CHAPTER 4

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General preparation

4.1 The preparation of a defence to the possession claim for a secure occupier[1] should take place at the earliest possible opportunity. If instructed *at the last minute*, go immediately to para 4.79.

4.2 If instructed *well in advance* of any prospective or actual court hearing date, the adviser will need to take full instructions from the client (see the instructions checklist at appendix C).

4.3 In addition to taking the client's statement and assembling background material relating to the particular possession proceedings, the adviser will wish to gather together:

- the claim form and particulars of claim;
- a copy of the tenancy agreement;
- a copy of the notice seeking possession – if any (see para 2.4);
- the rent book/rent account/schedule of arrears; and
- other relevant documents.

4.4 An early opportunity might usefully be taken to inspect the tenant's housing management file as held by the landlord, in order to secure copies of the above and any other relevant documents. In the case of a local authority landlord an application for such access should:

- be made in writing;
- make reference to the Data Protection Act 1998;
- enclose a signed authority from the client;
- enclose a cheque for £10 (being the maximum fee currently payable for access).

4.5 Most local authority landlords will respond to such a request either by simply forwarding a photocopy of the entire file or by making it available at their offices with a copying facility. Other social landlords make similar provision for tenants (or their advisers) to inspect housing files. If the possession proceedings have already started (and will proceed beyond the first hearing), such documents would in any event eventually be obtained in the course of disclosure.[2] If the proceedings have not yet started but are contemplated, early disclosure of the documents would certainly accord with the principles of the Practice Direction on Pre-Action Protocols[3] and, in a rent arrears case, with the Rent Arrears Pre-Action Protocol (see para 3.38 and appendix D).

1 References in this chapter to a 'secure tenant' should be treated as including a 'secure licensee' (see para 1.27) unless the contrary is stated.

2 CPR Part 31.

3 See para 4 of the CPR Practice Direction on Pre-Action Protocols.

4.6 Depending on the issues which arise in the client's statement, and after consideration of the documents, it may be necessary to undertake a housing benefit (or general welfare benefit) assessment and/or obtain an expert's report on the condition of the property.

4.7 Many defendants will qualify for initial advice under the Legal Help and Legal Help at Court schemes (see chapter 28) but a full certificate for publicly funded legal representation should be applied for immediately if the tenant might meet the financial criteria and some prospect of resisting possession can be shown. The usual rules governing public funding are modified because the litigation concerns an issue of vital importance, ie, the tenant's continued occupation of his or her home.[4] Indeed, the Legal Services Commission's Funding Code – Decision-Making Guidance para 19.7(4) states:

> Legal Representation is likely to be granted where there is a substantive defence to the possession action, including a defence as to reasonableness of the possession order being made, ie, where the ground for possession has been made out but where the court must also assess whether it is reasonable in all the circumstances to make an order for possession.

4.8 If the adviser is instructed only a few days prior to the hearing, an emergency certificate for legal representation should be obtained or granted under devolved powers (see chapter 28).

4.9 If a defence is to be submitted this should be in the appropriate variant of the defence form (N11), filed with the court, and properly served on the landlord in advance of the hearing date (see chapter 23 for possession procedure and appendix B for a precedent defence). The adviser instructed at a late stage will simply have to pass a copy to the landlord at court (if it has been possible to file a defence at all) or apply for an extension of time in which to file a defence. In the latter case, it would be sensible to have an outline or early draft of the defence available at court.

4.10 The following pages set out the so-called 'technical' defences and then the 'substantive' defences. Either or both can be successfully deployed to resist or defeat possession proceedings.

4 See Legal Services Commission Funding Code – criteria para 10.3.

Technical defences

4.11 Although these defences are described as 'technical', at least in the short term[5] they have the potential to be as effective as the substantive defences in preventing the landlord from obtaining an order for possession against a secure occupier.

Defective notice

4.12 As seen above (at para 2.4) the proper notice – a notice seeking possession – must usually be served on the secure tenant as a prerequisite to the commencement of possession proceedings. If the notice is deficient, the proceedings must fail unless in the particular case the court exercises its discretion to dispense with notice (see para 4.45). In this chapter, each potential irregularity in a notice seeking possession is considered before a review of the circumstances in which the court may exercise its power to dispense with the need for a valid notice.

4.13 A sample copy of a notice seeking possession in the current prescribed form for periodic secure tenancies is reproduced in appendix A. (The different prescribed form for fixed-term secure tenancies is not reproduced.) Every notice seeking possession relied on by a landlord should be carefully inspected with a view to discovering any possible deficiency that might render it invalid.

Form

4.14 The notice must usually be in the form prescribed in regulations made by the secretary of state.[6] Those regulations are made by statutory instrument.

4.15 The current prescribed form of notice is contained in the Secure Tenancies (Notices) Regulations 1987,[7] as amended by the Secure Tenancies (Notices) (Amendment) (England) Regulations 1997,[8] and

5 See *City of London v Devlin* (1997) 29 HLR 58, CA.

6 HA 1985 s83(2)(a).

7 1987 SI No 755. The earliest prescribed form was contained in Secure Tenancies (Notices) Regulations 1980 SI No 1339, as amended by SI 1984 No 1224 and upheld in *Wansbeck DC v Charlton* 79 LGR 523; (1981) 42 P&CR 162, CA. Those regulations were saved for the purposes of the Housing Act 1985 by Housing (Consequential Provisions) Act 1985 s2(2). A revised form was prescribed by Secure Tenancies (Notices) Regulations 1987, which came into force on 13 May 1987.

8 1997 SI No 71.

subsequently by the Secure Tenancies (Notices) (Amendment) (England) Regulations 2004[9] and the Secure Tenancies (Notices) (Amendment) (Wales) Regulations 2005.[10]

4.16 These numerous references to regulations simply serve to demonstrate the importance of checking the actual notice relied on by the landlord against the prescribed form which was required on the date on which the notice was given.

4.17 If the notice is *not* in the form prescribed at the date of service it may[11] be ineffective. However, because minor technical deficiencies would otherwise invalidate notices, the 1987 Regulations contain a 'saving provision' that a notice seeking possession not in the prescribed form will be valid if it is 'in a form substantially to the same effect'.[12] The use of delegated legislation in this way to save otherwise faulty notices has been held to be within the relevant powers of the secretary of state: *Dudley MBC v Bailey*.[13]

4.18 As that case was fought entirely on the point of the lawfulness of the saving power (rather than on the faults in the notice actually served), there is little judicial guidance from it about the degree of error necessary to remove a form from the category of 'substantially to the same effect' as that prescribed and into a category of invalidity.[14]

4.19 Arguably, a notice would differ in substance if the 'Notes for Guidance' contained in the body of the prescribed form were omitted from the notice actually served[15] or were only set out on the reverse[16] or on a separate sheet without (at the very least) an indication to 'see overleaf' or 'see attached'.

4.20 Similarly, the words 'name(s) of secure tenant(s)' in paragraph 1 of the prescribed form are crucial, because the guidance notes on the prescribed form distinguish secure tenants from other tenants and licensees. It should also be noted that the words 'Notice of Seeking

9 2004 SI No 1627.

10 2005 SI No 1226.

11 In *Swansea CC v Hearn* (1991) 23 HLR 284, CA, a notice to quit served without the latest version of the statutorily prescribed information set out on it, but with the earlier version endorsed, was held effective.

12 Secure Tenancies (Notices) Regulations 1987 reg 2(1).

13 (1990) 22 HLR 424, CA.

14 But see *Tadema Holdings v Ferguson* (2000) 32 HLR 866, CA, in which a notice of rent increase was held to be 'substantially to the same effect' as the prescribed form after an examination of its alleged defects.

15 See *Manel v Memon* (2001) 33 HLR 24, CA.

16 But see *Swansea CC v Hearn* (1991) 23 HLR 284, CA, in which prescribed particulars were given on the reverse of a notice to quit, although this particular point does not appear to have been taken.

Possession' and the statutory reference at the head are themselves important parts of the prescribed form. They enable the tenant to identify the statutory power under which it is alleged the notice has been given.

4.21 On the other hand, simple 'slips' such as the omission of a manuscript signature above the typescript job title of the officer authorising the giving of the notice, will not prevent the form being substantially to the same effect as the prescribed form and thus valid.[17]

4.22 For guidance on the situation which arises when the landlord has transferred its interest to a new landlord *after* serving a notice, see K*nowsley Housing Trust v Revell, Helena Housing Limited v Curtis*.[18]

Name of tenant

4.23 The prescribed form has a space for the insertion of the tenant's name and the notice must be served on *that tenant*.[19] Practical difficulties may arise over the misspelling of names or the use of former names where the tenant has changed his or her name following marriage or otherwise. To guard against this difficulty most landlords will use the name as it appears on the original tenancy agreement.

4.24 If the tenancy is a joint tenancy then the reference on the prescribed form to the 'tenant' is a reference to all the joint tenants. All must therefore be named in the notice even if some are no longer in residence.[20]

Ground

4.25 The notice must 'specify the ground on which the court will be asked to make an order for possession'.[21] The ground specified must therefore correspond with the ground that is (1) pleaded in the particulars of claim and (2) relied on in court.

4.26 As to (1), landlords sometimes fail to set out in their particulars of claim the ground on which possession is being sought, contrary to the requirements of the Civil Procedure Rules (see chapter 23). As to (2), if a different ground for possession is made out at trial from that shown in the notice seeking possession, the proceedings must

17 *City of London v Devlin* (1997) 29 HLR 58, CA.

18 [2003] EWCA Civ 496; [2003] HLR 63,CA.

19 HA 1985 s83(1)(a). See *Enfield LBC v Devonish and Sutton* (1997) 29 HLR 691, CA.

20 *Newham LBC v Okotoro* March 1993 *Legal Action* 11.

21 HA 1985 s83(2)(b).

be dismissed[22] unless the court gives permission for an alternative ground to be read into the notice seeking possession by alteration or addition, or the court exercises a discretion to dispense with the requirement of notice altogether.[23]

4.27 Although neither the Housing Act (HA) 1985 nor the regulations which prescribe the form of notice define what is meant by 'specify', courts should interpret this to mean that the actual words of the ground as they appear in the statute must be set out or, in default, at least words giving all the salient elements of the ground relied on.[24] The case for requiring the exact text in a notice seeking possession served on a secure tenant is strengthened by the use of the marginal note in the prescribed form which directs the landlord to 'give the text in full of each ground which is being relied on'. It follows that the words used in the notice seeking possession must always be carefully checked against the actual statutory formulation of the ground in each case. If they are significantly different this may well invalidate the notice.

Particulars

4.28 The notice must, on its face, give 'particulars' of the ground for possession specified in it.[25] These particulars must give the tenant sufficient details of the circumstances that the landlord relies upon in asserting that a ground for possession is made out, since the function of the notice is to fire a 'warning shot' telling the tenant what the complaint is against him or her so as to enable the tenant to rectify it.[26] Clearly, the simple statement 'arrears of rent' is an insufficient particular.[27] Similarly 'various acts of nuisance' or 'instances of dilapidation' would be inadequate.[28] In a nuisance case, the Court of Appeal described the following particulars as 'obviously' insufficient:[29]

> The tenant frequently disturbs his neighbour, and on one occasion has threatened his neighbour with physical violence.

22 See *Midlothian DC v Tweedie* 1993 GWD 1068, Sh Ct.

23 HA 1985 ss83–84 and see *Gedling BC v Brener* September 2001 *Legal Action* 23.

24 *Mountain v Hastings* (1993) 25 HLR 427, CA.

25 HA 1985 s83(2)(c).

26 *Torridge DC v Jones* (1986) 18 HLR 107; [1985] 2 EGLR 54, CA. See too *Marath v MacGillivray* (1996) 28 HLR 484, CA.

27 *Torridge DC v Jones* (1986) 18 HLR 107; [1985] 2 EGLR 54, CA.

28 *South Buckinghamshire DC v Francis* [1985] CLY 1900 and *Slough BC v Robbins* [1996] CLY 3832; December 1996 *Legal Action* 13.

29 *Camden LBC v Oppong* (1996) 28 HLR 701, CA, at 703.

4.29 Likewise the use of the simple words 'major refurbishment scheme' in a claim for possession under ground 10 is deficient,[30] as is the bare repetition of the terms of a tenancy agreement where the ground alleged is breach of those terms.[31] Neither can simple repetition of the text of the statutory ground amount to 'particulars'.

4.30 If insufficient particulars are given, the court cannot entertain the proceedings, which must, therefore, be struck out unless the notice is amended or the court finds it just and equitable to dispense with notice.[32] The court can give the landlord permission to amend the notice seeking possession for the purpose of improving the particulars,[33] but it should not be assumed that the discretion will be exercised in favour of such an amendment if application is made at a late stage in the proceedings.[34]

4.31 If particulars are given but they are *inaccurate*, the court may (according to the degree of inaccuracy) permit the claim to proceed or allow amendment of the notice seeking possession. For example, if the notice gives particulars that the 'arrears of rent are £x' and it is shown at trial that the landlord has innocently and in error included in that figure amounts which are not arrears of rent, the action can proceed, but the judge will take into account the nature and extent of the error in determining whether possession should be given.[35]

The dates

4.32 The prescribed form contains a space for completion of the specified date (see para 2.7) and for entry of the date of the notice itself (which should be the date of service). It is vital that these dates are carefully checked, first, to ensure that the dates have been entered and, second, to identify any errors. A form is not in the prescribed form or in a form to substantially the same effect if a material date has either been omitted[36] or incorrectly stated.[37]

4.33 The specified date must be no earlier than the date on which the tenancy or licence could have been brought to an end by notice to

30 *Waltham Forest LBC v England* March 1994 *Legal Action* 11.
31 *East Devon DC v Williams* December 1996 *Legal Action* 13.
32 *Torridge DC v Jones* (1986) 18 HLR 107; [1985] 2 EGLR 54, CA.
33 *Camden LBC v Oppong* (1996) 28 HLR 701, CA.
34 *Merton LBC v Drew* July 1999 *Legal Action* 22.
35 *Dudley MBC v Bailey* (1990) 22 HLR 424, CA.
36 *Patel v Rodrigo* June 1997 *Legal Action* 23.
37 *Panayi v Roberts* (1993) 25 HLR 421, CA.

quit or notice to determine given by the landlord on the same date that the notice seeking possession was served.[38]

4.34 Accordingly, the adviser should check carefully the date of service and the minimum period of notice the landlord would have been required to give under the provisions of the tenancy agreement, statute or common law. In the ordinary case of a weekly periodic tenancy, the specified date must be no earlier than four weeks after the next rent day.[39] If the 'specified date' is too early, the notice is bad on its face and the proceedings should be dismissed unless the court exercises a discretion to dispense with service of the notice in the landlord's favour. The Housing Act 1985 does not give the court power to amend the dates set out in the notice.

4.35 Unless the notice included ground 2 (nuisance) as one of the grounds specified in it, proceedings issued before the specified date should also be dismissed, as no claim should be issued until after the specified date has passed.[40]

Has the notice lapsed?

4.36 The notice is valid for only 12 months from the specified date.[41] It must be noted that the 12 months runs *not* from the date of service but from the specified date it contains.

4.37 As the specified date is usually at least 28 days after the notice was served, it should be at about the end of the thirteenth month after service that the notice lapses (contrast the position for the notice seeking possession served in respect of an assured tenancy, para 12.20).

4.38 No proceedings can be brought in respect of a notice that has lapsed.[42] Thus, an action for possession started more than 12 months after the specified date is defective and should be struck out unless the court decides that it is just and equitable to dispense with notice.[43]

4.39 For these purposes, the proceedings 'begin' on the date the relevant county court issues the claim.[44] A notice might be treated as

38 HA 1985 s83(5). See too para 2.6 if the notice relies on ground 2.

39 Protection from Eviction Act 1977 s5, as amended.

40 HA 1985 s83(4)(a). But see *City of London v Devlin* (1997) 29 HLR 58, CA, in which the claim was issued three days before the specific date but a further claim was issued after that date and consolidated with the first claim.

41 HA 1985 s83(3)(b) and (4)(b).

42 HA 1985 s83(4).

43 *Edinburgh City Council v Davis* 1987 SLT 33, noted at June 1987 *Legal Action* 19.

44 *Shepping v Osada* (2001) 33 HLR 13, CA. See also *Salford City Council v Garner* [2004] EWCA Civ 364; [2004] HLR 35, in relation to introductory tenancies.

'spent' once it has been used to found a claim for possession. A court is unlikely to allow a second set of proceedings to be issued within the period of validity of a single notice[45] except, perhaps, where the two sets of proceedings based on the same notice are to be consolidated.[46]

Service

4.40 The Housing Act 1985 requires that the notice seeking possession has been served by the landlord 'on the tenant'.[47] It is for the landlord to prove that the notice was served on the secure tenant. There is, of course, no difficulty if the secure tenant admits service.

4.41 Nothing in HA 1985 Part IV or in s617 (service of notices) assists with the form that service of the notice must take.[48] It has been held that 'serve' is an ordinary English word connoting the delivery of a document to a particular person.[49] For the rules on acceptable proof of service developed by the courts in relation to methods of service of notices to quit (in summary: personal service on the tenant, service on a wife of the tenant or service on the servant of the tenant), see para 14.25.[50] The common law acceptance of service on the tenant's wife as service on the tenant must presumably now be taken to extend to service on the husband or registered civil partner of the tenant.

4.42 In the absence of an express admission by the tenant of service of the notice seeking possession, the burden of proof remains on the landlord to show that the notice was properly served.

4.43 Although the surest route to proving service is personal delivery to the tenant, many landlords seek to rely on postal service, putting the notice through a letterbox or giving it to someone at the property to pass on to the tenant. None of these is reliable or offers conclusive evidence that the tenant was served. Local authority landlords are not assisted in establishing service by the Local Government Act 1972 s233 (which permits service by post or hand delivery of statutory notices to the 'proper address', usually the last known address), because

45 See *Shaftesbury HA v Rickards* December 2005 *Legal Action* 20.

46 *City of London v Devlin* (1997) 29 HLR 58, CA.

47 HA 1985 s83(1).

48 See January 1982 *Housing* 27.

49 *Tadema Holdings v Ferguson* (2000) 32 HLR 866 at 873.

50 See *Enfield LBC v Devonish and Sutton* (1997) 29 HLR 691, CA.

a notice seeking possession is not served by the authority in its capacity as a local authority but rather in the capacity of landlord.[51]

4.44 To avoid these difficulties, the Court of Appeal has encouraged landlords of secure tenants to ensure that express provision for appropriate methods of service is made in the tenancy agreement itself.[52]

Dispensing with notice

4.45 Until the changes introduced by the Housing Act 1996, a successful argument that a notice seeking possession was defective was fatal to the landlord's case. However, HA 1985 s83(1)(b), as amended by the 1996 Act,[53] now provides the court with the power to dispense with the need for a valid notice where it is 'just and equitable to do so'. An application to dispense should be entertained only if the secure tenant has been given full notice of it and of the basis on which the exercise of the power is sought.[54]

4.46 On whether the application should be allowed, the approach taken is that:

> Every case will depend upon its own facts and the pleaded ground or grounds relied on in the notice. The court must take all the circumstances into account, both from the view of the landlord and the tenant, and decide whether it is just and equitable to dispense with the required particulars.[55]

4.47 In *Braintree DC v Vincent*,[56] the secure tenant was in a nursing home and her sons were occupying the property. The landlord brought possession proceedings against the sons as trespassers. The judge joined the tenant to the proceedings, and a possession order was made on the basis that the property had ceased to be her only or principal home and on the alternative statutory ground of rent arrears. In relation to the statutory ground, the judge considered that it was just and equitable to dispense with a notice seeking possession. This decision was upheld in the Court of Appeal. Although it was 'obviously only

51 See *Chesterfield BC v Crossley* June 1998 *Legal Action* 10 and *Eastbourne BC v Dawson* June 1999 *Legal Action* 23.

52 *Wandsworth LBC v Atwell* (1995) 27 HLR 536, CA and *Enfield LBC v Devonish* (1997) 29 HLR 691, CA.

53 HA 1996 s147.

54 *Knowsley Housing Trust v Revell, Helena Housing Limited v Curtis* [2003] EWCA Civ 496; [2003] HLR 63.

55 *Kelsey Housing Association v King* (1995) 28 HLR 270, CA, at 276.

56 [2004] EWCA Civ 415.

in relatively exceptional cases where the court should be prepared to dispense with a section 83 notice', the circumstances were unusual in procedural terms. The tenant was added as defendant only at the insistence of the judge, and a notice of seeking possession would have been of no benefit to her. See also para 12.24, concerning the same power as it applies to assured tenancies (under HA 1988 s8), and in particular: *North British HA v Sheridan*.[57]

4.48 See too the linked cases of *Curtis v Helena Housing Association Ltd* and *Revell v Knowsley Housing Trust*,[58] in which the claimants sought to dispense with the notice requirement following a large-scale transfer of council housing stock to other social landlords. The Court of Appeal gave general guidance in the handling of applications to dispense with notices seeking possession (although in the context of possession claims against assured tenants).

Defective claims

4.49 The usual rules on drafting claims in civil litigation apply to possession proceedings against secure occupiers in the county court (see chapter 23). Common technical deficiencies in landlords' claims for possession against secure tenants include:

- failure to join all joint tenants;
- failure to set out the landlord's title;
- failure to refer to the notice seeking possession;
- insufficient particulars given (particularly of 'reasonableness');[59] and
- failure to restrict the claim to the ground in the notice seeking possession.

4.50 The claim for possession must be brought in accordance with the provisions of CPR 55 and the Practice Directions to that rule (each of which is reproduced in appendix E).The particulars of claim in possession proceedings must contain prescribed basic information about the premises and the tenancy agreement.[60] Moreover, if the claim is on the ground of non-payment of rent the particulars of claim should

57 [2000] L&TR 115; (2000) 32 HLR 346, CA.

58 [2003] EWCA Civ 496; [2003] HLR 63, CA.

59 See *Midlothian DC v Brown* 1990 SCLR 765 and *Renfrew DC v Inglis* 1991 SLT (Sh Ct) 83.

60 CPR PD 55A para 2.1.

be in the relevant court form[61] and must contain prescribed particulars concerning the arrears and the circumstances of the parties.[62]

4.51 However, as landlords can generally apply for and obtain permission to amend, reliance on defects in the claim will rarely provide a long-term defence. It has nevertheless been possible in some cases to have the whole proceedings struck out for failure to use and complete the usual form of particulars of claim for use in 'arrears' cases or otherwise give the prescribed particulars. The application to strike out a defective claim is likely to have greater prospects of success if there has also been a failure to comply with the Practice Direction on Pre-Action Protocols or a specific protocol such as the Rent Arrears Protocol (reproduced at appendix D).

Action improperly brought

4.52 If the possession proceedings against the secure tenant have been improperly brought (for example, the decision to bring them has been motivated by bad faith, abuse of power or malice by landlord), the county court may be invited to strike out the action as an abuse of process or the tenant could set up the unlawful action of the landlord by way of defence to the claim.[63] The possibility of such a 'public law' defence to a possession claim is explored further in chapter 25.

Set-off

4.53 Secure tenants have a complete defence to an action for possession based on a failure to pay monies due to the landlord if they can properly set off (for example, by a successful counterclaim under CPR Part 20) an amount payable to them by the landlord and equal to or greater than the amount the landlord has claimed. Such circumstances usually arise from success on a counterclaim for disrepair (see para 23.35) or a failure to pay housing benefit (see chapter 37). However, reliance should not be placed solely on a defence by way of set-off which presupposes a successful counterclaim, because there is never a guarantee that the counterclaim will succeed.[64]

61 Form N119.

62 CPR PD 55A paras 2.1–2.4A.

63 The repeated issue of unjustified proceedings may even amount to 'harassment': *Allen v Southwark LBC* [2008] EWCA Civ 1478; January 2009 *Legal Action* 25.

64 *Haringey LBC v Stewart* (1991) 23 HLR 557, CA.

Substantive defences

Ground not made out

4.54 The first substantive line of defence for the secure tenant, assuming that the technical defences mentioned above have proved insufficient, is to demonstrate that the ground asserted by the landlord is not made out on the evidence and on the balance of probabilities. The usual issues dealt with in possession proceedings on the grounds available against secure tenants, and common methods of defending such cases, are set out in the discussion of the individual grounds (see chapter 3).

Condition not made out

4.55 The second line of defence, assuming that the landlord has proved (or the tenant admits) that a ground has been made out, is to demonstrate that there is insufficient evidence to establish on the balance of probabilities that a necessary condition is satisfied. The conditions are discussed in chapter 3 together with the respective grounds to which they relate. The most common condition is that it is reasonable to order possession and it is for the landlord to satisfy the court that it would be reasonable to make a possession order.

Possession orders and eviction

Adjournment on terms

4.56 It need not inevitably follow that, because both a ground and the necessary condition can be made out, a possession order (whether outright or conditional) should be made against a secure tenant. Indeed, there are cases in which, despite it being shown that the landlord has acted reasonably in bringing possession proceedings and has established both the ground and its associated condition, it is nevertheless worthwhile to give the tenant another 'chance'. That may be appropriate even in a serious case, for example, where a young tenant has been convicted of a drug offence relating to use of the premises.[65] The mechanism readily available to the court is the adjournment of the proceedings[66] in all cases except those brought

65 *Glasgow HA v Hetherington* September 2009 *Legal Action* 32, Sheriff Court.
66 HA 1985 s85(1).

under grounds 9 to 11 inclusive (to which the statutory power to adjourn does not apply).

4.57 The statutory power to adjourn (additional to any other discretion in the court) arises in all cases relying on grounds 1 to 8 or grounds 12 to 16 contained in HA 1985 Sch 2. In any of these cases, the court may adjourn the proceedings for such period or periods as it thinks fit.[67] This has the substantial benefit to the secure tenant of not simply avoiding a possession order but, in most cases, of avoiding an adverse costs order. The costs of the claim are not usually awarded to one party or the other if the matter is adjourned.

4.58 The safeguard for the landlord is that the court is free to make the adjournment conditional.[68] For example, the adjournment may be conditional on the tenant paying the current rent plus £x towards the arrears. The check on excessive conditions is HA 1985 s85(3)(a), which provides that conditions are not to be imposed if they would cause exceptional hardship to the tenant or would otherwise be unreasonable. A form of order for adjournment on terms meeting these points was first published almost 20 years ago.[69] An example of such an order is given in appendix B.

4.59 If the court cannot be persuaded to deal with the matter by way of adjournment, and it decides to make a possession order, the adviser must seek to avoid the making of an absolute or outright order for possession.

Resisting an absolute/outright possession order

4.60 There are, of course, many cases in which the landlord establishes both the grounds and conditions for possession against a secure tenant and the court is satisfied that a possession order must be made. If a possession order is made, the secure tenancy continues only until the order is executed (by a bailiff evicting the tenant pursuant to a warrant granted in execution of the order).[70]

4.61 Prior to amendments introduced on 20 May 2009, the Housing Act 1985 provided that the tenancy ended on the date on which the tenant was to give up possession in pursuance of the order. This meant that the secure tenancy would end on the date for possession

67 HA 1985 s85(1).

68 HA 1985 s85(3).

69 See J Platt and N Madge, 'Suspended Possession Orders' (1991) 141 NLJ 853.

70 HA 1985 s82(1) and (1A), as amended by Housing and Regeneration Act 2008 Sch 11 para 2(3).

stated in the order or on breach of any terms on which an order had been suspended. The result was that many tens of thousands of secure tenants lost their tenancies but nevertheless remained in possession (often indefinitely) unless and until the former landlord obtained execution of the order. They were described by the courts as 'tolerated trespassers'. As a result of the amendments made in 2009, no further secure tenants will become tolerated trespassers. Those who were tolerated trespassers have become 'replacement tenants' (see chapter 10).

4.62 The tenant's adviser will nevertheless want to persuade a court to make a form of possession order that will not be capable of execution (and thus termination of the tenancy) in the near future. The court has a wide discretion as to the form of order to be made and can postpone the date for delivery of possession (the earliest date after which execution can be sought) for such period as it thinks fit.[71] It also has power to add provisions to the order which suspend or stay the execution of the order.[72] The tenant's adviser will therefore be seeking to persuade the court either (1) that the date for possession should be postponed, usually on condition that the tenant complies with certain specified terms, or (2) if the court is not prepared to postpone the possession date conditionally, that execution of the order on or after the date stated for possession should be stayed on terms. For a general discussion of the jurisdiction of the court to postpone the date for possession and suspend or stay execution of possession orders, and for more on the available forms of order, see chapters 33 and 34.

Postponed conditional possession orders

4.63 These orders have in the past, indeed even very recently, been described as 'suspended possession orders'.[73] The better view is that they should be called 'postponed possession orders', since HA 1985 s85(2) provides that the court may '*postpone* the date of *possession*' but may only 'stay or *suspend* the *execution* of the order'. The term 'suspension' is therefore used only in relation to enforcement of the possession order, not in relation to the order itself.

4.64 The court will usually accede to an application to 'postpone' the order only where postponement is on the basis of specified terms

71 HA 1985 s85(2)(b).

72 HA 1985 s85(2)(a).

73 The court form N28 is still entitled *Order for possession (rented residential premises) (suspended)*.

being complied with during the period of postponement. The court must impose conditions on any postponement relating to payment of rent and such further conditions as it thinks fit unless that would cause exceptional hardship or would otherwise be unreasonable.[74] The conditions imposed should, of course, relate to the subject-matter of the claim.[75]

4.65 Even though a postponed conditional possession order will mean that, at least for the time being, the tenant retains the secure tenancy and occupation of his or her home, wherever possible tenants' advisers should seek to avoid the making of *any* form of possession order. Even a postponed order gives rise to adverse consequences. First, *costs* are usually awarded against the tenant on the making of the order for possession, whether postponed or otherwise. Although a tenant with a legal aid funding certificate for legal representation has some protection against an award of costs, such protection is not absolute (see chapter 28) and for those without such protection, costs may cause considerable hardship. Second, the postponement may be on terms which – although they must not be unreasonable or cause exceptional hardship – may nevertheless cause some hardship. Third, in the event of a breach of the conditions, the landlord may proceed to apply for a warrant for execution of the possession order.

4.66 If a postponed possession order is to be made, the form of wording of the order is critical. The court's practice may be to use the court form N28 (March 2006 template, which contains a date for delivery of possession) or form N28A (July 2006 template, which does not contain a date for delivery of possession). However, in *Bristol CC v Hassan; Bristol CC v Glastonbury*,[76] the Court of Appeal made it clear that a judge is not obliged to set out the terms of a possession order in any particular form. The wording of the actual order the court may make is at large.

4.67 The requirements of modern IT systems are such that, unless care is taken, whatever the judge manually records as to the terms of the order made, the wording may be electronically transposed by the court's administrative staff into one of the standard templates. Advisers seeking to avoid that occurring should furnish the judge with a typescript or manuscript of the actual order sought/made that can be approved by the judge and sealed by the court.

74 HA 1985 s85(3).

75 *Lambeth LBC v Hama* January 2008 *Legal Action* 34.

76 [2006] EWCA Civ 656; [2006] 1 WLR 2582; [2006] HLR 31.

4.68 In July 2006, a new Section IV ('Orders fixing a date for possession') was added to CPR PD 55A to deal with postponed conditional possession orders made in form N28A which do not contain a specified date for giving possession. Where an order has been made in this form, and the conditions of postponement are alleged to have been breached, CPR PD 55A para 10.2 provides that the landlord may apply to the court for an order fixing the date on which the tenant has to give up possession. At least 14 days before making such an application, the landlord must give written notice to the tenant of its intention to do so, and of its reasons for doing so. The notice must record, by reference to a copy of the rent account, in what respect the tenant has failed to comply with the order and must invite the tenant's response within seven days. The application itself may be made without notice, but the landlord must attach a copy of the tenant's reply (if any) and must state whether there is any outstanding housing benefit claim by the tenant. A district judge should usually determine the application without a hearing by fixing the date for possession as the next working day, unless he or she considers that a hearing is necessary, in which case a date of hearing will be arranged.

4.69 The exercise of fixing a date for possession on such an application is usually a paper procedure, although the judge may refer the landlord's application for an oral hearing where appropriate (for example, where the tenant has responded to the landlord's notice and has denied the alleged breach or explained the reason for the breach). That is particularly true of cases in which allegations of anti-social behaviour in breach of conditions of the order are denied.[77] Only if the court then fixes a date will it become possible for the landlord to seek execution of the order and (on execution) bring the tenancy to an end.

4.70 It is clearly important for advisers and legal representatives to attempt to persuade the court that it should use the form N28A rather than N28. Where an order is made in form N28 (March 2006), the order becomes capable of enforcement on a single breach of the terms of the order. Where form N28A is used, the landlord cannot seek execution of the order in the event of a breach or breaches unless and until the court fixes a date for possession on an application by the landlord. In *Croydon LBC v Crawford*[78] the judge made an order that possession be suspended on conditions for two years in an anti-social behaviour case. The order was in a form prepared by the council's advocate and the Court of Appeal refused permission to

77 *Wandsworth LBC v Whibley* [2008] EWCA Civ 1259; [2009] HLR 26.

78 [2010] EWCA Civ 618.

appeal on the ground that a postponed order in form N28A should have been made

4.71 Any postponed order should preferably be expressed to provide for automatic discharge on compliance with all its specified terms or on the expiry of a particular period from the date it is made.[79]

4.72 In any event, the tenant can always apply for the discharge or rescission of the possession order if the conditions are complied with,[80] even if they were not complied with punctiliously.[81] When amended by provisions yet to be commenced, the Housing Act 1985 will provide that the court may at any time discharge or rescind a possession order if it thinks it appropriate to do so having had regard to (1) any conditions imposed under by the order and (2) the conduct of the tenant in connection with those conditions.[82] As is obvious, the prospects of a successful application to discharge or rescind the order will be greater the more that the tenant is able to show some substantive efforts at compliance with the original conditions.

Preventing an eviction

4.73 Where an order for possession has been made, secure occupiers retain their tenancy or licence and their secure status until the date they give up possession on execution of the order.[83] It is on that date that both the security and the tenancy or licence end.

4.74 In the case of an *absolute or outright order* for possession, the date on which the tenant is to give up possession will be clearly shown in the order itself or identified by a reference to 'X days from today's date' (often 28 days from the date of hearing). From that date, the landlord can seek execution of the order. An adviser instructed for the secure tenant who is subject of such an order should always consider (1) whether an appeal can be justified (see para 3.208), (2) whether an application can be made to set it aside (see para 34.7) or (3) whether circumstances have changed sufficiently since the order was made to enable a successful application to be made to postpone the date for possession, on terms if necessary.[84]

79 *Blaenau Gwent BC v Snell* March 1990 *Legal Action* 13 and see *Merton LBC v Hashmi* September 1995 *Legal Action* 13, CA.

80 HA 1985 s85(4).

81 See *Knowsley Housing Trust v White* [2008] UKHL 70; [2009] 1 AC 636.

82 HA 1985 s85(4), as substituted by Housing and Regeneration Act 2008 s299 and Sch 11 Pt 1 paras 1 and 3.

83 HA 1985 s82(1) and (1A), as amended by Housing and Regeneration Act 2008 Sch 11 para 2(3).

84 *Ujima Housing Association v Smith* April 2001 *Legal Action* 21.

4.75 In the case of a *conditional order* for possession made in court form N28 (see para 4.66), the landlord can apply for execution of the order as soon as any date stated in it has passed and the terms have not been complied with.[85] Where the order was a *postponed conditional order* in court form N28A (see para 4.66), the landlord will first need to obtain a fixed date for possession using the procedure described above (para 4.72) before seeking execution of the order.

4.76 Once the date fixed by an order has passed, the landlord may apply to the court (by completing a simple form) for the issue of a warrant for possession and its execution by a bailiff. The occupier should receive notice from the bailiffs (form N54) giving the time and date on which they will attend to take possession.

4.77 Whether the order was expressed to be absolute/outright or was postponed, the court can suspend or stay *execution* of the order or further postpone the date for possession on any grounds that it 'thinks fit'.[86] This can be done at any time before the moment of execution of the order by the bailiffs, even a matter of hours or minutes beforehand.[87] The procedure for making an application for a stay, suspension or postponement is described in chapter 34. Note that this procedure is not available where the possession order has been obtained under ground 9, 10, 10A or 11 contained in HA 1985 Sch 2, but that in all other cases it is available even if the original date for possession has passed or the terms of a conditional order have been breached.

Reinstating the tenant after eviction

4.78 Even if the order has been executed by the bailiff taking possession, it may still not be too late to set aside the possession order or the warrant or both. See para 34.54 for a full description of what can be done to reinstate the former tenant after eviction.

'Duty advocate' plan

4.79 Almost every county court now has a 'help desk' or 'duty representation scheme' available to a tenant who attends court unrepresented on the date fixed for hearing of a possession claim. Such schemes are funded by the Legal Services Commission (LSC), central government

85 *Thompson v Elmbridge BC* [1987] 1 WLR 1425; (1987) 19 HLR 526, CA and *Leicester CC v Aldwinkle* (1992) 24 HLR 49, CA.

86 HA 1985 s85(2).

87 *Islington LBC v Harridge* (1993) *Times* 30 June, CA.

(Department for Communities & Local Government) or operated by volunteers. This section of this chapter illustrates how an adviser on such a scheme might respond to the type of secure tenancy possession case which occurs with greatest frequency – a claim based on rent arrears – and where instructions are received *at the door of the court*.

4.80 The proper preparation of a defence in a rent arrears possession case usually requires careful consideration. In particular, all the documents must be examined, statements taken and negotiations with the landlord pursued and, where appropriate, a fully pleaded defence filed (possibly including a counterclaim).

4.81 If instructed at 'the door of the court' the adviser should avoid the temptation of immediately negotiating or advocating for a postponed conditional possession order requiring payment of current rent and a modest level of weekly payment off the arrears. After all, closer examination may establish that there are in fact no arrears at all or (if there are arrears) that the tenant has a defence as described earlier in this chapter.

4.82 If instructions are received literally at the last moment, the adviser should make an initial application for the case to be put back in the list of cases awaiting hearing and then take some brief particulars from the client. Although the court list may contain dozens of cases, it does not always follow that there will be the opportunity to have a lengthy discussion – these cases can be processed very quickly in some courts.

4.83 The adviser should try to take a preliminary statement from the tenant covering the duration of the tenancy, the personal circumstances of the tenant, the circumstances surrounding the 'arrears', details of income and details of housing benefit received (see appendix C for a useful checklist).

4.84 If the tenant has any documents with him or her, or if copies can be obtained from the landlord's representative at court, the adviser should inspect:

- the notice seeking possession (see para 4.12);
- the claim form and the particulars of claim (see paras 4.49–4.51);
- the rent book/rent account schedule; and
- any correspondence or other relevant documents.

4.85 If there is time and if necessary, Legal Help or Help at Court forms should be completed at this stage so that on return to court the adviser can undertake funded representation (see chapter 28).

4.86 If it emerges that the arrears are disputed, or there is disrepair which may sustain a counterclaim, or simply that more time is

needed to ensure that the defence can be put fairly, the immediate objective should be to secure an adjournment to another date. Before returning to make such an application in court the adviser should be prepared to deal with:

- the likely eventual defence;
- the tenant's circumstances;
- the possibility of an agreement to pay current rent during the adjournment;
- the possibility of an agreement to pay something off the alleged arrears during that time (without prejudice to any contention that nothing, or not the amount claimed, is owed);
- the reason why advice was not sought earlier; and
- the minimum case management directions necessary to achieve the next stage in the claim (for example, date by which a defence should be served).

4.87 The adviser may then indicate to the landlord's representative that a request for an adjournment will be made. If the application is opposed, the adviser may need to explain to the court that:

- he or she has just been instructed;
- those instructions reveal that the client has an arguable defence (for example, that the arrears are disputed or it would not be reasonable to order possession and/or that the tenant has a potential counterclaim and defence by way of set-off based on disrepair or failure to pay housing benefit, etc);
- the tenant will immediately be directed to a legal adviser to draft the defence; and
- an adjournment is sought for that purpose.

4.88 It is usually helpful to be able to indicate that the tenant will submit to a condition that current rent be paid throughout the period of the adjournment.[88] The court may be tempted to impose a requirement for additional modest payments towards the arrears but (where appropriate) the adviser may respond that further conditions would be unreasonable or would cause excessive hardship.[89] The adviser should invite the making of directions for a defence to be filed within (say) 21 days and for such other steps as may be appropriate, for example, disclosure, experts' reports, etc. The court should be addressed on the proper order as to the costs of the adjournment.

88 HA 1985 s85(3).

89 HA 1985 s85(3)(a).

4.89 In most cases, the above procedure ought to achieve an adjournment. If not, the adviser has to do his or her best to defend successfully on the day and obtain permission to appeal any adverse order made. In an appropriate case, an appeal may be entered against the refusal to adjourn, in addition to an appeal against the order made.[90]

4.90 Once the adjournment is secured, the adviser should make the necessary arrangements for full legal representation to be obtained and for all technical and substantive defences and counterclaims to be considered. If the matter is to be conducted by a solicitor, advisers should bear in mind the possible delays in obtaining a full funding certificate for legal representation and the importance of not exceeding the time allowed by the court for filing and service of the defence.

90 See *Janstan Investments Ltd v Corregar* (1973) 21 November, unreported, CA; *Spitaliotis v Morgan* [1986] 1 EGLR 51; (1985) 277 EG 750, CA and *Bates v Croydon LBC* [2001] EWCA Civ 134; (2001) 33 HLR 70.