AnthonyGold

Legal Update

Dr David Smith

NATIONAL HMO NETWORK

Working together to improve the quality and choice of private-rented housing

Property Standards

Room sizes

AnthonyGold

- Applies to new and renewed licences after 1 October 2018
  - Only in England
  - No application to existing licences
- Basic consideration is unchanged
  - Is the property reasonably suitable for the sought number or some other number of person?
- However, new licences have room size conditions
  - 6.5sqm = 1 person, 10.22sqm = 2 people, 4.54sqm = 1 child under 10
  - Rooms under 4.54sqm are reportable
- Discretion
  - As to applications with non-compliant rooms
  - As to mistaken occupation

Key Room Size Points

AnthonyGold

- Does not apply to visitors
- It is a straight floor area measurement
  - Not “useable floor space”
- It applies to the sleeping room
  - Not the aggregate space available for individual use
  - Ceiling height of less than 1.5m excluded
- 6.51sqm is not a test of suitability
  - A room may exceed this and be unsuitable!
- *Clark* is also still good law
  - So local guidance is guidance and not a standard

Discrimination and the Discretion to Prosecute

AnthonyGold

- Slight problem with room size limits
- Discriminatory against pregnant women
- Woman who is pregnant can occupy a room of 6.51sqm or greater
  - But not after the birth of her baby
- But it is unlawful to evict a pregnant women
  - Including for 6 months after birth of child
- Creates an impossible scenario
- In part this should be dealt with under the public interest test
  - Is it in the public interest to prosecute
- Not being handled well in all cases
  - A lot of prosecutions are withdrawn through lack of evidence, for example

Waste

AnthonyGold

- New compulsory licence condition in relation to waste policies
- Arguably gold plating as also covered by the management regulations
- Requires licence holder to comply with LHA waste scheme
  - Not all local authorities have waste schemes however!
  - But you still have to put the condition in!
- Some landlords a bit concerned by this
  - As they think it makes them liable for tenant misbehaviour
- It does not
  - Landlords must reflect local authority waste schemes in their properties
  - Not police tenant use of them

Fitness for human habitation

AnthonyGold

- Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill
  - Supported by government
- Not accepted by the Welsh government so England only
- Probably in force from April 2019
- Amends s8, Landlord and Tenant Act 1985
  - So all rental property must be fit for human habitation
- Standard is to be set by court
  - Based on HHSRS hazard profiles
  - But this is not the HHSRS
- Based on actual occupier not notional occupier
  - So house could be fit but not meet HHSRS

Licensing

New Mandatory Licensing

AnthonyGold

- As from 1 October 2018
- England only
- Only in relation to s254 HMOs, not s257
- For houses and converted buildings
  - HMO with 5 or more occupiers
  - Number of storeys now irrelevant
- For flats created by conversion
  - Any single flat which is an HMO with 5 or more person
- For purpose-built flats
  - Single flat which is an HMO with 5 or more persons
  - But only if the block has just two flats in it

Key Points

AnthonyGold

- Not all local authorities have processes in place
  - Duty to effectively implement licensing scheme – S55(5)(a)
  - Inability to apply prevents landlords serving s21 notices- probable ECHR breach
  - Tenants can in principle seek an RRO against unlicensed landlords
- Equally a problem for “grace periods”
- HMOs already covered by selective licensing are grandfathered
  - But not properties that were not HMOs

Gaskin

AnthonyGold

- High Court case
- Applies EU Services Directive and UK Provision of Services Regulations to licensing
- Issues over fees
  - Application fee is for application not enforcement
  - Can this be worked round?
- Other issues
  - Tacit approval
  - Non UK licence holders

Parr

AnthonyGold

- Supreme Court decision on HMO licence conditions
- Previously tribunals and courts had inserted and approved a licence condition that allowed for student occupation only
  - Which allowed use of rooms that might be unsuitable for other occupiers
- Supreme Court has approved that approach
- Different types of occupier have different modes of occupation
  - Therefore a property may be suitable in different ways depending on occupier
  - And so restrictions on occupier type are appropriate if they speak to this
- However time limits are to occupation are unlikely to be acceptable

Section 21

Introduction

AnthonyGold

- Changes introduced by Deregulation Act 2015
- First came into effect on 1 October 2015
- Initially applied only to new ASTs granted on or after 1 October 2015 including renewals
- Transitional period for old tenancies ended on 1 October 2018
- Most, but not all, of the changes now apply to all ASTs
- Still grey areas!

Summary of the Changes

AnthonyGold

1. Prescribed notice - new Form 6A and changes to timings
2. Prescribed Information – How to Rent Checklist
3. Prescribed Requirements –Gas Safety Certificates (GSC) and Energy Performance Certificates (EPC)
4. Retaliatory Eviction

Definitions: Old AST v New AST

AnthonyGold

- Distinction is still relevant

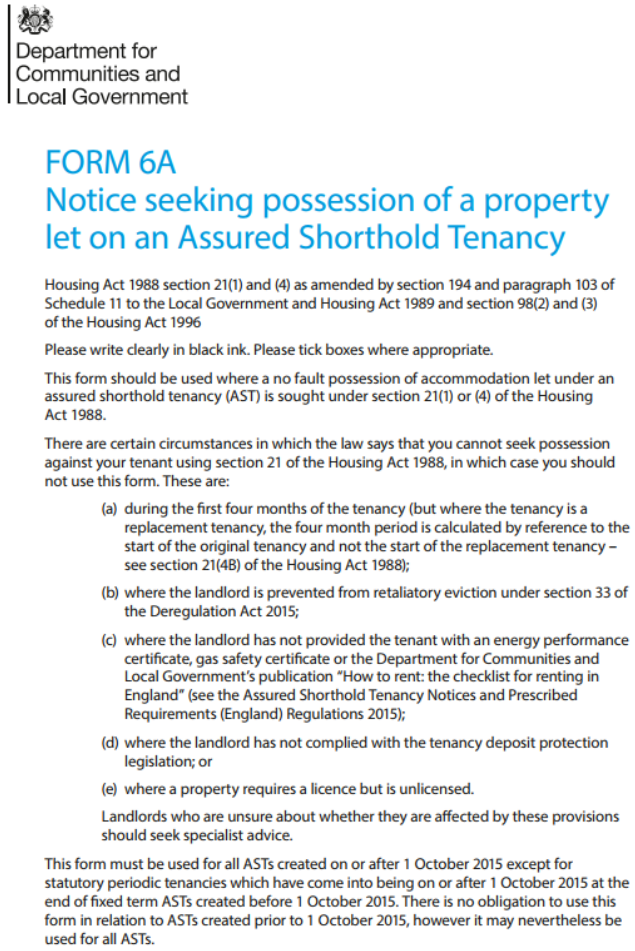
- **Old AST** - ASTs granted before 1 October 2015 including tenancies that became statutory periodic tenancies on or after 1 October 2015 following the expiry of a fixed-term that commenced before 1 October 2015

- **New AST** – ASTs granted on or after 1 October 2015 including renewal agreements

Form 6A

AnthonyGold

- **Should now be used for all ASTs**
- What about pre-1 October 2015 tenancies?
- Grey area but good practice to use Form 6A for all ASTs to avoid disputes



Department for Communities and Local Government

FORM 6A
Notice seeking possession of a property let on an Assured Shorthold Tenancy

Housing Act 1988 section 21(1) and (4) as amended by section 194 and paragraph 103 of Schedule 11 to the Local Government and Housing Act 1989 and section 98(2) and (3) of the Housing Act 1996

Please write clearly in black ink. Please tick boxes where appropriate.

This form should be used where a no fault possession of accommodation let under an assured shorthold tenancy (AST) is sought under section 21(1) or (4) of the Housing Act 1988.

There are certain circumstances in which the law says that you cannot seek possession against your tenant using section 21 of the Housing Act 1988, in which case you should not use this form. These are:

(a) during the first four months of the tenancy (but where the tenancy is a replacement tenancy, the four month period is calculated by reference to the start of the original tenancy and not the start of the replacement tenancy – see section 21(4B) of the Housing Act 1988);

(b) where the landlord is prevented from retaliatory eviction under section 33 of the Deregulation Act 2015;

(c) where the landlord has not provided the tenant with an energy performance certificate, gas safety certificate or the Department for Communities and Local Government's publication "How to rent: the checklist for renting in England" (see the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015);

(d) where the landlord has not complied with the tenancy deposit protection legislation; or

(e) where a property requires a licence but is unlicensed.

Landlords who are unsure about whether they are affected by these provisions should seek specialist advice.

This form must be used for all ASTs created on or after 1 October 2015 except for statutory periodic tenancies which have come into being on or after 1 October 2015 at the end of fixed term ASTs created before 1 October 2015. There is no obligation to use this form in relation to ASTs created prior to 1 October 2015, however it may nevertheless be used for all ASTs.

Timing of notice - restrictions

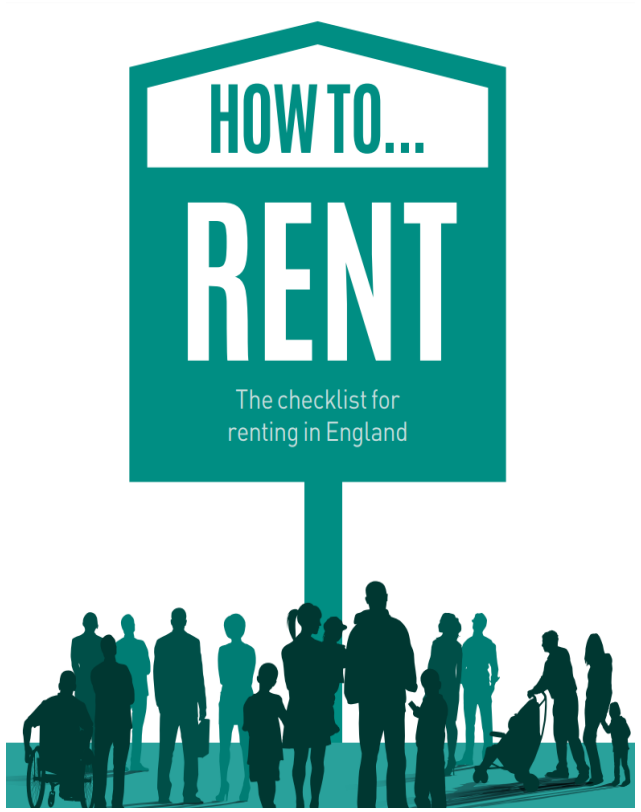
AnthonyGold

- Applies to all ASTs
- Can't serve s21 notice in first 4 months of original AST
  - But does not apply to 'replacement tenancies'
- Section 21 notices now expire after 6 months – 'use it or lose it'
  - Probably means that old notices are now useless

Prescribed Information

AnthonyGold

- Information about the rights and responsibilities of a landlord and tenant under an AST
- ‘How to Rent: The Checklist for renting in England’
- Last updated 6 July 2018
- Correct version must be given before serving s21 notice
- By post or email (where agreed)
- Updating of guide on renewal as necessary



Does this now apply to all ASTs?

AnthonyGold

- Requirement to serve How to Rent guide only applies to new ASTs granted on or after 1 October 2015 including renewals
- Does not apply to old ASTs even if still in existence after 1 October 2018
- Specific carve out for this in the Deregulation Act

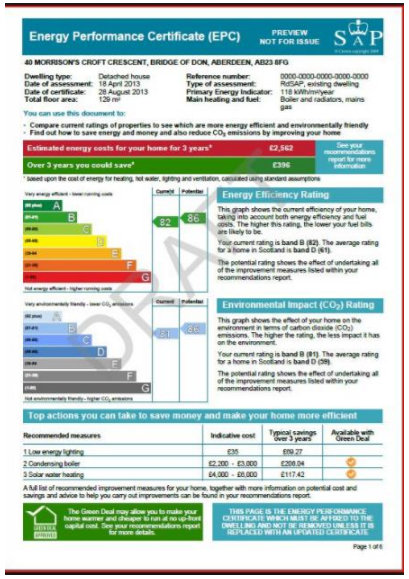
S21A Housing Act 1988

AnthonyGold

- Landlord cannot serve valid section 21 notice when in breach of a '<u>prescribed requirement</u>'

- These are:
  - Provision of Gas Safety Certificate (GSC)
  - Provision of Energy Performance Certificate (EPC)


LANDLORD/HOMEOWNER GAS SAFETY RECORD


Energy Performance Certificate (EPC)

Does it apply to all ASTs?

AnthonyGold

- Deregulation Act states that requirements apply to any AST in existence from 1 October 2018
- But the prescribed requirements are contained in regulations: the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 (SI 2015/1646)
- And these expressly state that they apply only to new ASTs granted on or after 1 October 2015
- This is still a not totally clear but it seems that rules do not apply to old tenancies

Gas Safety Certificates

AnthonyGold

- Area that has caused the most concern for landlords
- 'Prescribed requirement' refers to existing duties on landlords imposed by the Gas Safety (Installation and Use) Regulations 1998
- These state that every landlord shall ensure that a copy of the last gas safety record is given to any new tenant of the premises before that tenant occupies those premises
- Can landlord remedy before serving s21 notice?

Caridon Property Ltd v Monty Schooltz [2018]

AnthonyGold

- Specialist housing judge, HHJ Luba QC, stated:
  - GSC must be given prior to occupation
  - 'once and for all obligation on a prospective landlord in relation to a prospective tenant'
  - Once opportunity has been missed it is not possible for landlord to rectify the breach later
- Decision not binding but highly persuasive
- Most county court judges will follow this
- Problematic as it leaves some landlords in an impossible position
  - Decision may not be right
  - Judgement does not mention ECHR
  - Total s21 ban may violate landlord's rights under Art 1, Prot 1

What about EPCs?

AnthonyGold

- Requirement is contained in the Energy Performance of Buildings (England and Wales) Regulations 2012
  - *"The relevant person must ensure that a valid energy performance certificate has been given free of charge to the person who ultimately becomes the buyer or tenant."*
- Could tenants who do not receive EPC before the commencement of their tenancy run a similar argument to that seen with GSC?
- Ensure EPCs are also given before tenant moves in and keep records

EPCs and HMOs

AnthonyGold

- Is EPC required where tenant occupies room in a HMO with shared facilities?
- Current view that EPC is not required
- Another grey area
  - European Directive is not very clear on this
  - And neither are the UK regulations
  - Probably a distinction between shared house HMO and bedsit HMO
- Good practice to give EPC to all tenants

Retaliatory Eviction

AnthonyGold

- Designed to prevent a landlord evicting a tenant as a result of complaints about the condition of the property
- Provisions work in two ways:
  - prevents landlord from serving a valid s21 notice or
  - s21 notice already served rendered invalid
- Depends on local authority involvement and service of a 'relevant notice'
  - Improvement Notice relating to category 1 or 2 hazard
  - Emergency Remedial Action Notice

Prohibition on serving section 21 notice after relevant notice

AnthonyGold

- If a relevant notice has been served landlord is prohibited from serving a section 21 notice for **6 months**
- Suspended notice – 6 month prohibition starts from day suspension ends
- Prohibition does not apply if notice is revoked by LA or quashed by FTT
- Watch out for draft improvement notices – not a relevant notice
  - No formal action means that there is no restriction
- Important point to consider for local authorities
  - Often not enough thought given to informal as against formal action

Tenant's complaint followed by s21 notice

AnthonyGold

- This part applies where tenant complains about condition and landlord serves section 21 notice.

- Section 21 notice is invalid if:
  1. Tenant makes complaint in writing to landlord
  2. Landlord either:
     - Fails to respond within 14 days
     - Provides an inadequate response
     - Serves a section 21 notice in response
  3. Tenant pursues complaint with local authority
  4. Local authority then serves a relevant notice

Possession proceedings underway

AnthonyGold

- Relevant notice served before possession order:
  - Court MUST strike out landlord's claim if section 21 notice is rendered invalid
- Relevant notice served after possession order
  - If possession order is made first and then relevant notice is served, possession order cannot be set aside on that basis
- Potential for a race between local authority and court!

Defences

AnthonyGold

- Condition of property that gave rise to relevant notice due to tenant's breach
- At time of service of s21 notice property genuinely on market for sale
- Landlord a private registered provider of social housing
- Mortgage entered into before AST granted and at time of service of section 21 lender requires vacant possession to exercise power of sale

Consultation, Working Groups & Other Matters

Possible Changes

AnthonyGold

- A lot of consultations just now
  - Longer tenancies
  - Electrical safety
  - CMP
  - MEES caps
  - Housing Court
- Other working groups
  - Agent regulation
  - Tenancy deposits
  - Universal credit
  - Energy efficiency
- But not necessarily all that relevant

But No Change

AnthonyGold

- Very little parliamentary time available
  - For primary legislation
  - Or even secondary legislation
- Unless already timetabled
  - So Tenant Fees Bill goes ahead
- Block to allow for Brexit legislation
  - So somewhat dependent on a deal

Longer Tenancies

AnthonyGold

- Proposal is for 3 year tenancies
- Big push from tenants for removal of s21
  - Government is a little cool on this prospect
- Difficult to do in practice
  - A lot of exclusions necessary
  - Likely to need court reform to bring confidence to the sector
- Exclusions may be a problem
  - Students etc
- However little prospect of legislation
  - So possibly best done by incentives

Sentencing Guidance

AnthonyGold

- There is no guidance on sentencing for any housing related offence
  - This leads to very high variability of sentencing in the magistrates' courts
  - Which can be unjust
- The sentencing council has held a general consultation on guidance ofr offences that lack it
  - Which includes housing offences
- Key element is removing the profit element
  - However, this cuts across RROs a bit
  - Final version of guidance still to come

POCA

AnthonyGold

- It has generally been accepted that POCA does not apply to HMO licensing offences
  - Because the profit does not derive from the offence
  - Rent is payable whether or not there is a licence
- However, this may not be the case for other such offences
- Some LHAs are trying to use POCA for management regs offences etc
  - On the basis that there is a direct profit associated with not having a property to standard
- Still to be ruled on by the courts
  - But potentially important in larger cases

Tenant Fees Bill

AnthonyGold

- Working through Parliament
  - Now in the House of Lords moving to committee
- Expect implementation in Spring 2019
- Some changes
  - Now includes assignments as well so fees not possible for those
  - Now covers all residential tenancies
- Still has gaps and flaws
  - Rent can be increased or decreased as long as it is in the tenancy agreement so higher rent for first month still appears to be possible
  - Any fees is allowed as long as there is a choice
- Default fees still allowed
  - But must be reasonable and supported by written evidence

CMP

AnthonyGold

- Ongoing work on CMP
- Problem with deposits and a dispute is emerging on this issue
- Deposit schemes cover deposits so CMP does not have to
  - But deposit schemes cannot accept all the liability
- Actually there may be a flaw in understanding
  - CMP requires money held on behalf of someone else to be covered
- Stakeholder deposits are not held on behalf of someone else
  - It is a contractual relationship between parties and stakeholder
  - So they may not fall within CMP at all

New Housing Court

AnthonyGold

- Consultation just opened
- Potentially one of the most important changes in last decade
- Changes to law and new rights are all very well
  - But rights are not rights if they are not enforced
- Potential to transform sector by unblocking court delay
  - And increasing access to justice
  - Rebuilding confidence for landlords and tenants
- Fairly open consultation
  - No clear view on whether there will be any change at all
- Concerns will be around appetite and funding from MoJ

"No DSS"

AnthonyGold

- Not uncommon for landlords and agents to advertise on this basis
- Large Shelter campaign on this
- It may be discriminatory
  - But not necessarily in all cases
  - And may also be justified in some cases
- Problems with bank lending as well
- Decisions should be made on a case by case basis
  - Rather than be general statement