Section 21 and the Deregulation Act for Tenants

Introduction

Section 21 is a supplemental route to possession for Assured Shorthold Tenancies. It exists to undermine the effects of s5 in relation to those tenancies and allow landlords to have their properties back at the end of a fixed term tenancy or at any stage during a periodic tenancy.

Problems

Section 21 has always been contentious to some degree in that it does not require a landlord to give any specific reason for recovery of the property. To that extent it has always been vulnerable to some degree of abuse in that it can be used as an alternative to service of a section 8 notice in any AST which is no longer in a fixed term. Additionally, its lack of time limitation mean it can be left out there as a quick means to remove a tenant in a periodic tenancy at any stage. Arguably this removes the discretion of the Court in relation to parts of the section 7 eviction process. This was accepted by the government at the time it was introduced and the debates from that period show that the government considered it acceptable that a tenant would be aware that once an s21 notice had been served they were living at hazard. Of course, they had not considered the type of landlords that might be operating the system and the drive toward relatively short tenancies that has ultimately occurred. This has led ultimately to new restrictions being imposed on the legislation in the Deregulation Act 2015.

Retaliatory Eviction and Tenancy Reform

There were originally a suite of changes proposed to s21 within the Tenancies Reform Bill. This was a Private Members Bill put forward by the Liberal Democrat MP, Sarah Tether which Government had then supported. However, the Bill was stopped by being talked out at second reading stage by some backbench Conservative MPs. However, similar provisions were then brought back at Lords Report stage of the Deregulation Act 2015 and passed with little or no debate. These changes are substantial but they will only be applicable in England. They do not apply to Wales. A version of s21 showing how it looks with all changes incorporated can be found below.

Retaliatory Eviction

One of the main thrusts of the changes was to prevent landlords faced with complaints about property condition from their tenants from simply removing the tenant using s21 and substituting them with someone more accommodating. In order to prevent this s21 notices will not be validly served if:

- the tenant has made a written complaint to the landlord about the condition of the property prior to its being served; and
- the landlord has not provided an adequate written response within 14 days; and
- The tenant has then complained to the relevant local authority who have decided to serve an Improvement Notice in respect of the property or have carried out emergency remedial action themselves using their powers under the HHSRS.

An adequate response is defined as a response which defines the actions the landlord is proposing to take to deal with the complaint and sets out a reasonable timescale for doing so.

In addition, where an Improvement Notice has been served or emergency remedial action has been carried out at any time the landlord is precluded from serving a notice under s21 for a period of 6 months from the date of that notice being served. Where the landlord asserts that the tenant's actions are what has caused the condition situation to arise then these restrictions will not apply. There is also an exemption which allows for the section 21 notice to be valid if the property is genuinely on the market for sale but this must be the open market and with no intention to sell it to some connected party.

S21(4)a Changes

s21(4)(a) has been altered in England to exclude the need for an s21(4)(a) notice to expire on the last day of a period of the tenancy. The restriction in s21(4)(a) that the notice must be at least one period of the tenancy will remain. However, as *Spencer v Taylor* is still good law and therefore s21(1)(b) notices can be used in most cases this will make little difference either way.

Section 21 Timing

There is a new restriction on serving section 21 notices early. It will not now be permissible to serve a s21 notice in the first four months of an initial tenancy. Where the tenancy is renewed then the notice can be served immediately. This creates an odd situation for a 6 month tenancy. The notice cannot be served in the first 4 months and is a two month notice. Time must also be allowed for service of the notice. In practice that means that many 6 month tenancies will now become tenancies for 6 months and a few days.

In addition to the restriction on early service there is a further new "use it or lose it" aspect to s21 notices in that they will not be able to be utilised at all more than 6 months after the date they were first given to the tenant. As they are of course 2 month notices this means that the notice will need to made use of within four months after it has required the tenant to leave. Where the notice is given under s21(4)(a) and the periods of the tenancy are longer than 2 months such that the notice has to be for a longer period then it can be used within 4 months of the date the tenant was being asked to leave.

Standardised Section 21 Notices

There is to be a new power to make regulations to prescribe a set form of a section 21 notice which will need to be used when giving notice. This sets out the tenant's rights, the time limits, and their ability to complain about the condition. There are in fact two notices as the government made an error on the initial notice. The initial notice was published in Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 but this was replaced by the notice in the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) (Amendment) Regulations 2015. The original regulations are also important as they contain other key provisions.

Other Required Information and Limits

There are other key requirements. There is a new power for regulations to be made requiring a landlord to give tenants information about their rights. This is met by the requirement to give a tenant the government's How to Rent Guide. This must be given before the service of an s21 notice. The correct version of the guide is the one that was in existence immediately prior to the tenancy commencing. On renewal there is a requirement to update the guide if it has changed in the meantime but there is no requirement to do so at any other time.

The second requirement is to permit regulation to be made prohibiting the service of an s21 notice if other matters relating to health and safety, property condition, or energy performance have not been met. This is met by requiring a valid EPC and Landlord's GSC to be given to the tenant prior to service of the s21 notice.

Commencement

The changes which create a new form of s21 notice come into force on 1 October 2015 for any tenancy that is new or actively renewed (not statutory periodic) on 1 October 2015. From 1 June 2018 all ASTs will need to use the new style notice, irrespective of when they began.

The remaining changes to s21, that is the limit on serving them in the first four months and the various alterations regarding tenant complaints about condition do not come into force until 1 October 2015 and, again, are only applicable to new tenancies commencing after that date. The provisions will be applicable to all Assured Shorthold Tenancies from 1 October 2018.

Consequences and Defences

There are a number of important potential uses for the changes brought to section 21. Historically it has been very difficult to defend against s21 notices. Therefore, when a disrepair defence is being used to prevent eviction for arrears of rent there has always been an alternative option open to the landlord, eviction by way of a s21 notice. If an eviction is obtained in this way then, in many cases, the tenant will not pursue the disrepair claim and so there is considerable advantage for the

landlord to go down this route. However, this is no longer so simple.

The following steps should be taken:

1. Consider when faced with a section 21 notice today is whether the tenancy is covered by the amended Deregulation Act provisions. If it is then there are a range of new defences available.
2. Assuming the Deregulation changes apply, then the notice itself should be considered to ensure it complies with the requirement in the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) (Amendment) Regulations 2015. Look for notices that pre-date the standard notice or that are from the first erroneous Regulations.
3. The additional information should be checked for to ensure that this has been provided properly as well as the traditional deposit information. A check should be made for the correct version of the How to Rent guide.
4. Look for potential HHSRS matters. Any complaint about condition made to the landlord in writing, however nebulous, may be of value. A text message, email, or letter complaining about noise, damp, cold, security or any form of disrepair will be a condition complaint for the purposes of the Deregulation Act changes. If this exists then an immediate request should be made to the local authority under the HHSRS asking for an inspection and highlighting the complaint made and the lack of action. Any s21 served between complaint and inspection (provided the inspection results in an Improvement Notice) could result in the s21 being invalidated. The HHSRS is much wider than the classical view of disrepair and deals with matters of property quality. Therefore matters which would normally be discounted as not being disrepair may well fall within the scope of the HHSRS.

Pressure should be put on local authorities to carry out an HHSRS inspection promptly. Recent evidence shows that local authorities are not inspecting in relation to more than half of HHSRS complaints. While there is no absolute duty to inspect it is worth asking why they are not inspecting promptly. If a request for an inspection has been made and a possession hearing occurs then an applications for adjournment should probably be made. There is no absolute power to grant this but it is likely that District Judges may use general case management powers to do so. They cannot order the local authority to inspect but an order requesting this may be useful.

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