POSSESSION CLAIMS FAILING DUE TO LITTLE KNOWN HURDLES

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As most reading this will know, S.21 of the Housing Act 1988 enables landlords of residential property to terminate assured shorthold tenancies (ASTs) without being required to give a reason for wanting to obtain possession.

It is therefore unsurprising that S.21 has remained the more popular choice for landlords, as opposed to the S.8 possession route which not only requires the landlord to prove the grounds for possession brought against the tenant but often also to show that it is reasonable for the Court to make such an order for possession.

Whilst on its face S.21 appears to be a dream for landlords, the Housing Act 2004 (and more recently the Deregulation Act 2015) introduced a raft of obligations, which, if not adhered to, prevent a S.21 notice from being served.

A possession claim will fail in any of the following scenarios:

1) Where a S.21 notice was served on the tenant and the AST is not in fact an AST, but rather an assured tenancy (S.21 is only reserved for ASTs)[1];
2) Where proceedings are issued prior to the expiry of a S.21 notice[2];
3) Where the property is required by the Housing Act 2004 to be licensed as a House in Multiple Occupation (HMO) and is not so licensed[3];
4) Where the landlord has failed to protect the deposit in an authorised deposit scheme within 30 days of receiving the funds[4];

[1] This could either be where the landlord specifically allows for the AST to become an assured tenancy, or where the tenancy is a pre-Housing Act 1996 tenancy and no notice under S.20 Housing Act 1988 was initially served on the tenants.
[2] S.21(1)(b), and S.21(4)(b) Housing Act 1988
[3] S.75 Housing Act 2004. No S.21 notice will be valid if an HMO which needs to be licensed is not so licensed, unless the landlord is in the process of applying for a license.
[4] S.213 (3) Housing Act 2004 and see S.215 (1) Housing Act 2004 re S.21 Notice

5) Where the landlord has failed to provide the tenant with prescribed information within 30 days of receiving the deposit[5];
6) In the event that someone paid the deposit on behalf of the tenant (otherwise known as a relevant person[6]) and the landlord has failed to provide that relevant person with prescribed information within 30 days of receiving the deposit[7] *[NB – The duty to provide the relevant person with such information exists regardless of whether the landlord has in fact provided the tenant with such information];*

The following are only in relation to tenancies that have commenced on or after 1 October 2015:

7) Where the S.21 notice is served on the tenant within the period of 4 months beginning with the day on which the tenancy began[8];
8) Where an improvement notice was served by the Council in relation to a category 1 or category 2 hazard, and a S.21 notice was served on the tenant within the period of 6 months beginning with the day on which the improvement notice was served[9];
9) Where a notice was served by the Council following emergency remedial action, and a S.21 notice was served on the tenant within the period of 6 months beginning with the day on which the improvement notice was served[10];
10) Where the landlord takes revenge on the tenant for complaining about the condition of the property (or the common parts of the building[11]), and such a complaint is made to the landlord or to a person acting on behalf of the landlord in relation to the tenancy[12], and the landlord attempts to carry out a retaliatory eviction. Provided the case does not fall under any of the allowed exemptions[13], the S.21 notice will be deemed invalid should the following steps have taken place:

    i) Before the S.21 notice was given, the tenant made a complaint to the landlord in writing about the condition of the property; and
    ii) The landlord failed to provide a response within 14 days with a description of the action that he proposes to take to address the complaint and/or he failed to set out a reasonable timescale within which that action will be taken; and

[5] S.213 (6) Housing Act 2004 and see S.215 (1A) & (2) Housing Act 2004 re S.21 Notice
[6] S.213 (10) Housing Act 2004 and see S.215 (1A) & (2) Housing Act 2004 re S.21 Notice
[7] S.213 (6) Housing Act 2004
[8] S.36 (2) Deregulation Act 2015 and S.21 (4B) Housing Act 1988
[9] S.33 1 (a) Deregulation Act 2015
[10] S.33 1 (a) Deregulation Act 2015
[11] S.33 (10) & (11) – Where the complaint is made about any common parts of the building of which the dwelling-house forms a part. This however only applies if (a) the landlord has a controlling interest in the common parts, and (b) the condition of those common parts is such as to affect the tenant's enjoyment of the dwelling-house or of any common parts which the tenant is entitled to use.
[12] S.33 (12) Deregulation Act 2015
[13] Ss.33(8), 33(9) and 34 Deregulation Act 2015

iii) The tenant made a complaint to the local authority's environmental health service about the same, or substantially the same, defects complained about to the landlord; and

iv) The local authority has served a relevant notice in relation to the property in response to the complaint made by the tenant.[14]

11) Where no Energy Performance Certificate has been given to the tenant either prior to the tenancy commencing or at the least prior to the giving of a section 21 notice[15];
12) Where no Gas Safety Certificate has been given to the tenant prior to the tenant first entering into occupation of the property[16]. (See commentary on case of *Caridon Property Limited v Monty Shooltz* (unreported);
13) Where the landlord, or someone acting on his behalf, has failed to give the tenant the current version of the document entitled "How to rent: the checklist for renting in England", as published by the Department for Communities and Local Government.[17]
14) Where the new prescribed form of S.21 notice has not been served on the tenant.[18]

Whilst not within the above list, claims have also been failing due to landlords' letting agents mistakenly completing the Claim Form and Particulars on behalf of the landlord, signing them on behalf of the landlord and sending them off to court in order to get the claim issued. This activity is deemed to be 'conducting litigation', and classed as a "reserved legal activity" under S.12 of the Legal Services Act 2007 (LSA). S.14 of the LSA makes such an activity a criminal offence and therefore I would strongly advise any landlords and/or lettings agents to use a legal professional to deal with such steps.

Over the last year there has been a surge in failed S.21 possession claims, many such claims issued under the quick accelerated possession route (a paper system designed to avoid the need for a hearing). Judges have become quick to highlight any errors in procedure so as to hold a S.21 notice invalid, which inevitably means the end of the road for any S.21 possession claim.

Whether you are a solicitor, landlord, letting agent or other property professional, it is strongly advised that you check the above list before serving a S.21 notice. Should any mistakes have been made so as to deem any S.21 notice invalid, a new valid S.21 notice would need to be served on the tenant, which

[14] S.33 (2) Deregulation Act 2015
[15] S.38 Deregulation Act and Regulation 2 (1)(a) of The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015
[16] S.38 Deregulation Act and Regulation 2 (1)(b) of The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015
[17] Regulation 3 of The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015/1646
[18] S.37 Deregulation Act 2015 and see the prescribed form at http://www.legislation.gov.uk/uksi/2015/1725/schedule/made

will delay possession by at least another 2-3 months (possibly longer depending on Court Bailiff availability). In the majority of possession cases this will often mean there will be months' worth of rent arrears by the time vacant possession is given.

Should tenants have little or no means to be able to settle the arrears, landlords will be looking to those who originally served the defective notice/issued proceedings (i.e. solicitor, letting agent etc.) for any financial redress.

Therefore, ignorance of the current rules is no excuse and a failure to comply will have ramifications for all concerned. In order to avoid exposure to such a risk, it is advisable to get a second opinion before embarking upon the S.21 route.

Michael has assisted hundreds of solicitors, landlords, letting agents, and property managers over the years, and is able to provide advice, drafting and/or representation in court as and when required.

To know more about the areas Michael can deal with, or see any further articles, please visit www.lettingsbarrister.co.uk and www.42br.com.

Should you wish to instruct Michael, you are welcome to make a booking through his clerk by telephoning 020 7831 0222 or emailing clerks@42br.com.

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