

Assured Tenancies and Assured Shorthold Tenancies Forthcoming Changes

The Assured Tenancies (Amendment) (England) Order 2010 ("the Order") will come into force on 1 October 2010. The Housing Act 1988 introduced assured tenancies ("ATs") and assured shorthold tenancies ("ASTs") and the Order raises the annual rental threshold for the creation of an AT or an AST from £25,000.00 per year to £100,000.00 per year.

The Order will affect all private rented sector tenancies that are in existence already and which will continue beyond 1 October, as well as affecting those created after the Order comes into force. Any tenancy that is not an AT or an AST already because the rent is higher than £25,000.00 per year will become an AT or, more likely, an AST from 1 October, if the annual rent for that tenancy is no more than £100,000.00 per year. In many cases, what would be presently a contractual tenancy (outside the Housing Act assured and assured shorthold tenancy arrangements) will convert automatically to an AST with effect from 1 October, but some contractual tenancies with high rents could become ATs, conferring greater security of tenure upon the tenants and the potential for a right of renewal to the original tenant's family members. A private rented sector tenancy granted before 28 February 1997 is an AT unless a valid pre-tenancy notice was served under Section 20 of the 1988 Act, in which case it would be an AST.

From the tenant's perspective, it should be noted that when contractual tenancies become ATs or ASTs with effect from 1 October, those tenancies will cease to qualify for pre-emption rights contained in Part I of the Landlord & Tenant Act 1987 (tenants' rights of first refusal in the event that the landlord is wishing to sell the reversionary interest).

By bringing a wider range of tenancies within the ambit of the AT/AST regime, the Tenancy Deposit Scheme, which was introduced by the Housing Act 2004, will apply to many tenancies which are currently outside those arrangements. The Tenancy Deposit Scheme applies only to deposits paid by occupiers who have an AST. Landlords who are in receipt of a deposit under an AST are required to protect the deposits within one of the three registered schemes and in the event of non-compliance, the landlord cannot use the "notice

only" ground to recover possession of the let property (i.e., by giving two months' notice under Section 21 of the Housing Act 1988) and furthermore, the Court can order the return of the deposit and the payment to the tenant of an amount equal to three times the deposit that should have been put into a deposit scheme.

The Order is unclear as to what happens in relation to agreements which previously were not subject to the Tenancy Deposit Scheme but which will be so with effect from 1 October. The Office for Communities and Local Government considers that landlords of tenancies that convert to ASTs must protect their tenants' deposits, which means that deposits already held would have to be put into one of the deposit schemes. However, it should be noted that if a landlord does not comply with the "initial requirements" set out in Section 213 of the Housing Act 2004 (including the lodging of the deposit within 14 days of its receipt by the landlord) then the sanctions referred to above may apply. Whilst there may be a strong argument for saying that this amounts to a retrospective sanction against a landlord who may have entered into a tenancy agreement which did not require the lodging of the deposit, some landlords may choose to pay the deposit that they hold pursuant to an AT or a contractual tenancy into one of the recognised deposit schemes now, before 1 October, even though the deposit was paid before the tenancy becomes an AST as a result of the Order. If this is not done, the tenant could, under Section 214 of the Housing Act 2004, ask the Court to return the deposit to the tenant and for an order that the landlord pay a sum equal to three times the deposit by way of sanction. In addition, the landlord could not give a notice under Section 22 of the Housing Act 1988 to seek possession of the property from the tenant so long as the deposit remained unprotected.

The Order is also unclear as to the date from which the converted tenancy will run for the purposes of notice provisions and the ability for the landlord to recover possession using the notice-only ground. If the landlord wants to recover possession of his property by using the notice-only ground contained in Section 21 of the Housing Act 1988, the Court's

order for possession cannot take effect until six months after the beginning of the tenancy. In addition, the tenant has the right under Section 22 of the 1988 Act to refer an excessive rent to the Rent Assessment Committee, but this cannot be exercised more than six months after the tenancy began. The question therefore is whether the AST is deemed to commence on the date that the tenancy agreement was entered into by the landlord and the tenant (before 1 October) or whether the tenancy is deemed to be an AST only from 1 October. There are no transitional provisions in the Order to cover these aspects and it is hoped therefore that the Government will issue guidance as to the interpretation of the Order before it comes into force.

For further details on this article please contact
Douglas Turner - douglas-turner@birketts.co.uk

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f 01473 23 05 24	f 01603 23 05 33	f 01223 32 66 29



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