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## GREATER PROTECTION FOR TENANTS IN MORTGAGEE POSSESSION CLAIMS

IN October 2010 The Mortgage Repossessions (Protection of Tenants) Act 2010 came into force. The Act is designed to protect tenants of residential property who are facing eviction as a result of their landlord defaulting on mortgage repayments. Tenants of "unauthorised tenancies" (that is, tenancies created without the consent of the lender) have traditionally had limited options in the face of mortgagee possession proceedings. This led to a situation whereby tenants were facing eviction from their homes at short notice as a result of their landlord falling behind on mortgage repayments (not necessarily as a result of tenants defaulting on rent!).

### The Old Law

The Court Rules have for some time required claimants in mortgagee possession proceedings to serve notice of the commencement of proceedings for possession on any occupiers at least 14 days before the hearing of the claim. This has enabled tenants with a legitimate interest to apply to be joined to the proceedings. However, until recently, where the tenancy has been granted without the consent of the lender, tenants have been unable to ask the court to postpone the possession date.

### The New Law

The new Act provides qualifying tenants with the ability to apply to the court for a postponement of the date for delivery of possession by up to two months. If the court has already made a possession order, qualifying tenants will – in certain circumstances – be able to ask the court to stay execution again by up to two months. The rationale behind these provisions is to give tenants more time to find alternative accommodation.

The Act also entitles occupiers to notice of the lender's intention to execute a possession

order (by applying for a warrant of possession). A period of 14 days from service of the prescribed notice must then pass before the possession order can be executed.

### Conclusions

These provisions are good news for tenants of mortgaged property. It affords them a greater degree of protection if, in the event of possession proceedings, it transpires that the tenancy was granted without the lender's consent. It should be noted however, that in determining whether it is "reasonable" for the court to exercise its powers to postpone the possession date etc, the court must have regard to any breach of covenant on the tenant's part. Presumably this means that if an unauthorised tenant is behind with rent, the court may be less inclined to postpone the possession date.

Landlords may discover that the date by which their lender can repossess the property is delayed as a result of intervention by their tenants. This may or may not be welcome news, depending on the individual circumstances of each case and prevailing market conditions. Many lenders will be displeased with their borrowers for having contributed to a delay in the possession date and it remains to be seen whether lenders will seek to impose "penalties" on their borrowers for granting unauthorised tenancies.

These provisions are bad news for lenders, whose ability to repossess a mortgaged property may be delayed due to the unauthorised activities of their borrowers. Lenders may be looking at steps to further discourage borrowers from granting unauthorised tenancies. In addition, the Act creates yet more red tape, as a result of the new requirement to serve notice of intention to execute a possession order in advance of (or at the same time as ) applying to the court for a warrant of possession.



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This newsletter is aimed at letting agents and other persons who manage or deal with residential lettings. Please re-visit previous editions at [www.clmlaw.co.uk/facthsheets.htm](http://www.clmlaw.co.uk/facthsheets.htm)

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## “Common Law” or “Assured” Tenancy?

Until 1 October 2010 tenancies which attracted an annual rent in excess of £25,000 were excluded from the assured tenancy regime. That is to say, they were not regarded as assured tenancies for the purposes of the Housing Act 1988. Letting agents became used to calling such agreements “common law tenancies”.

From 1 October 2010, the annual rental threshold increased to £100,000. This means that a large number of common law tenancies with a rental income between £25,000 and £100,000 will have become assured tenancies (or assured shorthold tenancies) over night. This has all manner of implications. The government has expressed the following views:-

1. The majority of existing common law tenancies are likely to have become

assured *shorthold* tenancies, rather than assured tenancies on 1 October 2010.

2. Landlords should not need to protect their tenant’s deposits in a recognised scheme immediately upon a common law tenancy converting to an AST (although it would be a good idea to do so).

3. The deposit *will* need to be protected if the tenancy is renewed after 1 October 2010 or a new deposit taken.

3. If *before* 1 October 2010 a landlord served notice to quit on his tenant to take effect *after* 1 October 2010 the notice will not operate to determine the tenancy.

4. From 1 October 2010 landlords are able to use Section 21 of the Housing Act 1988 to determine assured shorthold

tenancies which previously had been common law tenancies. The government seems to be of the view however that the court will not be able to make an order for possession to take effect sooner than six months after the tenancy became an AST.

5. For those small number of tenancies which became assured tenancies, rather than assured *shorthold* tenancies, landlords will need to establish a Schedule 2 ground in order to recover possession under Section 8.

The government acknowledges that these issues will ultimately be decided by the courts. The position seems far from satisfactory. The government could perhaps have made the legislation more explicit, rather than issuing guidance as to how the courts are likely to interpret it.

## Case Law Update: Failure to Protect Deposits

As reported in previous editions of this newsletter, the courts have been deliberating on the implications of landlords failing to pay tenancy deposits into approved tenancy deposit schemes. The Housing Act 2004 places landlords under an obligation to pay any deposits received into a TDS and provide the tenant with prescribed information within 14-days of receipt (hereafter the “Initial Requirements”).

Uncertainty arose as to whether if a landlord (who had failed to comply with the Initial Requirements within the required 14-day period) later paid the

deposit into a TDS and provided the prescribed information in advance of the court hearing he could avoid liability to pay penalties imposed by the Act.

The Court of Appeal has now ruled that the 14-day period is not critical. If a landlord has failed to comply with the Initial Requirements within this period his tenant can demand compensation (via the courts if necessary). However, if as a result of the tenant taking such action the landlord later pays the deposit into an approved scheme and provides the prescribed information the tenant loses his entitlement to compensation. It is only if

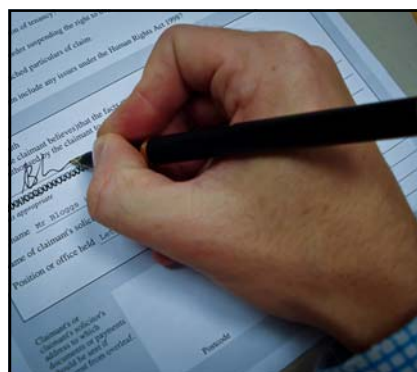
the landlord does not comply with the Initial Requirements at all that the court has power to impose sanctions.

The question “what incentive does the landlord have to comply with the Initial Requirements” inevitably arises. It appears that the landlord can simply sit back and wait to see whether or not the tenant makes a fuss about his failure to comply. It is important to remember however that a landlord will not be able to rely on a Section 21 Notice if at the time of service he has not complied with the Initial Requirements. Late compliance may therefore delay recovery of possession.

## Dangers of Letting Agents Signing Claim Forms

It has been reported that certain letting agents offer to complete and sign claim forms for possession claims on behalf of landlord clients as part of their full management package. The problems in doing so are twofold:

1. Firstly the court rules stipulate who should sign the statement of truth contained within the claim form. Generally, this will be either the claimant or his legal representative. The rules state, “An agent who manages property or investments for the party cannot sign a statement of truth. It must be signed by the party or [his legal representative].”



2. Section 22 of the Solicitors Act 1974 provides that any “unqualified person” who

draws or prepares legal proceedings in return for a fee will be guilty of a criminal offence. Therefore, where this service is offered by letting agents as part of their full management package, technically the landlord client (i.e. the claimant) has been charged for the service.

If a letting agent has signed a claim form on behalf of a landlord client, not only might this result in a delay in the proceedings, but the client will be entitled to a refund of any fees charged by the letting agent for having done so. Potentially, the letting agent concerned may face criminal prosecution.