RECOVERING ABANDONED PREMISES - DRAMATIC LEGAL CHANGES

MICHAEL GRANT – 2018

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INTRODUCTION

The Housing and Planning Act 2016 ("the Act") is one of the most recent pieces of legislation in the area of housing law, and with it comes some dramatic changes.

One such change is the implementation of a new prescribed mechanism for landlords to recover possession of abandoned premises, as provided for by S.57 of the Act; a subject which the law has *until now* remained relatively quiet about. The prescribed mechanism allows a landlord to recover possession without the need to obtain a court order, provided the relevant provisions of the Act are correctly adhered to.

Nevertheless, whilst S.57 is good news for landlords, it is not yet in force, and this will unfortunately remain the position until a date of commencement is set by Parliament.

FIRST INDICATIONS OF ABANDONMENT

Whether a landlord has dozens of properties, or merely just the one, it is highly unlikely that he will be keeping such a close eye on the property so as to notice the comings and goings of his tenants.

It is however important to note that a tenant need not physically be present at all times in order to be residing at a premises, which principle can also apply to periods of extended absence. In such cases, a tenant may continue to reside in or occupy premises as a home, provided that i) he intends to return and ii) there is some physical evidence of that intention. Such cases are prevalent among elderly tenants who go into residential nursing care for extended periods of respite care. As long as such tenants can show that they have an *enduring intention* to return home, they are to be seen as continuing to reside in their premises.[1]

This, however, should not detract from the numerous other cases of abandonment which see tenants vacating premises with no intention of returning. The question is, how can a landlord know, or accurately know, a tenant's intentions? It would be sensible in the first instance to carry out a thorough investigation into the tenant's apparent disappearance. During any such investigation, it would be wise to always keep in the back of one's mind the fact that a court may one day scrutinise every step of the investigative process, so as to decide whether the landlord had reasonable cause to believe the tenant was no longer residing in the property[2].

Usually, the first hint of abandonment comes a good while after the tenants have in fact vacated the premises.

A typical chronology of events therefore is as follows:

a) The tenants vacate the premises without giving notice to the landlord;
b) The landlord suffers missed rental payment(s);
c) The landlord attempts to contact the tenants on numerous occasions, but to no avail;
d) The landlord carries out site visits to the outside of the property to obtain more clarity.

[1] *Hammersmith & Fulham LBC v Clarke* (2002) HLR 37, CA
[2] S.1 (2), Protection from Eviction Act 1977

The first indications of abandonment will usually arrive somewhere between b) and c) above, but a landlord can obtain a clearer picture at or near to the end of d). This process can take as long as 2-3 months (or 2-3 months' rent in arrears before any legal action has been initiated), so typically a landlord will want to take action once he knows, or reasonably suspects, the tenants have abandoned the property.

Accordingly, if a landlord suspects his property has become abandoned, he can either wait until S.57 is in force (which is inadvisable due to the uncertainty surrounding its date of commencement) or act immediately in accordance with the current legal position.

Should he decide to take immediate action, it is important he is first fully aware of the current legal position and its potential ramifications.

CURRENT LEGAL POSITION

● Assured Tenancies

Section 1 of the Housing Act 1988 states that a tenancy granted after 15th January 1989 under which a dwelling-house is let as a separate dwelling is classed as an assured tenancy (AT), provided the following criteria are met:

i) the tenant (or each of the joint tenants) is an individual,
ii) the tenant (or at least one of the joint tenants) occupies the dwelling-house as his only or principal home; and
iii) the tenancy is not one which falls under any of the exceptions listed in Part I of Schedule 1 of the Housing Act 1988.

Tenants of ATs enjoy what is called 'security of tenure', which in essence means that it can be difficult to bring such a tenancy to an end and hence difficult for a landlord to recover possession. In order to recover possession, a landlord will have to prove not only a ground for possession[3], but often also that it is reasonable for the court to make an order for possession.

Ever since the Housing Act 1996 has been in force, all such tenancies granted after 28th February 1997 are classed as assured shorthold tenancies ("ASTs"), unless the tenancy agreement expressly states that it is to be an AT[4]. The main difference between an AT and an AST is that the former enjoys security of tenure, whereas the latter substantively does not. Landlords of ASTs are able to use the same grounds for possession as those used for bringing ATs to an end[5], but can elect an alternative route under S.21 of the Housing Act 1988, if they so wish. S.21 is not available for ATs, only ASTs, and can be engaged on or after the coming to an end of an AST which was a fixed term tenancy.

Possession under S.21 does not require the landlord to specify a ground for possession nor does it require reasonableness to be proved. Furthermore, provided the requirements for S.21 notices have been complied with, the court has no discretion and must make an order for possession. It would be remiss however not to point out that there are numerous requirements to be adhered to prior to

[3] Grounds 1-17, Schedule 2, Housing Act 1988
[4] *It is common for Housing Associations to grant ATs so as to provide the tenants with more security than under an AST. ATs also are usually granted for a longer term than the average AST*.
[5] *Ibid*

serving a S.21 notice, in order for the notice to be valid[6]. Nevertheless, one can either comply with such requirements, or, if the window of opportunity to comply has since closed, one can possibly find a way to navigate around them.

S.5 of the Housing Act 1988 makes it clear that any assured tenancy cannot be brought to an end by the landlord except:

a) by obtaining a possession order under either S.7[7] or S.21 as the case may be, and

b) the execution of the order (*i.e. when the tenant vacates the property in compliance with the possession order or, if the tenant remains in occupation after the date set by the possession order, once a bailiff carries out the eviction).*

It is important to note however that ASTs are still ATs in essence. This therefore means that, like ATs, ASTs too need to satisfy the criteria under S.1 of the Housing Act 1988 (as seen above). Even if a tenancy begins assured (whether an AT or AST), it would need to continue to satisfy the criteria under S.1 of the Housing Act 1988 otherwise it will lose its assured status. In the case of abandonment for example, a tenant will no longer be occupying the dwelling-house as his only or principal home, thereby rendering the tenancy no longer assured, and thus by extension no longer an AST.

Although the tenant no longer *occupies the dwelling-house as his only or principal home*, he will still have a continuing legal interest in the property, which continuing interest is the 'contractual tenancy'. In order for a landlord to recover possession of the property he will have to bring such a contractual tenancy to an end by serving a notice to quit ("NTQ").

● NTQs

Please note, the rules governing NTQs are vast, and it is advisable that if one is unsure as to what should be incorporated within the notice, how much notice to give and/or how to effect service, then legal assistance should be sought, or at least a second opinion obtained, before taking action. However, as with everything, what will constitute a valid NTQ will very much depend on the given circumstances of each case.

In general, a NTQ must comply with the common law rules relating to a notice's validity. Usually, any written terms of the tenancy agreement will override the common law rules, but such terms cannot override the provisions of S.5 of the Protection from Eviction Act 1977 (*i.e. i) that it is in writing, ii) contains information within the notice as prescribed by the 1977 Act, and iii) it is given not less than 4 weeks before the date on which it is to take effect*).

However, in situations whereby an AT/AST loses its assured status by virtue of the tenant having abandoned the property, the current legal position is somewhat vague as to whether or not a landlord would need to obtain an order for possession prior to gaining entry to the property. In theory, the landlord is entitled to enter the property following expiry of the NTQ, without the need to obtain an order for possession. However, as explained below, the potential ramifications of mistakenly believing the tenant has abandoned the property may give rise to a criminal conviction.

● Consequences of Mistaken Belief of Abandonment

It is imperative that any landlord who intends to re-enter an abandoned property is 100% certain that the property is so abandoned and that the tenant has in fact vacated. If the landlord gets this detail

[6] For example, Ch.4, Housing Act 2004 and Ss. 30 – 40, Deregulation Act 2015
[7] Using Grounds 1-17, Schedule 2, Housing Act 1988

wrong and changes the locks pursuant to a mistaken belief, any returning tenant who had been temporarily absent from the property would find themselves locked out, and therefore (potentially) unlawfully evicted.

If a landlord is found to have unlawfully evicted a tenant, he could:

i) face a claim for damages for unlawful eviction under the Housing Act 1988; and
ii) be prosecuted under the Protection from Eviction Act 1977 and found guilty of a criminal offence punishable by an unlimited fine[8] and/or a custodial sentence[9].

In light of the above consequences, before re-entering a property any prudent landlord is advised to wait until the NTQ expires and thereafter instigate possession proceedings to obtain an order for possession.

Notwithstanding the NTQ route, if a landlord is not 100% certain that his tenant has in fact abandoned the property, it may be prudent to take a more pragmatic approach and assume that the tenant is still occupying the dwelling-house as his only or principal home, in order to be able to elect either the S.8 or S.21 route for possession, which routes are only available so long as the tenancy maintains its 'assured' status. Please note however, that if the tenant has in fact abandoned the property, and the landlord is certain of this, then he loses the ability to claim that the tenancy remains assured and must serve a NTQ if he wishes to bring the tenancy to an end.

● Unlawful Eviction

The offence of unlawful eviction is committed if "*any person unlawfully deprives the residential occupier of any premises of his occupation of the premises or any part thereof, or attempts to do so*".[10]

At first glance it would appear that a landlord would be guilty of the above offence if, following the expiry of a NTQ, he changed the locks upon the mistaken belief of abandonment, which thereafter caused the returning tenant to be stranded on the doorstep without access to the property.

If the landlord is so charged with the above offence, he would need to prove to the court that this 'mistaken belief' was not without reasonable cause. S.1 (2) of the Protection from Eviction Act 1977 allows a landlord to be able to successfully defend such a prosecution if he can prove to the court "*that he believed, and had reasonable cause to believe, that the residential occupier ceased to reside in the premises".*

This is why it is important for the initial investigation carried out by a landlord as to whether or not the property has become abandoned should be conducted thoroughly and with the Court's potential scrutiny in mind.

DRAMATIC NEW CHANGES – HOUSING AND PLANNING ACT 2016

Sections 57–63 of the Act will remove the current level of uncertainty, as illustrated above, and instead will introduce a prescribed mechanism to allow landlords to recover possession of abandoned premises upon service of a notice under S.57, without needing to go to court and obtain an order for possession.

[8] S.85, Legal Aid Sentencing and Punishment of Offenders Act 2012
[9] S.1 (4) Protection from Eviction Act 1977
[10] S.1 (2) Protection from Eviction Act 1977

Whilst this does look very promising for landlords, it is imperative that this abandonment mechanism is properly complied with. A number of the provisions are incredibly stringent (especially service, content and timing of notices) which therefore may cause mistakes to be made, which in turn would invalidate the process initiated by the landlord. As a result, he would not be legally entitled to recover possession, and would technically need to restart the process and ensure its compliance.

In reality, however, in cases where a) the property has become abandoned, b) the landlord initiates S.57 and c) the landlord fails to accurately comply with the prescribed notice provisions, such mistakes will likely go unchallenged and neither the absconded tenant nor the landlord would be any the wiser.

● **The Conditions**

The proposed conditions for bringing an AST to an end in cases of abandonment are as follows:

1) the tenancy relates to premises in England,
2) there needs to be either 8 weeks, 2 months, 1 quarter, or 3 month's rent in arrears (depending on how often rent is to be paid),
3) 3 warning notices need to be given at different times;
4) no tenant, named occupier or deposit payer has responded in writing to any of those notices before the end of 8 weeks, which period began the day the first notice was given.

This whole process, starting from the moment the landlord initiates the abandonment procedure (i.e. serves the first notice) to the date the landlord would be entitled to gain entry and recover possession is approximately 8 weeks.

Looking through the above conditions, that which is likely to bring about the most debate and/or dispute is the third condition in respect of warning notices[11].

● **Warning Notices – S.59 of the Act**

Three warning notices need to be given at different times over the 8-week period. Each warning notice must explain the following[12]—

(a) that the landlord believes the premises to have been abandoned,

(b) that the tenant, a named occupier or a deposit payer must respond in writing before a specified date if the premises have not been abandoned, and

(c) that the landlord proposes to bring the tenancy to an end if no tenant, named occupier or deposit payer responds in writing before that date.

[NB - The 'specified date' referred to above at (b) is any date the landlord wishes to specify which date is after the end of the period of 8 weeks, beginning with the day on which the 1st notice was given to the tenant.]

1st Notice

- Can be given before or once the unpaid rent condition is met.

[11] S.59 Housing and Planning Act 2016
[12] S.59 (4) Housing and Planning Act 2016

- Must be given to the tenant, any named occupiers, or any deposit payer.
- The notice may be given by delivering it to the tenant, named occupier or deposit payer in person.[13]

  If, however, the notice is not delivered to the tenant, named occupier or deposit payer in person, it must be given by[14]—

  (a) leaving it at, or sending it to, the premises to which the tenancy relates,

  (b) leaving it at, or sending it to, every other postal address in the United Kingdom that the tenant, named occupier or deposit payer has given the landlord as a contact address for giving notices,

  (c) sending it to every email address that the tenant, named occupier or deposit payer has given the landlord as a contact address for giving notices, and

  (d) in the case of a tenant, leaving it at or sending it to every postal address in the United Kingdom of every guarantor, marked for the attention of the tenant.

2nd Notice

- Must be given at least 2 weeks and no more than 4 weeks after 1st warning notice was given
- Can only be given once the unpaid rent condition is met *(i.e. If the tenant pays the arrears before the unpaid rent condition is met then this puts the process to an end, and the landlord will be unable to recover possession)*.
- Must be given to the tenant, any named occupiers, or any deposit payer.
- The notice may be given by delivering it to the tenant, named occupier or deposit payer in person.[15]

  If, however, the notice is not delivered to the tenant, named occupier or deposit payer in person, it must be given by[16]—

  (a) leaving it at, or sending it to, the premises to which the tenancy relates,

  (b) leaving it at, or sending it to, every other postal address in the United Kingdom that the tenant, named occupier or deposit payer has given the landlord as a contact address for giving notices,

  (c) sending it to every email address that the tenant, named occupier or deposit payer has given the landlord as a contact address for giving notices, and

  (d) in the case of a tenant, leaving it at or sending it to every postal address in the United Kingdom of every guarantor, marked for the attention of the tenant.

3rd Notice

- Must be given at least 5 days before the 8-week period comes to an end

[13] S.61 (2) Housing and Planning Act 2016
[14] S.61 (3) Housing and Planning Act 2016
[15] S.61 (2) Housing and Planning Act 2016
[16] S.61 (3) Housing and Planning Act 2016

- Must be given by fixing it to some conspicuous part of the premises to which the tenancy relates

● The Final Notice (S.57 Notice)

The final notice is the notice referred to in S.57, which is to be given to the tenant only once the conditions have been met, which has the effect of bringing the AST to an end on the day the notice is given.

However, whilst there has been much prescription as to the content, timing and service of warning notices, there is absolutely no information given about the final notice under S.57 which would bring the AST to an end.

Subject to any clarification given by Parliament in due course as to the content and service of a S.57 notice, one can merely infer the following:

i) Content of a S.57 notice

In the absence of any declaration in the Act, and subject to Parliament providing clarity on this in due course, it is logical to infer that any S.57 notice must first of all specify that it is a notice pursuant to S.57 of the Act. It would then be prudent to specify that the conditions set out in S.57 have since been complied with and accordingly the AST is hereby brought to an end on (date S.57 notice is given). Whether the AST is brought to an end forthwith or by 11:59pm that evening is unclear, and it is therefore advisable to possibly wait until midnight to re-enter the property.

ii) Service of a S.57 notice

In the absence of any specific provision in the Act detailing the method of serving a S.57 notice, it is logical to infer that the provisions relating to the method of service for warning notices would equally apply to S.57 notices.

Therefore, in order for the S.57 notice to be validly served, as seen above in relation to the 1st and 2nd warning notice, it may have to be served personally on the tenant, named occupier or deposit payer. Equally, if the notice is not delivered to the tenant, named occupier or deposit payer in person, it may have to be given by —

(a) leaving it at, or sending it to, the premises to which the tenancy relates,

(b) leaving it at, or sending it to, every other postal address in the United Kingdom that the tenant, named occupier or deposit payer has given the landlord as a contact address for giving notices,

(c) sending it to every email address that the tenant, named occupier or deposit payer has given the landlord as a contact address for giving notices, and

(d) in the case of a tenant, leaving it at or sending it to every postal address in the United Kingdom of every guarantor, marked for the attention of the tenant.

For extra caution, the landlord could also fix the notice to some conspicuous part of the premises to which the tenancy relates, just as he had to do with the 3rd notice.

If, once S.57 goes live, Parliament remains silent about service of such a notice, then it is perhaps recommended to adopt a more belt and braces approach to service and elect all the above methods, which will ensure that at least one of the S.57 notices would have been validly served in accordance with the Act, bringing the AST to an end on the day of service.

Whilst this may seem overly cautious, it is better to exercise caution than risk invalidating the process.

● What if rent is paid prior to the S.57 notice?

The Act provides that even in circumstances where the unpaid rent condition has in fact been met (e.g. at least 2 months' rent is unpaid), if the tenant pays rent prior to the S.57 notice being served (whether this payment relates to the previous 2 months or any future period), then the unpaid rent condition is deemed to be no longer met, which will no longer entitle the landlord to proceed with the process of recovering possession under the Act.

Any landlord who wishes to avoid such a situation from occurring would see that the S.57 notice is served on (or immediately after) the "specified date", which date is referred to in all three notices, being a day 8 weeks after the 1st notice was given.

● What if the tenant reappears after the AST is brought to an end?

If the landlord has brought the AST to an end after serving a S.57 notice, the tenant has a period of 6 months to apply to have the AST reinstated[17], provided he has a good reason[18] for having failed to respond to the warning notices.

However, the Act does not deal with the situation where a landlord subsequently rents out the property to another tenant, and the former tenant thereafter makes an application to have his AST reinstated before the 6-month period has elapsed. It is currently unclear which tenancy will prevail.

S.60 of the Act states, "*if the County Court finds that the tenant had a good reason for failing to respond to the warning notices it may make any order it thinks fit for the purpose of reinstating the tenancy".* The words "*may make any order it thinks fit*" implies that the court has a discretion, rather than an obligation to reinstate.

An analogy can be drawn with a similar area in the world of property law, known as forfeiture. For those reading this article with a limited, or no, property law background, forfeiture is the procedure which allows a landlord (should he so elect) to bring to an end a contractual fixed term tenancy or lease before the expiry of the fixed term. A landlord is only entitled to forfeit a tenancy if the written lease agreement expressly provides for the landlord to do so. At common law, and in simple terms, a landlord could enforce the right of forfeiture by re-entering the land and taking possession.

However, Section 2 of the Protection from Eviction Act 1977 made it unlawful for a landlord to re-enter a property which contained a residential occupier, without first obtaining a possession order and thereafter valid execution of that order (i.e. a bailiff carrying out an eviction should the tenant refuse to vacate after the date set by the court).

Forfeiture is commonly used by landlords of commercial leases in order to bring such tenancies to an end following a particular breach of the lease. A tenant can make an application for relief from forfeiture, which, if granted by the Court, will effectively resurrect the otherwise terminated lease and treat it as continuing. The tenant has a period of 6 months in which to make such an application[19] and

[17] S.60(3) Housing and Planning Act 2016
[18] S.60(1) Housing and Planning Act 2016
[19] S.138 (9A) County Courts Act 1984

relief will usually be granted provided the tenant can make good the breach upon which the lease was originally forfeited (i.e. if there was forfeiture for non-payment of rent, that i) the arrears will be paid and perhaps ii) that the tenant can also show evidence that he will be able to maintain rental payments moving forward).

A comparison therefore can be drawn between the new abandonment rules (S.60 of the Act) and the law surrounding forfeiture, as in both cases the tenant has 6 months in which to make the application for reinstatement/relief.

In cases whereby landlords have brought leases to an end by forfeiture, and have subsequently rented out their properties to a third party (a new tenant), the issue for the courts as to whether or not an application for relief will be granted will very much depend upon the following:

i) when such an application for relief from forfeiture is made by the original tenant;
ii) whether or not the landlord has "*reasonably and not precipitately*" granted a new lease; and
iii) whether granting relief to the original tenant will cause an injustice to either the landlord or the new tenant, or both.[20]

If for instance a tenant makes an application for relief very late on in the 6-month period (i.e. in the 5th month after forfeiture) and the landlord acted reasonably in granting a new lease to a third party, then the Court is unlikely to grant relief if, in doing so, it would cause an injustice to either the landlord, the new tenant, or both.

It however remains to be seen what the Court's position would be in cases of abandonment, and whether lawyers acting on behalf of landlords would be able to use the same arguments above in order to successfully resist an application for reinstatement.

Time will tell.

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.

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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.

42 BEDFORD ROW

Michael Grant / Barrister
michael.grant@42br.com / 0776 198 5046

Office: 020 7831 0222 / Fax: 020 7831 2239
42 Bedford Row / London / WC1R 4LL

www.42br.com

[20] *Silverman v AFCO (UK)* [1988] 1 E.G.L.R. 51