

ENDING A TENANCY WITHOUT A COURT ORDER: SURRENDER AND ABANDONMENT

INTRODUCTION

Where residential accommodation is let on an assured shorthold tenancy (or a non-shorthold assured tenancy), the landlord can legally only end the tenancy by obtaining a Court order for possession. Where the tenancy is an assured shorthold tenancy then the main way to obtain possession, if the landlord wishes to do so, is to give a Section 21 notice and a claim is then made for possession under Section 21 (the no fault ground for possession) once the notice has run out. However, the Court order cannot take effect earlier than the end of the fixed term, unless there is a break clause allowing for the fixed term to be ended early. In any event, an order for possession under Section 21 cannot be made to take effect until the tenant has occupied the property for at least six months.

Alternatively, the landlord must rely on one of the grounds for possession, such as rent arrears or breach of the terms of the tenancy, including Ground 8 where there are 2 months' rent arrears.

In reality, however, the vast majority of tenancies end without a Court order. In these cases, the landlord needs to be sure that the tenancy has come to an end so as to ensure that the tenant has no further rights to occupy the property. The landlord is then free to re-let the property or sell it, if that is what is proposed. In this Guidance we explain the different ways in which the tenant can bring the tenancy to an end because usually the landlord has to rely on the tenant to end the tenancy, if the landlord wishes to avoid having to go to Court to bring the tenancy to end. All of this is linked with abandonment where a tenant moves out leaving the property vacant.

ASSURED TENANCIES AT COMMON LAW

The system of assured tenancies, including shortholds, is built on common law rules. First of all there has to be a tenancy at common law and so long as there is, if the tenancy relates to a dwelling which is occupied by one or more of the tenants as his/her only or main home, the tenancy is classified as an assured tenancy. It will be a shorthold assured tenancy, unless the landlord has granted non shorthold status (which is unlikely in practice). To end the tenancy effectively, both the assured/shorthold status must be brought to an end, and also the underlying common law tenancy must be terminated. Where the landlord obtains a Court order for possession the Court order will end both and, in most cases the tenant's own actions, will also have the same effect bringing both to a finish at the

same time. Sometimes, however, the assured/shorthold status can end but without the underlying tenancy being terminated. This is particularly relevant where the tenant moves out, e.g. without telling the landlord midway through a fixed term tenancy so that the property appears to have been abandoned.

FIXED TERM TENANCIES AND PERIODIC TENANCIES

There are two types of tenancy, a fixed term tenancy and a periodic tenancy.

The former, as the name suggests, is granted for a fixed period such as six months or twelve months. It runs out automatically when the fixed term ends but can run on if the tenant remains in occupation. At the end of a fixed term a periodic tenancy will come to being, if the tenant stays on. If the tenancy agreement makes no provision for automatic continuation then this run on tenancy is a new tenancy imposed on the landlord and tenant by law, called a statutory periodic tenancy. The same rules then apply for this purpose as with any other periodic tenancy.

A periodic tenancy runs on from period to period such as weekly or monthly tenancy until the tenant gives a valid notice to end it. The landlord cannot give a notice to quit so long as the tenancy has the status of being an assured/shorthold tenancy. The landlord has to take Court possession proceedings either under Section 21 or some other ground.

ENDING A TENANCY WITHOUT A COURT ORDER: SURRENDER AND ABANDONMENT

Unlawful eviction

It is important to remember that if you unlawfully evict a tenant (or anyone resident in the property) then you can be sued for damages which can be substantial. An injunction can be granted ordering you to allow anyone who has been evicted to move back into the property. You can also be prosecuted and fined or even imprisoned. The basic rule is that if anyone at all is residing in the property they can only be evicted by Court order. Even when a Court order is obtained the eviction must actually be carried out by a Court Bailiff.

Where a property has been let under a shorthold tenancy (or a non-shorthold assured tenancy) to avoid a civil claim for damages and/or an injunction you will have to show both that the property is no longer occupied by any tenant as their only or main home and the tenancy has come to an end, as well as demonstrating that no one is still residing in the property. To avoid a criminal conviction you will have to show that you believed and had reasonable cause to believe that any occupier had ceased to reside in the property. Always remember that legally someone would be resident in a property even though they may not be physically there. This applies if they intend to return but are temporarily absent, e.g. because they are hospital, on holiday or in prison.

How can the tenant end the tenancy?

A tenant can end a tenancy in a number of ways. In the case of a fixed term tenancy it will end automatically by the tenant moving out on or before the last day of the fixed term. The tenant must have gone by midnight on the last day (or whatever other time of day the tenancy agreement may specify). The tenant does not need to give notice that he/she is moving out. If the tenant stays on beyond the last day of the tenancy then a statutory periodic tenancy will come into being or, if the tenancy agreement provides for this, there may be an automatic continuation with a contractual run on. In such a case, where a continuation of a periodic tenancy has begun, even if the tenant then moves out the tenancy will not end unless the tenant gives proper notice to quit as if the tenancy is a periodic tenancy.

In the case of a periodic tenancy (including a statutory periodic tenancy), if the tenant gives proper notice to end the tenancy, the tenant must then cease to reside and vacate the property by the expiry date of the notice for it to be effective to end the tenancy. The notice needs to be in writing. It must run out on the last day of a period of the tenancy or a rent payment day, unless the tenancy agreement says that it can run out at any other time. If it is a statutory periodic tenancy then it will have to run out at the end of a period of the tenancy and it must always be for a minimum of four weeks. For a four weekly (lunar monthly) tenancy, fortnightly tenancy or weekly tenancy then four weeks' notice needs to be given. In the case of a calendar monthly tenancy then a month's notice must be given. In the case of a quarterly tenancy a full quarters notice is required. Unless the landlord waives the defect and accepts short notice, an ineffective notice will not end the tenancy.

Surrendering the tenancy

Surrender is an agreement by the landlord and tenant to bring the tenancy to an end, whether it is a fixed term tenancy or a periodic tenancy. It may be expressly agreed in writing between the landlord and the tenant or it may be implied from their actions (what is also called surrender by operation of law). There must be unequivocal action by both landlord and tenant signifying that the tenancy is at an end.

The tenant is liable to pay the rent and comply with the tenancy terms down to the last day of the tenancy even if he/she has moved out (unless the landlord agrees to accept an earlier end of tenancy such as where the tenancy is surrendered).

Implied surrender

Normally a tenant will tell you when they are going to move out. Usually you will meet up with them and they will return the keys. In some cases, this may follow on from you serving a Section 21 notice or a Section 8 notice. In this situation, where the keys are handed over by the tenant who moves out, the tenancy will be ended by an implied surrender, i.e. by the action of the tenant, which is then accepted by the landlord.

What happens if the tenant just moves out?

In some cases, the tenant will just move out without telling you. Can the landlord just take the property back and change the locks?

At this point, you should remember that normally the landlord can only end a tenancy by Court order. However, in this situation, what you have to consider is whether:

- The tenant has brought the tenancy to an end, e.g. by giving you a proper notice, where the tenancy is periodic or where the fixed term has ended and the tenant has left.
- There is an implied surrender (even though the tenant has actually not handed the property back to you directly) or whether you can follow the procedures regarding abandonment as set out in the section below.

You need to be confident of your position before you take matters into your own hand and, if in doubt, apply for a Court order. The consequences of getting it wrong can be serious. It is also important that you take advice.

When can simply leaving the property be treated as an implied surrender?
If the property has just been left, in what situations can you safely regard this as an implied surrender?

To do this, the tenant's actions have to be inconsistent with an intention on the part of the tenant to continue with the tenancy. In effect, this is then treated as an offer to surrender which the landlord can accept by taking the property back and changing the locks.

There are four things to consider

Has the tenant said or written anything that would indicate that he/she was leaving? Has the tenant left a key/keys behind or sent you the keys? The keys may have been left in the property or with a neighbour. Alternatively, they may have been sent back to you. Obviously, if they have been sent back direct to you this is a good indication of if the tenant is offering an implied surrender.

Has the tenant left any possessions behind?

If all possessions have been removed, including any furniture that the tenant brought into the property, this is an indication that the tenant has given up possession. On the other hand if some possessions have been left behind this becomes more difficult - see the next section on abandonment.

Is the rent in arrears?

You are strongly advised not to repossess a property if the rent is being paid. Again, for more information regarding this see the section on abandonment. You should always remember that just because a tenant is in arrears this does not mean that the tenant has to leave and you have no automatic right to end the tenancy just because there are arrears.

It is always worth remembering that dishonest tenants may try to make it appear that they have moved out to tempt the landlord to repossess so that they can then claim compensation.

A combination of the tenant telling you that they are going to move out or the tenant's belongings having been removed, and leaving the keys behind are strong indications of an implied surrender, in a situation where the tenant has not met up with you and given you the property (and the keys) back. If it is clear that the tenant has gone for good you can decide to accept the tenancy is at an end and if this is clear cut you can then take the property back, if you wish.

If you are not confident of this, then you should move onto the abandonment section and consider following the procedures there. This may help you but only if you are satisfied that the tenant has indeed moved out for good, there is no intention of him/her returning and there are rent arrears. This may also help if you cannot be satisfied that there is implied surrender.

You should only rely on the implied surrender route if indications above make it clear that, so far as the tenant is concerned, there is every indication that the tenant is ending the tenancy.

Surrender during a fixed term

You should always remember that if a tenant has committed to a fixed term you are entitled to hold the tenant to that term and require the tenant to pay the rent, even though the tenant has moved out. You may not want to take the property back, at least until you have found another tenant.

What tenants can do in this situation is send you the keys back in the hope that you will repossess the property and change the locks. If you do not want to do this but want the tenancy to continue it is important that you write immediately back to the tenant to make it clear that you are not accepting their surrender. You can of course, say that you would be prepared to accept a surrender but only as and when a new tenant is found. You can also ask the tenant to find an alternative tenant for you.

On the other hand, you may want to take control of the situation. If you want to do this you can keep the keys but make it clear to the tenant in writing that you are holding the keys on the tenant's behalf so that the tenant can have them back at any time. In the meantime, you will seek to find a new tenancy for the tenant's benefit. Any use of the keys will purely be for inspection/repair purposes. By

making it clear that you are not accepting surrender you can avoid this ploy which some tenants sometimes use to try to end a fixed term tenancy early.

You should also remember that with a fixed term tenancy there is no obligation on the part of the landlord to mitigate loss by re-letting the property so you can hold the tenant to the term.

In practice, however, you should remember that if the tenant is not paying rent then it may be worthwhile “cutting your losses” and taking the property back, especially if you are able to find a replacement tenant.

Abandonment

Fundamentally there is no such thing as abandonment simply ending a tenancy. What can the landlord do where the property appears to have been abandoned by the tenant? The landlord may find he/she faces a very difficult choice. The tenant appears to have left the property and there has been no contact with the landlord. Rent arrears could well be building up. The basic rule is that if you are in any doubt at all as to whether the tenant has really gone always apply for a Court order. If you get it wrong it could be costly.

You could end up paying out far more than if you had followed the Court route and obtained a Court order for possession.

The other basic rule to understand is that there is no automatic right to end a tenancy because the tenant has abandoned the property. After all, there is no obligation on the tenant to live in the property if he/she does not want to do so. It is unlikely that a Court would accept that by implication the tenancy has been surrendered by the tenant even where the tenant appears to have left the property and there are substantial rent arrears. After all, the tenant may be in hospital, away on a long holiday, or in prison. In one particular case the property had apparently been abandoned and the tenant owed nine months' rent arrears, but there was no implied surrender. Therefore if you get it wrong and evict without a Court order, you could end up having to pay compensation to the tenant or even allow the tenant to move back in. Additionally you could be prosecuted for unlawful eviction. This is why you need to be clear that the tenant has gone and gone for good.

What to do if the property is abandoned

If the landlord believes that the property may have been abandoned you should try to contact the tenant. Phone, text or email the tenant, contact any friend or relation of the tenant you know. Importantly, you should visit the property. If you enter the property make sure that you take a witness with you. You should take photographs. Find out what the tenant has left behind. Are there any articles of value? You should also check with neighbours. Ask them whether they have seen the tenant. Is there any evidence that the tenant has actually moved out, e.g. the tenant has told neighbours that he/she is going. Have they seen the

tenant loading up a van to remove their belongings? If housing benefits have been paid you need to contact the local authority to advise them of the situation.

At the end of the day the test is whether the tenant has gone and gone for good. Sometimes, the advice is to post an abandonment notice on the property, e.g. warning the tenant to get in touch within 14 days. This has no status in law and in any case may serve to identify the property as a target for burglars or vandals. You might just as well put a notice inside the property in case the tenant was to come back asking him/her to get in touch with you.

If the tenant has left behind valuable items or a significant amount of clothing or there are other signs of continuing occupation you must assume that the tenant has not gone for good.

Provided that you are fully satisfied that the tenant has genuinely gone and is not coming back, where there are rent arrears you can then consider ending the tenancy and re-entering the property. You will need to check that there is a forfeiture clause in the tenancy agreement.

This is a clause which allows you to re-enter the property in certain situations such as rent arrears or tenancy breach. Usually there needs to be a minimum period for this to apply in the case of rent arrears e.g. 14 days arrears. You do not need to serve a preliminary notice for rent arrears. Alternatively, if but only if the tenancy is a periodic tenancy, you can give the required notice to quit and take action once this has run out (remember you can also only do this if the tenant has gone for good so that it is no longer his/her only or main home).

If the rent is up to date it would be most unwise to assume that the tenant had abandoned the property so the Court route is to be preferred. Importantly you must only go down this self-help route if the tenant has clearly gone of his/her own accord and also gone for good.

For instance if you know that the tenant has moved out from your property into another property where they are now claiming housing benefit this could be a good indication that your property is no longer their only or main home so that you then take action to repossess by ending the underlying common law tenancy as this has now lost its assured shorthold status.

On the other hand being taken away by the Police or Immigration authorities is not enough to justify you acting in this way, for example.

Remember that you need to be satisfied that the tenant is no longer occupying the property as his/her home of their own free will and that you believe (and have grounds for belief) that the tenant has moved out for good. If the tenant is temporarily absent e.g. in hospital or absent due to force of circumstances e.g. arrest, the tenant will still be regarded as occupying the property as his/her only/main home. The tenancy will still have assured status so a court order is needed.