New legislation affecting landlords

The press rarely alerts landlords to the new legislation with which they must comply and the penalties and repercussions if they fail to do so. It is becoming harder for a landlord to avoid errors or non-compliance whilst managing a property themselves.

It's important for landlords to keep on top of changes to legislation so we've asked property law specialists, PainSmith solicitors, to run through the most recent changes.

Immigration Act 2014 ("the Act")

The Home Office rolled out this Act nationally as of February 1 2016. The Act imposes an obligation on a landlord or their agent to check the identity of all applicants or other residential occupiers over eighteen years of age; together with checking that the person holds a valid visa allowing them to rent a property prior to granting them a tenancy.

To date, the Home Office has taken a "softly approach" but has now indicated that they will pursue a harder line to enforce the conditions of this Act by starting to check that landlords and agents are carrying out the Right to Rent checks and keeping records for up to one year after the tenancy ends; otherwise penalties will be imposed. Most agents check the identity and if relevant the visa of the applicant or other occupier prior to the start of the tenancy. Although it is prudent of a landlord to verify this fact to ensure that he is not in breach of the law. If the agent does not manage the property, the obligation to check any new or additional occupiers and visa renewals falls on the landlord annually or when the visa expires if later.

Maintaining a good diary system is imperative. If the landlord fails to carry out the checks at the specified time during the tenancy, they may incur the civil penalty imposed by this Act; or even worse the penalty being imposed under the Immigration Act 2016 from December 1 2016 as shown below.

The obligations under this Act are as follows:

- All occupiers aged eighteen years or older must be checked for the Right to Rent prior to a Tenancy being granted;
- The agent or the landlord must check a passport or similar ID document and visa if applicable prior to granting the Tenancy;
- The person must be in physical attendance with the landlord or the agent and have the original document such as their passport and if applicable a visa with them;
- The agent or the landlord must verify the person is as described in the passport; that there are no obvious flaws in the passport such as spelling errors improbable dates of birth or other indications that the passport is forged; that a visa is valid; must take a copy of the passport and visa; and sign a declaration that they have seen the original which must be kept for twelve months after the Tenancy has ended;
- Any new occupiers taking up residence during the Tenancy; or upon renewal must be checked prior to the date they enter the Tenancy or take up occupation of the property;
- Further checks must be carried out every twelve months or the end of the visa whichever is later;

- The landlord and the agent cannot discriminate e.g. they cannot say they want a twelve months' tenancy then reduce it to seven months because that is the length of the visa held by the applicant;
- If a person has even a week left on a passport they have the right to remain for twelve months;
- The penalty for non-compliance under the Act is £3000 per person; but for a first offence it is £1000 per person. A reduction of 30% is given if the penalty is paid within twenty-one days. However, note the penalty being imposed by the Immigration Act 2016 as shown below.

Immigration Act 2016

This Act was enforced from December 1 2016; therefore now applies to all tenancies. The details are as follows:

- As well as the existing civil penalties (see above), new criminal penalties have been added for more severe offenders including unlimited fines and up to 5 years in prison;
- The Home Secretary can serve notices on landlords informing them that despite the fact they have checked the right to rent status of individuals, that one or more of those persons in fact has no right to rent; and the landlord must take action to evict the person;
- When a notice is served on a landlord by the Home Secretary (see above) he is now obliged to evict promptly and can be prosecuted if he does not take legal action;
- There is a new ground; 7B of Schedule 2 of the Housing Act 1988 granting mandatory possession on the issuing of a Section 8 notice. Then applying to the County Court although there will still be constraints due to the pressure on Court time; and equivalent powers to evict for non-Housing Act tenancies. The landlord should ensure the Assured Shorthold Tenancy agreement being used refers to ground 7B to enable action to be taken in Court;
- If notices from the Home Secretary show that some or none of the occupiers in a property have a right to rent, then the landlord can issue a 28-day notice to quit and then recover possession of the property without going to court at all. Although the landlord should be wary of taking such action without first seeking legal advice on the steps to be taken.

Deregulation Act 2015

The above Act introduced new rules regarding possession of an Assured Shorthold Tenancy ("AST").

If the Tenancy commenced after October 1 2015 the following new duties have been imposed on the landlord.

They are as follows:

- Introduction of the new Form 6A;
- Retaliatory eviction;
- Section 21(4) expiring at any time;
- The Section 21 not being served until after the first four months of the tenancy.

Although as stated above these new obligations only apply to tenancies commencing on or after October 1 2015. A point to note is that retaliatory eviction applies to any tenancy commencing before the 2015 date as from October 2018. Also, many judges may apply the new rules to older tenancies therefore all landlords must be aware of their obligations and how to comply.

Ignorance of the law is not a defence. Details are as shown below:

Section 21 (Form 6A)

If a tenancy commences after October 1 2015 then a Form 6A which is a prescribed form must be used to gain possession. The phrase "Prescribed Form" means that the wording has been laid down by statute and must be adhered to implicitly. All sections of the Form must be completed; no amendments made; and the advice for the tenant must be left in situ. Use of the incorrect form; or haphazard completion could delay possession.

If the tenancy commenced before the above date old Notices can be used. However, it is preferable to use the most recent Form 6A because judges will receive training in the sight and use of this Form.

Since October 1 2015 there has been a time limit on the validity of a Section 21 Notice (Form 6A). Effectively the Notice will only be valid for six months from the date served on the tenant. This date could be crucial if a landlord is selling a property. Expert advice will be vital for landlords in such circumstances to ensure if necessary a further Notice is served (important if the property is being sold); or if the current Notice can be relied on to gain possession.

A Section 21 Notice cannot be served until after the first four months of the tenancy as from October 1 2015. This means that if the Tenancy is of six months' duration whereas the tenant can leave on the last day of the fixed term without giving notice; the Landlord will have to allow time for serving the Notice on the tenant; therefore, may not be able to gain possession until after six months and a few days. Many landlords think a tenant must vacate the property when the Notice expires which is incorrect. Court proceedings for possession may be necessary. The Section 21 is a Notice seeking repossession which allows the judge to grant mandatory repossession. The Landlord is not entitled to possession of the property if the tenant is not in breach (when a different process is followed) until a valid Section 21 has been served, expired and, if necessary, a possession order obtained from the Court and the bailiff has evicted the tenant.

Since October 1 2015 a valid Section 21 Notice cannot be served unless the tenant is in receipt of a current EPC, Gas Safety Certificate and the "How to Rent" Handbook published by the government. As part of their initial procedure some serve such documents on the tenant at the start of the Tenancy and obtain a receipt. If the agent is not managing the property they may delegate the service of these documents to the landlord. Procedures should be verified to prevent errors. However, if the tenancy has lasted a period of time further copies may be required. If the documents are not up to date the Section 21 Notice will be void.

Finally, at one time if notice was served on a tenant during a periodic AST then the Notice had to expire on the day before the rent was due or it was invalid. The above Act followed case law (Spencer v Taylor) and changed statute. Now provided the landlord (or the agent on his behalf) has served the required two months' notice and allowed time for service of the Notice on the tenant, the Notice can expire at any time. This gives greater flexibility to the landlord. If the tenant gives notice to end a periodic AST he must still give one period's notice in writing to expire the day before the rent is due.

Retaliatory Eviction

The perception of government was that many "rogue landlords" failed to carry out repairs; and tenants were scared to complain in case a Section 21 Notice was served on them to end their tenancy. However, procedures as shown below must be carried out otherwise a

landlord will be unable to serve a valid Section 21 Notice to regain possession of his property:

If a tenant "complains" which in effect means mentioning the need for repair at the property the landlord or his agent must give an **adequate response** within fourteen days in writing. Such a response will detail the issue which has arisen; the action to be taken and the expected time scale. Failure to comply means a Section 21 notice to gain possession cannot be served. The landlord will not have a detailed property management system to take account of such actions and ensure that the response is sent out to the tenant in writing within the specified time frame and logged in the system. It will be important to note down exactly when the tenant brought up the question of lack of repair, the full response and if the tenant has refused access. Refusal to grant access may be a valid defence for lack of repair; but the occasions would have to be carefully documented.

In addition, if the tenant complains to the environmental health officer of the local authority of lack of repair and an improvement notice is served on the landlord then a Section 21 Notice cannot be served on the tenant for a further six months and all repairs must be completed. An improvement notice does not just take into account the lack of repair of which the tenant may have complained. Instead the officer will assess the property using the Housing Health and Safety Rating System under the Housing Act 2004. There are twenty-nine risk hazards under the HHSRS which the environmental health officer uses to assess the statistical analysis of risks and danger to the tenant. The landlord could therefore face a substantial financial outlay to comply with the improvement notice in addition to delaying possession of his property.

Housing and Planning Act 2016

This Act became law in May 2016 and is expected to be enacted in April 2017 once the secondary legislation has been drafted. It covers four main points:

- Electrical safety requirements;
- Client money protection;
- Banning orders;
- Rent repayment.

Electrical Safety

It is expected there will be regulations imposing a Portable Appliance Test ("PAT") and an electrical safety check of wiring on landlords. Currently the exact date of implementation is not known although the secondary legislation is expected to be published in March 2017; nor how often the tests will have to be carried out but if it follows a similar path to the Regulations for Houses in Multiple Occupation ("HMO") the wiring check will be every five years and the PAT test annually. It is not known whether the regulations will apply only to tenancies commencing from April 2017; or will apply to all current tenancies, as with the smoke and carbon monoxide alarms and detectors.

There will be penalties for non-compliance (probably a penalty fixed by environmental health who get to keep the money so have a vested interest in the matter). Although not indicated, currently

there is a strong possibility that the government may link proof of the checks being carried out and certificates being received by the tenant at the start of the tenancy and annually thereafter if relevant to the validity of the Section 21 Notice; and legislate to ensure copies of the electrical checks are given to the tenant at the start of the tenancy together with the current requirement to provide a gas safety certificate, EPC and "How to Rent" Handbook.

Client Money Protection ("CMP")

There is currently a working party in Parliament looking at the matter; but this requirement is almost certain to be enforced as it has a lot of cross party support together with other organisations such as ARLA and the Royal Institution of Chartered surveyors ("RICS"). It will mean all letting agents must have CMP which will protect landlords and tenants a lot more than proposals for abolishing fees on tenants. There is currently no set date for introduction. Agents who are a member of a professional body such as ARLA or the RICS have always held CMP and support proposals for its introduction for all landlords and agents. The landlord should always check with any letting agent before using their services that they hold CMP. If a landlord uses the letting service of an agent and chooses to hold the deposit it may end up being troublesome and expensive to get the necessary protection under CMP.

Banning Orders

These Orders will be made against both landlords and letting agents. If banned the person or organisation will not be able to engage in letting and property management work. The Order will be made by the First Tier Tribunal ("FTT") after an application from the local authority. The rules are expected to be in force in April 2017. The ban will last for a fixed term of at least twelve months. If the ban is breached, it will be a criminal offence punishable by imprisonment of up to 51 weeks or a fine of up to £30,000.

The Secretary of State will set up a database of landlords and agents convicted of specific offences including banning orders giving full details of all landlords and agents who are or were subject to a ban. This can be accessed by local authorities. It is not expected that the database will be available to the general public which appears to be a short-sighted approach because it will not protect a landlord or letting agent from dealing with a person or organisation who have been banned.

Rent Repayment Orders

This is an extension of the Rent Repayment Orders imposed on a landlord if they are convicted of not having a mandatory licence for an HMO under the Housing Act 2004 ("HA 2004") where up to twelve months' rent can be ordered to be repaid to the tenant or the local authority if the tenant is in receipt of housing benefit or local housing allowance. The application will be made to the FTT by the tenant or the local authority similar to the above system for an HMO.

Examples of when an Order may be made are as follows:

- Failure to comply with an improvement order or prohibition order under the Housing Health and Safety Rating System of the HA 2004;

- Unlawful eviction or harassment of a tenant for any reason such as cutting off energy supplies, entering the property without consent etc.;

- Breach of a banning order.

Conclusion

It is becoming harder for landlords to avoid errors or non-compliance whilst managing a property themselves. Many landlords do not realise that when a matter reaches the Court of Appeal ("C of A") and a decision is made, it binds the outcome of court cases in the County Court and affects all landlords.

Some important cases are noted below emphasising the effect on landlords:

- **Edwards v Kumarasamy:** went to the Supreme Court. In lower court and in the C of A the tenant successfully sued an individual landlord of one flat for an accident in the common parts (not the freeholder) citing lack of repair even though the individual landlord was not aware of it. The tenant had tripped over faulty paving near a refuse bin outside the property which usually comes under the repairing obligations of the freeholder; although the landlord does have liability to ensure work is carried out under the amendment to the Landlord and Tenant Act 1985 Section 11 which specifies the landlord's statutory repairing obligations. The Supreme Court said the Landlord was not liable to compensate the tenant if the landlord was not aware of the need for repair; and that he was not liable for accidents in the common parts. However, it is prudent to check common parts if managing and inform the freeholder or block manager of lack of repair to protect against any possible claim.

- **Sternbaum v Dhesi:** In this matter the property did not have a bannister rail and the tenant suffered injury. The tenant made a claim against their landlord alleging lack of a bannister rail was lack of repair and breach of the Defective Premises Act 1972 Section 4 which states that if the tenant suffers a loss due to a defect then the tenant should be compensated. The C of A found there was not lack of repair; nor breach of the Defective Premises Act 1972 Section 4. However, if the tenant had used the HA 2004 and the HHSRS (see above for details) the outcome may have been different. To this end landlords should scrutinise their property to ensure safety for a tenant. A clause cannot be inserted into a tenancy agreement saying the landlord will have no liability for death or injury.

- **Levett-Dunn v HHS Property Services:** If the tenant is not given an up to date address for the landlord and therefore serves notice on the only address held which is no longer used by the landlord then the notice is still valid even if the landlord never received the notice. This could be a crucial point for a landlord.

- **Marks and Spencer plc v BNP Paribas:** If the tenant gives notice after paying the rent and the notice period expires before the end of the rent period there is no apportionment of rent. All landlords should be aware of this fact because many tenants demand rent being returned especially if the property is re-let quickly.

We hope this has helped to demystify the legislation affecting landlords and shed some light on the upcoming changes due to come into effect in 2017. Further information can be found on the PainSmith Solicitors blog at www.painsmith.co.uk.