

Residential Possession Proceedings in the time of Covid-19



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Introduction

1. The residential landlord and tenant sector is still impacted by the current Covid-19 pandemic. The emergency legislation enacted by Parliament and the various Government guidance continues to materially impact on nearly all aspects of the residential landlord and tenant sector.
2. The aim of this seminar is to provide you with an overview of the legislative and procedural changes that occurred in residential possession law in England during the current pandemic. I will focus on the following three areas:
 - (a) Notice periods
 - (b) Commencing or reactivating stayed possession proceedings
 - (c) Enforcement action

A. Landlord notice periods

3. The Coronavirus Act 2020 (“the Coronavirus Act”) came into force on 25 March 2020. That Act granted the Government emergency powers to tackle the impact that the Covid-19 pandemic could and would have on all aspects of civil society.
4. In respect of residential possessions, the substantive provisions of the Act governing this area are section 81 and schedule 29 of the Act. In general these provisions protect social and private residential tenants from eviction by delaying when landlords can start possession proceedings during the pandemic.
5. Both section 81 and schedule 29 of the Coronavirus Act 2020 were due to expire in England on 20 September 2020, but are now currently due to expire on 31 May 2021 by virtue of the Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2021 (S.I. 2021/284), regs. 1(2), 2. Depending on the evolution of the virus, there is a possibility that expiry date may be extended again.
6. The extended notice period covers the following type of tenancies:
 - Protected tenancies and statutory tenancies under the Rent Act 1977
 - Secure tenancies and flexible tenancies under the Housing Act 1985
 - Assured and assured shorthold tenancies under the Housing Act 1988; and
 - Introductory and demoted tenancies under the Housing Act 1996

7. I will set out what the current notice requirements are in respect of each of these tenancies.

Rent Act 1977: contractual protected tenancies

8. A landlord must first serve a valid not to quit if they intend on terminating the tenancy of a tenant who occupies their premises under a periodic contractual tenancy regulated under the Rent Acts 1977.
9. Pursuant to section 5 of the Protection from Eviction Act 1977, possession proceedings cannot be commenced until the notice period provided by the notice to quit has expired, or if it is a fixed term contractual tenancy regulated under the Rent Acts 1977, the fixed term period has expired.
10. Following expiry of the contractual period the tenancy becomes a statutory tenancy if the tenant remains in occupation of the premises.

Rent Act 1977: statutory tenancies

11. Under section 3(4) of the Rent Act 1977, a landlord seeking to commence possession proceedings, was not previously required to serve notice to end their tenant's statutory tenancy regulated under the Rent Act 1977.
12. Since 26 March 2020 landlords are now required to serve a notice of intention to commence possession proceedings pursuant to section 3(4A) of the Rent Act 1977. This notice can, however, under section 3(4B) of the Rent Act 1977 be dispense with if the court considers it just and equitable to dispense with the requirement to comply.
13. The relevant notice periods are as follows:
 - For notices served between 26 March 2020 and 28 August 2020 – 3 months' notice must be given
 - For notices served between 29 August 2020 and 31 May 2021 – 6 months' notice must be given unless one of the exceptions applies
14. The exceptions being as follows:
 - Where at least 6 months' rent is unpaid, the minimum notice period is 4 weeks
 - Where anti-social behaviour is alleged, whether or not any other ground is relied upon, the minimum notice period is 4 weeks

- If there has been a breach of the right to rent rules (Case 10A) and provided that no other ground applies, the minimum that must be given to the tenant for a non-renewal notice is 3 months

Secure Tenancies under the Housing Act 1985

15. Under section 83 of the Housing Act 1985, a secure tenant of a local authority landlord or a private registered provider of social housing, if the tenancy was granted pre-the Housing Act 1988, must be served with a valid notice of seeking possession, also known as a NOSP, before possession proceedings can be commenced, unless the court has determined that it is just and equitable to dispense with the same.

26 March 2020 until 28 August 2020

16. In respect of all the notice periods for the grounds of possession set out in schedule 2 to the 1985 Act, for all NOSP's served between 26 March 2020 and 28 August 2020, the minimum notice periods was extended to 3 months.

29 August 2020 until 31 May 2021 (unless extended)

17. A 6 months' extended notice period has been applied for all grounds of possession, except where possession is sought in the following circumstances;
- Where there are arrears of at least 6 months' rent and possession is being sought on the basis of ground 1 of schedule 2 to the 1985 Act (rent arrears or other breach of tenancy), the notice period for a NOSP is 4 weeks if no other ground is specified apart from ground 2 of schedule 2 to the 1985 Act; namely, the anti-social behaviour or use of the premises for immoral or illegal purposes ground. For rent arrears below 6 months then a 6 months' notice period applies
 - Where possession is being sought as a result of anti-social behaviour or use of the premises for immoral or illegal purposes, pursuant to ground 2 of schedule 2 to the 1985 Act, possession proceedings can be commenced immediately after the service of the NOSP
 - Where possession is being sought as a result of the conviction of the tenant or a person residing at the tenant's premises for an indictable offence which took place during or at the scene of a riot pursuant to ground 2ZA of schedule 2 to the 1985 Act, the notice period for a NOSP is a minimum of 4 weeks if no other ground is specified apart from ground 2 of schedule 2 to the 1985 Act; namely, the anti-social

behaviour or use of the premises for immoral or illegal purposes ground specified apart from ground 2 of schedule 2 to the 1985 Act

- Where possession is being sought on the basis of domestic abuse and the partner who was the victim has permanently left the premises, pursuant to ground 2A of schedule 2 to the 1985 Act, the notice period for a NOSP is a minimum of 4 weeks if no other ground is specified apart from ground 2 of schedule 2 to the 1985 Act
- Where the tenant or a person acting at the tenant's instigation has been found to have knowingly or recklessly made a false statement which induced the grant of a tenancy, possession proceedings can be brought on the basis of ground 5 of schedule 2 to the 1985 Act and the notice period for the NOSP in those circumstances is a minimum of 4 weeks if no other ground is specified apart from ground 2 of schedule 2 to the 1985 Act

Flexible tenancies

18. Pursuant to section 107D of the Housing Act 1985, a landlord has the right to possession of premises lent under a flexible tenancy on the expiry of the fixed term.

Notice of non-renewal

19. To regain possession a landlord must first serve on the tenant a notice of non-renewal of the tenancy pursuant to section 107D(3) of the 1985 Act. The notice of renewal must be in writing and give the tenant not less than six months' notice and inform the tenant of their right to seek a review.
20. The notice should be served before the expiry of the fixed term, but it should be noted that the legislation does not prescribe when the notice of non-renewal should be served.

Notice seeking possession

21. After the expiry of the notice of non-renewal, a landlord must serve a notice of seeking possession, also known as a NSP, on the tenant to regain possession of the premises.
22. There is no prescribed form to recover a NSP, but it must be in writing.
23. Before the Coronavirus 2020 Act came into force; namely before 26 March 2020, the minimum notice period for the NSP was 2 months.

24. For a NSP served between 26 March 2020 and 28 August 2020, the minimum notice period for a NSP was extended to 3 months.
25. For a NSP served between 29 August 2020 and 31 May 2021 (unless this date is extended), the minimum notice period for a NSP has been extended to 6 months.

Assured and assured shorthold tenancies under the Housing Act 1988

26. For tenancies let under an assured or assured shorthold tenancy (AST), if possession is being sought on the basis of what is colloquially termed as a “fault ground”, pursuant to section 8 of the Housing Act 1988 (“the 1988 Act”), a landlord can only regain possession if they first serve on their tenant a notice of their intention to seek possession. This notice is more commonly known as a “section 8 notice” or a “NSP”.
27. Possession must be sought on the basis of one of the mandatory or discretionary ground of possession set out in schedule 2 to the 1988 Act.
28. For a NSP served between 26 March 2020 and 28 August 2020, the minimum notice period for all the grounds of possession was extended to 3 months.
29. For notices served between 29 August 2020 and 31 May 2021 (unless this date is extended), the minimum notice period for a NSP has been extended to 6 months, save in the following circumstances:

Mandatory grounds of possession

- In respect of ground 7 of schedule 2 to the 1988 Act, which deals with the death of the tenant, the minimum notice period for a NSP is 3 month
- In respect of ground 7A of schedule 2 to the 1988 Act, which deals with serious anti-social behaviour committed by the tenant or a person residing with the tenant, the minimum notice period for a NSP has been reinstated to the pre-pandemic notice period of a minimum of 4 weeks for a periodic tenancy and 1 month for a fixed term tenancy
- In respect of ground 7B of schedule 2 to the 1988 Act, where possession is sought because the tenant does not meet the residency requirements of the immigration

rules i.e. the tenant has failed the “right to rent checks”, the minimum notice period for a NSP is 3 months

- In respect of ground 8 of schedule 2 to the 1988 Act, which relates to the mandatory rent arrears grounds, the minimum notice period for the service of a NSP is 4 weeks where there are at least 6 months’ worth of rent arrears. Where the rent arrears are less than 6 months’ the minimum notice period for a NSP remains 6 months

Discretionary grounds for possession

- In respect of grounds 10 and 11 of schedule 2 to the 1988 Act, which are the discretionary rent arrears grounds, the minimum notice period for the service of a NSP is 4 weeks where there are at least 6 months’ worth of rent arrears. Where the rent arrears are less than 6 months’ the minimum notice period for a NSP remains 6 months
- In respect of ground 14 of schedule 2 to the 1988 Act, which relates to anti-social behaviour or use of the premises for immoral or illegal purposes by the tenant or a person residing in or visiting the premises, the pre-pandemic position has been reinstated, therefore possession proceedings can be commenced immediately after a NSP has been served
- In respect of ground 14A of schedule 2 to the 1988 Act, where possession is being sought on the basis of domestic abuse and the partner who is the victim has permanently left the premises, the minimum notice period for a NSP has reverted to its pre-pandemic notice period of 2 weeks. It should be remembered that this ground can only be used by social landlords
- In respect of ground 14ZA of schedule 2 to the 1988 Act, where possession is being sought as a result of the conviction of the tenant or a person residing at the tenant’s premises for an indictable offence which took place during or at the scene of a riot, the minimum notice period for a NSP has reverted to its pre-pandemic notice period of 2 weeks
- In respect of ground 17 of schedule 2 to the 1988 Act, where the tenant or a person acting at the tenant’s instigation has been found to have knowingly or recklessly

made a false statement which induced the grant of a tenancy, the minimum notice period for a NSP has reverted to its pre-pandemic notice period of 2 weeks

Non-fault grounds under section 21 of the 1988 Act

30. Landlords are still permitted to rely on the non-fault ground procedure for recovering possession of a property let on an AST. A valid notice of seeking possession under section 21 of the 1988 Act must first be served by the landlord. These notices are colloquially known as a “section 21 notice”.
31. The minimum notice period for a section 21 notice served between 26 March 2020 and 28 August 2020 is 3 months.
32. The minimum notice period for a section 21 notice served between 29 August 2020 and 31 May 2021 (unless this date is extended) is now 6 months.

Introductory Tenancies

33. For introductory tenancies under the Housing Act 1996 (“the 1996 Act”) a landlord can only gain possession if they first serve a notice under section 128 of the 1996 Act. The standard notice period for a section 128 notice was 4 weeks.
34. The minimum notice period for a section 128 notice was extended to 3 months for all section 128 notices served between 26 March 2020 and 28 August 2020 for all claims.
35. The minimum notice period for a section 128 notice has been amended as follows in respect of notices served between 29 August 2020 and 31 May 2021 (unless this date is extended):
 - If a landlord has stated that the reason possession is being sought is in relation to anti-social behaviour, domestic abuse or for a conviction following a riot, the minimum notice period is 4 weeks, whether or not any other reason is stated
 - In all other cases the minimum notice period is 6 months

Demoted tenancies

36. A local authority or housing acting trust tenant who occupies their premises under a demoted tenancy can only have their tenancy terminated if their social landlord first serves them with a notice of proceedings for possession before commencing possession

proceedings. There is no prescribed form for the notice, but it must be in writing and comply with the other requirements of section 143E(3) of the Housing Act 1996.

37. Before a private registered provider of social housing can obtain possession or premises let under a demoted tenancy, it must serve the tenant with a valid notice either under section 8 or section 21 of the 1988 Act.
38. The minimum notice period was extended from the minimum of 28 days or equivalent to the length of the period of the tenancy, whichever was longer to 3 months for all notices served between 26 March 2020 and 28 August 2020 for all claims.
39. The minimum notice has been amended as follows in respect of notices served between 29 August 2020 and 31 May 2021 (unless this date is extended):
 - If a landlord has stated that the reason possession is being sought is in relation to anti-social behaviour, domestic abuse or for a conviction following a riot, the minimum notice period is 4 weeks, whether or not any other reason is stated
 - In all other cases the minimum notice period is 6 months

B. Possession proceedings

40. A stay on all possession proceedings and enforcement action was initially imposed by the Master of the Rolls, Sir Terence Etherton and the Lord Chancellor, Rt Hon Robert Buckland QC for a period of 90 days with effect from 27 March 2020 until 25 June 2020. It was subsequently extended to 23 August 2020 pursuant to CPR PD 51Z and CPR 55.29. On 21 August 2020 the Master of the Rolls, on the direction of the Lord Chancellor, extended the stay for a further four weeks until 20 September 2020. CPR 55.29 was amended to reflect this change to the moratorium period.
41. When the stay on possession claims was lifted on 20 September 2020 landlords or their agents will need to comply with the terms of CPR PD 55C (PD 55C). PD 55C sets out the steps a landlord must take to reactivate a stayed claim for possession. It also sets out the procedural requirements that will apply to new and existing claims. It is set to expire on 30 July 2021.
42. On 17 September 2020, the Master of the Rolls issued detailed information concerning the arrangements for the resumption of possession hearings from 21 September 2020, including guidance on Possession Proceedings Listing Priorities in the County Court

and Overall Arrangements for Possession Proceedings in England and Wales (“the Overall Arrangements”).

43. The Overall Arrangements document is an important because it explains how the court will use some of the additional information required by PD 55C to prioritise cases. Except for accelerated possession claims, the timeline now includes a short review appointment (on the Review Date) before the substantive hearing.

Claim stayed before 23 August 2020

44. For stayed possession claims that were issued before 3 August 2020 unless the court directs otherwise, the claim will not be listed, heard, reheard or referred to a judge if a defence was filed until one of the parties’ files and serves a written notice (a “Reactivation Notice”).
45. The Reactivation Notice must:
- confirm that the party wishes the case to be listed, relisted, heard or referred; and
 - except in proceedings relating to an appeal, set out what knowledge that party has as to the effect of the Coronavirus pandemic on the defendant and their dependants
46. If the claim was commenced on rent arrears grounds, the claimant must provide an updated rent account for the previous two years at the same time as the Reactivation Notice is served.
47. In a claim that was stayed, where case management directions were made before 23 August 2020, a party who files and serves a Reactivation Notice must also file and serve the following:
- (a) a copy of the last directions order together with new dates for compliance with the directions taking account of the stay before 20 September 2020; and
 - (b) either—
 - (i) a draft order setting out additional or alternative directions which are required (including proposing a new hearing date); or
 - (ii) a statement in writing that no new directions are required and that an existing hearing date can be met; and
 - (c) a statement in writing as to whether the case is suitable for hearing by video or audio link.

48. In any claim (whether a new claim or a stayed claim) brought on or after 3 August 2020, the Claimant must—
- (a) bring to the hearing two copies of a notice—
 - (i) in a claim to which the Pre-Action Protocol for Possession Claims by Social Landlords is applicable, confirming that the Claimant has complied with that Pre-Action Protocol and detailing how the Claimant has done so; and
 - (ii) in all claims, setting out what knowledge that party has as to the effect of the Coronavirus pandemic on the Defendant and their dependants; and
 - (b) serve on the Defendant not less than 14 days prior to the hearing the notices referred to in sub-paragraph (a) setting out what knowledge that party has as to the effect of the Coronavirus pandemic on the Defendant and their dependants.
49. It is important to note that the requirement to file and serve a Reactivation Notice does not apply to claims in which a final possession order has already been made.

Accelerated possession claim

50. In any claim (whether a new claim or a stayed claim) brought on or after 3 August 2020 to which Section II of Part 55 applies the Claimant must file with the claim form for service with it a notice setting out what knowledge that party has as to the effect of the Coronavirus pandemic on the Defendant and their dependants.

Mediation pilot

51. A new, free, Housing Possession Mediation Pilot Scheme. The pilot scheme launched on 1 February 2021 and is expected to run for an initial six-month period.

C. Enforcement

Moratorium on enforcement action

52. There is currently a moratorium on the execution of warrants for possession until 31 May 2021 (unless this date is extended) or delivering a notice of eviction, subject to the following exemptions:

- A writ or warrant relates to an order for possession made against trespassers to which CPR 55.6 applies (persons unknown)
- A warrant of possession granted wholly or partly on the basis of grounds of anti-social behaviour, nuisance, domestic violence or false statements (under grounds 7A, 14, 14A or 17 of Schedule 2 to the 1988 Act)
- A warrant of possession granted wholly or partly on the basis of ground 7 of Schedule 2 to the HA 1988 (death of the tenant) where the person attending is satisfied that the dwelling house is unoccupied at the time of attendance
- A warrant of possession granted wholly or partly on the basis of grounds the mandatory or discretionary rent arrears grounds under grounds 8, 10 and 11 of Schedule 2 to the HA 1988, where the amount of unpaid rent arrears outstanding is at least an amount equivalent to six months' rent.

Conclusion

53. Continue to keep abreast of the guidance provided by the Government in relation to ongoing compliance with their statutory duties as the Covid-19 emergency measures evolve.

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