No-fault evictions: one door closes, another opens

As part of long-awaited proposals to reform the English private rental market, no-fault eviction is on its way out: Daniel Bacon takes a look at what is set to replace it

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IN BRIEF

- The Renters (Reform) Bill proposes to repeal section 21 of the Housing Act 1988, ending the most popular route to no-fault eviction.
- No-fault evictions will nonetheless continue under new and liberalised Schedule 2 grounds.
- We may expect some landlords—particularly in higher-risk cases—to continue to prefer such routes to possession.

Possession proceedings in England are changing. No-fault eviction under s 21 of the Housing Act 1988 (HA 1988) is on its way out—an outcome promised by the government since March 2019 and now taking form in the Renters (Reform) Bill making its way through Parliament. In its stead, the substantive grounds for possession on which section 8 eviction relies—contained in Sch 2, HA 1988—will be strengthened and expanded. Landlords will continue to have a range of options for the recovery of possession of their rental properties, including no-fault options under new and liberalised Sch 2 grounds.

Laying the groundwork

The most consequential no-fault liberalisation of grounds for the majority of residential landlords will be amendments to Ground 1 and a new Ground 1A. Ground 1 is an existing mandatory ground for possession if the landlord or a member of their family requires the property to move into themselves. Under present law, it can generally only be relied on if included in the terms of the tenancy agreement to which the parties—landlord and tenant—contracted in the first place. The Renters (Reform) Bill proposes to liberalise this ground to enable all residential landlords to rely on it regardless of notice having been given in the terms of the agreement.

The second key liberalisation is Ground 1A—a new ground covering completely new territory. If the landlord wishes to sell their property, it is of course an essential property right that they are able to do so. What is more controversial—at least to bodies such as renters' campaign group Generation Rent—is that they are able to do so with vacant possession. A landlord selling with tenants in situ can expect to incur a 20% discount on the open market compared to the value of the house if sold with vacant possession. The seller's pool of potential buyers will be far smaller with tenants in situ, and on top of this, buy-to-let purchasers will be looking at the business case for the investment—typically wanting as much as an 8% return and therefore looking to drive a harder bargain than many potential owner-occupiers would be inclined or able to pursue. Under current law, there is no ground for the recovery of vacant possession in order to sell a rented property, though this is clearly what landlords wanting to sell prefer. This is precisely the liberalisation that the new mandatory Ground 1A provides.

Under current law, a landlord who needs to move into their own rental property but who neglected to include provision for Ground 1 in the tenancy agreement, or a landlord who wishes to sell their property with vacant possession, will have no choice (provided that no fault-based ground is available) but to rely upon section 21. For landlords who *can* rely on section 21, there is no problem. However, compliance with the many regulations required to make a section 21 notice valid is not always straightforward, and in some cases a landlord who has breached their obligations will be unable to rely on section 21 at all. A landlord who is less than punctilious in matters of their professional obligations therefore may find themselves unable to seek possession via section 21, and if they cannot rely on Ground 1 either (there being no relevant notice in the tenancy agreement), and if the tenants themselves have done nothing wrong, then the landlord will find themselves in real difficulty in recovering possession of their property for any reason. They may be left with only one option: to 'pay off' the tenants, effectively bribing them to leave. This is the path pursued in approximately 5% of cases, according to the English Private Landlords Survey conducted annually by the government.

A landlord facing such barriers today will not face the same barriers under the proposals of the Renters (Reform) Bill. Section 8 simply does not carry the same restrictions. Although it is part of the plan to make deposit protection compliance a prerequisite for section 8 validity, this is only one obligation and non-compliance will be easily correctible by returning the deposit to the tenant prior to the service of a section 8 notice. There is no chance under the reform proposals that a landlord may be permanently precluded from obtaining mandatory possession because of a failure to comply with this or that regulation. The liberalisation of Sch 2 no-fault grounds—the amendment and insertion of Grounds 1 and 1A respectively—will therefore greatly strengthen the hand of a landlord who is looking to sell a property with vacant possession or to move themselves or their family in.

Avoiding abuse

When relying on Grounds 1 or 1A (under the proposed reforms), there will be no specific evidential burdens to meet. Indeed, a bare assertion of *intending* to sell or *intending* to move in may be sufficient to satisfy these mandatory grounds. It is likely that the courts will step in to require something a little more substantive than that, but it is worth remembering that a property owner can put their house on the market with agents and then take it off again with no cost to themselves. The danger of course is that landlords will simply lie to recover possession on one of these no-fault mandatory grounds. Legal commentators have highlighted this as being an aspect of the Bill ripe for abuse, and as the Bill proceeds through Parliament, the Renters Reform Coalition (an umbrella body of organisations including Shelter and Generation Rent) is lobbying for amendments such that there be 'a burden of proof on landlords to provide unequivocal evidence of their plans to use the property for the purpose set out in the possession ground'. The Bill does do *something* to try to address this risk—it makes it a criminal offence for a landlord to lie or to be reckless as to whether or not they are entitled to rely on the Sch 2 ground they are using. Such deceptive reliance would also be subject to a large fine, depending of course on enforcement. The efficacy of these mechanisms is in dispute, and the offence would have to be proved not to the civil but to the far higher criminal standard. The Bill also proposes to make it unlawful (subject to a fine) to re-let the property within three months of recovering possession on either Ground 1 or 1A. Again, the efficacy of this proposal has been questioned, not least because it would be the responsibility of understaffed and underfunded local authority departments to enforce. The Local

Government Association has warned that without adequate resourcing, effective enforcement of these provisions will not be possible.

Landlords will not be allowed under the proposed reforms to re-let a property for at least three months after recovering possession on either of Grounds 1 or 1A. Even accounting for this three-month 'void period' however, some landlords may nonetheless consider the lost rent to be a loss worth shouldering in some higher risk cases where the real reason for wanting possession is rent arrears. So long as the landlord does in fact wait out the three months and identifies some substantive change in circumstances to justify their change of heart (such that they are no longer selling or moving in, but re-letting instead), then they would be protected from the risk of a fine and also presumably by the high burden of proof of the criminal standard. After all, there is nothing unlawful, criminal, or otherwise subject to a fine, about coming to an earnest decision to sell up or move in, and then having an equally earnest change of heart three months later.

Countering counterclaims

There are many reasons for preferring no-fault eviction in certain cases where the landlord's real motivation is rent arrears. If there are any risks to a potential rent arrears claim for possession—accusations of disrepair or discrimination etc, and most particularly if the tenant may qualify for legal aid funding—no-fault eviction will restrict the defences available, clarify the route to possession, and help in the mitigation of a landlord's risk. Section 21 is particularly useful for this, being binary (gas safety certificates have either been provided or not, prescribed information has either been provided or not, licensing has either been obtained or not, and so forth), but some landlords may consider that even with the repeal of section 21, not all is lost in light of the proposed reforms to Sch 2.

The principal risk inherent in the section 8 fault-based route to possession for rent arrears is that counterclaims—the most common being for disrepair—having a monetary value, create a set-off against arrears, therefore giving rise to a direct defence to the claim. All elements of the counterclaim will therefore be in scope for legal aid funding if the tenant is eligible. Counterclaims can be complicated, wide-reaching, and requiring of expensive expert reports and a significant amount of legal input. If the tenant qualifies for and obtains legal aid funding, then they themselves will benefit from a full arsenal of mostly free legal support, including solicitors and barristers operating on merits sometimes as low as 45% and subjecting the landlord's claim to lengthy and costly litigation, for which the landlord will of course have to pay their own legal team out of pocket. Even if the tenant eventually loses, the tenant will benefit from legal aid costs protection, meaning no costs recovery for the landlord (except in rare instances pursuant to s 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012); yet, if the tenant wins, the landlord will almost certainly be faced with a costs order themselves for the tenant's legal costs at *inter partes* rates.

No-fault possession routes simply do not have the same scope to support protracted defences and counterclaims under legal aid or at all. A landlord faced with the potential for a high-risk fault-based arrears claim against a legally-aided defendant may be well-advised to baulk at the idea of pursuing it using the 'proper' grounds even as strengthened under the proposed new regime, in much the same way as they show a well-advised preference for section 21 under the current regime. The loss of three months' rent while manifesting an (earnest) change of heart about selling or moving in—perhaps amounting to a loss of not much more than £3,600 at current average rents in the lower quartile—may in fact be worth it. If one thing is certain, it is that protracted litigation in the county courts over a fault-based arrears claim against a legally-aided defendant will cost *considerably* more than that.

Sidestepping risks

The Renters (Reform) Bill proposes to revolutionise tenancies and routes to possession. The main idea is apparently to strengthen tenants' rights, and in many aspects it may do just that. But with some landlords unable to rely on section 21 under the current system, the reform proposals will also improve those landlords' routes to possession and may also inadvertently strengthen their ability to sidestep the risks of an arrears-based claim against a legally-aided defendant. It is a peculiar feature of the Renters (Reform) Bill that the most diligent and punctilious landlords may be faced with greater costs, slower proceedings, and sometimes greater risks owing to the loss of section 21, while the least diligent and least punctilious—those who are in fact precluded from relying on section 21 in the first place—may find their routes to possession multiplied.

In nearly 50% of cases today, the 'real' reason landlords serve notice is rent arrears, and while section 8 notices account for 25% of the notices served, section 21 notices account for nearly 70%, according to the English Private Landlords Survey. One of the questions for the Renters (Reform) Bill is, with section 21 on its way out, will landlords facing a tenant in rent arrears be content with the fault-based grounds of section 8 as intended, or will they—at least in some circumstances—seek to use the liberalised grounds of Sch 2 as a fresh iteration of their existing preference for no-fault eviction instead? Only time, Parliament, landlords themselves, and the courts, will tell, but the opportunity certainly appears to be there. NLJ

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