA 1988. Therefore, a tenant is not required to have defaulted on the terms of the AST in order for possession to be sought under the Section 21 procedure.
3. Under the Deregulation Act 2015 [‘the DA 2015’], a Section 21 notice in England must be the prescribed form (Form 6A). The Section 21 notice cannot be served within 4 months of the day on which the original tenancy began, and the notice will only be valid for 6 months from the date on which the notice is served.
4. The DA 2015 also brought in a number of requirements for landlords in England to comply with before a Section 21 notice could be served. In particular, the landlord must ensure that:
5. The tenant has been served with a valid Energy Performance Certificate (EPC) and valid Gas Safety Certificate (GSC) for the property;
6. 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);
7. 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;
8. The property has a House in Multiple Occupation (HMO) licence, if so required;
9. A selective licence has been obtained, if required; and
10. The landlord has returned any payments which cannot be required by them under the Tenant Fees Act 2019.
11. Under Sections 33 and 34 of the DA 2015, where a tenant makes a genuine complaint about the condition of their property and their complaint has not been addressed by their landlord within 14 days, their complaint has been verified by a local authority inspection and the local authority has served either an improvement notice or a notice of emergency remedial action, a landlord cannot evict that tenant for 6 months using the Section 21 procedure. This is known as a retaliatory eviction and is expressly prohibited under the DA 2015.
12. For properties in Wales, the Deregulation Act 2015 does not apply so there is no prescribed format for Section 21 Notices. However, the Section 21 notice must expire on the last day of a tenancy period, specifying that possession is required after that day. Therefore, the period of notice required will usually be more than two months. The notice must also state that possession is required by virtue of Section 21(4) of the HA 1988.
13. The requirements set out in the Housing Act 2004 and Housing (Wales) Act 2016 apply to properties in Wales. In particular, the landlord must ensure that:
14. 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;
15. The property has a House in Multiple Occupation (HMO) licence, if so required;
16. A selective licence has been obtained, if required;
17. 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
18. The landlord has returned any payments which cannot be required by them under the Rent Homes (Fees Etc.) (Wales) Act 2019.
19. 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. The claim for possession using the accelerated procedure must be started using either court form N5B England or N5B Wales. In the first instance, a judge will consider the application without a hearing and may grant an order for possession at that point.
20. If the accelerated procedure is being followed, the claim can be issued at any County Court hearing centre under CPR 55.11. If the claim is referred to a judge and it is decided a hearing should be held, the judge will order the proceedings to be transferred to the County Court hearing centre which serves the address where the property is situated as per CPR 55.16(1A).
21. An additional claim for rent arrears or damages can also be brought under the standard procedure.

**Notice to quit**

1. It is unlawful to re-enter premises let as a dwelling if the tenancy is not a statutory protected tenancy nor an excluded tenancy (common law tenancy) and the occupier has not vacated. For the purposes of Section 3 of the PEA 1977, "occupier" means any person who is lawfully residing at the premises, or any part of them at the termination of the tenancy under Section 3(2). Section 3 of the PEA 1977 also applies to licences under Section 3(2B).
2. If a notice to quit needs to be served in relation to premises let or licensed as a dwelling, the notice must be in writing and contain the information currently prescribed by the Notices to Quit etc. (Prescribed Information) Regulations 1988 (SI 1988/2201). The Notice to Quit must be served not less than four weeks before the date on which the notice to quit is stated to take effect (subject to any longer period that is prescribed by contract or the common law).
3. If possession proceedings need to be issued following the service of a notice to quit, the standard procedure would be used.

**The standard procedure under CPR 55**

1. The AST agreement will usually outline the method of service for notices seeking possession. Usually, first class post or recorded delivery will be the approved method of service, but some tenancy agreements will allow for multiple methods of service. If the tenancy agreement is silent to a method of service, post or hand delivery is the expected method of service but any of the methods outlined in CPR 6.20 could be used. The notice seeking possession will be deemed to be served in line with the table set out at CPR 6.26 and will vary depending on the method of service used. Evidence of service of the notices should be kept or a certificate of service completed by the person effecting service.
2. The standard procedure for issuing a claim for possession of a residential property is outlined within CPR 55. The prescribed N5 claim form would be used to outline the basis of the claim and supported by particulars of claim in the N119 prescribed format. The Claimant can use a single claim form to bring all claims that can conveniently be disposed of in the same proceedings. Therefore, a Claimant can bring a claim for possession on the ground of rent arrears and a claim for unpaid rent or any other appropriate relief in the same set of proceedings using the same claim form.
3. The Claimant should be the person entitled to possession of the property, and the defendant should be in occupation or possession of the property. If there is more than one tenant, they should all be named as defendants in the claim for possession. The particulars of claim must identify the land that the claim relates to, confirm that the claim relates to residential property, state the grounds upon which possession is claimed, give details of the tenancy agreement and details of those the Claimant knows are in possession of the property. If there is a claim for rent arrears, the particulars of claim should also outline the amount of rent due at the start of the proceedings, a schedule of rent arrears up to the start of the proceedings, the daily rate of rent and interest, the steps taken to recover the arrears and information known to the Claimant about the circumstances of any occupiers.
4. A copy of the tenancy agreement (if written), the notices served, evidence of the service of the notices and any documents required by the claim form (such as the DA 2015 documents) should be attached to the claim. The particulars of claim must be filed at the court and served on the Defendant with the Claim form at the same time.
5. If the standard procedure is being followed, a claim for possession of land should be issued at any County Court hearing centre (unless it is appropriate for the High Court). A hearing date will not be fixed until the claim is received by the County Court hearing centre which serves the address where the land is situated (CPR 55.5(1A)). The claim can only be issued in the High Court in exceptional circumstances (CPR 55.3(2) and (3)). Exceptional circumstances include: Complicated dispute of facts or Complicated points of law. If the Claimant wants to issue the claim in the High Court, a certificate stating the Claimant's grounds for doing so must be filed at court.
6. Under CPR 55.7(1), the Defendant does not have to serve an acknowledgment of service in a claim for possession of land. Usually, the Defendant should serve a defence within 14 days of service of the particulars of claim. The defence should respond to the claim by admitting, denying or requiring proof of each allegation in the particulars of claim and state the defendant's case by setting out the facts and matters on which the defendant relies to defeat or limit the claim, including stating any alternative version of events or any positive or substantive defence. Unlike in the majority of civil claims, under CPR 55.7(4) the Claimant cannot issue an application for a default judgment if the defendant does not file or serve a defence in a claim for possession.
7. If the court determines that the Claimant is entitled to possession, it will make an order for possession. The parties will then make representations to the court on the date for possession, as the defendant will be given a reasonably sufficient time to vacate the premises. If possession is ordered following the service of a Section 8 notice brought on mandatory grounds or a Section 21 notice under the HA 1988, the usual order will require the defendant to give up possession of the premises within 14 days of the order being made. Under Section 89 of the Housing Act 1980, the court should only grant a period of more than 14 days in "exceptional circumstances" and at the request of the defendant. The court only has the power to extend a mandatory order for possession to a maximum of 6 weeks from the date of the order being made.

**Summary: what can you do now to prepare?**

1. Whilst the CVA 2020 and CPR PD 51Z have stayed all possession claims for 3 months, solicitors and their landlord clients are still able to serve notices and issue claims for possession proceedings. However, the current guidance from the MHCLG is:

“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”.

1. 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. It does not appear that the restrictions apply to those who have remained in occupation following the termination of a licence or a common law tenancy.
2. Additionally, the CVA 2020 does not prevent landlords from pursuing other claims, such as debt claims in respect of the non-payment of rent. However, this is subject to the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (SI 2020/451) (2020 Regulations), in effect from 25 April 2020. 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.
3. The first step that can be undertaken now is to decide if you wish to use the Section 8 or Section 21 procedure. It is not possible to use the procedure under Section 21 of the HA 1988 to bring a fixed term tenancy to an end before its contractual expiry date and the landlord can only use the possession procedure under Section 8 of the HA 1988. There can be tactical advantages in serving a Section 8 notice on the grounds of tenant default but where obtaining possession is the priority, the advantage of serving a Section 21 notice is that the landlord does not need to prove an element of tenant default to obtain possession.
4. If you intend to serve a Section 8 Notice, ensure that:
5. The notice is in the prescribed form (Form 3);
6. The grounds relied upon within the notice are correctly set out; and
7. The grounds are correctly particularised within the notice.
8. If you intend to serve a Section 21 Notice in England, ensure that:
9. The notice is in the prescribed form (Form 6A);
10. The tenant has been served with a valid Energy Performance Certificate (EPC) and valid Gas Safety Certificate (GSC) for the property;
11. 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);
12. 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;
13. The property has a House in Multiple Occupation (HMO) licence, if so required;
14. A selective licence has been obtained, if required; and
15. The landlord has returned any payments which cannot be required by them under the Tenant Fees Act 2019.
16. If you intend to serve a Section 21 Notice in Wales, ensure that:
17. 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;
18. The property has a House in Multiple Occupation (HMO) licence, if so required;
19. A selective licence has been obtained, if required;
20. 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
21. The landlord has returned any payments which cannot be required by them under the Rent Homes (Fees Etc.) (Wales) Act 2019.
22. If you intend to serve a Notice to Quit, ensure that:
23. The notice is in writing, and
24. The notice contains the information currently prescribed by the Notices to Quit etc. (Prescribed Information) Regulations 1988 (SI 1988/2201).
25. Remember that as a result of the restrictions caused by the CVA 2020 and CPR PD 51Z, you can serve a notice (with a three month minimum period) and issue the claim at Court but the Court will not list a hearing for 90 days upon receipt of the claim. Therefore, it is important to issue the claim as soon as possible in order to start the clock on the 90 day waiting period. Once the order for possession is made and expires, you will need to check whether the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (SI 2020/451) (2020 Regulations) are still in force to allow you to enforce the order.

This note is for general information only and is not and is not intended to constitute legal advice on any general or specific legal matter. For legal advice on particular cases please contact Ben Cressley, Senior Civil Team Clerk, on 0207 427 6810 to discuss instructing Counsel.

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**10TH MAY 2020**