It?s not my fault

29 November 2018

Sarah Woolnough looks at the section 21 court process and details how changes to the way that notices must be served affect both landlords and letting agents

---

Obtaining possession isn?t always as easy as it would seem, as the following example illustrates.

My landlord client lets their property on an assured shorthold tenancy (AST) and the tenant has been living there for 4 years. The last signed agreement in April 2017 was for a fixed term of 12 months; the tenancy is now a periodic tenancy, and my client wants to obtain possession so their daughter can move in to the property while at university. They have served a section 21 notice as required, which has now expired, and instructed me to review the papers with a view to issuing court proceedings.

> *Section 21 notices [...] provide that a landlord may terminate a tenancy by serving the tenant with at least 2 months? notice*

At first glance, this should be a relatively simple matter. However, as many landlords will be aware, the section 21 procedure has been changed for any tenancy that was granted or renewed after 1 October 2015.

The law

The Housing Act 1988 governs my client?s tenancy, as it covers ASTs. Section 21 notices, taken from section 21 of the act , provide that a landlord may terminate a tenancy by serving the tenant with at least 2 months? notice. Providing this was served to bring the tenancy to an end following the fixed term ? or, if it was periodic, that at least 2 months? notice had been given ? a landlord could obtain possession via this no-fault procedure. If the tenant failed to vacate the property, the landlord simply issued accelerated possession proceedings that, in most cases, were a paperwork exercise and required no court hearing.

Since 1 October 2015, a landlord must have fulfilled various provisions to be able to serve a section 21 notice and issue court proceedings. For any tenancy granted or renewed since that date, landlords have been required to provide tenants with the following documents at the start of the tenancy:

- a copy of the energy performance certificate;
- an up-to-date gas safety certificate, if applicable; and
- a copy of the relevant edition of the government?s How to Rent leaflet .

Additionally, if a deposit is taken, the landlord must ensure they have complied with the

deposit protection legislation as set out in the Housing Act 2004 . A landlord is also prevented from serving a section 21 notice during the first 4 months of the tenancy. Finally, landlords are now required to serve form 6A, a new prescribed section 21 notice.

If landlords have not met the above requirements, they are now barred from even issuing a section 21 notice. This means that if their tenant is not in breach of the terms of the tenancy, the landlord will not be able to get possession of their property.

Effect on the client

My client has provided me with all the relevant tenancy documents: the tenancy agreement, copy of the section 21 notice, covering letter serving the notice, and proof of service of the notice.

I go through a checklist when instructed on section 21 proceedings, discussing with the landlord whether they have met the requirements set out above. I also ask whether the tenant has notified them of any repairs that are required to the property, and whether these have been dealt with: a landlord cannot issue a section 21 notice if there is a repair issue outstanding. This is often referred to as a retaliatory eviction where a disgruntled landlord does not want to deal with such repairs and serves a section 21 notice to get rid of the tenant.

What to ask the client

If my client confirms they have met all the requirements before serving the section 21 notice, then I will ask for proof. Do they have anything signed by the tenant to confirm receipt of the relevant documents at commencement? Where any of these have been updated, I will ask for proof that this has also been acknowledged by the tenant. If my client proves that this was done before serving the section 21 notice, then I will be satisfied that proceedings can be issued, and if any points are disputed by the tenant I have the necessary evidence to counter this.

Since 1 October 2015, a landlord must have fulfilled various provisions to be able to serve a section 21 notice and issue court proceedings

If my client has only partly met the requirements, or not complied with them at all, then I must advise that this cannot be remedied, and the section 21 notice is rendered invalid. Their options are then either:

1. to start the termination process again, after fulfilling the new requirements and ensuring they have proof of service of documents, meaning that obtaining possession is delayed by at least a further 2 months; and
2. to take their chances by issuing the proceedings and hoping the tenant does not raise a defence or the court puts the landlord to proof.

My advice to my client would be to go for option 1. But is scenario 2 ever likely?

In short, yes. I acted recently in a case where the tenant defended on the basis that they had not been provided with the latest gas certificate for the property or the correct version of the *How to Rent* leaflet when the tenancy became periodic.

The matter did not go before the judge to be argued because the tenant was represented by the local Citizens Advice Bureau , and a deal for a possession order was agreed between the parties. It was, however, a costly lesson for the landlord as it significantly increased his legal bill.

Since then, there has been a county court case. In February 2018?s Caridon Property Ltd v Monty Shooltz [2018] EW Misc B9 (CC) , the landlord appealed the decision by the district judge not to give a possession order for their failure to provide the tenant with a gas certificate at the start of the tenancy. The appeal was dismissed as it was held that the landlord only had one opportunity to serve the tenant with the certificate in force at commencement of a tenancy and that this could not be remedied, rendering the section 21 notice invalid.

Although this decision was not binding, the appeal judge in *Caridon* is held to be one of the leading practitioners on housing, and it is expected that other county courts will follow his decision.

Summary

Landlords need to ensure they have complied with the requirements and that they can get evidence of this. Good practice will mean that a landlord ? or their letting agent ? will ensure that the tenant signs copies of the documents served, or prepare a receipt setting out what was served, when and how and have that signed by the tenant. This can then be used as evidence in the court proceedings if challenged.

A clever tenant can now raise a defence asking for proof, and without any documentary evidence the landlord?s claim is bound to fail

The Court Claim Form (N5B(E)) has also been changed and asks the landlord to confirm that the requirements have been met. A clever tenant can now raise a defence asking for proof, and without any documentary evidence the landlord?s claim is bound to fail.

In my experience, it is not only landlords who are falling foul of these requirements; letting agents also cannot show that they have complied or have documentary proof.

This will lead to landlords incurring more legal costs when trying to seek possession. Letting agents may be affected where landlords try to cut costs by taking on management of the properties themselves, but if they don?t keep up to speed with the requirements it will still mean any claims for possession could fail. They will need to be able to show landlords that they are equipped to comply with the new requirements and have appropriate procedures in place to do so.

Sarah Woolnough is a chartered legal executive and member of the Dispute Resolution Team at Furley Page LLP

Further information

- Related competencies include Housing management and policy and Landlord and tenant

- This feature is taken from the RICS Property journal (October/November 2018)
- Related categories include Dealing with problems , Ending the tenancy , Setting up the tenancy , Tenant arrears and bankruptcy and Types of tenancies