



Possession in the time of COVID

The effect of the COVID-19 pandemic upon the housing sector in this country has been unprecedented. In order to address the problems faced by landlords, tenants, mortgagees, bailiffs and the Courts, there have been legislative changes, procedural innovations and changes of practice. This short article looks at the changes brought about by the Public Health (Coronavirus) (Protection from Eviction) (England) Regulations (No.1) (SI2021/015) & (No.2) (SI2021/164) 2021 ["The Regulations"].

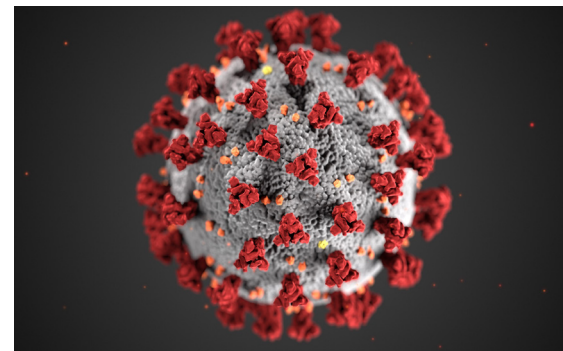
The Regulations restrict the circumstances in which tenants can be evicted from their homes. The first set of regulations barred evictions until 21 February 2021 and the second set of regulations extended this period until 31 March 2021. This was done by providing that no person (essentially court bailiffs) could attend a dwelling-house for the purpose of executing a writ or warrant of possession. So, whilst it was possible pre-March 2020 and has been possible (at least in theory) since 21 September 2020 to obtain a residential possession order, since November 2020 all enforcement action has been paused. Landlords might be able to get a court order requiring their tenants to leave, but they are not able to instruct bailiffs to change the locks and complete the eviction.

It has at all times been properly recognised that a total bar on evictions would be inappropriate and so exceptions have been created for situations of, *inter alia*, anti-social behaviour, domestic violence and extreme rent arrears. Initially, extreme rent arrears were



described as 9 months' rent, excluding any rent arrears accruing after 23 March 2020. However, the Regulations now define substantial rent arrears (such as will afford an exception to the eviction bar) as equivalent to 6 months' rent. This is a very significant change as very many rent arrear cases will involve this level of arrears given that 2 months' arrears is the minimum for a Ground 8 claim.

It must though be noted that having a possession order and 6 months' rent arrears will not necessarily entitle a landlord to take enforcement action. This was made clear in *Trinity House of Deptford Strond v. Prescott* [2021] EWHC 283 (QB). In that case a landlord had, in January 2020, obtained a possession order pursuant to a s.21 notice served in August 2019. Although the tenants were 21 months in arrears as at February 2021 the Court held the landlords could not rely upon the substantial rent arrears exception in the Regulations because the original possession order had not been made under Grounds 8, 10 or 11 of Schedule 2 to the Housing Act 1988 (as the Regulations stipulated). An argument that the Regulations should be "read" (on human rights grounds) as permitting enforcement of pre-pandemic possession orders which were not founded on rent arrears failed. The Court held that



any discrimination in the treatment of landlords with tenants in current substantial arrears was justified by the landlord's original "choice" to seek possession on the basis of a no-fault s.21 notice rather than a notice under s.8 of the Housing Act 1988.

The decision in *Trinity House* demonstrates that the Courts will regard bailiff action pre-April 2021 as exceptional and will consider the Regulations strictly. Moreover, at the time of writing, England remains in lock-down. Whether this will remain the position on 31 March 2021, when the Regulations expire, remains to be seen. If there are future local lock-downs in place in areas where warrants of possession are to be executed it may be that local bailiffs will be reluctant to take such enforcement action. This is a situation which will likely cause further disappointment for residential landlords already carrying large (possibly irrecoverable) rental arrears.

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