Could the Deregulation Bill destabilise the residential rental market?

How will the Deregulation Bill, currently making its way through the House of Lords, affect the residential tenancy market? Lee Pearce, partner and head of the property disputes team at Ellisons Solicitors, looks at how the Bill will shape the future of the private rented sector.

The Deregulation Bill is a Bill to make provision:

1. for the reduction of burdens resulting from legislation for businesses or other organisations or for individuals;
2. for the repeal of legislation which no longer has practical use;
3. about the exercise of regulatory functions; and
4. for connected purposes.

What are the key changes proposed in the Bill and what prompted these?

One of the main thrusts of the changes was to prevent landlords faced with complaints about property condition from their tenants from simply removing the tenant using the Housing Act 1988, s 21 (HA 1988) and substituting them with someone more accommodating. In order to prevent this, s 21 notices will not be validly served unless certain conditions are met—including that the tenant has made a written complaint to the landlord about the condition of the property prior to its being served and the landlord has not provided an adequate written response within 14 days.

An adequate response must define the actions the landlord is proposing to take to deal with the complaint and sets out a reasonable timescale for doing so. In addition, where an improvement notice has been served or emergency remedial action has been carried out, the landlord is precluded from serving a notice under s 21 for a period of six months from the date of that notice being served.

There is a new restriction on serving s 21 notices early. It will not now be permissible to serve a s 21 notice in the first four months of an initial tenancy. Where the tenancy is renewed then the notice can be served immediately.

In addition to the restriction on early service there is a further new ‘use it or lose it’ aspect to s 21 notices in that they will not be able to be utilised at all more than six months after the date they were first given to the tenant. These date changes are another hurdle, but they probably will not have a huge effect on many landlords as s 21 notices are normally used fairly promptly and the practice of serving such a notice at an early stage has largely fallen out of fashion.

There is to be a new prescribed form of a s 21 notice which will need to be used when giving notice. There are two other potential limits. There is a new power for regulations to be made requiring a landlord to give a tenant information about their rights. This is likely to mirror similar information required in Scotland. The second requirement is to permit regulation to be made prohibiting the service of a s 21 notice if other matters relating to health and safety, property condition, or energy performance have not been met.

As to tenancy deposits, the first big set of amendments are designed to deal with the case of *Superstrike v Rodrigues* [2013] EWCA Civ 669, [2013] All ER (D) 135 (Jun). The summary of that case was that landlords must serve the prescribed information on tenants and relevant persons on every renewal and when the tenancy becomes periodic. There are two big amendments here:

1. If a deposit was taken before the legislation came into force for a fixed term tenancy which then became periodic after the deposit legislation came into force (ie after 6 April 2007) then all will be forgiven provided that the deposit is protected and the relevant prescribed information served within 90 days of these amendments coming into force, and
2. If a deposit was taken after 6 April 2007 and protected and the prescribed information served then on any renewal it will be assumed that the prescribed information was properly served—there is no protection for landlords who never protected the deposit during the initial tenancy but there is forgiveness for landlord who were late in their protection.

These two provisions are effectively retroactive. Current court proceedings relating to these situations will therefore be terminated when the provisions come into force but costs will not be payable to landlords for that. Closed cases where the time for appeal has passed cannot be reopened due to these changes.

The second big set of amendments is related to the Court of Appeal decision in *Charlambous and another v NG and another* [2014] EWCA Civ 1604, [2014] All ER (D) 175 (Dec). The summary is that deposits taken before the legislation began, where the tenancy became periodic before the legislation began, must also be protected prior to a s 21 notice being served. The government has actually altered the legislation to confirm the decision in *Charlambous*. Therefore, any landlord who is in a similar position with a tenancy that became periodic before the legislation came into force should now protect those deposits. The legislation confirms that there is no financial penalty for this.

The government also responded to complaints from the tenancy deposit protection schemes stemming from some county court decisions about the prescribed information. They have amended this so that it is now clear that where the prescribed information says the landlord's information must be given, then giving the details of an agent who protected the deposit for the landlord at the outset is also acceptable.

In their current form, are the proposed changes likely to be successful in achieving their aim?

This remains to be seen. There are clearly loopholes which can be exploited. For example, if a landlord has lived in the property before they can obtain possession by

using a HA 1988, s 8 notice citing ground 1. This is rarely used as an option but may see a new lease of life. Whether this will actually prevent retaliatory eviction is entirely dependent on whether it actually is a big problem in the first place. There are differing views on that. The deposits changes will clearly fix some issues. However, problems remain with the relevant legislation. The government approach on deposits appears to remain a reactive one, only dealing with major issues when their hand is forced by a prominent decision. It is likely that tenancy deposits will be a matter that will appear again before the appeal courts and probably Parliament as well.

Has anything been missed out or could the changes lead to any unintended consequences?

I am very concerned that the changes will cause the effective death of the accelerated possession process in the county court. This is heavily used by private landlords to evict tenants. If the tenant can make a challenge relating to condition, this will be essentially factual and will mean that a hearing will have to be listed. This will take the matter outside the accelerated procedure and the pressure on the courts of the extra hearings could cause the possession process to become untenable. Coupled with the increase in hearing fees, many smaller landlords may simply decide that they are no longer interested in renting as the risks are too high and exit the sector. Some may see this as desirable but the effects of this are actually impossible to predict and could be serious.

What are the common issues and grey areas in this area of law?

HA 1988, s 21 has always been poorly understood. It has a number of remaining loopholes around tenant notice and the effects of a s 21 notice. For example, a s 21 notice does not in fact end a tenancy whereas a tenant's notice to quit apparently does. So if a landlord serves a notice under s 21 during a periodic tenancy, can a tenant then just leave or should they in fact serve a counter-notice to end the tenancy? These are issues which have never been properly resolved.

With regards to deposits one of the most important outstanding issues relates to 'relevant persons', that is, people who pay the deposit on the tenant's behalf. There often arises a scenario where the landlord is not actually aware that this has happened. In that case the legislation appears to still penalise the landlord despite that lack of knowledge.

What should lawyers advise their clients?

The most important thing at this stage is to ensure that clients are aware of the upcoming changes. Inevitably many of them will not be aware of these alterations and what it will mean. For landlords, the most important requirement will be to be aware of the changes to the s 21 notice and retaliatory eviction rules—in particular, the need to respond promptly and clearly in writing to condition complaints will be key. For tenants who have current claims for unprotected deposits or defences to s 21 notices which are reliant on arguments which these changes will undermine, should decide if they can comfortably obtain judgment before the provisions come into force. If they cannot, then they may wish to seek to settle these matters out of court. Landlords by contrast will want to delay these matters as long as possible.

What is the predicted timeframe on this?

It is hard to be totally sure when all this will come into force. The election is disruptive to the timing of almost everything at the moment. When the changes were introduced in the Lords, the government indicated that they did not expect the necessary regulations to be drafted in time for these changes to be brought in before the election. Therefore we must assume a start date in the autumn, probably October 2015 as has become customary.

If you have any queries arising from the above please feel free to contact Lee or one of his team.

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