

## Briefing Note: Residential Possession Proceedings

### Introduction

Landlords frequently wish to recover possession of a let residential property if (a) the tenant is in arrears of rent, (b) the tenant has breached other terms of the tenancy agreement e.g. caused it to fall into disrepair or unlawfully sublet it, or (c) the landlord simply wants to sell the property. Frustratingly for landlords, the law in this area favours the tenant. It is not possible to simply gain possession by re-entering your property and changing the locks. If you did, the tenant would have a strong claim against you for breach of the terms of the tenancy; namely, “the covenant (agreement) for quiet enjoyment”, and/or unlawful eviction and harassment. This could lead to a damages claim and/or possibly a criminal conviction.

**Briefing Note**  
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**For detailed advice on all residential possession proceedings please contact:**

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There are potentially three steps to be taken to recover possession of residential property:

1. Serving notice on the tenant that possession is required (“the notice of possession”);
2. Issuing a claim for possession in the county court; and
3. Recovering possession after judgment.

Should the tenant fail to leave the property after the expiry of a notice of possession, the proper procedure must be followed and you must obtain a possession order from the court before trying to take back possession. Even when the notice seeking possession has expired, you do not have the right to evict the tenant without a court order. After the court has made the possession order, a bailiff’s services may be required to recover possession after judgment.

This briefing note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

### Notice of possession

#### Assured Shorthold Tenancies

All assured tenancies entered into on or after 28 February 1997 are (except for a few limited exceptions which are beyond the scope of this note) automatically assured shorthold tenancies (‘AST’s). It is therefore likely that your tenancy agreement with a residential tenant is an AST. Broadly speaking, there are two types of notice which may be used to recover possession of a property let on an AST: 1) a “section 8 notice” (a fault notice); and 2) a “section 21 notice” (a no fault notice).

#### Section 8 – “fault notice”

A section 8 notice is generally used where the tenant is in breach of terms of the tenancy, most commonly unpaid rent. The section 8 notice informs the tenant that the landlord intends to issue proceedings for possession of the property on the grounds specified in the notice. The notice states the earliest date that proceedings will begin. Generally, the most common grounds relied upon are that the tenant has accumulated substantial rent arrears at the time the notice is served and at the date of the hearing; the tenant has persistently delayed in paying the rent due; and any obligation of the tenancy (other than non-payment of rent) has been broken. After expiry of the notice you may issue court proceedings for recovery of possession from the court. If a claim is not issued within 12 months of the notice being served, it becomes invalid and a fresh notice will need to be served before proceedings can be issued.

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The notice period varies depending on the ground relied upon. The most common ground is where there are at least 2 months' rent arrears and in that case the notice period is at least 2 clear weeks.

The notice is in a prescribed form and you must use the latest form in place at the time of serving the notice.

### Section 21 – “no fault notice”

The tenant does not need to be in breach of the terms of the tenancy for this notice to be served. After the expiry of the notice, you can issue court proceedings for an order requiring the tenant to give you possession of the property. There used to be two types of notice depending on whether you are terminating: 1) a fixed term tenancy or a tenancy that has continued after expiry of the fixed term; or 2) a tenancy that has only ever been a periodic tenancy e.g. a tenancy that runs from one period to another such as from week to week, month to month or year to year and has never had a fixed term. In some cases the landlord will need to calculate the last day of a period of a tenancy and this date will need to be specified in the notice.

Since 1 October 2018 there is now only one type of section 21 notice to serve on a tenant and it must be in the new prescribed form.

As from 1 October 2018 there are further important changes to the legislation and notices which now apply to all AST's. Please bear this in mind.

Legal advice should be sought as to the appropriate notice and its validity.

In order to ensure that you serve a valid notice you must first check that you:

1. are using the correct form;
2. have inserted all the correct details on the form;
3. are giving the correct amount of notice taking into account time for service;
4. are serving it by the correct method of service;
5. have properly dealt with any tenancy deposit (if one was taken);
6. have provided the tenant with the requisite information about the deposit (if one was taken) known as 'prescribed information';
7. have (at no charge to the tenant) provided the tenant with an energy performance certificate (EPC) ;
8. have provided the tenant with a valid gas safety certificate at the time of entering the tenancy;
9. have provided the tenant with the appropriate leaflets published by the Department for Communities and Local Government entitled 'How to rent: The checklist for renting in England';
10. have not served a notice before you are entitled to do so. You are not entitled to serve a section 21 notice on a tenant in the first 4 months of a tenancy unless the tenancy is a particular type of tenancy being a replacement or periodic tenancy;
11. have licensed the property if you are obliged to do so by your local authority;
12. are not prevented from 'retaliatory eviction', also known as 'revenge eviction'; and
13. have returned any payments made by the tenant which are prohibited under the 2019 tenant fees legislation or otherwise properly dealt with them.

Failure to ensure all the requirements are met will render a section 21 notice invalid.

Proceedings for possession cannot be commenced more than six months after the section 21 notice is served.

In addition, there is an obligation on private rented sector landlords in England to install smoke and carbon monoxide alarms in premises used as living accommodation. This will apply regardless of when the tenancies were entered into. There is also an additional obligation to ensure that those smoke and carbon monoxide alarms are in proper working order at the start of any new tenancy from 1 October 2015. Failure to comply with this legislation could result in a penalty charge of up to £5,000 (this figure may be subject to change) per breach but this will not affect the validity of a section 21 notice.

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### Comparison between the two types of notice

The advantages of a section 8 notice are:

- a) The most common grounds, non-payment of rent and breach of another term of the tenancy, mean you may only have to wait 14 days after the deemed date of receipt by the tenant of the notice of possession before being able to issue proceedings for possession.
- b) There are no complex calculations as to “the last day of the period of the tenancy”, which may still be relevant for some section 21 notices. Note that some tenancy agreements still refer to the notice needing to end on a particular day.
- c) Service of the notice on a “fault” basis can bring to the tenant’s attention breaches of the tenancy. The requirement for the tenant to leave the property at short notice may focus his or her mind more quickly on finding alternative accommodation than with a s21 notice.
- d) You are not precluded from recovering possession on this type of notice even if the tenancy deposit requirements and/or other regulations such as gas safety certificate or energy performance certificate have not been complied with. However, you will need to consider the possibility of a counterclaim being issued against you if you have not complied with the deposit legislation properly as this could impact on the level of rent arrears and in turn your claim, if it is based on arrears.

The disadvantages of serving a section 8 notice are that:

- a) You have to prove that the grounds for possession set out in the notice are made out. Certain grounds are mandatory, such as where the tenant has at least 8 weeks’ rent unpaid, if the rent is paid weekly or fortnightly; or, if rent is payable monthly, at least two months’ rent is unpaid at the time of serving the notice. Other grounds are discretionary, such as where the tenant has breached an obligation of the tenancy. If the mandatory grounds are made out, the court should order that the tenant must deliver up possession on a specific date. If only discretionary grounds are made out, then the court must decide on a balance of probabilities whether possession should be delivered up.
- b) If the tenant pays part of the arrears (even just before the possession hearing), then the landlord may have to rely upon discretionary grounds such as persistent delay in paying rent and/or some rent being lawfully due from the tenant. This makes obtaining a possession order under this ground less certain than the procedure used under the section 21 notice, provided the section 21 notice is valid.
- c) You have to use the standard procedure at court to recover possession, which may mean an 8-week delay, at least, in recovering possession. One or more court hearings will be necessary.

The benefits of using the section 21 notice are that:

- a) You do not need to prove that the tenant was in breach of the terms of the tenancy;
- b) If the section 21 notice is valid and all the correct steps have been taken in issuing a claim then a possession order must be made (subject to some discretion for the court to postpone the date for possession in cases of exceptional hardship); and
- c) If you do not seek to recover rental arrears then you may use the accelerated possession procedure at court (provided you have a written tenancy agreement). This may mean that you obtain a possession order and therefore evict the tenant more quickly. This procedure is also usually cheaper (if uncontested) because it is usually dealt with on paper and without a hearing.

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The disadvantages are:

- a) That for some section 21 notices, the date of expiry must be carefully calculated. Otherwise the notice is potentially invalid and the court will not order possession. This is still applicable in some cases but in light of changes made to the legislation by the Deregulation Act 2015 this is likely to become less of a relevant consideration in time.
- b) You cannot serve a notice until at least 4 months after the commencement of the term of the tenancy.
- c) If you have not properly protected the tenancy deposit in a government scheme (as required) and provided the tenant with the requisite information/documentation, this can prevent you from recovering possession until certain steps are taken.
- d) You cannot serve a notice if the tenant has made a written complaint as to the condition of the property or any communal areas and a landlord has either not responded or responded inadequately, and then a certain type of notice concerning the condition of the property has been served on the landlord by the local authority. There are a number of specific rules, timeframes and exceptions that apply here.
- e) You cannot serve a notice if the property is required to be licensed at the time the notice is served and it is not.
- f) You cannot serve a notice unless and until the tenant has been given an up to date copy of the how to rent checklist, a valid gas safety certificate at the start of the tenancy and a valid EPC certificate.

Determining which notice to serve can be complicated and depends on tactical considerations in each case.

### **Bringing the notice to the tenant's attention**

The tenancy agreement may contain provisions as to how the notice should be sent or otherwise brought to the tenant's attention. Equally, the law provides certain provisions. Again, legal advice should be sought.

Some tenants will vacate the property after being served with the notice. If they do not, after expiry of the relevant notice, you can issue a claim for possession, normally in the county court, relying on either the section 8 or section 21 notice.

### **Claim for possession**

#### **Standard procedure**

Certain information and documents must be provided to the court in the claim form and particulars of claim, the documents required to issue court proceedings. Once the claim has been issued by the court, it will be sent back indicating a date for the possession hearing. The hearing date will be between 28 and 56 days from the date of issue of the claim form. The defendant has 14 days from the date of deemed receipt of the claim form to put in a defence at court.

#### **At the hearing**

The first hearing is typically 5 to 10 minutes long. If the defendant has not filed a defence, or has put in a defence which does not show a genuine dispute on substantial grounds, the judge will normally determine possession there and then. If the defendant's defence is of substance, the judge will normally adjourn the case with directions as to disclosure and witness statements and order a longer hearing at a later date. After disclosure and witness evidence, the judge will determine whether possession should be delivered at the longer hearing.

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If possession is ordered at the first hearing, the date for possession is typically 14 days after the date of the hearing, except in cases of exceptional hardship.

### Rental arrears

The landlord may ask the court to make an order that the tenant pays the unpaid rent within a certain period, normally 14 days. If a tenancy deposit is held, the landlord should ask the court to make an order that the deposit may be repaid to him out of that scheme.

### Accelerated procedure

This provides for a faster process, without necessarily having a hearing, for a possession order to be made, if the tenant does not file a defence. This may not be used if the landlord has relied upon the s8 notice or wishes to make any other claims than possession, eg for unpaid rent or dilapidations,

### Recovering your costs

Many landlords have terms in their tenancy agreements allowing them to recover costs of recovering possession of the property from their tenants. However, the court rules in possession claims provide for fixed costs, these are limited to the court issue fee and approximately £70 (currently) for legal costs. The court will not normally award a landlord his actual legal fees, but the fixed fees, unless the proceedings become more complex than the norm. An example of more complex proceedings would be when the court requires further hearings to the first hearing. Unless you have legal expenses insurance which would cover your legal fees, or the tenant pays your fees as part of a settlement, you are likely to have to finance the possession proceedings yourself with little prospect of recovery of those costs from the tenant.

### Recovering possession after judgment

If the tenant stays in the property beyond the date for possession specified in the court order, the landlord must apply for a warrant for possession. The warrant for possession allows a bailiff to re-enter the property and evict anyone found at the property. The warrant will specify a date and time for the warrant to be "executed", i.e. the property given back to the landlord. The landlord will need to arrange for a locksmith to meet with the bailiff at the property to change the locks at that appointment.

Unless the tenants leave the property in the meantime, clear their belongings and hand over all keys to the property the landlord, it is only after the bailiff has recovered possession of the property, that the landlord may re-let the property or otherwise go back into possession. It is important to note that physical recovery of the property by bailiffs is not always quick – it depends on the workload of the bailiffs for the court concerned. In some cases it can take weeks and even months.

If you would like to know more about this topic or our other legal services, please contact:

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