

Number 16

A Change in the Law Relating to Payment of Rent by Cheque

A recent case¹ will have far-reaching implications for both landlords and tenants when rent is paid by cheque.

In strict legal terms a landlord is entitled to be paid in cash unless another method of payment is expressly agreed or adopted through a course of dealings. It is common practice for rent to be paid by direct debit or standing order mandate, in which case the appropriate arrangements are usually set up at the beginning of a tenancy, with payments to be received by the landlord or a managing agent's bank on or before the date on which the rent falls due.

If a tenant pays rent by cheque and a specific cheque is accepted, provided cleared funds are received by the landlord upon first presentation, the rent will be deemed paid. A landlord will have waived the right to refuse rental payments made by cheque if he has previously accepted rent in that manner from the tenant in question, unless he serves notice to the contrary. However, following the decision in *Day v Coltrane*, if a landlord rejects a last-minute payment of rent by cheque, or if it fails to clear in advance of the possession hearing, the rent will be treated as unpaid and in arrears.

The exact date rent is paid is highly relevant in circumstances where a tenant is seeking to avoid a mandatory possession order in residential possession proceedings or claiming automatic relief from forfeiture in the six month period following the grant of a possession order or the taking of peaceful possession in relation to a commercial lease.

- If a cheque clears on first presentation, payment is deemed to have been made on the date the cheque was delivered to the landlord.
- If there has been a pattern of the tenant sending the cheque by post, the tenant will be permitted to carry on doing so and the cheque will be deemed to have been delivered on the day of posting, rather than when the landlord actually received it.

Where a residential landlord is owed at least two months' rent by an assured tenant at the date of service of the statutory notice of intended proceedings and the debt is still due at the date of the hearing, he will be entitled to a mandatory order for possession under ground 8 of the Housing Act 1988.

In *Day v Coltrane* the tenancy agreement did not specify how rent was to be paid, but the arrangement had been that the tenant would post a cheque to the landlord the day before it became due. However, owing to administrative problems the tenant's housing benefit payments were delayed and the landlord served notice and commenced possession proceedings when more than two months' rent became due. A few days before the hearing the tenant sent a cheque to the landlord's solicitors and the landlord paid it into her bank account, although there was insufficient time before the hearing for the cheque to clear.

¹ *Coltrane v Day* [2003]17 EG 146

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Payment by cheque is a conditional payment and the Court of Appeal held that if a last-minute payment of rent is accepted by a landlord a judge has discretion to adjourn a possession hearing to see if the cheque clears. If it is not paid on first presentation the court must make an order for possession. Although it must be borne in mind that a judge is not obliged to adjourn a hearing and may make an immediate order for possession in such circumstances.

A landlord can refuse to accept a last-minute payment of rent because a prima facie breach of a lease will have occurred if a tenant does not make payment of rent on time.

Although Day v Coltrane was a residential possession action, the principle would presumably apply to late payments made by tenants at the end of the six month period following forfeiture of a lease during which they are entitled to relief from forfeiture if payment of rent arrears is made.

Both landlords and tenants should be aware that an uncleared cheque does not have to be accepted as payment, but even if it is, a landlord may still be entitled to possession if the cheque fails to clear either on first presentation, by the date of a possession hearing or the last day on which relief from forfeiture could be obtained.

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