Possession proceedings – Seminar – 10th September 2008

1. **Introduction** –

These notes are intended to assist volunteers of Law Works who are giving pro bono advice on housing law. It is aimed at people with little or no experience of the subject. It is hoped they will enable you to identify a specific area and provide **basic** advice to clients. It deals first with basic housing law and the major change which took place on 15/1/89 with the coming into force of the Housing Act 1988, as a basis for dealing with possession proceedings, mainly involving tenants.

The seminar is intended to last for 1 hour.

2. Overview – stages of possession and eviction

3. Status of occupancy

4. Types of Tenancy

5. Determining Status

6. What types of queries you might have to deal with? What to do? What to advise?

7. I have received a letter from my landlord to say I am being evicted. What can I do?

8. I have left (am going to leave) my private rented accommodation and my landlord will not give me back my deposit. What can I do?

9. Possession proceedings

10. Overview

11. Types of queries you are likely to meet

12. what to do

13. what to advise

**Part I - Status**

1. **Status of occupant** – 4 possibilities

   i. no landlord and does not own the property ☒ trespasser

   ii. 4 qualities of a tenancy present

      a) identifiable parties - a landlord and a tenant
      b) identifiable premises – could be a single room or acres of land
      c) period of tenancy – e.g. weekly/monthly
      d) exclusive possession – conveys use of the property to the exclusion of all others
(Street v Mountford 1985)

iii. any quality missing  licensee, e.g. no payment

iv. no landlord and owns the property  mortgagor/owner occupier
2. Trespasser/Licensee/Mortgagor – concerned today mainly with tenants. However, there are similar procedures for obtaining possession from other occupants. Generally speaking, it will be necessary for someone with better title to obtain a court order if the matter is being resisted.

Ending Occupation

i. Trespasser: owner may still need to apply to court for an order due to potential criminal liability. Need only prove title and intention to regain possession (s6 Criminal Law Act 77 – makes it an offence for any person to use or threaten violence against people or property to gain entry, if the person knows there is someone on the premises at the time of the proposed entry, opposed to the entry). Speedy procedure for an IPO (interim possession order – entry without consent). Can obtain a possession order after 3 days. Adverse possession Limitation Act defence, 12 years, rarer. Reform: must register claim on land register

ii. Former tenant or licensee: serve reasonable notice of termination of licence. Licensor may still need to apply to court for an order due to potential criminal liability (s6CLA 77/ s3 of the Protection from Eviction Act - PEA 77 – former tenants entitled to stay in occupation until a court order made, save “excluded” tenants)

iii. Mortgagor: lender has immediate legal right to possession of mortgaged property. Court has limited inherent and statutory power to stop lender obtaining possession or delay possession. Court will only exercise discretion to suspend an order for possession if satisfied any arrears can be cleared within a reasonable period of time (Administration of Justice Act 1970, s36)

Part II – Types of tenancies and determination of tenancies

3. Tenancy. Largely covered by statute. Two important questions

   i. Who is your landlord? The answer is likely to tell you which statute covers the tenancy

   ii. When did you move into the property? The answer is likely to help you determine what type of tenancy is involved.

4. Who is your landlord? For our purposes, there are 2 answers to this question

   i. Landlord is a council landlord: public sector tenancy, covered by the Housing Act 1998 and/or the Housing Act 1996
ii. Landlord is a private landlord private sector tenancy, covered by the Housing Act 1988, the Housing Act 1996 or the Rent Act 1977.

5. When did you move in? Important dates

i. Public sector landlord – before 1997 - definitely a secure tenant. After 1997, likely to be secure tenant, but might be introductory tenant.

ii. Private sector occupants – before 15/1/1989, Rent Act protected tenant or statutory tenant. After 15/1/1989, but before 28/2/1997 – tenancy likely to be assured. Tenancy will be assured shorthold, if and only if notice served before commencement of the tenancy, to confirm that tenancy is assured shorthold tenant. Due to landlord’s difficulty, provision changed on 28/2/1997, by the Housing Act 1996. After 28/2/1997, tenancy likely to be assured shorthold. Tenancy will be assured, if and only if notice served before commencement of the tenancy, to confirm that tenancy is assured.

6.

Types of tenancy -

i. Public sector tenancies

a. Secure council tenancy – property let as a separate dwelling under a tenancy or licence, where one party is an individual and the other is a local authority. It affords good protection for the tenant as secure tenancy can only be terminated by possession order made by the court. Generally, the court will make such an order if and only if satisfied it is reasonable in all the circumstances to make a possession order. A secure tenancy depends on occupation. At the point at which occupation ceases permanently, the secure tenancy ends. Note also exceptions to secure tenancy status, set out in Sch. 1, 1985 Act)

b. Introductory tenancy – probationary tenancy for 12 months at the end of which it can become a secure tenancy. Excluded from being an introductory tenancy, if immediately, before tenancy granted, it was a secure tenancy. Council must take steps to set up an introductory tenancy regime for all new tenancies. If system is not set up, there can be no introductory tenancy. The idea of an introductory tenancy is if tenant breaches the probation, there is a right of review of the decision by the council. The tenant has 14 days in which to request the review. During the probation, council can terminate tenancy. It can go on to obtain a possession order. Generally, court must make a possession order, provided the court is satisfied that a valid notice has been served. In the event that the tenant disputes the review and the review procedures, these may be challenged by way of Judicial Review.
ii. Private Sector tenancies

a. **Rent Act protected tenancy** – Becoming increasingly rare, as no new Rent Act tenancies created after 15/1/1989 (nearly 17 years ago). As with secure tenancy, it is property let as a separate dwelling, before 15/1/89. Once occupation permanently ceases, the protected tenancy ceases. There is a list of exclusions, set out in ss5-12 – the main one of which is a Resident landlord, that is, where the landlord lives in the same building. Upon termination of the protected (contractual) tenancy, a statutory tenancy arises on the same terms and conditions at the contractual tenancy. It is the statutory tenancy which requires possession proceedings to end it.

b. **Assured tenancy** – after 15/1/1989. Again, defined as property let as a separate dwelling. There is again a list of exclusions which are rare in practice, set out in Sch. 1 of the 1988 Act. The main one is the resident landlord. As with secure and protected tenancies, it depends on occupation. Reasonable protection for tenant, as landlord must generally prove tenant has done something wrong to obtain possession, e.g. failed to pay rent.

c. **Assured shorthold tenancy** – this is a form of assured tenancy, which affords very little protection. It must be for a period not less than 6 months and generally the tenant has safeguards against termination in that time. Thereafter, a landlord can serve notice of termination of the tenancy by giving 2 months notice in prescribed form, i.e., there need be no fault on the part of the tenant.

**Part III – Proceedings for Possession**

7. **Background** – all the above types of tenancy are protected by statute. The statute sets out the procedure to be followed in order for a landlord to recover possession. The procedure is contained in **CPR 55** Civil Practice Rules and in the County Court Rules, Order 26, rule 17 (warrants). Note also **CPR 39.3** – deals with applications to set aside (cancel) a possession order, where it is made in the absence of a tenant. Where tenant is present, order can only be challenged by way of appeal (CPR 52).

8. **Possession Procedure** – 2 important steps for a landlord to take

   i. **Notice** – **termination of contractual tenancy** - the landlord must serve a notice to show that s/he regards the common law (contractual) tenancy
terminated. Once the contractual tenancy is ended, statute then provides for a statutory tenancy to take the place of the contractual tenancy on broadly the same terms. It is the statutory tenancy that requires possession proceedings to terminate it, i.e. ended only by court order.

ii. **Ground for possession** - In order for the court to make a possession order, the landlord must prove to the court a ground for possession.

iii. the type of notice and the grounds of possession is set out in the relevant statute. Statutory protection and security of tenure is marked by the need to serve notice of end of tenancy, state a ground for possession and obtain a court order.

9. **Notices – termination of tenancy at common law**

i. Secure tenancy - Notice of Seeking Possession – prescribed form giving at least 28 days notice.

ii. Introductory tenancy - Notice of Proceedings for Possession, prescribed form giving 14 days to request a review

iii. Assured (or shorthold) tenancy - Notice of Seeking Possession, prescribed form giving notice of between 2 weeks and 2 months, depending on ground for possession

iv. Rent Act protected tenancy - Notice to Quit, prescribed form, giving at least 28 days notice. s5 of the Protection from Eviction Act 1977 (PEA), requires all notices to quit to be in writing, give a minimum of 4 weeks notice and must expire on either the last or first day of a period of the tenancy.

10. **Grounds for Possession –**

i. Secure tenancy – Schedule 2 of the 1985 Act – need to prove ground + reasonableness/ground + alternative accommodation/ground + suitable accommodation + reasonableness. You will mainly encounter Ground 1 unpaid rent or breach of term in the tenancy agreement. However, Ground 2 deals with anti social behaviour, e.g. gang violence, drugs selling. Need to prove ground (e.g. rent arrears) + reasonableness.

ii. Reasonableness – this means that the court has discretion to decide whether or not to make a possession order. It can decline to do so, if, in
all the circumstances of the case, it considers it unreasonable to do so; for example, in a secure tenancy case, where the arrears are largely due to errors of the council’s own housing benefit department. Or where arrears are very low, e.g. under £100; or where there are reasonable alternatives to possession, e.g. direct deduction from tenant’s state benefit.

iii. Introductory tenancy – need only prove service of Notice of Proceedings for Possession

iv. Assured tenancy – Sch.2, Part I Mandatory Grounds (e.g. Ground 8 – 2 months rent arrears)
Sch.2, Part II, Discretionary Grounds

v. Assured shorthold tenancy – additional mandatory ground – (s21)

vi. Rent Act tenancy – (Sch.15, Part I – mandatory grounds
Part II – discretionary grounds. Case 1- rent arrears and breach of term of tenancy


Section 22 (3)( c ) DDA 1995 makes it unlawful for a person who manages any premises (e.g. a landlord) to discriminate against a person with a disability who occupies those premises “by evicting [him] or subjecting him to any other detriment”

2 cases - In Manchester City Council v Romano [2005] 1 WLR 2775 at [63]) – the Court of Appeal held that in a case where the court has a discretion as to whether to make a possession order, that if the tenant can show that the landlord’s conduct amounted to unlawful discrimination under the DDA 1995, that factor was a factor to be taken into account when the court was determining whether it was reasonable to make an order of possession

In LB Lewisham v Malcolm [2007] EWCA Civ 763 the Court of Appeal looked at circumstances where possession proceedings constitute unlawful discrimination under the DDA. The court considered Romano

It held that damages would not provide an effective remedy in possession proceedings where the tenant has no security of tenure but where the possession proceedings constitute unlawful discrimination. It also held that a court should dismiss possession proceedings if satisfied that their pursuit is unlawful. The Court also considered three further issues namely (i) the manner in which the trial judge had addressed the issue of disability; (ii) the issue of "causation" namely the relationship between the treatment and the disability; and (iii) the relevance of "knowledge".

The ruling goes considerably further than the judgment in Manchester City Council v Romano [2005]
Malcolm is being appealed to the House of Lords
Other defences – include
- not reasonable to make possession order (discretionary ground) e.g. outstanding HB
- Defendant has significant counterclaim for disrepair
- Technical defence – defect of relevant notice – but note that court may have power to waive the defect in some cases (not in section 21 cases)

11. Possession Proceedings - governed by CPR 55. Landlord must prepare and lodge Claim for Possession and Particulars of Claim, setting out information prescribed in CPR 55. This includes

i. identifying the land to which the claim relates

ii. whether claim relates to residential property

iii. ground for possession

iv. full details of tenancy or mortgage agreement

12. The court will fix a hearing date, which must not be less than 28 days from the date Claim issued. Defendant must have at least 21 days notice of the hearing. A Reply form will be sent with the Claim. The Defendant has 14 days to return this to indicate whether the Claim will be defended. If there is a defence, it is likely that the hearing date will be adjourned with directions. Instructions can be taken to see if the tenant has a claim against the landlord, e.g. disrepair, to counterclaim in the proceedings

13. Accelerated Possession Proceedings – where

i. there is an assured shorthold tenancy

ii. the landlord has served a section 21 notice, giving 2 months notice of termination of the tenancy and intention to apply for possession

iii. he seeks possession only

s/he can apply to the court for an order for accelerated possession on a prescribed form. The court has the power to make an order without a hearing, based on the papers only, which must include the tenancy agreement and the section 21 notice. The tenant has 14 days to reply to indicate whether s/he has a defence to the Claim, or whether s/he wants the court to postpone possession for maximum of 42 days, in case of exception hardship. No reply court will make possession order on considering the papers only, that is, no court hearing.

14. Possession Order – can be **suspended** or **outright**
i. Outright Possession Order (OPO) means and immediate order for possession on a fixed date. On this date, legal possession of the property returns to the landlord, the tenant is ordered to leave by the court and the statutory tenancy formally ends. The Housing Act 1980, s89 allows that possession should not be postponed to a date later than 14 days after the making of the order, unless it appears to the court that this would cause exceptional hardship. In any event, it shall not be postponed later than 6 weeks after the making of the order.

ii. Possession Order means that the date on which possession is transferred is delayed upon the occurrence of certain terms. In the case of rent arrears, the court usually orders the tenant to pay the rent, plus an amount off the arrears. Once the tenant misses such a payment, the possession order comes into effect, the tenant is ordered to leave and the statutory tenancy formally ends.

There is now a line of authorities relating to tolerated trespasser.

**Bristol CC v Hassan [2006] EWCA Civ 656** – in the case of secure tenants, the case was responsible for introducing the concept of postponed possession orders. Once the order is broken by the Defendant, e.g. term of the order to pay rent plus amount off the arrears is broken, landlord then has to apply to the court for a date on which the tenancy will be determined.

**White v Knowsley [2007] EWCA Civ 404** – applies the same principle as in Bristol case to assured tenants.

15. After the possession order

i. **Breaking the possession order** – where the tenant fails to comply with the possession order, the statutory tenancy ends.

ii. In the case of secure tenants, the case of **Burrows v Brent 1996 HL**, created the concept of a tolerated trespasser. This is a secure tenant against whom a possession order has been made and the order has been broken and where the landlord allows the occupant to stay until formal steps are taken to evict him/her. An OPO is broken by staying in the property after the date on which the possession order takes effect. An SPO is broken by failure to comply with a term to which the order is
subject. Once the order is broken the statutory tenancy ends. Such an occupant is without tenancy rights, the tenancy having ended, unless and until an application is made to the court under s85(2) Housing Act 1985 to reinstate the secure tenancy. This allows the court to postpone the date on which possession was due to take effect.

iii. In the case of assured tenancies, it is believed that concept of tolerated trespasser also applies, although there have been no decided cases in respect of it. s9 Housing Act 1988 is similar to s85 of the 85 Act.

16. Application for eviction –

i. the landlord applies to the court for a bailiffs warrant. This is application for court bailiffs to attend the property and evict the tenant, for his/her failure to comply with the court order. The application is made on a prescribed form with payment of a fee.

ii. The bailiff will then write to the occupant to confirm attendance at the property on a particular date (the eviction date) in order to evict all occupants on the property referred to in the warrant.

17. Application to stay the eviction – at this stage, the occupant/former tenant can apply to the court to stop the eviction. The court has wide discretion to do so. The application is made on Form N244, with payment of a fee (presently £35) or completion of a fees exempt form, stating the reasons why the court order has been breached, proposals for remedying the breach and a proposal to deal with future conduct. If the application for a stay of execution is dismissed, the eviction will go ahead. If the court grants a stay, the eviction will be stopped and the court will impose terms in respect of any adjournment, stay or suspension, e.g. as to payment of rent and arrears.

18. Post Eviction – an application can be made after the eviction for re-entry into the property. Again, the application is made on N244 with the appropriate fee. The court’s powers are extremely limited to order re-entry.

19. There are 3 situations where this can be done

i. where an application can be made to set aside the original possession order as Defendant was not present (CPR 39.3)

ii. where there has been fraud in obtaining the eviction
iii. where there has been abuse of process or oppression in the execution of the eviction

(Hammersmith + Fulham v Hill 1995 CA). An example of oppression is where the landlord or
someone else involved in the eviction process (e.g. the court) does something to prevent the
occupant applying to the court to stay the eviction, e.g. says that the only way to stop the eviction
is to clear all the arrears (LBLambeth v Hughes 2001 CA)

Further Reading
LAG – (Legal Action Group) - Defending Possession Proceedings – by Nick Madge, Jan Luba
and Derek McConnell
Manual of Housing Law – Andrew Arden/Caroline Hunter – Sweet and Maxwell

Statutes
Rent Act 1977
Criminal Law Act 1977
Protection from Eviction Act 1977
Housing Act 1980
Housing Act 1985
Housing Act 1988
Housing Act 1996

Examples

2. Mrs. B. comes to see you. She has an eviction date due in 2 weeks time. She has no papers with
her. She says she has been living at her property for about 10 years and is terrified of being
evicted. She believes she has arrears of over £3,000. She wants to know what, if anything, she can
do.

i. what further information would you need from Mrs. B.

ii. what documentation might you want to see

iii. what advice would you give Mrs. B about her status

iv. what advice would you give Mrs. B about what next needs to be done.

3. Gordon Brown comes to your office. He says he has an eviction notice from his landlord, Mr.
Chester, whom he owes rent, of about £1,000. It tells him that if he does not pay all the arrears by
19th May, court proceedings will be started against him. He has already started packing his bags
to move out with his wife and children.

i. what further information would you need from Mr. Brown?

ii. what advice would you give him about the eviction notice?

iii. what should he do about his packed bags?

iv. what practical steps could he take?