

Legal update — June 2018

Real estate litigation

When is an assured shorthold tenancy not an assured shorthold tenancy?



This 'bad joke' of property letting will not get many laughs from landlords finding themselves inadvertently burdened with tenancies which in effect have fully assured status, due to a failure to fully comply with the formalities required to grant an AST.

It is becoming increasingly complicated to correctly grant an AST. There are a number of formalities which landlords, or their agents, simply must get right.

The statutory requirements regarding tenancy deposits and the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 (**the AST Regs**) must be followed to the letter. If they are not, a landlord will lose his right to later rely on section 21 of the Housing Act 1988 (**the Act**) to terminate the tenancy. Section 21 is the "no fault" 2 month notice basis for possession. Where this is lost the tenancy is, to all intents and purposes, a fully assured tenancy which can only be terminated if a statutory ground for possession can be made out.



Source: Shutterstock

The Claim Form for possession under the accelerated procedure includes a number of questions specifically designed to ascertain whether there has been compliance with these formalities, so these will be subject to judicial scrutiny, even if no issue is raised by a tenant.

Those purchasing with tenants in situ will need to be thorough in their due diligence, particularly if they need

vacant possession in order to carry out any redevelopment plans.

Tenancy deposits

Deposits must be protected in one of three government backed tenancy deposit protection schemes. In addition, prescribed information regarding tenancy deposit protection must be served upon the tenant. That prescribed information includes a certificate signed by the landlord or agent confirming that the information provided is accurate to the best of the landlord's knowledge and belief, so serving a 'draft' version upon the tenant when the tenancy is offered is not sufficient to satisfy the requirement.

For tenancies granted since 6 April 2012, both steps must be taken within 30 days of receipt of the deposit. For those granted earlier, different rules apply.

This is not a new requirement, but it is an absolute one. If there is non-compliance, or only partial compliance, the landlord and/or agent will be exposed to a penalty claim from the tenant and the landlord will not be able to rely on s21, unless the deposit is first repaid to the tenant.

The AST Regs

These regulations apply to tenancies granted on or after 1 October 2015, having been introduced by the Deregulation Act 2015.

Prescribed Requirements

Prescribed legal requirements are set out in reg 2 and a s21 notice may not be served at a time when the landlord is in breach of those requirements (s21A of the Act).

The requirements reference those at reg 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012 (**the EPC Regs**) and para (6) or (7) of reg 36 of the Gas Safety (Installation and Use) Regulations 1998 (**the Gas Safety Regs**).

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In simple terms, a tenant must be provided with the Energy Performance Certificate (**EPC**) and gas safety certificate (where applicable) for the property.

The recent County Court case of *Caridon Property Ltd v Shooltz* offers some clarity on the timing of service, at least in relation to the gas safety certificate.

On appeal, HHJ Jan Luba QC held that a s21 notice could not be served where the landlord had failed to provide a gas safety certificate **prior to tenant taking up occupation of the property**, as required by reg 36(6)(b) of the Gas Safety Regs. Judge Luba QC took a strict approach in interpreting the AST Regs and rejected the argument that reg 2(2) removed the requirement to provide the certificate by a specified time. He found this was a 'once and for all' requirement which could not be corrected by providing the documents at a later stage, even if the current certificate had been provided prior to service of the s21 notice.

The County Court is required to follow other County Court decisions, unless satisfied that they are wrong and Judge Luba QC is a recognised expert in housing law. It is therefore highly unlikely that a County Court Judge would be persuaded to do anything but follow this decision. Therefore, it is essential that the gas safety certificate is provided **before** the tenant moves in.

So what of the EPC? The AST Regs cite only reg 6(5) of the EPC Regs which requires simply that a valid EPC is provided free of charge to the person who ultimately becomes the tenant. No time for compliance is specified.

However, reg 6(2) of the EPC Regs (which is not referred to) sets out the requirement to provide the EPC at the earliest opportunity and no later than the earlier of: the date on which written information is supplied to the prospective tenant; or the time of viewing.

It is clear that a similarly strict approach could be applied by viewing the EPC Regs in their entirety and landlords would be well advised to ensure that the EPC is also provided **before** the tenancy begins.

Prescribed Information: "How to Rent"

The AST Regs also require a landlord to provide prescribed information to the tenant (reg 3). This takes the form of a government leaflet entitled '*How to rent: the checklist for renting in England*'. Again, a s21 notice may not be served at a time when the landlord is in breach of this requirement (s21B of the Act).

No time limit for service is specified, but best practice is to serve at the outset. There is a further point to watch here, which might trip landlords up.

The AST Regs state that the checklist may be provided in hard copy or, where a tenant has provided an email address at which he is content to accept service, by email. The checklist itself makes it clear that, if the guide is to be provided by email, it **should be sent as a PDF**. Therefore, simply sending a link will not be sufficient.

The checklist was updated on 17 January 2018. A s21 notice will only be validly served if the most recent version of the checklist has been provided to the tenant prior to service. This version should be served on all new tenants, as well as any existing tenants if the landlord intends to serve a s21 notice.

Comment

For those readers who have dealt with pre-1997 ASTs, where a section 20 notice must have been validly served at the outset to create a true AST, you may well be reminded of the bad old days. If a defective s20 notice was served, or where a landlord was simply unable to produce evidence of service of the s20 notice, the tenancy would be fully assured and s21 could not be used.

The difference is that, pre-1997 there was just one notice to be served, whereas now there are several requirements.

In addition to carrying out 'right to rent' checks, ensuring properties are in a fit state for letting and all health and safety requirements have been met and arranging inventories/schedules of condition, Landlords/their agents should ensure:

- Deposit:
 - Protected within 30 days
 - Prescribed information served within 30 days
 - Evidence of compliance retained
- Gas Safety Certificate:
 - Served prior to occupation
 - Renewals served annually
 - Evidence of compliance retained
- Energy Performance Certificate:
 - Provided free of charge (prior to occupation)
 - Evidence of compliance retained

- How to Rent Booklet:
 - Provided in hard copy or by PDF with tenant's consent
 - Evidence of compliance retained.

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