

16. POSSESSION

For ease of use, this chapter is divided into five parts as follows:

- Part 1: Practical tips
- Part 2: Secure tenancies
- Part 3: Assured tenancies
- Part 4: Mortgages
- Part 5: Civil Procedure Rules Part 55.

Part 1: Practical tips

16.1 Preliminaries

Sources

Defending Possession Proceedings (Legal Action Group, 2006, sixth edition – should be available in every county court.

Civil Procedure ('The White Book') and *The Civil Court Practice* ('The Green Book') both have the annotated text of relevant housing statutes.

Pre-reading

In view of the pressure of listing and variety of different types of tenancy which are often the subject matter of possession proceedings in the same list, it is wise to note on files the nature of the tenancy and the claim for possession, and to check the validity of notices, etc. in advance. It is impossible to decide whether or not a landlord is entitled to an order for possession without first ascertaining the type of tenancy and the statutory security of tenure (if any) which it enjoys.

Jurisdiction

The Practice Direction (PD) on allocation of cases to levels of judiciary provides that district judges have jurisdiction to hear possession actions, irrespective of track (CPR 2 PD 11.1(b)).

Listing

Cases involving 'personal financial matters' (such as rent or mortgage arrears) should 'in the first instance be listed by the court as hearings in private' (CPR 39.2(3)(c) and PD 39 para. 1.5).

Procedure

Since October 2001 almost all possession proceedings have been brought under CPR Pt 55 – see below.

A possession hearing is a trial – evidence may be given orally or in writing (CPR 55.8(3) and PD55 para. 5.4).

If the claim is not heard on the return day and it is genuinely disputed on grounds which appear to be substantial, directions should be given. They should include allocation to track or directions which will enable the claim to be allocated

16.2 Secure and assured tenancies – arrears

If a landlord is relying upon a discretionary ground for possession (e.g. Housing Act 1985 (HA 1985) Sch. 2 Ground 1 or Housing Act 1988 (HA 1988) Sch. 2 Grounds 10 or 11), he must prove:

- the tenancy – normally by producing the tenancy agreement
- service of the requisite HA 1985 s.83 or HA 1988 s.8 notice of intention to bring proceedings – unless the court considers it just and equitable to dispense with that requirement (see below)
- the arrears – ideally by a written schedule, and
- that it is reasonable to make an order for possession. See HA 1985 s.84(2) ('the court shall not make an order for possession . . . unless it considers it reasonable to make the order) and HA 1988 s.7(4).

The requirement that the court is satisfied that it is reasonable to make a possession order means that even if the ground is proved, the court has a choice of orders – outright possession order, suspended possession order, adjournment to fixed date, general adjournment, adjournment on terms, no order or dismissal of the possession claim.

The burden of proof lies upon the claimant.

In connection with reasonableness, note the difficulties in making a suspended possession order 'by consent' – *Hounslow LBC v McBride* (1999) 31 HLR 143, CA, (see below).

16.3 Suspended possession orders

Historically these were made using Form N28 and with reference to HA 1985 s.85(2) and HA 1988 s.9(2).

Note that if a suspended possession order was made on Form N28, in use prior to October 2001, the effect of breach of the terms of the order by a secure tenant was the immediate termination of the tenancy. The tenant became a tolerated trespasser. Forms N28 used after October 2001 and before revision of the form effectively terminated secure tenancies even if tenants complied with the terms of suspension (*Harlow DC v Hall* [2006] EWCA Civ 156; (2006) *The Times*, March 15). See below and the decision of the Court of Appeal in *Bristol CC v Hassan* [2006] EWCA Civ 656; 23 May 2006.

Always explain to tenants who attend, the effect of orders in clear, simple language.

16.4 Notices of intention to bring proceedings

Check that:

- (a) the address is correct
- (b) the ground is set out
- (c) particulars of the ground are set out
- (d) the appropriate period of notice was given:
 - (i) 28 days under HA 1985 s.83 and Sch. 2, but note the special rules below)
 - (ii) 14 days under HA 1988 s.8 and Sch. 2 Grounds 3, 4, 8, 10, 11, 12, 13, 15 or 17
 - (iii) two months under HA 1988 s.8 and Sch. 2 Grounds 1, 2, 5, 6, 7, 9 and 16.

(Note the special rules that apply to HA 1985 s.83A Sch. 2 Grounds 2 and 2A and HA 1988 s.8A and Sch. 2 Grounds 14 and 14A (anti-social behaviour and domestic violence).)

- (e) the notice is still in force – notices cease to have effect after 12 months – see HA 1985 s.83(3)(b) and HA 1988 s.8(3)(c).

16.5 Possession orders

Section 89 HA 1980 provides that in many circumstances the maximum period of time that can be allowed before a possession order takes effect is 14 days, unless exceptional hardship would be caused, in which case the maximum period is six weeks. Section 89 applies to all cases except:

- mortgage possession proceedings
- actions for forfeiture of leases – see County Courts Act 1984 s.138 and Law of Property Act 1925 s.146
- discretionary grounds for possession under Rent Act 1977, HA 1985 and HA 1988
- restricted contracts under Rent Act 1977, and
- rental purchase agreements (HA 1980 s.88).

If an order for possession is made under a mandatory ground, this should be noted on the court file to avoid the kind of difficulties relating to applications to suspend experienced in *Capital Prime Plus plc v Wills* (1999) 31 HLR 926, CA – see *Diab v Countrywide Rentals 1 plc* (2001) 10 July, ChD.

Note the forms most commonly used:

- N26 (order for possession, rented land)
- N27 (forfeiture)
- N28 (suspended possession order).

16.6 Suspension of warrants

The relevant legislation is HA 1985 s.85(2) and HA 1988 s.9(2).

Note that if the warrant has been executed, there is no jurisdiction to suspend unless:

- (a) the original possession order is set aside (e.g. under CPR 39.3); or
- (b) the warrant has been obtained by fraud oppression or abuse of process (*Hammersmith and Fulham LBC v Hill* (1995) 27 HLR 368).

It is wise to ascertain the amount of the alleged arrears from the landlord and whether or not that sum is disputed by the tenant before hearing the tenant's submissions. If the arrears are disputed, 'the up-to-date position has to be clearly and accurately established' before hearing the application – *Haringey LBC v Powell* (1996) 28 HLR 798, CA.

If there is sufficient time before execution, it is always preferable to hear applications to suspend on notice – if necessary abridging the time for service under CPR 3.1(2)(a).

If the warrant is suspended, always explain the effect of this to tenants in clear, simple language.

16.7 Accelerated possession procedure

See CPR 55.11–55.19.

This can only be used by landlords who wish to recover possession from assured shorthold tenants after service of a valid section 21 notice.

If the landlord complies with the procedure and there is no defence, the judge shall make an order for possession without requiring the attendance of the parties (CPR 55.17).

Common defects are:

- missing documents (e.g. tenancy agreement, notices under s.20 and s.21)
- claims not brought by landlord (see *Chesters Accommodation Agency Ltd v Abebrese* (1997) *The Times*, July 28, CA)
- fixed-term tenancies which have not expired and which contain no break clause

- invalid s.21 notices (e.g. giving less than two months' notice, or if served during a periodic tenancy not expiring on the last day of a period of the tenancy (s.21(4)(a)).

16.8 Mortgage possession proceedings

The court should always be provided with the following

- evidence – normally in written form
- office copy entries or the original Charge Certificate
- Family Law Act search
- notice to occupiers.

Before considering what order should be made, it is always wise to note:

- the date of the charge
- the amount of the initial advance
- the current arrears
- the current outstanding balance
- the current monthly instalments
- the date and amount of the last payment
- the number of years of the term remaining.

Note the court's powers under Administration of Justice Act 1970 s.36 to adjourn, stay or suspend if the arrears are likely to be paid during a 'reasonable period'. Prima facie this means the remaining term of the mortgage (*Cheltenham and Gloucester Building Society v Norgan* [1996] 1 WLR 343; [1996] 1 All ER 449, CA). The position is different where there are 'all moneys' charges securing, for example bank overdrafts which are repayable on demand (see *Habib Bank v Taylor* [1982] 1 WLR 1218, CA).

If claimants seek a money judgment for the outstanding balance, they are entitled to such a judgment (*Cheltenham and Gloucester Building Society v Grattidge* (1993) 25 HLR 454, CA), although, if the possession order is suspended, it is normal to suspend any money judgment on the same terms.

As to costs, see CPR 48.3, s.50 of the Costs Practice Direction and *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2)* 1993] Ch 171, [1992] 3 WLR 723, [1992] 4 All ER 588, CA. It is normal to order 'costs to be added to security' or to say nothing about costs and to leave the lender to rely upon the terms of the mortgage deed. The court may only order 'costs not to be added to security' if there has been unreasonable conduct by the lender.

Part 2: Secure tenancies

16.9 Introduction

Tenants in the public sector who enjoy security of tenure have secure tenancies – see HA 1985 Pt IV. Secure tenants can only be evicted if:

- the landlord serves a notice seeking possession (or persuades the court that it is just and equitable to dispense with such a notice)
- the landlord proves a ground for possession, and
- (in most cases) the landlord satisfies the court that it is reasonable to make a possession order.

Secure tenants also enjoy other important rights, such as the right to buy (often at a discount), the right of family members to succeed to the tenancy after death of the tenant, rights to mutual exchange, etc.

Section 79 HA 1985 provides that a secure tenancy exists at any time when:

- a) the property is a '**dwelling-house**' – see s.112
- b) it is let as a '**separate dwelling**'
- c) the '**landlord condition**' is satisfied – see s.80
- d) the '**tenant condition**' is satisfied – see s.81, and
- e) none of the **exceptions** in Sch. 1, s.89(3) and (4), s.90(3) and (4) and s.91(2) and (3) applies.

Licensees may enjoy the same rights as secure tenants, provided that the licence was not granted as a temporary expedient to someone who entered the premises as a trespasser – see s.79(3) and (4).

16.10 The landlord condition

HA 1985 lists the types of landlord who can be secure landlords.

It includes:

- **local authorities** – see s.4
- **housing action trusts** – see s.4.
- **urban development corporations** – see s.4
- **housing co-operatives** – see s.5.

Note that if a **housing association** granted a tenancy before 15 January 1989, and all the other requirements of a secure tenancy exist, that tenancy remains a secure tenancy – see s.80(1) prior to amendment by HA 1988 and HA 1988 s.35. Tenancies granted by housing associations on or after 15 January 1989 are likely to be assured or assured shorthold tenancies within the meaning of HA 1988.

The Court of Appeal has held that the landlord condition is not satisfied if there are joint landlords and only one of the joint landlords comes within the list of bodies specified in s.80(1) - see *R v Council of City of Plymouth and Cornwall CC ex p Freeman* (1987) 19 HLR 328, CA.

16.11 The tenant condition

See HA 1985 s.81.

In order to gain and retain public sector security of tenure, tenants must occupy premises as their 'only or principal home' (cf Housing Act 1988 s.1(1)(b) ('as his only or principal home'), Leasehold Reform Act 1967 s.1 ('as his residence') and Rent Act 1977 s.2 ('as his residence'). Security of tenure and associated rights, such as the right to buy, are lost if secure tenants cease to occupy premises as their only or principal home (*Sutton LBC v Swann* (1986) 18 HLR 140, CA) or if they sublet or part with possession of the whole (HA 1985 s.93). However, it is possible for tenants or licensees to have two or more homes in the public rented sector, but only the one which is the 'principal' home can be secure.

In order to maintain a 'home' a tenant need not be physically resident, so long as there is an intention to return after a temporary absence and some physical sign of continued occupation (e.g. furniture and possessions in the property). Two houses can be occupied as a home at the same time – *Crawley BC v Sawyer* (1988) 20 HLR 98, CA where a council tenant went to live with his 'girlfriend' for a period of approximately one and a half years during which time the gas and electricity supplies to the premises which he rented from the council were cut off. Held that the rented premises remained his principal home throughout the period.

It is possible for a tenant to lose security of tenure by reason of non-occupation but to regain it by re-occupying the property before service of a notice to quit - see *Hussey v Camden LBC* (1995) 27 HLR 5, CA where, as the tenant was occupying the property as his only or principal home at the time of service of the notice to quit, the Court of Appeal held that the earlier loss of security was irrelevant.

Sub-letting of the whole of premises means that any tenancy ceases to be secure – see s.93 and *Jennings v Epping Forest DC* (1993) 25 HLR 241, CA, *Muir Group Housing Association Ltd v Thornley* (1993) 25 HLR 89, CA and *Brent LBC v Cronin* (1997) 30 HLR 43, CA, cf *Merton LBC v Salama* (1989) CAT No 89/169; June 1989 Legal Action 25, CA (parting with possession of part of premises – tenancy remained secure). Parting with possession is not to be inferred simply from the fact that another person has been allowed to use and occupy a tenant's home during his temporary absence – *Lam Kee Ying v Lam Shes Tong* [1975] AC 247, PC.

16.12 Excluded categories

See HA 1985 Sch. 1 which provides that following cannot be secure tenancies

- long lessees
- introductory tenancies
- demoted tenancies
- premises occupied in connection with employment
- land acquired for development
- accommodation for homeless persons
- accommodation for asylum seekers
- temporary accommodation for persons taking up employment
- private sector leasing (short-term arrangements)
- temporary accommodation during works
- agricultural holdings
- licensed premises
- student lettings
- business tenancies under Landlord and Tenant Act 1954 Pt II, and
- almshouses.

16.13 Security of tenure

A secure tenancy cannot be brought to an end by a *landlord* except by obtaining an order of the court (HA 1985 s.82). This principle does not apply where the tenancy has ceased to be secure (e.g. as a result of the tenant ceasing to occupy it as his only or principal home – see s.81, but note the need for a court order under the Protection from Eviction Act 1977) or where the termination is brought about by the action of a tenant by serving a notice to quit on the landlord (see, for example, *LB Hammersmith and Fulham v Monk* [1992] 1 AC 478; [1991] 3 WLR 1144; [1992] 1 All ER 1, HL, *Harrow LBC v Johnstone* [1997] 1 All ER 929, [1997] 1 WLR 459, HL; *Greenwich LBC v McGrady* (1982) 81 LGR 288; (1982) 46 P&CR 223; (1983) 6 HLR 361; (1982) 267 EG 515, CA); *Newham LBC v Kibata* [2003] EWCA Civ 1785; 9 December 2003; and *Bradney v Birmingham CC*; *Birmingham CC v McCann* [2003] EWCA Civ 1783; 9 December 2003.

Note also *Harrow LBC v Qazi* [2003] UKHL 43; [2003] 3 WLR 792, where by a majority (Lord Bingham and Lord Steyn dissenting) the House of Lords held that the law enabling a public authority landlord to exercise its unqualified right to recover possession, following service of a *tenant's* notice to quit which has terminated the tenancy, with a view to making the premises

available for letting to others on its housing list, does not violate the essence of the right to respect for the home under Article 8(1). Contractual and property rights cannot be defeated by a defence based on Article 8 (Lord Hope and Lord Scott), although in exceptional cases where defendants believe that local authorities are acting unfairly or from improper motives, they can apply to the High Court for judicial review (Lord Millett). (See too *Lambeth LBC v Kay*; *Leeds CC v Price* [2006] UKHL 10; [2006] 2 WLR 570.)

16.14 Notice of proceedings

HA 1985 s.83 (as introduced by HA 1996 s.147) provides that the court shall not entertain possession proceedings against a secure tenant unless the landlord has served a section 83 notice or the court considers it just and equitable to dispense with the requirement.

A section 83 notice must state the ground for possession and give 'particulars' of the ground (s.83(2)(c)).

As to **service** see *Wandsworth LBC v Atwell* (1995) 27 HLR 536; [1996] 01 EG 100, (1996) 94 LGR 419, CA and *Enfield LBC v Devonish* (1997) 29 HLR 691, (1996) *The Times*, December 12 [1996] EGCS 194, CA. If there are joint tenants, it should be addressed to all of them – *Newham LBC v Okotoro* March 1993 Legal Action 11, Bow County Court.

Notices must specify a date after which proceedings may be brought which must not be earlier than the date on which the tenancy could otherwise be brought to an end by a notice to quit served by the landlord. (See also Protection from Eviction Act 1977 s.5.) However a notice may state that proceedings under Ground 2 (nuisance or anti-social behaviour) may be begun immediately. In that case, the notice should specify the date sought by the landlord as the date on which the tenant is to give up possession.

Notices cease to be in force 12 months after the date specified in the notice. If that date passes, a new notice should be served (s.83(3)(b) and s.83A).

16.15 Particulars of the ground

In rent arrears cases the particulars given must at least show the amount claimed, and in all cases the notice must be sufficiently particularised to 'tell the tenant what he had to do to put matters right before proceedings are commenced' – *Torrige DC v Jones* (1986) 18 HLR 107 at 114; (1985) 276 EG 1253, CA. ('The reasons for taking this action are non-payment of rent' is not sufficient – the notice is invalid.)

See too:

- *East Devon DC v Williams and Mills* December 1996, Legal Action 13, Exeter County Court (possession claimed under Sch. 2 Ground 1 (breach of the terms of the tenancy). The notice set out the relevant terms but in the section marked 'Particulars' merely repeated the terms in full, without indicating the conduct relied upon – the possession claim was struck out)

- *Slough BC v Robbins* [1996] 12 CL 353, Slough County Court (notice seeking possession giving as particulars: ‘Numerous complaints have been received over a period of time that annoyance and nuisance is being caused to your neighbours by noise and disruptive behaviour. This nuisance and annoyance has been investigated by my staff and I believe the complaints to be substantiated’ was held to be defective – the proceedings were struck out), and
- *South Buckinghamshire CC v Frances* [1985] 11 CL 152; [1985] CLY 1900, Slough County Court (where it was held that HA 1980 s.33(2) (now HA 1985 s.83(2)(c)) required detailed particulars which should be similar to those required under Law of Property Act 1925 s.146. It must be obvious to tenants what they must do. Although there was discretion to allow amendment of the notice (now contained in Housing Act 1985 s.84(3)), the council would not be permitted ‘at a late stage’ in the proceedings to amend the notice to include a schedule of dilapidations and particulars of nuisance which ought to have been included in the original notice).

However in *Dudley MBC v Bailey* [1991] 10 EG 140; (1990) 22 HLR 424, CA Ralph Gibson LJ stated that:

‘The question is whether, at the date of the notice, the landlord has in good faith stated the ground and given the particulars of that ground. The requirement of particulars is satisfied, in my judgment, if the landlord has stated in summary form the facts which he then intends to prove in support of the stated ground for possession. Error in the particulars does not, in my judgment, invalidate the notice, although it may well affect the decision of the court on the merits’. (22 HLR at p.431)

See too *Marath v MacGillivray* (1996) 28 HLR 484, CA under Housing Act 1988 s.8.

16.15.1 Adding or altering particulars

Section 83 expressly enables a court to give leave for a landlord to add to or alter the ‘grounds’ on which possession is claimed (s83(4)), but is silent about the addition or alteration of the ‘particulars’ required by the notice. In *Camden LBC v Oppong* (1996) 28 HLR 701, CA, the Court of Appeal held the s.83(4) power extended to a power to add to or alter the particulars. The court stated that such leave would be granted only in circumstances where it would be just do so and that the nature and extent of the addition or alteration would always be a critical factor.

16.15.2 Form of notice

The form of notice is prescribed by the Secure Tenancies (Notices) Regulations 1987 SI 1997/775 (as amended). Paragraph 2(1) of the Regulations states that the notice should be ‘substantially to the same effect’ as that contained in the Regulations. Minor variations are unlikely to invalidate a notice – see *Dudley MBC v Bailey* [1991] 10 EG 140; (1990) 22 HLR 424, CA where Ralph Gibson LJ held that a notice, although not precisely in the prescribed form, was ‘substantially to the same effect’.

In *City of London v Devlin* (1995) 29 HLR 58, CA, the Court of Appeal held that a notice seeking possession which had not been signed by the Director of Housing above that description which appeared on the printed form was 'substantially to the same effect' as that prescribed and accordingly valid. Simon Brown LJ stated that: 'The reality here is that a series of aridly technical points raised by the applicant at trial were defeated by a series of creative, largely procedural rulings' which were not even arguably impermissible.

16.15.3 Dispensing with a notice requirement

The court considers it just and equitable to dispense with the requirement of such a notice (s.83(1)(b)). This provision brings secure tenancies into line with assured tenancies (cf HA 1988 s.8(1)(b)). It is 'obviously only in relatively exceptional cases where the court should be prepared to dispense with a section 83 notice' (*Braintree DC v Vincent* [2004] EWCA Civ 415). There have been few Court of Appeal decisions involving cases where landlords have completely failed to serve any notice under s.83 or HA 1988 s.8. However in *Kelsey HA v King* (1995) 28 HLR 270, CA it was held that it was just and equitable to dispense with the notice requirement where a notice served was found to be invalid because it had not given adequate particulars of the complaints of nuisance. The court had regard, inter alia, to (a) developments since the commencement of proceedings; and (b) the late stage in the proceedings at which any point about the deficiency in the notice was taken.

16.16 Grounds for possession

See HA 1985 s.84 and Sch. 2.

There are 18 grounds for possession. The most common are Ground 1 (rent arrears or breach of an obligation of the tenancy) and Ground 2 (nuisance or annoyance). The burden of proof lies upon the landlord to satisfy the court that the ground for possession is made out.

16.17 Reasonableness

HA 1985 s.84 provides that in relation to the discretionary grounds (Grounds 1 to 8) the court shall not make an order for possession unless it considers it reasonable to do so.

If one of Grounds 1 to 8 is proved, the court may:

- make an outright order for possession
- make a conditional or suspended possession order – see Form N28
- adjourn the proceedings, either to a fixed date, or more normally, with liberty to restore, often on condition that the defendant pays the current rent and £x per week of arrears of £yyyy, the next payment to be made by 4 p.m. on [date]
- (rarely) dismiss the claim for possession.

In a public sector possession list, the most common questions one has to consider are 'Is it reasonable to make a possession order? If it is, is it reasonable to suspend the order?'

Housing Act 1985 s.84

This states:

The court shall not make an order for possession [of a dwelling-house let under a secure tenancy] . . . on the grounds of [e.g. arrears of rent] unless it considers it reasonable to make the order.

Housing Act 1985 s.85(2)

This states:

On the making of an order for possession of such a dwelling-house on any of those [discretionary] grounds, or at any time before the execution of the order, the court may (a) stay or suspend the execution of the order.

The question of reasonableness is an 'overriding requirement' – *Smith v McGoldrick* (1976) 242 EG 1047, CA. Proof of reasonableness is a separate and distinct requirement in addition to proof of the ground for possession.

Failure to consider reasonableness means that a judgment for possession is a nullity – ***Shrimpton v Rabbits*** (1924) 131 LT 478.

See too *R v Bloomsbury and Marylebone County Court ex p Blackburne* (1985) 275 EG 1273, CA concerning a consent order whereby Mr Blackburne was paid £11,000 in return for him consenting to possession. He subsequently changed his mind and instructed new solicitors to apply for judicial review to quash the possession order. The Court of Appeal granted his application, approving Glidewell J's conclusion that:

'if there is before the court a claim that the defendant is entitled to the benefit of the Rent Acts, the court may not make an order for possession unless it is satisfied, either by evidence or by admission by or on behalf of the defendant, that he is not entitled to that protection.' ((1984) HLR 56 at 67)

Exactly the same principles apply to secure tenancies.

Hounslow LBC v McBride (1999) 31 HLR 143, CA concerned possession proceedings relying on HA 1985 Sch. 2 Grounds 1 (non-payment of rent) and 2 (conduct causing nuisance or annoyance). Before the hearing of the claim the parties agreed that a suspended possession order should be made. At a brief hearing, attended by solicitors, the district judge made the order sought, without hearing any evidence. Later Ms McBride applied to have both the possession order and the warrant set aside, claiming that the district judge had not had sufficient material before her to enable her to reach the conclusion that it was reasonable to make the order. The circuit judge allowed the defendant's application. The Court of Appeal agreed that the order should be set aside.

Nothing in the order itself or in the circumstances surrounding the making of the order indicated that Ms McBride had admitted that it was reasonable to make the order. Nor had the district judge taken sufficient steps to satisfy herself of the reasonableness of making the order.

See too *R v Birmingham CC ex p Foley* March 2001 Legal Action 29, (2000) 14 December, QBD and *Baygreen Properties Ltd v Gil* [2002] EWCA Civ 1340; [2002] 49 EG 126; [2003] HLR 12.

The burden of proving that it is reasonable to make a possession order (whether suspended or absolute) lies upon the claimant landlord.

In *Cumming v Danson* [1942] 2 All ER 653 at 655, Lord Greene MR said:

‘in considering reasonableness . . . it is, in my opinion, perfectly clear that the duty of the Judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad common sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account.’

The requirement of reasonableness ‘gives the court a very wide discretion’ – *Bell London and Provincial Properties Ltd v Reuben* [1946] 2 All ER 547, CA.

In considering reasonableness, courts should not be concerned with the propriety or impropriety of a landlord's policy or rules, but rather with ‘the reasonableness in the particular case of ordering possession’. *Barking and Dagenham LBC v Hyatt* (1992) 24 HLR 406, CA.

Note also the Department of the Environment Circular 18/87, *Rent Arrears* which states:

‘[Local authorities] should see that, where a tenant does have an arrears problem, there is an approved approach with officers giving warnings of graded severity, depending on the duration and scale of the arrears, building up to repossession of the dwellings as the final sanction.

‘Personal contact with tenants . . . is important. As arrears often start with personal crises an authority's initial response should be a sympathetic one, aimed at gaining if possible an understanding of the tenant's circumstances and tailoring the subsequent action to those specific circumstances. . . . the initial aim should be to help the tenant to avoid further arrears and to clear those already incurred. . . . In the Minister's view, legal action should ideally be avoided by identifying and controlling an arrears problem early enough to solve it.

The Joseph Rowntree Research Paper *Housing cases in county courts* states:

‘Social landlords . . . take the view that there is a greater chance of recovering arrears if tenants remain in occupation.’ (p33)

See too the Pre Action Protocol on Possession Claims (approved by the CPR Rules Committee but not yet published at the time of writing of this chapter.)

16.18 Three ‘reasonableness’ examples

1. *Woodspring DC v Taylor* (1982) 4 HLR 95, CA

The defendants, were in their mid-fifties, had been tenants of the council for 24 years and had a good rent record. Mr Taylor was made redundant and received a large tax demand. His wife became ill. They owed £557 at the start of possession proceedings and £700 at the date of the hearing. By this time, they were receiving benefit and the DHSS was paying current rent plus £1 per week off the arrears. In the county court, a registrar made an absolute possession order. The Court of Appeal set aside the order, finding that no reasonable registrar could have found that it was reasonable to make the order. Waller LJ stated that it was ‘hard to understand a conclusion that it was reasonable to make an order turning them out of their house’ (at 99).

2. *Second WRVS Housing Society v Blair* (1987) 19 HLR 104, CA

The defendant, a secure tenant, had lived in property for seven years when he became affected by a psychiatric illness. His life ‘fell apart’ and rent arrears mounted. He received supplementary benefit towards the housing costs but spent it on food. The county court judge, finding that there were arrears of £1,198 and that the tenant was still on supplementary benefit, ordered possession suspended for two months in case the debt could be cleared in that time. The Court of Appeal set aside the order, because the judge had failed to consider in detail the question of reasonableness and, in particular, the available welfare benefits. The case was sent back for reconsideration to ascertain ‘more fully the benefits which could be obtained from DHSS in relation to arrears and more generally in relation to [the tenant’s] condition’. Dillon LJ stated:

‘It is well known that arrangements can be made with the DHSS when housing benefit is payable to see that the rent is paid direct to the landlord and I feel that is a matter which should have been taken into account.’

3. *Brent LBC v Marks* (1999) 31 HLR 343, CA

In 1993 the tenant was granted a secure tenancy. Arrears of rent for temporary accommodation were transferred to the rent account. Housing benefit was then credited weekly to the rent account from 1996 to meet current rent. Deductions were made by the DSS from income support and paid to the council in respect of (a) the charges which were ineligible for housing benefit and (b) £2.50 per week towards the arrears. These payments were made quarterly in arrears and so the pattern of the rent account was of regularly accruing arrears which were only reduced four times a year. The council served a notice of intention to seek possession in 1997. Legal aid was not granted to the tenant, but her solicitors wrote to the court drawing attention to the pattern of payment and the reasonableness condition. A circuit judge granted a possession order, suspended on terms that the tenant pay current rent and £2.50. The Court

of Appeal allowed the tenant's appeal and remitted the case to the county court. The judge ought to have had more regard to the fact that current rent was being paid and that the benefit system was both causing and then dealing with the arrears. Looking at the overall position this was a responsible tenant whose position had stabilised. On a new exercise of the court's discretion, a possession order might not be made.

16.19 The effect of breach of a suspended possession order

Suspended possession orders made in Form N28 prior to Bristol CC v Hassan [2006] EWCA Civ 656; 23 May 2006

If a suspended possession order is breached, the tenancy comes to an end. The former tenant becomes 'a tolerated trespasser' (*Burrows v Brent LBC* [1996] 1 WLR 1448, HL).

Thompson v Elmbridge BC [1987] 1 WLR 1425; (1987) 19 HLR 526; (1988) 86 LGR 245, CA. Mrs Thompson was a sole tenant. A possession order was made on grounds including arrears of rent. The order was suspended on terms including payment of £10 per week towards the arrears. Further arrears accrued and Mrs Thompson departed, leaving her husband in possession. The council sought to execute the possession order. Mr Thompson who was paying current rent by way of certificated housing benefit applied for a transfer of the tenancy to him under the Matrimonial Homes Act 1983. The Court of Appeal held that the secure tenancy had come to an end on the first occasion that the terms of the suspended possession order had been breached by failing to pay the current rent or instalments towards the arrears. There was no tenancy to transfer under the Matrimonial Homes Act 1983.

If a suspended possession order is breached:

- the tenant loses the right to buy (HA 1985 s.118)
- the tenant loses rights to mutual exchanges (HA 1985 s.92)
- the tenant loses the benefit of the landlord's repairing obligations (e.g. Landlord and Tenant Act 1985 s.11)
- the tenant's spouse loses rights to the transfer of the tenancy under the Family Law Act 1996
- the tenant's spouse and/or other members of the family lose the right to succeed to the tenancy on death (HA 1985 ss.87–90).

If the occupant is still in possession it is possible to apply for a further suspension under HA 1985 s.85(2) or HA 1988 s.9(2), but that protection may be lost – see *Leicester CC v Aldwinkle* (1992) 24 HLR 40, CA. A suspended possession order was made in 1983. By 1988, the tenant was in breach of its terms as a result of non-payment following a period of illness. This breach brought her tenancy to an end. In early 1989, the ex-tenant, although often away from the property for hospital and other treatment, was in contact with the housing benefit department

of the council in an attempt to get the arrears cleared in part by a backdated housing benefit claim. Despite this, in July 1989, the council applied for and obtained a warrant and executed the possession order by recovering possession in August 1989. The ex-tenant returned to her flat in November to find the property secured and all her possessions removed. She applied to have the warrant stayed or suspended. However, the power to suspend or stay is available only before actual execution of the order (HA 1985 s.85). The Court of Appeal held that (a) application without notice for a warrant was provided for by rules of court and use of the rules was not an abuse of process and (b) the court could not 'write in' to the rules a requirement for notice to cure a perceived breach of natural justice. Leggatt LJ, giving the judgment, urged that consideration be given to the introduction in the county court of an equivalent to RSC Order 46 r.3 which requires that leave be sought before a possession order can be executed.

In such circumstances, the only remedies available to the ex-tenant are (a) to apply to set aside the original possession order (see eg CPR 39.3); or (b) to apply to set aside the warrant. This can only be done if the warrant was obtained by fraud, or there has been abuse of process or oppressive conduct on the part of the plaintiff (*Hammersmith and Fulham LBC v Hill* (1995) 27 HLR 368, CA). See below.

Further, in *Harlow DC v Hall* [2006] EWCA Civ 156; (2006) *The Times*, March 15, the Court of Appeal held that the form of 'suspended possession order' (N28) in use from 15 October 2001 had the effect, contrary to the intention of the judges using it, of terminating the secure tenancy, *even if the tenant fully complied with the terms of suspension*.

Conditional possession orders made in Form N28 introduced after Bristol CC v Hassan [2006] EWCA Civ 656

After *Harlow CC v Hall* HM Court Service adopted a 'temporary fix' which gave effect to judges' intentions of suspending/postponing possession orders, but which still converted tenants into tolerated trespassers immediately upon breach. The new form of conditional order expounded by the Court of Appeal in *Bristol CC v Hassan* postpones possession to a date to be fixed. On breach of any of the terms of the order, the landlord may apply to the court for a date for possession. Breach of such an order does not automatically convert the tenant into a tolerated trespasser.

16.19.1 An alternative?

HA 1985 s.85(1) states:

'Where proceedings are brought for possession of a dwelling-house let under a secure tenancy on any of the grounds set out in Part I or Part III . . . the court may adjourn the proceedings for such period or periods as it thinks fit.'

For these reasons, just as you should always ask yourself whether or not it is reasonable to make an absolute order, you should also ask yourself whether or not it is reasonable to make

a suspended order (see *Laimond Properties Ltd v Raeuchle* (2001) 33 HLR 113, CA). If you do not consider it reasonable you should adjourn on terms. If the tenant fails to comply with the terms, the local authority/housing association restores the action and, unless there are good reasons for the breach of terms, obtain a possession order. (Although I have no set rules, I am far more likely to adjourn on terms if the defendant is in receipt of income support or other state benefits – in such circumstances the Department of Work and Pensions credit the weekly payments towards the rent arrears in arrears, after they are due, with the result that the tenant automatically breaches the suspended possession order and becomes a trespasser.)

16.20 Other points on reasonableness

16.20.1 Breach of repairing obligations

If a defendant counterclaims unsuccessfully for breach of repairing obligations, in ordinary circumstances, it is not reasonable to make a possession order if the tenant has made arrangements, in the event of the failure of his counterclaim, for the early discharge of the arrears. However, in exceptional circumstances where there has been a bad history of persistent delay in paying rent, it may be reasonable to make an absolute order for possession – *Haringey LBC v Stewart* (1991) 23 HLR 557; [1991] 2 EGLR 252, CA.

16.20.2 'A most serious breach'

The proper approach in a case of the commission of 'a most serious breach' of the tenancy agreement is that it will be reasonable to order possession in the absence of some exceptional circumstance – *Bristol CC v Mousah* (1997) 30 HLR 32, CA, (serious drug dealing).

16.20.3 Anti-social behaviour by family members

The fact that anti-social behaviour was caused by the tenant's children or other members of the family does not prevent the court from making an outright possession order (*Kensington & Chelsea RLBC v Simmonds* (1997) 29 HLR 507, (1996) *The Times*, July 15, CA, *Northampton BC v Lovatt* [1998] 07 EG 142, (1998) *The Times*, January 3, CA, *Darlington BC v Sterling* (1996) 29 HLR 309, CA and *Portsmouth City Council v Bryant* (2000) 32 HLR 906, [2000] EHLR 287, CA (claimant does not have to establish fault or even knowledge on the part of the tenant, but the extent of personal fault is relevant when considering reasonableness). However an outright possession order may not be appropriate where the anti-social behaviour was not caused by the tenant, but by a member of the tenant's family who has since left the premises, with the result that the chances of recurrence are reduced (*Castle Vale Housing Action Trust v Gallagher* [2001] EWCA Civ 944, (2001) 33 HLR 810).

16.20.4 Confirming breaches of covenant

Where there is an admitted breach of covenant and an intention to continue with the breach a landlord should only be refused possession in a 'very special case' – *Sheffield CC v Green* (1994) 26 HLR 349, CA; cf *Bell London & Provincial Properties Ltd v Rueben* [1947] KB 157, CA). It is in the public interest that necessary and reasonable conditions in tenancy agreements are enforced fairly and effectively. *Sheffield CC v Jepson* (1993) 25 HLR 299, CA concerned a

tenant keeping a dog in breach of an express term of the tenancy agreement. Although there was little evidence about the defendant's dog in particular, it was reasonable to make a suspended possession order.

The availability of the power to grant an injunction restraining breach of the terms of a tenancy agreement is not a reason to make a suspended possession order rather than an outright order (*Canterbury City Council v Lowe* (2001) 33 HLR 583, [2001] L&TR 152, CA). In a case involving the parking of a caravan in a front garden in breach of the terms of a tenancy agreement, the Court of Appeal held that the propriety of the council's policy was not a factor relevant to the exercise of discretion. The judge should not have been concerned with the propriety or impropriety of the policy rule. His concern should have been with the reasonableness in the particular case of ordering possession – *Barking and Dagenham LBC v Hyatt and Hyatt* (1992) 24 HLR 406, CA. cf *Wandsworth LBC v Hargreaves* (1994) 27 HLR 142, CA. (The latter case concerned a breach of a term of the tenancy when a visitor brought petrol into the flat to make petrol bombs, which were then thrown from the window. A fire started in the flat from spilt petrol, causing £14,000 worth of damage. The Court of Appeal dismissed the council's appeal against a refusal of the county court judge to order possession.

16.20.5 Homelessness

A local authority's housing obligations towards the defendant if made homeless, and in particular the question of whether rehousing is likely to be refused as a result of intentional homelessness may have greater or lesser weight when considering reasonableness, depending on the circumstances – cf:

- *Rushcliffe BC v Watson* (1992) 24 HLR 123, CA (the prospect that, if evicted, the tenant would probably be found to be intentionally homeless was a very real consideration);
- *Bristol CC v Mousah* (1997) 30 HLR 32, CA (whether the tenant would be rehoused as homeless was a matter for the council and not for the court);
- *Darlington BC v Sterling* (1996) 29 HLR 309, CA (a decision by a circuit judge that as a district judge had formed the view that the tenant ought not to be roofless he should not have ordered possession unless the council could show it would provide suitable alternative accommodation overturned by the Court of Appeal); and
- *Shrewsbury and Atcham BC v Evans* (1997) 30 HLR 123, CA (the judge had not needed to consider how a tenant who had 'flagrantly and deliberately lied about her circumstances' in order to obtain council housing would be rehoused).

16.20.6 Recent legislation

The Anti-Social Behaviour Act 2003 s.16 introduces new HA 1985 s.85A and HA 1988 s.9A.

If the court is considering whether it is reasonable to make an order for possession on Ground 2 or Ground 14, the court must consider, in particular:

- the effect that the nuisance or annoyance has had on persons other than the person against whom the order is sought
- any continuing effect the nuisance or annoyance is likely to have on such persons
- the effect that the nuisance or annoyance would be likely to have on such persons if the conduct is repeated.

It is now essential to refer to these provisions in every judgment when deciding whether or not it is reasonable to make a possession order based upon anti-social behaviour.

In recent years, the trend in the Court of Appeal has been to adopt a far tougher stance in relation to anti-social behaviour. The Court of Appeal has been more ready to dismiss appeals by tenants against outright orders and to overturn county court decisions not leading directly to the eviction of tenants - see, for example:

- *Manchester City Council v Higgins* [2005] EWCA Civ 1423; [2006] HLR 14
- *Norwich City Council v Famuyiwa* [2004] EWCA Civ 1770; (2005) *The Times*, January 24
- *London and Quadrant Housing Trust v Root* [2005] EWCA Civ 43; [2005] HLR 28 (an assured tenancy case) *New Charter Housing (North) Ltd v Ashcroft* [2004] EWCA Civ 310; [2004] HLR 36 (an assured tenancy case)
- cf *Moat Housing Group South Ltd v Harris and Hartless* [2005] EWCA Civ 287; [2005] 3 WLR 691.

16.21 Further suspension

The court's power to stay or suspend execution or postpone the date of possession may be exercised when making an order for possession 'or at any time before the execution of the order' (s.85(2)).

When exercising its powers under s.85 the court shall impose conditions with respect to the repayment of arrears of rent and mesne profits unless it considers that to do so would cause exceptional hardship (s.85(3)). There have been no reported Court of Appeal decisions as to what might constitute 'exceptional hardship'.

Where there is a substantial dispute about the amount claimed and the tenant's compliance with the order, the up-to-date position has to be clearly and accurately established before considering an application to suspend under s.85 - *Haringey LBC v Powell* (1996) 28 HLR 798, CA.

The court, exercising its discretion on an application to suspend a warrant under s.85, may take account of matters (e.g. breaches of the terms of the tenancy agreement or anti-social

behavior) other than those relied upon as grounds for making the original possession order – although it is not always right to do so (*Sheffield City Council v Hopkins* [2001] EWCA Civ 1023, [2002] HLR 12, (2001) *The Times*, July 23, CA).

A tenant against whom an outright order has been made under a discretionary ground is entitled to make a fresh application to a district judge to stay or suspend execution. Such an application ‘is not in any way affected or fettered by the reasons given by [the district judge who heard the possession claim]... on such an application the district judge can take all relevant circumstances into account as they appear at the time of the application. Those will include any medical evidence which is before the court, any evidence as to the defendant’s behaviour since the original order and the effect of an immediate order for possession which is not suspended upon the likelihood of the applicant being re-housed under the Housing Act 1996.’

There is a continuing remedy in the county court (*Plymouth CC v Hoskin* [2002] EWCA Civ 684, 1 May 2002).

There is no power under s.85(2) to stay or postpone the date for giving up possession under an existing possession order if tenants have already given up possession without the need for execution of the order. The words ‘at any time before the execution of the order’ in s.85(2) have to be read subject to the qualification ‘and for so long as execution is required to give effect to that order’ (*Dunn v Bradford MDC, Marston v Leeds City Council* [2002] EWCA Civ 1137; [2003] HLR 15; (2002) *The Times*, September 5).

A secure tenancy comes to an end on the first occasion that the terms of a pre-*Bristol CC v Hassan* suspended possession order are breached (e.g. by failing to pay the current rent or instalments towards the arrears) – *Thompson v Elmbridge BC* [1987] 1 WLR 1425; (1987) 19 HLR 526, CA and *Burrows v Brent LBC* [1996] 1 WLR 1448, [1996] 4 All ER 577, [1997] 11 EG 150, 29 HLR 167, HL. In this ‘limbo’ period there is neither a tenancy nor a licence. Accordingly, there can be no breach of any express or implied obligations or duties relevant to tenancies or licences (e.g., to repair). See:

- *Thompson v Elmbridge BC* [1987] 1 WLR 1425; (1987) 19 HLR 526, CA (no jurisdiction to transfer tenancy to spouse under Matrimonial Homes Act 1983 after breach of suspended possession order)
- *Leicester City Council v Aldwinkle* (1992) 24 HLR 40, CA; *Tower Hamlets LBC v Azad and Another* (1997) 13 March, September 1997 Legal Action 13, CA; *Brent LBC v Knightley* (1997) 29 HLR 857, (1997) *The Times*, February 26, [1997] EGCS 11, CA (no right to succeed under s.87 after death of tenant if breach of suspended possession order)
- *R v Sheffield CC ex p Creaser and Jarvis* September 1991 Legal Action 15, QBD (no right to internal review of decision to evict as required by the council’s standard tenancy agreement after breach of suspended possession order).

An agreement to forbear from evicting a former tenant after breach of a suspended possession order does not restore the old tenancy but simply means the occupier is in a legal limbo as a 'tolerated trespasser' until either the agreement to forbear is broken (in which case the landlord can seek a warrant) or the former tenant applies successfully to the court to discharge, rescind or modify the order so as to revive the earlier tenancy (*Burrows v Brent LBC* [1996] 1 WLR 1448, [1996] 4 All ER 577, [1997] 11 EG 150, 29 HLR 167, HL and *Greenwich LBC v Regan* (1996) 28 HLR 469, 72 P&CR 507, CA). Occupiers are not, however, homeless because they continue in occupation by 'rule of law' (HA 1996 s.175(1)(c)). If either party wishes to revive the old tenancy for the purpose of enforcing its express or implied terms, they can apply to the court for an order varying the date on which possession is to be given so that the old tenancy can be resurrected (s.85(2)).

Note the case of *Swindon Borough Council v Aston* [2002] EWCA Civ 1850; [2003] HLR 42. Although 'the court will be extremely reluctant to infer the creation of a new secure tenancy during the limbo period', viewed objectively, the conduct of both landlord and tenant in this case was sensibly referable only to the existence of a new tenancy. That was confirmed by the way in which the landlord relied upon the terms of his 'tenancy agreement' to coerce him into keeping the garden in proper order, and by the provision of the new tenancy agreement. Mr Aston was accordingly a secure tenant from approximately three months after he cleared the arrears. It was neither possible nor necessary to rescind the original order. Cf *Newham LBC v Hawkins* [2005] EWCA Civ 451; [2005] HLR 42.

As to applications for orders under s.85(2)(b) retrospectively to revive tenancies, see *Lambeth LBC v Rogers* [2000] 03 EG 127, CA, *Routh v Leeds CC* June 1998 Legal Action 11, CA and *Marshall v Bradford MBC* [2002] HLR 22, CA where it was said that when considering an application to revive retrospectively a tenancy, the court should bear in mind: (i) the tenant's previous payment record; (ii) whether all parties were before the court; and (iii) whether the tenant was seeking merely the execution of works of repair or also damages for past disrepair.

16.21.1 After the warrant has been executed

The court's power to stay or suspend execution or postpone the date of possession only applies **before the execution of the order** – *Hammersmith and Fulham LBC v Hill* (1995) 27 HLR 368; [1994] 2 EGLR 51, CA. After execution an occupier can only be restored to possession if either:

- the possession order is set aside (see, for example, *Governors of Peabody Donation Fund v Hay* (1987) 19 HLR 145, CA; *Hackney LBC v White* (1995) 28 HLR 219, CA; and *Tower Hamlets LBC v Abadie* (1990) 22 HLR 264, CA), or
- the warrant has been obtained by fraud, abuse of process or oppression (*Hammersmith and Fulham LBC v Hill* (1995) 27 HLR 368; [1994] 2 EGLR 51, CA – it was arguable that the council had behaved 'oppressively' where the tenant claimed that after issue of the warrant, but before execution, council officers had said that the defendant would have no chance of having the warrant suspended unless she was able to pay £1,000 within 24 hours.

In *Southwark LBC v Sarfo* (2000) 32 HLR 602, CA Roch LJ said:

‘[O]ppression may be very difficult if not impossible to define, but it is not difficult to recognise. It is the insistence by a public authority on its strict rights in circumstances which make that insistence manifestly unfair. The categories of oppression are not closed because no-one can envisage all the sets of circumstances which could make the execution of a warrant oppressive’

‘Oppression’ is not limited to acts by the landlord. Misleading information from a court office, depriving a tenant of taking steps to have execution of a warrant for possession stayed prior to execution, may amount to oppression (*Hammersmith & Fulham LBC v Lemeh* ([2001] L&TR 423, (2001) 33 HLR 231, and *Lambeth LBC v Hughes* (2001) 33 HLR 350, CA). However it has also been held that:

- a possession warrant obtained and executed against a secure tenant without fault on anyone's part cannot properly be set aside as oppressive or an abuse of process
- oppression cannot exist without the unfair use of court procedures, and
- something more than the mere use of the eviction process – some action on someone's part which was open to criticism – is required before the court's procedures can be said to have been unfairly used (*Jephson Homes HA v Moisejevs* [2001] 2 All ER 901, (2001) *The Times*, January 2, CA and *Circle 33 Housing Trust v Ellis* [2005] EWCA Civ 1233; [2006] HLR 7).

The Court of Appeal has held that the procedure which allows the issue of a warrant of possession and the arrangements for execution following breach of a suspended possession order do not infringe tenants' rights under ECHR Articles 6, 8 or 14 (*Southwark LBC v St Brice* [2001] EWCA Civ 1138, [2002] 1 WLR 1537, [2002] L&TR 11.) but note that as a result of HRA concerns, bailiffs should now deliver Form N54 (Notice of Eviction) to all addresses where evictions are due to take place and hand it to the defendant personally or leave it at the property in an envelope addressed to the defendant(s) by name and ‘any other occupiers’.

16.22 Introductory tenancies

Introductory tenancies are a form of probationary tenancy introduced by HA 1996 and granted by some local authorities lacking security of tenure within the first year of the tenancy. HA 1985 Sch. 1 para. 1A provides that introductory tenancies cannot be secure tenancies (HA 1996 Sch. 14, para. 5).

HA 1996 s.124 provides that ‘a local housing authority or housing action trust (HAT) may elect to operate an introductory tenancy regime.’ The DoE's *Circular on Introductory Tenancies* (2/97) suggests that local authorities should consult with existing tenants in accordance with HA 1985 s.105 before setting up an introductory tenancy regime (para. 6). Where such an election is made, all new periodic tenancies and licences (HA 1996 s.126) which would otherwise be secure tenancies are introductory tenancies or licences unless immediately

before the new tenancy, one or more of the tenants was either a secure tenant or an assured tenant of a registered social landlord. Tenancies remain introductory tenancies until the end of the 'trial period' which lasts for one year after the date on which the tenancy was entered into, or the date on which the tenant was first entitled to possession, whichever is later. Earlier periods where the tenant had another introductory tenancy or had an assured shorthold tenancy granted by a registered social landlord count towards the trial period provided that there is no gap between them.

Tenancies cease to be introductory tenancies if:

- the circumstances are such that the tenancy could not be secure, or
- a person or body other than a local housing authority or HAT becomes the landlord, or
- the election is revoked, or
- the tenant dies and there is no-one qualified to succeed (HA 1996 s.125 and s.133(3)).

The DoE's *Circular on Introductory Tenancies* (No. 2/97) suggests that landlords should ensure 'that introductory tenancies can never be used as a weapon against vulnerable individuals and ensure that there are safeguards to protect such tenants. . . [They] must be vigilant to ensure that neighbours are not able to make a case for eviction against a vulnerable tenant whose behaviour may be different through no fault of their own. (paras 9 and 11)' Where there are vulnerable tenants, they should liaise with social services and should have arrangements 'for automatic notification to social services at an early stage once any problems arise' (para. 12). The Circular also states that 'eviction is not necessarily appropriate when problems arise between a vulnerable tenant and neighbours' (para. 14) and that 'landlords should have fair and rigorous procedures in place to investigate complaints against tenants (para. 19)'. The local authority associations have produced comprehensive good practice guidance on running an introductory regime which should be read in conjunction with the circular.

Landlords may only bring introductory tenancies to an end by obtaining a possession order in court (HA 1996 s.127). Before bringing proceedings landlords must serve notices giving reasons for the decision to seek a possession order and specifying a date after which court proceedings may be begun. The notice given must be equivalent to that which would otherwise be needed to terminate the tenancy by notice to quit. It must also inform tenants of their right to 'request a review of the landlord's decision' and that they may seek advice from a CAB, housing aid centre, law centre or solicitor (HA 1996 s.128). The Circular states: 'As good practice landlords should include a full statement of the reasons for seeking possession which could include a case history of the sequence of events' (para. 16).

'The precise way in which a landlord chooses to conduct . . . a review is for each landlord to determine' (DoE Circular, para. 22). However the Introductory Tenants (Review) Regulations 1997 SI 1997/72 set out certain basic requirements to be followed on reviews. Reviews are not to be by way of a hearing unless tenants inform their landlords that they wish to have an oral hearing (para. 2). A request for an oral hearing must be made within 14 days after receipt of the notice seeking possession. Reviews must be carried out by a person who was not involved in the original decision to seek possession (para. 3). If the review is not to be conducted by an oral hearing, the tenant may make written representations (para. 4).

If there is an oral hearing, the tenant has a right to:

- be heard and accompanied or represented by another person
- call persons to give evidence
- put questions to anyone who gives evidence, and
- make representations in writing (para. 5).

The tenant must be notified of the time, date and place of any hearing. It must take place not less than five days after the request for a hearing (para. 6). The Regulations do not however specify a minimum period between notification of the date of the hearing and the hearing itself.

The review must be carried out and the tenant notified of the result before the date specified as the date after which proceedings may be begun.

If a landlord serves a notice which expires and then brings proceedings against an introductory tenant, the court must make a possession order. It is not necessary for the landlord to give evidence about the reason for seeking possession (but see below). All that is necessary is to prove that notice was served and that any review has been determined or that the period specified in the notice has expired (s.127). 'Suspended possession orders . . . are not appropriate for introductory tenancies. Applications to court for possession must lead to eviction' (DoE Circular, para. 20).

The Act is silent as to the methods by which tenants may challenge review decisions. This is not dealt with either in the Introductory Tenancies (Review) Regulations. Tenants who are dissatisfied with a review decision may apply for judicial review. In view of *Avon DC v Buscott* [1988] QB 656, [1988] 1 All ER 841, CA and *Manchester City Council v Cochrane* (see below) if tenants wish to challenge a review decision by making an application for judicial review, and it seems to the county court hearing a possession claim that there is some prospect of success, the possession proceedings should be adjourned pending determination of the application for judicial review.

In *Manchester City Council v Cochrane* [1999] 1 WLR 809, (1999) *The Times*, January 12, CA, introductory tenants tried to defend the proceedings and were allowed to file a defence

denying the alleged breaches of the tenancy agreement and alleging that there had been a denial of natural justice. The Court of Appeal held that the county court is not able to entertain such a defence. The word 'shall' in s.127(2) means that once the requirements of s.128 have been complied with, the county court has no discretion but to make an order for possession. The private law right of tenants under an introductory tenancy is no more than a right to remain in possession until an order for possession is made. Tenants are not entitled to raise by way of private law defence any alleged invalidity of the review. That is a matter of public law.

In *R (McLellan) v Bracknell Forest DC* [2001] EWCA 1510, [2002] QB 1129; [2002] 2 WLR 1448, [2002] 1 ALL ER 899, the Court of Appeal held that eviction of an introductory tenant falls within ECHR Article 8(1) (*Lambeth LBC v Howard* (2001) 33 HR 58, CA). Accordingly it is necessary to consider under Article 8(2) whether an eviction is in accordance with the law and whether it is necessary for the protection of the rights of others. A tenant under an introductory tenancy has the right to raise the question whether it is reasonable in the particular case to insist on eviction, i.e. whether the eviction can be justified under Article 8(2) (*Poplar HARCA v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, and Human Rights Act 1998 s.7(1)(b)). The review procedure taken together with the availability of judicial review provides adequate protection.

Section 127 does not prevent tenants from relying on Convention rights if the procedure in *Manchester City Council v Cochrane* [1999] 1 WLR 809 is followed. Therefore the introductory tenancy scheme is not as such incompatible with Article 8 and there is no reason to think that individuals' rights will be infringed without remedy from the courts. If the pace of eviction is too fast the court may grant a limited extension of time under HA 1980 s.89(1). Section 89 is not itself incompatible with Article 8.

The decision of the review panel involves the determination of an introductory tenant's civil rights and so ECHR Article 6 is engaged. However the combination of the review panel plus judicial review is enough to meet the requirements of Article 6. There is no requirement that a council must be satisfied that there has been a breach of the terms of the tenancy before serving notice – the question is whether, in the light of allegation and counter-allegation, it was reasonable for the council to take a decision to proceed with termination of the tenancy. There is no reason to believe that the review procedure will not be operated fairly, nor any reason to believe that judicial review will not provide an adequate safeguard for tenants enabling them to challenge any unfairness or infringement of their Convention rights, bearing in mind that the courts will 'examine the decision maker's actions more rigorously' where a discretionary power is liable to interfere with fundamental human rights.

Where a review has taken place it should be the norm for the council to set out in an affidavit before the county court how the review procedure was operated in each case so that the court has the necessary information to decide whether to adjourn pending an application for judicial review.

If the 'trial period' ends before determination of the possession proceedings, the tenancy remains an introductory tenancy until the determination of proceedings or the date on which possession is to be given up, whichever is later (s.130(2)).

Although introductory tenants lack security of tenure, the Act gives them some rights which are equivalent to those of secure tenants: for example, succession (HA 1996 ss.131–133 and s.140) and information and consultation (ss.136–137). The right to a repair scheme (HA 1985 s.96) has been extended to introductory tenancies by the Secure Tenancies (Right to Repair) (Amendment) Regulations 1997 SI 1997/73).

Assignment of introductory tenancies is in general prohibited although they may be transferred by orders made under Matrimonial Causes Act 1973 s.24, Matrimonial and Family Proceedings Act 1984, Children Act 1989 Sch. 1 and to a person who would be qualified to succeed the tenant if the tenant died immediately before the assignment (HA 1996 s.134). The Housing Act 1996 (Consequential Amendments) Order 1997 SI 1997/74 amends other legislation so as to include references to introductory tenancies.

16.23 Demoted tenancies

Under the Anti-Social Behaviour Act 2003 county courts have the power to change secure or assured tenancies into demoted tenancies, lacking the rights that are associated with secure and assured tenancies. Procedure relating to demoted tenancies is contained in CPR Pt 55 and 65 and PD 65.

Under HA 1985 s.82A local housing authorities, housing action trusts and registered social landlords may apply to a county court for a demotion order. The court can only grant a demotion order if:

- a notice seeking a demotion order has been served or it is just and equitable to dispense with that requirement (HA 1985 s.83 as amended)
- it is satisfied that the tenant or a person residing in or visiting the dwelling-house has engaged or has threatened to engage in conduct to which s.153A or s.153B of the HA 1996 (anti-social behaviour or use of premises for unlawful purposes) applies, and
- it is reasonable to make the order.

A demotion order:

- (a) terminates the secure tenancy with effect from the date specified in the order
- (b) if the tenant remains in occupation, creates a demoted tenancy – see HA 1996 ss.143A–143P. (If the landlord is a registered social landlord, the tenancy becomes a demoted assured shorthold tenancy.)

- (c) makes it a term of the demoted tenancy that any arrears of rent payable at the termination of the secure tenancy become payable under the demoted tenancy
- (d) lacks security of tenure but (s.143E) before bringing a possession claim, a landlord of a demoted tenant must serve on the tenant a notice of proceedings which:
 - states that the court will be asked to make a possession order
 - sets out the reasons for the landlord's decision to apply for the order, and
 - specifies the date after which proceedings for the possession of the dwelling-house may be begun.

Section 143F provides a procedure for an internal review of the decision to seek possession.

If this procedure is followed, the court must make a possession order (s.143D).

However, in the absence of a possession claim, if the tenant remains in occupation, s.143B provides that (in most circumstances), a demoted tenancy becomes a secure tenancy at the end of the period of one year (the demotion period) starting with the day the demotion order takes effect.

Part 3: Assured tenancies

Most private sector landlords let on **assured shorthold** tenancies (see below). Most **assured** tenancies are granted by housing associations or other registered social landlords. (If granted before 15 January 1989, they would have been secure tenancies under HA 1985, but see HA 1988 s.35.)

16.24 Requirements for an assured tenancy

There can only be an assured tenancy if there is a tenancy. There can be no such thing as an 'assured licence'. See *Street v Mountford* [1985] 2 WLR 877, HL; *AG Securities v Vaughan* [1988] 2 WLR 689, HL.

Housing Act 1988 s.1 contains four pre requisites for the creation of an assured tenancy:

1. **The dwelling house must be let as a separate dwelling.** This is the well-known phrase which appears in the Rent Act 1977 s.1. The word 'dwelling' is not a term with a specialised legal meaning. It is 'the place where [an occupier] lives and to which he returns and which forms the centre of his existence ... No doubt he will sleep there and usually eat there; he will often prepare at least some of his meals there.' However there is no legislative requirement that cooking facilities must be available for premises to qualify as a dwelling. In deciding whether an occupant has security of tenure: 'The first step is to identify the subject-matter of the tenancy agreement. If this is a house or part of a house of which the tenant has exclusive possession with no element of sharing, the only question is whether, at the date when proceedings were brought, it was the tenant's

home. If so, it was his dwelling. . . . The presence or absence of cooking facilities in the part of the premises of which the tenant has exclusive occupation is not relevant'

(*Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301, [2001] 3 WLR 806, [2002] 1 ELL ER 46).

Section 3 provides that if a tenant enjoys exclusive occupation of some rented accommodation with a right to share other accommodation with other people, apart from the landlord, the mere fact that the other accommodation is shared, does not prevent the tenant from occupying the accommodation which is not shared as a separate dwelling (compare Rent Act 1977 s.22 and HA 1985 s.79).

2. The tenant, or if there are joint tenants, each of the joint tenants, must be individuals. A genuine letting to a company can never be an assured tenancy (*Hiller v United Dairies* [1934] 1 KB 575, *Hilton v Plustitle Limited* [1988] 3 All ER 1051 and *Kaye v Massbetter Ltd* [1991] 39 EG 129. In such cases, the tenancy is unprotected and may be terminated either by the passing of time or by service of a notice to quit. If this is done, a landlord who brings possession proceedings is automatically entitled to possession without having to prove any ground for possession.
3. The tenant, or if there are joint tenants, at least one of them, must occupy the premises as his only or principal home. This is the same wording as HA 1985 s.81, the 'tenant condition' which applies to secure tenancies. It is a more restrictive definition than the comparable provisions in the Rent Act 1977 s.2(1)(a). It is not possible for assured tenants to maintain assured tenancies in more than one home at the same time, although there is no reason why assured tenants should not be temporarily absent from the premises in question provided that they remain their only or main home. See *Crawley BC v Sawyer* (1987) 20 HLR 98; *London Borough of Sutton v Swann* (1985) HLR 140; *Notting Hill Housing Trust v Etoria* April 1989 Legal Action 22.
4. A tenancy cannot be an assured tenancy if any of the exceptions listed in Sch. I applies. Many of these exceptions are similar to those set out in Rent Act 1977 Pt I. These are:
 - A tenancy which is entered into before or pursuant to a contract made before 15 January 1989.
 - Tenancies of dwelling houses with high rateable values – i.e. over £1500 in Greater London, over £750 elsewhere (compare Rent Act 1977 s.4). Note that references to the Rating (Housing) Regulations 1990 SI 1990/434 provide that where tenancies are granted after 1 April 1990, they cannot be assured if the rent is more than £25,000 per annum. 'Rent' does not include sums paid in respect of services, repairs, maintenance or insurance.
 - Tenancies at a low rent – either where no rent is payable or where the rent is less than two thirds of the rateable value. Note that the references to the Rating

(Housing) Regulations provide that tenancies granted after 1 April 1990 cannot be assured if the **rent** is less than £1,000 per annum in London or less than £250 per annum outside London.

- Business tenancies – see Pt II of the Landlord & Tenant Act 1954 (compare the Rent Act 1977 s.2 and s.24).
- Tenancies under which dwelling-houses consist of or comprise premises licensed for the sale of intoxicating liquors for consumption on the premises (compare the Rent Act 1977 s.11).
- Tenancies under which agricultural land, exceeding two acres is let together with the dwelling-house and agricultural holdings within the meaning of the Agricultural Holdings Act 1986 (compare the Rent Act 1977 s.10).
- Lettings to students by specified educational institutions (SEIs). See the Assured and Protected Tenancies (Lettings to Students) Regulations 1998 SI 1998/1967 which define SEIs – basically any institution providing higher or further education which is publicly funded and various other named institutions. Note too that lettings by registered housing associations cannot be assured tenancies (compare the Rent Act 1977 s.8).
- Holiday lettings – where the purpose of the tenancy is to confer on the tenant the right to occupy the dwelling-house for a holiday (compare the Rent Act 1977 s.9). See *Buchmann v May* [1978] 2 All ER 993; *R v Camden Rent Officer ex parte Plant* (1981) 257 EG 713.
- Resident landlords:
 - The dwelling house let forms only part of a building and the building is not a purpose built block of flats.
 - The tenancy was granted by an individual who at the time when it was granted occupied as his only or principal home another dwelling house which is either part of the same flat or part of the same building (see HA 1988 s.1(l)(b)).
 - At all times since the tenancy was granted the interest of the landlord under the tenancy has belonged to an individual who has occupied as his only or principal home another dwelling in the same flat or building.
 - The tenant was not prior to the grant of the tenancy an assured tenant of accommodation elsewhere in the same building.

There are periods of disregard after the sale of premises or the death of a landlord when the fact that there is no resident landlord living in the building does not mean that the 'resident landlord' exception ceases to apply (see Pt III of Sch. 1).

Compare the Rent Act 1977 s.12 and Sch. 2.

This is essentially a question of fact for the trial judge to consider and the Court of Appeal will generally be reluctant to overturn such findings – see, for example, *Lewis-Graham v Conacher* [1992] 02 EG 171, CA.

- Crown tenancies – but not premises managed by the Crown Estates Commissioners.
- Premises let by local authorities, the Commission for New Towns, Urban Development Corporations, Development Corporations, Waste Disposal Authorities, Residuary Bodies, Fully Mutual Housing Associations, Housing Action Trusts etc.

The provision of ‘board’ is *not* an exception (compare the Rent Act 1977 s.7).

If one of the exceptions in Sch. 1 applies, the tenant has no security of tenure. Once a notice to quit has been served and has expired the tenant has no statutory protection, except, in some cases, the Protection from Eviction Act 1977 s.3 which provides that it is unlawful for a landlord to evict such a tenant without taking court proceedings. The landlord need only prove that the contractual tenancy has been terminated. Note the form of notice to quit prescribed by the Notice to Quit (Prescribed Information) Regulations 1988 SI 1998/2201, although old forms of notice to quit may still be valid – *Swansea City Council v Hearn* (1991) 23 HLR 284 and, in another context, *Tadema Holdings v Ferguson* (2000) 32 HLR 866, CA.

16.25 Security of tenure

Section 5 provides that a periodic assured tenancy can only be brought to an end by a landlord obtaining an order of the court or by surrender. Section 5(1) makes it clear that notices to quit served by landlords have no effect upon periodic assured tenancies. Service of a notice to quit by a tenant may terminate an assured tenancy (*London Borough of Greenwich v McGrady* (1982) 6 HLR 36 and *LB Hammersmith v Monk* [1992] AC 478).

If a contractual fixed term assured tenancy is brought to an end, other than by an order of a court or by surrender, a periodic assured tenancy (called a ‘statutory periodic tenancy’) normally comes into existence immediately after the fixed-term tenancy has come to an end. The basic rule is that the terms of the new statutory periodic tenancy are the same as for the former contractual assured tenancy (s.5(3)(e)). However s.6 provides a mechanism by which landlords and tenants may propose new terms.

16.26 Possession proceedings against assured tenants

The Housing Act 1988 s.5(1) provides

‘An assured tenancy cannot be brought to an end by the landlord except by obtaining an order of the court in accordance with the following provisions of this Chapter or Chapter II below ...’

16.26.1 Notices of intention to bring proceedings

A landlord wishing to bring possession proceedings against an assured tenant should first serve a notice in the prescribed form informing the tenant that it is the landlord's intention to bring proceedings on one or more grounds specified in the notice. The form of notice is prescribed Form 3 in the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997 SI 1997/194. Paragraph 2 states 'any reference to a numbered form is a reference to the form bearing that number in the schedule to these Regulations, *or to a form substantially to the same effect.*' A notice which complies with an old version of the (Forms) Regulations, but not the current version, is likely to be valid (*Tadema Holdings v Ferguson* (2000) 32 HLR 866, CA).

The notice must include:

(a) The text of the grounds for possession relied upon.

A notice which under the heading 'Ground 8' simply states 'At least [two] months rent is unpaid' is not valid – *Mountain v Hastings* (1993) 25 HLR 427, CA. Although the full text of the ground as set out in HA 1988 Sch. 2 may not have to be repeated verbatim,

'the words used [must] set out fully the substance of the ground so that the notice is adequate to achieve the legislative purpose of the provision. That purpose . . . is to give . . . information . . . to enable the tenant to consider what she should do and, with or without advice, to do that which is in her power and which will best protect her against the loss of her home' (per Ralph Gibson LJ)

and

(b) Particulars of the grounds relied upon.

For example, if proceedings are to be issued under Ground 11, it is not enough for the notice merely to state 'persistent rent arrears', without giving any figures of arrears or dates of late payment. See:

- *Kelsey HA v King* (1995) 28 HLR 270, CA (notice invalid due to insufficient particulars, but just and equitable to dispense with notice)
- *Marath v MacGillivray* (1996) 28 HLR 484, CA (section 8 notice stating as particulars of the arrears 'At a meeting between the landlord and tenant on 24 July 1994 the arrears were agreed at £103.29 . . . Since that date no payments of rent have been made.' No figure for the arrears as at the date of the notice was given, but notice held to be valid. The Court of Appeal held that a notice from a landlord to a tenant complies with HA 1988 s.8 provided that 'it is made clear . . . that more than [two] months rent is at the date of that notice unpaid and due and provided also that in some way or other that notice makes it clear either how much, or how the tenant can ascertain how much, is alleged to be due.' It is not necessary for the notice to contain a schedule of the arrears.

- *Torrige DC v Jones* (1985) 18 HLR 107, CA
- *South Bucks DC v Francis* (1985) 11 CL 152, cc
- but cf *Dudley MBC v Bailey* (1990) 22 HLR 424, CA.

The court has power to alter or add to the grounds specified in the notice (s.8(2)). However this power can only be exercised if there is a valid notice – it is solely directed to the possibility of adding to or deleting grounds, not to correcting an invalid notice (*Mountain v Hastings* (1993) 25 HLR 427; [1993] 29 EG 96, CA).

Under s.8(2) the court may allow particulars to be added if they have not been given earlier (*Marath v MacGillivray* – see above).

Schedule 2, Pt IV makes it clear that it is sufficient if just one out of two or more joint landlords gives notice.

The required length of notices of intention to bring possession proceedings against assured tenants depends upon the ground for possession:

- (a) Grounds 1 (owner-occupiers), 2 (mortgagees), 5 (ministers of religion), 6 (demolition, reconstruction), 7 (devolved under will), 9 (suitable alternative accommodation) and 16 (let as a consequence of employment) – **two months' notice** or notice equivalent to the contractual period of the tenancy, whichever is longer, has to be given (s.8(4)).
- (b) Grounds 3 ('out of season holiday let'), 4 ('out of term student let', 8 (two months' rent arrears), 10 (rent arrears), 11 (persistent arrears), 12 (breach of obligation), 13 (waste or neglect), 14A (domestic violence) and 15 (ill treatment of furniture) - at least **two weeks' notice** required (s.8(3)(b)).
- (c) If the landlord relies upon Ground 14 (nuisance or annoyance) proceedings may begin **immediately after service of the notice**.

If a tenancy agreement provides for a longer period of notice, it appears that the landlord is bound by that longer period unless it is just and equitable to dispense with service of the notice (*Northern British Housing Association v Sheridan* (2000) 32 HLR 346, CA and see below).

16.26.2 Service of section 8 notices

See *Enfield BC v Devonish and Sutton* (1997) 29 HLR 691, (1997) 75 P&CR 288, (1996) *The Times*, December 12, [1996] EGCS 194, CA; *Wandsworth LBC v Attwell* (1995) 27 HLR 536; [1996] 01 EG 100, (1996) 94 LGR 419, CA.

Proceedings must be begun within 12 months of service of the notice, otherwise a new notice must be served.

There is no need for a landlord of an assured tenant to serve a notice to quit as well as a notice of intention to bring proceedings (s.5(l)).

The court has power to dispense with service of a notice prior to the institution of possession proceedings if it considers it 'just and equitable' to do so (s.8(1)(b)) but not in proceedings brought under Ground 8, i.e. eight weeks' arrears (s.8(5)).

It is 'obviously only in relatively exceptional cases where the court should be prepared to dispense with a section 83 notice' (*Braintree DC v Vincent* [2004] EWCA Civ 415).

In deciding whether it is just and equitable to dispense with service, a court should 'weigh all the factors before it' and 'take all the circumstances into account, both from the view of the landlord and the tenant' – *Kelsey HA v King* (see above) (regarding full particulars attached to summons, delay on part of tenant in applying to strike out possession proceedings).

The attitude of the court in deciding what is just and equitable should be the same as in the Rent Act cases such as *Fernandes v Parvardin* (1982) 264 EG 49, 5 HLR 33, CA, and *Bradshaw and Martyn v Baldwin-Wiseman* (1985) 17 HLR 260; 49 P&CR 382, CA.

See too:

- *Boyle v Verrall* [1997] 04 EG 145, 29 HLR 436, CA (below)
- *Northern British Housing Association v Sheridan* (2000) 32 HLR 346, CA
- *Knowsley Housing Trust v Revell; Helena Housing Ltd v Curtis* [2003] EWCA Civ 496; [2003] HLR 63
- *McShane v William Sutton Trust* (1997) 1 L&T Review D67, December 1997 Legal Action 13, (county court) where it was held that although there is nothing to prevent a landlord from serving a section 8 notice on the same day as proceedings are commenced and there is nothing in the rules preventing a landlord from applying ex parte to dispense with service of a section 8 notice, following *Kelsey HA v King* (1995) 28 HLR 270, CA it is not possible for a judge deciding whether or not to dispense with service to weigh up all factors from both points of view without the tenant being in court.

16.26.3 Grounds for possession

As well as serving a Notice of Intention to Bring proceedings for possession, or persuading the court to dispense with such a notice, a landlord must satisfy the court that one of the grounds for possession set out in Sch. 2 exists. Some grounds for possession are mandatory, whereas others are discretionary, with a requirement that the landlord must satisfy the court that it is reasonable to make an order for possession as well as satisfying the ground for possession.

Note that some of these grounds for possession may also be relied upon by landlords during the fixed term of an assured shorthold tenancy – see below.

16.26.4 Mandatory grounds

Ground 1 – Returning owner occupier

A landlord must prove that:

1. At, or before, the grant of the tenancy the landlord gave notice in writing that possession might be recovered on this ground. The notice need not be in any particular form and may be included as a recital in any tenancy agreement provided that the agreement does not operate retrospectively. The court has power to dispense with such a notice if it considers it just and equitable. See:
 - (a) *Boyle v Verrall* [1997] 04 EG 145, 29 HLR 436, CA. (In determining whether it is just and equitable to dispense with notice, the court should look at all the circumstances of the case. If oral notice was given when a tenancy was granted, it may be an important factor favouring dispensation. However it does not follow that oral notice is a prerequisite for such a decision. On the other hand absence of oral notice is not a reason for restricting dispensation to circumstances where there is an ‘exceptional case’. A tenant's persistent late payment of rent is a relevant circumstance.)
 - (b) *Mustafa v Ruddock* (1998) 30 HLR 495, CA. Matters relevant to the exercise of discretion included:
 - (i) the original letting purported to be an assured shorthold
 - (ii) the proceedings were undefended: there was no evidence of hardship to the tenant
 - (iii) there was genuine hardship to the landlord
 - (iv) the error arose through the mistake of the landlord's agent who was now bankrupt.The failure to notify the tenant that possession might be required was an important factor but in no way conclusive.
 - (c) *Hegab v Shamash* June 1998 Legal Action 13, CA. The Court of Appeal stated that it was ‘inherent in . . . deciding what was just and equitable [to take] into account all the circumstances’. The court allowed the tenant's appeal because the judge had failed to take into account two matters, namely the fact that the tenant had paid a deposit of £4,000 in relation to a proposed purchase of the premises which had not been refunded and that the landlord had not paid the costs of earlier proceedings concerning an illegal eviction by the landlord.

and either

2. At some time before the grant of the tenancy the landlord, or if there are joint landlords, at least one of them, occupied the dwelling-house as his only or principal residence. A landlord's previous occupation may be temporary and intermittent in order to suffice – see *Naish v Curzon* (1984) 17 HLR 220, CA and *Mistry v Isidore* (1990) 22 HLR 281, CA cf *Ibie v Trubshaw* (1990) 22 HLR 191, CA.

or

3. The landlord (or at least one of them) 'requires the dwelling-house as his or his spouse's only or principal home'. The landlord need not show that the premises are reasonably required, merely that the landlord 'bona fide wants' or 'genuinely has the immediate intention' of occupying the premises (*Kennealy v Dunne* [1977] QB 837, CA). Premises need not be required as a permanent residence and fairly intermittent residence will be sufficient (*Naish v Curzon* (1984) 17 HLR 220, CA).

This ground for possession is not available to a new landlord who has acquired the premises 'for money or money's worth' from an original landlord who gave a notice that possession might be recovered under this ground (*Epps v Rothnie* [1945] KB 562, CA).

Ground 2 – Mortgagees

This ground applies if:

1. a mortgagee is entitled to exercise a power of sale (e.g. if the mortgagor has defaulted on instalments of the mortgage) and
2. the mortgagee requires vacant possession to exercise that power and
3. a Ground 1 notice was given before the commencement of the tenancy or the court considers it just and equitable to dispense with the notice.

Note the comments of Lord Denning MR in *Quennell v Maltby* [1979] 1 WLR 318.

Ground 3 – Tenancy preceded by 'holiday let'

A landlord must prove that:

1. not later than the grant of the tenancy, notice was given that possession might be recovered under this ground and
2. at some time during the 12 months prior to the grant of the tenancy, the dwelling-house was occupied for a holiday.

The court has no power to dispense with service of the notice required prior to the grant of the tenancy. See *Fowler v Minchin* (1987) 19 HLR 224, CA but cf *Springfield Investments v Bell* (1990) 22 HLR 440, CA.

Ground 4 – Educational institutions

This ground applies where, during the 12 months preceding the tenancy, premises were let by a specified educational institution. As with Ground 3, notice stating that this ground may be relied upon has to be served before the commencement of the tenancy. See the Assured and Protected Tenancies (Lettings to Students) Regulations 1998 SI 1998/1967.

Ground 5 – Ministers of Religion

This ground applies to premises which are ‘held for the purpose of being available for occupation by a minister of religion as a residence from which to perform duties of his office’. Notice that possession might be required must be served before the grant of the tenancy and the landlord must satisfy the court that the property is required for occupation by a minister of religion as a residence.

Ground 6 – Demolition or reconstruction

This ground is available for a landlord who ‘intends to demolish or reconstruct the whole or a substantial part of the dwelling-house or to carry out substantial works’. This ground is very similar to Landlord & Tenant Act 1954 s.30(l)(f).

1. It has been held that ‘reconstruction’ means ‘a substantial interference with the structure of the premises and then a rebuilding, in probably a different form, of such part of the premises as has been demolished by reason of the interference with the structure’. See *Joel v Swaddle* [1957] 3 All ER 325 at 329; *Barth v Pritchard* [1990] 20 EG 65.
2. The landlord must show that the intention will be fulfilled shortly after the date of the hearing (*Betty's Cafe v Phillips* [1958] 1 All ER 607, HL). There are two elements to the concept of intention:
 - (i) a genuine desire that the result will come about and
 - (ii) a reasonable prospect of bringing about that result.
3. *Edwards v Thompson* [1990] 29 EG 41. The landlord failed to prevent the grant of a new tenancy because she had not found a developer at the time of the hearing and ‘there was a real possibility that [she] would not be in a position to carry out the entire development on the termination of the current tenancy. . . . She had failed to show that she had the means and ability; she had not established the necessary intention.’

It is not essential that a landlord obtain planning permission in advance if it can be shown that there is a reasonable prospect of getting consent. (*Gregson v Cyril Lord* [1962] 3 All ER 907).

4. The landlord must show that, because of one of four specified reasons, the intended work cannot reasonably be carried out without the tenant giving up possession of the premises. 'Possession' means 'putting an end to legal rights of possession' and not merely access (*Heath v Drown* [1972] 2 All ER 561 and HA 1988 s.16).
5. This ground is not available to a landlord who has acquired his interest in the property by purchasing it after the grant of the tenancy.
6. When a possession order is made under this ground the landlord must pay a sum equal to the tenant's reasonable removal expenses (s.11(1)).

Ground 7 – Death of the tenant

Although an assured tenancy may pass by will or on intestacy after the death of a tenant, the landlord may obtain possession if proceedings are brought within 12 months of the death of the tenant or the date upon which the landlord became aware of the death. 'Proceedings for possession' means court proceedings, not the service of a section 8 notice (*Shepping v Osada* [2000] 30 EG 125, [2001] L&TR 489, (2000) *The Times*, March 23, CA).

This ground does not apply if a spouse succeeds to the tenancy under s.17. The Act specifies that acceptance of rent after the death of the former tenant should not be regarded as creating a new tenancy unless the landlord has agreed in writing to a change in the terms of the tenancy, such as an increase in rent.

Ground 8 – Two months' rent arrears

As amended by HA 1996 s.101.

This is the first of three distinct grounds for possession based on rent arrears, although in practice most landlords plead all three in the alternative. Under Ground 8, two months' rent arrears (or eight weeks' arrears in the case of a weekly tenancy) give a landlord an automatic right to a possession order. However the landlord must prove that there are two months' arrears, both at the time when the notice of the landlord's intention to bring proceedings is served and at the date of the hearing.

Judges are entitled to find that Ground 8 is satisfied despite the fact that housing benefit is owed by the local authority (*Marath v MacGillivray* (1996) 28 HLR 484, CA, where the local authority paid benefit after the hearing with the result that the arrears were reduced below the Ground 8 threshold).

In *North British Housing Association Limited v Matthews* [2004] EWCA Civ 1736; [2005] 1 WLR 3133; [2005] 2 All ER 667 the Court of Appeal held, in relation to Ground 8, that:

1. The court cannot be satisfied that the landlord is entitled to possession before the date of the hearing. The date of the hearing is the date when the claim is heard. It is not the date fixed for the hearing if, on that date, an adjournment is granted without a hearing taking place at all.

2. There is no doubt that it is a perfectly proper exercise of the court's discretion to adjourn, if a case has to be taken out of the list because there is no judge available, there has been over-listing or the defendant is prevented by ill-health from attending court.
3. The court retains jurisdiction to grant an adjournment before it is satisfied that the landlord is entitled to possession. It may be a proper exercise of discretion to adjourn the hearing before the court is satisfied that the landlord is entitled to possession: for example, where there is an arguable claim for damages which can be set off against arrears; where the tenant shows that there is an arguable defence based on accord and satisfaction or estoppel arising from an agreement whereby the landlord accepts an offer by the tenant to pay off the current rent and arrears at a certain rate in return for not pursuing the claim for possession; or where the court is satisfied that there is a real chance that the tenant would be given permission to apply for judicial review of the landlord's decision to claim possession because of abuse of power.
4. However it is not legitimate to adjourn to enable the tenant to pay off arrears and so defeat the claim for possession, unless there are exceptional circumstances, for example, if a tenant is robbed on the way to court or if a computer failure prevents the housing benefit authority from being able to pay benefit due until the day after the hearing date. The fact that arrears are attributable to maladministration on the part of the housing benefit authority is not an exceptional circumstance.
5. Once the court has expressed the conclusion that it is satisfied that the landlord is entitled to possession, there is no power to grant an adjournment in any circumstances (see s.9(6)).

Note *Day v Coltrane* [2003] EWCA Civ 342; [2003] 1 WLR 1379 concerning delivery of a cheque is a conditional payment. If it is agreed (either expressly or through a course of dealing) that payment may be made by cheque, 'where a cheque is offered in payment it amounts to a conditional payment.... from the time when the cheque was delivered' provided that it clears. That principle applies to Ground 8. If a cheque clears on presentation, the debt is paid when the cheque was delivered. An uncleared cheque delivered to the landlord at or before the hearing and which was accepted by him, or which he was bound by an earlier agreement to accept, is to be treated as payment on the date of delivery provided it was subsequently paid on first presentation.

If possession proceedings are brought during the fixed term of a tenancy, there is no power to grant relief from forfeiture – County Courts Act 1984 s.138 does not apply – *Artesian Residential Investments v Beck* [2000] QB 541, [2000] 2 WLR 357, [1999] 3 All ER 113, CA.

With all 'rent arrears' grounds, there may be:

1. The possibility of a defence of set off, based on a counterclaim for breach of repairing obligations (express terms, Landlord and Tenant Act 1985 s.11, Defective Premises Act

1972, quiet enjoyment, etc.). See *British Anzani (Felixstowe) v International Marine Management* [1980] 1 QB 137; *Chiodi v De Marney* [1988] 41 EG 80, CA; *Davies v Peterson* (1989) 21 HLR 63, CA

or

2. A defence relying upon the Landlord and Tenant Act 1987 s.48. See *Dallhold Estate v Lindsey* [1992] 23 EG 112, CA; *Hussain v Singh* [1993] 31 EG 75, CA; *Rogan v Woodfield Building Services* [1995] 20 EG 132, CA; *Drew-Morgan v Hamid-Zadeh* (2000) 32 HLR 316, CA.

16.26.5 Discretionary grounds

Ground 9 – Suitable alternative accommodation

The availability of suitable alternative accommodation, either at the time of the hearing or when the order is to take effect, is a ground for possession. Part III of Sch. 2 gives further clarification as to the matters to be taken into account when determining whether or not accommodation is suitable. When a possession order is made under this ground, the landlord must pay a sum equal to the tenant's reasonable removal expenses (s.11(1)).

Ground 10 – Rent Arrears

A landlord must prove that there were rent arrears both at the date when proceedings were begun and, unless the court considers it 'just and equitable' to dispense with the need for service of a notice prior to issue, that there were arrears when the notice was served. In theory a possession order may be made even if the arrears are paid off before the hearing, although in most circumstances there would be strong grounds for arguing that it would not be reasonable to make an order. See *Dellenty v Pellow* [1951] 2 All ER 716, CA; *Lee-Steere v Jennings* (1987) 20 HLR 1, CA.

Ground 11 – Persistent delay in paying rent

Even if there are no arrears on the date when possession proceedings are issued, persistent delay in paying rent which is due is a ground for possession. The phrase 'persistent delay' is not defined, but is likely to have the same meaning as in the Landlord and Tenant Act 1954 s.30(1)(b), i.e. one instalment of rent has been in arrears for a significant period of time or instalments have persistently been paid late, or both. See *Hopcutt v Carver* (1969) 209 EG 1069; *Horowitz v Ferand* [1956] CLY 4843 (cc).

Ground 12 – Breach of any obligation

This ground applies if 'any obligation of the tenancy (other than one related to the payment of rent) has been broken or not performed'.

Ground 13 – Waste or neglect

This ground applies not only to premises let, but also to common parts.

Ground 14 – Anti-social behaviour

As inserted by HA 1996 s.148.

The tenant or a person residing in or visiting the dwelling-house:

- (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in lawful activity in the locality, or
- (b) has been convicted of :
 - (i) using the dwelling house or allowing it to be used for immoral or illegal purposes, or
 - (ii) an arrestable offence committed in, or in the locality of, the dwelling house.

There is no requirement that any person visiting the premises and causing a nuisance should be there lawfully. The ground is wide enough, for example, to encompass behaviour by a former partner of a tenant who has been excluded, but returns contrary to the tenant's wishes.

Arrestable offences are defined by Police and Criminal Evidence Act 1984 s.24 and include all offences for which the sentence is fixed by law (e.g. life imprisonment), offences for which adults may be sentenced with terms of imprisonment of five years or more, taking motor vehicles without authority and offences under the Sexual Offences Act 1956 s.22 and s.23 (causing prostitution of women and procuring girls under 21).

See too *Northern British Housing Association v Sheridan* (2000) 32 HLR 346, CA.

Ground 14A – Domestic violence

As inserted by HA 1996 s.149.

This ground applies where one of both partners is a tenant and:

- (a) one partner has left because of violence or threats of violence by the other towards that partner or a member of that partner's family, and
- (b) the court is satisfied that the partner who has left is unlikely to return.

Landlords seeking to rely upon this ground must satisfy the court that notice of proceedings for possession has been served on the partner who has left the home or that they have taken reasonable steps to effect service (HA 1996 s.150).

Where possession is sought under Ground 14A, it is not sufficient that the alleged violence or threats of violence were merely one of a range of causes of equal efficacy in the victim's departure from the property. For the ground to be made out it has to be established that the

alleged violence or threat of violence was the dominant, principal and real cause of the departure (*Camden LBC v Mallett* (2001) 33 HLR 204, CA).

Ground 15 – Deterioration of furniture

This ground is not applicable in the context of this bench book.

Ground 16 – Premises let to employees

An employer who has let accommodation to an employee ‘in consequence’ of employment may claim possession if the tenant has ‘ceased to be in that employment’. It applies whether or not the employer requires the premises for another employee.

Ground 17 – Tenancy induced by false statement

The tenant is the person, or one of the persons, to whom the tenancy was granted and the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by:

- (a) the tenant, or
- (b) a person acting at the tenant's instigation.

This ground was introduced by HA 1996 s.102 and is identical to HA 1985 Sch. 2 Ground 5 as amended.

As to the meaning of ‘instigate’, see *Merton LBC v Richards* [2005] EWCA Civ 639; [2005] HLR 44.

It is only available where the defendant is the person to whom the tenancy was granted – not against any assignee (*Islington LBC v Uckac* [2006] EWCA Civ 340; (2006) *The Times*, April 19).

16.26.6 Reasonableness

The criteria for establishing whether or not it is reasonable to make an order for possession against an assured tenant are the same as those used in proceedings against secure tenants. See, for example, *West Kent Housing Association v Davies* (1998) 31 HLR 415, [1998] EGCS 103, CA.

As to suspension of possession orders, see s.9 and the notes on HA 1985 s.85 above. Section 9 ‘gives a wide power to stay or suspend an order for possession which is applicable to all cases except those where it is expressly excluded by statute.’ The power may be exercised where circumstances have changed since the original hearing, even where an outright order was made by a different judge (*Ujima HA v Smith* April 2001 Legal Action 22, (2000) October 16, ChD, where the defendant was by the time of the application to suspend accepting her legal responsibility for serious damage to a shared kitchen and offering to pay £150 in compensation).

Note also *Plymouth CC v Hoskin* [2002] EWCA Civ 684, 1 May 2002.

The same points about 'consent orders' made in respect of secure tenancies apply to assured tenancies. The jurisdiction of the court to make an order for possession under HA 1988 s.7 (the comparable provision for assured tenancies) is limited. If the court is not satisfied that a ground under Sch. 2 has been established it does not have jurisdiction to make the order. A court is under a duty to determine whether the relevant ground has been established, whether or not it has been raised by the parties. Where a court lacks jurisdiction, it cannot be conferred merely by consent. To confer jurisdiction an admission that a ground is satisfied, either express or implied, has to be clearly shown. Any consent order should clearly spell out in express terms the admission made by the tenant, or the court should ask the tenant what admission was being made, so that there can be no room for confusion or doubt in the future (*Baygreen Properties Ltd v Gil* [2002] EWCA Civ 1340; [2002] 49 EG 126; [2003] HLR 12. - 'possession order by consent' approved by circuit judge set aside).

16.26.7 After an outright order

In a case where an outright order for possession was made under HA 1988 Sch. 2, Ground 8, but the landlord subsequently accepted the tenant's offer to pay rent and £100 per month of arrears, the Court of Appeal held that the landlord had done nothing to affect the legal relations between the parties. No new or different terms were arrived at. The landlord had no intention to create a new tenancy. The legal relations between the parties were governed by the terms of the order until the landlord took a position inconsistent with the order (*Stirling v Leadenhall Residential 2 Ltd* [2001] EWCA Civ 1011, [2002] 1 WLR 499, [2001] 3 All ER 645, (2001) *The Times*, July 25, CA).

16.26.8 Demoted tenancies

Under the Anti-Social Behaviour Act 2003 county courts have power to change assured tenancies into demoted tenancies, lacking the rights that are associated with assured tenancies. Procedure relating to demoted tenancies is contained in CPR Pt 55 and Pt 65 and PD 65.

The law concerning assured tenancies is similar to new HA 1985 s.82A (see above). Under new HA 1996 s.6A, if a landlord succeeds, the tenant becomes a demoted assured shorthold tenant. The procedure for obtaining possession is the same as against other assured shorthold tenants (two months' notice under HA 1988 s.21) except that a possession order against a demoted assured shorthold tenant may take effect within six months of the grant of the tenancy.

16.26.9 Assured shorthold tenancies

Requirements for assured shorthold tenancies

The position is different, depending upon whether the tenancy was granted before 28 February 1997 or on or after that date.

1. Tenancies granted before 28 February 1997

Housing Act 1988 s.20 stipulated four requirements for the creation of an assured shorthold tenancy:

1. It had to be for a fixed term of not less than six months.
2. It could not contain any provision enabling the landlord to terminate the tenancy within six months of the beginning of the tenancy.
3. Notice in the prescribed form had to be served before the commencement of the tenancy stating that the tenancy will be an assured shorthold tenancy. The court has no power to dispense with service of this notice. The form of the notice is prescribed by the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1988. See *York and Ross v Casey* [1998] 2 EGLR 25, (1999) 31 HLR 209, CA; *Clickex Ltd v McCann* [1999] 30 EG 96, CA; *Ravenseft Properties Ltd v Hall* [2001] EWCA Civ 2034, [2002] HLR 33; *White v Chubb*; *Kasseer v Freeman* [2001] EWCA Civ 2034, [2002] 11 EG 156; *Osborn and Co Ltd v Dior* [2003] EWCA Civ 281; [2003] HLR 45.

A section 20 notice could be served upon a prospective tenant's agent (*Yenula Properties Ltd v Naidu* [2002] EWCA Civ 719; [2002] 42 EG 162; [2003] HLR 18.

4. It would have been an assured tenancy but for the above three requirements being satisfied.

2. Tenancies granted on or after 28 February 1997

Housing Act 1996 s.96 and Sch. 7 take effect as a new HA 1988 s.19A and Sch. 2A. They provide that all tenancies entered into on or after 28 February 1997, which would otherwise have been assured tenancies, are automatically assured shorthold tenancies lacking long-term security of tenure unless certain exceptions apply (see Sch. 2A). This applies whether the tenancy is granted orally or by a written agreement. In other words, the requirement of a section 20 notice informing the tenant that the tenancy would be an assured shorthold tenancy has been abolished.

Possession proceedings

HA 1988 s.21 provides:

- '21(1) Without prejudice to any right of the landlord under an assured shorthold tenancy to recover possession of the dwelling house let on the tenancy in accordance with Chapter I above, on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy, a court shall make an order for possession of the dwelling house if it is satisfied
- (a) that the assured shorthold tenancy has come to an end and no further assured tenancy (whether shorthold or not) is for the time being in existence, other than a statutory periodic tenancy; and
 - (b) the landlord or, in the case of joint landlords, at least one of them has given to the tenant not less than two months' notice **in writing** stating that he requires possession of the dwelling house.'

All that a landlord need do to recover possession is to:

- (a) prove that the tenancy has come to an end and that no new tenancy has been granted, and
- (b) give at least two months' notice to the tenant that the landlord requires possession, and
- (c) take court proceedings.

If landlords comply with these requirements, they are automatically entitled to possession. The court has no power to suspend possession orders, apart from HA 1980 s.89(1) which provides that orders for possession must take effect no later than 14 days after the court order unless exceptional hardship would be caused, in which case the maximum period that may be allowed is six weeks.

The section 21 notice:

- may be given before any fixed term expires or even at the beginning of the tenancy (s.21(2))
- need not be in any particular form, although it must be in writing (HA 1996 s.98)
- may be given by only one of several joint landlords (s.21(4)(a)).

There is no power to dispense with service of the notice.

It is important to check that:

1. The notice gives at least two months' notice although no actual date need be specified provided that 'the tenant knows or can easily ascertain the date referred to' (*Lower Street Properties Ltd v Jones* [1996] 48 EG 154, CA). The phrase 'at the end of the tenancy' in a notice given pursuant to s.21 means 'after the end of the tenancy' and so complies with the requirements of s.21(4)(a) (*Notting Hill Housing Trust v Roomus* [2006] EWCA Civ 407; 29 March 2006).
2. If the tenancy is a periodic tenancy, the date specified in the notice is (or the period of notice given in the notice expires on) 'the last day of a period of the tenancy' (s.21(4)(a)).

Uncertainty was caused by the dichotomy between the HA 1988, s.21(1)(b) and s.21(4)(a). Section 21(1)(b) merely provides that the landlord must give 'the tenant not less than two months' notice stating that he requires possession of the dwelling-house'. However, s.21(4)(a) provides that the date specified in a notice where there is 'a periodic tenancy' shall be 'the last day of a period of the tenancy'. Although it has been argued that s.21(1) and s.21(4) are simply alternatives that may be used as landlords choose, the better view is that there is no need for the two months' notice to expire on

'the last day of a period of the tenancy' if the notice is served during a fixed-term assured shorthold but this requirement has to be satisfied if the notice is served after the expiry of a fixed term (i.e. during a statutory periodic assured shorthold tenancy). The use of the words 'without prejudice ... to ... subsection (1)' in s.21(4) clearly shows that the two subsections are alternatives and that s.21(4) is not an additional requirement for all s.21(1) notices. The words in s.21(2) ('A notice under paragraph (b) of subsection (1) above may be given before or on the day on which the tenancy comes to an end') indicate that a s.21(1) notice is one which can be served during a fixed term. In contrast, the use of the words 'let on an assured shorthold tenancy which is a periodic tenancy' in s.21(4) indicate that the s.21(4)(b) requirement applies whenever a notice is served during a periodic tenancy – and that includes a statutory periodic tenancy (cf. s.13(1)(a) and (b) and s.15(3)). This approach is also supported by HA 1996, s.98 which refers to s.21(1) notices as being given 'under a fixed term' and s.21(4) as the 'corresponding provision for periodic tenancies'.

In *Gracechurch SA v Tribhovan and Abdul* (2001) 33 H.L.R. 263, CA, Simon Brown LJ described the dismissal of possession proceedings, because a notice requiring possession from a periodic tenant did not expire on the last day of a period of the tenancy, as 'clearly correct'. This was confirmed by the Court of Appeal in *McDonald v Fernandez* [2003] EWCA Civ 1219; [2003] 42 EG 128, when rejecting a landlord's contention that s.21 should be construed in the same way as the common law rules relating to notices to quit. It might be possible to give a notice to quit that expired on either the first day or the last day of a period of the tenancy, but that was not because there were two last days. It was because the last day ended at midnight and the first day of the new period would begin thereafter. A section 21 notice is not a notice to quit. The niceties of contractual notices to quit should not be imported into the plain words of the statute. Section 21(4)(a) requires the notice to specify the last date of the period. It is not a situation where the legislation permits the form to be substantially to the same effect. The subsection is clear and precise. Accordingly, a notice served during a periodic assured shorthold tenancy which does not expire 'on the last day of a period of the tenancy' is unlikely to be valid.

3. The date specified 'is not earlier than the earliest day on which ... the tenancy could be brought to an end by a notice to quit given by the landlord on the same date as the notice ...' (s.21(4)(b)). Accordingly more than two months' notice is required where there is an express provision requiring a longer period of notice or the rental period is longer than two months (e.g., where there is a quarterly tenancy), in which case three months' notice has to be given.

and

4. Proceedings have not been commenced before the date specified in the notice. The claim for possession in *Lower Street Properties Ltd v Jones* was dismissed because proceedings were started the day before the section 21 notice expired. Schiemann LJ

stated it 'is implicit that the landlord cannot bring proceedings until after [the date specified in the notice]' although Kennedy LJ reached his decision on the grounds that the notice served stated, 'The landlord cannot apply for such an order before the notice has run out', and left open whether, with a different wording, proceedings could have been begun before expiry.

5. If the tenancy is one to which HA 1988 s.19A applies, that any possession order will not take effect earlier than six months after the grant of the original tenancy (HA 1988 s.21(5) as inserted by HA 1996 s.99).

16.26.10 Section 21 and ECHR Article 8

In *Poplar HARCA v Donoghue* [2002] QB 48, [2001] 3 WLR 183, CA, a case in which a housing association served a section 21 notice and took possession proceedings against an assured shorthold tenancy, the Court of Appeal held the assured shorthold tenancy regime does not breach ECHR Article 8.

Part 4: Mortgages

16.27 Introduction

Although some mortgages are regulated by the Consumer Credit Act 1974, most mortgage possession proceedings are governed by the provisions of the Administration of Justice Acts 1970 and 1973. These Acts, although considered daily in the county courts, received very little attention from the Court of Appeal for the first 20 years of their existence. The last few years have however seen a significant increase in appeals and this has resulted in a dozen or so reported decisions. This body of case law has had a marked effect upon practice in the county courts.

16.28 Power to suspend or to delay date for possession

At common law, 'the court has no jurisdiction to decline to make a possession order or to adjourn the hearing, whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course' (*Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883, ChD.) In *Caunt* Russell J stated that the sole exception to this rule is that possession proceedings

'may be adjourned for a short time to afford the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend, and so forth'. (p.912)

However the Administration of Justice Act 1970 s.36(1) provides:

‘Where the mortgagee under a mortgage of land which consists of or includes a dwelling house brings an action in which he claims possession... (not being an action for foreclosure in which a claim for possession... is also made) the court may exercise any of [its] powers... if it appears to the court that in the event of its exercising the power the mortgagor is *likely* to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.’

Section 36(2) provides that the court:

- ‘(a) may adjourn the proceedings, or
 - (b) on giving judgment, or making an order, for delivery of possession... or at any time before execution of such judgment or order may:
 - (i) stay or suspend execution of the judgment or order, or
 - (ii) postpone the date for delivery of possession
- for such period or periods as the court thinks reasonable.’

The court's powers under s.36 apply equally to repayment mortgages and endowment mortgages (*Bank of Scotland v Grimes* [1985] 2 All ER 254, CA). However the position is different where a charge securing a bank overdraft provides that the sum owed shall only become payable on demand, (an ‘all moneys charge’) since, in those circumstances, there is no agreement to defer payment (see AJA 1973 s.8 and *Habib Bank Ltd v Taylor* [1982] 3 All ER 561, CA).

In *Royal Bank of Scotland v Miller* [2001] EWCA Civ 344, [2002] QB 255, CA it was held that (1) the relevant time for determining whether land consists of or includes a dwelling-house within the meaning of s.36 is the time when the mortgagee claims possession, not the date when the legal charge is entered into; and (2) breach of a term of the mortgage (e.g. occupation by a third party without consent) does not prevent s.36 from applying.

The court's power under s.36 to adjourn mortgage possession proceedings, stay or suspend execution or postpone the date for delivery of possession ceases after a warrant has been executed. (*Cheltenham and Gloucester Building Society v Obi* (1996) 28 HLR 22, CA).

A bankrupt has locus standi to make an application to the court for relief under Administration of Justice Acts 1970 and 1973 (*Nationwide BS v Purvis* [1998] BPIR 625, CA).

16.29 Criteria and evidence

The borrower must, on the balance of probabilities satisfy the court that it is likely that the arrears will be cleared within a reasonable period. The court cannot suspend an order for possession under s.36, however hard the circumstances, if there is no prospect of the borrower reducing the arrears (*Abbey National Mortgages v Bernard* (1995) 71 P&CR 257, CA).

The defendant need not always produce evidence in the normal formal sense (e.g. witness statement, affidavit or on oath). In *Cheltenham and Gloucester Building Society v Grant* (1994) 26 HLR 703, CA where the building society unsuccessfully challenged the common practice of district judges exercising their discretion under AJA 1970 without hearing sworn evidence from borrowers, Nourse LJ stated that:

‘it must be possible for [judges] to act without evidence, especially where, as here, the mortgagor was present in court and available to be questioned and no objection to the reception of informal material is made by the mortgagee. Clearly, it will sometimes be prudent for the mortgagor to put in an affidavit before the hearing.’ (p.707)

The Court of Appeal declined to lay down rigid rules as to how ‘busy district judges’ should satisfy themselves as to the requirements in s.36 and upheld the original order made by the district judge that a possession order should not be enforced without leave of the court while regular payments were made.

16.30 Reasonable period

One crucial question which has to be answered in every case is ‘What is a reasonable period?’ The phrase is not defined by the Administration of Justice Acts.

In *Centrax Trustees v Ross* [1979] 2 All ER 952, ChD, Goulding J stated that in assessing how long a reasonable period might be, the court must ‘bear in mind the rights and obligations of both parties, including [the lender’s] right to recover their money by selling the property, if necessary, and the full past history of the security.’

In *First Middlesbrough Trading and Mortgage Co Ltd v Cunningham* (1974) 28 P&CR 69, CA, Scarman LJ, when considering what is a ‘reasonable period’ within s.36, stated:

‘since the object of the installment mortgage was, with the consent of the mortgagee, to give the mortgagor the period of the mortgage to repay the capital sum and interest, one begins with a powerful presumption of fact in favour of the period of the mortgage being the “reasonable period”.’ (p.75)

In *Western Bank v Schindler* [1977] Ch 1; [1976] 2 All ER 393, CA Buckley LJ stated:

‘What must be reasonable must depend on the circumstances of the case. . . . In a suitable case the specified period might even be the whole remaining prospective life of the mortgage.’ ([1976] 2 All ER at p.400)

These passages were obiter but were followed by the Court of Appeal in *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 All ER 449, (1995) 28 HLR 443, (1996) 72 P&CR 46, CA. Waite LJ stated that in determining ‘a reasonable period’:

‘the court should take as its starting point the full term of the mortgage and pose at the outset the question: would it be possible for the mortgagor to maintain payment-off of the arrears by installments over that period?’ (p.458)

In *Norgan* there had been a history of arrears. In May 1990, when arrears stood at £7,216, the building society obtained a possession order suspended for 28 days. In December 1990 the terms of the suspension were varied, but not complied with, and the building society obtained a warrant. The warrant was twice suspended on terms, but when the borrower failed to comply, the building society applied to reissue the warrant and the borrower cross-applied for a further suspension. The district judge gave leave to reissue the warrant and refused any further suspension. By the time the appeal came before the circuit judge the arrears were in the region of £20,000. He dismissed the borrower's appeal and she appealed to the Court of Appeal. The Court of Appeal allowed her appeal.

Evans LJ set out a number of considerations which are likely to be relevant when establishing what is a reasonable period. They include:

‘(a) How much can the borrower reasonably afford to pay, both now and in the future? (b) If the borrower has a temporary difficulty in meeting his obligations, how long is the difficulty likely to last? (c) What was the reason for the arrears which have accumulated? (d) How much remains of the original term? (e) What are the relevant contractual terms, and what type of mortgage is it, i.e. when is the principal due to be repaid?’

Other matters which may be relevant include family circumstances and the income of other members of the family. If arrears have accrued as a result of matrimonial breakdown, are any proceedings for ancillary relief likely to result in an order which will enable arrears to be paid off? Is the Department of Work and Pensions (or should it be) paying anything towards the interest due on the mortgage?

16.31 Security at risk

Norgan was a case where the lender's security was not at risk. Courts are likely to be far more cautious about exercising s.36 powers where there is already negative equity or where there is a risk of negative equity. In *Norgan* Waite LJ recognised that there would be cases where evidence might ‘be required to see if and when the lender's security will become liable to be put at risk as a result of imposing postponement of payments in arrear’. (p.459) Evans LJ indicated that courts should ask ‘Are there any reasons affecting the security which should influence the period for payment?’ (p.463) Similarly in *First Middlesbrough Trading and Mortgage Co Ltd v Cunningham* the Court of Appeal stated that when exercising its AJA discretion, one of the ‘relevant surrounding circumstances’ which the court is entitled to take into account is the fact that the debt might be inadequately secured.

Sometimes borrowers produce letters from estate agents in order to satisfy the court about the value of the property in comparison with the amount of the loan outstanding, but in *Bristol*

and *West BS v Ellis* (1997) 29 HLR 282, CA the Court of Appeal stated that judges should approach such estimates with 'reserve'. If a borrower's valuation is disputed, it may be necessary for there to be an adjournment for an independent valuation so that the court can determine whether the lender's security is at risk.

16.32 Sale of the property

In most cases borrowers try to satisfy the court that it is likely that the arrears will be cleared within a reasonable period by giving evidence about their income and expenditure. However, where borrowers' income is not sufficient to repay arrears, they may seek time in which to sell the property so that the outstanding balance (including arrears) can be paid from the proceeds of sale.

In *National and Provincial Building Society v Lloyd* [1996] 1 All ER 630, (1995) 28 HLR 459, CA, the Court of Appeal considered an appeal against a decision to suspend a possession order to give the borrower time to sell premises and so clear mortgage arrears. The building society argued that any such suspension should only be for a short period. Neill LJ rejected this submission. If there is clear evidence that completion of the sale of a property 'could take place in six or nine months or even a year', there was no reason why the court could not come to the conclusion that it was likely that the arrears would be repaid within a reasonable period.

What is 'a reasonable period' is a question for the court in each individual case. However, in *Lloyd* there was insufficient evidence before the judge to show that the arrears would be paid within a reasonable period. Much of it was 'a mere expression of hope' and accordingly the building society's appeal against the suspension was allowed.

In *Bristol and West BS v Ellis* (1997) 29 HLR 282; (1996) 73 P&CR 158, CA, the Court of Appeal confirmed that what is a reasonable period for sale depends on the individual circumstances of each case, particularly the extent to which the mortgage and arrears are secured by the value of the property. In *Ellis* the Court of Appeal allowed a lender's appeal against an order which would have allowed the borrower three to five years (when her children would have finished university education) to sell because there was insufficient evidence that Mrs Ellis could or would sell the property within that period or that the proceeds of sale would be sufficient to discharge the mortgage debt and arrears. The court stated that the comments by Neill LJ in *National and Provincial BS v Lloyd* [1996] 1 All ER 630 that sale 'could take place in six or nine months or even a year' did not establish a year as the maximum period 'as a rule of law or as a matter of general guidance'. (See too *Cheltenham and Gloucester BS v Johnson* (1996) 28 HLR 885, CA where *Lloyd* was followed.)

In most cases where the security is not at risk, the court adjourns or makes a suspended order to allow the borrowers to arrange a sale. It is generally accepted that borrowers occupying premises achieve a better price on sale than lenders through 'forced sales'. For example in *Target Home Loans v Clothier* [1994] 1 All ER 439; (1993) 25 HLR 56, CA borrowers paid no mortgage instalments for over 15 months and when possession proceedings came to court

there were arrears of £46,000. The lenders sought an immediate possession order, but the district judge adjourned for 56 days under s.36. When the Court of Appeal heard the appeal, there was a letter from estate agents indicating that an offer of £450,000 for the house had been received. Nolan LJ, after asking whether there was a prospect of an early sale, stated:

‘If so, is it better in the interests of all concerned for that to be effected by [the borrower] and his wife or by the mortgage company? If the view is that the prospects of an early sale for the mortgagees as well as for [the borrower] are best served by deferring an order for possession, then it seems to me that that is a solid reason for making such an order ...’ ([1994] 1 All ER at p.447)

The Court of Appeal made a possession order to take effect in three months.

Even if the power to suspend execution under Administration of Justice Act 1970 s.36 cannot be exercised because it is unlikely that the borrower can repay arrears within a reasonable period, the county court still has a residual inherent jurisdiction to defer the giving up of possession in order to enable the lender to sell the property (*Cheltenham and Gloucester plc v Booker* (1997) 29 HLR 634; (1997) 73 P&CR 412; [1997] 1 EGLR 142 (1996) *The Times*, November 20, CA.) In such circumstances the court may give conduct of the sale of premises to the lender while postponing execution of a warrant for possession until completion of the sale, thus allowing the borrower to remain in occupation.

There is no reason in principle for the court to accede to a lender's insistence upon immediate possession if:

- possession will only be required on completion
- the presence of the borrowers' pending completion will enhance, or at least not depress, the sale price
- the borrowers will cooperate in the sale, and
- they will give possession to the purchasers on completion.

However in *Booker* Millett LJ stated these conditions are seldom likely to be satisfied and the circumstances in which such a course would be appropriate are hard to imagine. Such an order would ‘certainly be a rarity’.

If a lender does not agree to a borrower selling premises, the borrower may apply for an order for sale under the Law of Property Act 1925 s.91(2). Such an application may be made in a county court if ‘the amount owing in respect of the mortgage or charge at the commencement of the proceedings does not exceed £30,000’ (the High Court and County Courts Jurisdiction Order 1991, para. 2(4)). If the amount owing is more than £30,000 a section 91 application has to be made in the High Court. In *Cheltenham and Gloucester BS v Krausz* [1997] 1 All ER 21, CA the Court of Appeal held that a district judge in the county court has no jurisdiction to suspend a warrant in these circumstances. Phillips LJ did not consider:

‘that the County Court, as part of its inherent jurisdiction, can properly suspend an order or warrant for possession in order to enable a mortgagor to apply to the High Court for an order under section 91. It [is] incumbent on the mortgagor to seek from the High Court any relief which the court is empowered to give before the warrant takes effect.’

He noted that s.36 makes it clear that parliament did not intend that the court should have power to curtail mortgagees' rights to possession unless the proceeds of sale were likely to discharge the mortgage debt.

Part 5: Civil Procedure Rules Part 55

See CPR Pt 55 – implemented on 15 October 2001.

16.33 Materials

Civil Procedure (Amendment) Rules 2001 SI 2001/256, Sch. 1.

Practice Direction – PD55.

The following forms are available at www.courtservice.gov.uk/fandl/menu_house.htm:

N206 A Notice of Issue

N206 B Notice of Issue

N5 Claim form for possession of property

N5A Claim form for relief against forfeiture

N119 Particulars of claim for possession (rented residential premises)

N7 Notes for defendant

N7A Notes for defendant

N11R Defence form (rented residential premises)

N120 Particulars of claim – mortgaged residential premises

N11M Defence form – mortgaged residential premises

N5B Claim form – accelerated possession procedure

N11B Defence to possession claim – accelerated procedure

N7B Notes for defendant – forfeiture claim

N121 Particulars of claim – trespassers

N11 Form of defence

N26 Order for possession

N27 Order for possession (forfeiture)

N28 Order for possession (rented residential premises)(suspended)

N440 application for time order

16.34 Application

Part 55 must be used where a claim includes a possession claim brought by:

- a landlord
- a lender
- a licensor

(CPR 55.2).

The Civil Procedure (Amendment) Rules 2001 para. 31 (Transitional provisions) provides that CPR 55 only applies to claims issued on or after 15 October 2001.

16.35 Trespassers

Part 55 must also be used in a claim against trespassers. The replacement to CCR Ord 24 and RSC Ord 113 is within Pt 55.

A claim against trespassers means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not (CPR 55.1(b)). This reverses the former position – *Moore Properties (Ilford) Ltd v McKeon* [1976] 1 WLR 1278, ChD.

Part 55 has been amended to include claims where a landlord seeks an interim possession order under the Criminal Justice and Public Order Act 1994 – see Pt 55, paras 20 to 28.

16.36 Which court?

Possession claims must be started in the county court for the district where the property is situated (CPR 55.3(1)). However, a claimant can start the claim in the High Court if there are exceptional circumstances (PD55 para. 2.1), for example:

- complicated disputes of fact
- points of law of general importance
- claim against trespassers and substantial risk of public disturbance to persons or property which require immediate determination
- value of property and amount of financial claim may be a relevant circumstances but they alone will not normally justify starting the claim in the High Court.

PD 55 points out the consequences of issuing in then High Court when this is not justified.

16.37 Claim form

This must be in the prescribed form (PD55 para. 2.6) and must be verified by a statement of truth (CPR 22.1). A rubber stamp of a signature does not comply – see *Birmingham CC v Hosey* December 2002 Legal Action 20, Birmingham County Court, 2 October 2002.

In a claim against trespassers, if the claimant does not know the name of a person in occupation, then claim must be brought against ‘persons unknown’ in addition to any named defendants (CPR 55.3(4)).

If the claim is issued in the High Court it must be accompanied by a certificate stating reasons for bringing the claim in the High Court, verified by a statement of truth.

16.38 Particulars of the claim

Particulars must be filed and served with the claim form (CPR 55.4).

All particulars of claim must:

- comply with CPR 16
- contain concise statement of facts
- if interest is sought, give details
- identify the land to which the claim relates (PD55, para. 2.1(1))
- state whether it is residential property (PD55, para. 2.1(2))
- state the ground on which possession is claimed (PD55, para. 2.1(3))
- give full details of any mortgage or tenancy agreement (PD55, para. 2.1(4))
- give details of every person who, to the best of the claimant's knowledge, is in possession of the property (PD55, para. 2.1(5)).

16.39 Additional requirements for particulars of claim where tenancy of residential premises

See PD55 para. 2.3.

If non-payment of rent is relied upon, the particulars of claim must state:

- the amount due at the start of proceedings
- in schedule form, the dates when arrears of rent arose, all amounts of rent due, the dates and amounts of all payments made and a running total of the arrears
- the daily rate of any rent and interest

- any previous steps taken to recover arrears, with full details of any court proceedings
- any relevant information about the defendant's circumstances, including details about benefits and payments direct.

In addition, the name of any person known to be entitled to apply for relief from forfeiture in which case the claimant must file a copy of the particulars of the claim for service upon him (PD55 para. 2.4).

16.40 Additional requirements for particulars of claim where mortgage of residential premises

See PD55 para. 2.5.

If the claim concerns residential premises, the particulars of claim must state:

- whether an Class F land charge has been registered, or a notice under the Matrimonial Homes Act 1983 has been entered and whether a notice under the Family Law Act 1996 has been registered – if so the claimant must serve notice of proceedings on such a person
- the state of the mortgage account, including: the amount of advance, periodic payment and interest required; and the amount needed to redeem the mortgage including solicitors' costs and administration charges
- if a regulated consumer credit agreement, the total amount outstanding
- the rate of interest payable.

If a claim is based on arrears, the particulars of claim must state:

- in schedule form, the dates when arrears arose, all amounts due, the dates and amounts of all payments made and a running total of the arrears
- details of all other payments to be made and claimed
- any relevant information about the defendant's circumstances, including details about benefits and payments direct
- any previous steps taken to recover arrears, with full details of any court proceedings.

16.41 Additional requirements for particulars of claim where claim is against trespassers premises

See PD55 para. 2.6.

The particulars of claim must state:

- the claimant's interest in land
- the circumstances in which the land is occupied without licence of consent
- the effect of failure to comply - CPR 3.10.

16.42 Service

Normal rules in CPR Pt 6 apply (personal service, first class post, leaving at last known address, document exchange, fax by court, or claimant).

Where the claim is against trespassers who are persons unknown service of the claim should be effected by:

- attaching it to the main door or some other part clearly visible and
- through a letter box in a sealed transparent envelope addressed to 'the occupiers' or
- placing stakes in the land.

(If these methods are to be used, claimant must supply the court with sufficient stakes and transparent envelopes (PD55 para. 4.1.)

16.43 Defendant's response

Note the following:

- CPR Pt 10 (acknowledgement of service) does *not* apply (CPR 55.7(1))
- CPR Pt 12 (default judgment) does *not* apply (CPR 55.7(4))
- the response must be in a form annexed to the PD (PD 55 para. 1.5)
- CPR 15.2 (defendant who wishes to defend must file a defence within 14 days) does not apply in a claim against trespassers (CPR 55.7(2))
- in any other possession claim the defendant may take part, but failure to file or serve a defence may be taken into account when deciding costs order (CPR 55.7(2))
- in Consumer Credit Act cases, the borrower may apply for a time order in defence or by application in proceedings (PD55 para. 7.1) and N440.

The court will fix a hearing date on issue (CPR 55.5(1)).

16.44 Time between service and hearing

This must be at least:

- two days (trespassers – non-residential land)

- five days (trespassers – residential premises)
- 21 days (all other possession claims)

CPR 55.5(2) and (3).

In addition:

- the hearing date will be not less than 28 days from date of issue (CPR 55.5(3)(a))
- the standard period between issue and hearing will be not more than eight weeks (CPR 55.5(3)(c)).

However, the time may be shortened CPR 3.1(2)(a) and particular consideration should be given to shortening the time where:

1. the defendant, or a person for whom the defendant is responsible, has assaulted or threatened to assault:
 - (a) the landlord
 - (b) a member of the landlord's staff or
 - (c) another tenant
2. there are reasonable grounds for fearing such an assault, or
3. the defendant, or a person for whom the defendant is responsible, has caused serious damage or threatened to cause serious damage to the property or to the home or property of another resident. (PD 55, para. 3.2).

16.45 At the hearing (or any adjournment)

The court may

- decide the claim; or
- give case management directions (CPR 55.8(1)).

16.46 Case management

If the claim is genuinely disputed on grounds which appear to be substantial, directions will include allocation to track or directions to enable it to be allocated.

16.47 Allocation

The claim should only be allocated to the small claims track (SCT) if all parties agree (CPR 55.9(2)). If it is allocated to the SCT, the fast-track costs regime applies but trial costs are at the discretion of the judge and shall not exceed the amount of fast-track costs (currently £350) allowable in CPR 46.2 if the value were up to £3,000 (CPR 55.9(3)).

Consider:

- CPR 26.8
- the amount of arrears of rent or mortgage instalments
- the importance to the defendant of retaining possession
- the importance of vacant possession to the claimant.

Regarding PD 55 para. 6.1 (financial value not necessarily the most important factor) – the claim may be allocated to the fast track even though the value of the property is in excess of £15,000.

16.48 Preparation for hearing

Apart from claims against trespassers, all witness statements must be filed and served at least two days before the hearing. They should include evidence of arrears up to date at the hearing – if necessary by including a daily rate – but not prevent it being brought up to date at the hearing. (PD 55 para. 5.2).

The defendant should give evidence about then amount of outstanding benefits and the state of benefit claims (PD 55 para. 5.3).

In cases of mortgage possession claims, the claimant should, not less than 14 days before the hearing, send a notice addressed to the occupiers giving details of the hearing and must produce a copy and evidence of service at the hearing (CPR 55.10)).

Where the claimant serves the claim form and particulars of the claim, he must produce the certificate of service at the hearing (CPR 55.8(6)).

16.49 Evidence at the hearing

- If not allocated, or allocated to the SCT, any fact that needs to be proved may be proved by evidence in writing: either a witness statement or a claim form with a statement of truth (CPR 55.8(3)). However, if the fact is disputed and the maker of the witness statement is not present, the court will normally adjourn so that oral evidence can be given (PD55 para. 5.4)).

As to the use of hearsay evidence in claims based upon nuisance and annoyance, see *Solon South West Housing Association Ltd v James* [2004] EWCA Civ 1847; [2005] HLR 24.

16.50 Accelerated possession procedure

This applies only to claims brought under HA 1988 s.21 to recover possession against assured shorthold tenant (CPR 55.11). It must be started in the county court for the district in which the property is situated.

16.51 Conditions set out in CPR 55.12 must be complied with

These are as follows:

- the tenancy was entered into on or after 15 January 1989
- the only purpose is to recover possession – no other claim is made
- the tenancy did not immediately follow an assured tenancy which was not and assured shorthold tenancy (AST)
- the tenancy was an AST in accordance with s.19A or s.20(1)(a) to (c)
- the tenancy is subject to written agreement, or follows a tenancy where there was a written agreement
- s.21(1) or s.21(4) notice was given.

The claim form:

- must be in the form set out in the PD
- must contain information and be accompanied by documents required in that form
- all sections must be completed.

16.52 CPR 55.14 Defence

A defendant who wishes to oppose a claim must file a defence within 14 days after service of the claim form. The defence must be in the form set out in the PD.

16.53 Consideration by a district judge

See CPR 55.15.

The claim is referred to a judge, either:

- on receipt of the defence, or
- on the claimant's request after 14 days have expired.

The judge can still consider a defence if it is received out of time but before landlord's request is received.

If the defendant does not file the defence and no request is made by the claimant within three months after service, then the claim will be stayed.

16.54 Consideration of the claim (CPR 55.16)

The judge will either:

- make an order for possession without a hearing, or
- if he is not satisfied the claim was served or the claimant is entitled to possession, fix a hearing date and give case management directions (at least 14 days' notice of hearing must be given), or
- strike out the claim if it discloses no reasonable grounds for bringing the claim (if it is struck out, reasons must be given with the order and the claimant may, within 28 days, apply to restore the claim).

Note *Manel v Memon* [2000] 33 EG 74, (2001) 33 HLR 235, (2000) *The Times*, April 20, CA where the claimant landlord brought proceedings under the accelerated possession procedure (CCR Ord 49 r.6A) against the defendant claiming that he was a pre-1997 assured shorthold tenant. The tenant filed a reply denying that the landlord had served a valid section 20 notice because the notice served omitted the four bullet points with instructions and advice to the tenant set out in Form 7 of the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1998 SI 1998/2203.

The Court of Appeal held that the bullet points and in particular the exhortation to take legal advice and the statement that the giving of the notice did not commit the tenant to take the tenancy were part of the substance of the notice. Without them the notice was not 'substantially to the same effect' as the prescribed form within the meaning of para. 2 of the Regulations. The notice was defective and a possession order made by the district judge was set aside. The Court of Appeal expressed concern that the district judge adopted the accelerated possession procedure and made a possession order without giving the tenant the opportunity to make representations at an oral hearing. Holman J said:

'[The accelerated possession procedure] is a robust machinery. It depends upon district judges rigorously considering the documents which have been filed. Some replies may be little more than a plea, however genuine for mercy. But if, on the face of the reply, a matter has been raised which, if true, might arguably raise a defence; or if the documents filed by the claimant might arguably disclose a defect in his claim, then the district judge must necessarily be 'not satisfied' within the meaning of C49.6A(16) and a hearing on notice must be fixed.'

Although decided under CCR Ord 49 r.6A, exactly the same considerations apply to accelerated possession procedure cases under Pt 55.

16.55 Postponement of possession (CPR 55.18)

The claimant may indicate in the claim form that he is content for the judge to consider postponement without a hearing. In that case the judge may fix a date for possession in six weeks without a hearing.

Otherwise if the defendant seeks postponement on the ground of exceptional hardship (HA 1980 s.89) the judge must make an order for possession within 14 days, but direct a hearing on issue of the postponement.

The hearing must be before the date on which possession is to be given up.

If at the hearing, the judge is satisfied that there will be exceptional hardship, he may vary the date on which possession must be given up but to no more than six weeks after the date on which the original order was made (PD 55 para. 8.4 and HA 1980 s.89).

Power to set aside or vary order on application within 14 days of service of order, or on court's own initiative (CPR 55.19)

HOUSING AT A GLANCE

