SECTION 21 NOTICES FROM 1 OCTOBER 2015

Deregulation Act 2015 ss.33-41; Housing Act 1988

The Deregulation Act 2015 introduces a raft of new measures controlling assured shorthold tenancies ("ASTs"). Practitioners should by now be aware of the provisions relating to tenancy deposits contained in ss.30-32, which came into force (with retrospective effect) on March 26 2015. However, further significant changes, relating to the operation of notices under Section 21 Housing Act 1988 ("section 21 notices"), enter into force on 1 October 2015 (save where otherwise stated). These provisions will for the time being apply only to ASTs granted on or after 1 October 2015 of a dwelling-house situated in England (see more fully below).

Sections 33-34: Preventing retaliatory eviction

Retaliatory eviction defined

Section 33(1) provides that where a "relevant notice" is served in relation to a dwelling-house, a section 21 notice may not be given in relation to an AST within six months beginning with the day of service of the relevant notice, or if operation of the relevant notice has been suspended, within six months beginning with the day on which the suspension ends.

A "relevant notice" for these purposes is defined in s.33(13) as any one of the following:

(a) a notice served under section 11 of the Housing Act 2004 (improvement notices relating to category 1 hazards),

(b) a notice served under section 12 of that Act (improvement notices relating to category 2 hazards), or

(c) a notice served under section 40(7) of that Act (emergency remedial action).

These notices will have to be served by the relevant local housing authority.

Section 33(2) further provides that a section 21 notice given in relation to an AST of a dwelling-house is invalid where:

(1) before it is given, the tenant made a written complaint to the landlord regarding the condition of the dwelling-house at the time of the complaint;

(2) the landlord did not provide any response or any adequate response within 14 days, or gave a section 21 notice in relation to the dwelling-house;

(3) the tenant then made a complaint to the relevant local housing authority about the same, or substantially the same, subject matter as the complaint to the landlord;

(4) the relevant local housing authority served a relevant notice in relation to the dwelling-house in response to the complaint; and

(5) if the section 21 notice was not given before the tenant's complaint to the local housing authority, it was given before service of the relevant notice.

For these purposes:

(1) An "adequate response" by the landlord is one in writing which describes the action the landlord proposes to take to address the complaint, and sets out a reasonable timescale within which that action will be taken.

(2) The complaint can be made otherwise than in writing where the tenant does not know the landlord's postal or e-mail address, or waived altogether where the tenant has made reasonable efforts to contact the landlord to make the complaint but was unable to do so.

(3) The complaint may be made to any person acting on behalf of the landlord in relation to the tenancy, e.g. a letting agent.

Section 33(6) directs the court to strike out proceedings for an order for possession under section 21 if before the order is made, the section 21 notice has become invalid under s.33(2). However, section 33(7) makes clear that an order for possession made under section 21 must

not be set aside on the ground that a relevant notice was served *after* the order for possession was made.

Application to common parts

By section 33(10) and (11), the provisions on retaliatory eviction apply equally to notices served or complaints made in relation to any common parts of a building of which the dwelling-house forms a part, provided the landlord has a controlling interest in the common parts and the condition of those parts is such as to affect the tenant's enjoyment of the dwelling-house or any of the common parts which the tenant is entitled to use.

Exemptions

Section 33(8) provides that section 33(1) does not apply if the section 21 notice is given *after* the relevant notice has been revoked or quashed, or a decision of the relevant local housing authority to refuse to revoke the relevant notice has been reversed, or a decision of the relevant local housing authority to take the action to which the notice relates has been reversed, in accordance with the relevant provisions of the Housing Act 2004.

Section 33(9) provides that section 33(2) does not apply where the operation of the relevant notice has been suspended.

Section 34 provides a range of further exemptions to section 33(1) and (2). In summary, section 33(1) and (2) will not apply where:

(1) the condition of the dwelling-house or common parts that gave rise to service of the relevant notice is due to a breach by the tenant of the duty to use the dwelling-house in a tenant-like manner, or any express term of the tenancy to the same effect;

(2) at the time the section 21 notice is given the dwelling-house is "genuinely on the market for sale" (i.e. not to a person "associated" with the landlord within the meaning of s.178 Housing Act 1996, or to a business partner of the landlord, a person associated with the landlord's business partner or a business partner of a person

associated with the landlord. The definition of "business partner" in section 34(5) is expansive and should be consulted in full.);

(3) the landlord is a private registered provider of social housing; or

(4) the dwelling-house is subject to a mortgage granted before the beginning of the tenancy, the mortgagee is entitled to exercise a power of sale and the mortgagee requires possession of the dwelling house to dispose of it in exercise of that power at the time the section 21 notice is given.

Section 35: Section 21 notices in respect of *periodic* assured shorthold tenancies

Section 35 essentially places the decision in *Spencer v Taylor* [2013] EWCA Civ 1600 on a statutory footing by inserting the new subsection 4ZA into section 21 of the Housing Act 1988.

Subsection 4ZA provides that the date specified in a notice under s.21(4)(a) (relating to a periodic AST) shall no longer need to be the last day of a period of the tenancy. As with s.21(1)(b), the landlord need only give not less than two months' notice.

Section 36: Time limits in relation to section 21 notices and proceedings

Section 36 inserts new subsections 4B-4E into section 21 of the Housing Act 1988.

Section 21(4B) prevents service of a section 21 notice in the first four months of the tenancy, or in the case of a replacement tenancy (as defined in section 21(7), i.e. a new tenancy of the same or substantially the same premises granted by the same landlord to the same and tenant at the end of an existing AST) within four months of the day on which the original tenancy began.

By section 21(4C), s.21(4B) has no application to a statutory periodic tenancy arising under s.5(2) HA 1988.

By section 21(4D) proceedings for an order for possession may not be begun more than six months after the date on which a section 21 notice is given. An exception is provided by s.21(4E): where a notice is given under s.21(4) specifying a date more than two months after

the date the notice was given, proceedings for possession may not be begun later than *four* from the date specified in the notice. Failure to issue proceedings within these time limits will mean a fresh notice has to be served.

Section 37: Prescribed form of section 21 notices

Section 37 inserts the new subsections 21(8) and (9), which provide for the Secretary of State to make regulations prescribing the form of section 21 notices.

Regulation 4 of the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 gives effect to section 37 by amending regulation 3 of the Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015. By the new regulation 3 (fa), a section 21 notice must be in the prescribed Form No. 6A.

Owing to an error in the regulations as originally drafted, the correct Form 6A is now to be found in the schedule to The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) (Amendment) Regulations 2015.

Section 38: Compliance with prescribed requirements

Section 38 introduces a new section 21A into the Housing Act 1988, by which a section 21 notice may not be served a time where the landlord is in breach of a prescribed requirement. These may relate to:

(a) the condition of dwelling-houses or their common parts;

(b) the health and safety of occupiers of dwelling-houses; or

(c) the energy performance of dwelling-houses.

At the time of writing, regulation 2 of The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 gives effect to section 38 by providing that the prescribed requirements are:

(1) the requirement to provide an energy performance certificate to a tenant free of charge in accordance with regulation 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012;

(2) the requirement to provide the tenant with a copy of the gas safety certificate required under paragraph (6) or (7) of regulation 36 of the Gas Safety (Installation and Use) Regulations 1998.

Section 39: Requirement to provide prescribed information

Similarly, section 39 inserts a new section 21B which provides that no section 21 notice may be given at a time where the landlord has not complied with a requirement to provide such information as may be prescribed by the Secretary of State about the rights and responsibilities of a landlord and a tenant under an AST.

Regulation 3 of The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 gives effect to section 39 by providing that the landlord must serve a version of the latest document entitled "*How to rent: the checklist for renting in England*", published by the Department for Communities and Local Government.

Section 40: Repayment of rent where tenancy ends before end of a period

Section 40 entitles the tenant of an AST that is brought to an end before the end of a period of the tenancy to a pro-rata repayment in respect of rent paid in advance for that period for such time as the tenant is out of possession of the dwelling-house.

The repayment due to the tenant is calculated as follows:

R x D/P

Where –

R is the rent paid for the final period;
D is the number of whole days of the final period for which the tenant is not in occupation; and
P is the number of whole days in that period.

For example, suppose rent payable in advance in the sum of £1,000 fell due and was paid on the 1 January, and the landlord recovers possession on the 21 January. There are 31 days in the period and the tenant will not be in occupation for 10 whole days (22 January to 31 January). The tenant is entitled to a repayment of £322.58 (£1,000 x (10/31)).

If the amount of repayment due has not been paid when the court makes an order for possession under section 21, the court must order the landlord to make the repayment.

Section 41: Application of sections 33-40

Finally, and importantly, section 40 provides that the provisions above apply only to an AST of a dwelling-house in England granted on or after the day on which the provision comes into force. For the time being, these sections do not apply to a statutory periodic tenancy arising by virtue of section 5(2) Housing Act 1988 where the original AST was granted pre-commencement of that provision.

However, three years after the entry into force of each provision (save section 39) the provision will apply to any AST of a dwelling-house in England, regardless of when it was granted.

The law is stated as at 1 October 2015.

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