

Residential Possession practice and procedure

Procedure in possession claims

Forms

- The claim form should be in form N5 or N5B for the accelerated procedure for ASTs
- The Particulars of Claim should be in form N119, N120 for mortgaged residential premises and N121 for trespassers
- The Particulars of Claim must be filed and served with the Claim Form (CPR Rule 55.4)
- Defence forms (form for defending the claim, form for admitting the claim, form for acknowledging service) must be served with the Claim Form/ Particulars of Claim (CPR Rule 7.8) this is only really of relevance in trespasser proceedings where the landlord serves the Claim Form/ Particulars of Claim.

Timings

- For claims other than claims against trespassers the hearing date should be not less than 28 days after the date of issue (CPR rule 55.5(3)(a))
- The Defendant must be served with the Claim Form and Particulars of Claim not less than 21 days before the hearing date (other than in a trespass claim) (CPR rule 55.5(3)(c))

Accelerated Possession Proceedings

- This procedure which avoids the need for a court hearing may be used where the conditions in CPR Rule 55. 11(1)(b) are satisfied

(a) the tenancy and any agreement for the tenancy were entered into on or after 15 January 1989;

(b) the only purpose of the claim is to recover possession of the property and no other claim is made;

(c) the tenancy did not immediately follow an assured tenancy which was not an assured shorthold tenancy;

(d) the tenancy fulfilled the conditions provided by section 19A or 20(1)(a) to (c) of the 1988 Act;

(e) the tenancy –

(i) was the subject of a written agreement;

(ii) arises by virtue of section 5 of the 1988 Act but follows a tenancy that was the subject of a written agreement; or

(iii) relates to the same or substantially the same property let to the same tenant and on the same terms (though not necessarily as to rent or duration) as a tenancy which was the subject of a written agreement; and

(f) a notice in accordance with sections 21(1) or 21(4) of the 1988 Act⁵ was given to the tenant in writing.

(2) If the tenancy is a demoted assured shorthold tenancy, only the conditions in paragraph (1)(b) and (f) need be satisfied.

- the Claim form should be Form N5B
- there must be strict compliance with the above conditions
- if the tenant wishes to oppose the claim he must file a defence within 14 days of service of the claim form in form N11B

Tenancies under the Housing Act 1988

A tenancy under which a dwelling house is let as a separate dwelling is an assured tenancy provided that:

- The tenant or each of the joint tenants is an individual
- The tenant or at least one of the joint tenants occupies the dwelling house as his only or principal home
- The tenancy is not within the exceptions in part 1 of schedule 1 to the Housing Act 1988

- Part 1 of schedule 1 provides that the following cannot be assured tenancies:

- Tenancies entered into before commencement (15th January 1989)
- Tenancies under which the annual rent exceeds £100,000

It is worth noting that the rent threshold increased to £100,000 as of 1st October 2010 such that many existing tenancies became Assured Tenancies as at this date.

- Tenancies at a low rent
- Business Tenancies
- Licensed Premises
- Tenancies of agricultural land or agricultural holdings
- Lettings to students
- Holiday Lettings

- Resident Landlords
- Crown Tenancies
- Local Authority Tenancies
- Transitional cases

Grounds for Possession

- The grounds for possession for both assured and assured shorthold tenancies are found in Schedule 2 to Housing Act 1988

Possession using s.8 notice

The notice

- During a fixed term tenancy the landlord must establish that ground 2, 8 or 10-15 inclusive is made out as well as that the lease reserved a right on re-entry in respect of the ground relied upon (section 7(6) Housing Act 1988)
- Notice must be served on the tenant in the prescribed form (Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997/194)
- The notice must:
 - specify the grounds on which the landlord intends to bring possession proceedings
 - state that proceedings will not begin after a date specified in the notice
 - state that proceedings will not begin later than 12 months from the date of service of the notice
- The dates for the commencement of proceedings vary according to the ground relied upon but run from the date of service of the s.8 notice and not from the date the notice was signed
- The court may alter or add to the grounds specified and may dispense with notice altogether if it is just and equitable to do so the court may also accept a notice that is 'short'
- There is however no such discretion where possession is sought on the basis of ground 8 of Schedule 2

Rent Arrears

- It is always worth pleading grounds 8,10 and 11 in case the tenant pays off sufficient arrears before the hearing to bring the amount outstanding to under two months rent

- If relying on ground 8 it is worth either having a witness at the hearing or a witness statement dated either the evening before or the day of the hearing confirming the current arrears

Possession using a s.21 notice

- Additional means of terminating an assured shorthold tenancy (“AST”)
- There is no prescribed form although the notice must be in writing

Fixed term AST s.21(1)

- Two months notice may be given before or on the day the tenancy comes to an end but must not determine on a date prior to the expiry of the fixed term

Periodic AST s.21(4)

- The notice must specify a date but it is not necessary to specify a calendar date (**Lower Street Properties Ltd v Jones** [1996] 2 E.G.L.R 67);
- The date specified must be the last day of a period of the tenancy (for a statutory periodic tenancy s.5(3)(d) provides that it is one ‘under which the periods of the tenancy are the same as those for which rent was last payable under the fixed term tenancy)
- The date specified must not be earlier than the earliest day on which the tenancy could have been determined by notice to quit
- The notice must state that possession is required by virtue of s.21 *after* the date specified
 - ‘At the end of a period of your tenancy’ meant the same thing as after and is a valid notice (**Notting Hill Housing Trust v Roomus** [2006] EWCA Civ 407)
 - ‘On the last day of a period’ will invalidate the notice (**McDonald v Fernandez** [2003] EWCA Civ 1219)
- The Court of Appeal (**Notting Hill Housing Trust v Roomus** [2006] EWCA Civ 407) has approved the following formula

‘I give you notice that I require possession of the dwelling-house known as [the address] after the day on which a complete period of your tenancy expires next after the end of two months from the service of this notice’

Tenancy Deposit Protection Schemes

Since 6th April 2007 a landlord must place any deposit taken in respect of a shorthold tenancy into one of the approved tenancy deposit protection schemes (Housing Act 2004 sections 212-215)

Key points

- A landlord is not able to serve a section 21 notice if the deposit is not protected (s.215(1) Housing Act 2004)
- It is not clear whether a tenancy which became an AST as a result of the rent threshold increase falls within s.215(1). It has been successfully argued that as s.215(1) refers to a deposit 'paid in connection with a shorthold tenancy' it does not apply to a deposit paid in connection with a common law tenancy which later became a shorthold tenancy, this also fits with the Department of Communities and Local Government's current guidance¹ . However the point is yet to be conclusively determined and the contrary is certainly arguable
- Where a tenant makes a claim for three times the deposit under s.214 the following points are now clear:
 - The landlord will not be required to pay three times the deposit if he pays the deposit into a scheme before the date of the hearing, although there may be costs consequences (**Draycott v Hannells Letting Ltd (t/a Hannells Letting Agents** [2010] 3 All E.R. 411 and **Tiensia v Vision Enterprises Ltd (t/a Universal Estates** [2011] 1 All E.R. 1059)
 - It also seems, perhaps strangely given that purpose of the scheme, that a claim under s.214 cannot be brought after the tenancy has been determined (**Gladehurst Properties Limited v Farid Hashemi** [2011] EWCA Civ 604)

Trespassers

CPR Rule 55.1(b) defines a possession claim against trespassers' as:

'a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not'

Key points:

- For the purposes of part 55 a trespasser does not include a claim against a former tenant or sub tenant and is limited to persons who entered and remained on the land without permission
- The particulars of claim (form N121) and any witness statements must be filed and served with the claim form (CPR rule 55.5(2))

¹ <http://www.communities.gov.uk/housing/privaterentedhousing/annualrentalthreshold/>

- Defence forms (form for defending the claim, form for admitting the claim, form for acknowledging service) must be served with the Claim Form/ Particulars of Claim (CPR Rule 7.8)

- For residential premises there must be five *clear* days between service and the hearing for non residential premises there must be *two* clear days between service and the hearing (CPR rule 55.5(2))

- If the claim includes persons unknown they must be served in accordance with CPR rule 55.6 by
 - Attaching copies of the claim form, particulars of claim and any witness statements to the main door or some other part of the land so that they are clearly visible; and
 - if practicable, inserting copies of those documents in a sealed transparent envelope addressed to 'the occupiers' through the letter box; or
 - placing stakes in the land in places where they are clearly visible and attaching to each stake copies of the claim form, particulars of claim and any witness statements in a sealed transparent envelope addressed to 'the occupiers'

- The certificate of service should state that service was in accordance with CPR rule 55.6 and detail the methods used

- Possession should be forthwith (***McPhail v Persons Unknown*** [1973] Ch.447)

Rent Act Tenancies

No new Rent Act tenancies can be granted after 15 January 1989 but there are still some around

Key points:

- Cannot terminate a Rent Act Tenancy by using any of the methods in the Housing Act 1988

- To obtain possession the Landlord must establish that the contractual tenancy has been determined AND that there are statutory grounds for possession

- For a fixed term tenancy the landlord must either wait for the term to come to an end or establish that the contractual tenancy has come to an end by other means (for example forfeiture)

- For a periodic protected tenancy the contract may be determined by a notice to quit
- The grounds for possession are set out in Schedule 15 Rent Act 1977

Some key provisions to bear in mind

Section 48 Landlord and Tenant Act 1987

- If a landlord fails to provide the tenant with an address in England and Wales at which notices may be served any rent or services charges are treated as not due at any time before the landlord complies with this section
- The notice must be in writing (**Rogan v Woodfield Building Services Ltd** [1995] 1 E.G.L.R 72)
- The landlord should serve the notice prior to commencing a claim
- Interest will not accrue until the section has been complied with
- Where the address of a landlord within England and Wales is stated without qualification in the written tenancy agreement s.48 is satisfied (**Rogan v Woodfield Building Services Ltd** [1995] 1 E.G.L.R 72)
- Note that a section 48 notice must be served prior to a section 8 notice (**Marath v MacGillivray** (1996) 28 H.L.R 486)
- Failure to serve a notice under this section does not destroy the right to claim rent otherwise due before service of the notice

Section 47 Landlord and Tenant Act 1987

- Written demands from a landlord to a residential tenant for sums due under the lease must contain an address at which notices may be served on the landlord. Any part of the amount demanded which consists of a service or administration charge shall be treated for all purposes as not due at any time before the landlord provides an address for service
- The landlord should serve such a notice prior to commencing the claim
- Interest will not accrue until the section has been complied with
- Failure to serve a notice under this section does not destroy the right to claim sums otherwise due before service of the notice

s.167 Commonhold and Leasehold Reform Act 2002

- A landlord of a long lease of a dwelling may not exercise a right of re-entry or forfeiture for non payment of rent, services charges or administration charges unless the unpaid amount exceeds the prescribed amount (£350.00²) or has been payable for more than a prescribed period (3 years)

Section 81 Housing Act 1996

- A landlord cannot serve a s.146 notice or exercise a right of re-entry or forfeiture for non-payment of service charges unless it is finally determined that the service charge is payable or the tenant has admitted that it is so payable

² Rights of Re-entry and Forfeiture (Prescribed sum and Period) (England) Regulations 2004/3086

- There is county court authority (**Hillbrow (Richmond) Ltd v Alogaily** November 7 2005 [2006] C.L.Y 2707) which suggests that a default judgment is not a final determination for the purposes of s.81

Section 5(1) Protection from Eviction Act 1977

- A notice to quit for premises let as a dwelling is invalid unless it is in writing, contains the prescribed information³ and expires not less than four weeks after service on the tenant

Section 2 Protection from Eviction Act 1977

- While any person is lawfully residing in premises let as a dwelling any right of re-entry or forfeiture can only lawfully be exercised by court proceedings
- Premises let as a dwelling include premises in mixed business and residential use (**Pirabakaran v Patel** [2006] EWCA Civ 685)

Section 89 Housing Act 1980

- The court will not postpone the giving up of possession for more than 14 days or 6 weeks if the court is satisfied that exceptional hardship would be caused
- Does not apply where court had power to make the possession order only where it considered it reasonable to do so

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³ Notices to Quit etc. (Prescribed Information) Regulations 1988/2201