

Pitfalls when taking Residential Possession Proceedings

Jonathan McNae
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020 7420 9500

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Introduction

1 This paper is aimed at ensuring that practitioners do not make silly mistakes in bringing possession claims before the Courts. There are many practitioners who do not regularly deal in this area but for various reasons (mostly favours) undertake this work on a very occasional basis. This paper is aimed primarily at practitioners who have no real interest or experience in this area, but may be called upon by a favoured client to help out. This paper is unashamedly the type of paper to keep in a desk drawer and to have a look at on just such an occasion.

- 2 There need to be limits on what is covered in this paper. The whole gamut of residential occupation is vast, and although there needs to be some awareness of this, the most common aspect of possession is in relation to occupancy pursuant to an Assured Shorthold Tenancy (AST).
- 3 Therefore, this paper is primarily aimed at taking possession proceedings in relation to assured tenancies and ASTs. Whilst there are still a number of Rent Act tenancies in existence, these are a regime of their own and are not covered by this paper.

Getting documents together

- 4 The most useful document to procure from the client is the tenancy agreement itself. The other documents that may be required will depend on the ground(s) to be relied upon for the taking of possession. For example, if there is to be a claim based upon rent arrears, then rent books/ bank accounts will be helpful to determine what has been paid.
- 5 Documents that the adviser should be aware of are:
- a. CPR Part 55, including the Practice Direction (Possession Claims);
 - b. CPR Part 65 (Anti-Social Behaviour and Harassment Proceedings);
 - c. Form N5 – Claim Form;
 - d. Form N119 – Particulars of Claim for Residential Possession Proceedings.

PITFALL NO. 1 – THE BASIS OF OCCUPATION - IS THERE A TENANCY?

6 There are many forms of occupation and I do not propose here to relay to such an experienced audience what those are. Suffice it to say, if one wants to take possession proceedings on the basis of their being an assured shorthold tenancy, the first question is whether this is a tenancy.

Is there a tenancy?

7 One must look at the nature of the occupation rather than the words used by the parties. Simply because a document says assured shorthold tenancy at the top does not make it so. The Courts are also live to landlords pretending that something is a licence when in fact it is a lease: see, for example, Antoniades v. Villiers [1988] 3 WLR 139, where the Court of Appeal investigated whether a term allowing a landlord unrestricted access was in fact a genuine term. Had this been so, then the requirements for a tenancy, let alone an assured tenancy, would not have been satisfied.

8 One might have thought that the question of whether something was a tenancy would have been settled by now. However, see the very recent Supreme Court ruling in Berrisford (FC) v Mexfield Housing Co-operative Limited [2011] UKSC 52. The Court had to consider whether an occupation arrangement for an indeterminate term could be a tenancy. The Court held that while there is no apparent justification for the rule that an agreement for a term of uncertain duration cannot give rise to a tenancy and the law is not in a satisfactory state, this

rule has been established for many centuries and should not be jettisoned (at least in this case) [Paras 34 – 37].

Is there an assured tenancy?

9 Section 1 of the Housing Act 1988 contains three prerequisites, all of which must apply for the tenancy to be an assured tenancy:

- a. the dwelling house must be let as a separate dwelling;
- b. the tenant or each of the joint tenants must be individuals;
- c. at least one tenant must occupy the premises as his or her only or principal home.

10 There are also a number of exceptions listed in Schedule 1 to the Housing Act 1988. If any of these apply, then the tenancy cannot be an assured tenancy.

Amongst other things to look out for:

- a. tenancies at a high rent (now for England over £100,000 per annum);
- b. tenancies at a low rent meaning less than £1,000 per annum in London or £250 per annum elsewhere;
- c. those tenancies granted before 1st April 1990 with rateable values above £1,500 in Greater London and £750 elsewhere;
- d. if granted before 1st April 1990 at a rent less than two-thirds of the rateable value;
- e. tenancies granted by private landlords under arrangements made with local housing authorities relating to duties towards the homeless;
- f. tenancies granted by fully mutual housing associations.

Is it an AST?

- 11 An AST is merely a sub-species of assured tenancy. Therefore all the requirements for an assured tenancy must be met if a tenancy is to be an AST; and then some additional requirements which differentiate between ASTs and assured tenancies. The position has changed over time, but for tenancies granted on or after 28th February 1997, the default position is that if a tenancy is granted that could be an assured tenancy it will be an assured shorthold tenancy. The main points to look out for is whether there were any negotiations or agreements that predated 28th February 1997 or whether the agreement upon which possession is sought is merely one agreement in a line of many the first of which predated the 1997 changes. In any of these circumstances, one really needs to go back to the books.

PITFALL NO. 2 – CHOOSING THE RIGHT BEST ROUTE TO POSSESSION

- 12 The advisor must then determine what is the best route to possession. This will inform the adviser as to what notices to serve and what the client needs to be told about when possession may be given.
- 13 Section 5 of the Housing Act provides that a landlord may take possession only following the obtaining and the execution of a Court order. Self help methods of regaining possession as may be used in the commercial sphere are not permitted under the Housing Act and attempts to do so are likely to fall foul of the Protection from Eviction Act 1977, an Act which carries criminal sanctions.

- 14 The two regimes may broadly but inaccurately be described as fault based and non-fault based regimes for the regaining of possession. The “fault based” regime requires the servicing of a notice pursuant to Section 8 of the Housing Act (a Section 8 Notice) specifying the ground or grounds of default upon which the landlord wishes to rely. Overwhelmingly these relate to failures to pay rent or the breach of some other term of the tenancy.
- 15 The “non-fault based” regime requires a valid notice to be served pursuant to Section 21 of the Housing Act 1988 and then for the time specified in that notice to have expired without the tenant giving up possession.

Overview of the Section 8 procedure

- 16 Having determined that the tenancy is an assured or an assured shorthold tenancy and that the tenant is in default, then a Section 8 notice can be prepared. A Section 8 notice needs to specify one or more grounds for possession from a list in Schedule 2 to the 1988 Act. As indicated, the most important are:
- Ground 8: significant rent arrears.
 - Ground 10: minor rent arrears.
 - Ground 11: persistent delay in the payment of rent.
 - Ground 12: the breach of any obligation of the tenancy agreement.
- 17 Of the grounds specified in the Schedule, grounds 1 to 8 are mandatory grounds, in that if they are made out then the Courts must make an order for possession,

whereas grounds 9 to 17 are discretionary grounds and the Courts must also further exercise its own jurisdiction to determine whether it would be reasonable to make an order in all the circumstances.

- 18 Normally, a certain period of time must elapse between the service of the Section 8 notice and the commencement of the possession proceedings. The length of time depends upon which ground or grounds are being specified.

Overview of the Section 21 procedure

- 19 As indicated, the Section 21 regime provides for a no fault mechanism for the determination of assured shorthold tenancies. This is a regime specific to ASTs. Essentially, a landlord must serve one of two different notices pursuant to Section 21 of the 1988 Act. As an assured shorthold tenancy suggests the tenant is assured of occupation for a short period of time which is the fixed term of the tenancy.

- 20 Whilst a Section 8 notice may be served whether the tenant is in the fixed term of the tenancy or is occupying on a periodic tenancy following on from the conclusion of the initial term, a Section 21 notice can only bring a tenancy to an end at the end of the initial fixed term at the earliest. The exception to this rule is if there is a break clause which allows for termination at an earlier point in time in which case a Section 21 notice may be sufficient to activate that break.

- 21 The notice that the landlord must serve depends upon whether the tenant occupies within the period of a fixed term or whether the tenant is occupying on a periodic tenancy having held over at the conclusion of the fixed term.
- 22 If the fixed term is ongoing, then the landlord should serve a notice under Section 21(1)(b). In this instance, the landlord must give the tenant not less than two months notice of the requirement for possession of the dwelling house. If the tenancy is outside the fixed term, then a notice pursuant to Section 24(4)(a) should be served. This requires that at least two months notice must be given, and that the date specified shall be the last day of a period of the tenancy.
- 23 There is one final choice for those landlords seeking possession on the Section 21 route. It is possible for the accelerated possession procedure to be invoked (see below).
- 24 If in doubt, serve all the notices that may be required, specifically providing that each is served without prejudice to the others.
- 25 Finally, one fundamental point that must be checked prior as soon as one is instructed is whether there is a forfeiture clause within the terms of the agreement, as without this termination during the fixed term when relying on merit and important grounds, including grounds 8, 10 and 12, will mean that proceedings would be unsuccessful: see Section 7 of the Housing Act 1988.

PITFALL NO. 3 – VALIDITY OF NOTICES

26 This is with regret a topic in its own right. There are various books that are dedicated solely to this. However, I propose only to deal with the most basic and common problems.

The identities of the parties

27 It is pretty obvious that the correct parties should be named on the notice, both the landlord and the tenant should be properly described. A managing agent is unlikely to be the landlord and should not be described as such.

Date that possession is required

28 On a Section 21(4)(a) notice, this is a very important requirement, and must be accurately identified. However, on many of the standard forms there is a saving provision which normally reads something along the lines of:

“I give you notice that I require possession of the dwelling house known as (insert address) after (insert date) or, if later, the date on which a complete period of your tenancy expires next after the end of two months from the service of this notice.”

29 A defect in relation to the date specified cannot be dispensed with on Mannai grounds.

30 As a general rule, all notices under the Housing Act requiring possession need to be served upon the tenant. This means that they need to come to the attention of the tenant: Wandsworth LBC v Attwell (1995) 27 HLR 536. There are some exceptions to this rule in relation to Section 8 notices but Section 21 notices

require service. Practitioners should remember that sufficient time has to elapse from service: there is no point choosing a date two months away on a Section 21 notice only to put the notice in the post. It will not satisfy the requirements of the Act in those circumstances.

- 31 Given that many of the requirements to gain possession of residential premises require a “tick box” approach, service of these notices is hugely important. Simply to post a notice is insufficient, and many cautious and sensible practitioners will ensure that these notices are delivered to the property or the tenant in person or by utilising a process server. Some landlords also require a counter-signed copy to be given back to the server by the tenant with a signature at the bottom.

Tenancy Deposit Schemes

- 32 If a deposit has been given in relation to a tenancy that came into force on or after 6 April 2007, then it should be held in a recognised tenancy deposit scheme. If the deposit is not held in accordance with the requirements of the scheme, then a s.21 notice, if served, will be invalid: s.215 of the Housing Act 2004. A landlord may not retrospectively validate an invalid s.21 notice by subsequently complying with the TDS requirements. A new notice must be served.

PITFALL NO. 4 – DRAFTING PROCEEDINGS

- 33 This pitfall has become a lot easier to avoid since standardised Claim Forms and Particulars of Claim have been developed: see Claim Form N5 and standard Particulars of Claim on Form N119.

34 As these forms give landlords pointers towards the matters that are required to be covered, it is recommended that these forms rather than ‘free-style’ Particulars of Claim are used in the overwhelming majority of situations. The pitfalls are therefore fairly obvious: failing to fill in certain sections or failing to score out those parts that are unnecessary or duplicated to allow for various different permutations to be covered on the same form.

35 One major error when it comes to drafting proceedings relates to seeking possession on the accelerated procedure under the Section 21 regime. This procedure requires various conditions as set out in CPR 55.12 to be complied with. Therefore, the procedure is only of use where:

- a. the AST was entered into on or after 15th January 1989;
- b. the only purpose is to recover possession;
- c. the tenancy did not immediately follow an assured tenancy which was not an assured shorthold tenancy;
- d. an AST has been properly granted in accordance with the Housing Act 1988 provisions (see Housing Act 1988 Section 19A);
- e. the tenancy is subject to a written agreement or follows a tenancy which was a written tenancy agreement;
- f. a Section 21 notice has been given.

36 If possession is sought on the accelerated procedure, then the Claim Form must be in the form set out in the Practice Direction to CPR 55, denoting that form N5B must be used. It must contain information and be accompanied by the documents required in form; and all sections are required to be completed. A blank reply

form should accompany every Claim Form issued under the accelerated procedure.

37 There are various pitfalls that can befall a landlord seeking accelerated possession, including:

- failing to exhibit a Section 20 Notice (relating to tenancies granted before 28th February 1997)
- Failing to exhibit a Section 21 notice. (If either of these notices is defective, then the claim will fail.)
- The statement of truth on the Claim Form should not be completed by an agent.

38 The most important point is that if a claim for any other relief save for possession of the property is sought then the accelerated proceedings route cannot be used. This includes a claim for rent arrears. It is, however, possible to seek possession on an accelerated basis and make a separate claim for rent.

PITFALL NO. 5 – ISSUING PROCEEDINGS

39 The Particulars of Claim must be filed and served with the Claim Form: CPR 55.4.

40 Finally, proceedings should be issued in the Court that has jurisdiction over the area in which the property is situated: CPR 55.3. It is possible to issue in the High Court, but this is almost always inadvisable, and if this is done, then CPR 55.3(2)

and CPR PD 55A need to be noted. Although there is a power of the Court under CPR 3.10 to remedy fundamental errors such as this, it only seeks to add time and money to the proceedings leaving you with an unhappy client.

41 Proceedings may be issued online: see CPR PD 55B.

42 There is no pre-action protocol at present in relation to residential tenancy possession proceedings (compare the position for mortgaged residential property). However, it is important to be seen to have tried to avoid litigation, especially if relying upon a discretionary ground. Further, Paragraph 5 of Form N119 requires a pleading of the steps already taken to recover arrears (if applicable). Attempts to reach payment arrangements, for example, often meet with the Court's approval.

PITFALL NO. 6 – THE HEARING

Accelerated Possession "Hearings"

43 If the reply form is not returned then the claim for possession will be treated as unopposed and possession orders can in those circumstances be made without any hearing.

44 If a defence to an accelerated possession claim is received, or 14 days has elapsed since the service of the Claim Form, then the papers should be referred to a District Judge. It is the District Judge's role to consider whether:

- a. the claim is made out and there is no defence, in which case a possession order should be made without a hearing;
- b. the claim itself discloses no reasonable grounds for bringing the claim in which case it should be struck out;
- c. there are any issues relating to the claim then a hearing date should be fixed giving at least 14 days notice of the hearing: see CPR 55.16.

45 If the landlord is entitled to a possession order then the Court has limited jurisdiction: it must make an order to take effect within 14 days unless there is acceptable hardship which allows the Court to delay matters for a maximum of 6 weeks: see Housing Act 1980, Section 89.

Other Possession Hearings

46 It is axiomatic that one must prove one's case at a possession hearing. CPR 55 provides that the failure to serve a Defence does not preclude a tenant from participating at the hearing.

47 Whilst these hearings tend only to last for a short period of time they remain trials of actions and need to be treated as such (although see Forcelux Limited v. Binnie [2009] EWCA Civ 854 and cases subsequent, which suggest that for certain purposes, possession hearings should not be considered to be trials). Amongst other points, it is clear that evidence would be required to prove grounds upon which the landlord seeks to rely pursuant to a Section 8 notice.

48 Of the grounds based upon rent arrears, only Section 8 is a mandatory ground, and it is often very important to make out this ground in order to require the Court to make a possession order. The most commonly used provisions of Ground 8 require:

Both at the date of the service of the notice under Section 8 of this Act relating to the proceedings for possession and at the date of the hearing –

- (a) if rent is payable weekly or fortnightly, at least 8 weeks' rent is unpaid;
- (b) if rent is payable monthly, at least 2 months' rent is unpaid;

and for the purpose of this ground “rent” means rent lawfully due from the tenant.

49 The date of the hearing is the date when the claim is heard. If for whatever reason there is an adjournment granted without a hearing taking place then the date that is relevant becomes the later date: North British Housing Association Limited v. Matthews [2005] 1 WLR 3133.

50 Also, given the requirement for there to be specified amount of arrears at the date of the service of the notice, Ground 8 is not one of those grounds upon which the service of a Section 8 notice may be dispensed with: it is fundamental therefore that the Claimant's landlord proves that a valid Section 8 notice has been served.

51 One also needs evidence of the arrears at the date of the hearing. A witness statement provided to the landlord's representative the day before will not necessarily be accepted by a Court as being evidence of the position as at the date of the hearing.

- 52 This can lead to practical difficulties, including the fact that many landlords are busy people and do not wish to take time out to go to Court. Witness statements should be served at least two clear days before the hearing, and in some Courts it is good practice to include evidence within those statements of what the arrears will be as at the date of the hearing if no further payments are made. A landlord is permitted to bring the position up to date at the hearing: see CPR PD 55 Para. 5.2.
- 53 It is always worth checking with the representative going to Court whether or not a witness will be required.

PITFALL NO. 7 – THE POSSESSION ORDER

- 54 Assuming all goes well, the landlord will seek and should receive a possession order. This order can take various forms and practitioners should be aware of the provisions of the Housing Act 1980, Section 89. By Section 89(1), the Court may only postpone the giving of possession to a date 14 days after the making of the order unless the exceptional hardship rule applies in which case 6 weeks may be permitted. However, those restrictions do not apply in circumstances where, amongst others, the Court considers the question of reasonableness. In the Housing Act context, this means that the landlord makes out a ground from grounds 9 to 17 inclusive of Schedule 2 to the 1988 Act.
- 55 Again, this is another reason why when it comes to rent arrears it is important for a landlord seeking to regain possession to make out Ground 8. If a discretionary ground is made out, then the Court has a wide discretion as to the terms of an

order that may be made: see s.9 Housing Act 1988, which gives jurisdiction for extended discretion of the Court in possession claims, including the making of conditional, postponed or suspended possession orders.

Consent Orders

56 Landlords should be very wary of entering into orders by consent in relation to residential claims based upon the provisions of the Housing Act 1988. The Court may not make a “consent order” against an assured tenant unless there is either a concession by express admission that the Housing Act protection does not apply or alternatively it is established that a ground for possession exists and it is reasonable if required to make an order for possession. For example, in Hounslow LBC v. McBride (1999) 31 HLR 143 (CA) a suspended possession order had been made by consent but there was no evidence relating to the reasonableness of making such an order nor was there any concession relating to the same. This was a case involving anti-social behaviour, and nonetheless despite the fact that a warrant had been issued, the possession order was set aside.

57 Whilst it is superficially attractive to enter into a consent order to take possession of the property, a landlord should be very wary about doing so as it may be that this sets the whole process back many months if the tenant subsequently seeks some way of escaping from the agreement that had previously been made. It is possible to draft orders by consent that do bind the tenant, but great care should be taken. In R v. Bloomsbury and Marylebone County Court ex parte Blackburne (1985) 275 EG 1273, (CA) both parties were legally represented but nonetheless

the tenant subsequently changed his mind and applied successfully for the possession order to be set aside.

PITFALL NO. 8 – MANAGING CLIENT EXPECTATIONS

58 One does not always provide a favoured client with the best possible service by agreeing to take residential possession proceedings against a tenant. The first issue is cost. This splits in turn into many further issues. First, the costs of proceedings.

59 The usual rules about costs as contained in the CPR apply to possession claims. The wider discretion of the Courts is stated at CPR 44.3. Many tenancy agreements contain provisions for contractual rights to costs to be paid, and in Church Commissioners v. Ibrahim [1997] 1 EGLR 13, the Court of Appeal held that landlords should not be deprived of their contractual right to costs on an indemnity basis unless there is a good reason to do so.

60 Nonetheless, the Courts are not always predisposed to applying the case law, knowing that the level of costs in issue and the wide discretion given in relation to decisions on costs mean that palm tree justice is often the order of the day.

61 One very important point that landlords need to be made aware of at a very early stage in the proceedings is that the fixed costs regime in CPR 45 can apply in certain circumstances to possession actions. The most important situation is that where the Defendant fails to defend the claim. It may be that the landlord has expended many thousands of pounds to bring a claim to Court and that money

would be wasted save for the limited award under the fixed cost regime, which generally works out to be £276.75.

62 In my experience, most landlords are pragmatic about the lack of recoverability of costs and are usually fairly aware that it is unlikely that money judgments would ultimately lead to recoupment in any event. Most landlords are merely concerned to get their property back and re-let on a basis that provides an income stream.

63 The other main point is expectation management. Possession claims can be expensive, long winded and difficult for a landlord to understand. There are many tenants who are very capable of playing the system and if a landlord is unfortunate enough to have one of those tenants, then removing them is difficult.

64 There is nothing that a sensible adviser can do to change this, it is merely a fact of the process and the lack of accountability as to costs and other sums awarded against the Defendant tenant. All the advisor can do is to point out these pitfalls from the beginning so that the landlord is fully appraised of the situation and goes into the process with open eyes.

CONCLUSIONS

65 In many ways residential possession proceedings are more fraught with pitfalls for the occasional practitioner than commercial matters. The sums due are normally far more modest and it does not always merit the careful analysis that is required to take successful proceedings. However, if a landlord wishes to be rid of an

errant tenant that is exactly what must happen and the incidence of the cost of all of this tends to fall upon the landlord.

66 There are mutterings at the moment about reforming the procedures, and it is thought that perhaps the pendulum has swung too far in favour of tenants. The truth is that the system as set down within the statute provides a workable mechanism if the Courts are not over-stretched. As soon as the Courts require an adjourned hearing it could be many months into the future because of the pressures on their own time and the system starts to crumble.

67 Whether securing greater rights for landlords will be high on the agenda for our leaders over the coming years is unlikely but one shall have to wait and see. In any event, the security provided within society by requiring landlords to observe certain processes and to be supervised in doing so by the provision of Court orders is here to stay.

Jonathan McNae

Selborne Chambers
10 Essex Street
London WC2R 3AA

www.selbornechambers.co.uk
jonathan.mcnae@selbornechambers.co.uk

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