

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 (or CSAs).

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

The CSAs contain a number of legislative provisions designed to assist services and provide security to various sectors during the current unprecedented climate. The legislation is designed to be in force for 6 months. After the 6 months have passed, the legislation will no longer be in effect. However, the government has the power to extend the legislation by a further 6 months up to two times if necessary.

The CSAs make significant temporary changes to the Housing (Scotland) Act 1988 and the Private Housing (Tenancies) (Scotland) Act 2016. This means it affects 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.

2 Have evictions been banned by the CSAs?

The CSAs have been reported as imposing a “ban” on evictions but this is not correct in law. 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 possession can be recovered.

In most cases it will mean that repossession will generally take longer and is potentially less likely to succeed.

3 Will 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 they are “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 7 April 2020.

Notices which were validly served on or before 6 April will not be affected, nor will be the subsequent applications to the First- Tier Tribunal for repossession.

4 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.

5 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 it 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.

As of 3 June 2020 the Scottish Ministers have not yet prescribed any pre-action requirements but it is expected they will soon do so.

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

6 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.

As of 3 June the Scottish Ministers have not yet prescribed any pre-action requirements but it is expected they will soon do so.

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

7 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.

8 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 6 months for all grounds except for Grounds 1, 9 and 15 (see below).

The AT6 notice period is now 2 months if possession is sought on the basis of Ground 9 (the tenant is being provided with alternative accommodation).

The AT6 notice period is now 3 months if possession is sought on the basis of 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) or Ground 15 (the tenant or someone visiting the property has been convicted of a criminal offence or carried out a course of antisocial conduct).

9 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 still 28 days if possession is sought on the basis of Ground 10 (the tenant is not occupying the let property as the tenant's home).

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 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).
- 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.

10 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.

11 If the tenant is in rent arrears can the landlord still evict them 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.

Short Assured Tenancies and Assured Tenancies – previously eviction could 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 for Form AT6 is now 6 months rather than 2 weeks.

Scottish Private Residential Tenancies – previously eviction could 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.

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

As of 3 June 2020 the Scottish Ministers have not prescribed the pre-action requirements. However, in terms of the CSAs the requirements may include the following:

- (1) Information to be provided by a landlord to a tenant including information about the terms of the tenancy, rent arrears and any other outstanding financial obligation under the tenancy.
- (2) Steps to be taken by a landlord with a view to seeking to agree arrangements with a tenant for payment of future rent, rent arrears and any other outstanding financial obligation under the tenancy.
- (3) Such other matters as the Scottish Ministers consider appropriate.

13 If I am a landlord should I still try to recover possession 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.

14 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 would avoid it being 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.

15 What is the position of applications which have already been made to the First-tier Tribunal Housing and Property Chamber?

As far as we are aware, applications which have been made to the tribunal are still ongoing. However, all Case Management Discussions or hearings currently scheduled have been universally postponed until 9 July 2020. There is no guarantee the tribunal will recommence scheduling hearings close to or at that date.

It is therefore not presently possible to progress these applications.

16 Will it be possible to make an application to the First-tier Tribunal Housing and Property Chamber before 9 July 2020?

The Tribunal appears to still be accepting applications. However, the application will not proceed any further after it is accepted because the tribunal is currently unable to serve papers on the respondents or set a Case Management Discussion or hearing.

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

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