arden chambers

DEFENDING POSSESSION PROCEEDINGS

HLPA SEMINAR – 15 JULY 2015

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TOPICS

1) Tenancy Deposit Schemes
1) Retaliatory Eviction
1) Changes to section 21, Housing Act 1988 procedure
2) Post *R(ZH and CN) v LB Newham and LB Lewisham*

(1) Tenancy Deposit Schemes

- The requirement for landlords to register deposits in accordance with an authorised scheme was brought in by way of amendments to the Housing Act 2004 on **6 April 2007**: (Housing Act 2004 (Commencement No.7)(England)(Order), Article 2(a).
- The introduction of legislative protection for tenancy deposits came about as a response to concerns over the lack of regulation in this area.
- Generated considerable judicial interpretation and legislative amendments.
- **The Deregulation Act 2015, ss.30 – 32 introduced yet further changes, with effect from 26 March 2015.**

CHAPTER 4, HOUSING ACT 2004

S.213	**Requirements relating to tenancy deposits** **s.213(3) - *Initial requirements*** **s.213(6) – *Prescribed Information***
S.214	**Proceedings relating to tenancy deposits**
S.215	**Sanctions for non-compliance**

Prescribed Information – s.213(5), Housing Act 2004

The prescribed information enables tenants to understand how the tenancy deposit scheme works and the mechanism by which they can recover their deposits.

The Housing (Tenancy Deposits)(Prescribed Information) Order 2007 came into force 6 April 2007. The Deregulation Act 2015, makes retrospective amendments to the 2007 Order.

- New! **Article 2(3)** – allows a **letting agent's details** to be provided in the prescribed information *instead* of the landlord's.

Prescribed Information – changes have retrospective effect

Article 3 – provides that the amendments to the 2007 Order are to be treated as having effect since 6 April 2007, save for the following.

Amendments will *not* have effect in relation to legal proceedings under s.214, Housing Act 2004/s.21, Housing Act 1988 possession proceedings in which the point had been argued but which have been either settled or finally determined before 26 March 2015.

Cost protection for the tenant

- If the proceedings have not been finally determined or settled by 26 March 2015, and the court decides against the s.214 claim or grants possession pursuant to s.21 in consequence of the aforementioned amendment, the tenant will have **cost protection** and the court must not order the tenant to pay the landlord's costs to the extent that the court reasonably considers those costs are attributable to the proceedings under s.214/s.21: s.30(5), Deregulation Act 2015.

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Prohibition on serving s.21 Notice

In order to compel landlords to comply with their statutory obligations Parliament imposed sanctions on defaulting landlords pursuant to s.214 and s.215, Housing Act 2004.

Landlord's are prohibited from serving valid s.21 notices in following scenarios:

(1) **Deposit not being held in authorised scheme: s.215(1)**
(2) **Initial requirements not complied with: s.215(1A)**
(3) **Prescribed information requirements not complied with: s.215(2)**
(4) **Non-money deposit obtained and not returned**

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Charalambous v NG + s.215, Housing Act 2004

- The amendments made to the Housing Act 2004, by s.31, Deregulation Act 2015, came about in response to the Court of Appeal decision in *Charalambous v NG* [2014] EWCA Civ 1604.
- "Although it was never the government's intention – either in 2007 or following amendments made to the tenancy deposit legislation in 2012 by the Localism Act 2011 – that the tenancy deposit legislation should apply to such deposits, **the amendments enshrine the Court of Appeal's decision in the legislation.**"

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- S.215, Housing Act 2004, has been amended, pursuant to s.31(3), Deregulation Act 2015.
- **It means that the prohibition on serving a s.21 notice is extended to all cases where a tenancy deposit has been paid and accordingly if a landlord wishes to use the s.21 possession procedure the landlord will need to protect the deposit (or return it in full, or with agreed reductions.)**
- The amendments do **not** however extend the other sanctions and penalties provided for under s.214 and s.215 to such cases.

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New! s.215A – s.215C, Housing Act 2004

- The Deregulation Act 2015 inserted 3 news sections into Chapter 4, Housing Act 2004.

(1) Section 215A – Statutory periodic tenancies: deposit received before 6 April 2007

(2) Section 215B – Shorthold tenancies: deposit after 6 April 2007

(3) Section 215C - Transitional provisions

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Landlords who fail to protect deposits lose the ability to rely on no-fault based ground for possession in s.21, Housing Act 1988 **unless** they return the deposit in full or until s.214 court proceedings are resolved.

The purpose of the new provisions is to deal with the issues arising out of the Court of Appeal's decision in the case of ***Superstrike v Rodrigues*** [2013] EWCA Civ 669.

- Deposit received in connection with a fixed term AST prior to 6 April 2007.
- After 6 April 2007 a statutory periodic tenancy arose on the expiry of the fixed term.
- S.213 applied.

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Extended window for compliance

- The new s.215A applies to cases where a tenancy deposit was received in connection with a **fixed term tenancy prior to 6 April 2007**, and on or after that date, a **statutory periodic tenancy arose** on the expiry of the fixed term tenancy.

Extended window for compliance

- Whilst the tenancy deposit protections *do* apply, landlord's have an extended window in which comply: s.215A(1)(3), Housing Act 1988.
- **23 June 2015**

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s.215B, Housing Act 2004

Problem: Is there a duty on the landlord to comply with the tenancy deposit protection requirements every time a tenancy becomes a statutory periodic, or is renewed?

Answer: When a tenancy deposit is received after 6 April 2007, the deposit is protected and the prescribed information is sent to the tenant, then so long as the deposit remains protected in accordance with the same authorised tenancy deposit scheme from one tenancy to the next, there is **no requirement for the landlord to re-send the same information** to the tenant each time the tenancy is renewed or rolls over: **the landlord will be treated as having complied with the tenancy deposit protection afresh at the start of each tenancy.**

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s.215C Transitional Provisions

- New s.215A and S.215B are to be treated as having **effect since 6 April 2007.**
- Any current s.21 possession proceedings, or s.214 penalty claims issued *before* 26 March 2015 will be determined on basis of s.215A and s.215B.

This means …

- What had been an invalid s.21 notice will be valid!
- What had been a valid s.214 penalty claim will be dismissed if the only basis of the claim was *Superstrike* failure to serve the prescribed information.
- The new sections do not have effect in relation to legal proceedings under s.214, or s.21, HA 1988, which have either been finally determined by a court or settled by the parties prior 26 March 2015.

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COST PROTECTION

- **Protection in respect of legal costs for tenants if proceedings already begun.**
- S.215(5) – "…The court must not order the tenant… to pay the landlord's costs, to the extent that the court reasonably considers those costs are attributable to the proceedings under section 214 of this Act or (as the case may be) section 21 of the Housing Act 1988."

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(2) RETALIATORY EVICTION

BACKGROUND

- Campaign to legislate against 'retaliatory evictions' started by Debbie Crew - "The Tenant's Dilemma'" (2007).
- Introduced as a private Members' Bill by Sarah Teather MP: The Tenancies (Reform) Bill.
- The Bill failed to complete its Second Reading Stage.
- Government introduced amendments to the Deregulation Bill (in a slightly altered version).
- **ss.33 – 40, Deregulation Act 2015**
- The Deregulation Act 2015 received royal assent on 26 March 2015.

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Policy Rationale

"The policy rationale for the changes is **to prevent tenants from feeling unable to complain about poor property conditions because they fear eviction.** The government also intends that the sections should encourage landlords to keep their property in a decent condition and to comply with all legal obligations placed upon them, in order not to lose their right to reply on section 21."

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S.33 – Key Provision – *Preventing retaliatory eviction*

Aim: To protect assured shorthold tenants in private rented accommodation against retaliatory eviction where the tenants are suffering from poor or unsafe property condition.

Protection: Landlords are prevented from evicting tenant(s) by giving notice pursuant to s.21 for 6 months from the date of service of the relevant notice.

Coming into force 1 October 2015

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Section 33(1) – 6 month window of protection

s.33(1) Where a **relevant notice** is served in relation to a dwelling-housing in England, a section 21 notice may not be given in relation to an assured shorthold tenancy of a dwelling house –

(a) **within six months** beginning to with the day of service of the relevant notice, or

(b) where the operation of the relevant notice has been suspended, within six months beginning with the day on which the suspension ends.

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S.33(13)(a) - "Relevant Notice'"

What is deemed to be a "relevant notice" for the purpose of s.33 is limited to:

(a) Improvement notice served under s.11, Housing Act 2004

(b) Improvement notice served under s.12, Housing Act 2004

(c) A notice served under s.40(7), Housing Act 2004 (emergency remedial action)

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s.33(2) - Summary

A **s.21 notice will be invalid**, if, before the notice was given, the tenant had made a complaint about the condition of the dwelling to the landlord, the landlord did not provide an adequate or timely response to the tenant, or served a s.21 notice and the tenant then contacted the local authority , who served a relevant notice in relation to the state of the dwelling.

The **Court must strike out proceedings** for an order of possession under s.21, if before the order is made, the s.21 notice that would otherwise require the court to make an order for possession has become invalid due to s.33(2): s.33(6).

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Step-by-Step – s.33(2)

(a) Tenant makes a **complaint in writing** to the landlord about the condition of the dwelling (s.33(2)(a);

(b) The Landlord:
- does not provide a response to the complaint within 14 days (s.33(2)(b)(i); or
- does not provide an **adequate response** (s.33(2)(b)(ii); or
- serves a s.21 notice (s.33(2)(b)(iii); AND

(c) The tenant then complains to the local authority (s.33(2)(c);

(d) An Environmental Health Officer inspects the dwelling, following which the local authority serve a "**relevant notice**"(s.33.(2)(d);

(e) If the s.21 notice was not given between the tenant's complaint to the local housing authority it was given before the service of the relevant notice.

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'Adequate response'

s.33(3) The reference in subsection (2) to an adequate response by the landlord is to a **response in writing** which

(a) provides a **description of the action** that the landlord proposed to take to address the complaint; and

(b) **sets out a reasonable timescale** within which action will be taken.

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Can't reach the landlord?

- S.33(2) will still operate to invalidate a s.21 notice given if:
  - Tenant does not have to make the complaint in writing to the landlord if he does not know the landlord's postal or email address: s.33(4).
  - Tenant has made "reasonable efforts" to contact the landlord to complain about the condition of the dwelling-house but was unable to do so: s.33(

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s.34 – Further exemptions

The protection of s.33(1) and s.33(2) do *not* apply where the condition of the dwelling-house which gave rise to the service of the relevant notice is due to a breach by the tenant of –

(a) The duty to use the dwelling-house in a tenant-like manner; or
(b) An express term of the tenancy to the same effect.
(c) At the time the s.21 notice is given, the dwelling-house in genuinely on the market for sale.

S.34(4) sets out further when it should be considered the property is not 'genuinely on the market for sale' – e.g intention to sell to a person associated with landlord/business partner/

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ISSUES

- If a possession order has already been made, the subsequent service of a relevant notice is of no effect in overturning the possession order.
- Awareness of tenants of their rights/correct procedures?
- Practical success of legislation contingent upon service of a relevant notice by the local authority.
- UK Government Guidance on housing enforcement measures.
- How will s.34(4) operate in practice? What is un-tenant like behaviour?

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(3) CHANGES TO S.21, Housing Act 1988 PROCEDURE

Policy Rationale

"The changes that are made to the section 21 procedure aim to make the eviction process more straightforward to both landlords and tenants."

- S.35 – Notice
- S.36 – Time limits in relation to s.21 notices and proceedings
- S.37 – Prescribed form of s.21 notices
- S.38 – Prescribed legal requirements
- S.39 – Landlord to provide prescribed information

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New s.21(4ZA), Housing Act 1988

Notice to be provided in relation to periodic assured shorthold tenancies

The new section 21(4ZA), Housing Act 1988, which comes into force on 1 October 2015, will **disapply** the requirement that the date specified in a s.21(4)(a) notice must be the last day of the period of the tenancy.

NB: To remedy the impact of s.21(4ZA), which may mean a tenant is required to give up possession part-way through the period for which they have already paid rent in advance, the tenant will be entitled to rent repayment in respect of the unexpired period: s.35, Deregulation Act 2015.

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New s.21(4B – 4E), Housing Act 1988

Time Limits

- A section 21 notice may not be given in relation to a tenancy **within first 4 months** of the tenancy.

- this will end the practice of landlord's serving s.21 notices at the commencement of the tenancy.

- Possession proceedings **may not be begun later than 6 months** from the date of service of the s.21 notice.

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New Regulations?

Since **1 July 2015**, the Secretary of State has had the power to make regulations:

- prescribing **the *form* of s.21(1) or s.21(4) notices:** s.21(8), Housing Act 1988
- prescribing **legal requirements**: s.21A, Housing Act 1988
- requiring landlords to provide **prescribed information**: s.21B, Housing Act 1988

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s.21A, Housing Act 1988 - Prescribed legal requirements

- **A landlord will be prohibited from using the s.21 notice procedure where she had failed to comply with the prescribed legal requirements**.
- Aimed at ensuring only law abiding landlords will be able to rely on the 'no fault' eviction process.
- Prescribed legal requirements can relate:
  - to housing conditions
  - health and safety,
  - or energy performance e.g. annual gas safety certification.

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s.21B, Housing Act 1988 - Requirement for landlord to provide prescribed information

S.21B(3) – " A notice under subsection (1) or (4) of section 21 may not be given in relation to an assured shorthold tenancy of a dwelling-house in England at a time when the landlord is in breach of a requirement imposed by regulations under subsection (1)."

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Which tenancies are protected?

Transitional provisions: s.33 – 40 Deregulation Act 2015

- Only tenancies granted "on or after the day the sections come into force" are protected: s.41(1).
- Further, statutory periodic tenancies which arise after the sections come into force, but where the original tenancy was granted before the relevant sections come into force are **not** protected.

BUT, once a provision has been brought into force it will apply to all assured shorthold tenancies, whether granted before or after the commencement date, three years after the provision comes into force. This is with the exception of s.39 (requirement the landlord to provide prescribed information) which will continue to apply only to 'new' tenancies entered into after the coming into force of the relevant sections.

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(4) Post *R(ZH and CN) v LB Newham and LB Lewisham*

Eviction without a court order

R(ZH and CN) v LB Newham and LB Lewisham [2014] UKSC 62

- Issues left unresolved by the Supreme Court?

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Lady Hale at **[165]**

"In this context I am puzzled by what appears to be the generally accepted view that the protection of section 3 of the [Protection from Eviction Act 1977] *will* apply once the local authority have accepted that they owe the family the "full housing duty" in section 193(2) of the 1996 Act. But the existence of that "full housing duty" is a quite separate matter from the terms on which the family occupy their accommodation. They may well remain in exactly the same accommodation on exactly the same contractual terms thereafter. There may well be no new letting or no new licensing for some time. Their occupation of those particular premises is just as precarious as before . The full housing duty will come to an end if they refuse an offer of suitable alternative accommodation elsewhere. So can it be said that the purpose for which the premises were let or licensed has changed just because the nature of the local authority's duty has changed? Even if that could be said, the contractual terms of the tenancy or licence cannot be determinative of its purpose."

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