michelmores

CAAV NATIONAL TUTORIAL 2023

FARM COTTAGES

michelmores

RESIDENTIAL TENANCIES

DETAILED NOTES

Relevant Statutes

Rent (Agriculture) Act 1976

Rent Act 1977

Housing Act 1988

Housing Act 1996

Housing Act 2004

Landlord & Tenant Act 1985 (section 11 – repairing obligations)

The Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015 (SI 2015/620)

The Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment) Regulations 2019

The Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment) Regulations 2016 (SI 2016/443)

Tenant Fees Act 2019

Renting Homes (Wales) Act 2016

Key Dates

15 January 1989

28 February 1997

Starting Point

1st Qu (EVERY TIME) - When did the occupation start?

- Before 15 January 1989 = either the *Rent Act 1977* or the *Rent (Agriculture) Act 1976* **or** service occupancy
- On or after 15 January 1989, **but** before 28 February 1997 = *Housing* Act *1988* **or** service occupancy

- On or after 28 February 1997 = *Housing Act 1998* as amended by *Housing Act 1996*

2nd Qu - Does occupant have links to agriculture?

If answer is yes – possible options are:

- Assured Agricultural Occupancy if occupation on or after 15 January 1989; or
- Rent (Agriculture) Act 1976 protection if occupation prior to 15 January 1989.

Whether occupation does fall under either of options (a) or (b) will depend upon circumstances of each case - i.e. whether the qualifying statutory conditions are met.

(A) RENT (AGRICULTURE) ACT 1976

1 APPLICABILITY

You must apply a 3 stage test to determine whether the 1976 Act applies. The question is whether the occupant is a 'protected occupier' under the 1976 Act:

- Qualifying Worker
- Qualifying Ownership
- Relevant licence or tenancy

Qualifying Worker:

- *The occupier must be employed in agriculture.*

  Employee or self-employed?

  The concept of an 'agricultural worker' is widely drafted and is different from definitions used in other statutes, e.g. includes forestry workers; does not include gamekeepers: *Normanton v Giles [1980]*; but an on-farm mechanic employed to repair all farm machinery satisfied the definition: *McPhail v Greensmith [1993]*.

  Each case will be determined on its own facts – you may need to give careful thought to whether occupier falls within the definition.

- *The occupier must have worked full time (at least 35 hrs per week) in agriculture for 91 out of [the last] 104 weeks (or have an injury or disease caused by the agricultural work which prevents them working).*

  The wording of the Act is unclear, but it is widely accepted that the phrase *'the last'* is not literal. Provided the occupier has worked for the requisite period of time **at some stage**, he will satisfy this limb of the test.

So if a person was employed in agriculture for the relevant period of time in the past, then for so long as he continues to occupy the premises, the protection will continue, even if he is no longer employed in agriculture - **Don't forget that!** Watch out for retired workers, or former employees now working elsewhere.

Qualifying Ownership:

Either the employer owns the house OR the employer has made arrangements with the owner for it to be occupied by his agricultural employee.

The property just needs to have been in qualifying ownership **at some point** during the period of occupation – a change of ownership of the dwelling house will not affect the statutory protection.

Relevant licence or tenancy:

Occupier must have exclusive occupation of a residential property, let as a separate dwelling.

Excludes lodgers; workers provided with board and lodging; workers sharing accommodation with landlord or many other people (e.g. hostel accommodation) **but** protection bites if occupier shares with 2 other workers or less.

NOTE there is no requirement for a rent to be paid at all and therefore no issue if rent is very low either – this is precisely when 1976 Act was designed to step in because it is traditionally a very common scenario in agricultural context and the Rent Act 1977 had a minimum rent threshold. This meant that many agricultural workers would otherwise have been unprotected.

2 IMPACT OF 1976 ACT PROTECTION

- Owner has very limited ability to recover vacant possession (closed list of statutory grounds);
- Succession rights for tenant (one right of succession);
- Regulated rents (known as fair rents) which may be 60-70% of open market value.

All three factors obviously have a significant knock-on effect on capital value with big reductions from open market value, particularly if there are potential successors.

3 RENT REVIEW UNDER THE 1976 ACT

Whilst the contractual arrangement (e.g. employment contract) is in existence, Landlord can only charge (and review) rent if provision is made for that within the agreement.

Upon retirement/termination of employment, the original contractual bargain no longer applies – occupation becomes a *statutory tenancy* and the 1976 Act provides a mechanism for a rent to be charged under that replacement tenancy **but** landlord must follow a prescribed statutory process before any rent can be charged

Process:

The landlord could seek to agree a 'fair rent' with the tenant under sections 11 and 12 of the Act, following service of a formal notice of increase. Any *agreed rent* cannot exceed the registered rent (if that has been done) **or** an amount equal to 1.5 times the rateable value of the property as at 31 March 1990 (the legislation provides other measures if property did not have a rateable value at that date). The latter is very difficult to determine. So the best approach for a landlord is usually the alternative option:

i.e. to formally apply to the Rent Officer (now part of the Valuation Office Agency) for registration of a fair rent. The tenant will be notified and given an opportunity to comment.

Once a fair rent is registered, the landlord can serve a notice of rent increase and demand that the tenant pays rent. Registration of a fair rent imposes a ceiling on the amount of rent that can be charged (but landlord can of course charge less). Fair rents can be reviewed and a new fair rent registered every 2 years.

Determining the Fair Rent:

The Rent Officer will take the following factors into account when determining the fair rent:

- Age, character, locality and state of repair of property;
- Quantity, quality and condition of any furniture, fixtures and fittings provided by landlord;
- Any premium received.

The following factors must be disregarded when setting the fair rent:

- Any defect or disrepair caused by occupier;
- Tenant's improvements;
- *Scarcity.*

Scarcity is the crucial point. It requires an assumption that the number of tenants seeking property to rent is not substantially greater than the number of properties available – so it assumes a neutral market - traditionally led to suppression of rental levels to below OMV, sometimes by up to 40%.

Minimum Rent Threshold:

If the tenant had been paying rent for a property under the original contractual arrangement with his landlord, he may not have 1976 Act protection – it would depend on how much rent he was paying.

If he paid more than two-thirds the rateable value of the property as at 31 March 1990, it will fall outside the 1976 Act and he would be a Rent Act 1977 protected tenant (assuming same commencement date).

It is usually very hard to find out what the RV was. As a VERY ROUGH, BROAD RULE OF THUMB, any rent payable in excess of £50/month should start ringing alarm bells and needs further investigation.

4 SUCCESSION UNDER THE RENT (AGRICULTURE) ACT 1976

There is one right of succession: *Section 3 of the 1976 Act*

Succession by spouse:

Provided the spouse is living with deceased occupier immediately before the date of death, they have a right to succeed.

The spouse would be granted the same tenancy which confers lifetime security of tenure BUT it will not carry succession rights.

NOTE: definition of *'spouse'* obviously includes civil partners. It also includes cohabitees/de-facto spouse

Succession by family member:

If no spouse living at date of death, scope for *succession by a family member* instead. This is more complex than succession by a spouse in two ways:

1 Qualifying period of residence:

Family member must have lived with deceased tenant for at least 6 months prior to date of death if deceased was still a protected occupier at date of death;

Extended to 2 years ending with date of death if it had become a statutory tenancy

2 Type of succession tenancy:

If deceased occupant was a protected occupier still, the successor is either given a protected occupancy (limited circumstances) or an **assured tenancy** under the Housing Act 1988. If he was a statutory tenant by date of death, the successor is granted an assured tenancy. This means no rent protection (OMV will be payable), but still lifetime security of tenure for successor.

NB. Definition of *'family member'* is widely drafted.

Includes: step-children, siblings, nephews, nieces, grandchildren, brother/sister in law BUT must be a family relationship.

5 GROUNDS FOR POSSESSION

The landlord cannot obtain vacant possession without a court order *and* the court can only make a possession order if the landlord establishes one of a closed list of statutory grounds: *Schedule 4 of 1976 Act*

The grounds are split between mandatory (court must order possession) and discretionary (court will only make an order if it considers it reasonable to do so).

Mandatory grounds (x3): *Part 2 of Sch 4*

Rarely used.

Overcrowding; landlord occupied the property as his residence in the past and needs it again for that purpose; property is a retirement property for landlord (both require landlord to serve prior notice upon commencement notifying tenant that ground may be used).

Discretionary grounds (x10): *Part 1 of Sch 4*

Most common/useful/relevant:

- suitable alternative accommodation is available (arranged by landlord) **[see below]**
- suitable alternative accommodation available (provided by Local Authority) (links to *section 27)* – old 'ADHAC' procedure
- rent arrears or breach of obligations under the tenancy
- property reasonably required by landlord or his immediate family.

Suitable alternative accommodation (arranged by landlord)

The Landlord may be able to establish that suitable alternative accommodation is available. He would need to satisfy the court that:

- the accommodation is reasonably suitable to the needs of the occupier and his family as regards proximity to place of work, and either that it is:
    - *reasonably suitable* to the means of the occupier/his family and to their needs as regards extent and character; OR
    - similar as regards rental and extent to the accommodation provided in the neighbourhood by the local housing authority to people whose needs are similar to the occupier and his family *(This alternative limb is established by provision of a certificate from the authority concerned, but is rarely used in practice)*.

It is a question of fact in each case - will depend upon size and character the property and any specific needs of the tenant.

Remember it is a discretionary ground, so as Stage 2, landlord needs to satisfy the court that it would be *reasonable* for the court to grant a possession order.

If the landlord is successful in moving the tenant to new accommodation, he will take his protected statutory tenant status with him. The tenant will occupy the new property on the same basis as the current one. Landlord can seek to charge a rent for the new premises.

NB. The second alternative accommodation ground, which refers to the local authority, is worth bearing in mind. Although formal certificates are not commonly obtained, it can be useful if a landlord can obtain informal confirmation from the authority as regards the sort of property they would make available to the occupier and his family given their circumstances.

It provides a useful comparison when set against the alternative property being offered by the landlord.

Suitable alternative accommodation (provided by Local Authority)

One of the grounds of possession available under the Rent Act 1977 is when the property is reasonably required by the landlord to house another employee.

There is no corresponding provision within the 1976 Act. Instead, section 27 and Ground II of the '76 Act discretionary grounds together create a procedure where the landlord can apply to the Local Authority on the basis that he needs vacant possession of the dwelling in order to house a new *agricultural worker* and is unable to provide, *by any reasonable means*, suitable alternative accommodation to the outgoing worker.

Landlord will need to show that the new worker needs to be re-housed in the interests of 'efficient agriculture' **and** that he has no means of providing suitable alternative accommodation himself.

Not a useful tool if the landlord has other properties let on AST's which could be vacated to make room for the outgoing worker. This process used to be dealt with by ADHAC – now falls to Local Authority.

Note: The process is available for properties subject to 1976 Act tenancies, 1977 Rent Act tenancies and Housing Act 1988 assured tenancies or assured agricultural occupancies.

(B) RENT ACT 1977

1 APPLICABILITY

Relevant to tenancies granted **before** 15 January 1989.

The Rent (Agriculture) Act 1976 and the Rent Act 1977 are very similar regimes, and confer a comparable degree of protection on occupiers – e.g. lifetime security of tenure and rent regulation but there are some **key differences**:

- TWO rights of succession under 1977 Act (in certain circumstances);
- Slightly different grounds for possession *(Sch 15)*
- Minimum rent threshold under 1977 Act

NB. Rent Act 1977 may be relevant to clients if they have long term residential tenants with no links to agriculture. **Key Point** to remember with Rent Act tenancies is that properties let for nominal rents won't be covered, so the Rent Acts won't catch service occupiers who were provided with rent free accommodation as part of their employment (unless they are agricultural workers covered by 1976 Act).

2 SUCCESSION UNDER THE RENT ACT 1977:

The succession rights differ depending on whether original tenant died before or after 15 January 1989.

Original tenant died before 15 January 1989:

Upon original tenant's death, a right of succession was available to spouse living with tenant at date of death, OR family member living with tenant for 6 months prior to death – the first successor (in either category) will have become a Rent Act 1977 statutory tenant (lifetime security of tenure and rent protection).

The first successor's statutory tenancy conferred *one further right of succession*. If the first successor died before 15 January 1989, the succession tenancy will = a statutory tenancy again. HOWEVER, if first successor died after 15 January 1989, the second successor is only granted an assured tenancy = security of tenure but no rent protection.

Original tenant died after 15 January 1989:

If first successor is spouse, they take on a RA 1977 statutory tenancy – just need to have been living with deceased tenant at date of death. Upon spouse's (first successor's) death, one further right of succession available to person who was member of original tenant's family AND first successor's family AND living with first successor for two years prior to the second death. If those requirements are met, 2nd successor is granted an assured tenancy under the Housing Act 1988 (security of tenure but no rent protection).

If first successor wasn't spouse, they would only have been granted an assured tenancy originally. No further right of succession available.

(C) ASSURED TENANCIES – HOUSING ACT 1988

1 APPLICABILITY

The Housing Act 1988 came into effect in January 1989, replacing the Rent Acts for new residential lettings.

Tenancies which were created between 15 January 1989 and 28 February 1997 in which the tenant was **not** served with prior notice under section 20 of intention to create an AST will have taken effect as assured tenancies.

Key similarities and differences between a Housing Act 1988 assured tenancy and a Rent Act 1977 tenancy:

Similarities

- Minimum rent threshold.
- Lifetime security of tenure – a statutory periodic tenancy comes into existence at expiry of original contractual arrangement on same terms as previous agreement.
- Landlord can only obtain vacant possession if court grants possession order on basis of limited list of statutory grounds.

Differences

- No rent regulation under 1988 Act.

- One right of succession to assured tenants.

2 RENT REVIEW

If tenant still occupying under original fixed term contract, landlord cannot review the rent unless there is a rent review mechanism contained in tenancy agreement (need a written agreement), **or** if the parties agree an increased rent.

In many cases, the most likely scenario is that tenant occupied under a relatively short fixed term initially which automatically converted to a **statutory** periodic tenancy when the fixed term expired. If rent is paid monthly, you will be dealing with a monthly periodic tenancy.

Once a statutory tenancy comes into existence, the landlord can seek an open market rent (no rent regulation under 1988 Act) **but** must follow a specific **process:**

- Landlord serves a statutory notice of intention to increase rent, in a *prescribed form*.
- Notice must be served in advance. The required notice period is governed by the duration of the periodic tenancy. If a monthly periodic tenancy, at least one months' notice must be given.
- Tenant has opportunity to refer matter to Rent Assessment Committee (now dealt with by First Tier Tribunal (Property Chamber) if he/she disagrees with proposed rental figure.

NB: need to use the Prescribed Forms

3 GROUNDS FOR POSSESSION

Assured tenants have lifetime security of tenure – to obtain VP landlord must obtain a court order for possession. The court will only grant an order if landlord establishes one of the Schedule 2 grounds under the 1988 Act -

Mandatory grounds (x8): includes rent arrears (still outstanding at date of hearing); redevelopment of property.

Note that the 'major redevelopment' ground is only available to the landlord if they were a party to the original letting – preventing sales off with intention to obtain VP and redevelop.

Discretionary grounds (x10): rent arrears; suitable alternative accommodation; breach of tenancy; property let by reason of tenant's employment and employment has now ceased **AND** court must be satisfied that it is reasonable to make possession order (stage 2).

(D) ASSURED SHORTHOLD TENANCIES – HOUSING ACT 1988

All new lettings entered into on or after **28 February 1997** take effect as AST's unless prior notice served to create an assured tenancy (very rare!)

Plus many AST's were created before 28 February 1997 if landlord served a section 20 notice on tenant before commencement

Exception to this basic rule if you are dealing with an agricultural worker – you will need to consider assured agricultural occupancy issues. [**See Section E below**]

Basic Hallmarks of ASTs:

- Minimum rent requirement of £250 per annum to create an AST
- Much easier for landlords to obtain vacant possession – they confer no security of tenure following the expiry of the fixed term (usually 6 or 12 months fixed initially as standard).
- Upon expiry of the fixed term, landlord has an absolute right to terminate the tenancy upon service of 2 months' written notice pursuant to *section 21 of the Housing Act 1988*.
- If neither party ends the arrangement upon the expiry of the fixed term, a statutory periodic tenancy comes into existence under *section 5(2) of the Housing Act 1988*. This allows tenant to remain in occupation on same terms as previous contractual arrangement.

NB. The **Deregulation Act 2015** introduced a number of changes to the provisions governing the management and termination of assured shorthold tenancies in England. Most came into force on 1 October 2015. **NB it doesn't apply in Wales.**

- Changes to section 21 notices
- Introduced additional pre-conditions to service of a valid section 21 notice
- Protection against retaliatory evictions

The past three years have been a transition period. Before 1 October 2018 the rules only applied to new ATSs that commenced after 1 October 2015. However, they now apply to all assured shorthold tenancies, irrespective of the date they were entered into, or the date they became periodic. This includes fixed term AST which became a statutory periodic tenancy under section 5(2) of the Housing Act 1988 after 1 October 2015 (i.e. on expiry of the initial fixed term).

(E) ASSURED AGRICULTURAL OCCUPANCIES – HOUSING ACT 1988

Ordinarily, any new tenancy granted today (i.e. since 28 February 1997) automatically takes effect as an AST, whether written or verbal. BUT occupant will not occupy under an AST if he/she satisfies the *'qualifying agricultural worker'* test **unless** prior notice of the intention to grant an AST was served AND rent is at least £250 per annum.

'Qualifying agricultural worker' test is set out in *Schedule 3 Housing Act 1988* – it is based upon and fundamentally the same as the 'protected occupier' test under the 1976 Act. [**See detailed information provided in Section A above**].

Rent – An AAO can take effect irrespective of whether rent is charged or not and regardless of how much rent may be charged.

Cf: requirement for AST's to have a £250 per annum minimum rent and the historic split between Rent Act 1977 protection or 1976 Act protection before 1989, depending upon rental level.

Notice requirement - Prior notice required using statutory prescribed form (Form 9). The notice MUST be served before occupier takes possession if there is any risk that *'qualifying agricultural worker'* test might be satisfied. Provided the notice is served (and rent is more than £250), an AST will be created – so no security of tenure and the landlord is protected. The notice is an **absolute pre-requisite** in these circumstances – otherwise an AAO would be granted, even if there is a written tenancy agreement purporting to be an AST.

Implications of an AAO:

- lifetime security of tenure (via creation of statutory periodic tenancy upon termination of original contractual arrangement). Statutory tenancy is on same terms as original contractual agreement, subject to statutory overlay;
- one right of succession – *Housing Act 1988* provisions.
- *Schedule 2* possession grounds apply (as per assured tenancies - see above), but Ground 16 not available (*L was T's employer and employment has ended).*
- no rent regulation – can charge an open market rent. Landlord can seek to review rent in accordance with statutory provisions in the Act following service of prescribed notices etc. with recourse to First-Tier Tribunal if parties cannot agree.

(F) MANAGEMENT OF AST'S

There have been a number of recent regulatory changes and new requirements imposed on landlords which you need to be aware of.

1 GRANTING AN AST

The following requirements must be complied with at the start date:

Deposit: If a deposit is taken, this must be protected in an approved TDS and prescribed information given to the tenant – both within 30 days of receipt

Deregulation Act 2015 requirements: These rules now apply to all ASTs. The tenant must be provided with:

(a) A copy of the gas safety certificate (if there are any gas appliances in the property). Thereafter annual gas safety checks must be carried out

(b) An Energy Performance Certificate (EPC)

(c) A copy of the DCLG Booklet - *How to Rent: the checklist for renting in England*

Smoke & Carbon Monoxide Alarms: Smoke alarms must be fitted on each storey and a carbon monoxide alarm installed in any room containing a solid fuel burning appliance. All alarms must be checked and in working order at the start of the tenancy: *See the Smoke & Carbon Monoxide Alarm (England) Regulations 2015.* As above, the Regulations apply to all new tenancies starting on or after 1 October 2015.

Right to Rent Checks: Landlords of let residential property in England must establish that new tenants (and all other adults who will be living in the property) have an immigration status which gives them the right to rent in the UK.

- Applicable to all adult occupiers of let property used as a main residence – so also applies to residential property let under FBTs or mixed use commercial premises under LTA 1954.

- Landlords must check all new tenants - it is against the law to only check people you think aren't British citizens.

- Passports and (if applicable), visas, must be checked and appropriate records kept to show that this has been done. If the tenant's right to rent is time limited, further checks must be carried out in future, as appropriate. See Home Office Leaflet: *Right to Rent Document Checks: A User Guide.*

- Requirements introduced by *the Immigration Act 2014***. The rules apply** to all tenancies granted on or after 1st February 2016.

- Since 1 December 2016 it is a criminal offence to let a property to an illegal migrant if the landlord knew, or had reasonable cause to believe, that the person did not have a right to rent in the UK: *Immigration Act 2016.*

- Currently the rules only apply in England.

Documentation: ASTs do not have to be in writing, but for certainty, a written tenancy agreement should always be prepared so that both parties are clear of their rights and obligations.

If there is no written agreement, the tenant can ask for a written statement of key terms under section 20A HA 1988 (e.g. start date, rent, payment dates).

2 REPAIRING OBLIGATIONS

Section 11 of the *Landlord and Tenant Act 1985* applies to all leases of dwelling houses granted for a term of less than 7 years – provided they were granted on or after 24 October 1961.

The following comments therefore apply to <u>all</u> residential tenancies granted since October 1961, not just ASTs. Landlords cannot contract out of section 11.

Section 11 requires the landlord to keep in repair and proper working order:

- The structure and exterior of the property, including drains, gutters, external pipes. Note that internal plasterwork is deemed to be part of the structure of the house.

- The installations for the supply of water, electricity, gas, hot water, central heating and sanitation (including basins, sinks, baths and toilets).

Tenants are only responsible for repair and maintenance if the tenancy agreement expressly imposes obligations on them. If the agreement is silent, the tenant has only limited obligations imposed by the common law:

- To use the premises in a tenant-like manner. This includes repairing damage caused by the tenant or their guests; unblocking sinks, cleaning windows, sweeping chimneys but not re-decoration: *Warren v Keen [1953].*

- Not to cause damage or allow damage to be caused to the property.

NB. Section 11 does not apply to agricultural or commercial tenancies.

3 RETALIATORY EVICTIONS & HHSRS

Under the *Housing Act 2004,* a Housing Health and Safety Rating System (HHSRS) was introduced enabling local authorities to assess the condition of housing stock in their area.

Under the HHSRS, Authorities can risk assess properties and identify potential hazards – they look at the structure, interior condition and the condition of key features such as the sanitation and heating systems. A HHSRS assessment can be requested by the tenant or a third party (e.g. a neighbour or health professional).

If a HHSRS assessment identifies health and safety problems, the authority have power to take various forms of action, including issuing an improvement notice, making a prohibition order (which can limit the occupation of the property until the problems are remedied), taking emergency remedial action to carry out repairs, or serving a demolition order (in extreme cases).

If a notice is served under the HHSRS there are restrictions on the landlord's ability to serve a section 21 notice to terminate the arrangement – see new retaliatory eviction rules under *sections 33 and 34 Deregulation Act 2015.* The rules now apply to all AST's, whenever they were granted.

4 TERMINATING AST'S

4.1 LANDLORD'S SECTION 21 NOTICE

As noted above, if the Landlord wishes to terminate an AST, he/she must serve a section 21 notice.

Timing: The courts will not enforce a section 21 notice unless the fixed term has expired and at least 6 months has passed since commencement.

Since 1 October 2015, landlords cannot serve a section 21 notice within the first 4 months of a new fixed term tenancy.

Form of Notice:

Previously, there were different notice requirements depending upon whether you were dealing with a fixed term or periodic AST. If **fixed,** landlord just needed to give at least 2 months' notice. It did not have to expire on a particular day: Section 21(1)

BUT landlords of contractual periodic tenancies had to comply with s21(4), which required that the date specified in the notice to quit had to be the last day of a tenancy period. In practice, landlords often ended up having to give almost 3 months' notice to terminate monthly periodic ASTs.

The notice procedure has now been standardised in relation to all tenancies granted on or after 1 October 2015, and as of 1 October 2018 applies to all ASTs, regardless of the date they were granted.

New *s21(4ZA)* – now, the date specified in a section 21 notice given in respect of **all ASTs**, no longer needs to be the last day of a period of the tenancy. L simply needs to give not less than 2 months' notice - although if the tenancy is a contractual periodic tenancy, at least one period's notice is still required [**see Guidance Notes on the new Form 6A notice**].

New *s21C* entitles tenant to a refund of any overpaid rent where a tenancy comes to an end mid-way through a period.

The Section 21 notice is now a **prescribed form** for the first time (**Form 6A**). This has recently been amended by The Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment) Regulations 2019 to incorporate relevant provisions from the Tenant Fees Act 2019 (the "TFA") **[see detailed information in section L below]**.

All Section 21 Notices served after 1 June 2019 must use the new Form 6A.

Form 6A must now be used for all tenancies irrespective of when they commenced.

Pre-cursors for a valid s21 notice:

A landlord cannot serve a valid s21 notice unless:

- The deposit has been properly protected in a TDS within 30 days of receipt **or** returned to the tenant if the TDS obligations were not met.

- Any unlawfully charged fees or an unlawfully retained deposit has been returned to the tenant.

- Tenant been provided with copies of:
  - EPC
  - Gas Safety Certificate (if applicable)
  - A Copy of 'How to Rent Guide'?

  These documents currently only have to be provided if the tenancy was granted after 1.10.15 **but** the requirements apply to all tenancies, whenever granted, after 1.10.18.

  NB: the documents should be served at start of tenancy but can be done retrospectively (before L wants to serve s21!)

4.2 **POSSESSION CLAIMS**

If the tenant fails to vacate upon expiry of the s21 notice, landlord cannot evict without a court order. Proceedings must be issued within 6 months of serving s21 notice (if a post 1.10.15 AST).

Landlord can commence **accelerated possession proceedings**. Court will grant an order on the papers if judge is satisfied that:

- tenancy is an AST;
- the fixed term has expired;
- a minimum period of 6 months has elapsed since commencement;
- the correct form of notice was used, giving requisite period of notice;
- the pre-cursors for a valid s21 notice (outlined above) were all met before s21 notice was served;
- the notice was properly served on tenant.

Although procedure gives tenant 14 days to lodge a defence to the claim if they wish, the grounds on which a successful defence could be mounted are limited to the above matters. Judge will make a decision on the papers, unless tenant lodges arguable defence.

If court orders possession, standard order gives tenant 14 days to vacate, although this can be extended by up to 6 weeks if the tenant requests an extension and establishes 'exceptional circumstances'.

4.3 PROBLEM TENANTS – RECOVERING RENT ARREARS:

In the case of a tenant falling behind on their rent, the landlord will most likely want to (a) obtain VP and (b) recover the rent arrears.

There are two options:

1 The Landlord could seek possession under section 21 in usual way but lodge a combined claim for possession and recovery of rent arrears.

However it can't then be dealt via the accelerated possession route. Landlord instead needs to use the standard possession procedure under Part 55 CPR which is still relatively straightforward, but the court will always list a hearing. Hearing will be listed not less than 28 days and not more than 8 weeks after date claim issued – so much slower. If tenant lodges an arguable defence, it will usually be listed for a second hearing.

Consider whether commercially it would be more sensible to opt for the accelerated route to prevent arrears increasing further. Tenant could then be pursued separately for the arrears in the small claims court or via service of a statutory demand (but £5k arrears required).

Not ideal because it leads to two sets of proceedings.

Factors to consider: level of arrears, likelihood of recovery; prospects of re-letting quickly.

2 Landlord could seek possession under *section 8 of the Housing Act 1988,* in reliance upon one of the mandatory or discretionary rent arrears grounds contained within S*chedule 2, HA 1988.*

The section 8 notice must be in a prescribed form and provide minimum statutory notice period of intention to commence proceedings (2 weeks' notice when possession sought because of rent arrears). As a minimum, even if papers lodged immediately upon expiry of the 2 weeks, it is likely to take up to 8 weeks to get it in front of a judge.

In addition, unless rent arrears are still outstanding at date of the hearing (allowing L to rely on the mandatory ground), the court will only grant possession if it considers it reasonable to do so. There is therefore a risk that the tenant clears the arrears, and the court refuses to exercise discretion to grant an order.

The *section 8* route is only likely to be useful to landlords if tenant falls into **arrears during the fixed term AST.**

(G) SERVICE OCCUPANCIES

Let's consider a situation where, for example, a nanny is in occupation of an annexe to her employer's main house and her occupation is rent free and she is granted exclusive possession. The annexe is self-contained and she does not share any facilities with the family living in the main house, or receive board and lodging or anything of that nature. In that case the AST £250 p/a minimum rent threshold is not met.

Instead, the arrangement could be a service occupancy. A genuine service occupancy creates a **licence** and not a tenancy. Such occupation falls outside the regulation of the Housing Acts – there is no agricultural angle in this scenario, so there is no issue with AAO's. The arrangement cannot lead to an AST either, because the £250 p/a rent threshold is not met.

In order to constitute a service occupancy, one of two tests must be satisfied, **either**:

1 The occupation must be **necessary** for the performance of the employee's duties; **or**

2 If the occupation by the employee is not essential for the performance of his duties, then the occupation must be **required** by the employer for the *better performance* of the employees' duties and such requirement is an express term of the employment contract.

So, if the nanny is living in the annexe for the necessary performance of her duties, rather than as a reward for doing so, you are dealing with a service occupancy. If such occupation is only required for the better performance of her duties then a suitable clause should be inserted in the contract of employment and the status of service occupancy will be preserved.

The nanny will have very few rights beyond those conferred by her contract of employment. Her occupation rights will come to an end when her employment is terminated. Always check the terms of the specific contract though.

NB. It is perfectly possible to grant a tenancy to an employee in this situation, if that is more suitable for the parties. Just remember the minimum £250 per annum rental.

(H) COMMON LAW TENANCIES

Some lettings will fall outside the statutory regimes entirely and will instead be governed by common law rules and take effect as common law tenancies, e.g.:

- lettings to a company
- tenancies at a low rent (either no rent or less than £250 p/a or £1000 p/a in London) [e.g. the nanny example above, if she did not satisfy the service occupier test above)
- tenancies at very high rent (over £100k p/a).

(I) EXCLUSIONS - OTHER STATUTORY REGIMES

Lettings of residential property will also fall outside the Housing Act/Rent Act regime if they form part of:

- a business tenancy under Part II of the LTA 1954; **or**
- an agricultural holding under either AHA 1986 or ATA 1995 **and** they are *occupied by the person responsible for the control of the farming* (can be either tenant or an agent of the tenant – i.e. a farm worker who controls the farming on the holding).

  NB: If you have an FBT or AHA tenancy that includes cottages, tenant can let those out as either AST's or AAO's (subject to any covenants restricting sub-letting within their agricultural tenancy) – **risk factor for head landlord**.

(J) MINIMUM ENERGY EFFICIENCY STANDARDS ("MEES")

The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 took effect from 1 April 2018. They establish a minimum level of energy efficiency for privately rented properties in England and Wales; Energy Performance Certificate (EPC) standard E will become the lowest acceptable standard. MEES apply:

- the first time a landlord lets or re-lets their property from **1 April 2018**;
- to all domestic properties from **1 April 2020**; and
- to all non-domestic properties from **1 April 2023**.

The regulations require landlords of properties falling below the minimum standard to take the necessary steps to improve the energy efficiency of their properties before they are let/re-let provided that the improvements can be made 'at no cost to the landlord'. It was anticipated that funding would be available through schemes such as the Green Deal Finance or from Local Authorities, failing which landlord's were not required to make the improvements but instead, could register an exemption.

A government consultation took place just weeks before MEES came into force. The consultation proposed the removal of the 'no cost to landlord' principle and the introduction of the 'landlord funding contribution', where the landlord is unable to obtain suitable 'no cost' funding or subsidy.

The outcome of this consultation was the Energy Efficiency (Private Rented Property) (England and Wales) (Amendment) Regulations 2019 (SI 2019/595) (the Amendment Regulations) which came into force on 1 April 2019. These Amendment Regulations mainly make amendments related to domestic private rented property. The "no cost to landlord" has been replaced with a cap for landlord's expenditure of £3,500. The landlord is entitled to include this cap in any investment in energy efficiency made to the property since October 2017.

This is likely to be a problem for landlords in the rural sector where dwellings are likely to be older farm cottages. However, there is a new "high cost" exemption available to sub-standard domestic private rented property which cannot be improved to an energy performance of E for less than £3,500. To register an exemption the landlord must submit three installer quotes.

There is also ambiguity regarding which properties will be affected by the MEES regulations. Currently it is only those properties that are required to have an EPC. Section 5 of the Energy Performance of Buildings (England and Wales) Regulations 2012 sets out which buildings do not require them. **Note** that there is not an automatic exemption for listed buildings.

(K) TENANT FEES ACT 2019

The TFA provides additional protection for most residential tenants. It has banned most letting fees and caps tenancy deposits paid by tenants for all new or renewed tenancy agreements signed on or after 1 June 2019.

The aim is to reduce the costs tenants can face when agreeing a tenancy and those they can incur during the term. The changes mean that landlords and letting agents can now only charge tenants the following:-

- rent;
- a refundable tenancy deposit capped at no more than 5 weeks' rent where the total annual rent is less than £50,000, or 6 weeks' rent where the total annual rent is £50,000 or above;
- a refundable holding deposit (to reserve a property) capped at no more than 1 week's rent;
- payments associated with early termination of the tenancy, when requested by the tenant;
- payments capped at £50 (or reasonably incurred costs, if higher) for the variation, assignment or novation of a tenancy;
- payments in respect of utilities, communication services, TV licence and Council Tax; and
- a default fee for late payment of rent and replacement of a lost key/security device giving access to the housing, where required under a tenancy agreement.

If a landlord has retained any unlawful charges or an unlawfully retained holding deposit then they will not be able to serve a valid section 21 notice for the tenant's eviction.

The TFA also makes some amendments to the duties of letting agents to provide information imposed by the Consumer rights Act 2015.

In addition, there is now a mandatory requirement on property agents to join a Client Money Protection Scheme.

The Renting Homes (Fees etc) (Wales) Act 2019 implements similar protections for residential tenants in Wales.

(L) ELECTRICAL SAFETY STANDARDS IN THE PRIVATE RENTED SECTOR (ENGLAND) REGULATIONS 2020

These Regulations require landlords to have electrical installations in their properties inspected and tested by a qualified and competent person at least every 5 years.

Landlords must provide a copy of the electrical safety report to their tenants. The Local Authority may also request a copy to be provided to them. Timescales for providing the reports are as follows:

- To existing tenants within 28 days of the inspection and test
- To new tenants before they begin occupation
- To the Local Authority within 7 days of a request
- To prospective tenants within 28 days of a request

The Regulations came into force on 1 June 2020, and from the 1 April 2021 they apply in all cases where a private tenant occupies a property as their only or main residence.

Exceptions are contained in Schedule 1, and include:

- Social housing
- Lodgers
- Those on a long lease of 7 years or more
- Student halls
- Hostels and refuges
- Hospitals and hospices
- Other healthcare related accommodation

MICHELMORES LLP
September 2023