

Covid-19 : FAQs for private landlords regarding changes to residential tenancies as a result of the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No.2) Act 2020

Guidance on how private landlords should deal with rent and terminating tenancies following the introduction of The Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No.2) Act 2020.

What are the Coronavirus (Scotland) Acts 2020 and how do they affect private residential tenancies?

The new Acts (CSAs) contain a number of legislative provisions designed to provide security to various sectors during the current unprecedented climate. The legislation is currently in force until September 2021 but the government has the power to extend the legislation by a further 6 months from that date if necessary.

The CSAs make significant temporary changes to the Housing (Scotland) Act 1988 and the Private Housing (Tenancies) (Scotland) Act 2016. This means they affect almost all residential tenancies in Scotland including Short Assured Tenancies, Assured Tenancies and Scottish Private Residential Tenancies.

The changes are designed to improve security of tenure for tenants during the worst of the coronavirus outbreak by extending the notice periods and changing the legal criteria which apply to Notices and applications to the First-tier Tribunal Housing and Property Chamber for repossession.

Have eviction applications been banned by the Coronavirus (Scotland) Acts 2020?

The CSAs have been reported as imposing a “ban” on evictions. It should be noted that the CSAs “ban” enforcement of an eviction order in Tier 3 and Tier 4 areas until at least September 2021, but this does not mean there is a ban on Landlords pursuing an eviction order. It is still possible for landlords to serve notices and apply for orders to recover possession under the CSAs. Changes have however been made to notice periods and the way in which some eviction applications must be carried out.

In most cases it will mean that applications for eviction orders will generally take longer and an application is potentially less likely to succeed. It also might not be possible to enforce them an eviction order, depending on the area in which the let property is located.

I have been granted an eviction order. Can I carry out the eviction?

The ability to enforce an eviction order depends on the location of the let property. In terms of the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 it is prohibited for any person to serve a charge for removing or carry out an eviction at a property which is in a Tier 3 or Tier 4 area. It is a criminal offence to do so. This prohibition is currently in force until at least 1 September 2021.

Does the new legislation apply to all residential tenancies?

The CSAs state that the legislative changes apply to all private residential tenancies for which a Notice to Leave, Notice to Quit (and Form AT6) or Notice in terms of Section 33 of the Housing (Scotland) Act 1988 is served while the new Act “is in force”. This is essentially all Short Assured Tenancies, Assured Tenancies and Scottish Private Residential Tenancies for which a Notice to Leave, Notice to Quit and Form AT6 or Notice in terms of Section 33 of the Housing (Scotland) Act 1988 was served on or after 7th April 2020. Notices which were validly served on or before 6th April will not be affected, nor will be the subsequent applications to the First- Tier Tribunal for repossession

How is eviction or repossession affected for Short Assured Tenancies?

The principal change unique to Short Assured Tenancies is that repossession based on Section 33, which was previously a mandatory “no fault” ground is no longer mandatory. Repossession will no longer be granted unless the First-tier Tribunal Housing and Property Chamber decides that it is “reasonable” to make an order for possession. The Tribunal therefore has been given a discretionary power to refuse to grant an order for eviction even if the proper Notices have been validly served.

The notice periods for notices have also been changed. See further information below.

How is eviction or repossession affected for Assured Tenancies?

The Housing (Scotland) Act 1988 contains 17 grounds on which a landlord may serve a Notice (AT6) to recover possession. Some of these grounds were mandatory in that the First-tier Tribunal Housing and Property Chamber had to grant an order for possession if the ground applied and the notice was validly served. Other grounds were discretionary, in that the Tribunal would only grant an order if the Notice was validly served and the Tribunal was satisfied that it was reasonable to issue an eviction order in all the circumstances.

The CSAs change all grounds to become discretionary grounds. The Tribunal will therefore always consider whether it is reasonable to issue an eviction order in all the circumstances. If the Tribunal decides it is not so reasonable then the Tribunal will refuse the application and no order for possession will be granted.

If the application for repossession is based on Ground 8 (i.e. the tenant is in arrears equal to 3 months’ rent or more) and *any part* of the arrears arose while the CSAs were in force then the Tribunal must also consider to what extent the landlord followed the “pre-action requirements” which are prescribed by the Scottish Government. See further information on the pre-action requirements below.

The notice periods for notices have also been changed. See further information below.

How is eviction or repossession affected for Scottish Private Residential Tenancies?

The Private Housing (Tenancies) (Scotland) Act 2016 contains 18 grounds on which a landlord may serve a Notice to Leave and thereby seek to recover possession. Some of these grounds were mandatory in that the First-tier Tribunal Housing and Property Chamber had to grant an order for possession if the ground applied and the notice was validly served. Other grounds were

discretionary, in that the Tribunal would only grant an order if the Notice was validly served and the Tribunal was satisfied that it was reasonable to issue an eviction order in all the circumstances.

The CSAs change all grounds to become discretionary grounds. The Tribunal will therefore always consider whether it is reasonable to issue an eviction order in all the circumstances. If the Tribunal decides it is not so reasonable then the Tribunal will refuse the application and no order for possession will be granted.

If the application for repossession is based on Ground 12 (i.e. the tenant is in arrears of any amount) and *any part* of the arrears arose while the CSAs were in force then the Tribunal must also consider to what extent the landlord followed the “pre-action requirements” which are prescribed by the Scottish Government. See further information on the pre-action requirements below.

The notice periods for notices have also been changed. See further information below.

Are there any changes to the notices which need to be served to terminate Short Assured Tenancies?

The CSAs do not change the operation of Notices to Quit. It is still necessary to serve a Notice to Quit in order to bring a Short Assured Tenancy to an end. Section 33 Notices must also still be served. However, the period of notice for a Section 33 Notice has been extended by the CSAs from 2 months to 6 months.

Are there any changes to the notices which need to be served to terminate Assured Tenancies?

The CSAs do not change the validity or operation of Notices to Quit. It is still necessary to serve a Notice to Quit in order to bring an Assured Tenancy to an end. It is still possible to terminate the tenancy early by serving only the Form AT6 in certain circumstances. However, the notice period for the AT6 has been revised depending on which ground is being relied upon. Previously, the notice period was 2 weeks or 2 months depending on the ground. The CSAs increase these notice periods significantly.

The AT6 Notice period is now 28 days if possession is sought on the following ground:

- Ground 15 (the tenant or someone visiting the property has been convicted of a criminal offence or carried out a course of antisocial conduct).

The AT6 notice period is now 2 months if possession is sought on the following ground:

- Ground 9 (the tenant is being provided with alternative accommodation).

The AT6 notice period is now 3 months if possession is sought on the following ground:

- Ground 1 (the landlord occupied the property as their only or principal home prior to the tenancy commencing and served a notice on the tenant before the tenancy was entered into stating that the property might be recovered by the landlord so that they could return to live there as their only or principal home).

The AT6 Notice period is now 6 months for the remaining Grounds 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 16 or 17.

Are there any changes to the notices which need to be served to terminate Scottish Private Residential Tenancies?

The CSAs do not change the validity or operation of Notices to Leave. It is still necessary to serve a Notice to Leave in order to recover possession or raise an application at the First-tier Tribunal Housing and Property Chamber. However, the notice period has been revised depending on which ground is being relied upon. Previously, the notice period was either 28 days or 84 days depending on the ground. The CSAs increase these notice periods significantly.

The Notice period is 28 days if possession is sought on the following grounds:

- Ground 10 (the tenant is not occupying the let property as the tenant's home).
- Ground 13 (the tenant has a relevant conviction).
- Ground 14 (the tenant has engaged in relevant anti-social behaviour).
- Ground 15 (the tenant associates in the let property with a person who has a relevant conviction or has engaged in relevant anti-social behaviour).

The Notice period is now 3 months if repossession is sought on the following grounds:

- Ground 4 (Landlord intends to live in the property).
- Ground 5 (family member intends to live in the property).
- Ground 16 (the landlord is not registered by the relevant local authority 20 under the Antisocial Behaviour etc. (Scotland) Act 2004)
- Ground 17 (the let property or associated living accommodation is in multiple occupation and not licensed under Part 5 of the Housing (Scotland) Act 2006).

The notice period is 6 months for the remaining Grounds 1, 2, 3, 6, 7, 8, 9, 11, 12 and 18.

I am a tenant and my landlord wants me to keep paying rent even if I lose my job. Do I still have to pay rent during the coronavirus outbreak?

The CSAs make the process less guaranteed and more lengthy for landlords who decide to evict tenants who can no longer pay rent. It does not however affect the tenant's obligation to pay rent. There is no "rent freeze" or "rent holiday" currently planned by the Scottish government. Rent still technically falls due in terms of the tenancy. However, the changes made by the CSAs are designed to ensure that tenants who can no longer pay rent will not be as likely to be evicted. No changes have been made to the landlord's ability to raise a civil application at any time to the First-tier Tribunal Housing and Property Chamber seeking an order against the tenant(s) for payment of rent arrears.

The best course of action is to be transparent and make your landlord aware of your issues as soon as possible. In terms of the pre-action requirements, your landlord will likely need to demonstrate they tried to accommodate you before they could be granted an order for repossession by the First-tier Tribunal.

If the tenant is in rent arrears can the landlord still pursue an eviction order while the Coronavirus (Scotland) Acts 2020 are in force?

It is still possible to evict tenants on the basis of rent arrears in any type of tenancy. However, the process for eviction is longer and is not guaranteed under the CSAs.

For Short Assured Tenancies and Assured Tenancies eviction could previously usually be sought on the basis of arrears of any amount. However, if arrears amounted to more than three months' rent at the date the Tribunal considered making an order, the ground was mandatory and the Tribunal had to grant an order. The CSA changes this so that the Tribunal must always exercise its discretion and consider whether it is reasonable to grant an order even if the tenant is in more than three months' arrears. It is also likely the landlord will need to prove that they followed the pre-action requirements. Furthermore, the notice period for Form AT6 is now 6 months rather than 2 weeks.

For Scottish Private Residential Tenancies eviction could previously usually be sought on the basis of arrears of any amount. However, if arrears amounted to more than three months' rent at the date the Tribunal considered making an order, the ground was mandatory and the Tribunal had to grant an order. The CSAs change this so that the Tribunal must always exercise its discretion and consider whether it is reasonable to grant an order even if the tenant is in more than three months' arrears. It is also likely the landlord will need to prove that they followed the pre-action requirements. Furthermore, the notice period is now 6 months rather than 28 days.

What are the pre-action requirements for evictions based on rent arrears?

The pre-action requirements apply where (1) a Notice to Quit or a Notice to Leave was served after 6 April 2020 and (2) an application is made to the First-Tier Tribunal on or after 6 October 2020 for eviction on the basis of rent arrears. When considering whether it is reasonable to grant an order for eviction based on rent arrears, the Tribunal must consider the extent to which the landlord has complied with the following requirements:

1. The First-tier Tribunal must take into account the extent to which the landlord provided the tenant with clear information relating to:-
 - a. the terms of the tenancy agreement,
 - b. the amount of rent for which the tenant is in arrears,
 - c. the tenant's rights in relation to proceedings for possession of a house (including the pre-action requirements set out in these regulations), and
 - d. how the tenant may access information and advice on financial support and debt management.
2. The First-tier Tribunal must also take into account any reasonable efforts made by the landlord to agree with the tenant a reasonable plan to make payments to the landlord of:-
 - a. future payments of rent, and
 - b. the rent for which the tenant is in arrears.
3. Finally, the First-tier Tribunal must take into account whether the landlord has taken reasonable consideration of:-
 - a. any steps being taken by the tenant which may affect the ability of the tenant to make payment to the landlord of the rent for which the tenant is in arrears within a reasonable time,
 - b. the extent to which the tenant has complied with the terms of any payment plan agreed to, and
 - c. any changes to the tenant's circumstances which are likely to impact on the extent to which the tenant complies with the terms of a payment plan agreed to.

Now that the pre-action requirements have been prescribed, it is clear that any landlord currently waiting to raise proceedings should be prepared to follow and prove that they followed them.

If I am a landlord should I still try to make an application for an eviction order while the CSAs are in force?

This will depend on the facts and circumstances. The CSAs may be in force for up to 18 months or possibly longer. Waiting for the CSAs to no longer be in force is not an ideal solution. We recommend discussing matters with the tenants to see if there is an agreeable solution. While there is no way to shorten the longer notice periods, it is possible that the tenants will move out voluntarily during or at the end of the notice period. However, if the tenants do not move out then the landlord needs to consider whether the Tribunal will consider eviction to be reasonable in all the circumstances on the basis of the facts.

We recommend landlords contact us to discuss their prospects.

If the Coronavirus (Scotland) Acts 2020 stop being in force what happens to notices served while they were in force?

The CSAs apply to Notices served while they are in force. This means that if notices are served when they are not in force then they will not be subject to the longer notice periods or the additional discretionary grounds. Given the CSAs' wording, our view is that even if a Notice is served while the CSAs are in force it would be competent to serve a new notice when the CSAs are not in force which notice will not be subject to the CSAs' provisions. Given that some notice periods (i.e Section 33 Notices) have been increased significantly, it might be quicker in some cases to serve a new notice when the CSAs are no longer in force.

A view should however be taken on whether it will be better to allow the prior notice period to run at that time or serve a new notice.

If you have any further questions or queries, please contact:

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