Possession appeal sends a warning to landlords

This article can also be found in the Estates Gazette.

Joel Semakula explains why a County Court possession appeal serves as a lesson for landlords.

The County Court has handed down judgment in *Lescott v Heil* (unreported, G00SS236, 2022), an appeal against a possession order in respect of a residential property made pursuant to section 21 of the Housing Act 1988 ("the 1988 Act").

The facts of this case are well known to those that travel up and down the country arguing possession claims. Ms Heil occupied the property pursuant to a statutory periodic tenancy. A section 21 notice was served on 10 March 2020 requiring possession to be given up on 14 May 2020. Heil did not leave the property and therefore on 1 June 2020 a claim was issued seeking possession using the accelerated procedure.

In April 2021, District Judge Callaghan made a 14-day possession order and ordered costs in the sum of £4,333.36. Heil was subsequently granted permission to appeal on three grounds, although this article focuses on only one: that the current *How To Rent* booklet had not been provided to the tenant prior to the commencement of the statutory periodic tenancy.

The *How To Rent* booklet

Prior to service of a section 21 notice, a landlord must have given the tenant a copy of the relevant *How To Rent* booklet: section 21B(3) of the 1988 Act. It was common ground that the landlords in this case would have needed to have given the tenant a copy of the *How To Rent* document published on 26 June 2018 or 31 May 2019 prior to the service of the section 21 notice (which of those two versions would depend on the date it was provided to the tenant).

However, within the claim form, the landlords set out that the tenant was provided with a copy of the *How To Rent* document on 2 March 2018, and the copy attached was the edition published in January 2018. As such, HHJ Holmes at Southend County Court found that the claim form itself could not have satisfied the district judge of the fact that the up-to-date edition had been provided to the tenant. In addition, no further evidence was given in advance of the possession hearing. The judge determined the landlords had therefore failed to comply with section 21B(3) and, as a result, the section 21 notice was invalid.

As a matter of fact, the landlords had evidence – in the form of receipts signed by the tenant – that they had actually served a copy of the May 2019 edition of the *How To Rent* document on 6 December 2019. They sought to adduce this evidence on appeal. If the landlords did indeed serve the May 2019 version in December 2019, and that had been pleaded in the claim form before the District Judge, Heil accepted that the objection to the validity of the section 21 notice on that basis would fall away. The landlords sought permission to amend the claim form to make that pleading.

The defect

The defect here was that the *How To Rent* document pleaded in the claim form was not the correct version. In HHJ Holmes' judgment, the issue was one of jurisdiction:

"The District Judge should have identified that the failure invalidated the s.21 notice. Although a laborious task, checking the dates of the tenancy or tenancies and the date of the s.21 notice and the various notices and documents relied upon is fundamental to the judge's task. The error was identifiable on the face of the Claim Form."

He found that, subject to the application to amend the claim form, the possession order could not stand.

The landlords relied on *Singh v Dass* [2019] EWCA Civ 360 to argue that Heil should not be permitted to raise this new point, which she had failed to raise below. HHJ Holmes accepted that, had the issue of the *How To Rent* document been raised in the defence or at the hearing before the District Judge, matters would have developed differently at the hearing, the landlords would have been alerted to the problem and obtained the evidence on which they sought to rely in the appeal hearing.

However, given his finding that the defect in respect of this issue was of a jurisdictional nature, HHJ Holmes held that issue does not arise for further consideration.

The landlords' applications

As to the application to amend the claim form and to adduce fresh evidence on appeal, the judge refused that application in respect of the *How To Rent* evidence, finding:

1. it failed the first step of the test in *Ladd v Marshall* [1954] 3 All ER 745, namely that the evidence could have been obtained with reasonable diligence for use at the trial;
2. the error was "completely of the Claimant's making";
3. the appellate court is not the appropriate forum to correct errors of the sort identified here – the issue was fundamental and any reasonable claimant or adviser would not have made the same omission.

In these circumstances, DDJ Holmes allowed the appeal and set aside the possession order.

Correct your defects

The nature of possession proceedings is such that these hearings are short and heard by district judges dealing with a busy possession list and often unrepresented defendants. That means a mistake such as this is easy for all involved to miss. It is rare that defendants, particularly those who are legally aided, appeal these orders, but if they do, such a mistake can be fatal. The outcome here is particularly harsh on landlords, particularly in circumstances where they had evidence that they had served and the tenant had received the prescribed documents, prior to service of the section 21 notice. The case serves as a warning to landlords who secure possession orders without the

correction of underlying defects in the claim – sometimes an adjournment is a better outcome. The landlords in this case may now have to start the process afresh in the context of a heavy backlog and a shortage of district judges.

On top of this, as HHJ Holmes notes, the effect of this judgment is that the level of scrutiny, either when a possession claim is being considered by a district judge on the papers or in an oral hearing, will require a not inconsiderable period of time. That is a matter of concern.

Joel Semakula acted for the landlords in this appeal.